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Case No: A3/2019/0985

A3/2019/0986

A3/2019/0987

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
MR JUSTICE ROTH
[2019] EWHC 1004 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2019

Before :

LORD JUSTICE LONGMORE

LADY JUSTICE ROSE

and

SIR STEPHEN RICHARDS

Between:

**THE SECRETARY OF STATE FOR
HEALTH & ANOTHER**

**Claimant/
Respondent**

and

**(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT
LIMITED**

**(3) LES LABORATOIRES SERVIER SAS
(4) SERVIER SAS**

**Defendants/App
ellants**

And Between

**THE SCOTTISH MINISTERS & NORTHERN
IRISH MINISTERS**

**Claimants/
Respondents**

and

(1) SERVIER LABORATORIES LIMITED

**(2) SERVIER RESEARCH AND DEVELOPMENT
LIMITED**

(3) LES LABORATOIRES SERVIER SAS

(4) SERVIER SAS

**Defendants/
Appellants**

And Between:

THE WELSH MINISTERS & OTHERS

**Claimants/
Respondents**

and

**(1) SERVIER LABORATORIES LIMITED
(2) SERVIER RESEARCH AND DEVELOPMENT
LIMITED**

(3) LES LABORATOIRES SERVIER SAS

(4) SERVIER SAS

**Defendants/
Appellants**

Kelyn Bacon QC and Daniel Piccinin (instructed by **Sidley Austin LLP**) for the Appellants
Robert Palmer QC and Julian Gregory (instructed by **Reynolds Porter Chamberlain LLP**)
for the Scottish Ministers

Robert Palmer QC and Laura Elizabeth John (instructed by **Geldards LLP**) for the Welsh
Ministers

Robert Palmer QC and David Drake (instructed by **Peters & Peters Solicitors LLP**) for the
Secretary of State for Health)

Hearing date : 18 June 2019

Approved Judgment

Lady Justice Rose:

1. These three appeals raise the important question of how far the EU law principle of res judicata can be relied on by the Appellants ('Servier') as establishing facts which they wish to prove in their defences to the damages claims brought by the Respondents (whom I shall call 'the Claimants'). Servier submits that certain factual findings were made in its favour by the General Court when giving judgment in an action to annul a competition law infringement decision adopted by the EU Commission. Those findings are relevant to issues that are going to be considered at a hearing in October 2019 about whether the Claimants failed to mitigate the loss they claim to have suffered as a result of Servier's infringement of the competition rules. Roth J, who is charged with the case management of these complex proceedings, held in his judgment of 17 April 2019 reported at [2019] EWHC 1004 (Ch) that none of the factual findings of the General Court relied on by Servier was binding on him for the purposes of that forthcoming hearing. These appeals against his judgment have been expedited so that our decision is known in time for a pre-trial review of that preliminary issues hearing.

The background

2. Servier is a manufacturer of pharmaceuticals including the drug perindopril. Perindopril is a prescription-only product classed as an ACE-inhibitor used in the treatment of various conditions including hypertension and cardiovascular diseases. Servier's perindopril product is marketed under the brand name "Coversyl". Coversyl was a blockbuster drug with global sales of more than €800 million in 2006 and 2007. The main compound patent for perindopril expired in 2003 to 2005 in most EU member states. The Claimants allege that Servier engaged in anti-competitive conduct designed to delay the date on which other manufacturers could bring generic versions of perindopril to the market in the UK. Market entry by generic products occurred in July 2007 after Pumfrey J held that a new patent for the crystalline form of perindopril was invalid for lack of novelty. The Claimants say that market entry would have occurred earlier if Servier had not committed infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') and/or the Chapter 1 and Chapter 2 prohibitions imposed by the Competition Act 1998. These infringements and the delay in cheaper generic versions of perindopril becoming available caused them to spend more on perindopril prescriptions within the NHS than they would have spent if cheaper generic perindopril had become available earlier.
3. There was an investigation into Servier's alleged anti-competitive conduct by the EU Commission culminating in a decision adopted on 9 July 2014: Case COMP/39.612 *Perindopril (Servier)* ('the Decision'). The Commission found that Servier had entered into amicable patent settlement agreements with six producers of generic pharmaceutical products. Under those agreements Servier made substantial financial payments referred to as "reverse payment patent settlements". The Commission found that these constituted anti-competitive agreements contrary to Article 101 TFEU and that by entering into these agreements, among other conduct, Servier had abused its dominant position contrary to Article 102 TFEU. An important issue in the Commission investigation into the Article 102 infringement was the definition of the relevant market in which Coversyl competed; was the relevant market limited to perindopril or did it include other ACE-inhibitors or a wider range of products? The

Commission defined the relevant market for finished products as comprising only perindopril and rejected Servier's argument that it comprised, at least, all ACE-inhibitors. The Commission imposed significant fines on Servier and the generic companies; Servier's fine was more than €330 million.

4. The Secretary of State for Health and the other English claimants commenced their action in the High Court on 3 May 2011, before the Decision was issued. The Scottish/Northern Irish and Welsh claims were commenced in mid-2012. The Particulars of Claim in all three actions were significantly amended following the publication of the Decision in 2014 so as to rely on the findings of infringement made by the Commission.
5. An important amendment to Servier's Defence was introduced in November 2015. Servier applied to amend its pleading to introduce a new defence based on the principles of mitigation, causation and contributory negligence. These raised what has been called "the prescribing argument". The amendments were opposed by the English claimants but permission was granted by Henderson J on 4 October 2016. The amendment inserted a new section headed "Failure to mitigate, causation/remoteness and/or contributory negligence" asserting, without prejudice to the denials of liability, that the Claimants have failed to take all reasonable steps to mitigate their loss. In summary, the prescribing argument is that:
 - i) there was no material clinical difference between perindopril and other ACE-inhibitors which had been available in generic form from late 1999;
 - ii) the Claimants should therefore have taken all reasonable steps to encourage switching from the prescription of perindopril to the prescription of cheaper alternative ACE-inhibitors in generic form but failed to do so;
 - iii) accordingly the Claimants failed to mitigate their loss and/or those events broke the chain of causation and/or rendered any damage too remote.
6. As Roth J noted in his judgment, the prescribing argument brought into greater prominence the question of the substitutability of perindopril and other ACE-inhibitors. Following the introduction of the prescribing argument, that issue was relevant in the damages claims not only for the question of market definition and dominance but also to the Claimants' ability to recover under any heads of their claim.
7. Servier challenged the Decision in the General Court. The General Court handed down judgment on 12 December 2018, Case T-691/14 *Servier SAS v EU Commission* ECLI:EU:T:2018:922 ('the *Servier* Judgment'). A provisional English language version of the judgment has recently been published. The UK Government did not intervene in that appeal. The Court upheld most of the Commission's findings including its analysis that four of the five settlement agreements challenged were restrictions of competition by object contrary to Article 101 TFEU. Before turning to consider the three complaints raised by Servier in relation to the definition of the relevant finished product market, the General Court recalled the scope of the judicial review it was bound to carry out:

“1374. In that regard, it must be borne in mind that, according to settled case-law, although the EU judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review 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 ...

1375 The Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Those Courts must establish, among other things, not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it ...

1376 Moreover, it should be pointed out that, according to settled case-law of the Court of Justice, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. Where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement ...”

8. Despite that, the General Court’s analysis of the relevant market in response to Servier’s complaints extended over 225 paragraphs making up Section 12 of the *Servier* Judgment. The General Court noted that the definition of the relevant market is the result of a body of evidence permitting an assessment of the extent to which substitution of products or services would take place. The definition of the boundaries of the market must be made by examining empirical evidence, aimed at making an effective use of all information which is relevant in an individual case: paragraph 1383. The Court recorded that at the hearing it had invited the parties to comment on the respective significance of therapeutic substitutability and price in the definition of the relevant market in the pharmaceutical sector: paragraph 1390. It noted further that the definition of the relevant market in the pharmaceutical sector must take due account of the relative weakness of price pressure and of the fact that the choice of treatment by prescribers is primarily determined not by the cost of the available medicinal products but “on the basis of prescribers’ perceptions of the therapeutic advantages and disadvantages of those medicinal products”: (see paragraph 1393). Indeed, the Court stated, when a medicinal product proves to be clearly superior to others in therapeutic terms, or even represents the only therapeutic option

recommended by the scientific community, it may be chosen by prescribers regardless of its price, even if that price is significantly higher than that of the other available medicinal products. A reduction in price of other medicinal products is in those circumstances unlikely to increase their market share.

9. The General Court posed the first question it needed to address as whether during the relevant period there were any medicinal products recognised or perceived as equivalent to perindopril, and thus easily substitutable for it, or whether the therapeutic merits of perindopril had sufficiently distinguished it from the competition: paragraph 1404. The Commission had held in the contested Decision - in particular in recitals 2449, 2499 and 2519 - that perindopril had a therapeutic use which differed from that of other ACE-inhibitors. The Commission had concluded that ACE-inhibitors could not be regarded as a simple homogeneous class. In support of that conclusion, the Commission relied on medical guidelines, a range of scientific studies, internal documents from Servier and a survey of perindopril prescribers. The applicants had argued to the contrary; that ACE-inhibitors form part of a homogeneous class within which there is no significant difference justifying a finding that the perindopril compound, by itself, constitutes a separate market.
10. The General Court examined all the material on which the Commission relied in some depth. It concluded in the light of all the documents in the Commission's case file that there was no significant difference between perindopril and the other ACE-inhibitors in therapeutic terms. Under the heading "The distinction between perindopril and other ACE-inhibitors in terms of efficacy and side-effects" the General Court stated that:
 - i) it followed from the presentation of the basic information in the Decision that "the mode of action, main indications, contraindications and side effects of the ACE-inhibitors are similar": paragraph 1425;
 - ii) the ATC classification system does not distinguish in any way between perindopril and other ACE-inhibitors with respect to therapeutic use: paragraph 1429;
 - iii) at paragraph 1481:

"In the light of all the documents in the file, it must be concluded that there is no significant difference between perindopril and the other ACE inhibitors in therapeutic terms, including in terms of efficacy and side effects. There is in the file no objective scientific evidence of the therapeutic superiority of perindopril over other ACE inhibitors. ACE inhibitors are widely perceived as substitutable by prescribers and there are numerous medicinal products regarded by doctors as therapeutic equivalents to perindopril. Accordingly, the Commission erred in considering that the ACE inhibitor class was heterogeneous and that perindopril exhibited particular therapeutic characteristics within that class of medicinal products."

- iv) it was not apparent from the documents in the file that the other ACE-inhibitors raised particular concerns on the part of prescribers relating to their side-effects or reduced efficacy. Since doctors did not regard ACE-inhibitors as heterogeneous, the Commission's analysis as regards any risks associated with switching was "called into question": "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": (paragraph 1519).
11. The General Court considered further whether other ACE inhibitors were widely perceived as substitutable by prescribers. In addition to the finding at paragraph 1481 set out above, the Court said that there were no factors limiting the leeway available to doctors to prescribe ACE inhibitors other than perindopril. There were therefore "no particular concerns regarding the therapeutic use or possible side effects of ACE inhibitors which might have given rise to a high degree of 'inertia' of doctors who had already had occasion to prescribe perindopril when those doctors were choosing to prescribe any of the ACE inhibitors for new patients": (see paragraph 1489).
12. The General Court put forward a number of reasons why the Commission had underestimated the substitutability of different ACE-inhibitors for existing patients. At paragraph 1540 the Court said:
- "1540. It follows from the foregoing that the Commission underestimated the propensity of patients treated with perindopril to switch treatment, relying, moreover, on the erroneous assumption of the heterogeneity of medicinal products in the ACE-inhibitors class. It is apparent from the documents in the file that treatment switching of patients commencing treatment with perindopril is significant over a period of five years, which calls into question the average length of treatment as assessed by the Commission and the significance of the lock-in effects of perindopril's patient base."
13. Further, the Court stated at paragraph 1544 that:
- "... the prescribing behaviour of doctors was not characterised by a high degree of 'inertia' and treatment switching by continued-use patients was significant. It is therefore on the basis of erroneous assumptions liable to vitiate its analysis that the Commission considered that the potential impact which the promotional activities of producers of other medicinal products had on sales of perindopril should be regarded as particularly limited."
14. The General Court also upheld complaints concerning the Commission's analysis of pricing information. The Court concluded its review of the relevant market by saying:
- "1589. In the present case, at the end of the overall assessment of the elements on which the Commission based its assessment and of the examination of the applicants' complaints, it must be concluded that the Commission made a series of errors in the

analysis of the definition of the relevant market. The Commission:

- wrongly considered, with regard to therapeutic use, that ACE inhibitors were a class of heterogeneous medicinal products and that perindopril had particular characteristics within this class of medicinal products;
- wrongly concluded that a mechanism of doctors’ ‘inertia’ had significantly restricted the competitive pressure exerted on perindopril by the other ACE inhibitors with respect to new patients;
- underestimated the propensity of patients treated with perindopril to switch treatment;
- failed to give due consideration to the companies’ promotional activities and their significance in the analysis of competitive relationships;
- disregarded the particular characteristics of competition in the pharmaceutical sector, erroneously inferring from an analysis of natural events based primarily on price changes that perindopril was not subject to significant competitive pressures from other ACE inhibitors.

1590 By relying on an analysis vitiated by the errors referred to above, the Commission restricted the relevant market to the perindopril compound alone, while the documents in the file show that perindopril may have been exposed to significant non-price competitive pressures from the other ACE inhibitors. In those circumstances, it must be held that the Commission’s errors are such as to vitiate the result of its analysis.

1591 It must therefore be concluded, following an assessment made by the Court in accordance with the limits on judicial review ... that it has not been established that the relevant product market is limited solely to originator and generic perindopril.”

15. In its overall conclusions at the end of the judgment, the General Court said: (paragraph 1963):

“ ... as regards Article 102 TFEU, the Court considers that it has not been established that the relevant finished product market was limited to perindopril. Since it has not been established that Servier had a dominant position ... on that market..., the existence of an abuse of such a position is called into question ...”

16. In the operative part of the judgment, the General Court annulled the finding of abuse of dominance and annulled the fine imposed on Servier for the Article 102 infringement. It ordered Servier and the Commission to bear their own costs. Servier's overall fine was reduced to just under €230 million.
17. Both the Commission and Servier have appealed to the Court of Justice of the European Union ('CJEU') against the *Servier* Judgment: see Cases C-201/19P and Case C-176/19P. Those appeals are still pending before the CJEU. The UK Government has been granted permission to intervene in those appeals. It is common ground that these claims cannot proceed to a final trial until those appeals have been finally resolved. Roth J recorded at [46] of his judgment that in the light of the *Servier* Judgment, the Claimants have stated that they will not pursue their case under Article 102 for abuse of dominance unless the judgment is reversed in those respects by the CJEU. The prescribing argument remains very relevant to Servier's defence even if the abuse of dominance case falls away. Critical to the prescribing argument is the degree of therapeutic equivalence between perindopril and other ACE-inhibitors; whether between 2003 and 2009 prescribing doctors viewed them as substitutable and whether the various health authorities should reasonably have encouraged doctors to prescribe another ACE-inhibitor instead of perindopril, either for new patients or by switching existing patients.
18. In January 2018, Roth J ordered the hearing of a set of preliminary issues, referred to as the mitigation issues. The early determination of these preliminary issues was useful because it could eliminate or substantially reduce the costs of a wide-ranging disclosure exercise relating to the mitigation issues that would otherwise need to be carried out. The preliminary issues ordered to be tried are:
 - i) 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?
 - ii) If not, in what circumstances would that have been unreasonable or inappropriate?
 - iii) Was it unreasonable for [the Claimants] to fail to take any (and if so, which) of the steps set out in paragraph 83C of the Defendants' Re-Re-Amended Defence to the English Claimants' claim or identified in the Defendants' Further Information dated 29 September 2017?
19. Paragraph 83C of the Re-Re-Amended Defence referred to there lists seven possible steps including issuing national guidance encouraging the switch, using the national Quality and Outcomes Framework to incentivise a switch to cheaper generics, providing patient information leaflets or template letters for use by physicians when switching patients and using software such as "ScriptSwitch" to provide a visual prompt for NHS prescribers in order to highlight the availability of an alternative, more cost-effective treatment.
20. The mitigation trial is now listed to be heard in October 2019. As is, unfortunately, the way of this particular world, the trial is now expected to last for 22 days with numerous expert witnesses being called. In preparation for the mitigation trial, Roth J

ordered the parties to exchange pleadings setting out their case as to whether any of the findings in the *Servier* Judgment were binding on the national court. Servier identified eight propositions that they contended represented findings by the General Court which were binding on account of the EU principle of res judicata. They also alleged that it would be an abuse of process as a matter of domestic law for the Claimants to dispute those findings. The Claimants admitted two of the factual findings so the question of whether they were binding on the national court became moot.

21. Roth J held that two of the remaining six contested propositions were not actually findings of fact made in the *Servier* Judgment. He held that the remaining propositions were findings, albeit one only made in a modified form, but they were not res judicata for the purpose of the mitigation trial. He rejected Servier's case on abuse of process. Roth J granted permission to appeal on the question of res judicata, describing it as an important issue on which Servier has a reasonable prospect of success. He refused permission on two further grounds, challenging his conclusions on what were findings of the General Court and as to abuse of process. Permission to appeal on the two additional grounds was refused by Patten LJ by order dated 20 May 2019.
22. The propositions of fact therefore now in contention are the following (using the letters that applied when they were among the original eight propositions):
 - (a) 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 contraindications: see paragraphs 1425, 1429, 1481, 1519 and 1589 of the *Servier* Judgment.
 - (b) 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: see paragraphs 1481 and 1489 of the *Servier* Judgment.
 - (c) the finding that there was no element that limited the discretion available to physicians to prescribe ACE-inhibitors other than perindopril for new patients: see paragraph 1489 of the *Servier* Judgment; and
 - (e) 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: see paragraphs 1540 and 1544 of the *Servier* Judgment.
23. In considering the application of the EU principle of res judicata, Roth J stated at the outset that Servier does not rely on the English principles of res judicata or issue estoppel: [53]. He underlined what he saw as the need to keep the EU concept of res judicata "within proper bounds" because of the very broad consequences that flow from it in precluding a party in subsequent proceedings from contesting the "fact", even though it had no involvement in the proceedings in which the finding of fact was made: [70]. He drew an analogy with patent law where the holder of a patent which has been declared invalid cannot then try to enforce that patent against someone who was not a party to the proceedings in which the patent had been successfully challenged. That did not mean that all the findings that led to the invalidity had such

absolute effect. He said that “judgments that have effect *inter omnes* under English law generally concern questions of status: of a patent, or a marriage, or of property or concern the disposition of property”: [71]. He described the judgment of the CJEU in Cases C-442&471/03P *P&O Ferries v Commission* EU:C:2006:356 and the other European authorities which I consider below. He considered that his analysis was consistent with the authorities of the CJEU that had been cited to him where that Court had held that findings that led directly to, and were inseparable from, the operative part of the annulling judgment were held to be res judicata.

24. Roth J concluded at [77] that the only finding of fact in the *Servier* Judgment that is res judicata with absolute effect is that in paragraph 1963, namely that the Commission had not established that the relevant market was limited to perindopril. That conclusion mirrored what the Court had said in paragraph 1591 at the end of the section of the *Servier* Judgment dealing with definition of the relevant market:

“77. ... It is that finding which is inseparable from, and necessary to explain, the operative part of the judgment annulling article 6 of the Decision which found that Servier had abused its dominant position. At most, the *res judicata* could extend to the immediately preceding para 1590 and the conclusion that perindopril was exposed to significant non-tariff competitive pressures from other ACE inhibitors. In my judgment, there is no basis in EU law for applying *res judicata erga omnes* to all the myriad factual findings based on careful scrutiny of the evidence in the over 200 preceding paragraphs of section 12, or to the subsidiary conclusions in the four sub-sections of analysis of the second of the three complaints assessed by the Court in section 12, or indeed to the findings under the various heads within those sub-sections.”

25. Roth J considered the argument put forward by Servier that a wider principle was necessary to ensure that the national court complies with the duty of sincere cooperation now set out in Article 4(3) TEU. He accepted, as did the Claimants, that that duty prevents a national court from finding that Servier has abused its dominant position unless the *Servier* Judgment is overturned on this point by the CJEU. He did not consider, however, that it would be incompatible for the national court in these damages proceedings to reject Servier’s prescribing argument on the basis of evidence about doctors’ prescribing practices and the degree of substitutability of perindopril with other ACE-inhibitors. He held that the legal context in which the facts covered by Servier’s propositions now arise would be entirely different since questions of causation and remoteness of damage are governed by the domestic law of the Member States.

The main case law of the EU Courts

26. It was common ground before us that the EU principle of res judicata applies directly in a domestic court dealing with a dispute falling within the scope of EU law without the parties having to rely on the duty of sincere cooperation now set out in Article 4(3) TEU. It was also common ground that there are a number of strands of the EU jurisprudence of res judicata. One of those is referred to as ‘relative res judicata’ and arises 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. The strand of jurisprudence we are concerned with is described by the parties as the annulment strand or absolute res judicata. It is the binding scope of a judgment of the General Court or the CJEU annulling a measure adopted by an EU institution.

27. The issue of how much of the Commission’s Decision is binding on the High Court in these proceedings in so far as it was upheld by the *Servier* Judgment was not an issue which was addressed at the hearing before us. That may well need to be considered at some stage. The current version of the pleaded case in the English action, the Re-Re-Re-Amended Non-Confidential Particulars of Claim, sets out the broad findings of the Decision and pleads that the Claimants will rely on the Decision pursuant to Article 16 of Regulation 1/2003/EC and/or that they will rely on the Decision as evidence properly admissible before an English court. In response to that plea, Servier in its Re-Re-Amended Defence pleads, amongst other things that the Decision will only be binding:

“insofar as the findings in question are upheld by the General Court (and by the Court of Justice in the event of further appeal) and to the extent that such findings form part of or are necessary for the operative part of the Decision”.

28. Although Servier uses in that plea the wording taken from the case law I am about to describe, I understood that the parties accepted that in the light of Article 16 of Regulation 1/2003 and the ruling of the General Court in Case T-474/04 *Pergan Hilfsstoffe v Commission* [2007] ECR II-4225, there was little if any read across from what this Court decides on this appeal to the question of how far the national court is bound by findings in the Decision which support the overall finding of infringement.
29. In the following paragraphs I refer to the Court that is now the General Court by that name even though it was known as the Court of First Instance at the time of some of the judgments. I refer to the Court which is now the Court of Justice of the European Union as the CJEU. I will also use the Treaty article numbers as they appear in the TFEU.
30. The principal though not the earliest judgment dealing with the annulling strand of the EU principle of res judicata is that described in the judgments of the European Courts arising out of the State aid granted to the ferry service between Portsmouth and Bilbao. The background to the case is complicated but key to understanding what was decided. In July 1992 P&O Ferries had entered into an agreement with the Diputación (the Provincial Council of Biscay) and the Ministry of Trade and Tourism of the Basque Government to establish a ferry service between Bilbao and Portsmouth. The agreement provided for the two authorities to buy 26,000 travel vouchers to be used on the route over a three-year period at a price which was higher than the commercial rate. The agreement was challenged by a competitor, Brittany Ferries, referred to as BAI. BAI operated a shipping service between Plymouth and Santander and alleged that the mass purchase of tickets on the new service amounted to State aid. The Commission took the initial view that that agreement, referred to in the judgment as “the original agreement”, was not a normal commercial transaction. On 29 September 1993 the Commission initiated a procedure under the State aid rules to investigate whether the original agreement was a State aid incompatible with the common market.

31. Following the initiation of that procedure, P&O Ferries suspended the original agreement and in March 1995 entered into a new agreement with the Diputación but not the Ministry. According to the new agreement, the Diputación undertook to buy 46,500 travel vouchers to be used on the route spread over three years but the price per ticket was 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 the State aid rules. On 7 June 1995 the Commission adopted a decision terminating the procedure that had been triggered by the original agreement. The Commission stated in the June 1995 decision that the new agreement introduced significant modifications which met the Commission's earlier concerns. The Commission thus considered that the new agreement did not constitute State aid.
32. That decision to terminate the investigation was challenged by BAI before the General Court with P&O Ferries but not the Diputación intervening in support of the Commission. On 28 January 1999 the General Court delivered a judgment annulling the 7 June 1995 decision on the ground that the Commission had misinterpreted the relevant Treaty provisions when concluding that the new agreement did not constitute State aid: see Case T-14/96 *BAI v Commission* [1999] ECR II-139 ('*BAI v Commission*').
33. In the light of that judgment, on 26 May 1999 the Commission decided to initiate a State aid investigation in relation to the new agreement. The Commission then adopted a decision on 29 November 2000 in which it declared that the new agreement did constitute State aid and that the aid was incompatible with the common market. The Commission ordered the Kingdom of Spain to recover the sums already paid. The infringement decision was appealed to the General Court by both P&O Ferries and the Diputación. The Diputación challenged the whole decision whereas P&O Ferries challenged only the order for recovery of the aid already paid. The General Court handed down judgment on 5 August 2003: in Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2957 ("*P&O Ferries GC*").
34. Before considering the complaints levelled by the applicants against the infringement decision, the General Court considered the plea of inadmissibility raised by the Commission. The Commission argued that the supposed errors could not be examined because of the force of res judicata attaching to the *BAI v Commission* judgment. The General Court held at [77] of *P&O Ferries GC* that the force of res judicata attaching to a judgment can constitute a bar to the admissibility of an action only if the previous action which gave rise to the judgment in question was between the same parties, had the same subject-matter and was founded on the same grounds. It then observed, at [79] and [80], that the Diputación's action was directed against a different measure from the measure which gave rise to *BAI v Commission*, so that the two actions did not have the same subject-matter. Further, the action before the Court was not between the same parties as those involved in the *BAI v Commission* proceedings. The Court went on, however, to reject all the grounds of appeal raised by P&O Ferries and the Diputación. It concluded, broadly, that the changes made in the new agreement did not affect the substance of the original agreement and that the two agreements should be regarded as a single grant of aid. The General Court therefore dismissed the challenge to the Commission's infringement decision.

35. P&O Ferries and the Diputación both brought appeals before the CJEU challenging *P&O Ferries GC* and both intervened in support of the other's appeal. On the substance of the matter, they submitted that the General Court had erred in law in three respects in concluding that the sums paid by the Diputación to P&O Ferries could properly be classified as State aid. The Commission did not revive its objection based on res judicata in opposing the appeal but the Court of its own motion invited the parties to give their views on the issue and those views were put forward at the hearing. This was on the basis that observance of the principle of res judicata was a matter of public policy and a fundamental principle of the Community legal order.
36. Advocate General Tizzano reached the same conclusion as the General Court although for different reasons. He did not consider that the fact that the cases involved different parties was necessarily decisive: see paragraph 69 of his Opinion. What was more relevant was whether the cases dealt with the same subject matter. That was not simply whether they challenged the same measure but rather whether the same points of law were raised before the Court. If they were and judgment has been given, then the force of res judicata will apply. He concluded that the dispute in the *P&O Ferries* case appeared to be 'substantially identical' to the dispute resolved in *BAI v Commission* although the actual decisions being challenged were of course different. However, the Advocate General then referred at paragraphs 75 to 79 of his Opinion to the formal inquiry that the Commission had reopened following the *BAI v Commission* judgment and to the fact that all interested parties had been invited to submit further observations and information before the Commission adopted the replacement decision. The General Court could not, he thought, have ignored the possibility that the replacement decision might be based on that new material. He therefore advised the CJEU to find that res judicata did not arise.
37. The CJEU did not follow the Advocate General's opinion. It held that the General Court had erred in defining the scope of the principle of res judicata: Cases C-442/03P and C-471/03P *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4883 ('*P&O Ferries CJEU*'). The CJEU described the res judicata principle in the following terms:

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

42. In the *BAI v Commission* judgment the Court of First Instance annulled the decision of 7 June 1995 in which the Commission held that the new agreement did not constitute State aid and consequently decided to terminate the review procedure which had been initiated in respect of the aid granted to 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, Case 1/54 *France v High Authority* [1954] ECR 1, or p. 17, 34; Case 2/54 *Italy v High Authority* [1954] ECR 37, at p. 55; Case 3/54 *Assider v High Authority* [1955] ECR 63; and Case C-310/97P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 54).

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

45 In addition, the question of the force of res judicata with absolute effect is a matter of public policy, which must, consequently, be raised by the Court of its own motion.”

38. Applying that to the facts of the case before it, the CJEU held that in order to annul the decision of 7 June 1995, the General Court in *BAI v Commission* had based its decision in particular on the finding that the new agreement was not a normal commercial transaction; that the cultural and social aims pursued by the Spanish authorities should play no part in the characterisation of the new agreement; and that the Commission had misinterpreted the Treaty provisions in concluding that the new agreement did not constitute State aid. No appeal had been lodged against the *BAI v Commission* judgment and its operative part and ratio decidendi had therefore become final. The CJEU held that it was clear from the grounds of the General Court’s judgment in *BAI v Commission* that: [48]

“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.”

39. The Commission had then reopened the review procedure as it was required to do in order to comply with the judgment in *BAI v Commission*. In the contested decision it had “confirmed the classification as State aid acknowledged by the General Court in the *BAI v Commission* judgment” and had concluded further that the aid was incompatible with the Treaty.

40. The CJEU therefore concluded:

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

failed to have regard to the force of res judicata with absolute effect of its previous judgment.”

41. Other arguments were raised by the Diputación attacking the General Court’s conclusions on the different question whether the State aid was compatible with the internal market. The lawfulness of the agreements, if they were indeed State aid, had not been considered by the General Court in the *BAI v Commission* judgment. Ultimately the appeals were dismissed.
42. The reference in *P&O Ferries CJEU* to the Commission being required to reopen the review procedure on the compatibility of the alleged aid following the *BAI v Commission* judgment was a reference to the duty on EU institutions, now set out in Article 266 TFEU. That states:

“The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.”
43. Other judgments of the EU Courts have been more explicit in linking their discussion of the EU principle of res judicata to the fact that the Commission decision they were reviewing was a decision taken in order to comply with an earlier annulling judgment. This was more explicit, for example, in Cases 97/86 etc *Asteris AE v Commission* [1988] ECR 2200 (*‘Asteris’*). That case concerned what Advocate General Slynn described in his Opinion as “further chapters in the saga of Community aid paid to Greek producers of tomato concentrates”. The levels of aid were fixed in a series of regulations adopted by the Commission, one regulation adopted for each marketing year 1981/82, 1982/83 and 1983/84. Each regulation used a coefficient to adjust the aid to take account of variations in packaging and concentration between Community production of tomato concentrates and imports from non-member countries. A different coefficient was used for Greek production compared to that used for producers in other member states. Greece challenged the coefficient used in the regulation adopted for the marketing year 1983/84. In a judgment in 1985 the CJEU held that the Commission had committed a technical error in the coefficients adopted, leading to an unjustified reduction of aid granted to Greek producers. The Court therefore declared the relevant regulation void as giving rise to unequal treatment. The Court further held 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. Prior to the delivery of the judgment, the Commission adopted three further regulations for subsequent marketing years 1984/85 onwards all using the same coefficient that had been adopted in the regulations declared unlawful. Following the annulment of the 1983/84 regulation, the Commission declined the request of Asteris and other Greek producers that it revoke and remake the other regulations incorporating the offending coefficient. Greece brought an action for the annulment for what it alleged was the Commission’s unlawful refusal to comply with the earlier judgment.
44. The question thus arose whether, as Greece contended, the CJEU’s annulling judgment required the Commission, pursuant to its duty under what is now Article 266, to correct the coefficient in other regulations adopted for marketing years before or after the annulling judgment or whether as the Commission argued the Court’s

judgment only obliged it to adopt a replacement measure for the 1983/84 marketing year. The CJEU said:

“26. In order to adjudicate upon the application for annulment of the Commission's refusal to act, in pursuance of the procedure initiated against it for failure to act, it is necessary first to determine what measures an institution is obliged to take under Article [266] in order to comply with a judgment of the Court of Justice annulling a measure adopted by it.

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.”

45. The Court therefore held that although the primary obligation on the institution arising from a finding of illegality was to adopt a measure eliminating the illegality, the judgment “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”. The Court then drew a distinction based on the temporal effect of the judgment. By virtue of the retroactive effect of judgments, the finding of illegality takes effect from the date on which the annulled measure entered into force. Thus the finding that the coefficients were illegally fixed was binding with respect not only to the marketing year covered by the annulled regulation but also to all subsequent marketing years. By contrast the finding could not apply to the marketing years covered by regulations adopted before the 1983/84 marketing year: [31]. The Commission had, the Court therefore held, failed to fulfil its obligations by refusing to replace regulations which entered into force after the date of the adoption of the annulled regulation.
46. A different aspect of the principle of res judicata in the context of the Commission's obligation to comply with an annulling judgment was considered by the CJEU in Case C-310/97P *Commission v AssiDomän Kraft Products* [1999] I-5363. This appeal arose out of the Commission decision and then the CJEU judgment in *Wood Pulp II* (Cases C-89/85, etc *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307). By its decision, the Commission determined that a large number of producers of wood pulp had engaged in a price fixing cartel. On an action for annulment of the Commission decision brought by 28 of those producers, the CJEU annulled the finding of a cartel on the basis that this was not established by the evidence relied on by the Commission. AssiDomän was one of several Swedish addressees of the Commission's infringement decision who had not challenged the decision on appeal. The Commission rejected their request to reconsider the decision as it applied to them. AssiDomän argued that the Commission was required, following the annulment of its decision, to take measures to comply with the judgment of the Court in regard not only to the parties to the appeal proceedings but also to other parties. They relied on

the judgment in *Asteris* in support of that submission. The General Court decided (Case T-227/95 [1997] ECR II-1185) that although the earlier judgment had not annulled the decision as regards addressees who had not appealed, the obligation on the Commission to comply with the judgment could go beyond the group of persons who had brought the action. The General Court pointed out that the CJEU in the *Wood Pulp II* judgment had rejected the main evidence relied on by the Commission against all the addressees of the decision to prove that there had been concertation on price and therefore that there had been an infringement of Article 101. The General Court concluded that on this point the *Wood Pulp II* judgment “clearly had the potential to affect the Commission’s findings relating to [AssiDomän]”: see [84] of the General Court’s judgment. The General Court therefore held that the Commission was obliged, in the light of the grounds of the *Wood Pulp II* judgment, to review the decision so far as it related to the other addressees and to determine whether it was appropriate to repay the fines.

47. The CJEU on the appeal in *AssiDomän* disagreed. It held that:

“54. ... 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.”

48. There are two cases following the CJEU’s judgment in *P&O Ferries CJEU* on which the parties in this appeal relied. In Case C-221/10P *Artegoda GmbH v Commission* judgment of 19 April 2012 EU:C:2012:216, the applicant alleged it had suffered losses owing to the adoption of a Commission decision ordering member states to withdraw national marketing authorisations for a medicinal product for which Artégoda held the marketing authorisation. In a judgment dated 26 November 2002 in earlier proceedings (Cases T-74/00 etc [2002] ECR II-4945) the General Court had annulled that Commission decision on two grounds, first that the Commission lacked competence and second that even if the Commission had competence, the decision was vitiated by a defect in that it infringed Article 11 of Directive 65/65. The Commission had appealed against that judgment. The CJEU had dismissed the appeal on the ground that the General Court had been right to hold that the Commission lacked competence to adopt the contested decision and that accordingly it had to be annulled (Case C-39/03P [2003] ECR I-7885). The CJEU did not rule on the other pleas put forward by the Commission.
49. Artégoda applied for compensation from the Commission but the Commission rejected the claim. Artégoda applied to the General Court for an award of damages.

The issue before the Court was whether there had been a sufficiently serious breach of the rule of law as to trigger the EU's non-contractual liability to pay damages (Case T-429/05 [2010] ECR 11-491). The Commission argued before the General Court that there had been no infringement of Article 11. The General Court held that that plea was inadmissible because it was inconsistent with the binding nature of the earlier judgment of the General Court (in Cases T-74/00 etc). That judgment had, following the dismissal of the appeal by the CJEU, "acquired the authority of a final decision with respect to all matters of fact and law actually or necessarily settled by the General Court". The fact that the CJEU in Case C-39/03P had not found it necessary to examine the plea alleging breach of Article 11 was, the General Court held, irrelevant. The General Court went on to hold that neither the lack of competence nor the breach of Article 11 gave rise to a claim in damages and dismissed Artegodan's appeal.

50. Both Artegodan and the Commission appealed to the CJEU. The Commission's cross-appeal raised the question whether it was entitled to argue that there had been no breach of Article 11 or whether that was res judicata because of the judgments in the earlier proceedings. In its judgment in Case C-221/10P, the CJEU emphasised at [86] the importance for the EU and national legal orders of the principle of res judicata in ensuring the stability of the law and legal relations. The Court went on:

"87 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 (...)."

51. The Court held that the fact that the earlier appeal had not required a decision on the plea alleging infringement of Article 11 was far from irrelevant. The scope of the CJEU's judgment in Case C-39/03P had been limited to the issue of lack of competence. The CJEU had not so far resolved the second question about the breach of Article 11. It followed, therefore, that the General Court had erred in holding in its judgment in Case T-429/05 that the factual and legal findings in the judgment of the General Court in Cases T-74/00 etc concerning the infringement of Article 11 had acquired the force of res judicata in the same way as the factual and legal findings relating to the lack of competence.
52. Finally and most recently is the decision of the General Court in Case T-629/16 *Shoe Branding Europe BVBA v EUIPO* judgment of 1 March 2018, ECLI:EU:T:2018:108. Shoe Branding filed an application for registration of a Community trademark comprising two parallel stripes for footwear. Adidas AG filed a notice of opposition to the registration of the mark based on its earlier right to a mark consisting of three parallel stripes applied to footwear. The Opposition Division of the OHIM rejected the opposition and the Second Board of Appeal of OHIM dismissed Adidas' appeal. The Board of Appeal took the view that the differences in the number of stripes and their respective positions on the shoe were sufficient for it to find that the signs at issue were overall dissimilar. Those differences were, the Board held, sufficient to preclude any likelihood of confusion. Adidas appealed to the General Court against that decision.

53. The General Court annulled the Board's decision: Case T-145/14 *Adidas AG v OHIM* judgment of 21 May 2015. The Court found that the Board's finding that the differences in the two marks would not pass unnoticed by the consumer who pays attention to the details of sports shoe was at odds with the fact that the consumer of those products does not demonstrate a high degree of attention. The Court recalled that sports shoes are everyday consumer goods. The relevant public is made up of the average consumer who is reasonably well-informed and reasonably observant and circumspect but whose degree of attention must be regarded as average when purchasing them. The Court considered that the presence of the stripes would be easily and immediately noticed by the average consumer but that the differences in positioning and inclination were noticeable only if the consumer undertook a closer inspection. The Board had also failed to take into account other elements of the two different stripe configurations which were similar such as that they were parallel stripes, equidistant and of the same width and contrasting with the background colour of the shoe. The Court held that the Board was wrong to conclude that the marks at issue were visually dissimilar and hence was wrong to conclude that there was no likelihood of confusion. Shoe Branding's appeal to the CJEU (Case C-396/15P) was dismissed as being in part manifestly inadmissible and in part manifestly unfounded: see Order of the Court of 17 February 2016.
54. The Board of Appeal then reconsidered the appeal brought by Adidas against the decision of the Opposition Division. In a decision of 8 June 2016 the Board upheld the appeal and allowed the opposition. The Board now held that taking account of the degree of similarity between the marks at issue, the identity of the goods covered by the marks and the high reputation of the Adidas mark there was a likelihood that the relevant public might establish a link between the marks and that the use of the mark would take unfair advantage of the reputation of the earlier mark. Shoe Branding brought an appeal against that decision before the General Court: Case T-629/16. Shoe Branding complained that the Board had misapplied the "average consumer test" and that the decision was vitiated by errors of appraisal which had already been committed by the General Court in the annulling judgment. They argued that sports shoes were not everyday consumer goods but specialised goods. They also complained that the Board had failed to take account of the fact that the average consumer paid particularly close attention to the side of sports footwear and to the figurative marks applied to them. The Board had committed an error of assessment, Shoe Branding said, in considering that the average consumer of sports footwear did not display a high level of attention but only a low level of attention.
55. The General Court addressed first the question whether it was open to Shoe Branding to put forward those arguments in the light of the General Court's annulling judgment in Case T-145/14. EUIPO argued that the matter of the degree of attention of the relevant public "was definitively settled by the General Court and the Court of Justice in the annulling judgment and the order on appeal respectively" and that those judicial decisions were res judicata: [99]. The General Court noted that following the dismissal of Shoe Branding's appeal in Case C-396/15P, the annulling judgment in Case T-145/14 had become final. It therefore had "the authority of res judicata with absolute effect":

"101 ... That authority attaches to both the operative part and the ratio decidendi of the judgment, which provides the

necessary underpinning for the operative part and is inseparable from it (see [*P&O Ferries CJEU*] paragraph 44 and the case-law cited).

102 Moreover, ... EUIPO is required to take the measures necessary to comply with judgments of the Courts of the European Union. In that regard, it is apparent from settled case law that, in order to comply with a judgment annulling a measure and to implement it fully, the institution responsible for adopting that measure is required to have regard not only to the operative part of the judgment but also to the grounds constituting its essential basis. 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. ...

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

56. The General Court held that in its decision allowing the opposition, the Board of Appeal had effectively and fully complied with the grounds of the annulling judgment. It was not open to Shoe Branding to challenge the merits of the Board’s assessment regarding the degree of attention of the relevant public. This part of Shoe Branding’s appeal was therefore inadmissible.

Discussion

57. During the hearing of the appeal, the parties were reluctant to commit themselves as to whether the dispute between them was a dispute as to the test to be applied for res judicata in accordance with the European case law or whether they agreed about the test but disagreed as to the result of applying that test to the *Servier* Judgment. Ms Bacon QC, appearing for Servier, said that she adopted the wording of the test used by the CJEU in *Asteris* at paragraph 27 without the need for any gloss or qualification. That paragraph states that the elements of an annulling judgment which are res judicata erga omnes are found not only in the operative part of the judgment but also in 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, the Court said, which identify the precise provision held to be illegal and indicate the specific reasons which underlie the finding of illegality. Precisely the same formulation of the test was adopted more recently by the General Court at paragraph 102 of *Shoe Branding*.
58. The reluctance of each party to accept the other’s paraphrase of the test reflects the difficulty of pinning down the precise content of the words used by the CJEU; when

is a matter of fact or law “inseparable” from the operative part of the judgment; what constitutes the “essential basis” of the judgment? It is further confused by the fact that the European Courts appear to use the term “ratio decidendi” to include facts as well as law, or at least conclusions of mixed fact and law, rather than to refer only to the legal principle established by the case. That is not surprising given that the European Courts have adopted the civil law system in which there is no formal concept of stare decisis and judgments are generally binding only with regard to the decided case and for the parties to those proceedings. The concept of the ratio decidendi of a case familiar to a common lawyer is not what is being referred to in these judgments. This is also a reminder of the caution needed when searching for EU principles in subtle nuances of English language, particularly when the language of the case may not be English— the language of the case in *Asteris* was Greek and the languages of *P&O Ferries CJEU* were both English and Spanish.

59. The way through this is, in my judgment, as submitted by Mr Palmer QC on behalf of the Claimants. To discern the content of the terms used and hence the scope of the principle, one must consider the purpose of the principle invoked by the EU Courts in the case law.
60. In both *Asteris* and *Shoe Branding*, the test expressed is closely bound up with the context in which the issue has arisen, namely that the measure challenged in the proceedings before the EU Court has been adopted by the EU institution in compliance with an earlier annulling judgment invalidating an unlawful measure previously adopted by that institution. It is obviously right that an institution should not be criticised for adopting the subsequent measure in so far as the reasons for adopting that subsequent measure implement the reasons why its earlier measure was held to be unlawful. As the General Court said in *Shoe Branding* the Board of Appeal in allowing the opposition of Adidas had effectively and fully complied with the grounds of the earlier annulling judgment. It was therefore not open to Shoe Branding to challenge the decision insofar as the Board of Appeal was in effect bound to decide it in that way. Similarly, when the Commission decided that the new agreement between P&O Ferries and the Diputación was an unlawful State aid, it was doing so in order to comply with the reasoning of the General Court in *BAI v Commission* in so far as the first building block of its replacement decision was the finding that the agreement constituted an aid.
61. An institution which is considering how to comply with an annulling judgment needs to identify where it previously went wrong. If a finding of infringement of Article 102 is quashed by the General Court the operative part of the judgment does not say whether the Court was not satisfied that the conduct was abusive, or held that the company’s market share did not confer dominance or that the relevant product or geographic market was not properly defined. The institution must look behind the operative part to see what it needs to do to correct its error. Once it has corrected that error, the institution’s decision is protected by the “absolute effect” of the annulling judgment from attack by those who in effect disagree with the conclusion arrived at in the annulling judgment. As the Court states in *Asteris* [27] the purpose of finding out the essential basis of the judgment is to determine the “exact meaning” of what is stated in the operative part and to find the “specific reasons which underlie the finding of illegality” so that the institution can take those into account when replacing the annulled measure.

62. Mr Palmer argued that the specific reasons which underlie the finding of illegality in the *Servier* Judgment is only that the Commission had not established that the relevant product market comprised only perindopril. I do not agree that the case law recognises a distinction between the ratio of the annulling judgment being that the Commission has not established that the relevant market is limited solely to perindopril on the one hand and the ratio being that the relevant market is not limited solely to perindopril on the other. It is true, as Mr Palmer pointed out, the General Court prefaces its discussion of Servier's three criticisms of the definition of the relevant market by describing the limits of the Court's reviewing role. However, that review includes whether the evidence relied on is factually accurate and whether that evidence contains all the information which must be taken into account. What emerges from the case law is that the Commission does not comply with Article 266 by having a fresh look at the issue, and considering itself free to come to the same conclusion or a different conclusion as the new evidence and further consideration dictates. That approach was rejected by the CJEU in *P&O Ferries CJEU* when it declined to follow the Opinion of Advocate General Tizzano.
63. In *BAI v Commission* the pleas put forward to challenge the termination of the investigation into the original agreement were a mixture of 'insufficiency of reasoning' and substantive infringement of Article 107. One of the key paragraphs in that judgment states that "The file produced before the Court does not support the conclusion that the number of travel vouchers was determined by an increase in the actual needs felt by the authorities": [76]. When dealing with the second point raised by the Commission, that the existence of certain social and cultural programmes proved that the number of tickets needed genuinely reflected the need for travel, the General Court referred twice to what appeared from the file before the Court: [79]. In *P&O Ferries GC* the General Court set out the evidence described by the Commission in the replacement decision for rejecting the Diputación's contention in the re-opened investigation that it needed all the travel vouchers purchased under the new agreement. As I have described, it rejected the plea of res judicata on the grounds that the measure under challenge was a different measure and the parties were not the same. The General Court did consider the effect of the *BAI v Commission* judgment when it considered the substance of the Diputación's plea: [116]
- "In paragraphs 76 and 79 of [*BAI v Commission*], the Court, in assessing whether a normal commercial transaction was involved, adopted as the decisive criterion whether the agreement for the purchase of travel vouchers concluded between the Diputación and P&O Ferries reflected actual needs felt by the authorities. It found that that had not been satisfactorily established."
64. The General Court therefore took from its earlier judgment only the principle of law and did not regard the annulling judgment as binding on the question of whether the new agreement actually was an aid.
65. Advocate General Tizzano supported an approach which assumed that following an annulling judgment it was open to the institution to reconsider the matter in respect of which it previously fell into error and come to the same or a different fresh conclusion which could then be attacked and defended on the merits. He agreed with the General

Court as to the point of law decided by the General Court in the *BAI v Commission* that became res judicata and so binding on the Court in *P&O Ferries GC*. He pointed out that following the annulling judgment, the Commission had not confined itself to re-presenting the same measure with a new statement of reasons conforming to the judgment but had initiated a formal enquiry inviting interested parties to submit their comments. He considered that regardless of the extent to which the Commission should have respected the earlier judgment, “it clearly could not fail to take account of any new or additional facts alleged by the parties to the procedure”. Those facts “might have caused the Commission’s final assessment to go in a different direction.”: [76]. In such a case the General Court reviewing the new decision would also have to take account of those new developments and re-examine the issue. He thought that the General Court had been right to re-examine the nature of the measure at issue because any other approach would have meant “a denial of judicial protection, in so far as the Commission’s assessments concerning further matters raised by the parties would have been removed from the purview of the Community Court”: [78].

66. As we have seen, the CJEU held that the principle of res judicata went further. The result of an annulling judgment is not that the institution looks again at the issue. Rather, the institution is bound to decide the issue in the way the annulling Court has concluded it should be decided. Hence any Court reviewing that new decision cannot entertain a challenge on that issue; the matter is res judicata. The *BAI v Commission* judgment had concluded that the new agreement was not a normal commercial transaction. It was clear from the grounds of that judgment that that meant that “the Commission should have classified the aid at issue as State aid”: see paragraph 48 of *P&O Ferries CJEU*. In order to comply with that judgment, the Commission was required to reopen the review procedure but only in relation to the compatibility of the aid. The part of the replacement decision which classified the agreement as State aid was giving effect to the classification acknowledged by the General Court in the *BAI v Commission* judgment. The General Court had therefore been wrong to entertain pleas that the aid did not amount to State aid because that was a finding now res judicata erga omnes.
67. I take from the CJEU’s judgment in *P&O Ferries CJEU* that if the Commission in its reopening of the proceedings following *BAI v Commission*, had decided on the basis of new information that it had been right all along that the agreement was not an aid, that would not have fulfilled its obligations under Article 266. Similarly, I consider it was not open to the Board of Appeal following the annulling judgment in Case T-145/14 *Adidas AG v OHIM* to consider the matter afresh, apply the test as clarified by the General Court and decide again that the rival stripe marks were dissimilar and there was no likelihood of confusion.
68. The extension of the principle of res judicata by the CJEU in *P&O Ferries CJEU* both helps and hinders Servier’s arguments in this appeal. It helps because it makes clear that what becomes res judicata is not simply a finding that the Commission has failed to adduce sufficient evidence to support the decision but it is the decision itself. However, it hinders Servier’s arguments because it separates the element of the judgment which is res judicata from the underlying facts. What matters for the principle as established in *P&O Ferries CJEU* is not why or on the basis of what evidence the General Court concluded in *BAI v Commission* that the new agreement was not a normal commercial transaction. What matters is the fact that it did so

conclude. The conclusion was inevitably based on the facts before the Court in the particular proceedings; that is the case in all litigation. Those facts might well have been cast in a different light if the Commission invited new evidence and submissions and re-took the decision which had been annulled. It is precisely that enquiry which is ruled out by the principle.

69. I do not see the General Court's judgment in *Shoe Branding* as inconsistent with this analysis. Ms Bacon focuses on paragraph [103] where the Court referred to the degree of attention of the relevant public as constituting necessary support for the operative part of the earlier judgment. It was not that isolated fact that the Court held was res judicata. The Court also held that the res judicata principle precluded Shoe Branding's complaint that the Board of Appeal had, in the replacement decision, merely restated the Court's earlier conclusion on the similarity of the marks rather than carrying out its own analysis. The Board could not reasonably be criticised for adopting the Court's conclusion that the marks were similar: [115]. The debate was thus not about whether or not buyers of sports shoes pay average or lower than average attention to buying shoes but 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 Brand could not rely on that, or on any other ground, for challenging the decision that the marks were similar. The similarity of the marks was res judicata in light of the earlier judgment.
70. Coming back to the appeal before this court: what parts of the *Servier* Judgment are res judicata? The operative part of the *Servier* Judgment simply annuls the finding that there had been an infringement of Article 102. That does not tell the Commission or anyone else whether the error was in the definition of the relevant product or geographic market or in the characterisation of the conduct as abusive. For that, one must go to paragraphs 1589 – 1592 to find the specific reasons underlying the finding that the Article 102 infringement must be annulled. The specific reason is that the Commission wrongly concluded that the relevant product market was limited solely to originator and generic perindopril. In the light of that finding, (subject of course to the outcome of the appeal to the CJEU) the Commission would be in breach of Article 266 if it re-opened its investigation, gathered more evidence and decided that there was now enough evidence to support that narrow definition of the relevant market. If the Commission wanted to pursue a case on Article 102 against Servier it would have to do so on the basis of a different definition of the relevant product market. Further, suppose the Commission receives a complaint by a different customer alleging abuse of dominance by Servier where that complaint assumes that the relevant product market is limited to perindopril. The Commission would have to reject the complaint on the grounds that that was not the proper definition of the relevant market. If the complainant tried to challenge that rejection before the General Court, the General Court would not be able to entertain the complainant's pleas to the effect that the Commission had wrongly rejected a narrow definition of the relevant product market. That issue would be res judicata as against the complainant as a result of the *Servier* Judgment.
71. The application of the principle to this case means that it is not open to the Claimants to bring a stand-alone claim for damages for breach of Article 102 by Servier (whether for the conduct considered in the Decision or any other conduct) on the basis

that the proper definition of the relevant product market is limited to perindopril. That is the issue of fact and law that has been settled by the General Court.

72. Of course, the Claimants are not trying to do that. The purpose for which Servier is seeking to identify what is res judicata in the *Servier* Judgment is a very different purpose from that discussed in the European Courts' case law. Servier is trying to borrow four "facts" from the *Servier* Judgment and deploy them in a context which has nothing to do with the assessment of Servier's conduct under Article 102 or with the consequences of the annulling judgment. The context is the Claimants' alleged failure to mitigate the losses suffered as a result of an agreement which infringes Article 101. I do not find any support in the European cases for the idea that factual findings made by the Court in an annulling judgment as part and parcel of its analysis of the impugned measure can be borrowed in domestic proceedings in the way suggested. Indeed, I consider that this approach is contrary to the decision of the CJEU in *AssiDomän* which firmly rejected the idea that the factual findings as to how the wood pulp market worked could be borrowed by the Swedish producers to overturn the decisions taken against them. Such an approach also raises a host of practical difficulties. The first difficulty is ascertaining the degree of granularity of the factual findings made that fall within the scope of what is res judicata. Much of the hearing before us was devoted to that exercise. The second difficulty arises where, as frequently happens, there are a number of facts found by the General Court to support a particular conclusion. How can a national court decide which of them is "essential to" or "inseparable from" or "sufficiently proximate" to or a "pillar of" the EU Court's ratio, to use only some of the descriptors used in the course of argument? There is a risk that different national courts before which follow-on damages claims against the same defendant for the same infringement are brought may come to different answers as to which findings in the *Servier* judgment are binding in this way. A third difficulty is that factual findings may point in different directions. For example, the General Court might have found that ACE-inhibitors are in fact a homogeneous medicinal product and that there is little inertia on the part of prescribers for new patients. But it might also have found that existing patients rarely switch whatever treatment they are on. Overall, these facts, considered along with many others, may lead the Court to conclude that perindopril did not form a relevant product market of its own. It is not clear whether Servier would say that all these "facts" are res judicata or only those which support the conclusion drawn by the General Court. It is difficult to describe findings of fact pointing in favour of narrow market definition as being 'inseparable' from the ratio of the case quashing that definition. Yet the conclusion that they are not binding whereas those pointing in favour of a wider market definition are binding would lead to a very unbalanced analysis in any later proceedings.
73. The exercise which Servier invites us to undertake of trying to decide whether a factual finding is a pillar of the ratio or is only supporting the pillar or of trying to grade the findings of fact in the *Servier* Judgment and map them across to the level of facts found in *P&O Ferries* or *Shoe Branding* is in my judgment a futile one – that is not what the EU res judicata principle is aiming at. I agree with Mr Palmer's submission that the principle urged upon us by Servier is wide-ranging and unstable with no workable defined limits going far beyond anything in the Courts' jurisprudence. The EU principle is looking at identifying the reasons why the General Court annulled the Commission Decision. The reason given in the *Servier* Judgment

for annulling the Article 102 infringement decision was that the Commission was wrong to find that the relevant product market was limited to perindopril because the relevant market is not so limited. That is the “ratio decidendi” of the case in the sense that that term is used by the CJEU and that finding is binding to the extent that the EU principle dictates.

74. That ratio was based on what an English lawyer would call a multi-factorial assessment. The different factors in the multi-factorial assessment, some of which are relied on as the four propositions in dispute, are not in themselves the specific reasons for the decision to annul the Article 102 infringement finding and they are not res judicata in themselves in a different context. Outside the appeal to the CJEU, the finding cannot now be attacked on the grounds that other ACE-inhibitors are not substitutable for perindopril or on the grounds that there is significant inertia in respect of new or existing patients. It cannot be attacked on any ground at all. That does not mean, however, that all or any of the factual findings that the General Court took into account when arriving at its conclusion are immune from challenge if they arise as part of some other enquiry divorced from the question of the relevant market definition. I would therefore dismiss the appeal.

Sir Stephen Richards:

75. I agree.

Lord Justice Longmore:

76. I also agree.