SLAUGHTER AND MAY

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EU ordered to pay over €50,000 in damages in first excessive length of proceedings case

The EU has been **ordered** to pay over €50,000 in damages to Gascogne (formerly Groupe Gascogne) and its subsidiary Gascogne Sack Deutschland (formerly Sachsa Verpackung) as a result of the excessive length of time taken to have their cartel appeals heard by the General Court (GC).[1] This marks the first case in which the GC has ordered compensation for a breach of the right to adjudication within a reasonable period of time, one of the rights enshrined in the Charter of Fundamental Rights of the European Union.[2]

Background

In November 2005 the European Commission announced that it had fined Gascogne €13.2 million for its participation in a 20-year illegal cartel in the industrial plastic bags sector. Gascogne challenged this decision in February 2006 and its appeals were ultimately rejected by the GC in November 2011, after a six-year wait. Gascogne further appealed to the European Court of Justice (ECJ), which similarly dismissed the appeals two years later in November 2013. However, the ECJ noted that Gascogne could seek compensation for possible damage suffered as a result of the excessive length of the proceedings before the GC. In August 2014 Gascogne brought a damages action for breach of the right of the parties to a hearing within a reasonable time. It claimed nearly €4 million in damages for the material and non-material harm (around €3.5 million and €500,000 respectively) suffered due to the excessive length of the proceedings.

The GC's judgment

In its judgment handed down on 10 January 2017 the GC upheld Gascogne's claim in part, awarding €47,064 in damages for the material harm suffered and €10,000 for the non-material harm. The GC outlined the following three cumulative conditions that must be present for the EU to incur non-contractual liability:

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] The full text of the **judgment** is currently only available in French.
[2] See the second paragraph of Article 47 of the Charter.

(i) The EU institutions' conduct must have been unlawful;

(ii) Actual damage must have been suffered; and

(iii) There must be a causal link between the conduct and the damage pleaded.

The GC held that all three conditions had been satisfied.

In relation to the conduct of the ECJ (as an EU institution) being unlawful, the GC found that the right to a hearing within a reasonable time had indeed been breached. The length of the proceedings in Gascogne's appeals to the GC was excessive, lasting over five years and nine months, which could not be justified in the circumstances of the case. In particular, the GC noted that in competition cases (which are often more complex than other cases), a period of 15 months between the end of the written phase and the beginning of the oral phase of the procedure is generally appropriate. However, the parallel treatment of related cases may justify an increase in the acceptable length of proceedings by one month per additional related case. As 12 parallel actions were brought against the Commission's decision, an increase in length of 11 months was justified in Gascogne's case. The GC therefore determined that a period of 26 months would have been appropriate, finding that the degree of complexity of the case did not justify a longer period. In Gascogne's appeals, this period had lasted 46 months. This delay of 20 months could therefore not be justified.

The GC also determined that Gascogne had suffered actual and certain damage, both material and non-material. Gascogne claimed that its material harm included: (i) prolonged payment of fees for a bank guarantee provided to the Commission in respect of the fine; (ii) payment of interest on the fine imposed in 2005 beyond a reasonable period; and (iii) loss of the opportunity of obtaining investment earlier due to uncertainty surrounding the fine. The GC accepted that Gascogne had suffered actual damage in relation to the costs for the bank guarantee, but rejected the two other claims.

The GC found a causal link between the illegal conduct and the actual damage suffered by Gascogne: if the proceedings had not been excessive in length, Gascogne would not have had to pay bank guarantee costs for an unnecessarily prolonged period. The GC awarded €47,064 in damages as compensation for the material harm suffered.

The GC also accepted Gascogne's claim that it suffered non-material harm as a result of the excessive length of the proceedings, as it had experienced a degree of uncertainty that went beyond that usually caused by litigation, which affected the companies' planning and management. The companies were therefore awarded €10,000 in compensation.

Finally, the GC also ordered for compensatory interest to be paid on the €47,064 amount of damages from 4 August 2014 (when the damages claims were filed) to the date of the GC's judgment.

The GC's judgment is subject to possible appeal to the ECJ.

Other excessive length of proceedings cases

Several other cases in which parties are seeking damages for the excessive length of cartel proceedings are currently pending before EU judges: (i) German electronics manufacturer Kendrion seeks up to €13.35 million and Spanish plastic manufacturer Armando Álvarez seeks €3.5 million in relation to the same industrial plastic bags case as Gascogne; (ii) Dutch technology company Aalberts Industries seeks

€1.1 million in relation to the copper fittings case; and (iii) glass manufacturer Guardian Europe seeks €3.5 million in relation to the flat glass case.

Concluding remarks

Gascogne's damages action sets a precedent for companies being able to claim compensation from the EU for the harm suffered as a result of proceedings being excessively long. However, the amount of the damages awarded was very low, amounting to little more than 1% of Gascogne's original claim and reportedly not even meeting its legal costs. In addition, the GC suggests that a longer decision-making period could still be justified by the specific circumstances of a case.

It remains to be seen whether the other pending claims relating to excessive length of proceedings will be successful and, if so, what the level of compensation will be, and indeed whether further actions will be brought in their wake. It will also be interesting to see whether such claims give additional impetus to the EU courts to speed up competition law proceedings, aided by the recent decision to double the number of GC judges.

Other developments

Antitrust

ECJ confirms European Commission's fining method in its first hybrid cartel case regarding animal feed phosphates

On 12 January 2017 the ECJ **dismissed** the appeal brought by Cie financière et de participations Roullier and its subsidiary Timab Industries (together, Roullier) in its entirety, thereby upholding the GC's **judgment** of 20 May 2015 and in turn, the European Commission's **decision** of 20 July 2010 to fine Roullier €59.85 million for its participation in an animal feed phosphates cartel. While the other 12 participants in the cartel had chosen to settle the case with the Commission, Roullier withdrew from the settlement discussions halfway through the procedure, also withdrawing certain admissions relating to its involvement. The Commission subsequently applied the standard procedure against Roullier. The present case is the first 'hybrid cartel' case decided by the Commission and before the EU courts, focussing on the relationship between the standard procedure and the settlement procedure.

In its appeal to the GC, Roullier contended that by imposing a fine which was higher than the range (between €41 million and €44 million) envisaged during the settlement discussions, the Commission had unfairly penalised it for withdrawing from the settlement process. Moreover, during the settlement discussions, Roullier did not dispute the duration of the cartel (1978 to 2004), but after it withdrew it successfully argued with the Commission that its participation should be reduced by 15 years (1993 to 2004). Since the cartel period was much shorter than that discussed during the settlement procedure, it was paradoxical that the fine imposed was much higher than that envisaged during the settlement discussions. The GC, however, found that the Commission had not unfairly penalised Roullier and that when reaching a decision under the standard procedure, the Commission should not be constrained by the

range of fines it communicated during settlement discussions.[3] Dissatisfied with this outcome, Roullier appealed further to the ECJ.

The ECJ dismissed Roullier's appeal and confirmed the fine imposed by the Commission. The ECJ found that the GC had correctly verified the validity of the Commission's analysis, as well as the factors used by the Commission to calculate the amount of the fine. In particular, the ECJ noted that although the Commission used the same methodology during both the settlement and standard procedures, the Commission was entitled to 'review' the amount of the fine. During the standard process, the Commission had to take into account new information which required it to review the file, to redefine the duration of Roullier's participation in the cartel and not to apply the fine reductions which were discussed during the settlement discussions. In particular, the ECJ noted that the fact that a shorter period of infringement resulted in a higher fine was explained by the Commission's finding that the reductions it had proposed during the settlement discussions, which were based on the information provided by Roullier in respect of the period of 1978 to 1993, would no longer be appropriate. Therefore, Roullier could not rely on any legitimate expectation that the figures intimated to it by the Commission during the settlement procedure would be maintained. The ECJ further rejected Roullier's argument that the Commission had breached Roullier's right to not provide self-incriminating evidence, by using in its final decision the leniency and other declarations Roullier had made during the settlement procedure, since these self-incriminatory statements were, in the present case, "purely voluntary".

The Commission **welcomed** the ECJ judgment rejecting Roullier's claim that the Commission had punished it for not settling and confirming that the company had suffered no discrimination for not settling the case.

ECJ rejects Toshiba's appeal against parental liability in cathode ray tubes cartel

On 18 January 2017 the ECJ issued its **judgment** dismissing Toshiba's appeal in relation to the cathode ray tubes cartel in its entirety, thereby confirming the €82.8 million fine jointly and severally imposed on Toshiba, Panasonic and their joint venture Matsushita Toshiba Picture Display (MTPD).

In December 2012 Toshiba, Panasonic and MTPD were held jointly and severally liable by the European Commission for €86.7 million in relation to MTPD's participation in a cathode ray tubes cartel. In addition, Toshiba and Panasonic were each held individually liable for €28 million and €157.5 million respectively. In September 2015 the GC annulled Toshiba's individual fine and also reduced the joint fine to €82.8 million on the basis that the Commission did not prove to the requisite legal standard that Toshiba was aware of the cartel before the formation of MTPD. The GC still found, however, that Toshiba was liable for its jointly controlled subsidiary MTPD. Toshiba then proceeded to the ECJ, seeking for the joint fine to be annulled on the ground that it was not in a position to exercise 'decisive influence' over MTPD during the cartel and should therefore not be held liable for MTPD's behaviour.

The ECJ found that the GC correctly held Toshiba to be in a position to exercise 'decisive influence' over MTPD throughout the duration of the cartel, given that (i) contractual provisions stipulated that the commercial conduct of MTPD required the joint determination of its parent companies; (ii) Toshiba's right

[3] For further details on the GC's ruling, see the Slaughter and May **EU Competition & Regulatory Newsletter (22 – 28 May 2015)**.

of veto over MTPD's business plan existed for the entire duration of MTPD's existence; (iii) Toshiba had the capacity to prevent MTPD from taking decisions involving outlays which appear relatively modest in light of MTPD's capital; and (iv) Toshiba had the right to appoint two directors.

Regulatory

Separation of system operator role but no break-up of National Grid group

The Office of Gas and Electricity Markets (Ofgem), the Department for Business, Energy and Industrial Strategy (BEIS) and National Grid issued a **joint statement** on the future of electricity system operation on 12 January 2017. The statement sets out their intention to establish a new legally separate electricity system operator (SO) entity within the National Grid group, amid concerns that National Grid's role as electricity SO conflicts with its interests in electricity transmission. The new electricity SO will have its own board of directors and no member of the SO's board will sit on the boards of other National Grid group companies. It will also have employees that are physically separate from any other National Grid group company. Ofgem, BEIS and National Grid are of the view that a more independent SO can create benefits for consumers by enabling a more competitive and flexible system that mitigates potential and perceived conflicts of interest. Establishing a more independent SO is currently considered to be a proportionate remedy to deliver benefits to consumers; in the longer term, Ofgem has said that it may be necessary to consider establishing a fully independent SO.

Alongside the statement, Ofgem has also published a **consultation** on the proposal for greater separation, the process that will be followed to achieve separation and the responsibilities of the new electricity SO. Subject to responses received during the consultation period, which closes on 10 March 2017, Ofgem expects the new SO company to be fully operational by April 2019.

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