JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

20 January 2010 *

In Joined Cases T-252/07, T-271/07 and T-272/07,

Sungro, SA, established in Córdoba (Spain),

applicant in Case T-252/07,

Eurosemillas, SA, established in Córdoba,

applicant in Case T-271/07,

Surcotton, SA, established in Córdoba,

applicant in Case T-272/07,

represented by L. Ortiz Blanco, lawyer,

* Language of the case: Spanish.

v

Council of the European Union, represented by M. Moore, A. De Gregorio Merino and A. Westerhof Löfflerova, acting as Agents,

and

European Commission, represented by L. Parpala and F. Jimeno Fernández, acting as Agents, assisted by E. Díaz-Bastien Lopez, L. Divar Bilbao and J. Magdalena Anda, lawyers,

defendants,

ACTIONS for compensation, under Article 235 EC and the second paragraph of Article 288 EC, for losses allegedly suffered by the applicants as a result of the adoption and application, during the 2006/2007 marketing campaign, of Chapter 10a of Title IV of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), as inserted by Article 1(20) of Council Regulation (EC) No 864/2004 of 29 April 2004 amending Regulation No 1782/2003 and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ 2004 L 161, p. 48), and annulled by the Court's judgment in Case C-310/04 *Spain* v *Council* [2006] ECR I-7285,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas and N. Wahl (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 April 2009,

gives the following

Judgment

Legal context

1 On the accession of the Hellenic Republic to the European Communities in 1980 a support scheme for cotton was introduced by Protocol 4 on cotton annexed to the Act of Accession of that Member State (OJ 1979 L 291, p. 174; 'Protocol 4').

2 That scheme was applied for the first time to the 1981 harvest, and was later extended when the Kingdom of Spain and the Portuguese Republic acceded to the Communities in 1986.

3 According to paragraph 2 of Protocol 4, the scheme is intended particularly to support the production of cotton in regions of the Community where it is important for the agricultural economy, to permit the producers concerned to earn a fair income, and to stabilise the market by structural improvements at the level of supply and marketing.

4 Paragraph 3 of Protocol 4, both in its original version and as amended by Council Regulation (EC) No 1050/2001 of 22 May 2001 adjusting, for the sixth time, the system of aid for cotton introduced by Protocol 4 (OJ 2001 L 148, p. 1), provides that the scheme 'shall include the grant of an aid to production'.

5 Paragraph 6 of Protocol 4, as amended by Regulation No 1050/2001, provides that '[t]he Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall decide on the adjustments necessary to the system introduced pursuant to this Protocol and shall adopt the general rules necessary for implementing the provisions of this Protocol'.

6 On the basis of paragraph 6, the Council of the European Union adopted Council Regulation (EC) No 1051/2001 of 22 May 2001 on production aid for cotton (OJ 2001 L 148, p. 3).

7 Under Articles 2, 11 and 12 of that regulation, the production aid for unginned cotton is equivalent to the difference between the guide price for unginned cotton fixed by the regulation and the world market price, and the aid is paid to cotton ginning undertakings for the unginned cotton purchased by them at a price at least equal to the minimum price fixed by that regulation.

8 As part of the reform of the common agricultural policy the Council adopted Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for

direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1).

9 Recitals 24 and 28 in the preamble to Regulation No 1782/2003 read as follows:

'(24) Enhancing the competitiveness of Community agriculture and promoting food quality and environment standards necessarily entail a drop in institutional prices for agricultural products and an increase in the costs of production for agricultural holdings in the Community. To achieve those aims and promote more market-oriented and sustainable agriculture, it is necessary to complete the shift from production support to producer support by introducing a system of decoupled income support for each farm. While decoupling will leave the actual amounts paid to farmers unchanged, it will significantly increase the effectiveness of the income aid. It is, therefore, appropriate to make the single farm payment conditional upon cross-compliance with environmental, food safety [and] animal health and welfare [standards], as well as the maintenance of the farm in good agricultural and environmental condition.

...

(28) In order to leave farmers free to choose what to produce on their land, including products which are still under coupled support, thus increasing market orientation, the single payment should not be conditional on production of any specific product. However, in order to avoid distortions of competition some products should be excluded from production on eligible land.'

10 Recitals 1, 2, 5, 6, 7, 22 and 23 in the preamble to Council Regulation (EC) No 864/2004 of 29 April 2004 amending Regulation No 1782/2003 and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (OJ 2004 L 161 p. 48; 'the contested regulation') state:

'(1) The decoupling of direct producer support and the introduction of the single payment scheme are essential elements in the process of reforming the common agricultural policy aimed at moving away from a policy of price and production support to a policy of farmer income support. Regulation … No 1782/2003 … introduced these elements for a variety of agricultural products.

(2) In order to meet the objectives that lay at the heart of the reform of the common agricultural policy, the support for cotton, olive oil, raw tobacco and hops should be largely decoupled and integrated into the single payment scheme.

...

(5) A complete integration in the single payment scheme of the current support scheme in the cotton sector would bring a significant risk of production disruption to the cotton producer regions of the Community. A part of the support should therefore continue to be linked to the cultivation of cotton through a crop specific payment per eligible hectare. Its amount should be calculated in such a way so as to ensure economic conditions which, in regions which lend themselves to that crop, enable activity in the cotton sector to continue and prevent cotton from being driven out by other crops. In order to achieve that goal, it is justified that the total available aid per hectare per Member State is set at 35% of the national share of the aid that went indirectly to the producers.

(6) The remaining 65% of the national share of the aid that went indirectly to the producers should be available for the single payment scheme.

(7) For environmental reasons, a base area per Member State should be established in order to limit the areas sown under cotton. In addition, the eligible areas should be restricted to those authorised by the Member States.

...

(22) The decoupling of the aid for cotton and raw tobacco might require actions towards restructuring. Additional Community support for the production regions of the Member States in which Community aid for cotton and raw tobacco was granted during 2000, 2001 and 2002 should be made available by a transfer of funds from heading 1(a) to heading 1(b) of the financial perspectives. This additional support should be used as provided for in Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) ...

(23) In order to ensure the harmonious continuation of the payment of income aid to producers in the cotton, olive oil and tobacco sectors, the option of postponing the integration of these support schemes in the single payment scheme should not apply.'

11 The contested regulation inserted in Title IV of Regulation No 1782/2003 a Chapter 10a, 'Crop specific payment for cotton', which comprises Articles 110a to 110f ('the contested provisions').

12 Under Articles 110a to 110c of Regulation No 1782/2003 as amended:

'*Article 110a*

Scope

Aid shall be granted to farmers producing cotton falling within CN code 5201 00 under the conditions laid down in this Chapter.

Article 110b

Eligibility

1. The aid shall be granted per hectare of eligible area of cotton. In order to be eligible, the area shall be located on agricultural land authorised by the Member State for cotton production, sown under authorised varieties and maintained at least until the boll opening under normal growing conditions.

However, if the cotton does not attain the stage of boll opening as a result of exceptional weather conditions recognised as such by the Member State, areas fully sown under cotton shall remain eligible for aid provided that the areas in question have up

to the boll opening not been used for any other purpose than for the production of cotton.

2. Member States shall authorise the land and the varieties referred to in paragraph 1 in accordance with detailed rules and conditions to be adopted in accordance with the procedure referred to in Article 144(2).

Article 110c

Base areas and amounts

1. A national base area is hereby established for:

— Greece: 370 000 ha

— Spain: 70 000 ha

— Portugal: 360 ha.

2. The amount of the aid per eligible hectare shall be in:

— Greece: EUR 594 for 300 000 hectares and EUR 342,85 for the remaining 70 000 hectares

— Spain: EUR 1 039

— Portugal: EUR 556.

…'

13 Articles 110d and 110e of Regulation No 1782/2003 as amended deal with approved inter-branch organisations, made up of farmers producing cotton and at least one ginner and 'aiming at, in particular, the supply of qualitatively suitable unginned cotton to the ginner'. These inter-branch organisations can differentiate a maximum of half the aid to which their farmer members are entitled in accordance with scales fixed by them which take into account in particular the quality of the unginned cotton.

14 The contested regulation also inserted in Regulation No 1782/2003 a Title IVB, 'Financial transfers', containing, among others, Article 143d, 'Financial transfer for restructuring in the cotton regions', which reads as follows:

'As from budget year 2007, an amount of EUR [22 million], originating from the average expenditure for cotton in the years 2000, 2001 and 2002, shall be available per calendar year as additional Community support for measures in cotton producing regions under rural development programming financed under the EAGGF "Guarantee" Section according to Regulation … No 1257/1999.'

15 Finally, the contested regulation inserted in Article 153 of Regulation No 1782/2003, among others, a Paragraph 4a repealing Regulation No 1051/2001, which, however, was to continue to apply to the marketing year 2005/06. Under Article 156(2)(g) of Regulation No 1782/2003 as amended, the new support scheme for cotton is to apply from 1 January 2006 for the cotton sown as from that date.

Facts

16 By action brought on 22 July 2004 before the Court of Justice, the Kingdom of Spain applied for the annulment of Chapter 10a in Title IV of Regulation No 1782/2003 as inserted by the contested regulation. It relied in support of its action on four pleas in law: infringement of Protocol 4, breach of the obligation to state reasons, misuse of powers and, finally, breach of the general principles of Community law, in particular, the principles of proportionality and the protection of legitimate expectations.

17 By its judgment in Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, the Court upheld the action. Whilst rejecting the Kingdom of Spain's first three pleas in law, it

upheld the first part of the fourth plea in law and annulled the contested provisions on the ground that the Council had infringed the principle of proportionality. It therefore, in order, in particular, to avoid any legal uncertainty as to the scheme applicable to aid in the cotton sector following that annulment, suspended its effects until the adoption, within a reasonable time, of a new regulation.

18 On 19 March 2007, the applicants, Sungro, SA, Eurosemillas, SA, and Surcotton, SA, which are undertakings established in Spain which gin raw cotton and have received aid under the cotton support scheme established by Protocol 4, applied to the Council and the Commission of the European Communities for compensation for the loss suffered because of the contested provisions assessed respectively at EUR 37 188 as regards Sungro, at EUR 2 661 427 as regards Eurosemillas, and at EUR 1 734 027 as regards Surcotton.

19 On 1 June 2007, each applicant received a letter from the Council informing it that, after examining its application for compensation and the documents annexed thereto, the Council considered that the conditions for its non-contractual liability to be incurred were not satisfied.

20 On 9 May 2007, the Commission also replied negatively to the claim for compensation made by each of the applicants.

Procedure and forms of order sought by the parties

21 By applications lodged at the Registry of the Court between 26 June and 25 October 2007, registered under numbers T-217/07, T-218/07, T-244/07 to T-246/07, T-252/07 to T-255/07, T-258/07 to T-260/07, T-268/07 to T-272/07 and T-394/07, 18 cotton ginning undertakings, including the applicants, brought actions for compensation for

the losses they allegedly suffered because of the adoption and application, during the 2006/07 marketing campaign, of the contested provisions.

22 By order of 18 October 2007, the President of the Eighth Chamber of the Court decided, after hearing the parties, to join those cases for the purposes of the written procedure and the oral procedure.

23 On the same day, the Court (Eighth Chamber) adopted a measure of organisation of procedure limiting the scope of the pleadings to the principle of the Community's non-contractual liability and the method for evaluating the loss.

24 By letter lodged at the Court Registry on 18 July 2008, the applicants in Joined Cases T-217/07, T-218/07, T-244/07 to T-246/07, T-253/07 to T-255/07, T-258/07 to T-260/07, T-268/07 to T-270/07 and T-394/07 informed the Court that they were discontinuing their actions. By order of partial removal of 20 October 2008 of the President of the Eighth Chamber of the Court, those 15 cases were removed from the Court's register.

25 The parties in Joined Cases T-252/07, T-271/07 and T-272/07 presented oral argument and answered the oral questions put to them by the Court at the hearing on 22 April 2009.

26 In Case T-252/07 Sungro claims that the Court should:

— declare the action admissible;

— give judgment upholding its action for damages under Article 288 EC and declaring its right to be compensated financially by the Council and Commission jointly and severally in a total sum of EUR 37 188 for the loss caused to it by the unlawful adoption of the contested provisions and their application to the cotton sector during the 2006/07 marketing campaign;

— order the Council and the Commission to pay the costs.

27 In Case T-271/07, Eurosemillas claims that the Court should:

— declare the action admissible;

— give judgment upholding its action for damages under Article 288 EC and declaring its right to be compensated financially by the Council and Commission jointly and severally in a total sum of EUR 2 661 427 for the loss caused to it by the unlawful adoption of the contested provisions and their application to the cotton sector during the 2006/07 marketing campaign;

— order the Council and the Commission to pay the costs.

28 In Case T-272/07, Surcotton claims that the Court should:

— declare the action admissible;

— give judgment upholding its action for damages under Article 288 EC and declaring its right to be compensated financially by the Council and Commission jointly and severally in a total sum of EUR 1 734 027 for the loss caused to it by the unlawful adoption of the contested provisions and their application to the cotton sector during the 2006/07 marketing campaign;

— order the Council and Commission to pay the costs.

29 The Council contends that the Court should:

— dismiss the actions in their entirety;

— order the applicants jointly and severally to pay the costs.

30 The Commission contends that the Court should:

— dismiss the actions entirely as unfounded;

— order the applicants to pay the costs.

31 After hearing the parties' views on the matter at the hearing, the Court (Eighth Chamber) decided to join the three cases also for the purposes of the judgment, in accordance with Article 50 of its Rules of Procedure.

Law

Preliminary observations

32 As they confirmed at the hearing in reply to a question put by the Court, the applicants rely, in support of their actions, on the existence of a right to compensation for unlawful conduct of the Community's organs. They stated in fact that they did not intend to rely, for the purposes of the present proceedings, on the liability of the Community for lawful conduct of its organs.

33 More precisely, the applicants maintain that, for the purposes of the second paragraph of Article 288 EC, the three cumulative conditions for the Community's non-contractual liability for unlawful conduct of its organs, namely the unlawfulness of

the conduct of which the Community institution is accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of, are all met in this case.

34 The Council and the Commission submit, on the other hand, that none of the conditions for the Community's non-contractual liability is satisfied. They submit, in particular, that the applications are based on a false premiss in that they distort the meaning and scope of the judgment in *Spain* v *Council*.

35 The Court notes that it has been consistently held that, for the purposes of the second paragraph of Article 288 EC, the Community's non-contractual liability for unlawful conduct of its institutions is subject to the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the Community institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see, to that effect, Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 26, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 106 and the case-law cited).

36 The cumulative nature of those conditions means that, if any one of them is not satisfied, the action for damages must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 30; see also, to that effect, Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraphs 14 and 63).

37 In this case, it is appropriate to start by examining whether the condition relating to the existence of a causal link between the Community institutions' unlawful conduct and the losses alleged by the applicants is satisfied.

The causal link between the infringement of the principle of proportionality which vitiated the contested regulation and the heads of loss pleaded

Arguments of the parties

38 The applicants submit that the contested provisions which were annulled by the judgment in *Spain* v *Council*, but the effects of which were continued until the adoption of a new regulation, caused the losses which they claim to have suffered.

39 Those losses consist, first and mainly, in the loss of profits (*lucrum cessans*) resulting from the significant reduction in the quantities of cotton sown, produced and, consequently, ginned during the 2006/07 marketing campaign, compared to the average of the quantities of cotton sown, produced and ginned during the three preceding campaigns (2003/04, 2004/05 and 2005/06), which were governed by Regulation No 1051/2001. The contested regulation, which established a scheme of aid decoupled from production of 65% in the form of a subsidy per cultivated hectare paid directly to farmers irrespective of the quantity of cotton produced, in place of the scheme which then existed of support linked entirely to production and paid through the ginning undertakings, caused a drastic reduction in the area cultivated, in the yield per hectare and in cotton production of the order of 60%. The applicants point out in that regard that, in Spain, cotton production and ginning are closely linked economic activities. Secondly, the applicants suffered pecuniary losses (*damnum emergens*) corresponding to the costs of the services of legal and financial advisers incurred following the adoption of the contested regulation.

40 In support of their claims, the applicants argue that the documents drawn up by a firm of experts in March 2007 which they annexed to their applications, namely the report on the effects of the reform of the support scheme for cotton on Spanish production ('the 2007 report') and the expert reports on the losses which each of them suffered ('the expert reports'), prove not only the reality of their losses, but also the causal link between the application in Spain of the contested provisions and the losses

they suffered during the 2006/07 marketing campaign, a period during which those provisions were applied. It was the adoption of the contested provisions which were annulled by the Court and their application in the cotton sector during that campaign which caused a considerable reduction in the area sown with cotton per farmer and in the yields per hectare and, therefore, a very large drop in production and, as a result, in the supply of cotton to the ginning industry. In the applicants' submission, if the contested provisions had not been adopted or if other provisions, better suited to the objectives stated in Protocol 4 and in recital 5 in the preamble to the contested regulation, had been adopted, the losses suffered would not have arisen or, at the very least, would have been significantly less.

41 The applicants point out also that the various reports which the Kingdom of Spain annexed to its application in *Spain* v *Council* put forward the very negative effects which the contested provisions had on the continuation of cotton growing in Spain, since its profitability is no longer ensured. In fact, in the applicants' submission, those reports forecast that the contested provisions, in particular the percentages adopted by the Council in respect of coupled and decoupled aid, could not ensure the profitability of production in the areas concerned, entailing the abandonment of a large part of the area sown and therefore of production, as well as its replacement by other crops, and thus provoking a large reduction in the quantity of cotton which can be processed by the ginning industry. Likewise, both the European Parliament and the European Economic and Social Committee are opposed to the percentages of aid adopted by the Community legislature and have pointed out the unsuitability of the measures to attain the stated objectives.

42 The applicants argue that the abovementioned forecasts and the absolute nature of the causal link between the contested provisions and the losses which they suffered are confirmed by the facts. In that regard, the 2007 report shows that the reduction in the volume of cotton produced in Spain following the adoption of the contested provisions caused very large losses to the ginning industry, the sales volume of which dropped significantly for want of raw material. The effect of such reduction is further aggravated by the fact that the industry is only able to obtain supplies of raw material, that is to say raw cotton, through local production. The extent of the drop in sales

cannot, moreover, be associated to any other variable factor generally regarded as determining agricultural production.

43 The applicants make clear that the application of the contested provisions during the 2006/07 marketing campaign has a negative effect not only on the quantities of cotton they gin, but also on the sale price obtained for cotton fibre. Moreover, the reduction in the volume of fibre produced, resulting from the change in the regulations, could have negative repercussions on the competitive position of ginning undertakings during marketing campaigns to come, since the market entry of new competitors from non-member countries has been facilitated.

44 It is also clear from the 2007 report that the effects of the new scheme were even worse for the 2007/08 marketing campaign, since it was possible that the applicants might not be able to cope financially with another campaign under the new aid scheme in the cotton sector and that they might be driven into insolvency or closure.

45 In their reply, the applicants maintain that, contrary to the defendant institutions' contentions, the 2007 report and the expert reports are not based on mere assumptions but on actual data, confirmed by the impact study carried out by the Commission's services in 2007 and based on the ginning undertakings 'financial statements, which establish the existence of actual damage produced by the change in regulations. That damage was estimated from a comparison of the actual results obtained under the two schemes, an approach which is, in the experts' view, correct. The defendant institutions' very general criticisms of the relevance and conclusions of those reports reveal that they did not take the trouble to examine them carefully.

46 The Council and the Commission submit, in essence, that the condition requiring the existence of a causal link between the unlawful act committed by the Council in the adoption of the contested regulation and the losses alleged is not satisfied in this case. They contend, in particular, that the applicants confine themselves to asserting

that the losses which they allegedly suffered were the result of the application of the contested provisions. However, the evidence which the applicants adduced cannot lead to the conclusion that they have discharged the burden of proof which rests on them. In that regard, the submissions drawn from the 2007 report and the expert reports, which are based on an evaluation of the volume of cotton which would have been produced if the cotton support scheme introduced by the contested regulation had not been reformed, are irrelevant. The applicants should have relied on the difference between, first, the contested regulation's effects and, second, the effects of a regulation reforming the support scheme for cotton which is not vitiated by error of law, such as that which the Council intends to adopt as soon as possible.

Findings of the Court

47 As regards the condition relating to the existence of a causal link between the conduct alleged and the damage pleaded, it is settled case-law that the alleged loss must be a sufficiently direct consequence of the conduct complained of and such causal link must be the determining cause of the loss (see, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 55; and the judgment of 19 July 2007 in Case T-360/04 *FG Marine* v *Commission*, not published in the ECR, paragraph 50). The burden of proof of such a casual link rests on the applicants (see Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25, and Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265, paragraph 41 and the case-law cited).

48 In order to determine the harm attributable to a wrongful act of a Community institution, account must be taken of the effects of the failure which caused liability to be incurred and not of those of the measure of which it forms part, provided that the institution could or should have adopted a measure having the same effect without

breaching any rule of law. In other words, the analysis of the causal link cannot start from the incorrect premiss that, in the absence of unlawful conduct, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful act and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

49 The Court must therefore consider whether the unlawful act impugned in this case is the immediate cause of the damage alleged (see, to that effect, *Finsider and Others* v *Commission*, paragraph 28) to establish the existence of a direct relationship of cause and effect between the conduct of which the Community is accused and the damage complained of (see, to that effect, Case 36/62 *Société des Aciéries du Temple* v *High Authority* [1963] ECR 289, 298 and *Finsider and Others* v *Commission*, paragraphs 41 and 50).

50 As regards the unlawful conduct in this case, the applicants, as they confirmed at the hearing in reply to a question put by the Court, identify the operative event which gave rise to the losses they claim to have suffered exclusively as the unlawful act committed by the Council in adopting the contested regulation, namely the infringement of the principle of proportionality as established by the Court in *Spain* v *Council*.

51 In that regard, it is important to recall that the Court, in *Spain* v *Council*, held that the contested provisions should be annulled on the ground that the principle of proportionality had been infringed.

52 More precisely, the Court noted that it was common ground that the adoption of the contested provisions had not been preceded by a Commission study assessing the

probable socio-economic effects of the proposed reform in the cotton sector, whereas such studies had been carried out in connection with the reform of support schemes in some other sectors, such as the tobacco sector (paragraph 103 of the judgment). The question therefore arose of the bases on which the amount of the specific aid for cotton had been determined, and consequently of whether, on those bases, the Community legislature had been able, without exceeding its broad discretion, to reach the conclusion that, if set at 35% of the total existing aid in the previous support scheme, that amount would suffice for attaining the objective pursued of ensuring the profitability and hence the continuation of cotton growing.

53 Ruling on compliance with the principle of proportionality, which requires that acts adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question (paragraph 97 of the judgment), the Court decided that the Community institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures and on which the exercise of their discretion depended (paragraph 123 of the judgment). However, in that case, first, certain labour costs had not been taken into consideration for the purposes of the comparative study of the foreseeable profitability of cotton growing under the support scheme, an analysis which had been used as the basis of the determination of the amount of the specific aid for cotton, and, secondly, the potential effects of the reform on the economic situation of the ginning undertakings had not been examined even though it was a basic factor to be taken into account in order to assess the profitability of cotton growing (see paragraphs 124 to 132 of the judgment).

54 The Court concluded therefrom that the Council, the author of the contested regulation, had not shown that in adopting the new cotton support scheme established by that regulation it had actually exercised its discretion, involving the taking into consideration of all the relevant factors and circumstances of the case, including all the labour costs linked to cotton growing and the viability of the ginning undertakings, which it was necessary to take into account for assessing the profitability of that crop

(paragraph 133 of the judgment). In the Court's view, it followed that the information submitted by the Community institutions did not enable it to ascertain whether the Community legislature had been able, without exceeding the bounds of the broad discretion it enjoys in the matter, to reach the conclusion that fixing the amount of the specific aid for cotton at 35% of the total existing aid under the previous support scheme would have sufficed to guarantee the objective set out in recital 5 in the preamble to the contested regulation, which was to ensure the profitability and hence the continuation of that crop, an objective reflecting that laid down in paragraph 2 of Protocol 4 (paragraph 134 of the judgment). The Court therefore concluded that the principle of proportionality had been infringed (paragraph 135 of the judgment).

55 It is in the light of those points that it is appropriate to consider whether the applicants have adduced any evidence or indication of a causal link between the unlawful act committed in adopting the contested regulation and the various heads of loss pleaded.

— The causal link between the infringement of the principle of proportionality which vitiated the contested regulation and the loss arising from the reduction in cotton production and the subsequent decrease in the expected income of the ginning undertakings during the 2006/07 marketing campaign

56 It is clear from the arguments developed by the applicants, both in their application and in their reply, as well as in the reports and the expert reports they submitted in their support, that their examination consists in showing that there is a link between the decrease in the volume of cotton sales during the 2006/07 marketing campaign and the entry into force of the contested regulation and not between that decrease and the unlawful act committed by the Council in adopting that regulation.

57 As regards, first of all, the 2007 report, it consists, as is clear from its subject-matter, of a description of the 'effects of the reform of the support scheme for cotton on Spanish production'. The explanations set out in that report are, as is clear from the wording of its various sections, devoted either to the examination of the 'effects of the reform on the incentives to grow cotton', or the 'quantification of the effects of the

reform on Spanish production'. It must also be noted that that evaluation covers principally the overall effects of the transition from a support scheme linked exclusively to cotton production to a scheme of decoupled aid of 65% of that production.

58 As for the expert reports, they seek to evaluate, in their first part, the impact of the reform on the whole ginning sector and, in their second part, the amount of loss suffered by each of the applicants by reference to the three earlier marketing campaigns, during which the previous support scheme for cotton was in effect. The applicants submit, in that regard, that the losses they suffered were calculated in the expert reports 'from the difference between the estimated results for the [2006/07] marketing campaign taking account of the current regulations on aid for cotton (as estimated at the closure of the campaign) and what the undertaking's results would have been on the basis of the previous support scheme (the alternative scenario)'.

59 That evidence cannot establish that the losses alleged are directly connected to the infringement of the principle of proportionality by the Council in adopting the contested regulation. As stated in paragraph 48 above, the analysis of the causal link cannot start from the incorrect premiss that, in the absence of unlawful conduct, the institution would have refrained from acting or would have adopted a contrary measure, but must be undertaken by comparing the situation caused, for the third party concerned, by the wrongful act and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law.

60 In this case, it is clear from the judgment in *Spain* v *Council* that it was not the contested provisions themselves, but the failure to take account of all the relevant factors and circumstances, in particular by carrying out a study of the reform's impact, before their adoption which was criticised from the point of view of an infringement of the principle of proportionality. The result is that there is no causal link between any decrease in income due solely to the reform and the unlawful act found by the Court, since that act casts no doubt on the decision to undertake such a reform. It was therefore for the applicants to provide evidence to show that the rates of coupled and decoupled aid adopted in the 2004 reform, namely 35% and 65%, respectively, which

caused the losses they allege, would have been different if the Community institutions had, in accordance with that judgment, found all the relevant data (impact on cotton production, labour costs linked to cotton growing and the effect of the new scheme on the ginning sector).

61 However, the applicants have not shown that, in the absence of the unlawful act found by the Court in *Spain* v *Council*, the contested regulation would not have been adopted or would necessarily have been different in content. In that regard, it is important to recall that, as is clear from its statement of reasons, the contested regulation and particularly the Chapter 10a which it inserted in Regulation 1782/2003 forms part of the reform of the common agricultural policy initiated by Regulation No 1782/2003, the purpose of which is to substitute a policy of supporting prices and production for a policy of direct support for farmers' incomes and one of the essential elements of which is the decoupling of direct support for producers and the introduction of a single payment scheme (see recital 1 in its preamble). Since the transition to a scheme of aid progressively decoupled from production is at the heart of the reform of the common agricultural policy, the applicants cannot, for the purpose of these proceedings, refer to the support scheme for production which existed before the contested regulation was adopted.

62 It is also important to point out that, when the present proceedings were brought, the Council had not yet adopted the new regulation and that it was therefore, at that stage, impossible to prejudge the content of the provisions reforming the support scheme for cotton which would be adopted following, and in conformity with, the judgment in *Spain* v *Council*. In those circumstances, it was for the applicants to adduce concrete evidence establishing with certainty that the future regulation would, in the light of the obligation to take into consideration all the relevant factors and circumstances pertaining to the specific situation of the cotton sector, including all the elements necessary to assess the profitability of that crop, provide for a system of support for cotton producers different from that envisaged by the contested regulation.

63 In other words, it was for them to show that, by adopting a new scheme in compliance not only with the law by carrying out a study of the reform's impact, but also with the objectives underlying the reform of the common agricultural policy, the Council was

inevitably led to adopt a system and rate of decoupling aid to producers different from those provided for by the contested provisions.

64 However, not only have the applicants failed to adduce such evidence, but it is clear from the impact study, carried out by the Commission's services during 2007 in conformity with the judgment in *Spain* v *Council*, that, among the three strategic options envisaged, namely 'support for production' ('pre-reform scenario'), 'total decoupling' and 'quasi-total decoupling' ('scenario 2004'), it is the latter which offers the better means of attaining the various objectives of the reform, in that it satisfies the conditions stated in Protocol 4 and is in keeping with the process of reform of the common agricultural policy.

65 To the same effect, the new proposal for a regulation submitted by the Commission and dated 9 November 2007 states that the studies carried out conclude that the percentages of 35% of aid coupled to production and of 65% of aid decoupled from production should be maintained.

66 Finally, the new regulation adopted following *Spain* v *Council*, namely Council Regulation (EC) No 637/2008 of 23 June 2008 amending Regulation (EC) No 1782/2003 and establishing national restructuring programmes for the cotton sector (OJ 2008 L 178, p. 1) retains those same percentages of coupled and decoupled aid (see recitals 9 and 10 in its preamble).

67 Nor can the fact raised by the applicants at the hearing that Regulation No 637/2008 contains provisions that are apparently more favourable to ginning undertakings than those laid down by the contested regulation prove that there is a sufficiently direct causal link between the unlawful act and the losses alleged, since it is not established

that the new provisions contained in that regulation, which are intended to help the cotton sector to stabilise in the new legal and market context, are necessarily the result of the various impact studies carried out by the Commission's services in conformity with the judgment in *Spain* v *Council*. Indeed, it does not follow at all from the conclusions in those studies (see paragraph 5 of the summary of the above-cited impact study) or from the statement of reasons in Regulation No 637/2008 (see recitals 16 to 24 in its preamble) that the insertion of those provisions was made following the taking into consideration, pursuant to the judgment in *Spain* v *Council*, of all the relevant factors and circumstances.

— The causal link between the infringement of the principle of proportionality which vitiated the contested regulation and the legal and financial advisers' charges

68 As regards losses consisting in the 'costs of legal and financial advice services' and, as the case may be, provisions for depreciation and plant and equipment, the applicants have failed to state to what extent those charges for advice incurred 'following the adoption of the contested regulation', assuming that they were actually incurred, were directly linked with the unlawful act found by the Court in *Spain* v *Council*.

69 Indeed, in reply to a question put by the Court at the hearing, the applicants stated that the charges in question related in fact to charges incurred for the purposes of these proceedings. However, the costs incurred in relation to judicial review proceedings before the Community judicature must be regarded as covered by the decisions given on costs, under the specific procedural rules applicable to that type of

expenditure, in the decisions bringing the proceedings to an end and on conclusion of the special proceedings provided for in cases where the amount of the costs is challenged. Those proceedings exclude any claim for the same sums, or sums expended for the same purposes, in connection with proceedings alleging non-contractual liability of the Community, including those incurred by parties who, having been unsuccessful, have had to pay the costs.

70 It follows from all the foregoing considerations that the applicants have not been able to establish that the losses they suffered are connected, by reason of a relationship of cause and effect, with the infringement of the principle of proportionality which vitiated the contested regulation.

71 Therefore, the actions must be dismissed as unfounded, without there being any need to examine whether the other conditions required for establishing the Community's non-contractual liability are satisfied in the present case.

Costs

72 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since

the applicants have been unsuccessful and the Council and Commission have applied for costs, the applicants must be ordered to bear their own costs and to pay those of the Council and Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Joins Cases T-252/07, T-271/07 and T-272/07 for the purposes of judgment;

2. Dismisses the actions;

3. Orders Sungro, SA, Eurosemillas, SA, and Surcotton, SA to bear their own costs and to pay, jointly and severally, those incurred by the Council of the European Union and by the European Commission. Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 20 January 2010.

[Signatures]