The Union's liability for failure to adjudicate within a reasonable time

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The Union's Liability for Failure to Adjudicate within a Reasonable Time: EU Tort Law after *Gascogne, Kendrion and ASPLA*

Joined Cases C-138/17 P and C-147/17 P, *Gascogne Sack Deutschland and Gascogne v. European Union*, Judgment of the Court (First Chamber) of 13 December 2018, EU:C:2018:1013.

Case C-150/17 P, *European Union v. Kendrion NV*, Judgment of the Court (First Chamber) of 13 December 2018, EU:C:2018:1014

Joined Cases C-174/17 P and C-222/17, *European Union v. ASPLA and Armando Álvarez SA*, Judgment of the Court (First Chamber) of 13 December 2018, EU:C:2018:1015

1. Introduction

The non-contractual liability for damages caused by judicial decisions is one of the most disputed domains of tort law.[1] EU law has contributed greatly to the development of this specific domain of state liability law at Member State level. The decisions in *Francovich, Brasserie du Pêcheur* and *Köbler* set out the general legal framework for damages actions if national courts misapply EU law.[2] In the cases of *Gascogne, Kendrion* and *ASPLA* the Court of Justice of the EU (CJEU) found *itself* confronted – for the first time – with a number of separate damages actions for breach of EU law, namely the alleged failure to adjudicate within a reasonable time as required by paragraph 2 of Article 47 of the Charter of Fundamental Rights of the EU (Charter). All these damages claims followed on an overdue dismissal of annulment actions by the applicants against a Commission Decision finding a violation of Article 101 TFEU (the cartel prohibition) in the *Industrial Bags* case.[3]

In this contribution, we analyze the meaning and potential impact of the judgments in *Gascogne, Kendrion* and *ASPLA* on the non-contractual liability of the EU for damages caused by unlawful judicial conduct of the CJEU.[4] While giving due attention to the different roles the CJEU has played in these proceedings, we focus on the substantive parameters of EU tort law at play, namely unlawfulness, causation and damage. How should 'unlawfulness' be understood in a damages claim for delayed adjudication; what link is required between such unlawfulness and damage; and what 'damage' may be compensable? In many jurisdictions, the liability for judicial decision-making is restricted to a very limited set of cases by a specific conception of the elements of unlawfulness (violation of 'fundamental legal principles') and culpability ('gross

[1] See for an eloquent account: Cappelletti, ""Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility" 31 *American Journal of Comparative Law* (1983), 1-62.
[2] C-6/90, *Francovich and Bonifaci*, EU:C:1991:428; C-46/93, *Brasserie du Pêcheur*, EU:C:1996:79; Case C-224/01 *Köbler*, EU:C:2003:513.
[3] Case COMP/F/38.354 – *Industrial Bags*.
[4] Throughout this contribution we will use the term "CJEU" to denote the judicial institution of the EU, comprising both the General Court (GC) and the Court of Justice (CJ) as its courts. We refer to "GC" and "CJ" when discussing the distinctive judgments these two courts have delivered in the cases under review.

negligence'), or by additional procedural requirements.[5] In the cases under review here, as we will show, also the constitutive elements of causation and damage were interpreted in a way that is likely to further limit the (scope of) non-contractual liability of the EU in this context.[6] We consider this a grim outcome for the applicants concerned, which saw their fundamental right to have their case adjudicated within a reasonable time clearly violated.

2. Factual and legal background

The applicants in *Gascogne*, *Kendrion*, and *ASPLA*, each involved in the industrial bags cartel, had been subject to a decision by the European Commission of 30 November 2005 finding a violation of Article 101 TFEU (the cartel prohibition). The applicants brought an action against the decision to the General Court (GC) in which they claimed that it should annul that decision or reduce the amount of the fine which had been imposed by the Commission. The parties had not paid the fine directly after the decision was issued. Instead, they had opted to provide the Commission with a bank guarantee for the period of the appeal proceedings and to pay interest.

The GC dismissed the applicants' actions for annulment by judgments of 16 November 2011, thus taking almost six years to come to this decision. The applicants brought appeals against the judgments, but the Court of Justice (CJ) dismissed these.[7] Importantly, however, in its judgments of 26 November 2013 in the cases of *Gascogne* and *Kendrion* the CJ pointed out 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."[8] As such, the annulment action before the GC had breached the applicants' right to a fair trial within a reasonable time.[9] At the same time, however, the CJ stated that "a claim for compensation for the damage caused by the failure by the GC to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the GC itself."[10]

As a result, the applicants in *Gascogne*, *Kendrion*, and *ASPLA* brought a separate action pursuant to Article 268 TFEU against the EU for compensation of damage suffered because of the unreasonably long proceedings before the GC in their actions for annulment.[11] The applicants

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[5] Van Gerven et al., *Cases Materials and Text on National, Supranational and International Tort Law* (Hart, 2000), 392; and Scherr, "Comparative aspects of the application of the principle of State liability for judicial breaches" 12 *ERA Forum* 2012, 565-588.

[6] See for a brief account of the CJ rulings, focusing on their implications for competition law practitioners: Breuvart and Kye, 'Gascogne, Kendrion, and ASPLA: Little Relief from the Slow Wheels of Justice', 10 *Journal of European Competition Law & Practice* (2019), 159-161.

[7] Case C-40/12 P, *Gascogne Sack Deutschland* v. *Commission*, EU:C:2013:768; Case C-58/12 P, *Groupe Gascogne* v. *Commission*, EU:C:2013:770; Case C-50/12 P, *Kendrion* v. *Commission*, EU:C:2013:771; Case C-35/12 P, *ASPLA* v. *Commission*, EU:C:2014:348; and Case C 36/12 P, *Armando Álvarez* v. *Commission*, EU:C:2014:349.

[8] *Gascogne*, EU:C:2013:768, para 91; *Kendrion*, EU:C:2013:771, para 102.

[9] *Gascogne*, EU:C:2013:768, para 96; *Kendrion*, EU:C:2013:771, para 106.

[10] *Gascogne*, EU:C:2013:768. para 84; *Kendrion*, EU:C:2013:771, para 95.

[11] T-577/14, *Gascogne*, EU:T:2017:1; T-479/14, *Kendrion*, EU:T:2017:48; T-40/15, *ASPLA*, EU:T:2017:105. See for a discussion Bressers, "Damages for Delay: The EU Held Liable for Harm Caused by 'Unjustified Inactivity' in General Court Proceedings", 8 *Journal of European Competition Law & Practice* (2017), 1-7.

all claimed damages for the costs of the bank guarantee incurred due to the excessive length of the proceedings, as well as the interest on the amount of fine. Additionally, the parties in *Gascogne* claimed that the delay in proceedings had reduced their opportunity to find an investor at an earlier stage. The applicants in *Gascogne* and *Kendrion* also sought compensation for non-pecuniary losses, including the harm to the companies' reputation, uncertainty in decision making, difficulties in managing the business, and anxiety and inconvenience experienced by their managers and employees.

The matter was considered by the GC in light of Article 47(2) of the Charter, which provides that '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' This and other provisions of the Charter bind the EU and its institutions, including the CJEU. A violation of these obligations may also lead to the non-contractual liability of the EU as governed by Article 340(2) TFEU, which requires the EU to 'make good any damage caused by its institutions or by its servants in the performance of their duties.' Following Article 268 TFEU the CJEU has the jurisdiction in disputes relating to compensation for damage based on Article 340(2) TFEU. The GC, as an organizational unit of the CJEU, will hear such damages actions at first instance pursuant to Article 256(1) TFEU, while the CJ, as another organizational unit, may hear appeals on points of law and review the reasoning deployed by the GC.

The GC ruled partly in favour of *Gascogne*, *Kendrion*, and *ASPLA*. It held that the length of the procedure in the annulment actions exceeded the reasonable time for adjudicating and, as such, constituted an infringement of Article 47(2) of the Charter. The analysis of the GC concentrated on the time between the end of the written part of the procedure and the beginning of the oral part of the procedure, where it found 'unjustified inactivity'. The total duration of this phase of the procedure amounted to 46 months in each of the cases. The GC held that the period of 'unjustified inactivity' lasted 20 months, which qualified as a sufficiently serious breach of the right to a fair trial to justify a non-contractual liability of the EU for damage suffered by the parties under Article 340(2) TFEU. As a result, the GC awarded the parties compensation for the damage they had suffered.

As far as the material damage was concerned, the applicants were awarded damages to compensate the costs of the bank guarantee incurred over the period of time equal to the number of months of unjustified inactivity. The compensation for this head of damage was awarded only for the period directly preceding the award of the delayed judgment in the annulment actions. With that judgment, the breach of the obligation to adjudicate within a reasonable time ended. Thus, the GC refused to award damages for the costs of the bank guarantee incurred during the appeal to the CJ. Furthermore, the GC refused to award compensation for the interest that was paid over the fine to the Commission during the period of the delay. In this respect, the court held that the parties did not provide sufficient evidence to show that the amount of interest was greater than the rate of return of the amount of money which was available to the parties during the proceedings due to the fact that the fine was not paid at an earlier stage. Based on the lack of

sufficient evidence, the GC dismissed also the claim for damages in *Gascogne* relating to the failure to find an external investor sooner.[12]

As far as non-pecuniary loss was concerned (a claim which was only advanced in *Gascogne* and *Kendrion*), the GC refused to award damages for the harm to the applicants' reputation, difficulties in managing the business and anxiety and inconvenience experienced by their managers and employees. The court held that these claims were either unsubstantiated or related to losses suffered by persons other than the parties themselves (i.e. by the managers and employees of the parties). However, the GC did award damages for non-pecuniary loss which the applicants had suffered as a result of being placed in a situation of uncertainty that went beyond the degree of uncertainty usually caused by litigation, and which inevitably had an impact on their business. Applying an *ex aequo et bono* reasoning, the Court awarded EUR 5 000 to each of the applicants in *Gascogne* and EUR 6 000 to the applicant in *Kendrion*.

3. Opinions of the Advocate General

The EU argued in its respective appeals before the CJ that the GC erred in law when it conceptualized the elements of 'causation' and 'damage'. In his Opinions in *Gascogne*, *Kendrion* and *ASPLA*,[13] which should be read together, Advocate General Wahl considered both grounds of appeal well founded. In discussing the concept of causation, he first emphasized that, according to well-established case-law, Article 340 TFEU cannot be interpreted as requiring the EU to make good every harmful consequence, even a remote one, of conduct of its institutions. Instead, the tort liability of the EU is limited in that for a damages action to succeed the conduct at issue must be the *determining* cause of the damage. The damage should thus be the direct consequence of the unlawful act of the defendant EU institution and should not depend on the intervention of other causes.[14]

This legal framework, the Advocate General argued, was also applied in the *Holcim* case-law.[15] In this line of case-law, the EU Courts have consistently held that the costs incurred by an undertaking of providing and maintaining a bank guarantee as a security for the payment of a fine imposed by the European Commission cannot be recovered from the EU through a damages action for lack of a sufficiently direct causal link. This is so even if the underlying Commission Decision is considered unlawful and, as such, is annulled by the EU Courts. In such a case, it is considered, the damage is the consequence of the undertaking's own decision to provide a bank guarantee and not pay the enforceable fine directly. The GC had considered this case law not to be applicable to actions against the EU for the compensation of damages suffered because of the

[12] *Gascogne*, para 93.
[13] Opinion of A.G. Wahl in Joined Cases C-138/17 P and C-147/17 P, *Gascogne Sack Deutschland and Gascogne v. European Union*, ECLI:EU:C:2018:620; Opinion of A.G. Wahl in Case C-150/17 P, *Kendrion v. European Union*, EU:C:2018:612; and Opinion of A.G. Wahl in Joined Cases C-174/17 P and C-222/17, *European Union v. ASPLA and Armando Álvarez SA*, ECLI:EU:C:2018:615.
[14] Opinion in *Gascogne*, para 30; Opinion in *Kendrion*, para 50; Opinion in *ASPLA*, para 30 (emphasis as in original).
[15] Case T-28/03, *Holcim v. Commission*, EU:T:2005:139, para 123 as confirmed by e.g. Case C-460/09 P, *Inalca SpA v. Commission*, EU:C:2013:111, paras. 118-120.

breach of the obligation to adjudicate within a reasonable time. To that end, it had reasoned that this breach was unforeseeable at the time when the applicants decided to provide a bank guarantee, and that the breach had occurred after that initial decision. Accordingly, the GC found that the causal link between the breach and the damage could not have been severed by the applicants' initial decision to not effect immediate payment of the fine.[16]

The Advocate General challenged this conception of causation by arguing that foreseeability should not be the test to establish a sufficient causal link under Article 340(2) TFEU. Instead, the test is whether the alleged damage is a *direct* consequence of the EU institution's unlawful behaviour.[17] Foreseeability, the Advocate General suggested, would be relevant to examine whether contributory negligence on the part of the applicants broke the causal chain, which the GC did not do. The fact that the unlawfulness of the CJEU's conduct was unforeseeable is neither necessary nor sufficient to trigger the EU's liability.[18]

The Advocate General also opined that the GC could not have distinguished the cases before it from those that gave rise to the *Holcim* case-law by drawing attention to the fact that the unlawfulness occurred after the applicants' decision to provide the Commission with a bank guarantee. The Commission Decision was directly enforceable and no requests for interim measures to suspend the obligation of the payment of the fine were lodged before the EU Courts. The Commission may accept a deferral of payment of the fine on the condition that the company undertakes to pay the interest on late payment and provides a bank guarantee as a security of payment for the outstanding sum (including interest). The undertaking can then make provisions for the payment of the sum on its balance sheet, continue to use the resources involved and use it for investment purposes. However, the decision to provide a bank guarantee and maintain it throughout the proceedings for annulment is entirely voluntary. Moreover, nothing prevented, as a matter of EU law, the applicants in this case to terminate a guarantee provided and settle the fine. Consequently, the reasoning of the GC cannot be accepted in that it drew attention only to the initial decision of the applicants to provide a bank guarantee when distinguishing the cases from the *Holcim* case-law and not to later stages in the proceedings, when they could have settled the outstanding sum.[19] In this regard, the GC did in fact use the same argument for the period during which the appeal against the unlawfully delayed decision before the CJ was pending, and thus contradicted itself.[20]

The Advocate's General conclusion on the element of causation was therefore that the GC erred in law by misinterpreting the concept of causation. While he acknowledged that the costs associated with maintaining the bank guarantee during the period of excessive duration of the proceedings were a consequence of unlawful judicial conduct, this was not the *determining* cause. Instead, the decisive factor was the applicants' decision to provide and maintain the bank

[16] Cf. Opinion in *Gascogne*, para 28; Opinion in *Kendrion*, para 48; Opinion in *ASPLA*, para 28.
[17] Opinion in *Gascogne*, paras. 34-35; Opinion in *Kendrion*, paras. 54-55; Opinion in *ASPLA*, paras. 34-35 (emphasis as in original).
[18] Opinion in *Gascogne*, paras. 36-42; Opinion in *Kendrion*, paras. 56-62; Opinion in *ASPLA*, paras. 36-42.
[19] Opinion in *Gascogne*, paras. 43-53; Opinion in *Kendrion*, paras. 63-75; Opinion in *ASPLA*, paras. 43-53.
[20] Opinion in *Gascogne*, paras. 55-56; Opinion in *Kendrion*, paras. 77-78; Opinion in *ASPLA*, paras. 55-56.

guarantee.[21] As the element of causation could not be established, the Advocate General concluded, the damages award should be quashed and the actions dismissed.

Advocate General Wahl went on to assess how the GC assessed the concept of 'damage'. He held that the Court falsely equated the costs of the bank guarantee in the period of the excessive delay of the proceedings with the material compensable damage under Article 340 TFEU. While the conduct of the EU and its institutions may trigger costs for undertakings like the applicants, they may also result in certain gains. Damage only emerges where the net difference between the costs and gains is negative.[22] As noted, the bank guarantee and the deferral of the payment of the fine may have provided the applicants with certain gains. It is, in fact, a form of corporate finance. The GC had ignored this understanding and only focused on the costs borne by the applicants. However, with respect to the payment of the interest on the amount of the fine the Court held that the applicants failed to meet the burden of proof to show that, during the period of excessive delay, the amount of interest paid was greater than the advantage conferred on them by possession of the outstanding sum. Here, again, the GC's assessment of the different heads of damage alleged was contradictory.[23]

The grounds of appeal advanced by the applicants in *Gascogne* and *Kendrion* principally challenged the GC's reasoning in relation to the award of non-material damages. In short, they suggested that the amount of compensation awarded was too low because they did not reflect the losses they had actually incurred. At first instance, the applicants in *Gascogne* had claimed 'at least' EUR 500 000, but were awarded EUR 5 000 each in non-material damages. In *Kendrion* the applicant got EUR 6 000, but submitted that the Court should have awarded compensation corresponding to 5% of the fine imposed (i.e. EUR 1 700 000).

The Advocate General considered the arguments of the applicants unfounded. He first set out what, in his view, 'non-material damage' means for the purposes of Article 340 TFEU. While this Treaty provision imposes an obligation on the EU to restore, as far as possible, the assets of the applicant as they were before the unlawful conduct of one of its institutions, this is not possible for losses of a non-pecuniary nature. These include pain and suffering, emotional distress, impairment of life or of relationships. These heads of damage are intangible and there is no market value for them like there is for material damage. The compensation granted in these situations is therefore *symbolic* monetary compensation or *compensation in kind*. This also explains why it is not an easy task to quantify the compensation to be awarded. The EU courts will have to find guidance in general principles such as, for example, fairness, justice and proportionality and balance these against predictability, legal certainty and equal treatment. In determining the proper balance, the courts enjoy a wide margin of discretion.[24] In *Kendrion*, the Advocate General went on to discuss the possibility for legal persons to claim compensation for non-material damage, concluding that only the effects related to *corporate distress* should be regarded as a compensable head of damage.[25]

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[21] Opinion in *Gascogne*, paras. 57-60; Opinion in *Kendrion*, paras. 79-80; Opinion in *ASPLA*, paras. 57-60.
[22] Opinion in *Gascogne*, paras. 68-70; Opinion in *Kendrion*, paras. 85-87; Opinion in *ASPLA*, paras. 63-65.
[23] Opinion in *Gascogne*, paras. 71-76; Opinion in *Kendrion*, paras. 87-93; Opinion in *ASPLA*, paras. 66-76.
[24] Opinion in *Gascogne*, paras. 82-86; Opinion in *Kendrion*, paras. 105-109 (emphasis as in original).
[25] Opinion in *Kendrion*, paras. 110-116 (emphasis as in original).

In *Gascogne*, the Advocate General considered that the GC did not err in its finding that the claim of EUR 500 000 for non-pecuniary loss was unsubstantiated. In fact, the award of such an amount would essentially lead to a challenge or partial annulment of the fine, against which an appeal had already been lodged unsuccessfully. To determine the appropriate measure of non-material damage the amount of the fine imposed should not be taken into account. Instead, the Advocate General suggested, regard must be had to the extent (or seriousness) of the violation of the EU rights of the applicants.[26] Following a similar reasoning, the Advocate General also considered unfounded the submission made by the applicant in *Kendrion* that the GC should have awarded compensation for non-material damage corresponding to 5% of the fine imposed.[27] In conclusion, the reasoning of the Court, which has the exclusive jurisdiction to assess the means and extent of compensation for the damage, sufficiently supported its decision to award damages for non-pecuniary loss of EUR 5 000 and EUR 6 000 to the respective applicants. Such symbolic compensation is necessarily determined *ex aequo et bono* and does not deprive the damages action of Article 340(2) TFEU of its full effectiveness.[28]

4. Judgments of the Court

The judgments of the CJ in *Gascogne*, *Kendrion* and *ASPLA* closely follow the respective Opinions of the Advocate General. In each case, the damages awards of the GC was set aside for the lack of a sufficiently direct causal link. The non-contractual liability of the EU pursuant to Article 340(2) TFEU requires a sufficiently direct causal nexus between the conduct of the EU institution and the damage. It is thus necessary, the CJ held, to determine whether the breach of the obligation to adjudicate with a reasonable time is the determining cause of the damage resulting from the payment of bank guarantee charges during the period of unlawful delay. The CJ then recalled the rule following from the *Holcim* case-law, implying that the costs of providing and maintaining a bank guarantee as a security for the payment of a fine imposed by the European Commission cannot be recovered from the EU through a damages action, even if the underlying Commission decision is considered unlawful and is annulled on appeal for lack of a sufficiently direct causal link. In such a case, the damage is the consequence of the undertaking's own decision to provide a bank guarantee and not pay the fine directly.[29]

According to the CJ, the circumstances referred to by the GC to differentiate the present cases from those within the *Holcim* case-law were unfounded. The fact that the unlawful delay was unforeseeable and that the unlawfulness occurred after the initial decision of the applicants to provide a bank guarantee, are irrelevant to determining the necessary causal link between the unlawful conduct of the CJEU and the damage alleged. That would only be the case if it were compulsory to maintain a bank guarantee. However, maintaining such a guarantee is not required by EU law. This is a matter of discretion of the undertaking, which is free from the perspective of EU law to terminate the guarantee at any moment during the proceedings and consequently settle the fine. The applicants themselves had considered the proceedings in the annulment action

[26] Opinion in *Gascogne*, paras. 89-90, 95.
[27] Opinion in *Kendrion*, paras. 121-122, 126-127.
[28] Opinion in *Gascogne*, paras. 96-101; Opinion in *Kendrion*, paras. 123-125, 128.
[29] *Gascogne*, paras. 22-24; *Kendrion*, paras. 52-54; *ASPLA*, paras. 23-25.

to considerably exceed the normal term of dealing with this type of actions, and in that light they could have reconsidered the appropriateness of maintaining the bank guarantee. In those circumstances, the CJ held, the unlawful judicial conduct cannot be the determining cause of the damage suffered by the applicants as a result of paying bank guarantee charges during the period of excessive delay. Such damage is the consequence of the applicants' own decision to maintain the bank guarantee throughout the proceedings, despite the financial consequences which that entailed. The GC thus erred in law by misinterpreting the notion of causation.[30]

While this finding led to the setting aside of the damages claims in all actions, the CJ went on to consider the grounds of appeal submitted by the applicants pertaining to the notion of damage and the assessment of the means and extent of the compensation to be awarded. In *Kendrion* and *ASPLA*, the applicants had argued that GC had not correctly assessed the alleged material damage suffered as a result of paying additional default interests on the fine and/or additional charges for the bank guarantee, or at least that its reasoning on that point was inadequate. In tune with what the Advocate General had observed, the CJ held that damage within the meaning of Article 340 TFEU, only emerges where the net difference between the costs and gains is negative. The onus is on the applicant seeking compensation to provide conclusive proof as to the existence and extent of the loss alleged. In both cases, the applicants failed to show that they suffered actual and certain damage in that they did not adduce proof that, during the period by which the reasonable time for adjudicating was exceeded, the amount of the default interest that was later paid to the Commission was greater than the advantage conferred on it by possession of the sum equal to the amount of the fine plus default interest.[31] Accordingly, the CJ approved the reasoning of the GC that liability of the EU for this head of damage could not be established.

Finally, the CJ considered the grounds of appeal submitted by the applicants in *Gascogne* and *Kendrion* that challenged the GC's reasoning in relation to the award of damages for non-pecuniary loss. They also submitted that the award effectively undermined their right to effective judicial protection as safeguarded by Article 47 of the Charter. The CJ first held that the Court had adequately reasoned its decision not to award the (excessive) amounts claimed. As a general rule of competence, once the GC has found the existence of damage, it only has jurisdiction to assess, within the confine of the claims, the means and the extent of compensation for the damage. The CJ may review the Court's judgments on that matter and in the judgments under appeal the reasoning adequately supported the damages award.[32] Secondly the CJ confirmed its position that the amount of the award of damages for non-pecuniary loss should not be coupled to the amount of the fine imposed. Moreover, compensation of non-material damage may constitute appropriate compensation for the purposes of Article 340 TFEU to make good such damage. Such compensation, albeit limited, could thus not be seen to undermine the applicants' rights under Article 47 of the Charter.[33]

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[30] *Gascogne*, paras. 26-33; *Kendrion*, paras. 55-62; *ASPLA*, paras. 26-33.
[31] *Kendrion*, paras. 86-100; *ASPLA*, paras. 40-47.
[32] *Gascogne*, paras. 44, 50 and 61-62; *Kendrion*, paras. 110-112.
[33] *Gascogne*, para 51; *Kendrion*, paras. 108-109.

5. Comments

The judgments in *Gascogne*, *Kendrion* and *ASPLA* concern the non-contractual liability of the EU for unlawful conduct. While the EU had previously been held liable for damage allegedly caused by unlawful legislative or administrative acts (e.g. Council Regulations and Commission Decisions), separate damages action against the EU rooted in the unlawful judicial conduct of the CJEU are new.[34] The three cases jointly set out the basic legal framework to determine the Union's liability for unlawful judicial decision-making. We start to analyse the approach taken by the CJ, by locating and qualifying the damages actions in *Gascogne*, *Kendrion* and *ASPLA* in what has been coined the "juristic jungle" of EU tort law.[35] We proceed by assessing how the CJ developed the key concepts of unlawfulness, causation and damage that comprise the legal framework of the tort liability of the Union for unlawful judicial conduct. We conclude by considering the impact of the judgments on damages actions against the EU involving unlawful judicial conduct of the EU Courts.

5.1 The Jungle of EU Tort Law

The phrase 'EU tort law' is an umbrella term for rules on non-contractual liability governed by EU law. The vicarious liability of the EU for damage caused by unlawful conduct of its officials, bodies and other subordinates can be seen as a first tier of EU tort law.[36] A second tier concerns rules of secondary EU law which set out conditions for non-contractual liability in a number of specific domains of tort law. These rules involve Regulations or Directives on, for example, liability for delayed flights,[37] competition law violations,[38] and defective products.[39] These regulations and directives essentially seek to lay down EU-wide harmonized rules of liability in clearly delineated pockets of national tort law.

A third tier of EU tort law revolves around the breach of a rule of EU law conferring rights on an individual. In this tier, within which also the cases of *Gascogne*, *Kendrion* and *ASPLA* sit, tort liability must be seen as the necessary corollary of a directly effective rule of EU law that is intended to protect the legitimate interests of the claimant. In other words, to ensure the full

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[34] Admittedly, the CJ had been faced with a similar damages action in *Baustahlgewebe v. Commission* (Case C-195/95 P, EU:C:1998:608). In this case, which also turned on excessive length of annulment proceedings in relation to a competition law fine, the CJ allowed the action by reducing the amount of the fine imposed by ECU 50.000,-, which it saw as reasonable satisfaction for the excessive duration of the proceedings. This approach is no longer allowed due to new jurisdictional rules (see at paragraph 5.2 *infra*). Therefore the damages actions in *Gascogne*, *Kendrion* and *ASPLA* against the EU for unlawful judicial conduct can be considered as 'new'.

[35] Brüggemeier, *Tort Law in the European Union* (Wolters Kluwer, 2018), 41.

[36] Cfm. Joint cases 136/83 and 169/83, *Leussink and others v. Commission*, EU:C:1986:371 and Case 308/87, *Grifoni v. EAEC*, EU:C:1990:134.

[37] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, O.J. 2004, L 46/1.

[38] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, O.J. 2014, 349/1.

[39] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. 1985, L 210/29, Directive as last amended by Directive 1999/34/EC of the European Parliament and of the Council, O.J. 1999, L 141/20.

effectiveness of such a rule of EU law, the right holder must also be able to seek compensation based on tort law principles for the losses he has allegedly suffered because of an infringement of that rule. The potential defendants in such a damages action would be a Member State, a private individual or the EU itself.[40] *Francovich* liability constitutes a prime example of EU law-based tort liability for Member States.[41] The judgments in *Courage*, *Manfredi*, *Viking* and *Laval* have set out the EU law framework governing the liability of private individuals for the violation of EU law rules having horizontal direct effect,[42] including those set out in the Charter.[43]

The (non-vicarious) tort liability of the EU and its institutions for a breach of EU law is governed by paragraph 2 of Article 340 TFEU. This paragraph holds that in the case of non-contractual liability, the EU must make good any damage "in accordance with the general principles common to the laws of the Member States". The CJ also referred to this common pool of legal principles in the *Bergadem* case when tying together the conditions that govern both the non-contractual liability of the EU and of Member States for breach of EU law, namely (i) unlawful conduct, (ii) damages and (iii) a causal link between that conduct and the damage claimed.[44] Accordingly, when defining the three parameters of this branch of EU tort law, the CJ is required to factor in relevant principles common to the national tort laws of the Member States. This raises the question of how the CJ, in the cases of *Gascogne*, *Kendrion* and *ASPLA*, has taken up that task, conceptualized the three conditions to establish the liability of the EU, and explained its approach in doing so.[45]

Before we can turn to that question, however, we briefly consider a number of important procedural matters that the damages actions in *Gascogne*, *Kendrion* and *ASPLA* have raised.

5.2. Jurisdiction and admissibility

Jurisdiction in damages actions for unlawful judicial conduct

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[40] See for this threefold typology also: Sieburgh, "EU Law and Non-contractual Liability of the Union, Member States and Individuals", in: Hartkamp et al. (Eds.), *The Influence of EU Law on National Private Law* (Wolters Kluwer, 2014), pp. 465-542.

[41] Case C-6/90, *Francovich and Bonifaci*.

[42] Case C-453/99, *Courage Ltd v. Bernard Crehan*, EU:C:2001:465, Joined Cases C-295/04 to C-298/04, *Manfredi and others*, ECLI:EU:C:2006:461, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, EU:C:2007:772, and Case C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, EU:C:2007:809. See for an analysis Sieburgh, op. cit. *supra* note 40, pp. 518-536 and Verbruggen, "The Impact of Free Movement of Goods and Services on Private Law Rights and Remedies", in Sieburgh and Micklitz (Eds.), *Primary EU Law and Private Law Concepts* (Intersentia, 2017), pp. 47-91.

[43] Cf. Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257, paras. 76-77.

[44] Case C-352/98 P, *Bergaderm and Groupil v. Commission*, EU:C:2000:361. It should be noted here that the tort liability of the EU has not been exclusively based on unlawful conduct. In *Masdar* (Case T-333/03, EU:T:2006:348) unjustified enrichment served as the basis for accepting extra-contractual liability of the EU. Moreover, in *FIAMM* (Joined Cases C-120 and 121/06, EU:C:2008:476) the CJ ruled *obiter dictum* that the EU could potentially be liable in tort if it would fail to offer adequate compensation of the losses sustained by an otherwise lawful legislative act that restricts the rights of property or the freedom to pursue a trade or profession.

[45] This essentially is a question about the legal interpretative and comparative law method of the EU judiciary, on which see: Lenaerts and Gutman, "The Comparative Law Method and the Court of Justice of the European Union. Interlocking Legal Orders Revisited", in Andenas and Fairgrieve (Eds.), *Courts and Comparative Law* (OUP, 2015), pp. 141-176.

Can a damages action based on Article 340(2) TFEU be brought in the context of an appeal before the CJ against an allegedly unlawful judgment of the GC? In their separate appeals against the delayed GC judgments, the parties in *Gascogne* and *Kendrion* had advanced the argument that the fine imposed on them by the European Commission should be offset by the damage it had suffered because of the excessively late judgments. For reasons of procedural economy such an offsetting is desirable. In the *Baustahlgewebe* case, the CJ had previously awarded an application for compensation for unlawfully delayed adjudication in the context of a substantive appeal against a judgment at first instance for that specific reason.[46]

In its rulings on appeal, however, the CJ considered this approach no longer tenable,[47] thereby confirming its more recent position in *Der Grüne Punkt*.[48] Allowing the application as made by Gascogne and Kendrion on the sole basis that there was a failure to adjudicate within a reasonable time would effectively reopen the question of the validity of the (amount of the) fine imposed by an otherwise lawful Commission decision. This would stifle the need to ensure full compliance with EU competition law rules. Moreover, if there is no indication that the failure to adjudicate within a reasonable time affected on the outcome of the proceedings before the GC, the setting aside of the judgment under appeal would not remedy the violation of the right to effective legal protection as protected by Article 47 Charter. The adequate remedy for that breach constitutes a damages action against the EU or its institutions as governed by Article 340(2) TFEU. It is the GC that, pursuant to Article 256(1) and 268 TFEU, has jurisdiction to hear and determine at first instance such an action. In other words, the CJ would also overstep its jurisdictional competences should it hear and allow an application for compensation due to unlawful judicial conduct of the GC.[49]

All in all, the cases in *Gascogne* and *Kendrion* confirm that persons alleging to have suffered a loss because of an unlawful irregularity in the proceedings before the EU courts cannot include a claim for compensation in any substantive appeal against the judgment that is allegedly unlawful. Instead, such claimants will have to bring a separate damages action against the EU before the GC. This also implies that the claimants do not have to await the judgment on appeal before bringing an action for damages.

Prescription

This position raises a second important procedural matter, namely that of prescription. When does the period of prescription governing the admissibility of a damages claim against the EU based on Article 340(2) TFEU start to run? Would that be the moment when the allegedly unlawful judgment was passed or – in the case of a judgment of the GC – when the appeal

[46] Case C-195/95 P, *Baustahlgewebe v. Commission*, para 48. See for a discussion Toner, Case Note in CML Rev. (1999) 1345-1355.
[47] Case C-40/12 P, *Gascogne Sack*, EU:C:2013:768, paras. 81-90; Case C-58/12 P, *Groupe Gascogne*, EU:C:2013:770: paras. 73-84; and Case C-50/12 P, *Kendrion*, EU:C:2013:771, paras. 77-95.
[48] Case C-385/07 P, *Der Grüne Punkt*, EU:C:2009:456, paras. 193-195. A.G. Wahl was of the same opinion.
[49] At the time of the *Baustahlgewebe* case, the Court of First Instance did not hold the exclusive jurisdiction in damages actions for the non-contractual liability of the EC. As A.G. Léger also considered it inappropriate that that Court would rule over its own alleged unlawful conduct, the CJ assumed jurisdiction over the matter and awarded compensation in this specific case. Cf. Opinion of A.G. Bot in Case C-385/07 P, *Der Grüne Punkt*, paras. 318-323.

against that litigious judgment was (in part) awarded and the unlawfulness of the judgment was beyond doubt? The matter was raised in the *Gascogne* case, when the EU acting as defendant in the damages action lodged before the GC claimed that the action was time-barred.[50] Pursuant to Article 46 of the Statute of the CJEU, a five-year limitation period applies to damages actions concerning the non-contractual liability of the EU. The EU – as represented by the CJEU in damages actions for unlawful judicial conduct – had argued that the action was inadmissible because it sought compensation for non-material damage suffered more than five years before the action was brought. Following this logic, Gascogne should have brought the action midway the annulment action it had lodged before the GC against the Commission decision, without even knowing its outcome. Ironically, it would also mean that the CJEU could invoke the limitation rule as a defense against a claim alleging the unlawful delay of adjudication by the EU courts precisely by delaying that adjudication long enough.[51]

The GC correctly dismissed this defense. In line with established case law, it held that the period for prescription starts to run when all conditions governing the non-contractual liability of the EU are objectively satisfied.[52] Since the unlawfulness of the event giving rise to such liability is judicial conduct, it is appropriate to set the starting point of the period for prescription on the date of the contested judicial decision, that is, the date on which the event giving rise to the damages action has fully materialised.[53] An appeal against that contested decision before the CJ does not interrupt that period for such an appeal and cannot – as we learned above – lead to the award of a damages appeal. The application made by Gascogne to the GC was on time and thus the plea for inadmissibility of the CJEU was dismissed.

Impartiality

Third, and finally, there was the question of who must represent the EU in a damages action based on Article 340(2) TFEU for unlawful judicial conduct? Should that be the CJEU as an institution of the EU or the European Commission, being the EU institution responsible for the promotion of the general interest of the EU? The background to this discussion is, of course, the impartiality of the CJEU when hearing and determining damages actions brought against the CJEU for unlawful conduct of – again – the CJEU. The matter was addressed best in *Kendrion*. At first instance, the CJEU had claimed that the action was inadmissible for it should have been addressed to the European Commission. Advocate General Sharpston had, too, considered the Commission to be best positioned to represent the EU in the proceedings.[54] However, the GC held, in a separate order, that the fundamental requirements of independence and impartiality effectively relate to the CJEU acting in its capacity of the EU judiciary. Accordingly, those requirements would not bar the CJEU from taking up the role of representative of the EU in a damages action against the EU. According to settled case-law, the EU will be represented by the institution that is responsible for the event that supposedly is at the origin of the damage alleged.

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[50] T-577/14, *Gascogne*, EU:T:2017:1, paras. 40-50.
[51] See also Bressers, op. cit. *supra* note 11, 7.
[52] T-577/14, *Gascogne*, EU:T:2017:1, paras. 43-45.
[53] *Ibid*., paras. 46-47.
[54] Opinion of A.G. Sharpston in Case C-58/12 P, *Groupe Gascogne* EU:C:2013:360, para 147. *Contra* Opinion of A.G. Maduro in Joined Cases C-120/06 P and C-121/06 P, *FIAMM and others* v *Council and Commission*.

The impartiality of the GC in hearing the damages action would be safeguarded by appointing a separate chamber to rule on the damages claim, as it did.[55]

In the appeal lodged by the CJEU against the damage award of the GC, the question on impartiality again surfaced, but now because of a plea for inadmissibility that Kendrion had raised. In this plea, Kendrion held that the appeal of the CJEU before the CJ for unlawful judicial conduct of the CJEU runs afoul of Article 47 Charter, which requires a review by an independent and impartial court of law. The CJ dismissed the plea by highlighting the different functional and institutional roles the CJEU, the GC and the CJ play in damages actions regarding the non-contractual liability of the EU for unlawful judicial conduct.[56] While the CJEU represents the EU in such actions as the EU institution whose conduct has allegedly caused the damage, the GC and CJ are two separate organisational entities of the CJEU that hold the jurisdiction – by force of primary EU law – to hear and determine such actions in first instance and on appeal, respectively. At both first instance and on appeal, measures of organisation of procedure or measures of inquiry had been undertaken, such as the requirement to sit in a different composition from that which heard the dispute giving rise to the procedure of which the duration is criticised, to ensure the full independence and impartiality of the respective EU courts. Accordingly, the CJ reasoned, the rights conferred on Kendrion by Article 47 of the Charter were safeguarded throughout the proceedings.[57]

5.3 Unlawfulness

As noted, the EU's non-contractual liability under the second paragraph of Article 340 TFEU is subject to three main conditions, namely: (i) the unlawfulness of the conduct alleged against the EU or its institutions; (ii) the occurrence of damage; and (iii) a causal link between the breach attributable to the EU institution or body concerned and the damage suffered by the party involved.[58] The first condition requires a sufficiently serious breach of a rule of law intended to confer rights on individuals.[59] In *Gascogne*, *Kendrion*, and *ASPLA* each of the applicants claimed that there was a violation of the fundamental right to a fair trial within a reasonable time. The right to a fair trial within a reasonable time is safeguarded by Article 47(2) of the Charter, which finds its roots in Article 6 of the European Convention on Human Rights (ECHR) and relates to the principle of effective judicial protection.[60] On this basis, the existence

[55] T-479/14, *Kendrion v. European Union*, EU:T:2015:2.
[56] *Kendrion*, EU:C:2018:1014, paras. 27-40.
[57] Cf. the Opinion of A.G. Wahl in *Kendrion*, EU:C:2018:612, paras. 18-39.
[58] E.g. Case 281/284, *Zuckerfabrik Bedburg AD v. Council and Commission* [1987] ECR I-49, par. 17; Case T-170/00, *Förde-Reederei GmbH v. Council and Commission* [2002] ECR II-515, par. 37; Case C-259/96 P, *Council v. Lieve de Nil & Christiane Impens* [1998] ECR I-2915, para 23. See for an early appraisal of the case law and the three conditions the contributions in Heukels and McDonnell (Eds.), *The Action for Damages in Community Law* (Kluwer, 1997). See also Magnus, "Elemente eines europäischen Deliktsrechts", *Zeitschrift für europäisches Privatrecht (ZEuP)* 1998, pp 602–614, at 612.
[59] See, e.g. Case C-352/98 P, *Bergaderm and Groupil v. Commission*, paras. 42-43, and Joined Cases C-120 and 121/06, *FIAMM and Others* v *Council and Commission*, para 173. See in detail Sieburgh op. cit. *supra* note 40, p. 475-483.
[60] See, e.g. Case C-385/07 P, *Der Grüne Punkt*, para 179. Mak, "Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters", in Micklitz (Ed.), *Constitutionalization of European Private Law* (OUP, 2014), pp. 236-258.

of a right to a fair trial within a reasonable time was recognized as a general principle of EU law before the Charter entered into force.[61] It has been common ground since *Baustahlgewerbe* that this right also applies in the context of proceedings brought against a Commission decision.[62]

The criteria that should be taken into account to appraise whether the duration of proceedings is reasonable have also been set out in *Baustahlgewerbe*. Here, the CJ drew an analogy to judgments of the European Court of Human Rights (ECtHR) concerning the right to a fair trial enshrined in Article 6 ECHR.[63] In accordance with this guidance, the starting point is that the reasonableness of the length of proceedings can never be decided *in abstracto* but must always be assessed in the light of particular facts of the case. Therefore, there is no one objective time frame in which a case should be decided. The assessment of the court must be based on the criteria laid down in the case law which include in particular, the complexity of the case, the conduct of the applicant and of the relevant authorities and the importance of what was at stake for the applicant in the litigation.[64]

The criterion of complexity refers to both factual and legal aspects of the case.[65] A very complex case may justify a duration of proceedings that would otherwise be considered as unreasonably protracted. As far as the conduct of the parties is concerned, a breach of a right to a fair trial within a reasonable time can only be established if the delay is attributable to the court. Thus, a claim for compensation will be dismissed if it was the conduct of the applicant that delayed the proceedings. Finally, as regards what is at stake for the applicant, if the party has a significant interest in the outcome of the proceedings the case should be handled more swiftly.[66]

The CJ strictly followed these criteria in *Gascogne* and *Kendrion* in its judgments from 2013.[67] It is worth noticing that even though the CJ explicitly stated in these judgments that it is for the GC to assess whether the duration of the proceedings was unreasonable, it went on to establish that the GC did breach Article 47(2) of the Charter.[68] In the ensuing damages actions, the GC followed the reasoning expressed by the CJ on the matter of unlawfulness.[69] This stance explains why the reasonableness of the delay was not discussed in detail in the judgments of the CJ from 2018. The CJ merely confirmed in *Kendrion* that what should be taken into account in

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[61] The CJ held has that the principle of effective judicial protection 'has been reaffirmed' by Article 47. See e.g. Joined Cases C-317/08 to C-320/08, *Alassini* EU:C:2010:146, para 61. See in general Prechal, "The Court of Justice and Effective Judicial Protection: What Has the Charter Changed? in Paulussen et al. (Eds.), *Fundamental Rights in International and European Law*, (T.M.C. Asser Press, 2015), pp. 143-157.
[62] *Baustahlgewebe*, para 1.
[63] *Ibid*., para 29. See for an analysis of the ECtHR jurisprudence in this respect Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, 2nd ed. (Council of Europe Publishing, 2007).
[64] See e.g. *Baustahlgewebe*, para 29; *Der Grüne Punkt*, para 181; Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v. Commission of the European Communities* [2007] ECR I-0729, para 116; Case C-194/99 P, *Thyssen Stahl AG v. Commission of the European Communities* [2003] ECR-I-10821, para 155. See also Jarass, *Charta der Grundrechte der EU*, 3rd ed (C.H. Beck, 2016), commentary on Article 47, no. 41–44.
[65] Edel, op. cite. *supra* note 63, p 39.
[66] *Baustahlgewebe*, paras. 29–49.
[67] *Gascogne* 2013 paras. 85–96; *Kendrion* 2013 paras. 96–106.
[68] *Gascogne* 2013, paras. 89–90, 96; *Kendrion* 2013, paras. 101–102, 106.
[69] *Gascogne* 2017, paras. 55–78; *Kendrion* 2017, paras. 38–63; *ASPLA* 2017, paras. 57–83.

the appraisal of reasonableness of the duration of the proceedings is its overall length rather than the length of its individual phases.[70] As explained by Advocate General Wahl, splitting up the overall procedure into different phases and analyzing each phase in 'clinical isolation' could lead to misleading outcomes. A small delay in one phase may seem unimportant. However, if combined with delays in other phases, it may contribute to an excessive duration of the proceedings as a whole. On the other hand, a long duration of one phase of proceedings may be compensated by a prompt handling of other phases.[71] Clearly, this view is driven by practical considerations as it facilitates flexibility in the handling of the case load before the EU Courts.

Furthermore, the CJ confirmed that it was sufficient for the GC to explain in general terms how it determined what should be the reasonable time to deal with a given case. The CJ is not expected to provide a detailed calculation on which it based its decision.[72] The same approach has been followed by the ECtHR which in principle is reluctant to set out strict time frames for handling a case and consistently refuses to supply a detailed specification of a reasonable length of each of the activities undertaken by the court during the proceedings.[73] Rather, the court limits itself to the assessment of the objective criteria (such as the complexity of the case, the conduct of the parties and the importance of the case to the parties) based on the individual circumstances of each case in the same way as it was done by the GC at first instance.

The judicial duty to provide reasons for court decisions is recognized as part of the right to a fair trial.[74] Reasons are required to ensure that court decisions are comprehensible and acceptable by the parties.[75] Without sufficient reasons, a party cannot challenge the decision and the appellate court cannot conduct a meaningful review of the decision given by the lower court.[76] At the same time, however, it is accepted in the jurisprudence of the ECtHR that it is not always possible to indicate exactly what led the court to arrive at a conclusion and it is not necessary to provide a detailed answer to every point made by the parties. The ECtHR has therefore accepted that the extent of the court's duty to give reasons depends on the nature of the decision in question as well as on the specific circumstances of a given case.[77] A similar approach has been adopted by Member State courts.[78]

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[70] *Kendrion* 2018, paras. 72–73.
[71] Opinion of A.G. Wahl in *Kendrion*, para 133.
[72] *Kendrion* 2018, paras. 80–81.
[73] Edel, op. cit. *supra* note 63, p 35.
[74] Zuckerman, *Zuckerman on Civil Procedure. Principles of Practice*, 3rd ed. (Sweet & Maxwell, 2013), p 156; Shapiro, "In Defence of Judicial Candor", (1987) 100 *Harvard Law Review* 731.
[75] Zuckerman, op. cit. *supra* note 74, p 156.
[76] *Ibid*.
[77] The jurisprudence of the ECtHR in this respect has been well-summarized David Steel J. in an English case of *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 All ER 276, [2002] 1 WLR 395, QB.
[78] Taking the UK as an example, Lord Philips M.R. explained the matter in the following way in the case *English v Emery Richmond & Strick Ltd* [2002] EWCA Civ 605: '*(…) if the appellant process is to work satisfactorily, the judgment must enable the appellant court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision.*' (at para 19).

As far as a decision on the reasonable length of the proceedings is concerned, one may point out that the duration of certain activities carried out by the court is not possible to assess *a priori*. As indicated by Advocate General Wahl in *Kendrion*, one such activity is the preparation of a preliminary report by the Judge-Rapporteur, which must be preceded by a thorough reflection on the legal issues raised by the case in order to identify points for further analysis.[79] A certain level of discretion of the court when determining the exact reasonable length of the proceedings is therefore unavoidable. The use of the objective criteria – such as case complexity, party conduct, and the importance of the case to the parties involved – limits the subjective element of assessment and allows both the parties and the appellate court to determine, at least in general terms, how the decision was reached.

5.4 Causation

At the heart of the CJ judgments in *Gascogne*, *Kendrion*, and *ASPLA* is the interpretation of the element of causation. This element essentially deals with the connection deemed necessary in tort law between the defendant's misconduct and the compensable damage as suffered by the claimant.[80] This description seems straightforward, but the element of causation is known for raising vexed, value-based questions around the proper scope of liability law. As a common approach to conceptualizing causation, the national tort laws of Member States usually distinguish between the two stages of establishing causation and limiting causation.[81] The first stage concerns the *conditio sine quo non* or 'but for' test, which asks whether the damage would have occurred without/but for the misconduct of the defendant. Since this test may lead the defendant to incur liability for even very unlikely or remote damage, a second stage is used to limit liability to legally relevant causes that can be attributed to the defendant.[82] A host of tests are applied at this stage (e.g. adequacy, foreseeability, proximity), but on the whole the outcome is determined by policy considerations as to what is considered fair and reasonable in the given case.[83]

The concept of causation in EU tort law is underdeveloped. As some commentators have noted, the concept is 'compared to the variety of causality issues discussed under the national legal systems, quite fragmentary [and the] terminology is inconsistent.'[84] In the case of Member State liability and liability of individuals for breach of EU law rules, the CJEU has deliberately left the assessment of causation requirements with the national courts on the basis of their national laws. That national conceptualization finds its limits in the general principles of

[79] Opinion of A.G. Wahl in *Kendrion*, para 138.
[80] See generally: Hart and Honore, *Causation in the Law* (Clarendon, 1985).
[81] Van Gerven et al., op. cit. *supra* note 5, pp. 452-457; Van Dam, *European Tort Law*, (OUP, 2013), pp. 310-311; Infantino and Zervoganni, "Summary and Survey of the Results", in Infantino and Zervoganni, *Causation in European Tort Law* (CUP, 2017), pp. 597-599.
[82] Cf. Article 3:201 Principles of European Tort Law (PETL) and Article VI.-4:101(1) Draft Common Frame of Reference (DCFR), incl. the explanatory notes at pp. 3422-3438.
[83] Van Gerven et al., op. cit. *supra* note 5, pp. 453-455 and Van Dam, op. cit. *supra* note 81, pp. 342-343.
[84] Magnus and Bitterich, in Winiger et al. (Eds.), *Digest of European Tort Law, Vol. 1: Essential Cases on Natural Causation* (Springer, 2007), 1/27 no. 3 ff . See also: Kellner, ""Tort Law of the European Community": A Plea for an Overarching Pan-European Framework", *ERPL* (2009), 133-154.

effectiveness and equivalence.[85] The *Kone* judgment offers an example of this supranational framing. In that case, the CJ held first of all that individuals who purchased goods or services from undertakings that were not a member of a cartel, but offered their goods and services at higher prices since they had adapted these prices to the inflated price level caused by the cartel – a phenomenon called 'umbrella pricing' – have standing to sue cartelists for damages under Article 101(1) TFEU.[86] Importantly, the CJ also considered that the causation rule of national private law under discussion, which categorically excluded the right for victims of umbrella pricing to claim damages as it demands a direct causal link between the cartel and the loss allegedly suffered by the claimant – which is absent in the case of umbrella pricing – undermines the full effectiveness of Article 101(1) TFEU, and should therefore be set aside.[87]

However, as far as the non-contractual liability of the EU for breach of EU law is concerned, the EU courts have set out their own path to conceptualize the constitutive elements of liability.[88] Here, they do not borrow from "the general principles common to the laws of the Member States", as Article 340(2) TFEU suggests.[89] The judgments in *Gascogne*, *Kendrion* and *ASPLA* underline this self-standing approach, also in relation to the concept of causation.

As held in these judgments, passing the *condition sine qua non* / 'but for' test is not enough to establish causation. Instead, a sufficiently direct causal link is required. The disputed conduct of the EU must therefore be the determining cause giving rise to the alleged damage.[90] Damage that does not 'go beyond the bounds of the normal economic risks inherent to the activities in the sector concerned' must be borne by the applicant himself.[91] Intervening causes may break the causal link, including those causes that must be attributed to the applicant. This concerns the doctrine contributory negligence ('own fault'), which is married to the concept of causation.[92] In *Grifoni*, which is a classic case of vicarious liability, this led to the apportionment of liability between the EU and the applicant.[93] However, in cases concerning the unlawfulness of legislative or administrative acts, the CJ has held that the causal link breaks down if the alleged

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[85] Cf. Case 33/76, *Rewe-Zentralfinanz*, EU:C:1976:188, para 5 and Case 45/76 *Comet*, EU:C:1976:191. See for a broader discussion: Van Gerven, "Of Rights, Remedies and Procedures", CML Rev. (2000), 501-536 and Reich, "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights", CML Rev. (2007), 705-742.

[86] Case C-557/12, *Kone and others*, EU:C:2014:1317. See also: Dunne, 'It never rains but it pours? Liability for "umbrella effects" under EU competition law in *Kone*', CML Rev. (2014), 1813-1828.

[87] *Ibid.*, paras. 33-34. See for a similar reasoning in the field of product liability law: Case C-621/15, *N. W. and Others v. Sanofi Pasteur MSD SNC and Others*, EU:C:2017:484.

[88] See for an early account Toth, "The Concepts of Damage and Causation as Elements of Non-contractual Liability", in Heukels and McDonnell (Eds.), op. cit. *supra* note 58, pp. 179-198.

[89] Van Dam, op. cit. *supra* note 81, pp. 49-50 and p 323. See also Wurmnest, *Grundzüge eines europeïschen Haftungsrecht* (Mohr Siebeck, 2003), p 185.

[90] See note 27 *supra*. See also Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, *Dumortier and Others* v. *Council*, EU:C:1979:223, para 21; Case C-460/09 P, *Inalca SpA v. Commission*, paras. 46 and 117; and Case C-433/10 P, *Mauerhofer v. Commission*, EU:C:2011:204, para 127.

[91] Cf. Case C-104/89 and C-37/90, *Mulder and others v. Council and Commission* ("Mulder II"), EU:C:1992:217, para 13.

[92] In this regard, Lord Atkin has famously held in *Caswell v. Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (at 165):'I find it impossible to divorce any theory of contributory negligence from the concept of causation."

[93] Case C-308/87, *Grifoni v. EAEC*, paras. 16-17.

damage must be considered reasonably foreseeable for the applicant.[94] In this subset of cases concerning the liability of the EU for breach of EU law, the CJ thus applies the notion of contributory negligence to dismiss liability claims. This has no basis in the national tort law systems of the Member States, where contributory negligence is consistently used as a theory to apportion the liability between the defendant and claimant, i.e. the liability is divided amongst the two such that the damages to be compensated by the defendant are reduced.[95]

The CJ closely follows this restrictive causation framework in *Gascogne*, *Kendrion* and *ASPLA* to dismiss the damages actions against the EU for unlawful judicial conduct. In holding so, it essentially reasoned that the initial decision to provide a bank guarantee to the European Commission rather than directly paying the imposed fine, was entirely on the applicants. Similarly, the decision to maintain the bank guarantee throughout the action for annulment was theirs, and theirs only. EU law does not require a bank guarantee, nor does it prevent the undertaking that was fined to terminate, at any time, the contractual arrangement between the undertaking and the bank, and pay the fine. In fact, the CJ held, it would have been reasonable for the applicants to pay the fine the moment the action for annulment was exceeding the period which the applicants themselves considered normal. Despite the apparent foreseeability of damage, they kept the arrangements with the bank in place.[96] In those circumstances, the CJ argued, the breach of the obligation to adjudication within a reasonable time cannot be the determining cause of the alleged damage suffered in relation to the bank guarantee.

The restrictive approach taken here by CJ may be explained by two policy rationales. The first, more general rationale is that the liability exposure of the EU, when exercising its discretionary competences, should be limited. Too great a threat of incurring liability might hamper the EU's ability to legislate, administrate and adjudicate.[97] These considerations, which also play an important role in the national tort law systems of the Member States when limiting the liability of public authorities and courts,[98] is expressed by the CJ in its settled case law when it holds that "Article 340 TFEU cannot be interpreted as requiring the EU to make good *every* harmful consequence, even a remote one, of the conduct of its institutions."[99] If it turns out the conduct was unlawful, only the losses directly caused by that misconduct should be compensable.

The second, more specific rationale explaining the restrictive approach of the CJ is that the Court sought to confirm its *Holcim* case-law and extend it to actions claiming compensation for costs for bank guarantees in relation to unlawful judicial acts. As noted, this line of case-law

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[94] See e.g. Case C-169/73, *Compagnie Continentale France v. Council*, EU:C:1975:13, paras. 23-32 and Case C-440/07 P, *Commission v Schneider Electric*, EU:C:2009:459, para 205.
[95] Van Gerven et al., op. cit. *supra* note 5, pp. 732-733 and Van Dam, op. cit. *supra* note 81, pp. 375-376.
[96] These considerations give rise to what in the tort law systems of the Member States would be called a claimant's 'duty to mitigate the loss', which is a doctrine that qualifies the principle of full reparation and leads to an apportionment of the liability (and thus damages) among the defendant and claimant. See e.g. Van Gerven et al., op. cit. *supra* note 5, pp. 871-872.
[97] See also: Hanf, "EU Liability Actions", in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law. Volume 1: The European Union Legal Order* (OUP, 2018), p. 936-937.
[98] Van Gerven et al., op. cit. *supra* note 5, pp. 388-392 and Van Dam, op. cit. *supra* note 81, pp. 577-579.
[99] Cf Opinion of A.G. Wahl in *Gascogne*, para 30 (emphasis added) (with further references to case law).

implies that the costs of providing and maintaining a bank guarantee as a security for the payment of a fine imposed by the European Commission cannot be recovered from the EU through a damages action, even if the underlying Commission Decision is considered unlawful and is annulled on appeal for lack of a sufficiently direct causal link. In such a case, the damage is the consequence of the undertaking's own decision to provide a bank guarantee and not pay the enforceable fine directly.[100] This reasoning, the CJ now holds, also applies in the case of a breach of the obligation to adjudication within a reasonable time as a result of which the bank guarantee was kept in place longer than initially anticipated by the applicant. Accordingly, a consistent approach is set in place to handle claims for compensation of costs for bank guarantees in the context of the payment of competition law fines, even if the action for annulment of that fine is unduly delayed.

A number of critiques can be advanced against the restrictive approach the CJ takes to conceptualize causation in cases of unlawful judicial conduct such as *Gascogne*, *Kendrion* and *ASPLA*. First of all, the breach of EU law for which the EU is held accountable is rooted in the judicial misconduct of the CJEU in an annulment action lodged against a Commission decision imposing a competition law fine, and not in any administrative misconduct of the European Commission that is under scrutiny in such an action. The applicants voluntarily withheld direct payment of the fine and, by doing so, knowingly assumed the risk that the annulment action could be delayed, and that the costs of the related bank guarantee accumulating throughout the proceedings would be theirs to bear, regardless of the outcome. However, they did not assume the risk that the annulment action would be *unlawfully* delayed by the CJEU, and that they would have to bear the loss caused by that delay.[101] The wrong *in casu* is thus of a very different nature and therefore the analogy the CJ draws with the *Holcim* case-law should not be drawn, at least not without any further justification. By transposing the case law on unlawful Commission Decisions to cases involving the unlawfulness of CJEU adjudication, the CJ conflates the positions of two EU institutions having very different roles and competences in imposing and assessing competition law fines.

Second, to establish a causal link in a damages action Member State courts will typically assess whether the misconduct of the defendant sparked the losses of the applicant. Accordingly, the damage compensable in a damages action emerges from the moment of the unlawful conduct of the defendant. As the unlawfulness in the judgments under discussion concerned the breach of the obligation to adjudicate within a reasonable time, the loss in terms of the additional charges for maintaining the bank guarantee incurred from the moment when the proceedings were unlawfully delayed, is in principle caused by that misconduct. The test that was applied by the CJ implies the inclusion of circumstances that preceded the unlawfulness concerned. Under this *ex ante* test, the initial decision to provide a bank guarantee and maintain it dilutes the causal link.

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[100] Case T-28/03, *Holcim v. Commission*, para 123 as confirmed by e.g. Case C-460/09 P, *Inalca SpA v. Commission*, paras. 118-120.

[101] This reasoning is also apparent in the 'assumption of risk' doctrine in tort law, which holds that a victim cannot be (fully) compensated for a loss caused by a risk that he voluntarily and knowingly assumed. However, if the loss lies beyond the risk that the victim reasonably assumed, the doctrine – often used as a defense by the defendant – does not hold. See Van Dam, op. cit. *supra* note 81, 256-257. See also Article 7:101(d) PETL and Article VI.-5:101(2) DCFR, incl. the explanatory notes at pp. 3463-3464 and 3469-3474.

However, in the national tort laws of the Member States such anterior factors do not generally weigh in on the stage of establishing the causal link. Instead, these factors typically influence the extent of the liability by way of the doctrines of contributory negligence and/or the duty for the defendant to mitigate the losses, each of which leads to an apportionment of liability. By doing so, national courts take into account the conduct of the applicant, including the question of whether it was foreseeable that its conduct would contribute to the (extent of the) damage. In that regard it might be held, as the GC did at first instance, by the time of the breach of the obligation to adjudicate within a reasonable time (i.e. some 20 months into the action for annulment before the GC), the initial decision of the applicants to opt for a bank guarantee rather than to pay the fine directly, had already been taken. Moreover, at that time it was unforeseeable for the applicants that the action for annulment would be unlawfully delayed.

Third and finally, causation is an element of tort law that is strongly influenced by the other conditions of liability. It should thus not be considered in isolation, as the CJ did. Causation is first of all influenced by the character of the infringed right and the interests it protects.[102] The unlawfulness concerned in the judgments under discussion is a violation of a fundamental right as safeguarded by Article 47 of the Charter, which has the purpose to protect litigants against the legal uncertainty associated with dilatory civil or criminal proceedings. Moreover, the more negligent the misconduct is, the easier more remote or unforeseeable consequences are attributed to the tortfeasor.[103] Thus, even if the alleged damage is more remote or unforeseeable, the gravity of the misconduct can lead to the imposition of liability for the damage. In *Gascogne, Kendrion* and *ASPLA* the CJ had itself already established that the length of the proceedings of the action for annulment could not be justified by any particular circumstances of the cases, and constituted a sufficiently serious breach of Article 47 of the Charter. The seriousness of that misconduct can well make up for the supposed indirectness of the link with the alleged damage.

To account for these critiques the CJ could have reasoned, in our opinion, along the two general phases that courts in most Member States deploy to assess the element of causation.[104] This implies establishing whether the costs of the bank guarantees as well as the additional interests paid on the fine in excess of the reasonable time for adjudication, were caused by the unlawful judicial conduct. Issues of foreseeability or remoteness of damages can be accounted for via the doctrines of contributory negligence and/or the duty for the defendant to mitigate the losses. Brüggemeier puts it as follows: *"Aspects of directness, certainty, etc. of the damage do not belong to the complex of causation. These are deliberations on whether a caused damage (sic!) will fulfil addition normative criteria to trigger liability in specific case scenarios. (...) The*

[102] Van Gerven et al., op. cit. *supra* note 5, pp. 453-455 and Van Dam, op. cit. *supra* note 81, p 309.
[103] Van Dam, op. cit. *supra* note 81, p 308.
[104] To be sure, we do not argue that the CJ should adopt the majority position of the Member States in assessing causation *because* it is the majority position. This is not what Article 340(2) TFEU requires it to do. See also Lenaerts and Gutman, op. cit. *supra* note 45, p. 152-153. Instead, we suggest that the CJ, as part of its legal interpretative method, could have been more explicit about why it understands causation as it does and how that understanding relates to conceptions in the Member States. Adopting the majority position to which we draw attention would have provided, in our view, the CJ with a more balanced and nuanced approach, leading to fairer results.

point here is not to determine causation but attribution of damage, i.e. the scope of liability."[105] By doing so, the CJ could have acknowledged, on the one hand, the breach of the fundamental rights of the applicants by holding that the EU is in principle liable for damage arising from that breach. On the other hand, it could have accounted for the conduct of the applicants by more closely assessing how their conduct in relation to the bank guarantee contributed to the extent of the damage, and limiting the liability of the EU accordingly.

Clearly, the conduct of applicants should play a role in the assessment of the liability of the EU. In our opinion, and following the general principles that are common to the national tort laws of the Member States, this should only be so as far as the extent of that liability is concerned. How would this work in the judgments discussed here? For the purposes of bringing a separate damages action for the unlawful delay in adjudication, we can distinguish three different phases in the annulment actions as individually brought by the parties in *Gascogne*, *Kendrion* and *ASPLA*. In phase (i) the action is still within the timeframe as required by Article 47 of the Charter. In phase (ii) the action is unjustifiably delayed and violates Article 47. In phase (iii) the appellant should reasonably understand that the delay is excessive and take measures to limit the losses he incurs as a result of that delay. The boundaries between the different phases are obviously diffuse and must be established *ex post facto* in the damages action, taking into account the relevant circumstances of the case.[106] Viewed from this perspective, then, the EU might be liable for the damage incurred due to the breach of the violation to adjudicate within reasonable time, but this liability is limited to the point that the appellant ought to understand that the damage incurred goes beyond what is reasonable. The damage for which the EU would thus be liable emerges in a limited time window (i.e. phase (ii) indicated above), perhaps of no more than a few months, if at all.

The approach outlined here would, in our view, more eloquently balance the conflicting policies the cases under discussion raise, namely that of having in place an adequate remedy against violations of fundamental rights for damages caused to the applicant, and that of limiting the liability exposure of the EU in cases of unlawful delays by the EU courts. An advantage of the approach would also be that it aligns with what is common in the Member States, thus promoting a more coherent overarching approach to non-contractual liability for breach of EU law. After all, in cases involving the liability of Member States and private individuals for damage caused by the breach of rights conferred upon individuals by EU law,[107] the causation framework as proposed by the CJ in *Gascogne*, *Kendrion* and *ASPLA* does not apply. Instead, national causation rules are in force, on the basis of which liability for breach of EU law may be easier to establish than in damages actions against the EU itself.

5.5 Damage

[105] Brüggemeier, op. cit. *supra* note 35, pp. 82-83. See along the same lines Wurmnest, op. cit. *supra* note 89, pp. 177-181; Van Dam, op. cit. *supra* note 81, p 323; and Sieburgh, op. cit. *supra* note 40, p 486.
[106] See also Breuvart and Kye, op. cit. *supra* note 6, p. 161 (commenting that 'The Court's reasoning appears to presume that parties would immediately know when a delay becomes unreasonable and, therefore, when they should revisit their initial decision to submit a bank guarantee and provisionally pay the fine. This might be difficult in practice.')
[107] See at notes 41-43 *supra.*

Article 340 TFEU explicitly links non-contractual liability with the occurrence of damage. Mere wrongful conduct is not sufficient to give rise to liability if no damage has been suffered by the aggrieved party. [108] Like most national legal systems,[109] EU law does not define the concept of damage or harm.[110] The CJEU has not deeply elaborated on the notion of damage either.[111] In the domains of Member State liability and liability of individuals for breach of EU law rules, the CJEU has left the deliberation of the concept with the national courts, again using the general principles of effectiveness and equivalence as controlling parameters.[112] Article 340 TFEU states that the Union is liable for "*any damage*" caused by its institutions or its servants. In similar terms, Article 41(3) of the Charter refers to the right to compensation for *"any damage*". Hence, it can be assumed that both provisions accept the natural meaning of damage as any negative consequence of a wrongful conduct. As a result, an occurrence of any kind of damage may give rise to liability under these provisions. Despite the lack of a general definition, various specific types of damage have been recognized in the jurisprudence of the CJEU. The principal heads of damage include material (pecuniary) damage, which covers loss of material assets (*damnum emergens*) and loss of profit (*lucrum cessans*), as well as non-pecuniary damage. Compensation for both types of damage was claimed in *Gascogne* and *Kendrion*. The claim in *ASPLA* was limited to compensation for material damage.

Material damage

As held in *Kendrion* and *ASPLA*, the essential condition for an award of damages is that the damage must be actual and certain.[113] The requirement has been well-recognized in the case law although a range of different terms have been used. Apart from the need for damage to be "actual"[114] or "actual and certain",[115] the case law refers to "real",[116] "real and certain"[117] or "real

[108] For a broader account of the requirement of damage see the contributions in Koziol and Schulze (Eds.) *Tort Law of the European Community* (Springer, 2008) by Oliphant, "The Nature and Assessment of Damages" pp 241–272; Vaquer, "Damage", pp 23–46; and Antoniolli, "Community Liability", pp 213–240; Vestling, *Die vertragiliche and außervertragliche Haftung der EG nach Art. 288 EGV* (Peter Lang, 2003) p 70; and Toth, op. cit. *supra* note 88, pp 179–180.

[109] The exception is § 1293 ABGB which defines damages as every detriment inflicted upon the property, rights or person of another ('Schade heißt jeder Nachteil, welcher jemanden an Vermögen, Rechten oder seiner Person zugefüget worder ist.').

[110] The terms "damage" and "harm" are used in the case law interchangeably – see, e.g., Case T-120/89, *Stahlwerke Peine-Salzgitter AG v. Commission* [1991] ECR II-279, par. 120, 131; Case C-259/96 P, *De Nil*, para 23.

[111] See Vaquer, op. cit. *supra* note 108, p 24; Wurmnest, op. cit. note 89 supra, p 209.

[112] See Verbruggen, op. cit. *supra* note 42, pp. 78-81.

[113] *Kendrion* 2018, paras. 87–88; *ASPLA* 2018, paras. 40–42.

[114] See e.g. Case 58/75, *Jacques Henri Sergy v. Commission* [1976] ECR 1139, para 39; Case C-259/96 P, *De Nil*, para 23; Case T-76/94, *Jansma* [2001] ECR II-243, para 49.

[115] See e.g. Case T-99/95, *Peter Esmond Stott v. Commission* [1996] ECR II-2227, para 72; Case T-230/94, *Frederick Farrugia v. Commission* [1996] ECR II-195, para 46.

[116] See e.g. Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* [1998] ECR II-667, para 59.

[117] Case T-231/97, *New Europe Consulting and others v. Commission* [1999] ECR II-2403, para 29.

and existing"[118] damage as well as "the fact of damage",[119] the "reality of damage",[120] or the "unquestionable existence"[121] of damage. In general, the requirement is not satisfied if damage is hypothetical or speculative and a claim is "based merely on suppositions".[122] Damage is considered to be hypothetical where it is "doubtful and imprecise"[123] or "indeterminate",[124] thus, where it is not possible to establish with certainty that the party claiming compensation has suffered it.[125]

In *Kendrion* and *ASPLA* the CJ followed this approach to dismiss claims for compensation for damage suffered as a result of the payment by the parties of default interest to the Commission for the period by which the reasonable time for adjudicating was exceeded. In this regard, the CJ stated that the damage suffered by the parties could only be considered actual and certain if the default interest that accrued during that period was greater than the advantage conferred on the parties by the fact that they possessed the amount of the fine plus default interest during that time. In holding so, the CJ explained that the parties failed to provide sufficient evidence to show that they suffered an actual and certain damage as a consequence of the payment of default interest to the Commission. This reasoning suggests that the CJ considers the requirement of actuality and certainty of damage to fall into the realm of proof rather than substance, a tendency which could already be seen in its previous judgments. It is neither the type of interests infringed, nor the nature of damage, nor the way in which it has occurred that makes it actual and certain. What matters for the requirement to be satisfied is rather the ability of a party to provide evidence as to both the occurrence and the exact amount of the damage.[126]

The CJ refrained from addressing an argument put forward by the EU to support its appeal in *Gascogne*, *Kendrion*, and *ASPLA* concerning a wrong calculation by the GC of damages for the bank guarantee charges incurred by the parties. The CJ held that there was no need to rule on this ground of appeal because the established lack of causal link excludes this damages award in any case.[127] The issue was, however, addressed by Advocate General Wahl in his Opinions where he concurred with the EU by suggesting that the GC erred in law by equating the *costs* of the bank guarantee in the period by which the reasonable time for adjudicating was exceeded

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[118] Case T-13/96, *TEAM Srl v. Commission* [1998] ECR II-4073, para 76.
[119] See e.g. Case 253/84, *GAEC v. Council* [1987] ECR 123, paras. 9-10; Case T -203/96, *Embassy Limousines v. European Parliament* [1998] ECR II-4239, para 45; Case T-72/99, *Meyer* [2000] ECR II-2521, para 49.
[120] See e.g. Case 26/81, *SA Oleifici Mediterranei v. European Economic Community* [1982] ECR 3057, para 16.
[121] See e.g. Joined Cases T-17/89, T-21/89 and T-25/89, *Augusto Brazzelli Lualdi and others v. Commission* [1992] ECR II-293, para 35; Case T-20/89, *Heinz-Jörg Moritz v. Commission* [1990] ECR II-769, para 19.
[122] Joined Cases C-104/89 and C-37/90, *Mulder II*, Opinion of A.G. Van Gerven, para 37.
[123] Case 147/83, *Münchener Import-Weinkellerei Herold Binderer GmbH v. Commission* [1985] ECR 257, para 20.
[124] Case T-267/94, *Oleifici Italiani Spa v. Commission* [1997] ECR II-1239, para 73.
[125] See Vaquer, op. cite *supra* note 108, p 28. The requirement of certainty does not contradict with the fact that in an appropriate case the Court may grant a declaration that the Community is liable for damage even where the damage cannot yet be exactly determined, provided it is imminent and sufficiently foreseeable – see e.g. Joined Cases 56 to 60/74, *Kampffmeyer v. Commission and Council* (*Kampffmeyer* V) [1976] ECR 711; Case 59/83, *Biovilac* [1984] ECR 4057. An example of a situation in which these conditions were not satisfied is provided by the Case 147/83, *Weinkellerei Binderer v. Commission*.
[126] See also Joined Cases 55-59/63 and 61/63/63, *Modena v High Authority*, ECR 1964, 211, 229; Case T-571/93, *Lefebvre v Commission*, ECR 1995, II 2379, 2410.
[127] *Gascogne* 2018 para 36; *Kendrion* 2018, para 63; *ASPLA* 2018, para 35.

with *damage*.[128] Indeed, the GC failed to apply the principle of "full compensation" as it has been generally recognized in the jurisprudence of the CJEU. Following this principle, an award of compensation should mirror the amount of the damage caused by the wrongful act or omission,[129] and in this way provide, as far as possible, restitution for the aggrieved party.[130] This means that the aggrieved party should be put in the position she would have been in if there had been no wrongful conduct.[131] As a result, an inquiry into the hypothetical position of the party is required which involves a certain level of speculation and estimation.[132] In his Opinion in *Ireks-Arkady* Advocate General Capotorti explained that '*The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place: the hypothetical nature of that restoration often entails a certain degree of approximation.*'[133]

Following this approach, the EU Courts should not focus on one particular head of damage as the GC did in *Gascogne*, *Kendrion*, and *ASPLA* by equating the costs of the bank guarantee in the period of the overrun with damage suffered by the parties. Instead, they should examine the applicant's economic situation looking at all its aspects. Otherwise, the applicant is likely to be overcompensated. A comparable situation was analyzed in the case of *Oleifici Italiani*, where the party was stopped by a Council Regulation from marketing oil that it imported to the common market.[134] The party claimed that the prohibition was unlawful and infringed its acquired rights. For several years, the oil was kept in a warehouse, thus, the party incurred storage costs. Eventually, the party managed to sell the oil outside the EU taking advantage of increased oil prices on the world market. The party's claim for damages covering the costs of storage was dismissed by the Court of First Instance on the ground that the actual profit gained by the party was greater than the amount of its claim. Thus, the applicant in fact suffered no real damage.[135]

Similarly, the parties in *Gascogne*, *Kendrion*, and *ASPLA* did not only incur the costs of the bank guarantee during the unreasonably long proceedings, but it may be assumed that they also benefited from using the substantial amount of money during this period, for example for purposes of liquidity or investment. Thus, the principle of full compensation required the GC to examine whether the costs of the bank guarantee were greater than the advantage conferred on the parties by possession of the amount of money in question. A negative answer would mean that the parties suffered no damage and therefore no compensation should be awarded, regardless

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[128] Opinion of A.G. Wahl in *Gascogne*, para 68; Opinion of A.G. Wahl in *Kendrion*, para 85; Opinion of A.G. Wahl in *ASPLA*, para 63.
[129] Joined Cases C-104/89 and C-37/90, *Mulder II*, para 34.
[130] Case C-308/87, *Grifoni*, para 40; Joined Cases C-104/89 and C-37/90, *Mulder* III [2000] ECR I-203, para 51.
[131] Joined cases C-104/89 and C-37/90, *Mulder II*, Opinion of A.G. Van Gerven, para 39; Joined Cases C-104/89 and C-37/90, *Mulder III*, para 63.
[132] Oliphant, op. cit. *supra* note 108, p 241–242. Joined Cases C-104/89 and C-37/90, *Mulder III*, para 65; Case 49/79, *Pool* [1980] ECR 569.
[133] Case 238/78, *Ireks-Arkady* [1979] ECR 2955, Opinion of A.G. Capotorti, para 9. See also Oliphant, op. cit. *supra* note 108, p 242.
[134] Case T-267/94, *Oleifici Italiani*.
[135] Case T-267/94, *Oleifici Italiani*, para 74 (the Court of First Instance rejected the applicant's allegation that the Regulation was unlawful).

of whether the requirement of causation is satisfied. Confusingly, the GC did apply this reasoning when analyzing the damage arisen from the need to pay the default interest to the Commission. In this regard, the court stated that the applicants in *Gascogne*, *Kendrion* and *ASPLA* did not provide sufficient evidence to show that the amount of the default interest was greater than the benefits gained by the parties from having this amount of money at their own disposal during the period of the proceedings.[136] As pointed out by Advocate General Wahl, it is difficult to understand why the court refrained from applying the same approach with regard to the costs of the bank guarantee.[137]

Non-pecuniary loss

At first instance, the applicants in *Gascogne* and *Kendrion* were awarded damages for the prolonged state of uncertainty in which they were placed because of the excessive duration of judicial proceedings. Both the GC and the CJ qualified this award as compensation for non-pecuniary loss suffered by the parties. Neither primary and secondary EU law nor the case law of the CJEU have explicitly defined the notion of non-pecuniary loss. It could be argued that its meaning is no different to that found in most national legal systems.[138] Non-pecuniary loss is usually defined in a negative way, namely as a disadvantage or detriment that is not pecuniary, that is, it does not concern money, riches, property or wealth of the aggrieved party. Hence, the decisive factor taken into account when classifying a detriment suffered as 'non-pecuniary loss' is neither the immaterial nature of the injured interest, nor the difficulties in identifying the scope of such damage because also certain pecuniary losses cannot be precisely quantified (e.g. future losses). The deciding criterion is rather whether the interference with the claimant's interests results in consequences other than a diminution of her money, riches, property or wealth.[139]

It has been recognized in the jurisprudence of the CJEU that compensation for non-pecuniary loss can be awarded to both natural and legal persons.[140] A legal person may suffer, for example, a damage to its image, reputation, prestige or integrity,[141] as well as uncertainty concerning the outcome of a tendering procedure and its being forced to ensure it was in a position of readiness to perform the contract if granted.[142]

The practice of awarding damages for non-pecuniary loss suffered by a legal person due to excessively long proceedings was first accepted in the jurisprudence of the ECtHR.[143] As its case

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[136] Gascogne 2017, para 108; *Kendrion* 2017, para 77; *ASPLA* 2017 para 101.
[137] Opinion of A.G. Wahl in *Gascogne* para 76; Opinion of A.G. Wahl in *Kendrion* para 93; Opinion of A.G. Wahl in *ASPLA* para 71.
[138] Vaquer, op. cit. *supra* note 108, p 39.
[139] Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (CUP, 2016), p 21; Larenz, Zur Abgrenzung des Vermögensschadens vom ideellen Schaden, *Versicherungsrecht* 1963, p 312.
[140] See, e.g., Case T-203/96, *Embassy Limousines v. European Parliament*, par. 108 and T-231/97, *New Europe Consulting and others v. Commission*, para 53.
[141] Case T-231/97, *New Europe Consulting and others v. Commission*, par. 68; T-156/89, *Valverde* [1991] ECR II-407, para 163 (compensation rejected); Case T-277/97, *Ismeri Europa Srl v. Court of Auditors of the European Communities* [1999] ECR II-1825, para 82 et seq. (compensation rejected).
[142] Case T-203/96, *Embassy Limousines v. European Parliament*, para 108.
[143] For a detailed analysis of the case law of the ECtHR concerning the matter see Wilcox, op. cit. *supra* note 139, pp 62–84.

law developed, the ECtHR came to emphasize the need to promote the equality of treatment between natural and legal persons in this domain. The fundamental reason for allowing claims for damages for non-pecuniary loss suffered not only by natural but also by legal persons was the need to ensure the proper application of the principle of effective judicial protection in both situations. In the leading case on the matter, the ECtHR explained that 'since the principal form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be *effective*, to award pecuniary compensation for non-pecuniary damage to commercial companies, too.'[144] The ECtHR went on to state that non-pecuniary loss suffered by companies may include heads of claim that are to a greater or lesser extent 'objective' or 'subjective'.[145] In the context of the vicarious liability of the EU, a similar claim was made by Advocate General Tesauro in his Opinion in *Grifoni* where he stated that "all the legal systems accept that that assessment [of non-pecuniary loss] must have regard to all the circumstances, both subjective and objective, of each particular case". [146]

The reference to "objective" aspects of non-pecuniary loss merits specific discussion in the context of damages initially awarded in *Gascogne* and *Kendrion* for the "prolonged state of uncertainty".[147] The GC explained that the applicants were put in a position of uncertainty greater than normally engendered by court proceedings which had an impact on decision-making and the running of those businesses and therefore constituted non-pecuniary damage. Admittedly, uncertainty can be disruptive and can prevent an undertaking from fully planning its activities. Such an uncertainty, however, does not constitute non-pecuniary loss as traditionally understood. Rather, it comprises of unquantifiable pecuniary (material) damage. In the language used by the ECtHR, it qualifies as the 'objective non-pecuniary loss', i.e. a damage which is in fact pecuniary but difficult to translate into hard currency.[148] Such damage shares only one similarity with non-pecuniary loss in the traditional sense, namely that it is difficult to quantify. It does not, however, involve interference with bodily, mental, emotional or personality spheres of the aggrieved party, but rather concerns its economic position only.[149] Awarding damages for such loss as a means to ensure an effective protection in the case of unreasonably long proceedings should raise no doubts. However, using the term 'non-pecuniary' to describe such damage, as done by both the GC and the CJ in *Gascogne* and *Kendrion*, is inapt and raises confusion as such damage should not be considered as 'non-pecuniary'.

What distinguishes the decisions in *Gascogne* and *Kendrion* from the case law of the ECtHR is the reluctance of the GC to award damages for non-pecuniary loss suffered by members of the applicants' executive bodies or employees rather than the applicants themselves.[150] On this ground, the GC refused to award compensation for difficulties in managing the business, as well

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[144] ECtHR, *Comingersoll SA* v. *Portugal*, Appl. No. 35382/97, judgment of 6 April 2000, para 35. Emphasis added.
[145] ECtHR, *Comingersoll SA* v. *Portugal*, para 35.
[146] Case C-308/87, *Grifoni* [1994] ECR I-341, Opinion of A.G. Tesauro, para 7.
[147] *Gascogne* 2017, para 157; *Kendrion* 2017, para 128.
[148] The use of the concept 'objective non-pecuniary loss' by the ECtHR rather than material damage in this context has been criticized by V Wilcox – see Wilcox, op. cit. *supra* note 139, p 74.
[149] Wilcox, op. cit. *supra* note 139, p 74.
[150] *Gascogne* 2017, paras. 147–150; *Kendrion* 2017, paras. 117–120.

as anxiety and inconvenience experienced by managers and employees. The position of the court in this respect reflects the general reluctance of the CJEU to compensate indirect damage understood as the "indirect consequence of the harm initially suffered by [another person] who [was] the direct victim of damage".[151] It should be noted, however, that both a disruption in the management of the undertaking as well as the anxiety and inconvenience caused to the members of the management team are recognized by the ECtHR as heads of damage for which compensation can be awarded in the case of unreasonably long proceedings.[152] Even the notion of uncertainty caused by excessively long adjudication has been understood by the ECtHR more broadly than by the EU Courts so as to also cover the uncertainty caused to the company's directors[153] and shareholders.[154] Also here we might conclude, as we did in relation to the concept of causation, that the CJ followed a rather restrictive approach in defining the concept of damage, more specifically non-material damage.

6. Conclusion

Our exposition of the litigation in the cases of *Gascogne*, *Kendrion* and *ASPLA* has revealed that the CJ has rather narrowly defined the elements of both causation and damages in damages actions against the EU grounded in the breach of the obligation to adjudication within a reasonable time as laid down in Article 47 of the Charter. As both elements are constitutive for the EU's non-contractual liability, the risk of the EU incurring liability for unlawful delays in proceedings before the EU Courts is therefore minimal. The case of *Guardian* illustrates this point.[155] The case is broadly similar to the judgments that were discussed here. Closely following the reasoning in these judgments, the CJ now has allowed the appeal of the CJEU and dismissed the damages actions of the appellant.[156]

The judgments in *Gascogne*, *Kendrion* and *ASPLA* (and *Guardian*) now constitute the legal framework for any damages action against the EU for unlawful judicial conduct. Evidently, the unlawfulness of the conduct of EU Courts might also be rooted in other procedural irregularities that Article 47 of the Charter covers. One example is the failure of the EU judiciary to provide adequate reasoning for its judgments.[157] Even if the unlawfulness of the conduct of the EU

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[151] Case C-220/88, *Dumez France SA and Tracoba SARL* v. *Hessische Landesbank and others*, EU:C:1990:8, para. 14.
[152] ECtHR, *Comingersoll SA* v. *Portugal*, para 35.
[153] ECtHR, *Meltex Ltd and Mesrop Movsesyan* v. *Armenia*, Appl. No. 32283/04, judgment of 17 June 2008, para 105; ECtHR, *Tudor-Comert* v. *Moldova*, Appl. No. 27888/04, judgment of 4 November 2008, para 46.
[154] ECtHR, *Comingersoll SA* v. *Portugal*, para 36; ECtHR, *Wohlmeyer Bau GmbH* v. *Austria*, Appl. No. 20077/02, judgment of 8 July 2004, para 61; ECtHR, *Petikon Oy and Parviainen* v. *Finland*, Appl. No. 26189/06, judgment of 27 January 2009, para 46; ECtHR, *Rock Ruby Hotels Ltd* v. *Turkey*, Appl. No. 46159/99, judgment of 26 October 2010, para 36. This approach is known in the literature as the 'attribution theory'. See in detail: Wilcox, op. cit. *supra* note 139, p 146-166; Fellner, *Personlichkeitsschutz juristischer Personen* (Neuer Wiss Verlag, 2007).
[155] Joined Cases C-447/17 P and C-479/17 P, *Guardian Europe v. European Union*, ECLI:EU:C:2019:672.
[156] Cf. also Opinion of A.G. Bot in Case C-447/17 P, *Guardian Europe v. European Union*.
[157] See e.g. Case C-463/17 P, *Ori Martin v. Court of Justice of the European Union*, ECLI:EU:C:2018:411 (action dismissed for lack of unlawfulness).

Courts were ever to be established in such a damages action, the elements of causation and damage may prove insurmountable in practice.

Writing on the concepts of the causation and damage in 1997, Toth held that the Courts had developed a fairly comprehensive, consistent and settled case law in relation to the Community's liability for unlawful administrative decision-making and legislative measures. That framework, he held, was "unlikely to change in the near future."[158] The judgments in *Gascogne*, *Kendrion* and *ASPLA* confirm and solidify this approach, despite persistent criticism in the literature, and extend it to the realm of unlawful judicial conduct. Given the principled reasoning of the CJ in its judgments, we expect no change for another 25 years to come.

Paul Verbruggen, Katarzyna Kryla-Cudna[*]

[158] Toth, op. cit. *supra* note 88, p 198.

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