Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 25 July 2018 [1]

Joined Cases C-138/17 P and C-146/17 P

European Union, represented by the Court of Justice of the European Union
v
Gascogne Sack Deutschland GmbH
Gascogne (C-138/17 P)
and
Gascogne Sack Deutschland GmbH
Gascogne
v

European Union, represented by the Court of Justice of the European Union (C-146/17 P)

(Appeal — Non-contractual liability — Reasonable duration of the proceedings — Obligation to adjudicate within a reasonable time — Material damage — Bank guarantee charges — Causal link — Non-material damage)

1. What are the types of damage that the European Union has, under Article 340 TFEU, to make good to individuals whose right to have their case adjudicated within a reasonable time was breached by the Court of Justice of the European Union? More particularly, under what circumstances should compensation for the damage allegedly caused by the excessive delay be awarded?

2. These are, in essence, the key issues raised by the appeals lodged by the European Union, represented by the Court of Justice of the European Union, [2] and by Gascogne Sack Deutschland GmbH and Gascogne against the judgment of the General Court of 10 January 2017, in Case T-577/14, *Gascogne Sack Deutschland and Gascogne* v *European Union* ('the judgment under appeal'), [3] in which the latter awarded those companies certain sums by way of compensation for the material and non-material damage sustained by them as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgments of 16 November 2011, *Groupe Gascogne* v *Commission*, T-72/06 [4] and *Sachsa Verpackung* v *Commission*, T-79/06. [5]

1 Original language: English.

2 Hereinafter for simplicity referred to as 'the European Union'.

3 EU:T:2017:1.

4 Not published, EU:T:2011:671.

5 Not published, EU:T:2011:674.

3. Largely similar issues are also raised by four other appeals — two lodged by the European Union, and two by other companies — against two judgments of the General Court in which that court awarded compensation for the material and non-material damage sustained by those companies as a result of the breach of the obligation to adjudicate within a reasonable time. In those proceedings too, I am delivering my Opinion today.[6] The present Opinion should thus be read together with those Opinions.

I. Background to the proceedings

4. By applications lodged on 23 February 2006, Sachsa Verpackung GmbH, now Gascogne Sack Deutschland GmbH, on the one hand, and Groupe Gascogne SA, now Gascogne, on the other hand, brought actions pursuant to (what is now) Article 263 TFEU against Commission Decision C(2005) 4634 of 30 November 2005 relating to a proceeding pursuant to Article [101 TFEU] (Case COMP/F/38.354 — Industrial bags) ('Decision C(2005) 4634').[7]

5. By judgments of 16 November 2011, the General Court dismissed those actions.[8] Gascogne Sack Deutschland and Gascogne brought appeals against the judgments of the General Court. The Court of Justice, by judgments of 26 November 2013,[9] dismissed the appeals. However, in its judgments, the Court of Justice found that 'the length of the proceedings before the General Court, which amounted to approximately 5 years and 9 months, [could not] be justified by any of the particular circumstances' of the case.[10]

II. Procedure before the General Court and the judgment under appeal

6. By application lodged on 4 August 2014, Gascogne Sack Deutschland and Gascogne brought an action pursuant to Article 268 TFEU against the European Union for compensation for the damage allegedly suffered as a result of the length of the proceedings before the General Court which led to the judgments of 16 November 2011 in Cases T-72/06 and T-79/06. In essence, Gascogne Sack Deutschland and Gascogne requested the General Court to order the European Union to pay the following sums: (i) EUR 1 193 467 for losses suffered as a result of paying beyond a reasonable period the additional legal interest applied to the nominal amount of the fine imposed by the Commission; (ii) EUR 187 571 for losses suffered as a result of making additional bank guarantee payments beyond a reasonable period; (iii) EUR 2 000 000 for profits lost or losses suffered as a result of 'the throes of uncertainty'; (iv) EUR 500 000 'at least' for the non-material damage suffered. Gascogne Sack Deutschland and Gascogne also requested that those amounts be increased by compensatory and default interest at the rate applied by the European Central Bank (ECB) to its main refinancing operations, increased by two percentage points, starting from the date when their application had been submitted.

7. By the judgment under appeal, the General Court ordered the European Union to pay EUR 47 064.33 to Gascogne by way of compensation for the material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the cases giving rise to the judgments of 16 November 2011 in Cases T-72/06 and T-79/06. The General Court also decided that that compensation was to be reassessed by applying compensatory interest, starting

6 Case *European Union* v *Kendrion*, C-150/17 P; and Joined Cases *European Union* v *ASPLA and Armando Álvarez*, and *ASPLA and Armando Álvarez* v *European Union*, C-174/17 P and C-222/17 P.

7 The cases mentioned in footnote 6 above also concern procedures started by other undertakings that were addressees of Decision C(2005) 4634.

8 Judgments of 16 November 2011, *Groupe Gascogne* v *Commission*, T-72/06, not published, EU:T:2011:671, and *Sachsa Verpackung* v *Commission*, T-79/06, not published, EU:T:2011:674.

9 Judgments of 26 November 2013, *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, EU:C:2013:768; and *Groupe Gascogne* v *Commission*, C-58/12 P, EU:C:2013:770.

10 See, respectively, paragraphs 97 and 91 of the judgments referred to in the previous footnote.

from 4 August 2014 and continuing up to the date of delivery of the judgment, at the annual rate of inflation determined, for the period in question, by Eurostat in the Member State where those companies are established. The General Court further ordered the European Union to pay compensation of EUR 5 000 each to Gascogne Sack Deutschland and Gascogne for the non-material damage those companies have suffered as a result of the breach of the obligation to adjudicate within a reasonable time. The compensatory sums for both material and non-material damage were to bear default interest, starting from the date of delivery of the judgment and continuing until full payment, at the rate set by the ECB for its principal refinancing operations, increased by two percentage points. The action was dismissed as to the remainder.

8. As regards costs, the General Court ordered: (i) the European Union to bear its own costs and also the costs incurred by Gascogne Sack Deutschland and Gascogne in connection with the objection of inadmissibility which gave rise to the order of 2 February 2015, *Gascogne Sack Deutschland and Gascogne* v *European Union*, T-577/14;[11] (ii) Gascogne Sack Deutschland and Gascogne, on the one hand, and the European Union, on the other hand, to bear their own costs in connection with the action giving rise to the judgment; and (iii) the European Commission to bear its own costs.

III. Procedure before the Court and forms of order sought

9. By appeal lodged on 17 March 2017, the European Union claims that the Court of Justice should:

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

– dismiss as unfounded Gascogne Sack Deutschland and Gascogne's claim at first instance, seeking a sum of EUR 187 571 for losses allegedly suffered as a result of making additional bank guarantee payments beyond a reasonable period;

– order Gascogne Sack Deutschland and Gascogne to pay the costs.

10. Gascogne Sack Deutschland and Gascogne, for their part, contend that the Court of Justice should:

– dismiss the appeal;

– order the European Union to pay the costs.

11. By appeal lodged on 22 March 2017, Gascogne Sack Deutschland and Gascogne claim that the Court of Justice should:

– set aside in part the judgment under appeal, by which the General Court, whilst recognising the infringement of the right to adjudication within a reasonable period in the cases which gave rise to the judgments of 16 November 2011 in Cases T-72/06 and T-79/06 and the existence of material and non-material damage sustained by the applicants as a result of the infringement of the 'reasonable period' obligation, ordered the European Union to pay inadequate and incomplete compensation for the harm suffered;

– give final judgment on the financial compensation for material and non-material damage sustained by the appellants in the exercise of its unlimited jurisdiction, in accordance with their requests at first instance;

– order the European Union to pay the costs of the proceedings.

11 Not published, EU:T:2015:80.

12. The European Union, for its part, contends that the Court of Justice should:

– dismiss the appeal;

– order Gascogne Sack Deutschland and Gascogne to pay the costs.

13. In the proceedings in Case C-138/17 P, the European Commission was admitted to intervene in support of the form of order sought by the European Union.

14. By decision of the President of the First Chamber of 17 April 2018, Cases C-138/17 P and C-146/17 P were joined for the purposes of the Opinion and the judgment.

IV. Assessment of the grounds of appeal

A. Preliminary remarks

15. In its application in Case C-138/17 P, the European Union puts forward three grounds of appeal. By its first and second grounds of appeal, the European Union claims that the General Court erred in law by misinterpreting the respective notions of 'causal link' and 'damage'. By its third ground of appeal, the European Union claims that the General Court erred in law and failed to provide sufficient reasons when determining the period during which the material damage was sustained. The Commission essentially agrees with the European Union.

16. Gascogne Sack Deutschland and Gascogne claim that the appeal of the European Union should be dismissed as partly inadmissible (second ground of appeal) and partly unfounded (first and third grounds of appeal).

17. In its application in Case C-146/17 P, Gascogne Sack Deutschland and Gascogne put forward seven grounds of appeal. By their first ground of appeal, they allege that the General Court erroneously applied the concept of '*non ultra petita*' when it refused to grant reparation for the material damage sustained before 30 May 2011. By their second ground of appeal, Gascogne Sack Deutschland and Gascogne allege that the judgment under appeal is vitiated by contradictory reasoning with regard to: (i) the calculation of the period of time by which the reasonable duration of the proceedings was exceeded, and (ii) the period for which the compensation for material damage was awarded. By their third ground of appeal, Gascogne Sack Deutschland and Gascogne submit that, in resorting to a method of calculation of the material damage that differed from the one proposed by them, the General Court breached their rights of defence. Gascogne Sack Deutschland and Gascogne's fourth, fifth, sixth and seventh grounds of appeal are all directed at the General Court's findings concerning the alleged non-material damage. In essence, they maintain that the General Court erred in law in dismissing their request to be awarded compensation of EUR 500 000 'at least' on the ground that such compensation would, if awarded, have the effect of reopening the question of the amount of the fine imposed on Gascogne Sack Deutschland and Gascogne by Decision C(2005) 4634. They also criticise the judgment under appeal for not providing proper reasoning as regards the award of the compensation of EUR 5 000 for the non-material damage.

18. The European Union, for its part, contends that Gascogne Sack Deutschland and Gascogne's grounds of appeal are either unfounded (first, second, third and part of the seventh ground) or ineffective (fourth, fifth, sixth and part of the seventh ground).

19. In the present Opinion, I shall examine first the grounds of appeal that concern material damage and, subsequently, those that concern non-material damage.

B. Material damage

20. The three grounds of appeal put forward by the European Union in Case C-138/17 P, as well as the first, second and third grounds of appeal put forward by Gascogne Sack Deutschland and Gascogne in case C-146/17 P, all concern the General Court's findings with regard to the material damage allegedly suffered by Gascogne Sack Deutschland and Gascogne. In particular, both parties contend that the General Court erred in law in examining Gascogne Sack Deutschland and Gascogne's claims in relation to the damage resulting from the costs relating to the bank guarantee which those companies provided to the Commission to avoid an immediate settlement of the fine imposed by Decision C(2005) 4634.

21. I consider it appropriate to begin my legal analysis on these issues by examining the claims concerning the bank guarantee charges paid by Gascogne. To that end, I will start with the *first* ground of appeal put forward by the European Union. I will subsequently deal, only for the sake of completeness, with the European Union's *second* ground of appeal. After that, there will be no need to examine the remaining grounds of appeal, put forward by the European Union and by Gascogne Sack Deutschland and Gascogne, concerning the bank guarantee charges.

1. Existence of a causal link

22. By its first ground of appeal in Case C-138/17 P, the European Union, supported by the European Commission, takes issue with the General Court's interpretation and application of the concept of 'causal link'. In essence, the European Union contends that there is no direct causal link between the breach by the General Court of the obligation to give judgment within a reasonable time in Cases T-72/06 and T-79/06 and Gascogne's damage arising from the payment of the bank guarantee charges. In particular, the European Union emphasises that that damage was the outcome of a choice made by Gascogne to maintain the operation of the bank guarantee throughout the proceedings, instead of paying the fine imposed by the Commission.

23. For their part, Gascogne Sack Deutschland and Gascogne defend, on this point, the judgment under appeal: in particular, they take the view that the General Court has rightly distinguished the present case from other cases previously examined by the EU Courts. Gascogne Sack Deutschland and Gascogne also maintain that the European Union's arguments constitute an 'abuse of procedure' and essentially call into question the Court of Justice's findings in its judgments of 26 November 2013, *Gascogne Sack Deutschland* v *Commission*, C-40/12 P, and *Groupe Gascogne* v *Commission*, C-58/12 P.

24. In the following, I shall start by briefly illustrating the reasoning followed by the General Court and then explain why, in my opinion, the European Union's first ground of appeal is well founded.

25. In paragraphs 79 and 80 of the judgment under appeal, the General Court recalled the settled case-law, according to which the damage for which compensation is sought in an action to establish non-contractual liability on the part of the European Union must be actual and certain, which is for the applicant to prove. It falls also to the applicant to adduce proof of the existence of a causal link — that is, of a sufficiently direct nexus — between the conduct complained of and the damage alleged.

26. In paragraphs 111 and 114 to 116 of the judgment under appeal, the General Court observed that, had the duration of the proceedings in Cases T-72/06 and T-79/06 not exceeded the reasonable time for adjudication, Gascogne would not have had to pay any bank guarantee charges during the period of the overrun. That meant, in its view, that there was a causal link between the breach of the obligation to adjudicate within a reasonable time and the occurrence of the damage suffered by Gascogne as a result of its having paid bank guarantee charges during the period of the overrun.

27. Referring to previous case-law ('the *Holcim* case-law'),[12] the General Court recognised — in paragraph 118 of the judgment under appeal — that, in principle, the bank guarantee charges incurred by a company penalised by a Commission decision are the consequence of that company's own decision to provide a bank guarantee so as not to comply with the obligation to pay the fine within the period stipulated in the contested decision. Thus, that cost cannot normally be regarded as being a *direct* consequence of the institution's behaviour.

28. However, the General Court then went on — in paragraphs 119 to 121 of the judgment under appeal — to distinguish the case at hand from those that gave rise to the *Holcim* case-law. The General Court took the view that, at the time when Gascogne Sack Deutschland and Gascogne brought their actions in Cases T-72/06 and T-79/06, and at the time when Gascogne provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable, and Gascogne Sack Deutschland and Gascogne could legitimately expect their actions to be dealt with within a reasonable time. The General Court also observed that the reasonable time for adjudicating in Cases T-72/06 and T-79/06 was exceeded after the Gascogne's initial decision to provide a bank guarantee. For those reasons, it held that the link between the fact that the reasonable time for adjudicating in Cases T-72/06 and T-79/06 was exceeded and the payment of bank guarantee charges during the period of the overrun could not be considered severed by Gascogne's initial decision not to effect immediate payment of the fine and to provide a bank guarantee. It thus concluded, in paragraph 122 of the judgment, that the causal link was sufficiently direct for the purposes of Article 340 TFEU.

29. The reasoning followed by the General Court is, in my view, erroneous. In essence, the General Court accepts the authority devolving from the *Holcim* case-law but then goes on to distinguish the present case from those which were the object of that case-law. Like the General Court, I believe that the *Holcim* case-law is sound but, unlike the General Court, I do not consider the present case to be substantially different from the cases giving rise to the judgment in Holcim: to my mind, neither of the two grounds given by the General Court for that distinction is, either taken alone or in combination, convincing.

30. Before explaining in detail why I am of that view, I would like to emphasise that, according to well-established case-law, Article 340 TFEU cannot be interpreted as requiring the European Union to make good every harmful consequence, even a remote one, of conduct of its institutions.[13] Accordingly, in an action for non-contractual liability of the Union it is not enough that the conduct complained of is one of the causes of the alleged damage; that conduct has to be the *determining* cause of the damage.[14] In other words, a sufficient nexus exists only where the damage is the direct consequence of the unlawful act of the institution responsible and it does not depend on the intervention of other causes, whether positive or negative.[15]

12 See judgment of 21 April 2005, *Holcim (Deutschland)* v *Commission*, T-28/03, EU:T:2005:139, paragraph 123, and order of 12 December 2007, *Atlantic Container Line and Others* v *Commission*, T-113/04, not published, EU:T:2007:377, paragraph 38. I would point out that, so far, the Court of Justice has not had an opportunity to endorse this line of case-law.

13 To that effect, see judgment of 4 October 1979, *Dumortier and Others* v *Council*, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 21. More recently, see order of 31 March 2011, *Mauerhofer* v *Commission*, C-433/10 P, not published, EU:C:2011:204, paragraph 127 and the case-law cited.

14 See order of 31 March 2011, *Mauerhofer* v *Commission*, C-433/10 P, not published, EU:C:2011:204, paragraph 127 and the case-law cited.

15 See, to that effect, Opinion of Advocate General Trabucchi in *Compagnie continentale France* v *Council*, 169/73, EU:C:1974:32, point 4.

(a) The foreseeability of the unlawful conduct

31. The first ground given by the General Court for distinguishing the present case from those which gave rise to the *Holcim* case-law is that, at the time when Gascogne Sack Deutschland and Gascogne brought their actions in Cases T-72/06 and T-79/06, and at the time when Gascogne provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time by the General Court was *unforeseeable*.

32. However, that statement is in the first place inaccurate. Unfortunately, a certain number of cases that had been decided by the General Court shortly before the actions in Cases T-72/06 and T-79/06 were lodged had been of a significant duration.[16] That is especially true of cases concerning the application of EU competition rules, and in particular cartels,[17] which are notoriously complex and time-consuming and may require a parallel or coordinated handling of several cases at the same time.

33. True, Gascogne Sack Deutschland and Gascogne, as any other applicant, could expect their cases to be decided within a reasonable time. However, in the light of the General Court's practice and judicial record at the material time, it was a rather uncertain and difficult exercise to calculate the likely duration of the proceedings in order to estimate the potential total cost of the bank guarantee.

34. In the second place, and more importantly, regardless of whether the excessive delay in Cases T-72/06 and T-79/06 was foreseeable, the General Court erred in using the concept of 'foreseeability' in order to establish the existence of a sufficient causal nexus triggering the European Union's liability.

35. The key question, in the case at hand, is not whether the victim of the alleged damage was able to anticipate the unlawful event that produced the alleged damage. What is crucial in order to establish the non-contractual liability of the European Union in the present case is, first and foremost, whether the alleged damage is a *direct* consequence of the institution's unlawful behaviour.

36. That is a point which the General Court failed to examine in detail. It seems to me that, in the context of that examination, the potential unforeseeability of the excessive delay could have only been relevant in two circumstances. However, neither of those circumstances applies in the present case.

37. On the one hand, that element could have been relevant if Gascogne Sack Deutschland and Gascogne had been unable, subsequently, to reverse their initial decision to defer payment and submit a bank guarantee. Yet, as it will be shown in points 48 to 52 below, that is not the case: at any time in the course of the judicial proceedings, Gascogne Sack Deutschland and Gascogne were at liberty to settle the fine and withdraw the bank guarantee. Thus, even if unforeseeable at first, Gascogne Sack Deutschland and Gascogne could have adapted their conduct in the light of that new event.

38. On the other hand, the potential unforeseeability of the excessive delay could also have been relevant if the European Union had argued, before the General Court, that Gascogne Sack Deutschland and Gascogne failed to show reasonable diligence in avoiding or limiting the extent of the damage that might have ensued from their choice of deferring the settlement of the fine until the end of the judicial proceedings.

16 See, for example, judgments of 13 January 2004, *Thermenhotel Stoiser Franz and Others* v Commission, T-158/99, EU:T:2004:2; of 11 May 2005, *Saxonia Edelmetalle* v *Commission*, T-111/01 and T-133/01, EU:T:2005:166; of 19 October 2005, *Freistaat Thüringen* v *Commission*, T-318/00, EU:T:2005:363; and of 14 December 2005, *Laboratoire du Bain* v *Council and Commission*, T-151/00, not published, EU:T:2005:450.

17 See, among others, judgments of 11 December 2003, *Marlines* v *Commission*, T-56/99, EU:T:2003:333; of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T-44/00, EU:T:2004:218; of 14 December 2005, *Honeywell* v *Commission*, T-209/01, EU:T:2005:455; and of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74.

39. In that regard, it must be borne in mind that, according to settled case-law, in an action for non-contractual liability, it must be verified whether, at the risk of having to bear the damage himself, the person adversely affected had demonstrated, as a prudent person, reasonable diligence in avoiding or limiting the extent of the damage. The causal link may be broken by negligence on the part of the person adversely affected, where that negligence proves to be the determinant cause of the damage. [18]

40. That is not, however, why the General Court referred to that element in the judgment under appeal. The General Court did not use the criterion of foreseeability to examine whether Gascogne Sack Deutschland and Gascogne's negligence had broken the causal link between the alleged damage and the EU institution's conduct complained of; instead it applied that concept in order to establish the existence of such a link as a first step.

41. Nevertheless, the potential unforeseeability of the event giving rise to the alleged damage says nothing about the *determining factor* of the alleged damage. Even assuming that the excessive delay was unforeseeable, that fact is neither necessary nor sufficient to trigger the European Union's liability.

42. In the light of the above, I take the view that, in the judgment under appeal, the General Court wrongly interpreted and applied the concept of 'foreseeability' for the purposes of Article 340 TFEU in order to establish the existence of a causal link between the alleged damage and the conduct complained of.

(b) Gascogne Sack Deutschland and Gascogne's lack of choice

43. The second ground given by the General Court for distinguishing the present case from those which gave rise to the *Holcim* line of case-law is that the reasonable time for adjudicating in Cases T-72/06 and T-79/06 was exceeded *after* Gascogne Sack Deutschland and Gascogne's decision to provide a bank guarantee.

44. That element too is, in my view, irrelevant.

45. At the outset, it should be borne in mind that a Commission decision, such as Decision C(2005) 4634, is legally binding and presumed valid until annulled by the EU Courts. Should an undertaking penalised by a fine imposed by the Commission consider that the Commission decision is unlawful and that immediate compliance with it may provoke irreparable harm, it is open to that undertaking to lodge a request for interim measures before the EU Courts under Articles 278 and 279 TFEU while challenging the validity of the decision.

46. If no such a request is lodged, or if such a request is dismissed by the EU Courts, a fine must be paid, as a rule, within the period stipulated in the decision. That said, the EU budgetary rules [19] permit the Commission to accept that the payment of a fine be deferred, provided that the debtor undertakes to pay the interest on late payment and lodges a financial guarantee covering the debt outstanding in both the principal sum and the interest.

18 See, for example, judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 61. That principle is, as the Court has consistently held, a general principle common to the legal systems of the Member States: see, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 85 and the case-law cited.

19 Article 85 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1). That regulation, applicable at the material time, has now been replaced by Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1).

47. Thus, the choice is offered to the undertakings intending to challenge a fine before the EU Courts to opt either for an immediate settlement (the rule) or to request the possibility of submitting a bank guarantee (the exception). The choice of the undertaking must be *financially neutral* for the Union: a deferral of the payment may not lead to a loss for the Union's budget. The accounting officer who, in collaboration with the authorising officer responsible, takes a decision on the request of the undertaking to defer the payment does not have the power to alter the value of the fine that was decided by the Commission as institution (that is, by the college of Commissioners). At the same time, the decision of an undertaking to immediately settle the fine, despite its intention to challenge the Commission decision before the EU Courts, should not lead to an unjust enrichment of the European Union. This is why, on the one hand, if the EU Courts uphold the Commission decision, the fine whose payment has been deferred becomes payable with interest. On the other hand, the annulment of the contested Commission decision gives rise to an obligation of the Union to repay the sums paid, increased by the applicable interest rate.[20]

48. The decision to defer payment of a fine evidently allows the undertaking to continue using the corresponding sums while the judicial proceedings are pending. However, it also implies some extra costs (those associated with the submission of the bank guarantee) that the undertaking must accept to bear, including where it ultimately obtains the annulment of the challenged decision. It is, therefore, for each undertaking fined by the Commission to assess whether it is financially in its interest to settle the fine within the prescribed period, or to request a deferral of the payment and provide a bank guarantee.

49. Importantly, unlike what the General Court implies, that is not a choice that may only be made once. Any undertaking having chosen to submit a guarantee may always reverse its original decision and proceed to the payment of the fine.[21] By doing that, it avoids the accrual of additional interest on the principal and it may withdraw the bank guarantee previously provided.

50. Nothing prevents, as a matter of EU law, an undertaking from terminating the bank guarantee and settling the fine, when that undertaking deems that course of action to be more advantageous. It may thus be assumed that, if at no point in time in the course of the proceedings an undertaking revisits its initial choice, that is because that undertaking finds the continuous operation of the bank guarantee to still be in its best interest. Indeed, whether the initial decision continues to be advantageous subsequently depends on multiple factors that — as the Commission points out — may significantly vary over time (the cost of borrowing money, the fees applied by the bank for the guarantee, the return that the sum due generates when invested in other businesses, and so forth). From an economic perspective, it is thus reasonable to presume that an undertaking may regularly reconsider its initial decision.

51. Therefore, as correctly argued by the European Union, the choice of providing a bank guarantee instead of settling the fine imposed by the Commission was not made only at the beginning of the procedure: that choice was freely and consciously *maintained* (or *confirmed*) by Gascogne Sack Deutschland and Gascogne during the entire period that the judicial proceedings in Cases T-72/06 and T-79/06 lasted, including when those proceedings had become of a significant duration.

52. The above is confirmed, to some extent, by Gascogne Sack Deutschland and Gascogne. In their statement of defence, they acknowledge that they were aware that, at any time during the proceedings, they could have settled the fine and withdrawn the bank guarantee.

20 See, to that effect, judgment of 12 February 2015, *Commission v IPK International*, C-336/13 P, EU:C:2015:83. Regarding the type and amount of interest to be repaid by the Commission to a company that had paid a fine to comply with a decision adopted under Article 101 TFEU subsequently annulled by the EU Courts, see Case T-201/17, *Printeos v Commission*, pending.

21 See, for example, judgment of 12 May 2016, *Trioplast Industrier* v *Commission*, T-669/14, not published, EU:T:2016:285, paragraph 103.

53. Concluding on this point, the General Court's second reason for distinguishing the present case from those that gave rise to the *Holcim* case-law is thus based on an erroneous premiss: that the only decision that mattered in the case at hand was Gascogne Sack Deutschland and Gascogne's initial decision to defer payment and provide a bank guarantee before the beginning of the proceedings.

54. The erroneous nature of that premiss is also indirectly confirmed by the judgment under appeal.

(c) The contradiction in the judgment under appeal

55. In paragraph 130 of the judgment under appeal, the General Court found that no sufficiently direct causal link existed with regard to the cost of the bank guarantee borne *after* the delivery of the judgments in Cases T-72/06 and T-79/06. The General Court considered the payment of such charges to be the consequence of the personal and independent decision which Gascogne Sack Deutschland and Gascogne took, after the delivery of that judgment, not to pay the fine, not to request suspension of the operation of Decision C(2005) 4634, and to bring an appeal against the aforementioned judgment. That being so, it is not clear to me why the decision to maintain the bank guarantee was, in the General Court's view, decisive to exclude the liability of the European Union *after* the delivery of the judgment but not *before*.

56. As the European Union argued, there seems to be no meaningful difference between those periods that may be relevant under Article 340 TFEU. Also during the first instance proceedings Gascogne Sack Deutschland and Gascogne consciously chose not to request suspension of the contested decision and to continue the operation of the bank guarantee until those proceedings were ended. Paragraph 130 of the judgment under appeal thus confirms that the elements which the General Court considered relevant in paragraphs 119 to 121 of the same judgment for distinguishing the case at hand from the *Holcim* case-law are immaterial.

(d) Interim conclusion

57. As an interim conclusion, it cannot be disputed that the fact that Gascogne Sack Deutschland and Gascogne had to bear the costs relating to the bank guarantee provided to the Commission in the period of the overrun is a *consequence*, among others, of the General Court's inability to deliver its decision within a reasonable time.

58. However, that was not the *determining* cause of the alleged damage. The decisive factor was Gascogne Sack Deutschland and Gascogne's decision to continue benefiting from an exception that they had requested from their obligation to pay a fine that was due, in full awareness of the costs and risks their choice entailed. Accordingly, the principles stemming from the *Holcim* case-law are applicable in the case at hand.

59. For all those reasons, I take the view that the General Court erred in its interpretation and application of the concept of 'causal link' for the purposes of Article 340 TFEU. To my mind, there is no sufficiently direct causal link between the breach by the General Court, in Cases T-72/06 and T-79/06, of the duty to give judgment within a reasonable time and Gascogne Sack Deutschland and Gascogne's alleged damage arising from the payment of the bank guarantee charges in the period of the overrun.

60. That conclusion is by no means calling into question the Court of Justice's findings in its judgments of 26 November 2013, *Gascogne Sack Deutschland* v *Commission* (C-40/12 P), and *Groupe Gascogne* v *Commission* (C-58/12 P). Contrary to what is argued by Gascogne Sack Deutschland and Gascogne, in those judgments the Court of Justice only ruled on the existence of a breach, by the General Court, of the obligation to adjudicate within reasonable time in Cases T-72/06 and T-79/06. It did not, however, rule on the existence of any damage deriving from that breach. The Court of

Justice, in fact, pointed out that it was 'for the General Court to assess both the actual existence of the harm alleged and the causal connection between that harm and the excessive length of the legal proceedings in dispute by examining the evidence submitted for that purpose'. [22]

61. Lastly, by bringing an appeal before the Court of Justice against the General Court's findings on the existence of material damage to be compensated, the European Union is not committing any 'abuse of procedure', as contended by Gascogne Sack Deutschland and Gascogne. As I have explained in detail in points 19 to 36 of my Opinion in *Kendrion*, the fact that the European Union is, in these proceedings, represented by the Court of Justice of the European Union does not give rise to a conflict of interest. Gascogne Sack Deutschland and Gascogne's argument disregards the distinction that is to be made between the Court of Justice of the European Union as institution, and the judicial bodies that are part of that institution (currently, the Court of Justice and the General Court). [23] The Court of Justice, as judicial body hearing the appeal, fulfils the criteria of objective and subjective impartiality required under Article 47 of the Charter of Fundamental Rights of the European Union.

62. In the light of that, the judgment under appeal must be set aside in so far as it ordered the European Union to pay EUR 47 064.33 to Gascogne by way of compensation for the material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the cases which gave rise to the judgments of 16 November 2011, *Groupe Gascogne* v *Commission* (T-72/06, not published, EU:T:2011:671), and *Sachsa Verpackung* v *Commission* (T-79/06, not published, EU:T:2011:674).

63. This means that, if the Court of Justice agrees with me on this point, there would be no need to examine the *second* and *third* grounds of appeal put forward by the European Union in Case C-138/17 P, and the *first*, *second* and *third* grounds of appeal put forward by Gascogne Sack Deutschland and Gascogne in Case C-146/17 P. Nonetheless, because of the importance for future cases of the issue raised, I believe it may be helpful to deal, only for the sake of completeness, with the *second* ground of appeal put forward by the European Union.

2. Concept of 'damage'

64. By its second ground of appeal, the European Union, supported by the Commission, claims that the General Court misinterpreted the concept of 'damage'. In its view, the first instance court should have examined whether, in the period of the overrun, the bank guarantee charges paid by Gascogne were greater than the advantage conferred on it by possession of a sum equal to the amount of the fine. For their part, Gascogne Sack Deutschland and Gascogne ask the Court of Justice to dismiss this ground of appeal as inadmissible because it introduces new arguments at the appeal stage. Alternatively, they consider the European Union's second ground of appeal unfounded, since there is no relationship between the advantages possibly enjoyed and the losses suffered by them in the period of the overrun.

65. It seems to me that this ground of appeal is admissible and well founded.

66. To begin with, I find Gascogne Sack Deutschland and Gascogne's objections as to the admissibility of this ground of appeal unpersuasive. According to settled case-law, an appellant is entitled to lodge an appeal relying, before the Court of Justice, on pleas arising from the judgment under appeal itself which seek to criticise, in law, its merits. [24]

22 Paragraph 88 in Case C-58/12 P, and paragraph 94 in Case C-40/12 P.

23 See Articles 13(1) and 19(1) TEU.

24 See, to that effect, judgment of 28 February 2018, *Commission* v *Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 90 and the case-law cited.

67. The present ground of appeal is directed against paragraphs 111 to 131 of the judgment under appeal in which, in the European Union's view, the General Court misinterpreted the concept of 'damage' for the purposes of Articles 268 and 340 TFEU. In particular, the European Union considers the judgment to be contradictory as it applies, when considering whether the alleged loss consisting in the payment of the bank guarantee charges is to be considered 'damage' under the provisions of the FEU Treaty, a legal test different from that applied when examining the alleged loss consisting in the payment of interest on the amount of the fine.

68. Next, I find the European Union's criticism of the judgment under appeal on this matter convincing. Indeed, I take the view that the General Court erred in law when, without any specific explanation or further inquiry, in paragraphs 111 and 114 of the judgment under appeal, it equated the *costs* of the bank guarantee in the period of the overrun with *damage* to be compensated under Article 340 TFEU.

69. The two concepts should be kept distinct.

70. An act or omission of an EU institution may have various consequences for the financial situation of undertakings like Gascogne Sack Deutschland and Gascogne. It may give rise to certain costs for an undertaking but, at the same time, it may result in certain gains for that undertaking. There is 'damage', within the meaning of Article 340 TFEU, only where the net difference between costs and gains is negative.[25] In other words, there must be an *overall loss* stemming from the conduct complained of. Otherwise, there would be the paradoxical situation in which, despite having financially benefited from the conduct of an EU institution, an undertaking would also be entitled to claim additional sums from the Union.

71. As explained in points 48 and 50 above, the decision of an undertaking to defer payment and provide a bank guarantee, on the one hand, gives rise to certain costs but, on the other hand, it also allows that undertaking to use, for a period of time, a sum which may generate gains. These various effects are not unrelated, as wrongly argued by Gascogne Sack Deutschland and Gascogne, but they are inextricably linked: they are the two sides of the same coin.

72. Economically, the choice to defer payment of a fine essentially constitutes a form of financing for the undertaking concerned: until the end of the judicial proceedings, that undertaking practically borrows the money owed to the Union from the Union itself. The overall cost of the financing is, put simply, the sum of the bank guarantee charges plus, should the undertaking lose in the judicial proceedings, the interests eventually due on the principal. However, the judgment under appeal focuses only on the costs borne by Gascogne Sack Deutschland and Gascogne, and says nothing about the possible gains or savings made by those companies thanks to the deferral of the payment.

73. To my mind, that is an error committed by the General Court. As mentioned in point 50 above, an undertaking is presumed to act, at all times, in the manner that it considers rational from an economic and financial perspective. Therefore, it may be reasonable to presume that, for the whole duration of the judicial proceedings in Cases T-72/06 and T-79/06, Gascogne Sack Deutschland and Gascogne found it more advantageous to continue borrowing from the Union the sum corresponding to the amount of the fine due, rather than to use their own liquidity or to borrow that amount from credit institutions.

25 See, to that effect, judgment of 19 May 1992, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:1992:217, paragraph 26 et seq.

74. If that is so, it cannot be ruled out that the excessive delay in the adjudication of Cases T-72/06 and T-79/06 not only did not cause a loss for Gascogne Sack Deutschland and Gascogne, but it even gave rise to a financial advantage for those companies. Yet, that is not something that may be ascertained on the basis of the judgment under appeal since the General Court considered, without any further inquiry, that the bank guarantee charges in the period of the overrun corresponded to the damage suffered by Gascogne during that time.

75. Finally, I would add that, on this point too, the judgment under appeal appears contradictory. Indeed, as regards another form of alleged damage (the payment of the interest on the amount of the fine) the General Court held that Gascogne Sack Deutschland and Gascogne had adduced no evidence to show that, during the period of the overrun, 'the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on them by possession of the sum equal to the amount of the fine plus default interest'. [26]

76. It is difficult to understand why the General Court failed to apply a similar standard with regard to the alleged damage consisting in the payment of the bank guarantee charges relating to the same period.

77. In conclusion, the *second* ground of appeal put forward by the European Union is also well founded. As mentioned in point 62 above, therefore, point 1 of the operative part of the judgment under appeal must be annulled. There is, consequently, no need to examine the third ground of appeal put forward by the European Union in Case C-138/17 P, and the first, second and third grounds of appeal put forward by Gascogne Sack Deutschland and Gascogne in Case C-146/17 P.

C. Non-material damage

78. The *fourth*, *fifth*, *sixth* and *seventh* grounds of appeal relied on by Gascogne Sack Deutschland and Gascogne in Case C-146/17 P are all directed against paragraphs 151 to 165 of the judgment under appeal in which the General Court awarded compensation of EUR 5 000 each to Gascogne Sack Deutschland and Gascogne for the non-material damage suffered as a result of the breach of the obligation to adjudicate within a reasonable time in Cases T-72/06 and T-79/06. Gascogne Sack Deutschland and Gascogne submit that the General Court committed various errors in law and request that the Court of Justice award them a higher amount, in conformity with their request at first instance.

79. The four grounds of appeal regarding non-material damage will be examined together in the following. For the reasons given below, I agree with the European Union that the arguments put forward by Gascogne Sack Deutschland and Gascogne are either ineffective or unfounded.

1. The concept of non-material damage and the independence of the action for non-contractual liability

80. First, Gascogne Sack Deutschland and Gascogne criticise the General Court for holding, in paragraphs 161 to 163 of the judgment under appeal, that the amount of compensation for non-material damage sought by them (EUR 500 000 'at least'), because of its amount, would have had the effect of reopening the question of the amount of the fine imposed on them by Decision C(2005) 4634, even though it had not been established that the failure to adjudicate within a reasonable time in Cases T-72/06 and T-79/06 had any bearing on the amount of that fine. Second,

26 Paragraph 108 of the judgment under appeal.

Gascogne Sack Deutschland and Gascogne contend that the General Court's statements in points 161 to 163 of the judgment under appeal also deprive Articles 256 and 340 TFEU of effectiveness. The General Court is essentially refusing to award compensation for all the damage suffered, thereby breaching their right to an effective remedy.

81. These arguments are based, to my mind, on a misreading of the judgment under appeal. They are, in fact, either ineffective or unfounded.

82. At the outset, it may be useful to clearly define what is to be considered, in my view, 'non-material' damage for the purposes of the FEU Treaty. In that regard, it must be borne in mind that compensation under Article 340 TFEU aims at restoring, as far as possible, the assets of the victim as they were before the unlawful conduct of the EU institution.[27] Therefore, pecuniary losses which are a direct consequence of that conduct are normally to be compensated through the payment of a sum equal to those losses.

83. However, that is impossible for losses which are non-pecuniary, or non-material.[28] In most legal systems, the concept of 'non-material' damage refers to types of damage that are intangible and that cannot be easily given an economic value since there is, strictly speaking, no market value for them. Typical examples of such damage include pain and suffering, emotional distress, impairment of life or of relationships. In essence, it covers different forms of physical and/or psychological harm.

84. In all those situations, the status quo ante manifestly cannot be re-established. Hence, any type of compensation that the courts may award will always and inevitably be 'second best'. That is why the payment of an amount of money may or may not, depending on the circumstances, be the most appropriate form of compensation.[29] Indeed, the EU Courts have, in certain cases, found that *symbolic* monetary compensation[30] sufficed, or that *compensation in kind* may be granted.[31] In other cases, the EU Courts did not order any specific form of compensation, since they considered that the annulment of the wrongful act,[32] or the mere recording in the judgment of the unlawful event,[33] might constitute satisfactory compensation for the purposes of Article 340 TFEU.[34]

85. If pecuniary (and non-symbolic) compensation is considered the most appropriate form of reparation in a given case, it is not an easy task to quantify the sum to be awarded. The court having jurisdiction in such a case must estimate an amount that adequately reflects the injury suffered by the victim, without unduly punishing the author of the unlawful conduct. In the absence of obvious or generally-accepted economic benchmarks, courts may only find guidance in general principles such as, for instance, fairness, justice and proportionality on the one hand, and predictability, legal certainty and equal treatment on the other.

86. It is thus unavoidable that, to determine the existence of non-material damage, to identify the best means to adequately compensate it and, where appropriate, to calculate the sum to be awarded, courts will enjoy significant leeway.

27 See, to that effect, Opinion of Advocate General Capotorti in *Ireks-Arkady* v *EEC*, 238/78, EU:C:1979:203, p. 2983.

28 The two terms are often used interchangeably.

29 Cf. judgment of 7 February 1990, *Culin* v *Commission*, C-343/87, EU:C:1990:49, paragraphs 26 to 29.

30 Judgment of 14 June 1979, *V.* v *Commission*, 18/78, EU:C:1979:154, paragraph 19.

31 Judgment of 10 May 2006, *Galileo International Technology and Others* v *Commission*, T-279/03, EU:T:2006:121, paragraph 63.

32 See, among others, judgment of 11 July 2007, *Sison* v *Council*, T-47/03, EU:T:2007:207, not published, paragraph 241 and the case-law cited.

33 See, among others, judgments of 9 July 1981, *Krecké* v *Commission*, 59/80 and 129/80, EU:C:1981:170, paragraph 74, and of 9 July 1987, *Hochbaum and Rawes* v *Commission*, 44/85, 77/85, 294/85 and 295/85, EU:C:1987:348, paragraph 22.

34 It may be worth noting, in this context, that the ECtHR too has, in some cases, considered declaratory judgments and symbolic awards to constitute 'just satisfaction' within the meaning of Article 41 of the European Convention on Human Rights. See, among others, judgments of the ECtHR, 21 February 1975, *Golder v. the United Kingdom*, CE:ECHR:1975:0221JUD000445170, § 50; 23 November 1976, *Engel and Others v. the Netherlands*, CE:ECHR:1976:1123JUD000510071, §§ 10 and 11; 17 October 2002, *Agga v. Greece*, CE:ECHR:2002:1017JUD005077699, §§ 65 and 66; 30 November 2004, *Vaney v. France*, CE:ECHR:2004:1130JUD005394600, §§ 55 to 57.

87. Against that background, the reading of paragraphs 161 to 163 of the judgment under appeal made by Gascogne Sack Deutschland and Gascogne is unconvincing. Those paragraphs must be read in their proper context.

88. In paragraphs 144 to 154 of the judgment under appeal, the General Court analysed the different heads of non-material damage alleged by Gascogne Sack Deutschland and Gascogne and found some of those not admissible or at any rate not established,[35] and some possibly compensated by the mere recording, in the judgment under appeal, of the breach that had been committed by the General Court in Cases T-72/06 and T-79/06.[36] Therefore, only one head of non-material damage was found to have been established to the requisite legal standard and to require non-symbolic financial compensation: the damage deriving from the prolonged state of uncertainty in which Gascogne Sack Deutschland and Gascogne were placed because of the excessive duration of the judicial proceedings.[37]

89. In the light of that, and taking the view that there was no other evidence which could substantiate compensation of EUR 500 000 'at least' — in paragraph 160 of the judgment under appeal — the General Court rejected Gascogne Sack Deutschland and Gascogne's estimate of the damage. The following paragraphs 161 to 163 simply make clear — and, as correctly argued by the European Union, merely for the sake of completeness — that the compensation requested by Gascogne Sack Deutschland and Gascogne could also not be justified by the considerable amount of the fine imposed on them. Indeed, in a case such as the one at hand, the action for non-contractual liability could neither be a substitute for, nor an alternative to, the actions for annulment that Gascogne Sack Deutschland and Gascogne had unsuccessfully brought before the EU Courts in the past.

90. In other words, what the General Court is essentially saying in those passages is, put simply, that one of the criteria or parameters to be used in order to determine the amount of compensation for non-material damage cannot be the amount of the fine imposed on Gascogne Sack Deutschland and Gascogne by Decision C(2005) 4634. The reason is that, according to settled case-law,[38] the sum to be awarded as compensation cannot, directly or indirectly, call into question the amount of the fine. Thus, the General Court took the view that granting the compensation requested by Gascogne Sack Deutschland and Gascogne would have, in the light of its significant amount, been tantamount to reducing the amount of the fine.

91. Finally, I must observe that the mere fact that the General Court found the amount of compensation requested by Gascogne Sack Deutschland and Gascogne not justified, and thus awarded those companies a lower sum, does not mean that the General Court failed to compensate the damage in full. It only means that Gascogne Sack Deutschland and Gascogne did not provide sufficient evidence to corroborate all the heads of damage which they had claimed. By the same token, the disagreement between the General Court and the applicants on the amount of compensation to be awarded cannot be regarded as, in practice, depriving an action under Articles 256 and 340 TFEU of its effectiveness.

2. The alleged contradiction and insufficient reasoning in the judgment under appeal

92. Third, Gascogne Sack Deutschland and Gascogne take the view that the reasoning in the judgment under appeal is contradictory: on the one hand the General Court states that the compensation to be awarded for non-material damage cannot reopen the question of the amount of the fine imposed by the Commission (paragraphs 161 to 163), whereas on the other hand it states that the amount of the

35 See paragraphs 148, 149 and 153 of the judgment under appeal.

36 See paragraph 154 of the judgment under appeal.

37 Paragraphs 157 and 158 of the judgment under appeal.

38 See case-law referred to in points 161 and 162 of the judgment under appeal.

non-material damage to be made good should be calculated, inter alia, taking into account the extent of the failure to adjudicate within a reasonable time and the need to ensure that an action brought under Articles 256 and 340 TFEU is effective (paragraph 165). Fourth, Gascogne Sack Deutschland and Gascogne submit that the General Court has not sufficiently explained the criteria it used to determine as EUR 5 000 the amount of compensation due to each of them for non-material damage.

93. To begin with, I do not find the reasoning in the judgment under appeal on this issue to be contradictory.

94. As explained in points 89 and 90 above, in paragraphs 161 to 163 of the judgment under appeal, the General Court explained why the amount of the fine imposed on Gascogne Sack Deutschland and Gascogne by Decision C(2005) 4634 could not be included among the criteria to be taken into account in order to determine the amount of the compensation due for non-material damage. Conversely, in paragraph 165 of the judgment under appeal, the General Court set out the criteria that it did take into account for that purpose. The latter criteria were not only different from the former but, I would add, quite reasonable.

95. In particular, it seems to me that, in estimating the compensation to be awarded, it is appropriate to take into account the extent of the failure to adjudicate within a reasonable time committed by the General Court in Cases T-72/06 and T-79/06: the longer the period by which the reasonable duration of the proceedings was exceeded, the longer the period of uncertainty which affected the companies' decision-making and running of their businesses, the higher, in turn, the compensation due, and vice-versa.

96. Finally, with regard to the fact that the General Court referred, among the criteria that it would take into account, also to the need to ensure that an action brought under Articles 256 and 340 TFEU is effective, I would observe the following. As mentioned in point 84 above, given the particular nature of non-material damage, it is not excluded a priori that symbolic compensation may suffice to make good the damage suffered by the victim. However, in the case at hand, the General Court had, in paragraphs 155 to 158 of the judgment under appeal, explained why it had taken the view that, for a certain head of damage alleged by Gascogne Sack Deutschland and Gascogne, symbolic compensation did not suffice.

97. It is thus consistent with the above finding that, when estimating the amount of damage to be compensated, the General Court made sure that the sum awarded, being merely symbolic, did not deprive the action of its effectiveness.

98. In addition, I am of the view that the judgment under appeal contains an adequate statement of reasons as to why the General Court decided to award Gascogne Sack Deutschland and Gascogne compensation of EUR 5 000 each for the non-material damage they suffered.

99. It should be borne in mind that, according to well-established case-law, once the General Court has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the means and extent of compensation for the damage. However, in order for the Court of Justice to be able to review the judgments of the General Court, those judgments must be sufficiently reasoned and, as regards the assessment of the damage, indicate the criteria taken into account for the purposes of determining the amount decided upon.[39]

39 See judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 50 and 51 and the case-law cited.

100. Against that background, I note that in the judgment under appeal the General Court has, first, succinctly but clearly illustrated its reasons for concluding that a certain type of non-material damage alleged by Gascogne Sack Deutschland and Gascogne had been adequately proven while others had not. Second, the General Court explained why the award of pecuniary compensation was deemed necessary for one head of damage and, third, it referred to the criteria taken into account to determine the amount of that compensation.

101. To my mind, that constitutes, for compensation that is necessarily determined *ex aequo et bono*, an adequate explanation. In the light of this, I am of the view that Gascogne Sack Deutschland and Gascogne's arguments cannot call into question, before the Court of Justice, the determination of the amount of the damage awarded by the General Court.[40]

V. Consequences of the assessment

102. If the Court of Justice agrees with my assessment, the appeal lodged by the European Union must be upheld and point 1 of the operative part of the judgment under appeal set aside accordingly.

103. Since, in the light of the facts available and the exchange of views before the Court of Justice, it is possible to give final judgment on this matter, the Court of Justice should dismiss Gascogne Sack Deutschland and Gascogne's claim for compensation in respect of the material damage consisting in the payment of the bank guarantee charges in relation to the period in which the reasonable time for adjudication in Cases T-72/06 and T-79/06 was exceeded.

104. The appeal by Gascogne Sack Deutschland and Gascogne should be rejected in its entirety

VI. Costs

105. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

106. If the Court of Justice agrees with my assessment of the appeals, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure of the Court of Justice, Gascogne Sack Deutschland and Gascogne should pay the costs of the present proceedings. The costs of the first instance proceedings should, in my view, remain as awarded by the General Court. The European Commission should bear its own costs in relation to both instances.

VII. Conclusion

107. Having regard to all the above considerations, I propose that the Court of Justice:

– set aside point 1 of the operative part of the judgment of the General Court of 10 January 2017, in Case T-577/14, *Gascogne Sack Deutschland and Gascogne* v *European Union*;

– dismiss Gascogne Sack Deutschland and Gascogne's claim for compensation in respect of the material damage consisting in the payment of the bank guarantee charges in relation to the period in which the reasonable time for adjudication in Cases T-72/06, *Groupe Gascogne* v *Commission* and T-79/06, *Sachsa Verpackung* v *Commission*, was exceeded;

– dismiss the appeal lodged by Gascogne Sack Deutschland and Gascogne;

40 See, similarly, judgment of 30 May 2017, *Safa Nicu Sepahan v Council*, C-45/15 P, EU:C:2017:402, paragraphs 52 and 53.

– order Gascogne Sack Deutschland and Gascogne to bear their own costs and the costs of the European Union, represented by the Court of Justice of the European Union, in relation to the appeal proceedings, and their own costs in relation to the first instance proceedings;

– order the European Union, represented by the Court of Justice of the European Union to bear its own costs in relation to the first instance proceedings; and

– order the European Commission to bear its own costs in relation to both instances.