



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 30 May 2013¹

Case C-58/12 P

Groupe Gascogne SA

v

European Commission

(Appeal — Competition — Cartel — Industrial plastic bags sector — Fines — Breach of fundamental right to a fair hearing within a reasonable time by the General Court)

Preface

1. On 16 November 2011 the General Court delivered three separate judgments² in which it dismissed separate applications seeking annulment of the Commission's decision in Case COMP/38354 – Industrial Bags.³ In that decision, the Commission found that there had been a serious, long-lasting infringement of what was at the time Article 81 EC (now Article 101 TFEU); and it imposed heavy fines on a number of subsidiary companies and their respective parents. This is one of the appeals from those judgements of the General Court.⁴

2. As well as raising novel questions of competition law, these appeals contain complaints that the General Court infringed Article 47 of the Charter of Fundamental Rights ('the Charter')⁵ as it failed to adjudicate within a reasonable time. For that reason, it is clearly incumbent upon this Court to try to deal with the appeals expeditiously. In order to accommodate that requirement whilst respecting the need to allow appropriate time for translation, I have divided the issues that I am covering between the three Opinions in the following way.

3. The key legislative provisions, together with a description of the cartel, the procedure leading to the Commission's decision and the fines imposed, are to be found at points 6 to 34 of my Opinion in *Gascogne Sack Deutschland*.⁶ Because slightly different points are raised in each appeal as to the circumstances in which parent companies are, or are not, responsible for the actions of their wholly-owned subsidiaries, this question is discussed in all three Opinions. My analysis of the issues arising out of the claim that the General Court failed to adjudicate within a reasonable time (in

1 — Original language: English.

2 — Judgments of 16 November 2011 in Case T-54/06 *Kendrion v Commission*, Case T-72/06 *Groupe Gascogne v Commission* and Case T-79/06 *Sachsa Verpackung v Commission*. A summary is published in English of the three judgments under appeal. The full texts are available in French for all three cases on the Court's website. For *Kendrion*, a full version in Dutch is also available.

3 — Decision C(2005) 4634 final of the Commission of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38354 – Industrial bags) ('the decision'). A summary is published in OJ 2007 L 282, p. 41.

4 — Case C-40/12 P *Gascogne Sack Deutschland v Commission*, Case C-50/12 P *Kendrion v Commission* and Case C-58/12 P *Groupe Gascogne v Commission* (the present matter). For the full picture in relation to applications challenging the decision before the General Court and subsequent appeals before this Court, see point 102 below.

5 — OJ 2010 C 83, p. 2.

6 — Cited in footnote 4 above.

particular, the criteria for determining whether there has been excessive delay and the possible remedies that can be given if that has happened) is contained in this Opinion at points 70 to 150. An examination of the detailed arguments advanced by each appellant in relation to (for example) adequacy of reasoning in the General Court’s judgments is, of course, to be found in the respective Opinions dealing with each appeal.⁷

Introduction

4. In its appeal, Groupe Gascogne challenges the General Court’s interpretation of two concepts in competition law: the notion of the undertaking and the principle that liability for an infringement committed by a wholly-owned subsidiary should be attributed to its parent company. Groupe Gascogne submits that where any fine relating to such an infringement is imposed on the basis of joint and several liability, the upper limit (‘the 10% ceiling’) of that fine should be calculated under Article 23(2) of Regulation No 1/2003⁸ by taking into account the combined turnover of the subsidiary and its parent rather than the worldwide turnover of the companies that comprise the whole corporate group.⁹

Legislation

The consolidated accounts directive

5. An objective of the consolidated accounts directive¹⁰ is to coordinate national legislation governing the annual accounts of certain types of companies, in particular groups of companies that comprise an undertaking.¹¹ A further objective of that measure is to ensure that financial information concerning such undertakings is made available to shareholders and to third parties.¹² Undertakings subject to the obligation to prepare consolidated accounts are defined in Article 1(1) and (2). They include any parent undertaking that:

- ‘(a) has a majority of the shareholders’ or members’ voting rights in another undertaking ... or
- (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking ... and is at the same time a shareholder in or member of that undertaking; or
- (c) has the right to exercise a dominant influence over an undertaking ... of which it is a shareholder or member ...’.

7 — The Opinions in all three appeals are delivered on 30 May 2013.

8 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). Regulation No 17 was repealed by virtue of Article 43(1) of Regulation No 1/2003. The Commission has cited both regulations in part 6 of the decision as the legal basis for the fines imposed. The relevant provisions of Regulation No 17 are Article 15(2) and Article 17. They are mirrored in Article 23(2) and (3) and Article 31 of Regulation No 1/2003. In this Opinion I shall refer to the provisions of Regulation No 1/2003, which should be read as also covering Articles 15(2) and 17 of Regulation No 17, since they were not materially changed insofar as is relevant to the issues raised in this appeal.

9 — Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361, paragraph 102. The Commission’s Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) also mention worldwide turnover when referring to the 10% ceiling in Article 23(2) of Regulation No 1/2003. I shall therefore use the expression ‘worldwide turnover’ in this Opinion when referring to the turnover of the entire corporate group.

10 — Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1).

11 — See the first recital in the preamble to the consolidated accounts directive.

12 — See the third recital in the preamble to the consolidated accounts directive.

6. Article 16 of the consolidated accounts directive provides *inter alia*:

‘1. Consolidated accounts shall comprise the consolidated balance sheet, the consolidated profit-and-loss account and the notes on the accounts.

...

3. Consolidated accounts shall give a true and fair view of the assets, liabilities, financial position and profit or loss of the undertakings included therein taken as a whole.’

Summary of the judgment under appeal

7. At first instance Groupe Gascogne¹³ asked the General Court to:

- set aside the decision insofar as it is addressed to and imposes a fine on it;
- amend the decision insofar as it imposes a fine on its subsidiary Gascogne Sack Deutschland (‘GSD’) in excess of 10% of GSD’s turnover, contrary to Article 15(2) of Regulation No 17;
- in the alternative, set aside Article 2(i) of the decision;
- in the further alternative, amend Article 2(i) of the decision and reduce the amount of the fine imposed jointly and severally on Groupe Gascogne and GSD;
- order the Commission to pay the costs of the proceedings.

8. In support of its application for annulment of the decision Groupe Gascogne put forward three grounds of appeal. First, Groupe Gascogne submits that the Commission infringed Article 101 TFEU by wrongly attributing to it joint and several liability for the infringement committed by GSD. Second, Groupe Gascogne claims that the Commission erred in law in the decision, because it misconstrued the term ‘undertaking’ in Article 81 EC; as a result, it infringed Article 23(2) of Regulation No 1/2003 by imposing a fine on Groupe Gascogne that was calculated on the basis of Groupe Gascogne’s worldwide turnover rather than on the combined turnover of Groupe Gascogne (presumably taking into account the turnover of the holding company, Groupe Gascogne, but not that of its subsidiaries) and GSD. Third, Groupe Gascogne submits that the fine imposed jointly and severally on it and GSD infringes the proportionality principle insofar as the Commission failed to ensure that there was a reasonable relationship between the penalty imposed and the actual turnover achieved in the plastic bags sector.

9. At the hearing at first instance, Groupe Gascogne raised three points alleging infringement of its fundamental rights guaranteed by the Charter. First, it alleged a breach of the rights of the defence and the presumption of innocence guaranteed by Article 48 of the Charter. Second, it submitted that the reasoning in the decision was inadequate and therefore hindered any review of its legality. Third, it relied upon Articles 47 and 49 of the Charter contending that the General Court should exercise its unlimited jurisdiction and impose a proportionate sanction.

10. In paragraph 31 of the judgment under appeal the General Court held that the first point, concerning a breach of Groupe Gascogne’s rights of defence and the presumption of innocence, comprised new elements and was therefore inadmissible.

11. The General Court proceeded to dismiss all three pleas and consequently the action in its entirety.

¹³ — Case T-72/06 *Groupe Gascogne*, cited in footnote 2 above (‘the judgment under appeal’).

Grounds of appeal

12. Groupe Gascoigne puts forward four grounds of appeal.

13. First, Groupe Gascoigne submits that the General Court erred in law by refusing to examine the impact of the changes in the EU legal order brought about by the entry into force on 1 December 2009 of Article 6(1) TEU, in particular with regard to Article 48 of the Charter.

14. Second, Groupe Gascoigne asserts that the General Court infringed Article 101 TFEU and Article 48 of the Charter: (i) by incorrectly attributing joint and several liability to Groupe Gascoigne for the infringement committed by GSD from 1 January 1994 to 26 June 2002 solely on the basis that GSD was a wholly-owned subsidiary of Groupe Gascoigne, and (ii) by upholding the decision inasmuch as it held Groupe Gascoigne to be jointly and severally liable, as to EUR 9.9 million, for payment of the fine imposed on GSD.

15. Third, in the alternative, Groupe Gascoigne submits that the General Court erred in law by misconstruing the concept of ‘undertaking’ and consequently by determining the 10% ceiling for the fine payable taking into account Groupe Gascoigne’s worldwide turnover, rather than by reference to the combined turnover of GSD and its parent company.

16. Fourth, also put in the alternative, Groupe Gascoigne submits that the General Court infringed Article 47 of the Charter in that it failed to adjudicate upon the proceedings within a reasonable time.

First and second grounds of appeal – breach of fundamental rights and incompatibility of the presumption of decisive influence – Article 48 of the Charter

17. By its first ground of appeal Groupe Gascoigne submits that, insofar as the General Court held the plea raised at the hearing concerning the change in status of the Charter after the entry into force of the Lisbon Treaty to be inadmissible, it erred in law. By its second ground of appeal Groupe Gascoigne submits that the presumption of decisive influence¹⁴ by virtue of which the infringement committed by GSD was attributed to it, is incompatible with its fundamental right to a fair trial because that presumption operates in effect as a presumption of guilt.

18. I shall consider the first and second grounds of appeal together since they both raise issues of fundamental rights.

14 — It is settled case-law that the conduct of a subsidiary may be imputed to its parent company, in particular where the subsidiary does not decide independently its own commercial policy. In such circumstances a parent and a subsidiary form a single undertaking for the purposes of Article 101 TFEU. The Commission may address a decision imposing fines to the parent without having to establish its personal involvement in the infringement. Where a parent company owns 100% of the share capital there is a presumption that it is able to exercise a decisive influence over its subsidiary and there is a rebuttable presumption that it does in fact exercise such influence (‘the presumption of decisive influence’). See Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco v Commission* [2012] ECR (‘*Alliance One*’), paragraphs 42 to 46 and the case-law cited.

Summary of the submissions

Groupe Gascogne's appeal

19. As far as the first ground of appeal is concerned, Groupe Gascogne complains that the General Court erred in failing to take account of the effects of the Treaty status conferred upon the Charter after the entry into force of the Lisbon Treaty. Moreover, even if the General Court is right in holding that the rights of the defence and the presumption of innocence were guaranteed under EU law before 1 December 2009 by virtue of the general principles of law, those principles do not have the same legal value as the Treaties. Accordingly, the change in status of the Charter means that the rights guaranteed must now be applied with increased rigour by the EU courts.

20. In relation to its second ground of appeal, Groupe Gascogne submits that Article 48 of the Charter should be interpreted in the light of Article 6 of the European Convention on Human Rights ('ECHR'). When interpreting Article 48 of the Charter the Court should also take into account the constitutions and legal traditions of the Member States. The application of the presumption of decisive influence operates in effect as a presumption of guilt and is therefore prohibited.

21. There is moreover a lack of reasoning in the General Court's judgment demonstrating that Groupe Gascogne in fact exercised decisive influence over its subsidiary, GSD. Groupe Gascogne had no control over the activities of GSD in the plastic bags sector. The General Court erred therefore in attributing GSD's practices to Groupe Gascogne.

The Commission's response

22. The Commission considers the first ground of appeal to be manifestly unfounded.

23. No express allegations were made concerning a breach of the presumption of innocence or the rights of the defence during the written procedure. Moreover, the General Court did not refuse to examine the impact of the change in status of the Charter. It simply drew the conclusion that that change did not affect the legal position, as the presumption of innocence and the rights of the defence already comprised part of the EU legal order. The argument that the general principles of law do not have the same legal value as the Treaty is inoperative.

24. The Commission considers that Groupe Gascogne's second ground of appeal is in principle inadmissible, at least inoperative and in any event unfounded.

25. Insofar as the second ground of appeal covers matters that were not raised before the General Court it is inadmissible. Groupe Gascogne's written observations at first instance contained no references to the case-law of the European Court of Human Rights ('the Strasbourg Court') concerning Article 6 ECHR, or to the case-law of the French Conseil Constitutionnel (Constitutional Council). Groupe Gascogne's position is based on a misunderstanding of the case-law concerning the attribution of liability for an infringement committed by a subsidiary to its parent company. The Commission refers to the Opinion of Advocate General Kokott in *Alliance One*.¹⁵

26. The Commission submits that the second ground of appeal is inoperative because, in finding that Groupe Gascogne was jointly and severally liable with GSD, the Commission did not rely exclusively on the presumption of decisive influence. The General Court examined in depth the additional factors submitted by the Commission demonstrating that Groupe Gascogne had actually exercised decisive influence over GSD's conduct.

¹⁵ — Cited in footnote 14 above.

27. It follows from the Court's judgment in *Elf Aquitaine*¹⁶ that the presumption of decisive influence is compatible with the presumption of innocence guaranteed in Article 48 of the Charter. Accordingly, the second ground of appeal is unfounded.

Assessment

Fundamental rights – admissibility at first instance

28. It follows from Article 44(1)(c) read together with Article 48(2) of the General Court's Rules of Procedure that Groupe Gascogne's plea concerning Article 48 of the Charter interpreted in the light of Article 6 ECHR could only be admissible if it were based on matters of fact or law which came to light in the course of the procedure.

29. It is clear from Groupe Gascogne's request to re-open the written procedure (made by letter dated 20 October 2010) on the ground that a new point of law had arisen during the course of the procedure that its legal advisers considered that the plea concerning fundamental rights raised new matters that were not included in the initial application.

30. The General Court's finding in paragraph 27 of the judgment under appeal makes it plain that Groupe Gascogne's plea concerning Article 48 of the Charter did not constitute part of its initial application for annulment. The General Court states:

'As regards the applicant's complaints alleging an infringement of the principle of the presumption of innocence and the rights of the defence guaranteed by Article 48 of the Charter, these are additional to the arguments put forward in the application and do not present a sufficiently close connection with the arguments put forward initially to be considered as forming part of the normal evolution of debate in proceedings before the Court. Those complaints accordingly fall to be considered as new complaints.'¹⁷

31. Furthermore, the content of that plea differed from that concerning Article 49 of the Charter in respect of the proportionality of the sanction imposed. Therefore, Groupe Gascogne's submissions were not sufficiently linked to that point to constitute an amplification of arguments already raised.

32. Accordingly, I consider that the General Court's assessment was correct.

33. It follows that the General Court did not err in law in holding Groupe Gascogne's plea raised at the hearing concerning a breach of Article 48 of the Charter to be inadmissible.

Fundamental rights – compatibility of the presumption of decisive influence with Article 48 of the Charter

34. There are three parts to Groupe Gascogne's complaint: (i) in interpreting Article 48 of the Charter the General Court should have considered Article 6 ECHR and the legal traditions of the Member States; (ii) the presumption of decisive influence was applied as a presumption of guilt and (iii) the General Court failed to provide sufficient reasoning demonstrating that Groupe Gascogne exercised such an influence over GSD.

16 – Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947 (*Elf Aquitaine*), paragraphs 59 to 62.

17 – My translation.

35. If Groupe Gascogne were permitted to put forward for the first time before this Court pleas in law which it had not raised in due time before the General Court, that would enable it to bring a wider case on appeal than that heard at first instance. However, in an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it.¹⁸

36. I have already noted in relation to the first ground of appeal that Groupe Gascogne did not raise pleas concerning the interpretation of Article 48 of the Charter in the light of Article 6 ECHR or the legal traditions of the Member States at first instance.¹⁹ It follows that insofar as Groupe Gascogne's plea covers matters that are raised for the first time before this Court the complaint is inadmissible.²⁰

37. Those matters could have been invoked before the General Court during the written procedure. First, those rights constituted part of the general principles of EU law. Second, although the Charter was not yet legally binding, the Court frequently drew guidance from its provisions in delivering judgments prior to the entry into force of Article 6 TEU.²¹ Furthermore, the Court has held that the Lisbon Treaty does no more than codify the Charter.²²

38. The Court has held that the presumption of decisive influence is not incompatible with Article 48 of the Charter.²³ Moreover, contrary to Groupe Gascogne's submission, the Court has held that that presumption does not operate in effect as a presumption of guilt.²⁴

39. As the General Court stated at paragraph 73 of the judgment under appeal, Groupe Gascogne's claim that the Commission's reasoning was insufficient was put forward '... in essence, in support of the position that the applicant did not participate in [GSD]'s operations when it purchased that company in 1994. The commercial interest of the acquisition lay essentially in the opening of an outlet for the paper produced by the applicant's group. There was no intention to intervene in the conduct of [GSD's] business or, in particular, in the industrial plastic bags sector, in which the applicant was not present and which was, in any event, of little economic importance.'²⁵

40. The duty incumbent upon the General Court (under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union) to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the grounds on which the judgment under appeal is based and provides the Court of Justice with sufficient material for it to exercise its powers of review on appeal.²⁶

41. The General Court made the following findings in the judgment under appeal concerning Groupe Gascogne's decisive influence over GSD:

'74 Whilst it is true that certain of the matters raised by the applicant indicate that [GSD] enjoyed a large measure of autonomy, it none the less remains the case that the applicant did indeed intervene in its subsidiary's operations, that it imposed significant limits on the direction of its conduct on the market and that it thus exercised effective control over its subsidiary.

18 — *Alliance One*, cited in footnote 14 above, paragraph 111 and the case-law cited.

19 — See point 29 above.

20 — See points 30 to 32 above.

21 — See for example Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 (*Kadi*), paragraph 335.

22 — Case C-289/11 P *Legris Industries v Commission* [2012] ECR, paragraph 36.

23 — *Alliance One*, cited in footnote 14 above, paragraph 113.

24 — *Elf Aquitaine*, cited in footnote 16 above, paragraphs 59 to 62.

25 — My translation.

26 — *Alliance One*, cited in footnote 14 above, paragraph 64.

...

93 Consideration of all of the evidence and arguments put forward by the applicant and the Commission shows that the latter did not commit any error of assessment in taking the view that the applicant regularly monitored the management of its subsidiary and in attributing responsibility to the applicant for the infringement committed by its subsidiary. Indeed, without the Commission needing to rely on the presumption of effective control to which the applicant's 100% shareholding gives rise, all of the evidence available to the Commission allowed it to conclude that the parent company effectively controlled its subsidiary in the present case.²⁷

42. In those paragraphs of the judgment under appeal the General Court examined the evidence and found that Groupe Gascogne was actively involved in GSD's operations to the extent that the parent company effectively controlled the subsidiary.

43. I therefore consider that Groupe Gascogne's second ground of appeal is unfounded. The General Court's reasoning is sufficient to enable the persons concerned to know the grounds on which it is based and the Court to have sufficient material to exercise its powers of review within this appeal. Therefore that judgment is not vitiated by any failure to state reasons, contrary to what is claimed by Groupe Gascogne.

44. It follows that the first and second grounds of appeal should be dismissed.

The third ground of appeal: interpretation of the term 'undertaking' for the purposes of Article 23(2) of Regulation No 1/2003

Summary of the submissions

Groupe Gascogne's appeal

45. Groupe Gascogne submits that the General Court erred in its interpretation of the term 'undertaking' in Article 23(2) of Regulation No 1/2003. The purpose of that provision is to ensure that any fine imposed is not excessive. In construing it, the General Court made two errors. First, it confused the concepts of 'undertaking' and 'personal responsibility'. The term 'undertaking' in competition law has a very specific meaning; it is not interpreted in the same way as 'personal responsibility'. It is essential to define the undertaking by reference to the entity to which the anti-competitive practices can be attributed.

46. Second, Groupe Gascogne submits that the General Court erred in confusing the notion of the undertaking with that of the corporate group. According to the Court's case-law it is only where the entire corporate group constitutes one single undertaking that the worldwide turnover of the entire group should be taken into account in determining the 10% ceiling in order to set the upper limit of the fine for the purposes of Article 23(2) of Regulation No 1/2003. There is no reasoning in the judgment under appeal (or the decision) showing the existence of such a group.

47. The fine imposed on GSD in the decision is EUR 13.2 million, and Groupe Gascogne is jointly and severally liable for EUR 9.9 million of that amount. Groupe Gascogne contends that the upper limit of the fine should not be more than EUR 2 070 400, 10% of GSD's turnover. That figure is put forward on the footing that Groupe Gascogne's second ground of appeal is upheld, namely the infringement committed by GSD cannot be attributed to it

²⁷ — My translation.

The Commission's response

48. The Commission contends that the third ground of appeal is unfounded. It is settled case-law that the turnover of an undertaking as a whole gives an indication of its economic importance and influence on the market. Groupe Gascogne is considered to be responsible for GSD's infringement. The Commission was therefore entitled to refer to 10% of the worldwide turnover of the group in determining the upper limit of the fine.

Assessment

49. How should the 10% ceiling (the upper limit of the fine) be determined where a parent company is found liable for an infringement committed by its wholly-owned subsidiary? Groupe Gascogne challenges the concept established in settled case-law that in such circumstances the 10% ceiling in Article 23(2) of Regulation No 1/2003 is calculated by reference to the worldwide turnover of the companies that comprise the group. It submits that in the present matter the 10% ceiling should be set by reference to the combined turnover of GSD and itself. It would follow that the upper limit of the fine would be lower, as 10% of GSD's and Groupe Gascogne's combined turnover (namely that of the holding company without taking its subsidiaries into account) would generate a lower figure than 10% of the worldwide turnover of the entire group.

50. I disagree with Groupe Gascogne.

51. The word 'undertaking' is given a wide interpretation in Article 23(2) of Regulation No 1/2003. It encompasses more than one entity engaged in an economic activity. What is the entity identified as the undertaking for the purposes of that provision?

52. Article 23(2) of Regulation No 1/2003 refers to '... each undertaking and association of undertakings participating in the infringement ...'.

53. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. That concept must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons. When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.²⁸

54. Where liability is attributed to a parent company it is considered to have participated in the infringement. Therefore, the undertaking identified for the purposes of Article 23(2) of Regulation No 1/2003 is the parent and the subsidiary.

55. The purpose of the 10% ceiling is to prevent fines being imposed which it is foreseeable that undertakings due to their size, determined by their worldwide turnover, will not be able to pay.²⁹ Furthermore, the Court has held when considering Article 15(2) of Regulation No 17³⁰ that deterrence is one of the factors to be taken into account in calculating the amount of the fine.

28 — *Alliance One*, cited in footnote 14 above, paragraph 42.

29 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 280 and 281.

30 — The predecessor of Article 23(2) of Regulation No 1/2003.

56. It therefore seems to me that, where a parent company is held jointly and severally liable with its subsidiary for infringing the competition rules, it is consistent with the wording and the purpose of Article 23(2) of Regulation No 1/2003 to determine the 10% ceiling of any fine imposed by reference to the worldwide turnover of the undertaking taking account of the corporate group in its entirety. There is no requirement in EU law that other subsidiaries in the group should be active in the same market or that they should be connected to the infringement before their turnover can be taken into account in setting the fine to be imposed.

57. The Commission invites the Court to consider certain measures of secondary legislation regulating company accounts, in particular the consolidated accounts directive. That submission is made in support of its argument that the 10% ceiling should be determined by reference to the worldwide turnover of the undertaking in question. I have not taken account of those measures in my assessment.

58. I consider that the consolidated accounts directive does not provide a clear analogy. The definition of undertaking in Article 1(1) and (2) of that directive is not the same as that applied in competition law where liability for a subsidiary's infringement is attributed to its parent company. Importantly, the term 'consolidated accounts' is not defined in the same way as the term worldwide turnover is explained in the Court's case-law concerning Article 23(2) of Regulation No 1/2003.

59. Last, as regards the alleged failure to state sufficient reasons in the judgment under appeal,³¹ I note that the General Court sets out Groupe Gascogne's arguments in paragraphs 96 to 104 of the judgment under appeal. It follows from the General Court's findings in paragraphs 107 to 110 that it rejected those arguments. That is because it found that Groupe Gascogne and GSD comprised the same undertaking and that under the rules of competition law the 10% ceiling should be calculated by reference to the worldwide turnover of all the companies within the Groupe Gascogne group.

60. In paragraph 108 of the judgment under appeal the General Court stated that: '... the ceiling of 10% must be calculated on the basis of the total turnover of all the companies constituting the group of which the ultimate holding company is the head, since only the total turnover of the component companies of the group can constitute an indication of the size and economic power of the undertaking in question (*Akzo Nobel and Others v Commission*, paragraph 90 [³²])'.³³

61. In paragraph 111 the General Court explained: '... the taking into account of the consolidated turnover figure of the parent company for the purposes of the application of the ceiling of 10% of the turnover of the undertaking in question does not require that it be demonstrated that each subsidiary in the group is not autonomous in the manner in which it determines its conduct on the market'.³⁴

62. Furthermore in paragraph 112 of the judgment under appeal the General Court stated that in confirming the determination of the 10% ceiling by reference to the worldwide turnover, it was not attributing responsibility for the infringement to the subsidiaries other than GSD comprised in the Groupe Gascogne group.

63. The General Court explained in paragraph 113 that in taking account of the worldwide turnover of the ultimate holding company (Groupe Gascogne) for the purposes of calculating the 10% ceiling, it did not require that the subsidiaries comprising the group should be active on the same market, nor that those subsidiaries and the infringement must be connected.

31 — The relevant principles in the Court's case-law have already been set out in point 40 above.

32 — Case T-112/05 [2007] ECR II-5049.

33 — My translation.

34 — My translation.

64. In those paragraphs the General Court makes it plain that it considered that Groupe Gascogne and GSD comprise the same undertaking for the purposes of Article 23(2) of Regulation No 1/2003 and that in calculating the 10% ceiling it should take into account the worldwide turnover of the constituent parts of that undertaking. It did not consider the conduct of other subsidiaries in the group as relevant to the issue of determining the fine. Nor does it consider those subsidiaries to be connected to the infringement.³⁵

65. Since those paragraphs of the judgment under appeal enable the persons concerned to know the grounds on which it is based and the Court to have sufficient material to exercise its powers of review within this appeal, that judgment is not vitiated by any failure to state reasons.

66. I therefore consider that the third ground of appeal is unfounded.

67. I add that if the Court were to reach a different conclusion (namely that the 10% ceiling should be determined by reference to the combined turnover, rather than the worldwide turnover), but considered Groupe Gascogne to be jointly and severally liable for EUR 9.9 million of GSD's fine, it would be faced with the difficulty that there is no information before it as to what the combined turnover of the two companies was at the relevant time. It is not therefore possible to calculate 10% of that sum and ascertain whether it would result in a reduction of the fine payable by Groupe Gascogne and if so, by how much. The matter would therefore have to be remitted to the General Court.

Inability to pay the fine imposed

68. Like its subsidiary GSD, at the hearing before this Court Groupe Gascogne made submissions concerning its current financial position, arguing that it is unable to pay the fine imposed by the decision. Equivalent submissions were not made at first instance and no provision of the Treaty, the Court's Statute or its Rules of Procedure was cited in support.

69. I consider that Groupe Gascogne's submissions regarding its inability to pay are inadmissible for the same three reasons as I have set out at points 121 to 124 of my Opinion in *Gascogne Sack Deutschland*.

Failure to adjudicate within a reasonable time

70. The law's delays have provided ample opportunity, over the years, for writers of fiction to exercise their wit. For an example pertinent to the present appeals, I can do no better than to quote Charles Dickens' preface to the first edition of *Bleak House*:

'A few months ago, on a public occasion, a Chancery Judge had the kindness to inform me, as one of a company of some hundred and fifty men and women not labouring under any suspicions of lunacy, that the Court of Chancery, though the shining subject of much popular prejudice (at which point I thought the Judge's eye had a cast in my direction), was almost immaculate. There had been, he admitted, a trivial blemish or so in its rate of progress, but this was exaggerated, and had been entirely owing to the "parsimony of the public"; which guilty public, it appeared, had been until lately bent in the most determined manner on by no means enlarging the number of Chancery judges appointed – I believe by Richard II, but any other King will do as well.'

³⁵ — See point 56 above.

71. By its fourth ground of appeal, Groupe Gascogne claims that the General Court infringed Article 47 of the Charter because it failed to decide the case within a reasonable time. This is not the first time that the issue of what constitutes a reasonable period of time for the adjudication of competition proceedings before the General Court has been raised before the Court.³⁶ However, this case both enables and requires the Court to clarify a number of issues of principle.³⁷ When and before which court (the General Court, or this Court on appeal) should a plea of undue delay be raised? What are the criteria to apply when determining what constitutes ‘unreasonable’ or ‘excessive’ delay? And, if there is deemed to have been undue delay, what is the appropriate remedy?

The right to a fair hearing within a reasonable time

72. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States. It has been enshrined in Articles 6 and 13 ECHR and reaffirmed by Article 47 of the Charter.³⁸ Article 47 provides that everyone is entitled to an effective remedy and to a fair hearing within a reasonable time. By virtue of Article 52(3) of the Charter, since the rights guaranteed by Article 47 correspond to rights guaranteed by the ECHR, their meaning and scope are to be construed in the light of Articles 6(1) and 13 ECHR.³⁹ Thus, the criteria developed by the the Strasbourg Court in interpreting those provisions should be applied in determining whether a case has been adjudicated within a reasonable time and how to remedy an infringement of that principle.⁴⁰ That Court has held in *Sürmeli*⁴¹ that the Contracting States are subject to a duty to organise their legal systems in such a way that their courts can meet the requirements of Article 6(1) ECHR, including the obligation to hear cases within a reasonable time.

73. The European Union is not, of course, yet a Contracting Party to the ECHR. However, inasmuch as the Member States have already made the status of the Charter equivalent to that of the Treaties, they have committed themselves to ensuring that, within the field of operation of EU law, the rights guaranteed by the Charter will be respected effectively. The European Union is, moreover, now committed to the necessary negotiations to accede to the ECHR. I therefore consider that the Member States have, in principle, already committed themselves to ensuring that the judicial structures of the European Union are able to meet the requirements of Article 47 of the Charter and Article 6(1) ECHR and ensure a fair hearing within a reasonable time for matters falling within their jurisdiction.

Raising a plea of undue delay

74. Self-evidently, the best way of avoiding a breach of the right to a fair trial within a reasonable time is to ensure that, before a delay in case-handling becomes excessive, remedial action is taken. Effective case management by the court itself is naturally the preferred procedure. However, it seems to me also to be perfectly proper and legitimate for a litigant to express concern if proceedings are becoming unduly protracted, without necessarily waiting until judgment is handed down. That may (for example) involve contacting the Registry, after a prolonged period of apparent inactivity, to enquire

36 — Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417 (*‘Baustahlgewebe’*); Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland v Commission* [2009] ECR I-6155 (*‘Der Grüne Punkt’*); and Case C-110/10 P *Solvay v Commission* [2011] ECR I-10439 (*‘Solvay’*). The latter case concerned the Commission’s failure to deal with the administrative phase of the procedure within a reasonable time as well as the General Court’s failure to adjudicate within a reasonable time in the proceedings before it.

37 — See also my Opinions in *Gascogne Sack Deutschland*, points 125 to 141, and *Kendrion*, points 108 to 134.

38 — *Kadi*, cited in footnote 21 above, paragraph 335.

39 — Article 47 of the Charter encompasses both rights. Specifically, Article 47(1) guarantees the right to an effective remedy; Article 47(2) the right to a fair and public hearing within a reasonable time.

40 — Case C-334/12 RX *Arango Jaramillo and Others v EIB* [2013] ECR (*‘Jaramillo’*), paragraph 28.

41 — *Sürmeli v. Germany* [GC], no. 75529/01, paragraph 137, ECHR 2006-VII.

about the progress of the case. I do not think that a litigant is under any duty to prompt a court in this way; but the advantage of the litigant being proactive is that it may be possible for the problem to be nipped in the bud. The court can take steps to ensure that the rest of the procedure is speeded up so that, overall, the right to a fair hearing within a reasonable time is respected.

75. Whether or not a litigant raises the matter before the General Court has, in my view, no bearing on his subsequent right to raise it on appeal before this Court.

76. An appeal against a decision of the General Court is limited to points of law. The grounds of appeal may also include procedural irregularities that adversely affect the claimant concerned.⁴² It is settled law that a failure to adjudicate within a reasonable time is such a procedural irregularity which the Court has already held to be admissible.⁴³

Excessive duration of legal proceedings – a measurable concept?

77. The Strasbourg Court assesses the reasonableness of the length of proceedings in the light of the particular circumstances of the case before it and takes account of the following four criteria laid down in its case-law: importance of the case to the applicant, the complexity of the case, the applicant's conduct and the conduct of the competent authorities.⁴⁴

78. In *Baustahlgewebe* this Court measured the duration of proceedings in the General Court (which it described as 'considerable') from the date when the application for annulment was lodged to the date that Court delivered judgment (in that case, approximately five years and six months).⁴⁵ Between the end of the written procedure and the decision to open the oral procedure 32 months had elapsed. Within that period there had been a procedural decision to join 11 cases for the purposes of the oral procedure. The Court stated that what constitutes a reasonable time should be assessed on a case by case basis and applied the four criteria derived from the case-law of the Strasbourg Court that I have just set out ('the *Baustahlgewebe* criteria'). The Court also noted certain constraints inherent in proceedings before the EU Courts. In particular, it suggested that the rules governing the language of proceedings should be taken into account.⁴⁶

79. In *Der Grüne Punkt*⁴⁷ the proceedings lasted 5 years and 10 months, including 3 years and 9 months between the end of the written procedure and the opening of the oral phase. The General Court took no procedural steps during that time. On appeal this Court assessed the period between when the application was lodged and when judgment was delivered in the light of the *Baustahlgewebe* criteria.

80. In both *Baustahlgewebe* and *Der Grüne Punkt* the Court found that the General Court had failed to adjudicate within a reasonable time. However, the approach taken thus far to establishing whether proceedings have been unduly lengthy has perhaps been more pragmatic than scientific.

42 — Article 58 of the Statute of the Court of Justice.

43 — See *Baustahlgewebe*, paragraph 19, see also *Der Grüne Punkt*, paragraph 176, both cited in footnote 36 above.

44 — *Pélissier and Sassi v. France* [GC], no. 25444/94, paragraph 67, ECHR 1999-II.

45 — *Baustahlgewebe*, cited in footnote 36 above, paragraphs 28 and 29.

46 — *Baustahlgewebe*, paragraph 43, cited in footnote 36 above. See also Articles 36 and 37 of the Rules of Procedure concerning the determination of the language of a case.

47 — Cited in footnote 36 above.

81. I think it is important to resist the temptation to generalise about what is ‘excessive’ by focusing exclusively on the overall length of the proceedings. Rather, it seems to me that the right starting point is to look briefly at what the General Court does and the constraints within which it functions, to see the effect of those elements upon the time taken to dispose of a case and, on that basis, to identify more clearly those periods during the handling of a case that should be subjected to particular scrutiny.

82. The General Court has seen a significant increase in its jurisdiction since its foundation in 1989.⁴⁸ Leaving to one side those areas of law that are not the subject-matter of this appeal, the jurisdiction that it exercises over Commission decisions in competition cases cannot simply be assimilated to the work of a national competition law tribunal. EU cartel cases often involve undertakings in several different Member States, bringing applications for annulment in their procedural language of choice from amongst the 23 (soon to be 24) official languages at their disposal. Once the written pleadings are closed, these must be reduced into a common working language to enable the judges and their legal secretaries to start work on the file. The General Court draws on the same shared translation directorate as this Court. There are competing claims for translation resources; and it would not be realistic to assume that all the translations for every competition case before the General Court can be (or should be) given the same priority as (for example) an urgent preliminary ruling procedure before this Court involving an applicant who is in custody. If there has been a full set of elaborate written pleadings (application, defence, reply and rejoinder), possibly with extensions of time for all save the initial application, and each of these documents has also to be translated, it is not implausible that something like 20 to 22 months may already have elapsed before the file can, in any meaningful sense, be opened for study.⁴⁹ The point I am making is that the cross-border, multi-lingual nature of EU competition law will tend to produce the effect of lengthening the time that will elapse before a case can *start* to be examined.⁵⁰

83. There is, however, probably no such thing as an ‘average’ competition case. Some may be relatively straightforward, once the arguments raised have been filleted out. Others can give rise to dense, complex, novel issues. In some cases, the sheer weight of documents and technical evidence that must be assessed is itself a formidable exercise. Where several undertakings challenge a Commission decision fining them for participating in a cartel, it is logical for their cases to be handled together. That will mean, however, that the individual cases cannot move faster than the pace of the slowest proceedings in that particular group.

84. If and to the extent that the General Court finds it necessary, in order properly to examine a case, to engage in active case management (for example, by convening a case management conference, or by requesting specific further information in writing from the parties), such time should clearly be *disregarded* when examining how long the case has taken to hear. Time spent ensuring a fair trial is time reasonably expended.

85. What of the proposition that it is common knowledge that the General Court is overloaded, with a significant backlog of cases, and that this inevitably means that the General Court will take significantly longer to process cases than it might otherwise?

48 — For a useful summary, see the Court’s Annual Report, proceedings of the General Court and the Statistics of judicial activity of the General Court available on http://curia.europa.eu/jcms/jcms/J02_7000/.

49 — I am basing myself here on what seems to be the normal pattern for written procedures for competition cases in general before the General Court. It would of course be possible to re-engineer the system so that competition cases were handled rather differently throughout the judicial process. I emphasise, however, that the issue in this appeal (as in *Kendrion* and *Gascoigne Sack Deutschland* and Case C-578/11 P *Deltafina* (pending and currently suspended)) concerns whether there has been excessive delay in handling a particular case, not whether radical re-design of the existing system would be a good idea.

50 — This is without prejudice to the observation made in the preceding footnote: even under a differently designed system, the reality of inter-Member State cartels and the multi-lingual nature of the European Union will, I think, make it difficult for EU competition cases to be handled with the same dispatch as a domestic competition case.

86. Although I have considerable sympathy for the General Court's plight, it seems to me that general overload cannot per se be used to justify excessive delay in case-handling leading to a breach of the right to a fair trial within a reasonable time.

87. To the extent that revised internal procedures and active case management can lead to an improved use of existing resources, that is self-evidently an objective actively to be pursued. The General Court is, indeed, currently overhauling its Rules of Procedure with that very aim in mind. However, the search for swifter case-handling cannot become a goal that displaces all others. The right to a *fair trial* within a *reasonable time* is a right that encompasses two key components, not one. Cutting every last possible corner in a search for swifter case-handling would not be compatible with maintaining the overall fairness of the proceedings. Nor, more generally, would it be an appropriate way of conducting the judicial process. The context of these linked appeals is that the undertakings concerned have been subjected to substantial fines for what the Commission deems to have been very serious breaches of the competition rules. Those undertakings have the right to put their arguments contesting that decision and have them examined with care; and to feel that, win or lose, they have had due process from the General Court in the review of their case. As this Court has emphasised, a full review by the General Court is necessary to safeguard procedural fairness where the Commission acts as investigating authority, prosecuting authority and fining authority.⁵¹ As I have already indicated, the time that such thorough review takes is not 'excessive' time or 'wasted' time. It is the foundation upon which the legitimacy of the General Court's judgments rests.

88. To the extent that the available resources of the General Court are inadequate to deal appropriately with the present and reasonably to be expected future case load, the responsibility must lie with the Member States.

89. I have already alluded⁵² to the obligation incumbent upon Contracting States to the ECHR to ensure that their courts are organised in a way that respects the right to a fair trial within a reasonable time. I can see no convincing reason for applying a different logic to the EU judicial institutions. The jurisdiction of the General Court (and with it, concomitantly, that court's workload) has increased very significantly over the years. The problem of that court's backlog is common knowledge. A request has been made for additional judges⁵³ – so far, without result. Even within the existing arrangements, there are sometimes difficulties. The current President of the General Court has recently drawn attention publicly to the impairment to the General Court's productivity that results if the reappointment process does not run smoothly (making due allowance for scrutiny by the Article 255 committee) and there is a lengthy period of uncertainty in the run-up to the renewal date.⁵⁴ These are genuine concerns.⁵⁵ A person within the jurisdiction of an individual Member State is entitled to expect that that State will organise its national court system adequately and efficiently,

51 — Case C-272/09 P *KME and Others v Commission* [2011] ECR I-12789, paragraphs 102 to 106 and the case-law cited; see also points 68 and 69 of my Opinion and the case-law cited.

52 — See point 72 above.

53 — See Part II of http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf.

54 — Letter from President Jaeger to the Irish Presidency dated 12 March 2013, published at <http://register.consilium.europa.eu/pdf/en/13/st07/st07758.en13.pdf>. President Jaeger had previously written (on 23 May 2012) to the Council to identify the judges whose terms of office would expire on 31 August 2013 and to request the governments concerned to present their proposals before 15 November 2012: http://www.parlament.gv.at/PAKT/EU/XXIV/EU/08/82/EU_88277/imfname_10037088.pdf. See also the House of Lords European Union Committee, 16th Report of Session 2012-13, 'Workload of the Court of Justice of the European Union: Follow-up Report', in particular paragraphs 59 and 67, <http://www.publications.parliament.uk/pa/ld201213/ldselect/lddeucom/163/163.pdf>. See further the letter dated 26 March 2013 from the CCBE to the President of the Court concerning the appointment of judges to the EU Court, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/260313_EN_EU_Repsp1_1364893059.pdf.

55 — At the time of drafting this Opinion, it appears likely that (provided all the appointment processes are completed in time) there will be up to nine new judges when the membership of the General Court is partially renewed in September 2013. Since additional judges will also join both the General Court and this Court on Croatia's accession to the European Union on 1 July 2013, this would mean that just over a third of the members of the General Court will then be new in post.

placing sufficient well-qualified judges in post, renewing them in office (assuming they are competent) so as to maintain a stable and effective judiciary, and providing adequate support staff. Those whose cases come before the EU courts are surely similarly entitled to arrangements that protect their right to a fair trial within a reasonable time.

90. It follows that difficulties caused by case overload, however real they may be, should be disregarded when assessing whether there has been excessive delay in handling a particular case.

91. Drawing together the threads of what I have said thus far, it seems to me legitimate first, to disregard the time from the lodging of the application to the end of the written procedure; second, to make a plausible additional allowance of time (I am taking here, as a rule of thumb, four months, but it could be longer in a very heavy case or if there is particular pressure on translation resources at that point in the year) to obtain the translation of the last pleading after the end of the written procedure; and third, also to disregard any periods of time that can be attributed to active case-management. The focus should therefore be on examining periods of apparent inaction, whilst making reasonably generous allowance for the time that is genuinely required to get from the moment when the written pleadings are available in the institution's working language to the moment at which the convocation for the hearing can sensibly be sent out.⁵⁶

92. Again, I emphasise that there is no magic figure that can be plucked from the air as the 'right' length of time that should elapse between availability of the translated file and convocation of the hearing in order to respect the right to a fair trial within a reasonable time.⁵⁷ A reasonably straightforward case might need six months for that stage of the procedure. A significantly more complex case (or – for example – a cartel with multiple interlinked appeals) might require double that time, perhaps even more. In general terms – as an indication of the parameters within which I am thinking – I consider that, in a case in which there has been *no* active case management, if more than 18 months had elapsed from the close of the written procedure (i.e., in the language of procedure) *and* the parties have still not been informed of the date for the hearing, alarm bells should be ringing. Such a time frame seems to me to go beyond what is plausible as the norm for case-handling.

93. Does it follow that, as soon as that (admittedly arbitrary) point is passed, there has been excessive delay?

94. I think not. In my view there is a transitional stage, during which there has undoubtedly been delay, but the delay is not yet 'excessive' delay. Again, this is the realm of subjective judgment rather than hard analysis. For my part, I would be prepared to accept that as much as perhaps a further six months might elapse before the delay became excessive (or, to put it more colloquially, before 'late' becomes 'unacceptably late'). Others might attach different numbers to the different stages. But once more than two years have elapsed since the end of the written procedure, with no active case management and no convocation of the parties to a hearing, I would be minded to regard the delay as excessive and would require persuading otherwise.

95. Against that background, I turn to consider whether there was excessive delay in the present case.

56 — That is indeed the approach adopted by the Strasbourg Court, see for example, *Findlay v. the United Kingdom*, 25 February 1997, paragraphs 73 and 74 *Reports of Judgments and Decisions* 1997-I.

57 — *Jaramillo*, cited in footnote 40 above, paragraphs 43 and 44.

Summary of the submissions

96. Groupe Gascogne states that, when it lodged its application before the General Court challenging the decision and the fine imposed, it arranged a bank guarantee to cover payment of that fine and of any interest which might accrue thereon, pending the outcome of the proceedings at first instance. Groupe Gascogne claims that the length of those proceedings (close to six years) was excessive.⁵⁸ Groupe Gascogne submits that the General Court infringed Article 47 of the Charter, by failing to adjudicate within a reasonable time. Accordingly, Groupe Gascogne asks the Court to quash the judgment under appeal, or alternatively to reduce the amount of the fine imposed taking into account the financial burden that it has suffered as a result of the breach of its fundamental right.

97. The Commission submits, first, that Groupe Gascogne's plea is inadmissible since it failed to raise the issue of failure to adjudicate within a reasonable time at the hearing before the General Court. Second, the judgment under appeal should not be quashed in its entirety as Groupe Gascogne has not complained that its rights of defence have been infringed because the General Court failed to decide Groupe Gascogne's case within a reasonable time. Third, even if the Court finds that the proceedings before the General Court were unduly lengthy, Groupe Gascogne has not suffered any material loss due to the excessive duration of those proceedings. Fourth, the appropriate remedy in such circumstances is for Groupe Gascogne to lodge a separate application for damages. Fifth, in the alternative, if the Court awards compensation in the appeal proceedings, any such award should be symbolic.

Assessment: was there a failure to adjudicate within a reasonable time?

98. I consider that Groupe Gascogne is not precluded from raising for the first time on appeal before this Court the question whether the General Court failed to adjudicate within a reasonable time,⁵⁹ for the same reasons as I have set out in points 128 to 130 of my Opinion in *Gascogne Sack Deutschland*.

99. Groupe Gascogne claims that there was delay between the close of the written procedure and the date that it received notification of the hearing.⁶⁰ However, Groupe Gascogne confirms that proceedings moved swiftly after the reallocation of its case to a new judge-rapporteur in September 2010.⁶¹

100. Groupe Gascogne lodged its application for annulment on 23 February 2006. The written procedure ended on 23 July 2007. On 23 September 2010 the Registry of the General Court informed Groupe Gascogne that the matter had been allocated to the Fourth Chamber (at that stage, there had been a period of inactivity of about three years and two months). On 20 October 2010 Groupe Gascogne requested that the written procedure be reopened.⁶² On 14 December 2010 the company was informed that the case had been set down for hearing. The case was heard by the General Court on 2 February 2011 and judgment was delivered on 16 November of that year.

101. What is known that could justify the (lengthy) period between the end of the written procedure and the convening of the various hearings?

58 — The application for annulment was lodged on 23 February 2006 and judgment was delivered on 16 November 2011.

59 — See point 75 above.

60 — That is a common feature of all three appeals, see also *Gascogne Sack Deutschland* and *Kendrion*.

61 — GSD and Kendrion also state that their cases moved quickly after they were allocated to a new judge-rapporteur.

62 — See point 17 above.

102. As far as cases relating to this cartel are concerned, at least 15 addressees of the decision lodged applications for annulment before the General Court.⁶³ One of those cases was withdrawn.⁶⁴ In two cases judgment was delivered on 13 September 2010.⁶⁵ In nine cases (including the present matter) judgment was delivered on 16 November 2011. Three cases remain pending before the General Court. Apart from the present appeal, *Gascogne Sack Deutschland* and *Kendrion*, there are two other appeals currently pending before this Court.⁶⁶

103. Groupe Gascogne's case is linked closely to that of its subsidiary, GSD. However, that case has proceeded at roughly the same pace as its parent company's and has not therefore hindered the present proceedings.

104. Applying the four *Baustahlgewebe* criteria, it is plain that since Groupe Gascogne is jointly and severally liable for a fine of EUR 9.9 million, the case is of importance to the undertaking.⁶⁷ It is also clear that the case raises complex issues.

105. I do not consider that the duration of the proceedings can be attributed to Groupe Gascogne's conduct. It is true that on 20 October 2010, Groupe Gascogne requested the General Court to reopen the written procedure in order to raise arguments about the new, post-Lisbon status of the Charter (see points 19 to 21 above). However, it is clear from the fact that Groupe Gascogne was notified on 14 December 2010 that its case had been set down for hearing that that procedural incident had little or no effect on the overall duration of proceedings.

106. So far as I can tell, no active case management took place during the apparent period of inactivity (three years and two months) between the end of the written procedure and Groupe Gascogne's request to re-open the written procedure.

107. I reject as mere rhetoric the suggestion – put forward by Groupe Gascogne – that the fact that its case was set down for hearing some three months after allocation to a new judge rapporteur means that it was evidently capable of being handled *ab initio* within such a time frame. On the one hand, it is both illegitimate and implausible to infer that the new rapporteur took over case files on which no work whatsoever had been done by his predecessor and, on the other hand, it is abundantly clear that Judge van der Woude and his team made exceptional efforts to bring the industrial plastic bags cases on for hearing. It would be wholly wrong and unrealistic to use the time that they took as the yardstick by which to judge what would have been a reasonable 'normal' time for processing this case.

108. It is also necessary (as I have indicated earlier) to make due allowance for issues of translation and for studying with care multiple inter-linked files – pleadings and detailed (usually, untranslated) annexes – that related to the same cartel and Commission decision and that raised complex issues of fact and law. There were, so far as I can tell from the file, no particular reasons why the appeals relating to this particular cartel had to be treated from the beginning with special urgency (or why, of those 15 applications challenging the Commission's decision, the 3 that have led to the present appeals by Groupe Gascogne, GSD and *Kendrion* should have been singled out from the beginning for special treatment – there had not (for example) been well-argued but ultimately unsuccessful applications for interim measures). Put a different way: the appellants were entitled to have their cases treated with reasonable dispatch, neither more nor less.

63 — There were six different languages of procedure across the fifteen cases.

64 — Order of 6 July 2006 in Case T-43/06 *Cofira Sac v Commission*. The full text of the order of the General Court is available on the Court's website in French and Italian.

65 — (i) Judgment of 13 September 2010 in Case T-26/06 *Trioplast Wittenheim v Commission*. The full text is available in French and Swedish on the Court's website. (ii) Case T-40/06 *Trioplast Industrier v Commission* [2010] ECR II-4893.

66 — Case C-35/12 P *Plásticos Españoles (ASPLA) v Commission* and Case C-36/12 P *Armando Álvarez v Commission*. Both cases have been suspended until judgment is delivered in *Groupe Gascogne*, *Gascogne Sack Deutschland* and *Kendrion*.

67 — The fine imposed on GSD is EUR 13.2 million. Groupe Gascogne is jointly and severally liable for EUR 9.9 million of its wholly-owned subsidiary's fine.

109. Judged by that standard, and applying the general parameters that I have set out in points 72 to 95 above, the ineluctable conclusion is nevertheless that this case took too long.

110. In my view the Court should resist the temptation to identify, in its judgment, a single specific figure in months as the norm for the time that should elapse between the moment that the written procedure is ended (in the language of procedure) and the moment that the generic cartel case is set down for hearing. Whilst internal targets can and should be set, such figures are for guidance. There can be perfectly good reasons for exceeding them in a particular appeal or series of appeals. It follows – as I have already indicated⁶⁸ – that delay can only be assessed on a case-by-case basis.

111. At the same time, I accept that it is necessary to say more than ‘there was excessive delay in the present case’. On the one hand, it is important to give an indication of the extent to which the right to a fair hearing within a reasonable time was breached. On the other hand, should any of the applicants be minded to bring a separate action for damages,⁶⁹ it will be necessary to quantify the breach to enable such a claim to be considered.

112. I cannot emphasise sufficiently that quantifying delay is not an exact science. Any assessment is approximate. Looking at the features of this case, taken against the background of all the challenges to the decision sanctioning the industrial plastic bags cartel, and focusing on the period of time that elapsed between the end of the written procedure and the convocation for the hearing, I think it is reasonable to say that that stage of the procedure for this case might have taken up to two years without there having necessarily been delay that could fairly be characterised as ‘excessive’. It follows that – in round figures – this case took about a year and a half longer at first instance at the General Court than it should have done.

113. What should the Court do where the issue of failure to adjudicate in a reasonable time is raised in the context of an appeal?

Remedies

114. Where there is a failure to hear a case within a reasonable time any remedy for that infringement must be effective.⁷⁰ In the context of the ECHR, the Strasbourg Court has indicated that there should be a specific procedure in the legal system of the Contracting Parties for dealing with such claims.⁷¹

115. This Court has followed two different approaches in *Baustahlgewebe* (reduction in the fine) and *Der Grüne Punkt* (separate action for damages). Neither is perfect.

116. Groupe Gascogne asks the Court to apply the *Baustahlgewebe* approach.⁷² That approach has the obvious advantage of procedural economy. However, as I shall explain, I have doubts as to the adequacy of the legal basis for that approach and the extent to which it can really be said to provide an effective and appropriate remedy.⁷³

117. The *Der Grüne Punkt* approach requires a separate action for damages to be lodged before the General Court. It would be for that court to examine whether the claimant has suffered injury or loss, whether there is a causal link between the injury and the failure to adjudicate within a reasonable time and to quantify any damage. Thus, any damages awarded would reflect the actual injury suffered by the

68 — See points 81 to 84 above.

69 — See point 133 et seq. below.

70 — *Kudła v. Poland* [GC], no. 30210/96, paragraph 156, ECHR 2000-XI.

71 — *Kudła v. Poland*, cited in footnote 70 above, paragraph 157.

72 — The applicants in *Gascogne Sack Deutschland* and *Kendrion* take a similar approach.

73 — See points 130 and 131 below.

claimant. There is no such examination under the *Baustahlgewebe* approach. This Court does not assess detailed claims for damages when a claimant raises undue delay in the context of an appeal against a judgment of the General Court confirming a Commission decision penalising an infringement of the competition rules. Rather, it makes a global estimate of what percentage reduction in the original fine would be appropriate. By definition, however, the *Der Grüne Punkt* approach is procedurally more cumbersome, as it requires that a separate damages action be lodged. Moreover, the claim would have to be brought before the General Court, whose conduct of the substantive appeal is – precisely – what lies at the root of the damages action. Would such an action comply with the requirements of Article 6(1) ECHR?

118. There appears to be no common remedy across the European Union for failure to adjudicate within a reasonable time in competition cases. Certain Member States order a reduction in the penalty imposed or mitigate its execution where there has been excessive delay.⁷⁴ Other Member States only provide financial compensation rather than a reduction in the fine.⁷⁵ Some have adopted specific provisions concerning compensation for an infringement of the right to a fair hearing within a reasonable time.⁷⁶ Others consider that a judgment finding that there has indeed been a failure to adjudicate within a reasonable time suffices as just satisfaction.⁷⁷ In at least one Member State,⁷⁸ there are specific rules governing the percentage reduction in penalty that is to be applied for a failure to adjudicate within a reasonable time in competition matters.

119. The Court invited the 27 Member States, the European Parliament and the Council to indicate in writing their views on the approach taken in, respectively, *Baustahlgewebe* and *Der Grüne Punkt*. Seven Member States indicated a preference for the former, three favoured the latter and six Member States expressed no preference. The Council endorsed *Baustahlgewebe* whilst acknowledging that the two remedies coexist and neither is perfect. The European Parliament considered the *Der Grüne Punkt* approach to be better.

120. The Strasbourg Court has stated that, in an appropriate case, a judgment may constitute due satisfaction in cases where a procedural irregularity has been established.⁷⁹ Article 41 ECHR additionally provides that that Court may, if appropriate, award fair reparation. There is however, no equivalent provision in EU law granting, in express terms, an equivalent 'fair reparation' power to this Court.

121. I derive the following principles from this Court's case-law, the ECHR as interpreted by the Strasbourg Court and the legal traditions of the Member States. First, there is no uniform approach. Second, any approach is likely to be imperfect, in the sense that it will have both advantages and disadvantages. Third, any remedy must be effective if it is to satisfy Article 13 ECHR and thus Article 47 of the Charter.

122. Let us go back for a moment to first principles.

74 — Austria, Belgium, Germany, Finland, the Netherlands, Spain and the United Kingdom.

75 — France, Italy, Poland and Romania.

76 — Germany, Finland, Italy and Poland.

77 — Germany and Greece.

78 — The following rules have been developed in the case-law of the Netherlands courts concerning competition matters. The length of proceedings is considered to be unreasonable where the combined length of the administrative phase and the judicial phase is more than five years and six months. Where the period in excess of that time is less than six months a fine may be reduced by up to 5%. The reduction is up to 10% (subject to a cap of EUR 10 000) where the excessive length of proceedings is between 6 and 12 months. For periods in excess of 12 months the court has discretion to determine the amount by which to reduce the fine.

79 — *Hauschildt v. Denmark*, 24 May 1989, paragraph 58, Series A no. 154.

123. An undertaking lodges an application before the General Court seeking the annulment of a competition decision. The usual sequential written pleadings are lodged and the written procedure is closed. Initially, those acting on behalf of the undertaking are unconcerned by the passage of time: no doubt the court is working on the file. After a while, enquiries are made of the General Court's Registry as to how the case is progressing. In the absence of some sign of active case management, perhaps a polite formal letter will then be written to the General Court expressing concern at the length of time that has already elapsed, identifying likely heads of damage (unforeseen additional costs of the bank guarantee, uncertainty damaging share price and making it difficult to plan for the future, and so on) and reserving the client's right to argue that there has been unreasonable delay in handling the appeal and either to seek a reduction in the fine originally imposed or to claim damages. If the General Court reacts by speeding up the process, well and good – the problem is nipped in the bud and no further remedy is required. Assuming that that does not happen, however, the argument about unreasonable delay may be made again at the hearing before the General Court.

124. How will that plea be treated before the General Court? Here, I wish to distinguish sharply between cases where the appellant is still able to exercise fully his rights of defence and those cases – one hopes, rare cases – in which the very passage of time has made it impossible for the appellant to get a fair hearing.⁸⁰ In those circumstances, the only effective remedy for the breach of the right to a fair hearing within a reasonable time is indeed to annul the decision. But there is no suggestion in the three appeals that Groupe Gascogne, GSD or Kendrion have been impeded in their ability to argue their appeals effectively.

125. The fine that is being challenged before the General Court was imposed for a specific breach of the competition rules. Assuming that none of the substantive grounds of appeal succeed, what is the logic behind reducing the fine? I can see none. To the extent that the undertakings can point to specific heads of loss – to damage that they have suffered by reason of that part of the overall time taken to dispose of their appeal which may be considered to be 'unreasonable' or 'excessive' – a (separate) claim for damages under Article 340 TFEU may properly lie. But delay in the General Court is conceptually quite distinct from the anti-competitive conduct that led the Commission to impose the fine in the first place. For that reason, the undue delay plea before the General Court may properly be characterised as inoperative. Even if it is well-founded in law and borne out by the facts of the case, it can have no effect on the outcome of the appeal.⁸¹

126. But, if such a plea is inoperative before the General Court, surely it is equally inoperative before this Court on appeal?

127. It is for this reason that I disagree with the *Baustahlgewebe* approach. Fining an undertaking for breaching the competition rules cannot be assimilated to imposing a custodial sentence upon an individual, where delay in the trial process can indeed appropriately be remedied (if the individual is still found guilty and deserving of imprisonment) by a reduction in the sentence to be served. Rather, if the undertaking has been harmed by the delay, that harm can be broken down into financial heads of damage causatively linked to the excessive time taken to dispose of the appeal. Evidence can be adduced and, where damage is proved, an appropriate compensatory award can be made. Within the EU legal order, it is the General Court, rather than this Court, that is the jurisdiction that is concerned with detailed fact-finding and the weighing of evidence. That would seem to me to be a further element in favour of concluding that a free-standing action for damages before the General Court is preferable to trying to grant an effective remedy by reducing fines on appeal.

80 — Perhaps this is more likely to occur with an individual rather than an undertaking; but the possibility that a key witness for the undertaking might die or become untraceable during the course of over-long proceedings cannot be excluded.

81 — Case C-46/98 P *EFMA v Council* [2000] ECR I-7079, paragraph 38, and see more recently Case C-520/09 P *Arkema v Commission* [2011] ECR I-8901, paragraph 31.

128. An 18th century Lord Chancellor of England once rhetorically asked, ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’⁸² Part of not having such attributes is that an undertaking – unlike an individual – cannot plausibly claim for the psychological trauma of having a trial hanging over its head.⁸³ If it has suffered in the marketplace by reason of excessive delay, it can reasonably be expected to try to quantify that loss in monetary terms and to adduce evidence to support the figures that it is putting forward.⁸⁴

129. I add that my discomfort with the *Baustahlgewebe* approach is compounded by a sense of unease as to the precise legal base for reducing a fine in such circumstances. Again, it may be helpful here to go back to first principles.

130. When the Commission imposes a fine, it has discretion as to the amount. There is no specific provision in Regulation No 1/2003 which gives it a legal basis for reducing the fine that it would otherwise have imposed because the administrative proceedings took too long. That is nevertheless what the Commission did in *Dutch Beer*.⁸⁵ On appeal, the General Court made a further reduction of 5% in the fine, notwithstanding that the substantive grounds of appeal had failed.

131. It is unclear to me how Article 261 TFEU (on which the General Court relied) provides a satisfactory basis for reducing a fine when there are no substantive grounds for modifying the Commission’s assessment of *the fine that was appropriate to the infringement*. True, Article 31 of Regulation No 1/2003 and Article 261 TFEU give the General Court (and this Court on appeal) ‘unlimited jurisdiction’; but that unlimited jurisdiction is intimately linked to the appropriateness (or otherwise) of the penalty imposed in relation to the infringement committed. Delay in a procedure – whether that be the Commission’s delay during the administrative phase or the General Court’s delay during the judicial phase – has nothing to do with the undertaking’s conduct or the gravity of the infringement.

132. I am aware that the rigour of this approach does not coincide with the stance adopted by the General Court in considering claims of undue delay.⁸⁶ Nor was it the approach taken by this Court in *Baustahlgewebe*. However, it seems to me that the Court is now at a point where it can and should rule on which is the better of the two remedy routes presently available. I understand that it is tempting to opt for the ‘procedural economy’ of reducing the fine (by some unspecified percentage, calculated on some unknown basis)⁸⁷ in the context of an appeal. I am not satisfied by the intellectual foundations of such an approach (relationship between fine and conduct; jurisdiction; transparency) and it has, at worst, the potential to become almost entirely arbitrary. (I add that, were the legislator to decide to introduce specific rules governing what should happen to levels of fines if there is undue delay in either the administrative or judicial phase of competition cases, that would be a very different matter; but so far that avenue has – I believe – not been explored.)

82 — Edward, First Baron Thurlow Lord Chancellor of England 1778-1783 and 1783-1792, quoted in John Poynder, *Literary Extracts* (1844), vol. 1, p. 268.

83 — The Strasbourg Court has sometimes awarded damages for non-pecuniary loss where it considers that the applicant must have suffered distress and frustration attributable to the delay in adjudication: see, for example, *Barry v. Ireland*, no. 18273/04 (15 December 2005), paragraph 61 and the case-law cited. However, where there is no evidence of injury attributable to delay that Court does not make such an award: see, for example, *Hauschildt v. Denmark*, cited in footnote 79 above, paragraph 58.

84 — To the extent that it may positively have benefitted from the delay, it would need to give credit for that benefit when quantifying its overall loss.

85 — Case T-235/07 *Bavaria v Commission* [2011] ECR II-3229 (*‘Dutch Beer’*).

86 — See, in addition to *Dutch Beer* (cited above in footnote 85), Case T-18/03 *CD-Contact Data v Commission* [2009] ECR II-1021, and Case T-214/06 *Imperial Chemical Industries v Commission* [2012] ECR.

87 — I am aware that, in her Opinion in *Solvay* cited in footnote 36 above, at point 198, Advocate General Kokott suggested that it might be appropriate to reduce the fine imposed in that case by 50%. Unless I am mistaken, she did not advance precise reasons why that would be the appropriate percentage – it may well be that she took the approach that, ‘in all the circumstances of the case, the right figure is X’. For the reasons that I have given, I am uneasy with such an approach.

Quantification of damage

133. Groupe Gascogne claims that it has suffered injury on account of the excessive length of the proceedings before the General Court. However, it has not identified, as a damages claim, the loss that it attributes to the breach of its right to a fair trial within a reasonable time.⁸⁸ Here again, it may be helpful to go back to first principles.

134. When the Commission imposes a fine for an infringement of the competition rules and the undertaking that is the addressee of the decision decides to challenge the Commission's decision before the General Court, that undertaking has a choice. It can either pay the fine or obtain a bank guarantee to cover both the fine itself and any liability for interest accruing on that sum.⁸⁹ My understanding is that it is standard practice for undertakings to make the commercial decision to choose the latter option, because they normally consider that it is in their financial interest to do so. In any event, that is what Groupe Gascogne did.⁹⁰

135. An appeal before the General Court does not have suspensory effect. Nor is interim relief awarded to protect a claimant against purely financial damage whilst a case is pending.⁹¹ Thus, even where an undertaking successfully contests a Commission decision imposing a fine and obtains an order either quashing that decision completely or at least reducing the fine, it still bears the costs of financing any bank guarantee that it gave and must also then pay both any outstanding fine and the accrued interest thereon. Those financing costs are not recoverable.

136. In contrast, if the undertaking chooses to pay the fine and then successfully challenges the decision imposing it, that undertaking is entitled both to the return of the sums paid and interest thereon. The interest paid compensates for the fact that the claimant has not had the use of that money whilst the legal proceedings were pending.

137. Where the application to the General Court is heard within a reasonable time, it is thus accepted that an undertaking that chooses to secure payment of the fine by means of a bank guarantee is responsible for the financial costs that arise from its decision not to pay the fine up front. Where proceedings before the General Court are unduly lengthy, that undertaking is subject to (i) uncertainty and (ii) additional costs, inasmuch as it has to bear the expense of financing its bank guarantee for longer than expected. However, to the extent that there is material loss for the period that exceeds what would have been a 'reasonable time' for that appeal to be heard, that remains a separate matter to the infringement of the competition rules committed by that undertaking and the fine imposed penalising that infringement. And, as I shall explain below, it does not necessarily follow that such costs are always equivalent to material loss, since the undertaking chose that particular method to meet its obligation to pay the fine.⁹²

138. Thus, where a fine is imposed on an undertaking for infringing the competition rules, the length of the time taken to hear its case has no bearing on the fine itself.

88 — The position is the same in respect of GSD and Kendrion.

89 — See the Commission's letter to Groupe Gascogne dated 13 December 2005 (Annex 3 to Groupe Gascogne's application before the General Court for annulment of the decision).

90 — As did GSD and Kendrion.

91 — See for example, order of the President of the General Court of 2 March 2011 in Case T-392/09 R 1. *garantovaná v Commission*.

92 — See points 134 to 138.

139. Before coming down definitively in favour of the separate damages claim approach, there are two obvious potential drawbacks that I need to address. First, in a context in which too much time has already been lost, what of the additional time that will be needed to pursue a free-standing damages claim? Second, are there problems arising from the fact that the damages claim will have to be brought before the very court that is said to have caused the claimant injury by failing to hear its substantive appeal against the Commission's decision within a reasonable time?

140. So far as the first objection is concerned, it goes without saying that the General Court would have to ensure that any separate action for damages was heard expeditiously. Provided that it does so, I think that the first potential objection can be dismissed.

141. The second potential objection is more weighty. Actions for damages against an EU institution lie exclusively within the jurisdiction of the General Court. That court would necessarily examine the issues of fact that would arise in such a damages claim, such as whether there was material and/or non-pecuniary loss and whether such loss was caused by the infringement of Article 47 of the Charter. (If there had not already been a finding by this Court on appeal that there had been undue delay before the General Court, one of the issues of fact that would have to be determined would be whether there had, indeed, been excessive delay.)

142. Even though such proceedings would of course be subject to review by this Court on appeal, does the fact that the General Court would be both the party against whom the breach of fundamental rights was alleged and the tribunal before which the claim was brought mean that it would not qualify as an 'independent and impartial tribunal' for the purposes of Article 6(1) ECHR?⁹³

143. The Strasbourg Court has held that the concepts of independence and impartiality are closely linked. The following factors are relevant in any assessment of independence: the manner of appointment of the members of the tribunal concerned, their terms of office, whether there are guarantees against outside pressures and whether the body concerned presents an appearance of independence. As for impartiality, the Strasbourg Court has held, first, that the tribunal must be subjectively free of personal prejudice or bias; and, second, that it must be impartial from an objective perspective: that is, it must offer sufficient guarantees to exclude any legitimate doubt in that respect.⁹⁴

144. It follows from Article 252 TFEU and Articles 2 and 3 of the Statute of the Court of Justice that the members of the General Court are subject to obligations aimed at ensuring they are independent and impartial. It is moreover plain that their independence is unlikely to be in doubt in assessing claims for damages, as they are not subject to supervision by any institution or body that might have an interest in the outcome of such proceedings.

145. It seems to me that the real issue is whether the General Court would be perceived to be impartial when ruling on a damages claim arising from an allegation that the General Court itself was responsible for infringing the claimant's fundamental rights.

146. In my view, there are adequate factors to tip the balance in favour of considering that the General Court may reasonably be considered to be sufficiently impartial.

93 — At the time of *Baustahlgewebe* Advocate General Léger proposed that the Court should hear such cases. However, that is no longer possible given the changes in the rules concerning the Court's jurisdiction following the Treaty of Nice. See point 321 of Advocate General Bot's Opinion in *Der Grüne Punkt*, cited in footnote 36 above.

94 — *Findlay*, cited in footnote 56 above, paragraph 73.

147. First, any compensation that might be payable would not come from the General Court itself. It would come from the EU budget, so the General Court would have no direct interest in the financial consequences of the proceedings.⁹⁵ Second, in order to meet the subjective requirement of being free from personal bias⁹⁶ the General Court would have to ensure that such a damages action was heard by a different chamber of judges to that which heard the substantive issue. Third, to the extent that the argument that there has been an infringement of Article 47 of the Charter is likely to be raised on appeal rather than before the General Court, it is this Court that would make any finding that there had been excessive delay. The General Court's role would be confined to dealing with proof of loss and assessment of quantum. Fourth, although the situation giving rise to proceedings for an infringement of Article 47 of the Charter falls within the sphere of operation of the General Court, it would be the Commission's role, acting to promote the general interest of the European Union in conformity with Article 17(1) TEU, to defend the proceedings before that court.⁹⁷ Fifth, any decision of the General Court would of course be subject to review on points of law by this Court.

148. I thus conclude that, to the extent that the appellant considers that it has suffered loss as a result of the General Court's failure to dispose of its case within a reasonable time, an action for damages in the General Court constitutes a more appropriate and effective remedy for the purposes of Article 47 of the Charter, as interpreted in the light of Articles 6(1) and 13 ECHR, than some reduction in the level of fine.⁹⁸ In so far as it is appropriate expressly to recognise the General Court's breach independently of any potential damages claim, I consider that a declaration to that effect by this Court constitutes just satisfaction.

149. One final point needs to be addressed: what would be 'the event giving rise' to the non-contractual liability of the Union for the purposes of Article 46 of the Statute? To my mind, that event must be the finding by this Court that there was undue delay before the General Court.⁹⁹ It follows that the five year limitation period within which to bring any such damages claim would begin to run from the judgment of the Court in this appeal.

150. I therefore suggest that the Court should make a declaration that there was excessive delay in the disposal of Groupe Gascogne's appeal before the General Court; and that the Court should make clear that it is open to Groupe Gascogne to bring a separate action for damages should it choose to do so.

Costs

151. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138, 140 and 184 of the Rules of Procedure, read together, Groupe Gascogne as the unsuccessful party on all substantive grounds of appeal should be ordered to pay the costs of the proceedings.

Conclusion

152. I therefore consider that the Court should:

— dismiss the appeal;

95 — Fines are allocated to the European Union's own resources.

96 — See points 143 and 144 above.

97 — See also Article 335 TFEU.

98 — Groupe Gascogne's present plea seeking a reduction in the fine seems to me to be based squarely upon *Baustahlgewebe*: it was not presented as a separate claim for material loss and/or non-pecuniary damages, nor would this Court have jurisdiction to entertain such a claim.

99 — If the 'event' were the point at which reasonable case-handling turned into undue delay, (a) there would be considerable legal uncertainty as to the moment from which the five year limitation period began to run; and (b) truly inordinate delay before the General Court might even result in a claim becoming time-barred before the General Court gave judgment. That cannot be right.

- declare that the General Court failed to adjudicate within a reasonable time in Case T-72/06 *Groupe Gascogne v Commission*; and
- order Groupe Gascogne to pay the costs of the proceedings.