



The importance of defining the relevant product market

Judgment of the General Court of the European Union of 12 of December of 2018, Case T-691/14 Servier and Others v European Commission

Introduction

The General Court of the European Union partially annuls the Decision of the European Commission (EC) of 9 of July of 2014, which sanctioned Servier and certain generic companies for entering into agreements that restricted competition and which also sanctioned Servier for abusing its dominant position.

According to these agreements, the generic companies agreed to refrain from marketing *perindopril* and from challenging Servier's patent, in exchange for a significant amount of money. In this Judgment, the General Court confirms the restriction but annuls the sanction regarding the abuse of dominance, on the understanding that the EC erred in defining the relevant product market.

Relevant product market

According to the General Court, the EC erred when defining the relevant product market as comprising only one sole molecule (*perindopril*; i.e. ATC 5 level) due to the several reasons:

1) The EC ignored the specific characteristics of the pharmaceutical sector when defining the relevant market by mainly focusing on the price of the product, whilst the price is not a decisive element to determine the relevant market for medicines. The General Court stated that other characteristics of a qualitative nature are more important when defining the market, such as the therapeutic

use of the product, its mechanism of action, its therapeutic benefits and its side effects.

- 2) The EC considered that *perindopril* had specific characteristics that differentiated it from the rest of ACE inhibitors and, because of that, *perindopril* constituted a single market. The General Court contests this and concludes that when it comes to medicinal products, the relevant market is formed by all the products that can be used to treat a particular disease and that may be considered as substitutable by the prescriber.
- 3) The EC considered that physicians preferred to prescribe *perindopril* and that patients being continuously treated with *perindopril* had little predisposition to change to other medicinal products. However, the General Court states that there is no significant difference between the efficacy and side effects of *perindopril* and other competing products, and that it was proven that changing treatments was frequent.
- 4) Another element that the General Court takes into account when analyzing the relevant market issue is the existence or not of competitive constraints on a product. The General Court understands that the investment levels in promoting *perindopril* (even if they decreased when generics appeared) shows that the product was subject to high competitive constraints by other products, which means that all these products may be considered as part of the same relevant product market.