JUDGMENT OF THE COURT (Sixth Chamber)
20 December 2017 (*)
(Appeal — Agreements, decisions and concerted practices — Market in industrial plastic bags — Formal notice from the European Commission to the appellant for the payment of default interest on the amount of the fine imposed — Action for annulment and for damages)

In Case C-364/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 July 2016,

Trioplast Industrier AB, established in Smålandsstenar (Sweden), represented by T. Pettersson, F. Sjövall and A. Johansson, advokater,

appellant,

the other party to the proceedings being:

European Commission, represented by V. Bottka and P. Rossi, acting as Agents,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, S. Rodin (Rapporteur) and E. Regan, Judges,
Advocate General: M. Wathelet,
Registrar: A. Calot Escobar,
having regard to the written procedure,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

By its appeal, Trioplast Industrier AB asks the Court to set aside the judgment of the General Court of the European Union of 12 May 2016, *Trioplast Industrier* v *Commission* (T-669/14, not published, 'the judgment under appeal', EU:T:2016:285), by which the General Court dismissed the appellant's action seeking, first, the annulment of the European Commission's letter of 3 July 2014 ('the letter at issue'), by which the appellant had been put on notice to pay the amount of default interest due following Commission Decision C(2005) 4634 final of 30 November 2005, as amended on 7 December 2005, relating to a proceeding pursuant to Article 81 [EC] (Case COMP/38.354 — Industrial bags) ('the 2005 decision') and, secondly, an order for the Commission to pay damages under the second paragraph of Article 340 TFEU.

Background to the dispute

The background to the dispute was set out as follows by the General Court in paragraphs 1 to 39 of the judgment under appeal:

In 1999, the applicant, [Trioplast Industrier], acquired Silvallac SA, through its subsidiary Trioplanex France SA, from Nyborg Plast International A/S, a company incorporated under Danish law, subsequently renamed FLS Plast A/S. The latter is a subsidiary of the group controlled by FLSmidth & Co. A/S ('FLSmidth').

The transfer took place on 19 January 1999, with retroactive effect from 1 January 1999. In July 1999, Silvallac was renamed Trioplast Wittenheim SA by the applicant.

On 30 November 2005 the Commission … adopted [the 2005 decision], in which it found that several undertakings in the industrial plastic bag sector had, in breach of Article 81 EC, participated in agreements or concerted practices of an anticompetitive nature extending to Belgium, Germany, Spain, France, Luxembourg and the Netherlands, from January 1982 to June 2002.

...

Article 2, first paragraph, point (f), of the operative part of the [2005 decision] imposed the following fines:

"[Trioplast Wittenheim]: EUR 17.85 million. Of this amount, [FLSmidth] and [FLS Plast] shall be jointly and severally liable for the sum of EUR 15.30 million and [the applicant] shall be jointly and severally liable for the sum of EUR 7.73 million."

It was also stated in the third and fourth paragraphs of Article 2 of the 2005 decision that:

"The fines shall be paid in euros, within three months of the date of the notification of this Decision, to the following account: … After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points, namely 5.56%."

...

By application lodged at the Court Registry on 9 February 2006, the applicant brought an action against the 2005 decision. That case was registered as Case T-40/06.

At the same time, FLSmidth and FLS Plast lodged at the Court Registry on 24 February 2006 two actions seeking annulment of the 2005 decision. Those actions were lodged under the case numbers T-64/06 and T-65/06.

After having concluded an agreement with FLSmidth and FLS Plast, the applicant provided a bank guarantee on 30 March 2006 in the sum of EUR 4.87 million.

By its judgment of 13 September 2010 in *Trioplast Industrier* v *Commission* (T-40/06, … EU:T:2010:388), the Court found that the 2005 decision had to be annulled "in so far as the starting amount of the fine imposed on the applicant was based on the market share achieved by Trioplast Wittenheim in the reference year 1996".

Furthermore, in the [judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388]), the Court accepted the applicant's arguments that because the combined value of the sums for which the applicant, on the one hand, and FLSmidth and FLS Plast, on the other, were held to be jointly and severally liable in respect of the fine imposed on Trioplast Wittenheim was greater than the amount of that fine, the [2005] decision failed to define the precise amount of the fine which Trioplast Wittenheim would ultimately have to pay. In those circumstances, the Court held that, in linking the amount actually recovered from the applicant to the amounts recovered from FLSmidth and FLS Plast, and vice versa, the Commission had imposed de facto joint and several liability on the applicant, on the one hand, and on FLSmidth and FLS Plast, on the other, even though those undertakings had never together formed a joint economic unit.

Consequently, the Court, on the one hand, annulled Article 2, first paragraph, point (f), of the 2005 decision, "in so far as it relates to [the applicant]", and on the other, in the exercise of its unlimited jurisdiction, set at "EUR 2.73 million the amount ascribed to [the applicant], on the basis of which its share of the joint and several liabilities of the successive parent companies for payment of the fine imposed on Trioplast Wittenheim SA must be determined".

The Court dismissed the remainder of the action.

By its letter of 25 February 2011, the Commission informed the applicant of the two options available to it following the [judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388)].

First, the Commission proposed that the applicant maintain the bank guarantee, reducing it to EUR 2.73 million plus interest. That guarantee could also be replaced by a new guarantee for the same amount issued by another … bank with its registered office within the European Union. ...

Secondly, the Commission gave the applicant the option of making a provisional payment of the amount set by the Court in the [judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388)], plus default interest …

By two separate letters of 18 and 30 March 2011, the applicant requested the Commission, inter alia, to accept the withdrawal of the bank guarantee in the light of the annulment by the Court of the 2005 decision in so far as it related to the applicant.

By its letter of 9 June 2011, the Commission maintained that the [judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388)], had not completely annulled the 2005 decision in so far as it related to the applicant. The Commission enclosed with its letter of 9 June 2011 a copy of the letter addressed to the guarantor confirming the reduction of the bank guarantee to an amount of EUR 2.73 million plus interest from 17 March 2006.

By its letter of 5 July 2011, the applicant repeated its line of argument that the Court had annulled in its entirety the 2005 decision in so far as it related to the applicant.

In its judgments of 6 March 2012[,] *FLS Plast* v *Commission* (T-64/06, [not published,] EU:T:2012:102) and … *FLSmidth* v *Commission* (T-65/06, [not published,] EU:T:2012:103) …, the Court, inter alia, reduced to EUR 14.45 million the amount of the fine imposed on Trioplast Wittenheim for which FLS Plast and FLSmidth were held to be jointly and severally liable pursuant to Article 2, first paragraph, point (f), of the 2005 decision.

By its letter of 30 March 2012, the Commission informed the applicant that it took the view that "the fine imposed on [the applicant] has become definitive" and requested it to pay the amount of EUR 3 322 979.93, that is to say, the amount of EUR 2.73 million plus default interest at a rate of 3.56% from 17 March 2006 to the value date of 20 April 2012.

By its letter of 11 April 2012, the applicant claimed, inter alia, that default interest could not continue to accrue since the 2005 decision had been annulled by the Court in so far as it related to the applicant.

On 16 May 2012, FLSmidth and FLS Plast lodged appeals against the judgments of [6 March 2012, *FLS Plast* v *Commission* (T-64/06, [not published,] EU:T:2012:102) and *FLSmidth* v *Commission* (T-65/06, [not published,] EU:T:2012:103)]. Those appeals were lodged under case numbers C-238/12 P and C-243/12 P.

...

By its letter of 19 July 2012, the Commission confirmed that it still had a claim against the applicant in the amount of EUR 2.73 million plus default interest and that it required the bank guarantee to be maintained. …

By its letter of 17 August 2012, the applicant expressed its wish to make a provisional payment in the amount of EUR 2.73 million but not the default interest. It thus sought to terminate the bank guarantee and put an end to the charges related thereto. …

By its letter of 30 August 2012, the Commission noted that proposal, stating, however, that it was only a partial provisional payment since no payment of default interest had been made.

By its letter of 20 September 2012, addressed to the guarantor bank, the Commission ordered the reduction of the amount of the bank guarantee to EUR 632 920.21 plus default interest accruing on that sum.

...

By its letter of 11 October 2012, the applicant notified its acceptance of the latest wording of the bank guarantee but maintained its position as to the provisional nature of the payment of the sum of EUR 2.73 million and the lack of justification for the request for payment of default interest.

...

By its judgments of 30 April 2014[,] *FLSmidth* v *Commission* (C-238/12 P, … EU:C:2014:284) and of 19 June 2014[,] *FLS Plast* v *Commission* (C-243/12 P, … EU:C:2014:2006) …, the Court of Justice dismissed the appeals brought by FLSmidth and FLS Plast.

By [the letter at issue], the Commission put the applicant on notice to pay interest amounting to EUR 674 033.32 with the value date of 15 July 2014. That interest was calculated on the basis of the amount of EUR 2.73 million to which default interest had been added at the rate of 3.56% from 17 March 2006 until 17 September 2012, and of the amount of EUR 632 920.21 to which default interest had been added at a rate of 3.56% from 18 September 2012 until 15 July 2014.

The applicant paid the contested amount on 14 July 2014, while expressing reservations as to the existence of an obligation to pay.

...'

The procedure before the General Court and the judgment under appeal

By application lodged at the General Court Registry on 15 September 2014, the appellant brought an action for the annulment of the letter at issue, and sought, as an alternative claim, an order for the Commission to pay damages pursuant to the second paragraph of Article 340 TFEU.

In paragraphs 47 to 78 of the judgment under appeal, the General Court ruled, first, on the plea of inadmissibility raised by the Commission against the appellant's action, by which the Commission contended that the letter at issue did not constitute a challengeable act in that it was devoid of binding legal effects capable of affecting the interests of the appellant by bringing about a distinct change in its legal position.

In that regard, the General Court found, in particular, that by claiming, in the letter at issue, the payment of default interest at the rate of 3.56% from 17 March 2006 on the amount of the fine set by the 2005 decision, as subsequently amended by the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) and the judgments of 6 March 2012, *FLS Plast* v *Commission* (T-64/06, not published, EU:T:2012:102) and of 6 March 2012, *FLSmidth* v *Commission* (T-65/06, not published, EU:T:2012:103), those last two judgments having been confirmed on appeal, the Commission had not introduced new elements capable of producing binding legal effects affecting the interests of the appellant by bringing about a distinct change in its legal position. The General Court concluded from this, therefore, that that letter did not constitute a challengeable act for the purposes of Article 263 TFEU.

Consequently, the General Court dismissed the application for annulment of the letter at issue as inadmissible.

Secondly, the General Court examined, in paragraphs 79 to 104 of the judgment under appeal, the merits of the appellant's application for an order requiring the Commission to pay damages.

Since it considered that the condition relating to the causal link between the conduct alleged and the damage pleaded was not met in the present case, the General Court dismissed the application for damages.

Consequently, the General Court dismissed the appellant's action in its entirety.

Forms of order sought by the parties

The appellant claims that the Court should:

first, set aside the judgment under appeal;

secondly,

annul the letter at issue;

cancel or reduce the default interest of EUR 674 033.32;

order the Commission to reimburse the expenses of EUR 4 686.64 incurred in providing security for payment of the default interest;

thirdly, in the alternative, pursuant to the second paragraph of Article 340 TFEU:

order the Commission to pay damages in the amount, or part of the amount, of the default interest of EUR 674 033.32;

order the Commission to pay damages in the amount of the expenses of EUR 4 686.64 incurred in providing security for payment of the default interest;

fourthly, order the Commission to pay damages, pursuant to the second paragraph of Article 340 TFEU, in the amount, or part of the amount, of the expenses of EUR 22 783.90, incurred in providing a bank

guarantee following the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388);

fifthly, order interest on such sums as are found to be due;

sixthly, order the Commission to pay the costs of the proceedings before the General Court as well as the Court of Justice.

The Commission contends that the Court of Justice should:

dismiss the appeal; and

order the appellant to pay the costs.

The appeal

The first ground of appeal, alleging an infringement of Article 263 TFEU

Arguments of the parties

By its first ground of appeal, the appellant complains that the General Court incorrectly concluded that the letter at issue did not constitute a challengeable act for the purposes of Article 263 TFEU.

In that regard, the appellant disputes the premisses of the General Court's reasoning concerning the admissibility of the action.

The appellant disputes, first, the General Court's finding, in paragraph 59 of the judgment under appeal, that the EU judicature is not competent to replace the fine imposed by the Commission, in the 2005 decision, by a new, legally distinct fine. The appellant submits that that premiss is 'correct but misses the point'. The pertinent question is rather whether the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) annulled the 2005 decision. The judgment of 14 July 1995, *CB* v *Commission* (T-275/94, EU:T:1995:141), which the General Court cited in paragraph 59 of the judgment under appeal, does not enable that question to be answered.

The appellant disputes, secondly, the finding in paragraph 60 of the judgment under appeal, that it was unequivocally clear from paragraph 172 of the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) that the determination by the General Court of a new starting amount, on which to base the calculation of the limit up to which the appellant was held liable, was an amendment to the 2005 decision. The appellant submits that the interpretation of paragraph 172 is 'plainly wrong and inconsistent' with a contextual reading of the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388).

In that regard, the appellant submits that it is apparent, in particular, from paragraph 171 and the operative part of the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), that the 2005 decision was annulled and not amended by that judgment. The Commission ought, because of the annulment of the 2005 decision and following the judgments of 6 March 2012, *FLS Plast* v *Commission* (T-64/06, not published, EU:T:2012:102), and of 6 March 2012, *FLSmidth* v *Commission* (T-65/06, not published, EU:T:2012:103), to have adopted a new decision in order to set a new fine. Having failed to do so, the letter at issue is the first decision requiring the appellant to pay the principal amount and default interest. The letter at issue constitutes, therefore, a decision which has produced binding legal effects directly affecting the interests of the appellant by bringing about a distinct change in its legal position.

Lastly, the appellant submits that it also follows from the fact that the 2005 decision was annulled that default interest could not accrue. It states in that regard that, since, following the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), there was no longer a certain and fixed amount, there was no basis for charging default interest.

The Commission contends that the first ground of appeal must be rejected as being, in part, inadmissible and, in part, inoperative, in particular in that it is directed at appraisals of facts by the General Court related to the content of the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), and in that it also simply repeats pleas already raised before the General Court.

In any event, the first ground of appeal must be rejected as unfounded.

Findings of the Court

By its first ground of appeal, the appellant complains, in essence, that the General Court erred in law in finding that the letter at issue did not constitute a challengeable act, for the purposes of Article 263 TFEU.

As regards, first of all, the admissibility of that ground of appeal, it should be recalled that it follows, inter alia, from Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by the General Court, does not satisfy the requirement to state reasons under those provisions (see judgment of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, paragraph 19 and the case-law cited).

However, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be argued again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgments of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541,

paragraph 51, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 47).

In the present case, by its first ground of appeal, the appellant does not seek a mere re-examination of the application submitted to the General Court, but specifically seeks to challenge the legal reasoning which led the General Court to hold that the letter at issue was not such as to produce binding legal effects directly affecting the legal interests of the appellant so as to bring about a distinct change in its legal position.

The appellant has indicated sufficiently the passages of the judgment under appeal that it considers to be vitiated by errors of law and set out the legal arguments relied on in support of its claim, thus enabling the Court of Justice to carry out its review.

In the context of the first ground of appeal, the appellant does not call in question the General Court's assessment, in the judgment under appeal, of the facts and evidence. It disputes the General Court's interpretation of the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388). In particular, it criticises, in the light of its own situation, the consequences in law drawn from that judgment by the General Court, especially as regards the legal characterisation of the letter at issue having regard to the provisions of Article 263 TFEU, which constitutes a point of law subject to review by the Court of Justice on appeal.

It follows that the first ground of appeal is admissible.

As regards the merits of the first ground of appeal, first of all, it is apparent from settled case-law concerning the admissibility of actions for annulment that, in order to ascertain whether an act may be the subject of such an action, it is necessary to look to the substance of that act, the form in which it was adopted being in principle irrelevant in that regard (see, to that effect, in particular, judgments of 22 June 2000, *Netherlands* v *Commission*, C-147/96, EU:C:2000:335, paragraph 27, and of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraphs 42 and 43).

In that regard, it is also apparent from settled case-law that only measures or decisions which seek to produce legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (see, in particular, judgments of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 29; of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 51; and of 9 December 2014, *Schönberger* v *Parliament*, C-261/13 P, EU:C:2014:2423, paragraph 13).

Thus, an action for annulment is, in principle, only available against a measure by which the institution concerned definitively determines its position upon the conclusion of an administrative procedure. On the other hand, intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure or purely implementing measures, cannot be treated as 'acts open to challenge', in that such acts are not intended to produce autonomous binding legal effects compared with those of the act of the EU institution which is prepared, confirmed or enforced (judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine*, C-351/15 P, EU:C:2017:27, paragraph 37 and the case-law cited).

In that regard, it must be noted, first, that, by Article 2, first paragraph, point (f), of the operative part of the 2005 decision a fine of EUR 17.85 million was imposed on Trioplast Wittenheim. With regard to that amount, FLSmidth and FLS Plast were held 'jointly and severally liable' by that decision for the period from 1990 to 1999, and the appellant 'jointly and severally liable' for the period from 1999 to 2002, each in its capacity as a parent company of Trioplast Wittenheim. The obligation to pay default interest was also set out in that decision.

Next, it should be recalled that, by its judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), the General Court annulled the 2005 decision on the grounds, first, that the Commission had, in that decision, selected, with regard to the appellant, an incorrect reference year for determining the gravity of the infringement and, secondly, that Article 2, first paragraph, point (f), of the 2005 decision failed to indicate the share which fell to the appellant, whilst at the same time allowing the Commission full discretion in calling on the respective joint and several liabilities of the successive parent companies which never formed an economic unit together.

Consequently, the General Court, in the exercise of its unlimited jurisdiction, set at EUR 2.73 million 'the amount ascribed to [the appellant], on the basis of which its share of the joint and several liabilities of the successive parent companies for payment of the fine imposed on Trioplast Wittenheim [had to] be determined'.

Accordingly, the General Court was correct, in the judgment under appeal, to reject the appellant's argument that the 2005 decision had been annulled in its entirety by the General Court in the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) so that the Commission no longer had a claim against the appellant.

First, while the General Court did, by the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), annul Article 2, first paragraph, point (f), of the 2005 decision in so far as it relates to the appellant, it did, however, in the exercise of its unlimited jurisdiction — as the General Court correctly noted in paragraph 60 of the judgment under appeal — determine a new starting amount on which to base the calculation of the limit up to which the appellant was held jointly and severally liable for payment of the fine imposed on its subsidiary.

In that regard, it must be held that it was in response to the appellant's argument that, in essence, the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) had led to the cancellation of any claim against it, that the General Court found, in paragraph 60 of the judgment under appeal, without erring in law, that that new starting amount, as set by the General Court in the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), was not, therefore, a new fine that was legally distinct from that which the Commission imposed in the 2005 decision.

Secondly, in paragraph 61 of the judgment under appeal, the General Court correctly found that it was apparent from the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) that the amount set there was 'a maximum amount on the basis of which the applicant's share of the joint and several liabilities of the successive parent companies for payment of the fine imposed on its subsidiary was to be determined'. It follows that the determination of the appellant's share depended on the extent of the joint and several liability of FLSmidth and FLS Plast and, therefore, the outcome of the actions for annulment which those companies had also brought against the 2005 decision.

However, the General Court was entitled, without erring in law, to hold in particular in paragraphs 61 and 74 of the judgment under appeal, that the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388) and the judgments of 6 March 2012, *FLS Plast* v *Commission* (T-64/06, not published, EU:T:2012:102), and of 6 March 2012, *FLSmidth* v *Commission* (T-65/06, not published, EU:T:2012:103), which followed it, left the Commission no discretion in determining the final amount of the fine imposed on the appellant and that the Commission had, therefore, a claim which was 'certain' and 'of a fixed amount' following the latter two judgments of the General Court.

Consequently, the General Court was fully entitled to conclude, in paragraph 74 of the judgment under appeal, on the basis moreover of the grounds set out in paragraphs 63 to 73 of that judgment, which have not been specifically challenged in the context of the present appeal, that the 2005 decision, as amended by the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), 'was …, in any event, enforceable following the judgments [of 6 March 2012, *FLS Plast* v *Commission* (T-64/06, not published, EU:T:2012:102), and of 6 March 2012, *FLSmidth* v *Commission* (T-65/06, not published, EU:T:2012:103)]'.

In that context, the present case must, lastly, be distinguished from that which gave rise to the judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine* (C-351/15 P, EU:C:2017:27), in which the Court of Justice characterised a letter from the Commission demanding default interest as a challengeable act for the purposes of Article 263 TFEU.

In that judgment, the Court first of all recalled, citing the judgment of 6 December 2007, *Commission* v *Ferriere Nord* (C-516/06 P, EU:C:2007:763, paragraph 29) that such letters only constitute, as a general rule, an enforcement notice, not entailing autonomous legal consequences compared with the original decision of the Commission imposing a fine and, as the case may be, default interest. The Court, however, stated, next, that that was not the case of the letters in question in the case giving rise to the judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine* (C-351/15 P, EU:C:2017:27), in that they demanded that the undertakings concerned pay default interest in spite of the payment in full of the original amount of the fine and, therefore, were, in fact, a modification of the pecuniary obligation for which those undertakings were liable (judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine*, C-351/15 P, EU:C:2017:27, paragraph 48).

In the present case, as is apparent from paragraphs 34 to 38 above, the 2005 decision, as amended by the judgment of 13 September 2010, *Trioplast Industrier* v *Commission* (T-40/06, EU:T:2010:388), constituted authority to execute the obligation to pay the fine and corresponding default interest, so that the letter at issue which followed it could not itself constitute an act entailing autonomous legal consequences.

The first ground of appeal must, therefore, be dismissed as unfounded.

The second ground of appeal, relating to the assessment of the causal link

Arguments of the parties

By its second ground of appeal, the appellant complains, in essence, that the General Court incorrectly found that causality was lacking between, first, the Commission's decisions and actions and, secondly, the damage which the appellant sustained.

In that regard, the appellant states that according to paragraphs 100 to 103 of the judgment under appeal the damage it had sustained had not been caused by the Commission's decisions and actions but rather by its own choice not to comply with those decisions and actions. According to the appellant, the General Court's reasoning is based essentially on the fact, relied on in the judgment under appeal, that under Article 278 TFEU an action for annulment does not have suspensory effect.

The appellant submits, first of all, that the General Court conflated the lawfulness of the Commission's decisions with the enforceability of those decisions. It submits that if the decision is found to be unlawful, it cannot be held against the addressee of the decision that it did not comply with it.

Next, as the General Court itself pointed out in paragraph 102 of the judgment under appeal, the appellant argues that in the event that it had paid the principal amount immediately but had subsequently been successful in its action for annulment, the Commission would have had to return to it not just the principal amount but also default interest on that amount.

Lastly, the fact that it was open to the appellant to choose between immediate payment and the bank guarantee option does not change this. Both were viable alternatives, each associated with its risks and costs.

In the present case, immediate payment was associated with particular risks, and in particular the substantial risk for the appellant of paying more than its actual share of the fine or of paying for FLS Plast's and FLSmidth's share. For the appellant, it was, therefore, 'out of the question' to pay the full amount immediately, forcing it to bring a claim against FLS Plast and FLSmidth.

Since it takes the view that the General Court ought to have ruled on the merits of its application for damages, the appellant maintains the arguments put forward before the General Court, as set out in paragraphs 80 to 86 of the judgment under appeal.

The Commission disputes the appellant's arguments.

Findings of the Court

It must be found that, by its second ground of appeal, the appellant, confines itself, in essence, to repeating the arguments relating to the causal link between the Commission's decisions and actions and the damage which the appellant allegedly sustained, which it had already submitted to the General Court, including those based on facts expressly rejected by that court, without identifying precisely any error of law which the General Court might have made in examining its claim for damages.

Consequently, since the appellant seeks, therefore, in fact, mere re-examination of its arguments submitted to the General Court, the second ground of appeal must be rejected as inadmissible in accordance with the settled case-law referred to in paragraph 21 above.

Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed in its entirety.

Costs

Under Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

Under Article 138(1) of those Rules, applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful and the Commission has applied for costs to be awarded against it, the appellant must be ordered to pay the costs of the appeal proceedings.

On those grounds, the Court (Sixth Chamber) hereby:

Dismisses the appeal;

Orders Trioplast Industrier AB to pay the costs.

Fernlund Rodin Regan

Delivered in open court in Luxembourg on 20 December 2017.

A. Calot Escobar C.G. Fernlund

Registrar President of the Sixth Chamber

---

* Language of the case: English.