Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 January 2017*

(Appeal — Agreements, decisions and concerted practices — Market for methacrylates — Fines — Joint and several liability of parent companies and their subsidiary for the latter's unlawful conduct — Payment of the fine by the subsidiary — Reduction of the amount of the subsidiary's fine following a judgment of the General Court of the European Union — Letters from the accountant of the European Commission demanding payment by the parent companies of the amount it repaid to the subsidiary plus default interest — Action for annulment — Challengeable acts — Effective judicial protection)

In Case C-351/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 July 2015,

European Commission, represented by V. Bottka and F. Dintilhac, acting as Agents,

appellant,

supported by:

EFTA Surveillance Authority, represented by C. Perrin, acting as Agent,

intervener,

the other parties to the proceedings being:

Total SA, established in Courbevoie (France),

Elf Aquitaine SA, established in Courbevoie,

represented by E. Morgan de Rivery and E. Lagathu, lawyers,

applicants at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: V. Giacobbo-Peyronnel, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 9 June 2016,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2016,

gives the following

Judgment

1 By its appeal the European Commission seeks the setting aside of the judgment of the General Court of the European Union of 29 April 2015, *Total and Elf Aquitaine* v *Commission* (T-470/11, 'the judgment under appeal', EU:T:2015:241), by which the General Court partially annulled the Commission's letters BUDG/DGA/C4/BM/s746396, of 24 June 2011 ('the letter of 24 June 2011') and BUDG/DGA/C4/BM/s812886, of 8 July 2011 ('the letter of 8 July 2011') (together 'the contested letters') relating to payment, by Total SA and Elf Aquitaine SA ('the respondents') of the fine and default interest payable following Commission Decision C(2006) 2098 final of 31 May 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/F/38.645 — Methacrylates) ('the Methacrylates decision').

Background to the dispute

2 The background to the dispute is set out by the General Court in paragraphs 2 to 28 of the judgment under appeal as follows:

> '2 By the [Methacrylates decision], the Commission … imposed a fine of EUR 219 131 250 on Arkema SA and its subsidiaries Altuglas International SA and Altumax Europe SAS (taken together, 'Arkema') jointly and severally for participating in a cartel ('the original fine').
>
> 3. The [respondents], Total SA and Elf Aquitaine SA, which, during the period of the infringement found in the Methacrylates decision, were the parent companies of Arkema, were found liable jointly and severally for payment of the original fine to the extent of EUR 181 350 000 and EUR 140 400 000 respectively.
>
> 4. On 7 September 2006 Arkema paid the original fine in full and subsequently brought an action against the Methacrylates decision ('Methacrylates judicial proceedings'), as did the [respondents], simultaneously and independently.
>
> *Methacrylates judicial proceedings before the General Court*
>
> 5. On 4 and 10 August 2006 respectively the [respondents] and Arkema brought an action for the annulment of the Methacrylates decision.
>
> 6. In Case T-206/06 the [respondents] claimed primarily that the Methacrylates decision should be annulled.
>
> 7. Alternatively they also claimed that the original fine imposed jointly and severally on Arkema and themselves should be reduced.
>
> 8 On 24 July 2008 the Commission wrote a letter to Arkema asking it to confirm that its payment of 7 September 2006 had been made "on behalf of all the debtors jointly and severally liable", adding that, first, "without such confirmation and if the [Methacrylates decision was] annulled in relation to the undertaking on whose behalf the payment was made", it, the Commission, would "repay the

sum of EUR 219 131 250 with interest" and, secondly, that "if all or part of the fine [was] upheld by the Court of Justice in relation to any of the other joint and several debtors" it "[would] demand from that debtor any sum remaining due plus default interest at the rate of 6.09%".

9. By letter of 25 September 2008 Arkema informed the Commission that it had paid the sum of EUR 219 131 250 "in its capacity as joint and several debtor and that, since that payment, the Commission [had] received full satisfaction as against Arkema and as against all the other joint and several debtors". To that extent, Arkema "regretted that it [was] unable to authorise the Commission to retain any sum whatever should its action before the Community court [be] crowned with success".

10 On 24 November 2008 the Commission wrote to the [respondents] to inform them of Arkema's letter of 25 September 2008 and of the fact that Arkema had refused to complete the common payment declaration submitted by the Commission.

11 The [respondents'] action was dismissed by judgment of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, … EU:T:2011:250).

12. On the other hand, the action brought separately by Arkema against the Methacrylates decision was partly upheld by the judgment of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, … EU:T:2011:251), in so far as the fine imposed on Arkema was reduced to EUR 113 343 750.

13. In the [judgment of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251)], the Court found that, in the exercise of its unlimited jurisdiction, the increase in the fine applied to Arkema as a deterrent should be reduced in order to take account of the fact that, on the day on which the fine was imposed, Arkema was no longer controlled by the [respondents] (judgment [of 7 June 2011, *Arkema France and Others* v *Commission*, T-217/06, EU:T:2011:251], paragraphs 338 and 339).

14. No appeal was lodged against the judgment [of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251)], so that it has acquired the binding authority of a judgment which has become final.

15. The Commission repaid Arkema, with value date of 5 July 2011, a total of EUR 119247033.72 (principal amount of EUR 105 787 500 plus interest of EUR 13459533.72).

The [contested] letters

Letter of 24 June 2011

16. In the letter of 24 June 2011 the Commission informed the [respondents] that, "in compliance with the judgment [of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251)], [it] would repay Arkema the amount of the reduction in the fine decided upon by the Court".

17. In the same letter of 24 June 2011, the Commission also asked the [respondents] "at the same time, should an appeal be lodged before the Court of Justice against the judgment [of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250)], for payment of the amount outstanding, together with default interest at the rate of 6.09% from 8 September 2006", that is to say, EUR 68 006 250, for the payment of which Total was held "jointly and severally" liable as to EUR 27 056 250 plus default interest, that is to say, a total of EUR 88135466.52.

18 By letter of 29 June 2011 to the Commission, the [respondents] contended, in substance, that the Commission had "received full satisfaction" since 7 September 2006 and they put various questions to the Commission for clarification of several points in the letter of 24 June 2011.

Letter of 8 July 2011

19 By the letter of 8 July 2011, the Commission replied in particular, that, "contrary to the [respondents'] understanding, [the Commission] would certainly not waive recovery of the amounts due if [the respondents] refrained from lodging an appeal before the Court of Justice", adding that "the [respondents'] liability was not extinguished by the retention/deduction of the sums mentioned by the judgment [of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251)] and paid by Arkema".

20 In the same letter the Commission admitted that it had been mistaken as to the amount which it intended to claim and added that the amount due from Elf Aquitaine, pursuant to the Methacrylates decision and also the judgment of [7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250), and of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251)], was EUR 137099614.58, including default interest of EUR 31312114.58 …, for which Total was jointly and severally liable as to EUR 84028796.03.

21 In the letter of 8 July 2011 the Commission added that, if the [respondents] were to appeal against the judgment [of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250)], it would be open to them to provide a bank guarantee rather than to pay the fine.

22. On 18 July 2011 the [respondents] paid the Commission the sum demanded in the letter of 8 July 2011, that is to say, EUR 137099614.58.

Methacrylates judicial proceedings before the Court of Justice on appeal

23. On 10 August 2011 the [respondents] lodged an appeal against the judgment [of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250)].

…

25. The appeal was dismissed by order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, [not published] … EU:C:2012:60), the Court of Justice having dismissed all the [respondents'] claims.

…

28 On the alternative claims seeking exemption from the payment of default interest, the Court of Justice found as follows:

"89 This claim must be dismissed as manifestly inadmissible in that it is directed, not … against the judgment [of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250)], but against the Commission's letter [of 8 July 2011] which is, furthermore, the subject of an action of the [respondents] before the General Court, lodged at the registry of that Court under number T-470/11."'

The procedure before the General Court and the judgment under appeal

3 By application lodged at the Registry of the General Court on 1 September 2011, the respondents brought an action for annulment against the contested letters before the General Court, seeking, in the alternative, the reduction of the sums demanded in those letters, and in the further alternative, the annulment of the default interest.

4 By separate document lodged at the Court Registry on 17 November 2011, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court. It argued, in particular, that the contested letters were acts which cannot be challenged as they were devoid of binding legal effects of such a kind as to affect the respondents, and that the payment obligation on them derived solely from the Methacrylates decision.

5 In the judgment under appeal, the General Court, first, examined the objection of inadmissibility in paragraphs 72 to 101 thereof.

6 In that connection, the General Court held, in particular, that, as regards the amount of the principal demanded from the respondents in the contested letters, those letters did not affect their interests by bringing about a distinct change in their legal position, within the meaning of Article 263 TFEU, as a result of the Methacrylates decision.

7 However, as regards the obligation to pay default interest, the General Court held that that did not arise at all from that decision, or from the judgments of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250), or of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251), because Arkema had paid the whole of the original fine immediately after the decision, so that the disputed act did alter their legal position by increasing the amount due from the respondents under that decision.

8 Therefore, the General Court held the action to be admissible as it was directed against the default interest demanded from the respondents in the contested letters.

9 Second, in paragraphs 107 to 118 of the judgment under appeal, the General Court examined the substance of the action in so far as it was directed against the default interest demanded from the respondents and upheld it to that extent.

10 Therefore, the General Court annulled the contested letters in so far as the Commission had demanded from the respondents default interest and dismissed the action for the remainder.

Forms of order sought and procedure before the Court

11 The Commission contends that the Court of Justice should:

— set aside the judgment under appeal;

— declare the action brought before the General Court to be inadmissible;

— order the respondents to bear the entire costs.

12 The respondents contend that the Court should:

— dismiss the appeal; and

— order the Commission to pay the costs.

13 By decision of the President of the Court of Justice of 17 February 2016, the EFTA Surveillance Authority was granted leave to intervene in support of the form of order sought by the Commission. However, since the request for leave to intervene was lodged after the expiry of the period prescribed in Article 190(2) of the Rules of Procedure of the Court of Justice, pursuant to Article 129(4) of the Rules of Procedure, that party was granted leave to submit its observations only at the hearing which took place on 9 June 2016.

The appeal

Third ground of appeal: contradictory reasoning in the judgment under appeal

Arguments of the parties

14 By its third ground of appeal, which it is appropriate to examine first, the Commission submits that the judgment under appeal is vitiated by contradictory reasoning.

15 The Commission claims, in paragraph 113 of that judgment, that the General Court wrongly held that the Commission's rights with respect to both Arkema and the respondents which were jointly and severally liable for payment had been fully satisfied, even though the General Court had correctly observed, in paragraph 9 thereof, that Arkema 'regretted that it [was] unable to authorise the Commission to retain any sum whatever should its action before the Community court [be] crowned with success'.

16 According to the Commission, Arkema's statement necessarily implied that there had not been a common payment declaration. In those circumstances, the General Court could not hold that the Commission had received full satisfaction as against it and as against all the other joint and several debtors.

17 The respondents submit that the third ground of appeal must be rejected as manifestly inadmissible and, in any event, as manifestly unfounded.

Findings of the Court

18 In essence, the Commission criticises the General Court for having wrongly stated, in paragraph 113 of the judgment under appeal, that the Commission had 'received full satisfaction', although, by its letter of 25 September 2008, Arkema did not declare common payment. That institution seeks, under the pretext of contradictory reasoning, to challenge the General Court's interpretation of that letter in the exercise of its power to evaluate the facts.

19 Although the question whether the grounds of a judgment of the General Court are contradictory or inadequate is a point of law which is amenable, as such, to judicial review on appeal (see, in particular, judgments of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 45, and of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 123), such is not the case of an assessment of facts which, save where the clear sense of the evidence has been distorted, which has not been argued in the present case, is not, according to settled case-law, subject to review by the Court of Justice (see, to that effect, in particular, judgments of 10 July 2014, *Greece* v *Commission*, C-391/13P, not published, EU:C:2014:2061, paragraph 29, and of 20 January 2016, *Toshiba Corporation* v *Commission*, C-373/14 P, EU:C:2016:26, paragraph 40).

20 Consequently, the third ground of appeal must be rejected as inadmissible.

First ground of appeal: the General Court erred in law by holding that the contested letters produced binding legal effects

Arguments of the parties

21 By its first ground of appeal, which relates, in particular, to paragraphs 81 to 87 of the judgment under appeal, consisting of three parts, the Commission claims essentially, that the General Court erred in law by holding that the contested letters produced binding legal effects able to affect the respondents' interests. The EFTA Surveillance Authority endorses that plea in substance.

22 By the first part of the first ground of appeal, the Commission submits that the contested letters are merely demands for payment pursuant to the Methacrylates decision, preparing for the possible enforcement of that decision following the judgments of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250), and of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251). However, those letters do not yet constitute an 'enforcement measure' and, therefore, do not set out the Commission's final position. Only the decision may be the subject of enforcement measures which were, so to speak, avoided by the payment made by the respondents.

23 By the second part of the first ground of appeal, the Commission claims that the content of the contested letters shows that they do not produce binding legal effects. Those letters express the opinion of the Accounting Officer regarding the recovery of the fine imposed by the Methacrylates decision, and merely set out the detailed rules for payment or 'the coverage of the fine to date', which is clearly a measure taken in the context in the enforcement of the decision.

24 By the third part of the first ground of appeal, the Commission claims that the contested letters added nothing to the content of the Methacrylates decision. The respondents' obligation to pay the fine and the interest thereon is simply the result of the Methacrylates decision, read in the light of the judgments of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250), and of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251), and the order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, not published, EU:C:2012:60). Thus, as is clear from the case-law of the General Court and the Court of Justice, the Commission does not have any discretion in this regard, for the fixing of default interest flows from the relevant provisions of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1, 'the Financial Regulation'), and its implementing regulation, Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 (OJ 2012 L 362, p. 1).

25 According to the Commission, the contested letters only reflect its intention to enforce the Methacrylates decision, and do not produce any other legal effects than those in that decision. Those letters are not dissociable from the decision for which they are acts preparatory to its enforcement.

26 The respondents take the view that the first ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

27 In that connection, as regards the second and third parts of that ground of appeal, they are, according to the respondents, manifestly inadmissible since, by those parts, the Commission, in essence, merely repeats the arguments that it already put before the General Court, without having established the errors of law that the General Court allegedly committed in that regard, and without identifying the paragraphs of the judgment under appeal that it criticises.

28 As to the first part of the first ground of appeal, it must, in the respondents' view, be dismissed as unfounded.

Findings of the Court

29 By its first ground of appeal, the Commission criticises the General Court, in substance, for erring in law by holding that the contested letters, in so far as by them the Commission had demanded default interest, are actionable measures within the meaning of Article 263 TFEU.

30 As regards the admissibility of that ground of appeal, in relation to its second and third parts, it follows from the provisions of 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, in particular, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 46 and the case-law cited).

31 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 discussed 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).

32 In the present case, by its first ground of appeal, in particular in its second and third parts, the Commission 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 contested letters were such as to produce binding legal effects so as to bring about a change in the position of the undertakings concerned.

33 To that end, the Commission also indicated to the requisite legal standard the passages of the judgment under appeal that it considers vitiated by an error of law, and the legal arguments relied on in support of its claim, thus enabling the Court to carry out a review.

34 It follows that the first ground of appeal is admissible.

35 As to the substance of the first ground of appeal, the parts of which must be examined together, it must be recalled, as a preliminary point, that it follows from settled case-law as regards the admissibility of an action for annulment that, in order to determine whether an act may be subject to such an appeal, importance must be given to the substance of that act, the form in which an act or decision is adopted being in principle irrelevant to the right to challenge such acts (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, paragraph 43).

36 In that connection, it is also clear from settled case-law that only measures the legal effects of 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).

37 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 (see, to that effect, in particular, judgments of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 55; of 6 December 2007, *Commission* v *Ferriere Nord*, C-516/06 P, EU:C:2007:763, paragraph 29; and of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 52).

38 It is from that perspective that the Commission, in its first ground of appeal, argues essentially that, as regards the obligation to pay the default interest demanded, the contested letters are not intended to produce binding legal effects separate from those deriving from the Methacrylates decision, since that obligation to pay default interest arises only from that decision and the relevant regulatory provisions, and that those letters added nothing to that decision. Thus, the contested letters were preparatory to the possible enforcement of the Methacrylates decision.

39 In the light of the specific circumstances of the case, such arguments cannot be accepted.

40 In that connection, it must be recalled, first of all, that by the Methacrylates decision, by which a fine of EUR 219 131 250 was imposed on Arkema, the respondents, in their capacity as its parent companies, were held 'jointly and severally' liable for the payment of the fine up to EUR 140.4 million and EUR 181.35 million respectively.

41 Next, by the judgment of 7 June 2011, *Arkema France and Others* v *Commission* (T-217/06, EU:T:2011:251), the amount of the fine imposed on Arkema was reduced to EUR 113 343 750. However, the amount of the fine imposed, as such, on the respondents remained unchanged as a result of the judgment of 7 June 2011, *Total and Elf Aquitaine* v *Commission* (T-206/06, EU:T:2011:250) which was further confirmed by the order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, not published, EU:C:2012:60, paragraph 83).

42 Finally, it is not disputed that, as the General Court acknowledged in paragraph 112 of the judgment under appeal, Arkema has paid the whole of the original fine imposed by the Methacrylates decision of EUR 219 131 250 on 7 September 2006.

43 In that connection, it must be held first, that, in paragraph 113 of the judgment under appeal, the General Court held that it was clear from Arkema's letter sent to the Commission on 25 September 2008, that Arkema clearly stated that the Commission, had 'received full satisfaction as against [it] and as against all the other joint and several debtors' and, therefore, paid the full amount of the original fine also on behalf of the respondents, an assessment which, as is clear from the reasons set out in paragraphs 18 to 20 of the present judgment, cannot be challenged in the present appeal.

44 Second, it must be recalled that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary (see, to that effect, judgments of 22 January 2013, *Commission* v *Tomkins*, C-286/11 P, EU:C:2013:29, paragraphs 37, 39, 43 and 49, and of 17 September 2015, *Total* v *Commission*, C-597/13 P, EU:C:2015:613, paragraph 38).

45 In the present case, the joint and several liability of the respondents with regard to Arkema was purely derivative of that of their subsidiary, to the exclusion of any other factor. Therefore, it follows from the case-law of the Court, as the Advocate General observed, in particular in points 64 to 68 of his

Opinion and independently of the question whether Arkema made a common payment declaration, that, after the full payment of the original fine by Arkema, which is not contested, that, in any event, the Commission was no longer entitled to claim payments from the respondents in that regard.

46 Having regard to the foregoing considerations, it must be stated that, as the General Court rightly stated in paragraph 116 of the judgment under appeal, the Commission could not justifiably demand default interest from the respondents in respect of the fine imposed in the Methacrylates decision.

47 It follows that, contrary to the Commission's submissions, that in so far as it had demanded undue default interest, those letters cannot be regarded as being purely confirmatory of the obligations deriving from the Methacrylates decision and as being preparatory to its enforcement.

48 Therefore, even if the letters by which the Commission simply claims from the addressees of a decision concerning the infringement of competition rules (such as the Methacrylates decision) the payment of the fine which is imposed by that decision, or default interest which may arise from it, those letters may, in principle, only constitute an enforcement notice of the decision concerned, and, therefore, are unable to produce binding legal effects of such a nature as to affect the interests of the undertakings concerned (see, to that effect, judgment of 6 December 2007, *Commission* v *Ferriere Nord*, C-516/06 P, EU:C:2007:763, paragraph 29), that is not the case, having regard to their content, of the contested letters, in that they demand that the respondents pay default interest in spite of the payment in full of the original amount of the fine and, therefore, is, in fact, a modification of the pecuniary obligation for which they are liable.

49 It follows that the General Court has not erred in law by holding, in particular in paragraph 99 of the judgment under appeal, that the contested letters, in so far as by them the Commission had demanded default interest, produced binding legal effects such as to affect the respondents' interests by bringing about a distinct change in their legal position, and therefore, by treating those letters as challengeable acts within the meaning of Article 263 TFEU.

50 The first complaint must therefore be rejected as unfounded.

The second ground of appeal: infringement of the principles of lis pendens and res judicata

Arguments of the parties

51 By its second ground of appeal, the Commission criticises the General Court, essentially, for infringing the principles of *lis pendens* and *res judicata*, in that it detached, in particular in paragraphs 80 and 93 to 101 of the judgment under appeal, the question of default interest to be paid from the rest of the Methacrylates decision.

52 In that connection, the Methacrylates decision contains, in Article 2 thereof, provisions on the principal fine imposed and the interest to pay in the case of non-payment, which are ancillary to it. At the date the action was brought in the case which gave rise to the judgment under appeal, the appeal before the Court in Case C-421/11 P relating to that decision was still being heard. Furthermore, following the order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, not published, EU:C:2012:60), that decision had become definitive for the respondents with respect to all its elements, including the question of interest.

53 The respondents challenge the merits of the second ground of appeal observing, in particular, that the conditions of *lis pendens* between two cases and *res judicata*, such as those deriving from the case-law of the Court of Justice and the General Court are not fulfilled in the present case.

Findings of the Court

54 In so far as the second ground of appeal is based essentially on the Commission's argument, as argued in relation to its first ground of appeal, that the demand for default interest in the contested letters is only an enforcement measure for what is already laid down in the Methacrylates decision and is not dissociable from it, it must be held that that argument, as is clear, in particular from paragraphs 44 to 52 of the present judgment, cannot be accepted.

55 Furthermore, and to the same effect, the Court, in paragraph 89 of the order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, not published, EU:C:2012:60), as the General Court rightly recalled in paragraph 100 of the judgment under appeal, dismissed as manifestly inadmissible the claim brought by the respondents in the appeal which gave rise to that order, exempting them from paying interest, having regard to the fact that it did not relate to the judgment which was the subject of that appeal and, therefore, the Methacrylates decision, but the contested letters imposing default interest.

56 Accordingly, the second ground of appeal must be rejected as unfounded.

57 Since none of the grounds of appeal raised by the Commission have been upheld, the appeal must be dismissed in its entirety.

Costs

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

59 Under Article 138(1) of those rules, applicable to appeal proceedings 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 Commission has been unsuccessful and the respondents have applied for costs, it must be ordered to pay the respondents' costs and bear its own costs.

60 According to Article 140(2) of those rules, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the EFTA Surveillance Authority is to bear its own costs when it intervenes in proceedings.

61 Therefore the EFTA Surveillance Authority must be ordered to bear its own costs.

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

1. **Dismisses the appeal;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Total SA and Elf Aquitaine SA;**

3. **Orders the EFTA Surveillance Authority to bear its own costs.**

[Signatures]