Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 18 October 2012 [1]

Case C-460/09 P

Inalca SpA - Industria Alimentari Carni Cremonini SpA
v

European Commission

(Appeals — Non-contractual liability of the European Union — Limitation period — Point from which time starts to run)

I – Introduction

1. By their appeal, Inalca SpA – Industria Alimentari Carni ('Inalca') and Cremonini SpA ('Cremonini') seek the setting aside of the order of 4 September 2009 in Case T-174/06 *Inalca and Cremonini* v *Commission* ('the order under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') dismissed their action for damages in respect of loss which they had purportedly suffered following the communication to the Italian authorities on 6 July 1998, by the Commission of the European Communities, of the findings of an investigation implicating them ('the Commission's letter of 6 July 1998'). [2]

2. It should be emphasised that Inalca and Cremonini claim – without being contradicted on this point by the Commission – that, at the end of the national procedures instituted following the Commission's letter, they were cleared of any suspicion. In 2006, the Commission therefore closed the recovery procedure which was being conducted against Inalca and Cremonini in connection with the information set out in the Commission's letter of 6 July 1998.

3. In the present case, the Court of Justice is called upon, inter alia, to rule on the limitation period applicable to actions to establish the non-contractual liability of the European Union and, in particular, on the criteria for establishing the point at which, in the circumstances of the present case, time began to run for the purposes of that limitation period.

II – The facts and the national and Community procedures

4. Inalca and Cremonini form part of a group of companies active in the production and distribution of goods for restaurant and catering services, as well as in the provision of those services.

1 — Original language: French.

2 — The inquiry was conducted by the Commission's Unit for the Coordination of Fraud Prevention (UCLAF) in order to ascertain whether certain refunds for beef and veal exported to Jordan were lawful.

5. Following an investigation carried out in Jordan in February and March 1998 in connection with the export refund system for agricultural products, the Commission informed the Italian authorities by letter of 6 July 1998 that, out of a total of 37 978 tonnes of beef and veal exported outside the European Community without any customs declaration for placing the meat on the Jordanian market, 2 272 tonnes had been exported from Italy. In the letter, the Commission called upon the Italian authorities to find out the name of the exporter in order to commence procedures for the recovery of export refunds and, to the extent that aiding and abetting could be established, criminal proceedings.

6. By letter of 15 January 1999, the competent Italian authorities notified Inalca and Cremonini of decisions to recover refunds relating to the exports at issue ('the recovery decisions of 15 January 1999').[3] Inalca and Cremonini launched administrative appeals against those decisions, which were dismissed by decisions of 7 March 2000.

7. On 16 February 1999, the Italian authorities informed the competent Italian judicial authority of the findings of the Commission investigation, which led to the commencement of criminal proceedings against the legal representatives of Inalca and Cremonini.

8. On 30 November 1999, Inalca and Cremonini took out two insurance policies guaranteeing payment (*polizze fideiussorie*) in order to bring about the suspension of the procedure for the recovery of sums to be repaid.

9. The complaint on which the criminal investigation was based was withdrawn on 18 December 2002. By civil judgment of 16 January 2004, it was held that the charges against Inalca upon which the recovery decision of 15 January 1999 rested were unfounded and that Inalca was not liable to pay the sum of which reimbursement was claimed. By civil judgment handed down on 27 April 2005, similar findings were made in favour of Cremonini.

10. By letters dated 22 and 23 March 2004 respectively, the Italian authorities granted Inalca's application for the withdrawal of the recovery decision of 15 January 1999 against it and the insurance policy guaranteeing payment was cancelled. Similarly, by letters dated 22 and 23 December 2004 respectively, Cremonini's application for withdrawal of the recovery decision of 15 January 1999 against it was granted and the insurance policy guaranteeing payment which Cremonini had taken out was cancelled

11. By letter of 27 January 2005, Inalca called upon the Commission to compensate it for the loss which it purported to have suffered as a result of the investigation launched by the Commission and the Commission's communication to the Italian authorities of the findings of that investigation. By letter of 15 April 2005, the Commission[4] informed Inalca that it could not allow its claim for damages because any right to compensation would in any event be time-barred pursuant to Article 46 of the Statute of the Court of Justice.

3 — The decisions mention Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13), paragraph 1 of which provides: '[t]he Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to: – satisfy themselves that the transactions financed by the Fund are actually carried out and are executed correctly; – prevent and deal with irregularities; – recover sums lost as a result of irregularities or negligence ...'. Under paragraph 2 of Article 8, '[t]he Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures'.

4 — The letter was sent by the Director-General of the European Anti-Fraud Office (OLAF), the legal successor of UCLAF.

12. By Decision No 2006/678/EC of 3 October 2006[5] ('the Commission decision of 3 October 2006'), the Commission withdrew – from the list of notifications provided for in Articles 3 and 5 of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field, and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11) – the irregularities in relation to export refunds on beef and veal exported to Jordan, notified to the Italian Republic.

13. By letter of 9 March 2006, Inalca and Cremonini claimed compensation from the Commission for the losses which they had suffered, assessed at EUR 2 861 000 in total. The Commission did not allow that claim.

III – The action before the General Court and the order under appeal

14. By document lodged at the Registry of the General Court on 27 June 2006, Inalca and Cremonini brought an action to establish non-contractual liability on the part of the Community and seeking an order requiring the Commission to compensate the losses purportedly suffered, assessed at EUR 2 861 000, and to pay compensatory interest thereon as well as default interest.

15. By separate document dated 18 September 2006, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Court's Rules of Procedure, contending that the action was inadmissible in that it was time-barred under Article 46 of the Statute of the Court of Justice.

16. On the issue of admissibility, the General Court pointed out in paragraph 46 of the order under appeal that time for the purposes of the limitation period for bringing an action against the Community to establish non-contractual liability begins to run when all the pre-conditions for the existence of an obligation to make good the damage are satisfied and, in particular, once the damage to be made good has materialised. In paragraph 47 of the order under appeal, the General Court pointed out that, in cases where the Community's liability stems from a legislative measure, the limitation period begins to run as soon as the injurious effects of the measure have come about. The Court stated that, in disputes arising from individual measures, as in the present case, the limitation period does not begin until the damage has actually materialised. It concluded in paragraph 49 of the order under appeal that, in order to identify the precise time at which the purported injurious effects materialised vis-à-vis Inalca and Cremonini, it was necessary to examine first the material damage, and then the non-material damage, in respect of which Inalca and Cremonini claimed compensation.

17. As regards the material damage, the General Court first of all found, in paragraph 51 of the order under appeal, that the loss linked to the taking out of payment guarantee policies with an insurance company came about with certainty on 30 November 1999, the date on which Inalca and Cremonini took out those policies. The Court accordingly rejected the argument put forward by Inalca and Cremonini that the injurious effects of the letter at issue only became certain when the Commission's decision of 3 October 2006 was adopted. The Court nevertheless stated, in paragraphs 59 and 64 of the order under appeal, that the damage consisting in the expense of taking out the insurance policies was ongoing in nature and that the action for damages in respect of this loss was admissible in so far as it related to contracts renewed after 27 June 2001.

5 — Commission Decision on the financial treatment to be applied, in the context of clearance of expenditure financed by the European Agricultural Guidance Fund, Guarantee Section, in certain cases of irregularity by operators (OJ 2006 L 278, p. 24). See p. 31 of that decision.

18. Next, as regards the expenses incurred for legal advice and assistance and the staff costs entailed for the management of the files in question, the General Court found, in paragraphs 71 and 73 of the order under appeal, that the loss constituted by those expenses had been instantaneous and that, consequently, the action for damages was time-barred in so far as it related to them.

19. Lastly, as regards the claim for compensation of the damage purportedly sustained in the form of loss of profits because of the reduction in financial resources attributable to payment of the premiums for the insurance policies guaranteeing payment and the cost of legal advice and assistance and staff costs, the General Court held, in paragraph 74 of the order under appeal, that that claim lacked the necessary precision and had therefore to be dismissed as inadmissible.

20. As regards non-material damage, the General Court held, in paragraph 77 of the order under appeal, that the action was time-barred in so far as it related to such damage, since the purported damage had materialised in 1999 and 2000, when the procedures were commenced, that is to say, more than five years before the action was brought. In paragraph 78 of the order under appeal, the Court rejected the argument put forward by Inalca and Cremonini to the effect that that damage was ongoing in nature and had continued until delivery of the judgment of 27 April 2005. The Court added, in paragraph 79 of the order, that, in any event, Inalca and Cremonini had done no more than allege damage to their commercial reputation, without providing the slightest indication of what exactly that meant. The Court concluded, in paragraph 81 of the order under appeal, that the action was admissible solely in so far as it sought compensation for the loss arising from payment of the premiums linked to the insurance policies guaranteeing payment after 27 June 2001.

21. As to the substance, the General Court first referred to settled case-law according to which, in order for the European Union to incur non-contractual liability for the purposes of the second paragraph of Article 288 EC, a number of conditions must be satisfied: the conduct imputed to the institution must be unlawful; the damage must be real; and there must be a causal link between the conduct alleged and the damage in question. The Court went on to state, in paragraph 85 of the order under appeal, that, since one of the three pre-conditions for Community liability was not satisfied, the claims for damages had to be dismissed without there being any need to consider whether the other two conditions were satisfied.

22. In paragraph 90 of the order under appeal, the General Court found that, without it being necessary to rule on the question whether the harm caused by the recovery decisions of 15 January 1999 could be imputed to the Community, the harm arising from the taking out of the payment guarantee insurance policies had not been directly caused by the Commission's letter of 6 July 1998.

23. In the light of the above considerations, the General Court held, in paragraph 94 of the order under appeal, that, in so far as it was admissible, the claim for damages brought by Inalca and Cremonini fell to be dismissed as clearly lacking any foundation in law.

IV – The appeal and the cross-appeal

24. By their appeal, Inalca and Cremonini claim that the Court of Justice should set aside the order under appeal, refer the case back to the General Court and direct the Commission to pay the costs of the present proceedings as well as those incurred in relation to Case T-174/06. Inalca and Cremonini rely on seven grounds of appeal.

25. In its defence, the Commission addresses the seven grounds of appeal.

26. In addition, the Commission makes a cross-appeal, alleging error of law. In particular, the Commission contends that the Court of Justice should: (i) set aside the order under appeal in so far as it held the action at first instance to be partially admissible; (ii) dispose of the dispute by dismissing the appeal as wholly inadmissible; and (iii) in any event, order Inalca and Cremonini to pay the costs incurred both at first instance and on appeal.

V – Analysis

27. Given its decisive character, it is appropriate first to examine the cross-appeal brought by the Commission.

A – *The Commission's cross-appeal*

1. Arguments of the Commission

28. By its cross-appeal, the Commission calls on the Court of Justice to clarify its case-law relating to the point at which time starts to run for the purposes of the limitation period for claims for damages in cases other than those where liability stems from a legislative measure.

29. The Commission argues, principally, that the General Court erred in law by holding, in paragraphs 46 and 47 of the order under appeal, that, in the present case, the date on which time began for the purposes of the limitation period is the date on which the harmful effects of the measure came about. The Commission points out that a special set of rules has been established for cases where the liability of the European Union stems from a legislative measure. That arrangement can be explained by the special nature of the harm which stems from a legislative measure, which does not produce effects vis-à-vis individuals until afterwards. It does not apply in other cases, particularly those in which liability stems from physical actions or material circumstances.

30. In the alternative, the Commission argues that the General Court erred in law by holding, in paragraph 47 of the order under appeal, that the action for damages before it concerned a dispute relating to individual acts within the meaning of *Holcim (Deutschland)* v *Commission*,[6] since it did not in fact involve any individual measure that produced obligations for its addressee.

31. In the further alternative, the Commission submits that the General Court erred in law by arbitrarily changing the criteria adopted in *Holcim (Deutschland)* v *Commission*. The Commission takes the view that, in the present case, time for the purposes of the limitation period began to run on the date when the harmful event took place, that is to say, 6 July 1998, the date of the Commission's letter, or, at the latest, on the date when Inalca and Cremonini learned about that letter as a result of the recovery decisions of 15 January 1999.[7]

32. Moreover, the Commission observes that, where the damage relied upon is ongoing in nature, an action to establish liability could, in practice, remain open, even for the purposes of obtaining partial compensation, for a very long time, that is to say, until five years have elapsed from the time when the last harmful effects of the act upon which the claim is based were suffered. The limitation period would no longer serve to prevent an action from being brought, but merely to limit the amount of damage for which compensation could be sought to the damage suffered during the five years preceding commencement of the action.

6 — C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 29.

7 — In paragraph 16 of the defence and cross-appeal, the Commission mentions the date 15 July 1999. It seems to me, however, that this is an obvious clerical error and that the date should read 15 January 1999, as in the other passages of the document.

33. Inalca and Cremonini submit that the Court should dismiss the Commission's cross-appeal.

2. Analysis

34. In the cross-appeal, the Court of Justice is called upon to verify whether the General Court was right in holding that time for the purposes of the limitation period started to run from the point identified in the order under appeal.

35. As regards the starting point for the limitation period, it must be recalled that, in accordance with Article 46 of the Statute of the Court of Justice of the European Union, 'proceedings against the European Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto'.

36. The beginning of the five-year limitation period has been defined in case-law with respect to various different situations. Thus, in cases where the liability of the European Union has its origin in a legislative measure, that period of limitation does not begin until the damaging effects of the measure have arisen and, in consequence, not until the time at which the persons concerned were bound to have suffered certain damage. [8] In the case of disputes arising from individual measures, the period of limitation begins as soon as the decision has produced its effects vis-à-vis the persons concerned by it. [9] In other cases, time for the purposes of the limitation period cannot start to run until all the pre-conditions for the obligation to provide compensation for damage are satisfied and, in particular, not until the damage to be made good has materialised. [10]

37. Two remarks must be made, however: one regarding the method of calculating the limitation period and the other about its exact starting point.

38. First of all, as regards the manner of calculating the limitation period, I would observe that, in the order under appeal, the reasoning of the General Court was predicated on the idea that the decisive date for determining whether or not the claim for damages is time-barred is identified by reference to the date on which the action was lodged before it. According to that approach, the date to be taken into account is the date falling five years before the date on which the action is commenced. Since the action was brought on 27 June 2006, the General Court held that the limitation period started on 27 June 2001.

39. However, to adopt such a 'reverse chronology' approach in the present case is not without its dangers. It should be borne in mind that Article 46 of the Statute of the Court of Justice refers, on the contrary, to the normal chronological order, defining the starting point of the limitation period by reference to the date on which the event giving rise to the damage occurred. [11]

8 — See, to that effect, Joined Cases 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 and 282/82 *Birra Wührer and Others* v *Council and Commission* [1984] ECR 3693, paragraph 15, and Case C-51/05 P *Commission* v *Cantina sociale di Dolianova and Others* [2008] ECR I-5341, paragraph 54.

9 — See, to that effect, *Holcim (Deutschland)* v *Commission*, paragraph 30.

10 — See the order of 4 August 1999 in Case T-106/98 *Fratelli Murri* v *Commission* [1999] ECR II-2553, paragraph 25, and the order of 14 September 2005 in Case T-140/04 *Ehcon* v *Commission* [2005] ECR II-3287, paragraph 53, as well as judgment of 28 September 2010 in Case T-247/08 *C-Content* v *Commission*, paragraph 53. On the other hand, the daily loss of interest on the value of the damage does not prevent the limitation period from running. Indeed, since interest is calculated on the value of the damage at the date on which it materialised, the purpose of interest is solely to ensure updated compensation for the damage suffered. It is accordingly not to be confused with the event giving rise to the action, for the purposes of Article 46 of the Statute of the Court of Justice, which constitutes the moment when time for the purposes of the limitation period starts to run (see paragraph 28 of the order in *Fratelli Murri* v *Commission*).

11 — This situation must be distinguished from the situation in Case T-174/00 *Biret International* v *Council* [2002] ECR II-17 (see paragraph 41). In that case, the injurious effects purportedly suffered by the applicant were due to the adoption and retention of a Commission importation embargo. The General Court explained that, where the damage has not been caused immediately, but has recurred on a daily basis over a particular period as a result of an unlawful measure remaining in force, with respect to the date of the event which interrupted the limitation period, the time bar under Article 46 of the Statute of the Court of Justice applies to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods. That is not the case here, however.

40. It is therefore important to identify the act or the event, attributable to an institution of the European Union, that is capable of making time begin to run for the purposes of the limitation period. In this regard, I would make the following observations.

41. The Commission argues that, in the present case, time for the purposes of the limitation period began to run on the date on which the harmful event occurred, that is to say, with effect from the Commission's letter of 6 July 1998, or, in any event, with effect from the date on which Inalca and Cremonini learned of that letter, that is to say, the date of the recovery decisions of 15 January 1999.

42. According to the General Court's presentation of the facts, the date of the Commission's letter of 6 July 1998 seems to be the first date on which the Commission acted in the present matter.

43. The injurious effect – acknowledged for the sake of argument – can in fact be linked to the Commission's letter of 6 July 1998. That letter, however, is neither a legislative measure nor an individual measure; nor, moreover, is it an actionable measure. The Court of Justice has already had occasion to analyse this type of document in *Nutra* v *Commission*.[12] It clearly stated that such documents fall within the sphere of a particular form of cooperation between the Commission and a Member State. That form of cooperation could be described as a recommendation from the Commission to the Member State which then becomes a binding obligation upon the economic operators concerned, identified specifically through the adoption of a national measure.

44. Accordingly, whilst the Commission's letter of 6 July 1998 was certainly at the origin of the damage relied upon by Inalca and Cremonini, the fact nevertheless remains that, given the nature of that document and its incompleteness, it could not, by itself, have caused time to start running in this case for the purposes of the limitation period. The letter necessarily had to be followed up by other, more specific measures – in the circumstances, the recovery decisions of 15 January 1999. Any actual harm which materialised would have been caused by those decisions, in so far as they imposed an obligation to refund money and identified Inalca and Cremonini. From the time they received those decisions, Inalca and Cremonini were fully informed of the situation and of the possible financial consequences. The injurious effect of the Commission's letter of 6 July 1998 did not actually materialise until the legal position of Inalca and Cremonini changed after they received the recovery decisions of 15 January 1999. Accordingly, in the present case, the date on which the recovery decisions of 15 January 1999 were received should be regarded as the starting date for the limitation period relating to the liability of the European Union.

45. That being so, the limitation period – which began in January 1999 – expired five years later, in January 2004. The purpose of that time-limit is to fix in advance a period of time during which the liability of the European Union may be invoked. Anyone wishing to postulate in pleadings the liability of the European Union on the basis of the Commission's letter of 6 July 1998, which was followed up by the recovery decisions of 15 January 1999 adopted by the Italian authorities, had to act within five years of the receipt of those decisions. The only effective way to interrupt the limitation period was to bring proceedings: Article 340 TFEU does not prevent the Court from being asked to declare the European Union in principle liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed.[13]

46. Consequently, the starting point of the limitation period must be identified, in this case, as the date on which Inalca and Cremonini became aware of the respective recovery decisions of 15 January 1999.

12 — C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraph 30.

13 — See Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *EEC* [1976] ECR 711, paragraph 6, and Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49, paragraph 14, and the order of the Court of First Instance of 14 December 2005 in Case T-369/03 *Arizona Chemical and Others* v *Commission*, ECR II-5839, paragraph 106.

47. Now, as I have already mentioned, the five-year limitation period, which began in January 1999 when the recovery decisions of 15 January 1999 were received, expired in January 2004. Consequently, the action before the General Court, which was brought on 27 June 2006, must be regarded as out of time.

48. The Commission's cross-appeal should therefore be upheld on this point and the remainder dismissed, since the General Court erred in finding, in paragraphs 46 and 47 of the order under appeal, that time for the purposes of the limitation period in the present case did not begin to run until the harm arising from the Commission's letter of 6 July 1998 had actually materialised, and given that the General Court categorised the annual renewal of the payment guarantee insurance policies as separate harmful events capable of extending the limitation period.

49. It follows that the General Court also erred, in paragraph 75 of the order under appeal, in ruling the action partially admissible.

50. In the light of the foregoing, I propose that the Court of Justice should:

— ruling on the cross-appeal, set aside the order under appeal in so far as it declared that the action at first instance was partially admissible, and

— dismiss the action at first instance as wholly inadmissible.

B – *The first six grounds of appeal for the main appeal*

51. Inalca and Cremonini put forward grounds of appeal alleging variously: the grounds stated for the order under appeal are contradictory; inconsistency with Community case-law; infringement of Article 44(1)(c) of the Rules of Procedure of the General Court; distortion of the arguments raised; and error of law.

52. In so far as I propose that the Court of Justice should uphold the Commission's cross appeal and dismiss the action as wholly inadmissible, in that it was brought out of time, it is no longer necessary for the first six grounds for the main appeal to be examined in the judgment.

53. It is therefore only briefly, and for the sake of completeness, that I shall examine them here. Furthermore, since the second, third and fourth grounds of appeal relate to damage linked to loss of profits and to non-material damage, they should be considered together.

1. First ground of appeal

54. By the first ground of appeal, Inalca and Cremonini allege that the grounds stated for the order under appeal are contradictory and that the order is inconsistent with Community case-law as regards the distinction between, on the one hand, the procedural criterion relating to the point at which time starts to run for the purposes of bringing proceedings and, on the other, verification that the pre-conditions for liability have been satisfied.

55. According to Inalca and Cremonini, the General Court erred in failing to take into account, in paragraph 55 of the order under appeal, the Commission's decision of 3 October 2006. Until that decision was adopted, in fact, Inalca and Cremonini had been in a state of legal uncertainty as to the existence and amount of the harm suffered, which only materialised definitively in 2006. Inalca and

Cremonini argue that the General Court also failed to distinguish between the procedural criterion relating to the point at which time starts to run for the purposes of bringing proceedings and the question whether the conditions for liability have been satisfied, and made the mistake, in paragraph 55 of the order under appeal, of basing its reasoning upon that confusion of the two factors.

56. According to Inalca and Cremonini, the General Court should have decided on the date of 3 October 2006, the date on which the Commission adopted the decision closing the procedure.

57. Inalca and Cremonini accordingly maintain that time for the purposes of the limitation period started to run well *after* the damage had materialised.

58. However, that analysis must be rejected for a number of reasons.

59. First of all, it emerges from the written pleadings of Inalca and Cremonini that they had suffered damage well before the Commission's decision of 3 October 2006. They mention, by way of example, taking out the insurance policies guaranteeing payment, which they did in 1999, entailing the payment of premiums on the dates specified in those policies. It cannot validly be argued in this connection that, notwithstanding the existence of harm (assuming that there was harm), the limitation period did not begin until seven years later, in 2006. The relevant date cannot, therefore, be the date which Inalca and Cremonini suggest.

60. Moreover, time for the purposes of the limitation period does not begin to run from the moment when the measure which caused the damage is removed from the legal system. That is what the Court pointed out in *Holcim (Deutschland)* v *Commission* [14] in connection with a decision annulled by one of the Courts of the European Union, holding that it was irrelevant, as regards the starting point of the period of limitation, that the unlawful conduct on the part of the European Union had been established by a ruling of the General Court.

2. Second ground of appeal

61. Inalca and Cremonini submit, as regards the time-barring of their actions in relation to the costs which they had incurred for legal advice and assistance and for staff, that the grounds stated for the order under appeal are clearly contradictory and that the General Court failed to respect settled case-law.

62. That ground of appeal must be rejected. The General Court was right, in paragraph 71 of the order under appeal, in categorising as instantaneous the loss corresponding to the costs of legal advice and assistance and the staff costs which Inalca and Cremonini had been caused to incur and in drawing the inference that, in relation to those costs, the action had therefore been brought out of time. Inalca and Cremonini are confusing the limitation period for bringing an action and the occurrence of the damage. If the Court of Justice accepts my analysis of the point from which time starts to run for the purposes of the limitation period, it would follow that the action for damages should have been brought by January 2004 at the latest in relation also to the above loss. However, that was not done. [15]

14 — Paragraph 31.

15 — Even if that claim had been admissible, I would hesitate to admit the possibility of requiring the Commission to bear the legal costs relating to national procedures, since it is in the context of the national procedure that liability for such costs must be decided (see, in this connection, judgment of 16 July 2009 in Case C-481/07 P *SELEX Sistemi Integrati* v *Commission*, paragraphs 20 to 26.

3. Third, fourth and fifth grounds of appeal

63. The third, fourth and fifth grounds of appeal concern damage purportedly suffered in the form of loss of profits and non-material damage.

64. By their third ground of appeal, Inalca and Cremonini argue that the Court distorted the arguments and infringed Article 44(1)(c) of the Rules of Procedure of the General Court by dismissing as inadmissible their claim for compensation of the harm which they had suffered in the form of loss of profits.

65. Furthermore, according to the fourth ground of appeal, the General Court adopted an approach which was inconsistent with the case-law and relied upon reasoning which obviously lacked logical cohesion as regards the time-barring of the claim for compensation of non-material damage.

66. Lastly, by their fifth ground of appeal, Inalca and Cremonini submit that the General Court infringed Article 44(1)(c) of the Rules of Procedure and misapplied the case-law on non-material damage, and that the grounds stated by the General Court were manifestly illogical in so far as it held that the claim for compensation of non-material damage was, in any event, inadmissible.

67. As regards, first of all, the admissibility of the claims for compensation for the purported loss of profits and non-material damage, the arguments put forward by Inalca and Cremonini are equally incapable of succeeding. The General Court dismissed those claims, in paragraphs 74 and 80 of the order under appeal, on the ground that they were abstract. Because of their lack of precision, those claims failed to comply with Article 44(1)(c) of the Rules of Procedure. It is, however, clear that, according to the case-law, it is necessary to adduce sufficient evidence in support of any claim for compensation for a loss of profits or for non-material damage. For this type of damage also, it falls to the claimants to adduce evidence both of the existence of the harm and of the data on which they base their assessment of that harm. [16]

68. Moreover, as regards the supposedly ongoing nature of the non-material damage relied upon, the General Court was right to rule, in paragraphs 77 and 78 of the order under appeal, that it was not ongoing.

4. Sixth ground of appeal

69. By their sixth ground of appeal, Inalca and Cremonini argue that the General Court erred in law in connection with the causality condition by holding that there was no causal link between the Commission conduct complained of and the purported harm, in the context of the claim for compensation of the loss resulting from payment of the premiums linked to the insurance policies, to the extent that that claim was ruled admissible.

70. The Commission, for its part, contends that the ground of appeal is, in any event, clearly lacking any foundation in law.

71. It must be observed in this connection that the ground of appeal relates to the single part of the action which the General Court held to be admissible. Nevertheless, should the Court of Justice accept my analysis of the point from which time runs for the purposes of the limitation period, the order under appeal will in any event need to be set aside on this point also, further to the cross-appeal brought by the Commission.

16 — See *SELEX Sistemi Integrati* v *Commission*, paragraph 37. It is nevertheless true that, in certain cases concerning staff of the EU institutions, the General Court and the Civil Service Tribunal of the European Union have upheld such claims without always defining in detail the criteria taken into account in performing the calculation.

72. So far as is relevant, I would observe, in connection with the causal link, that the General Court was right to hold in paragraph 92 of the order under appeal, by analogy with *Holcim (Deutschland)* v *Commission*, that the decision whether to take out an insurance policy guaranteeing payment was left entirely to the discretion of Inalca and Cremonini and was not in way rendered compulsory by the adoption of the recovery decisions of 15 January 1999. Had Inalca and Cremonini chosen immediately to reimburse the export subsidies, they would have avoided having to pay the cost of taking out those insurance policies. Furthermore, as the Commission observed at the hearing, had they done so, the sums in question would have been returned to them with interest. The sixth ground of appeal therefore appears to be clearly without any foundation, and I would suggest that it be dismissed also.

73. It follows that none of the grounds of appeal mentioned in point 51 above are well founded. They must therefore, in any event, be rejected as unfounded.

C – *The seventh ground of appeal*

74. By their last ground of appeal, Inalca and Cremonini claim that the Court of Justice should set aside the order under appeal on grounds of breach of the principle that the duration of proceedings must be reasonable.

75. Inalca and Cremonini argue, principally, that, given the factual and procedural origins of the present case, it is not appropriate to apply the case-law of the Court of Justice which, in cases where the duration of proceedings before the General Court is unreasonable, makes the possibility of setting aside the decision at first instance conditional upon showing that the excessive duration of the proceedings had an effect on the outcome of the dispute, without prejudice to the possibility of obtaining compensation for the harm caused by the excessive duration of the proceedings, in accordance with Articles 235 EC and 288 EC.

76. In the alternative, Inalca and Cremonini assert that the excessive duration of the proceedings in any event had an effect on the final outcome of the case.

77. The Commission disputes those arguments in their entirety and contends that they are inadmissible.

78. I would note that no plea alleging that judgment was not given within a reasonable period of time in the proceedings before the General Court was submitted to that Court.[17] Inalca and Cremonini had no opportunity of entering such a plea, since the General Court gave its decision by means of an order, without organising a hearing.

79. I would point out that, whilst the failure of the General Court to give judgment within a reasonable period of time is liable, if established, to give rise to a claim for damages through an action brought by the applicant against the European Union, pursuant to Article 268 TFEU read in conjunction with the second paragraph of Article 340 TFEU, it nevertheless remains the case that Article 113(1) of the Rules of Procedure of the Court of Justice provides that an appeal may only seek to set aside, in whole or in part, the judgment of the General Court and, as the case may be, seek the same form of order, in whole or in part, as that sought at first instance.[18] However, that is not the case here.

17 — See, in that connection, Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraph 195.

18 — Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 205.

80. Nevertheless, if failure on the part of the General Court to give judgment within a reasonable time has an effect on the outcome of the dispute before it, that circumstance may be put forward in an appeal in support of a plea that the judgment be set aside. However, in the present case, in the absence of any indication that the length of the proceedings affected their outcome in any way, the ground of appeal alleging that the proceedings before the General Court did not satisfy the requirements concerning disposal of the case within a reasonable time cannot lead to the setting aside of the order delivered by the General Court and must therefore be dismissed as inadmissible. [19]

81. That being so, the claim made by Inalca and Cremonini, by means of the seventh ground of appeal, that the order under appeal should be set aside must be dismissed as inadmissible.

VI – Conclusion

82. In conclusion, I propose that the Court should:

(1) set aside the order of the Court of First Instance of the European Communities of 4 September 2009 in Case T-174/06 *Inalca and Cremonini* v *Commission* in so far as, in paragraph 75, the action was held to be admissible in so far as it related to the claims for compensation of the material harm corresponding to the loss caused by payment of the premiums linked to the insurance policies guaranteeing payment, due from 27 June 2001 onwards;

(2) dismiss the appeal and the remainder of the cross-appeal;

(3) dismiss in its entirety the action brought before the Court of First Instance of the European Communities by Inalca SpA – Industria Alimentari Carni and Cremonini SpA in Case T-174/06 as inadmissible;

(4) order Inalca SpA – Industria Alimentari Carni and Cremonini SpA to pay, in addition to their own costs, the costs incurred by the European Commission both at first instance and in this appeal.

19 — *FIAMM and Others* v *Council and Commission*, paragraphs 203 and 211.