Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 December 2012*

(Appeals — Protection of the financial interests of the European Union — Identification of the level of risk associated with an entity — Early warning system — OLAF investigation — Decisions — Requests for activation of W1a and W1b warnings — Reviewable measures — Admissibility)

In Case C-314/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 June 2011,

European Commission, represented by D. Triantafyllou and F. Dintilhac, acting as Agents,

appellant,

the other party to the proceedings being:

Planet AE, established in Athens (Greece), represented by V. Christianos, dikigoros,

applicant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, J.-J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: Y. Bot,

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

1 By its appeal the European Commission seeks the annulment of the order of the General Court of the European Union in Case T-320/09 *Planet* v *Commission* [2011] ECR II-1673 ('the order under appeal'), by which that Court dismissed the plea of inadmissibility raised by the Commission against the

* Language of the case: Greek.

application lodged by Planet AE ('Planet') seeking annulment of the decisions of the European Anti-Fraud Office (OLAF) requesting Planet's registration in the early warning system ('EWS'), by activation initially of a W1a warning and subsequently of a W1b warning.

Legal context

2 In order to counter fraud and any other illegal activities affecting the financial interests of the Communities, on 16 December 2008 the Commission adopted Decision 2008/969/EC, Euratom, on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (OJ 2008 L 344, p. 125).

3 According to recital 4 in the preamble to Decision 2008/969, 'the purpose of the EWS is to ensure, within the Commission and its executive agencies, the circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities'.

4 According to recitals 5 to 7 of that decision, OLAF, which has access to the EWS in the pursuit of its tasks in the area of the conduct of investigations and the collection of information for the prevention of fraud, is responsible, together with the authorising officers responsible and the Internal Audit Service, for requesting the entry, modification or removal of EWS warnings, under the administration of the Commission's accounting officer or his subordinate staff.

5 In that connection, the second subparagraph of Article 4(1) of Decision 2008/969 provides that '[t]he accounting officer [of the Commission or his subordinate staff] shall enter, modify or remove EWS warnings pursuant to requests by the [authorising officer by delegation] responsible, [by] OLAF and the Internal Audit Service.'

6 Under the first subparagraph of Article 5(1) of that decision, '[a]ll requests for registration of warnings, their modification or removal shall be addressed to the accounting officer.'

7 Under the third subparagraph of Article 6(2) of that decision, '[i]n the case of procurement or grant award procedures the [authorising officer by delegation] responsible or his staff shall verify whether there is a warning in the EWS at the latest before the award decision.'

8 According to Article 9 of Decision 2008/969, the EWS is based on warnings signalling the level of risk associated with an entity in accordance with categories on a scale from W1, corresponding to the lowest level of risk, to W5, corresponding to the highest level of risk.

9 Article 10 of that decision, entitled 'W1 warnings', provides in paragraphs 1 and 2:

'1. OLAF shall request the activation of a W1a warning where its investigations at an early stage give sufficient reason to believe that findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds. …

2. OLAF … shall request the activation of a W1b warning where [its] investigations give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds. ...'

10 Under Article 11(1) of that decision 'OLAF … shall request the activation of a W2a warning where [its] investigations lead to findings of serious administrative errors or fraud involving third parties, especially those who are benefiting or have benefited from Community funds.'

11 Article 16 of Decision 2008/969 makes clear that a W1 warning is to be 'registered for information purposes only and may entail no consequence other than reinforced monitoring measures.'

Background to the dispute

12 The background to the dispute has been set out as follows by the General Court in paragraphs 8 to 13 of the order under appeal:

'8 [Planet] is a Greek company which provides advisory services in the field of the administration of companies. Since 2006, it has been engaged, in its capacity as a member of three consortiums, in three projects in Syria financed by the Commission. Since 16 October 2007, it has been the subject of an enquiry carried out by OLAF into suspected irregularities within the framework of these three projects.

9 Following a tendering procedure launched within the framework of the seventh Framework Programme for Research and Technological Development, [Planet] was invited by the Commission, by a letter dated 18 April 2008, to enter into negotiations with the aim of determining the definitive terms of a contract for a grant regarding its offer to assume the role of co-ordinator of a consortium concerning the project "Advancing knowledge – intensive entrepreneurship and innovation for growth and social well-being in Europe" (the "AEGIS project"). The Commission's letter mentioned that any possible grant from the Community could not exceed an amount of EUR 3 300 000 and that negotiations had to be concluded before 30 June 2008

10 The findings emerging in the enquiry mentioned in point 8 above led OLAF to request [Planet's] registration in the EWS on two occasions. On 26 February 2009, it requested the activation of a W1a warning and, on 19 May 2009, it requested the activation of a W1b warning. The registrations were made on 10 March and 25 May 2009.

11 On 27 February 2009, the Commission sent [Planet] the negotiated contract for a grant (the "contract") so that [it] and the other members of the consortium to which it belongs could sign it. On 11 March 2009, [Planet] returned the signed contract to the Commission so that the latter, in turn, could sign it.

12 On 4 June 2009, the Commission informed [Planet] by email ["the email of 4 June 2009"] that the process of signing the contract had been suspended until a further condition had been satisfied, namely the opening by [Planet] of a blocked bank account, through which [it] would have access only to the part of the advance payment which it was due under the contract, whereas the rest of the advance payment would be transferred directly by the bank to the other members of the consortium. The email mentioned that this new condition was required because of an unexpected event, namely the registration of [Planet] in the EWS by the activation, first, of a W1a warning, and then of a W1b warning.

13 After [Planet] had agreed with its bank that the bank undertook to transfer, following the receipt of the advance to be paid by the Commission, to each member of the consortium the amount which it was due, the Commission signed the contract on 3 July 2009.'

The action before the General Court and the order under appeal

13 By application lodged at the Registry of the General Court on 14 August 2009, Planet brought an application before the General Court for annulment of the decisions of OLAF.

14 By separate document of 9 November 2009, the Commission raised a plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the General Court. It contends that Planet's application is inadmissible because of the nature of the contested measures, which were merely internal precautionary informative measures which could not be the subject of a review of legality under Article 230 EC.

15 First, the General Court made clear, in paragraphs 21 to 27 of the order under appeal, as regards the subject-matter of the dispute, that, although the application for annulment was formally directed at the decisions of OLAF requesting Planet's registration in the EWS, it must be found that it is also directed at the decisions to activate W1a and W1b warnings ('the contested measures').

16 Then, in paragraphs 37 and 38 of the order under appeal, the General Court recalled the settled case-law according to which an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. On the other hand, actions directed against decisions which only constitute measures internal to the administration and which have no effect which is external to the administration are inadmissible.

17 In paragraph 39 of the order under appeal, the General Court pointed out that the fact that the administration processed data for purely internal purposes in no way rules out the possibility that such activities may damage the interests of the persons concerned. According to the General Court, the existence of such damage depends on several factors, which include the consequences to which such processing may give rise and the correspondence between, on the one hand, the objective of the processing in question and, on the other hand, the provisions concerning the powers of the administration concerned.

18 After considering, in paragraph 40 of the order under appeal, the question of the legal basis of Decision 2008/969, and finding, in paragraph 41 of that order, that the lack of competence of the author of the contested measures constitutes an issue of public policy which may be raised by the Court of its own motion, the General Court went on to examine the content of the contested measures.

19 First, the General Court assessed whether the entry of a warning about an entity in the EWS and, in particular, in category W1, is a measure which concerns only internal relations within the Commission and whose effects are confined to the Commission internally.

20 Having analysed, in paragraphs 44 and 45 of the order under appeal, the relevant provisions of Decision 2008/969, the General Court held, in paragraph 46 of the order, that in this case, the contested measures were not confined to internal relations within the Commission, but had produced external effects, namely the suspension of the signature of the contract and the imposition of an additional condition on Planet.

21 Second, in paragraphs 47 to 50 of the order under appeal, the General Court analysed the question whether the effects produced by the contested measures were such that they could be considered to be binding legal effects, affecting Planet's interests and bringing about a distinct change in its legal position.

22 The General Court concluded, in paragraph 51 of the order under appeal, that the contested measures affected Planet's scope for negotiation, organisation within the consortium of which it was part and, therefore, Planet's ability actually to conclude the project at issue. The General Court added that to refuse Planet the right to any judicial review would be incompatible with a European Union governed by the rule of law, particularly as Decision 2008/969 does not provide for any right for natural and legal persons to be informed or heard before they are registered in the EWS by the activation of W1 to W4 and W5b warnings.

23 Finally, in paragraph 53 of the order under appeal, the General Court pointed out that the contested measures cannot be regarded as intermediate and preparatory measures not subject to review, in so far as they not only have the legal characteristics of reviewable measures but also constitute the conclusion of a special procedure, that is to say, the registration of an entity on a warning list.

24 The General Court therefore dismissed the plea of inadmissibility raised by the Commission.

Forms of order sought

25 By its appeal, the Commission asks the Court of Justice to set aside the order under appeal, to declare the action inadmissible and to order Planet to pay the costs.

26 Planet asks the Court to dismiss the appeal and to order the Commission to pay the costs.

The appeal

27 The Commission relies on eight pleas in support of its appeal against the order under appeal. Those pleas are (i) misinterpretation of Decision 2008/969, (ii) absence of any distinct change in the legal situation of Planet as a result of the warnings in question, (iii) the indirect effect of those warnings on Planet, (iv) failure of the General Court to state grounds, (v) confusion of legal remedies, (vi) breach of freedom of contract and the principle of consent, (vii) the erroneous classification of the warnings as decisions without stating any reasons and (viii) subordination of the admissibility of the action to the merits of the action.

28 Since the first three pleas are closely linked, they should be considered together.

The first, second and third pleas

Arguments of the parties

29 By its first plea, the Commission argues that the General Court misinterpreted Decision 2008/969 in that it made an erroneous generalisation about the provisions of that decision in considering a W1 warning to be equivalent to W2 to W5 warnings. In that regard, the Commission considers that the General Court's reasoning contains a contradiction since, on the one hand, in paragraph 44 of the order under appeal, it concludes that any warning in the EWS necessarily affects relations between the authorising officer and the entity concerned, and, on the other hand, in paragraph 45 of that order, it makes the finding that Article 16 of Decision 2008/969, concerning the consequences of a W1 warning, is less restrictive than Articles 15, 17 and 19 to 22 of that decision.

30 According to the Commission, the W1 warning is obviously different from the other warnings in that, as is apparent from Article 10 of Decision 2008/969, its activation is triggered by the mere probability of an error or irregularity and not, as in the case of the other warnings, by their absolute certainty. That distinction is confirmed by Article 16 of Decision 2008/969, under which a W1 warning is to be registered for information purposes only and may entail no consequence other than reinforced monitoring measures. The Commission takes the view that, in describing the content of Article 16 of Decision 2008/969 as 'less restrictive', the General Court should have concluded that, in such a case, the grant of legal protection was also merely provisional.

31 By its second plea, the Commission alleges that the General Court was wrong to hold, in paragraph 44 of the order under appeal, that the W1 warning necessarily affected relations between the authorising officer concerned and Planet. According to the Commission, while the requirement of monitoring

entails an element of restriction at the level of the services of the institution concerned, the reinforcement of monitoring measures amounts at the most to an increased level of attention and does not in any way entail any binding effects with regard to the entity monitored.

32 By its third plea, the Commission alleges that the General Court found, in paragraph 48 of the order under appeal, a direct causal link between the contested measures and the additional measures which Planet had to take before the contract was signed, whereas those measures did not stem from the W1 warning but were the result of the independent assessment of the authorising officer responsible.

33 The Commission alleges that, in any event, the General Court failed to define, in paragraph 49 of the order under appeal, the measures which placed Planet at a disadvantage and, moreover, breached the procedural principle of the non-discriminatory assessment of the allegations and evidence put forward by the parties, by ignoring, inter alia, the correspondence between the contracting parties and the negotiations in which Planet and its bank took part.

34 Planet argues that the first two pleas raised by the Commission amount to a distortion of the content of paragraphs 44 and 45 of the order under appeal, in so far as, in those paragraphs, the General Court merely concluded that the authorising officers were required to adopt specific measures against the entities concerned, whatever the level of warning at issue, including the W1 warning, and that the Court did not rule on the relations between the contracting parties and the possible effect of the contested measures on its legal situation.

35 Planet considers that the third plea must be rejected as in part inadmissible and in part unfounded.

Findings of the Court

36 It must be observed that, in order to rule on the question of the admissibility of the action for annulment brought by Planet against the contested measures, the General Court first assessed, in paragraphs 44 to 46 of the order under appeal, whether the entry of a warning about an entity in the EWS is a measure which concerns only internal relations within the institution concerned and whose effects are confined to that institution internally.

37 In that regard, the General Court found, having explained the operation of the EWS and the objective pursued by Decision 2008/969, which is to protect the financial interests of the European Union in the context of the implementation of budgetary measures, that Articles 15 to 17 and 19 to 22 of Decision 2008/969 not only permit but also, and primarily, require the authorising officers concerned to adopt specific measures against the entity or the project concerned.

38 The General Court concluded, in paragraph 44 of the order under appeal, that the impact of a warning about an entity in the EWS, even in the W1 category, cannot be confined within the institutions, organs and agencies of the European Union and such a warning necessarily affects relations between the authorising officers concerned and that entity.

39 The General Court added, in paragraph 45 of the judgment under appeal, that that conclusion is not affected by Article 16 of Decision 2008/969, according to which a W1 warning is to be registered for information purposes only and may entail no consequence other than reinforced monitoring measures, in so far as the fact that there is a W1 warning in reality results in a duty of the authorising officer concerned to adopt reinforced monitoring measures, as the warning would otherwise be ineffective.

40 It was only after having found, in paragraph 46 of the order under appeal, that the contested measures had in fact produced effects outside the institution concerned, that the General Court considered, in paragraphs 47 to 51 of the order under appeal, on the basis of the evidence of the facts of the case, whether those effects could be considered to be binding legal effects which are capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.

41 First, it follows from the foregoing account, that the General Court did not equate the W1 warning to warnings W2 to W5, but, rather, emphasised the specific nature of the W1 warning having regard to the less restrictive consequences flowing from it under Article 16 of Decision 2008/969.

42 Next, contrary to the Commission's assertion, the reasoning of the General Court in paragraphs 44 and 45 of the order under appeal does not contain a contradiction in the finding that, even if the consequences of a W1 warning are less restrictive, the fact remains that the reinforced monitoring measures which the authorising officer concerned is required to take against the entity concerned are not confined entirely to the institution internally, but are capable of having effects on the relations between that institution and the entity concerned.

43 First, the Commission itself accepts in its second plea that the requirement of monitoring entails an element of restriction at the level of the services of the institution concerned.

44 Second, it must be found that the General Court did not hold, in paragraph 44 of the order under appeal, that any warning, including the W1 warning, necessarily affects the legal situation of the person concerned. The General Court's reasoning must be understood as meaning that, although a warning about an entity in the EWS, including the W1 warning at issue here, necessarily has repercussions on relations between the authorising officer concerned and the entity affected, that does not imply that the external effects are automatically such as to bring about a distinct change in the legal situation of the entity affected. The Court must, rather, ascertain on a case by case basis whether there is such a change, as the General Court did in paragraphs 47 to 51 of the order under appeal.

45 The Commission's argument concerning Article 10 of Decision 2008/969 must also be rejected as based on a misreading of paragraphs 44 and 45 of the order under appeal.

46 The fact that, under Article 10 of Decision 2008/969, the activation of a W1 warning is triggered at an early stage by the mere probability of an error or irregularity, unlike the other warnings, which are activated in the case of certainty, is not such as to call into question the findings of the General Court regarding the repercussions which the warnings are liable to have on relations between the authorising officer and the entity affected.

47 Finally, it must be observed that the argument derived from Article 16 of Decision 2008/969 based on the contention that the consequences of a W1 warning are less restrictive is not relevant with regard to the grant of judicial protection to Planet since such protection is required by the finding of a distinct change in the legal situation of the person concerned.

48 In that connection, the General Court examined the effect of the contested measures on Planet and found that the company was required, first, to give up the management of the distribution of advances amongst the members of the consortium to which it belonged and, second, to take additional measures to fulfil the new conditions which the Commission imposed on it relating to the signing of the contract.

49 The General Court concluded that the contested measures affected Planet's scope for negotiation, organisation within the consortium to which that company belonged and, therefore, its ability actually to conclude the contract for the AEGIS project.

50 With regard, more specifically, to the causal link between the contested measures and the additional conditions which Planet had to fulfil in order to obtain the signature of the contract by the Commission, the General Court found, in paragraph 46 of the order under appeal, that it could be clearly deduced from the email of 4 June 2009 that the suspension of the signature of the contract and the imposition of an additional condition were the result of the contested measures. In addition, the General Court pointed out, in paragraph 48 of the order under appeal, that the entities seeking the commitment of financial resources of the European Union and who are the subject of a warning in the EWS, are obliged to comply with the conditions and precautionary measures imposed by the authorising officer responsible.

51 Accordingly, it must be held that the General Court did not make an error of law in finding that the precautionary measures imposed in this case on Planet were the direct result of the contested measures.

52 As regards the Commission's argument that those additional measures were the result, not of the warning registered in the EWS, but of an independent assessment by the authorising officer responsible, suffice it to note that this argument is not only unsupported by any evidence capable of establishing an error of law in the reasoning of the General Court, but it also contradicts the Commission's assertion, mentioned in paragraph 43 of the present judgment, that the services of the institution concerned are required to take reinforced monitoring measures following a W1 warning.

53 As to the Commission's argument regarding the General Court's failure to specify in what way Planet was placed at a disadvantage, it must be recalled that the General Court pointed out, in paragraph 48 of the order under appeal, that the precautionary measures imposed following the registration of a W1 warning in the EWS had repercussions on the internal organisation of the consortium to which Planet belonged.

54 The General Court concluded, in paragraph 49 of the order under appeal, that, as from the time of the registration of the first warning in the EWS, Planet found itself in a different situation from that in which it found itself within the consortium during the negotiations between the contracting parties before the adoption of the contested measures. In that connection, the General Court relied on the correspondence between the parties, from which it is apparent, inter alia, that Planet was required, in order to obtain the Commission's signature of the contract, to give up the management of the distribution of advances to the members of the consortium to which it belonged. In addition, it is clear from paragraphs 50 and 51 of the order under appeal that the General Court referred to the various measures which Planet had to take to fulfil the new conditions imposed by the Commission for the signature of that contract and that it concluded that the contested measures affected not only Planet's scope for negotiation but also its ability actually to conclude the contract in question.

55 Accordingly, it cannot be argued that the General Court did not specify in what way Planet was placed at a disadvantage.

56 As regards the argument put forward by the Commission regarding the General Court's failure to examine the evidence produced by the parties, it must be borne in mind that it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts and the legal conclusions it has drawn from them (see, in particular, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others* v *Commission* [2008] ECR I-10193, paragraph 58).

57 Thus, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, in particular, *General Motors* v *Commission*, paragraph 52, and *Coop de France bétail et viande and Others* v *Commission*, paragraph 59).

58 In this case, it is clear from paragraph 49 of the order under appeal that the General Court, in referring to the email of 4 June 2009 and the exchange of correspondence which followed it, took account of the various pieces of evidence and, in particular, of the correspondence exchanged between the contracting parties on which the Commission relies in the present appeal.

59 What is more, the assessment of the different forms of evidence made by the General Court in paragraphs 49 to 51 of the order under appeal does not constitute a question of law subject to the review of the Court of Justice, save where the clear sense of the evidence has been distorted, which has not been alleged by the Commission.

60 It follows from all the foregoing considerations that the first three pleas relied on by the Commission in support of its appeal must be rejected as inadmissible in part and unfounded in part.

The fourth plea

Arguments of the parties

61 By its fourth plea, alleging a failure to state reasons, the Commission submits that the General Court, in paragraph 49 of the order under appeal, found that the mere fact that Planet was relieved of the burden of its management obligations within the consortium and no longer had to distribute payments to the various members, could constitute an unfavourable change in the legal situation of that company. The Commission points out that Planet was not deprived of any financial advantage.

62 Planet considers that this plea is based on a misreading of the order under appeal and that the Commission is attempting, in fact, to have the facts on the basis of which the General Court made its decision examined afresh.

Findings of the Court

63 It must be observed that the question whether the grounds of a judgment of the General Court are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal (see, inter alia, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 90).

64 According to settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see Case C-259/96 P *Council* v *de Nil and Impens* [1998] I-2915, paragraphs 32 and 33, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 70).

65 In that connection, the General Court pointed out, in paragraphs 49 and 50 of the order under appeal, that Planet was required, in order to obtain the Commission's signature of the contract, to give up the management of the distribution of advances to the members of the consortium to which it belonged

and fulfil the additional conditions laid down by the Commission. The General Court concluded that the contested measures had affected Planet's scope for negotiation and its ability actually to conclude the contract at issue.

66 Accordingly, it must be held that the reasoning followed by the General Court in paragraphs 49 to 51 of the order under appeal is in itself clear and comprehensible and that it is capable of constituting grounds for the conclusion which it reaches.

67 The Commission's assertion that Planet was not in any way deprived of a financial advantage concerns a matter of fact, which, for the reasons already set out in paragraphs 57 and 58 of this judgment, does not fall within the jurisdiction of the Court of Justice on appeal.

68 Consequently, the fourth plea must be rejected as in part inadmissible and in part unfounded.

The fifth plea

Arguments of the parties

69 By its fifth plea, alleging a confusion of legal remedies, the Commission argues that since the conditions relating to the organisation of the consortium are an integral part of the contract, any challenge to them is no longer covered by the remedy of annulment but should be analysed, like the other rules on the operation of the contract and the arrangements for payment, on the basis of Article 272 TFEU.

70 Planet takes the view that the argument relied on in support of this plea is new and must, therefore, be declared inadmissible.

Findings of the Court

71 It must be observed that the order under appeal concerns only the question of the admissibility of the action for annulment of the W1 warnings of which Planet was the subject and that neither the question of the merits nor that of the legality of the change in contractual relations which came about as a result of the contested measures has been put before the General Court.

72 Therefore, the Commission's submission of a confusion of legal remedies cannot succeed and the fifth plea must be held to be unfounded.

The sixth plea

Arguments of the parties

73 By its sixth plea, alleging a breach of freedom of contract and of the principle of consent, the Commission alleges that the General Court was wrong to hold, in paragraph 51 of the order under appeal, that the lack of any possibility of judicial review of the truth of the matters relied on is not compatible with a European Union governed by the rule of law, whereas, in the present case, what is at issue is not a unilateral decision entailing negative effects for the persons concerned, but a contractual relationship which the Commission and Planet concluded in the exercise of the freedom of contract.

74 Planet contends that the Commission is confusing the contractual relationship and the subject-matter of the action for annulment.

Findings of the Court

75 In that regard, it must be borne in mind that the General Court made clear, in paragraphs 49 and 51 of the order under appeal, that it follows from the email of 4 June 2009 that, as a result of the registration of a W1 warning in the EWS, Planet's situation within the consortium to which it belonged underwent a change and that, therefore, the scope for negotiation of the company was affected by the contested measures.

76 In so far as the Commission criticises the General Court for not having confirmed that the parties were merely exercising their freedom of contract, suffice it to note that, by that plea, it is calling into question findings of fact which fall exclusively within the jurisdiction of the General Court.

77 It follows from the foregoing considerations that the sixth plea must be held to be inadmissible, for the same reasons as those given in paragraphs 57 and 58 of the present judgment.

The seventh plea

Arguments of the parties

78 By its seventh plea, alleging the erroneous classification of the warnings as decisions without stating any reasons, the Commission submits, first, that the wording of paragraph 51 of the order under appeal shows that it is not the W1 warning which damages Planet but the OLAF investigation which is the legal ground for that warning. The Commission points out that the warning is merely an internal measure which it is authorised to adopt by reason of the organisational autonomy which it enjoys, that it produces no legal effect and is confined to the Commission internally.

79 Next, according to the Commission, the reasoning of the General Court in paragraph 53 of the order under appeal is erroneous in that the warning does not constitute the conclusion of a special procedure.

80 Finally, the assertion by the General Court, in paragraph 52 of the order under appeal, that Decision 2008/969 does not provide for any right for the persons concerned to be informed, is, it alleges, not substantiated in so far as the General Court is again making a generalisation in mentioning warnings as a whole without referring to the fact that there is provision for a hearing in the case of a W5 warning.

81 Planet contends that the seventh plea merely reiterates the arguments put forward by the Commission at first instance, with the result that it should be declared inadmissible. In any event, Planet considers that the Commission's reasoning distorts the content of paragraph 52 of the order under appeal.

Findings of the Court

82 By its first argument under the seventh plea, the Commission, in fact merely reproduces the argument it had already made before the General Court, without taking a position on the grounds given by the General Court on that point.

83 In paragraph 26 of the order under appeal, the General Court observed that, despite the formal claims made by Planet directed at OLAF's requests to register it in the EWS, the Commission starts from the mistaken premiss that it is only the decisions to activate W1a and W1b warnings which are challenged and which form the subject-matter of the dispute.

84 The General Court held, in paragraph 25 of the judgment under appeal, that, from the point of view of an entity registered in the system, the request for activation of a warning and the actual warning constitute a group of decisions forming a whole. It concluded, in paragraph 27 of the order, that Planet's action, formally directed against the decisions of OLAF, must be regarded as directed also, so far as necessary, against the contested measures.

85 Given that, first, the Commission has not called into question the argument of the General Court relating to the subject-matter of the dispute, appearing in paragraphs 25 to 27 of the order under appeal, and that, second, it has not succeeded in establishing, by its previous pleas in law, that the General Court made an error of law in holding that the contested measures were capable of affecting Planet's interests in that they brought about a distinct change in its legal situation, the present argument must be rejected as unfounded.

86 As regards the second argument under the seventh plea, suffice it to note that it is the result of a misreading of paragraph 52 of the order under appeal and that it must therefore be rejected. That paragraph makes express reference to the W1 to W4 and W5b warnings and thus does not concern the W5a warning, in relation to which a right to a hearing is specifically provided for in Article 8(2)(a) of Decision 2008/969.

87 As to the third argument under this plea, directed against paragraph 53 of the order under appeal, it must be observed that, according to the General Court, the contested measures cannot be considered to be intermediate and preparatory decisions which are not subject to review, not only because it was held in paragraphs 44 to 48 of the order under appeal that those measures had the legal characteristics of reviewable measures but also because they represented the conclusion of a special procedure.

88 As is clear from the wording of paragraph 53 of the order under appeal, the General Court intended simply to reiterate the conclusion it had already reached on conclusion of its argument in paragraphs 44 to 48 of that order, adding, however, that the contested measures constituted the conclusion of a special procedure for the registration of an entity in the EWS.

89 As the Commission has not succeeded in calling into question that conclusion, the argument directed at paragraph 53 of the order under appeal must be rejected as ineffective.

90 According to settled case-law, complaints directed against a ground included in the judgment purely for the sake of completeness cannot lead to the judgment being set aside and are therefore nugatory (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 148).

91 It follows from the foregoing considerations that the seventh plea must be held to be unfounded.

The eighth plea

Arguments of the parties

92 By its eighth plea, alleging the subordination of the admissibility of the action to its merits, the Commission alleges that the General Court made a partial assessment of the W1 warning because of the doubts it had with regard to the Commission's authority to adopt Decision 2008/969.

93 Since the eighth plea is directed against a ground of the judgment which is not decisive for the conclusion reached in the operative part, Planet considered that it must be declared to be ineffective.

Findings of the Court

94 As is clear from paragraph 37 of the order under appeal, an action for annulment is available, according to settled case-law, in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, inter alia, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case C-521/06 *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 29, and Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 51).

95 The question of the admissibility of an action for annulment must, therefore, be assessed according to criteria relating to the substance of the contested measures.

96 It must be held that the Commission has failed to establish in what way the General Court did not correctly apply the case-law cited in paragraph 94 of the present judgment.

97 While the General Court found it necessary, in paragraphs 40 to 42 of the order under appeal, to tackle the question of the competence *ratione materiae* of the Commission and added that 'if only for this reason' the content of the contested measures should be analysed, the fact remains that the content of the contested measures needed, in any event, to be analysed in order to assess the merits of the objection of inadmissibility raised by the Commission.

98 The Commission's submission relied on against paragraph 41 of the order under appeal, by which it alleges that the General Court made a partial assessment of the contested measures, cannot, therefore, be upheld.

99 It follows from the foregoing that the eighth plea must be rejected as unfounded.

100 As none of the eight pleas relied on by the Commission in support of its appeal can be upheld, the appeal must be dismissed in its entirety.

Costs

101 According to the first paragraph of Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Articles 184(1) and 190(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Planet has applied for costs to be awarded against the Commission and the Commission has been unsuccessful, the Commission must be ordered to pay the costs of the appeal proceedings.

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

1. Dismisses the appeal;

2. Orders the European Commission to pay the costs.

[Signatures]