



## The Battle over Damages for Delayed Proceedings at EU General Court Continues

### IN SHORT

**Background:** Following excessive delays before the General Court, Gascogne, Kendrion, and ASPLA claimed compensation after waiting some five years each in their appeals of the "industrial bags" cartel fines.

**The Result:** For the first time, the EU General Court awarded damages for delayed proceedings within its own chambers. The General Court also set out what constitutes undue delay in cartel cases.

**Looking Ahead:** Both the European Union and Gascogne initiated appeals before the EU's highest court in challenge of the General Court's decision. The Court of Justice's rulings are not anticipated before early 2018.

The controversy continues over damages for excessively lengthy proceedings at the European Union ("EU") General Court. In March 2017, both the EU and Gascogne initiated appeals before the EU's highest court in challenge of the General Court's first-ever damage award in Gascogne for delayed proceedings within its own chambers.

#### Pursuit of Damage Claims for Delayed Proceedings

Gascogne and Gascogne Germany (together "Gascogne") claimed compensation for the General Court's delay in ruling on its appeal of the "industrial bags" cartel fine imposed by the European Commission. Gascogne invoked the non-contractual liability of the EU (pursuant to Article 340 TFEU), arguing that it suffered damages from the lengthy proceedings, which violated its right to a fair trial within a reasonable time.



*In the Gascogne v. European Union ruling, judges from the General Court awarded damages against their own court.*



**Material Harm.** In the *Gascogne v. European Union* ruling of 10 January 2017 (Case T-577/14), judges from the General Court awarded damages against their own court. They found that the test for invoking EU's non-contractual liability was satisfied, based on meeting the three cumulative conditions below, and awarded €47,064 for material harm:

1. The **unlawful conduct** of the institution resulted from an infringement of the fundamental right to a fair trial within a reasonable time, as guaranteed by Article 47 of the Charter of Fundamental Rights of the EU. It was evidenced by the 46 months that elapsed between the written and oral proceedings, which far exceeded the General Court's calculation that the proceedings should have taken 26 months (i.e., an unjustified delay of 20 months);
2. **Actual and certain damages** occurred, due to the additional payment of bank guarantee costs covering the unpaid cartel fine during the period in which the reasonable time for adjudicating was exceeded; and
3. A **causal link** existed between Gascogne's damages suffered and the untimely proceedings, given the additional costs incurred from Gascogne's prolonged bank guarantee costs.

More specifically, the material harm recognized by the General Court did not actually correspond to the unjustified 20-month delay. The General Court narrowed the period of compensation from 30 May 2011 to 16 November 2011, in light of Gascogne's own claims and the General Court's own views on the proper time-frame for damages.

**Non-Material Harm.** Concerning non-material harm, Gascogne claimed that the breach of the obligation to adjudicate within a reasonable time gave rise to non-material damage of several kinds

(including reputational harm and uncertainty in business planning). However, the General Court awarded only €5,000 in damages to each of the two applicants.

Thus, the total award of some €57,000 000 (corresponding to €47,064 for material harm and a total of €10,000 for non-material harm) fell well below Gascogne's claim of €3.89 million in damages. The EU and Gascogne have both challenged the legitimacy of this damage award.

### Subsequent Damage Awards in *Kendrion* and *ASPLA*

The *Gascogne* ruling was quickly followed by the General Court's judgments in *Kendrion v. European Union* (T-479/14 of 1 February 2017) and *ASPLA v. European Union* (T-40/15 of 17 February 2017). These cases confirmed the General Court's approach to determining the EU's non-contractual liability for excessively lengthy proceedings.

- In *Kendrion*, which sought some €13.35 million in damages, the General Court awarded nearly €600,000 in material damages. This corresponded to *Kendrion's* bank guarantee costs (€588,769), under the same time-frame of damages as calculated in *Gascogne*. The non-material damage award of only €6,000 reflected, once again, inadequate proof of reputational harm and uncertainty costs.
- In *ASPLA*, which claimed some €3.5 million in damages, the General Court awarded €155,993 in material damages, corresponding to bank guarantee costs for a period calculated according to the same method as in *Gascogne* and *Kendrion*.

In an additional case of delayed proceedings at the General Court concerning a fine imposed in the "copper fittings" cartel, *Aalberts Industries* (T-725/14), the General Court dismissed the damage claims. It found that there was no unjustified period of inactivity during the contested proceedings.

## THREE KEY TAKEAWAYS

1. The General Court has established what constitutes undue delay in cartel cases. The timespan between written and oral arguments before the General Court should be limited to 15 months but can be extended depending on the particular factors of each case (i.e., complexity of the dispute, conduct of the parties, review of parallel proceedings, etc.).
2. The damage award by the General Court for delayed proceedings in its own chambers is significant. But even if the award is upheld, the European Courts likely will heavily scrutinize damage claims, which will probably be restricted to well-defined damages on a carefully delineated time-frame of harm.
3. Pending the appeals to the Court of Justice in *Gascogne*, with rulings not expected until early 2018, the fate of these first-ever damage awards for delayed proceedings remains in suspense.

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