Who are the Real Winners and Losers in the General Court?

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Introduction

Given the very high fines that are often imposed by the European Commission ("Commission") for alleged infringements of competition law, an efficient court system, which allows for a review of those decisions within a reasonable time period, is essential to delivering justice. However, the General Court of the European Union ("General Court") has a reputation for very lengthy (and therefore costly) proceedings. That delay, when combined with the refusal to countenance appropriate costs awards for winning parties, provides a disincentive to bring meritorious cases and fails to sufficiently deter some of the more speculative cases.

In this article, we explore the issue of the acknowledged delays in the General Court and consider options for reducing the General Court's backlog of cases (specifically arguing for better costs awards), before going on to discuss the attitudes of both the General Court and the Commission towards the recovery of costs. We also address a recent suggestion to introduce fees for bringing cases, which we believe is both a misdiagnosis of the ailment and the wrong remedy.

Delays in the General Court

A recent UK Government Report found that General Court procedures last an average of 33 months, a statistic it described as "*worrying*".[1] Significantly, trends show that the length of General Court procedures is increasing over time. Our own analysis of competition related appeals against Commission decisions decided by the General Court in 2013 reveals an average duration in excess of 50 months. That averaging disguises some shocking outliers: in appeals of fines imposed for the Industrial Bags cartel, the General Court took some 69 months to come to a decision.[2] On further appeal to the Court of Justice of the European Union ("CJEU"), it was found that the General Court had breached the appellants' fundamental right to a hearing within a reasonable time (as guaranteed by Article 47 of the European Charter of Fundamental Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms).[3] The CJEU ultimately found that the appropriate remedy was for the appellants to bring an action for damages against the General Court itself.

As Advocate General Eleanor Sharpston recently wrote, companies that "*fall foul of the competition rules and who find themselves on the receiving end of adverse decisions*" are often subject to "*fines so substantial that they are likely to have a significant impact on […]*

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* The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of the Sidley Austin LLP or its partners.

[1] UK House of Lords "European Union Committee Follow-Up Report on the Workload of the Court of Justice of the European Union", 16th Report of Session 2012-2013, see: http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/163/163.pdf.

[2] Joined Cases T-72/06 *Groupe Gascogne v Commission* (16 November 2011) and T-54/06 *Kendrion v Commission* (16 November 2011).

[3] Joined Cases C-58/12 P *Groupe Gascogne v Commission* (26 November 2013), C-40/12 P *Gascogne Sack Deutschland v Commission* (26 November 2013) and C-50/12 P *Kendrion v Commission* (26 November 2013).

profitability, if not future viability".[4] Those companies can either pay the fine immediately, or pay later – after providing a bank guarantee and agreeing to pay interest on the amount of the fine if it is upheld. A company that considers that a fine has been wrongly imposed upon it and that decides to appeal is likely to want to defer payment until a decision has been reached by the General Court. The excessive length of General Court proceedings has the effect of disproportionately increasing the costs associated with deferring that payment.

Options for reducing the General Court's backlog of cases

The delays in the General Court are in large part attributed to the huge backlog of cases, which becomes self-reinforcing. A few years ago, Vassilios Skouris (President of the CJEU) commented that "*whatever it does, the General Court is unable to deal with the volume of cases lodged every year, still less absorb the accumulated backlog*",[5] and more recently, Advocate General Eleanor Sharpston noted that "*the workload of the General Court has increased and gone on increasing*".[6]

Logically, there are only two ways of reducing the General Court's backlog: (1) increase its capacity to deal with cases, or (2) reduce the number of cases that come before it.

Increasing the General Court's capacity to deal with cases

Most of the suggestions for reform focus around increasing the General Court's capacity to deal with cases. In 2011, President Skouris put forward a proposal to increase the number of General Court judges.[7] However, that suggestion is proving politically very difficult to achieve (only earlier this month did EU Member State governments finally reach consensus on the proposal to add judges and they are still unable to agree on how the judges should be appointed). President Skouris also considered the introduction of specialist courts; though he went on to explain that he did not consider that to be an effective remedy, arguing that it would only offer a brief respite and that it would eventually add to the overall workload since there would be a further judicial level of appeal.[8]

Reducing the number of cases that come before the General Court

Conversely, Klaus-Heiner Lehne (Chair of the European Parliament's Legal Affairs Committee) recently suggested introducing court fees, particularly for competition cases,

[4] Eleanor Sharpston, "Effective Judicial Protection through Adequate Judicial Scrutiny – Some Reflections", Journal of Competition Law and Practice (2013) 4(6): 453-454.
[5] "Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto" put forward to the President of the Council of the European Union by Vassilios Skouris acting as President of the CJEU on 7 April 2011.
[6] See footnote 5.
[7] See footnote 6.
[8] *Ibid*.

to reduce the number of cases that come before the General Court (interestingly though, he did also state that the introduction of fees "*would be extremely lucrative for the Court*").[9]

Proceedings before the General Court are currently free in the sense that no charge or fee of any kind is payable. Although the introduction of court fees may have some deterrent effect if they are set at a sufficiently high level, this potential remedy is outweighed by its flaws. It imposes a tax on the worthy and hopeless cases alike. Also, if it is set at a deterrent level, the burden of a significant court fee, that a potential appellant may not ultimately be compensated for, is bound to end up deterring some who had a good chance of success, thereby denying access to justice.

Another option, which could reduce the number of cases that come before the General Court, whilst avoiding the risk of deterring meritorious appeals, is the introduction of "proper" costs awards.

The rules on costs in General Court cases

As it stands, the General Court gives a decision on costs in the judgment or order that brings proceedings to an end. Like most jurisdictions, the General Court applies the "loser pays" principle, in that the losing party is often ordered to pay some of the costs of the winning party. The parties are free to decide the value of the costs to be claimed between them, but "*if there is a dispute concerning the costs to be recovered, the General Court hearing the case shall, on application by the party concerned and after hearing the opposite party, make an order, from which no appeal shall lie*".[10] The General Court considers "*expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers"* to be recoverable costs.[11]

It is settled case-law that, since there are no EU provisions laying down fee scales, the General Court must make an unfettered assessment of the facts of the case, taking into account the subject-matter and nature of the proceedings, their significance from the point of view of EU law, as well as the difficulties presented by the case, the amount of work generated by the dispute for the agents and advisers involved and the financial interests that the parties had in the proceedings.[12]

In cases involving the Commission, the remuneration of its officials is not recoverable, since defending the Commission's interests is deemed to be within the remit of their employment. However, when the Commission chooses to instruct external lawyers to assist in cases, fees of those external lawyers are recoverable.

[9] MLex Market Intelligence, "EU courts should charge fees for competition cases, lawmakers say", Lewis Crofts, Matthew Newman and Vesela Gladicheva, 27 November 2013.
[10] Article 92(1) of the Rules of Procedure of the General Court.
[11] Article 91(b) of the Rules of Procedure of the General Court.
[12] Case T-342/99 DEP, *Airtours* v *Commission* [2004] ECR II-1785.

The application of the costs rules in practice

Since few costs orders are published, there is very little precedent and it is "*difficult to identify principles behind the Court's reasoning in decisions on costs*".[13] We have to rely on anecdotal evidence of both our own experiences and the experiences that other lawyers in the field have shared with us. For the purpose of this article we discussed the issue informally with lawyers from a dozen of the leading antitrust firms with offices in Brussels.

It is widely acknowledged that the General Court rarely grants anything close to a realistic amount of costs to a party that is successful against the Commission. Our own analysis of costs applications in General Court appeals of Commission competition decisions reveals that on average only around a third of the costs claimed are ultimately recovered. When the Commission loses a case, it seems to take an aggressive approach to negotiating the recoverable amount of the winner's costs, even when the costs claimed by the winning party are in line with market levels. However, when the Commission itself wins, the level of costs it demands are very low. No article like this is complete without a few good "war stories" and we can provide anecdotes from both sides of the fence.

Some years ago we represented a client in an action against the Commission before the General Court alleging, among other things, that the Commission had damaged our client's reputation by leaking a sensitive document. We withdrew the case against the Commission when it agreed to issue an apology and to pay our client's costs. The case, which was acknowledged to be novel and took many months to prosecute, incurred substantial costs. However, while ultimately accepting its error (which it could have done far earlier and avoided those costs), the Commission tried to argue that the recoverable costs should be only £10,000. After some negotiation the Commission ultimately offered £40,000 and argued that it had been extremely generous in increasing its offer four-fold, though it knew that the true costs to our client were many multiples of that sum. Our client was happy with its victory and saw it as a good return on its investment, but not all can afford to take that approach, and neither should they have to.

For completeness we should mention, based on our discussions with other lawyers, that there are one or two recent cases that show encouraging signs of a more generous approach (which would be a welcome development if they prove not to be isolated incidents).[14]

Turning to the other side of the coin, it is common for the Commission to instruct external lawyers to assist its Legal Service officials in complex cases. In the past we have taken on cases on behalf of the Commission. When we do so we accept that the level of fees on offer will be only a fraction of the costs we will incur to provide a professional service. We do this, and no doubt other firms take the same approach, because it is good experience to

[13] Richard Plender, "European Courts Procedure", London: Sweet and Maxwell, 2000, p. 15026.
[14] See, for example, the costs order in Case C-404/10 P-DEP, *Lagardère v Editions Odile Jacob* (28 November 2013). Editions Odile Jacob was ordered to reimburse Lagardère as much as €267,000 (98% of the costs claimed).

work occasionally on the Commission's side of the fence. However, with the standard rate to defend a cartel case (with millions of Euros in fines at stake) typically being no more than €50,000 per case, the work is effectively "pro bono". Given that the Commission wins the majority of its cases and would then be able to recover a sizeable portion of its reasonable costs, that approach is difficult to understand.

A few years ago our firm took on instructions to defend the Commission against appeals from four alleged cartelists and we did that fully in the knowledge that it would be effectively "pro bono". The Commission offered to pay €15,000 per case, which we negotiated up to €17,500. Though the defence was largely successful, we assume the appellants were only obliged to pay at that level (despite the fact that had we been billing any other winning client our bill would have been many multiples of that amount, which would have been recovered from the "losers").

The proper application of a "loser pays" rule

As Herbert Kritzer has argued, a "loser pays" rule has two purposes. "*First, it is intended to compensate the winning party for the costs incurred to obtain vindication. Second, it serves to make potential litigants, particularly potential plaintiffs, consider the risks associated with losing and to be cautious in initiating legal actions.*"[15]

We believe that if there is a genuine concern about workload (and frankly even if there is not), then there needs to be a fundamental rethink of the costs a winning party should be able to recover. First, appellants are not properly compensated for the costs incurred to obtain vindication. The General Court manifests an unrealistic expectation of how much cases cost to run (even when some of the judges have had experience of running such cases in their previous lives). Given the issues at stake, appellants are entitled to seek advice from experienced advisors that have a sophisticated understanding of the relevant law and practice. Of course, that kind of advice comes at a price. Second, appellants, or those they are suing, are not subject to the proper risks associated with losing, meaning that the costs do not act as a sufficient deterrent either to bringing unmeritorious cases, or to raising weak arguments in defence.

The General Court should introduce more realistic costs awards to incentivise those that have genuine claims to bring them and to deter those that have more speculative cases. We do not argue that the right to costs should be unfettered and appreciate that the General Court should have some role in assessing what is reasonable, for example, to compensate the loser for certain costs it was put to unnecessarily, to encourage the parties to settle outside of court, or to encourage the parties to act reasonably during the court procedure.

The Commission should also pay a fair fee for the work that it employs external lawyers to do on its behalf and should recover a commercial level of costs in the cases it wins as an added deterrent to unmeritorious appeals. Where the Commission is unsuccessful it is either because there was a flaw in its original decision, or because it failed to defend the

[15] Herbert M. Kritzer, "Fee Regimes and the Cost of Civil Justice" (2009) 28(3) Civil Justice Quarterly.

appeal effectively. The Commission should accept that it will lose some cases and bear its proper costs when it does.

Final remarks

Let us return to the question that this article opens with. In our view, the real winners in appeals of Commission competition decisions before the General Court are the Commission itself (which does not have to pay realistic costs either to a winning appellant or to its own external lawyers and companies that have enough resources to bear the majority of their own costs of a case (whether the claim is meritorious or not). The real losers are companies that have had fines improperly imposed upon them by the Commission, which view the costs of litigation as too much of a risk to bring a claim and are thus denied access to justice. The introduction of a more realistic notion of recoverable costs would help to address this imbalance.

We do not think that the introduction of court fees is at all sensible as it could dissuade companies from appealing meritorious cases and act as a barrier to justice. However, if court fees are to be introduced, then we argue that there is an even greater need to introduce costs awards that fully compensate successful appellants for such fees as well as a more realistic amount of the costs of running the case.

The introduction of a more realistic notion of recoverable costs, which we see as necessary, requires an unlikely radical shift in the attitudes of both the Commission and the General Court. Having said that, now that the CJEU has made it clear that appellants can bring actions for damages in the situation that the General Court fails to adjudicate within a reasonable period of time, the General Court may now have the impetus for change, and the Commission may well follow suit.