— consequently, hold that the payments made by Westfälische Drahtindustrie GmbH to the Commission between 29 June 2011 and 16 June 2015 in the amount of EUR 16 400 000 plus compensatory interest which has become due in the amount of EUR 1 420 610, making a combined total of EUR 17 820 610, are to be taken into account in respect of the standalone fine imposed by the General Court in the judgment of 15 July 2015, *Westfälische Drahtindustrie and Others* v *Commission* (T-393/10, EU:T:2015:515), as from 15 July 2015 and that as a result of the payment of 17 October 2019 of EUR 18 149 636,24 that fine has already been paid in full;

— order the Commission to pay to Westfälische Drahtindustrie GmbH an amount of EUR 1 633 085,17 together with compensatory interest with effect from 17 October 2019 until reimbursement in full of the corresponding amount owed;

— in the alternative, set aside the judgment under appeal and order the Commission to pay compensation to all three appellants in the amount of EUR 12 236 931,69 in settlement of the amount claimed from Westfälische Drahtindustrie GmbH by the Commission letter of 2 March 2020 in the amount of EUR 12 236 931,36 and to pay to Westfälische Drahtindustrie GmbH the amount of the overpayment being EUR 1 633 085,17 together with compensatory interest since 17 October 2019 until reimbursement in full of the amount owed;

— in the alternative to the heads of claim appearing in the three indents above, refer the case back to the General Court for a ruling;

and in any event

— order the Commission the pay the costs incurred in the proceedings at first instance and on appeal.

Grounds of appeal and main arguments

The appellants put forward three grounds of appeal:

1. The judgment under appeal infringes EU law and is vitiated by contradictory reasoning. It is true that the General Court also recognises the substantive amendment and substitution of the fine imposed on the appellants by the Commission in 2010/2011. Notwithstanding the clear nature of the terms of the operative part to the contrary and the General Court's findings in the judgment of 15 July 2015, it is argued in the judgment under appeal, however, that the unlawful Commission decision issued in 2010/2011 and the unreasonable fine imposed by that decision remained unchanged and identical.

2. In the judgment under appeal, the General Court failed to have regard for the legal consequences of the judgment of 15 July 2015. The General Court infringed the principle under which the EU institutions were obliged to remove the specified consequences following the delivery of the judgment of 15 July 2015.

3. In the judgment under appeal, the General Court infringed the fundamental procedural right of the appellants to effective judicial protection in the form of their claim to a fair hearing. The General Court rejected all the pleas with the same reasoning that the fine revised in the judgment of 15 July 2015 was not a new fine. The decision taken in the judgment under appeal as to the legal nature of the fines is questionable. Furthermore, there is no close connection between the various pleas such as to justify their rejection by means of a single legal argument. Rather, the General Court should have undertaken an independent and careful examination of all the pleas. It is not apparent that the General Court provided sufficient reasons for the rejection of all the pleas in the judgment under appeal.

Appeal brought on 17 February 2023 by WhatsApp Ireland Ltd against the order of the General Court (Fourth Chamber, Extended Composition) delivered on 7 December 2022 in Case T-709/21, WhatsApp Ireland v European Data Protection Board

(Case C-97/23 P)

(2023/C 121/12)

Language of the case: English

Parties

Appellant: WhatsApp Ireland Ltd (represented by: H.-G. Kamann, Rechtsanwalt, F. Louis and A. Vallery, avocats, P. Nolan, B. Johnston and C. Monaghan, Solicitors, P. Sreenan and D. McGrath, Senior Counsel, C. Geoghegan and E. Egan McGrath, Barrister-at-Law)

Other party to the proceedings: European Data Protection Board (EDPB)

Form of order sought

The appellant claims that the Court should:

— set aside the order under appeal;

— declare the applicant in case T-709/21 admissible;

— refer the case back to the General Court for it to give judgment; and

— order the respondent to pay the costs of the appeal proceedings.

Pleas in law and main arguments

In support of its appeal, the WhatsApp relies on two pleas in law.

In its first plea in law, WhatsApp submits that the General Court erred in its interpretation of the concept of an 'act open to challenge' and the Court of Justice's case-law under Article 263 TFEU by holding that Binding Decision 1/2021 of the EDPB of 28 July 2021 on the dispute between the supervisory authorities concerned arising from the draft decision regarding WhatsApp drawn up by the Data Protection Commission (DPC) (Ireland) ('the Contested Decision') is a mere preparatory act. In so finding, the General Court erred in holding that WhatsApp, as a non-privileged applicant, had to demonstrate that the Contested Decision brings about a distinct change in its legal position. The General Court further erred in finding that WhatsApp is not directly concerned by the Contested Decision. Moreover, the General Court's legal analysis is erroneous. The General Court ought to have found that (i) the Contested Decision does not merely constitute an intermediate act, but rather lays out the definitive position of the EDPB in respect of the matters referred to it for determination under Article 65 GDPR ([1]); (ii) the Contested Decision had legal effects and brought about a distinct change in WhatsApp's legal position; and (iii) WhatsApp was directly concerned by the Contested Decision because it left no genuine discretion to the DPC tasked with its implementation.

In its second plea in law, WhatsApp submits that the General Court committed errors in law in the interpretation of the notion of 'binding decision' within the meaning of Article 65(1) GDPR and the principle of consistent interpretation and application of European Union law.

([1]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).