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Delayed EU Court Proceedings Can Give Rise to Claims for Damages

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Stephen C. Mavroghenis
Brussels
+32.2.500.9814
stephen.mavroghenis@shearman.com

Geert Goeteyn
Brussels
+32.2.500.9800
geert.goeteyn@shearman.com

Trevor Soames
Brussels
+32.2.500.9800
trevor.soames@shearman.com

The time taken by the European judiciary[1] to adjudicate on cases is of increasing concern. Failure by the General Court to conclude proceedings within a reasonable time triggers a right to compensation. In order to obtain damages, claimants need to make a fresh application before the General Court, separate from that seeking to annul or reduce the fines imposed by the Commission in antitrust cases. A number of damages actions for delayed EU Court proceedings were brought last year. It is now clear that the EU Courts will be held liable for their own delays. However, a number of questions remain unanswered, including the determination of the quantification of the damages.

Excessive Delays at the GC and the Right to a Fair Trial within a Reasonable Time

It is widely understood that the GC is overloaded and suffers from a significant backlog of cases, in particular as a result of the ever increasing number of appeals of EU decisions in complex competition cases.[2] While this inevitably means that the GC will take longer to process cases, an appellant still has a right to a fair trial within a reasonable time.

How Long is Too Long?

The CoJ has indicated that the reasonableness of the period for delivering judgment is to be determined on a case-by-case basis, assessing the individual facts and circumstances of each case. In making such an assessment, the CoJ takes account of a

[1] The Court of Justice of the European Union ("CJEU") is the European institution encompassing the European judiciary. It includes a number of courts, in particular the Court of Justice ("CoJ") (the highest court in the European legal system) and the General Court ("GC").

[2] A proposal to double – in three stages over the next five years – the number of judges working at the GC is currently being discussed.

number of factors, such as the complexity of the dispute, the conduct of the parties, supervening procedural matters, etc.[3]

In the following recent cases, the CoJ found that the length of the proceedings before the GC could not be justified by any of the particular circumstances of the case:

Case	Length of proceedings
Guardian Industries v Commission (C-580/12 P)	4 years and 7 months
Deltafina SpA v Commission (C-578/11 P)	5 years and 8 months
Gascogne Sack v Commission (C-40/12 P)	5 years and 9 months
Kendrion v Commission (C-50/12 P)	5 years and 9 months
FLSmidth & Co v Commission (C-238/12 P)	More than 6 years

In *Kendrion v Commission*[4], the CoJ found that the GC had breached the corporation's right to a fair trial within a reasonable time. The total proceedings of the GC lasted 5 years and 9 months and the time between the end of the written procedure and the start of the oral procedure was 3 years and 10 months.

Options Available for Corporations Affected by Excessive Delays in GC Proceedings

Corporations whose interests have been adversely affected by excessive delays in GC proceedings for the annulment of an antitrust decision have adopted one of two different approaches: (a) raising the issue before the GC itself in the annulment proceedings; or (b) appealing the GC's judgment before the CoJ, alleging procedural impropriety.

The first option has been unsuccessful, with the GC expressing doubt as to whether an action for annulment constituted an appropriate framework for addressing and penalizing failures to determine the case in question within a reasonable time. Appropriately, the GC also held that the Chamber of the GC responsible for the case would not provide corporations with sufficient safeguards; notably guaranteed impartiality when assessing whether it, itself, committed a procedural irregularity in causing an unjustified delay.[5]

The second option has been more successful. Appellants have argued that excessive delays in GC proceedings amount to a procedural impropriety adversely affecting their rights and, as such, they have requested the CoJ to determine whether there has been a breach of the right to a fair trial within a reasonable time.[6] Once a breach has been established, corporations can then seek redress.

Remedies for Unreasonable Delays in GC Proceedings – The CoJ has Made its Choice

Where the CoJ itself has established that proceedings before the GC have failed to be completed within a reasonable time, one might have expected the CoJ to take the appropriate measures to remedy the breach. This, however, is not the case.

[3] *Baustahlgewebe v Commission*, C-185/95 P, EU:C:1998:608, para. 29; *Der Grüne Punkt – Duales System Deutschland GmbH v Commission*, C-385/07 P, EU:C:2009:456, para. 184.

[4] *Kendrion v Commission*, C-50/12 P, EU:C:2013:771.

[5] *Groupe Gascogne v Commission*, C-58/12 P, EU:C:2013:770, para. 84; *Saint-Gobain Glass France v Commission*, T-56/09, EU:T:2014:160, para. 499–500.

[6] *Baustahlgewebe v Commission*, para. 19.

Some corporations have claimed that a finding that the GC has failed to complete proceedings within a reasonable time justifies setting aside the judgment under appeal.[7] The CoJ has, nonetheless, repeatedly held that such a measure would not remedy the infringement unless the applicant can demonstrate that the delay materially affected the outcome of the case.[8]

Failure by the GC to observe the reasonable time requirement in its proceedings would therefore in principle only give rise to a claim for compensation for the harm suffered. In *Baustahlgewebe*, having held that the plea alleging excessive duration of the proceedings was well founded, the CoJ considered that a sum of ECU 50,000 constituted "*reasonable satisfaction*" and reduced the fine accordingly, "[f]*or reasons of economy of procedure and in order to ensure an immediate and effective remedy*."[9]

Over time, however, compensation in the form of a reduction of fine has become inconceivable for the CoJ.[10] Today, it appears that there is only one viable path: a claim for damages.

A failure on the part of the GC to adjudicate within a reasonable time can give rise to a separate claim for damages.[11] Such a claim may not be made directly to the CoJ in the context of the appeal against the GC's judgment; it must be brought before the GC itself, as a separate action.[12] Last year, a number of corporations, including Kendrion and Gascogne Sack, followed that path and lodged a separate action, claiming damages before the GC. Last month, the GC addressed a key procedural question: who should be the defendant in these actions?

Action for Damages Lodged Against the European Judiciary or the Commission?

Following the CoJ's judgment finding that the GC breached the corporation's right to a fair trial within a reasonable time, Kendrion brought a new separate action in June 2014, claiming damages before the GC. Kendrion lodged the claim against the European Union represented by the CJEU.[13]

In September 2014, the CJEU questioned admissibility, claiming that the GC should (a) dismiss the action as inadmissible as it is directed against the European Union represented by the CJEU, or in the alternative, (b) in the event that the GC considered that the claim for damages was admissible, order that the European Commission be substituted for the CJEU as the defendant. The CJEU did not dispute the fact that the action was to be lodged against the European Union or that the alleged harm originated from the behavior of the GC, but argued that the European Union should be represented by the Commission and not by the CJEU itself.

7 See, e.g., *Deltafina SpA v Commission*, C-578/11 P, EU:C:2014:1742, para. 81.

8 See, *e.g.*, *Der Grüne Punkt*, para. 193. The opposite approach would have allowed an appellant to reopen the question of the existence of an infringement on the sole ground that there was a failure to adjudicate within a reasonable time, whereas all of its substantive arguments had been rejected (*Ibid.*, para. 194).

9 *Baustahlgewebe*, para. 48, 49, 141 and 142.

10 The solution proposed in *Baustahlgewebe* is understood to have been dictated *inter alia*, by the fact that, at the time, the jurisdiction of the GC was not set out in the Treaty of the European Union. It is only after the entry into force of the Treaty of Nice that the GC got exclusive jurisdiction in actions for compensation for damages caused by the European institutions in the performance of their duties (see Opinion of Advocate General Bot delivered on 31 March 2009 in *Der Grüne Punkt*, EU:C:2009:210).

11 *Groupe Gascogne v Commission*, para. 82.

12 *Groupe Gascogne v Commission*, para. 84.

13 *Kendrion v European Union*, T-479/14.

The GC rejected the CJEU's plea of inadmissibility by an order dated 6 January 2015.[14] The applicant brought the action for damages against the European Union represented by the CJEU on the grounds that the European judiciary, and in particular the GC, violated its right to a fair trial within a reasonable time. The GC sided with the applicant: where the European Union is liable for a tortious act of one of its institutions, the European Union is to be represented before the GC by the institution responsible for the act in question. The GC found that the CJEU, which comprises the GC, was the right European institution to represent the European Union in this action.

The case can now proceed on the merits.[15] The next steps are for the GC to examine the actual existence of the alleged harm and the causal connection between that alleged harm and the excessive length of the legal proceedings.

We believe that any appeal by the CJEU against the GC order will be unsuccessful. The European Commission has no general right to represent the European Union before the European judiciary. Also, according to settled case law, where the liability of the European Union is incurred by the act of one of its institutions, the European Union is represented before the GC or the CoJ by the institution(s) accused of the act giving rise to liability.[16] However, actions for damages brought directly against the institutions have been equally admitted.

Interestingly, soon after the CJEU raised its objection of admissibility in *Kendrion*, another alleged victim of excessive delays, Gascogne Sack, which had initially lodged its claim for damages against the CJEU[17], subsequently lodged another action against the European Commission[18] presumably to ensure that at least one of these actions would pass the admissibility threshold.

Major Takeaways

Corporations seeking remedies for excessive delays by the GC in determining appeals against Commission decisions in antitrust cases should not expect compensation in the form of a reduction of fines. To facilitate a claim, corporations can raise the procedural impropriety in appellant proceedings before the CoJ for it to examine the reasonableness of the alleged excessive period. If successful, the corporation can bring a subsequent action for damages before the GC. In an interesting development, two corporations, ASPLA and Armando Álvarez, have just launched an action for damages before the GC without having first argued the procedural impropriety before the CoJ.[19] It appears that these corporations intend to rely – or free-ride – upon the CoJ judgments in *Kendrion* and *Gascogne Sack* finding that the GC failed to adjudicate within a reasonable time in their respective actions for annulment of the same Commission decision.[20] It remains to be seen how the GC will react to this turn of events.

It is currently unclear whether, taking a step further than ASPLA and Armando Álvarez, a corporation could bring an action before the GC in circumstances where neither it, nor another appellant has raised the procedural impropriety

14 *Kendrion v European Union*, T-479/14, EU:T:2015:2.

15 Subject to any appeal. Arguably, the CJEU could appeal the GC's order which would result in the unprecedented situation of the CJEU requesting its highest court, the CoJ, to set aside an order of the GC.

16 *Briantex and Di Domenico v EEC and Commission*, C-353/88, EU:C:1989:415, para. 7.

17 *Gascogne Sack Deutschland and Gascogne v Court of Justice of the European Union*, T-577/14.

18 *Gascogne Sack Deutschland and Gascogne v Commission*, T-843/14.

19 *ASPLA and Armando Álvarez v Court of Justice of the European Union*, T-40/15.

20 *Kendrion*, *Gascogne Sack* and *Aspla / Armando Álvarez* all concern the industrial bags cartel. The length of proceedings before the GC in these three cases was similar, if not identical, however, unlike Kendrion and Gascogne Sack, neither Aspla nor Armando Álvarez raised this with the CoJ.

(or even appealed the GC judgment) before the CoJ. However, we cannot see any legal reason to prevent a corporation from doing so provided that the conditions for launching the action are met, in particular that the deadline for acting (five years from the date on which the damage occurred) is complied with.

The need to launch separate damages actions before the GC, rather than the CoJ making an award for damages, seems counter-intuitive as it will add to the GC's already heavy case load, which is the main reason for excessive delays in the first place. The CoJ has apparently rejected arguments concerning the "*economy of procedure*" and the need "*to ensure an immediate and effective remedy*" disregarding the logical consequences that corporations will have to invest more time and resources bringing a fresh action to claim damages, having already faced years of litigation.

Concerns also arise as to the potential for prosecutorial bias in circumstances where the GC would hear claims for damages resulting from its own procedural impropriety. The CoJ already addressed this issue in previous cases finding that when hearing such claims, the GC must sit in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticized.[21] This does not however fully rectify the issue given the intractable appearance of bias when a judicial body is adjudicating on matters emanating from it. It is a trite but nonetheless relevant observation that not only must justice be done, it must also be seen to be done.[22]

The GC's case load has for years now fuelled an intense political debate. An increasing number of damages actions against the European Union resulting from judgments being delivered with excessive delays will unlikely appease the detractors. While the CJEU might have expected these damages actions to raise political awareness and trigger decisions to expand the number of judges and ameliorate the backlog of cases, it might not have anticipated actions to be brought against it.

21. *Kendrion v Commission, C-50/12 P, para. 101.*

22. *R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256.*

Avenue des Arts 56 | Kunstlaan 56 | 1000 Brussels