Michaelmas Term

[2020] UKSC 44

On appeal from: [2019] EWCA Civ 1096

JUDGMENT

Secretary of State for Health and others (Respondents) vServier Laboratories Ltd and others (Appellants)

before

Lord Reed, President

Lord Lloyd-Jones

Lord Briggs

Lord Sales

Lord Hamblen

JUDGMENT GIVEN ON

6 November 2020

Heard on 9 June 2020

Appellants	Respondent (1)
Kelyn Bacon QC	Jon Turner QC
Daniel Piccinin	David Drake
	Philip Woolfe
(Instructed by Sidley Austin LLP (London))	(Instructed by Peters & Peters Solicitors LLP)

Responden
Daniel Bear
Alexandr
Littlewoo
(Instructed
Reynolds P
Chamberlai
(London
Responden
Laura Eliza
John

(Instructed
Geldards L
(Cardiff)

Appellants:-

(1) Servier Laboratories Ltd

(2) Servier Research and Development Ltd

(3) Les Laboratoires Servier SAS

(4) Servier SAS

Respondents:-

(1) Secretary of State for Health and another

(2) The Scottish Ministers and others

(3) The Welsh Ministers and others

LORD LLOYD-JONES: (with whom Lord Reed, Lord Briggs, Lord Sales and Lord Hamblen agree)

1.
This case concerns the circumstances in which under EU law a finding in a judicial decision by an EU court is binding in later judicial proceedings. The EU principle of res judicata, which applies directly in a domestic court of a member state when dealing with a dispute falling within the scope of EU law, has a number of strands. One is known as relative res judicata and applies where a second action is brought between the same parties, dealing with the same subject matter and based on the same grounds as an earlier action. However, this case concerns a distinct strand known as absolute res judicata or, to use its full Latin tag, res judicata erga omnes. This is intended to convey that, where the principle applies, a judicial decision is given dispositive effect which is binding not simply on the parties to the decision but on all the world. It is a principle of EU law which has been developed by the EU courts in recent decades in a specific context for a specific purpose which relates to the effective judicial control of EU institutions and the maintenance of the EU legal order. It concerns the binding scope of a judgment of the General Court of the European Union ("the General Court") or the Court of Justice of the European Union ("CJEU") annulling a measure adopted by an EU institution. In addressing its scope and applicability it is therefore necessary to set to one side distinct notions of res judicata, issue estoppel and abuse of process as understood in common law jurisdictions.

The factual background

2.
The appellants (referred to collectively as "Servier"), who are defendants in each of the proceedings giving rise to this appeal, developed and manufactured the medicinal product perindopril erbumine ("Perindopril"), which is used in the treatment of cardiovascular diseases including the treatment of high blood pressure. They marketed Perindopril under the trade name "Coversyl". Perindopril falls within the class of medicines known as angiotensin-converting-enzyme inhibitors ("ACE inhibitors"). Servier obtained a number of patents for Perindopril during the course of its development.

3.
The respondents to this appeal (referred to collectively as "the claimants"), are the national health authorities of England, Wales, and Scotland and Northern Ireland. They are the claimants in the national proceedings. The High Court has directed that the three sets of proceedings be jointly

managed and be tried on the same occasion (Order of Henderson J dated 26 February 2016). The present appeal is against the order of the Court of Appeal dated 27 June 2019 that followed a one-day hearing on 18 June 2019 ([2019] EWCA Civ 1096; [2020] Ch 193).That order dismissed Servier's appeal from the order of Roth J at first instance dated 17 April 2019, following a two-day hearing on 6-7 March 2019 ([2019] EWHC 1004 (Ch); [2019] 5 CMLR 6).

The national proceedings

4.
The national proceedings were commenced by the claimants between May 2011 and September 2012. In those proceedings, each of the claimants alleged:

(1)
breaches by Servier of article 101 of the Treaty on the Functioning of the European Union ("TFEU") and/or the Chapter 1 prohibition under the Competition Act 1998 (the "1998 Act"), consisting in the conclusion of anticompetitive agreements between Servier and potential manufacturers and/or suppliers of generic Perindopril, under which the generic manufacturers/suppliers would stay out of the market in return for financial consideration; and

(2)
an abuse of a dominant position by Servier contrary to article 102 TFEU and/or the Chapter 2 prohibition under the 1998 Act consisting in:

(a)
the obtaining, defending and enforcing of an invalid patent through the provision of misleading information to patent authorities and/or courts; and

(b)
the adoption of an exclusionary strategy, designed to keep competitors off the market, by entering into anticompetitive agreements with generic manufacturers and/or suppliers (as above), and by purchasing rights to an alternative means of manufacturing Perindopril developed by a company known as Azad.

5.
In addition, the English claimants alone pleaded a further claim for the tort of causing loss by unlawful means, based on largely the same facts as the alleged patent abuse. Following the striking out of that claim ([2019] EWCA Civ 1160; [2019] 3 WLR 938), the claims are essentially identical across all three sets of proceedings. The English claimants' appeal against the decision of the Court of Appeal to uphold the strike out of that cause of action is pending before the Supreme Court.

6.
The claimants allege that by reason of Servier's unlawful conduct, the entry of generic Perindopril onto the UK market was delayed, which caused the price of Perindopril to be higher than it otherwise would have been. The claimants allege that as a result they have suffered substantial financial loss through the higher prices they have paid for Servier's Perindopril product.

7.
In October 2016, Servier was granted permission by Henderson J to amend its pleadings to include defences to the effect that if liability and causation are established then the claimants' damages should be reduced or extinguished (i) because the claimants failed to mitigate their losses, (ii) for contributory negligence or (iii) because the losses claimed are too remote: [2016] EWHC 2381 (Ch);

[2016] 5 CMLR 25. These defences are described collectively and for convenience as “the prescribing argument”.

The Commission proceedings

8.
In 2009 the European Commission (“the Commission”) commenced an investigation in case COMP/39.612 into whether Servier’s conduct relating to Perindopril had the object or effect of hindering generic entry of Perindopril on European Economic Area (“EEA”) markets. The Commission granted interested party status to the English claimants for the purpose of the administrative stage of the proceedings. This entailed: (i) access to a confidential 16-page summary of the Statement of Objections but not access to any of the evidence, submissions or other documents on the Commission’s file (after the Commission proceedings had concluded, access was granted to relevant documents from the Commission’s file in the disclosure exercise in the national proceedings); (ii) the opportunity, which was taken, to make submissions in writing; and (iii) the opportunity, which was taken, to attend the oral hearing and make 30 minutes’ oral submissions. The other claimants did not request to be and were not interested parties in the proceedings before the Commission.

9.
On 9 July 2014, the Commission issued a decision finding that Servier contravened articles 101 and 102 TFEU and imposing fines (“the Commission Decision”). Those aspects of the Commission Decision concerning article 102 are most relevant to the present appeal. In particular, in determining that Servier held a dominant position in a relevant market (an element of the finding of breach of article 102 TFEU), the Commission defined the relevant market as comprising only Perindopril and it rejected Servier’s argument that it comprised, at least, all ACE inhibitors.

10.
After obtaining disclosure of the Commission Decision on 9 March 2015, the claimants in all three sets of proceedings introduced amendments to their particulars of claim to rely on the Commission Decision, including in relation to the definition of the relevant market.

Servier’s Appeal against the Commission Decision and the General Court Judgment

11.
On 21 September 2014, Servier applied to the General Court in Case T-691/14 seeking the annulment of the Commission Decision. Servier relied on 17 pleas in support of its application, including the 14th plea which was summarised as follows: “… the Commission wrongly and artificially restricted the relevant market for finished products to the single molecule of perindopril, by excluding the 15 other enzyme conversion inhibitors available on the market.”The claimants did not apply to intervene and they were not involved in the General Court proceedings.

12.
The General Court gave its judgment on 12 December 2018 (Case T-691/14) EU:T:2018:922 (the “General Court Judgment”). In it, the General Court:

(1)
annulled one of the findings of infringement of article 101 TFEU (in relation to the settlement agreement between Krka (Krka Tovarna Zdravil dd is a Slovenian pharmaceutical company which had, with a number of other pharmaceutical companies, filed opposition proceedings before the European

Patent Office against one of Servier's patents) and Servier), but upheld the remainder of the Commission's findings of infringement of article 101 TFEU; and

(2)
annulled the finding of infringement of article 102 TFEU in its entirety, on the grounds that the relevant market at the relevant time extended beyond Perindopril and Servier did not have a dominant position in that wider market.

13.
Both the Commission and Servier have now appealed from the General Court Judgment to the CJEU: see pending cases C-201/19P and C-176/19P. The UK Government has been granted permission to intervene in those appeals. The Commission is challenging (i) the General Court's approach to market definition including the General Court's analysis of the considerations of therapeutic substitutability and (ii) the determination that the Krka Agreement was not in breach of article 101 TFEU.

14.
There are significant overlaps between the allegations of infringement in the national proceedings and the infringements investigated and found by the Commission. As a result, it is common ground that the domestic proceedings cannot proceed to a final trial until the Commission proceedings and appeals therefrom have been finally resolved at EU level.

The prescribing argument

15.
The prescribing argument relies (inter alia) on factual contentions that (a) ACE inhibitors exert a "class effect" (meaning that all drugs in the class work in essentially the same way and produce essentially the same effects) and (b) that there was no clinical difference between Perindopril and alternative ACE inhibitors that should have been material to NHS prescribers' choice between ACE inhibitors, or to the claimants' decision as to whether to encourage switching to other ACE inhibitors already available in generic form. On the basis of those factual contentions, Servier pleads further that NHS prescribers could therefore prescribe these ACE inhibitors as an alternative to Perindopril and the claimants should therefore have taken all reasonable steps to encourage switching from the prescription of Perindopril to the prescription of cheaper alternative ACE inhibitors in generic form. Paragraph 83C of Servier's re-re-amended defence to the English claimants' claim sets out the particular steps which Servier contends the claimants should have taken to encourage prescribers to prescribe cheaper alternative ACE inhibitors that, unlike Perindopril, were already available in generic form during the relevant period.

16.
On 31 January 2018, Roth J ordered that there should be a nine-day trial of a set of preliminary issues in relation to the prescribing argument. The early determination of these issues was intended to be useful because it could eliminate or substantially reduce the costs of a disclosure exercise relating to the prescribing argument. On 8 November 2018, the trial estimate for the preliminary issues was extended to 22 days and the trial was relisted for October 2019. Roth J indicated that the preliminary issues trial should not take place before the General Court had issued its judgment, which it had not yet done at that time.

17.
The preliminary issues ordered to be tried, as subsequently amended, were:

(1)
Would it have been reasonable or appropriate in the period between 2003 and 2009 for a clinician to prescribe another ACE inhibitor instead of Perindopril in all circumstances, except where the patient was allergic to or intolerant of all alternative ACE inhibitors?

(2)
If not, in what circumstances would that have been unreasonable or inappropriate?

(3)
Was it unreasonable for the claimants to fail to take any (and if so, which) of the steps set out in paragraph 83C of Servier's re-re-amended defence to the English claimants' claim or identified in Servier's Further Information dated 29 September 2017?

18.
The General Court having delivered its judgment on 12 December 2018, Servier indicated that its position was that certain findings made by the General Court (in particular as to the substitutability of Perindopril with other ACE inhibitors) would be binding on the High Court in the trial of the preliminary issues. On 18 January 2019, Roth J directed the parties to serve pleadings on the question of the extent to which findings of fact made in the General Court Judgment that also arise for determination in the preliminary issue trial of the prescribing argument are binding in that trial.

19.
On 1 February 2019, Servier served its pleading setting out eight propositions of fact derived from the General Court Judgment on which it intended to rely as binding in the trial of the preliminary issues. These propositions were:

(1)
There was no significant difference between Perindopril and other ACE inhibitors in therapeutic terms, including in terms of efficacy and side effects, mode of action, main indications and contra-indications (General Court Judgment paras 1425, 1429, 1481, 1519, 1589).

(2)
ACE inhibitors were widely perceived as substitutable by prescribers and there were many medications considered by physicians as therapeutic equivalents to Perindopril (General Court Judgment paras 1481, 1489).

(3)
There were no reasons why physicians should not have prescribed ACE inhibitors other than Perindopril for new patients (General Court Judgment para 1489).

(4)
Switching between ACE inhibitors for existing patients did not raise particular fears on the part of physicians (General Court Judgment para 1519).

(5)
The prescribing behaviour of physicians was not characterised by a high degree of "inertia" and treatment changes in patients undergoing continuous treatment were significant (General Court Judgment para 1544).

(6)

At least some Primary Care Trusts (“PCTs”) considered, as from 2005, that Perindopril was no more effective than any other ACE inhibitor and recommended, for cost reasons, the use of other ACE inhibitors than Perindopril, or even the substitution of another ACE inhibitor for Perindopril, in particular lisinopril or ramipril (General Court Judgment para 1464).

(7)
At least some PCT policies had a real negative effect on Perindopril sales at local level (General Court Judgment para 1534).

(8)
Servier’s promotional activities did not sufficiently differentiate Perindopril from other ACE inhibitors for it to be recognised for particular therapeutic qualities by physicians (General Court Judgment paras 1472, 1473).

20.
Servier contended that in so far as those propositions were findings made in the General Court Judgment, they were binding in the preliminary trial for two reasons:

(1)
the EU law principle of res judicatarenders findings of fact and law constituting the ratio of an annulling judgment of the General Court binding erga omneswith absolute effect; and

(2)
in all of the circumstances of the case, including the claimants’ ability to participate in the EU proceedings (through the UK state) and their own positive reliance on the Commission’s findings in relation to the prescribing argument, it would be an abuse of process for the claimants to require Servier to relitigate those factual issues in the mitigation trial.

21.
The claimants admitted as facts the propositions stated at (6) and (7) in para 19 above, so the question of whether those findings were binding did not arise for consideration by Roth J. The claimants denied, however, that the principle of res judicataconfers binding effect in respect of the other findings of fact relied on by Servier in these proceedings, and denied that there would be an abuse of process as alleged or at all.

22.
In his judgment Roth J addressed (at para 51) the question of whether the six disputed propositions were actually found as facts in the General Court Judgment. He concluded that:

(1)
propositions (1) to (3) were findings made in the General Court Judgment;

(2)
proposition (5) was only made in modified form, to the effect that the Commission had not established that the prescribing behaviour of physicians was characterised by a high degree of “inertia”, and treatment changes in patients undergoing continuous treatment were significant; and

(3)
propositions (4) and (8) were not findings made in the General Court Judgment.

23.

In his judgment, Roth J held that none of the findings of fact constituted res judicatafor the purposes of the preliminary issues trial, and that it was not an abuse of process for the claimants to advance arguments and adduce evidence at the preliminary issues trial contrary to the propositions set out by Servier.

24.
Roth J granted permission to appeal in respect of Servier's res judicatapleading on the grounds that the question of how the EU principle of res judicataapplies in this context had not been decided before and raised an important issue on which Servier had a reasonable prospect of success. In addition, Servier sought permission first from Roth J, and then from the Court of Appeal, on the questions of (i) whether propositions (4), (5) and (8) had been found as facts in the General Court Judgment, and (ii) on the question of abuse of process. Permission to appeal was refused on these further grounds.

25.
On 18 June 2019, the Court of Appeal heard the expedited appeal from Roth J in relation to the issue of res judicata. On 27 June 2019 the Court of Appeal delivered its judgment ([2020] Ch 193), in which it held that none of the findings of fact relied on by Servier constituted res judicatafor the purposes of the preliminary issues hearing. It refused permission to appeal to the Supreme Court.

26.
On 25 July 2019, the Supreme Court granted Servier permission to appeal on the issue of res judicata, solely on the basis that the application involved a point of law which is arguably not acte clair.

27.
On 26 July 2019, at the pre-trial review in relation to the preliminary issues hearing, with the consent of the parties, Roth J vacated the October 2019 preliminary issues hearing pending determination of this appeal to the Supreme Court.

Issues on this appeal

28.
On this appeal, the Supreme Court is asked to determine whether the following findings of fact made by the General Court are binding on the national court in a trial of preliminary issues under the EU principle of res judicata:

(1)
the finding that there was no significant difference between Perindopril and other ACE inhibitors in therapeutic terms, including in terms of efficacy and side effects, mode of action, main indications and contra-indications (paras 1425, 1429, 1481, 1519 and 1589 of the General Court Judgment);

(2)
the finding that ACE inhibitors were widely perceived as substitutable by prescribers and there were many medications considered by physicians as therapeutic equivalents to Perindopril: (paras 1481 and 1489 of the General Court Judgment);

(3)
the finding that there was no element that limited the discretion available to physicians to prescribe ACE inhibitors other than Perindopril for new patients (para 1489 of the General Court Judgment); and

(4) the findings: (i) that the Commission had not established that the prescribing behaviour of physicians was characterised by a high degree of “inertia”; and (ii) treatment changes in patients undergoing continuous treatment were significant (paras 1540 and 1544 of the General Court Judgment).

29.
Servier contends that the appeal raises a point of EU law that cannot be characterised as acte clairagainst Servier. By contrast, the claimants contend that the point of law is acte clairand that the High Court and Court of Appeal reached the right conclusion. If the Supreme Court agrees with Servier that this issue is not acte clairagainst it, the Supreme Court is asked to refer the question to the CJEU pursuant to article 267 TFEU and, upon a preliminary ruling being received from the CJEU, to determine the issue.

Preliminary reference to the CJEU

30.
On this appeal Servier seeks a preliminary reference to the CJEU. Ms Kelyn Bacon QC for Servier submits that the limitations imposed by the Court of Appeal on the absolute res judicata principle have no basis in the EU jurisprudence. However, recognising that the application of the principle in domestic proceedings has never previously been considered by the EU courts, she submits that the appropriate way forward is for this court to make a reference to the CJEU under article 267 TFEU. She accordingly submits that the CJEU should be asked directly whether the findings of fact identified by Servier in the judgment of the General Court are binding in the national proceedings in relation to the quantification of the claimants’ loss. That, she submits, is a question of law the answer to which is essential to the pending national proceedings and which cannot be said to be acte clair against Servier.

31.
I consider that the fact that the Commission has appealed against the judgment of the General Court to the CJEU where that appeal is pending constitutes an insuperable obstacle to this court making a preliminary reference at this time. It is clearly established in the case law of the European courts that the principle of absolute res judicata applies only to judicial decisions which have become definitive after all rights of appeal have been exhausted, or after expiry of the time limits provided to exercise those rights. It is only in such circumstances that the principle operates so as to prevent a judicial decision from being called into question (P&O European Ferries (Vizcaya) SA v Commissionof the European Communities (Joined Cases C-442/03P and C-471/03P) [2006] ECR I-4845 (“P&O European Ferries CJEC”), para 47; Artegodan GmbH v European Commission (Case C-221/10P) EU:C:2012:216 (“Artegodan”), paras 86-78, 92-93). Indeed, on the hearing of the appeal before us, this was common ground between the parties. The Commission’s appeal to the CJEU attacks the decision of the General Court on the definition of the relevant product market. There can be no definitive judicial ruling on that issue until the judgment of the CJEU is handed down. That court may come to a different conclusion on this issue from that of the General Court. At that time, it would be necessary to analyse the decision and reasoning of the CJEU and to consider the possible application of the absolute res judicata principle to that judgment. As matters presently stand, it cannot be said, in accordance with article 267 TFEU, that answers to the questions which Servier proposes we should refer to the CJEU are necessary in order to enable the national courts to give judgment. Those questions ask, in particular, whether specific findings in the General Court Judgment are binding on the national courts. Those findings may well be reversed or rendered redundant by the judgment of the CJEU on the appeal.

32.
For the same reasons, the hearing of this appeal may be considered premature. This court has been addressed on the findings of the General Court in relation to the relevant product market and invited to rule on whether under the principle of absolute res judicata they are binding on the parties in the national proceedings. The short answer is that they are not because, as matters stand, the findings are not definitive and they may never become definitive because they may be overturned by the CJEU on appeal. Nevertheless, the underlying issues of law before us are of considerable general importance and have been addressed in detail in the judgment of the Court of Appeal and in the submissions of counsel to this court. As the members of this court have come to a clear and unanimous view on the underlying legal issues, it is appropriate for this court to set out its views in the hope that they might assist in later stages of the national proceedings.

The principle of absolute res judicata

33.
The leading authority on the EU principle of absolute res judicata is P&O European Ferries CJEC. It is necessary to refer to the history of the litigation in some detail. In July 1992 P&O Ferries entered into an agreement (“the original agreement”) with the Ministry of Trade and Tourism of the Basque Government (“the Ministry”) and the Provincial Council of Biscay (“the Diputación”) relating to the establishment of a ferry service between Bilbao and Portsmouth, under which the Ministry and the Diputación agreed to purchase over a period of three years 26,000 travel vouchers for use on that ferry route at a price higher than the commercial rate. Brittany Ferries (“BAI”), which operated a service between Plymouth and Santander, complained to the Commission alleging that this amounted to state aid. The Commission took the initial view that the agreement was not a normal commercial transaction and initiated a procedure to investigate whether the agreement was a state aid incompatible with the common market. Implementation of the original agreement was later suspended and on 7 March 1995, P&O Ferries entered into a new agreement (“the new agreement”) with the Diputación but not with the Ministry, under which the Diputación agreed to buy 46,500 travel vouchers for use on the same route over a three-year period with the price per ticket set at a discounted rate to reflect the Diputación’s long-term purchasing commitment. The new agreement was notified to the Commission in accordance with state aid rules. On 7 June 1995 the Commission adopted a decision terminating the procedure that it had initiated to investigate the original agreement. The Commission stated that the new agreement introduced significant modifications which met its earlier concerns and that, accordingly, it did not constitute state aid. That decision was challenged by BAI before the Court of First Instance. P&O Ferries and the Kingdom of Spain intervened in support of the Commission but the Diputación did not intervene. By its judgment of 28 January 1999 in Bretagne Angleterre Irlande(BAI) v Commission of the European Communities (Case T-14/96) [1999] ECR II-139 (“BAI v Commission”), the Court of First Instance annulled the decision of 7 June 1995 on the ground that the Commission had founded its decision that the new agreement did not constitute state aid on a misinterpretation of the state aid rules.

34.
In May 1999 the Commission accordingly decided to initiate a state aid procedure to investigate the new agreement. On 29 November 2000 it adopted a decision in which it declared that the new agreement did constitute state aid and that the aid was incompatible with the common market. The Kingdom of Spain was ordered to recover the sums already paid. P&O Ferries and the Diputación challenged that decision in the Court of First Instance, the Diputación challenging the whole decision but P&O merely challenging the order for recovery of aid already paid. In its judgment of 5 August

2003 in P&O European Ferries (Vizcaya) SA v Commission of the European Communities (Joined Cases T-116/01 and T-118/01) [2003] ECR II-2957 (“P&O Ferries GF1”) the Court of First Instance rejected a plea by the Commission that the challenge was inadmissible because of the force of res judicata arising from the judgment in BAI v Commission. The Court of First Instance held (at paras 77-80) that the force of res judicata attaching to a judgment could constitute a bar to the admissibility of an action only if the action which gave rise to the judgment was between the same parties, had the same subject matter and was founded on the same grounds. Accordingly, res judicata could not be pleaded where the actions did not relate to the same measure, since the measure whose annulment was sought was an essential element of the subject matter of an action. In its view, since the action was directed against the Commission’s decision of 29 November 2000 while the BAI v Commission judgment concerned the Commission’s decision of 7 June 1995 the two actions could not be considered to have the same subject matter. Furthermore, the action was not between the same parties as those in the BAI case. Res judicata did not prevent the action from being brought. However, on addressing the merits, the Court of First Instance concluded, in summary, that the changes made in the new agreement did not affect the substance of the aid instituted by the original agreement and that the two agreements constituted a single grant of aid. The challenge to the Commission’s infringement decision was therefore dismissed.

35.
P&O Ferries and the Diputación appealed against this judgment to the Court of Justice of the European Communities (“CJEC”). On the appeal the Commission did not revive its objection on grounds of res judicata but the CJEC took the point of its own motion on the basis that observance of the principle was a matter of public policy and a fundamental principle of the Community legal order. On this issue, Advocate General Tizzano (at paras 60-79 of his Opinion EU:C:2006:91) came to the same conclusion as the Court of First Instance but for different reasons. He was not sure that the fact that the parties to the two sets of proceedings were different was decisive. What mattered, in his view, was whether the cases dealt with the same subject matter. This did not require that two claims should be entirely identical but that they related to the points of law before the court. He considered that the point of law at issue in both cases was the same, namely the assessment that the Commission had made of the measure at issue in determining whether or not the new agreement constituted state aid. However, since after the BAI v Commission judgment the Commission had instituted a new procedure, during which the interested parties had submitted further observations and information, he could not ignore the possibility that the replacement Commission decision of 29 November 2000 had been based on new material. On this basis he considered that there was no res judicata.

36.
The CJEC, however, rejected both the General Court’s view and the Advocate General’s view of the scope of the force of res judicata attaching to the BAI v Commission judgment:

“41. Contrary to the view taken by the Court of First Instance, the BAI v Commission judgment did not only have relative authority preventing merely new actions frombeing brought with the same subject-matter, between the same parties and based onthe same grounds. That judgment was invested with the force of res judicatawithabsolute effect and prevented legal questions which it had already settled from beingreferred to the Court of First Instance for re-examination.

42. In the BAI vCommission judgment the Court of First Instance annulled the decision of 7 June 1995 in which the Commission held that the new agreement did not constitute state aid and consequently decided to terminate the review procedure which had been initiated in respect of the aid granted to Ferries Golfo de Vizcaya.

43. That annulment led retroactively to the disappearance of the decision of 7 June 1995 with regard to all persons. An annulling judgment of that nature thus has authority erga omnes,which gives it the force of res judicata with absolute effect (see, in particular, France v High Authority (Case 1/54) [1954] ECR 1, or p 17, 34; Italy vHigh Authority (Case 2/54)[1954] ECR 37, at p 55; Assider v High Authority (Case 3/54)[1955] ECR 63; and Commission vAssiDomän Kraft Products (Case C-310/97P) [1999] ECR I-5363, para 54).

44. That authority is not attached only to the operative part of the BAI vCommission judgment. It is also attached to the ratio decidendiof that judgment which isinseparable from it (see, to that effect, Asteris vCommission (Joined Cases 97/86, 193/86, 99/86 and 215/86) [1988] ECR 2181, para 27, and Commission v AssiDomän Kraft Products, para 54).

45. In addition, the question of the force of res judicatawith absolute effect is a matter of public policy, which must, consequently, be raised by the court of its own motion."

37.
The CJEC then applied those principles to the case before it (at paras 46-52). In order to annul the decision of 7 June 1995 the Court of First Instance based itself on the conclusion that the new agreement was not a normal commercial transaction and on the fact that the cultural and social aims pursued by the Spanish authorities played no part in the characterisation of the new agreement in the light of the Treaty provisions. Furthermore, the Court of First Instance had found that the Commission's conclusion that the new agreement did not constitute state aid was based on a misinterpretation of the Treaty provisions. There had been no appeal against the judgment in BAI v Commission and its operative part and ratio decidendi had therefore become final. In the view of the CJEC, it was clear from the grounds of that judgment that the Commission should have classified the aid at issue as state aid and that, following the annulment, it would have to reopen the review procedure in respect of that aid. In order to comply with that judgment, the Commission, as it was required to do, reopened the review procedure on the compatibility of the aid in dispute with the Treaty. In the contested decision it had confirmed the classification as state aid acknowledged by the Court of First Instance in the BAI v Commission judgment and had considered that the aid in dispute was incompatible with the Treaty. The Commission therefore gave its decision on the same measures as those which were classified as state aid in the BAI v Commission judgment. The CJEC continued:

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

51. Thus, the judgment under appeal is vitiated by an error of law in so far as it examined the plea alleging infringement of article 87(1) EC (now article 107 TFEU) which, in its three parts, sought to challenge the classification of the aid in dispute as state aid. That error does not, however, mean that the operative part of the judgment under appeal should be called into question.

52. It follows from the above considerations that the Diputación's first three grounds of appeal cannot, in the light of the force of res judicata of the BAI vCommission judgment, be examined by the Court of Justice. Those grounds of appeal are irrelevant and must be dismissed."

38.

In seeking to define the scope and applicability of the principle of absolute res judicata it is essential to have regard to its purpose. This is firmly rooted in the annulment by the EU courts of acts of EU institutions. Article 263 TFEU provides for the judicial review of the legality of certain acts of specified EU institutions and, for this purpose, it confers jurisdiction in actions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Pursuant to article 266 TFEU, an institution whose act has been annulled is required to take the necessary measures to comply with the annulling judgment. As the CJEC explained in P&O Ferries, where a Commission decision has been annulled on substantive as opposed to procedural grounds the judgment itself has the force of res judicata; what becomes binding is the substance of the judgment and not simply the conclusion that the Commission has failed to adduce sufficient evidence to support the decision. Furthermore, the annulment of the act which has been challenged leads retroactively (ex tunc) to the disappearance of the act in question with regard to all persons (P&O European Ferries CJEC at para 43). An annulling judgment of that nature accordingly has authority erga omnes, which gives it the force of res judicata with absolute effect. This is necessary in order to ensure stability of legal relations, in particular by securing that legal matters which have been definitively settled by judicial decision cannot be referred once again to the EU courts for reconsideration (P&O Ferries CJEC at para 41; Artegodan at para 86). It also serves to define with certainty what is required in order to comply with the annulling decision and, thereby, to assist the institution concerned to achieve compliance. If, however, subsequent proceedings do not call into question an issue that has already been settled by the EU courts, the principle of absolute res judicata can have no application.

39.
The principle of absolute res judicata gives dispositive effect to the judgment itself. It is the usual practice of EU courts to express the outcome of the action in a brief final paragraph of the judgment referred to as the operative part. While this will have binding effect, it will be necessary to look within the judgment beyond the operative part in order to ascertain its basis, referred to as the ratio decidendi. (EU law has no system of stare decisis or binding precedent comparable to that in common law jurisdictions and this EU concept of ratio decidendi is, once again, distinct from the concept bearing the same name in the common law.) It will be essential to look beyond the operative part in this way in order to identify the reason for the decision and in order that the institution whose act has been annulled should know what steps it must take to remedy the situation. In a case where the principle of absolute res judicata applies, it will extend to findings that are the necessary support for the operative part of the annulling judgment.

40.
This has been expressed very clearly by the CJEC in a series of cases. In Asteris AE v Commission of the European Communities (Joined Cases 97/86, 193/86, 99/86 and 215/86) [1988] ECR 2181; [1988] 3 CMLR 493 (“Asteris”) it observed at para 27:

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

Similarly, in Commission of the European Communities vAssiDomän Kraft Products AB (Case C-310/97P) [1999] ECR I-5363 (“AssiDomän”) the CJEC observed at para 55:

“The only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the Community Court … is to determine the exact meaning of the ruling made in the operative part of the judgment.”

These authorities were referred to by the CJEC in P&O European Ferries CJEC (at para 44, cited at para 36 above) where it observed that the authority erga omnes of an annulling judgment “is not attached only to the operative part of the BAI v Commission judgment but is also attached to the ratio decidendi of that judgment which is inseparable from it.” Similarly, in Artegodan (at para 87) the CJEU observed:

“In that regard, the court has held, firstly, that res judicata extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question … and, secondly, that the force of res judicata attaches not only to the operative part of that decision, but also to the ratio decidendi of that decision which is inseparable from it …”

41.
In the present case, Servier submits that the four findings of the General Court on which it seeks to rely (see para 28 above) are binding for all purposes in the claimants’ damages actions. While accepting that the ultimate question before the General Court was whether other ACE inhibitors were substitutable for Perindopril at the relevant time, Servier maintains that the court needed to make each of the key findings on which they now seek to rely and that, accordingly, they form part of the ratio decidendi which is binding. The claimants, on the other hand, while denying that the four findings of the General Court on which Servier seeks to rely are essential to or inseparable from the General Court’s final conclusion that the Commission erred in its definition of the relevant product market, raise the more fundamental objection that the principle of absolute res judicata is limited to preventing an annulment judgment from being called into question in subsequent proceedings.

42.
The purpose of the principle of absolute res judicata provides the key to identifying which parts of an annulling decision are binding erga omnes. They can have that effect only if it is necessary to respect them in order to prevent the court’s conclusions from being undermined or, in the context of an EU institution charged with complying with the terms of the judgment, in order to prevent contradiction of the court’s decision as to what needs to be done to secure compliance with EU law. Considered in the light of its purpose, it is clear that the notion of ratio decidendi comprises the grounds which form the essential basis of the judgment, the precise reasons for the illegality. It is for this reason that it is inseparable from the authority erga omnes of an annulling judgment. As the claimants put it in their written case, only those aspects of the grounds of the judgment which explain the meaning of the annulment decision form part of the ratio decidendi because those are the aspects which must be respected in order to fulfil the purpose of preventing the annulment judgment from being called into question in subsequent proceedings.

43.
Contrary to the submission on behalf of Servier, the judgment of the General Court in Shoe Branding Europe BVBA v European Union Intellectual Property Office (EUIPO) (adidas AG intervening) (Case T-629/16) EU:T:2018:108 (“Shoe Branding”) is not inconsistent with this analysis. In an earlier case (adidas AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (Shoe Branding Europe BVBA intervening) (Case T-145/14) [2015] ETMR 33 (“adidas”)) the General

Court annulled a decision of the Board of Appeal of OHIM that a trademark registered by Shoe Branding consisting of two diagonal stripes on a shoe was sufficiently different from adidas's three stripe mark to be regarded as dissimilar and not likely to give rise to consumer confusion. Before the General Court adidas had alleged several errors of assessment by the Board in assessing the likelihood of consumer confusion within article 8(1)(b) of Council Regulation (EC) No 207/2009. The General Court undertook an assessment of all factors relevant to the case and concluded that the Board of Appeal had made several errors in assessing the competing marks. One element of the General Court's reasoning (at paras 31-35, 40-42) was that, as a matter of fact, the shoe purchasing public is made up of average consumers, whose degree of attention is only average. The General Court recalled that the average consumer normally perceives a mark as a whole and does not analyse its various details. On this basis the General Court concluded (at para 43) that the combined effect of the errors meant that the Board of Appeal had been wrong to conclude that the marks were visually dissimilar and (at paras 49-50) that this vitiated its finding that there was no likelihood of confusion. The General Court (at para 53) upheld on the same basis a further plea of adidas relating to infringement of article 8(5) of Regulation 207/2009 which applies where a mark would take unfair advantage of, or be detrimental to, the distinctive character or reputation of a similar earlier trademark.

44.
The Board of Appeal of OHIM then reconsidered the matter. In its fresh decision it applied the General Court's reasoning to conclude that there was visual similarity between the marks and it went on to find that the use of the new mark by Shoe Branding would take unfair advantage of the reputation of adidas's mark. Shoe Branding then appealed to the General Court (Shoe Branding (Case T-629/16)) challenging, inter alia, the Board's assessment of the existence of damage to the reputation or distinctive character of adidas's mark. The General Court rejected Shoe Branding's complaint of a misapplication of the average consumer test on the basis that it concerned matters that were res judicata with absolute effect as a result of the adidas judgment. In particular, it held (at paras 103-105) that the General Court's findings in adidas relating to the degree of attention of the relevant public "constitute the necessary support for the operative part of that judgment" and therefore "themselves have the authority of res judicata with absolute effect". As the Board had fully complied with those grounds of the annulling judgment it was not open to Shoe Branding to challenge the Board's assessment regarding the degree of attention of the relevant public. Furthermore, with regard to Shoe Branding's complaint concerning the failure of the Board to perform a global assessment of the degree of similarity, the court concluded (at paras 111-112) that the General Court in adidas had definitively settled the issue of similarity by considering the similarities and differences in the marks for itself. The General Court observed (at paras 113-115) that the court's conclusions on the similarity of the marks in adidas constituted "the necessary support for the operative part" of that judgment, that it had not been open to the Board to depart from the court's assessment of similarity in adidas and that it was therefore not open to Shoe Branding to challenge the Board's adoption of that conclusion.

45.
Ms Bacon is correct in her submission on behalf of Servier that the General Court's findings in relation to the degree of attention of the relevant public were not the ultimate conclusion on the legal issue in the adidas case. They were findings of fact that fed into the court's multifactorial assessment of the similarity between the two marks which in turn led to the court's ultimate conclusion on risk of confusion under article 8(1)(b) of Regulation 207/2009 and detriment to reputation under article 8(5). The finding in the adidas case as to the degree of attention paid by purchasers was inseparable from

the court's ultimate conclusion in that appeal and, as a result, it was part of the ratio decidendi. However, as Rose LJ explained in her insightful judgment in the Court of Appeal in the present case (at para 69), in the challenge brought by Shoe Branding the debate was not about whether or not buyers of sports shoes pay average or lower than average attention to buying shoes but about whether Shoe Branding was entitled to try to overturn the Board of Appeal's finding that the marks were similar on the grounds that buyers paid higher than average attention. The ruling was that Shoe Branding could not rely on that or on any other ground for the purpose of challenging the decision that the marks were similar. It was in that context, and that context alone, that the previous decision as to the degree of attention paid by purchasers was binding.

46.
Turning to the judgment of the General Court in the present case (Case T-691/14) EU:T:2018:922, the operative part of the judgment simply annuls the finding that there has been an infringement of article 102 TFEU and is uninformative as to the basis for doing so. An examination of the judgment reveals that the specific reason it came to that conclusion was that the Commission erred in concluding that the relevant product market was limited solely to originator and generic Perindopril as opposed to all ACE inhibitors. In coming to that conclusion, the General Court (at paras 1589-1591) considered that the Commission made a series of errors in the analysis of the definition of the relevant market. In this regard, the General Court made a number of findings of fact, including the four findings on which Servier now seeks to rely. The issue of the scope and extent of the General Court's ratio decidendi only arises in a context where the General Court's assessment of Servier's conduct under article 102 is sought to be re-examined. Assuming for present purposes that the ruling of the General Court were to become definitive, if there were such a challenge it would be necessary to ask which parts of the judgment would need to be respected in order to prevent the judgment from being undermined. If and to the extent that it could be shown that each of the four findings of fact on which Servier now seeks to rely was an essential basis of the General Court's ruling as to what was the relevant product market, those findings would form part of the ratio decidendi and it would not be possible to challenge them for the purpose of challenging the General Court's conclusion as to what was the relevant product market within article 102.

47.
In the present case, however, Servier seeks to rely on the four findings of fact of the General Court in an entirely different context. Ms Bacon submits that the EU principle of absolute res judicata applies to render the four findings of the General Court binding in the national proceedings in relation to issues of causation, remoteness and mitigation of loss. She submits that the General Court has found that all ACE inhibitors were substitutable and were perceived by prescribers as being substitutable, that in practice there were no obstacles to switching between any of them and that these specific findings were the necessary support or essential basis or specific reasons for the General Court's annulment of the Commission Decision. She says that those findings therefore carry the authority of res judicata erga omnes with absolute effect in any proceedings that fall within the scope of EU law in which those same factual issues arise.

48.
In making this submission, Servier seeks to detach those findings from the authority erga omnes of the annulling judgment which alone can make them part of the ratio decidendi. Although the proceedings before the national court originally included a claim for damages founded on an infringement of article 102 TFEU, the claimants have confirmed, following the General Court's judgment annulling the Commission Decision, that if that judgment is upheld in the further appeal to

the CJEU that claim will no longer be pursued. As presently constituted, the claim in the national proceedings is a claim for breach of statutory duty founded on alleged infringements of article 101 TFEU. No question arises in the proceedings before the national court as to the relevant product market for the purposes of article 102 or the applicability of article 102. As a result, the ratio decidendi of the annulling judgment is simply not engaged. The findings on which Servier relies have no significance independent of the annulling judgment. It is not necessary to treat those findings as binding in any other legal context in order to preserve the authority of the annulling judgment.

49.
Furthermore, the broad view of absolute res judicata for which Servier contends is not supported by the case law of the EU courts. This is not surprising, as to apply the principle in a context detached from the annulling judgment would be entirely inconsistent with the purpose of that principle, which is to prevent the annulling judgment from being called into question in subsequent proceedings.

50.
AssiDomän has its origin in a Commission infringement decision against 43 producers finding unlawful collusion in the international wood pulp market, in particular by concerting on prices for bleached sulphate wood pulp. Subsequently, 26 of the producers, not including AssiDomän or any of the other Swedish producers, applied successfully to annul that decision (Ahlström Osakeyhtiö v Commission of the European Communities (Joined Cases C-89, 104, 114, 116-117 and 125-129/85) [1988] ECR 5193 (“Wood Pulp”)). Later, and after the expiry of the time limit for challenging the Commission’s decision, the Swedish producers asked the Commission to reconsider their legal position in the light of the Wood Pulp judgment and to refund to each of them the fines which they had paid, to the extent that they exceeded the sum upheld by the CJEC in relation to certain applicants for findings of infringement which it had not annulled. They contended in particular that they were in the same position as the other producers in relation to the operative part of the Wood Pulp judgment and that the annulment by the CJEC of the Commission’s finding that addressees of the Commission decision had concerted on prices should also have been applied to them, even though they were not party to the proceedings in Wood Pulp. The Commission refused their request and the Swedish producers brought proceedings challenging that refusal. That challenge succeeded before the Court of First Instance (AssiDomän Kraft Products ABv Commission of the European Communities (Case T-227/95) [1997] ECR II-1185; [1997] 5 CMLR 364) but failed on appeal by the Commission to the CJEC (Case C-310/97P) [1999] ECR I-5363; [1999] All ER (EC) 737.

51.
In their action for annulment of the Commission’s refusal decision the Swedish producers advanced two grounds. First, they contended that the Commission infringed the principle of EU law according to which a judgment annulling a measure has the effect of rendering the contested measure null and void, erga omnes and ex tunc. Secondly, they contended that the Commission had infringed the first paragraph of what is now article 266 TFEU. A Grand Chamber of the CJEC considered that the Commission’s original infringement decision had to be regarded as a bundle of individual decisions against each producer. It considered ([1999] ECR I-5363, paras 50-53) that what is now article 266 TFEU requires an institution which adopted an annulled measure only to take the necessary measures to comply with the judgment annulling its measure and that if an addressee of a decision decides to bring an action for annulment, the matter to be tried relates only to those aspects of the decision which concern that addressee. It continued:

“[54] Furthermore, although the authority erga omnes exerted by an annulling judgment of a court of the Community judicature … attaches to both the operative part and the ratio decidendi of the

judgment, it cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality.

[55] The only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the Community Court … is to determine the exact meaning of the ruling made in the operative part of the judgment. The authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever."

52.
Servier submits that AssiDomän is a case where the applicants sought to rely on findings of fact about the conduct of the non-Swedish producers to prove similar but distinct factual propositions about the Swedish producers. In their submission, because the findings of fact in the earlier Wood Pulp decision were different there was no scope for the application of the principle of absolute res judicata. This is, however, a misreading of the CJEC decision in AssiDomän. The plea of the Swedish producers related to findings as to the wood pulp market made in the earlier decision and which applied directly to the Swedish producers. Thus the Court of First Instance in AssiDomän expressly stated (at para 75) that the decision had been annulled "on the basis of considerations which apply generally to the Commission's analysis of the wood pulp market and are not founded on any examination of conduct or practices on the part of individual addressees of the Wood Pulp decision" and (at para 82) that the relevant findings related "generally to the validity of the Commission's economic and legal assessment of parallel conduct observed on the market". Similarly, on appeal to the CJEC, Advocate General Ruiz-Jarabo Colomer (at para 71) expressly endorsed the former statement of the Court of First Instance. Accordingly, the point of distinction identified by the CJEC was not, as Servier submits, the scope of the findings of fact in Wood Pulp but, rather, the ambit of the operative part of the annulling judgment. The reasoning of the CJEC was that the principle of absolute res judicata did not apply because the legal context was materially different. AssiDomän therefore provides compelling support for the claimants' submission that the grounds of an EU judgment annulling a measure cannot be considered to have binding effect when transplanted into a context divorced from the annulling judgment.

53.
European Commission v Tomkins plc (In re Copper Fittings Cartel) (Case C-286/11P) [2013] Bus LR 999 ("Tomkins") does not support Servier's reading of AssiDomän. In Tomkins an operating subsidiary company and its parent company were penalised by the Commission for infringement of the EU competition rules. The liability of the parent was wholly derived from the subsidiary's participation in the cartel and the Commission imposed a fine jointly and severally on the parent and subsidiary. They each brought separate actions before the General Court challenging the Commission's decision. The subsidiary's appeal succeeded in obtaining an annulment of the decision in relation to a period of the infringement that the parent had not challenged in its appeal. The General Court ((Case T-382/06) [2011] ECR II-1157), nevertheless, annulled the Commission's decision in relation to the parent company's involvement during that period, because its liability was wholly derived from that of the subsidiary. The Commission appealed to the CJEU, arguing that in reducing the duration of the infringement for the parent, without any express claim to that end having been made by the parent, the General Court had ruled ultra petita, thereby infringing the court's case law, in particular the judgments in AssiDomän andArcelorMittal Luxembourg SA v Commissionof the European Communities (Joined Cases C-201/09P and C-216/09P) [2011] ECR I-2239. In rejecting that submission, the Grand Chamber held that where the liability of a parent was derived exclusively from

that of its subsidiary and where both have brought parallel actions having the same object, the General Court was entitled, without ruling ultra petita, to take account of the outcome of the action brought by the subsidiary and to annul the contested decision in respect of the relevant period also in so far as the parent was concerned.Contrary to Servier’s submission, Tomkins casts no light on the true effect of AssiDomän.

54.
In Pérez-Díaz v Commission of the European Communities (Case T-156/03) EU:T:2006:153 Mr Pérez-Díaz applied in a competition for inclusion in a reserve list of Commission staff. The 60 best candidates were to be appointed. Mr Pérez-Díaz was rejected and he challenged this decision. The Court of First Instance annulled the decision on the ground that the examining panel had an insufficient knowledge of Spanish, when it was required to assess Mr Pérez-Díaz’s proficiency in that language. Two other unsuccessful candidates, Sabbag and Bachotet, had also successfully challenged the process on the ground that the composition of the assessment panel had fluctuated. The Commission then held a further oral test for Mr Pérez-Díaz before a reconstituted panel which rescored him and compared his new score with the original score of the lowest successful candidate. He was informed that his results in the new test were insufficient and that he could not be included in the reserve list. Mr Pérez-Díaz then brought a further challenge, maintaining that it was wrong to compare his score with a score reached through the original process during which the composition of the panel had fluctuated. Although Mr Pérez-Díaz had not criticised the fluctuation of the composition of the panel in his original challenge, the Court of First Instance held that he could rely on the effects of the annulling judgments in the challenges brought by Sabbag and Bachotet. It held (at para 60) that the organisation of Mr Pérez-Díaz’s new oral test disregarded the res judicata arising from the grounds constituting the necessary support for the operative parts of the judgments in the actions brought by Sabbag and Bachotet against the Commission.

55.
Servier submits that Pérez-Díaz demonstrates that the question whether a res judicata can be relied on in a second set of proceedings depends on a close analysis of the reasons for the annulment in the first decision and whether those same reasons have any application in the second proceedings as opposed to any formal analysis of who the parties were or whether findings are being borrowed from one context to another. However, the judgment shows that the case turns on the scope of the annulling judgments and the Commission’s obligations under article 266 TFEU to take the necessary measures to comply with them. The Court of First Instance explained (at paras 46-48, 57, 60) that in complying with the annulling judgment resulting from Mr Pérez-Díaz’s first challenge the Commission was required to act in accordance with EU law and was therefore required to remedy the breach of equal treatment arising from the fluctuation of the composition of the panel, identified in the challenges of the other unsuccessful candidates, which had vitiated the examination of all the candidates including Mr Pérez-Díaz. The Commission could not legally, in remedying the annulment decisions in accordance with article 266, re-open the selection procedure for the benefit of the excluded candidates by reproducing the conditions of the conduct of the initial oral test. The Commission’s remedial obligation resulting from the judgments in the Sabbag and Bachotet challenges extended to according equal treatment to Mr Pérez-Díaz. In simply comparing his result on the second assessment with the results of the original flawed process, the Commission had failed to discharge that obligation. This is not, therefore, a case where a factual finding was transposed with binding effect from its context in an annulling judgment to the distinct context of different litigation. The finding had no legal force independent of the annulment declaration.

56.
Pérez-Díaz exemplifies a feature of the principle of absolute res judicata which the CJEC described in Asteris. Having explained (at para 27, cited at para 40 above) that the obligation of an EU institution to comply with an annulling judgment requires it to have regard not only to the operative part but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part, the CJEC continued (at para 28):

“However, although a finding of illegality in the grounds of a judgment annulling a measure primarily requires the institution which adopted the measure to eliminate that illegality in the measure intended to replace the annulled measure, it may also, in so far as it relates to a provision with specific scope in a given area, give rise to other consequences for that institution.”

57.
In Asteris the CJEC had, in an action brought by Greece, annulled Commission Regulation No 1615/83 fixing the coefficients to be applied to the production aid for tomato concentrates for the 1983/84 marketing year. The Regulation was annulled to the extent to which the coefficients resulted in inequality of treatment as between Greek producers and those in other member states. In its annulling judgment the CJEC stated that it was the duty of the Commission to fix new coefficients for Greece or to devise some other system of compensation taking account of the fact that the aid scheme differentiated between Greece and the other member states. The Commission adopted a new Regulation in respect of the 1983/84 year but refused to adopt new regulations in respect of the years before or after 1983/84. Of the Regulations which the Commission refused to amend, the Regulations in respect of the years 1981/82 and 1982/83 were adopted before the annulled Regulation and the Regulation in respect of the years 1984/85 to 1986/87 was adopted after the annulled Regulation. Greece challenged the Commission’s refusal to take the necessary consequential measures with respect to the previous and subsequent years, covered by regulations identical to the annulled Regulation but which were not challenged within the prescribed time limits. The CJEC noted that those Regulations related to situations different from those governed by the annulled Regulation. Having set out (at paras 26 and 27, cited above) the obligations which an annulling judgment entails for the institution concerned, the CJEC held (at paras 29-31) that where, as in that case, the effect of the annulled Regulation was limited to a clearly defined period (ie the year 1983/84) the institution which adopted the measure (ie the Commission) was, first, under an obligation to ensure that the new legislation adopted following the annulling judgment and governing the marketing years subsequent to that judgment contains no provisions having the same effect as the provisions held to be illegal. However, by virtue of the retroactive effect of annulling judgments, the finding of illegality took effect from the date on which the annulled measure entered into force. Accordingly, the Commission was also under an obligation to eliminate from the Regulations already adopted when the annulling judgment was delivered and governing years after 1983/84 any provisions with the same effect as the provision held to be illegal. Consequently, the finding that the coefficients to be applied to the amount of aid for Greek producers were illegally fixed was binding with respect not only to the year 1983/84 covered by the annulled Regulation, but also to all subsequent marketing years. By contrast, that finding could not apply to the marketing years covered by the Regulation adopted before the year 1983/84.

58.
The grant of relief in Asteris in respect of the later years was not the result of the transposition with binding effect of an essential finding to a different legal context. Rather, it provides a further example

of the further consequences which may be required to flow from an annulling judgment. (See further in this regard Société Nouvelle des Usines de Pontlieue-Aciéries du Temple (SNUPAT) v High Authority (Joined Cases 42 and 49/59) [1961] ECR 53, considered in AssiDomän [1999] ECR I-5363, paras 64-68.)The refusal of relief in Asteris in respect of the earlier years where the Commission's acts had been vitiated by precisely the same illegality, is, however, particularly significant for present purposes because it is entirely inconsistent with Servier's submission as to the transferability of a binding res judicata from one legal context to another.

59.
In support of its case, Servier also relies by way of analogy on the status of Commission decisions before national courts of member states and in particular on the recent judgment of the Competition Appeal Tribunal in Royal Mail Group Ltd v DAF Trucks Ltd [2020] CAT 7; [2020] Bus LR 1795 ("Trucks"). Following a settlement decision of the Commission in 2016 finding that five major European truck manufacturing groups had operated a cartel between 1997 and 2011, a number of purchasers brought in the Competition Appeal Tribunal follow-on claims for damages against those manufacturers. The Tribunal observed (at para 129) that detailed factual findings made in infringement decisions about the operation of a cartel can be relied upon to quantify the loss caused by that cartel in follow-on national proceedings. Servier accordingly submits that findings of fact that are essential to the operative part of an infringement decision are binding for the purposes of the damages claim, without any further limitation on the use that the parties can make of those findings in the proceedings.

60.
The difficulty with this submission is that the two situations are not analogous. First, the status of Commission infringement decisions before the courts of member states is governed by specific EU legislation, Council Regulation (EC) No 1/2003, which modernised the system for enforcement of rules of EU competition law and which conferred on national courts the power to apply those rules in parallel with the Commission. The legislation emphasises (recital (22)) the importance of avoiding conflicting decisions, in order to ensure compliance with the principles of legal certainty and the uniform application of the EU competition rules in a system of parallel powers. Accordingly, article 16 of Council Regulation (EC) No 1/2003 provides that when national courts rule on agreements, decisions or practices under articles 101 or 102 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. Secondly, under the law as it existed prior to the coming into effect of Council Regulation (EC) No 1/2003, (see Masterfoods Ltd v HB Ice Cream Ltd (Case C-344/98) [2000] ECR I-11369), a national court was not bound to apply any of the underlying findings of fact that were previously reached by the Commission where the subject matter of the case before the national court was different (Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)[2007] 1 AC 333 per Lord Bingham at para 11; per Lord Hoffmann at para 69). Thirdly, I note that in Trucks itself the Tribunal observed (at para 33), correctly in my view, that the principle of res judicata is not engaged where the issue concerns a decision of the Commission (as opposed to a decision of the EU courts) and that the determination of what findings in a Commission decision are binding involves different considerations.

61.
I agree with the observations of Rose LJ (at paras 72 and 73 of her judgment in the Court of Appeal [2020] Ch 193) that the approach for which Servier contends raises a host of practical difficulties and that it is wide-ranging and unstable with no workable defined limits. She identifies three practical difficulties in particular. The first is ascertaining the degree of granularity of the factual findings made

that fall within the scope of what is res judicata. Secondly, there will frequently be a number of facts found by the General Court to support a particular conclusion. National courts are likely to experience difficulty in deciding which are “essential to” or “inseparable from” or “sufficiently proximate to” or “a pillar of” the ratio decidendi. There is here, moreover, considerable scope for different national courts to come to different conclusions as to which findings are binding. Thirdly, factual findings will often point in different directions, requiring the General Court to undertake a multi-factorial assessment in order to arrive at its ultimate conclusion. Moreover, if only some of the General Court’s factual findings are res judicata, this could lead to a very unbalanced factual analysis in any subsequent national proceedings. More generally, it seems to me that confined to the context of the consequences of an annulling judgment, the principle of absolute res judicata performs a useful function in promoting legal certainty, the effective judicial control of EU institutions and the maintenance of the EU legal order. However, once freed from that restriction it could operate in an arbitrary and unjust manner, binding strangers to the original dispute in a wholly different legal context in a manner which could not be reconciled with principles of a fair trial. (See, by analogy, the Opinion of Advocate General Trstenjak in Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (Case C-472/10) [2012] 3 CMLR 1, para 60.)

62.
Servier’s attempt to rely in the present case upon the principle of absolute res judicata is, therefore, misplaced. Servier seeks to borrow findings of fact from the annulling judgment of the General Court made in the context of abuse of dominant position under article 102 TFEU and to deploy them in an entirely different context which concerns mitigation of loss flowing from alleged anti-competitive agreements under article 101 TFEU and which has nothing to do with article 102 or with the consequences of the annulling judgment. The claims by the claimants in the national proceedings do not call into question or undermine in any way the conclusion of the General Court in its annulling judgment or the consequences of that judgment, nor do they contradict the General Court’s decision as to what needs to be done to secure compliance with EU law. For these reasons I am satisfied to the standard of acte clair that the principle of absolute res judicata has no application to the present case. I would dismiss the appeal.