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CASE NOTE

At Last! Reaching the Remedy for Delay after a Long Ride through the EU Judicial System, Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, EU:T:2017:1

§1. INTRODUCTION

Complaints about excessive length of judicial proceedings in Europe are hardly anything new under the sun. Even a cursory glance at the caseload of the European Court of Human Rights (ECtHR) reveals that in the last ten years only, the Strasbourg court delivered judgments in over 2000 cases involving the alleged breach of the reasonable time requirement of Article 6 of the European Convention on Human Rights (ECHR).¹

Although long mindful of the potential problems associated with a mounting number of new and pending cases, the EU judiciary has until recently faced only a few legal challenges against excessively long proceedings.² As a result, the steadily increasing strain on the EU courts was left largely unaided until delays became more commonplace and more serious. The tipping point came in 2011 when the General Court issued judgments in several competition law cases after nearly six years of proceedings which, on appeal, the Court of Justice (CJEU) deemed unjustifiably protracted.³ Yet the finding of a breach of the right to a hearing within reasonable time, protected by Article 47 of the Charter, led to no immediate relief for the injured parties. The CJEU upheld throughout the appeals its doctrine from *Der Grüne Punkt* that the only effective remedy for undue delay is an action for damages pursuant to Articles 268 and 340(2) TFEU on the non-contractual liability of the Union.⁴

The General Court's decision in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union* represents the first concluded case where the judicial remedy

¹ Violations of Article 6 ECHR concerning delays in proceedings before courts in fact account for the vast majority of all cases submitted to the ECtHR.

² The first case in which the CJEU acknowledged that a delay in breach of the litigant's rights occurred was Case C-185/95 P *Baustahlgewebe v. Commission*, EU:C:1998:608. The case was decided in 1998 but it took eleven years before the Court had another opportunity to revisit the issue in Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland v. Commission*, EU:C:2009:456.

³ Case C-40/12 P *Gascogne Sack Deutschland GmbH v. Commission*, EU:C:2013:768; Case C-58/12 P *Groupe Gascogne SA v. Commission*, EU:C:2013:770; Case C-50/12 P *Kendrion NV v. Commission*, EU:C:2013:771; Case C-578/11 P *Deltafina SpA v. Commission*, EU:C:2014:1742; Case C-35/12 P *ASPLA v. Commission*, EU:C:2014:348; Case C-36/12 P *Armando Álvarez v. Commission*, EU:C:2014:349. Almost all of these cases concerned the same anti-competitive practices in the industrial bags sector.

⁴ Case C-385/07 P *Der Grüne Punkt*, para. 195.

for undue delay established by the CJEU had been invoked.⁵ In a rather lengthy judgment, the Third Chamber of the General Court, sitting in an extended composition, found partially in favour of the claimants, awarding approximately € 57,000 plus interest in damages for the failure of the General Court to adjudicate within a reasonable time in two antitrust cases.⁶ Although the award amounts only to less than 1.5% of total compensation sought by the parties, the larger significance of the case lies in demonstrating the peculiar difficulties associated with remedying delays before EU courts. Implicitly, the decision illustrates that the assertion of the CJEU that a self-standing claim for damages represents the only appropriate effective remedy for the purposes of Article 47 of the Charter is not entirely unproblematic, particularly when viewed in light of ECtHR case law.

§2. BACKGROUND TO THE CASE

The case at hand relates to undue delays produced by the General Court in the course of actions for annulment brought by the litigating companies against fines imposed by the Commission on cartel members in the industrial bags sector.⁷ These proceedings, which were dealt with concomitantly by the General Court and alongside another action of the same nature,⁸ lasted almost five years and nine months, from February 2006 until November 2011. Moreover, the General Court rejected the pleas against the Commission fines and so the claimants lodged appeals with the CJEU in which they alleged, *inter alia*, that the former Court of First Instance breached their right to a trial within reasonable time.

Before assessing whether the rights of the appellants were actually breached, the CJEU addressed the question of remedies. In part, it upheld what was already known from *Baustahlgewebe*, namely that an excessive duration of proceedings cannot, unless it affected the outcome of the case, lead to the contested judgment being set aside.⁹ However, in order to answer what does constitute an effective remedy, the Court was forced to choose between reducing the fine, as it had done in *Baustahlgewebe*, and referring the parties to an action for damages, as it established in *Der Grüne Punkt*, where

⁵ Since the judgment in *Gascogne Sack and Gascogne*, the General Court concluded three similar cases, two of which had a also similar outcome. The following analysis therefore applies, *mutatis mutandi*, to them as well. See Case T-479/14 *Kendrion v. European Union*, EU:T:2017:48; Case T-40/15 *ASPLA and Álvarez v. European Union*, EU:T:2017:105. The undue delay claim in the third case, *Aalberts*, was dismissed by the General Court, while raising doubts, in the eyes of the present author, about the impartiality of the decision in the action for damages (see below under 4. A). See Case T-725/14 *Aalberts Industries NV v. European Union*, EU:T:2017:47.

⁶ Case T-72/06 *Groupe Gascogne SA v. Commission*, EU:T:2011:671 and Case T-79/06 *Sachsa Verpackung v. Commission*, EU:T:2011:674.

⁷ Commission Decision C (2005) 4634 of 30 November 2005.

⁸ Case T-54/06 *Kendrion v. Commission*, EU:T:2011:667.

⁹ Case C-40/12 P *Gascogne Sack Deutschland GmbH*, para. 85; Case C-185/95 P *Baustahlgewebe*, para. 49.

the Commission had not imposed a fine. The CJEU opted decisively for the latter and stated that Article 340(2) TFEU “constitutes an effective remedy of general application for asserting and penalising” undue delay.¹⁰

The CJEU acknowledged that the inescapable outcome of prescribing this remedy was that the General Court would become the judge in its own case, as according to Article 256(1) TFEU only it (the General Court) has jurisdiction in actions concerning the non-contractual liability of the Union. With objective impartiality (see below) of such proceedings in question, the CJEU added that the General Court must sit in a different composition from the one implicated in the delayed proceedings.¹¹ Likely for the same reason, the CJEU also established the existence of excessive delay and hence a breach of Gascogne’s rights.¹²

In the wake of the CJEU’s appeal decision, the injured parties at last paid their deferred fines to the Commission and filed an action for damages before the General Court in accordance with the judgment of the CJEU.

§3. PROCEEDINGS BEFORE THE GENERAL COURT

The action for damages before the General Court that constitutes the subject of this case note is at least as remarkable for the arguments revealed during the proceedings as for the decision itself, if not more. Both the representatives of the CJEU and the judges of the General Court spoke directly to previously evaded issues related to the prescribed remedy for delays; the proceedings are therefore worth recounting in some detail.

A. PROCEDURAL OBJECTIONS OF THE CJEU

In the first instance, the CJEU (in its institutional capacity) contested Gascogne’s claim for damages on the grounds that the EU should be represented in the proceedings by the Commission and not by the CJEU.¹³ It put forward five reasons in support of its challenge, out of which two merit more attention: the CJEU asserted that there is a general principle of representation of the EU by the Commission; second, it claimed that due to requirements of independence and objective impartiality the CJEU cannot represent the EU in the case. The CJEU also complained against the damages sought being charged to the CJEU’s section of the EU budget, as opposed to that of the Commission.

¹⁰ Case C-40/12 P *Gascogne Sack Deutschland GmbH*, para. 88.

¹¹ *Ibid.*, para. 96.

¹² *Ibid.*, para. 102.

¹³ Order of the General Court of 2 February 2015 in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, para. 21.

By an Order of 2 February 2015, the General Court rejected all of the CJEU's arguments.¹⁴ It ruled that it is the CJEU that shall represent the Union, as, following established case law, representation in an action for damages falls to the EU institution responsible for the event giving rise to damage. In the present case the breach of rights was caused by the General Court which forms part of the CJEU (Article 19 TEU), an institution of the EU (Article 13 TEU). Moreover, the General Court stated that the general principle, by virtue of which the EU is to be represented by the Commission, is not applicable to these proceedings; rather, according to the General Court's reading of Article 335 TFEU and Article 17(1) TEU, representation of the EU by the Commission is limited to cases before courts of the Member States and third countries.¹⁵ The General Court also found no basis for charging the damage to a different section of the EU budget than to that of the CJEU. On the contrary, it found a provision in the annual budget that anticipated that the CJEU would cover damages.¹⁶ It should be noted that on both issues – representation and budget – the General Court departed from the Opinion of AG Sharpston in the appeal to the original case.¹⁷

As regards the question of independence and impartiality, the General Court understandably repeats what the CJEU said when it established that an action for damages represents an effective remedy for delays: the Treaties prescribe mandatory jurisdiction of the General Court in such cases; there are only three courts in the EU judiciary; and the decision of the General Court shall not be taken by the same judges who were responsible for the excessively long cases. For these reasons the General Court found that the requirements of independence and impartiality were satisfied.¹⁸

The CJEU was not happy with the procedural decision of the General Court and decided to appeal the order – *to the Court of Justice*. Meanwhile, it asked the General Court to stay the proceedings until the appeal was decided by the CJEU; the General Court obliged, thus further prolonging the whole saga. The CJEU was in essence seeking a re-

¹⁴ Ibid, para. 65.

¹⁵ Ibid, para. 41. Article 335 TFEU states that “[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation”. Article 17(1) TEU declares that “[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end. (...) With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation”.

¹⁶ Order of the General Court of 2 February 2015 in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, para. 50-51.

¹⁷ Opinion of Advocate General Sharpston in Case C-58/12 P *Groupe Gascogne SA v. Commission*, EU:C:2013:360, para. 147.

¹⁸ Order of the General Court of 2 February 2015 in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, para. 53-64.

evaluation of the claims that were rejected by the General Court. In particular, it alleged that in the absence of specific rules on representation in actions based on Article 268 TFEU, the General Court should have taken greater account of the principles of the sound administration of justice and the independence and impartiality of tribunals.¹⁹ In the end, no decision on the appeal was taken, as the CJEU retracted its application and the case was removed.

B. JUDGMENT OF THE GENERAL COURT

Given that the more fundamental questions relating to the fairness and effectiveness of the remedy were to an extent addressed in the procedural order of the General Court, it is somewhat understandable that the Court does not return to them in the judgment. The judgment, nevertheless, does provide some clarification regarding a number of ambiguities in the remedial procedure and shows how the hitherto theoretical scenario can transpire in practice.

First, the General Court established that the starting point of the five-year limitation on actions for damages referred to in Article 46 of the Statute of the CJEU is the date of adoption of the decision that has given rise to the claim against the Union. As in the present case, the injurious judgments of the General Court were adopted 16 November 2011 and the applicants filed their claim 4 August 2014, the action was not time-barred.

Second, the General Court examined the gravity of the alleged delay in the competition law cases. It confirmed that the proceedings in question were indeed delayed, as was already ascertained by the CJEU in the appeal decisions (to which the General Court referred),²⁰ but it also recounted the proceedings in detail in order to determine the precise extent of the delay. The General Court established that the unjustified period of inactivity amounted to 20 months (of the total duration of five years and nine months).²¹

Third, regarding the existence of damages and their causal link to the excessive length of the proceedings, the General Court dismissed most of the alleged damages demanded by the applicants.²² The award, € 47,064, was limited to material damage incurred as a

¹⁹ Case C-125/15 P *Court of Justice v. Gascogne Sack Deutschland and Gascogne*, Application (OJ C 155, 11 May 2015). The CJEU was more expansive on its arguments in the parallel case of *Kendrion*; see Case C-71/15 P *Court of Justice v. Kendrion*, Application (OJ C 107, 30 March 2015).

²⁰ Case C-40/12 P *Gascogne Sack Deutschland GmbH v. Commission*, para. 102; Case C-58/12 P *Groupe Gascogne SA v. Commission*, para. 96.

²¹ Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, para. 76.

²² See *ibid*, para. 92-94 regarding the allegations that the company could have secured an earlier investment but for the delay in the General Court's judgment; *ibid*, para. 108 on the payment of interest on the amount of the fine; *ibid*, para. 130 regarding the damage suffered from incurring bank guarantee fees after the delayed decision of the General Court; and *ibid*, para. 150 on the alleged immaterial damage suffered by employees of the company.

result of bank guarantee fees between 30 May 2011 and 16 November 2011.²³ The award could have been higher but for a restriction in the application which was based on different assumptions regarding the General Court's approach to the case.²⁴ In addition, the Court granted Gascogne immaterial damage for the prolonged period of uncertainty but only in the amount of € 5,000 for each applicant.²⁵

§4. COMMENTS

Two fundamental issues arise from this remedies-for-delay saga and both warrant increased attention. First, the impartiality of the General Court in the action for damages is contestable, and there are good reasons to be even more suspicious with respect to similar cases in the future which might not follow the same trajectory as *Gascogne Sack Deutschland* and *Gascogne*. Second, the effectiveness of the judicial remedy as prescribed by the CJEU and carried out by the General Court might be called into question in light of the case law of the ECtHR. While it is true that the EU judiciary is considerably constrained in terms of its design, institutional organization cannot fully account for the deficiencies associated with remedying undue delay before EU courts.

A. INDEPENDENCE AND IMPARTIALITY OF THE GENERAL COURT

In order to regain a bird's-eye view of the interlinked parts of the remedies-for-delay saga, it is perhaps appropriate to pause for a moment and reconstruct the scenario once again. After discernibly delayed first instance proceedings, usually concerning a competition infringement, litigants normally appeal the case to the CJEU for a breach of rights (Article 47 of the Charter). In *Gascogne*, *Gascogne Sack Deutschland* and *Kendrion*, the CJEU told the appellants that it cannot remedy the violation of their right by the General Court in the course of the appeal; rather, the *only* effective remedy in such a case is for the litigants to initiate an action for damages before the General Court. The CJEU, nonetheless, took the opportunity to take the heat off the General Court by establishing the violation of the reasonable time requirement. This had a positive impact on the impartiality of the remedial proceedings, even though, as was explained above, the General Court thoroughly reanalysed the existence and extent of delay.²⁶

The issue with this litigation sequence is that it does not necessarily follow from a strict reading of the CJEU's case law which can prove contradictory for a party seeking relief for a breach of its right to a hearing within a reasonable time. If such a hypothetical

²³ Ibid, para. 142.

²⁴ Ibid, para. 135-139.

²⁵ Ibid, para. 158 and 165.

²⁶ The scope of the examination probably exceeded what was envisaged by Advocate General Sharpston in her Opinion in Case C-58/12 P *Group Gascogne SA v. Commission*, para. 147.

litigant sticks to the established interpretation of the case law and decides to skip appealing the first-instance decision to the CJEU on its way to the action for damages, which according to the CJEU constitutes the only effective remedy but which does not require a previous appeal judgment, the General Court will be judging its own conduct in entirety without any previous pre-determination by the CJEU, in contrast to the situation in *Gasconne* and others. In fact, a similar scenario has recently transpired in *Aalberts*, whereby the litigant did not complain about the length of the first-instance proceedings in the appeal case before the CJEU which subsequently led to the General Court founding no violation of the reasonable time requirement without prior involvement of the CJEU.²⁷ Moreover, as the breach of the reasonable time requirement is normally in itself an insufficient reason to set aside the delayed decision, it is in principle impossible to even bring an appeal case before the CJEU on the ground of delay in the absence of other grounds for appeal.²⁸ The CJEU will declare such appeals inadmissible, as it has done in the past.²⁹

In the hypothetical but wholly realistic scenario, as demonstrated by the *Aalberts* case,³⁰ where the action for damages before the General Court has not been prejudged by the CJEU, it is difficult to see how this could comply with the requirements of judicial independence and impartiality arising under Article 6(1) ECHR. The ECtHR has long held that impartiality can be assessed through a subjective and an objective test.³¹ Subjective impartiality is not particularly problematic in view of the present legal problem, as the action for damages is not adjudicated by the same judges responsible for the delay. In addition, the personal integrity of the judges of the General Court would be largely unquestioned; the only accusation could concern personal bias resulting from professional affiliation (solidarity) with colleagues in charge of the dilatory case. This would be, however, difficult to establish, since the ECtHR recognizes a presumption of judges'

²⁷ Case T-725/14 *Aalberts Industries NV v. European Union*, EU:T:2017:47, para. 80. For the appeal decision in the prior proceedings see Case C-287/11 P *Aalberts Industries NV and Others v. Commission*, EU:C:2013:445.

²⁸ Article 169(1) (formerly Article 113(1)) of the Rules of Procedure of the Court of Justice requires that an appeal "shall seek to have set aside, in whole or in part, the decision of the General Court".

²⁹ Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v. Council and Commission*, EU:C:2008:476, para. 203-2011; and Case C-583/08 P *Gogos v. Commission*, EU:C:2010:287, para. 56-59. Curiously, in *FIAMM* the Court of Justice first dismissed the claim as inadmissible, but nonetheless decided to utter some paragraphs vaguely pointing in the direction of the General Court not breaching the reasonable time requirement. One can presume that the Court was trying to take precautions against the difficulties with impartiality of the General Court. On the contrary, in *Gogos* the Court restricted itself to finding the claim inadmissible with no further comments.

³⁰ In *Aalberts*, the litigants have not raised the issue of impartiality, however.

³¹ ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, Application No. 8692/79 para. 30.

compliance with the subjective test, while impartiality is considered in the circumstances of each case.³²

When it comes to the objective test, the hurdle is more difficult to overcome. The question to be answered is whether “there is legitimate reason to fear that a particular body lacks impartiality” and if this is objectively justifiable.³³ In the leading ECtHR case on impartiality of proceedings against affiliated courts, *Mihalkov v. Bulgaria*, the Strasbourg court considered objective impartiality in conjunction with the criterion of independence, and it found a violation of Article 6(1) ECHR.³⁴ The ECtHR reasoned that the professional attachment between a district and a city court in Sofia, which both featured as defendants in the case, was in itself capable of eliciting doubts as to the impartiality and independence of the seized court.³⁵ In addition, the doubts were strengthened by the fact that, similarly to *Gascogne Sack Deutschland and Gascogne*, the indemnity to the applicant was to be paid from the court’s budget.³⁶ The CJEU has in fact cited *Mihalkov* in support of its plea to be replaced by the Commission as a defendant, but this was rejected by the General Court which pointed to differences between the factual situation in *Mihalkov* and in the General Court’s own case, given that *Mihalkov* had not concerned damages for undue delay.³⁷

The foregoing analysis leads to a complex picture of the General Court’s impartiality in the remedial proceedings. The action for damages initiated by *Gascogne* could *just* clear the objective test, for the sole reason that the litigants themselves did not raise impartiality of the General Court in the application. It could then be deduced, for example in the course of a potential appeal before the CJEU, that the applicants did not perceive the General Court as breaching their right to an independent and impartial tribunal.³⁸ However, had *Gascogne* raised the issue of the General Court’s impartiality, and provided the standards set by the ECtHR in *Mihalkov* were not to be relaxed before the EU courts in the circumstances of remedies for unreasonable delay, the EU courts in *Gascogne Sack Deutschland and Gascogne* would have trouble meeting them: the General Court re-examined its own conduct in-depth; the defendant and the adjudicator were professionally affiliated (part of the same institution); and the damages are paid out of the CJEU’s institutional budget.

³² ECtHR, *Hauschildt v. Denmark*, Judgment of 24 May 1989, Application No. 10486/83, para. 47.

³³ ECtHR, *Wettstein v. Switzerland*, Judgment of 21 December 2000, Application No. 33958/96, para. 44.

³⁴ ECtHR, *Mihalkov v. Bulgaria*, Judgment of 10 April 2008, Application No. 67719/01, para. 45 and 51.

³⁵ *Ibid*, para. 47.

³⁶ *Ibid*, para. 48.

³⁷ Order of the General Court of 2 February 2015 in Case T-577/14 *Gascogne Sack Deutschland and Gascogne v. European Union*, para. 59.

³⁸ On the importance of impressions, see ECtHR, *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, Application No. 19874/92, para. 58.

As a final point, it should be recalled that generally ECHR standards flow directly into EU law by virtue of Article 52(3) of the Charter, which prescribes convergence of scope and meaning between identical rights protected by the Charter and by the ECHR. The Explanations to the Charter do not *verbatim* confirm that the right to an independent and impartial tribunal of Article 47 of the Charter is identical to the same right under Article 6(1) ECHR – as the scope of protection is more extensive under the Charter – but they do state that “in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union”.³⁹ The CJEU, however, has recently (in keeping with Opinion 2/13) protested against unrestrained application of Article 52(3) of the Charter on the ground that transposition of ECHR standards must take due account of the EU courts’ autonomy.⁴⁰

B. THE EFFECTIVENESS OF THE REMEDY

The fact that the case at hand represents the first time that damages were awarded for a breach of the reasonable time requirement is, in itself, somewhat worrying. It means that until now, no aggrieved parties managed to take advantage of the allegedly effective remedy of a self-standing action for damages.

What is essentially at stake is whether the remedy, as designed by the CJEU and executed by the General Court, qualifies as effective for the purposes of Article 47 of the Charter and Article 13 ECHR. As a preliminary matter, and as in the case of objective impartiality, it follows from the Explanations to the Charter that although the scope of the two provisions is not identical, the Charter right should be applied similarly to Article 13 ECHR.⁴¹ For that reason, it is again appropriate to look to the ECtHR, which has a well-developed body of case law regarding what constitutes an effective remedy for a breach of the reasonable time requirement.

The ECtHR requires that any remedy designated to alleviate undue delay must be effective both in law and in practice;⁴² and the remedy must also be sufficient and accessible.⁴³ When it comes to remedies of a general nature, such as an action for damages under Articles 268 and 340 TFEU, the Court in particular stresses the need to point to concrete examples in the case law whereby it was possible for an aggrieved party to obtain relief through the remedy in question.⁴⁴ In addition, the ECtHR has a preference for preventive as opposed to compensatory remedies, even though both are in principle

³⁹ Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/02, p. 30.

⁴⁰ Case C-601/15 PPU, *J.N.*, EU:C:2016:84, para. 47.

⁴¹ Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/02, p. 29-30.

⁴² ECtHR, *Kudła v. Poland*, Judgment of 26 October 2000, Application No. 30210/96, para. 157.

⁴³ ECtHR, *Paulino Tomás v. Portugal*, Judgment of 27 March 2003, Application No. 58698/00.

⁴⁴ ECtHR, *Doran v. Ireland*, Judgment of 31 October 2003, Application No. 50389/99, para. 65-66.

capable of being effective.⁴⁵ The Court, nevertheless, also acknowledges the necessity of compensating for proceedings that have already been excessively delayed.⁴⁶

It was also noted by the ECtHR that a follow-up action for damages may be rendered inadequate where it, too, takes an excessively long period of time. This period also comprises the enforcement stage of the proceedings, meaning the payment of any awarded compensation.⁴⁷ In order to meet the reasonable time requirement with respect to an action for compensation resulting from undue delay, the Court observed that a state may need to apply different procedural rules from those generally applicable in actions for damages, without prejudice to the guarantee of fairness as enshrined in Article 6 ECHR. Similarly, the rules governing legal costs may also necessitate diverging from those that would be normally applicable, as the aggrieved party is forced to initiate such proceedings in the interest of obtaining relief.⁴⁸

How does *Gascogne Sack Deutschland and Gascogne* stand up against the ECtHR standards? First, as the case represents the first concluded application for relief, there is no track-record proving that the remedy is effective in practice. Second, the General Court applied no special regime for legal costs to facilitate access of the litigants to the prescribed remedy. Third, the length of the remedial proceedings amounted to nearly two and a half years, mainly due to a procedural appeal of the CJEU that was later withdrawn. Although the ECtHR does not specify a time limit for compensatory actions, they should be dealt with expeditiously and certainly faster than ordinary cases.⁴⁹ This has not come true for *Gascogne*, as the average length of proceedings in 2015 at the General Court was 20.6 months, to which the approximately 29 months-long action for damages compares unfavourably.⁵⁰

Fourth and last, it remains to be answered whether the level of compensation awarded by the General Court was adequate. Presuming the General Court's assessment of material damage is correct, the question chiefly concerns non-pecuniary damage, which was assessed in a manner inspired by the ECtHR, but without acknowledging so.⁵¹ The ECtHR is mostly reticent about setting precise amounts necessary for the remedy to be sufficient. In elaborating the methodology to apply its own Article 41 ECHR on just satisfaction, the Strasbourg Court nevertheless stated that "a sum varying between EUR 1,000 and 1,500 per year's duration of the proceedings (and not per year's delay) is a base

⁴⁵ ECtHR, *Scordino v. Italy* (No. 1), Judgment of 29 March 2006, Application No. 36813/97, para. 183.

⁴⁶ Ibid, para. 185.

⁴⁷ Ibid, para. 195 and 197.

⁴⁸ Ibid, para. 200 and 201.

⁴⁹ ECtHR, *Vidas v. Croatia*, Judgment of 3 July 2008, Application No. 40383/04.

⁵⁰ While it is true that the lengthy delay when the proceedings were stayed came about as a result of the CJEU's appeal, the precedent-setting nature of the case is immaterial from the perspective of *Gascogne* whose rights have been breached.

⁵¹ See footnote 21 above and the paragraphs quoted.

figure for the relevant calculation” of non-pecuniary damage.⁵² This calculation has also been taken over by some domestic courts.⁵³ Assuming that the circumstances of the present case do not significantly alter the basic award,⁵⁴ the General Court’s compensation for non-material damage of € 5,000 per company would appear to fall within the margins of what the ECtHR would award, especially given that the compensation can be slightly lower if granted through the ‘domestic’ remedy.⁵⁵ The General Court has not, however, reflected in the amount of non-pecuniary damage the suboptimal performance of the remedy in light of points one to three of the preceding paragraph.

All in all, as with the impartiality of the proceedings, the effectiveness of the action for damages balances on the edge. A mitigating circumstance in the present case that the ECtHR would take into account in a hypothetical examination of the remedy is the ongoing reorganization and expansion of the General Court. This can be considered a preventive structural remedy that should limit further delays in proceedings.⁵⁶

In conclusion, the saga elaborated in this case note makes palpable the benefits of external judicial review, particularly due to the institutional constraints existing on the EU level. The ECtHR would be in a much better position than either of the EU courts to ensure that fundamental rights violations are not ultimately left without appropriate relief. As a consequence of the CJEU’s rejection of the EU’s draft accession agreement to the ECHR,⁵⁷ such external oversight is, unfortunately, still missing. The spotlight is therefore on the CJEU to showcase that it can maintain a high level of fundamental rights protection on its own. As the parties in *Gascogne*, as well as in the parallel case of *Kendrion*, have appealed the General Court’s judgment,⁵⁸ the CJEU appears to have its work cut out for itself.

⁵² ECtHR, *Apicella v. Italy*, Judgment of 10 November 2004, Application No. 64890/01, para. 26.

⁵³ See, for example, Cpn 206/2010, Decision of the Supreme Court of the Czech Republic, 13 April 2011.

⁵⁴ The basic award may be increased or decreased in view of the conduct of the applicant; number of courts involved; what is at stake; and the standard of living in the country. See ECtHR, *Apicella v. Italy*, para. 26.

⁵⁵ Ibid. The ECtHR puts a premium on when the damages are awarded on the domestic level as opposed to in Strasbourg. The compensation can be further reduced if the domestic court finds a violation of the applicant’s rights, which was the case with *Gascogne*.

⁵⁶ ECtHR, *Scordino v. Italy (No. 1)*, para 183.

⁵⁷ Opinion 2/13 of the Court, EU:C:2014:2454.

⁵⁸ See Case C-138/17 P *European Union v. Gascogne Sack Deutschland and Gascogne*; Case C-146/17 P *Gascogne Sack Deutschland and Gascogne v. European Union*; Case C-150/17 P *European Union v. Kendrion*.