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## **COMMISSION OPINION**

**of 22.12.2014**

**following a request under Article 15(1) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union)**

**The Secretary of State for Health and others v. Servier Laboratories Limited and others; The Scottish Ministers and others v. Servier Laboratories Limited and others; and The Welsh Ministers and others v. Servier Laboratories Limited and others (Claims No HC11C01423; HC12E02766 and HC12B03451)**

(Only the English text is authentic)

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## 1. INTRODUCTION

1. On 2 September 2014, lawyers acting for the Claimants in proceedings before the High Court of Justice (Chancery Division), London (the "High Court"), forwarded to the European Commission (the "Commission") a request made by the High Court pursuant to Article 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup> (now Articles 101 and 102 of the Treaty on the Functioning of the European Union, "TFEU"). The High Court requests the Commission's opinion on certain questions relating to the disclosure within the above proceedings of the confidential version of the Commission decision of 9 July 2014 in case COMP/AT.39612 – *Perindopril (Servier)* (the "*Servier* case") addressed to Les Laboratoires Servier and other companies within the Servier group (collectively "Servier").

## 2. PRELIMINARY REMARKS

2. Article 15(1) of Council Regulation (EC) No 1/2003 provides that in proceedings for the application of Article 101 or 102 TFEU, courts of the Member States may ask the Commission for its opinion on questions concerning the application of the EU competition rules. The Commission's approach to cooperation between the Commission and the courts of the Member States is addressed in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ("the Cooperation Notice").<sup>2</sup>
3. It is useful to recall that opinions of the Commission under Article 15(1) of Regulation No. 1/2003 are not binding upon the national courts. Only the Court of

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<sup>1</sup> OJ L 1 of 4.1.2003, p. 1 ("Regulation No. 1/2003"). Since 1 December 2009, Articles 81 and 82 of the Treaty became Articles 101 and 102 TFEU respectively. References in Regulations and Notices adopted before 1 December 2009 to Articles 81 and 82 of the Treaty should be understood as references to Articles 101 and 102 TFEU, respectively.

<sup>2</sup> OJ C 101 of 27.4.2004, p. 54. See in particular points 27-30.

Justice of the European Union ("ECJ") is entitled to give a binding interpretation of the EU competition rules by way of a preliminary ruling. Article 267 TFEU provides that if a question on the interpretation of EU competition rules is raised before a national court, that court may request the ECJ to give a preliminary ruling, if it considers that a decision on the question is necessary to enable the national court to give judgment. Where such a question is raised in a case pending before a national court against whose decisions there is no appeal, that court is required to refer the matter to the ECJ, unless the latter has already ruled on the point or unless the correct application of EU law is obvious.<sup>3</sup>

4. In accordance with the Cooperation Notice, when giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification requested, without considering the merits of the case pending before the national court.<sup>4</sup>

### 3. THE REQUEST FOR AN OPINION

5. The High Court's request originates from three sets of proceedings brought by the English National Health Service (Claim No. HC11C01423), the Scottish and Northern Irish National Health Services (Claim No. HC12E02766) and the Welsh National Health Service (Claim No. HC12B03451) (together the "Claimants") against Servier. The Claimants seek damages from Servier for alleged infringements of Articles 101 and 102 TFEU. The request notes that the scope of the alleged infringements may partly overlap with the subject matter of the Commission's decision of 9 July 2014 in the *Servier* case (the "Decision").
6. The High Court requested the Commission's opinion on the draft Confidentiality Order that it intends to address to Servier to disclose the confidential version of the Decision.<sup>5</sup> The High Court's view that the confidential version of the Decision should be disclosed appears to result in particular from a concern that only by disclosing the confidential version of the Decision can the High Court ensure that it complies with its duty under Article 16 of Regulation No. 1/2003 to avoid taking decisions running counter to the Decision. The High Court would only disclose the confidential version of the Decision to a "confidentiality club", the arrangements for which have been agreed between the Claimants and Servier.
7. Before adopting its order, the High Court seeks the Commission's opinion on the following questions:
  - (1) Does the Commission have any objection to the High Court ordering Servier to disclose, and provide a copy of, the Decision to the Claimants and to the High Court subject to the terms of the confidentiality club; and

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<sup>3</sup> Judgment in *CILFIT v Ministry of Health*, C-283/81, EU:C:1982:335.

<sup>4</sup> Cooperation Notice, point 29.

<sup>5</sup> The Commission has been asked similar questions in other proceedings before the High Court. See, for example, the Letter of 15 December 2010 sent by the Director General of DG Competition to the solicitors for National Grid Electricity with relation to *National Grid Electricity Transmission plc v ABB Ltd and Others* [2011] EWHC 171(Ch) ("DG's letter of 15 December 2010 in the *National Grid* case"); and the Commission's opinion of 5 May 2014 in application of Article 15(1) of Regulation No. 1/2003 regarding Interchange fee litigation before the Judiciary of England and Wales: *Wm. Morrison Supermarkets plc and Others v MasterCard Incorporated and Others* (Claim Nos. 2012/699; 2012/1305-1311) ("Commission's opinion of 5 May 2014 in the *MasterCard* case").

- (2) if so, the High Court requests the Commission to:
  - (a) set out the basis for those objections;
  - (b) confirm whether any information referred to in the Decision was provided to the Commission (other than by Servier) voluntarily (and, if so, which paragraphs of the Decision contain such information); and,
  - (c) confirm which parts (*e.g.*, by reference to paragraph numbers) of the Decision the Commission would object to Servier disclosing to the Claimants and to the High Court.

#### **4. THE COMMISSION'S OPINION**

##### **4.1. Current legal framework**

8. The EU legislative framework with respect to the issues assessed in this opinion is as follows.

###### *4.1.1. The protection of confidential information under EU law*

9. Article 339 TFEU obliges the Commission and its staff not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. This obligation is further specified in Article 28(2) of Regulation No. 1/2003 which provides that the Commission shall not disclose information acquired pursuant to this Regulation except in certain situations, such as those referred to in Article 15.<sup>6</sup> As further elaborated in the case law, the information covered by professional secrecy refers to business secrets and other confidential information (hereafter, for the sake of brevity, "confidential information").<sup>7</sup>
10. Article 15(1) of Regulation No. 1/2003 provides a statutory basis for cooperation between the Commission and national courts in the form of transmission of information. The Cooperation Notice (points 21-26) explains that the Commission will not transmit information to a national court if the national court is unable to guarantee that the rights under Article 339 TFEU of persons concerned will be respected. The present request does not constitute a request for the transmission to the national court of information by the Commission, the information at issue already being in the possession of Servier, as an addressee of the Decision. The Commission would however draw attention to case-law<sup>8</sup> showing that the obligations flowing from Article 339 TFEU can be relevant where parties to the Commission proceedings want to use documents obtained from the Commission, such as the Statement of Objections or a Decision, or through access to the Commission's file, in national court proceedings for the application of Articles 101 or 102 TFEU.
11. Under EU law, the Commission's duty to protect professional secrecy does not prevent the disclosure of documents containing confidential information that were obtained from the Commission (including the confidential version of the Commission decision) in proceedings before a national court applying Articles 101 and 102 TFEU. In *Postbank*, the General Court held that Article 339 TFEU cannot

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<sup>6</sup> These exceptions are included in Articles 11, 12, 14, 15 and 27 of Regulation No. 1/2003.

<sup>7</sup> Judgment of 18 September 1996, *Postbank v Commission*, T-353/94, ECR, EU:T:1996:119, paragraphs 86 and 87.

<sup>8</sup> Judgment of 18 September 1996, *Postbank v Commission*, T-353/94, ECR, EU:T:1996:119.

be interpreted as requiring the Commission to prohibit (third) parties, such as Servier, from producing in proceedings before a national court, documents containing confidential information received in the procedure before the Commission, as such interpretation would compromise the loyal cooperation between the Commission and the national courts under Article 4(3) TEU.<sup>9</sup>

12. However, Article 339 TFEU and Article 28(2) of Regulation No. 1/2003<sup>10</sup> require that the Commission takes "all necessary precautions to ensure that the entitlement of the undertakings concerned to protection of [confidential] information is not undermined by or during the transmission of the documents to the national courts".<sup>11</sup> It is then for the national court to effectively guarantee appropriate protection of confidential information that belongs to legal or natural persons from whom the information was obtained by the Commission (i.e., the originators of the information).<sup>12</sup> Although this is not a situation where the Commission is itself asked to provide the Decision to the Court, the Commission considers that its obligations under Article 339 TFEU mean that it should draw the Court's attention to the entitlement of the undertakings concerned to the protection of their confidential information. In addition to Article 339 TFEU, the Commission also draws attention to the provisions of Articles 7 and 8 of the Charter of Fundamental rights, which are relevant here as the High Court is implementing EU law by being seised of proceedings in which the cause of action is the alleged loss to the Claimants arising from an infringement of EU competition law. It follows from these provisions that the rights of those whose confidential information is liable to be used must be taken into account.
13. According to settled case-law "there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure the full effectiveness of the provisions of [Union] law in accordance with the principle of cooperation laid down in Article [4(3) TEU], these authorities are required to uphold the rights which those provisions confer on individuals".<sup>13</sup> However, in order to comply with its duty under Article 339 TFEU, it is for the Commission to consider, in its opinion under Article 15(1), the extent of the national court's guarantees for the protection of confidential information.

#### 4.1.2. *The use of information obtained through access to the file*

14. The present request concerns the disclosure of the Decision, which represents the final result of the Commission's investigation and is not therefore part of "the file" to which the rules on access to file during the investigation apply. However, the Decision comprises the Commission's analysis of the material placed on the Commission's file during the investigation and contains quotations from or references to that material. The Commission considers that it is therefore relevant for present purposes to have regard to the rules and practices relating to the use of documents obtained by parties under investigation.

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<sup>9</sup> *Ibid.*, para. 89.

<sup>10</sup> Judgment in *Postbank v Commission*, cited above, para. 90.

<sup>11</sup> *Ibid.*

<sup>12</sup> Judgment in *Postbank v Commission*, cited above, para. 90. See also: DG's letter of 15 December 2010 in the *National Grid* case, and Commission's opinion of 5 May 2014 in the *MasterCard* case.

<sup>13</sup> Judgment in *Postbank v Commission*, cited above, para. 69.

15. In order to allow parties to exercise their rights of defence, they are entitled to have access to any documents on the Commission's file (other than internal or otherwise privileged documents). Such documents must therefore be available in a form that is accessible to the parties under investigation. Where information is supplied by third parties or parties under investigation (together, "Third Parties"), they must provide that information in a non-confidential version. The description of a document on the Commission's file as "non-confidential" is however to be understood in the context of the investigation, where what the information provider considers non-confidential towards the parties under investigation would not necessarily be considered non-confidential towards a wider circle of persons, such as the Claimants. The *Servier* Decision includes information gathered not only from the addressees of the Decision (*Servier* and several other generic companies), but also from some 40 third parties (which were not addressees of the Decision, but provided evidence during the Commission's investigation).
16. The limits and conditions on the use of documents obtained through access to the Commission's file are set out in Article 15(4) of Regulation (EC) 773/2004<sup>14</sup> which provides that documents obtained through access to the file by any of the addressees of a Statement of Objections<sup>15</sup> shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.<sup>16</sup> Whilst it is therefore permissible for such documents to be used in national court proceedings in which damages are claimed for infringements Articles 101 and 102 TFEU, the Commission considers that courts should have regard to the fact that such documents might contain information from Third Parties that would be regarded by those Third Parties as confidential towards certain parties to the proceedings.

#### 4.1.3. *Intermediate conclusion*

17. The Commission therefore respectfully submits that the Charter of Fundamental Rights and the general principle of sincere cooperation between the Commission and national courts implies that the High Court should have regard to the rights under Article 339 TFEU of persons concerned when deciding upon the disclosure of the confidential version of the Decision.

#### 4.2. **The High Court's questions**

18. The High Court has asked the following questions:
- (1) Does the Commission have any objection to the High Court ordering *Servier* to disclose, and provide a copy of, the Decision to the Claimants and to the High Court subject to the terms of the confidentiality club?; and
  - (2) if so, the High Court requests the Commission to:

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<sup>14</sup> Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *Official Journal* L123, 27.04.2004, p.18-24.

<sup>15</sup> The Statement of Objections is the formal step in the investigation preceding the adoption of a final Decision; the Statement of Objections sets out the Commission's case against the parties concerned and refers to the evidence the Commission relies on in support of its preliminary view that the parties have infringed the competition rules of the Treaty. The parties are invited to exercise their rights of defence by responding to the Statement of Objections, for which purpose they are granted access to the Commission's file, so that they may comment on the evidence collected by the Commission.

<sup>16</sup> This is reiterated in point 48 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, *Official Journal* C325, 22.12.2005, p. 7-15.

- (a) set out the basis for those objections;
  - (b) confirm whether any information referred to in the Decision was provided to the Commission (other than by Servier) voluntarily (and, if so, which paragraphs of the Decision contain such information); and,
  - (c) confirm which parts (*e.g.*, by reference to paragraph numbers) of the Decision the Commission would object to Servier disclosing to the Claimants and to the High Court.
19. In the light of the factual and legal background outlined above, the Commission's opinion on these questions is as follows.
20. As appears from the Commission's letter in the *National Grid* case<sup>17</sup>, quoted in the High Court's request, the Commission does not consider that there is any basis to object in principle to the disclosure of the confidential version of the Decision, especially in view of the High Court's conclusion that the disclosure is necessary not simply to facilitate the Claimants' cases, but to ensure compliance with Article 16 of Regulation No. 1/2003

#### 4.2.1. *Disclosure of third parties' confidential information*

21. The draft Confidentiality Order sets up a confidentiality club that aims to guarantee the protection of the confidential information included in the Decision. The Claimants and Servier have agreed to the conditions of that confidentiality club. However, the agreement between Servier and the Claimants does not involve Third Parties, and it appears therefore that Third Parties have had no say over the arrangements for the disclosure of information which those Third Parties might regard as confidential towards the Claimants.<sup>18</sup> The agreement of Servier to the disclosure of confidential information under the conditions of this confidentiality club, both generally and as regards extensions pursuant to paragraphs 8(a) and 9(a) of the draft Confidentiality Order, does not ensure that the interests of Third Parties in the protection of their confidential information would be taken into account by the arrangements made for the disclosure of the confidential version of the Decision.<sup>19</sup> Therefore, the Commission respectfully suggests that the Court consider the position of Third Parties.

#### 4.2.2. *Composition and terms of the confidentiality club*

22. Paragraph 1 of the draft Confidentiality Order identifies and defines two categories of individuals which would have access to the confidential version of the Decision. Those categories are "Professional Advisers" and "Permitted Recipients." According to the definitions and conditions of the draft Confidentiality Order, "Professional Advisers" are not limited to named persons, but appear to comprise all such external legal and economic advisers as the parties may retain over the course of the proceedings. "Permitted Recipients" are identified by name or function in the Schedule, but the list of "Permitted Recipients" can be amended throughout the proceedings subject to the written consent of the Claimants or Servier or the consent of the Court (see paragraphs 1.b.ii, 8.a, and 9.a of the draft Confidentiality Order).

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<sup>17</sup> See DG's letter of 25 December 2010 in the *National Grid* case.

<sup>18</sup> See Commission's opinion of 5 May 2014 in MasterCard case, paragraph 19.

<sup>19</sup> Judgment in *Postbank v Commission*, cited above, para. 90.

23. The confidentiality club is considerably more widely drawn than in similar arrangements the Commission has seen in other proceedings in which damages are sought for infringements Articles 101 and 102 TFEU. The Commission notes the following aspects of the confidentiality club, which are novel to the Commission.
24. The list of Permitted Recipients includes a number of individuals working for the Claimants, some of them unnamed and/or referred to by the positions they occupy (e.g., Ministers of the Department of Health, Minister for Health, etc.). The Permitted Recipients include persons that hold positions that might involve commercial relationships with the addressees of the Decision or Third Parties<sup>20</sup> and include persons holding political functions.
25. Paragraph 9 of the draft Confidentiality Order also allows the Claimants to show, under certain conditions, parts of the Commission Decision to persons outside the confidentiality club. Whether this can be done depends firstly on Servier, irrespective of whether the information to be disclosed is that of Servier, or a Third Party.
26. Finally, paragraph 4 of the draft Confidentiality Order prohibits disclosure outside the confidentiality club "*save to the extent that they are required to do so by any applicable law or regulation, any order of a Court or competent jurisdiction or any competent governmental, judicial or regulatory body or by the **Scottish Parliament or the Northern Ireland Assembly***" (emphasis added). This paragraph would permit political bodies and administrations (such as those to which the Claimants belong) to provide for disclosure of the confidential information outside the confidentiality club, even if this were for purposes other than the application of Articles 101 and 102 TFEU.

#### 4.2.3. *Use of the information contained in the decision*

27. The request indicates that the draft Confidentiality Order "*restricts the use of the information contained in the Decision for the purposes of these proceedings only.*"<sup>21</sup> However, paragraph 5 of the draft Confidentiality Order allows for the use of the confidential version of the Decision for the purposes of "*issuing new proceedings arising out of the subject matter of these proceedings.*" Additionally, paragraph 12 permits Professional Advisers and Permitted Recipients to take any action in relation to the Commission Decision which has been authorised in writing by Servier.
28. The Commission understands that the default position in English law about the use of documents obtained on disclosure is that documents may only be used for the purposes of the proceedings in which they were disclosed,<sup>22</sup> but that this restriction may be lifted where it would be in the public interest to do so. The Court of Justice has recognised the public interest in there being effective remedies for infringements of Articles 101 and 102 TFEU. However, the nature of any "*new proceedings arising out of the subject matter of these proceedings*" is not clear to the Commission, in particular whether the draft Confidentiality Order intends that any such new proceedings would be confined to proceedings for the application of Article 101 or 102 TFEU, such as contribution proceedings between Servier and other addressees of the Decision. The possibility afforded by paragraphs 5 and 12 of the draft

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<sup>20</sup> The Permitted Recipients include persons who appear to have responsibility for budget and finance matters within the Claimant entities. It may be that those persons also thereby have a role in procurement relationships with undertakings whose information is used in the Decision.

<sup>21</sup> Paragraph 11.b of the letter of the High Court of 2 September 2014.

<sup>22</sup> CPR 31.22.



Confidentiality Order appears to permit disclosure of the Decision to as yet unidentified other persons for the purpose of other proceedings or contemplated proceedings.

29. The Commission recalls its comments above about how the Decision contains information from Third Parties, but that the arrangements set out in the draft Confidentiality Order do not give Third Parties any rights over the extent of the dissemination of their information. Furthermore, insofar as any other proceedings might not be proceedings for the application of Article 101 or 102 TFEU, paragraphs 5 and 12 of the draft Confidentiality Order would allow information originally acquired by the Commission to be used for purposes beyond the scope contemplated by Article 28(1) of Regulation 1/2003 and Article 15(4) of Regulation 773/2004. Those provisions allow the use of documents obtained through access to the file only for judicial and administrative proceedings for the application of Articles 101 and 102 TFEU (see paragraph 16 above).

#### **4.3. Conclusion**

30. The High Court asks if the Commission has any “objection” to the terms of the confidentiality club. As noted above, the Commission’s role under Article 15(1) is limited to giving its opinion, it being ultimately a matter for the High Court to determine procedural issues raised by the proceedings pending before it.
31. The Commission has, in principle, no objection to the disclosure of the confidential version of its Decision in the *Servier* case, provided that adequate protection is given to confidential information, notably that obtained from or concerning Third Parties. The Commission does however consider that it would be desirable for the draft Confidentiality Order to be tightened with respect to the protection offered to business secrets and other confidential information, in particular:
- (1) the arrangements for the protection of confidential information do not take account of any concerns that Third Parties might have;
  - (2) the broad and open ended membership of the confidentiality club, and the possibility for disclosure outside the confidentiality club; and,
  - (3) the potential use of confidential information in other proceedings, which it appears might not be proceedings applying Articles 101 and 102 TFEU.
32. Given that the Commission has no objection in principle to the disclosure of the confidential version of its Decision, but would only respectfully suggest that the conditions of the confidentiality club be tightened and reviewed with respect to the matters identified above, the Commission considers that the second question which postulates that the Commission objects to such disclosure, does not arise. The Commission would only add that identifying where in each of the 3187 recitals of the Decision Third Party information is to be found would be a very considerable undertaking. The findings in the Decision are supported by footnote references to the relevant documents from the Commission’s file (which Servier is in possession of) and it would be possible for Servier to identify for the High Court which information in the Decision originates from Servier and which from Third Parties.

Done at Brussels, 22.12.2014

*For the Commission*

*Alexander ITALIANER*  
*Director-General*

