Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

29 April 2015 *

(Competition — Methacrylates market — Fines — Joint and several liability of parent companies and their subsidiary for the latter's unlawful conduct — Immediate payment of the fine in full by the subsidiary — Reduction of the subsidiary's fine following a judgment of the General court — Letters from the Commission demanding payment by the parent companies of the amount repaid by it to the subsidiary, together with default interest — Actions for annulment — Challengeable act — Admissibility — Default interest)

In Case T-470/11,

Total SA, established in Courbevoie (France),

Elf Aquitaine SA, established in Courbevoie,

Represented originally by A. Noël-Baron and É. Morgan de Rivery, and subsequently by É. Morgan de Rivery and E. Lagathu, lawyers,

applicants,

v

European Commission, represented by B. Mongin and V. Bottka, acting as Agents,

defendant,

concerning an application for the annulment of the Commission's letters BUDG/DGA/C4/BM/s746396, of 24 June 2011, and BUDG/DGA/C4/BM/s812886, of 8 July 2011, or, alternatively, for a reduction in the amounts demanded or, in the further alternative, for annulment of the default interest of EUR 31 312 114.58 demanded from Elf Aquitaine, for which Total is jointly and severally liable as to EUR 19 191 296.03,

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka (Rapporteur) and V. Kreuschitz, Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2014,

gives the following

* Language of the case: French.

Judgment

Subject-matter to the proceedings

1 The action concerns an application for the annulment of the Commission's letters BUDG/DGA/C4/BM/s746396, of 24 June 2011 ('the letter of 24 June 2011'), and BUDG/DGA/C4/BM/s812886, of 8 July 2011 ('the letter of 8 July 2011') and, taken together, 'the contested letters').

Background to the case

2 By Decision C(2006) 2098 final, of 31 May 2006, relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area (EEA) (Case COMP/F/38.645 — Methacrylates) ('Methacrylates decision'), the Commission of the European Communities imposed a fine of EUR 219 131 250 on Arkema SA and its subsidiaries Altuglas International SA and Altumax Europe SAS (taken together, 'Arkema') jointly and severally for participating in a cartel ('the original fine').

3 The applicants, Total SA and Elf Aqutaine SA, which, during the period of the infringement found in the Methacrylates decision, were the parent companies of Arkema, were found liable jointly and severally for payment of the original fine to the extent of EUR 181 350 000 and EUR 140 400 000 respectively.

4 On 7 September 2006 Arkema paid the original fine in full and subsequently brought an action against the Methacrylates decision ('Methacrylates judicial proceedings'), as did the applicants, simultaneously and independently.

Methacrylates judicial proceedings before the General Court

5 On 4 and 10 August 2006 respectively the applicants and Arkema brought an action for the annulment of the Methacrylates decision.

6 In Case T-206/06 the applicants claimed primarily that the Methacrylates decision should be annulled.

7 Alternatively they also claimed that the original fine imposed jointly and severally on Arkema and themselves should be reduced.

8 On 24 July 2008 the Commission wrote a letter to Arkema asking it to confirm that its payment of 7 September 2006 had been made 'on behalf of all the debtors jointly and severally liable', adding that, first, 'without such confirmation and if the [Methacrylates] decision is annulled in relation to the undertaking on whose behalf the payment was made', it, the Commission, would 'repay the sum of EUR 219 131 250 with interest' and, secondly, that 'if all or part of the fine is upheld by the Court of Justice in relation to any of the other joint and several debtors' it '[would] demand from that debtor any sum remaining due plus default interest at the rate of 6.09%'.

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

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

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

12 On the other hand, the action brought separately by Arkema against the Methacrylates decision was partly upheld by the judgment of 7 June 2011, *Arkema France and Others* v *Commissio*n (T-217/06, '*Arkema* judgment', EU:T:2011:251), in so far as the fine imposed on Arkema was reduced to EUR 113 343 750.

13 In the *Arkema* judgment, paragraph 12 (EU:T:2011:251), the Court found that, in the exercise of its unlimited jurisdiction, the increase in the fine applied to Arkema as a deterrent should be reduced in order to take account of the fact that, on the day on which the fine was imposed, Arkema was no longer controlled by the applicants (*Arkema* judgment, paragraph 12 above, EU:T:2011:251, paragraphs 338 and 339).

14 No appeal was lodged against the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), so that it has acquired the binding authority of a judgment which has become final.

15 The Commission repaid Arkema, with value date of 5 July 2011, a total of EUR 119 247 033.72 (principal amount of EUR 105 787 500 plus interest of EUR 13 459 533.72).

Contested letters

Letter of 24 June 2011

16 In the letter of 24 June 2011 the Commission informed the applicants that, 'in compliance with the [Arkema] judgment, [it] would repay Arkema the amount of the reduction in the fine decided upon by the Court'.

17 In the same letter of 24 June 2011, the Commission also asked the applicants 'at the same time, should an appeal be lodged before the Court of Justice against the [Total and Elf Aquitaine] judgment, for payment of the amount outstanding, together with default interest at the rate of 6.09% from 8 September 2006', that is to say, EUR 68 006 250, for the payment of which Total was held 'jointly and severally' liable as to EUR 27 056 250 plus default interest, that is to say, a total of EUR 88 135 466.52.

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

Letter of 8 July 2011

19 By the letter of 8 July 2011, the Commission replied in particular, that, 'contrary to the applicants' understanding, [the Commission] would certainly not waive recovery of the amounts due if [the applicants] refrained from lodging an appeal before the Court of Justice', adding that 'the applicants' liability was not extinguished by the retention/deduction of the sums mentioned by the [Arkema] judgment and paid by Arkema'.

20 In the same letter the Commission admitted that it had been mistaken as to the amount which it intended to claim and added that the amount due from Elf Aquitaine, pursuant to the Methacrylates decision and also the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), and the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), was EUR 137 099 614.58, including default interest of EUR 31 312 114.58 ('default interest'), for which Total was jointly and severally liable as to EUR 84 028 796.03.

21 In the letter of 8 July 2011 the Commission added that, if the applicants were to appeal against the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), it would be open to them to provide a bank guarantee rather than to pay the fine.

22 On 18 July 2011 the applicants paid the Commission the sum demanded in the letter of 8 July 2011, that is to say, EUR 137 099 614.58.

Methacrylates judicial proceedings before the Court of Justice on appeal

23 On 10 August 2011 the applicants lodged an appeal against the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250).

24 In their appeal, the applicants asked the Court:

— 'primarily, to annul the [Total and Elf Aquitaine] judgment, to grant their claims at first instance before the General Court and, consequently, to annul [the Methacrylates decision];

— alternatively, to vary the fines imposed jointly and severally on Elf Aquitaine and on Total … and to reduce the joint and several fines to EUR 75 562 500 for Elf Aquitaine and to EUR 58 500 000 for Total;

— in the further alternative, to vary the fines imposed jointly and severally on Elf Aquitaine and on Total … in such proportion as the Court deems appropriate;

— in the final alternative, to exempt Elf Aquitaine and Total from payment of default interest that may have run from the [Methacrylates] decision to the date of the [Arkema] judgment.

…'

25 The appeal was dismissed by order of 7 February 2012, *Total and Elf Aquitaine* v *Commission* (C-421/11 P, the 'Court of Justice order', EU:C:2012:60), the Court of Justice having dismissed all the applicants' claims.

26 Regarding the alternative claims seeking the partial annulment of the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:211:250), the Court of Justice found as follows:

'78 The [applicants'] arguments must be dismissed as manifestly unfounded because they are not such as to affect the General Court's finding … that the fact that Arkema left the [applicants'] group after the period of the infringement in question, but before the adoption of the [Methacrylates] decision cannot affect the application of the multiplier in relation to the other companies of the group, which include the applicants. The General Court reached that conclusion by reason of the fact that the disposal of Arkema, whose turnover was approximately EUR 5.7 thousand million in 2005, could not have led to a significant decrease in the turnover of the [applicants'] group, which was taken into account by the Commission when setting the multiplier of 3, that is to say, approximately EUR 143 thousand million for the same year, such as to render the multiplier unjustified in relation to the applicants.

…

81 … it must be observed that the applicants' submissions concerning a violation of the "indivisible nature of the fine" and the need to extend in their favour the General Court's approach in [the *Arkema* judgment] arise from an erroneous concept, on the applicants' part, of both the substantive law and the procedural law.

82 First, the objective of the multiplier as a deterrent being precisely to ensure that, having regard to the size and the financial capacity of the undertaking in question, the fine should not become negligible, it goes without saying that, after the disposal of Arkema, that objective remained valid both for the applicants and for Arkema. As the size of the latter was considerably less than that of the applicants and, at the date of the [Methacrylates] decision, Arkema no longer formed part of the [applicants'] group, Arkema's size could not be taken into account for determining the multiplier representing the deterrent effect for the purpose of calculating the fine imposed on Arkema. That objective difference confronting Arkema and the applicants justified applying a different multiplier to the latter in any case.

83 Secondly, in the present case there is nothing to justify extending to the applicants the force of *res judicata* which is to be attributed to the [Arkema] judgment. The multiplier applying to them and to Arkema is different. The mere fact that those companies had to pay a fine for which they are [jointly and severally] liable cannot justify extending the force of *res judicata*. On that point, it is sufficient to note that, as the Commission explained in the letter of 8 July 2011, the reduction in Arkema's fine left the applicants' fine unchanged …'

27 On the further alternative claims seeking a reduction in the fine, the Court of Justice found as follows:

'86 … It must be borne in mind that the General Court has already dealt with an application for a reduction in the applicants' fine and that it found, after examining their arguments and exercising [its powers of] unlimited jurisdiction, that their arguments did not justify a reduction.

87 It is not open to the Court of Justice, when determining an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law …'

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

'89 This claim must be dismissed as manifestly inadmissible in that it is directed, not … against the [Total and Elf Aquitaine] judgment, but against the Commission's letter [of 8 July 2011] which is, furthermore, the subject of an action of the applicants before the General Court, lodged at the registry of that Court under number T-470/11.'

Procedure and forms of order sought by the parties

29 By application lodged at the registry of the General Court on 1 September 2011, the applicants brought the present action.

30 By separate document lodged at the Registry of the General Court on 17 November 2011 the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court.

31 The applicants lodged their observations on the objection on 3 January 2012.

32 On 30 March 2012 the parties were requested, by way of procedural organisation measures, to submit their observations on the effect, in the present case, of the order of the Court of Justice, paragraph 25 (EU:C:2012:60), in general and, in particular, concerning the due payment of the balance of the original fine as against the applicants with regard to, first, the principal sum, and, secondly, the default interest.

33 The parties submitted their observations in that respect within the permitted time-limits.

34 By order of 21 June 2012 the Court decided to reserve a decision on the objection of inadmissibility for the final judgment.

35 By document dated 19 September 2012 and addressed to the registry of the Court, the Commission lodged its defence.

36 By letter of 28 September 2012, the General Court registry served the Commission's defence on the applicants and informed the parties that the General Court considered that, as the file then stood, a second exchange of pleadings was unnecessary before the opening of the oral procedure, unless the parties made a reasoned request to the contrary.

37 By document dated 4 October 2012 addressed to the registry of the General Court, the applicants asked the Court, pursuant to Article 47(1) of the Rules of Procedure, to be authorised to lodge a reply.

38 By decision of 12 October 2012, the request was granted.

39 On 23 November 2012 the applicants lodged the reply.

40 On 20 December 2012 the Commission lodged its rejoinder.

41 By order of the President of the Third Chamber of the Court of 19 June 2013, it was decided, pursuant to Article 77(d) of the Rules of Procedure, after hearing the parties, to stay the proceedings pending the decision of the Court of Justice terminating the proceedings in Case C-231/11 P.

42 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was, consequently, assigned.

43 On 10 April 2014 the Court of Justice delivered its judgment in *Commission* v *Siemens Österreich and Others* and *Siemens Transmission and Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, ECR, 'Siemens judgment', EU:C:2014:256).

44 On the same day the Court delivered the judgment in *Areva and Others* v C*ommission* (C-247/11 P and C-253/11 P, ECR, 'Areva judgment', EU:C:2014:257).

45 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to submit their observations on the effect, in the present case, of the Siemens judgment, paragraph 43 above (EU:C:2014:256), and the Areva judgment, paragraph 44 above (EU:C:2014:257).

46 The parties submitted, within the prescribed time-limits, their observations on the effect, in the present case, of the Siemens judgment, paragraph 43 above (EU:C:2014:256) and the Areva judgment, paragraph 44 above (EU:C:2014:257).

47 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 3 October 2014.

48 The applicants claim that the Court should:

— declare the action admissible;

— as to the substance and principally, annul the contested letters;

— as to the substance and in the alternative, reduce the sum demanded by the Commission in the letter of 8 July 2011 or, at least, annul the default interest claimed from Elf Aquitaine in the sum of EUR 31 312 114.58, for which Total is jointly and severally liable in the sum of EUR 19 191 296.03;

— in any event, order the Commission to bear the costs.

49 The Commission contends that the Court should:

— principally, dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— in any event, order the applicants to pay the costs.

Law

50 With this action the applicants claim, principally, that the Court should annul the contested letters and, alternatively, reduce the sums demanded therein and, in the further alternative, annul the interest demanded therein.

51 The Commission contends that the application is inadmissible.

Admissibility

Arguments of the parties

– Arguments of the Commission

52 The Commission contends that the action is inadmissible because, first, it relates to acts which cannot be challenged and, secondly, it was brought when the applicants' appeal against the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250) was pending before the Court of Justice. In any case, the action is ineffective.

53 In the first place, the Commission asserts that the disputed acts have no binding legal effect likely to affect the applicants by seriously modifying their interests, so that those acts do not constitute decisions capable of being the subject of an action for annulment on the basis of Article 263 TFEU.

54 The applicants' payment obligation arises from the Methacrylates decision alone, as interpreted by the General Court in the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250) and the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) cannot affect the amount due from the applicants.

55 The contested letters are ordinary demands for payment of a amount due in accordance with the Methacrylates decision and they have no legal effects other than those arising from that decision. The letters are mere measures of execution and they do not finally determine the Commission's position, so that they do not affect the applicants' interests. They are inseparable from the Methacrylates decision and they prepare for its implementation.

56 Apart from their nature, the content of the contested letters shows that they do not produce binding legal effects, the letter of 24 June 2011 being necessarily provisional, whereas that of 8 July 2011 suggested that the applicants should provide a bank guarantee in the event of an appeal, which, according to the Commission, would preclude enforcement measures.

57 Secondly, the Commission submits that the applicants dispute the amount due as a result of the Methacrylates decision as interpreted by the General Court in the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), so that it was up to them to appeal against that judgment, which they did. However, the Commission observes that the applicants argued in their notice of appeal that they could not be 'held to any payment whatever of the balance remaining due, taking into account the necessary extension to the applicants of the force of *res judicata* of the *Arkema* judgment'.

58 Therefore, in the Commission's opinion, whether the General Court considered that the applicants' action in the present case is directed at the Methacrylates decision or at the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), it would have to be found that the action is inadmissible on the ground of *lis alibi pendens*.

59 Third, the Commission considers that, in any case, the action is ineffective as it is aimed, through the contested letters, at acts which can be challenged separately, namely the Methacrylates decision and the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), the effects of which would not be modified by the annulment, as the case may be, of the contested letters. Therefore, according to the Commission, the applicants have no interest in obtaining the annulment of the letters and, in fact, are only seeking revision of the amount of the fine.

60 Fourth, the Commission, in its reply to the General Court's question concerning the effect, in the present case, of the Court of Justice order, paragraph 25 above (EU:C:2012:60), maintained that the present action aimed to call into question the amount of the fine set in the Methacrylates decision, whereas that amount could no longer be called into question because the legal remedies against the decision had been exhausted following the Court of Justice order, paragraph 25 above (EU:C:2012:60), so that the applicants have no legal interest in bringing proceedings against the contested letters, which are ordinary measures for executing a decision which has now become final.

61 With regard to the admissibility of the action in that it is directed against the interest, the Commission considers that paragraph 89 of the Court of Justice order, paragraph 25 above (EU:C:2012:60), reproduced at paragraph 28 above, does not call into question the justification for the Commission's objection since that part of the claim is inseparable from the principal claim.

62 In any case, the complaint that the default interest is wrongful was put forward only at the stage of the observations on the objection of inadmissibility and not in the originating application, so that the complaint is inadmissible.

– The applicants' arguments

63 In their observations on the Commission's objection of inadmissibility, the applicants submit that the contested letters 'add' to the Methacrylates decision as interpreted by the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) and the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250) and that in any case the letters impose 'wrongful' interest on the applicants.

64 In the first place, the contested letters go further than the Methacrylates decision by imposing their own fine on the applicants whereas the decision fined the applicants only jointly and severally for Arkema's infringement and the latter paid the entire fine on 7 September 2006, so that the Commission can demand no payment whatever from the applicants on the basis of joint and several liability.

65 Following the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) and the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), the Commission ought to have not only repaid to Arkema the amount overpaid, but also ensured that the applicants' liability on a joint and several basis did not exceed that of their subsidiaries.

66 According to the applicants, the Commission, by the letters prolonging its correspondence with Arkema, deliberately aimed to circumvent the limits of joint and several liability and to increase the applicants' fine resulting from the Methacrylates decision and the *Arkema* judgment, paragraph 12 above (EU:T:2011:251). By demanding from the applicants the balance of the fine following the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), the Commission was obliterating the consequences of that judgment for the amount of the fine, which enabled the Commission to obtain a larger fine than that imposed in the Methacrylates decision, taking account of the interest demanded.

67 Secondly, regarding the default interest demanded by the Commission, the applicants contend that it has no basis in law and that there is no wrongful act as there was no delay in payment by Arkema in 2008 or on their part in 2011.

68 Third, on one hand, the applicants reject the Commission's objection of *lis alibi pendens* on the ground that the application in the present case does not relate to the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), but to the contested letters which 'add' to the Methacrylates and, for the same reasons, is based on different pleas.

69 On the other hand, the applicants also reject the Commission's argument that the application is ineffective on the ground that the contested letters 'add' to the Methacrylates decision with regard to the amount demanded as the principal sum, which converts a joint and several fine into a personal fine, and also with regard to default interest. In accordance with the contested letters, the applicants and Arkema had to pay a fine greater than that imposed in the Methacrylates decision.

70 Fourth, in their reply to the General Court's question concerning the effect, in the present case, of the Court of Justice order, paragraph 25 above (EU:C:2012:60), the applicants submit that the General Court must examine the legality of imposing a different fine in the light of the contested letters, which are in no way affected by the operative part of the order, paragraph 25 above (EU:C:2012:60).

71 In the same reply from the applicants, concerning the admissibility of the application in so far as it is directed against the default interest, the applicants consider that such interest is wrongful and punitive.

Findings of the Court

72 The Commission's objection disputes the admissibility of the action.

73 According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 263 TFEU (Case 60/81 *IBM* v *Commission*, ECR, EU:C:1981:264, paragraph 9, and Case C-516/06 P *Commission* v *Ferriere Nord*, ECR, EU:C:2007:763, paragraph 27).

74 It is also settled case-law that, in order to ascertain whether a measure the annulment of which is sought is open to challenge, it is necessary to look to its substance as the form in which it is cast is, in principle, immaterial (*IBM* v *Commission*, paragraph 73 above, EU:C:1981:264, paragraph 9; Case C-521/06 P *Athinaïki Techniki* v *Commission*, ECR, EU:C:2008:422, paragraphs 42 and 43; Case T-260/04 *Cestas* v *Commission*, ECR, EU:C:2008:115, paragraph 68).

75 In the present case, therefore, it is necessary to determine whether the Commission, in sending the contested letters, adopted a measure producing binding legal effects such as to affect the interests of the applicants by bringing about a distinct change in their legal position within the meaning of Article 263 TFEU.

76 According to the Commission, that is not the case because, in substance, the contested act was an ordinary provisional measure giving effect to the Methacrylates decision following the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), whereas the applicants were referring to that decision or the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250) in order to obtain a reduction in their fine.

77 The applicants take the opposite view, claiming, in substance, that the disputed act reveals a new element not arising from the Methacrylates decision, namely that they are required to pay part of the fine imposed on them jointly and severally with Arkema, together with default interest, being greater than that imposed in the decision and greater than the amount finally paid by Arkema, notwithstanding the fact that the fine was paid promptly and in full by Arkema, and independently of the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), which reduced the fine.

78 On that point, first, it is necessary to dismiss the Commission's argument that, in substance, the Court of Justice order, paragraph 25 above (EU:C:2012:60), made the Methacrylates decision final in relation to the applicants, so that they would no longer have a legal interest in bringing proceedings in the present case.

79 It is true that, as their appeal led to the abovementioned order, the applicants have exhausted their means of obtaining redress against the Methacrylates decision.

80 Nevertheless, first, in their application in the present case the applicants do not dispute the legality of that decision, but the legality of the contested letters and, secondly, in the Court of Justice order, paragraph 25 above (EU:C:2012:60), the Court ruled only on the legality of the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), and not on that of the letters contested in the present case (see, to that effect, Court of Justice order, paragraph 25 above, EU:C:2012:60, paragraphs 88 and 89).

81 Secondly, the Commission's argument that the contested letters are of a provisional and preparatory nature must nevertheless be dismissed.

82 Admittedly, it follows from the case-law that in the case of acts adopted by a procedure involving several stages, and particularly where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the Commission or the Council upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision (*IBM* v *Commission*, paragraph 73 above, EU:C:1981:264, paragraph 10; Case C-147/96 *Netherlands* v *Commission*, ECR, EU:C:2000:335, paragraph 26; and *Athinaki Techniki* v *Commission*, paragraph 74 above, EU:C:2008:422, paragraphs 42 and 43).

83 In the present case, however, it must be observed that the letter of 24 June 2011, as modified by the letter of 8 July 2011, laid down finally the Commission's position in so far as the contested letters were open to enforcement and any delay in enforcement would have caused interest payable by the applicants to run, so that the letters produced binding legal effects for the applicants.

84 Furthermore, the contested letters were followed by no further act of the Commission after the Court of Justice order, paragraph 25 above (EU:C:2012:60).

85 The facility, suggested in the Commission's letter of 8 July 2011, of providing a bank guarantee in the event of an appeal cannot call into question that assessment, unless the view is taken that, where such a facility is offered to the addressees of Commission decisions finding an infringement of European Union competition law and imposing a fine on them, such decisions are of a provisional or preparatory nature and therefore cannot be challenged under Article 263 TFEU.

86 For the same reason, the fact that the applicants appealed against the Total and Elf Aquitaine judgment, paragraph 11 above (EU:T:2011:250), cannot affect the enforceable nature of the contested letters either because the appeal was directed against the Total and Elf Aquitaine judgment, paragraph 11 above (EU:T:2011:250) and not against the contested letters.

87 Furthermore, it is common ground that the contested letters were written after the Methacrylates decision, so that it would be somewhat difficult for them to constitute an act preparatory to the adoption of that decision.

88 Nevertheless, the binding legal effects of the letters cannot by themselves establish the admissibility of the action in the present case.

89 Third, it is necessary to determine whether the contested letters were such as to affect the applicants' interests by bringing about a distinct change in their legal position within the meaning of Article 263 TFEU.

90 For that purpose it is necessary to determine whether the contested letters were such as to affect the applicants' interests by bringing about a distinct change in their legal position such as it resulted from the Methacrylates decision.

91 On that point it is common ground that, in the Methacrylates decision, the Commission fined Arkema EUR 219 131 250, of which EUR 140 400 000 was jointly and severally with Total and EUR 181 350 000 was jointly and severally with Elf Aquitaine, as their responsibility for the infringement had been acknowledged.

92 It is also common ground that, after the Methacrylates decision, the fine imposed jointly and severally on Arkema and the applicants was promptly paid in full by Arkema.

93 Nevertheless, with regard to the principal amount demanded from the applicants by the Commission in the contested letters, the Commission was content, so far as the applicants were concerned, to execute the Methacrylates decision after the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) and the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250).

94 As the Court of Justice observed, the reduction in Arkema's fine in the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) left unchanged the amount of the fine imposed on the applicants in the Methacrylates decision (Court of Justice order, paragraph 25 above, EU:C:2012:60, paragraph 83).

95 Therefore, so far as at least the principal amount demanded from the applicants in the contested letters is concerned, the letters did not affect the applicants' interests by bringing about a distinct change in their legal position within the meaning of Article 263 TFEU following the Methacrylates decision.

96 Therefore the action must be dismissed as inadmissible in so far as it seeks the annulment of the contested letters with regard to the principal amount demanded from the applicants.

97 However, that finding does not mean that the action as a whole is inadmissible because the applicants also seek the annulment of the contested letters in so far as in them the Commission also demanded the payment of default interest.

98 It must be observed that, contrary to the Commission's submission, the obligation to pay default interest did not arise at all from the Methacrylates decision or the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), or from the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), as Arkema had paid the whole of the original fine immediately after the decision.

99 Therefore, following the Methacrylates decision, as varied by the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) and the *Total and Elf Aquitaine* judgment, paragraph 11 above (EU:T:2011:250), the applicants were not required to pay default interest at all, so that the disputed act did modify their legal position by increasing the amount due from the applicants under the Methacrylates decision.

100 The Commission's argument concerning the Court of Justice order, paragraph 25 above (EU:C:2012:60), cannot cast doubt on that finding because, in that order, the Court of Justice dismissed the applicants' claim, in their appeal, to be exempted from interest as 'manifestly inadmissible in so far as it [was] directed, not … against the [Total and Elf Aquitaine]' judgment, but against a letter from the Commission [forming] the subject of an action [in the present case]' (Court of Justice order, paragraph 25 above, EU:C:2012:60, paragraph 89).

101 Therefore the action must be found admissible in that it is directed against the default interest demanded from the applicants in the contested letters.

Substance

102 As the action is admissible only in that it is directed against the default interest demanded from the applicants in the contested letters, the Court's examination must in substance relate only to that interest.

Arguments of the parties

103 In support of their alternative application for annulment and, within the limits of the General Court's jurisdiction, in relation only to the default interest, the applicants set out, in essence, the factual circumstances of the case and the fact that the Commission had the benefit in full of the principal amount, the interest and the receipts arising from the court orders.

104 Even considering that the Commission could demand default interest from the applicants, it could not run until after the *Arkema* judgment, paragraph 12 above (EU:T:2011:251), unless unjustified enrichment on the Commission's part is involved. However, the applicants paid the Commission the principal with interest without delay.

105 The Commission points out, first, that in the contested letters it demanded interest only on the outstanding amounts and not on the sums already paid by Arkema with final effect and, secondly, that it paid back to Arkema the overpayment resulting from the *Arkema* judgment, paragraph 12 above (EU:T:2011:251) with the appropriate interest.

106 The fact that the Commission had possession of the entire amount until execution of the *Arkema* judgment, paragraph 12 above (EU:T:2011:250) cannot exempt the applicants from their obligation to pay default interest on the sums repaid to Arkema.

Findings of the Court

107 With regard to the merits of the applicants' submissions directed at the default interest demanded by the Commission in the contested letters, it is necessary first to reject the applicants' arguments in their pleadings subsequent to the application, particularly those concerning the wrongful nature of the default interest in their observations on the Commission's objection of inadmissibility, in so far as those arguments are inadmissible, by virtue of Article 21 of the Statute of the Court of Justice, which is applicable to proceedings before the General Court in accordance with the first paragraph of Article 53 of the same Statute, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, because those arguments do not appear in the application (see, to that effect, the order of 14 February 2005, Case T-406/03 *Ravailhe* v *Comité des Régions*, ECR (Extracts), EU:T:2005:40, paragraphs 52 and 53 and the case-law cited; Case T-201/04 *Microsoft* v *Commission*, ECR, EU:T:2007:289, paragraph 94 and the case-law cited, and order of 27 March 2009, Case T-184/08 *Alves dos Santos* v *Commission*, EU:T:2009:87, paragraphs 18 to 21).

108 It also follows from the case-law that default interest must take into account the whole of the accumulated financial loss, including by reason of currency depreciation (see, to that effect, Case T-88/09 *Idromacchine* v *Commission*, ECR, EU:T:2011:641, paragraph 77 and the case-law cited).

109 It is also clear from the case-law that the power conferred on the Commission covers the power to determine the date on which the fine is payable and that on which default interest begins to accrue, the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision by requiring, where appropriate, the provision of a bank guarantee covering the principal amount of the fine imposed plus interest since, if the Commission had no such power, the advantage which undertakings might be able to derive from late payment of fines would weaken the effect of penalties imposed by the Commission when carrying out its task of ensuring that the rules on competition are applied (Case T-275/94 *CB* v *Commission*, ECR, EU:T:1995:141, paragraphs 47 and 48).

110 Likewise the General Court has found that the charging of default interest on fines is justified by the need to ensure that the Treaty is not rendered ineffective by practices applied unilaterally by undertakings which delay paying fines imposed on them (*CB* v *Commission*, paragraph 109 above, EU:T:1995:141, paragraph 48).

111 It follows that, generally, the one and only purpose of default interest is to compensate the creditor for the delay in the payment of the money owed to him because the deprivation of a money sum is always prejudicial.

112 In the present case, it is common ground that Arkema paid the whole of the original fine on 7 September 2006, which was also on behalf of the applicants, as appears from Arkema's letter of 25 September 2008 to the Commission.

113 On that point the Commission cannot properly claim that Arkema did not fulfil the common payment declaration since, in the letter of 25 September 2008 Arkema clearly stated that the Commission, had 'received full satisfaction as against Arkema and as against all the other joint and several debtors'.

114 It is also common ground that the applicants paid the sums demanded in the contested letters within the time-limits laid down by the Commission.

115 Therefore, at no stage in the circumstances of the present case was any delay in payment found on the part of the applicants.

116 Consequently, the Commission could not rightly demand default interest from the applicants in respect of the fine imposed in the Methacrylates decision.

117 In view of all the foregoing considerations, the contested letters should be annulled in so far as the Commission demanded from Elf Aquitaine default interest totalling EUR 31 312 114.58, for which Total was jointly and severally liable to the extent of EUR 19 191 286.03, and to dismiss the action as to the remainder.

118 Therefore, first, it is unnecessary to give a decision on the claims for amendment in so far as they relate to interest demanded in the contested letters and, second, the same claims must be refused in so far as they relate to the sums demanded in the main action, having regard to the considerations set out at paragraphs 90 to 100 above.

Costs

119 Pursuant to Article 87(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

120 In the present case the Court has granted the applicants' claims in part.

121 Therefore, having regard to the circumstances of the present case, it must be decided that the Commission shall bear two fifths of the applicants' costs and three fifths of its own costs. The applicants shall bear three fifths of their own costs and two fifths of the Commission's costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the Commission's letters BUDG/DGA/C4/BM/s746396, of 24 June 2011, and BUDG/DGA/C4/BM/s812886, of 8 July 2011, in so far as the European Commission demanded from Elf Aquitaine SA default interest of EUR 31 312 114.58 for which Total SA was jointly and severally liable to the extent of EUR 19 191 296.03;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission to bear two fifths of the costs of Total and Elf Aquitaine and three fifths of its own costs. Total and Elf Aquitaine are ordered to bear three fifths of their own costs and two fifths of the Commission's costs.**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 29 April 2015.

[Signatures]