Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

12 February 2019*

(Non-contractual liability — Competition — Agreements, decisions and concerted practices — Decision finding an infringement of Article 101 TFEU — Fines — Judgment partially annulling the decision — Reimbursement of the principal amount of the fine — Default interest — Sufficiently serious breach of a rule of law intended to confer rights on individuals — Causal link — Damage — Article 266 TFEU — Second sentence of Article 90(4)(a) of Delegated Regulation (EU) No 1268/2012)

In Case T-201/17,

**Printeos, SA**, established in Alcalá de Henares (Spain), represented by H. Brokelmann and P. Martínez-Lage Sobredo, lawyers,

applicant,

v

**European Commission**, represented by F. Dintilhac and F. Jimeno Fernández, acting as Agents,

defendant,

APPLICATION, primarily, pursuant to Article 268 TFEU, for compensation for the damage allegedly sustained because of the Commission's refusal to pay to the applicant default interest on the principal amount of a fine reimbursed following the annulment of Commission Decision C(2014) 9295 final of 10 December 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (AT.39780 — Envelopes) by judgment of 13 December 2016, *Printeos and Others* v *Commission* (T-95/15, EU:T:2016:722), and, in the alternative, pursuant to Article 263 TFEU, seeking annulment of the decision of the Commission of 26 January 2017 refusing that reimbursement,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Frimodt Nielsen, President, V. Kreuschitz (Rapporteur), I.S. Forrester, N. Półtorak and E. Perillo, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 July 2018,

gives the following

* Language of the case: Spanish.

## Judgment

### Background to the dispute

1 By its Decision C(2014) 9295 final of 10 December 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (AT.39780 — Envelopes) ('the 2014 decision'), the European Commission found that, inter alia, the applicant Printeos, SA, had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) by participating, from 8 October 2003 to 22 April 2008, in an agreement concluded and implemented on the European stock/catalogue and special printed envelopes market covering, inter alia, Denmark, Germany, France, Sweden, the United Kingdom and Norway. That decision was adopted in the context of a settlement procedure within the meaning of Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18) and the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

2 Having regard to the infringement established in Article 1(5) of the 2014 decision, the Commission imposed on the applicant, jointly and severally with certain of its subsidiaries, a fine of EUR 4 729 000 (Article 2(1)(e) of the 2014 decision).

3 Article 2(2) of the 2014 decision stated that the fine had to be paid within 3 months of the date of its notification.

4 Article 2(3) of the 2014 decision provides as follows:

'After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank [ECB] to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable financial guarantee or making a provisional payment of the fine in accordance with Article 90 of 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)].'

5 The first subparagraph of Article 2(3) of the 2014 decision is based on Article 83 of Delegated Regulation No 1268/2012, which, under the heading 'Default interest', provides, inter alia, as follows:

'1. … Any amount receivable not repaid on the deadline referred to in Article 80(3)(b) shall bear interest in accordance with paragraphs 2 and 3 of this Article.

2. The interest rate for amounts receivable not repaid on the deadline referred to in Article 80(3)(b) shall be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union*, in force on the first calendar day of the month in which the deadline falls, increased by:

…

(b) three and a half percentage points in all other cases.

…

4. In the case of fines, where the debtor provides a financial guarantee which is accepted by the accounting officer instead of payment, the interest rate applicable from the deadline referred to in Article 80(3)(b) shall be the rate referred to in paragraph 2 of this Article as in force on the first day of the month in which the decision imposing a fine has been adopted and increased only by one and a half percentage points.'

6 Article 83 of Delegated Regulation No 1268/2012 is based on Article 78(4) 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'), which empowers the Commission to adopt delegated acts in accordance with Article 210 thereof concerning detailed rules on, inter alia, default interest.

7 Article 90 of Delegated Regulation No 1268/2012, referred to in the second subparagraph of Article 2(3) of the 2014 decision (see paragraph 4 above), provides, inter alia, as follows:

'1. Where an action is brought before the Court of Justice of the European Union against a Commission decision imposing a fine or other penalties under the [FEU Treaty] or Euratom Treaty and until such time as all legal remedies have been exhausted, the debtor shall either provisionally pay the amounts concerned on the bank account designated by the accounting officer or provide a financial guarantee acceptable to the accounting officer. The guarantee shall be independent of the obligation to pay the fine or penalty payment or other penalties and shall be enforceable upon first call. It shall cover the claim as to principal and the interest due as specified in Article 83(4) [of the Financial Regulation].

2. The Commission shall secure the provisionally cashed amounts by having them invested in financial assets thus ensuring the security and liquidity of the monies whilst also aiming at yielding a positive return.

…

4. After all legal remedies have been exhausted and where the fine or penalty has been cancelled or reduced any of the following measures shall be taken:

(a) the amounts unduly collected together with the interest yielded shall be repaid to the third party concerned. In cases where the overall return yielded for the relevant period has been negative, the nominal value of the amounts unduly collected shall be repaid;

(b) where a financial guarantee has been lodged, the latter shall be released accordingly.'

8 Article 90 of Delegated Regulation No 1268/2012 is based on Article 83(4) of the Financial Regulation empowering the Commission to adopt delegated acts in accordance with Article 210 thereof concerning detailed rules on the amounts received by way of fines, penalties and accrued interest.

9 The applicant was notified of the 2014 decision on 11 December 2014.

10 By email of 16 February 2015, the Commission reminded the applicant that the fine had to be covered within 3 months of notification of the 2014 decision and that, if it decided to bring an action for annulment before the General Court, it had either to provide an adequate bank guarantee or to make provisional payment of the fine.

11 To this email was attached a note entitled 'Information Note on Provisionally Paid or Guaranteed Fines' of 20 July 2002. That note stated inter alia as follows:

'Pursuant to Article 85a 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)], the Accounting Officer shall provisionally collect the amounts of fines contested before the Court of Justice of the European Union from the company concerned or request it to provide a guarantee. After all legal remedies have been exhausted, the provisionally collected amounts and the interest they have yielded shall be entered into the budget or fully or partially repaid to the company concerned.

…

As regards fines decided by the Commission as from 2010, the Commission will invest the provisionally paid amounts in a fund composed of a portfolio of assets with an exposure limited to high quality sovereign credit risk and a residual maturity of up to [2] years. The fund shall be managed by Commission services.

In case the Court annuls the fine, fully or in part, the Commission will accordingly reimburse the amount of the fine in full or in part, together with a guaranteed return thereon.

The guaranteed return is based on the performance of the specific benchmark, calculated for the period of investment. …'

12 Article 85a of Regulation No 2342/2002 states inter alia:

'1. Where an action is brought before a Community court against a Commission decision imposing a fine, periodic penalty payment or other penalty under the EC Treaty or Euratom Treaty and until such time as all legal remedies have been exhausted, the accounting officer shall provisionally collect the amounts concerned from the debtor or request him to provide a financial guarantee. The guarantee requested shall be independent of the obligation to pay the fine, periodic penalty payment or other penalty and shall be enforceable upon first call. It shall cover the claim as to principal and the interest due as specified in Article 86(5) [of the same regulation].

2. After all legal remedies have been exhausted, the provisionally collected amounts and the interest they have yielded shall be entered into the budget or repaid to the debtor. In the event of a financial guarantee, the latter shall be enforced or released.'

13 Pursuant to the first paragraph of Article 290 of Delegated Regulation No 1268/2012, from 1 January 2013, Article 85a of Regulation No 2342/2002 was repealed and replaced by Article 90 of Delegated Regulation No 1268/2012 (see paragraph 7 above).

14 By application lodged at the Registry of the General Court on 20 February 2015, the applicant brought an action pursuant to Article 263 TFEU seeking, as its main claim, partial annulment of the 2014 decision.

15 On 9 March 2015, the applicant made provisional payment of the fine imposed by the 2014 decision.

16 On 10 March 2015, the applicant's representatives informed the Commission that that action had been brought and that provisional payment of the fine had been made.

17 In compliance with Article 90(2) of Delegated Regulation No 1268/2012, the amount of the fine provisionally paid by the applicant was paid into a financial asset fund created pursuant to Decision C(2009) 4264 final of the Commission of 15 June 2009 concerning the reduction in the risks of management of fines provisionally cashed, a fund which is managed by the Directorate-General for Economic and Financial Affairs ('the BUFI fund'). That decision was based on Article 74 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), replaced by Article 83 of the Financial Regulation.

18 By judgment of 13 December 2016, *Printeos and Others* v *Commission* (T-95/15, EU:T:2016:722; 'the *Printeos* judgment'), the Court found that the Commission had breached its obligation to state reasons pursuant to the second paragraph of Article 296 TFEU and for that reason it annulled Article 2(1)(e) of the 2014 decision. That judgment has become final.

19 By email of 14 December 2016, the Commission informed the applicant of its intention to repay the amount of the fine provisionally paid and provided it with the necessary forms.

20 By email of 15 December 2016, the applicant's representatives submitted the completed forms to the Commission.

21 By email of 26 January 2017, the Commission informed the applicant's representatives that it would repay the fine in the course of the following week.

22 That same day, the applicant's representatives stated in reply to the Commission that they understood and requested that the reimbursement of the fine should include interest thereon from the date on which the applicant had paid the fine (9 March 2015) at the interest rate applied by the ECB to its main refinancing operations ('the ECB refinancing rate') plus 3.5 percentage points, corresponding to the interest rate specified in Article 2(3) of the 2014 decision in the event of late payment (that is, after expiry of the period laid down in Article 2(2) of that decision).

23 By two emails of the same date (collectively, 'the contested email'), the Commission replied to the applicant's representatives as follows:

'As explained in the [information] note sent to you on 16 February 2015, provisionally cashed fines are invested in a fund. If a fine is annulled, the Commission reimburses it together with a guaranteed return thereon, based on the benchmark performance. That performance has been negative so only the principal will be repaid.

I attach for your information a calculation of the outflow amount, audited by [company] D.'

24 According to uncontested information provided by the Commission, the cumulative return on the BUFI fund was negative in 2015 (- 0.09%) and in 2016 (- 0.265%). Similarly, the ECB deposit facility rate had been negative since 5 June 2014: - 0.10% from June 2014, - 0.20% from September 2014, - 0.30% from December 2015 and - 0.40% from March 2016. Lastly, the ECB refinancing rate was 0.05% from 9 March 2015 and 0% from 16 March 2016.

25 By email of 27 January 2017, the applicant's representatives replied that, pursuant to Article 266 TFEU, the Commission was obliged to take the necessary measures to comply with the *Printeos* judgment. Citing the judgment of 10 October 2001, *Corus UK* v *Commission* (T-171/99, EU:T:2001:249, paragraphs 50 to 53; 'the *Corus* judgment'), they pointed out, in essence, that, in the case of an act that has already been executed, that obligation might entail restoring the applicant to the position that it was in prior to that act (principle of *restitutio in integrum*). In the case of a judgment cancelling or

reducing the fine imposed on an undertaking for an infringement of competition rules, the Commission, it was argued, was thus under an obligation to return the fine unduly paid by that undertaking, including not only the principal amount of the fine but also interest thereon.

26 On 1 February 2017, the applicant received into its bank account a transfer from the Commission of EUR 4 729 000, equivalent to the fine which it had provisionally paid on 9 March 2015.

27 By email of 3 February 2017, the Commission rejected the applicant's arguments, relying, inter alia, on Article 90(4) of Delegated Regulation No 1268/2012. It also stated as follows:

'First of all, it was the decision of your client to provide a provisional payment rather than a financial guarantee. Additionally, your client was perfectly aware that a provisional payment would be invested in a fund. The working of that fund and the concept of the guaranteed return was explained in detail in the "Information Note" sent to you on [16 February 2015].

As the overall return yielded for the period [between 10 March 2015 and 25 January 2017] was negative, the guaranteed return amounts to EUR 0.00 and only the principal has been paid to your client.'

## Procedure and forms of order sought

28 By application lodged at the Registry of the General Court on 31 March 2017, the applicant brought the present action.

29 On a proposal from the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral part of the procedure and, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure of the General Court, put a number of written questions to the parties concerning the bearing on the resolution of the case of, in particular, the judgment of 12 February 2015, *Commission* v *IPK International* (C-336/13 P, EU:C:2015:83; 'the *IPK* judgment'), inviting them to respond, in part, in writing, in part, at the hearing. The parties submitted their replies to the Court's written questions within the prescribed period.

30 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

31 The parties presented oral argument and replied to the written and oral questions put by the Court (Third Chamber, Extended Composition) at the hearing on 3 July 2018.

32 In response to oral questions put by the Court, the applicant, first, stated that it no longer wished to maintain the first paragraph of Article 266 TFEU as the main legal basis, by way of an independent form of action, of the first head of claim of its application and, second, confirmed that the term 'compensatory interest' referred to in its application should be understood as meaning 'default interest' as referred to in paragraph 30 of the *IPK* judgment, formal note of which was taken in the minutes of the hearing.

33 The applicant claims that the Court should:

– order the Commission to pay compensation of EUR 184 592.95, corresponding to default interest on the amount of EUR 4 729 000 at the ECB refinancing rate increased by 2 percentage points for the period from 9 March 2015 to 1 February 2017 ('the reference period') or, failing that, at the interest rate deemed appropriate by the Court;

– order the Commission to pay default interest on the amount requested in the preceding indent for the period from 1 February 2017 to the date on which the Commission actually pays that amount in pursuance of a judgment upholding the present action, at the interest rate applied by the ECB to refinancing operations increased by 3.5 percentage points or, failing that, at the interest rate deemed appropriate by the Court;

– in the alternative, annul the contested email;

– order the Commission to pay the costs.

34 At the hearing, the applicant requested an increase in the ECB refinancing rate, as referred to in the first indent of paragraph 33 above, to 3.5 percentage points.

35 The Commission contends that the Court should:

– dismiss the claim for damages as unfounded;

– declare inadmissible the claim for annulment of the contested email or, in the alternative, reject it as unfounded;

– declare inadmissible the plea of illegality of Article 90(4)(a) of Delegated Regulation No 1268/2012 ('the contested provision') or, in the alternative, dismiss it as unfounded;

– in the event that it is considered appropriate to grant compensation or interest to the applicant, perform the calculation on the basis of the criteria set out in paragraphs 65 to 78 of the statement of defence;

– in any event, order the applicant to pay the costs or, in the alternative, if compensation is awarded to the applicant, order each party to bear its own costs.

## Law

### *Subject matter of the dispute*

36 As its main claim, the applicant, having withdrawn its first head of claim from its application in so far as it was based on the first paragraph of Article 266 TFEU as an independent form of action (see paragraph 32 above), claims, under the second paragraph of Article 266 TFEU, read in conjunction with the second paragraph of Article 340 TFEU and Article 41(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), compensation equivalent to the amount of default interest that the Commission should have paid to it, in compliance with the *Printeos* judgment, when reimbursing the principal amount of the fine unduly paid by the applicant in accordance with Article 2(1)(e) of the 2014 decision, which fine was annulled by that judgment.

37 The applicant states that, inter alia, the contested provision does not apply to compensation for damage under the second paragraph of Article 266 TFEU and the second paragraph of Article 340 TFEU. Even supposing that it does, it breaches Articles 266 and 340 TFEU and Article 41(3) and Article 47 of the Charter, on the basis of which the applicant raises a plea of illegality under Article 277 TFEU.

38 In the alternative, the applicant requests, pursuant to Article 263 TFEU, that the contested email be annulled because it is founded on an inapplicable, repealed legal basis and, in any event, breaches Articles 266 and 340 TFEU and Article 41(3) and Article 47 of the Charter.

***Main claim for compensation in the first head of claim***

*Summary of the arguments of the parties*

39 According to the applicant, the Commission unlawfully failed to pay it default interest on the principal amount of the fine provisionally paid. The payment of that interest is an essential component of the restoration of the applicant to the situation in which it would have been if the 2014 decision had not been adopted (*Corus* judgment, paragraph 54). The loss of use of the principal amount of the fine unduly paid harmed the applicant in that it had to find other sources of finance and bear the costs of three bank loans taken out during the reference period. That loss of use was based on a sufficiently serious breach of rules of law conferring rights on individuals, attributable, inter alia, to recital 92 of the 2014 decision. The failure to state adequate reasons that vitiates recital 92 and its inconsistency with the truth, noted in paragraph 54 of the *Printeos* judgment, demonstrate the intentional, blatant, serious and inexcusable nature of the Commission's breach of EU law, which amounts to an abuse of authority. That is, in particular, confirmed by recital 16 of Commission Decision C(2017) 4112 final of 16 June 2017, amending the 2014 decision, which acknowledged that 'all undertakings, except Hamelin, had very high individual product/turnover ratios'. Indeed, the duty to state reasons under the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter is a fundamental right ensuring the effective exercise of another fundamental right: the right to an effective judicial remedy under Article 47 of the Charter. Similarly, the failure to pay interest on the principal amount of the fine unduly paid is a sufficiently serious breach of the first paragraph of Article 266 TFEU (order of 21 March 2006, *Holcim* (*France*) v *Commission*, T-86/03, not published, EU:T:2006:90, paragraph 32; 'the *Holcim* order'), which confers a subjective right to correct and full compliance with judgments of the General Court, the Commission enjoying no discretion in that regard. That breach cannot be remedied by the rules of law referred to in the contested email.

40 The applicant points out, on the one hand, that Article 85a of Regulation No 2342/2002 had been repealed as of 1 January 2013, the date on which Delegated Regulation No 1268/2012 entered into force. Regulation No 2342/2002 was therefore not in force on 16 February 2015, when the Commission sent the information relating to the provisional payment of the fine, on 1 February 2017, when it reimbursed the principal amount of the fine, or on 26 January 2017, when it sent the contested email. However, the Commission cannot rectify *ex post facto* the absence of a legal basis or its failure to pay the interest due by citing, for the first time in its email of 3 February 2017, Article 90 of Delegated Regulation No 1268/2012. On the other hand, should it be concluded that Article 90 is nevertheless a relevant legal basis, the applicant relies on Article 277 TFEU to claim that the contested provision is unlawful under Articles 266 and 340 TFEU and Article 41(3) and Article 47 of the Charter since it envisages the possibility that interest will not be paid.

41 First, the applicant submits, in essence, that the contested provision infringes the first paragraph of Article 266 TFEU and more specifically the principle of *restitutio in integrum*, as recognised in the *IPK* and *Corus* judgments (paragraphs 54 and 57), under which the Commission is required to reimburse not only the principal amount of the fine unduly paid but also interest thereon for the period during which the applicant was deprived of the use of that amount. That requirement of primary law takes precedence over any rule of secondary law that may gainsay it. Second, the contested provision infringes Article 47 of the Charter since judicial protection under Article 263 TFEU is not effective if the undertaking concerned is unable to obtain interest on an unduly paid fine after an EU Court annuls a decision imposing a fine for infringement of EU competition rules. A contrary conclusion would deter the bringing of actions against decisions imposing a penalty. Third, the contested provision is also contrary to Article 41(3) of the Charter and the second paragraph of Article 340 TFEU, since the Court of Justice ruled, in its judgment of 13 July 2006, *Manfredi* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 95), that it follows from the right of any individual to seek compensation for loss caused that injured persons must be able to seek compensation not

only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. The contested provision was therefore neither applicable in the present case nor capable of rectifying the lack of a legal basis authorising the Commission to refuse to pay interest.

42 The Commission replies that in the *Printeos* judgment the Court simply found that a failure to state adequate reasons had vitiated recital 92 of the 2014 decision but did not rule on the merits, that is to say, on the applicant's participation in an infringement of Article 101 TFEU. The argument that the statement of reasons at issue was contrary to the truth is therefore irrelevant, and the Commission was entitled to adopt Decision C(2017) 4112 final imposing the same fine as that imposed in the 2014 decision. In any event, such a failure to provide adequate reasons is not a sufficiently serious breach of a rule of EU law. In addition, the arrangements for the fine to be repaid were specified in the 2014 decision by reference to the contested provision with no objection from the applicant.

43 In the alternative, the Commission points out that, according to Article 278 TFEU, actions brought before the EU Courts do not have suspensory effect. Since the applicant did not request suspension of the 2014 decision, that decision was enforceable, which justified provisional payment of the fine in spite of the action for annulment brought against it. No damage was caused to the applicant in the present case as the principal amount of the fine was repaid, even though the fund's return was negative. In addition, the Commission was not late in making payment since it reimbursed that principal amount promptly, before the *Printeos* judgment became final.

44 The Commission submits that, in actions for damages, compensatory interest is intended primarily to provide compensation for the damage caused by inflation between the event causing the damage and payment of compensation and, in so far as possible, to provide restitution for the victim (the principle of *restitutio in integrum*). The award of compensatory interest is thus subject to the conditions for non-contractual liability being met, which is not the position in the present case. In any event, that interest must be calculated on the basis of the damage actually sustained, which is normally determined using the rate of inflation recorded for the period in question by Eurostat in the Member State in which the applicant is established. In the present case, during the reference period of 13 March 2015 to 1 February 2017, the rate of inflation in Spain was 0%. Even if compensatory interest were to be calculated on the basis of the ECB refinancing rate (see paragraph 24 above) and not on that of the rate of inflation, the applicable refinancing rate is the rate in force during the reference period, which was set at a rate of 0% on 16 March 2016, and not the rate of 0.05% applicable since 9 March 2015. There is no question of an increase of 2 percentage points since, unlike default interest, compensatory interest is not intended to place a greater burden on the debtor with a view to avoiding or limiting a delay in the performance of its payment obligation. The Commission submits that the applicant did not sustain damage as a result of the provisional payment of the fine and the need to find other sources of finance at a cost. As regards the default interest payable following a delay in complying with the obligation to pay a specific amount, the Commission states, in essence, that default interest must be calculated from the date of the judgment imposing that obligation until the date on which payment is made in full. Unlike compensatory interest, the interest rate applicable to default interest is the ECB refinancing rate plus 2 percentage points. The increase of 3.5 percentage points requested by analogy to the interest rate applied in the event of non-payment of the fine specified in the 2014 decision cannot therefore be agreed to.

45 The Commission submits that the plea of illegality raised against the contested provision is inadmissible and, in any event, unfounded. The admissibility of such a plea depends on the admissibility of the main action. However, in the present case the contested email is not a challengeable act. It merely confirmed the second subparagraph of Article 2(3) of the 2014 decision, which provided that the contested provision would apply should the applicant opt to make a provisional payment of the fine. The applicant failed to challenge the contested provision in its action against the 2014 decision and thus accepted it as final. The applicant's application for annulment of that provision is therefore inadmissible and, accordingly, so too is the plea of illegality.

46 On the merits, the Commission first points out that the contested provision replaced Article 85a of Regulation No 2342/2002 specifying the terms on which a provisional payment is reimbursed in the event of negative interest. Under the contested provision, if the addressee of the fine chooses, as in the present case, to make provisional payment of the fine instead of providing a guarantee, the amounts paid are invested in financial assets with the objective, inter alia, of obtaining a positive return on investment, a situation of which the applicant was apprised 'at all times'. If an EU Court annuls the decision imposing the fine, the provision states, in compliance with the case-law, that the principal amount and the interest yielded is to be returned. That interest is compensatory in nature and intended to offset the unavailability of the amount provisionally paid from the date on which it is paid to the date on which the principal amount is reimbursed and to redress any damage that might be occasioned. In the addressee's interests, the contested provision guarantees that, in the event of negative interest, it will receive at least the entire principal amount, meaning that the Commission bears the cost of a negative return over the reference period.

47 Second, the Commission takes the view that the contested provision complies with Article 266 TFEU and the principle of *restitutio in integrum*. That principle does not require the artificial reimbursement of interest in all cases but only in specific circumstances, which do not obtain in the present case given the macroeconomic situation in which the investment in question yielded negative interest. When the *Corus* judgment was delivered and the *Holcim* order made, no specific rules such as the contested provision existed as yet, and the Court was unable to take into consideration the prevailing economic climate with its low or negative interest rates since negative interest rates were hardly foreseen in the economic context of the countries of the European Union prior to the economic crisis of 2008. However, the right to positive interest would contradict economic reality in a context where interest rates were negative, and it might result in unjustified enrichment. In the present case, the contested provision is in fact favourable to the applicant, since without such a specific rule the negative yield noted in paragraph 24 above would have had to be deducted from the principal amount when it was repaid.

48 Third, the Commission denies that the contested provision infringes the second paragraph of Article 340 TFEU and Article 41(3) and Article 47 of the Charter since the applicant does not explain why it considers that the contested provision undermines the exercise of its rights to obtain redress and to receive interest and that it has not been able to exercise its right to an effective judicial remedy. Nor, the Commission submits, is the applicant correct in arguing that the non-payment of interest would deter addressees of competition decisions from applying to the Court for the annulment thereof since the reimbursement of interest (whether negative or positive) is ancillary to the application for annulment of the principal amount of the fine and cannot be foreseen when the application is lodged.

*Conditions in which the European Union incurs non-contractual liability*

49 Settled case-law has it that the European Union may incur non-contractual liability under the second paragraph of Article 340 TFEU only if a number of conditions are fulfilled, namely the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (see judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 64 and the case-law cited).

50 So far as the first condition is concerned, settled case-law requires that a sufficiently serious breach of a legal rule designed to confer rights on individuals must be established (see judgments of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 65 and the case-law cited, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 29 and the case-law cited).

51 That case-law also makes clear that that test is satisfied where a breach is established which implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authorities (see judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30 and the case-law cited). It is solely where that institution has only a considerably reduced, or even no, discretion that the mere infringement of EU law may suffice to establish that there has been a sufficiently serious breach (see, to that effect, judgments of 10 July 2003, *Commission* v *Fresh Marine*, C-472/00 P, EU:C:2003:399, paragraph 26 and the case-law cited, and of 4 April 2017, *Ombudsman* v *Staelen*, C-337/15 P, EU:C:2017:256, paragraph 39).

52 In the present case, the parties disagree as to whether the failure to pay interest on the principal amount of the fine repaid to the applicant is founded on a sufficiently serious breach of a rule of law intended to confer rights on individuals.

53 In support of its claim for compensation, the applicant alleges, first, a breach of the duty to state reasons under the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter in, inter alia, recital 92 of the 2014 decision, which led the Court to annul that decision in the applicant's regard by the *Printeos* judgment, and, second, a breach of the first paragraph of Article 266 TFEU establishing a subjective right to full and correct compliance with that judgment, the Commission having no discretion in that regard, including in respect of the payment of default interest.

54 The Court considers it appropriate to consider first the question whether there has been a sufficiently serious breach of the first paragraph of Article 266 TFEU.

*Whether there has been a sufficiently serious breach of the first paragraph of Article 266 TFEU*

55 Under the first paragraph of Article 266 TFEU, the institution whose act has been declared void must take the necessary measures to comply with the judgment in question. That article is a rule of law intended to confer rights on individuals as referred to in the case-law cited in paragraph 50 above. It establishes an absolute, unconditional obligation on the part of the institution which adopted the annulled act to take, in the interests of the successful applicant, the measures necessary to ensure compliance with the annulling judgment, to which the applicant's right to full compliance with that obligation corresponds.

56 Thus, in the event of the annulment of a decision imposing a fine (as in the present case) or of a decision ordering repayment of sums unduly received, case-law has recognised, pursuant to that rule, the applicant's right to be restored to the situation which it was in before that decision, which involves, inter alia, reimbursement of the principal sum that was unduly paid because of the annulled decision and the payment of default interest (see, to that effect, the *IPK* judgment, paragraph 29, and the *Corus* judgment, paragraphs 50, 52 and 53; the *Holcim* order, paragraphs 30 and 31; and the Opinion of Advocate General Bot in *Commission* v *IPK International*, C-336/13 P, EU:C:2014:2170, points 78 and 79). The Court of Justice has pointed out in this regard that payment of default interest constitutes a measure giving effect to a judgment annulling a measure for the purposes of the first paragraph of Article 266 TFEU in that it is designed to provide compensation at a standard rate for the loss of use of the monies owed and to encourage the debtor to comply with that judgment as soon as possible (*IPK* judgment, paragraphs 29 and 30).

57 In the present case, for the purposes of complying with the *Printeos* judgment and justifying its decision not to pay interest to the applicant, the Commission referred, in particular, to the contested provision.

58 In that context, the applicant's contention that the Commission wrongly applied Article 85a of Regulation No 2341/2002 instead of the contested provision which replaced it (see paragraph 40 above), cannot be upheld. As the Commission submits, the second subparagraph of Article 2(3) of the 2014 decision, which had not been challenged by the applicant in Case T-95/15 and had therefore become final, refers expressly to Article 90 of Delegated Regulation No 1268/2012 in connection with the option for the undertaking concerned to make provisional payment of the fine. That assessment is not undermined by the fact that the information note sent to the applicant by email of 16 February 2015 still referred — by mistake, as the Commission itself acknowledges — to Article 85a of Regulation No 2341/2002. Furthermore, the applicant does not dispute the fact that, during the reference period, the return on investment of the principal amount of the fine in the BUFI fund did not yield any interest but was negative, and that the Commission therefore complied with the conditions for applying the contested provision.

59 Regard being had to the case-law cited in paragraph 56 above, it is therefore necessary to examine whether, in the present case, the Commission's failure to pay default interest and the application of the contested provision constituted compliance with the *Printeos* judgment in accordance with the requirements arising under the first paragraph of Article 266 TFEU.

*Applicability of the contested provision and the duty to pay default interest under the first paragraph of Article 266 TFEU*

60 As the Commission acknowledged at the hearing, given the regulatory context of the contested provision and its clear wording, with its express reference to legal remedies and, in particular, to a situation in which the fine imposed by a decision has been annulled, the contested provision is intended to give effect to the requirements set out in the first paragraph of Article 266 TFEU. Likewise, in its written pleadings, the Commission confirmed that the contested provision had been adopted in order to bring the legislation into line with the requirements of the case-law, namely the *Corus* judgment and the *Holcim* order.

61 The contested provision must therefore be interpreted in the light of requirements arising under the first paragraph of Article 266 TFEU, to the extent to which its wording so permits. It is settled case-law that secondary EU legislation must be interpreted, as far as possible, in a manner consistent with the provisions of the Treaty and the general principles of EU law. However, that approach cannot lead to an unacceptable, *contra legem* interpretation of the legislation in question when its meaning is clear and unambiguous and not open to such interpretation (see, to that effect, judgment of 28 February 2017, *Yingli Energy* (*China*) *and Others* v *Council*, T-160/14, not published, EU:T:2017:125, paragraphs 151 and 152 and the case-law cited; see also, to that effect and by analogy, judgment of 29 June 2017, *Popławski*, C-579/15, EU:C:2017:503, paragraph 33 and the case-law cited). Accordingly, when a plea of illegality is raised under Article 277 TFEU against a provision the meaning of which is clear and unambiguous, it is for the Court alone to review its compliance with the provisions of the Treaty and the general principles of EU law.

62 Delegated Regulation No 1268/2012 does not define the term 'together with the interest yielded' used by the contested provision. In particular, it does not qualify that interest as 'default' or 'late-payment', like the interest referred to in Article 83. Similarly, Article 83(4) of the Financial Regulation, the legal basis of the contested provision, merely uses the ambiguous term 'accrued interest'. However, Article 78(4) of the Financial Regulation, which deals with the establishment of amounts receivable by the European Union from debtors, refers explicitly to the concept of 'default interest'. Moreover, in response to the Court's written and oral questions on that point, the Commission submitted, in essence, that the 'interest yielded' in that regard was neither default interest nor compensatory interest but interest *sui generis* exclusively relating to the return or profit that it would have been possible to achieve by depositing the principal amount into an account or investing it in financial assets.

63 The Commission essentially takes the view in this regard that the contested provision and the other provisions of Delegated Regulation No 1268/2012 comprise a complete system of rules governing the interest to be paid in the event that a debt is reimbursed following the annulment of a decision imposing a fine, which, in principle, precludes interest from being paid when, as in the present case, the conditions set out in the contested provision are not fulfilled. By contrast, irrespective of whether the contested provision applies, the Commission does not discount the possibility of paying compensatory interest to redress damage or default interest if the principal amount of the fine is paid late. In any event, the Commission considers that, in the present case, it did not make a late payment that might have justified the payment of default interest. It stresses that it immediately and promptly reimbursed the principal amount of the fine to the applicant even before the *Printeos* judgment became final, thereby precluding any delay in payment.

64 However, as has been recognised by the case-law referred to in paragraph 56 above, the duty which derives directly from the first paragraph of Article 266 TFEU to pay default interest following a judgment annulling, with retroactive effect, a decision ordering the recovery of an undue payment or imposing a fine is designed to provide compensation for loss of use of the monies owed. In this regard, the case-law takes into account the fact that, because the decision has been annulled *ex tunc*, the debt has existed ever since the party to which the decision was addressed unduly paid the amount ordered, with the result that from that point the author of that decision, as the debtor, is necessarily in default of payment (see, to that effect, the *IPK* judgment, paragraphs 30 and 76, and the *Corus* judgment, paragraphs 50 to 54). It should be made clear that that case-law does not distinguish between a situation following the annulment of a decision ordering the recovery of an undue payment or that following the annulment of a decision imposing a fine; it applies to any debt arising from the retroactive annulment of a measure adopted by an institution without prejudice to the scope of the contested provision or its applicability in the present case.

65 The Commission is therefore wrong to deny that it had been in default since 9 March 2015 — the date on which the applicant unduly made provisional payment of the principal amount of the fine — and to deny that it was consequently liable to pay default interest. As the 2014 decision was annulled with retroactive effect, the Commission had necessarily been late in reimbursing that principal amount since the time of that provisional payment. It was thus obliged to pay default interest pursuant to the first paragraph of Article 266 TFEU in order to comply with the principle of *restitutio in integrum* and to compensate the applicant at a standard rate for the loss of use of that amount.

66 It also follows that the Commission erred in taking the view that the contested provision prevented it from fulfilling its absolute and unconditional duty to pay default interest pursuant to the first paragraph of Article 266 TFEU. In any event, the contested provision cannot affect that duty or preclude such a payment since the term ‘interest yielded’ that it employs cannot be characterised as ‘default interest’ or compensation at a standard rate as referred to in the case-law cited in paragraph 64 above, but denotes only a real positive return on the investment of the amount in question.

67 The applicant is therefore correct to argue that, following the *Printeos* judgment and irrespective of the contested provision, the Commission was required, pursuant to the first paragraph of Article 266 TFEU as interpreted by the case-law, in terms of measures to comply with that judgment, not only to repay the principal amount of the fine but also to pay default interest as compensation at a standard rate for the loss of use of that amount during the reference period, and that it enjoyed no discretion in that regard.

68 In this respect, the Court rejects the Commission’s arguments that the applicant may be unjustly enriched, given the negative return on the principal amount of the investment during the reference period, or overcompensated by the reimbursement of the nominal value of that amount. That point of view is directly at odds with the principle of compensation at a standard rate through the payment of default interest laid down in the case-law.

69 Accordingly, having regard to the absolute and unconditional duty imposed on the Commission by the first paragraph of Article 266 TFEU to pay such interest, with no discretion in that regard, it must be found that the Commission committed a sufficiently serious breach of that rule of law which may render the European Union non-contractually liable pursuant to the second paragraph of Article 266 TFEU, read in conjunction with the second paragraph of Article 340 TFEU. That being the case, there is no need to rule on the other pleas raised by the applicant in that respect or on its plea of illegality in regard to the contested provision.

*Causal link and damage to be redressed*

70 It should be recalled that the condition concerning the causal link laid down by the second paragraph of Article 340 TFEU relates to the existence of a sufficiently direct causal link between the unlawful conduct complained of and the alleged damage (see judgments of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 53 and the case-law cited, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 61 and the case-law cited).

71 In this case, infringement by the Commission of its obligation to pay default interest under the first paragraph of Article 266 TFEU has a sufficiently direct causal link with the damage sustained by the applicant. That damage is equivalent to the loss of default interest during the reference period, that interest representing compensation at a standard rate for loss of use of the principal amount of the fine during the reference period and corresponding to the applicable ECB refinancing rate plus, as claimed in the present case, 2 percentage points (see paragraph 74 below).

72 In this respect, the Commission cannot blame the applicant for having freely chosen to pay the fine provisionally instead of providing a bank guarantee, which would also have generated financing costs, even though it was aware, or should have been aware, of the repayment terms specified in the contested provision in the event of an annulling judgment. As the Commission itself acknowledges, in accordance with Article 278 TFEU, in the absence of suspensory effect of an action directed against an enforceable decision imposing a fine, it is the principal and primary obligation of the undertaking concerned to make provisional payment of the fine, which, moreover, in this case was a requirement under Article 2(2) of the 2014 decision. It follows that the applicant's choice to make provisional payment of the fine is the logical consequence of the 2014 decision and cannot rupture the causal link between the unlawfulness alleged and the damage sustained.

73 As regards the amount of damage to be redressed, it must be noted that, in the present case, the Commission has not challenged the principal amount of compensation of EUR 184 592.95 — which the applicant claims as compensation for the default interest incurred but not paid since 9 March 2015 — but only its increase by 3.5 instead of 2 percentage points on the ECB refinancing rate (see paragraph 44 above). In the circumstances, it must be held that the principal amount claimed is payable in this case.

74 However, given that challenge and the fact that the applicant limited its request, in the first head of claim in the application initiating proceedings, to compensation in an amount that includes default interest at the ECB refinancing rate plus only 2 percentage points, the *ultra petita* rule prohibits the Court from going beyond that claim (see, by analogy, judgment of 19 May 1992, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:1992:217, paragraph 35). In that regard, the applicant's request during the hearing that the increase be raised to 3.5 percentage points — which it also made in its email of 26 January 2017 (see paragraph 22 above) — is belated and contrary to the principle that the forms of order sought by the parties may not be altered (see, to that effect, judgment of 9 November 2017, *HX* v *Council*, C-423/16 P, EU:C:2017:848, paragraph 18). Finally, it is only in the alternative, that is to say, in the event that the principal claim should be rejected, that the applicant asked that it be awarded a rate of interest that the Court might deem appropriate.

75 Consequently, that request for an increase must be rejected and the amount of recoverable compensation set at EUR 184 592.95.

***Claim for payment of default interest in the second head of claim***

76 Since the applicant has requested, in its second head of claim, the payment of default interest on the amount of compensation, as referred to in paragraph 75 above, default interest must be awarded from the delivery of the present judgment until full payment by the Commission, at the ECB refinancing rate plus 3.5 percentage points, as requested, by analogy to Article 83(2)(b) of Delegated Regulation No 1268/2012 (see, to that effect, judgment of 10 January 2017, *Gascogne Sack Deutschland and Gascogne* v *European Union*, T-577/14, EU:T:2017:1, paragraphs 178 and 179).

77 By contrast, that request must be rejected in so far as it seeks payment of default interest from 1 February 2017.

78 In the light of all of the foregoing considerations, the claim for compensation, as envisaged in the first head of claim, must be upheld, without there being any need to rule on the alternative claim for annulment of the contested email.

**Costs**

79 Under Article 134(1) of the Rules of Procedure, 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 largely unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Orders the European Union, represented by the European Commission, to redress the damage sustained by Printeos, SA, because of the failure to pay to that company EUR 184 592.95 in default interest for the period from 9 March 2015 to 1 February 2017 pursuant to the first paragraph of Article 266 TFEU, in compliance with the judgment of 13 December 2016, *Printeos and Others* v *Commission* (T-95/15);**

2. **The compensation referred to in point (1) above shall bear default interest, starting from the date of delivery of the present judgment and continuing until full payment, at the rate set by the European Central Bank (ECB) for its principal refinancing operations, plus 3.5 percentage points;**

3. **Dismisses the remainder of the action;**

4. **Orders the Commission to pay the costs.**

Frimodt Nielsen Kreuschitz Forrester

Półtorak Perillo

Delivered in open court in Luxembourg on 12 February 2019.

[Signatures]

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