Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 September 2019*

(Appeals — Actions for damages — Second paragraph of Article 340 TFEU — Excessive length of the proceedings in a case before the General Court of the European Union — Compensation for the damage allegedly sustained by the applicant — Concept of a 'single undertaking' not applied — Material damage — Bank guarantee costs — Causal link — Loss of profit — Non-pecuniary damage — Liability of the European Union for damage caused by infringements of EU law arising from a decision of the General Court — No incurring of liability)

In Joined Cases C-447/17 P and C-479/17 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 25 July 2017 and 8 August 2017,

European Union, represented by the Court of Justice of the European Union, represented initially by J. Inghelram and K. Sawyer, and subsequently by J. Inghelram, acting as Agents,

appellant,

the other parties to the proceedings being:

Guardian Europe Sàrl, established in Bertrange (Luxembourg), represented by C. O'Daly, Solicitor, and F. Louis, avocat,

applicant at first instance,

European Union, represented by the European Commission, represented by N. Khan, A. Dawes and C. Urraca Caviedes, acting as Agents,

defendant at first instance (C-447/17 P),

and

Guardian Europe Sàrl, established in Bertrange, represented by C. O'Daly, Solicitor, and F. Louis, avocat,

appellant,

the other parties to the proceedings being:

European Union, represented by the Court of Justice of the European Union, represented initially by J. Inghelram and K. Sawyer, and subsequently by J. Inghelram, acting as Agents,

* Language of the case: English.

European Union, represented by the European Commission, represented by N. Khan, A. Dawes and C. Urraca Caviedes, acting as Agents,

defendants at first instance (C-479/17 P),

THE COURT (First Chamber),

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

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2019,

gives the following

Judgment

1 By their respective appeals, the European Union, represented by the Court of Justice of the European Union (C-447/17 P), and Guardian Europe Sàrl (C-479/17 P) ask the Court to set aside in part the judgment of the General Court of the European Union of 7 June 2017, *Guardian Europe* v *European Union* (T-673/15, EU:T:2017:377; 'the judgment under appeal'), by which the General Court, first, ordered the European Union, represented by the Court of Justice of the European Union, to pay compensation in the sum of EUR 654 523.43 to Guardian Europe for the material damage sustained by that company because of the infringement of the obligation to adjudicate within a reasonable time in the case giving rise to the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494; 'Case T-82/08'), and secondly, dismissed the action as to the remainder.

Legal context

Statute of the Court of Justice of the European Union

2 Article 56 of the Statute of the Court of Justice of the European Union provides:

'An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. …'

Rules of Procedure of the Court of Justice

3 As provided in Article 174 of the Rules of Procedure of the Court of Justice, 'a response shall seek to have the appeal allowed or dismissed, in whole or in part'.

4 Article 176 of the Rules of Procedure is worded as follows:

'1. The parties referred to in Article 172 of these Rules may submit a cross-appeal within the same time limit as that prescribed for the submission of a response.

2. A cross-appeal must be introduced by a document separate from the response.'

5 Article 178 of the Rules of Procedure states:

'1. A cross-appeal shall seek to have set aside, in whole or in part, the decision of the General Court.

2. It may also seek to have set aside an express or implied decision relating to the admissibility of the action before the General Court.

…'

Background to the dispute

6 By application lodged at the Registry of the General Court on 12 February 2008, Guardian Industries Corp. and Guardian Europe brought an action against Commission Decision C(2007) 5791 final of 28 November 2007 relating to a proceeding under Article [101 TFEU] and Article 53 of the EEA Agreement (Case COMP/39165 — Flat glass) ('the decision at issue'). In their application, they essentially claimed that the General Court should annul the decision at issue in part in so far as it concerned them and reduce the amount of the fine imposed on them by that decision.

7 By judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), the General Court dismissed the action.

8 By application lodged on 10 December 2012, Guardian Industries and Guardian Europe lodged an appeal against the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494).

9 By judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), the Court of Justice, first, set aside the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), in so far as that judgment had rejected the plea in law alleging infringement of the principle of non-discrimination as regards the calculation of the amount of the fine imposed jointly and severally on Guardian Industries and Guardian Europe and had ordered those parties to pay the costs. Secondly, the Court annulled Article 2 of the decision at issue in so far as it set the amount of the fine imposed jointly and severally on Guardian Industries and Guardian Europe at EUR 148 000 000. Thirdly, the Court set the amount of the fine imposed jointly and severally on Guardian Industries and Guardian Europe by reason of the infringement established in Article 1 of the decision at issue at EUR 103 600 000. Fourthly, the Court dismissed the appeal as to the remainder. Fifthly, the Court apportioned the costs.

Procedure before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 19 November 2015, Guardian Europe brought an action on the basis of Article 268 TFEU and the second paragraph of Article 340 TFEU against the European Union, represented by the European Commission and by the Court of Justice of the European Union, seeking compensation for the damage which it considered that it had sustained as a result of, first, the excessive length of the proceedings before the General Court in Case T-82/08 and,

secondly, an infringement of the principle of equal treatment committed in the decision at issue and in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494).

11 By the judgment under appeal, the General Court:

‘1. [Ordered] the European Union, represented by the Court of Justice of the European Union, to pay compensation of EUR 654 523.43 to Guardian Europe … for the material damage sustained by that company because of the infringement of the obligation to adjudicate within a reasonable time in [Case T-82/08]. That compensation [was] to be adjusted by applying compensatory interest, starting from 27 July 2010 and continuing up to the date of delivery of the [judgment under appeal], at the annual rate of inflation determined, for the period in question, by Eurostat (the statistical office of the European Union) in the Member State where that company [was] established;

2. [Ordered that] the compensation referred to in point 1 … be increased by default interest, starting from the date of delivery of the [judgment under appeal] until full payment, at the rate set by the European Central Bank (ECB) for its main refinancing operations, increased by two percentage points;

3. [Dismissed] the action as to the remainder;

4. [Ordered] Guardian Europe to bear the costs incurred by the European Union, represented by the European Commission;

5. [Ordered] Guardian Europe, on the one hand, and the European Union, represented by the Court of Justice of the European Union, on the other, to bear their own costs.

Forms of order sought

12 By its appeal in Case C-447/17 P, the European Union, represented by the Court of Justice of the European Union, claims that the Court should:

– set aside paragraph 1 of the operative part of the judgment under appeal;

– dismiss as unfounded Guardian Europe’s claim, made at first instance, seeking to obtain a sum of EUR 936 000 in respect of bank guarantee costs in compensation for damage that it allegedly suffered because of infringement of the obligation to adjudicate within a reasonable time in Case T-82/08, or, and purely in the alternative, reduce that compensation to an amount of EUR 299 251.64, together with compensatory interest calculated having regard to the fact that that amount is composed of different amounts that became due at different points in time; and

– order Guardian Europe to pay the costs.

13 Guardian Europe contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

14 The European Union, represented by Commission, contends that the Court should:

– uphold the appeal in all respects; and

– order Guardian Europe to pay the costs.

15 By its appeal in Case C-479/17 P, Guardian Europe claims that the Court should:

– set aside the judgment under appeal in so far as point 3 of the operative part rejected part of Guardian Europe's claim for damages based on Article 268 TFEU and the second paragraph of Article 340 TFEU;

– order the European Union, represented by the Court of Justice of the European Union, to compensate Guardian Europe for the damage caused to it as a result of the General Court's breach of the requirement to rule within a reasonable time, by paying it the following amounts, together with, first, compensatory interest starting from 27 July 2010 up to the date of the judgment on the present appeal, at the annual rate of inflation determined, for the period in question, by Eurostat in the Member State where Guardian Europe is established, and secondly, default interest starting from the date of the judgment on the present appeal, at the rate set by the ECB for its main refinancing operations, increased by two percentage points:

  – EUR 1 388 000 for opportunity costs or loss of profit;

  – EUR 143 675.78 for bank guarantee costs; and

  – a determined amount in the form of an appropriate percentage of the fine imposed on Guardian Europe in the decision at issue, for non-pecuniary loss;

– order the European Union, represented by the Commission and the Court of Justice of the European Union, to compensate Guardian Europe for damage caused to it because of the Commission's and the General Court's infringement of the principle of equal treatment, by paying it the following amounts together with, first, compensatory interest starting from 19 November 2010 up to the date of the judgment on the present appeal, at the annual rate of inflation determined, for the period in question, by Eurostat in the Member State where Guardian Europe is established, and secondly, default interest starting from the date of the judgment on the present appeal, at the rate set by the ECB for its main refinancing operations, increased by two percentage points:

  – EUR 7 712 000 for opportunity costs or loss of profit;

  – a determined amount in the form of an appropriate percentage of the fine imposed on Guardian Europe in the decision at issue, for non-pecuniary loss;

– in the alternative, refer the case back to the General Court; and

– order the European Union, represented by the Commission and the Court of Justice of the European Union, to pay the costs.

16 The European Union, represented by the Court of Justice of the European Union, contends that the Court should:

– dismiss the appeal; and

– order Guardian Europe to pay the costs.

17 The European Union, represented by Commission, contends that the Court should:

– dismiss the appeal in so far as it is directed against the Commission; and

– order Guardian Europe to pay its own costs and those of the European Union, represented by the Commission.

18 By its cross-appeal in Case C-479/17 P, the European Union, represented by the Court of Justice of the European Union, claims that the Court should:

– set aside the decision rejecting the plea of inadmissibility of the claim for loss of profit;

– declare that Guardian Europe's claim for loss of profit is inadmissible; and

– order Guardian Europe to pay the costs.

19 Guardian Europe contends that the Court should:

– dismiss the cross-appeal; and

– order the European Union, represented by the Court of Justice of the European Union, to pay the costs.

20 By decision of the Vice-President of the Court, acting as President of the First Chamber, of 3 June 2019, Cases C-447/17 P and C-479/17 P were joined for the purposes of the judgment.

The appeal in Case C-447/17 P

21 In its appeal in Case C-447/17 P, the European Union, represented by the Court of Justice of the European Union, put forward four grounds of appeal. However, by letter of 7 January 2019, it withdrew its first, third and fourth grounds of appeal.

Arguments of the parties

22 In support of its second and — following its partial withdrawal — only ground of appeal, the European Union, represented by the Court of Justice of the European Union, the appellant in Case C-447/17 P, submits that, in holding, in paragraph 161 of the judgment under appeal, that there is a sufficiently direct causal link between the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and the loss sustained by Guardian Europe as a result of paying bank guarantee costs during the period by which that time was exceeded, the General Court erred in law in the interpretation of the concept of a 'causal link'.

23 In particular, the appellant in Case C-447/17 P contends that the General Court relied on the incorrect premiss that the decision to provide a bank guarantee is made at a single moment in time, that is to say, at the time of the 'initial decision' to provide that guarantee. Since the obligation to pay the fine continued for the duration of the proceedings before the Courts of the European Union, Guardian Europe had the possibility of paying the fine and thus complying with the obligation that it was under in that regard. As it had the possibility of paying the fine at any time, its own decision to replace that payment with a bank guarantee is a continuous choice, made by it throughout the proceedings. Therefore, the determining cause of the payment of the bank guarantee costs lies in its own decision not to pay the fine in full and to substitute that payment with a bank guarantee, and not in the infringement of the obligation to adjudicate within a reasonable time.

24 Moreover, the facts in the present case bear out that interpretation. As stated in paragraph 156 of the judgment under appeal, Guardian Europe cancelled the bank guarantee on 2 August 2013, on a date that had no connection at all with the proceedings before the Courts of the European Union, namely

10 months after delivery of the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), and 16 months before delivery of the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363).

25 The European Union, represented by the Commission, agrees with the arguments put forward by the appellant in Case C-447/17 P.

26 Guardian Europe, the respondent in Case C-447/17 P, submits that the General Court's delay was, in this instance, the only reason for the additional bank guarantee costs that it had to incur, it bearing no liability in that regard. In this context, Guardian Europe stresses that it did not infringe any rule of law when it decided to provide a bank guarantee to the Commission, that choice being, on the contrary, perfectly lawful. Therefore, if the Court were to find that the lawful choice to provide a bank guarantee gave rise to 'liability' on the part of Guardian Europe, the remedy for breach of the rights protected in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') would be emptied of any effectiveness once a company has chosen to cover part of its fine by a guarantee.

27 Guardian Europe states that there is a distinction between, on the one hand, bank guarantee costs incurred during the reasonable period within which a ruling should be given — which, pursuant to the case-law resulting, inter alia, from the judgment of 21 April 2005, *Holcim (Deutschland)* v *Commission* (T-28/03, EU:T:2005:139), and the order of 12 December 2007, *Atlantic Container Line and Others* v *Commission* (T-113/04, not published, EU:T:2007:377) are not recoverable — and, on the other hand, bank guarantee costs incurred after that period.

28 In that regard, relying on paragraph 62 of the judgment of 21 April 2005, *Holcim (Deutschland)* v *Commission* (T-28/03, EU:T:2005:139), Guardian Europe states that one of the main reasons for the Courts of the European Union having ruled that bank guarantee costs are not recoverable where a Commission decision imposing a fine is annulled is that the charges relating to the bank guarantee already incurred would have been payable to the banks whatever the final outcome of the action for annulment. This reasoning clearly cannot be applicable in the present case as Guardian Europe would not have had to pay additional bank guarantee costs if the General Court had ruled on its application within a reasonable time.

29 Guardian Europe requests that the Court reject the arguments advanced by the appellant in Case C-447/17 P concerning classification of the decision to provide a bank guarantee as a 'continuous choice' and that it uphold the General Court's analysis in paragraph 160 of the judgment under appeal.

30 Guardian Europe adds that under Member State law the causal link is broken only if the victim's behaviour is characterised by fault. Here, Guardian Europe's behaviour cannot be held to give rise to fault since it proactively sought to expedite the procedure before the General Court and repeatedly contacted the Registry to enquire about the status of the proceedings.

31 Guardian Europe contends, therefore, that this ground of appeal should be rejected.

Findings of the Court

32 As the Court has previously stated, the condition under the second paragraph of Article 340 TFEU relating to a causal link concerns a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof of which rests on the applicant, so that the conduct complained of must be the determining cause of the damage (judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 52 and the case-law cited).

33 It is therefore necessary to ascertain whether the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 is the determining cause of the damage resulting from the payment of bank guarantee costs during the period by which that time was exceeded in order to establish the existence of a direct relationship of cause and effect between the conduct of which the European Union, represented by the Court of Justice of the European Union, is accused and the damage alleged.

34 In that regard, it must be observed that, in an action for damages brought against the Commission, seeking, in particular, reimbursement of the guarantee fees incurred by the applicants in order to obtain the suspension of the decisions to recover the refunds at issue, decisions which were subsequently withdrawn, the Court held that, when a decision requiring the payment of a fine is coupled with the option of lodging a security intended to ensure that payment along with interest on late payment, pending the outcome of an action brought against that decision, the loss consisting of the guarantee fees results not from that decision but from the relevant party's own choice to lodge a security rather than to fulfil its repayment obligation immediately. In those circumstances, the Court established that there was no direct causal link between the conduct of which the Commission was accused and the damage alleged (see, to that effect, judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraphs 118 and 120).

35 The General Court held, in paragraph 160 of the judgment under appeal, that the link between the fact that the reasonable time for adjudicating in Case T-82/08 was exceeded and the payment of bank guarantee costs during that excess period cannot have been severed by Guardian Europe's initial decision not to effect immediate payment of part of the fine imposed by the decision at issue and to provide a bank guarantee.

36 In particular, as is apparent from paragraph 160 of the judgment under appeal, the two circumstances on which the General Court relied in reaching the conclusion set out in the preceding paragraph of the present judgment are (i) that, on the date on which Guardian Europe brought its action in Case T-82/08 and on the date on which it provided a bank guarantee, the infringement of the obligation to adjudicate within a reasonable time was not foreseeable and that it could legitimately expect that action to be dealt with within a reasonable time, and (ii) that the reasonable time for adjudicating was exceeded after Guardian Europe's initial decision to provide that guarantee.

37 However, those two circumstances cannot be relevant for finding that the causal link between the infringement of the obligation to adjudicate within a reasonable time, in Case T-82/08, and the damage suffered by Guardian Europe as a result of paying bank guarantee costs during the period by which that time was exceeded cannot have been severed by the decision of that undertaking to provide the bank guarantee (see judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 57).

38 That would be the case only if it were compulsory to maintain the bank guarantee, so that the undertaking which brought an action against a Commission decision imposing a fine on it, and which chose to provide a bank guarantee in order not to comply immediately with that decision, was not entitled, before the date on which the judgment on that action was delivered, to pay the fine and put an end to the bank guarantee that it had provided (judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 58 and the case-law cited).

39 As the Court has previously held, like the provision of the bank guarantee, the maintenance of that guarantee is a matter for the discretion of the undertaking concerned in the light of its financial interests. Nothing prevents, as a matter of EU law, that undertaking from terminating, at any time, the bank guarantee that it has provided and paying the fine imposed, where, in view of the evolution of the circumstances in relation to those existing on the date when that guarantee was provided, that undertaking deems that option more advantageous for it. That might be the case, in particular, where the conduct of the proceedings before the General Court leads the undertaking in question to take the view that the judgment will be delivered at a date later than that which it had initially envisaged and

that, consequently, the cost of the bank guarantee will be higher than the cost that it had initially envisaged when providing that guarantee (judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 59 and the case-law cited).

40 In the present instance, given that (i) on 12 February 2010, that is to say, 2 years after the application in Case T-82/08 was lodged, the oral procedure in that case had still not even been opened, as is apparent from the General Court's findings in paragraph 133 of the judgment under appeal, and (ii) the period which Guardian Europe itself regarded, in its application at first instance, as being the normal period for dealing with a case such as Case T-82/08 is precisely 2 years, it must be held that, by 12 February 2010 at the latest, Guardian Europe could not have been unaware that the duration of the proceedings in that case would considerably exceed that which it had initially envisaged, and that it could have reconsidered the appropriateness of maintaining the bank guarantee, having regard to the extra costs that maintaining it might entail.

41 In those circumstances, the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 cannot be the determining cause of the damage sustained by Guardian Europe as a result of paying bank guarantee costs during the period by which that time was exceeded. Such damage is the consequence of Guardian Europe's own decision to maintain the bank guarantee throughout the proceedings in that case, despite the financial consequences which that entailed (see judgment of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 61).

42 It follows from the foregoing considerations that, in holding that there is a sufficiently direct causal link between the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and the loss sustained by Guardian Europe as a result of paying bank guarantee costs during the period by which that time was exceeded, the General Court erred in law in the interpretation of the concept of a 'causal link'.

43 Consequently, since this ground of appeal has to be declared well founded, the appeal in Case C-447/17 P must be upheld and point 1 of the operative part of the judgment under appeal must be set aside.

The cross-appeal in Case C-479/17 P

Arguments of the parties

44 By the sole ground of appeal put forward in support of its cross-appeal in Case C-479/17 P, which it is appropriate to analyse before the main appeal in that case, the European Union, represented by the Court of Justice of the European Union, the cross-appellant, submits that, in rejecting, in paragraph 65 of the judgment under appeal, the plea of inadmissibility alleging that the compensation for the loss of profit pleaded by Guardian Europe would nullify the legal effects of a decision that has become final, specifically, the Commission decision of 23 December 2014 ('the decision of December 2014'), the General Court erred in law.

45 The cross-appellant in Case C-479/17 P, proceeding on the basis that the interest which the Commission paid to Guardian Europe, in accordance with the decision of December 2014, is intended to compensate for the loss that it suffered as a result of being deprived of the use of the overpaid amount of the fine, contends that Guardian Europe's claim for damages in respect of loss of profit is designed, ultimately, to obtain compensation for that loss at a rate higher than the rate used by the Commission in that decision.

46 However, in order to claim a higher rate of return on the sum which it was unable to enjoy because of overpayment of the fine imposed, Guardian Europe would have had to bring an action for annulment of the decision of December 2014. Thus, contrary to the findings in paragraph 64 of the judgment under appeal, that claim for damages has the same object and effect as an application for annulment of that decision.

47 That being so, the General Court should have applied the principle — resulting from the Court's case-law, in particular the judgments of 15 December 1966, *Schreckenberg* v *Commission* (59/65, EU:C:1966:60), and of 14 February 1989, *Bossi* v *Commission* (346/87, EU:C:1989:59, paragraphs 31 to 35), and the order of 4 October 2010, *Ivanov* v *Commission* (C-532/09 P, not published, EU:C:2010:577, paragraphs 23 to 25) — that a definitive decision cannot be challenged through an action for damages which has the same object and effect as an action for annulment would have had, and should, accordingly, have dismissed Guardian Europe's claim for compensation concerning an alleged loss of profit as inadmissible.

48 Guardian Europe contests the arguments put forward by the cross-appellant in Case C-479/17 P.

Findings of the Court

49 According to settled case-law, the action for damages under the second paragraph of Article 340 TFEU was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific purpose, and hence a declaration of inadmissibility of the application for annulment does not automatically render the action for damages inadmissible (order of 21 June 1993, *Van Parijs and Others* v *Council and Commission*, C-257/93, EU:C:1993:249, paragraph 14 and the case-law cited).

50 However, although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not in that way circumvent the inadmissibility of an application which concerns the same instance of illegality and which has the same financial end in view (order of the President of the Court of 26 October 1995, *Pevasa and Inpesca* v *Commission*, C-199/94 P and C-200/94 P, EU:C:1995:360, paragraph 27 and the case-law cited).

51 Thus, an action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of an individual decision which has become final and it would, if upheld, have the effect of nullifying the legal effects of that decision. That is the case if the applicant seeks, by means of a claim for damages, to obtain the same result as he would have obtained had he been successful in an action for annulment which he failed to commence in due time (see, to that effect, order of 4 October 2010, *Ivanov* v *Commission*, C-532/09 P, not published, EU:C:2010:577, paragraphs 23 and 24 and the case-law cited).

52 It must be determined whether, as the cross-appellant in Case C-479/17 P contends, the claim for damages made by Guardian Europe, on the basis of the second paragraph of Article 340 TFEU, in order to obtain compensation for the damage resulting from the alleged loss of profit, is designed to obtain the same result as an action for annulment that would have been brought against the decision of December 2014.

53 As is apparent from paragraph 24 of the judgment under appeal, by its action for damages Guardian Europe sought, in particular, compensation for the damage which it allegedly sustained as a result of, first, the length of the proceedings in Case T-82/08 and, secondly, the infringement of the principle of equal treatment in the decision at issue and in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), and which consisted in a loss of profit linked to the difference between, on the one hand, the interest repaid by the

Commission on the part of the fine that the Court ultimately held not be due in the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), and, on the other, the income that Guardian Europe might have earned if, instead of paying the Commission the sum ultimately held by the Court not to be due, it had invested that sum in its business.

54 Also, as is apparent from paragraphs 54 and 55 of the judgment under appeal, by the decision of December 2014 the Commission repaid the part of the fine held not to be due by the Court in the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), and paid interest on that sum in the amount of EUR 988 620.

55 As regards that decision, it should be recalled that, as the Court has previously stated, 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 entails, inter alia, the payment of sums due, the recovery of amounts paid but not owed and the payment of default interest. In that context, the Court has explained that payment of such 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 compensate at a standard rate for the loss of enjoyment of the monies owed and to encourage the debtor to comply with that judgment as soon as possible (see judgment of 12 February 2015, *Commission* v *IPK International*, C-336/13 P, EU:C:2015:83, paragraphs 29 and 30).

56 In order to determine the amount of the default interest that must be paid to an undertaking which paid a fine imposed by the Commission, following the annulment of that fine, the Commission must apply the rate set for that purpose 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).

57 Thus, where the available capital of an undertaking punished by the Commission enables it to pay the fine imposed and the fine is subsequently annulled, the damage consisting in the loss of enjoyment of that capital will normally be covered by payment, on the part of the Commission, of the default interest on the amount of the wrongly paid fine, interest which is calculated in accordance with Delegated Regulation No 1268/2012, in the present instance the sum of EUR 988 620.

58 Nonetheless, the possibility remains that, in particular circumstances, the amount of that interest will be insufficient to provide full compensation for the damage sustained on account of loss of enjoyment of the sum wrongly paid.

59 In such circumstances, in order to obtain compensation for the damage which results from loss of enjoyment of the sum wrongly paid and is not covered by the amount corresponding to the default interest to be paid by the Commission, the undertaking concerned must lodge an application for damages, on the basis of the second paragraph of Article 340 TFEU.

60 That assessment is borne out by the second paragraph of Article 266 TFEU, which provides that the obligation of the institution whose act has been declared void to take the necessary measures to comply with the judgment itself, which include payment of default interest, is not to affect any obligation which may result from the application of Article 340 TFEU.

61 In the present instance, by its action for damages, Guardian Europe does not seek repayment of the part of the fine held not to be due in the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), or payment of the interest yielded by that sum when it was in the Commission's possession, but the loss of profit referred to in paragraph 53 of the present judgment.

62 Also, as regards the default interest, any annulment of the decision of December 2014 could not give rise to the payment to Guardian Europe of a sum other than the amount of interest required to be repaid by the Commission, in accordance with Delegated Regulation No 1268/2012.

63 It is thus clear that the claim for damages made by Guardian Europe, on the basis of the second paragraph of Article 340 TFEU, seeking compensation for the damage resulting from the alleged loss of profit, is not designed to obtain the same result as an action for annulment that would have been brought against the decision of December 2014.

64 Therefore, the General Court was correct in holding, in paragraph 64 of the judgment under appeal, that Guardian Europe's claim for compensation as regards an alleged loss of profit has neither the same object nor the same effect as an action for annulment brought against the decision of December 2014 and cannot, therefore, be held inadmissible by virtue of abuse of process.

65 Consequently, it cannot be claimed that the General Court erred in law when, in paragraph 65 of the judgment under appeal, it rejected the pleas of inadmissibility alleging that the compensation for the loss of profit alleged would nullify the effects of a decision that has become final.

66 Accordingly, the sole ground of appeal put forward in support of the cross-appeal in Case C-479/17 P must be rejected as unfounded and the cross-appeal must be dismissed.

The main appeal in Case C-479/17 P

67 Guardian Europe puts forward six grounds of appeal in Case C-479/17 P.

The sixth ground of appeal

Arguments of the parties

68 By its sixth ground of appeal, which it is appropriate to examine first, Guardian Europe contends that the General Court erred in law when it held that only a judgment delivered by a Court of the European Union of last instance can make the European Union liable on account of an infringement of EU law.

69 In Guardian Europe's submission, the case-law of the Court of Justice does not explicitly rule out the possibility that a lower court's decision could give rise to an action for damages for infringement of EU law. The principle established by the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), is not limited to courts ruling at last instance.

70 Moreover, even if it were accepted that only a decision of a court of a Member State ruling at last instance can give rise to liability for infringement of EU law, it would not follow that this principle is also applicable in respect of the General Court, given the differences that exist between it and courts of the Member States.

71 Furthermore, since the Court of Justice by definition cannot infringe EU law in a judgment, the assessment in paragraph 122 of the judgment under appeal would mean that the Courts of the European Union can never be held liable for infringement of EU law.

72 Finally, Guardian Europe criticises the General Court for having held in paragraph 124 of the judgment under appeal that Guardian Europe did not allege serious failures in the judicial process, in particular of a procedural or administrative nature.

73 The European Union, represented by the Court of Justice of the European Union, respondent in the main appeal in Case C-479/17 P, contests Guardian Europe's arguments.

Findings of the Court

74 In order to assess the merits of Guardian Europe's complaint with regard to paragraph 122 of the judgment under appeal, it should be recalled that, in the context of the principle of liability on the part of a Member State for damage caused to individuals as a result of infringements of EU law for which the Member State can be held responsible, the Court has held that that principle is also applicable where the alleged infringement stems from a decision of a court of the Member State adjudicating at last instance (see judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 50).

75 In so determining, the Court relied, in particular, on the essential role played by the judiciary in the protection of the rights derived by individuals from EU rules and on the fact that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by EU law. In the latter regard, the Court pointed out that, since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights (see, to that effect, judgment of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 33 and 34).

76 Contrary to Guardian Europe's assertions, it is clear from the Court's case-law that the principle referred to in paragraph 74 of the present judgment is not applicable where the infringement of EU law is committed by a court of a Member State not adjudicating at last instance (see, to that effect, judgment of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 36).

77 Whilst, since domestic remedy lies against a judicial decision of a court adjudicating at last instance, an action for damages against the State is the only means of redress serving to ensure that the infringed right is restored and that effective judicial protection of the rights which individuals derive from EU law is thereby provided, the same does not apply as regards decisions of courts of first instance since a domestic remedy lies against them, and therefore infringements of EU law arising from those decisions may be corrected or put right.

78 Consequently, as the Advocate General has stated in point 110 of his Opinion, recourse to the judicial remedy is the appropriate means of redressing infringements of EU law that arise from decisions of national courts not adjudicating at last instance.

79 It must be determined whether the principle which precludes liability of a Member State for damage caused to individuals as a result of an infringement of EU law by a decision of a court of that Member State not adjudicating at last instance can be transposed to the regime under the second paragraph of Article 340 TFEU governing liability of the European Union.

80 In that regard, it should be noted, first, that, as is apparent from the first subparagraph of Article 19(1) TEU, the Court of Justice of the European Union, which is entrusted with the task of ensuring that in the interpretation and application of the Treaties the law is observed, includes a number of courts, namely the Court of Justice, the General Court and specialised courts.

81 Secondly, Article 256 TFEU provides that the General Court is to have jurisdiction to hear and determine 'at first instance' actions or proceedings referred to in that provision and decisions given by the General Court in such actions or proceedings may be subject to a right of appeal to the Court of Justice. The possibility of bringing an appeal before the Court of Justice is also provided for in Article 56 of the Statute of the Court of Justice of the European Union.

82 Thus, the characteristics of the judicial system of the European Union established by the Treaties in order to ensure judicial review in the EU legal order enable the General Court to be equated to a court of a Member State which does not adjudicate at last instance, as the Advocate General has observed in point 112 of his Opinion.

83 Accordingly, since infringements of EU law arising from decisions of the General Court against which an appeal may be brought before the Court of Justice can be corrected or put right, which, as is clear from paragraph 123 of the judgment under appeal, is precisely what occurred as regards the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), it must be concluded that bringing an appeal is the appropriate means of correcting errors of law committed in those decisions, and the principle referred to in paragraph 79 of the present judgment can therefore be transposed to the regime under the second paragraph of Article 340 TFEU governing liability of the European Union, with regard to those decisions.

84 Consequently, infringements of EU law arising from a decision of the General Court, such as the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), cannot give rise to liability of the European Union.

85 Accordingly, the General Court did not err in law in holding, in paragraph 122 of the judgment under appeal, that the European Union cannot incur liability for the content of a judicial decision that has not been delivered by a Court of the European Union adjudicating at last instance and could, therefore, be subject to an appeal.

86 So far as concerns Guardian Europe's argument, set out in paragraph 72 of the present judgment, regarding the General Court's assessment in paragraph 124 of the judgment under appeal, as the Advocate General has stated in point 121 of his Opinion and contrary to Guardian Europe's assertions, it is clear from the application lodged with the General Court that the claim for compensation for the damage allegedly caused by the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), was founded solely on a failure by the General Court to have regard in that judgment to the Court of Justice's case-law. The General Court cannot therefore be criticised for having held, in paragraph 124 of the judgment under appeal, that Guardian Europe's arguments in that regard were not based on the existence of serious failures in the functioning of the judicial process affecting the activity of a Court of the European Union.

87 Consequently, the sixth ground of appeal must be rejected as unfounded.

The first and fourth grounds of appeal

Arguments of the parties

88 By its first and fourth grounds of appeal, which it is appropriate to examine together, Guardian Europe criticises the General Court for having stated, in paragraphs 103 and 153 of the judgment under appeal, that it had not itself incurred the burden linked to the payment of the fine imposed by the Commission and that it could not therefore claim that, on account of the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and the infringement of the principle of equal treatment in the decision at issue and in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), it had sustained actual and certain damage deriving from the loss of profit pleaded.

89 Guardian Europe submits, in particular, that the General Court failed to apply the concept of an 'undertaking', within the meaning of EU law. Since, throughout the administrative procedure before the Commission that resulted in the decision at issue, the Guardian group was always treated as a 'single undertaking', within the meaning of EU law, the fine imposed on Guardian Europe having been calculated on the basis of the value of the sales of the Guardian group and not on those of Guardian Europe, the Guardian group should also have been regarded as a 'single undertaking' for the purpose of assessing, under the second paragraph of Article 340 TFEU, the damage resulting from the General Court's infringement of Article 47 of the Charter and the Commission's and the General Court's infringement of the principle of equal treatment.

90 Guardian Europe also submits that, in assessing the existence of the damage to itself, the General Court could not ignore the reality of its group links with its subsidiaries, which, moreover, were wholly owned.

91 Finally, Guardian Europe maintains that the Court of Justice has everything that it needs to award damages to compensate for the loss of profit which Guardian Europe allegedly suffered on account of those infringements.

92 The European Union, represented by the Court of Justice of the European Union, contests Guardian Europe's arguments.

93 The Commission contends that the General Court should have held that the claim for damages on account of infringement of the principle of equal treatment in the decision at issue was time-barred. In the Commission's submission, this is an issue of admissibility and therefore an issue of *ordre public* that the Court of the European Union can, and indeed must, raise of its own motion.

94 In the alternative, the Commission submits that the fourth ground of appeal must be dismissed as inadmissible as the claim for loss of profit against the Commission is a belated challenge to the decision concerning repayment of the overpaid element of the provisional payment of the fine.

95 In the further alternative, the Commission contends that, in any event, the General Court did not commit any error in finding that Guardian Europe sustained no damage in making provisional payment of the fine. Contrary to what is submitted by Guardian Europe, it was not treated as a single undertaking, within the meaning of EU law, in the decision at issue for the purpose of setting the fine. According to the Commission, only entities with legal personality can be held liable for infringements.

96 Finally, in the yet further alternative, the Commission submits that, even if the arguments put forward in the fourth ground of appeal are upheld, Guardian Europe suffered no loss of profit on account of an alleged sufficiently serious breach of the principle of equal treatment committed in the decision at issue. Since Guardian Europe had no captive sales, application of a fining methodology that included captive sales would in fact only have increased the fines imposed on other addressees.

Findings of the Court

97 First, as regards Guardian Europe's line of argument concerning the loss of profit which it allegedly suffered on account of the infringement of the principle of equal treatment committed in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), as is clear from paragraphs 122 to 125 of the judgment under appeal the General Court dismissed the claim for compensation concerning that alleged infringement not by relying on the findings, in paragraphs 103 and 153 of that judgment, relating to the fact that Guardian Europe did not itself incur the burden linked to the payment of the fine imposed by the decision at issue, but on the ground that the European Union cannot incur liability for a judicial decision that has not been delivered by a Court of the European Union adjudicating at last instance. It follows that that line of

argument is based on an incorrect reading of the judgment under appeal and is therefore unfounded, in particular since, as is clear from paragraph 84 of the present judgment, the General Court was in any event correct in holding that such an infringement cannot give rise to liability of the European Union under the second paragraph of Article 340 TFEU.

98 Secondly, as is apparent from paragraphs 93 and 94 of the present judgment, in its response the Commission contests the General Court's dismissal, in paragraphs 46 and 65 of the judgment under appeal, of the pleas of inadmissibility alleging (i) that the claim for compensation in respect of the material damage allegedly sustained because of the infringement of the principle of equal treatment committed in the decision at issue was time-barred and (ii) that compensation for the loss of profit resulting from such an infringement would nullify the legal effects of the decision of December 2014. In the Commission's submission, those objections to admissibility are absolute and should, therefore, be raised by the Court of Justice of its own motion.

99 As regards the plea of inadmissibility alleging that the aforesaid claim was time-barred, it should be recalled that the Court has already held that limitation constitutes an objection to admissibility which, unlike procedural time limits, is not absolute, but extinguishes the action for damages solely at the request of the defendant (judgment of 8 November 2012, *Evropaïki Dynamiki* v *Commission*, C-469/11 P, EU:C:2012:705, paragraph 54) and that compliance with a limitation period may not be raised by a Court of the European Union of its own motion but must be raised by the party affected (judgment of 14 June 2016, *Marchiani* v *Parliament*, C-566/14 P, EU:C:2016:437, paragraph 94 and the case-law cited).

100 It must therefore be held that, if the Commission wished the Court to set aside paragraph 46 of the judgment under appeal dismissing that plea of inadmissibility, it should have brought a cross-appeal for that purpose, as is clear from Articles 174, 176 and 178(2) of the Rules of Procedure of the Court of Justice.

101 As regards the plea of inadmissibility alleging that the action seeking compensation for the loss of profit claimed to be suffered because of the infringement of the principle of equal treatment committed in the decision at issue would nullify the legal effects of the decision of December 2014, without prejudice to the question whether this plea of inadmissibility may be raised by the Court of its own motion it is to be noted that the Commission's line of argument is effectively a complaint that the General Court committed the same error of law as that which is the subject of the sole ground of appeal put forward in support of the cross-appeal in Case C-479/17 P brought by the European Union, represented by the Court of Justice of the European Union. As stated in paragraph 66 of the present judgment, that ground of appeal has been rejected as unfounded.

102 Thirdly, so far as concerns Guardian Europe's line of argument that the General Court, in paragraphs 103 and 153 of the judgment under appeal, failed to apply the concept of an 'undertaking', within the meaning of EU law, it should be recalled that the Court of Justice has already held that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Article 101 or 102 TFEU, and not the concept of a 'company or firm' or of a 'legal person', used in Article 54 TFEU (judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 102).

103 It is apparent from the Court's case-law that EU competition law refers to the activities of undertakings and that the concept of an 'undertaking' covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 47 and the case-law cited).

104 The Court has also stated that, in the same context, the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraph 48 and the case-law cited).

105 Thus, the concept of an 'undertaking', within the meaning referred to in the preceding paragraph of the present judgment, is used specifically in order to implement the relevant provisions of EU competition law and, in particular, for the purpose of designating the perpetrator of an infringement of Articles 101 and 102 TFEU.

106 That concept is not, on the other hand, applicable in the context of an action for damages, founded on the second paragraph of Article 340 TFEU. As the Advocate General has observed in point 73 of his Opinion, such an action is an ordinary action, governed by general procedural rules, which are subject, in this instance, to company law and are independent of the principles that determine liability in anti-trust law.

107 Therefore, the General Court did not, in paragraphs 103 and 153 of the judgment under appeal, wrongly fail to apply the concept of an 'undertaking', within the meaning of EU law.

108 Fourthly, so far as concerns Guardian Europe's criticism, in the light of the reality of its relationships with its subsidiaries, of the General Court's finding in paragraphs 103 and 153 of the judgment under appeal that it had not itself incurred the burden linked to the payment of the fine, it should be noted at the outset that, where a person pleads a right to compensation of his own, it is incumbent upon him, in particular, to demonstrate that the damage for which he seeks compensation has been caused to him himself.

109 In the present instance, as regards the damage pleaded by Guardian Europe in respect of loss of profit, it should be noted that, as is apparent from the documents before the Court of Justice, it is not disputed that (i) part of the fine in the sum of EUR 148 000 000 imposed jointly and severally on Guardian Europe and its parent company, that is to say, EUR 111 000 000, was paid to the Commission immediately, in March 2008, the balance of EUR 37 000 000 being covered by a bank guarantee, and (ii) in July 2013 that guarantee was cancelled, and a sum totalling EUR 48 263 003, corresponding to the entire balance of the fine together with interest, was subsequently paid to the Commission.

110 Nor is it disputed that, as a result of the judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), which in particular reduced that fine to EUR 103 600 000, both the sum of EUR 7 400 000, being the amount by which the initial payment of EUR 111 000 000 exceeded the fine as adjusted by the Court, and the sum of EUR 48 263 003 paid to the Commission following the cancellation of the bank guarantee, that is to say, a total sum of EUR 55 663 003, turned out not to be due.

111 In that context, in the claim for compensation for the damage allegedly sustained because of an infringement of the principle of equal treatment, Guardian Europe demanded before the General Court compensation amounting to EUR 9 292 000 for the loss of profit that it allegedly suffered during the period from March 2008, when the sum of EUR 111 000 000 was paid, to 12 November 2014, the date of the Court of Justice's judgment reducing the fine imposed. The loss of profit pleaded consists, in particular, in the difference between, on the one hand, the interest repaid by the Commission, after the Court of Justice reduced the fine, and, on the other, the income which Guardian Europe could have earned, during the period indicated, if, instead of paying the overpaid sum of EUR 55 663 003, it had invested that sum in its business.

112 Furthermore, in the claim for compensation for the damage allegedly sustained because of the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 before the General Court, Guardian Europe demanded compensation amounting to EUR 1 671 000 for the loss of

profit that it allegedly suffered during the period from 12 February 2010, the date on which, in its opinion, judgment in Case T-82/08 should have been delivered, to 27 September 2012, the date of the judgment bringing that case to a close, on account of the infringement of the obligation to adjudicate within a reasonable time in that case. The loss of profit pleaded consists, in particular, in the difference between, on the one hand, the part of the interest repaid by the Commission — after the Court of Justice reduced the fine — that related to that period and, on the other, the income which Guardian Europe could have earned, during that period, if, instead of paying immediately the overpaid amount of EUR 7 400 000, it had invested it in its business.

113 As is clear from the General Court's findings in paragraphs 100 to 102 of the judgment under appeal, so far as concerns, first, the sum of EUR 111 000 000 paid to the Commission in March 2008, a sum of EUR 20 000 000 was paid by Guardian Industries. Whilst payment to the Commission of the remaining sum of EUR 91 000 000 was made by Guardian Europe, the fact remains that, pursuant to a number of agreements entered into between Guardian Europe and its seven subsidiaries, it was the latter which, as from 31 December 2007, bore, from an accounting and financial point of view, the part of the fine imposed by the Commission corresponding to that sum of EUR 91 000 000, in accordance with the apportionment resulting from those agreements. So far as concerns, secondly, the sum of EUR 48 263 003 paid in July 2013, it was Guardian Europe's seven subsidiaries which each paid a part of that sum directly to the Commission.

114 It follows that the overpaid sum of EUR 55 663 003, including the sum of EUR 7 400 000 paid to the Commission in March 2008, was, in fact, paid not by Guardian Europe, but in part by its seven subsidiaries and in part by Guardian Industries, a fact which, moreover, is not disputed by Guardian Europe.

115 However, account should be taken of the fact that, as contended by Guardian Europe in its observations both before the Court and previously before the General Court, those subsidiaries were wholly owned by it. Accordingly, as the Advocate General has, in essence, stated in point 79 of his Opinion, the impoverishment of those subsidiaries, as a result of payment of the fine at issue, indeed constitutes financial damage borne by the company on which they are wholly dependent. In the light of that circumstance, the General Court could not, without erring in law, derive from the fact that Guardian Europe's subsidiaries paid that fine the finding that Guardian Europe did not itself incur the burden linked to the payment thereof or conclude, on that ground, that it could not seek to obtain compensation for the loss of profit referred to in paragraphs 111 and 112 of the present judgment.

116 Nevertheless, that error of law is not such as to call into question the dismissal by the General Court of Guardian Europe's claims for compensation in respect of that loss of profit. Guardian Europe can properly assert that it itself sustained actual and certain damage consisting in a loss of profit connected with the inability to invest in its business the sums which its seven subsidiaries and Guardian Industries overpaid to the Commission only in so far as it establishes that, if those undertakings had been able to have those sums, they would have invested them in Guardian Europe's business.

117 However, Guardian Europe put forward nothing that can establish such a fact, merely asserting that payment of the fine by its subsidiaries and Guardian Industries led to a diminution of its resources that had an impact on its activity in Europe.

118 It thus follows from the foregoing that the General Court correctly dismissed the claims for compensation in respect of the loss of profit referred to above.

119 Consequently, the first and fourth grounds of appeal must be rejected.

The second ground of appeal

120 By its second ground of appeal, Guardian Europe submits that, in awarding it only 82% of the amount which it sought in respect of the bank guarantee costs paid after the reasonable period for adjudicating in Case T-82/08, on the ground that Guardian Europe's parent company, namely Guardian Industries, had paid 18% of that amount, the General Court failed to apply the concept of an 'undertaking', within the meaning of EU law, and distorted the plain sense of the evidence submitted by Guardian Europe.

121 Since this ground of appeal relates to the amount of compensation awarded by the General Court for the material damage sustained as a result of the payment by Guardian Europe of bank guarantee costs during the period by which the reasonable time for adjudicating in Case T-82/08 was exceeded and, as is apparent from paragraph 43 of the present judgment, point 1 of the operative part of the judgment under appeal has been set aside, it is no longer necessary to examine this ground of appeal.

The third and fifth grounds of appeal

Arguments of the parties

122 By its third and fifth grounds of appeal, which it is appropriate to examine together, Guardian Europe complains that the General Court erred in law when it rejected its claims for compensation for alleged damage to its reputation resulting from an infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and an infringement of the principle of equal treatment in the decision at issue and in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), in relying, first, on absence of proof of the non-pecuniary damage pleaded and, secondly, on the fact that any damage to its reputation resulting from those infringements would have been sufficiently made good by the finding that there was an infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and by the Court of Justice's annulling the decision at issue and reducing the amount of the fine.

123 Guardian Europe states that the right to compensation for non-pecuniary damage is underpinned by the very aim of the right, laid down in Article 47 of the Charter, to be judged within a reasonable time and that the case-law of the European Court of Human Rights acknowledges the existence of a presumption that excessively long proceedings will occasion non-pecuniary damage.

124 Furthermore, Guardian Europe observes that the fact that the fine which was imposed on it by the Commission in the decision at issue was the highest one gave the impression that it was the key participant in the cartel complained of in that decision, although it was the smallest producer and its involvement in the cartel was the shortest, an impression which was not rectified until the Court, in its judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363), reduced the fine imposed on Guardian Europe to the second lowest amount on account of an infringement by the Commission of the principle of non-discrimination.

125 Thus, Guardian Europe's 'relative weight' in the infringement was kept at a disproportionately high level for an excessive amount of time and this should allow a claim for damages without any additional proof being required.

126 Finally, in Guardian Europe's submission, neither the finding that the obligation to adjudicate within a reasonable time was infringed nor the annulment of the decision at issue by the Court and its reduction of the fine constitute adequate compensation for the damage to reputation which it suffered until that finding and that annulment.

127 In that regard, Guardian Europe notes that fines imposed by the Commission on undertakings which infringe EU competition rules are published, so that market players, including consumers, are aware of them. Thus, Guardian Europe was wrongly perceived as the main player in the cartel complained of in the decision at issue during the period in question.

128 In those circumstances, Guardian Europe submits that the only form of compensation suitable in the present case is monetary compensation calculated as a percentage of its fine, as was held by the General Court in the judgment of 16 June 2011, *Bavaria* v *Commission* (T-235/07, EU:T:2011:283, paragraphs 342 and 343).

129 The European Union, represented by the Court of Justice of the European Union, contests Guardian Europe's arguments.

130 The Commission, relying, in particular, on the judgment of 28 February 2013, *Inalca and Cremonini* v *Commission* (C-460/09 P, EU:C:2013:111, paragraph 99), submits that the claim for compensation on account of alleged damage to Guardian Europe's reputation stemming from the decision at issue is time-barred, as such damage is not recurrent in nature and arose wholly on the date of adoption of that decision.

131 In the alternative, the Commission contends that Guardian Europe's arguments are unfounded.

Findings of the Court

132 First, as regards Guardian Europe's line of argument concerning the loss of profit which it allegedly suffered on account of the infringement of the principle of equal treatment committed in the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494), as is clear from paragraphs 122 to 125 of the judgment under appeal the General Court dismissed the claim for compensation concerning that alleged infringement not by relying on the absence of proof of the non-pecuniary damage pleaded or on the fact that any damage to Guardian Europe's reputation resulting from that infringement was sufficiently made good, but on the ground that the European Union cannot incur liability for a judicial decision that has not been delivered by a Court of the European Union adjudicating at last instance. It follows that that line of argument is based on an incorrect reading of the judgment under appeal and is therefore unfounded, in particular since, as is clear from paragraph 84 of the present judgment, the General Court was in any event correct in holding that such an infringement cannot give rise to liability of the European Union under the second paragraph of Article 340 TFEU.

133 Secondly, as regards the Commission's line of argument that the claim for compensation for alleged damage to Guardian Europe's reputation stemming from the infringement of the principle of equal treatment committed in the decision at issue is time-barred, since, as is apparent from the case-law recalled in paragraph 99 of the present judgment, a Court of the European Union should not examine of its own motion whether such a claim complies with the limitation period to which it is subject, that line of argument should have been the subject of a cross-appeal brought by the Commission in accordance with Articles 174, 176 and 178(2) of the Rules of Procedure of the Court of Justice.

134 Thirdly, Guardian Europe contests the grounds which led the General Court to dismiss, in paragraphs 115 and 148 of the judgment under appeal, its claims for compensation for alleged damage to its reputation resulting from the infringement of the principle of equal treatment committed in the decision at issue and from the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08, that is to say, (i) that it had not proven that those infringements were such as to damage its reputation, as was found in paragraphs 113 and 145 of the judgment under appeal, and (ii) that, even if those infringements damaged its reputation, the finding that there was an infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and the

annulment of the decision at issue by the Court of Justice and its reduction of the amount of the fine imposed would be sufficient to make good the non-pecuniary damage pleaded, as was found in paragraphs 114 and 146 of the judgment under appeal.

135 As regards, in the first place, the grounds referred to in paragraphs 113 and 145 of the judgment under appeal, it should be recalled that, in accordance with the Court's settled case-law, first, any damage for which compensation is sought in an action to establish non-contractual liability of the European Union under the second paragraph of Article 340 TFEU must be actual and certain. Secondly, in order for the non-contractual liability of the European Union to be capable of being incurred, the damage must flow sufficiently directly from the unlawful conduct of the institutions. In any event, it is for the party seeking to establish the European Union's non-contractual liability to adduce conclusive proof as to the existence and extent of the damage it alleges, and as to the existence of a sufficiently direct causal nexus between the conduct of the institution concerned and the damage alleged (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 61 and 62 and the case-law cited).

136 It follows that Guardian Europe's line of argument that in the present instance there was a presumption regarding the existence of the non-pecuniary damage pleaded which spared it the need to adduce any evidence in that regard is unfounded.

137 Furthermore, it should be recalled that, in accordance with settled case-law, the General Court has exclusive jurisdiction to find and assess the facts and, in principle, to examine the evidence that it accepts in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. That assessment does not, therefore, constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice. Moreover, such a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission*, C-155/14 P, EU:C:2016:446, paragraph 23 and the case-law cited).

138 In the present instance, the General Court found in paragraph 112 of the judgment under appeal that Guardian Europe's arguments that the decision at issue had created a misleading impression regarding the role played by it in the flat glass cartel were not substantiated by evidence which proved that, by its gravity, the infringement of the principle of equal treatment in that decision was likely to have an effect on Guardian Europe's reputation beyond the effect linked to its participation in the cartel.

139 Furthermore, in paragraph 144 of the judgment under appeal, the General Court found that Guardian Europe's argument that it was perceived for a longer period as having a particular responsibility in the infringement at issue because of the failure to adjudicate within a reasonable time in Case T-82/08 was not substantiated by evidence such as to prove that, by its gravity, the failure to adjudicate within a reasonable time was likely to have an effect on Guardian Europe's reputation beyond the effect caused by the decision at issue.

140 Guardian Europe has not established or even pleaded that the assessments set out in paragraphs 112 and 144 of the judgment under appeal were founded on a distortion of the clear sense of the evidence.

141 Accordingly, the General Court was correct in holding, in paragraphs 113 and 145 of the judgment under appeal, that Guardian Europe had not proven that the infringement of the principle of equal treatment in the decision at issue and the infringement of the obligation to adjudicate within a

reasonable time in Case T-82/08 were such as to damage its reputation, and in consequently dismissing, in paragraphs 115 and 148 of the judgment under appeal, the claims for compensation made on that basis.

142 As regards, in the second place, the grounds stated in paragraphs 114 and 146 of the judgment under appeal, it is clear from the very wording of those paragraphs that those grounds are included for the sake of completeness, as the grounds set out in paragraphs 113 and 145 of the judgment under appeal are sufficient to dismiss the claims for compensation for the alleged damage to reputation pleaded by Guardian Europe.

143 In accordance with the Court's case-law, where one of the grounds adopted by the General Court is sufficient to sustain the operative part of its judgment, any defects that might vitiate other grounds given in the judgment concerned have, in any event, no bearing on that operative part and, accordingly, a plea relying on such defects is ineffective and must be dismissed (judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 68 and the case-law cited).

144 Consequently, the third and fifth grounds of appeal must be rejected as partly ineffective and partly unfounded.

The action before the General Court

145 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

146 In the present instance, in which the appeal in Case C-447/17 P has been upheld and point 1 of the operative part of the judgment under appeal has been set aside, the Court considers it appropriate to give final judgment on Guardian Europe's action for damages in so far as it is designed to obtain compensation for the damage resulting from the payment of bank guarantee costs after the reasonable period for adjudicating in Case T-82/08.

147 In accordance with settled case-law, 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 that institution and the damage complained of (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).

148 As the Court has previously held, if any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability on the part of the European Union (judgment of 14 October 1999, *Atlanta* v *European Community*, C-104/97 P, EU:C:1999:498, paragraph 65 and the case-law cited). Nor is the EU judicature required to examine those conditions in any particular order (judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 42 and the case-law cited).

149 For the reasons set out in paragraphs 32 to 41 of the present judgment, the action for damages brought by Guardian Europe before the General Court must be dismissed in so far as it is designed to obtain compensation in the sum of EUR 936 000 for the alleged material damage consisting in the payment of bank guarantee costs after the reasonable period for adjudicating in Case T-82/08.

Costs

150 Under Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

151 Under Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

152 Since the European Union, represented both by the Court of Justice of the European Union and by the Commission, has applied for costs to be awarded against Guardian Europe and the latter has been unsuccessful, both in the appeal in Case C-447/17 P and in the main appeal in Case C-479/17 P, Guardian Europe must be ordered to bear, in addition to its own costs, all the costs incurred by the European Union, represented both by the Court of Justice of the European Union and by the Commission, both at first instance and in those two appeals.

153 In addition, since Guardian Europe has applied for costs to be awarded against the European Union, represented by the Court of Justice of the European Union, and the latter has been unsuccessful in the cross-appeal in Case C-479/17 P, the European Union, represented by the Court of Justice of the European Union, must be ordered to bear, in addition to its own costs, all the costs incurred by Guardian Europe in the cross-appeal.

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

1. **Sets aside point 1 of the operative part of the judgment of the General Court of the European Union of 7 June 2017, *Guardian Europe* v *European Union* (T-673/15, EU:T:2017:377);**

2. **Dismisses the main appeal, brought by Guardian Europe Sàrl, in Case C-479/17 P;**

3. **Dismisses the cross-appeal, brought by the European Union, represented by the Court of Justice of the European Union, in Case C-479/17 P;**

4. **Dismisses the action for damages brought by Guardian Europe Sàrl in so far as it is designed to obtain compensation in the sum of EUR 936 000 for the alleged material damage consisting in the payment of bank guarantee costs after the reasonable period for adjudicating in the case which gave rise to the judgment of 27 September 2012, *Guardian Industries and Guardian Europe* v *Commission* (T-82/08, EU:T:2012:494);**

5. **Orders Guardian Europe Sàrl to bear, in addition to its own costs, all the costs incurred by the European Union, represented both by the Court of Justice of the European Union and by the European Commission, both at first instance and in the appeal in Case C-447/17 P and the main appeal in Case C-479/17 P;**

6. Orders the European Union, represented by the Court of Justice of the European Union, to bear, in addition to its own costs, all the costs incurred by Guardian Europe Sàrl in the cross-appeal in Case C-479/17 P.

Silva de Lapuerta Bonichot Regan

Fernlund Rodin

Delivered in open court in Luxembourg on 5 September 2019.

A. Calot Escobar
Registrar

R. Silva de Lapuerta
Acting as President of the First Chamber