Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 December 2018 *

(Appeal — Actions for damages — Second paragraph of Article 340 TFEU — Excessive duration of the proceedings in a case before the General Court of the European Union — Compensation for damage allegedly suffered by the applicant — Material damage — Bank guarantee charges — Causal link — Default interest — Non-material damage)

In Case C‑150/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 March 2017,

European Union, represented by the Court of Justice of the European Union, represented by J. Inghelram and E. Beysen, acting as Agents,

appellant,

the other parties to the proceedings being:

Kendrion NV, established in Zeist (Netherlands), represented by Y. de Vries, T. Ottervanger and E. Besselink, advocaten,

applicant at first instance,

European Commission, represented by C. Urraca Caviedes, S. Noë and F. Erlbacher, acting as Agents,

intervener at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), Vice-President, acting as President of the First Chamber, J.-C. Bonichot, E. Regan, C.G. Fernlund and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

* Language of the case: Dutch.

Judgment

1 By its appeal, the European Union seeks the partial setting aside of the judgment of the General Court of the European Union of 1 February 2017, *Kendrion* v *European Union* (T-479/14, 'the judgment under appeal', EU:T:2017:48), by which the General Court (i) ordered the European Union to pay Kendrion NV compensation in the amount of EUR 588 769.18 and EUR 6 000 for the material damage and non-material damage, respectively, suffered by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgment of 16 November 2011, *Kendrion* v *Commission* (T-54/06, not published, EU:T:2011:667) ('Case T-54/06'), and (ii) dismissed the action as to the remainder.

2 By its cross-appeal, Kendrion claims, in essence, that the Court of Justice should set aside the judgment under appeal and award it compensation in the amount of EUR 2 308 463.98 or, in the alternative, an amount which the Court considers reasonable, in respect of the material damage, and compensation in the amount of EUR 1 700 000 or, in the alternative, an amount to be set by the Court on equitable basis, in respect of the non-material damage.

Legal context

International law

3 Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'.

4 Under Article 41 of the ECHR:

'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

European Union law

The Charter

5 Title VI of the Charter of Fundamental Rights of the European Union ('the Charter'), headed 'Justice', includes Article 47, entitled 'Right to an effective remedy and to a fair trial', which states:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

...'

6 The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) state that the first paragraph of Article 47 thereof is based on Article 13 of the ECHR. The second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.

7 Article 52 of the Charter, entitled 'Scope and interpretation of rights and principles', provides:

'…

3. In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…'

The Statute of the Court of Justice of the European Union

8 The second paragraph of Article 56 of the Statute of the Court of Justice of the European Union provides:

'[An appeal before the Court of Justice] may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. …'

Background to the dispute

9 By application lodged at the Registry of the General Court on 22 February 2006, Kendrion brought an action 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'). In its application, it claimed, in essence, that the General Court should, principally, annul that decision in whole or in part or, in the alternative, annul the fine which had been imposed on it by that decision or reduce the amount of the fine.

10 By judgment of 16 November 2011, *Kendrion* v *Commission* (T-54/06, not published, EU:T:2011:667), the General Court dismissed that action.

11 By application lodged on 26 January 2012, Kendrion brought an appeal against the judgment of 16 November 2011, *Kendrion* v *Commission* (T-54/06, not published, EU:T:2011:667).

12 By its judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), the Court of Justice dismissed that appeal.

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 26 June 2014, Kendrion brought an action under Article 268 TFEU against the European Union for compensation for the damage that that company claims to have suffered as a result of the excessive duration of the proceedings, before the General Court, in Case T-54/06.

14 By the judgment under appeal, the General Court:

‘(1) Orders the European Union, represented by the Court of Justice of the European Union, to pay damages of EUR 588 769.18 to [Kendrion] 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 [Case T-54/06];

(2) Orders the European Union, represented by the Court of Justice of the European Union, to pay damages of EUR 6 000 to Kendrion by way of compensation for the non-material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in Case T-54/06;

(3) Orders that each award of compensation referred to in points 1 and 2 above be increased by default interest, as from the delivery of the present judgment up to the date of full payment, at the rate set by the European Central Bank (ECB) for its principal refinancing operations, increased by three and a half percentage points;

(4) Dismisses the action as to the remainder;

(5) Orders the European Union, represented by the Court of Justice of the European Union, to pay, in addition to its own costs, the costs incurred by Kendrion in connection with the inadmissibility claim which gave rise to the order of 6 January 2015, *Kendrion* v *European Union* (T-479/14, not published, EU:T:2015:2);

(6) Orders Kendrion, on the one hand, and the European Union, represented by the Court of Justice of the European Union, on the other hand, to bear their own costs relating to the action giving rise to the present judgment;

(7) Orders the European Commission to bear its own costs.’

Forms of order sought by the parties

15 By its appeal, the European Union claims that the Court should:

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

– dismiss as unfounded Kendrion’s claim at first instance, seeking compensation for the material damage allegedly suffered or, wholly in the alternative, reduce that compensation to an amount of EUR 175 709 87; and

– order Kendrion to pay the costs.

16 Kendrion contends that the Court should:

– declare the appeal inadmissible;

– in the alternative, dismiss the appeal; and

– order the appellant to pay the costs.

17 The European Commission contends that the Court should uphold the appeal in its entirety.

18 By its cross-appeal, Kendrion claims that the Court should set aside points 1 to 6 of the operative part of the judgment under appeal and, giving a new ruling:

– award compensation in the amount of EUR 2 308 463.98 or, in the alternative, in an amount that the Court considers reasonable, in respect of the material damage, as well as compensation of EUR 1 700 000 or, in the alternative, in an amount that the Court sets, on an equitable basis, in respect of the non-material damage;

– order that those amounts be increased by an interest rate that [the Court] deems appropriate from 26 November 2013;

– in the alternative, refer all or part of the case back to the General Court for determination in accordance with the judgment [of the Court];

– order the European Union to pay the costs.

19 The European Union contends the Court should:

– dismiss the cross-appeal and

– order Kendrion to pay the costs.

The main appeal

Admissibility of the appeal

Arguments of the parties

20 Kendrion, respondent in the main appeal, contends that the appeal is inadmissible in its entirety for two reasons.

21 In the first place, there is a conflict of interest resulting from the fact that the Court of Justice of the European Union has decided to refer the matter to itself by an appeal. The appeal thus infringes Article 47 of the Charter, which guarantees the right to bring a case before an independent and impartial court.

22 Thus, Kendrion takes the view that the appellant should have refrained from lodging an appeal against the judgment under appeal.

23 Moreover, and, in any event, since (i) in order to be consistent with the requirements of a proper administration of justice, the decision to lodge this appeal and the choice and wording of the grounds of appeal should have been adopted by a body empowered for that purpose within the Court of Justice of the European Union, which is not responsible for exercising its judicial function and which has no influence over it, and (ii) no mention in that regard is made in the appeal lodged by the appellant, Kendrion contends that, as long as that question has not been clarified, the appeal of the Court of Justice of the European Union is inadmissible.

24 In the second place, Kendrion notes that, in the judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), the Court held that an action for damages brought before the General Court is an effective remedy, thus abandoning the method of reducing fines that it had

applied until that judgment. The lodging of that appeal by the Court of Justice of the European Union, despite the costs and delay that such an action implies for Kendrion, calls into question, in practice, that case-law.

25 Lastly, if the appeal were to be declared admissible, Kendrion contends that the independence and impartiality of the Court require that, in this case, the review of the Court be exclusively limited to assessing whether the General Court manifestly infringed the applicable rules or whether it engaged in an application or an interpretation vitiated, beyond reasonable doubt, by an error of law.

26 The European Union, appellant in the main appeal, contests the arguments raised by the respondent in the main appeal to support the objection of inadmissibility raised.

Findings of the Court

27 As regards, in the first place, Kendrion's line of argument alleging that there is a conflict of interest resulting from the fact that the Court of Justice of the European Union decided to refer the matter to itself by an appeal, such a conflict constituting the breach of Kendrion's fundamental right to an independent and impartial tribunal, as set out in the second paragraph of Article 47 of the Charter, it should be recalled that, under Article 13(1) TEU, the Court of Justice of the European Union is an EU institution, which, as is apparent from Article 19(1) TEU, includes several courts, namely 'the Court of Justice, the General Court and specialised courts'.

28 Article 13(2) TEU provides that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein.

29 In that regard, it should be recalled that, under Article 268 TFEU, the Court of Justice of the European Union is to have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340 TFEU.

30 Article 256(1) TFEU states that the General Court is to have jurisdiction to hear and determine at first instance actions or proceedings referred to in Article 268 TFEU, and that decisions given by the General Court in such actions may be subject to a right of appeal to the Court of Justice.

31 In that latter regard, it should be borne in mind that, in accordance with Article 56 of the Statute of the Court of Justice of the European Union, an appeal may be brought before the Court of Justice by any party which has been unsuccessful, in whole or in part, in its submissions.

32 Moreover, as regards, in particular, the breach of the obligation to adjudicate within a reasonable time, it should be recalled that the Court has repeatedly held that the sanction for a breach, by a Court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. The Court has thus specified that a claim for compensation for the damage caused by the failure on the part of the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 55 and the case-law cited).

33 Lastly, actions for damages under the second paragraph of Article 340 TFEU must be directed against the European Union, which must be represented by the EU institution whose conduct has allegedly caused the damage claimed to have been suffered.

34 It follows from the foregoing, first, that, in actions for damages seeking, under the second paragraph of Article 340 TFEU, compensation for damage as a result of the breach by the General Court of its obligation to adjudicate within a reasonable time, such as the action at issue, it is necessary to distinguish between, on the one hand, the institution of the 'Court of Justice of the European Union' which, as an EU institution is supposedly at the origin of the damage alleged, and therefore has the status of defendant at first instance and, as the case may be, appellant in the appeal, and, on the other hand, the General Court and the Court of Justice, which are the courts of which it is composed, with jurisdiction to hear those actions and appeals, respectively.

35 Thus, the circumstance that, in this case, the appellant in the main appeal is the European Union, represented by the institution of the 'Court of Justice of the European Union', and, at the same time the court to which the appeal has been referred is the Court of Justice results not from a choice by that appellant, but from the strict application of the European Union law rules on the matter.

36 Second, contrary to what Kendrion contends, such a circumstance does not undermine the fundamental right of the person allegedly injured by the General Court's failure to adjudicate within a reasonable time to an independent and impartial tribunal, as set out in the second paragraph of Article 47 of the Charter, since such a fundamental right is guaranteed both at first instance and on appeal.

37 As regards the proceedings at first instance, the Court has already specified that the General Court, which has jurisdiction under Article 256(1) TFEU, hearing a claim for damages seeking compensation for the alleged damage resulting from the failure to adjudicate within a reasonable time, must sit in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 56 and the case-law cited).

38 As regards the appeal, the decision of the European Union, represented by the Court of Justice of the European Union to bring, as in this case, an appeal against the judgment delivered by the General Court in an action for damages is taken exclusively by the President of that institution, which represents it. Moreover, since the President of that institution is also the President of the Court of Justice as a judicial body hearing such an appeal, the President does not intervene in the judicial handling of the case, and is replaced by the Vice-President.

39 Third, contrary to Kendrion's contention, it cannot validly be argued that the European Union should have refrained from lodging this appeal. Since it was unsuccessful in its submissions, in the action at first instance, the European Union, represented by the Court of Justice of the European Union is, pursuant to Article 56 of the Statute of the Court of Justice of the European Union, entitled to bring an appeal against the judgment under appeal. No provision of European Union law limits the right of the parties to bring an appeal, provided that the conditions of that provision have been fulfilled, including where the party concerned is the European Union and the latter is represented by the Court of Justice of the European Union, as an EU institution. Such a limitation would, furthermore, be contrary to the principle of equality of arms, as the Advocate General observed in point 26 of his Opinion.

40 The first argument put forward by Kendrion as the basis for the objection of inadmissibility raised by it must therefore be rejected.

41 As regards, in the second place, Kendrion's argument alleging that, by bringing this appeal, the appellant in the main appeal calls in question the finding that the action for damages is an effective remedy, which the Court itself made in the judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), apart from the fact that that argument fails to have regard to the distinction raised in paragraphs 27 and 34 of this judgment, between, on the one hand, the Court of Justice of the European Union, as an institution, which is the appellant in the main appeal, and, on

the other hand, the Court of Justice as a judicial body, which delivered that judgment of 26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771), it is sufficient to note that the fact that, in several judgments, the Court of Justice has found that an action for damages is an effective remedy in no way prevents the Court of Justice of the European Union, as an institution representing the European Union against which an action for damages has been brought, to bring an appeal against the decision of the General Court disposing of that action, where the conditions set out in Article 56 of the Statute of the Court of Justice have been fulfilled, nor renders, consequently, such an appeal inadmissible.

42 That argument must therefore be rejected.

43 Lastly, Kendrion's argument relating to the standard of review that the Court should apply in this appeal must also be rejected. As the Advocate General observed in point 37 of his Opinion, there is nothing in EU law which permits the conclusion that the review which must be carried out by the Court in an appeal lodged by the European Union against a judgment of a tribunal delivered in an action for damages under the second paragraph of Article 340 TFEU should be more or less broad depending on the institution which represents the European Union.

44 In those circumstances, the appeal is admissible. That said, that conclusion is without prejudice to the examination of the admissibility of certain arguments considered individually (judgment of 4 May 2017, *RFA International* v *Commission*, C-239/15 P, not published, EU:C:2017:337, paragraph 20 and the case-law cited).

Substance

45 In support of its appeal, the European Union raises three grounds of appeal.

Arguments of the parties

46 By its first ground of appeal, the European Union submits that, by finding that there is a sufficiently direct causal link between the breach of the obligation to adjudicate within a reasonable time in Case T-54/06 and the loss sustained by Kendrion as a result of paying bank guarantee charges during the period by which that time was exceeded, the General Court erred in law by misinterpreting the notion of 'causal link'.

47 In particular, the European Union submits that the General Court relied on the erroneous premiss that the decision to provide a bank guarantee is made at a single point in time, namely at the time of the 'initial decision' to provide that guarantee. However, since the obligation to pay the fine existed throughout the proceedings before the Courts of the European Union, and even beyond that period, since the fine was not annulled, the applicant at first instance had the possibility of paying the fine and thus complying with its obligation in this regard. Since the applicant at first instance had the possibility of paying the fine at any time, its own decision to replace that payment by a bank guarantee is a continuous decision, which it has maintained throughout the proceedings. Accordingly, the determining cause of the payment of the bank guarantee charges lies in its own decision not to pay the fine and to replace that payment by a bank guarantee, and not in the breach of the obligation to adjudicate within a reasonable time.

48 The Commission supports the arguments put forward by the appellant in the main appeal.

49 Kendrion contends that what is essential in the present case, and what distinguishes it from the case-law stemming in particular from the judgment of 21 April 2005, *Holcim (Deutschland)* v *Commission* (T-28/03, EU:T:2005:139, paragraphs 121 to 123), and from the order of 12 December

2007, *Atlantic Container Line and Others* v *Commission* (T-113/04, not published, EU:T:2007:377, paragraphs 39 and 40), is that, as the General Court correctly found, in paragraphs 87 to 89 of the judgment under appeal, on the date when it provided a bank guarantee, the respondent in the main appeal could not and should not have been expected to reasonably foresee that the General Court would act unlawfully against it by giving judgment after an extraordinarily long period.

50 Moreover, whilst recognising that it did indeed have the right to choose, entirely independently, for specific reasons, whether or not to provide a bank guarantee, Kendrion states that exercising that right does not mean that it must bear all the harmful effects of circumstances which fall wholly within the sphere of risk of the appellant in the main proceedings. Lastly, Kendrion states that the choice between the provision of a bank guarantee and the payment of a fine is a serious choice which cannot be reconsidered continuously, let alone on a daily basis, especially as it is necessary to take account of long-term financial agreements, agreements concluded with the providers of the bank guarantee, the undertaking's financial situation and the relationship with the shareholders and other stakeholders.

51 Kendrion thus contends that this ground of appeal should be rejected.

Findings of the Court

52 It should be recalled that, as the Court has previously stated, the condition under the second paragraph of Article 340 TFEU relating to a causal link concerns a sufficiently direct causal nexus between the conduct of the EU institutions and the damage, the burden of proof of which rests on the applicant, so that the conduct complained of must be the determining cause of the damage (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).

53 It is therefore necessary to ascertain whether the breach of the obligation to adjudicate within a reasonable time in Case T-54/06 is the determining cause of the damage resulting from the payment of bank guarantee charges during the period by which that time was exceeded in order to establish the existence of a direct relationship of cause and effect between the conduct alleged against the Court of Justice of the European Union and the damage complained of.

54 In that regard, it must be observed that, in an action for damages brought against the Commission, for the purposes, in particular, of reimbursement of the guarantee charges incurred by the applicants in order to obtain the suspension of the decisions to recover the refunds at issue in the main proceedings, decisions which were subsequently withdrawn, the Court held that, when a decision requiring the payment of a fine is coupled with the option of lodging a security intended to ensure that payment along with interest on late payment, pending the outcome of an action brought against that decision, the loss consisting of the guarantee fees results, not from that decision, but from the interested party's own choice to lodge a security rather than to fulfil its repayment obligation immediately. In those circumstances, the Court established that there is no direct causal link between the conduct complained of and the damage alleged (see, to that effect, judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C-460/09 P, EU:C:2013:111, paragraphs 118 and 120).

55 The General Court found, in paragraph 89 of the judgment under appeal, that the link between the fact that the reasonable time for adjudicating in Case T-54/06 was exceeded and the payment of bank guarantee charges during that excess period cannot have been severed by Kendrion's initial decision not to effect immediate payment of the fine imposed by Decision C(2005) 4634 and to provide a bank guarantee.

56 In particular, as is apparent from paragraphs 87 and 88 of the judgment under appeal, the two circumstances on which the General Court relied in reaching the conclusion set out in paragraph 89 of that judgment are (i) that at the time when Kendrion brought its action in Case T-54/06, and the

time when it provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable and that that company could legitimately expect that action to be dealt with within a reasonable time, and (ii) that the reasonable time for adjudicating was exceeded after Kendrion's initial decision to provide that guarantee.

57 However, the two circumstances referred to by the General Court in paragraphs 87 and 88 of the judgment under appeal cannot be relevant for finding that the causal link between the breach of the obligation to adjudicate within a reasonable time, in Case T-54/06, and the damage suffered by Kendrion as a result of paying bank guarantee charges during the period by which that time was exceeded cannot have been severed by the decision of that undertaking to provide that guarantee.

58 That would be the case only if it were compulsory to maintain the bank guarantee, so that the undertaking which brought an action against a Commission decision imposing a fine on it, and which chose to provide a bank guarantee in order not to comply immediately with that decision, was not entitled, before the date on which the judgment on that action was delivered, to pay that fine and put an end to the bank guarantee that it had provided (judgment delivered today, C-138/17 P and C-146/17 P, *European Union* v *Gascogne Sack Deutschland and Gascogne*, paragraph 28).

59 As the Advocate General noted in points 57, 69 and 70 of his Opinion, and as the Court of Justice has already found, like the provision of the bank guarantee, the maintenance of that guarantee is a matter for the discretion of the undertaking concerned in the light of its financial interests. Nothing prevents, as a matter of EU law, that undertaking from terminating, at any time, the bank guarantee that it has provided and paying the fine imposed, where, in view of the evolution of the circumstances in relation to those existing on the date when that guarantee was provided, that undertaking deems that option more advantageous for it. That might be the case, in particular, where the conduct of the proceedings before the General Court leads the undertaking in question to take the view that the judgment will be delivered at a date later than that which it had initially envisaged and that, consequently, the cost of the bank guarantee will be higher than the cost that it had initially envisaged when providing that guarantee (judgment delivered today, C-138/17 P and C-146/17 P, *European Union* v *Gascogne Sack Deutschland and Gascogne*, paragraph 29).

60 In this case, given that (i) in September 2008, namely 2 years and 6 months after the application in Case T-54/06 was brought, the oral proceedings in those cases had still not begun, as is apparent from the General Court's findings in paragraph 48 of the judgment under appeal, and that (ii) the period which Kendrion itself considered, both in its application at first instance and in its cross-appeal, as being the normal period for dealing with actions for annulment in competition matters, is indeed 2 years and 6 months, it must be held that, by September 2008 at the latest, Kendrion could not have been unaware that the duration of the proceedings in that case would considerably exceed that which it had initially envisaged, and that it could have reconsidered the appropriateness of maintaining the bank guarantee, having regard to the extra costs that maintaining that guarantee might entail.

61 In those circumstances, the breach of the obligation to adjudicate within a reasonable time in Case T-54/06 cannot be the determining cause of the damage suffered by Kendrion as a result of paying bank guarantee charges during the period by which that time was exceeded. As the Advocate General noted in point 80 of his Opinion, such damage is the consequence of Kendrion's own decision to maintain the bank guarantee throughout the proceedings in that case, despite the financial consequences which that entailed.

62 It follows from the foregoing considerations that, by finding that there is a sufficiently direct causal link between the breach of the obligation to adjudicate within a reasonable time in Case T-54/06 and the loss sustained by Kendrion as a result of paying bank guarantee charges during the period by which that time was exceeded, the General Court erred in law by misinterpreting the notion of 'causal link'.

63 Consequently, since this ground of appeal must be upheld, point 1 of the operative part of the judgment under appeal must be set aside, without there being any need to rule on the second and third grounds of appeal put forward by the European Union in support of its appeal.

The cross-appeal

64 In support of its cross-appeal, Kendrion puts forward four grounds of appeal.

The third ground of appeal

65 By its third ground of appeal, Kendrion alleges that the General Court failed to state sufficient reasons and erred in law by misinterpreting the notion of ‘causal link’ when determining the period by which the reasonable time for adjudicating was exceeded and when assessing the material damage stemming from payment of bank guarantee charges.

66 Since, as is apparent from paragraph point 63 of this judgment, point 1 of the operative part of the judgment under appeal has been set aside, it is no longer necessary to examine that third ground of appeal.

The first ground of appeal

Arguments of the parties

67 By its first ground of appeal, Kendrion contends that, by finding that a period of 26 months (15 months plus 11 months) between the end of the written part of the proceedings and the opening of the oral part of the proceedings is appropriate for dealing with Case T-54/06, the General Court committed an error of law and failed to state adequate reasons when determining the reasonable time for adjudicating and, consequently, the period by which that reasonable time was exceeded.

68 In the first place, Kendrion submits that, for the purposes of determining the reasonable time for adjudicating, first of all, the General Court should have taken account of the total length of the proceedings. Next, on the basis both of the case-law of the European Court of Human Rights and of the ‘European Judicial Systems’ detailed report of 2012 of the European Commission for the Efficiency of Justice (‘the 2012 CEPEJ Report’), and in view of the complexity resulting from the international nature of the General Court, the latter should have set 2 years and 6 months as the reasonable time for adjudicating in Case T-54/06. Thus, the General Court should have found, lastly, that the period by which the reasonable time for adjudicating was exceeded was 3 years and 3 months.

69 Kendrion states that a period longer than two and a half years may also be reasonable to deal with a case such as that at issue provided that there is a specific justification. However, according to Kendrion, in this case, none of the circumstances specific to the case can justify proceedings before the General Court which lasted over two and half years, let alone a period of 26 months between the end of the written part and the opening of the oral part of those proceedings.

70 In the second place, the General Court failed to provide a statement of reasons for the finding in paragraph 58 of the judgment under appeal either so far as concerns the period of 15 months or as regards the additional period of one month per case. Moreover, there is a contradiction inasmuch as that approach is based on the idea that the complexity grows with the number of cases whereas that complexity was already taken into account in the determination of the period of inactivity of 15 months which was held to be acceptable in any cartel case, and that, in the judgment of

26 November 2013, *Kendrion* v *Commission* (C-50/12 P, EU:C:2013:771, paragraph 104), the Court determined that the grounds of appeal put forward by Kendrion 'did not present any particular difficulties'.

71 The European Union contends that Kendrion's arguments are inadmissible, and, in any event, unfounded.

Findings of the Court

72 As regards, in the first place, the line of argument alleging an error of law in the determination of the reasonable time for adjudicating, first, it should be pointed out that, contrary to what Kendrion seeks to suggest, it is apparent from the judgment under appeal that, for the purposes of determining the reasonable time for adjudicating, and consequently, the period by which that time was exceeded, the General Court took into account the entire length of the proceedings in Case T-54/06.

73 In paragraph 62 of the judgment under appeal, the General Court specified that an examination of the file in that case had not revealed anything to support the conclusion that there was a period of unjustified inactivity between the date of lodging the application and the date of lodging the rejoinder, or between the opening of the oral part of the proceedings and the delivery of the judgment closing that case. It follows that the General Court verified that the length of the first and last parts of the proceedings in Case T-54/06 was appropriate to deal with that case, only the length of the intermediate part of the proceedings, namely, that between the end of the written part and the opening of the oral part, having been found by the General Court to be unreasonable. That circumstance had the effect, consequently, of unreasonably increasing the total length of the proceedings, for the purposes of the second paragraph of Article 47 of the Charter.

74 Second, contrary to what Kendrion claims, nothing in European Union law establishes that, as regards the processing of competition cases brought before the General Court, such as that at issue, a period of 2 years and 6 months must be considered reasonable, for the purposes of the second paragraph of Article 47 of the Charter.

75 In that regard, Kendrion refers to the case-law of the European Court of Human Rights and to the 2012 CEPEJ Report to support its line of argument.

76 As regards the case-law of the European Court of Human Rights, although, in the light of Article 52(3) of the Charter, the principles resulting from that case-law with respect to the right of any person to a hearing within a reasonable time, laid down in Article 6(1) of the ECHR, can be taken into account in order to clarify the scope and meaning of the corresponding right laid down in the second paragraph of Article 47 of the Charter, the fact remains that, as the Advocate General observed in point 146 of his Opinion, Kendrion has not cited any judgment of the European Court of Human Rights from which it might be apparent that, in cartel proceedings before the General Court, such as those at issue, a period of 2 years and 6 months must be held to be reasonable.

77 As regards the 2012 CEPEJ Report, apart from the fact that it does not lay down rules of law, it must be pointed out that this report involves an analysis not of the periods for dealing with cases before the Courts of the European Union, but of the time limits in relation to proceedings in the Member States of the Council of Europe. As the Advocate General observed in point 147 of his Opinion, it cannot therefore be validly argued that that report suggests that the length of proceedings in relation to a competition matter before the General Court, such as those at issue, should not exceed two and a half years.

78 Thus, the General Court did not err in law in holding, in paragraph 58 of the judgment under appeal, that a period of 26 months, namely 15 months plus 11 months, between the end of the written part of the proceedings and the opening of the oral part of the proceedings, was appropriate for dealing with Case T-54/06.

79 Lastly, regarding Kendrion's argument raised in paragraph 69 of this judgment, which consists, in fact, of challenging the findings of the General Court in the light of the circumstances specific to Case T-54/06, it should be pointed out that the appellant in the cross-appeal cannot seek to have the Court of Justice substitute its own assessment for that of the General Court. According to settled case-law, an appeal is limited to points of law. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence adduced. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the facts or evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see order of 3 September 2013, *Idromacchine and Others* v *Commission*, C-34/12 P, not published, EU:C:2013:552, paragraph 64 and the case-law cited). However, in this case, Kendrion has not pleaded, let alone established, such a distortion, so that that argument is inadmissible.

80 As regards, in the second place, the line of argument alleging a failure to state reasons, it should be borne in mind that, according to settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's reasoning, so that the persons concerned can ascertain the reasons for the decision taken and the Court of Justice can exercise its power of review (judgment of 2 April 2009, *France Télécom* v *Commission*, C-202/07 P, EU:C:2009:214, paragraph 29 and the case-law cited).

81 However, contrary to what Kendrion asserts, the General Court adequately set out, in paragraphs 50 to 57 of the judgment under appeal, the reasons why it found that a period of 26 months, namely 15 months plus 11 months, between the end of the written part of the proceedings and the opening of the oral part of the proceedings was appropriate for dealing with Case T-54/06.

82 Consequently, the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

The second ground of appeal

Arguments of the parties

83 By its second ground of appeal, Kendrion complains that the General Court committed a manifest error of assessment and failed to state sufficient reasons when it rejected its claim for compensation for the material damage suffered as a result of paying default interest, on the ground that the appellant in the cross-appeal had not adduced any evidence to show that, during the period by which the reasonable time for adjudicating was exceeded, the amount of the default interest had been greater than the advantage conferred on it by possession, during that period, of the amount of the fine plus default interest. Kendrion further argues that, by ignoring its claim in the alternative that the European Union should be ordered to pay an amount that the General Court considered reasonable, whereas that court had sufficient information to give a ruling in that regard, the General Court erred in law.

84 In support of its line of argument regarding the alleged manifest error of assessment, Kendrion refers to (i) paragraphs 42 and 43 of its application at first instance, according to which it demonstrated that it had to pay the Commission interest at a rate of 3.56% and that it benefited itself from an advantage equal to the interest set in the opening of the credit which it enjoyed during that period, as well as to (ii) Annex V.3 to that application in which the amount of that interest was allegedly specified.

Similarly, the appellant in the cross-appeal refers to paragraphs 6 and 45 of that application according to which it allegedly offered to provide supporting evidence and documents. It states that at the hearing before the General Court, the issue of the damage was also raised.

85 The European Union contends that the arguments directed against the General Court's findings regarding the material damage alleged in respect of the payment of default interest on the amount of the fine must be rejected as inadmissible or, in the alternative, as unfounded. So far as concerns the line of argument relating to the claim in the alternative, the European Union contends, principally, that such a claim is inadmissible, and, in the alternative, that, in any event, by rejecting the claim for compensation for the material damage arising from the payment of default interest on the amount of the fine on the ground that the appellant in the cross-appeal had failed to prove the damage alleged whereas it was required to do so, the General Court also dismissed, in a well-founded and adequately reasoned manner, that claim in the alternative.

Findings of the Court

86 As a preliminary point, it should be recalled that, as the General Court noted, in paragraph 64 of the judgment under appeal, any damage for which compensation is sought in an action for non-contractual liability of the European Union under the second paragraph of Article 340 TFEU must be actual and certain (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 61 and the case-law cited).

87 In that context, it should be pointed out, as the Advocate General observed in point 87 of his Opinion, that, since an act or omission of an EU institution may give rise to certain costs for an undertaking but, at the same time, it may result in certain gains for that undertaking, it can be considered that there is damage, within the meaning of Article 340 TFEU, only where the net difference between costs and gains stemming from the conduct alleged against that institution is negative.

88 Thus, as regards the alleged damage resulting from payment of default interest on the amount of the fine during the period by which the reasonable time for adjudicating was exceeded, it is only, in fact, if the interest which has accrued during that period is greater than the advantage conferred on the appellant in the cross-appeal by possession, during that period, of the sum equal to the amount of the fine plus default interest that it may be considered that there is actual and certain damage.

89 Moreover, the Court has specified that it is for the party seeking to establish the European Union's non-contractual liability to adduce conclusive proof as to the existence and extent of the damage it alleges (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 62 and the case-law cited).

90 In this case, after finding, in paragraph 76 of the judgment under appeal, that, during the proceedings in Case T-54/06, Kendrion had paid neither the amount of the fine nor the default interest, so that, during the proceedings in that case, Kendrion had been in possession of the sum corresponding to the amount of that fine plus default interest, the General Court held, in paragraph 77 of the judgment under appeal, that the appellant in the cross-appeal had adduced no evidence to show that, during the period by which the reasonable time for adjudicating in Case T-54/06 was exceeded, the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on it by possession of the sum equal to the amount of the fine plus default interest.

91 The General Court observed, moreover, in paragraph 78 of the judgment under appeal, that such a finding is not called into question by the method of calculation proposed by the appellant in the cross-appeal, which consisted of deducting from the amount of the alleged damage the financing costs which that appellant would have had to bear, by way of financing by a bank, if it had been obliged to pay the fine on 26 August 2010. In that regard, the General Court found, in paragraph 79 of that

judgment, that Kendrion did not at any point claim, much less demonstrate, that it would have been obliged to rely on financing from a third party in order to pay the amount of the fine imposed by the Commission.

92 In those circumstances, as is apparent from paragraphs 86 to 89 of this judgment, the General Court was right (i) to hold, in paragraph 80 of the judgment under appeal, that it had not been established that, during the period by which the reasonable time for adjudicating in Case T-54/06 was exceeded, the appellant in the cross-appeal had suffered actual and certain damage arising from the payment of default interest on the amount of the outstanding fine, and (ii) to conclude, therefore that the claim for compensation for alleged damage suffered in that respect should be rejected.

93 That said, Kendrion claims, in the first place, that the General Court made a manifest error of assessment in paragraphs 77 and 79 of the judgment under appeal, a claim which emerges from paragraphs 42 and 43 of its application at first instance, and, in particular, from Annex V.3 accompanying that application.

94 In that regard, it should be recalled that, according to the Court of Justice's settled case-law, a distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 32, and the case-law cited).

95 Contrary to what Kendrion claims, neither (i) the table set out in Annex V.3 to its application at first instance, showing the costs that it allegedly had to bear by way of financing by a bank of the fine and the interest if it had been obliged to pay the fine on 26 August 2010 nor (ii) the offer, appearing in paragraph 45 of its application at first instance, to submit documents concerning that Annex V.3, shows that paragraphs 77 and 79 of the judgment under appeal are vitiated by a manifest error of assessment. Admittedly, it is apparent from that material that Kendrion did indeed calculate its damage by taking account of the benefit that it was able derive from not paying the fine, which the General Court did not moreover in any way deny. However the General Court was entitled to find, without committing any distortion, in paragraph 79 of that judgment, that Kendrion had not demonstrated that it had been obliged to rely on financing from a third party in order to pay the fine imposed on it.

96 In the second place, Kendrion submits that the General Court failed to state adequate reasons when it concluded, in paragraph 80 of the judgment under appeal, that its claim for compensation for the damage resulting from paying default interest during the period by which the reasonable time for adjudicating was exceeded should be rejected.

97 However, the statement of reasons given by the General Court, in paragraphs 76 to 79 of the judgment under appeal, is sufficient to enable Kendrion to understand the grounds on which the General Court relied to dismiss its claim for damages in respect of the default interest and to provide the Court of Justice with sufficient material for it to exercise its power of review on appeal.

98 It thus follows, in accordance with the case-law referred to in paragraph 80 of this judgment, that the judgment under appeal is not vitiated by a failure to state adequate reasons in that regard.

99 In the third place, Kendrion alleges that the General Court erred in law by ignoring its claim in the alternative that the European Union should be ordered to pay the amount that the General Court considered reasonable, whereas that court had sufficient information to give a ruling in that regard.

100 However, in the light (i) of paragraph 80 of the judgment under appeal, and, in particular, of the General Court's finding that there was no actual and certain damage in respect of the payment of default interest, and (ii) of the case-law referred to in paragraphs 35 and 36 of the judgment under appeal, according to which if any one of the conditions governing non-contractual liability on the part

of the European Union is not satisfied, the entire action must be dismissed and it is unnecessary to consider the other conditions for such liability (see, inter alia, judgment of 14 October 1999, *Atlanta* v *European Community*, C-104/97 P, EU:C:1999:498, paragraph 65), it is apparent from the judgment under appeal that the General Court rejected any claim for compensation arising from payment of that interest.

101 In those circumstances, Kendrion's line of argument put forward in this ground of appeal is unfounded.

102 Consequently, the second ground of appeal must be rejected in its entirety as unfounded.

The fourth ground of appeal

Arguments of the parties

103 By its fourth ground of appeal, Kendrion claims that the General Court erred in law in determining the compensation for the non-material damage resulting from the failure to adjudicate within a reasonable time. In particular, by granting it symbolic compensation of EUR 6 000 in this respect, instead of compensation equivalent to 5% of the amount of the fine, the General Court infringed Kendrion's right to just satisfaction, within the meaning of Article 41 of the ECHR, and, accordingly, its right to an effective remedy within the meaning of Article 47 of the Charter. The case-law of the European Court of Human Rights regarding Article 41 of the ECHR combined with the solution adopted by the Court in the judgment of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608), supports that line of argument.

104 In the alternative, Kendrion claims that the Court should itself set, on an equitable basis, the amount that it considers able to award it by way of equitable compensation for breach by an EU institution of the fundamental principle that decisions are to be adopted within a reasonable time, or to refer the case back to the General Court.

105 The European Union contends, principally, that this ground of appeal is inadmissible, and, in any event, unfounded.

Findings of the Court

106 In the first place, it should be observed, as the Advocate General notes in point 127 of his Opinion, that the case-law arising from the judgment of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608), on which Kendrion relies to claim that the General Court erred in law when determining the non-material damage and to support its claim for compensation of a sum corresponding to 5% of the amount of the fine, was modified by the Court (see, to that effect, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraphs 77 to 108, and the case-law cited), and is therefore no longer relevant for the purposes of determining compensation aimed at making good, under Article 340 TFEU, the non-material damage caused by the breach of the obligation to adjudicate within a reasonable time.

107 In those circumstances, Kendrion's line of argument, inasmuch as it seeks to challenge the General Court's refusal to grant it an amount corresponding to 5% of the fine imposed and to have the Court of Justice grant such an amount, must be rejected.

108 In the second place, it should be pointed out that, contrary to what the appellant in the cross-appeal submits, in view of the non-material damage, compensation such as that at issue may constitute appropriate compensation for the purposes of Article 340 TFEU to make good such damage (see, to

that effect, judgment of 14 June 1979, *V.* v *Commission*, 18/78, EU:C:1979:154, paragraph 19), so that that appellant cannot rely on its right to an effective remedy within the meaning of Article 47 of the Charter.

109 Since, as is apparent from paragraph 6 of this judgment, Article 41 of the ECHR does not correspond to Article 47 of the Charter, the finding in paragraph 135 of the judgment under appeal cannot, in any event, be called into question by the case-law of the European Court of Human Rights in relation to Article 41 of the ECHR.

110 Lastly, it should be borne in mind that, in the particular context of actions for damages, the Court has repeatedly held that, 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 (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).

111 As the Advocate General noted, in point 124 of his Opinion, the General Court first of all adequately set out, in paragraphs 117 to 128 of the judgment under appeal, the raisons which led it to find that certain heads of non-material damage alleged by the appellant in the cross-appeal had been sufficiently established by it whereas other heads had not. Next, in paragraph 129 of the judgment under appeal, the General Court observed that, having regard to the circumstances of the case, the non-material damage established, namely the damage suffered as a result of the prolonged state of uncertainty in which that appellant was placed during the proceedings in Case T-54/06, was not fully compensated by the finding of a breach of the obligation to adjudicate within a reasonable time. Lastly, in paragraphs 130 to 134 of the judgment under appeal, the General Court set out the criteria taken into account in order to determine the amount of the compensation.

112 Consequently, it cannot be alleged that the General Court erred in law when it found, in paragraph 135 of the judgment under appeal, that compensation of EUR 6 000 granted to the appellant in the cross-appeal constitutes adequate reparation for the damage it suffered as a result of the prolonged state of uncertainty in which it found itself during the proceedings in Case T-54/06.

113 Consequently, the fourth ground of appeal must be rejected as unfounded.

114 It follows from all the foregoing considerations that the cross-appeal must be dismissed in its entirety.

The action before the General Court

115 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

116 In the present case, the Court considers that it should give final judgment on the action for damages brought by Kendrion inasmuch as it is intended to obtain compensation for the damage resulting from paying bank guarantee charges beyond a reasonable time for adjudicating in Case T-54/06.

117 In that regard, it should be recalled that, in accordance with settled case-law, the European Union may incur non-contractual liability under the second paragraph of Article 340 TFEU only if a number of conditions are fulfilled, namely the unlawfulness of the conduct alleged against the EU institution, the

fact of damage and the existence of a causal link between the conduct of that institution and the damage complained of (judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 64 and the case-law cited).

118 As the General Court pointed out in paragraph 36 of the judgment under appeal, if any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability on the part of the European Union (judgment of 14 October 1999, *Atlanta* v *European Community*, C-104/97 P, EU:C:1999:498, paragraph 65 and the case-law cited). Moreover, the EU judicature is not required to examine those conditions in any particular order (judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 42 and the case-law cited).

119 For the reasons set out in paragraphs 52 to 62 of this judgment, the action for damages brought by Kendrion before the General Court, inasmuch as it is intended to obtain compensation for the alleged material damage consisting in the payment of bank guarantee charges beyond a reasonable time for adjudicating in Case T-54/06, must be dismissed.

Costs

120 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs.

121 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings.

122 Since the European Union has applied for costs against Kendrion and the latter has been unsuccessful, Kendrion must be ordered to bear its own costs and to pay all the costs incurred by the European Union in this appeal.

123 Under Article 138(3) of the Rules of Procedure, the European Union and Kendrion must be ordered to bear their own costs in relation to the proceedings at first instance.

124 Article 140(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which intervene in the proceedings are to bear their own costs. Moreover, in accordance with Article 184(4) of the Rules of Procedure, where, without having brought the appeal itself, an intervener at first instance has participated in the written or oral part of the proceedings before the Court of Justice, the latter may decide that that intervener is to bear his own costs.

125 The Commission, which was an intervener at first instance and which participated in the written part of the proceedings of the main appeal, is to bear its own costs both at first instance and in this appeal.

On those grounds, the Court (First Chamber) hereby:

1. Sets aside point 1 of the operative part of the judgment of the General Court of the European Union of 1 February 2017, *Kendrion* v *European Union* (T-479/14, EU:T:2017:48);

2. Dismisses the cross-appeal brought by Kendrion NV;

3. **Dismisses the claim for damages brought by Kendrion NV, inasmuch as it seeks to obtain compensation for the material damage consisting in the payment of bank guarantee charges beyond a reasonable time for adjudicating in the cases which gave rise to the judgment of 16 November 2011, *Kendrion* v *Commission* (T-54/06, not published, EU:T:2011:667);**

4. **Orders Kendrion NV to bear its own costs and to pay all the costs incurred by the European Union, represented by the Court of Justice of the European Union, in relation to the present appeal, and to bear its own costs at first instance;**

5. **Orders the European Union, represented by the Court of Justice of the European Union, to bear its own costs incurred at first instance;**

6. **Orders the European Commission to bear its own costs of both the proceedings at first instance and of the present appeal.**

[Signatures]