Reports of Cases

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

Case C-176/19 P

European Commission
v
Servier SAS,
Servier Laboratories Ltd,

Les Laboratoires Servier SAS

(Appeal – Competition – Agreements, decisions and concerted practices – Abuse of a dominant position – 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 – Settlement agreement linked to a licence agreement – Restriction of competition by object – Restriction of competition by effect – Definition of the relevant market)

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I. Introduction

1. Just like the parallel case of *Servier* v *Commission* (C-201/19 P), in which I am also delivering my Opinion today, this case follows in the wake of the cases of *Generics (UK) and Others*[2] and *Lundbeck* v *Commission*,[3] in which the Court established the criteria for a dispute settlement agreement between the holder of a pharmaceutical patent and a manufacturer of generic medicinal products to be regarded as contrary to EU competition law.

2. The background to the present case, to the case of *Servier* v *Commission* and to the seven other appeals making up this group of nine appeals lodged against eight judgments of the General Court[4] is formed by a number of patent dispute settlement agreements concluded by the manufacturer of originator medicines Servier with generic companies.

3. As in the cases of *Generics (UK) and Others* and *Lundbeck* v *Commission*, those agreements were concluded 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.

4. 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.

5. 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.

6. 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 the part of Servier, intended to delay the entry of generic perindopril companies on 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.

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

3 Judgments of 25 March 2021, *Lundbeck* v *Commission* (C-591/16 P, EU:C:2021:243; 'the judgment in *Lundbeck* v *Commission*'); of *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-201/19 P, *Servier and Others* v Commission); *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. In the judgment under appeal and in its other judgments in the group of cases in question, the General Court confirmed the Commission's analysis that the four 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 the case of *Servier* v *Commission* and by those generic companies in their respective appeals lodged against the judgments of the General Court concerning them.

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

9. Those annulments are challenged by the Commission in the present case and 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 a series of agreements as a restriction of competition by effect and the definition of the relevant market in the pharmaceutical field.

II. Background to the dispute

A. Facts

10. The General Court refers to 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. The Krka pharmaceutical group, which is registered in Slovenia and specialised in the development, production and sale of generic medicines, includes the parent company, Krka Tovarna Zdravil d.d., and a number of subsidiaries in Slovenia and in other countries ('Krka').[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, *Krka* v *Commission* (T-684/14, not published, EU:T:2018:918), and recital 19 et seq. of the decision at issue.

2. Product and patents at issue

(a) Servier's perindopril

13. 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. [9]

14. 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. [10] In France, protection under the patent was prolonged until 22 March 2005 and, in Italy, until 13 February 2009. [11] Perindopril erbumine tablets (2 and 4 mg) for the treatment of hypertension obtained marketing authorisation in Europe between 1988 and 1989. [12]

15. 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 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. [13]

16. 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. [14]

17. 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. [15] Perindopril arginine received marketing authorisation in France in 2004 and was subsequently authorised via the mutual recognition procedure in other Member States. [16]

9 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.

10 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).

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

12 Recital 98 of the decision at issue.

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

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

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

16 Recital 100 of the decision at issue.

(b) Krka's perindopril

18. Krka began its own development of perindopril from 2003 onwards. Over the period 2005-2006, it received marketing authorisations for a number of EU markets and launched its perindopril on the market in several central and Eastern European Member States, including Poland and Hungary. During that period, it was also preparing to place its product on the market in other Member States, including France, the United Kingdom and the Netherlands, either alone or in cooperation with other companies. [17]

3. Disputes relating to perindopril and launch of generic versions

19. 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. [18]

(a) Disputes before the EPO

20. First of all, 10 generic companies, including Krka, 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. [19]

21. 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. [20]

(b) Disputes before the national courts

22. The validity of the 947 patent has also been challenged by generic companies before the courts of certain Member States, and Servier has made applications for interim injunctions, some of which were successful. [21] 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.

23. Nevertheless, 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, were not interrupted and subsequently led to the invalidation of the 947 patent.

17 Recitals 821, 1674 and 1755 of the decision at issue.

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

19 Paragraphs 11 and 12 of the judgment under appeal and recitals 158 to 161, 164 and, concerning Krka more specifically, 830 of the decision at issue.

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

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

24. 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 UK courts 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. [22]

25. 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. [23]

26. From May 2008, Sandoz, another generic company, launched its generic perindopril in a number of Member States. [24]

4. Disputes and agreements between Servier and Krka

27. 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 Krka.

28. On 30 May 2006, Servier applied for an interim injunction in Hungary to prevent the marketing of a generic version of perindopril placed on the market by Krka, invoking the infringement of the 947 patent. That application was dismissed on 13 October 2006. [25]

29. In the United Kingdom, on 28 July 2006, Servier brought an action for infringement of the 340 patent against Krka. On 2 August 2006, Servier also brought an action for infringement of the 947 patent against Krka and applied for an interim injunction. On 1 September 2006, Krka brought a counterclaim for annulment of the 947 patent and an application for summary judgment. On 8 September 2006, Krka brought another counterclaim for annulment of the 340 patent.

30. On 3 October 2006, the High Court of Justice (England & Wales), Chancery Division (Patents Court) (United Kingdom), granted Servier's application for an interim injunction and dismissed the application for summary judgment brought by Krka on 1 September 2006 seeking the invalidation of the 947 patent, ordering that a full trial be held. On 1 December 2006, the pending proceedings were discontinued as a result of the settlement reached between the parties and the interim injunction was lifted. [26]

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

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

24 Recital 410 of the decision at issue.

25 Paragraph 22 of the judgment under appeal and recital 156 of the decision at issue (paragraph 22 of the judgment under appeal states that this application was rejected in September 2006, but I am taking recital 156 of the decision at issue as a basis here; that recital indicates 13 October 2006 as the relevant date).

26 Paragraph 23 of the judgment under appeal and recitals 156, 898 to 904, 909 and 1689 of the decision at issue.

31. On 27 October 2006, Servier and Krka signed a settlement agreement ('the Krka settlement agreement') and a licence agreement ('the Krka licence agreement'), supplemented by an amendment made on 2 November 2006. In addition, those parties entered into an assignment and licence agreement ('the Krka assignment and licence agreement') on 5 January 2007 (together, 'the Krka agreements').

32. The Krka settlement agreement provided that the 947 patent also covered the equivalent national patents. In accordance with that settlement agreement, in force until the expiry or the revocation of the 947 or 340 patents, Krka undertook to withdraw any existing claim against the 947 patent worldwide and against the 340 patent in the United Kingdom, and not to challenge either of those two patents worldwide in the future. Moreover, Krka and its subsidiaries were not authorised to launch or to market a generic version of perindopril which would infringe the 947 patent for the duration of the validity of that patent and in the country in which it was still valid, unless expressly authorised by Servier. Similarly, Krka could not supply to any third party a generic version of perindopril that would infringe the 947 patent, unless expressly authorised by Servier. In return, Servier was required to withdraw the proceedings pending worldwide against Krka based on the infringement of the 947 and 340 patents, including its applications for interim injunctions. [27]

33. Pursuant to the Krka licence agreement, concluded for a period corresponding to the validity of the 947 patent, Servier granted Krka an 'exclusive', irrevocable licence on the 947 patent to use, manufacture, sell, offer for sale, promote and import its own products which contain the alpha crystalline form of erbumine in the Czech Republic, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia.

34. In return for the licence, Krka was required to pay Servier 3% royalties on its net sales prices throughout those territories. Servier was entitled, in those same States, to use the 947 patent directly or indirectly (that is to say, for one of its subsidiaries or for one third party per country). [28]

35. When the agreements were concluded, the national equivalents of the 947 patent had not yet been granted to Servier in some of those seven markets, whereas Krka was already marketing its product on them. [29]

36. Pursuant to the Krka assignment and licence agreement, Krka assigned two patent applications to Servier, one concerning a process for the synthesis of perindopril (WO 2005 113500) and the other the preparation of formulations of perindopril (WO 2005 094793). The technology protected in those patent applications was used for the production of Krka's perindopril. Krka undertook not to challenge the validity of any patents granted on the basis of the applications at issue. In return for that assignment, Servier paid Krka EUR 15 million for each of the applications at issue. Servier also granted Krka a non-exclusive, irrevocable, non-assignable, royalty-free licence, with no right to sub-license (other than to its subsidiaries) on the applications or resulting patents, that licence being unrestricted in time, territory or scope of use. [30]

27 Paragraph 45 of the judgment under appeal and recital 908 of the decision at issue.

28 Paragraph 46 of the judgment under appeal and recital 910 of the decision at issue.

29 Recitals 843, 886, 1248 and 1755 of the decision at issue.

30 Paragraphs 47 to 51 of the judgment under appeal and recitals 400 and 923 to 928 of the decision at issue.

B. The decision at issue

37. In the decision at issue, adopted on 9 July 2014,[31] the Commission considered that Servier had infringed, first, Article 101 TFEU, by participating in four patent settlement agreements with reverse payments with Niche/Unichem, Matrix, Teva and Lupin, and in three agreements, constituting a single and continuous infringement, with Krka.

38. Second, the Commission considered that Servier had infringed Article 102 TFEU by drawing up and implementing, by means inter alia of technology acquisition and those 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.[32]

39. The Commission considered that Servier and Krka had infringed Article 101 TFEU in the 18/20 Member States[33] in which Krka undertook, under the Krka settlement agreement, to withdraw from competition with Servier with its existing products in exchange for a licence in the other seven Member States. The object of those agreements was thus to divide and allocate the EU markets between those two operators. The Commission also found that the Krka agreements had constituted a restriction of competition by effect and examined in that regard the effects of those agreements on the French, Netherlands and UK markets.[34] The Commission did not find an infringement in the seven Member States for which the licence had been granted.[35]

40. In addition, the Commission considered that Servier and Krka had infringed Article 101 TFEU in so far as Krka had stopped competing as an existing source of perindopril technology by transferring its technology to Servier in return for payment of a total of EUR 30 million.[36]

41. The Commission imposed fines on Servier for those infringements of Articles 101 and 102 TFEU.[37]

C. The judgment under appeal

42. 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).

31 See footnote 5 to this Opinion.

32 See Articles 1 to 6 of the decision at issue and paragraph 71 of the judgment under appeal.

33 This corresponds to all EU Member States (between 2004 and 2009, thus excluding Croatia; see recital 3134 of, footnote 1 to, and Article 4 of the decision at issue) other than the seven Member States covered by the Krka licence agreement. The decision at issue refers to '18/20 Member States' because the accession of Romania and Bulgaria to the European Union took place on 1 January 2007, two months after the conclusion of the Krka settlement agreement, which increased from 18 to 20 the number of markets not covered by the licence (recital 1677 of, and footnote 2243 to, the decision at issue).

34 Recitals 1816 and 1858 of the decision at issue.

35 See paragraph 1004 of the judgment under appeal and footnote 2451 to, and Article 4 of, the decision at issue.

36 Recital 1670 of the decision at issue.

37 See Article 7 of the decision at issue and paragraphs 72 and 73 of the judgment under appeal.

43. 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).

44. 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.

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

45. By document of 22 February 2019, the Commission lodged an appeal against the judgment under appeal.

46. At the same time, the Commission also lodged an appeal against the judgment of the General Court in *Krka* v *Commission*, whilst Servier and the other addressees of the decision at issue who had been unsuccessful before the General Court lodged appeals against the dismissal of their actions against that decision. [38]

47. By document of 22 May 2019, the United Kingdom sought leave to intervene 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.

48. The Commission claims that the Court should:

– set aside paragraphs 1, 2 and 3 of the judgment under appeal which annul (i) Article 4 of the decision at issue in so far as it finds that Servier participated in the agreements concluded between Servier and the company Krka, (ii) Article 7(4)(b) of the decision at issue which sets the fine imposed on Servier for concluding those agreements, (iii) Article 6 of the decision at issue which finds that Servier infringed Article 102 TFEU and (iv) Article 7(6) of the decision at issue which sets the amount of the fine imposed on Servier in relation to that infringement;

– set aside the judgment under appeal in so far as it declares Annexes A 286 and A 287 to the application and Annex C 29 to the reply admissible (paragraphs 1461, 1462 and 1463 of the judgment);

– give final judgment on Servier's action for annulment of the decision at issue and dismiss Servier's application for annulment of Article 4, Article 7(4)(b), Article 6 and Article 7(6) of the decision at issue and uphold the Commission's claim that Annexes A 286 and A 287 to the application before the General Court and Annex C 29 to the reply before the General Court should be declared inadmissible (paragraphs 1461 to 1463 of the judgment under appeal);

– order Servier to bear all the costs of the appeal.

[38] See footnote 4 to this Opinion.

49. The United Kingdom claims that the Court should:

– grant the form of order sought by the Commission.

50. Servier contends that the Court should:

– dismiss the appeal in its entirety; and

– order the Commission to pay the costs.

51. The EFPIA contends that the Court should:

– dismiss the appeal; and

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

52. 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*.[39]

53. On 20 and 21 October 2021, the parties to the nine appeals brought 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.

IV. Assessment

A. The appeal

54. In support of its appeal, the Commission relies on 11 grounds, the first 7 of which concern the General Court's considerations relating to the assessment of the Krka agreements from the perspective of Article 101 TFEU (1), whereas the last 4 concern the General Court's considerations on the definition of the relevant market for the purposes of applying Article 102 TFEU (2).[40]

[39] Judgments of 25 March 2021 *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).

[40] Servier produces transcripts of the discussions during the hearing before the General Court as annexes to its response. In its reply, the Commission contests the admissibility of those transcripts on the ground that they were drawn up by Servier for its own purposes and the Commission cannot therefore verify their reliability. Server disputes that that evidence is inadmissible. There is, however, no need to settle the question of their admissibility. The analysis of the grounds of appeal that follows will demonstrate that the claims in support of which Servier produces those annexes are ineffective (in relation to the claim that the disputes between Servier and the generic companies were genuine, see point 149 of this Opinion; as regards the claim that the Commission agreed that the licence granted by Servier to Krka was concluded at arm's length, see point 151 of this Opinion; and, with regard to the claim that the Commission could have taken a view on the arguments related to the visits to doctors, see point 435 of this Opinion).

1. Article 101 TFEU

55. By its first to sixth grounds of appeal, the Commission claims that the General Court erred in law in finding that the Krka agreements did not constitute a restriction of competition by object (a). By its seventh ground of appeal, the Commission submits that the General Court also erred in law in finding that nor had the Commission established that those agreements constituted a restriction of competition by effect (b).

(a) Restriction of competition by object (first to sixth grounds of appeal)

56. Before examining the Commission's grounds of appeal concerning the General Court's analysis of the anticompetitive object of the Krka agreements (2), it is useful to summarise how that object was analysed by the Commission in the decision at issue and by the General Court in the judgment under appeal (1).

(1) Analysis of the object of the Krka agreements in the decision at issue and in the judgment under appeal

(i) Decision at issue

57. In section 5.5 (recitals 1670 to 1812 of the decision at issue), the Commission examined the three agreements concluded between Servier and Krka and considered that they constituted a single and continuous activity, the object of which was to restrict competition by sharing the markets for perindopril in the European Union between those two operators. [41]

58. According to the Commission, first, the object of the Krka settlement agreement and of the Krka licence agreement was to divide and allocate the EU markets between Servier and Krka as follows: the Krka licence agreement allowed Krka to continue marketing or launching generic perindopril as part of a de facto duopoly with Servier in seven Member States which constituted Krka's core markets. That authorisation was granted in return for Krka's commitment, under the Krka settlement agreement, to desist from competing with Servier in the remaining 18/20 EU markets. [42] The Commission therefore considered that the licence agreement represented the inducement offered by Servier to Krka for the latter to accept the restrictions agreed in the settlement agreement. [43]

59. Second, the Commission found that the Krka assignment and licence agreement, concluded two months after the Krka settlement and Krka licence agreements, had made it possible for Servier and Krka to strengthen their competitive position, which stemmed from the division of markets established by the latter agreements, by preventing Krka from assigning its competing technology for the production of perindopril to other generic companies. Since the payment of the sum of EUR 30 million under that agreement was unconnected with Servier's expected or actual earnings from the commercial exploitation of the technology assigned by Krka, that payment was viewed by the Commission as a form of sharing of the rent brought about by the market sharing arrangement between Servier and Krka. [44]

41 Recitals 1811 and 1812 of the decision at issue.

42 Recitals 1753, 1756, 1760 and 1763 of the decision at issue.

43 Recitals 1738 to 1749, in particular recital 1745, of the decision at issue.

44 Recitals 1766 and 1803 to 1811 of the decision at issue.

(ii) Judgment under appeal

60. The General Court stated, in the first place, in paragraphs 255 to 274 of the judgment under appeal, the conditions under which, in its view, the insertion of non-challenge clauses in respect of patents and non-marketing clauses in respect of generic products into patent dispute settlement agreements was to be regarded as anticompetitive. According to the General Court, this is the case if the insertion of such clauses in such an agreement is based not on the parties' recognition of the validity of the patent and of the infringing nature of the generic products concerned, but on a significant and unjustified reverse payment made by the patent holder to the generic company, which induces the latter to agree to those clauses. The General Court found (paragraph 271 of the judgment under appeal) that, where they involve such an inducement, the agreements in question must be regarded as market exclusion agreements, in which the 'stayers' are to compensate the 'goers'.

61. In the second place, the General Court explained, in paragraphs 797 to 810 of the judgment under appeal, that, where a normal commercial agreement is linked to a patent dispute settlement agreement including non-challenge and non-marketing clauses, such a contractual arrangement must be regarded as anticompetitive if the value transferred by the patent holder to the generic company under the commercial agreement exceeds the value of the asset transferred by that company pursuant to that agreement. In other words, such a contractual arrangement must be regarded as anticompetitive if the normal commercial agreement linked to the settlement agreement serves, in reality, to mask a value transfer from the patent holder to the generic company, for which there is no quid pro quo other than that company's commitment not to compete.

62. In the third place, the General Court assessed, in paragraphs 943 to 1032 of the judgment under appeal, in the context of its examination of the ninth plea in law raised by Servier at first instance, alleging that there is no restriction of competition by object as far as concerns the Krka agreements, the situation of the linking of a settlement agreement with a licence agreement, which exists in the present case given the linking of the Krka settlement and Krka licence agreements.

63. In the General Court's view, in such a situation, the considerations summarised in point 61 above concerning the linking of a settlement agreement with a normal commercial agreement do not apply. The reason for this is that the linking of a settlement agreement to a licence agreement is an appropriate means of resolving a dispute, allowing the generic company to enter the market and satisfying the wishes of both parties. In addition, the presence, in a settlement agreement, of non-marketing and non-challenge clauses is legitimate where that agreement is based on the parties' recognition of the validity of the patent. Yet a licence agreement, which is meaningful only if the licence is actually used, is necessarily based on the parties' recognition of the validity of the patent (paragraphs 943 to 947 of the judgment under appeal).

64. In order to establish that a licence agreement linked to a settlement agreement in fact masks a reverse payment from the patent holder to the generic company, the Commission must therefore demonstrate that the royalty paid by that company to that patent holder under that licence agreement is abnormally low (paragraphs 948 and 952 of the judgment under appeal).

65. In addition, the anticompetitive object of the non-marketing and non-challenge clauses of the settlement agreement is mitigated by the procompetitive effect of the licence agreement, which encourages the market entry of the generic company (paragraphs 953 to 956 of the judgment under appeal).

66. Accordingly, where there is a genuine dispute involving litigation between the parties concerned and a licence agreement that is directly connected with the settlement of that dispute, the linking of that agreement to the settlement agreement does not constitute a strong indication of the existence of a reverse payment. In such circumstances, the Commission must therefore demonstrate, on the basis of other evidence, that the licence agreement does not constitute a transaction concluded at arm's length and thus masks a reverse payment, such that the contractual framework must be regarded as a restriction of competition by object (paragraph 963 of the judgment under appeal).

67. It was in the light of those criteria that the General Court examined, in paragraphs 964 to 1032 of the judgment under appeal, the Krka settlement and licence agreements, ultimately concluding that the Commission had not shown that those agreements had an anticompetitive object. The General Court based that finding, for the most part, on the following considerations:

– There were genuine, non-fictitious patent disputes ongoing and both the Krka settlement agreement and the Krka licence agreement were connected to those disputes (paragraphs 965 to 969 of the judgment under appeal).

– When those agreements were concluded, the parties were convinced of the validity of the 947 patent, in particular on account of the EPO decision of 27 July 2006.[45] The fact that Krka continued to challenge that patent before the courts and to market its product after that decision is not evidence to the contrary. By so doing, Krka, whilst being persuaded that the patent was valid, simply wanted to strengthen its position in the negotiations with Servier with a view to concluding the settlement agreement. A subsequent reply by Krka to a request for information from the Commission supports that interpretation (paragraphs 970, 971, 999, 1000, 1010, 1011 and 1026 to 1028 of the judgment under appeal).

– The amount of the royalty payable by Krka to Servier under the licence agreement was not abnormally low and the Commission failed to demonstrate that that agreement did not constitute a transaction concluded at arm's length. The Commission therefore failed to establish the existence of a reverse payment constituting an inducement (paragraphs 975 to 984 of the judgment under appeal).

– The implementation of a duopoly between Servier and Krka on the seven markets covered by the Krka licence agreement did not result from that agreement, but from the choices made by Servier and Krka subsequently, which were unforeseeable at the time of the conclusion of the agreement (paragraphs 987 to 991 of the judgment under appeal).

– There was no hermetic sharing of markets between Servier and Krka, because Servier was allowed to remain active on the seven markets covered by the licence (paragraphs 1003 to 1006 of the judgment under appeal).

– The Krka licence agreement had a positive effect on competition on those seven markets, even though the national equivalents of the 947 patent had not yet been granted on some of those markets, and therefore Krka did not need a licence to enter or remain on them. However, the licence had the beneficial effect that Krka avoided a subsequent legislation risk in the event that patents were granted to Servier on those markets in the future (paragraphs 1007 to 1009 and 1027 of the judgment under appeal).

[45] Point 21 of this Opinion.

– The contemporaneous documentary evidence furnished by the Commission to establish that Krka did not believe in the validity of the 947 patent and that Servier was pursuing a strategy of excluding generics is fragmentary, ambiguous, unconvincing or contradicted by a subsequent response by Krka to a request for information from the Commission (paragraphs 1010 to 1025 of the judgment under appeal).

68. Lastly, in the fourth place, the General Court considered, in paragraphs 1041 to 1060 of the judgment under appeal, that the classification of the Krka assignment and licence agreement as a restriction of competition by object was also erroneous because it had been based on the incorrect prior assumption of a market sharing arrangement established by the Krka settlement and licence agreements.

(2) The grounds of appeal relating to the object of the Krka agreements

69. In the Commission's view, the considerations of the General Court summarised in points 62 to 68 above are vitiated by several errors of law.

70. By its first ground of appeal, the Commission claims that the General Court erred in law in relying on Krka's alleged recognition of the validity of the 947 patent as part of its analysis of the object of the Krka agreements, whilst failing to examine the plea in law raised at first instance regarding the potential competition between Krka and Servier (i).

71. By its second ground of appeal, the Commission submits that the General Court's analysis is vitiated by errors because it considered that the licence did not constitute an inducement for Krka to accept the restrictions in the Krka settlement agreement (ii).

72. By its third ground of appeal, the Commission argues that the General Court misapplied the concept of a 'restriction of competition by object', in particular, by finding that there was no market sharing arrangement between Servier and Krka because that allocation was not 'hermetic', distorting the evidence as regards the parties' beliefs and considering that the duopoly established was the result of subsequent choices made by those parties and not of the agreements (iii).

73. By its fourth ground of appeal, the Commission claims that the General Court erred in law in its analysis of the documentary evidence relating to the parties' intention (iv).

74. By its fifth ground of appeal, the Commission considers that the General Court erred in law by taking into account the procompetitive effects of the licence (v).

75. By its sixth ground of appeal, the Commission submits that the judgment under appeal is vitiated by an error in law because the General Court refused to acknowledge the anticompetitive nature of the Krka assignment and licence agreement (vi).

(i) The competitive pressure exerted by Krka on Servier (first ground of appeal)

76. By its first ground of appeal, the Commission claims that the General Court made several errors of law and distorted evidence in finding, after providing an insufficient statement of reasons, that Krka no longer represented, de facto, a source of competitive pressure on Servier when the Krka agreements were concluded.

– *Admissibility and effectiveness of the ground of appeal*

77. First of all, Servier's objections that this ground of appeal is both inadmissible and ineffective must be rejected.

78. In the first place, contrary to Servier's allegation, the Commission specifies the paragraphs of the judgment under appeal to which its criticisms relate.

79. In the second place, nor is it the Commission's goal, as Servier claims, to have the Court of Justice reassess the facts. The Commission claims that the General Court did not comply with the rules governing the burden of proof and the adducing of evidence under EU law, that it distorted evidence and that the explanations it gave in that regard are vitiated by defective reasoning. Such errors may be relied on before the Court of Justice in the context of an appeal. In addition, the Commission's criticisms concern the legal characterisation of the facts examined by the General Court and the legal conclusions drawn from them by the General Court, which also falls within the scope of the review by the Court of Justice in appeal proceedings. [46]

80. In the third place, nor can Servier's arguments that this ground of appeal is ineffective be accepted.

81. According to Servier, the fact that the General Court did not examine the existence of potential competition between Servier and Krka cannot call into question the conclusions of the judgment under appeal regarding the lack of restriction of competition by object, which are based on grounds other than the classification of Krka as a potential competitor of Servier.

82. That objection by Servier echoes the General Court's finding, set out in paragraph 1234 of the judgment under appeal, that the fact that it had been found that the Krka agreements did not constitute, according to the General Court's analysis, a restriction of competition by object or a restriction of competition by effect meant that there was no need for the General Court to examine the plea in law regarding the potential competition between Servier and Krka.

83. However, contrary to what that paragraph appears to suggest and to what Servier claims, the General Court did not reject the classification of the Krka agreements as a restriction of competition by object (or the classification of those agreements as a restriction of competition by effect [47]) for reasons unconnected with the classification of Krka as a potential competitor of Servier.

84. As is apparent from the summary of the General Court's reasoning contained in points 60, 63 and 67 above, the General Court relied on Krka's alleged recognition of the validity of the 947 patent to reject the classification of the Krka agreements as a restriction of competition by object. The General Court considered, in essence, that, contrary to what the Commission had found (point 58 above), Krka had agreed not to compete with Servier on the 18/20 EU markets covered by the settlement not because Servier offered it a licence on the seven other markets but because it believed in the validity of the 947 patent.

[46] See order of 29 September 2010, *EREF* v *Commission* (C-74/10 P and C-75/10 P, not published, EU:C:2010:557, paragraphs 41 and 42 and the case-law cited), and judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 152 and 153 and the case-law cited).

[47] See, in this regard, seventh ground of appeal (point 304 of this Opinion).

85. According to the General Court, a patent dispute settlement agreement containing non-challenge and non-marketing clauses is to be regarded as a restriction of competition by object only if it is based not on the recognition of the validity of the patent by the parties but on an inducement paid by the patent holder to the generic company (paragraphs 262 to 265 of the judgment under appeal).

86. Accordingly, Krka's alleged recognition of the validity of the 947 patent was – together with the alleged lack of inducement inherent in the value transfer to Krka represented by the Krka licence agreement [48] – the underlying basis for the General Court's reasoning when analysing the anticompetitive object of the Krka agreements (paragraphs 970, 971, 999, 1000, 1010 to 1012 and 1026 to 1028 of the judgment under appeal).

87. However, in the context of its first ground of appeal, the Commission claims precisely that the General Court could not take a view on Krka's recognition of the validity of the 947 patent without first examining the question of the existence of potential competition between Krka and Servier. In support of the argument that Krka was a potential competitor of Servier, the Commission produced evidence, which was disregarded by the General Court, demonstrating that Krka was *not* in fact convinced of the validity of that patent. In addition, the General Court distorted the evidence adduced by the Commission, which the General Court opted to consider selectively and upon which it based its belief as regards Krka's alleged recognition of the validity of the patent, and put forward alternative, manifestly flawed explanations when interpreting that evidence.

88. It follows from those arguments that the Commission not only claims that the General Court should have examined whether Servier and Krka were potential competitors when the Krka agreements were concluded, but also, and primarily, that the General Court based its analysis concerning the anticompetitive object of those agreements on a partial, if not selective, assessment and a distortion of the evidence in the file.

89. There can be no doubt that such a criticism is relevant to the examination of the substance of the General Court's finding that the Krka agreements are not anticompetitive, since it could, if it were to prove well founded, indicate that that finding is erroneous and result in the judgment under appeal being set aside. [49]

90. It follows that the plea of inadmissibility based on the alleged ineffectiveness of the first ground of appeal must be rejected.

– *Substance*

91. According to the Commission, the General Court erred in law in finding, in particular in paragraphs 970, 1026, 1028, 1154 and 1162 of the judgment under appeal, that Krka recognised the validity of the 947 patent and that the steps taken by it further to the EPO decision of 27 July 2006 [50] did not demonstrate that it was determined to continue its efforts to enter the market despite that decision.

48 See, in this regard, second ground of appeal (points 135 to 176 of this Opinion).

49 See, with regard to this definition of the effectiveness of a plea, judgment of 21 September 2000, *EFMA* v *Council* (C-46/98 P, EU:C:2000:474, paragraph 38), cited in paragraph 1257 of the judgment under appeal.

50 Point 21 of this Opinion.

92. As a preliminary point, it is useful to recall that the question whether the rules of competition have been infringed can only be correctly determined if the evidence upon which the decision at issue is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market of the products in question. [51] The scope of judicial review provided for in Article 263 TFEU extends to all elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the parties. [52]

93. Next, it must be borne in mind that the prevailing principle in EU law is that evidence may be freely adduced and that the only relevant criterion for the purpose of assessing the evidence adduced is its credibility. [53] In order to satisfy the burden of proof incumbent on it, the Commission must gather sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place. [54]

94. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement. [55] The evidence available to the Commission must be capable of being supplemented by inferences and the existence of an anticompetitive practice or agreement may be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. [56]

95. If the Commission finds that the established facts cannot be explained other than by the existence of anticompetitive behaviour, the finding of an infringement cannot be accepted where the undertakings concerned put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission. [57]

51 Judgment of 14 July 1972, *Imperial Chemical Industries* v *Commission* (48/69, EU:C:1972:70, paragraph 68).

52 Judgments of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 44), and of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 72).

53 Judgments of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraphs 49 and 63); 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 128); and of 27 April 2017, *FSL and Others* v *Commission* (C-469/15 P, EU:C:2017:308, paragraph 38).

54 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); see also judgment of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, EU:T:2015:383, paragraph 176).

55 See, to that effect, judgment 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 513 to 523); see also judgment of 27 September 2006, *Dresdner Bank and Others* v *Commission* (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, EU:T:2006:271, paragraph 63).

56 See, to that effect, judgments 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, paragraphs 55 to 57), and of 27 September 2006, *Dresdner Bank and Others* v *Commission* (T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, EU:T:2006:271, paragraphs 64 and 65).

57 Judgments of 28 March 1984, *Compagnie royale asturienne des mines and Rheinzink* v *Commission* (29/83 and 30/83, EU:C:1984:130, paragraph 16); 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, paragraphs 126 and 127); and of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 74).

96. Lastly, a distortion of evidence exists where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect,[58] since the General Court has manifestly exceeded the limits of a reasonable assessment of that evidence.[59]

97. Contrary to the view taken by the General Court in paragraph 1016 of the judgment under appeal, those principles, in particular those summarised in point 94 above, apply not only where the Commission must infer the actual existence of an anticompetitive agreement, decision or concerted practice or anticompetitive contacts from fragmentary and sparse evidence. Those principles are also relevant in a situation such as that of the present case, in which the content of the agreements at issue was available to the Commission.[60]

98. In such a situation, it is not, of course, the actual content of those agreements which has to be reconstructed by means of inferences. However, the answer to the question whether the object of that content was to divide the market unlawfully must be deduced not only from that content, but also from the context of the agreements and, where appropriate, the parties' intention.[61] The abovementioned principles remain entirely relevant to the interpretation of those contextual elements.

99. In the present case, the Commission examined such contextual elements in order to determine whether Krka was a potential competitor of Servier before the Krka agreements were concluded. In that regard, the Commission explained, in recitals 1680 to 1700 of the decision at issue, that Krka was by far the main generic competitor to challenge Servier's competitive position as regards the supply of perindopril, that Servier and Krka were already actual competitors vis-à-vis the supply of perindopril in the Czech Republic, Hungary, Lithuania, Poland and Slovenia, and that Krka was a potential competitor on the other EU markets because, first, its product was ready to be launched there, second, the patent-related barriers were not insurmountable, third, it had a number of cooperation partners for several markets and, fourth, it was endeavouring to enter those markets.

100. With regard, more specifically, to Krka's assessment of the validity of Servier's patents, the Commission found, first, that there was ample documentary evidence predating the EPO decision of 27 July 2006 to show that Krka was convinced of winning its invalidation action (recital 1685 of the decision at issue).

101. Second, the Commission considered that Krka's claim that the EPO decision of 27 July 2006 prompted it to cease its efforts to market the alpha form of perindopril erbumine cannot be accepted and that the evidence produced by Krka in that regard was unconvincing in the light of certain evidence that showed that Krka did not accept that decision and remained determined to enter the market with its product (recitals 1686 to 1691 of the decision at issue).

102. The Commission claims that, if the General Court had taken account of the evidence and reasoning contained in the recitals of the decision at issue summarised in points 99 to 101 above, it could not have concluded, in paragraphs 971, 1010, 1011 and 1017 of the judgment under

58 Judgments of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37); of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 37); and of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17).

59 Judgments of 4 July 2013, *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 52), and of 17 October 2019, *Alcogroup and Alcodis* v *Commission* (C-403/18 P, EU:C:2019:870, paragraph 64).

60 Recital 56 of the decision at issue makes clear that the evidence used by the Commission includes the text of the agreements concluded between Servier and the generic companies.

61 Judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 53 and 54).

appeal, that Krka recognised the validity of the 947 patent and was dissuaded from continuing its efforts to enter the market further to the EPO decision of 27 July 2006 and the interim injunction of 3 October 2006 ordered in the United Kingdom against Krka. [62]

103. The General Court simply stated, in paragraphs 970 and 1154 of the judgment under appeal, that 'there were, at the time the settlement and licence agreements were concluded, consistent indications capable of leading the parties to believe that the 947 patent was valid', and made reference in that regard to paragraphs 967 and 968 of that judgment. In those paragraphs, it summarised certain facts regarding the opposition proceedings relating to the 947 patent before the EPO and the litigation between Krka and Servier before the English courts. [63]

104. However, amongst those facts, the General Court took into account only the EPO decision of 27 July 2006 and the interim injunction ordered against Krka by the High Court of Justice (England & Wales), Chancery Division (Patents Court), on 3 October 2006. In so doing, the General Court failed to consider the following factors, to which the Commission draws attention in this appeal, which are relevant to Krka's assessment of the validity of the 947 patent on the eve of the signature of the Krka settlement and licence agreements on 27 October 2006:

– Documentary evidence of Krka's assessment of the EPO decision of 27 July 2006 shows that Krka viewed that decision as 'shocking', 'dreadful' and biased, that it did not accept the decision's reasoning and that it was determined not to resign itself to it (recital 1688 of the decision at issue).

– Krka not only continued to challenge the validity of the 947 patent before the EPO after the EPO decision of 27 July 2006, [64] but, in September 2006, it filed counterclaims for invalidity of the 947 and 340 patents and it made an application for summary judgment before the High Court of Justice (England & Wales), Chancery Division (Patents Court) [65] (recitals 1687 and 1688 of the decision at issue).

– The High Court order made on 3 October 2006 as part of that litigation, granting Servier an interim injunction against Krka and ordering a full trial, [66] stated that Krka had a solid basis for challenging the validity of the 947 patent (recitals 904 and 1689 of the decision at issue).

– In Hungary, on 13 October 2006 Krka was successful in the legal proceedings brought against an application for interim injunction made by Servier, which was rejected [67] (recital 1687 of the decision at issue).

– A body of evidence shows that the possible invalidation of the 947 patent was perceived by Servier not as a marginal risk but as a real, concrete possibility (recital 1691 of the decision at issue).

– Krka informed the Commission that Servier believed that Krka had one of the best and most comprehensive pieces of evidence in the opposition before the EPO and the revocation in the United Kingdom (recitals 912, 1688 and 1690 of the decision at issue).

62 Point 30 of this Opinion.

63 Points 20, 21, 29 and 30 of this Opinion.

64 Point 21 of this Opinion.

65 Point 29 of this Opinion.

66 Point 30 of this Opinion.

67 Point 28 of this Opinion.

105. The General Court neither explained why it did not take that evidence into account nor a fortiori how, in its view, that evidence is compatible with the finding of Krka's alleged recognition of the validity of the patent further to the EPO decision of 27 July 2006 and the interim injunction ordered by the UK court on 3 October 2006.

106. First, the General Court did not put forward any evidence that would rebut the Commission's claim that there was no document contemporaneous to the agreements stating that that decision or that interim injunction altered Krka's perception of the 947 patent.

107. The Commission acknowledged, in recitals 1688 and 1690 of the decision at issue, that Krka was certainly no longer fully convinced of its case following the EPO decision of 27 July 2006 and that that decision and the injunctions granted in the United Kingdom against Krka and Apotex [68] had certainly influenced Krka's assessment of the patent situation. However, according to the Commission's analysis, Krka was far from giving up on insisting that the 947 patent was invalid, and enjoyed the support of its partners. Nothing precluded a real, concrete possibility of Krka invalidating the 947 patent in a full trial.

108. As the Commission claims, the evidence mentioned in point 104 above confirms that analysis, whereas the evidence in the file does not support the opposing view taken by the General Court.

109. Second, in paragraphs 1010 and 1011 of the judgment under appeal, the General Court relied on a reply by Krka to a request for information from the Commission, contained in recital 913 of the decision at issue, in which Krka had claimed, inter alia, that 'getting a license and withdrawing oppositions was considered as the best option for Krka at that time', and that, 'according to all other scenarios, a launch was not possible earlier than in at least 2 years after July 2006, and even after such period a launch was not warranted (risk that 947 is maintained, development risks for non-alpha)'. The General Court found that that extract 'support[ed] the conclusion that Krka considered that, without the licence agreement, it would be impossible to enter or remain on the market in the seven Member States covered by that licence agreement because of the 947 patent'.

110. However, by thus attributing greater weight to a statement made by Krka in the course of the procedure before the Commission than to evidence of Krka's beliefs prior to the conclusion of the Krka agreements, the General Court infringed the principles governing the production of evidence before the Courts of the European Union. In accordance with those principles, subsequent statements made for the purposes of the procedure before the Commission have a lower probative value than contemporaneous evidence and documents concerning the anticompetitive conduct at issue, which were drawn up *in tempore non suspecto* and directly connected with the facts at issue. [69]

111. Third, in that same vein, it is difficult to understand how Krka's claim, made during the Commission's investigation and cited in recital 1738 of the decision at issue, that 'the opportunity cost of not concluding the Krka Settlement Agreement would amount to "in 3 years well above €10 [million]" of lost profits' could constitute, as the General Court stated in paragraph 1000 of the judgment under appeal, 'an additional indication of the fact that it

[68] Point 24 of this Opinion.

[69] See judgment of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, EU:T:2015:383, paragraphs 183, 380 and 381 and the case-law cited).

considered the 947 patent was valid'. Those profits corresponded to those expected if it entered or remained on the seven markets covered by the Krka licence agreement, and therefore to an estimate of the commercial value of the licence.

112. However, the Commission is right to claim that it is not possible to infer, as the General Court does, from the fact that Krka estimated the value of the licence thus in the course of the procedure before the Commission that it considered, when the Krka agreements were concluded, that the 947 patent was valid. The General Court appears to infer that interpretation from the notion that that statement by Krka meant that it was convinced, at the time of the conclusion of the agreements, that it was going to lose that amount if it did not obtain a licence from Servier because it would be unable to enter or remain on those markets without such a licence.

113. However, as the Commission points out, there was no evidence to support such an interpretation and, on the contrary, there are strong indications to show that Krka would have remained on the markets covered by the licence without any agreements with Servier, in particular the fact that Krka continued to sell its product in Hungary after the EPO decision of 27 July 2006 and that it successfully defended itself against the application for an interim injunction made by Servier in Hungary (recital 1675 of the decision at issue).

114. Fourth, it is similarly difficult to understand why the General Court gave such paramount importance to the injunction obtained by Servier against Krka before the UK court on 3 October 2006, but did not even mention, in the relevant part of the judgment under appeal devoted to the object of the Krka agreements, that a similar application for an injunction by Servier against Krka had been rejected in Hungary on 13 October 2006.[70]

115. In paragraph 1155 of the judgment under appeal, in the part devoted to the effects of the Krka agreements, the General Court disregarded that fact on the ground that it was a procedure which did not concern any of the countries in which the Commission had found a restriction of competition by effect (France, the Netherlands and the United Kingdom) (see point 39 above). However, that argument is not relevant to an explanation why such a success in litigation by Krka did not influence its perception of the validity of the 947 patent or of its case as regards that patent, whereas, in the General Court's view, the injunction obtained by Servier in the United Kingdom had such a decisive impact on Krka's perception. As the Commission explained, using examples, in recitals 1690 and 1697 of the decision at issue, a successful challenge in one jurisdiction could entail a series of challenges in other jurisdictions. This is confirmed by the proceedings brought by Apotex and by its Netherlands subsidiary described in points 23 to 25 above.

116. Furthermore, the statement by the General Court in paragraph 968 of the French version of the judgment under appeal, which is the authentic version, that, by the order of 3 October 2006, the UK court 'granted Servier's application for an interim injunction and denied the motion brought by Krka on 1 September 2006' is misleading. The General Court merely mentions in that paragraph the fact that, on 1 September 2006, Krka brought a counterclaim for annulment of the 947 patent, which suggests that that was the claim that was rejected on 3 October 2006. That was not however the case. The General Court fails to clarify in the paragraph that Krka also applied for summary judgment on 1 September 2006. It was only that application which was dismissed by the UK court in its order of 3 October 2006, because in its view the examination of the patent required a full trial. By contrast, the court did not, at that stage, by any means reject the counterclaim for

[70] Point 28 of this Opinion.

annulment of the 947 patent made by Krka, which remained pending until the proceedings were discontinued as a result of the Krka settlement agreement (paragraph 23 of the judgment under appeal and recitals 904 and 1689 of the decision at issue). As the Commission stated in its pleadings and at the hearing in these appeal proceedings, the judge had recommended that the substantive examination of the patent take place swiftly and ordered that expedited proceedings be held, and the trial was to begin on 21 February 2007.

117. Fifth, as the Commission explains, the interpretation put forward by the General Court to the effect that the EPO decision of 27 July 2006 and the interim injunction granted to Servier against Krka by the UK court on 3 October 2006 were decisive factors that convinced Krka of the validity of the 947 patent and to abandon its efforts to enter the market independently is at odds with other findings by the General Court.

118. For instance, in paragraphs 366 to 370 of the judgment under appeal, the General Court explained that, in view of their provisional nature, such injunctions did not preclude the operation of potential competition, that even judgments on the merits were provisional as long as the possible remedies have not been exhausted, and that a decision confirming the validity of a patent, such as the EPO decision of 27 July 2006 (apart from the fact that it was also still open to appeal and, furthermore, was subsequently annulled [71]), did not in any way prejudge whether or not the generic products, which the patent holder alleged infringed that patent, constituted infringements.

119. Sixth, the alternative explanations provided by the General Court to justify that the evidence that it took into account in the course of its analysis does not rebut the finding of Krka's alleged recognition of the validity of the 947 patent are unconvincing.

120. In paragraphs 1026 and 1162 of the judgment under appeal, the General Court considered that 'the fact that Krka continued to challenge Servier's patents and to market its product even though the validity of the 947 patent had been upheld by the EPO Opposition Division [was] not a decisive factor for the purpose of establishing the existence of a restriction of competition by object, since the fact that Krka continued to exert competitive pressure on Servier can be explained by Krka's desire, despite the expected litigation risks, to strengthen its position in the negotiations that it was likely to have with Servier with a view to reaching a settlement'.

121. The Commission is right to claim that, by reaching such a conclusion, the General Court made a manifest error of assessment of a point of fact, namely that Krka continued to challenge the 947 patent after the EPO decision of 27 July 2006, without taking account of the abovementioned body of evidence gathered by the Commission and without considering the plausibility of its alternative explanation having regard to that evidence.

122. However, in the light of the evidence gathered by the Commission, which is summarised in point 104 above, there is no basis for the General Court's belief that Krka was convinced of the validity of the 947 patent and continued to challenge the validity of that patent before the courts solely in order to improve its negotiating position with Servier, and the General Court does not point to any fact from which it could have deduced that interpretation.

[71] Point 21 of this Opinion.

123. In addition, as the Commission rightly observes, the General Court contradicted itself when it explained, on the one hand, in paragraphs 963 and 965 to 968 of the judgment under appeal, that the disputes between Servier and Krka were genuine, whilst taking the view, on the other hand, in paragraph 1026 of that judgment, that Krka's continuation of those disputes was merely a strategic stance adopted in order to improve its position in its negotiations with Servier with a view to a settlement agreement.

124. Seventh, after providing a further unconvincing explanation, the General Court dismissed the Commission's objection, contained in recitals 1747 to 1756 of the decision at issue and repeated by the Commission in the context of this appeal, that the contents of the Krka settlement and licence agreements did not reflect the patent situations and risks in the countries covered by those agreements. The national equivalent of the 947 patent had not been granted in Poland, the Czech Republic and Slovakia,[72] but Servier nevertheless wanted to grant a licence for those countries. According to the Commission, this shows that the objective of those agreements was not to reach a compromise based on the merits of that patent, but rather to divide and allocate the markets solely in the economic interest of the parties. The agreements were therefore not based 'on the difference in patent-related risks for Krka, but on the economic zones of interest, as Latvia and Slovakia belonged to Krka's "core markets"'.

125. The General Court did not take that objection into account and addressed this issue only in paragraphs 1007 to 1009 and 1027 of the judgment under appeal, in which it considered that the Krka licence agreement had a positive effect on competition on those seven markets, even though the national equivalents of the 947 patent had not yet been granted on some of those markets, and therefore Krka did not need a licence to enter them. In the General Court's view, the licence nevertheless had the beneficial effect that Krka avoided a subsequent litigation risk, in the event that patents were granted to Servier on those markets in the future. However, that line of argument is insufficient not only to establish the alleged procompetitive effects of the licence,[73] but also to rebut the Commission's interpretation that the Krka agreements were not based on the parties' perception of the patent-related risks on the various markets concerned.

126. Finally, eighth, the General Court's finding, contained in essence in paragraphs 943 to 947, 963, 965 to 972, 1030 and 1157 of the judgment under appeal, that the actual conclusion of the Krka licence agreement confirmed that Krka recognised the validity of the 947 patent, cannot be accepted.

127. The General Court gave reasons for that conclusion in paragraphs 947, 1030 and 1157 of the judgment under appeal, stating that the conclusion of a licence agreement, which has no purpose for any licensee unless the licence is actually used, is based on the parties' recognition of the validity of the patent. However, inferring from the fact that a licence agreement is based, in principle or as a general rule, on the recognition of the underlying patent, that, in a specific case, the parties to such an agreement necessarily recognise the validity of the patent at issue, has echoes of a circular line of reasoning. In addition, the implementation of EU competition law would be seriously jeopardised if the parties to anticompetitive agreements could evade the application of Article 101 TFEU simply by giving such agreements a particular form.[74]

72 See point 35 of this Opinion.

73 See, in this regard, fifth ground of appeal (points 229 to 242, in particular point 239, of this Opinion).

74 See, in this respect, judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38, p. 248), and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 133 and the case-law cited).

128. Since the form taken by an agreement cannot be a determining factor, it therefore falls, as is clear from the case-law cited in points 92 to 96 above, pursuant to the relevant rules on the production of evidence, to the Commission and to the Courts of the European Union to rely on a body of relevant, consistent and convincing evidence to show that, in the specific case, the agreement at issue is to be regarded as a restriction of competition by object.

129. However, in the present case, contrary to the General Court's findings in paragraphs 1018, 1019 and 1025 of the judgment under appeal, it follows from the examination above that the Commission had in fact gathered such a body of evidence to show that, on the date on which the Krka settlement and licence agreements were concluded, Krka was not convinced of the validity of the 947 patent and was, on the contrary, determined to continue challenging that patent and to enter or remain on the market despite that patent. The General Court was wrong to find, in those paragraphs, that the evidence gathered by the Commission was fragmentary and ambiguous, without having examined that evidence in its entirety and by conducting a manifestly flawed assessment of the evidence examined by it, which it chose selectively.

– *Interim conclusion*

130. In those circumstances, the Commission is justified in claiming that the General Court infringed the principles governing the production of evidence and its review by the EU judicature. As has been observed, in accordance with those principles, evidence must be assessed as a whole and consistently and the review of that evidence must extend to all elements of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU.[75]

131. In the present case, the General Court's assessment of the evidence in the file was manifestly selective, as it failed to take account of a significant volume of relevant evidence and proposed interpretations of the evidence considered by it which have no foundation in the file and are unconvincing. The different light which the General Court sought to cast on the facts established by the Commission cannot therefore replace the Commission's explanation of those facts with an alternative plausible explanation.

132. It follows from the foregoing considerations that the first ground of appeal must be upheld.

133. In view of the significance attributed by the General Court to the finding – which has proved to be unfounded – of Krka's alleged recognition of the validity of the 947 patent when analysing the anticompetitive object of the Krka agreements, the merits of the first ground of appeal are sufficient on their own for the judgment under appeal to be set aside in so far as it found that it was not established that those agreements constituted a restriction of competition by object.

134. It is, however, appropriate also to consider the other grounds of appeal put forward by the Commission relating to the General Court's analysis of the anticompetitive object of the Krka agreements, in particular with a view to the disposal of the case by the Court of Justice once the judgment under appeal has been set aside.

[75] See points 92 to 96 of this Opinion.

(ii) The licence as an inducement for Krka to accept the restrictions of the settlement (second ground of appeal)

135. In the context of its second ground of appeal, the Commission claims that the General Court made several errors of law, distorted evidence and provided insufficient and contradictory reasons when it set about analysing the content and the objectives of the Krka licence agreement as an inducement made to Krka to accept the restrictions contained in the Krka settlement agreement.

136. In recital 1738 et seq. of the decision at issue, the Commission considered that the licence granted to Krka by Servier on the seven markets of Central and Eastern Europe had been a significant inducement for Krka to agree, by means of the settlement agreement, to refrain from competing with Servier on the remaining 18/20 EU markets.

137. In the Commission's view, the licence constituted a significant inducement for Krka to accept those restrictions because, first, it covered the markets on which Krka had traditionally been present in the European Union, where it achieved its highest margins; second, it gave it the guarantee that Servier would cease threatening it with the implementation of the 947 patent; and, third, it was a sole licence establishing a de facto duopoly between Servier and Krka on the seven markets concerned. The licence thus afforded Krka the certainty of guaranteeing its sales and the limited commercial pressure on those markets ensured that it generated high profits. Krka estimated the value in monetary terms of the advantages granted to be in excess of EUR 10 million (recitals 1738 to 1742 of the decision at issue).

138. For its part, the General Court considered, in paragraphs 948 to 952 of the judgment under appeal, that, as it is justified, in principle, to link a licence agreement, which is based on the recognition of the validity of the patent, to a settlement agreement containing non-marketing and non-challenge clauses, such a link does not constitute a 'strong indication' of a reverse payment. It is therefore for the Commission, in order to demonstrate that a licence agreement linked to a settlement agreement actually masks a reverse payment from the patent holder to the generic company, to show that the royalty paid by that company to the patent holder under that licence agreement is abnormally low and that that agreement was not concluded at arm's length.

139. In paragraphs 975 to 984 of the judgment under appeal, the General Court found that, in the present case, the amount of the royalty payable by Krka to Servier under the Krka licence agreement was not abnormally low and that the Commission had not demonstrated that that agreement did not constitute a transaction concluded at arm's length. According to the General Court, the Commission therefore failed to establish the existence of a reverse payment constituting an inducement within the context of the Krka settlement and licence agreements.

140. As a preliminary point, it is important to clarify that, contrary to what Servier suggests, the question of whether the General Court was right to conclude that the contractual framework formed by the Krka settlement and licence agreements did not involve a transfer of value from Servier to Krka, the sole quid pro quo for which was Krka's commitment not to compete, does not concern assessments of facts which, unless they are distorted, fall solely under the jurisdiction of the General Court. On the contrary, that question concerns the legal characterisation of the relevant facts by the General Court and the legal conclusions which it has drawn from them, which comes under the review conducted by the Court of Justice in the context of an appeal. [76]

[76] See order of 29 September 2010, *EREF* v *Commission* (C-74/10 P and C-75/10 P, not published, EU:C:2010:557, paragraph 41 and the case-law cited).

141. As the Court has found,[77] settlement agreements such as that in question 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 transfers of value, whether monetary or not, by the manufacturer of originator medicines in favour of the generic company can have no other explanation than the commercial interest of those parties not to engage in competition on the merits. In order to examine whether that is the case, it is necessary to assess 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 other than refraining from engaging in competition. If that is not the case, it has to be determined whether the net gain is sufficiently large actually to act as an incentive for the generic company concerned to refrain from entering or attempting to enter the market concerned.

142. Contrary to what the General Court held in the judgment under appeal, the Commission demonstrated in the decision at issue that that was indeed the case with the contractual framework formed by the Krka settlement and licence agreements.

143. As the Commission essentially observes, the General Court's analysis in that regard is vitiated by three errors. First, the General Court did not draw the conclusion that it should have drawn in the light of the fact that the licence offered by Servier to Krka on the seven markets of central and Eastern Europe constituted the quid pro quo for Krka's commitment not to compete with Servier on the remaining 18/20 EU markets. Next, the General Court focused on the royalty rate of the licence and the fact that the licence was allegedly concluded at arm's length, without taking account of the contractual arrangement formed by the Krka settlement and licence agreements in its entirety, its objectives and its context. Finally, in so doing, the General Court did not recognise that the licence entailed a significant transfer of value from Servier to Krka.

144. As the Commission states, those errors stem inter alia from the fact that the General Court's analysis is based on the fiction of a settlement agreement based on the merits of the underlying patent and of a separate licence agreement concluded at arm's length. However, by – implicitly – taking such a fiction as a basis, the General Court infringed the principles, which are in fact set forth in the judgment under appeal, that, in order to determine whether an agreement has an anticompetitive object, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.[78]

– *The licence as quid pro quo for the commitment not to compete*

145. In the first place, the General Court's analysis contains a contradiction in paragraph 1029 of the judgment under appeal. In that paragraph, the General Court considered that the undisputed fact that the licence was a condition of Krka's acceptance of the non-marketing and non-challenge clauses in the settlement agreement (as Krka had stated that it had 'sacrificed' the markets in Western Europe in favour of the central and Eastern European markets (recital 1748 of the decision at issue)) '[did] not establish that the licence agreement was not a transaction concluded at arm's length'.

77 Judgments in *Generics (UK) and Others* (paragraphs 87 to 94 and 111), and in *Lundbeck* v *Commission* (paragraphs 114 and 115).

78 See judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 53 and the case-law cited); see also the case-law cited in paragraph 193 of the judgment under appeal.

146. However, an agreement under which a patent holder grants a generic company a licence on certain markets, the quid pro quo of which is not (or not only) the royalty paid by that generic company for the grant of that licence but rather the commitment by that company not to compete with the patent holder on other markets, cannot be characterised as a transaction concluded at arm's length. It is not in line with normal market conditions for the quid pro quo for a licence on certain markets to take the form of a commitment not to compete on other markets, particularly where such an arrangement is not justified by differences related to the underlying patent situation.

147. A contractual arrangement of that kind, which involves a transfer of value from the patent holder to the generic company, taking the form of the grant of the licence on certain markets, on the one hand, and a commitment on that company's part not to engage in competition with that patent holder on other markets, on the other hand, must be examined through the analytical lens established by the Court, as set out in point 141 above, in order to determine whether the transfer of value from the patent holder to the generic company has a quid pro quo from that company other than its commitment not to compete.

148. As the Commission rightly argues, contrary to what is suggested, inter alia, in paragraphs 943, 956, 963 and 974 of the judgment under appeal, there is no reason not to use that analytical lens in the present case on the ground that the agreement concluded took the form of a licence and the transfer of value a non-monetary form, namely the assignment by Servier to Krka of a proportion of its market share on the markets covered by the licence. As I have already stated in points 127 and 128 above, the implementation of EU competition law would be seriously jeopardised if the parties to anticompetitive agreements could evade the application of Article 101 TFEU simply by giving such agreements a certain form. The determining factor is not the form taken by an agreement, but rather whether the content, objectives and context of an agreement reveal that its object is to restrict competition.

149. Therefore, the facts, referred to in paragraphs 943 to 948, 953 and 963 to 969 of the judgment under appeal, that there were genuine patent disputes pending between Servier and Krka and that the licence was connected with those disputes did not prevent such an agreement from being anticompetitive in nature, as the Commission rightly explained in recital 1709 of the decision at issue. That is all the more true because it has already been shown, in points 124 and 125 above, that the content of the Krka settlement and licence agreements did not reflect the patent situations and risks in the countries covered by those agreements. It does not appear therefore that those settlement and licence agreements reflected a compromise related to the underlying patent situation.[79]

– *The licence as an inducement*

150. In the second place, if the General Court's analysis of the Krka settlement and licence agreements is viewed through the analytical lens and in the light of the principles set out in points 141 and 144 above, the Commission appears justified in claiming that, in paragraphs 963, 973 to 984 and 1029 of the judgment under appeal, the General Court gave too much weight to the question of whether the licence itself, viewed independently from the settlement agreement, was in line with normal market conditions and whether the royalty rate was abnormally low.

[79] See, in this respect, my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 134 to 139).

151. As the Commission rightly argues, analysis of that question in isolation is meaningless. The reason for this is that, on the basis of an overall analysis of the settlement and licence agreements, it appears that the grant of the licence *itself* (regardless of the royalty rate and the question of whether the licence was granted in line with normal market conditions) was the quid pro quo offered by Servier to Krka for the latter's commitment not to engage in competition on the 18/20 Western European markets covered by the settlement. The Krka settlement agreement does not mention any other specific costs or performance on Krka's part for the benefit of Servier which could explain why Servier granted Krka a licence (recitals 1706 and 1735 of, and footnote 2354 to, the decision at issue).

152. The context of the Krka settlement and licence agreements, which were intrinsically linked (recitals 1701 to 1704, 1710, 1745 and 1746 of the decision at issue), the objectives of those agreements and the parties' intentions, as set out by the Commission in recitals 1670 to 1763 of the decision at issue, reveal the real reasons and show how Servier and Krka divided up the EU markets and how those two operators established a duopoly in the seven markets covered by the licence. Those factors, of which the General Court took insufficient account, demonstrate that the licence granted to Krka was the quid pro quo for the commitment not to compete contained in the settlement.

153. Krka was Servier's most advanced potential competitor in the supply of perindopril in the European Union, in particular on Servier's largest global markets, such as France and the United Kingdom. In addition, Krka was already an actual competitor on some of the seven markets covered by the licence which represented its traditional markets and on which it enjoyed a significant commercial presence (recitals 1673, 1674, 1676, 1681, 1716, 1721, 1738 and 1740 of the decision at issue). Hence, it does not appear plausible that Krka would have relinquished its presence on those markets and its determination to attempt to enter the other EU markets in return for a monetary payment, like the other generic companies with which Servier concluded settlement agreements.

154. As I have already had occasion to point out, a value transfer taking the form of a presence on a market permitted by the patent holder gives added value to a generic company by comparison with a simple monetary transfer. That added value consists of the possibility of distributing its own product and of building up or retaining its customer base, its distribution networks and its brand image.[80] This is especially important on a 'branded generic' market, where doctors' prescriptions do not refer to the international non-proprietary name of a medicinal product, that is to say, not to its compound or its active ingredient but rather to the brand of medicinal products, and therefore generic companies need to promote their own brands. This was the case on the markets concerned by the Krka licence agreement (recital 1726 of the decision at issue).

155. Since it was unable to eliminate Krka entirely from the market, as it did with the other generic companies with which it concluded agreements, Servier therefore offered Krka a share of the monopoly revenues generated precisely by the elimination of the other potential generic competitors and the risk of the opening of the market to generics, which would have resulted in a significant fall in prices. By eliminating that risk and ensuring Krka's controlled entry to only part of the market, Servier and Krka were able to maintain higher prices and far higher margins than if the market were opened to generics (recitals 1721, 1724, 1728 to 1730 and 1819 of the decision at

[80] See, to that effect, my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 171 and 172).

issue). As the Commission notes, without the quid pro quo of the commitment not to compete on the markets not covered by the licence, Servier had no reason to grant a licence to Krka which it had refused in the past.

156. For Krka, entry to just part of the market, as agreed with Servier, coupled with the certainty that Krka and Servier would remain the only operators on the market and that there would be no other generic entrants,[81] was ultimately preferable to continuing to challenge Servier's position throughout the European Union. One particular reason for this was that a victory in the patent litigation and an independent entry to the market would have opened the market to all generic companies, which would have led to a dramatic fall in prices and competition between those different companies. This is why, in Krka's internal communications from August/September 2005 and April 2006, to which the Commission refers in these appeal proceedings and which were not taken into account by the General Court, it was stated that the annulment of the 947 patent '[would] unfortunately open the market for everybody' and that 'a successful opposition namely opens the market to everybody' (recitals 844, 874, 914, 1759 and 1763 of the decision at issue).

157. Ultimately, the option offered by Servier of being the first and only generic company to remain on or enter part of the market was therefore preferable to Krka, particularly since, by virtue of the agreements with Servier, that entry was certain, whereas continuing with litigation and plans for an independent entry to the markets on which it was not yet present entailed risks and necessitated investments and resources.[82] The fact that the profits that Krka was able to make from the licence corresponded to the profits that it could have expected on the three largest markets in Western Europe, which it opted to forgo, confirms that interpretation (recitals 1733, 1739 to 1744, 1748, 1753 to 1756 and 1760 of, and footnotes 2348 and 2368 to, the decision at issue).

158. An overall analysis of the Krka settlement and licence agreements and of their context, formed inter alia by the agreements concluded by Servier with the other generic companies and Servier's global anti-generics strategy (see inter alia recitals 4 to 9, 1819, 2774, 2919, 2929 and 2932 of the decision at issue), therefore confirms that the Krka agreements were a 'joint activity [by Servier and Krka] to control the market', in the words used in an email from Krka dated 29 September 2005. Moreover, Krka contemplated the conclusion of an agreement with Servier concerning the 947 patent in internal communications of April 2006, to which the Commission refers in these appeal proceedings (recitals 849, 853, 873, 874, 1759, 1760 and 1763 of the decision at issue). These elements were likewise disregarded by the General Court.

159. It follows that the Commission could rightly conclude, in recital 1745 of the decision at issue, that, whilst a licence could be a legitimate means for a patent holder to grant other market players the right to use the know-how protected by the patent, the Krka licence agreement had been problematic as it had served as an inducement to secure restrictions on competition in the 18/20 markets not covered by the licence as part of the market sharing arrangement. The examination of the evidence put forward by the Commission, contained in points 145 to 158 above, has demonstrated that the Commission found that there had been a transfer of value from Servier to Krka under the Krka licence agreement, in the form of the market shares assigned by Servier to Krka, and that the quid pro quo for that value transfer was Krka's commitment not to compete with Servier on the remaining EU markets not covered by that licence agreement.

81 With regard to the exclusive nature of the licence and the establishment of a de facto duopoly between Servier and Krka by virtue of it, see points 195 to 204 of this Opinion.

82 See, in this respect, my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 118 to 120).

– *The quantification of the value transferred to Krka by means of the licence*

160. In this regard, in the third place, the Commission is also justified in claiming that, by focusing, in paragraphs 963, 973 to 984 and 1029 of the judgment under appeal, on whether or not the royalty payable under the Krka licence agreement was abnormally low, the General Court failed to examine whether the net gain from the transfer of value made by Servier to Krka under that agreement was sufficiently large to have actually induced Krka not to enter or attempt to enter the markets not covered by the licence.

161. It should be recalled that Krka estimated the commercial value of the licence, that is to say, the value of its presence on the duopolistic markets covered by the licence, at more than EUR 10 million in three years (recitals 1738 and 3162 of, and footnote 4112 to, the decision at issue). The Commission estimated that the operating margin that Servier sacrificed for Krka's benefit under the licence was even higher still (recital 1739 of the decision at issue).

162. The level of the royalty payable by Krka to Servier to use the licence was fixed at 3% of Krka's net sales on the markets covered by the licence (recital 910 of the decision at issue). The royalties came to approximately EUR 1.1 million over a period of four years for a turnover of around EUR 30 million (recital 1739 of, and footnote 2350 to, the decision at issue).

163. It is clear from those figures that the net gain from the value transferred by Servier to Krka under the Krka licence agreement came to approximately almost EUR 9 million at least in terms of the value of the licence for Krka, assuming that the EUR 10 million in profits estimated excluded the cost of the royalties. As for the margin sacrificed by Servier, a margin higher than Krka's profits on account of Servier's higher prices (recital 1739 of the decision at issue), the amount of the net gain from the value transferred by Servier to Krka under the licence would be even higher.

164. In paragraphs 977 to 981 of the judgment under appeal, the General Court considered that it is not necessarily abnormal that the rate of an operating surplus greatly exceeds the royalty rate of a licence, that the royalty represents only a small proportion of the licensee's margins and that that rate is calculated on the basis of the sales price of that licensee's product. In addition, the licence was not exclusive, which limited its advantageousness to Krka.

165. However, such general considerations cannot override the finding that, specifically, in the present case, the almost EUR 9 million (in terms of the value of the licence for Krka (see point 163 above)) transferred by Servier to Krka cannot be explained by any other quid pro quo from Krka than its commitment not to engage in competition with Servier on the 18/20 EU markets not covered by the Krka licence agreement. The General Court, whilst mentioning, at various points in the judgment under appeal, the royalty rate of 3% (paragraphs 975, 977, 983 and 1029 of the judgment under appeal), on the one hand, and Krka's estimate of the profits under the licence to be EUR 10 million (paragraph 1000 of the judgment under appeal), on the other hand, clearly did not relate those figures to one another in order to determine the net gain from the value transferred by Servier to Krka and to examine whether that gain could be explained other than by Krka's commitment not to compete under the Krka settlement agreement.

166. Contrary to the view taken by the General Court in paragraph 983 of the judgment under appeal, the finding that the transfer of value made by Servier to Krka under the licence agreement could not be explained by considerations limited to the economic value of the patent to which the licence relates was therefore not called into question. The General Court did not

invalidate the finding made by the Commission in recital 1739 of the decision at issue that if the Krka licence agreement had been negotiated without any additional considerations related to the non-licensed markets, a rational patent-holding licensor established on the market would have at least asked for a royalty close to the forgone profit margins on the sales captured by the licensee.

167. As the Commission rightly observes, the General Court's considerations do not take into account that Servier's forgone margin constituted a net value transfer from Servier to Krka, that the fact that the royalty represented a small fraction of Krka's profits in the countries covered by the licence shows that the value of the licence was sufficiently great to convince Krka to abandon the other 18/20 EU markets, and that the fact that the licence was legally non-exclusive did not prevent it from offering Krka a de facto duopoly with Servier, thus guaranteeing a significant competitive advantage and a share of the profits [83] (recitals 913 and 1738 to 1742 of the decision at issue).

168. By failing to take due account of the objectives of the Krka settlement and licence agreements in their entirety, as revealed by the context of those agreements, which is set out in points 145 to 158 above, the General Court not only refused to recognise that the value transferred by Servier to Krka under the licence consisted of the margins sacrificed by Servier for the benefit of Krka on the markets covered by that licence. In addition, the General Court also refused to recognise that that value likewise stemmed from the fact that Servier guaranteed that Krka could retain its high prices by virtue of the duopoly established between those two operators and the closure of the market to other generic competitors. The value transferred by Servier to Krka therefore also consisted in the preservation of that situation. Under the contractual arrangement between Servier and Krka, Krka allowed Servier to retain its monopoly on the markets not covered by the licence and, in exchange, Servier shared the revenues of its monopoly with Krka on the markets covered by that licence.

169. It follows that the complaints made by the Commission against the considerations of the General Court set out in paragraphs 992 to 997 of the judgment under appeal must likewise be upheld.

170. In those paragraphs, the General Court explained that the Commission's analysis to the effect that the licence granted to Krka on the seven central and Eastern European markets constituted an inducement for it to commit not to compete with Servier on the remaining 18/20 EU markets cannot be accepted. In the General Court's opinion, agreeing with that view would mean that the wider the scope of a licence agreement, the greater the inducement and thus the easier it would be to find there to be a restriction by object. Yet, this would be at odds with the fact that a licence is, by definition, procompetitive. Furthermore, accepting the Commission's analysis would mean that, when linking a settlement agreement to a licence agreement, a patent holder would be obliged to grant a licence over the entire territory covered by the settlement agreement. This would not, however, respect that patent holder's patent rights.

171. Such general considerations are incapable of revealing an error on the Commission's part in its analysis of the Krka agreements. That analysis is focused on the specific and concrete objectives and conditions of those agreements, which indicate that, in the circumstances of the present case, the Krka licence agreement constituted the quid pro quo for the commitment not to compete under the Krka settlement agreement. The sole consequence of that finding for future

[83] With regard to the exclusive nature of the licence and the establishment of a de facto duopoly between Servier and Krka by virtue of it, see points 195 to 204 of this Opinion.

agreements is that such agreements will be anticompetitive if analysis of them reveals that there is a significant transfer of value by the patent holder to a potential generic competitor which cannot be explained other than by the latter's commitment not to compete with the former.

172. Finally, in this regard, the Commission's last complaint under this ground of appeal, which is directed against the General Court's findings in paragraph 998 of the judgment under appeal, must also be upheld. In that paragraph, the General Court considered that an 'asymmetric' licence agreement such as that at issue here, which did not cover the entire territory covered by the settlement agreement, did not constitute a sufficient inducement for the generic company to agree to the restrictions under that settlement agreement. In the General Court's view, for such an agreement to be regarded as an inducement, 'it would have to offer that company compensation for the certain loss of expected profits resulting from the acceptance of a settlement with clauses prohibiting entry on certain geographic parts of the market'.

173. In making that statement, the General Court not only made the same error as that identified in point 168 above, but it also failed to have regard to the patent-related context of the agreements concerned in the present case, in which the situation of potential competition between the patent holder present on the market and its potential generic competitors preparing to enter that market is characterised precisely by uncertainty as to the validity of the patent and the infringing nature of the generic medicinal products. [84]

174. In such a context, there is no requirement that the competition authority demonstrate that, in the absence of the agreements, the potential generic competitors would definitely have entered the market and that, by concluding the agreements, they opted to forgo certain profits. It is sufficient for it to demonstrate that, without the agreements, those competitors had real, concrete possibilities to enter the market and make profits on it. [85] In order for such real, concrete possibilities to materialise, investment, efforts and risk taking is required on the part of the generic companies. It may therefore prove commercially more advantageous for them to abandon their efforts in that regard in return for the assignment of a share of the patent holder's monopoly revenues. [86]

175. Accordingly, the Court has acknowledged that, for a transfer of value to be regarded as sufficient inducement made in exchange for a commitment not to compete in a case such as that at issue here, there is no requirement whatsoever that the transfers of value should necessarily be greater than the profits which the generic company would have made if it had been successful in the patent proceedings. All that matters is that those transfers of value are sufficiently beneficial to encourage that company to refrain from entering the market concerned and not to compete on the merits with the manufacturer of originator medicines concerned. [87] Yet, it is apparent from the examination of this ground of appeal that the Commission specifically demonstrated that that had been the case here.

84 See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 66 to 70).

85 Judgment in *Generics (UK) and Others* (paragraph 38), and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 82 to 84, 122 to 127 and 176 to 178).

86 See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 119).

87 Judgment in *Generics (UK) and Others* (paragraph 94), and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 120).

– *Interim conclusion*

176. It follows from the foregoing considerations that the General Court erred in law in refusing to recognise that the Krka licence agreement involved a transfer of value from Servier to Krka, which constituted the quid pro quo for the latter's commitment not to compete with Servier on the markets covered by the Krka settlement agreement.

177. The second ground of appeal must therefore also be upheld.

178. As I found in points 133 and 134 above in relation to the first ground of appeal, it must likewise be pointed out with regard to the second ground of appeal that, although the merits of that ground of appeal are sufficient on their own to justify the judgment under appeal being set aside as regards the classification of the Krka agreements as a restriction of competition by object, it is appropriate to consider the other grounds of appeal put forward by the Commission in that connection, in particular with a view to the subsequent disposal of the case by the Court.

(iii) The application of the concept of a 'restriction of competition by object' (third ground of appeal)

179. The Commission's third ground of appeal alleges errors of law committed by the General Court in applying the concept of a 'restriction of competition by object'.

180. As in the case of the first two grounds of appeal, it is necessary, once again, to make clear from the outset that, contrary to Servier's claims, the complaints raised by the Commission in the context of this ground of appeal do not concern the General Court's assessment of the facts, but rather their legal characterisation and the application of the rules on the production of evidence. A review of the merits of that legal characterisation and of compliance with those rules falls within the jurisdiction of the Court of Justice in the context of an appeal. [88]

– *The lack of a 'hermetic' division of the markets*

181. In the first place, the Commission claims that the General Court erred in law in finding, in paragraphs 1003 to 1006 of the judgment under appeal, that the Krka agreements could not be regarded as market sharing agreements because they had not established a 'hermetic' division of the markets between Servier and Krka. The General Court came to that conclusion because Servier was not excluded from the seven markets covered by the Krka licence agreement, on which Servier and Krka competed with one another.

182. However, as the Commission rightly observes, that fact by no means precludes the Krka agreements from being classified as market sharing agreements. As has been analysed in points 141 to 176 above in the context of the examination of the second ground of appeal, the Commission demonstrated that the Krka settlement and licence agreements had the object of inducing Krka, by means of a significant transfer of value in the form of the Krka licence agreement, which afforded it a risk-free presence and a share of the monopoly revenues together with Servier on seven EU markets, to refrain from competing with Servier on the remaining 18/20 EU markets.

[88] See, to that effect, order of 29 September 2010, *EREF* v *Commission* (C-74/10 P and C-75/10 P, not published, EU:C:2010:557, paragraph 41 and the case-law cited).

183. Such an arrangement must be regarded as a market sharing agreement, even though Servier was not excluded from the seven markets assigned by the licence agreement to Krka, on which the Krka agreements had established a de facto duopoly between those two operators. This is a fortiori the case since the analysis has shown that the allocation of the EU markets between Servier and Krka was not aligned with differences related to the patent situation, but corresponded rather to a sharing of different areas of economic interest. [89]

184. The case-law on market sharing agreements does not require that there is a 'hermetic' division of the markets for an agreement to be classified as such. The present case precisely illustrates that market sharing agreements can take multiple forms. Accordingly, as the Commission rightly points out, if the General Court's interpretation in paragraphs 1003 to 1006 of the judgment under appeal were to be accepted, market sharing agreements such as those concerned in the present case would escape classification as a restriction of competition by object, which would unduly narrow the scope of Article 101 TFEU and seriously undermine the implementation of EU competition law. [90]

– *The parties' intentions and their beliefs vis-à-vis the validity of the 947 patent*

185. In the second place, the Commission questions paragraph 1012 of the judgment under appeal, in so far as it found that 'such a contractual framework, based on the recognition of the validity of the patent, cannot … be classified as a market exclusion agreement'. The Commission claims that the General Court distorted the meaning of the evidence related to the parties' beliefs vis-à-vis the validity of the patent. This line of argument has already been examined and deemed to be well founded, as far as concerns Krka, in points 100 to 130 above, in connection with the examination of the first ground of appeal.

186. As regards Servier, the Commission does not point to evidence which has been distorted by the General Court, and therefore it does not fall to the Court of Justice to identify such distortions of its own motion. [91] In any case, the Commission rightly observes that, even if the Krka agreements had been based on the parties' recognition of the 947 patent, such agreements would still not be excluded from the scope of Article 101 TFEU if their object is to divide up the market. This is a fortiori the case since the General Court based its findings contained in paragraph 1012 of the judgment under appeal on the failure to establish an inducement. However, as has been brought to light in points 141 to 176 above, in the context of the examination of the second ground of appeal, the General Court was wrong to conclude that no inducement was offered by Servier to Krka in exchange for the latter's commitment not to compete.

187. Moreover, it may be observed, in any event, that, in paragraphs 1020 to 1022 and 1024 of the judgment under appeal, the General Court distorted two items of evidence relating to Servier's intentions, which is clear simply from reading those paragraphs, without the Commission specifically claiming distortion in that regard. As I have stated in point 96 above, distortion exists

89 See points 124, 125 and 149 of this Opinion.

90 See, by analogy, judgment of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 36).

91 Judgments 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 50), and of 25 October 2007, *Komninou and Others* v *Commission* (C-167/06 P, not published, EU:C:2007:633, paragraph 41).

where, without recourse to new evidence, the assessment of the existing evidence appears manifestly incorrect,[92] since the General Court has manifestly exceeded the limits of a reasonable assessment of that evidence.[93]

188. First, in paragraphs 1020 to 1022 of the judgment under appeal, the General Court assessed the words '4 years gained = great success', which appeared in the minutes of a meeting of the top management of Servier, referring to the UK judgment of 6 July 2007, which held the 947 patent to be invalid.[94] According to the General Court, even assuming that it could be inferred from that document, to which reference is made in recitals 4, 112, 184, 244, 804, 1762 and 2984 of the decision at issue, that Servier's management had considered, following that judgment, that the interest of the 947 patent lay in allowing it to gain an additional four years of protection, it cannot be concluded from this that, on 27 October 2006, when the Krka settlement and licence agreements were concluded, Servier intended to conclude market sharing or exclusion agreements.

189. In so doing, the General Court failed to take into consideration the other evidence to which the Commission referred in recitals 4, 112, 184, 244, 804, 1762 and 2984 of the decision at issue, according to which, in 2007, the 947 patent (filed in 2001[95]) could have provided Servier with up to 14 years' additional patent protection (until 2021). Disappointment on the part of Servier could therefore be expected when the judgment that that patent was invalid was given in the United Kingdom in 2007. In the Commission's view, the fact that Servier, on the contrary, welcomed the 'four years gained' since the expiry of the supplementary protection certificate relating to the perindopril compound patent in the United Kingdom in 2003,[96] shows that Servier in fact congratulated itself on the success of its strategy of delaying the arrival of generics following the expiry of the protection afforded by the compound patent, a strategy consisting inter alia of filing the 947 process patent and concluding agreements with its generic competitors, including Krka.

190. In the light of all the evidence in the file, inter alia that previously referred to in point 158 above, which confirms that interpretation, it therefore appears that the General Court distorted Servier's comment '4 years gained = great success' when it took the view that that information could not confirm Servier's intention to delay the arrival of perindopril generics on the market, by means, inter alia, of the conclusion of the Krka agreements.

191. Second, the General Court distorted, in paragraph 1024 of the judgment under appeal, a Servier document entitled 'Coversyl: defence against generics', dated 19 June 2006 and referred to in recitals 7, 111, 141, 605, 803, 886, 1007, 1183, 1250, 1368, 1474, 1621, 1761, 1991, 2768, 2779, 2962 and 2981 of, and in footnotes 2386 and 2430 to, the decision at issue. According to the General Court, the fact that that document predates the EPO decision of 27 July 2006 considerably limits its relevance, since that decision substantially altered the context, in particular as regards the perception that Krka and Servier had of the validity of the 947 patent (paragraph 1017 of the judgment under appeal).

92 Judgments of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 37); of 22 November 2007, *Sniace* v *Commission* (C-260/05 P, EU:C:2007:700, paragraph 37); and of 17 June 2010, *Lafarge* v *Commission* (C-413/08 P, EU:C:2010:346, paragraph 17).

93 Judgments of 4 July 2013, *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 52), and of 17 October 2019, *Alcogroup and Alcodis* v *Commission* (C-403/18 P, EU:C:2019:870, paragraph 64).

94 Point 24 of this Opinion.

95 Point 15 of this Opinion.

96 Point 14 of, and footnote 10 to, this Opinion.

192. However, as I have already found in points 102 to 130 above, in the context of the examination of the first ground of appeal, the General Court's finding that that decision substantially altered Krka's perception of the validity of the 947 patent was unfounded. Nor did the General Court explain the reasons, first, why the EPO decision of 27 July 2006 should have substantially altered Servier's perception of that patent's validity or, second, why the conclusion of the Krka agreements following that decision, on 27 October 2006, should not have been a step in the implementation of Servier's anti-generics strategy that had been contemplated shortly beforehand.

193. Moreover, nor is it apparent why the Krka agreements should not have been part of that global strategy because the document referred to in point 191 above does not expressly mention a strategy concerning Krka, as suggested by the General Court in paragraph 1024 of the judgment under appeal. It is quite clear that the Krka agreements were part, like the agreements concluded with the other generic companies, which the General Court found to be anticompetitive,[97] of Servier's anti-generics strategy. Furthermore, the General Court failed to point out that the document in question also contained the words 'Did it work?', and indicated all the agreements concluded up until the date on which it was drawn up, whereas it mentioned Krka as one of the sources of generic competition that still existed at that stage.

194. It is therefore clear that the General Court also distorted that document by considering that it did not confirm Servier's intention to conclude anticompetitive agreements with Krka.

– *The de facto duopoly established by the licence*

195. In the third and fourth places, the Commission claims that the General Court erred in law in paragraphs 987 to 991 of the judgment under appeal in considering that the de facto duopoly between Servier and Krka, established on the seven markets covered by the Krka licence agreement, could at the very most be regarded as resulting from subsequent choices made by Servier and Krka, which were unforeseeable at the time of conclusion of that agreement. In the General Court's view, taking account of such subsequent choices is akin to taking account of the effects of the agreement, which is not required in order to analyse the object of that agreement. In addition, the alleged potential effect of the Krka licence agreement of having led to a duopoly between Servier and Krka on the markets concerned was based on hypothetical circumstances which were not objectively foreseeable at the time of the conclusion of the agreement.

196. That conclusion by the General Court is manifestly incorrect. It is apparent beyond any doubt from the analysis of the terms of the Krka agreements, and from the context in which they were concluded, set out in points 145 to 147, 150 to 159 and 168 above, that it was clear to Servier and Krka that those agreements were intended to organise the structure of the EU markets in such a way as to reserve the 18/20 markets not covered by the Krka licence agreement for Servier and the seven markets covered by the licence for Servier and Krka. That fact can be clearly inferred from the relevant evidence taken as a whole, whereas the alternative explanation provided by the General Court, namely that the duopoly was established as a result of subsequent choices that were unforeseeable when the agreements were concluded, is implausible and lacks credibility.

[97] See, inter alia, paragraphs 564 (concerning the agreements concluded with Niche and Matrix), 707 (concerning the agreement concluded with Teva) and 869 and 879 (concerning the agreement concluded with Lupin) of the judgment under appeal.

197. It is indeed true that, under the Krka licence agreement, Servier was theoretically authorised to grant another licence to one third party per country (paragraph 46 of the judgment under appeal and recitals 910 and 1744 of the decision at issue). However, the Commission convincingly substantiated, having regard to the entire contextual body of evidence furnished, that, in practice, it was clear to Krka that Servier would not exercise that option, and therefore the markets covered by the licence would remain reserved for Servier and Krka.

198. Thus, first, at the time of the conclusion of the Krka agreements, no other generic operator was expected to enter those markets (recitals 1739, 1742 and 1744 of the decision at issue). Second, as I have found in points 155 to 158 and 168 above, the contractual arrangement between Servier and Krka was precisely advantageous for both of those operators because it allowed them to keep prices high by preventing the fall in prices triggered by the opening of the market to generics, and to benefit from those prices and from increased market shares (recitals 1744 and 1755 of the decision at issue). That arrangement could therefore work only if no other generic operators entered the market.

199. Contrary to the view taken by the General Court, the establishment of a de facto duopoly between Servier and Krka on the markets covered by the licence was therefore not a hypothetical potential effect of the Krka agreements, which was not foreseeable at the time of the conclusion of those agreements, but in fact the foreseeable scenario brought about by those very agreements. Taking account of the establishment of that duopoly for the purposes of analysing the object of those agreements would therefore in no way necessitate an analysis of their effects.

200. Moreover, the Commission is not prohibited from relying on factual circumstances which take place subsequent to anticompetitive conduct in so far as they are intended to confirm the content of an objective item of evidence.[98] The fact that the Commission, with a view to substantiating the finding that the Krka licence agreement had the object of establishing a duopoly between Servier and Krka on the markets covered by the licence, took into account the fact that Servier did not actually grant a licence to a third party following the conclusion of the Krka agreements therefore does not mean that, at that point, the Commission analysed the effects of those agreements.

201. The hostile attitude and lack of cooperation between Servier and Krka on the markets covered by the licence, as noted by the Commission in recital 1725 of the decision at issue, do not, contrary to the view taken by the General Court in paragraph 991 of the judgment under appeal, lead to the conclusion that there had not been a duopoly between Servier and Krka established on those markets. The Commission has shown, in recitals 1728 and 1744 of the decision at issue, that, notwithstanding the fact that the situation brought about by the licence did not exclude a certain degree of competition between Servier and Krka, Servier's grant of that licence to Krka did not lead to a situation in which Servier's and Krka's earnings would be significantly eroded by effective competition, but to a de facto duopoly with Krka which Servier itself sought to maintain in order to preserve its revenue stream.

[98] Judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494, paragraph 55) (not challenged in this regard on appeal; see judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363); see also, to that effect, judgments of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals* v *Commission* (T-83/08, not published, EU:T:2012:48, paragraph 193), and of 16 June 2015, *FSL and Others* v *Commission* (T-655/11, EU:T:2015:383, paragraphs 178 and 217).

202. This is in line with the findings made in point 155 above to the effect that the licence was the price that Servier had to pay in order for Krka to agree not to compete with it on the 18/20 markets not covered by that licence and to stop threatening it with litigation that could potentially culminate in the market being entirely opened to generics.

203. That finding is also consistent with the explanations provided by the Commission in recital 1725 of the decision at issue, namely that the Krka licence agreement did not provide for a commercial partnership between Servier and Krka beyond the payment of royalties. On the contrary, Servier devised and implemented actions to confront market penetration by Krka's generics, for example in Poland, with a view to accompanying Servier's switch to perindopril arginine, which was not substitutable with Krka's perindopril erbumine. That switch was also part of Servier's anti-generics strategy, which was to ensure the 'evergreening' of perindopril (recital 239 of the decision at issue). [99]

204. It follows from all the considerations in points 195 to 203 above that the General Court's findings contained in paragraphs 987 to 991 of the judgment under appeal that it was not the object of the Krka agreements to establish a de facto duopoly between Servier and Krka on the markets covered by the licence are erroneous and cannot be accepted.

– *A statement made by Lupin*

205. In the fifth place, the Commission alleges that the General Court erred in law by refusing to recognise, in paragraph 1023 of the judgment under appeal, that a statement made by Lupin at the time of the Krka agreements, which is cited in recital 1730 of the decision at issue, was capable of substantiating Krka's statement that it had 'sacrificed' the Western European markets, on which it undertook not to compete with Servier, in favour of the seven markets of central and Eastern Europe, for which Servier granted it a licence.

206. According to the statement by Lupin in question, 'it would seem the rationale for this settlement from Servier's view is that it protects the key markets where high level substitution and/or [international non-proprietary name] prescribing is prevalent (UK/France). … By allowing Krka to enter branded generic markets of [central and Eastern Europe] it creates "brand" competition and more controlled erosion, but does not lead to a "land-slide" switch to generics'.

207. The General Court, which cites only the first part of that statement in paragraph 1023 of the judgment under appeal, considered that the statement did not support the conclusion that Servier intended to enter into market sharing or exclusion agreements with Krka. However, the Commission did not use the statement by Lupin to demonstrate an intention on Servier's part but rather to claim that that external observer's perception supported the finding that the object of the Krka agreements was to establish a market sharing arrangement between Servier and Krka. Contrary to what the General Court found, that conclusion is obvious, as the Commission observed in recital 1755 of, and footnote 2379 to, the decision at issue, in which it noted that 'the object of the deal was so plain that it could be observed by a competitor without an insight into the details of the agreement'.

[99] With regard to Servier's strategy of switching to perindopril arginine on account of the perindopril erbumine generics, see also, inter alia, recitals 8, 58, 89, 100, 217, 220, 222, 225, 233 to 242, 1183, 1924, 2089, 2156, 2530, 2532, 2533, 2912 and 2971 of the decision at issue.

208. Accordingly, the General Court's assessment of the statement by Lupin in question also appears to be distorted, since the General Court manifestly exceeded the limits of a reasonable assessment of that evidence. [100]

– *The 2004 Guidelines on technology transfer agreements and Regulation No 772/2004 on the application of Article [101(3) TFEU] to categories of technology transfer agreements*

209. In the sixth place, the Commission claims that the General Court erred in law, in paragraphs 248 and 958 of the judgment under appeal, by misinterpreting the 2004 Guidelines on technology transfer agreements [101] and Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article [101(3) TFEU] to categories of technology transfer agreements, [102] as justifying the linking of the Krka settlement and licence agreements. In those paragraphs of the judgment under appeal, the General Court explained, in essence, that it followed from those provisions that settlement and licence agreements can, in principle, be lawful and do not necessarily constitute infringements of Article 101 TFEU. While that fact is not disputed, it is true that, as I have already found in points 126 to 128, 148 and 149 above, general considerations on the form taken by the agreements at issue in the present case are irrelevant to determining whether, specifically and in the circumstances in question, those agreements constituted a restriction of competition by object.

– *Interim conclusion*

210. It follows from the foregoing considerations that, like the first and second grounds of appeal, the third ground of appeal is also well founded. The errors in law made by the General Court, as identified in the context of the analysis of this ground of appeal, combined with the errors observed when examining the first and second grounds of appeal, are sufficient to justify the part of the judgment under appeal devoted to the object of the Krka agreements being set aside. However, as I noted after examining the first and second grounds of appeal in points 133, 134 and 178 above, for the sake of completeness and with a view to the disposal of the case by the Court of Justice, the other grounds of appeal raised by the Commission against that part of the judgment under appeal concerning the classification of the Krka agreements as a restriction of competition by object should still be examined.

(iv) The parties' intention (fourth ground of appeal)

211. In the context of its fourth ground of appeal, the Commission alleges that the General Court made errors of law, omissions and distortions when applying the principles relating to the production of evidence and the assessment of the evidence gathered by the Commission regarding the parties' intentions. The complaints raised by the Commission in the context of this ground of appeal broadly overlap with criticisms already examined and deemed well founded as part of the analysis of the first to third grounds of appeal.

212. As a preliminary point, it is appropriate to note that it is indeed true, as the General Court observed in paragraph 222 of the judgment under appeal, that the parties' intention is merely a subsidiary factor to be taken into consideration when determining whether a type of

100 With regard to that definition of distortion, see points 96 and 187 of this Opinion.

101 Commission Notice – Guidelines on the application of Article [101 TFEU] to technology transfer agreements (OJ 2004 C 101, p. 2).

102 OJ 2004 L 123, p. 11.

coordination between undertakings restricts competition.[103] However, contrary to the view taken by Servier, that cannot lead to this ground of appeal being deemed ineffective. As I have already explained in my examination of the effectiveness of the first ground of appeal, in points 80 to 90 above, in the present case, evidence concerning the intentions and perceptions of the parties – in particular relating to Krka's alleged recognition of the validity of the 947 patent – formed one of the bases of the General Court's analysis as to whether the Krka agreements restricted competition.

– *The account taken of the parties' intention*

213. In the context of this ground of appeal, the Commission criticises the General Court, in the first place, for having accused it, in paragraph 1015 of the judgment under appeal, of having failed to examine the parties' intention even though, in the case of a restriction of competition by object, such analysis was not required.

214. However, on closer consideration, it appears that, rather than having accused the Commission of failing to examine the parties' intention, the General Court took the view, in paragraphs 1015 to 1026 of the judgment under appeal, that it could not be concluded on the basis of the evidence produced by the Commission that the Commission had demonstrated that Servier and Krka intended to conclude a market sharing or exclusion agreement.

215. Nevertheless, my analysis of this ground of appeal in the following points will show that that consideration is based on an incomplete analysis of the evidence and a disregard for the principles on the production and assessment of evidence under EU competition law.

– *The application of the principles relating to the production of evidence*

216. In this regard, the Commission criticises, in the second place, the General Court for having incorrectly interpreted the legal principles which should have guided its analysis of the evidence, and in accordance with which such an analysis must be comprehensive. Those principles have been set out in points 92 to 96 above.

217. First, the Commission alleges that the General Court failed to examine all the factual evidence upon which the decision at issue is based and made, in paragraphs 1017 to 1024 of the judgment under appeal, only brief reference to certain documents cited in the part of that decision concerning the parties' intention. In particular, the General Court did not refer to or consider the evidence presented in recitals 873, 847, 1687 to 1690 and 1758 to 1760 of the decision at issue or Servier's anti-generics strategy. Similarly, the General Court took no account of the email from Krka of 29 September 2005, cited in recitals 894 to 854 and 1760 of the decision at issue, or of the statement by Lupin, referred to in recitals 1730 and 1748 of that decision, which substantiate and reinforce one another.

218. Those complaints and that evidence have already been examined and the criticisms in that regard deemed well founded in points 102 to 130, 156, 158, 187 to 194 and 205 to 207 above, as part of the examination of the first to third grounds of appeal. As I have already observed in point 129 above, the General Court found, in paragraphs 1018, 1019 and 1025 of the judgment

[103] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 118).

under appeal, that the evidence gathered by the Commission was fragmentary and ambiguous, without having examined all the relevant evidence and conducting a manifestly erroneous assessment of the evidence examined by it, which was chosen selectively.

219. Second, the Commission claims that, in paragraph 1016 of the judgment under appeal, the General Court misapplied the case-law on inferences drawn when assessing evidence, taking the view that that case-law applies less clearly in the present case, in which the content of the agreements at issue was available to the Commission. The Commission argues in that regard that those agreements were not made public when they were concluded.

220. However, recital 56 of the decision at issue states that the text of the agreements formed part of the evidence used by the Commission and that institution does not dispute that it was able to access those agreements. Nevertheless, as has already been stated in points 97 and 98 above, irrespective of whether the Commission could have easily obtained the full content of the agreements, the case-law on inferences and deductions is in any event relevant in the present case. The answer to the question whether the object of that content was the unlawful division of the market must be inferred not simply from the content but also from the context of the agreements and the parties' intention; the Commission examined a large volume of documentary evidence in order to analyse that context and that intention.

221. In the same vein, the Commission criticises the General Court for having considered, in paragraph 1016 of the judgment under appeal, that 'inferences drawn from partial extracts of emails or other documents purporting to establish the intentions of the parties' cannot call into question a finding based on the actual content of the agreements.

222. In that regard, it should be recalled that it has already been found, in points 126 to 129, 148 and 149 above, that the General Court drew incorrect conclusions from the form of the Krka agreements, in particular from the fact that one of those agreements was a licence agreement. Similarly, it has been found that the General Court erred by analysing the Krka settlement and licence agreements independently from one another and removed from their context (point 144 above).

223. Lastly, it must be observed that, in paragraph 1016 of the judgment under appeal, the General Court appears to accuse the Commission of having drawn inferences 'from partial extracts of emails or other documents purporting to establish the intentions of the parties', whereas it has been found, inter alia, in points 116, 188 to 190, 193 and 205 to 207 above, that the General Court itself based its analysis on partial citations of documents and on facts cited *in extenso* in the decision at issue. Similarly, it has been repeatedly observed in the examination of the first three grounds of appeal that the General Court's analysis of the Krka agreements is based on an incomplete and partial consideration of the evidence and of the circumstances relating to the context of those agreements (see, inter alia, points 102 to 105, 114, 115, 152, 156, 158, 165 and 168 above). Conversely, the analysis of this appeal has shown that, contrary to the General Court's assertion in paragraph 1025 of the judgment under appeal, the Commission gathered a body of relevant and consistent evidence to support its finding that the Krka agreements constituted market sharing agreements.

224. The Commission is therefore justified in claiming that, if the General Court had correctly applied the principles on the adducing of evidence, recalled in points 92 to 96 and 110 above, it could not have come to the conclusion that it did. The complaint alleging errors of law by the General Court in applying those principles is therefore also well founded.

– *The credibility of evidence according to the date on which it was drawn up*

225. In the third place, the Commission submits that paragraphs 1017 and 1024 of the judgment under appeal are vitiated by errors of law for considering that the EPO decision of 27 July 2006 [104] and the interim injunction of 3 October 2006 ordered in the United Kingdom against Krka [105] had substantially altered the context in which the Krka agreements had been concluded, in particular as regards the perception by Krka and Servier of the validity of the 947 patent. Accordingly, the General Court considered, in particular in paragraphs 1017, 1018 and 1024 of the judgment under appeal, that documents postdating those events are of greater relevance in assessing the intentions of those parties than documents drawn up before those events.

226. However, as has already been found in points 101 to 108 and 114 to 123 above, as part of the examination of the first ground of appeal, the General Court came to those conclusions following a partial, if not selective, analysis of the evidence produced by the Commission and a manifestly erroneous assessment, if not a distortion, of the evidence which the General Court took into account.

– *The probative value of subsequent statements*

227. In the fourth place, the Commission claims that the General Court infringed the principles on the production of evidence by attributing, in points 999, 1000 and 1010 of the judgment under appeal, greater weight to the statements filed by Krka after the conclusion of the Krka agreements than to the contemporaneous evidence cited in paragraphs 1015 to 1024 of the judgment under appeal. That criticism has already been deemed to be well founded in points 109 to 113 above.

– *Interim conclusion*

228. It follows from the foregoing considerations that the fourth ground of appeal is also well founded. On account of the considerations already set out in points 133, 134, 178 and 210 above, further to the examination of the first, second and third grounds of appeal, the other grounds of appeal relating to the anticompetitive object of the Krka agreements should nevertheless be examined.

(v) The account taken of the procompetitive effects of the licence (fifth ground of appeal)

229. In the context of its fifth ground of appeal, the Commission claims that the General Court erred in law in paragraphs 1007 to 1009 and 1031 of the judgment under appeal in taking account of the positive effects of the licence in the seven Member States of Central and Eastern Europe in which it applied.

230. Contrary to what Servier argues, the Commission clearly identifies the errors which it attributes to the General Court in this regard, and therefore this ground of appeal is admissible.

231. In the paragraphs of the judgment under appeal criticised in this ground of appeal, the General Court stated that the Krka licence agreement had contributed to Krka's entry or continued presence on the seven markets covered by the licence. That agreement therefore had a

[104] Point 21 of this Opinion.

[105] Point 30 of this Opinion.

positive effect on competition by comparison with the previous situation in which Krka could only enter or remain on the market at risk, all the more since the validity of the 947 patent had just been confirmed by the competent authorities and since there was a risk, which Krka perceived as a serious risk, that its product was infringing.

232. However, that alleged positive effect on competition by the Krka licence agreement cannot call into question the finding that the Krka settlement and licence agreements constituted market sharing agreements and therefore a restriction of competition by object.

233. First, as the Commission observes, Article 4 of the decision at issue limited the finding of the infringement in respect of Servier and Krka to the 18/20 EU markets covered by the Krka settlement agreement, and did not find an infringement on the seven markets covered by the Krka licence agreement (see point 39 above). As the Commission rightly submits in the context of this appeal, and as it stated in recital 1755 of the decision at issue, Krka's entry or continued presence in those seven Member States, to which paragraph 1007 of the judgment under appeal refers, does not alter or justify the fact that Krka was eliminated as a source of potential competition on the 18/20 markets covered by the Krka settlement agreement.

234. In that context, contrary to what Servier argues, the judgments in *Consten and Grundig* v *Commission*[106] and *MasterCard and Others* v *Commission*,[107] cited by the Commission, are, *mutatis mutandis*, relevant in the present case. In those judgments, the Court considered, in essence, that procompetitive effects of an agreement on a certain market cannot 'compensate for' restrictive effects on competition of such an agreement on another market.

235. Second, even assuming that consideration has to be given to the effects of the Krka licence agreement on the markets concerned by that agreement, for the purposes of the comprehensive assessment of the Krka settlement and licence agreements in their entirety, those effects cannot call into question the finding that those agreements constituted a restriction of competition by object.

236. Thus, the Court did indeed find, in the judgment in *Generics (UK) and Others*,[108] that, where the parties to an agreement such as those concerned in the present case rely on procompetitive effects associated with that agreement, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object', in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object'.

237. However, the Court also found in that judgment that such procompetitive effects can call into question the finding of a restriction by object only if they are demonstrated, relevant and specifically related to the agreement concerned and sufficiently significant so that they justify a reasonable doubt as to whether the settlement agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object. The Court went on to find that that was not the case with an agreement allowing a controlled entry of a generic company on

106 Judgment of 13 July 1966, *Consten and Grundig* v *Commission* (56/64 and 58/64, EU:C:1966:41, p. 342).

107 Judgment of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 242).

108 Paragraph 103 of that judgment; see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 158 to 166).

the market, in agreement with the patent holder, for the purposes of reorganising the market concerned, which did not give rise to competitive pressure on that patent holder and brought only minimal – if not uncertain – benefits for consumers. [109]

238. Yet, in the present case, Krka's entry on the seven markets covered by the licence did not give rise to meaningful competitive pressure on Servier either (point 201 above). In addition, that entry came about in the context of a de facto duopoly between Servier and Krka, the object of which was to prevent the fall in prices that would have been triggered by an opening of the market if generics entered that market independently. Therefore, that controlled reorganisation of the market enabled Servier and Krka to retain much higher prices and market shares than in the event of the independent opening of the market to generics (points 155 to 158 above). The benefits brought for consumers by Krka's entry or continued presence on the markets covered by the licence were therefore limited by comparison with the benefits which would have flown from an independent opening of those markets to generics.

239. Moreover, the national equivalents of the 947 patent had not yet been granted on some of those markets, and therefore Krka did not need a licence to enter or remain on them. However, the General Court considered that the licence had the positive effect of eliminating for Krka the risk of further litigation if patents were granted to Servier on those markets in the future (paragraphs 1008 and 1027 of the judgment under appeal). It follows from those considerations that the alleged procompetitive effects of the Krka licence agreement were not only limited but also hypothetical and uncertain.

240. Finally, in the present case, as in the case of *Generics (UK) and Others*, the controlled entry, in agreement with a patent holder, of a generic company on the market came about in exchange for that company abandoning its efforts to enter that market independently. As I made clear in my Opinion in that case, providing consumers with some minimal benefits by means of a slight reduction in prices cannot call into question the anticompetitive object of an agreement which is, otherwise, designed to eliminate competition in relation to a particular product or on a particular market. [110]

241. In that context, the 'competitive' scenario with which it is necessary to compare the concerted situation implemented by the agreements is not that of a certain independent market entry by the generic manufacturers, but that of a continuance of their efforts to that end on the basis of their independent assessment of the corresponding risks and opportunities. Therefore, the fact that the concerted entry between the patent holder and the generic company is certain whereas an independent entry is dependent on the hazards of patent litigation cannot mean that controlled entry is necessarily the 'best scenario' in terms of competition. Indeed, what matters is not the entry of the generics onto the market at any price, but the fact that that entry takes place or does not take place through free competition and not due to a concerted action by the parties in place of free competition. [111]

242. It follows from those considerations that the fifth ground of appeal, alleging an error of law by the General Court in the assessment of the consequences of the procompetitive effects of the Krka licence agreement for the purposes of the classification of the Krka agreements as a restriction of competition by object, must also be upheld.

[109] Judgment in *Generics (UK) and Others* (paragraphs 105 to 111); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 168 to 172, 175 and 179).

[110] See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 175).

[111] See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 176 to 178).

(vi) The Krka assignment and licence agreement (sixth ground of appeal)

243. By its sixth ground of appeal, the last ground concerning the classification of the Krka agreements as a restriction of competition by object, the Commission alleges that the General Court erred in law by having refused to recognise the anticompetitive nature of the Krka assignment and licence agreement, concluded on 5 January 2007, that is to say, around two months after the conclusion of the Krka settlement and licence agreements on 27 October 2006.

244. As stated in point 59 above, the Commission found that the Krka assignment and licence agreement had allowed Servier and Krka to reinforce their competitive position that followed from the market sharing established by all the Krka agreements, by preventing Krka from assigning its rival technology for the production of perindopril to other generic companies. Since the payment of the sum of EUR 30 million under that agreement was unconnected with Servier's expected or actual earnings from the commercial exploitation of the technology transferred by Krka, that payment was viewed by the Commission as a sharing of the revenues generated by the allocation of the markets between Servier and Krka. [112]

245. For its part, the General Court considered, inter alia in paragraphs 1053, 1054 and 1059 of the judgment under appeal, that, since the Commission's finding of a restriction by object with regard to the Krka assignment and licence agreement had been based on the finding of a restriction by object with regard to the Krka settlement and licence agreements, and that latter finding had been found to be incorrect by the General Court, the finding relating to the restrictive object of that assignment and licence agreement also had to be annulled.

246. However, as has been found in the context of the examination of the first five grounds of appeal above, the General Court's findings regarding the anticompetitive object of the Krka settlement and licence agreements are erroneous, and the Commission was right to conclude that those agreements constituted a restriction of competition by object.

247. Accordingly, as the Commission rightly argues, the conclusions drawn by the General Court from those findings vis-à-vis the Krka assignment and licence agreement are based on an incorrect premiss.

248. Furthermore, the Commission is also justified in claiming that insufficient reasons are stated for the General Court's conclusions concerning the Krka assignment and licence agreement, set out in paragraphs 1041 to 1060 of the judgment under appeal, because they do not explain why recitals 1764 to 1810 of the decision at issue, which are devoted to that agreement and which the General Court did not even analyse, are incorrect.

249. It follows that the sixth ground of appeal, alleging errors committed in the General Court's analysis of the object of the Krka assignment and licence agreement, must likewise be upheld.

[112] Recitals 1766 and 1803 to 1811 of the decision at issue.

(3) Conclusion on the object of the Krka agreements

250. It follows from all the foregoing considerations made in the context of the examination of the Commission's first to sixth grounds of appeal (points 69 to 249 above) that the General Court's finding that the Krka agreements should not be regarded as a restriction of competition by object (paragraphs 1032, 1060 and 1233 of the judgment under appeal) is based on an analysis that is vitiated by errors of law and must be set aside.

251. Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may itself, if the decision of the General Court is quashed, give final judgment in the matter, where the state of the proceedings so permits.

252. It is apparent from the examination of the first to sixth grounds of appeal that that is the case here as regards the finding of the anticompetitive object of the Krka agreements. That examination has shown that the ninth plea in law raised at first instance by Servier, upon which the General Court's analysis is based (see paragraphs 910 to 942 and 1033 to 1040 of the judgment under appeal), is incapable of invalidating the Commission's finding contained, essentially, inter alia, in recitals 1756, 1810 and 1812 of the decision at issue, that those agreements constituted a single and continuous activity, the object of which was to divide and allocate the markets for perindopril in the European Union between Servier and Krka, allowing Krka to continue to market or to launch generic perindopril under the de facto duopoly with Servier in seven Member States in return for its commitment to refrain from competing with Servier on the remaining 18/20 EU markets.

253. The Court may therefore dispose of the case and reject the ninth plea in law raised at first instance by Servier as far as concerns the object of the Krka agreements, which will mean that the decision at issue is confirmed in this respect.

(b) The restriction of competition by effect (seventh ground of appeal)

254. Under its seventh ground of appeal, the Commission claims that the General Court made a series of errors of law in the examination of the anticompetitive effects of the Krka agreements.

255. As a preliminary point, it must be recalled that the anticompetitive object and anticompetitive effect of an agreement constitute not cumulative but alternative conditions for applying the prohibition laid down in Article 101(1) TFEU. An agreement is therefore prohibited, regardless of its effects, where its objective is anticompetitive. It follows that consideration of the effects of an agreement is superfluous when it is established that that agreement has as its object the prevention, restriction or distortion of competition within the common market. [113]

256. Accordingly, if, in the present case, the Court of Justice were to acknowledge, in accordance with the foregoing considerations and with the conclusion contained in points 252 and 253 above, that the General Court's findings that the Krka agreements do not have an anticompetitive object

[113] Judgments of 30 June 1966, *LTM* (56/65, EU:C:1966:38, p. 249); of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 28); and of 16 July 2015, *ING Pensii* (C-172/14, EU:C:2015:484, paragraphs 29 and 30); see also my Opinion in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, point 42).

are incorrect and that the Commission was right to find that those agreements have an anticompetitive object, there would be no need to examine this ground of appeal, which concerns the anticompetitive effects of the agreements.

257. I will nevertheless examine this ground of appeal for the sake of completeness.

258. Before conducting that examination (2), it is useful to provide a brief summary of how those effects were analysed both by the Commission in the decision at issue and by the General Court in the judgment under appeal (1).

(1) The analysis of the effects of the Krka agreements in the decision at issue and the judgment under appeal

(i) Decision at issue

259. In recitals 1214 to 1218 of the decision at issue, the Commission stated that, in order to assess the restrictive effects of an agreement, account should be taken of the actual conditions in which it produces its effects, and that the examination of the conditions of competition on a given market had to be based not only on existing competition between the undertakings already present on the relevant market but also on potential competition. According to the Commission, in the present case, it had to examine the effects of the settlement agreements, including those of the Krka agreements, on potential competition, since they had affected the inducements of Servier's generic competitors to prepare for entry to one or more EU markets.

260. In recitals 1219 and 1220 of the decision at issue, the Commission explained, in essence, that the assessment of the specific restrictive effects of the settlement agreements on potential competition, which had consisted in the removal of generic companies as potential competitors, and on the structure of competition on the markets concerned, had to be made on the basis of the facts at the time of those settlements, while taking into account how the agreements had actually been implemented. Classification as an infringement cannot, as a rule, depend on subsequent developments. According to the Commission, when the elimination of potential competition is at issue, 'looking at what actually happened may have little to do with what would likely have happened absent the agreement'. This is a fortiori true where the agreement significantly changes the incentives of one party, or both, to continue to compete.

261. In recitals 1221 and 1226 of the decision at issue, the Commission stated that the restrictive effects of an agreement had to be assessed in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement, which requires examining the degree of competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreements, and the competitive behaviour in which the generic companies would have been likely to engage in such a situation.

262. As regards the real, concrete possibilities for the generic companies to enter the relevant markets and compete with Servier, the Commission referred to its examination of the potential competition between Servier and the generic companies that it carried out in the context of its analysis of the object of the agreements (recital 1222 of the decision at issue).

263. Finally the Commission explained that it would also examine the restrictive effects of those agreements on the structure of competition, by analysing, inter alia, the parties' market power and the question of the existence of other sources of competition for Servier, a relevant question when the market is deprived of a new entrant (recitals 1223 to 1227 of the decision at issue).

264. In that regard, the Commission considered, in recitals 1228 to 1240 of the decision at issue, inter alia, that the competitive constraints imposed by other medicines on perindopril had limited effectiveness, which stood in stark contrast to the strength of the constraint expected from (and eventually introduced by) generic versions of perindopril. In the Commission's view, that competitive constraint exercised by perindopril generics was crucial since the objective of the contested practices was to neutralise that very constraint. Compared with the competitive constraint exerted by generics, other constraints for perindopril were insufficient to exercise effective competitive pressure.

265. Elimination of the competitive pressure from generics therefore had significant effects in terms of the overall consumer spending on perindopril. Since generics did not enter the market, Servier was not faced with effective competition because, aside from the generic versions of perindopril, there was no other major constraint for Servier. In so far as Servier's ability to maintain supra-competitive prices was related to the settlement agreements that it had concluded with the generic companies, it is also possible to show direct anticompetitive effects of those agreements (recitals 1240 to 1243 of the decision at issue).

266. In recitals 1244 to 1269 of the decision at issue, the Commission explained that, at the time of the conclusion of the agreements between Servier and the generic companies, the structure of the market was characterised by a limited number of generic companies which were preparing to enter the market. Aside from the parties which concluded those agreements with Servier, there remain just two major, direct generic threats for Servier. The Commission concluded that, in such circumstances, the removal of a single competitor significantly reduced the likelihood of a timely and effective market entry of generics.

267. The Commission next considered, in recitals 1813 to 1850 (continuation of section 5.5) of the decision at issue, whether the Krka agreements constituted a restriction of competition by effect; that examination was limited to the markets in France, the Netherlands and the United Kingdom (recital 1816 of the decision at issue).

268. According to the Commission, Krka was a potential competitor to Servier on those three markets and had real, concrete possibilities of entering them on short notice. Krka was an actual supplier of perindopril in five geographic markets and was preparing to enter a number of other markets, which showed its intentions in this respect. In addition, Krka was able to enter the markets where it was not an actual supplier within a short period of time as it had completed the development of its product. Krka was also actively clearing the way for its product through litigation in the United Kingdom and was convinced of the invalidity of the 947 patent (recital 1820 of the decision at issue).

269. By inducing Krka to undertake not to enter those markets, the Krka agreements had the effect of eliminating those possibilities of entering the market in France, the Netherlands and the United Kingdom. In the absence of the Krka agreements, Krka would have remained a competitive threat as a potential generic entrant with perindopril on those markets (recitals 1824 to 1834 of the decision at issue).

270. The Commission also considered that, when the Krka agreements were concluded, Krka was one of the most immediate threats to Servier (recitals 1843 and 1849 of the decision at issue) and that, given the market structure, the removal of a single competitor significantly reduced the likelihood of a timely and effective market entry of generics (recital 1844 of the decision at issue), a fortiori because Krka was also a potential supplier of perindopril products to other generic companies (recital 1848 of the decision at issue).

271. The Commission therefore concluded that the Krka agreements had had the effect of restricting appreciably potential competition between Servier and generic companies (recital 1850 of the decision at issue).

(ii) Judgment under appeal

272. The General Court examined the tenth plea in law put forward by Servier at first instance, alleging the misclassification of the Krka agreements as a restriction of competition by effect, in paragraphs 1075 to 1232 of the judgment under appeal.

273. In the first place, the General Court classified the approach adopted by the Commission concerning the restriction of competition by effect, summarised in points 259 to 263 above, as 'hypothetical' because it was based on hypotheses or 'possibilities' rather than on the events that actually took place (paragraphs 1078 to 1104 of the judgment under appeal).

274. Furthermore, the General Court took the view that the case-law according to which the analysis of the effects of an agreement also included its potential effects did not apply where the agreement in question had been implemented and penalised by the Commission (paragraphs 1107 to 1133 of the judgment under appeal).

275. In the second place, the General Court found, in paragraphs 1140 to 1217 of the judgment under appeal, that the Commission had made an error of assessment when it had found the Krka agreements to constitute restrictions of competition by effect.

276. First, the General Court considered, in paragraphs 1142 to 1187 of the judgment under appeal, that the Commission had not established the restrictive effects on competition of the non-marketing clause in the Krka settlement agreement. The Commission failed, inter alia, to demonstrate that, in the absence of that agreement, Krka would probably have entered the markets in France, the Netherlands and the United Kingdom. In that regard, the Commission disregarded the fact that Krka recognised the validity of the 947 patent. In relation to such recognition, the General Court repeated, in essence, in paragraphs 1148 to 1169 of the judgment under appeal, the same considerations as those upon which it had relied when examining the object of the Krka agreements, which have already been considered in the context of the analysis of the first ground of appeal. [114]

277. In the General Court's view, by merely invoking the 'competitive threat' that Krka would have continued to represent, the Commission failed to establish that the competition that would have occurred in the absence of the agreement would probably have been more open. In addition, the Commission should have specified the probable effects, in particular on prices, production,

[114] See points 102 to 129 of this Opinion.

quality, diversity of products or innovation, of the 'competitive threat' that Krka would have continued to represent for Servier in the absence of the Krka agreements (paragraphs 1174 to 1179 of the judgment under appeal).

278. Second, the General Court considered, in paragraphs 1192 to 1213 of the judgment under appeal, that the Commission had not established the restrictive effects on competition of the non-challenge clause in the settlement agreement. The Commission failed, inter alia, to demonstrate that, in the absence of that agreement, the continuation of the litigation between Krka and Servier would, probably, if not plausibly, have resulted in the more rapid or more comprehensive invalidation of the 947 patent. In that regard, the General Court considered that Krka's withdrawal from the proceedings in which it had engaged, namely, the proceedings before the English court [115] and those before the EPO, [116] had had no effect as regards the elimination of the 947 patent. Events following the conclusion of the agreement, that is to say, the invalidation of the 947 patent in the United Kingdom in the proceedings between Servier and Apotex [117] and the revocation of the 947 patent by the EPO's Technical Board of Appeal, [118] show that that patent had in any case been invalidated, regardless of the actions initiated by Krka. The Commission failed to demonstrate that the continuation of those actions would have had the effect that the patent would have been invalidated earlier or more comprehensively (paragraphs 1194 to 1207 of the judgment under appeal).

279. Third and finally, the General Court stated, in paragraphs 1214 and 1215 of the judgment under appeal, that nor had the Commission established the restrictive effects on competition of the Krka assignment and licence agreement.

280. In the third place, the General Court found, in paragraphs 1219 to 1232 of the judgment under appeal, that the Commission had erred in law in failing to take into account the actual course of events which it could have observed at the time that it adopted its decision and in basing its description of competition in the absence of the agreements on hypotheses or possibilities.

281. The General Court therefore concluded that the Commission had not established that the Krka agreements had constituted a restriction of competition by effect, and upheld the tenth plea in law put forward by Servier at first instance (paragraphs 1217 and 1232 of the judgment under appeal).

(2) The ground of appeal relating to the effects of the Krka agreements

282. In the context of its seventh ground of appeal, the Commission submits that the General Court's considerations, summarised in points 272 to 281 above, are vitiated by a series of errors of law.

283. The Commission claims that the General Court erred in law, in paragraphs 1128, 1178, 1179 and 1227 to 1231 of the judgment under appeal, in considering that the actual effect of restricting potential competition between Servier and Krka was not sufficient to demonstrate that the Krka agreements constituted restrictions of competition by effect. The Commission showed that,

115 See points 29 and 30 of this Opinion.

116 See points 20 and 21 of this Opinion.

117 See point 24 of this Opinion.

118 See point 21 of this Opinion.

when those agreements were concluded, Krka had real, concrete possibilities of entering the market, which the agreements eliminated, which is consistent with the counterfactual analysis required by case-law. The standard of proof should not be changed because patents were involved and the outcome of the patent disputes was unforeseeable.

284. The General Court was therefore wrong to take the view, in paragraphs 1123, 1160, 1161, 1165, 1168, 1169, 1173, 1174, 1178, 1179, 1183, 1204, 1206, 1207, 1209, 1221, 1226 and 1231 of the judgment under appeal, that the Commission should have demonstrated that, in the absence of the Krka agreements, Krka would probably have entered the three markets concerned 'at risk', and that it should have specified the probable effects of the 'competitive threat' that Krka would have continued to exert on prices and on other parameters of competition. Similarly, the General Court was wrong to have required, in paragraphs 1198 to 1207 of the judgment under appeal, that the Commission demonstrate that Krka's continuation of its ongoing litigation, which it abandoned on account of the Krka agreements, would have allowed the 947 patent to be invalidated more rapidly or more completely.

285. The Commission likewise considers that the General Court erred in law, in paragraphs 1107 to 1128 and 1225 of the judgment under appeal, by distinguishing between implemented agreements and non-implemented agreements for the purpose of the analysis of anticompetitive effects and by considering that the case-law on taking potential effects into account was irrelevant where the agreements had been implemented.

286. In addition, the Commission submits that the General Court erred in law, in paragraphs 1130, 1151, 1170, 1181, 1210 and 1219 of the judgment under appeal by requiring that the Commission take into account, for the purpose of assessing the effects of an agreement, all the factual developments which occurred before the adoption of its decision. On the contrary, the assessment of whether an agreement is anticompetitive should be made when that agreement is concluded.

287. Lastly, the Commission considers that the General Court erred in law and distorted evidence in taking the view, in paragraphs 1148 to 1170 of the judgment under appeal, that, in the absence of the Krka agreements, Krka would probably not have entered the markets concerned on account of its recognition of the validity of the 947 patent.

(i) The counterfactual analysis

288. In order to examine those criticisms, it must first be recalled that, in accordance with settled case-law, the restrictive effects on competition of an agreement may be both *real* and *potential*.[119]

289. For the purposes of assessing such effects, competition should be examined within the actual context in which it would occur in the absence of the agreement in dispute.[120]

[119] See, inter alia, judgments of 28 May 1998, *Deere* v *Commission* (C-7/95 P, EU:C:1998:256, paragraph 77); of 28 May 1998, *New Holland Ford* v *Commission* (C-8/95 P, EU:C:1998:257, paragraph 91); of 23 November 2006, *Asnef-Equifax and Administración del Estado* (C-238/05, EU:C:2006:734, paragraph 50); in *Generics (UK) and Others* (paragraph 117); and of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 73). Emphasis added.

[120] Judgments of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 161); in *Generics (UK) and Others* (paragraph 118); and of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 74).

290. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements. In that regard, although not necessarily decisive, the existence of similar contracts is a circumstance which, together with others, is capable of constituting an economic and legal context within which the contract must be judged. [121]

291. The scenario envisaged on the basis of the hypothesis that the agreement in question is absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of that agreement. [122]

292. The potential competition represented by a potential entrant eliminated by an agreement and the structure of the market in question may form the basis of the assessment of the restrictive effects of that agreement. [123]

293. In a situation such as that at issue in the present case, this is particularly true since, as the Court held in the judgment in *Generics (UK) and Others*, the establishment of the counterfactual scenario does not involve any definitive finding in relation to the chances of success of the generic company in the patent proceedings or to the probability of the conclusion of a less restrictive agreement. [124]

294. The sole purpose of the counterfactual scenario is to establish the realistic possibilities with regard to that company's conduct in the absence of the agreement at issue and thus to determine how the market would probably operate and be structured if that agreement had not been concluded. [125] While that counterfactual scenario cannot be unaffected by the chances of success of the generic company in the patent proceedings or again in relation to the probability of the conclusion of a less restrictive agreement, those factors constitute, however, only some factors among many to be taken into consideration in order to determine how the market would probably operate and be structured if the agreement concerned had not been concluded. [126]

295. Consequently, in order to establish the existence of appreciable potential or real effects on competition of settlement agreements such as those at issue in the present case, the competition authority does not have to find either that the generic company which is a party to that agreement would probably have been successful in the patent proceedings, or that the parties to that agreement would probably have concluded a less restrictive settlement agreement. [127]

296. It must be held that the Commission's examination of the effects of the Krka agreements, summarised in points 259 and 271 above, is consistent with the methodology established by that case-law for the analysis of the likely counterfactual scenario in the absence of those agreements.

121 See judgment of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 75 and the case-law cited).

122 Judgment of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 166).

123 Judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission* (T-461/07, EU:T:2011:181, paragraph 127).

124 Paragraph 119 of that judgment.

125 Judgments in *Generics (UK) and Others* (paragraph 120), and of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraph 76).

126 Judgment in *Generics (UK) and Others* (paragraph 120).

127 See, to that effect, judgment in *Generics (UK) and Others* (paragraphs 121 and 122); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 189 to 202).

297. To begin with, the Commission correctly set out the framework of its analysis by stating that it would examine the effects of the agreements in dispute by comparison with the actual economic and legal context in which competition would have taken place in their absence, and that it would therefore examine the degree of competition that would have existed between the parties and the competitive conduct that the generic companies would have likely adopted in the absence of any agreement (point 261 above).

298. Furthermore, as the Commission points out, it took sufficient account, as regards the legal and economic context of the Krka agreements, of the factual context of those agreements in relation to patents and patent litigation, in particular, in recitals 1826, 1829 and 1835 to 1846 of, and footnote 2445 to, the decision at issue.

299. In the light of the case-law set out in point 290 above, the Commission was also right to take into account the position of the respective agreements within the series of agreements concluded by Servier with generic companies and the strategy adopted by Servier, as well as the position of the parties on the market (points 263 to 266 above).

300. With regard to Krka, the Commission correctly took into account the fact that Krka was a major potential competitor, if not one of the most immediate threats to Servier on the three markets considered for the purposes of analysing the effects of the Krka agreements, who had real, concrete possibilities of entering those markets, and that the Krka agreements had eliminated those possibilities by inducing Krka to cease its efforts to enter those markets and to stop challenging Servier's patents (points 268 to 270 above).

301. Contrary to what the General Court found, inter alia, in paragraphs 1174 to 1178, 1183 and 1226 of the judgment under appeal, by demonstrating that, in the absence of the Krka agreements, Krka would have kept up its efforts to enter the markets concerned and that the effect of those agreements had been to eliminate Krka as a potential competitor to Servier and, in so doing, the potential for Krka's real, concrete possibilities of entering those markets being realised, the Commission substantiated sufficiently the restrictive effects on competition of those agreements.

302. In that regard, contrary to the view taken by the General Court in paragraphs 1183 and 1226 of the judgment under appeal, the considerations set out in the judgment in *Visa Europe and Visa International Service* v *Commission*, [128] namely that the analysis of the effects of an agreement may be founded on the potential competition represented by a potential entrant eliminated by the agreement, are not irrelevant in the present case because the context of the agreements concluded by Servier with the generic companies is characterised by the existence of the 947 patent. It is apparent from the case-law cited in point 294 above that the patent-related context of agreements, such as those concerned in the present case, must only be taken into account, among other factors, in respect of the context of those agreements. However, it does not follow from that fact that the principles established by case-law governing the counterfactual analysis of an agreement are rendered irrelevant.

[128] Judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission* (T-461/07, EU:T:2011:181, paragraphs 127, 187 and 191).

303. Therefore, the Commission is justified in claiming that the General Court erred in law, in particular, in paragraphs 1160, 1168, 1169, 1173 and 1182 of the judgment under appeal (point 276 above), by requiring that the Commission demonstrate that, in the absence of the Krka agreements, Krka would 'probably' have entered at risk the markets considered or that, if those agreements had not existed, the parties would have concluded a less restrictive agreement.

304. Furthermore, as the Commission claims, the General Court's analysis in paragraphs 1148 to 1169 of the judgment under appeal (point 276 above) to the effect that, in the absence of the Krka agreements, Krka would probably not have entered those markets because it was convinced of the validity of the 947 patent is vitiated by the same errors as those already established in the context of the examination of the first ground of appeal. [129]

305. Similarly, the General Court was wrong to consider, inter alia, in paragraphs 1192 to 1213 of the judgment under appeal (point 278 above) that, in order to establish the effects of the non-challenge clause contained in the settlement agreement, the Commission should have demonstrated that the continuation of the litigation that Krka abandoned pursuant to that agreement would probably have allowed the 947 patent to be invalidated more quickly or more completely.

306. As stated in points 293 and 295 above, the Court explained in the judgment in *Generics (UK) and Others* that, in a situation such as that at issue in the present case, the establishment of the counterfactual scenario does not involve demonstrating that the parties to the agreement would probably have concluded a less restrictive agreement or that the generic company which is party to the agreement in question would probably have been successful in the proceedings relating to the patent.

307. When conducting such a counterfactual analysis, it is in fact for a competition authority to depict not the situation which would have existed in the absence of the agreement vis-à-vis the patent, but rather the situation that would have existed as regards competition. In terms of competition, the counterfactual scenario would have been a situation in which the generic company continued to manage independently, on the basis of its own assessment of the patent situation, its commercial and litigation strategy in order to make the most of its real, concrete possibilities of entering the market. The situation which would have existed in the absence of the agreements would therefore have been a situation in which those real, concrete possibilities would have had a chance of being realised. [130]

308. In the present case, the restrictive effects on competition of the Krka agreements specifically involved the elimination of that chance of Krka's real, concrete possibilities of entering the markets in question being realised.

309. The fact that it is not possible to determine with certainty, as part of the counterfactual analysis, whether those possibilities would genuinely have been realised, has no bearing on the reality of the effect of their elimination. What matters, in terms of the impact on competition, is not whether Krka enters the markets concerned at any price or secures the invalidation of the

[129] See points 102 to 129 of this Opinion. In paragraphs 1148 to 1169 of the judgment under appeal, the General Court repeated, in the context of the examination of the effects of the Krka agreements, essentially the same considerations as those previously set out, inter alia, in paragraphs 970, 971, 1011, 1017, 1026 and 1027 of the judgment under appeal when analysing the object of those agreements.

[130] See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 117, 118 and 122 to 129).

patent, but rather the fact that it had the capacity and the firm intention to enter the market and have the patent invalidated in order to be able to benefit from free competition before entering into a concerted practice with Servier. [131]

310. Contrary to the view taken by the General Court, there is nothing 'hypothetical' about such a counterfactual analysis. The effect of eliminating potential competition is no less real than the effect of eliminating actual or existing competition, since an agreement not to engage in competition can be concluded both with a potential competitor and an existing competitor.

311. The approach adopted by the General Court disregards the fact that Article 101 TFEU protects not only actual competition, but also potential competition without which the entry of new entrants to the market could never take place. [132]

312. In addition, as the Commission argues, by requiring, in paragraph 1179 of the judgment under appeal, that the Commission specify the probable effects of the agreements on prices and other parameters of competition, the General Court disregarded the principle that Article 101 TFEU, like the other competition rules of the FEU Treaty, is designed to protect not only the immediate interests of competitors or consumers but also the structure of the market and thus competition as such. Therefore, the Court of Justice has held that, in order to find that coordination between undertakings has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices. [133] The same must also be true as regards the finding that coordination between undertakings has anticompetitive effects.

313. In addition, the Commission also rightly claims that the General Court was wrong to reject, in paragraphs 1180 and 1210 of the judgment under appeal, the premiss that the elimination of a major source of potential competition can, in itself, give rise to effects on prices or other parameters of competition with a reasonable degree of probability.

(ii) The relevant time for the counterfactual analysis

314. The Commission also claims that the General Court was wrong to require that the analysis of the effects of an agreement which has been implemented requires that all the factual developments which have taken place since its conclusion are examined. In the Commission's view, the relevant time for the analysis of the counterfactual scenario is in fact when an agreement is concluded.

315. The examination of the object of an agreement for the purposes of applying Article 101 TFEU must switch to the examination of the effects of that agreement if it is not possible to conclude, in the light of the type of agreement or of the mechanisms which it establishes, when analysed in their context, that the object of the agreement is to restrict competition. [134] In such a

131 See, to that effect, my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 128).

132 See my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 76 and 198).

133 Judgments of 4 June 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraphs 38 and 39); 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 63); and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 125); see also my Opinion in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, points 58 to 60). Moreover, see, to that effect, as regards the implementation of Article 102 TFEU, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others* (C-377/20, EU:C:2022:379, paragraph 44 and the case-law cited).

134 See, to that effect, judgments of 11 September 2014, *CB* v *Commissio*n (C-67/13 P, EU:C:2014:2204, paragraph 52); of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraphs 66 and 115); and of 2 April 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265, paragraph 55).

situation, it is necessary to examine whether the mechanisms established by the agreement, having regard to their operation, their context and the competitive situation on the market concerned, will have restrictive effects on competition once they apply.

316. Such an analysis of the effects of an agreement is required, for example, where an authority is faced with one or more agreements that form a complex set, including procompetitive and anticompetitive elements, the anticompetitive nature of which is impossible to determine without examining the effects of that agreement or those agreements,[135] and the objective of which is to determine the impact that the agreement may have on competition in the relevant market.[136]

317. It follows from the case-law cited in point 289 above that the counterfactual analysis involves examining competition within the actual context in which it would occur in the absence of the agreement in dispute. This necessarily means what would have happened in the absence of the agreement must be analysed and not what actually happened given that agreement. The actual events as they occurred in the course of and further to the implementation of the agreement are necessarily already tainted by the presence of that agreement. Thus, a counterfactual analysis which is based on such a situation that has already undermined free competition, such as that carried out by the General Court, inter alia, in paragraphs 1192 to 1213 of the judgment under appeal (see point 278 above), in that it infers the absence of restrictive effects from actual events which took place during the implementation of that agreement, is akin to circular reasoning that disregards the very bases of such an analysis, as required by the case-law referred to in points 289 to 295 above.

318. Whilst, in principle, nothing precludes account from being taken of subsequent events, which arise inter alia from the implementation of an agreement, when analysing the negative effects of that agreement on the market, as the Commission has stated (see recital 1220 of the decision at issue and point 260 above), those factors cannot be taken into account so as to establish a counterfactual scenario wrongly based on the existence as such of such an agreement, whereas that scenario is meant to take as a starting point the absence of the agreement.

319. The General Court was therefore wrong to rely on the continuation and on the outcomes of the proceedings before the UK courts and the EPO, following Krka's withdrawal from those proceedings, in order to find that the non-challenge clause contained in the Krka settlement agreement did not have restrictive effects (point 278 above). Even if Krka's continuation of those proceedings would not have led to a different outcome in terms of patents and litigation than that obtained by their continuation by other operators (which is not even established), this cannot be relevant for the purposes of the counterfactual assessment of the effects of that clause. In that regard, what matters is whether the effect of that clause was that Krka abandoned its attempts to compete with Servier, inter alia, by continuing the proceedings in question.

320. It follows that the Commission's consideration that the counterfactual analysis must be conducted at the time when the agreement is concluded is not erroneous. On the contrary, as the Court has held, the anticompetitive nature of an act must be evaluated at the time when that act

135 See, in this regard, judgments of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 74 et seq.); and of 26 November 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 22 to 24); and my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 164 and 171); see also Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 48 to 50).

136 Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, point 50).

was committed.[137] This is consistent inasmuch as it is agreements that have the object or effect of preventing, restricting or distorting competition within the internal market which are prohibited under Article 101(1) TFEU. Accordingly, the question whether an agreement has an anticompetitive object or anticompetitive effects must, in principle, be examined at the time of its conclusion.

321. Subsequent developments outside the control of the parties and independent from the mechanisms established by the agreement cannot overturn the anticompetitive nature of an agreement which had the effect of restricting competition when it was concluded.[138] As the Commission explained, inter alia, at the hearing in these appeal proceedings, a subsequent event which neutralises the effects of an agreement must be taken into account solely *ex nunc*, from when it occurs, in order to determine the duration of the infringement of Article 101 TFEU represented by the agreement. This is, furthermore, precisely how the Commission took account, in the present case, of the subsequent events that occurred following the conclusion of the agreements in dispute (here the annulment of the 947 patent in the United Kingdom, in the Netherlands and by the EPO) with a view to determining the respective end point of the infringements (see, with regard to Krka, recital 2126 of the decision at issue).

322. Moreover, in this respect, the judgment under appeal is also vitiated by contradictory reasoning. In paragraph 856 of that judgment, the General Court found, with regard to the agreement concluded by Servier with Lupin, that possible events occurring after the conclusion of that agreement cannot neutralise its restrictive nature and that it '[was] necessary to distinguish between, on the one hand, the issue of the very existence of the infringement, which cannot be called into question by the mere possibility that future events may occur, and, on the other hand, that of the duration of the infringement, which may depend on the actual occurrence of such events'.

323. That consideration precisely mirrors the Commission's arguments regarding the effects of the Krka agreements. It is impossible to comprehend why the General Court assessed this issue differently in relation to those agreements, on the one hand, and to the agreement concluded by Servier with Lupin, on the other hand.

(iii) The irrelevance of the distinction between implemented and non-implemented agreements

324. It follows from the foregoing that the distinction drawn by the General Court between the analysis of the effects of agreements which have been implemented and the effects of those which have not (see paragraphs 1107 to 1133 of the judgment under appeal and point 274 above) is irrelevant. Since the counterfactual analysis is made at the time when the agreement is concluded, that distinction is meaningless for the purpose of establishing the effects of an agreement, even though there is nothing to preclude account from being taken of subsequent factors, relating to the implementation of an agreement, vis-à-vis the context of that agreement.

137 Judgment of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraph 110).

138 See, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraph 360).

325. Furthermore, it follows from the case-law that the distinction between real and potential effects, as used by the General Court as part of its distinction between implemented and non-implemented agreements, is likewise irrelevant because, when conducting the counterfactual analysis, account should in any event be taken of the potential effects on the same basis as the real effects. [139]

326. Moreover, nor do the General Court's conclusions regarding the alleged distinction between implemented and non-implemented agreements for the purpose of analysing their effects follow from the case-law examined by the General Court to that end in paragraphs 1107 to 1133 of the judgment under appeal (point 274 above). Aside from being excessively case-specific, the General Court's proposed interpretation of that case-law is not only contrary to the scheme and the purpose of Article 101 TFEU (see point 320 above), but it also draws conclusions from that case-law which are incompatible with the explicit statements made therein, which make reference both to the real and to the potential effects of the agreements examined.

(3) Conclusion on the effects of the Krka agreements

327. It follows from the foregoing considerations, made in the context of the examination of the Commission's seventh ground of appeal (points 282 to 326 above), that the General Court erred in law by classifying as 'hypothetical' and rejecting the approach consisting in taking the real effect of the elimination of Krka as a source of potential competition as a basis in order to establish the restrictive effects on competition of the Krka agreements. The General Court's finding that those agreements should not be classified as a restriction of competition by effect (paragraphs 1217 and 1232 of the judgment under appeal) is therefore based on an analysis that is vitiated by errors of law and must be set aside.

328. As previously recalled in point 251 above, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may itself, if the decision of the General Court is quashed, give final judgment in the matter, where the state of the proceedings so permits.

329. It is apparent from the examination of the seventh ground of appeal that that is the case here as regards the finding of the anticompetitive effects of the Krka agreements. That examination has shown that the tenth plea in law raised at first instance by Servier, upon which the General Court's analysis is based (see paragraphs 1217 and 1232 of the judgment under appeal), is incapable of invalidating the Commission's finding that the Krka agreements had had the effect of restricting appreciably potential competition between Servier and the generic companies (recital 1850 of the decision at issue).

330. The Court may therefore dispose of the case and reject the tenth plea in law raised at first instance by Servier as far as concerns the effects of the Krka agreements, which will mean that the decision at issue is confirmed in this respect.

[139] Judgments in *Generics (UK) and Others* (paragraphs 115 to 122, in particular 117, 121 and 122), and of 18 November 2021, *Visma Enterprise* (C-306/20, EU:C:2021:935, paragraphs 73 and 74).

(c) Conclusion on the existence of an infringement under Article 101(1) TFEU with regard to the Krka agreements

331. It follows from the findings contained in points 250 to 253 and 327 to 330 above that the General Court's conclusions as to the lack of anticompetitive object and effects of the Krka agreements (paragraphs 1217 and 1232 to 1234 of the judgment under appeal) must be set aside, and that the Court of Justice may dispose of the case in this respect and reject the pleas of law at first instance alleging the lack of anticompetitive object and effects of those agreements. Therefore, the Court may confirm the finding made in the decision at issue that those agreements constituted a single and continuous infringement of Article 101 TFEU and the fine imposed on Servier in that regard (Article 4 and Article 7(4) of the decision at issue).

2. Article 102 TFEU

332. By its eighth to eleventh grounds of appeal, the Commission claims that the General Court erred in law in annulling the decision at issue as far as concerns the finding of an infringement of Article 102 TFEU by Servier.

333. The General Court upheld all the pleas in law put forward by Servier at first instance (the fourteenth to seventeenth pleas in law) relating to the infringement of Article 102 TFEU, on the basis of its finding that the Commission had incorrectly defined the relevant finished product market as being limited solely to the perindopril compound in its originator and generic versions.

334. Before examining the Commission's grounds of appeal contesting that finding (b), it is useful to summarise the findings of the decision at issue and of the judgment under appeal in this regard (a).

(a) The findings relating to Article 102 TFEU in the decision at issue and the judgment under appeal

(1) Decision at issue

335. In the first place, the Commission found that the relevant finished product market was limited to perindopril both in its originator version and its generic version. It made that finding based on the analysis of four Member States, namely, France, the Netherlands, Poland and the United Kingdom, for the period from 2000 to 2009 (section 6, recitals 2128 to 2549 of the decision at issue).

336. In reaching that conclusion, the Commission explained, first of all, that perindopril, which is used in the treatment of hypertension, was indeed part of the class of 'angiotensin converting enzyme (ACE) inhibitors', which formed a group consisting of 16 different compounds over the relevant period, sharing the same mode of action and having often similar therapeutic indications and side effects. However, not all ACE inhibitors form a perfectly homogeneous group of medicines, and perindopril was recognised as having certain characteristics that distinguished it from other ACE inhibitors. At the start of the relevant period for the definition of the market (in 2000), the class of ACE inhibitors was already a mature class and generic versions of the majority of ACE inhibitors were already available. The generic versions of the

ACE inhibitors regarded as closest to perindopril had become available between 1999 and 2005 (recitals 92, 93, 2144, 2145, 2149, 2165 to 2171, 2449 and 2537 and tables 21, 24, 27 and 30 of the decision at issue).

337. Next, examining the competitive constraints to which perindopril was subject, the Commission found that Servier had relied on the differences between the ACE inhibitors and on the particular qualities of perindopril to conduct a policy of differentiation in its promotional efforts directed at prescribing doctors (recitals 2445 to 2457 of the decision at issue).

338. In addition, and in particular, the Commission found that the very significant fall in the prices of the other ACE inhibitors following the entry of their generic versions did not result in a reduction in the prices of perindopril or in Servier's promotional expenditure, which remained stable throughout the period considered, or in a decline in the volumes of perindopril sold, which constantly increased. The very significant falls in the prices of the other ACE inhibitors did not therefore trigger a switch from perindopril to those other ACE inhibitors. The Commission concluded from this that perindopril was not subject to any significant competitive constraint from the other ACE inhibitors over the period under investigation and that Servier was therefore able to behave to an appreciable extent independently of the other producers of ACE inhibitors (recitals 2460 to 2495, 2521 and 2544 of the decision at issue).

339. Finally, the Commission found that the limited effectiveness of the constraints imposed by the other ACE inhibitors on perindopril stood in marked contrast to the strength of the constraint expected from, and eventually introduced by, the arrival of generic versions of perindopril, which could compete with all the existing sales of original perindopril. In addition, the Commission took the view that the competitive pressure exercised by perindopril generics had to be regarded as crucial in the assessment of the product market at issue if the object of the contested practices was to neutralise that same constraint (recitals 2528 to 2546 of the decision at issue).

340. In the second place, the Commission analysed Servier's position on the relevant finished product market and concluded that Servier was in a dominant position within the meaning of Article 102 TFEU on the market in original and generic perindopril in the United Kingdom, the Netherlands, France and Poland over the period considered (section 6, recitals 2550 to 2600 of the decision at issue).

341. In the third place, the Commission found that the relevant upstream market of the finished product market, the technology market, was limited to perindopril technology only and that Servier also occupied a dominant position on that relevant technology market (section 7, recitals 2601 to 2758 of the decision at issue).

342. Finally, in the fourth place, the Commission analysed Servier's behaviour and concluded that Servier's single and continuous strategy combining, inter alia, an acquisition of API technology and patent settlement agreements in return for reverse payments had constituted a single and continuous infringement of Article 102 TFEU (section 8, recitals 2759 to 2998 of the decision at issue).

(2) Judgment under appeal

343. For its part, the General Court upheld, in the first place, Servier's fourteenth plea in law at first instance relating to the definition of the relevant finished product market for the purposes of applying Article 102 TFEU. The General Court considered that the Commission had incorrectly determined the relevant market as being restricted solely to the perindopril compound (paragraphs 1367 to 1592 of the judgment under appeal).

344. That fourteenth plea in law raised by Servier at first instance included three complaints (paragraphs 1367 to 1370 of the judgment under appeal).

345. After making some preliminary remarks (paragraphs 1371 to 1405 of the judgment under appeal), the General Court, first, examined and rejected the first part of the first complaint, alleging a failure to take into account the overall economic context (paragraphs 1406 to 1417 of the judgment under appeal). Second, the General Court examined and upheld the second complaint, alleging that the Commission failed to take into account the therapeutic substitutability of ACE inhibitors (paragraphs 1418 to 1566 of the judgment under appeal). Third, the General Court examined and upheld the second part of the first complaint, alleging that excessive importance was attached to the price criterion in the market analysis (paragraphs 1567 to 1585 of the judgment under appeal). Fourth, the General Court found that there was no need to respond to the third complaint, alleging that the Commission's econometric analysis of prices is vitiated by a methodological flaw (paragraph 1586 of the judgment under appeal).

346. On completion of that examination, the General Court, whilst having recalled in paragraph 1374 of the judgment under appeal the principle that the review undertaken by the Courts of the European Union of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers,[140] concluded that, in the present case, the Commission had made a series of 'errors' in the analysis of the definition of the relevant market and had therefore wrongly restricted the relevant finished product market to the perindopril compound only, such that the fourteenth plea in law at first instance should be upheld (paragraphs 1589 to 1592 of the judgment under appeal).

347. Next, the General Court upheld, in the second place, Servier's fifteenth plea in law at first instance and annulled the finding made in the decision at issue that Servier held a dominant position on that finished product market (paragraphs 1595 to 1608 of the judgment under appeal).

348. The General Court also upheld, in the third place, Servier's sixteenth plea in law at first instance and annulled the finding of Servier's dominant position on the upstream market for finished products, namely the technology market (paragraphs 1611 to 1622 of the judgment under appeal).

349. Since the market had been incorrectly defined, the General Court lastly, in the fourth place, upheld Servier's seventeenth plea in law at first instance and annulled the finding in the decision at issue concerning Servier's abusive conduct (paragraphs 1625 to 1632 of the judgment under appeal).

[140] See judgments of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraphs 29, 39, 49, 56 and 58), and of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289, paragraphs 87, 534, 557 and 618).

350. On the basis of those considerations, the General Court annulled Article 6 (finding of an infringement by Servier of Article 102 TFEU) and Article 7(6) (fine in respect of that infringement) of the operative part of the decision at issue (paragraphs 1633 and 1963 of the judgment under appeal and points 2 and 3 of the operative part of that judgment).

(b) The grounds of appeal relating to Article 102 TFEU

351. The Commission raises four grounds of appeal against the General Court's findings relating to the definition of the relevant market.

352. In the context of its eighth ground of appeal, the Commission claims that the General Court made several errors of law in considering that the Commission had attached excessive importance to prices in determining the finished product market (1).

353. By its ninth ground of appeal, the Commission submits that the General Court erred in law both in its conceptual approach and its specific findings vis-à-vis therapeutic substitutability (2).

354. The Commission's tenth ground of appeal seeks a finding that the General Court erred in law in declaring admissible Annexes A 286 and A 287 to the application and Annex C 29 to the reply (3).

355. Finally, in the context of its eleventh and final ground of appeal, the Commission claims that the General Court erred in law in annulling, on the basis of its findings concerning the finished product market, the Commission's findings relating to the relevant perindopril API technology market (4).

(1) The significance of price when determining the relevant finished product market (eighth ground of appeal)

356. In the context of its eighth ground of appeal, the Commission claims that the General Court erred in law, in particular on the basis of its incorrect application of the concept of the 'relevant market' and of its insufficient and/or contradictory statement of reasons, when it upheld, in paragraphs 1567 to 1586 of the judgment under appeal, the second part of the first complaint of the fourteenth plea in law raised by Servier at first instance, which alleged that the Commission attributed excessive importance to the changes in prices related to medicinal products when determining the relevant product market (points 344 and 345 above).

357. As the Commission observes and as stated in point 345 above, the General Court rejected the first part of the first complaint of Servier's fourteenth plea in law at first instance (paragraphs 1406 to 1417 of the judgment under appeal). In so doing, the General Court confirmed that the Commission had indeed taken into consideration the overall economic context in its analysis of the relevant market, including the therapeutic use of the medicinal products and the changes in prices (paragraphs 1411 to 1415 of the judgment under appeal). The General Court also recognised, as factual elements, the low sensitivity of perindopril to the price changes of other ACE inhibitors, which was not disputed by Servier, and the facts that the volumes of perindopril sold by Servier had constantly increased and that Servier's profitability had remained very high over the period considered (paragraphs 1499, 1500, 1559, 1573, 1579 and 1583 of the judgment under appeal).

358. As the Commission points out, the General Court therefore took the view that the Commission had taken into consideration all the relevant factors, but that it had attributed excessive importance to the changes in prices in a context in which those changes, consisting in the dramatic fall in the prices of the other ACE inhibitors allegedly in competition with perindopril of up to 90%,[141] had affected neither the prices nor the volumes of perindopril sold by Servier, nor Servier's profitability over a nine-year period.

359. The Commission claims that, in so doing, the General Court made a series of errors of law as regards price-related factors in the determination of the relevant market (i), the lack of price sensitivity of the prescribing doctors (ii) and the account taken of the competition from the perindopril generics (iii).

(i) The price-related factors in the determination of the relevant market (first and second parts of the eighth ground of appeal)

360. In the context of the first and second parts of its eighth ground of appeal, the Commission claims, first, that, inter alia in paragraphs 1380 to 1405 and 1567 to 1586 of the judgment under appeal, the General Court erred in law in considering that price-related factors had taken on too much importance in the determination of the relevant market, whilst itself attributing no real importance to price in its analysis. Second, the Commission submits that the judgment under appeal is vitiated by an insufficient and contradictory statement of reasons as regards the price-related factors.

361. It must be observed that it is clear simply from reading the General Court's considerations in this regard that the Commission is justified in claiming that those considerations are vitiated by an insufficient and contradictory statement of reasons.

362. The General Court's considerations relating to the price factor begin, in paragraphs 1390 to 1404 of the judgment under appeal, with a series of general musings concerning the 'definition of a relevant product market in the pharmaceutical sector'.[142] In those paragraphs, the General Court stated, in essence, that competitive price pressure was largely mitigated in the pharmaceutical sector on account of the importance which prescribers attach to the therapeutic aspects of medicinal products and the regulatory framework governing their pricing and the arrangements for their reimbursement (paragraphs 1390 to 1394 of the judgment under appeal).

363. According to the General Court, doctors' freedom of choice and their focus on therapeutic aspects permit the operation of significant qualitative and non-price competitive constraints in addition to the mechanisms of price pressure (paragraphs 1395 to 1397 of the judgment under appeal).

364. At the same time, the General Court recognised, in paragraphs 1392 and 1398 of the judgment under appeal, that the variable of price may be important in determining the relevant market in the pharmaceutical sector. The lack of impact of the significant decrease in the price of a medicinal product on a medicinal product recognised as substitutable could therefore be indicative of the weakness of the competitive pressure on the latter medicinal product.

141 Recitals 2286, 2305, 2324 and 2345 of the decision at issue.

142 Title that appears before paragraph 1380 of the judgment under appeal.

365. Similarly, the General Court stated, in paragraph 1578 of the judgment under appeal, that economic substitutability could exist where changes affecting important economic variables other than prices shift a significant proportion of the sales from one product to another.

366. However, the General Court did not explain why, in its view, the fact, recognised in paragraphs 1573 to 1575 of the judgment under appeal, that the significant falls in the prices of the other ACE inhibitors had not had any impact on perindopril and that there had in fact *not* been a shift in the sales of perindopril to the other ACE inhibitors, was not indicative of the lack of competitive pressure on perindopril from the other ACE inhibitors.

367. Similarly, the General Court failed to explain its conclusion in paragraph 1579 of the judgment under appeal, which begins with the word 'consequently', even though the preceding paragraphs provide no support for the substance of that conclusion. According to that unexplained conclusion, the fact that the sales and the prices of perindopril fell only after the entry of generic perindopril, whereas they remained stable during the drop in the prices of the other ACE inhibitors, did not support the conclusion that there were no competitive constraints until the entry of the perindopril generics.

368. The General Court simply stated, in paragraph 1577 of the judgment under appeal, that, in the pharmaceutical sector, account had to be taken of the non-price competitive pressures, and referred in that regard to its considerations in paragraphs 1418 to 1566 of the judgment under appeal, which are meant to respond to the second complaint of Servier's fourteenth plea in law at first instance, which concerned the therapeutic substitutability between perindopril and the other ACE inhibitors (paragraph 1369 of the judgment under appeal).

369. However, not only does such a general reference, without any explanations, to the considerations set out in 149 paragraphs of the judgment under appeal not allow the parties or the Court to understand the General Court's reasoning, but nor do the General Court's findings make it possible to understand why the non-price competitive constraints, allegedly exerted by the other ACE inhibitors on perindopril, even if sufficient reasons should have been provided for the existence of such constraints in those 149 paragraphs, were in no way reflected in the evolution of the prices and volumes of perindopril identified by the Commission, which suggests on the contrary that perindopril was protected against constraints from the other ACE inhibitors.

370. As the Commission rightly alleges, the General Court's reasoning relating to the price factor is not only insufficient, because it does not make it possible to understand the significance of that factor in its overall analysis, but also contradictory in that the General Court accepts, in principle, the role of the price factor, on the one hand, whilst excluding that factor from that same analysis, on the other hand, without providing reasons for so doing.

371. Finally, as the Commission notes, the General Court seems to have called into question the importance of the price factor as such in its analysis of the relevant market. The General Court fails to relate its considerations on non-price constraints, on the one hand, and on prices, on the other, simply stating that those constraints existed and that their lack of impact on prices was irrelevant for the purposes of the analysis.

372. The Commission rightly claims that, in so doing, the General Court disregarded the principles established by case-law regarding the definition of the relevant market for the purposes of applying Article 102 TFEU.

373. In accordance with those principles, the market in question is defined with a view to determining the boundaries within which the assessment must be made whether an undertaking is able to behave to an appreciable extent independently of its competitors, its customers and consumers. [143]

374. In other words, it is a question of examining whether there are competing products which exert significant competitive constraints on the undertakings concerned. [144] For the purposes of such an analysis, account must be taken not only of the objective characteristics of the products in question (here: the therapeutic substitutability between perindopril and the other ACE inhibitors), but also the competitive conditions and the structure of supply and demand on the market, and therefore all the indicators of potential competitive constraints. [145]

375. As the General Court acknowledged in its judgment in *AstraZeneca* v *Commission*, [146] those principles also apply in the case of pharmaceutical markets, because the specific features of those markets do not negate the relevance of price-based indicators.

376. When determining the relevant market, it is therefore necessary to identify in a systematic way the competitive constraints that the undertakings involved face with a view to identifying those actual competitors who are capable of constraining those undertakings' behaviour or of preventing them from behaving independently of effective competitive pressure. [147]

377. Within the context of that analysis, account may be taken of natural events on the market over the period considered, [148] just like facts put forward as acts amounting to abuses. [149]

378. When conducting such an exercise, factors such as, in the present case, the evolution of the prices of perindopril and of the other ACE inhibitors, which show that products that can theoretically be substituted for the product at issue have not exerted a significant competitive constraint on that product, cannot be ignored. This is particularly the case since that evolution shows that only the entry on the market of generic versions of perindopril itself had an impact on perindopril. Yet it is specifically the agreements concluded by Servier with a view to delaying the entry of those generics on the market which form the basis, in the present case, of the alleged existence of abuse.

379. It follows from the foregoing considerations that the first and second parts of the Commission's eighth ground of appeal, alleging an insufficient and contradictory statement of reasons and errors of law as regards the account taken of the price factor in the General Court's analysis of the relevant market, are well founded.

143 Judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 28), and of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 51).

144 See, to that effect, judgment of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraph 38 et seq.).

145 See judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission* (322/81, EU:C:1983:313, paragraph 37); of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 32); of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 51); of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraph 30); and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission* (T-336/07, EU:T:2012:172, paragraph 111). See also, to that effect, judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22, paragraph 32), and of 14 November 1996, *Tetra Pak* v *Commission* (C-333/94 P, EU:C:1996:436, paragraph 13).

146 Judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraphs 183 and 203).

147 See paragraph 2 of the Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

148 See, for example, judgment of 12 December 1991, *Hilti* v *Commission* (T-30/89, EU:T:1991:70, paragraph 71).

149 Judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission* (27/76, EU:C:1978:22, paragraph 68); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 239).

(ii) The lack of price-sensitivity of prescribing doctors (third and fourth parts of the eighth ground of appeal)

380. By the third and fourth parts of its eighth ground of appeal, the Commission claims that the General Court erred in law in its considerations relating to the lack of price-sensitivity of prescribing doctors and by providing an insufficient and/or contradictory statement of reasons in that regard.

381. First of all, it must be observed, as the Commission alleges, that that reasoning provided in the judgment under appeal does indeed appear contradictory and does not make it possible to understand the conclusions drawn by the General Court from the doctors' lack of price-sensitivity.

382. Thus, on the one hand, the General Court stated, in paragraph 1390 of the judgment under appeal, that the fact that competitive price pressure is largely mitigated in the pharmaceutical sector on account of the importance which doctors attach to therapeutic aspects could justify narrow market definitions. On the other hand, the General Court relied, in paragraphs 1575 to 1578 of the judgment under appeal, on the lack of sensitivity of doctors to prices to justify a broad definition of the market based on non-price competitive constraints exerted on perindopril by the other ACE inhibitors.

383. In addition, whilst pointing out, in paragraphs 1393 to 1395 of the judgment under appeal, that demand in the pharmaceutical sector was essentially determined by the prescribing doctors, the General Court acknowledged, inter alia in paragraphs 1398 and 1464 of the judgment under appeal, that demand in that sector was also determined by social security systems, which are likely to encourage the prescription of generic versions of medicinal products recognised as equivalents.

384. Given that insufficient and contradictory statement of reasons, it is therefore impossible to understand the conclusions drawn from them by the General Court as regards the impact of demand in the pharmaceutical sector.

385. In addition, the Commission is also justified in claiming that the General Court erred in law by disregarding the very function of the market definition, which is to identify the significant competitive constraints to which the undertakings (here: Servier) are subject. As the Commission argues, the lack of price-sensitivity of doctors is in fact liable to lessen the competitive constraints on Servier, in that it allows Servier to set its prices more freely, and not the opposite, a fact which the General Court indeed recognised in paragraph 1390 of the judgment under appeal. [150]

386. As the Commission alleged, inter alia, at the hearing in these appeal proceedings, the General Court misconstrued the concept of the relevant market by focusing at length on the constraints on doctors rather than analysing the constraints on Servier. In addition, as the Commission also pointed out at the hearing, the purpose of the market definition is not to scrutinise the doctors' choices as such, but rather to analyse their implications for the scope of the competitive constraints on Servier.

[150] See also, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraphs 174 and 191).

387. It follows that the third and fourth parts of the eighth ground of appeal, alleging errors of law and an insufficient statement of reasons when the General Court took account of the choices of doctors for the purposes of determining the relevant market, are also well founded.

(iii) The competition exerted by the perindopril generics (fifth and sixth parts of the eighth ground of appeal)

388. Lastly, by the fifth and sixth parts of its eighth ground of appeal, the Commission alleges that the General Court erred in law by failing to take sufficient account of the competition exerted by the perindopril generics and providing, in that regard, an insufficient and/or contradictory statement of reasons.

389. Those criticisms overlap in part with certain complaints already examined in the context of the first and second parts of the eighth ground of appeal.

390. As has already been found in points 367 and 369 above, the General Court's reasoning is insufficient because it does not make it possible to understand the conclusions drawn by the General Court from the fact, acknowledged in paragraphs 1392 and 1579 of the judgment under appeal, that the prices of perindopril fell dramatically when perindopril generics were introduced, whereas they remained stable on the introduction of generics of the other ACE inhibitors.

391. Similarly, nor is it possible to understand the conclusions drawn by the General Court from the fact, acknowledged in paragraphs 1392 and 1398 of the judgment under appeal, that the social security systems could encourage the prescription of generics, whether generics of the medicinal product at issue itself or generics of medicines recognised as equivalents.

392. The Commission points out that paragraph 1392 of the judgment under appeal suggests that the competitive pressure exerted by the generics of a particular medicinal product could be taken into account only after their actual entry on the market, which is incorrect. However, it is unclear from reading paragraph 1392 of the judgment under appeal whether the General Court thus actually limited the account taken of the competitive constraint exerted by the generics of a particular medicinal product.

393. In any event, the Court clarified, in the judgment in *Generics (UK) and Others*, that the generics of a particular medicinal product may be taken into consideration for the purposes of the definition of the relevant market even if they are not yet actually being marketed on the market and if the patent situation is uncertain, where the manufacturers of the generic medicines concerned are in a position to present themselves within a short period on the market concerned with sufficient strength to constitute a serious counterbalance to the manufacturer of originator medicines already on that market. [151]

[151] Judgment in *Generics (UK) and Others* (paragraph 140); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 229 to 240).

394. In examining that question, factors which point to the patent holder's perception of generics as a threat are likewise relevant.[152] Accordingly, in the present case, as I have already stated in point 378 above, the fact that the practice objected to in the decision at issue consisted in the strategy implemented by Servier to delay the arrival of generics on the market is a significant factor in the analysis of the relevant market.

395. However, as the Commission rightly argues, the General Court failed to explain what significance it intended to attach, in its analysis, to the competitive constraints exerted by the perindopril generics.

396. Conversely, the General Court focused its analysis on the therapeutic substitutability between perindopril and the other ACE inhibitors, without taking sufficient account of the fact, noted by the Commission, that such substitutability, which did indeed exist in theory, was not reflected in practice in any effective substitution between those medicinal products.

397. It follows from the foregoing that the fifth and sixth parts of the eighth ground of appeal, alleging that insufficient account was taken of the competitive constraints exerted by the perindopril generics and that an insufficient statement of reasons was provided in that regard, must also be upheld.

(iv) Interim conclusion

398. It follows from the foregoing considerations, made in the context of examining the eighth ground of appeal, that the General Court erred in law and infringed the obligation to state the reasons for its judgment in finding that the Commission had attached excessive importance to the price factor when determining the relevant finished product market.

399. Those errors are sufficient, in themselves, to call into question the General Court's conclusions contained in paragraphs 1589 to 1591 of the judgment under appeal, namely that the Commission incorrectly defined the relevant finished product market and that it is not established that that market was limited to originator and generic perindopril only (point 346 above).

400. Thus, in paragraph 1589 of the judgment under appeal, the General Court did indeed list five separate errors allegedly made by the Commission in the determination of the relevant finished product market. The first four of those errors concern the therapeutic substitutability between perindopril and the other ACE inhibitors and the non-price competitive constraints, whereas only the fifth concerns the account taken of the price factor.

401. However, given the importance of the analysis of that price factor in the Commission's overall analysis (see point 338 above) and its interrelationship with the other factors (see points 369, 371 and 378 above), the finding that the General Court's conclusions in that regard are incorrect and insufficiently reasoned vitiates as erroneous the entire analysis conducted by the General Court vis-à-vis the definition of the relevant market, without it being necessary to examine the Commission's ninth ground of appeal, alleging errors on the part of the General Court when taking account of therapeutic substitutability in the determination of the relevant finished product market.

[152] Judgment in *Generics (UK) and Others* (paragraph 135); see also my Opinion in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, point 239).

402. Accordingly, the General Court's errors, identified in the context of the examination of the eighth ground of appeal, justify on their own the judgment under appeal being set aside in that it upheld, on the basis of the finding of the Commission's allegedly incorrect definition of the relevant product market, Servier's fourteenth to seventeenth pleas in law at first instance and annulled Article 6 and Article 7(6) of the decision at issue (see points 343 to 350 above).

403. It is therefore solely for the sake of completeness that I will examine the Commission's other grounds of appeal relating to Article 102 TFEU.

(2) The account taken of therapeutic substitutability in determining the relevant finished product market (ninth ground of appeal)

404. By its ninth ground of appeal, the Commission claims that the General Court erred in law both in its conceptual approach and in its specific findings in relation to therapeutic substitutability.

405. In the first part of this ground of appeal, alleging errors made by the General Court in the analysis of the role of therapeutic substitutability in the determination of the relevant finished product market, the Commission essentially calls into question the considerations contained in the part of the judgment under appeal intended to examine the second part of the first complaint of the fourteenth plea in law at first instance, alleging that excessive importance had been attached to the price factor in the analysis of the market (paragraphs 1567 to 1585 of the judgment under appeal) (see point 345 above) (i).

406. In the second to sixth parts of the present ground of appeal, alleging errors made by the General Court when taking into account or analysing certain evidence, the Commission criticises considerations contained in the part of the judgment under appeal intended to examine the second complaint of Servier's fourteenth plea in law at first instance, which concerned the therapeutic substitutability between perindopril and the other ACE inhibitors (paragraphs 1418 to 1566 of the judgment under appeal) (see point 345 above) (ii).

(i) The role of therapeutic substitutability in the determination of the relevant finished product market (first part of the ninth ground of appeal)

407. By the first part of its ninth ground of appeal, the Commission claims that the General Court erred in law in its analysis of the role of therapeutic substitutability in the determination of the relevant finished product market.

408. Contrary to Servier's claim, this part is not inadmissible because it is concerned solely with the General Court's assessment of the facts. On the contrary, it concerns the legal characterisation of the facts and the legal conclusions drawn from them by the General Court, which fall within the scope of the review conducted by the Court of Justice in appeal proceedings. [153]

[153] See points 79 and 140 of this Opinion.

409. The criticisms made by the Commission in the context of this first part of the present ground of appeal, which relate to the overassessment of non-price-related parameters of competition in the General Court's analysis of the relevant finished product market, mirror the criticisms made by the Commission in the context of its eighth ground of appeal concerning the General Court's underassessment of the price factor during that analysis.

410. The arguments put forward by the Commission in the context of this part of the ninth ground of appeal therefore overlap with some of the arguments already examined and deemed to be well founded in the examination of the eighth ground of appeal.

411. The Commission argues that the General Court erred in law when it took account of the therapeutic substitutability between perindopril and the other ACE inhibitors. According to the Commission, the General Court inferred solely from such therapeutic substitutability that actual non-price competitive constraints were exerted by the other ACE inhibitors on perindopril.

412. The Commission calls into question paragraphs 1385, 1395, 1397, 1574 to 1577, 1579 and 1584 of the judgment under appeal, which have already been examined, in essence, in points 362 to 369 above. In those paragraphs, the General Court essentially considered that doctors' prescription choices were guided principally by non-price factors, and that the analysis of the natural events related to prices did not support the conclusion that there were no qualitative and non-price competitive pressures.

413. However, as I have already observed in points 361 and 370 to 378 378 above, the Commission is justified in claiming that, by making those findings, the General Court's judgment is not only vitiated by an insufficient statement of reasons, but it also failed to have regard to the principles governing the determination of the relevant market. In accordance with those principles, it is not possible, when making that determination, to limit the examination solely to the objective characteristics of the products in question (here: their therapeutic substitutability). [154]

414. As the Commission alleges, the General Court seems in fact to have inferred solely from the therapeutic substitutability between perindopril and the other ACE inhibitors, and therefore from the objective characteristics of those medicinal products, that the other ACE inhibitors necessarily exerted non-price competitive constraints on perindopril.

415. As the Commission notes, substitutability of use between two products, and more specifically between two medicinal products, is only the starting point for the examination of whether they form part of the same relevant product market. [155] Such substitutability of use cannot, however, be already the end point for that examination, which must in fact go further with a view to determining whether that substitutability of use is actually reflected in effective competitive constraints, given the competitive conditions and the structure of supply and demand on the market concerned.

416. It follows that the Commission is justified in claiming that the General Court erred in law because of the way in which it took account of the therapeutic substitutability between perindopril and the other ACE inhibitors in its analysis of the relevant finished product market. The first part of the ninth ground of appeal must therefore be upheld.

154 See the case-law cited in footnote 145 to this Opinion.

155 See, to that effect, judgment of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25, paragraph 51 and the case-law cited).

(ii) The account taken or the analysis of certain evidence (second to sixth parts of the ninth ground of appeal)

417. By the second, third, fourth, fifth and sixth parts of the ninth ground of appeal, the Commission claims that the General Court erred in law when taking account of or assessing certain evidence.

418. As has already been stated in point 406 above, the evidence to which those parts relate forms part of the evidence examined by the General Court in its analysis of the second complaint of Servier's fourteenth plea in law at first instance regarding the therapeutic substitutability between perindopril and the other ACE inhibitors, set out in paragraphs 1418 to 1566 of the judgment under appeal (see point 345 above).

419. In the context of the second part of the ninth ground of appeal, the Commission argues that the General Court erred in law in the examination of the perindopril studies, set out in paragraphs 1435 and 1446 of the judgment under appeal. However, that examination concerns the interpretation of medical guidelines and perindopril studies, which come under the assessment of the facts and evidence by the General Court. This part is therefore inadmissible. [156]

420. Whilst, as the Commission points out, the Court of Justice reviews the relevance of facts and their use by the General Court for the purposes of determining the relevant market, as well as the respective weight attached by the General Court to facts and the relationship between them, [157] the actual assessment of those facts, save where they have been distorted, comes under the exclusive jurisdiction of the General Court.

421. It is true that the Commission argues that the General Court also made conceptual errors, inter alia by confusing the concepts of differentiation and superiority (paragraph 1446 of the judgment under appeal). Similarly, the General Court made such errors in the assessment of the conclusions to be drawn from Servier's promotional endeavours (paragraphs 1541 to 1566 of the judgment under appeal), and when assessing the relevance of the studies concerning the other ACE inhibitors in order to differentiate perindopril from those other ACE inhibitors (paragraphs 1448 and 1449 of the judgment under appeal). However, the Commission does not explain the consequences of those conceptual errors for the analysis as to whether the other ACE inhibitors exerted non-price competitive pressure on perindopril. It is therefore unclear what finding the Commission wishes to obtain from the Court of Justice by the second part of the ninth ground of appeal.

422. By the third part of the ninth ground of appeal, the Commission claims that, in paragraphs 1466 to 1473 of the judgment under appeal, the General Court erred in law when taking account of Servier's internal strategy documents and relating them to the medical guidelines and Professor V.'s report (paragraphs 1455 to 1457 of the judgment under appeal). Those criticisms essentially relate to the General Court's assessment of evidence, without any distortion being claimed, which is inadmissible on appeal.

423. It is true that the Commission does seem to claim that the General Court erred in assessing the conclusions to be drawn, as regards the competitive pressures allegedly exerted on perindopril by the other ACE inhibitors, from Servier's promotional endeavours and from the fact that those

156 See, to that effect, judgment of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraph 51).

157 See, for example, judgment of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraphs 36 to 50).

endeavours ceased when the perindopril generics entered the market. However, once again, there is no further explanation of the consequences of that error or as to what finding the Commission wishes to obtain from the Court of Justice if this part of the ninth ground of appeal were upheld.

424. In the fourth part of the ninth ground of appeal, the Commission argues that the General Court erred in law by taking account of irrelevant facts. In that regard, the Commission claims that the General Court was wrong to take account of the size of the patient base of the other ACE inhibitors (paragraphs 1494, 1495, 1499 and 1500 of the judgment under appeal), the turnover of the other ACE inhibitors (paragraphs 1497 and 1498 of the judgment under appeal) and the market shares held by perindopril on the German market (paragraph 1497 of the judgment under appeal), which was not one of the four national markets examined for the purposes of applying Article 102 TFEU. In addition, the General Court misapplied that provision by finding that the respective developments of the various ACE inhibitors were capable of calling into question the finding of a doctors' 'inertia' mechanism (paragraphs 1502, 1506 and 1507 of the judgment under appeal).

425. It must be observed that the reasons stated in those paragraphs of the judgment under appeal do not make it possible to understand how those findings of the General Court relating to other ACE inhibitors are relevant to the finding of the continuous growth in the sales of perindopril and the phenomenon of doctors' 'inertia', in the analysis of which the findings appear (paragraph 1488 of the judgment under appeal). It is not apparent how the fact that such a phenomenon could also have existed in relation to other ACE inhibitors and that the volumes of those inhibitors also increased can form the basis of the finding that those other ACE inhibitors exerted a competitive constraint on perindopril and formed part of the same market as it. In paragraph 1507 of the judgment under appeal, the General Court referred to fluctuations over time in the relative sales of ACE inhibitors as being liable to call into question the finding of a phenomenon of doctors' 'inertia', but did not relate that fact to the finding of the continuous growth in perindopril sales, which was however recognised in paragraphs 1499, 1500, 1579 and 1583 of the judgment under appeal.

426. As the Commission points out, the General Court's findings concerning the market shares of the other ACE inhibitors presuppose what is to be demonstrated, namely that a common market exists between those other ACE inhibitors and perindopril,[158] a fact which, moreover, the General Court recognised in paragraph 1506 of the judgment under appeal.

427. It follows that the judgment under appeal is vitiated by an insufficient statement of reasons as regards the account taken of the information on the other ACE inhibitors for the purposes of assessing the phenomenon of doctors' 'inertia', examined in paragraphs 1483 to 1513 of the judgment under appeal. Accordingly, the General Court's finding in paragraph 1513 of the judgment under appeal cannot be upheld. According to that finding, the Commission had not established that a phenomenon of doctors' 'inertia' and the existence of a growing group of 'loyal' perindopril prescribers had significantly restricted the competitive pressure exerted on perindopril by other ACE inhibitors with respect to new patients.

428. The fourth part of the ninth ground of appeal must therefore be upheld.

158 See, *mutatis mutandis*, judgment of 1 July 2010, *AstraZeneca* v *Commission* (T-321/05, EU:T:2010:266, paragraph 208). It is true that, in that case, the two groups of medicinal products concerned were put to a different use, whereas that was not the case with perindopril and the other ACE inhibitors. However, this in no way affects the relevance of the finding that drawing conclusions from the changes in the respective market shares of those medicinal products presupposes that those medicinal products have already been found to be part of the same market.

429. Under the fifth part of the ninth ground of appeal, the Commission submits that the General Court distorted evidence in paragraph 1519 of the judgment under appeal by finding that, 'in the absence of differences in efficacy and tolerance between ACE inhibitors, it has not been established that switching between ACE inhibitors raised particular concerns on the part of doctors'.

430. It is apparent just from reading recitals 2181, 2187, 2379, 2436, 2497 and 2499 of, and footnote 3303 to, the decision at issue, upon which the Commission relies, that the General Court's finding, reproduced in point 429 above, constitutes a distortion of those recitals and that footnote. [159] It is clear from those recitals and that footnote that the Commission did not base the finding of a concern on the part of doctors about making changes to the treatment of a patient with hypertension on differences in efficacy and tolerance between ACE inhibitors. The Commission's finding was rather based on the fact that the process of finding the right treatment may be lengthy, that the balance between healthy blood pressure and individual treatment tailored to each specific patient may be difficult to strike, and that a change in treatment, in so far as it necessarily entails a period in which hypertension is not controlled, carries major risks that may potentially result in the death of the patients concerned.

431. The fifth part of the ninth ground of appeal, alleging a distortion made by the General Court in paragraph 1519 of the judgment under appeal, must therefore likewise be upheld.

432. Lastly, by the sixth and final part of the ninth ground of appeal, the Commission claims that the General Court erred in law and distorted evidence when it took account of the Thalès studies in paragraphs 1520 to 1522 of the judgment under appeal.

433. Those studies analysed the prescribing habits of general practitioners over a certain period in France and the United Kingdom, and found that more than 90% of perindopril prescriptions were repeat prescriptions. The Commission inferred from the findings of those studies, in recitals 2380 to 2385 of the decision at issue, a level of 'loyalty' of over 90%, confirming the presence of lock-in effects.

434. However, in paragraphs 1520 to 1522 of the judgment under appeal, the General Court made a nuanced assessment of the relevance of those studies, noting that the proportion of repeat prescriptions in the total number of prescriptions gave only partial information on the propensity for patients treated with perindopril to switch medicines, inter alia because the rate of repeat prescriptions depends on the frequency of patients' visits to doctors' surgeries.

435. Without even examining the Commission's objection that it was unable to take a view on that argument, which had been presented by the General Court for the first time in the judgment under appeal, it must be stated that, even more than a distortion, the considerations in question are in fact vitiated by an insufficient statement of reasons because they are incomprehensible. For instance, it is unclear how a 90% rate of repeat prescriptions in the total number of prescriptions cannot be an indicator of loyalty and of a reticence to change amongst doctors and patients. Nor is it apparent why the frequency of patients' visits to doctors' surgeries would be likely to affect that conclusion, even though it appears quite plausible that, unlike initial prescriptions, repeat prescriptions do not necessarily require a further visit to a doctor's surgery. Similarly, the General Court's argument that 'the number of repeat prescriptions in relation to the total

[159] For the definition of distortion, see points 96 and 187 of this Opinion.

number of prescriptions does not measure the level of patient loyalty, in the sense of the proportion of patients treated with perindopril in period N who are still being treated with perindopril in period N + 1' is difficult to understand.

436. It follows that the sixth and final part of the ninth ground of appeal, alleging errors by the General Court when taking account of the Thalès studies, is also well founded.

(iii) Interim conclusion

437. It follows from the foregoing considerations that, of the six parts of the ninth ground of appeal, four must be upheld (points 416, 428, 431 and 436 above).

438. The errors identified in that context are sufficient, in themselves, to call into question the General Court's conclusions in paragraphs 1589 to 1591 of the judgment under appeal, in so far as they are based on alleged errors made by the Commission when analysing and taking account of the therapeutic substitutability between perindopril and other ACE inhibitors for the purposes of determining the relevant finished product market.

439. That finding is not called into question by the fact, to which Servier referred in particular at the hearing in these appeal proceedings, that the Commission does not contest, or unsuccessfully contests (see points 419 to 423 above), all the findings made by the General Court in the context of its examination of the second complaint of Servier's fourteenth plea in law at first instance concerning the therapeutic substitutability between perindopril and other ACE inhibitors in paragraphs 1418 to 1566 of the judgment under appeal (see point 345 above).

440. It is true, as has already been stated in point 400 above, that the General Court listed, in paragraph 1589 of the judgment under appeal, five separate errors allegedly made by the Commission when determining the relevant finished product market, the first four of which concern the therapeutic substitutability between perindopril and other ACE inhibitors and non-price competitive constraints. On the basis of the examination of the ninth ground of appeal, it is not possible to determine specifically which of those alleged errors have been called into question on appeal.

441. It is not necessary, however, to engage in such an exercise.

442. As the General Court itself stated in paragraph 1589 of the judgment under appeal, the findings contained in that paragraph are the outcome of an overall assessment of the elements on which the Commission based its assessment of the relevant finished product market. Accordingly, in so far as the examination of the ninth ground of appeal has shown that that overall analysis is vitiated by errors relating to key points, the outcome of that analysis appears necessarily to be vitiated in its entirety.

443. This is particularly true since, as has already been stated in point 368 above, in paragraph 1577 of the judgment under appeal, the General Court simply referred to paragraphs 1418 to 1566 of the judgment under appeal, which relate to therapeutic substitutability, in support of its claim that perindopril could be exposed to non-price and qualitative competitive pressures from other ACE inhibitors.

444. However, first, that general reference, without further explanation, to the considerations set out in 149 paragraphs of grounds does not allow the Court of Justice to understand the nature of those constraints and whether they were genuinely exerted.

445. Second, and in any event, as I have already made clear in points 369 and 371 above, the General Court's claims do not provide an explanation of how the non-price competitive constraints allegedly exerted by the other ACE inhibitors on perindopril were in no way reflected in changes in prices or volumes of perindopril.

446. In this regard, it must be recalled, finally, that the examination of the eighth ground of appeal revealed that the General Court had also erred in law and breached its obligation to state reasons when it held that the Commission had attached excessive importance to the price factor when determining the relevant finished product market, and that the various factors taken into account during that determination are interdependent (points 398 and 401 above).

447. As I found following the examination of the eighth ground of appeal, the upholding of the ninth ground of appeal in part must lead, on its own and particularly in conjunction with the upholding of the eighth ground of appeal, to the setting aside of all the General Court's conclusions on Article 102 TFEU, all of which stem from the allegedly incorrect definition of the relevant finished products market (see points 343 to 350 and 402 above).

448. It is therefore solely for the sake of completeness that I will continue to examine the Commission's other grounds of appeal relating to Article 102 TFEU.

(3) The inadmissibility of certain annexes produced at first instance (tenth ground of appeal)

449. In the context of its tenth ground of appeal, the Commission claims that the General Court erred in law in declaring admissible Annexes A 286 and A 287 to the application and Annex C 29 to the reply, which the Commission had already argued were inadmissible at first instance.

450. It should be recalled that, for an action before the General Court to be admissible, the basic matters of law and fact relied on must be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the application. It is not for the General Court to seek and identify in the annexes the pleas on which it may consider the action to be based. [160]

451. As regards offers of evidence produced with the reply, such evidence is admissible only if it is evidence in rebuttal or the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party. [161]

[160] See judgment of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraphs 40 and 41 and the case-law cited).

[161] Judgment of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraphs 71 and 72).

452. In the present case, the General Court considered, in paragraphs 1459 to 1463 of the judgment under appeal, first, that Annex C 29 was admissible because it responded to a criticism made by the Commission in its defence. Second, the General Court concluded that Annexes A 286, A 287 and C 29 were admissible because they substantiated arguments of fact and law relied upon in the application and the reply.

453. However, it must be observed that the findings made by the General Court in paragraph 1462 of the judgment under appeal do not allow the Court of Justice to understand to what extent the submission of Annexes A 286, A 287 and C 29 at first instance satisfied the conditions recalled in point 450 above. The General Court in fact simply stated that those annexes were admissible, without substantiating that finding sufficiently, and therefore the Court of Justice is unable to assess its merits.

454. For instance, in paragraph 1462 of the judgment under appeal, the General Court simply stated that, even though Annexes A 286, A 287 and C 29 were large and contained a succession of documents, Servier had set out in the body of the application the arguments on which it relied. In the General Court's view, Servier supported, through the production of those annexes containing documents from primary care trusts in the United Kingdom, its arguments seeking to show that those trusts have taken views on the therapeutic equivalence between perindopril and other ACE inhibitors, that they encouraged general practitioners to replace perindopril with other ACE inhibitors and that those policies, which are not individual in nature, have had a real impact on local demand.

455. In the context of those explanations, the General Court did not cite paragraphs of the pleadings at first instance or paragraphs of the annexes at issue to which those pleadings referred. The General Court's claim that those annexes were admissible is therefore insufficiently substantiated. It is true that, in its pleadings in these appeal proceedings, Servier does indicate the paragraphs of its pleadings at first instance which contained the argument that the annexes in question substantiated and the references to the relevant passages of those annexes. However, it is not for the Court of Justice, in the context of an appeal, to ascertain whether, and to what extent, those annexes did in fact substantiate arguments contained in the application and to proceed itself, in so doing, to examine the admissibility of those annexes at first instance.

456. In addition, it is impossible for the Court of Justice to ascertain whether, and to what extent, the General Court relied on Annexes A 286, A 287 and C 29 as part of its subsequent considerations. Although the General Court does indeed refer to the documents contained in those annexes, the numbers of those annexes are not cited in paragraphs of the judgment under appeal other than paragraphs 1345 (which summarises the Commission's arguments) and 1459 to 1463 (which examine the admissibility of the annexes at issue).

457. Accordingly, the judgment under appeal must be held to be vitiated, in this respect, by an insufficient statement of reasons, which the Commission also pleads and the Court may in any case raise of its own motion.[162] As the Commission submits, the approach adopted by the General Court to the examination of the admissibility of Annexes A 286, A 287 and C 29 differs from how it examined the admissibility of Annexes A 2 and A 3, which it analysed in detail in paragraphs 107 to 116 of the judgment under appeal.

[162] See judgment of 20 December 2017, *EUIPO* v *European Dynamics Luxembourg and Others* (C-677/15 P, EU:C:2017:998, paragraph 36 and the case-law cited).

458. In those circumstances, the tenth ground of appeal must be upheld, without it being necessary to examine the admissibility of Annex C 29 in the light of the principles recalled in point 451 above.

(4) The relevant technology market (eleventh ground of appeal)

459. In the context of its eleventh ground of appeal, the Commission claims that the General Court erred in law by annulling the findings in the decision at issue concerning the relevant perindopril API technology market and the dominant position held by Servier on that market (point 341 above).

460. In paragraphs 1611 to 1622 of the judgment under appeal, the General Court concluded that the Commission's findings concerning the relevant perindopril API technology market and Servier's position on that market were incorrect based on its own findings regarding the Commission's incorrect definition of the relevant finished product market.

461. However, since the analysis of the eighth and ninth grounds of appeal has revealed that those findings are incorrect and must be set aside (see points 398 to 403 and 437 to 448 above), the General Court's considerations on the relevant perindopril API technology market also appear to be vitiated by errors of law.

462. In those circumstances, the eleventh ground of appeal must be upheld, without it being necessary to examine the Commission's arguments by which it seeks to demonstrate that the General Court made additional errors of law in its considerations about the relevant perindopril API technology market which are separate from the errors made in connection with the definition of the relevant finished product market.

463. However, it must be observed that, since the General Court's findings on the finished product market cannot support its findings on the technology market as the former are incorrect, the Commission is justified in claiming that the General Court made a separate error of law by failing to analyse the specific considerations set out in the decision at issue relating to the technology market. Indeed, the General Court itself observed, in paragraph 1616 of the judgment under appeal, that the Commission had used, in its analysis of the technology market, other elements than when it determined the relevant finished product market.

(c) Conclusion on the grounds of appeal relating to Article 102 TFEU

464. It follows from the examination of the eighth to eleventh grounds of appeal contained in points 351 to 463 above that all the General Court's findings relating to the Commission's application of Article 102 TFEU (points 343 to 350 above) must be set aside.

465. As has already been recalled in points 251 and 328 above, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may itself, if the decision of the General Court is quashed, give final judgment in the matter, where the state of the proceedings so permits.

466. However, the state of the proceedings does not permit judgment to be given in this matter as regards the pleas in law put forward by Servier at first instance relating to Article 102 TFEU.

467. First, with regard to Servier's fourteenth plea in law at first instance, alleging the incorrect definition of the relevant finished product market, the analysis of the eighth to tenth grounds of appeal revealed deficiencies in the reasoning provided in the judgment under appeal. In addition, the General Court did not examine the third complaint of Servier's fourteenth plea in law at first instance, alleging that the Commission's econometric analysis of prices was vitiated by a methodological flaw. In those circumstances, the Court of Justice itself is unable to give final judgment on that fourteenth plea in law raised by Servier at first instance without itself conducting a new and complete examination of the file.

468. Second, the General Court upheld Servier's fifteenth to seventeenth pleas in law at first instance essentially on the basis of its findings relating to the fourteenth plea in law (points 347 to 349 above). Therefore, the Court is likewise unable to give judgment on those pleas in law without conducting a first and complete examination of the file.

B. The action before the General Court

469. It follows from the considerations set out in points 251 to 253, 328 to 330 and 331 above, that the state of the proceedings permits judgment to be given in this case as regards the classification of the Krka agreements as a single and continuous infringement of Article 101 TFEU, in relation both to the anticompetitive object and the anticompetitive effects of those agreements.

470. The Court of Justice may therefore dispose of the case and reject the ninth and tenth pleas in law as well as the application for annulment of Article 4 and Article 7(4)(b) of the decision at issue made by Servier at first instance.

471. However, it follows from the considerations contained in points 466 to 468 above that the state of the proceedings does not permit judgment to be given in the matter as regards the fourteenth to seventeenth pleas in law and the application for annulment of Article 6 and Article 7(6) of the decision at issue made by Servier at first instance, nor in relation to the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible.

472. The case should therefore be referred back to the General Court for a new judgment on those pleas and applications.

473. In that context, the Commission asks that the Court of Justice refer the case back to the General Court in a different composition to that which gave the judgment under appeal.

474. It must however be observed that, pursuant to Article 216(1) of the Rules of Procedure of the General Court, the decision to refer back, where appropriate, a case to another chamber after a judgment has been set aside by the Court of Justice is a matter for the President of the General Court.

475. In that regard, the Court of Justice has already had occasion to clarify that the fact that the same Judge sits in two Chambers hearing and determining the same case in succession cannot, by itself, give rise to doubt as to the impartiality of the General Court in the absence of any other objective evidence. [163]

[163] Judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 56).

V. Costs

476. Pursuant to Article 184(2) of the Rules of Procedure of the Court of Justice, 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.

477. First of all, in the present case, it follows from the foregoing considerations that the appeal is well founded in its entirety and that both the General Court's findings on the classification of the Krka agreements as an infringement of Article 101(1) TFEU and those on the infringement of Article 102 TFEU must be set aside.

478. Accordingly, Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS should be ordered to bear, jointly and severally, all their own costs and all the costs of the Commission related to these appeal proceedings.

479. As for the costs related to the proceedings at first instance, it is important to note, first, that they are concerned by these appeal proceedings only in so far as they relate to the ninth, tenth and fourteenth to seventeenth pleas in law raised by Servier at first instance and to the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible.

480. Second, it is important to note that the state of the proceedings permits judgment to be given in the matter only as regards the ninth and tenth pleas in law put forward by Servier at first instance relating to the classification of the Krka agreements as an infringement of Article 101 TFEU, and as regards the application for annulment of Article 4 and Article 7(4)(b) of the decision at issue made by Servier at first instance. The Court may therefore dispose of the case and give final judgment in the matter only in relation to those pleas raised and those applications made at first instance (see points 469 and 470 above).

481. By contrast, the state of the proceedings does not permit judgment to be given in the matter in relation to the fourteenth to seventeenth pleas in law raised by Servier at first instance concerning the classification of its conduct as an infringement of Article 102 TFEU, as regards the application for annulment of Article 6 and Article 7(6) of the decision at issue made by Servier at first instance, and vis-à-vis the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible. The case must therefore be referred back to the General Court for a new judgment on those pleas in law and applications (see points 471 and 472 above).

482. Accordingly, Servier SAS, Servier Laboratoires Ltd and Les Laboratoires Servier SAS should be ordered to bear, jointly and severally, the costs incurred by them and by the Commission at first instance in relation to the ninth and tenth pleas in law at first instance, and the decision on the costs incurred by Servier and the Commission at first instance in relation to the fourteenth to seventeenth pleas in law raised by Servier at first instance and to the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible should be reserved.

483. 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.

484. 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

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

(1) Points 1 to 3 of the operative part of the judgment of the General Court of the European Union of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922), are set aside.

(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 in relation to the ninth, tenth and fourteenth to seventeenth pleas in law at first instance, and the costs relating to the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible.

(3) The ninth and tenth pleas in law and the application for annulment of Article 4 and Article 7(4)(b) 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)), raised by Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS at first instance, are rejected.

(4) The case is referred back to the General Court for a new judgment on the fourteenth to seventeenth pleas in law raised and on the application for annulment of Article 6 and Article 7(6) of Decision C(2014) 4955 final made by Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS at first instance, and on the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible.

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

(6) Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS are to bear, jointly and severally, their own costs and the costs of the Commission related to the proceedings at first instance in so far as they concern the ninth and tenth pleas in law raised and the application for annulment of Article 4 and Article 7(4)(b) of Decision C(2014) 4955 final made by Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS at first instance.

(7) The costs of Servier SAS, Servier Laboratories Ltd, Les Laboratoires Servier SAS and the Commission related to the proceedings at first instance are reserved in so far as they concern the fourteenth to seventeenth pleas in law raised and the application for annulment of Article 6 and Article 7(6) of Decision C(2014) 4955 final made by Servier SAS, Servier Laboratories Ltd and Les Laboratoires Servier SAS at first instance, and the application made by the Commission at first instance for Annexes A 286, A 287 and C 29 to be declared inadmissible.

(8) 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.