



Advocate General's Opinions in Joined Cases C-138/17 P European Union v Gascogne Sack Deutschland GmbH Gascogne, C-146/17 P Gascogne Sack Deutschland GmbH Gascogne v European Union, Case C-150/17 P European Union v Kendrion and Joined Cases C-174/17 P European Union v ASPLA and Armando Álvarez and C-222/17 P ASPLA and Armando Álvarez v European Union

Press and Information

**Advocate General Wahl: the Court of Justice should set aside the judgments of the General Court by which it ordered the EU to pay compensation for material damage to a number of companies as a result of the excessive length of proceedings before that court**

*The requirement that the conduct of the institution is the determining factor of the alleged material damage is not satisfied here since that was, in fact, the companies' decisions to maintain the operation of a bank guarantee*

In February 2006, the companies Gascogne Sack Deutschland (formerly Sacha Verpackung) and Gascogne (formerly Group Gascogne), Kendrion, ASPLA and Armando Álvarez brought actions before the General Court for the annulment of Commission Decision made in respect of them concerning a cartel in the industrial plastic bags sector.<sup>1</sup>

In 2011, the General Court dismissed those actions.<sup>2</sup> On appeal, the Court of Justice, by judgments in 2013,<sup>3</sup> upheld the judgments of the General Court and, accordingly, the fines imposed upon the companies. However, in its judgments, the Court of Justice found that the length of the proceedings before the General Court could not be justified by any of the particular circumstances of the cases.

In 2014 and 2015, the companies each brought actions before the General Court against the EU for compensation for the damage allegedly suffered as a result of the length of the proceedings before the General Court.

In 2017 the General Court gave its judgments in those cases and ordered the EU to pay compensation in respect of material and non-material damage suffered by the companies, as set out in the table below.

Company	General Court Judgment	Material Damage (the payment of bank guarantee costs)	Non-Material Damage (the state of uncertainty for the company)
Gascogne Sack Deutschland	<a href="#">T-577/14</a> (See Also Press Release <a href="#">1/17</a> )	€0	€5,000

<sup>1</sup> Commission Decision C(2005) 4634 final of 30 November 2005 relating to a proceeding under Article [101 TFEU] (Case COMP/F/38.354 – Industrial bags).

<sup>2</sup> Cases [T-72/06](#) Groupe Gascogne v Commission, [T-79/06](#) Sascha Verpackung v Commission, [T-54/06](#) Kendrion v Commission, [T-76/06](#) ASPLA v Commission and [T-78/06](#) Armando Álvarez v Commission.

<sup>3</sup> Cases [C-40/12 P](#) Gascogne Sack Deutschland v Commission and [C-58/12 P](#) Gascogne/Commission [C-50/12 P](#) Kendrion v Commission, see also Press Release No [150/13](#) and [C-35/12 P](#) ASPLA v Commission and [C-36/12](#) Armando Álvarez v Commission.

Gascogne	<a href="#">T-577/14</a>	€47,064.33	€5,000
Kendrion	<a href="#">T-479/14</a>	€588,769.18	€6,000
ASPLA	<a href="#">T-40/15</a>	€44,951.24	€0
Armando Álvarez	<a href="#">T-40/15</a>	€111,042.48	€0

In 2017, the EU, represented by the Court of Justice of the European Union (the 'CJEU') brought appeals against the judgments of the General Court. It argued, amongst other things, that the General Court erred in its interpretation of the notions of 'causal link' and 'damage'.

The companies have also each appealed the decisions on the General Court arguing, in essence, that the General Court incorrectly calculated the compensation payable. In addition, Kendrion claims that the EU's appeal is inadmissible on the basis of a conflict of interest given that the EU is represented by the CJEU (the institution) and the case will be heard by the Court of Justice (the highest judicial body within that institution).

In today's Opinion, **Advocate General Nils Wahl first takes the view that the appeal brought by the EU is admissible.**

He notes that the CJEU has exclusive jurisdiction regarding actions against the EU for non-contractual liability, including for its own acts or omissions. The Treaties provide that the Court of Justice may not decline jurisdiction when the conditions for bringing an action are fulfilled, as is the case here. It is for the Member States, if necessary, to reform the EU system of judicial remedies.

The Court of Justice has already held that a claim for damages against the EU based on an alleged failure by the General Court to adjudicate within a reasonable time must be heard by the General Court. In such a case, the EU must be represented by the institution responsible for the alleged damages, which here is the CJEU since the General Court is a part of that institution. The institution is therefore a party to the case with all of the rights and obligations that entails, including the right to bring an appeal against the decisions of the General Court.

However, the Advocate General reiterates that the Court of Justice has consistently held that the possibility of having access to an independent and impartial tribunal is the cornerstone of the right to a fair trial and, for that reason, examines whether the Court of Justice may not be impartial in these proceedings.

He emphasises that there is a clear distinction between the administrative and judicial offices within the institution. Such division includes a requirement that no ex parte communication take place between those two offices regarding the subject matter of the proceedings. The main point of contact between the two branches is the President of the CJEU. For the purposes of these proceedings, the President, after having asked the legal adviser on administrative matters to execute his decision to appeal against the judgment of the General Court, does not interfere in the judicial handling of the case and had delegated responsibility for procedural acts that he would have had to carry out to the Vice-President of the Court of Justice. **Consequently, the Advocate General considers that the Court of Justice fulfils the requirement of impartiality in these proceedings.**

**Next, the Advocate General considers the substance of the appeals.**

In each of the cases, the EU argues that there is no direct causal link between the breach of the General Court of the obligation to give judgment within a reasonable time and the damage suffered by the companies. Instead, the damage was the outcome of a choice made by the companies to defer payment of the fine and instead maintain the operation of a bank guarantee.

**The Advocate General takes the view that the General Court did incorrectly interpret and apply the concept of 'causal link' as there is no sufficiently direct causal link between the breach by the General Court and the payment of the bank guarantee charges.** The requirement that the conduct of the institution is the determining factor of the alleged damage is not satisfied here. The determining factor was the companies' decisions to continue to benefit from an exception to the obligation to pay the fine stipulated by the Commission Decision and instead use a bank guarantee.

In the event that a company is subject to a fine imposed by the Commission it may ask to defer payment of that fine and instead provide a bank guarantee, pending the outcome of an action for annulment of that decision. According to the Advocate General, this is not a choice that may only be made once. Throughout the proceedings, a company may decide to terminate the guarantee and pay the fine on the basis that it is more advantageous to do so. Consequently, the companies' decisions to provide a bank guarantee were repeatedly confirmed throughout the entire period of the proceedings, including when they had become of a significant duration.

The Advocate General further takes the view that the General Court erred in law by equating the costs of the bank guarantee in the period of the overrun with the damage to be compensated. Instead, he argues that the General Court should have examined whether, in the period of the overrun, the bank guarantee charges paid by the companies were greater the advantages conferred on them by deferring payment of the fines and effectively borrowing those amounts of money from the EU.

Finally, in the appeals brought by **Gascogne Sack Deutschland, Gascogne and Kendrion**, those companies **argue that the General Court committed various errors in law in its assessment of their claims for compensation for non-material damage and request that the Court of Justice award them a higher amount. The Advocate General considers that those arguments should be dismissed.** In his view, in its judgments the General Court referred to the criteria taken into account to determine the amount of compensation that it considered was necessary, as it was required to do. According to the Advocate General, compensation for non-material damage is not meant to cover economic losses suffered by the applicant, nor are the EU courts required to define the sums to be awarded for the excessive duration of the proceedings as a percentage of the fine imposed by the Commission.

**Accordingly the Advocate General proposes that only the compensation for non-material damage remains payable at the amount awarded by the General Court.**

The case is now in deliberation and the Court of Justice will deliver its judgment in the coming months.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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