Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 25 July 2018 [1]

**Joined Cases C-174/17 P and C-222/17 P**

**European Union, represented by the Court of Justice of the European Union**
**v**
**Plásticos Españoles, SA (ASPLA)**
**Armando Álvarez, SA (C-174/17 P)**
**and**
**Plásticos Españoles, SA (ASPLA)**
**Armando Álvarez, SA**
**v**

**European Union, represented by the Court of Justice of the European Union (C-222/17 P)**

(Appeal — Admissibility — Non-contractual liability — Reasonable duration of the proceedings — Court of Justice of the European Union — Obligation to adjudicate within a reasonable time — Material damage — Bank guarantee charges — Interest — Causal link)

1. What are the types of damage that the European Union has, under Article 340 TFEU, to make good to individuals whose right to have their case adjudicated within a reasonable time was breached by the Court of Justice of the European Union? More particularly, under what circumstances should compensation for the damage allegedly caused by the excessive delay be awarded?

2. These are, in essence, the key issues raised by the appeals lodged by the European Union, represented by the Court of Justice of the European Union, [2] and by Plásticos Españoles, SA ('ASPLA') and Armando Álvarez, SA against the judgment of the General Court of 17 February 2017, *ASPLA and Armando Álvarez* v *European Union*, T-40/15 ('the judgment under appeal'), [3] in which the latter awarded ASPLA and Armando Álvarez certain sums by way of compensation for the material damage sustained by them as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgments of 16 November 2011, *ASPLA* v *Commission*, T-76/06, [4] and *Álvarez* v *Commission*, T-78/06. [5]

1 Original language: English.
2 Hereinafter for simplicity referred to as 'the European Union'.
3 EU:T:2017:105.
4 Not published, EU:T:2011:672.
5 Not published, EU:T:2011:673.

3. Largely similar issues are also raised by four other appeals — two lodged by the European Union, and two by other companies — against two judgments of the General Court in which that court awarded compensation for the material and non-material damage sustained by those companies as a result of the breach of the obligation to adjudicate within a reasonable time. In those proceedings too, I am delivering my Opinion today.[6] The present Opinion should thus be read together with those Opinions.

## I. Background to the proceedings

4. By application lodged on 24 February 2006, ASPLA, on the one hand, and Armando Álvarez, on the other hand, brought an action pursuant to (what is now) Article 263 TFEU against Commission Decision C(2005) 4634 of 30 November 2005 relating to a proceeding pursuant to Article [101 TFEU] (Case COMP/F/38.354 — Industrial bags) ('Decision C(2005) 4634').[7]

5. By judgments of 16 November 2011, the General Court dismissed those actions.[8] ASPLA and Armando Álvarez brought appeals against the judgments of the General Court. The Court of Justice, by judgments of 22 May 2014,[9] dismissed the appeals.

## II. Procedure before the General Court and the judgment under appeal

6. By application lodged on 27 January 2015, ASPLA and Armando Álvarez brought an action pursuant to Article 268 TFEU against the European Union for the damage allegedly suffered as a result of the length of the proceedings before the General Court in the cases which led to the judgments of 16 November 2011 in Cases T-76/06 and T-78/06. In essence, ASPLA and Armando Álvarez requested the General Court to order the European Union to pay them compensation of EUR 3 495 038.66, plus compensatory and default interest at the rate applied by the European Central Bank (ECB) to its main refinancing operations, increased by two percentage points, starting from the date when their application was lodged.

7. By the judgment under appeal, the General Court ordered the European Union to pay compensation of EUR 44 951.24 to ASPLA and compensation of EUR 111 042.48 to Armando Álvarez for the material damage suffered by each of those companies as a result of the breach of the obligation to adjudicate within a reasonable time in the cases giving rise to the judgments of 16 November 2011, *ASPLA* v *Commission* (T-76/06) and *Armando Álvarez* v *Commission* (T-78/06). Each of those compensatory sums was to be reassessed by applying compensatory interest, starting from 27 January 2015 and continuing up to the date of delivery of the judgment, at the annual rate of inflation determined, for the period in question, by Eurostat in the Member State where those companies are established. The General Court also ordered that each of the compensatory sums was to bear default interest, starting from the date of delivery of the judgment in question and continuing until full payment, at the rate set by the ECB for its principal refinancing operations, increased by two percentage points. The General Court dismissed the action as to the remainder.

8. As regards costs, the General Court ordered: (i) ASPLA and Armando Álvarez, on the one hand, and the European Union, on the other, to bear their own costs; and (ii) the European Commission to bear its own costs.

6 Joined Cases *European Union* v *Gascogne Sack Deutschland and Gascogne*, and *Gascogne Sack Deutschland and Gascogne* v *European Union*, C-138/17 P and C-146/17 P; and Case *European Union* v *Kendrion*, C-150/17 P.

7 The cases mentioned in footnote 6 above also concern procedures started by other undertakings that were addressees of Decision C(2005) 4634.

8 Judgments of 16 November 2011, *ASPLA* v *Commission* (T-76/06, not published, EU:T:2011:672), and *Álvarez* v *Commission* (T-78/06, not published, EU:T:2011:673).

9 Judgments of 22 May 2014, *ASPLA* v *Commission* (C-35/12 P, EU:C:2014:348), and *Armando Álvarez* v *Commission* (C-36/12 P, EU:C:2014:349).

## III. Procedure before the Court and forms of order sought

9. By appeal lodged on 5 April 2017, in Case C-174/17 P, the European Union claims that the Court should:

– set aside point 1 of the judgment under appeal;

– dismiss as unfounded the claim brought by ASPLA and Armando Álvarez at first instance seeking payment of an amount of EUR 3 495 038.66 as compensation for the damage they claim to have suffered as a result of the breach of the obligation to adjudicate within a reasonable time;

– order ASPLA and Armando Álvarez to pay the costs.

10. ASPLA and Armando Álvarez, for their part, contend that the Court should:

– dismiss the appeal;

– order the European Union to pay the costs.

11. By appeal lodged on 27 April 2017, in Case C-222/17 P, ASPLA and Armando Álvarez claim that the Court should:

– set aside the judgment under appeal;

– order the European Union to pay the appellants EUR 3 495 038.66, together with the corresponding compensatory and late payment interest, by way of compensation as a result of the General Court's infringement of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union;

– order the European Union to pay the costs.

12. The European Union for its part, contends that the Court should:

– dismiss the appeal;

– order ASPLA and Armando Álvarez to pay the costs.

13. In the proceedings in Case C-174/17 P, the European Commission was admitted to intervene in support of the form of order sought by the European Union.

14. By decision of the President of the First Chamber of 17 April 2018, Cases C-174/17 P and C-222/17 P were joined for the purposes of the Opinion and the judgment

## IV. Assessment of the grounds of appeal

### *A. Preliminary remarks*

15. In its application in Case C-174/17 P, the European Union puts forward two grounds of appeal, claiming that the General Court erred in law by misinterpreting the respective notions of 'causal link' and 'damage'. The Commission essentially agrees with the European Union.

16. ASPLA and Armando Álvarez claim that those grounds of appeal are unfounded.

17. In its application in Case C-222/17 P, ASPLA and Armando Álvarez put forward five grounds of appeal. By their first ground of appeal, they allege an error of law and a lack of sufficient reasons in the General Court's assessment of what was a reasonable period of time between the written and oral phase of the proceedings. By their second ground of appeal, they allege an error of law in the assessment of the material damage suffered. The third ground of appeal relied on by ASPLA and Armando Álvarez concerns an alleged error of law committed by the General Court in the application of the principle '*non ultra petita*' in relation to the assessment of the material damage suffered. By their fourth ground of appeal, those companies submit that, in resorting to a method of calculation of the material damage that differed from the one proposed by them, the General Court breached their rights of defence. The fifth ground of appeal, finally, concerns an alleged contradiction in the judgment under appeal as regards the period for which the material damage suffered by ASPLA and Armando Álvarez was to be compensated.

18. The European Union, for its part, contends that the grounds of appeal put forward by ASPLA and Armando Álvarez should be rejected.

19. In the present Opinion, I shall examine first the grounds of appeal that concern material damage. It will then be unnecessary to examine the grounds of appeal that concern the General Court's assessment of the period of time between the written and oral phase of the proceedings that, in the cases at hand, should be considered reasonable.

### *B. Material damage*

20. The two grounds of appeal put forward by the European Union in Case C-174/17 P, as well as the second, third, fourth and fifth grounds of appeal put forward by ASPLA and Armando Álvarez in Case C-222/17 P, all concern the General Court's findings with regard to the material damage allegedly suffered by ASPLA and Armando Álvarez. In particular, both parties contend that the General Court erred in law in examining ASPLA and Armando Álvarez's claims in relation to the damage resulting from the costs relating to the bank guarantee which those companies provided to the Commission to avoid an immediate settlement of the fine imposed by Decision C(2005) 4634. ASPLA and Armando Álvarez also argue that the General Court erred in law when dismissing their claim to be compensated for the interest paid to the Commission for the period of the overrun.

21. I consider it appropriate to begin my legal analysis of these issues by examining the claims concerning the bank guarantee charges paid by ASPLA and Armando Álvarez. To that end, I will start with the *first* ground of appeal put forward by the European Union. I will subsequently deal, only for the sake of completeness, with the European Union's *second* ground of appeal. After that, there will be no need to examine the remaining grounds of appeal put forward by ASPLA and Armando Álvarez.

22. I shall, finally, examine ASPLA and Armando Álvarez's *second* ground of appeal, which concerns the payment of the interest on the fine for the period of the overrun.

#### *1. Bank guarantee charges: existence of a causal link*

23. By its first ground of appeal, the European Union, supported by the European Commission, takes issue with the General Court's interpretation and application of the concept of 'causal link'. In essence, the European Union contends that there is no direct causal link between the breach by the General Court of the obligation to give judgment within a reasonable time in Cases T-76/06 and T-78/06, and ASPLA and Armando Álvarez's damage arising from the payment of the bank guarantee charges. In particular, the European Union emphasises that that damage was the outcome of a choice made by ASPLA and Armando Álvarez to maintain the operation of the bank guarantee throughout

the proceedings, instead of paying the fine imposed by the Commission. For their part, ASPLA and Armando Álvarez defend, on this point, the judgment under appeal: in their view, the bank guarantee charges paid in the period of the overrun were caused by the General Court's failure to adjudicate within a reasonable time.

24. In the following, I shall start by briefly illustrating the reasoning followed by the General Court and then explain why, in my opinion, the European Union's first ground of appeal is well founded.

25. In paragraphs 84 and 85 of the judgment under appeal, the General Court recalled the settled case-law, according to which the damage for which compensation is sought in an action to establish non-contractual liability on the part of the European Union must be actual and certain, which is for the applicant to prove. It falls also to the applicant to adduce proof of the existence of a causal link — that is, of a sufficiently direct nexus — between the conduct complained of and the damage alleged.

26. In paragraphs 104 to 107 of the judgment under appeal, the General Court observed that, had the duration of the proceedings in Cases T-76/06 and T-78/06 not exceeded the reasonable time for adjudication, ASPLA and Armando Álvarez would not have had to pay any bank guarantee charges during the period of the overrun. That meant, in its view, that there was a causal link between the breach of the obligation to adjudicate within a reasonable time and the occurrence of the damage suffered by ASPLA and Armando Álvarez as a result of their having paid bank guarantee charges during the period of the overrun.

27. Referring to previous case-law ('the *Holcim* case-law'),[10] the General Court recognised — in paragraph 109 of the judgment under appeal — that, in principle, the bank guarantee charges incurred by a company penalised by a Commission decision are the consequence of that company's own decision to provide a bank guarantee so as not to comply with the obligation to pay the fine within the period stipulated in the contested decision. Thus, that cost cannot normally be regarded as being a *direct* consequence of the institution's behaviour.

28. However, the General Court then went on — in paragraphs 110 to 112 of the judgment under appeal — to distinguish the case at hand from those that gave rise to the *Holcim* case-law. The General Court took the view that, at the time when ASPLA and Armando Álvarez brought their actions in Cases T-76/06 and T-78/06, and at the time when they provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable, and ASPLA and Armando Álvarez could legitimately expect their actions to be dealt with within a reasonable time. The General Court also observed that the reasonable time for adjudicating in Cases T-76/06 and T-78/06 was exceeded after the applicants' initial decision to provide a bank guarantee. For those reasons, it held that the link between the fact that the reasonable time for adjudicating in Cases T-76/06 and T-78/06 was exceeded and the payment of bank guarantee charges during the period of the overrun could not be considered severed by ASPLA and Armando Álvarez's initial decision not to effect immediate payment of the fine and to provide a bank guarantee. It thus concluded, in paragraph 113 of the judgment, that the causal link was sufficiently direct for the purposes of Article 340 TFEU.

10 See judgment of 21 April 2005, *Holcim (Deutschland)* v *Commission*, T-28/03, EU:T:2005:139, paragraph 123, and order of 12 December 2007, *Atlantic Container Line and Others* v *Commission*, T-113/04, not published, EU:T:2007:377, paragraph 38. I would point out that, so far, the Court of Justice has not had the opportunity to endorse this line of case-law.

29. The reasoning followed by the General Court is, in my view, erroneous. In essence, the General Court accepts the authority devolving from the *Holcim* case-law but then goes on to distinguish the present case from those which were the object of that case-law. Like the General Court, I believe that the *Holcim* case-law is sound but, unlike the General Court, I do not consider the present case to be substantially different from the cases that gave rise to the judgment in Holcim: to my mind, neither of the two grounds given by the General Court for that distinction is, either taken alone or in combination, convincing.

30. Before explaining in detail why I am of that view, I would like to emphasise that, according to well-established case-law, Article 340 TFEU cannot be interpreted as requiring the European Union to make good every harmful consequence, even a remote one, of conduct of its institutions.[11] Accordingly, in an action for non-contractual liability of the Union it is not enough that the conduct complained of is one of the causes of the alleged damage; that conduct has to be the *determining* cause of the damage.[12] In other words, a sufficient nexus exists only where the damage is the direct consequence of the unlawful act of the institution responsible and it does not depend on the intervention of other causes, whether positive or negative.[13]

*(a) The foreseeability of the unlawful conduct*

31. The first ground given by the General Court for distinguishing the present case from those which gave rise to the *Holcim* case-law is that, at the time when ASPLA and Armando Álvarez brought their actions in Cases T-76/06 and T-78/06, and at the time when they provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time by the General Court was *unforeseeable*.

32. However, that statement is in the first place inaccurate. Unfortunately, a certain number of cases that had been decided by the General Court shortly before the actions in Cases T-76/06 and T-78/06 were lodged had been of a significant duration.[14] That is especially true of cases concerning the application of EU competition rules, and in particular cartels,[15] which are notoriously complex and time-consuming and may require a parallel or coordinated handling of several cases at the same time.

33. True, ASPLA and Armando Álvarez, as any other applicant, could expect their cases to be decided within a reasonable time. However, in the light of the General Court's practice and judicial record at the material time, it was a rather uncertain and difficult exercise to calculate the likely duration of the proceedings in order to estimate the potential total cost of the bank guarantee.

34. In the second place, and more importantly, regardless of whether the excessive delay in Cases T-76/06 and T-78/06 was foreseeable, the General Court erred in using the concept of 'foreseeability' in order to establish the existence of a sufficient causal nexus triggering the European Union's liability.

11 To that effect, see judgment of 4 October 1979, *Dumortier and Others* v *Council*, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 21. More recently, see order of 31 March 2011, *Mauerhofer* v *Commission*, C-433/10 P, not published, EU:C:2011:204, paragraph 127 and the case-law cited.

12 See order of 31 March 2011, *Mauerhofer* v *Commission*, C-433/10 P, not published, EU:C:2011:204, paragraph 127 and the case-law cited.

13 See, to that effect, Opinion of Advocate General Trabucchi in *Compagnie continentale France* v *Council*, 169/73, not published, EU:C:1974:32, point 4.

14 See, for example, judgments of 13 January 2004, *Thermenhotel Stoiser Franz and Others* v Commission, T-158/99, EU:T:2004:2; of 11 May 2005, *Saxonia Edelmetalle* v *Commission*, T-111/01 and T-133/01, EU:T:2005:166; of 19 October 2005, *Freistaat Thüringen* v *Commission*, T-318/00, EU:T:2005:363; and of 14 December 2005, *Laboratoire du Bain* v *Council and Commission*, T-151/00, not published, EU:T:2005:450.

15 See, among others, judgments of 11 December 2003, *Marlines* v *Commission*, T-56/99, EU:T:2003:333; of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T-44/00, EU:T:2004:218; of 14 December 2005, *Honeywell* v *Commission*, T-209/01, EU:T:2005:455; and of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74.

35. The key question, in the case at hand, is not whether the victim of the alleged damage was able to anticipate the unlawful event that produced the alleged damage. What is crucial in order to establish the non-contractual liability of the European Union in the present case is, first and foremost, whether the alleged damage is a *direct* consequence of the institution's unlawful behaviour.

36. That is a point which the General Court failed to examine in detail. It seems to me that, in the context of that examination, the potential unforeseeability of the excessive delay could have only been relevant in two circumstances. However, neither of those circumstances applies in the present case.

37. On the one hand, that element could have been relevant if ASPLA and Armando Álvarez had been unable, subsequently, to reverse their initial decision to defer payment and submit a bank guarantee. Yet, as it will be shown in points 49 to 52 below, that is not the case: at any time in the course of the judicial proceedings, ASPLA and Armando Álvarez were at liberty to settle the fine and withdraw the bank guarantee. Thus, even if unforeseeable at first, ASPLA and Armando Álvarez could have adapted their conduct in the light of that new event.

38. On the other hand, the potential unforeseeability of the excessive delay could also have been relevant if the European Union had argued, before the General Court, that ASPLA and Armando Álvarez failed to show reasonable diligence in avoiding or limiting the extent of the damage that might have ensued from their choice of deferring the settlement of the fine until the end of the judicial proceedings.

39. In that regard, it must be borne in mind that, according to settled case-law, in an action for non-contractual liability, it must be verified whether, at the risk of having to bear the damage himself, the person adversely affected had demonstrated, as a prudent person, reasonable diligence in avoiding or limiting the extent of the damage. The causal link may be broken by negligence on the part of the person adversely affected, where that negligence proves to be the determinant cause of the damage.[16]

40. That is not, however, why the General Court referred to that element in the judgment under appeal. The General Court did not use the criterion of foreseeability to examine whether ASPLA and Armando Álvarez's negligence had broken the causal link between the alleged damage and the EU institution's conduct complained of; instead it applied that concept in order to establish the existence of such a link as a first step.

41. Nevertheless, the potential unforeseeability of the event giving rise to the alleged damage says nothing about the *determining factor* of the alleged damage. Even assuming that the excessive delay was unforeseeable, that fact is neither necessary nor sufficient to trigger the European Union's liability.

42. In the light of the above, I take the view that, in the judgment under appeal, the General Court wrongly interpreted and applied the concept of 'foreseeability' for the purposes of Article 340 TFEU in order to establish the existence of a causal link between the alleged damage and the conduct complained of.

*(b) ASPLA and Armando Álvarez's lack of choice*

43. The second ground given by the General Court for distinguishing case T-40/15 from those which gave rise to the *Holcim* line of case-law is that the reasonable time for adjudicating in Cases T-76/06 and T-78/06 was exceeded *after* ASPLA and Armando Álvarez's decision to provide a bank guarantee.

16 See, for example, judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 61. That principle is, as the Court has consistently held, a general principle common to the legal systems of the Member States: see, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 85 and the case-law cited.

44. That element too is, in my view, irrelevant.

45. At the outset, it should be borne in mind that a Commission decision, such as Decision C(2005) 4634, is legally binding and presumed valid until annulled by the EU Courts. Should an undertaking penalised by a fine imposed by the Commission consider that the Commission decision is unlawful and that immediate compliance with it may provoke irreparable harm, it is open to that undertaking to lodge a request for interim measures before the EU Courts under Articles 278 and 279 TFEU while challenging the validity of the decision.

46. If no such a request is lodged, or if such a request is dismissed by the EU Courts, a fine must be paid, as a rule, within the period stipulated in the decision. That said, the EU budgetary rules [17] permit the Commission to accept that the payment of a fine be deferred, provided that the debtor undertakes to pay the interest on late payment and lodges a financial guarantee covering the debt outstanding in both the principal sum and the interest.

47. Thus, the choice is offered to the undertakings intending to challenge a fine before the EU Courts to opt either for an immediate settlement (the rule) or to request the possibility of submitting a bank guarantee (the exception). Unlike argued by ASPLA and Armando Álvarez, the possibility that was offered to them by Article 85 of Regulation No 2342/2002 did constitute an exception. The rule, enshrined in Articles 278 and 279 TFEU, is that a Commission decision such as Decision C(2005) 4634 takes effect as soon as it is notified to its addressees, and remains applicable even if challenged before the EU Courts (unless its application is suspended by those courts).

48. The choice of the undertaking must be *financially neutral* for the Union: a deferral of the payment may not lead to a loss for the Union's budget. The accounting officer who, in collaboration with the authorising officer responsible, takes a decision on the request of the undertaking to defer the payment does not have the power to alter the value of the fine that was decided by the Commission as institution (that is, by the college of Commissioners). At the same time, the decision of an undertaking to immediately settle the fine, despite its intention to challenge the Commission decision before the EU Courts, should not lead to an unjust enrichment of the European Union. This is why, on the one hand, if the EU Courts uphold the Commission decision, the fine whose payment has been deferred becomes payable with interest. On the other hand, the annulment of the contested Commission decision gives rise to an obligation of the Union to repay the sums paid, increased by the applicable interest rate. [18]

49. The decision to defer payment of a fine evidently allows the undertaking to continue using the corresponding sums while the judicial proceedings are pending. However, it also implies some extra costs (those associated with the submission of the bank guarantee) that the undertaking must accept to bear, including where it ultimately obtains the annulment of the challenged decision. It is, therefore, for each undertaking fined by the Commission to assess whether it is financially in its interest to settle the fine within the prescribed period, or to request a deferral of the payment and provide a bank guarantee.

17 Article 85 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1). That regulation, applicable at the material time, has now been replaced by Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1).

18 See, to that effect, judgment of 12 February 2015, *Commission v IPK International*, C-336/13 P, EU:C:2015:83. Regarding the type and amount of interest to be repaid by the Commission to a company that had paid a fine to comply with a decision adopted under Article 101 TFEU subsequently annulled by the EU Courts, see Case T-201/17, *Printeos v Commission*, pending.

50. Importantly, unlike what the General Court implies, that is not a choice that may only be made once. Any undertaking having chosen to submit a guarantee may always reverse its original decision and proceed to the payment of the fine.[19] By doing that, it avoids the accrual of additional interest on the principal and it may withdraw the bank guarantee previously provided.

51. Nothing prevents, as a matter of EU law, an undertaking from terminating the bank guarantee and settling the fine, when that undertaking deems that course of action to be more advantageous. It may thus be assumed that, if at no point in time in the course of the proceedings an undertaking revisits its initial choice, that is because that undertaking finds the continuous operation of the bank guarantee to still be in its best interest. Indeed, whether the initial decision continues to be advantageous subsequently depends on multiple factors that — as the Commission points out — may significantly vary over time (the cost of borrowing money, the fees applied by the bank for the guarantee, the return that the sum due generates when invested in other businesses, and so forth). From an economic perspective, it is thus reasonable to presume that an undertaking may regularly reconsider its initial decision.

52. Therefore, as correctly argued by the European Union, the choice of providing a bank guarantee instead of settling the fine imposed by the Commission was not made only at the beginning of the procedure: that choice was freely and consciously *maintained* (or *confirmed*) by ASPLA and Armando Álvarez during the entire period that the judicial proceedings in Cases T-76/06 and T-78/06 lasted, including when those proceedings had become of a significant duration.

53. Concluding on this point, the General Court's second reason for distinguishing the present case from those that gave rise to the *Holcim* case-law is thus based on an erroneous premiss: that the only decision that mattered in the case at hand was ASPLA and Armando Álvarez's initial decision to defer payment and provide a bank guarantee before the beginning of the proceedings.

54. The erroneous nature of that premiss is also indirectly confirmed by the judgment under appeal.

*(c) The contradiction in the judgment under appeal*

55. In paragraph 119 of the judgment under appeal, the General Court found that no sufficiently direct causal link existed with regard to the cost of the bank guarantee borne *after* the delivery of the judgments in Cases T-76/06 and T-78/06. The General Court considered the payment of such charges to be the consequence of the personal and independent decision which ASPLA and Armando Álvarez took, after the delivery of that judgment, not to pay the fine, not to request suspension of the operation of Decision C(2005) 4634, and to bring an appeal against the aforementioned judgments. That being so, it is not clear to me why the decision to maintain the bank guarantee was, in the General Court's view, decisive to exclude the liability of the European Union *after* the delivery of the judgment but not *before*.

56. As the European Union argued, there seems to be no meaningful difference between those periods that may be relevant under Article 340 TFEU. Also during the first instance proceedings ASPLA and Armando Álvarez consciously chose not to request suspension of the contested decision and to continue the operation of the bank guarantee until those proceedings were ended. Paragraph 119 of the judgment under appeal thus confirms that the elements which the General Court considered relevant in paragraphs 110 to 112 of the same judgment for distinguishing the case at hand from the *Holcim* case-law are immaterial.

19 See, for example, judgment of 12 May 2016, *Trioplast Industrier* v *Commission*, T-669/14, not published, EU:T:2016:285, paragraph 103.

*(d) Interim conclusion*

57. As an interim conclusion, it cannot be disputed that the fact that ASPLA and Armando Álvarez had to bear the costs relating to the bank guarantee provided to the Commission in the period of the overrun is a *consequence*, among others, of the General Court's inability to deliver its decision within a reasonable time.

58. However, that was not the *determining* cause of the alleged damage. The decisive factor was ASPLA and Armando Álvarez's decision to continue benefiting from an exception that they had requested from their obligation to pay a fine that was due, in full awareness of the costs and risks their choice entailed. Accordingly, the principles stemming from the *Holcim* case-law are applicable in the case at hand.

59. For all those reasons, I take the view that the General Court erred in its interpretation and application of the concept of 'causal link' for the purposes of Article 340 TFEU. To my mind, there is no sufficiently direct causal link between the breach by the General Court, in Cases T-76/06 and T-78/06, of the duty to give judgment within a reasonable time and ASPLA and Armando Álvarez's alleged damage arising from the payment of the bank guarantee charges in the period of the overrun.

60. In the light of that, the judgment under appeal must be annulled in so far as it ordered the European Union to pay EUR 44 951.24 to ASPLA and EUR 111 042.48 to Armando Álvarez by way of compensation for the material damage sustained by those companies as a result of the breach of the obligation to adjudicate within a reasonable time in the cases which gave rise to the judgments of 16 November 2011 in Cases T-76/06 and T-78/06.

61. This means that, if the Court agrees with me on this point, there would be no need to examine the *second* ground of appeal put forward by the European Union and the *third*, *fourth* and *fifth* grounds of appeal put forward by ASPLA and Armando Álvarez. Nonetheless, because of the importance for future cases of the issue raised, I believe it may be helpful to deal, only for the sake of completeness, with the *second* ground of appeal put forward by the European Union. That analysis will also provide elements useful for examining ASPLA and Armando Álvarez's *second* ground of appeal.

*2. Bank guarantee charges: concept of 'damage'*

62. By its second ground of appeal, directed against paragraphs 104 to 120 of the judgment under appeal, the European Union, supported by the Commission, claims that the General Court misinterpreted the concept of 'damage'. In its view, the first instance court should have examined whether, in the period of the overrun, the bank guarantee charges paid by ASPLA and Armando Álvarez were greater than the advantage conferred on it by possession of a sum equal to the amount of the fine. For their part, ASPLA and Armando Álvarez ask the Court of Justice to dismiss this ground of appeal as unfounded. In their view, there is no relationship between the advantages enjoyed by ASPLA and Armando Álvarez and the losses suffered by them in the period of the overrun.

63. It seems to me that also this ground of appeal is well founded. Indeed, the General Court erred in law when, without any specific explanation or further inquiry, in paragraphs 104 and 105 of the judgment under appeal, it equated the *costs* of the bank guarantee in the period of the overrun with *damage* to be compensated under Article 340 TFEU.

64. The two concepts should be kept distinct.

65. An act or omission of an EU institution may have various consequences for the financial situation of undertakings like ASPLA and Armando Álvarez. It may give rise to certain costs for an undertaking but, at the same time, it may result in certain gains for that undertaking. There is 'damage', within the meaning of Article 340 TFEU, only where the net difference between costs and gains is negative.[20] In other words, there must be an *overall loss* stemming from the conduct complained of. Otherwise, there would be the paradoxical situation in which, despite having financially benefited from the conduct of an EU institution, an undertaking would also be entitled to claim additional sums from the Union.

66. As explained in points 49 and 51 above, the decision of an undertaking to defer payment and provide a bank guarantee, on the one hand, gives rise to certain costs but, on the other hand, it also allows that undertaking to use, for a period of time, a sum which may generate gains. These various effects are not unrelated but they are inextricably linked: they are the two sides of the same coin.

67. Economically, the choice to defer payment of a fine essentially constitutes a form of financing for the undertaking concerned: until the end of the judicial proceedings, that undertaking practically borrows the money owed to the Union from the Union itself. The overall cost of the financing is, put simply, the sum of the bank guarantee charges plus, should the undertaking lose in the judicial proceedings, the interest eventually due on the principal. However, the judgment under appeal focuses only on the costs borne by ASPLA and Armando Álvarez, and says nothing about the possible gains or savings made by those companies thanks to the deferral of the payment.

68. To my mind, that is an error committed by the General Court. As mentioned in point 51 above, an undertaking is presumed to act, at all times, in the manner that it considers rational from an economic and financial perspective. Therefore, it may be reasonable to presume that, for the whole duration of the judicial proceedings in Cases T-76/06 and T-78/06, ASPLA and Armando Álvarez found it more advantageous to continue borrowing from the Union the sum corresponding to the amount of the fine due, rather than to use their own liquidity or to borrow that amount from credit institutions.

69. That being so, it cannot be ruled out that the excessive delay in the adjudication of Cases T-76/06 and T-78/06 not only did not cause a loss for ASPLA and Armando Álvarez, but it even gave rise to a financial advantage for those companies. Yet, that is not something that may be ascertained on the basis of the judgment under appeal since the General Court considered, without any further inquiry, that the bank guarantee charges in the period of the overrun corresponded to the damage suffered by ASPLA and Armando Álvarez during that time.

70. Finally, I would add that, on this point too, the judgment under appeal appears contradictory. Indeed, as regards another form of alleged damage (the payment of the interest on the amount of the fine) the General Court held that ASPLA and Armando Álvarez had adduced no evidence to show that, during the period of the overrun, 'the amount of the default interest that was later paid to the Commission by Armando Álvarez was greater than the advantage conferred on that company by possession of the sum equal to the amount of the fine plus default interest'.[21]

71. It is difficult to understand why the General Court failed to apply a similar standard with regard to the alleged damage consisting in the payment of the bank guarantee charges relating to the same period.

72. In conclusion, the *second* ground of appeal put forward by the European Union is also well founded.

20 See, to that effect, judgment of 19 May 1992, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:1992:217, paragraph 26 et seq.

21 Paragraph 101 of the judgment under appeal.

*3. Interest*

73. By its second ground of appeal, directed against paragraphs 97 to 103 of the judgment under appeal, ASPLA and Armando Álvarez claim that the General Court erred in law in dismissing their request for compensation for the damage consisting in the interest on the amount of the fine imposed on them for the period of the overrun.

74. In its judgment, the General Court considered that ASPLA and Armando Álvarez had adduced no evidence to show that, during the period of the overrun, the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on them by possession of the sum equal to the amount of the fine plus default interest.

75. To my mind, the General Court was, for the reasons illustrated in points 23 to 72 above, correct in dismissing ASPLA and Armando Álvarez's claim. Since ASPLA and Armando Álvarez's actions were ultimately rejected by the EU Courts, the default interest to be paid to the Commission on the amount of the fine is clearly a cost that those companies had to bear for the period of time that the judicial proceedings were pending. However, that does not automatically mean that such a cost constitutes damage within the meaning of Article 340 TFEU.

76. More fundamentally, in the case at hand there is no sufficiently direct causal link, for the purposes of Article 340 TFEU, between the excessive duration of the proceedings and the loss consisting in the payment of the interest for the period of the overrun. As explained in point 52 above, the risk of having to bear that cost stemmed from ASPLA and Armando Álvarez's decision to defer payment of the fine until the end of the judicial proceedings. ASPLA and Armando Álvarez took that decision freely and in full knowledge of the financial consequences deriving from it.

77. Accordingly, ASPLA and Armando Álvarez's second ground of appeal should be dismissed.

## *C. The reasonable period of time*

78. By their *first* ground of appeal, directed against paragraphs 57 to 83 of the judgment under appeal, ASPLA and Armando Álvarez allege an error of law and a lack of reasons in the General Court's assessment of what was a reasonable period of time between the written and oral phase of the proceedings in Cases T-76/06 and T-78/06. This ground of appeal is divided into two parts.

79. The first part of this ground of appeal concerns paragraphs 67 to 69, on the one hand, and paragraph 72, on the other, of the judgment under appeal. According to ASPLA and Armando Álvarez, the General Court did not adequately explain why it reached the conclusion that a period of 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure was, in principle, an appropriate length of time for dealing with cases such as Cases T-76/06 and T-78/06. By the same token, ASPLA and Armando Álvarez take the view that the General Court did not adequately explain why the parallel processing of connected cases may be a justification for extending, by a period of one month for each connected case, the interval between the end of the written procedure and the opening of the oral procedure.

80. The second part of the first ground of appeal concerns an alleged contradiction between paragraphs 72 and 80 of the judgment under appeal. ASPLA and Armando Álvarez take the view that it is inconsistent to state, first, that the interval between the end of the written procedure and the opening of the oral procedure should be extended by one month for each connected case and, then, extend the reasonable period for Case T-78/06 by an additional four months because of its close connection with Case T-76/06.

81. The European Union considers this ground of appeal unfounded.

82. Regardless of its merits, this ground of appeal should, in my view, be rejected as ineffective.

83. Even if ASPLA and Armando Álvarez's complaints were found to be well founded, that would not lead to the annulment of the judgment under appeal and the award of higher compensation for the material damage allegedly sustained by those companies.

84. In points 23 to 72 and 73 to 77 above, respectively, I have explained why I take the view that neither the bank guarantee charges nor the interest on the amount of the fine paid by ASPLA and Armando Álvarez in the period of the overrun constitute damage that should be compensated in accordance with Article 340 TFEU. Therefore, if the Court were to agree with me on this point, the duration of the period of the overrun would be immaterial for the purposes of the present proceedings. Indeed, ASPLA and Armando Álvarez have not claimed compensation for any other form of damage except that discussed above.

## V. Consequences of the assessment

85. If the Court of Justice agrees with my assessment, the appeal lodged by the European Union must be upheld and point 1 of the operative part of the judgment under appeal set aside accordingly.

86. Since, in the light of the facts available and the exchange of views before the Court of Justice, it is possible to give final judgment on this matter, the Court of Justice should dismiss ASPLA and Armando Álvarez's claim for compensation in respect of the material damage allegedly suffered as a result of the General Court's failure to adjudicate within a reasonable time in Cases T-76/06 and T-78/06.

87. The appeal by ASPLA and Armando Álvarez should be rejected in its entirety.

## VI. Costs

88. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

89. If the Court of Justice agrees with my assessment of the appeals, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure of the Court of Justice, ASPLA and Armando Álvarez should bear their own costs and the costs of the European Union of the present proceedings in relation to both instances. The European Commission should, however, bear its own costs in relation to both instances.

## VII. Conclusion

90. Having regard to all the above considerations, I propose that the Court of Justice:

– set aside point 1 of the operative part of the judgment of the General Court of 17 February 2017, *ASPLA and Armando Álvarez* v *European Union*, T-40/15;

– dismiss the appeal lodged by ASPLA and Armando Álvarez;

– dismiss ASPLA and Armando Álvarez's claim for compensation of EUR 3 495 038.66 in respect of the material damage suffered as a result of the General Court's failure to adjudicate within a reasonable time in Cases T-76/06 and T-78/06;

– order ASPLA and Armando Álvarez to bear their own costs and the costs of the European Union, represented by the Court of Justice of the European Union, in relation to both instances;

– order the European Commission to bear its own costs in relation to both instances.