Haste Makes Waste (?) - Some Reflections on the European Court of Justice's Approach to Remedying Infringements of the General Court regarding the Right to be Heard Within a Reasonable Time

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Introduction

With the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights of the European Union ("**Charter**") having become binding, the protection of fundamental rights in the EU has gained importance. This also applies to cartel proceedings, and fining decisions are increasingly subject to close scrutiny by the EU Courts, particularly in terms of ensuring that the addressees' fundamental rights, including certain procedural rights, are respected. When actions for annulment are (partially) successful, this is more likely due to an infringement by the European Commission ("**Commission**") of rights such as the principle of equal treatment[1] than, for example, a successful challenge to the existence of a cartel, a company's involvement in or its (or the parent entity's) responsibility for it. But sometimes it is not the Commission that has infringed the party's fundamental rights but rather the General Court ("**GC**") itself. Most notably, there have been cases in which the GC has been found to have infringed the party's right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" as laid down in Article 47(2) of the Charter. This article explores how the European Court of Justice ("**ECJ**") has recently dealt with this issue and whether the ECJ's solution strikes the right balance between competition law enforcement and an effective protection of fundamental rights.

The ECJ's recent approach to infringements of the reasonable time principle

In the proceedings underlying the *Gascogne* case law,[2] the appellants claimed that their right to be heard within a reasonable time had been infringed by the GC because it had taken the GC more than five and a half years to deliver its judgments and in particular there had been a long period of inactivity after the end of the written procedure. Against this background, the appellants requested the ECJ to set aside the judgment, or alternatively to reduce the amount of the fine imposed. Indeed, in the earlier *Baustahlgewebe* judgment the ECJ had concluded that an excessive duration of proceedings should be remedied by way of a fine reduction "[f]or reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind."[3] In the *Gascogne* judgments the ECJ reaffirmed its earlier case law according to which a judgment cannot be set aside in its entirety where the failure to adjudicate within a reasonable time has not had any effect on the outcome of the proceedings before the GC.[4] As regards the reduction of the fine, the ECJ departed from the approach it had taken in *Baustahlgewebe* and found that the appropriate (and effective) remedy would be an action for damages to be brought before the GC (i.e., the court which committed the infringement[5]), "since such a

[1] See e.g. GC, judgment of 23 January 2014, Case T-395/09 – Gigaset AG/Commission, paras. 152-192.
[2] ECJ, judgments of 26 November 2013, Cases C-58/12 P – *Groupe Gascogne SA/Commission;* C-40/12 P – *Gascogne Sack Deutschland GmbH/Commission;* and C-50/12 P – *Kendrion NV/Commission*.
[3] ECJ, judgment of 17 December 1998, Case C-185/95 P – *Baustahlgewebe/Commission*, para. 48.
[4] ECJ, judgment of 26 November 2013, Case C-58/12 P – *Groupe Gascogne SA/Commission*, paras. 73-75; see also ECJ, judgment of 17 December 1998, Case C-185/95 P – *Baustahlgewebe/Commission*, para. 49.
[5] On this issue, see Opinion of AG *Wathelet* of 29 April 2014, Case C-580/12 P – *Guardian Industries Corp. and Guardian Europe Sàrl/Commission*, para. 112.

claim can cover all the situations where a reasonable time has been exceeded in proceedings."[6] This view has been confirmed more recently in the ECJ's *FLSmidth* decision.[7]

Both the GC's President *Jaeger*[8] and Advocate General ("**AG**") *Wathelet*[9] have expressed the view that the preferable and more efficient remedy for an infringement of the reasonable time principle would be a fine reduction. This seems to be the better view for a number of reasons, which shall be explored on the following pages.

No explanation for the departure from the ECJ's earlier case law

While the ECJ recognized the similarity of the *Gascogne* cases to the situation in the *Baustahlgewebe* judgment, it failed to explain its reasons for departing from the approach taken earlier in the *Baustahlgewebe* case. The alleged appropriateness of a damages claim cannot serve as an explanation, since that possibility had already existed at the time of the *Baustahlgewebe* precedent. The closest the ECJ got to explaining its new[10] approach was its reference to "the need to ensure that the competition rules of the European Union are complied with" and its view that therefore, "the Court cannot allow an appellant to reopen the question of the amount of a fine which has been imposed upon it, on the sole ground that there was a failure to adjudicate within a reasonable time, where all of its pleas directed against the findings made by the General Court concerning the amount of that fine and the conduct that it penalises have been dismissed."[11] However, this seems to overemphasize the need for deterrence at the expense of a more effective protection of fundamental rights. This is questionable both in view of the EU hierarchy of norms and the likely effect a fine reduction would have on the necessary compliance with EU competition law. As regards the latter, it has been rightly observed that a fine reduction "would not call into question the appropriateness of the [fine] itself [and] simply involves a form of offsetting against the original fine of the amount to be considered to represent appropriate compensation for the excessive length of the proceedings."[12]

Procedural economy and delimitation of competences as between the ECJ and the GC

The *Gascogne* approach is also unconvincing from the viewpoint of procedural economy. Whereas the ECJ, referring to Article 58(1) of the ECJ Statute and its own case law, found that it "has jurisdiction, in an appeal, to verify whether a breach of procedure adversely

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[6] ECJ, judgment of 26 November 2013, Case C-58/12 P – *Groupe Gascogne SA/Commission*, paras. 82-84.
[7] ECJ, judgment of 30 April 2014, Case C-238/12 P – *FLSmidth & Co. A/S/Commission*, paras. 116-117.
[8] PaRR, "Cartel fine reduction more efficient redress than damages – GC president", 26 May 2014.
[9] Opinion of AG *Wathelet* of 29 April 2014, Case C-580/12 P – *Guardian Industries Corp. and Guardian Europe Sàrl/Commission*, paras. 106 et seq.
[10] In its judgment of 16 July 2009 in Case C-385/07 P - *Der Grüne Punkt - Duales System Deutschland/Commission,* the ECJ already held that an action for damages would provide a sufficient remedy, but no fine had been imposed in that case.
[11] ECJ, judgment of 30 April 2014, Case C-238/12 P – *FLSmidth & Co. A/S/Commission*, para. 115; judgment of 26 November 2013, Case C-58/12 P – *Groupe Gascogne SA/Commission*, para. 78.
[12] Opinion of AG *Wathelet* of 29 April 2014, Case C-580/12 P – *Guardian Industries Corp. and Guardian Europe Sàrl/Commission*, para. 114, referring to the Opinion of AG *Kokott* of 14 April 2011, Case C-109/10 P – *Solvay SA/Commission*, para. 332.

affecting the appellant's interests was committed" by the GC,[13] it did not consider itself to be in a position to determine the consequences from such a breach and to provide the appellant with any remedy. The delegation to the GC of the responsibility for providing a remedy will necessarily further increase the GC's workload, which has already reached record levels with 790 new and 1325 pending cases in 2013.[14] At the same time, the ECJ will have to deal with other points raised by the same case, at least when the excessive duration of proceedings is not the only plea relied on by the appellant.

The precise delimitation of competences as between the ECJ and the GC is also not entirely clear. While the ECJ found that it is for the GC to assess whether a claim for damages is well founded, i.e. whether the party's rights have been infringed and whether there has been any actual harm and a causal connection between that harm and the excessive duration of the proceedings,[15] it nevertheless concluded itself that the length of the proceedings had been excessive.[16] This could imply that the GC must only establish the causal link between the breach and the damage.[17] Thus, it might be possible for an appellant to plead in an appeal before the ECJ that the length of the proceedings before the GC was excessive and then rely on the ECJ's findings in a subsequent damages action before the GC. This would appear to be possible in view of the limitation period for a damages claim (five years).[18] Whether this route is efficient in terms of procedural efficiency is another matter.

Further delay and costs

Moreover, a separate damages action will inevitably be associated with additional time and costs. As regards the former, it seems questionable whether further delays are appropriate when the infringement, for which a remedy is sought, is the excessive duration of proceedings. Indeed, AG *Wathelet* has called this solution "paradoxical."[19]

As for the latter, depending on the amount of the potential compensation and the additional costs caused by a separate damages action, the party whose fundamental rights have been infringed might be discouraged from seeking legal redress. This is because usually only a small proportion of the costs incurred in proceedings before the GC is recovered[20] and if the financial damage suffered by the party concerned is not sufficiently high it may not be economically reasonable to bring a damages action.

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[13] ECJ, judgment of 30 April 2014, Case C-238/12 P – *FLSmidth & Co. A/S/Commission*, para. 111.
[14] ECJ, Annual Report 2013, p. 174.
[15] ECJ, judgment of 26 November 2013, Case C-58/12 P – *Groupe Gascogne SA/Commission*, paras. 85-90.
[16] ECJ, judgment of 26 November 2013, Case C-58/12 P – *Groupe Gascogne SA/Commission*, paras. 91-96.
[17] Opinion of AG *Wathelet* of 29 April 2014, Case C-580/12 P – *Guardian Industries Corp. and Guardian Europe Sàrl/Commission*, para. 122.
[18] Indeed, Kendrion lodged a damages claim with the GC on 26 June 2014 (see Case T-479/14 – *Kendrion/Court of Justice of the European Union*).
[19] Opinion of AG *Wathelet* of 29 April 2014, Case C-580/12 P – *Guardian Industries Corp. and Guardian Europe Sàrl/Commission*, para. 111.
[20] On this issue, see *S. Kinsella* and *A. Duke*, "Who are the real winners and losers in the General Court?", CPI Europe Column, 24 January 2014.

Potential unavailability of judicial redress in some cases

Finally, it seems doubtful whether the ECJ was right in assuming that a damages claim "can cover all the situations where a reasonable time has been exceeded." The most obvious cases where the existence of a quantifiable damage may be demonstrated by the claimant are those cases in which it has chosen not to pay the fine provisionally but to provide a bank guarantee as long as the Commission's decision is under appeal and has not yet become binding. In such cases, the addressee has to pay interest on the amount of the fine, and the bank guarantee will also entail costs the addressee has to bear.

On the other hand, if the addressee of the decision has opted for the provisional payment of the fine, the existence of any quantifiable harm (e.g., lost profits) may be more difficult to prove, or it may even be the case that the addressee has not suffered any financial harm. In such cases, the party concerned might potentially be left without any remedy at all.

However, even in the absence of any quantifiable financial damage, judicial redress should be available for a violation of the right guaranteed by Article 47 of the Charter. Where a fundamental right does not specifically aim at protecting a party's economic interests, the availability of a remedy for the breach of that right should not be made dependent on any financial harm. Even if the GC should decide to award "symbolic" damages in a particular case, it would appear doubtful whether this would make up for the additional time and costs an action for damages (in parallel or subsequent to an appeal to the ECJ) would entail. The ECJ's unlimited jurisdiction[21] in the context of an appeal might provide more flexibility to address the question as to the appropriate remedy.

Conclusion

For the reasons set out above, it seems that an infringement of the reasonable time principle could be more efficiently and flexibly dealt with by the ECJ exercising its unlimited jurisdiction in the course of an appeal than by requiring the appellant to bring a separate action for damages before the GC. There may be situations in which a stand-alone damages action is appropriate, for example, when the party does not appeal the GC's decision on grounds other than the excessive duration (i.e., the damages action is not brought in addition to, but rather instead of an appeal), and the damage is quantifiable and not outweighed by the (non-reimbursable part of the) potential costs of litigation.

However, if an action for damages is the only way to plead a violation of the reasonable time principle, the party concerned could in some cases be left without any remedy at all.

The GC's President has suggested that the ECJ's likely intention was to anticipate an appeal before the European Court of Human Rights in Strasbourg following the EU's accession to the European Convention on Human Rights ("**ECHR**") and to demonstrate that a redress mechanism is in place.[22] While, if such an appeal should be made, the Strasbourg court

[21] Article 31 of Regulation 1/2003.
[22] PaRR, "Cartel fine reduction more efficient redress than damages – GC president", 26 May 2014.

might well find that the possibility of bringing a damages claim constitutes a sufficiently effective remedy in line with the ECHR's requirements,[23] it should be borne in mind that the ECHR guarantees only a minimum standard for the protection of fundamental rights, and there is nothing which prevents the parties to the ECHR from exceeding those standards.[24] In view of the ever-increasing fines, the importance of an effective protection of fundamental rights can hardly be overstated. Against this background, it would be desirable that the standards laid down in the ECHR were not only met, but that they were exceeded. The *Baustahlgewebe* precedent shows that this is possible, and national courts have also held that the excessive duration of proceedings warrants a fine reduction.[25]

[23] See Article 13 of the ECHR.
[24] Cf. Article 53 of the ECHR.
[25] See e.g. Bundesgerichtshof (German Federal Court of Justice), judgment of 26 February 2013, Case KRB 20/12 – *Grauzementkartell*, paras. 87-91.