Reports of Cases

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

Case C-150/17 P

European Union, represented by the Court of Justice of the European Union
v

Kendrion NV

(Appeal — Admissibility — Non-contractual liability — Reasonable duration of the proceedings — Court of Justice of the European Union — Obligation to adjudicate within a reasonable time — Material damage — Bank guarantee charges — Interest — Causal link — Non-material damage — Legal entities)

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

2. These are, in essence, the key issues raised by the appeals lodged by the European Union, represented by the Court of Justice of the European Union, [2] and by Kendrion NV against the judgment of the General Court of 1 February 2017, *Kendrion* v *European Union*, T-479/14 ('the judgment under appeal'), [3] in which the latter awarded Kendrion certain sums by way of compensation for the material and non-material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgment of 16 November 2011, *Kendrion* v *Commission*, T-54/06. [4]

3. Largely similar issues are also raised by four other appeals — two lodged by the European Union, and two by other companies — against two judgments of the General Court in which that court awarded compensation for the material and non-material damage sustained by those companies as a result of the breach of the obligation to adjudicate within a reasonable time. In those proceedings too, I am delivering my Opinion today. [5] The present Opinion should thus be read together with those Opinions.

1 Original language: English.

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

3 EU:T:2017:48.

4 Not published, EU:T:2011:667.

5 Joined Cases *European Union* v *Gascogne Sack Deutschland and Gascogne*, and *Gascogne Sack Deutschland and Gascogne* v *European Union*, C-138/17 P and C-146/17 P, and Joined Cases *European Union* v *ASPLA and Armando Álvarez*, and *ASPLA and Armando Álvarez* v *European Union*, C-174/17 P and C-222/17 P.

I. Background to the proceedings

4. By application lodged on 22 February 2006, Kendrion brought an action pursuant to (what is now) Article 263 TFEU against Commission Decision C(2005) 4634 of 30 November 2005 relating to a proceeding pursuant to Article [101 TFEU] (Case COMP/F/38.354 – Industrial bags) ('Decision C(2005) 4634'). [6]

5. By judgment of 16 November 2011, the General Court dismissed that action. [7] Kendrion brought an appeal against the judgment of the General Court. The Court of Justice, by judgment of 26 November 2013, [8] dismissed the appeal. However, in its judgment, the Court of Justice found that 'the length of the proceedings before the General Court, which amounted to approximately 5 years and 9 months, [could not] be justified by any of the particular circumstances' of the case. [9]

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

6. By application lodged on 26 June 2014, Kendrion brought an action pursuant to Article 268 TFEU against the European Union for compensation for the damage allegedly suffered as a result of the length of the proceedings before the General Court in the case which led to the judgment of 16 November 2011 in Case T-54/06. In essence, Kendrion requested the General Court to order the Union to pay, in respect of material damage, a sum of EUR 2 308 463.98, and in respect of non-material damage, a sum of EUR 11 050 000 (or, alternatively, a sum of EUR 1 700 000). It also requested that each amount be increased, from 26 November 2013, by a reasonable rate of late payment interest fixed by the Court.

7. By the judgment under appeal, the General Court ordered: (i) the European Union to pay damages of EUR 588 769.18 to Kendrion by way of compensation for the material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgment of 16 November 2011, *Kendrion* v *Commission* in Case T-54/06; (ii) the European Union to pay damages of EUR 6 000 to Kendrion by way of compensation for the non-material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in Case T-54/06; and (iii) that each award of compensation be increased by default interest, as from the delivery of that judgment up to the date of full payment, at the rate set by the European Central Bank for its principal refinancing operations, increased by three and a half percentage points. The General Court dismissed the action as to the remainder.

8. As regards costs, the General Court ordered: (i) the European Union to pay, in addition to its own costs, the costs incurred by Kendrion in connection with the inadmissibility claim which gave rise to the order of 6 January 2015, *Kendrion* v *European Union* (T-479/14); (ii) Kendrion, on the one hand, and the European Union, on the other hand, to bear their own costs relating to the action giving rise to that judgment; and (iii) the European Commission to bear its own costs.

III. Procedure before the Court and forms of order sought

9. By appeal lodged on 24 March 2017, the European Union claims that the Court of Justice should:

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

6 The cases mentioned in footnote 5 above also concern procedures started by other undertakings that were addressees of Decision C(2005) 4634.

7 Judgment of 16 November 2011, *Kendrion* v *Commission*, T-54/06, not published, EU:T:2011:667.

8 Judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771.

9 Ibid., paragraph 102.

– reject Kendrion's claim at first instance for compensation in respect of the material damage allegedly suffered or, in the furthest alternative, reduce that claim for compensation to EUR 175 709.87;

– order Kendrion to pay the costs.

10. With regard to the main appeal, Kendrion, for its part, contends that the Court of Justice should:

– declare the appeal inadmissible;

– in the alternative, dismiss the appeal as unfounded;

– order the European Union to pay the costs.

11. On 31 May 2017, Kendrion lodged a cross-appeal under Article 176 of the Rules of Procedure of the Court of Justice claiming that the Court of Justice should:

– set aside points 1 to 6 of the operative part of the judgment under appeal;

– order the European Union to pay compensation of EUR 2 308 463.98 or, alternatively, of an amount that the Court of Justice deems appropriate for material damage, and compensation of EUR 1 700 000 or, alternatively, of an amount that the Court of Justice deems appropriate, for non-material damage;

– order that those amounts be increased by an interest rate that the Court of Justice deems appropriate;

– in the alternative, refer the case back to the General Court;

– order the European Union to pay the costs.

12. In the proceedings, the Commission was admitted to intervene in support of the form of order sought by the European Union.

IV. Assessment of the grounds of appeal

13. In its application, the European Union puts forward three grounds of appeal. By its first and second grounds of appeal, the European Union claims that the General Court erred in law by misinterpreting the respective notions of 'causal link' and 'damage'. By its third ground of appeal the European Union claims that the General Court erred in law and provided insufficient reasons when determining the period during which the material damage was sustained.

14. Kendrion claims that the appeal should be dismissed as inadmissible or, in any event, as unfounded.

15. In its cross-appeal, Kendrion puts forward four grounds of appeal. In its first ground of appeal, Kendrion alleges that the General Court erred in law and failed to provide sufficient reasons when it found that a period of 26 months between the end of the written part of the procedure and the opening of the oral part of the procedure was an appropriate length of time for dealing with the case. In its second ground of appeal, Kendrion criticises the General Court for dismissing its claim to be compensated for the interest paid to the Commission in the period in which the reasonable time for adjudication was exceeded ('the period of the overrun'). In its third ground, Kendrion alleges that the General Court erred in law or, in any event, failed to provide sufficient reasons when assessing the

period for which Kendrion was awarded compensation for bank guarantee charges. In its fourth ground, Kendrion alleges that the General Court erred in law and failed to provide adequate reasons when it awarded Kendrion, for the non-material damages suffered, only symbolic compensation of EUR 6 000.

16. The European Union, supported by the Commission, asks the Court to dismiss the cross-appeal.

17. In the present Opinion, I shall examine, in the first place, Kendrion's claim that the appeal is inadmissible. I will thereafter turn to the grounds of appeal that concern, first, material damage and, subsequently, non-material damage. Finally, I shall deal with Kendrion's arguments which concern the reasonable length of the proceedings.

A. Admissibility

18. Before dealing with the substance of the case, it is necessary to address certain questions of admissibility raised by Kendrion.

19. In essence, Kendrion claims that the main appeal should be dismissed in its entirety because a conflict of interest exists in the present proceedings: the European Union is represented by the Court of Justice of the European Union (the institution), which acts before the Court of Justice (the highest judicial body within that institution).[10] Accordingly, in its view the appeal runs afoul of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') which guarantees a review by an independent and impartial tribunal. Kendrion further argues that, should the appeal be considered admissible, the review by the Court of Justice ought to be limited to manifest errors by the General Court.

20. In my view, Kendrion's arguments on the inadmissibility of the main appeal are to be rejected.

21. Article 268 TFEU and Article 340, second and third paragraphs, TFEU are very clear in giving the Court of Justice of the European Union *exclusive jurisdiction* with regard to actions against the European Union for non-contractual liability.[11] Those provisions do not contain any exception: the Court of Justice of the European Union is thus to rule also on liability deriving from its own acts or omissions, whether committed in its administrative capacity or in its judicial capacity. Whereas there seem to be no real reasons for concern in the former cases,[12] jurisdiction in the latter cases might, admittedly, be considered a less-than-perfect solution. Yet, it was unquestionably the choice of the drafters of the Treaties to bestow upon the Court of Justice of the European Union such broad and full jurisdiction on actions for damages.

22. Pursuant to Article 13(2) TEU, the Court of Justice of the European Union is to 'act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. Therefore, the Court of Justice of the European Union may not decline jurisdiction when the conditions set out for it in the Treaties are fulfilled. Nor may the Court of Justice of the European Union create a new basis for jurisdiction of the courts or tribunals of the Member States that goes beyond that provided for in Article 274 TFEU.[13] It is thus for the Member States, if necessary, to reform the EU system of judicial remedies currently in force, in accordance with Article 48 TEU.[14]

10 The two judicial bodies (the Court of Justice and the General Court) will collectively be referred to as 'the EU Courts'.

11 See also judgment of 17 July 2008, *Commission* v *Cantina sociale di Dolianova and Others*, C-51/05 P, EU:C:2008:409, paragraph 68 and the case-law cited.

12 Those are mostly staff cases or cases of public procurement.

13 That provision reads: '*Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties*, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States' (emphasis added).

14 To that effect, judgment of 25 July 2002, *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraph 45.

23. Proceedings brought under Articles 268 and 340 TFEU have to follow the allocation of jurisdiction set out in the provisions of the Statute of the Court of Justice of the European Union. Consistently with that, the Court of Justice has already held that a claim for damages against the European Union based on an alleged failure by the General Court to adjudicate within a reasonable time must be heard by the General Court. [15]

24. In such a case, the European Union is as a matter of principle represented by the institution responsible for the matter supposedly at the origin of the damage alleged. [16] In the present case, that is the Court of Justice of the European Union, since the General Court is part of that institution. [17] This was also the position that Kendrion defended in the proceedings before the General Court. [18]

25. That being so, in proceedings such as the present ones, that institution acts as a party, with all that this entails in terms of rights and obligations for it. In particular, Article 56 of the Statute of the Court of Justice of the European Union gives '*any party* which has been unsuccessful, in whole or in part, in its submissions' the right to bring an appeal before the Court of Justice against decisions of the General Court. [19] It is difficult to see why that provision should be read as meaning any party *except the European Union* when represented by the Court of Justice of the European Union.

26. After all, in the light of the principle of equality of arms, [20] where one party has the right to appeal, such a right must also exist for the other parties, provided that the relevant conditions are fulfilled. Therefore, I find no basis to support the view that the Court of Justice of the European Union is not permitted to lodge an appeal against a judgment of the General Court in which it acted as defendant on behalf of the European Union and that it considers erroneous.

27. That said, I would like to emphasise 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. For that reason, every court is obliged, of its own motion, to check such matters. [21] In the light of the arguments put forward by Kendrion, I believe that it is necessary to examine whether, in the present proceedings, the Court of Justice may not be impartial for the purposes of that case-law.

28. In that regard, it must be borne in mind that, to qualify as impartial, a court must fulfil two aspects: first, all members of the court must be *subjectively* impartial, that is, none of its members must show bias or personal prejudice; second, the court must be *objectively* impartial, that is, it must offer guarantees sufficient to exclude any legitimate doubt in this respect. [22]

15 See, in particular, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 95.

16 See, further, my Opinion in *Feralpi and Others* v *Commission*, C-85/15 P, C-86/15 P, C-88/15 P and C-89/15 P, EU:C:2016:940, point 74 and the case-law cited.

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

18 See order of 6 January 2015, *Kendrion* v *European Union*, T-479/14, not published, EU:T:2015:2, paragraph 10.

19 Emphasis added.

20 The Court of Justice has consistently held that Article 47 of the Charter includes, as a component of the principle of effective judicial protection, the principle of equality of arms or procedural equality. See, among others, judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 36 and the case-law cited.

21 Judgment of 1 July 2008, *Chronopost* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 46 to 48.

22 Ibid., paragraph 54 and the case-law cited.

29. As regards the first condition, a member of the court is to be presumed impartial, absent any evidence to the contrary.[23] Although the Rules of Procedure of the Court of Justice[24] do not contain any specific rule in relation to abstention and recusal of its members,[25] it is open to the parties to invoke the principles laid down in Article 18 of the Statute of the Court of Justice of the European Union, when they consider that one or more members of the Court of Justice (judge or Advocate General)[26] hearing their case should not sit in the composition.[27] However, no such circumstances may be seen in the present case, nor has Kendrion put forward any specific argument or evidence capable of raising any doubt in that respect.

30. At any rate, it is apparent from case-law that, to avoid the possibility that the judges sitting in a case may be, or be simply perceived to be, not impartial, the EU Court hearing an action for damages such as that brought by Kendrion must sit in a *different composition* from that which heard the dispute giving rise to the procedure whose duration is criticised.[28] In other words, no member of the EU Court who dealt with the first action may sit on the bench in the follow-up action.

31. The key question in the present case, therefore, seems rather to be whether the Court of Justice, *as a body*, offers sufficient guarantees to exclude any legitimate doubt as to its objective impartiality. It follows from the case-law of the ECtHR that the combination of judicial and non-judicial functions may or may not — depending on the circumstances — affect the impartiality of a tribunal.[29]

32. For the reasons explained in the following, and in the light of the institutional constraints of the EU judicial system, I take the view that the Court of Justice fulfils, in proceedings such as the present, the requirements of an impartial tribunal. In particular, the arguments put forward by Kendrion disregard the distinction that is to be made between the Court of Justice of the European Union as an institution, and the judicial bodies that are part of that institution (currently, the Court of Justice and the General Court).[30]

33. In that regard, it must be emphasised that, within the institution, there is a clear distinction between the administrative and the judicial offices. This means that the legal adviser on administrative matters of the Court of Justice of the European Union and his team on the one side, and the Court of Justice's members and their staff on the other, work separately and independently. To avoid any potential conflict of interest or any other issues of fair trial, no *ex parte* communication is to take place between them with regard to the subject matter of the proceedings.

23 Cf. Opinion of Advocate General Bot in *Der Grüne Punkt - Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:210, point 335 and the case-law of the European Court of Human Rights ('the ECtHR') cited.

24 No such rule may be found in the Rules of Procedure of the General Court either.

25 It may be asked whether the EU legislature should not fill that gap. Indeed, it may appear paradoxical that the Court of Justice of the European Union has no detailed rules on abstention and recusal, whereas it has consistently regarded the existence of such rules at national level as a necessary precondition for a national body to be considered 'a court or tribunal' for the purposes of Article 267 TFEU (see, to that effect, judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32 and the case-law cited). That question is, however, of no relevance in the present proceedings.

26 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 42.

27 It cannot be excluded that the failure of a member of the Court of Justice to recuse himself or to abstain despite a situation of conflict of interest may, when the conditions are fulfilled, constitute ground for a revision of a judgment pursuant to Article 44 of the Statute of the Court of Justice of the European Union.

28 See, in particular, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 101.

29 Cf. Opinion of Advocate General Bot in *Der Grüne Punkt - Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:210, points 330 to 332 and the case-law of the ECtHR cited.

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

34. The main point of contact between the two branches of the institution is the President of the Court of Justice of the European Union ('the President'), since he presides over both the institution and its highest judicial body at the same time. In the present case, the decision to lodge an appeal against the judgment of the General Court was in fact taken by the President who, for the execution of that decision, appointed the legal adviser on administrative matters of the Court of Justice of the European Union as agent.[31]

35. For that very reason, the President does not interfere in the judicial handling of the present case: he does not sit in the composition of the Court of Justice that hears the appeal, and the responsibility for the procedural acts that, as President of the Court of Justice, he would have had to carry out, has been delegated to the Vice-President of the Court of Justice.

36. In the light of the above, I take the view that the Court of Justice as a body fulfils also the requirement of objective impartiality in the context of the present proceedings. There is, consequently, no breach of Article 47 of the Charter.

37. Finally, I see no basis to hold that, in proceedings such as those at hand, the Court of Justice should fulfil its mandate as court of appeal (and of last resort) differently from what it is required to do in any other case. Again, the rules of the FEU Treaty (in particular, Article 256(1), second paragraph) and of the Statute of the Court of Justice of the European Union (especially Article 58) on appeals are fully applicable also to the present proceedings.

38. Failing any concrete indications on this issue from Kendrion, I find it hard to understand the reasons why the Court should apply a lighter or stricter standard of review of the impugned judgment, depending on the identity of the party having put forward the relevant ground of appeal. By the same token, it cannot be accepted that the European Union (the real defendant in an action for damages under Articles 268 and 340 TFEU) may have stronger or weaker procedural rights, depending on the institution that represents it.

39. Under those circumstances, I consider the appeal to be admissible.

B. Substance

1. Material damage

40. The three grounds of appeal put forward by the European Union, as well as the second and third ground of appeal put forward by Kendrion, all concern the General Court's findings with regard to the material damage allegedly suffered by Kendrion. In particular, both parties contend that the General Court erred in law in examining Kendrion's claims relating to the damage resulting from the costs for the bank guarantee which that company provided to the Commission in order to avoid an immediate settlement of the fine imposed by Decision C(2005) 4634. Kendrion also claims that the General Court erred in law when dismissing its claim to be compensated for the interest paid to the Commission for the period of the overrun.

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

31 Importantly, the other members of the Court of Justice were not involved in that decision, contrary to what is presumed by Kendrion in its submissions.

42. I shall, finally, examine Kendrion's *second* ground of appeal, which concerns the payment of the interest on the fine for the period of the overrun.

(a) Bank guarantee charges: existence of a causal link

43. By its first ground of appeal, the European Union, supported by the European Commission, takes issue with the General Court's interpretation and application of the concept of 'causal link'. In essence, the European Union contends that there is no direct causal link between the breach by the General Court of the obligation to give judgment within a reasonable time in Case T-54/06 and Kendrion's damage arising from the payment of the bank guarantee charges. In particular, the European Union emphasises that that damage was the outcome of a choice made by Kendrion to maintain the operation of the bank guarantee throughout the proceedings, instead of paying the fine imposed by the Commission. For its part, Kendrion defends, on this point, the judgment under appeal: in its view, the bank guarantee charges paid in the period of the overrun were caused by the General Court's failure to adjudicate within a reasonable time.

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

45. In paragraphs 64 and 65 of the judgment under appeal, the General Court recalled the settled case-law, according to which the damage for which compensation is sought in an action to establish non-contractual liability on the part of the European Union must be actual and certain, which is for the applicant to prove. It falls also to the applicant to adduce proof of the existence of a causal link — that is, of a sufficiently direct nexus — between the conduct complained of and the damage alleged.

46. In paragraphs 81 to 84 of the judgment under appeal, the General Court observed that, had the duration of the proceedings in Case T-54/06 not exceeded the reasonable time for adjudication, Kendrion would not have had to pay any bank guarantee charges during the period of the overrun. That meant, in its view, that there was a causal link between the breach of the obligation to adjudicate within a reasonable time and the occurrence of the damage suffered by Kendrion as a result of its having paid bank guarantee charges during the period of the overrun.

47. Referring to previous case-law ('the *Holcim* case-law'),[32] the General Court recognised — in paragraph 86 of the judgment under appeal — that, in principle, the bank guarantee charges incurred by a company penalised by a Commission decision are the consequence of that company's own decision to provide a bank guarantee so as not to comply with the obligation to pay the fine within the period stipulated in the contested decision. Thus, that cost cannot normally be regarded as being a *direct* consequence of the institution's behaviour.

48. However, the General Court then went on — in paragraphs 87 to 89 of the judgment under appeal — to distinguish the case at hand from those that gave rise to the *Holcim* case-law. The General Court took the view that, at the time when Kendrion brought its action in Case T-54/06, and at the time when it provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time was unforeseeable, and Kendrion could legitimately expect its action to be dealt with within a reasonable time. The General Court also observed that the reasonable time for adjudicating in Case T-54/06 was exceeded after the applicant's initial decision to provide a bank guarantee. For those reasons, it held that the link between the fact that the reasonable time for adjudicating in Case

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

T-54/06 was exceeded and the payment of bank guarantee charges during the period of the overrun could not be considered severed by Kendrion's initial decision not to effect immediate payment of the fine and to provide a bank guarantee. It thus concluded, in paragraph 90 of the judgment, that the causal link was sufficiently direct for the purposes of Article 340 TFEU.

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

50. Before explaining in detail why I am of that view, I would like to emphasise that, according to well-established case-law, Article 340 TFEU cannot be interpreted as requiring the European Union to make good every harmful consequence, even a remote one, of conduct of its institutions.[33] Accordingly, in an action for non-contractual liability of the Union it is not enough that the conduct complained of is one of the causes of the alleged damage; that conduct has to be the *determining* cause of the damage.[34] In other words, a sufficient nexus exists only where the damage is the direct consequence of the unlawful act of the institution responsible and it does not depend on the intervention of other causes, whether positive or negative.[35]

(1) The foreseeability of the unlawful conduct

51. The first ground given by the General Court for distinguishing the present case from those which gave rise to the *Holcim* case-law is that, at the time when Kendrion brought its action in Case T-54/06, and at the time when it provided a bank guarantee, the breach of the obligation to adjudicate within a reasonable time by the General Court was *unforeseeable*.

52. However, that statement is in the first place inaccurate. Unfortunately, a certain number of cases that had been decided by the General Court shortly before the action in Case T-54/06 was lodged had been of a significant duration.[36] That is especially true of cases concerning the application of EU competition rules, and in particular cartels,[37] which are notoriously complex and time-consuming and may require a parallel or coordinated handling of several cases at the same time.

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

54. In the second place, and more importantly, regardless of whether the excessive delay in Case T-54/06 was foreseeable, the General Court erred in using the concept of 'foreseeability' in order to establish the existence of a sufficient causal nexus triggering the European Union's liability.

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

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

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

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

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

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

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

57. On the one hand, that element could have been relevant if Kendrion had been unable, subsequently, to reverse its initial decision to defer payment and submit a bank guarantee. Yet, as it will be shown in points 68 to 74 below, that is not the case: at any time in the course of the judicial proceedings, Kendrion was at liberty to settle the fine and withdraw the bank guarantee. Thus, even if unforeseeable at first, Kendrion could have adapted its conduct in the light of that new event.

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

59. In that regard, it must be borne in mind that, according to settled case-law, in an action for non-contractual liability, it must be verified whether, at the risk of having to bear the damage himself, the person adversely affected had demonstrated, as a prudent person, reasonable diligence in avoiding or limiting the extent of the damage. The causal link may be broken by negligence on the part of the person adversely affected, where that negligence proves to be the determinant cause of the damage.[38]

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

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

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

(2) Kendrion's lack of choice

63. The second ground given by the General Court for distinguishing the present case from those which gave rise to the *Holcim* line of case-law is that the reasonable time for adjudicating in Case T-54/06 was exceeded *after* Kendrion's decision to provide a bank guarantee.

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

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

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

66. If no such a request is lodged, or if such a request is dismissed by the EU Courts, a fine must be paid, as a rule, within the period stipulated in the decision. That said, the EU budgetary rules [39] permit the Commission to accept that the payment of a fine be deferred, provided that the debtor undertakes to pay the interest on late payment and lodges a financial guarantee covering the debt outstanding in both the principal sum and the interest.

67. Thus, the choice is offered to the undertakings intending to challenge a fine before the EU Courts to opt either for an immediate settlement (the rule) or to request the possibility of submitting a bank guarantee (the exception). The choice of the undertaking must be *financially neutral* for the Union: a deferral of the payment may not lead to a loss for the Union's budget. The accounting officer who, in collaboration with the authorising officer responsible, takes a decision on the request of the undertaking to defer the payment does not have the power to alter the value of the fine that was decided by the Commission as institution (that is, by the college of Commissioners). At the same time, the decision of an undertaking to immediately settle the fine, despite its intention to challenge the Commission decision before the EU Courts, should not lead to an unjust enrichment of the European Union. This is why, on the one hand, if the EU Courts uphold the Commission decision, the fine whose payment has been deferred becomes payable with interest. On the other hand, the annulment of the contested Commission decision gives rise to an obligation of the Union to repay the sums paid, increased by the applicable interest rate. [40]

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

69. Importantly, unlike what the General Court implies, that is not a choice that may only be made once. Any undertaking having chosen to submit a guarantee may always reverse its original decision and proceed to the payment of the fine. [41] By doing that, it avoids the accrual of additional interest on the principal and it may withdraw the bank guarantee previously provided.

70. Nothing prevents, as a matter of EU law, an undertaking from terminating the bank guarantee and settling the fine, when that undertaking deems that course of action to be more advantageous. It may thus be assumed that, if at no point in time in the course of the proceedings an undertaking revisits its initial choice, that is because that undertaking finds the continuous operation of the bank guarantee to still be in its best interest. Indeed, whether the initial decision continues to be advantageous

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

40 See, to that effect, judgment of 12 February 2015, *Commission v IPK International*, C336/13 P, EU:C:2015:83. Regarding the type and amount of interest to be repaid by the Commission to a company that had paid a fine to comply with a decision adopted under Article 101 TFEU subsequently annulled by the EU Courts, see Case T-201/17, *Printeos v Commission*, pending.

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

subsequently depends on multiple factors that — as the Commission points out — may significantly vary over time (the cost of borrowing money, the fees applied by the bank for the guarantee, the return that the sum due generates when invested in other businesses, and so forth). From an economic perspective, it is thus reasonable to presume that an undertaking may regularly reconsider its initial decision.

71. Therefore, as correctly argued by the European Union, the choice of providing a bank guarantee instead of settling the fine imposed by the Commission was not made only at the beginning of the procedure: that choice was freely and consciously *maintained* (or *confirmed*) by Kendrion during the entire period that the judicial proceedings in Case T-54/06 lasted, including when those proceedings had become of a significant duration.

72. This is confirmed, to some extent, by Kendrion.

73. In its submissions, Kendrion indicates that the initial decision to provide a bank guarantee was taken because, at the time, it was found 'financially reasonable'. It further argues that the decision to terminate the bank guarantee and pay the fine before the end of the judicial proceedings would have been difficult to take, because of the financial consequences that it entailed (payment of a large sum, corresponding to half of its equity) and of the practical problems it raised (in particular, vis-à-vis the financial institutions which provided the bank guarantee and the shareholders and other stakeholders).

74. These arguments show that Kendrion was aware that it could have terminated the guarantee and settled the fine at any time. It also shows that the cost and benefits analysis of the options offered by the law with regard to the outstanding fine was (implicitly or explicitly) made by that company in the course of those proceedings. The fact that Kendrion decided to maintain the bank guarantee, for the whole duration of the proceedings before the General Court, for a number of strategic, economic, financial and practical reasons demonstrates that it acted in the way it believed to be in its best interest. As a side note, it may be added that the operation of the bank guarantee was prolonged until the end of the appeal procedure before the Court, even though Kendrion had lost at first instance.

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

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

(3) The contradiction in the judgment under appeal

77. In paragraph 98 of the judgment under appeal, the General Court found that no sufficiently direct causal link existed with regard to the cost of the bank guarantee borne *after* the delivery of the judgment in Case T-54/06. The General Court considered the payment of such charges to be the consequence of the personal and independent decision which Kendrion took, after the delivery of that judgment, not to pay the fine, not to request suspension of the operation of Decision C(2005) 4634, and to bring an appeal against the aforementioned judgment. If that is so, it is not clear to me why the decision to maintain the bank guarantee was, in the General Court's view, decisive to exclude the liability of the European Union *after* the delivery of the judgment but not *before*.

78. As the European Union argued, there seems to be no meaningful difference between those periods that may be relevant under Article 340 TFEU. Also during the first instance proceedings Kendrion consciously chose not to request suspension of the contested decision and to continue the operation of the bank guarantee until those proceedings were ended. Paragraph 98 of the judgment under appeal thus confirms that the elements which the General Court considered relevant in paragraphs 87 to 89 of the same judgment for distinguishing the case at hand from the *Holcim* case-law are immaterial.

(4) Interim conclusion

79. In conclusion, it cannot be disputed that the fact that Kendrion had to bear the costs relating to the bank guarantee provided to the Commission in the period of the overrun is a *consequence*, among others, of the General Court's inability to deliver its decision within a reasonable time.

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

81. For all those reasons, I take the view that the General Court erred in its interpretation and application of the concept of 'causal link' for the purposes of Article 340 TFEU. To my mind, there is no sufficiently direct causal link between the breach by the General Court, in Case T-54/06, of the duty to give judgment within a reasonable time and Kendrion's alleged damage arising from the payment of the bank guarantee charges in the period of the overrun.

82. In the light of that, the judgment under appeal must be annulled in so far as it ordered the European Union to pay damages of EUR 588 769.18 to Kendrion by way of compensation for the material damage sustained by that company as a result of the breach of the obligation to adjudicate within a reasonable time in the case which gave rise to the judgment of 16 November 2011, *Kendrion* v *Commission* (T-54/06, EU:T:2011:667).

83. This means that, if the Court agrees with me on this point, there would be no need to examine the *second* and *third* grounds of appeal put forward by the European Union and the *third* ground of appeal put forward by Kendrion. Nonetheless, because of the importance for future cases of the issue raised, I believe it may be helpful to deal, only for the sake of completeness, with the second ground of appeal put forward by the European Union. That analysis will also provide elements useful for examining Kendrion's *second* ground of appeal.

(b) Bank guarantee charges: concept of 'damage'

84. By its second ground of appeal, directed against paragraphs 81 to 99 of the judgment under appeal, the European Union, supported by the Commission, claims that the General Court misinterpreted the concept of 'damage'. In its view, the first instance court should have examined whether, in the period of the overrun, the bank guarantee charges paid by Kendrion were greater than the advantage conferred on it by possession of a sum equal to the amount of the fine. For its part, Kendrion asks the Court of Justice to dismiss this ground of appeal as unfounded. In its view, there is no relationship between the advantages enjoyed by Kendrion and the losses suffered by it in the period of the overrun.

85. It seems to me that also this ground of appeal is well founded. Indeed, the General Court erred in law when, without any specific explanation or further inquiry, in paragraphs 81 and 82 of the judgment under appeal, it equated the *costs* of the bank guarantee in the period of the overrun with *damage* to be compensated under Article 340 TFEU.

86. The two concepts should be kept distinct.

87. An act or omission of an EU institution may have various consequences for the financial situation of an undertaking like Kendrion. It may give rise to certain costs for the undertaking but, at the same time, it may result in certain gains for it. There is 'damage', within the meaning of Article 340 TFEU, only where the net difference between costs and gains is negative.[42] In other words, there must be an *overall loss* stemming from the conduct complained of. Otherwise, there would be the paradoxical situation in which, despite having financially benefited from the conduct of an EU institution, an undertaking would also be entitled to claim additional sums from the Union.

88. As explained in points 68 and 70 above, the decision of an undertaking to defer payment and provide a bank guarantee, on the one hand, gives rise to certain costs but, on the other hand, it also allows that undertaking to use, for a period of time, a sum which may generate gains. These various effects are not unrelated, as wrongly argued by Kendrion, but they are inextricably linked: they are the two sides of the same coin.

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

90. To my mind, that is an error committed by the General Court. As mentioned in points 70 and 74 above, an undertaking is presumed to act, at all times, in the manner that it considers rational from an economic and financial perspective. Therefore, it may be reasonable to presume that, for the whole duration of the judicial proceedings in Case T-54/06, Kendrion found it more advantageous to continue borrowing from the Union the sum corresponding to the amount of the fine due, rather than to use its own liquidity or to borrow that amount from credit institutions.

91. That being so, it cannot be ruled out that the excessive delay in the adjudication of Case T-54/06 not only did not cause a loss for Kendrion, but it even gave rise to a financial advantage for that company. Yet, that is not something that may be ascertained on the basis of the judgment under appeal since the General Court considered, without any further inquiry, that the bank guarantee charges in the period of the overrun corresponded to the damage suffered by Kendrion during that time.

92. Finally, I would add that, on this point too, the judgment under appeal appears contradictory. Indeed, as regards another form of alleged damage (the payment of the interest on the amount of the fine) the General Court held that Kendrion had adduced no evidence to show that, during the period of the overrun, 'the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on it by possession of the sum equal to the amount of the fine plus default interest'.[43]

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

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

43 Paragraph 77 of the judgment under appeal.

94. In conclusion also the *second* ground of appeal put forward by the European Union is well founded.

(c) Interest

95. By its second ground of appeal, directed against paragraphs 75 to 80 of the judgment under appeal, Kendrion claims that the General Court erred in law in dismissing its request for compensation for the damage consisting in the interest, at a rate of 3.56%, on the amount of the fine imposed on it for the period of the overrun.

96. In its judgment, the General Court considered that Kendrion had adduced no evidence to show that, during the period of the overrun, the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on it by possession of the sum equal to the amount of the fine plus default interest.

97. To my mind, the General Court was, for the reasons illustrated in points 43 to 94 above, correct in dismissing Kendrion's claim. Since Kendrion's action was ultimately rejected by the EU Courts, the default interest to be paid to the Commission on the amount of the fine is clearly a cost that Kendrion had to bear for the period of time that the judicial proceedings were pending. However, that does not automatically mean that such a cost constitutes damage within the meaning of Article 340 TFEU.

98. More fundamentally, in the case at hand there is no sufficiently direct causal link, for the purposes of Article 340 TFEU, between the excessive duration of the proceedings and the loss consisting in the payment of the interest for the period of the overrun. As explained in points 71 to 74 above, the risk of having to bear that cost stemmed from Kendrion's decision to defer payment of the fine until the end of the judicial proceedings. Kendrion took that decision freely and in full knowledge of the financial consequences deriving from it.

99. Accordingly, Kendrion's second ground of appeal should be dismissed.

2. Non-material damage

100. The *fourth* ground of appeal relied on by Kendrion is directed against paragraphs 121 to 135 of the judgment under appeal in which the General Court awarded that company compensation of EUR 6 000 for the non-material damage suffered because of the excessive delay in Case T-54/06. Kendrion submits that the General Court erred in law and requests to be awarded a higher amount.

101. The European Union, for its part, considers Kendrion's arguments inadmissible and, at any rate, unfounded.

102. In the following, I shall explain why I take the view that Kendrion's fourth ground of appeal cannot succeed. In order to do that, I find it useful to clarify some key concepts first.

(a) The concept of 'non-material damage'

103. Article 340 TFEU, second paragraph, states that 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good *any* damage caused by its institutions or by its servants in the performance of their duties'.[44] Accordingly, the EU Courts have consistently interpreted this provision as covering, as a matter of principle, both pecuniary losses (in the form of reduction of assets[45] and of loss of profits[46]) and non-pecuniary losses.[47]

104. Consistently with that case-law, in its judgment of 26 November 2013 in *Kendrion*,[48] the Court made clear that 'in an action for damages based on a breach by the General Court of the second paragraph of Article 47 of the Charter, in so far as it failed to have regard to the requirement that the case be dealt with within a reasonable time, the General Court must … in particular, ascertain whether it is possible to identify, in addition to any *material loss*, *any other type of harm* sustained by the party affected by the excessive period, which should, where appropriate, be suitably compensated'.[49]

105. Compensation under Article 340 TFEU aims at restoring, as far as possible, the assets of the victim as they were before the unlawful conduct of the EU institution.[50] Therefore, pecuniary losses which are a direct consequence of that conduct are normally to be compensated through the payment of a sum equal to those losses.

106. However, that is impossible for losses which are non-pecuniary, or non-material.[51] In most legal systems, the concept of 'non-material' damage refers to types of damage that are intangible and that cannot be easily given an economic value since there is, strictly speaking, no market value for them. Typical examples of such damage include pain and suffering, emotional distress, impairment of life or of relationships. In essence, it covers different forms of physical and/or psychological harm.

107. In all those situations, the status quo ante manifestly cannot be re-established. Hence, any type of compensation that the courts may award will always and inevitably be 'second best'. That is why the payment of an amount of money may or may not, depending on the circumstances, be the most appropriate form of compensation.[52] Indeed, the EU Courts have, in certain cases, found that *symbolic* monetary compensation[53] sufficed, or that *compensation in kind* may be granted.[54] In other cases, the EU Courts did not order any specific form of compensation, since they considered that the annulment of the wrongful act,[55] or the mere recording in the judgment of the unlawful event,[56] might constitute satisfactory compensation for the purposes of Article 340 TFEU.[57]

44 Emphasis added.

45 See, for example, judgment of 17 December 1998, *Embassy Limousines & Services* v *Parliament*, T-203/96, EU:T:1998:302, paragraph 89.

46 See judgment of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 59 et seq.

47 See, for example, judgment of 3 February 1994, *Grifoni* v *Commission*, C-308/87, EU:C:1994:38, paragraphs 36 to 38.

48 Judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 100.

49 Emphasis added.

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

51 The two terms are often used interchangeably.

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

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

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

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

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

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

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

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

110. That said, a point which I find worth stressing is that non-material damage is, as I see it, not simply damage whose pecuniary value may be difficult to estimate for *practical reasons*. It is only damage that, *by its very nature*, cannot be financially determined in a precise and unequivocal manner.

111. That aspect is especially relevant, in my view, when issues arise as to the possible compensation for non-material damage claimed by legal persons. Clearly, the concept of non-material damage appears to sit uneasily with the idea that a legal entity may suffer some kind of psychological or physical harm. This is why the possibility for legal persons to claim non-material damage is a controversial issue in many jurisdictions.[58] There is no need, however, for the purposes of the present proceedings, to have an in-depth discussion on that issue. It suffices to point out, in that regard, that the case-law of the EU Courts and of the ECtHR has found that, in some circumstances, legal persons too are entitled to claim compensation for non-material damage.

112. Recently, in *Safa Nicu Sepahan*, the Court of Justice upheld a judgment of the General Court in which the latter had recognised the existence of non-material damage for a company that had been 'associated with conduct which [was] considered a serious threat to international peace and security, as a result of which it [became] an object of opprobrium and suspicion (which thus affect[ed] its reputation)'.[59] In other cases, the General Court awarded compensation for non-material damage to undertakings that, because of the unlawful conduct of an EU institution, had been put 'in a position of uncertainty and forced it to make useless efforts with a view to responding to the urgency of the situation',[60] or had suffered harm to their 'image and reputation'.[61] By the same token, in a number of cases, the ECtHR has held that, to adequately compensate legal persons that may suffer non-material damage, 'account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company … and … the anxiety and inconvenience caused to the members of the management team'.[62]

113. However, those statements should, in my view, be taken cautiously. For the reason explained in point 110 above, I believe that not all damage stemming from, for example, the harm done to a company's reputation or the state of uncertainty created in a company's management may be regarded as being non-material. Indeed, negative consequences such as loss of customers, loss of business opportunities, necessity of larger investments in advertising or in branding and so forth are — arguably — of a pecuniary nature.

58 See, with further references, Wilcox, V., *A Company's Right to Damages for Non-Pecuniary Loss*, Cambridge University Press, Cambridge, 2016.

59 Judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council*, T-384/11, EU:T:2014:986, upheld in relevant parts by judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402.

60 Judgment of 17 December 1998, *Embassy Limousines & Services* v *Parliament*, T-203/96, EU:T:1998:302.

61 Judgment of 9 July 1999, *New Europe Consulting and Brown* v *Commission*, T-231/97, EU:T:1999:146, paragraph 69.

62 See, among many, judgment of the ECtHR of 6 April 2000, *Comingersoll S.A. v. Portugal*, CE:ECHR:2000:0406JUD003538297, § 35.

114. It is true that such consequences may be difficult to prove and/or to quantify, especially if some of the damage is expected to come into existence in the future. Nevertheless, they do not become 'non-material damage' merely because of the practical difficulties the victims may encounter in substantiating their claims. Future losses, too, may be compensated where reliable facts demonstrate that they are not speculative and will come into existence within a reasonable time frame.[63] In addition, to ensure adequate compensation where a strict application of the rules on the standard of proof would place too high a burden on the victim, the court hearing the case may decide to accept a lower standard of evidence, or make use of approximations or presumptions.[64] At any rate, the EU Courts enjoy broad discretion in choosing the data they see fit to calculate and evaluate the damage alleged by a party.[65]

115. For its part, the EU institution responsible for the alleged damage may not limit its arguments to those which contest the data and figures put forward by the applicants before the EU Courts. It is required to provide detailed statements of its criticisms.[66] More generally, EU institutions are to act in good faith and, in that context, they may not refuse to assist an applicant, for example by providing documents and information not otherwise available to him.[67]

116. Therefore, only the effects that are related to (what I would refer to as) *corporate distress* should be regarded as constituting non-material damage for which a legal entity may be awarded compensation.[68]

117. It is against this background that I shall examine the arguments put forward by Kendrion on this issue.

(b) The alleged errors

118. In support of its fourth ground of appeal, Kendrion puts forward several arguments. Kendrion contends, first of all, that the General Court has not sufficiently explained the criteria it used to determine at EUR 6 000 the amount of compensation due for non-material damage. At any rate, Kendrion considers that amount to be purely symbolic and submits that the General Court should have awarded compensation corresponding to 5% of the fine imposed by the Commission (that is, EUR 1 700 000). Kendrion refers, in that regard, to the judgment of the Court of Justice in *Heineken*.[69] Alternatively, Kendrion invites the Court of Justice to determine equitable compensation *ex aequo et bono*.

119. I find those arguments unpersuasive. To explain the reasons for that, I must recall the relevant passages of the judgment under appeal.

63 See, to that effect, judgment of 2 June 1976, *Kampffmeyer and Others* v *EEC*, 56/74 to 60/74, EU:C:1976:78, paragraph 6; and Opinion of Advocate General Reischl in *Milch-, Fett- und Eier-Kontor* v *Council and Commission*, 44/76, EU:C:1977:21, p. 413. That would seem to reflect, after all, a principle common to the laws of the Member States: see, to that effect, Van Gerven, W., (ed.), *Tort Law*, Hart Publishing, Oxford, 2000, pp. 816 to 845.

64 See, to that effect, judgments of 9 December 1965, *Société anonyme des laminoirs, hauts fourneaux, forges, fonderies et usines de la Providence and Others* v *High Authority*, 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63, EU:C:1965:120, p. 938, and of 9 November 2006, *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraph 42. See also judgment of 28 April 2010, *BST* v *Commission*, T-452/05, EU:T:2010:167, paragraph 168.

65 See, to that effect, judgment of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 79.

66 See, to that effect, judgment of 27 January 2000, *Mulder and Others* v *Council and Commission*, C-104/89 and C-37/90, EU:C:2000:38, paragraph 83.

67 To that effect, Opinion of Advocate General Lagrange in *Société anonyme des laminoirs, hauts fourneaux, forges, fonderies et usines de la Providence and Others* v *High Authority*, Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63, EU:C:1964:27, pp. 943 and 944. Cf also, Toth, A.G., 'The Concepts of Damage and Causality as Elements of Non-contractual liability', in Heukels, T., McDonnell, A., *The Action for Damages in Community Law*, 1 ed, Kluwer Law International, 1997, p. 185.

68 In support of this view, see by analogy judgment of the ECtHR, 10 May 2001, *Z and others v. The United Kingdom*, CE:ECHR:2001:0510JUD002939295, §§ 124 and 130.

69 Judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C-452/11 P, not published, EU:C:2012:829.

120. In paragraphs 121 to 128 of the judgment under appeal, the General Court first dismissed Kendrion's claim for non-material damage relating to alleged harm to its reputation. The General Court then went on to recognise that, despite some uncertainty concerning the fate of its action being inevitable for any applicant, the significant length of the proceedings in Case T-54/06 put Kendrion 'in a position of uncertainty greater than that normally engendered by court proceedings'. That prolonged state of uncertainty had, according to the first instance court, 'an impact on decision-making and the running of that business and therefore constituted non-material damage'.

121. In paragraphs 129 to 134 of the judgment under appeal, the General Court held that 'in the circumstances of the present case, the non-material damage suffered by [Kendrion] as a result of the prolonged state of uncertainty in which it was placed is not fully compensated by the finding of a breach of the obligation to adjudicate within a reasonable time'. However, the General Court rejected Kendrion's request that the compensation to be awarded had to be calculated as a certain percentage of the amount of the fine imposed by the Commission. That, in the General Court's view, would have had the effect of calling that fine into question, even though it had not been established that the failure to adjudicate within a reasonable time in Case T-54/06 had any bearing on the amount of that fine.

122. Thus, in paragraph 135 of the judgment under appeal, the General Court ruled that, for the purposes of determining the amount of compensation to be awarded to Kendrion for non-material damage, it was appropriate to take into account, in particular, 'the extent of the failure to adjudicate within a reasonable time, the applicant's conduct and the delay it reported during the proceedings and the need to ensure that the rules of EU competition law are complied with and the present action [was] effective'. On that basis, the General Court decided, *ex aequo et bono*, that compensation of EUR 6 000 constituted adequate reparation for the damage that Kendrion suffered as a result of the prolonged state of uncertainty in which it found itself during the proceedings in Case T-54/06.

123. From the outset, it should be borne in mind that, according to well-established case-law, once the General Court has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the means and extent of the compensation for the damage. However, in order for the Court of Justice to be able to review the judgments of the General Court, those judgments must be sufficiently reasoned and, as regards the assessment of the damage, indicate the criteria taken into account for the purposes of determining the amount decided upon. [70]

124. Against that background, I take the view that the judgment under appeal was sufficiently reasoned on this point. First, the General Court has, succinctly but clearly, illustrated its reasons for concluding that certain types of non-material damage alleged by Kendrion had been adequately proven while others had not. Second, the General Court explained why the award of pecuniary compensation was deemed necessary and, third, it referred to the criteria taken into account to determine the amount of that compensation. [71]

125. Moreover, to my mind, the General Court did not err in law in choosing those criteria or, more broadly, in interpreting the concept of 'compensation' under Article 340 TFEU. In that regard, it must be emphasised again that, as explained in points 106 to 110 above, the compensation to be awarded for non-material damage is by no means meant to cover economic losses suffered by the applicant. For that reason, compensation of an amount that may be regarded as merely 'symbolic' is not excluded altogether. The sum awarded to Kendrion in the judgment under appeal may admittedly appear low, but it should not be considered to constitute reparation for the extra costs and the missed profits that may have been caused by the state of uncertainty in which Kendrion was placed by the excessive duration of the proceedings in Case T-54/06. It is only compensation for the distress suffered by Kendrion (its organs, and the company as a whole) during the period of the overrun.

70 See judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 50 and 51 and the case-law cited.
71 See, similarly, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraphs 52 and 53.

126. Unlike as argued by Kendrion, the judgment of the Court of Justice in *Heineken*[72] does not require the EU Courts to define the sums to be awarded for the excessive duration of the proceedings as a percentage of the fine imposed by the Commission. In that judgment, the Court of Justice simply dismissed the appellant's arguments that the General Court had breached the principles of equality and proportionality in granting a 5% reduction of a fine imposed by the Commission, following an administrative procedure the duration of which the Commission itself had considered excessive. The Court of Justice observed that the General Court had exercised its power of unlimited jurisdiction to grant the appellant the reduction in question. The Court of Justice pointed out that the appellant's relevant claim had been addressed and that that company could not claim *an additional* reduction of the fine on the same ground.[73]

127. In addition, the Commission had not brought an appeal against that part of the first instance judgment. Therefore, the fact that the Court of Justice upheld the judgment under appeal cannot be taken as an endorsement, by the Court of Justice, of the General Court's findings in that respect. In any event, even if one were to read the judgment in *Heineken* as supporting Kendrion's argument, that judgment should be considered, on this point, to be no longer good law. Indeed, in its judgment, the General Court had followed an approach which was clearly inspired by the judgment of the Court of Justice in *Baustahlgewebe*.[74] Yet, some two years after *Heineken*, the Court of Justice expressly and definitely overruled the *Baustahlgewebe* case-law.[75] Also in the proceedings which led to the judgment of the Court of Justice of 26 November 2013, Kendrion had unsuccessfully invoked a similar argument.[76] I see no good reason why the conclusion on this point should be any different now.

128. In those circumstances, the finding in paragraph 135 of the judgment under appeal, to the effect that the non-material damage suffered by Kendrion had to be compensated, on the basis of an *ex aequo et bono* evaluation, with EUR 6 000, cannot be reviewed by the Court of Justice on appeal.[77] Consequently, the Court of Justice cannot simply discard the General Court's assessment with regard to the amount of the compensation due for non-material damage and itself determine an equitable compensation *ex aequo et bono*.

129. Kendrion's fourth ground of appeal must consequently be dismissed.

3. The reasonable duration of the proceedings

130. By its first ground of appeal, directed against points 44 to 63 of the judgment under appeal, Kendrion submits that the General Court erred in law in holding that the proceedings (that lasted for a total of approximately five years and nine months) which culminated in the delivery of the judgment of 16 November 2011 in Case T-54/06 exceeded by 20 months the reasonable time for adjudicating in such a case. In Kendrion's view, the maximum reasonable duration in such type of cases should be two and half years. It refers, in that regard, to the case-law of the ECtHR and to a report of the European Commission for Efficiency of Justice ('CEPEJ') of 2012.[78] In addition, Kendrion criticises the General Court for focusing only on the time elapsed between the end of the written procedure and the opening of the oral procedure, whereas it should have taken into account the overall duration of the proceedings.

72 Judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C-452/11 P, not published, EU:C:2012:829.

73 Judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C-452/11 P, not published, EU:C:2012:829, paragraphs 91 to 102.

74 Judgment of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608.

75 See, in particular, judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraphs 77 to 108.

76 The Court did not expressly deal with that argument in the judgment, whereas the Advocate General explicitly dismissed it: see Opinion of Advocate General Sharpston in *Kendrion* v *Commission*, C-50/12, EU:C:2013:350, points 130 to 132.

77 Ibidem. See also judgment of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 66.

78 The CEPEJ is a committee established in 2012 by the Committee of Ministers of the Council of Europe.

131. The European Union contends that the General Court correctly assessed the period of the overrun and asks the Court of Justice to dismiss Kendrion's first ground of appeal.

132. I have some sympathy for some of the arguments put forward by Kendrion. However, a closer scrutiny of the judgment under appeal reveals that the General Court did not commit the errors of law alleged by Kendrion.

133. At the outset, I must emphasise that I agree with Kendrion that, faced with issues relating to a possible excessive length of previous proceedings, the General Court is to look, first and foremost, at the overall duration of the proceedings. It may indeed be artificial to try to split up the overall procedure into different phases, in order to assess the reasonableness of the duration of one or more of those phases in 'clinical isolation' from the others. On the one hand, small delays in the different phases of the procedure may appear of little significance when taken individually but, when combined, they may nonetheless result in an unreasonable duration of the overall proceedings.[79] By the same token, it cannot be ruled out that a significant delay in one of the procedural phases may be compensated by handling the other phases of the procedure more swiftly.

134. For example, the lapse of a significant period between the end of the written procedure and the opening of the oral procedure does not necessarily translate into a significant duration of the overall procedure. Conversely, a relatively short period running between those two phases does not rule out the possibility that the overall proceedings exceed a reasonable duration. It all depends on how the chamber competent to rule on the case has organised its work and, accordingly, how the procedure continues.

135. A chamber may well decide to 'frontload' as much as possible the work before the hearing takes place or, conversely, to hold a hearing soon after the closing of the written procedure, leaving significant parts of the work to be completed after the hearing. The choice between those options may depend on several factors: the working methods of the judges sitting in the adjudicating chamber, their case load at any given moment and the specific characteristics of each case (for example whether there are many issues to be clarified at the hearing or not).

136. A short period of time between the written and the oral procedure helps the parties little if, subsequently, the deliberation is particularly long. Conversely, a longer-than-normal period between the written and the oral procedure may be fruitful if it allows for a speedy deliberation afterwards.

137. That said, the existence of significant periods of total *inactivity* in the handling of a case may certainly be considered a strong indication that a reasonable duration of the proceedings has been exceeded. Nevertheless, a period that may appear to the parties as being of inactivity is not necessarily so.

138. That is especially true for the period that runs between the end of the written procedure and the beginning of the oral procedure. Several important activities are carried out during that period, even if the parties are not informed of them (and, for some of those activities, the parties cannot be informed for reasons relating to the secrecy of the EU Court's deliberations).[80] In particular, apart from finalising the necessary translations, it is in that phase of the procedure that the Judge-Rapporteur presents a preliminary report to the General Court, which contains an analysis of the relevant issues of fact and

79 See, to that effect, judgment of the ECtHR of 27 February 2018, *Ruotolo v. Italy*, CE:ECHR:1992:0227JUD001246086, §17.

80 See Articles 2, 8 and 35 of the Statute of the Court of Justice of the European Union. See also Article 32 of the Rules of Procedure of the Court of Justice and Article 21 of the Rules of Procedure of the General Court.

of law raised by the action, proposals as to whether measures of organisation of procedure or measures of inquiry should be undertaken, whether there should be an oral part of the procedure and whether the case should be referred to the Grand Chamber or to a Chamber sitting with a different number of judges, or whether the case should be delegated to a single judge. [81]

139. It is difficult to overestimate the importance of such a document for the purposes of the proceedings. It is also impossible to assess, a priori, the time required to prepare that document in each case: before drafting, the Judge-Rapporteur has to thoroughly reflect on the legal issues raised by the case in order to identify avenues for analysis and points that need further consideration or clarification. [82] His proposals on how to proceed with the further treatment of the case are based on his preliminary legal analysis.

140. In addition, a possible inertia of the Court at some point in the course of the proceedings is not the only element to be taken into account in this context. *Inefficient* handling of a case may, in fact, be equally unacceptable for the purposes of Article 47 of the Charter. To give but a few examples: that may occur where the necessary translations of the procedural documents take an excessive time because of staff or organisational problems internal to the EU Courts. [83] That may also be the case where judges, during a prolonged period of time, fail to agree on the text of the decision closing the proceedings, despite frequent and repeated attempts. It may also happen that there are multiple or subsequent changes in the composition of the chamber hearing a case, thereby obliging the members of that chamber to re-do work that has already been accomplished. In all those circumstances, the duration of the procedure may become excessive for reasons which are not imputable to the parties and, arguably, should not affect those parties' right to a speedy trial.

141. Therefore, I agree with Kendrion that, in principle, the analysis required to determine whether previous proceedings have exceeded a reasonable duration should normally focus on the overall length of the proceedings. Generally, the emphasis cannot be placed only, or mainly, on potential periods of inactivity and, in particular, on the time elapsed between the end of the written procedure and the opening of the oral procedure.

142. Yet, in the case at hand, the General Court cannot be accused of having neglected the other phases of the procedure. In point 62 of the judgment under appeal, that court held that 'an examination of the file in Case T-54/06 has not revealed anything to support the conclusion that there was a period of unjustified inactivity between the date of lodging the application and the date of lodging the rejoinder, or between the opening of the oral part of the procedure and the delivery of the judgment'.

143. Consequently, the General Court has duly examined the activity (or inactivity) of the Court in the whole procedure. The General Court concentrated its analysis on a specific phase of the procedure because the facts of the case showed that the problems delaying the procedure occurred during that period. Indeed, in its judgment of 26 November 2013, the Court of Justice had already observed that the period between the end of the written procedure and the opening of the oral procedure, lasting for approximately 3 years and 10 months, '[could] not be explained by the circumstances of the case, whether it be the complexity of the dispute, the conduct of the parties or supervening procedural matters'. [84]

81 See Article 87 of the Rules of Procedure of the General Court.

82 Cf. Opinion of Advocate General Geelhoed in Joined Cases *Sumitomo Metal Industries* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2006:546, point 158.

83 See, to that effect, judgment of the ECtHR, 21 February 1997, *Guillemin v. France*, CE:ECHR:1997:0221JUD001963292, §43.

84 Judgment of 26 November 2013, *Kendrion* v *Commission*, C-50/12 P, EU:C:2013:771, paragraph 103.

144. In the light of that, even if Kendrion's arguments on the methods that the General Court ought to apply in an analysis such as that carried out in the case at hand are not incorrect, the criticism levelled at the General Court derives from an incorrect reading of the judgment under appeal.

145. As regards, finally, Kendrion's claim that the maximum reasonable duration in such a type of proceedings before the General Court should be two and half years, I find it to be untenable.

146. To begin with, Kendrion argues that such a limit is apparent from the case-law of the ECtHR. Yet, no specific case is cited. A brief perusal of the case-law of the Strasbourg court shows, instead, that each case is assessed on its own merits; that court appears very reluctant to set out strict or fixed thresholds. [85]

147. In addition, regardless of the value that should be attributed to such a document, I also do not find clear support for Kendrion's argument in the abovementioned CEPEJ report. First, I observe that such a report is meant to reflect considerations relating to judicial proceedings at national level. Proceedings before the EU Courts — with their multilingual environment — operate under different constraints than the former. Second, the passage of the report referred to by Kendrion merely states that a length of proceedings of up to two years is normally considered acceptable in non-complex cases. The report goes on to state that, for complex cases, a supplementary time period may be accepted by the ECtHR, but that that court will pay attention to possible periods of inactivity. It seems to me to amount to misreading the document to state that such a report suggests that under no circumstance a procedure before the General Court should exceed two and half years, regardless of its complexity.

148. For these reasons, I take the view that Kendrion's first ground of appeal, too, is to be rejected.

V. Consequences of the assessment

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

150. Since, in the light of the facts available and the exchange of views before the Court of Justice, it is possible to give final judgment on this matter, the Court of Justice should dismiss Kendrion's claim for compensation in respect of the material damage consisting in the payment of the bank guarantee charges in relation to the period in which the reasonable time for adjudication in Case T-54/06, *Kendrion* v *European Commission*, was exceeded.

151. The appeal by Kendrion should be rejected in its entirety.

VI. Costs

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

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

85 See, with ample references to the case-law, Edel, F., *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights among many*, 2nd ed., Council of Europe Publishing, 2007, pp. 33 to 39.

VII. Conclusion

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

– set aside point 1 of the operative part of the judgment of the General Court of 1 February 2017, T-479/14, *Kendrion* v *European Union*;

– dismiss Kendrion's claim for compensation in respect of the material damage consisting in the payment of the bank guarantee charges in relation to the period in which the reasonable time for adjudication in Case T-54/06, *Kendrion* v *European Commission*, was exceeded;

– dismiss the cross appeal lodged by Kendrion;

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

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

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