# JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

13 December 2006 *

In Case T-138/03,

**É. R., O. O., J. R., A. R., B. P. R.,** residing in Vaulx-en-Velin (France),

**T. D., J. D., D. D., V. D.,** residing in Palaiseau (France),

**D. E., É. E.,** residing in Ozoir-la-Ferrière (France),

**C. R.,** residing in Vichy (France), **H. R., M. S. R., I. R., B. R., M. R.,** residing in Pau (France),

**C. S.,** residing in Paris (France),

represented by F. Honnorat, lawyer,

applicants,

* Language of the case: French.

**Council of the European Union,** represented initially by M. Balta and F. Ruggeri Laderchi, and subsequently by M. Balta and F. Florindo Gijón, acting as Agents,

and

**Commission of the European Communities,** represented initially by D. Booss and G. Berscheid, and subsequently by G. Berscheid and T. van Rijn, acting as Agents,

defendants,

APPLICATION for compensation under Article 235 EC and the second paragraph of Article 288 EC for damage allegedly suffered by the applicants as a consequence of the infection and subsequent death of members of their families who developed a new variant of Creutzfeldt-Jakob disease linked to the appearance and spread within Europe of bovine spongiform encephalopathy, for which the Council and the Commission are alleged to be liable,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 February 2006,

gives the following

## Judgment

### Facts

I — *Outbreak of bovine spongiform encephalopathy and new variant Creutzfeldt-Jakob disease, and Community and national measures to combat those diseases*

1 Bovine spongiform encephalopathy ('BSE'), or 'mad cow disease', is one of a group of diseases known as transmissible spongiform encephalopathies, which are char-

acterised by brain degeneration and a sponge-like appearance of the nerve cells under microscopic analysis. These diseases are preceded by a silent incubation period, during which the infected, apparently healthy, subjects show no clinical sign of the disease. The probable origin of BSE was a change in the preparation of cattle feed, which contained proteins derived from sheep infected with scrapie. Transmission of the disease came about mainly through the ingestion of feed, in particular meat-and-bone meal, containing the infective agent that had not been eliminated.

2 BSE was detected for the first time in the United Kingdom in 1986. The epizootic disease developed rapidly in that country, rising from 442 cases at the end of 1987 to a maximum annual incidence of nearly 37 000 cases in 1992. Since the early 1990s cases of BSE have been recorded in other Member States.

3 In July 1988 the United Kingdom decided to prohibit the sale of feed for ruminants containing proteins derived from ruminants and to prohibit breeders from feeding ruminants with such feed (the 'ruminant feed ban' contained in the Bovine Spongiform Encephalopathy Order 1988, SI 1988/1039, and subsequently amended).

4 The Community institutions have also, since July 1989, adopted provisions to deal with BSE. Most of these measures were taken on the basis of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) and Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29), which allow the Commission to take protective measures where there is a risk to animals or to human health.

5 Thus, Commission Decision 89/469/EEC of 28 July 1989 concerning certain protection measures relating to BSE in the United Kingdom (OJ 1989 L 225, p. 51) introduced a number of restrictions on intra-Community trade in bovine animals born in the United Kingdom before July 1988. That decision was amended by Commission Decision 90/59/EEC of 7 February 1990 (OJ 1990 L 41, p. 23), which extended the ban on exporting bovine animals from the United Kingdom to include any bovine animal over the age of six months. Commission Decision 90/261/EEC of 8 June 1990 amending Decision 89/469 and Decision 90/200/EEC concerning additional requirements for some tissues and organs with respect to BSE (OJ 1990 L 46, p. 29) provided that observance of that ban was to be guaranteed by the affixation to the animals of a special mark and by the use of a system of computer records in order to enable animals to be identified. Furthermore, Commission Decision 90/134/EEC of 6 March 1990 (OJ 1990 L 76, p. 23) added BSE to the list of diseases notifiable under Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (OJ 1982 L 378, p. 58).

6 Commission Decision 90/200/EEC of 9 April 1990 concerning additional requirements for some tissues and organs with respect to BSE (OJ 1990 L 105, p. 24) introduced a series of measures designed to limit intra-Community trade between the United Kingdom and other Member States in certain tissues and organs — brain, spinal cord, tonsils, thymus, spleen, intestines — derived from bovine animals aged more than six months at slaughter. It also prohibited sending other tissues and organs for uses other than human consumption, and provided that any bovine animal which showed clinical suspicion of BSE was to be slaughtered separately and its brain was to be examined for evidence of the disease. If BSE was confirmed, the decision required the animal's carcass and offal to be destroyed. Commission Decision 92/290/EEC of 14 May 1992 concerning certain protection measures relating to bovine embryos in respect of BSE in the United Kingdom (OJ 1992 L 152, p. 37) required all the Member States to ensure that no embryos of the bovine species derived from females in which BSE was suspected or confirmed were sent to other Member States. As regards the United Kingdom, that decision prohibited the export of embryos derived from animals born before 18 July 1988 and required the adoption of the measures necessary in order to identify the donor animals.

7 Commission Decision 94/381/EC of 27 June 1994 concerning certain protection measures with regard to BSE and the feeding of mammalian derived protein (OJ 1994 L 172, p. 23) prohibited the feeding of mammalian derived protein to ruminants throughout the Community; however, Member States which enforced a system that made it possible to distinguish between animal protein from ruminant and non-ruminant species could be authorised by the Commission to permit the feeding to ruminants of protein from other mammalian species.

8 In 1995 the Creutzfeldt-Jakob Disease ('CJD') Surveillance Unit in Edinburgh (United Kingdom) identified 10 cases of CJD. This incurable, fatal neurological disease attacks humans and belongs to the family of human spongiform encephalopathies. The cases identified displayed a form that was sufficiently different from classic CJD to be described as new variant CJD ('nvCJD'). The patients were all young (19 to 41 years old, 29 years old on average), they had suffered from the disease for a relatively long period (13 months on average), and their disease was of a clinical type that differed from classic CJD and displayed completely new histological features that were discovered at autopsy.

9 In a statement which it issued on 20 March 1996, the Spongiform Encephalopathy Advisory Committee ('the SEAC'), an independent scientific body which is responsible for advising the United Kingdom Government on BSE, referred to these 10 cases of nvCJD, noting that 'although there [was] no direct evidence of a link ... the most likely explanation at [that stage was] that these cases [were] linked to exposure to BSE before the introduction of the [specified bovine offal] ban in 1989'.

10 On 27 March 1996 the Commission adopted Decision 96/239/EC on emergency measures to protect against BSE (OJ 1996 L 78, p. 47), which prohibited the export of any bovine animal and any meat of bovine animals or products obtained from them from the territory of the United Kingdom to other Member States or third

countries. That decision concerned in particular: (i) live bovine animals, their semen and embryos; (ii) meat of bovine animals slaughtered in the United Kingdom; (iii) products obtained from bovine animals slaughtered in the United Kingdom which were liable to enter the animal feed or human food chain, and materials destined for use in medicinal products, cosmetics or pharmaceutical products; and (iv) mammalian derived meat-and-bone meal.

11 The European Parliament set up a temporary committee of inquiry into BSE on 18 July 1996. On 7 February 1997 that committee adopted a report on alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts. The report pointed to poor management of the BSE crisis by the Commission, the Council and the United Kingdom authorities and criticised the operation of the Community committees responsible for veterinary and animal health matters.

12 Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (OJ 1997 L 216, p. 95) prohibited the use of what was known as 'specified risk material' ('SRM'), namely, first, the skull, including the brain and eyes, tonsils and spinal chord of bovine animals aged over 12 months, and of ovine and caprine animals which were aged over 12 months or had a permanent incisor tooth erupted through the gum and, secondly, the spleens of ovine and caprine animals. From the entry into force of that decision, the use of SRM for any purpose was prohibited, as was the use of the vertebral column of bovine, ovine or caprine animals for the production of mechanically recovered meat. In addition, SRM was to be subject to special treatment with a view to its destruction and was to be incinerated, without prejudice to further action Member States might take in relation to animals slaughtered on their own territory. The date initially laid down for the entry into force of that decision, 1 January 1998, was successively postponed until 30 June 2000.

13 On 29 June 2000, however, the Commission adopted Decision 2000/418/EC regulating the use of material presenting risks as regards transmissible spongiform encephalopathies and amending Decision 94/474/EC (OJ 2000 L 158, p. 76); the latter decision, concerning certain protection measures relating to BSE and repealing Decisions 89/469 and 90/200, had been adopted by the Commission on 27 July 1994 (OJ 1994 L 194, p. 96). Decision 2000/418 repealed and replaced Decision 97/534 and finally regulated the use of SRM, by defining the materials from bovine, ovine and caprine animals that were to be removed and destroyed after 1 October 2000, under a special process designed to ensure that BSE was not transmitted. That decision also prohibited the use of bones of the head and vertebral columns of such animals in certain cases and the use of certain slaughter techniques.

14 On 4 December 2000 the Council adopted Decision 2000/766/EC concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein (OJ 2000 L 306, p. 32), which entered into force on 1 January 2001 and required the Member States to prohibit the feeding of processed animal proteins to farmed animals kept, fattened or bred for the production of food.

15 On 13 September 2001 the Court of Auditors adopted Special Report No 14/2001 on BSE (OJ 2001 C 324, p. 1). In that report the Court of Auditors carried out a review of the BSE measures introduced and implemented by the European Union in order to identify and manage the risk of BSE occurring, being propagated and posing a risk to human and animal health. The Court of Auditors found in particular that the Commission's BSE strategy was generally sound and based on available scientific knowledge, but its effectiveness had been hampered by inadequate implementation by the Member States and by a lack of effective measures available to the Commission to enforce corrective action on Member States.

II — *Particular circumstances of the applicants and proceedings instituted before the French administrative and judicial authorities*

16 The applicants brought this action in their capacity as indirect victims and heirs of five persons who died of nvCJD in France between 1996 and 2002.

17 É. R., O. O., J. R., A. R. and B. P. R. are, respectively, the father, mother and three brothers of H. E. R., who died on 4 January 1996 aged 27 years.

18 T. D., J. D., D. D. and V. D. are, respectively, the mother, brothers and sister of L. D., who died on 4 February 2000 aged 36 years.

19 D. E. and É. E. are the parents of A. E., who died on 25 April 2001 aged 19 years. They are acting also as the statutory representatives of their minor daughter J. E., sister of A. E.

20 C. R. is the widow of F. R., who died on 10 February 2002 aged 36 years. She is acting also as the statutory representative of D. R., their minor child. H. R., M. S. R., I. R., B. R. and M. R. are, respectively, the father, mother and sisters of F. R.

21 C. S. is the widower of S. C. S., who died on 14 December 2002 aged 32 years. He is also acting as statutory representative of their minor children, M. S., S. S. S. and A. S.

22 The applicants have brought actions before the French administrative courts for the award of damages against the authorities of that State for their allegedly unlawful conduct in failing to adopt appropriate measures to prevent the risks presented by BSE. On 5 October 2005 the Tribunal administratif de Paris (Administrative Court, Paris, France) dismissed the applicants' claims, finding that the dates on which the victims were infected could have been prior to May 1988, the time to which the French Republic's failure to act pleaded by the applicants went back. The applicants appealed against those judgments to the Cour administrative d'appel de Paris (Administrative Court of Appeal, Paris). Furthermore, they made a civil party complaint in the context of a criminal investigation conducted by the Vice-President responsible for investigation at the Tribunal de grande instance de Paris (Regional Court, Paris) concerning a charge of manslaughter of the persons infected with nvCJD.

23 Following commitments made by the French Ministry of Health, the Family and People with Disabilities in letters dated 25 February and 7 July 2004, 'solidarity allowances' were granted to the applicants by the French Minister for the Interior in June 2004 and January 2005. Those compensation payments were made in respect of the damage suffered by the victims and their heirs as a result of nvCJD and were awarded following the advice of the Committee for Compensation of Victims of Iatrogenic Creutzfeldt-Jakob Disease following Growth Hormone Treatment, whose remit had been extended to include assessment of the harm suffered by persons infected with nvCJD. The total amount of the compensation payments was EUR 1 431 000.

## Procedure and forms of order sought

24 The applicants brought the present action by application lodged at the Registry of the Court of First Instance on 24 April 2003.

25 By letter lodged at the Registry of the Court of First Instance on 22 May 2003, C. S. applied for legal aid for himself and for his three minor children, on whose behalf he had brought the action as their statutory representative. By order of 9 February 2004 of the President of the Fifth Chamber, the Court of First Instance granted them legal aid.

26 In their pleadings the defendants asked for the present proceedings to be stayed until the outcome was known of the actions for damages brought by the applicants, with the exception of the family of H. E. R., against the French authorities before the courts of that Member State. They stated that those actions were based on the same facts and allegations and related to the same damage as that in the present case. By letter of 25 October 2003, the applicants made known their objection to that request for the proceedings to be stayed. As the applicants had objected to the request and it was not covered by any of the situations provided for in the third paragraph of Article 54 of the Statute of the Court of Justice or in Article 77 of the Rules of Procedure of the Court of First Instance, the Court did not grant the request.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, the Court put some questions to the parties and asked them to produce certain documents. The parties complied with those requests within the time-limit laid down.

28 The parties presented oral argument and their replies to the questions from the Court at the hearing in open court on 16 February 2006.

29 The applicants claim that the Court should:

— declare the action admissible;

— order the Council and the Commission jointly and severally to pay compensation totalling EUR 3 780 733.71, together with compensatory interest at a rate of 10% from the respective dates of death of the persons concerned and default interest from the date on which interlocutory judgment is delivered;

— in any event, reserve EUR 1 in respect of compensation for each case of damage identified in order to preserve the applicants' interest in bringing proceedings;

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

30 The Council and the Commission contend that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the claims as unfounded;

— order the applicants to pay the costs.

**Admissibility**

31 The Commission and the Council, the defendants, rely on three pleas of inadmissibility. The first plea alleges failure to make clear the basic legal and

factual particulars on which the action is based. The second plea alleges failure to exhaust national remedies and a link with national proceedings. The third plea alleges expiry of the limitation period.

I — *The first plea of inadmissibility: failure to make clear the basic legal and factual particulars on which the action is based*

A — *Arguments of the parties*

32 The defendants point out that, under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, every application must state the subject-matter of the dispute and contain a brief statement of the pleas in law on which it is based. An application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct complained of can be identified, the causal link between that conduct and the damage claimed, and the nature and extent of that damage. In the present case, the application does not make it possible to identify unambiguously the unlawful conduct claimed, due in particular to confusion between the unlawful conduct the applicants have alleged against the Council and that alleged against the Commission, and also that which is attributed to the French authorities. Furthermore, according to the Commission, the application lacks particulars as to when the first clinical signs of the disease appeared, which means it is not possible to determine either the date from which the five-year limitation period runs or, on the basis of that date, the relevance for each of the persons who have died of the acts or omissions alleged. The Council also states that the applicants have not adduced any objective evidence establishing a link between the infection of their relatives and the conduct complained of. Lastly, there is no information at all in the application regarding the method of calculation used to quantify the alleged damage, or any supporting documents or objective data that would enable such damage to be assessed.

33 The applicants contend that the objections put forward by the defendants relate to the merits of the applicants' claims and not to the admissibility of the action. They argue that the conduct complained of, the nature and extent of the damage claimed and the causal link identified have been described with sufficient precision.

B — *Findings of the Court*

34 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, every application must state the subject-matter of the dispute and contain a brief statement of the pleas in law on which it is based. In order to guarantee legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (orders in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21). According to settled case-law, in order to satisfy those requirements an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant attributes to the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage which he claims to have suffered, and the nature and extent of that damage (see, to that effect, Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107, and the order in Case T-53/96 *Syndicat des producteurs de viande bovine and Others* v *Commission* [1996] ECR II-1579, paragraph 22).

35 In the present case, the application does meet the abovementioned requirements. First, the applicants set out at length and in detail the actions and failures to act of which they accuse the defendant institutions and the principles which those institutions allegedly infringed (see, in particular, paragraphs 96 to 204 of the application). Second, the applicants quantify very precisely the amounts of

compensation claimed by each of them (see paragraphs 230 to 244 of the application). They also define the 'damage due to infection' which they claim, giving examples of compensation awarded by French courts on that basis (see paragraphs 226 to 228 of the application), and describe the non-material damage which they allege they suffered (see paragraph 229 of the application). Third, the applicants set out the reasons why they consider that there is a causal link between the conduct which they attribute to the Council and the Commission and the damage they consider they have suffered. Thus, they observe that the existence of a link between BSE and nvCJD has been established by medical, scientific and epidemiological arguments (see paragraphs 248 to 254 of the application) and attribute to the defendant institutions responsibility for the infection of their relatives, in particular due to their alleged failures to act in managing the BSE crisis (see paragraphs 256 to 268 of the application).

36 The conclusion must therefore be drawn that the conditions laid down in Article 21 of the Statute of the Court of Justice and in Article 44(1)(c) of the Rules of Procedure of the Court of First Instance are met in this case.

37 This plea of inadmissibility must therefore be dismissed.

II — *The second plea of inadmissibility: failure to exhaust national remedies and a link with national proceedings*

A — *Arguments of the parties*

38 The defendants submit that where national authorities are required to implement Community legislation individuals must use the remedies available before the national courts if those remedies are able to provide protection for their rights (Case

81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 9). They state that actions for damages relating to the same facts and the same damage and seeking the same compensation as in the present case have been brought by the applicants, with the exception of the family of H. E. R., before the Administrative Court, Paris, against the French authorities. The present action is therefore premature and hence inadmissible. There is also a risk of conflicting judgments and the possibility that the applicants may be compensated twice for one and the same instance of damage. In any event, the action is manifestly inadmissible as regards the damage arising both from the measures adopted by the national authorities in the exercise of their powers and from allegedly inadequate monitoring on the part of the Community institutions of the application of Community law by the Member States (order in Case T-201/96 *Smanor and Others* v *Commission* [1997] ECR II-1081, paragraphs 30 and 31).

39 The applicants point out that the Community judicature has exclusive jurisdiction to hear actions seeking compensation for damage attributable to institutions of the European Union. They add that the Court of First Instance has the power to obtain at any time evidence that would be of use to it in reaching its decision, such as documents relating to national proceedings. This ensures that the applicants cannot obtain compensation twice for the same damage.

B — *Findings of the Court*

40 According to settled case-law, the action for damages under Article 235 EC and the second paragraph of Article 288 EC was established as an autonomous remedy with a particular function to fulfil within the system of remedies, whose exercise is subject to conditions imposed in view of its specific objective (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 69). It is correct, however, that an action for damages must be appraised with regard to the entire system for the judicial protection of the individual and its admissibility may thus, in some cases, be subject to the prior

exhaustion of national remedies that are available for obtaining annulment of a decision of a national authority. In order for this to be the case, it is a necessary precondition that those national remedies give effective protection to the individuals concerned and that they are capable of leading to compensation for the damage alleged (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27, and *De Boer Buizen* v *Council and Commission*, paragraph 9).

41 However, this is not the situation in the present case. First, compensation for the damage alleged by the applicants cannot be obtained, even in part, through the annulment of one or more specific measures of a national authority. Second, the action for damages brought by the applicants is based on allegedly unlawful conduct of the Council and the Commission. Given in particular that the Community judicature has exclusive jurisdiction under Article 288 EC to hear actions seeking compensation for damage attributable to the Community, remedies available under national law cannot automatically in this case guarantee effective protection of the applicants' rights, that is to say in particular compensation for all the damage alleged by them (see, to that effect, Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 14; Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 17; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraphs 41 and 42; *Exporteurs in Levende Varkens and Others* v *Commission*, paragraph 72; and Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47, paragraphs 37 and 38).

42 Moreover, it should be noted that the Court has held that, where the same damage is the subject of two actions for compensation, one against a Member State before a national court and the other against the Community before the Community judicature, it may prove necessary, before deciding on the amount of the damage for which the Community will be held liable, to wait until the national court has given judgment on any liability on the part of the Member State, in order to avoid the applicant's being insufficiently or excessively compensated because of the different

assessment of two different courts (see, to that effect, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *EEC Commission* [1967] ECR 245, at 266, and Case 30/66 *Becher* v *Commission* [1967] ECR 285, at 300). In any event, that question does not concern the admissibility of the action brought before the Community judicature, but merely, where relevant, the final decision on the amount of the compensation it should grant.

43 Lastly, as regards the arguments by which the Council and the Commission contend that the alleged damage has arisen from actions by the national authorities in the exercise of their powers and from inadequate monitoring on the part of the Community institutions of the application of Community law by the Member States, suffice it to state that those arguments are not capable of resulting in the inadmissibility of the present action. They should be analysed, if appropriate, as part of the consideration either of the unlawful conduct alleged against the defendants or of the damage claimed by the applicants.

44 The second plea of inadmissibility must therefore also be dismissed.

III — *The third plea of inadmissibility: expiry of the limitation period*

A — *Arguments of the parties*

45 The defendants point out that, under Article 46 of the Statute of the Court of Justice, proceedings against the Community in matters arising from non-contractual liability are to be barred after a period of five years from the occurrence of the event giving

rise thereto. In the present case, that period began to run from the date on which the first symptoms of the disease appeared, the point in time at which the harm suffered personally by the victims and the alleged indirect damage suffered by their relatives arose.

46 The defendants observe that H. E. R. died on 4 January 1996 and that the clinical signs of his disease had already appeared by August 1994. They point out that the probable link between nvCJD and BSE had been revealed by the publication of the SEAC statement of 20 March 1996 and had been widely publicised in the press. They conclude that the action brought by the family of H. E. R. is time-barred by a considerable period. The defendants also express doubts with regard to whether the actions brought by the families of L. D., A. E. and F. R. are out of time, since the precise date on which the signs of the disease from which their relative died first appeared cannot be identified from the application. The burden of proving that those first symptoms did not appear more than five years before the application was lodged lies with the applicants.

47 The applicants contend that the limitation period for bringing an action for damages cannot begin to run from the date on which the first symptoms of the disease appeared. They maintain that the diagnostic criteria for nvCJD can be established with certainty only by findings made post mortem and that the first signs of the disease are an insufficient basis for a presumed diagnosis.

48 The applicants point out that the death of H. E. R. and the subsequent autopsy which confirmed the diagnosis of nvCJD took place before that disease had been officially described by scientific experts, and thus before the identity of the pathogen of BSE and nvCJD was known with a reasonable level of certainty. Indeed, until the adoption of the opinion of the Scientific Steering Committee ('the SSC') of 10 December 1999, H. E. R.'s family did not have the evidence needed in order to ascertain the event that had given rise to the damage sustained. That opinion signalled the existence of a scientific consensus on the identity of the pathogen linking BSE and nvCJD, whereas up to that time the link between the two diseases

was merely a 'plausible hypothesis'. Moreover, the judicial expert report which established the certainty of the diagnosis was not officially notified to H. E. R.'s family until 13 November 2003. As regards the other victims, their medical expert reports show that the diagnosis of nvCJD was not mentioned earlier than five years before the application was lodged.

B — *Findings of the Court*

49 Under Article 46 of the Statute of the Court of Justice, proceedings against the Community in matters arising from non-contractual liability are to be barred after a period of five years from the occurrence of the event giving rise thereto. That period cannot begin, however, before all the requirements governing the obligation to make good the damage are satisfied and, in particular, in cases where liability stems from legislative measures, before the injurious effects of the measures have been produced (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 10, and *Biret et Cie* v *Council*, paragraph 41). Lastly, where the victim could have known only belatedly of the event giving rise to the damage, the limitation period cannot begin for that person before he could have become aware of it (see, to that effect, Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 50).

50 In the present case, contrary to what the defendants contend, it is not appropriate to rely, as against the applicants, on the moment when the first clinical symptoms characteristic of the disease suffered by their relatives appeared as the beginning of the limitation period for their action. First, the injurious effects in question are linked both to the infection with nvCJD and to the death of the persons infected with that disease. Before the victims' deaths, therefore, that damage cannot be regarded as having fully materialised. Secondly, there is no dispute that at the

material time in this case a diagnosis of nvCJD was particularly difficult to establish and could often not be fully confirmed until after the patient's death. The Court holds therefore that in the present case the limitation period is not to begin before the respective dates of the death of each of the victims or, if it is later, of the establishment of a definite diagnosis of nvCJD.

51 So far as the families of L. D., A. E. and F. R. are concerned, the deaths of their relatives infected with nvCJD did not occur earlier than five years before the application was lodged. L. D. died on 4 February 2000, A. E. on 25 April 2001 and F. R. on 10 February 2002. In addition, it is clear from the judicial expert reports drawn up in respect of each of those victims at the request of the Regional Court, Paris, and the Administrative Court, Paris, dated 1 October 2002, 13 April, 20 May and 6 June 2003 and 29 January 2004, that in none of the cases was even a preliminary diagnosis of nvCJD established earlier than five years before the application was lodged.

52 On the other hand, H. E. R. died on 4 January 1996, that is to say, over seven years before the application was lodged in this case. The applicants deny, however, that the action brought by H. E. R.'s family is time-barred, arguing, first, that the judicial expert report which established a definite diagnosis was not officially notified to the family until 13 November 2003 and, second, that a scientific consensus on the identity of the pathogen linking BSE and nvCJD did not exist before the adoption of the SSC opinion of 10 December 1999. These arguments cannot, however, be upheld.

53 First, although the judicial expert report of 2 July 2003, drawn up by two experts at the request of the first investigating judge at the Regional Court, Paris, was not notified to H. E. R.'s parents until 13 November 2003, the fact remains that that report was drafted on the basis of H. E. R.'s medical file. It is clear from that file that on 23 November 1995 a cerebral biopsy indicated a preliminary diagnosis of spongiform encephalopathy in the patient. That diagnosis was supported by further

tests in November 1995. The autopsy on H. E. R.'s brain confirmed that he had been infected with 'Creutzfeldt-Jakob spongiform encephalopathy'. Lastly, it is also clear from the file, and was moreover acknowledged by the applicants at the hearing, that H. E. R.'s family was informed in 1996 of the confirmation of that diagnosis.

54 Secondly, it is generally accepted that it was the SEAC statement of March 1996 which established, on a scientific basis, a probable link between BSE and nvCJD. More particularly, as a result of being broadcast by the media, that statement marked the start of the general public's awareness of the risks associated with BSE and the link between that disease and nvCJD. The information contained in the SEAC statement significantly altered the perception among consumers of the danger which that disease represented for human health (Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraphs 52 and 53, and Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 109). On the other hand, the SSC opinion of 10 December 1999 on the human exposure risk via food with respect to BSE does not appear to have the same significance in the context of scientific research in this field, as it is limited rather to taking stock of further research conducted in order to assess and clarify the risk presented by BSE to human health. In any event, the SSC opinion of 10 December 1999 certainly did not have media coverage and an impact on public opinion comparable to those of the SEAC statement of 1996. Hence, the applicants' view that it was only following the adoption of the SSC opinion of 10 December 1999 that H. E. R.'s family could reasonably have been aware of the probable cause of H. E. R.'s disease should be rejected.

55 In the light of all the above considerations, it must be concluded that, as regards compensation for the damage arising from the infection and death of H. E. R., the present action was brought after the limitation period for bringing proceedings had expired.

56 Consequently, the right of action of É. R., O. O., J. R., A. R. and B. P. R. must be declared time-barred. This third plea of inadmissibility must be dismissed as to the remainder.

**Substance**

57 The applicants' main criticism of the Commission and the Council is that they infringed a higher rule of law protecting individuals, by failing to ensure a high level of health protection for consumers. In the alternative, they contend that in view of the unusual and special nature of the damage in question compensation for that damage should be provided by the Community institutions even if there is no fault on their part.

I — *Non-contractual liability of the Community for unlawful conduct of the defendant institutions*

A — *Arguments of the parties*

58 The applicants contend that the Council and the Commission persistently and deliberately favoured the interests of traders on the market in beef and veal to the detriment of the health of consumers when they assessed and managed the risks linked to BSE. There were wrongful omissions on the part of those institutions in carrying out their duties and obligations in the area of animal and human health and they adopted insufficient, incorrect, inadequate or belated standards and measures to deal with the risks resulting from BSE and nvCJD. The Council and the Commission should therefore be held liable for the infection of members of the applicants' families with nvCJD, but that liability is not exclusive.

59 The defendants point out that, as regards the Community's non-contractual liability, a right to reparation is conferred where three conditions are met: the rule of law infringed must be intended to protect individuals and the breach must be sufficiently

serious; the existence of damage must be established; and, lastly, there must be a direct causal link between the breach which is the responsibility of the Community and the damage sustained by the injured parties (Joined Cases T-94/00, T-110/00 and T-159/00 *Rica Foods and Others* v *Commission* [2002] ECR II-4677, paragraphs 250 and 251, and *Exporteurs in Levende Varkens and Others* v *Commission*, paragraphs 81 and 91). They deny that those three conditions are all met in the present case and state that the burden of proof lies with the applicants.

1. The unlawful conduct alleged against the Council and the Commission

60 The applicants contend that it was first and foremost for the Council and the Commission to adopt appropriate decisions in order to avoid the risks linked to the spread of BSE. They note that, under the third subparagraph of Article 129(1) of the EC Treaty (now, after amendment, the first subparagraph of Article 152(1) EC) and according to settled case-law, health protection requirements must be taken into account by those institutions in the implementation both of the common agricultural policy (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 61) and of the principle of free movement of goods (order in Case T-76/96 R *The National Farmers' Union and Others* v *Commission* [1996] ECR II-815).

61 The applicants accept that, in matters concerning the common agricultural policy, the Community institutions enjoy a broad discretion regarding definition of the objectives to be pursued and choice of the appropriate means of action, and hence when determining the level of risk deemed unacceptable for society. The Community judicature must, however, review whether the exercise of such discretion by those institutions is vitiated by a manifest error or a misuse of powers (Case 98/78 *Racke* [1979] ECR 69, paragraph 5, and Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14).

62 The applicants observe that, under Article 130r(2) of the EC Treaty (now, after amendment, Article 174(2) EC), the precautionary principle is one of the principles on which Community policy on the environment is based. That principle also applies where the Community institutions take, in the framework of the common agricultural policy, measures to protect human health (*United Kingdom* v *Commission*, paragraph 100, and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 64). Where there is scientific uncertainty as to the existence or extent of risks to human health, the Community institutions may take protective measures without having to wait until the reality and the seriousness of those risks become fully apparent (*United Kingdom* v *Commission*, paragraph 99; *National Farmers' Union and Others*, paragraph 63; and Case T-199/96 *Bergaderm and Goupil* v *Commission* [1998] ECR II-2805, paragraph 66).

63 The defendants observe that public health protection measures mainly fall within the competence of the Member States, which are required to adopt all measures regarded as necessary, both on the basis of Article 30 EC, in areas where there has been no harmonisation at Community level, and on the basis of the various safeguard clauses laid down in Community legislation, in areas where there has been harmonisation. The defendants refer in particular in that regard to Directives 89/662 and 90/425. The Member States are also responsible for implementing Community measures and monitoring their application by individuals and undertakings. Only an act or omission which falls solely within the competence of the Community institutions may form the subject of an action for damages against those institutions.

64 The Commission contends furthermore that, even before the precautionary principle was established by case-law in the 1990s, that principle had guided its actions in the management of the 'mad cow crisis'. It notes that the probable link between nvCJD and BSE was not announced until 1996 and that before that time scientists considered that the risk to humans was minimal. However, the

Commission did not restrict itself to measures intended solely to protect animal health, but from 1989 onwards adopted measures in the area of public health. Although those measures may now appear inadequate, the Commission's action should be judged in the light of the imperfect knowledge available at that time.

65 As regards the unlawful conduct specifically alleged against the Council and the Commission, the applicants contend, first, that the defendant institutions committed manifest errors of assessment in managing the risks linked to BSE. Second, they criticise the Council and the Commission for a misuse of powers. Third, they claim infringement of the principles of protection of legitimate expectations and of sound administration.

(a) The complaint alleging manifest errors of assessment in the management of the BSE crisis

66 The applicants contend that the defendants adopted the relevant measures with regard to the risks linked to BSE with significant delay when compared with the measures taken by the United Kingdom authorities, which prohibited the use of meat-and-bone meal in ruminant feed in July 1988.

67 The Commission denies this alleged delay in the adoption of appropriate measures. It points out that the legality of a measure must be assessed on the basis of the factual and legal situation which existed at the time when it was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7) and hence cannot depend on retrospective assessment of its efficacy.

68 First, the applicants criticise the delay in adopting the first Community measures to combat BSE. The first bans on the export of certain live bovine animals from the United Kingdom were not imposed until 28 July 1989, under Decision 89/469. The notification of cases of BSE did not become compulsory until 6 March 1990, under Decision 90/134. Lastly, it was not until 9 April 1990 that Decision 90/200 prohibited the export from the United Kingdom of certain bovine tissues and organs.

69 The Commission replies that it adopted the first measures against BSE only a few months after the publication by the United Kingdom Ministry of Agriculture, Fisheries and Food in February 1989 of the report of the Working Party on BSE (the Southwood Report).

70 Second, the applicants criticise the way in which the defendants managed objective risk factors such as the consumption of meal imported from the United Kingdom or the possibility of recycling the infective agent by the use of processed animal waste in the manufacture of animal feed. They point out that the measures introduced by the United Kingdom authorities in 1988 did not prevent United Kingdom producers from legally exporting such meal to other Member States. However, the Community did not prohibit the feeding of meat-and-bone meal derived from mammalian tissues to ruminants until July 1994, with the adoption of Decision 94/381. The delay in adopting these measures resulted in the development of an epidemic, illustrated by the first five cases of BSE declared in France in 1991. Lastly, the applicants contend that, even after the ban on feeding mammalian derived protein to ruminants, European livestock remained exposed to the risk of the spread of BSE due to cross-contamination in the animal feed manufacture and distribution chains.

71 The Commission points out that in 1989 and 1990 the veterinary committees had not recommended the adoption of Community legislation banning meat-and-bone meal. Faced with the refusal by Member States in 1989 to take measures that went

beyond what the opinions of the scientific committees advocated, the Commission had been forced to relinquish a ban on such meal, but it requested Member States to introduce unilateral bans.

72 Third, the applicants criticise the defendant institutions for their delay in introducing an embargo on all bovine animals and bovine products originating in the United Kingdom. That embargo was not imposed until 27 March 1996, with the adoption of Decision 96/239.

73 The Commission replies that between 1989 and 1996 there was no scientific opinion advocating such an embargo. In the light of the discovery of a possible link between BSE and nvCJD, revealed by the SEAC statement of 20 March 1996, the Commission immediately decided to reassess the risk. Thus, on 22 March 1996 it assembled the Scientific Veterinary Committee (ScVC) and on 25 March 1996 it convened the Standing Veterinary Committee (SVC). Following the latter's recommendation, on 27 March 1996 the Commission adopted Decision 96/239.

74 Fourth, the applicants complain of the delay in imposing the ban on the use of SRM. As a result of the opposition of several Member States, both in the SVC and in the Council, the entry into force of Decision 97/534, scheduled for 1 January 1998, was postponed on several occasions, and the ban on SRM did not take effect until 1 October 2000, following the adoption of Decision 2000/418. That ban constituted the main measure for the protection of human health because consumption of SRM was the direct source of infection with nvCJD.

75 The Commission maintains that, contrary to what the applicants assert, Decision 2000/418 was not the first Community measure concerning a ban on SRM. Decision

90/200 had already imposed a ban on exports from the United Kingdom of material such as brain, spinal cord, thymus, tonsils, spleen and intestines. The Commission contends that during the period from 1989 to 1996 it took all the measures advocated in the opinions of the scientific committees regarding withdrawal of SRM (previously called 'specified bovine offal' or 'SBO').

76 Fifth, the applicants contend that although the defendant institutions rapidly became certain that BSE had spread to other European countries besides the United Kingdom and were aware of the significance of an evaluation of the future epidemiological status of the Member States, it was not until it issued its opinion of 23 January 1998, amended on 20 February 1998, that the SSC recommended that an assessment should be made of the geographical risk represented by BSE.

77 The Commission challenges the view that such an evaluation of the future epidemiological status of the Member States was essential from 1990. In any event, Decision 90/134 imposed an obligation on all Member States to notify any outbreak of BSE, which made it possible to monitor the development of the epidemic in the different countries.

(b) The complaint alleging misuse of powers

78 The applicants state that on several occasions the Commission threatened Member States with judicial proceedings in order to dissuade them from adopting unilateral protection measures against risks linked to BSE, although Article 36 of the EC Treaty (now Article 30 EC) permits them to adopt such measures. They refer particularly to the Commission's opposition to the adoption by France in 1990 of a temporary suspension of imports of live bovine animals and derived products from

the United Kingdom, and to the introduction by France in 1992 of temporary measures prohibiting the offering for sale of food supplements and baby food containing tissues, apart from muscular tissues, of bovine and ovine origin. Those demands reflected the concern not to reveal the risk of occurrence of BSE in France and to conceal the inadequacy of the Community measures in this field, and constitute a misuse of powers.

79 The defendants point out that there is a misuse of powers where a Community institution adopts a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69). As the functioning of the internal market, the stability of agricultural markets and the assurance of a fair income to farmers are objectives legitimately pursued by the Community within the framework of the powers accorded to it by the Treaty, the applicants' complaints cannot disclose a misuse of powers.

(c) The complaint alleging infringement of the principles of protection of legitimate expectations and of sound administration

80 The applicants contend that the defendants have infringed the legitimate expectations of European consumers in that, in order to prevent the broadcasting of the effects of BSE from causing a collapse in the market in bovine meat, they favoured a policy of opaqueness and lack of transparency and failed to put in place a system of 'risk education'. The applicants also complain that the Community scientific opinions lack independence and transparency. They observe in that regard that the report of the European Parliament's committee of inquiry of 7 February 1997 strongly criticised the preponderance of United Kingdom representatives on the ScVC. Lastly, they criticise the Commission for not carrying out any BSE inspections until 1994.

81 The defendants recall that, in the absence of specific assurances given by the administration, no one may claim a breach of the principle of the protection of legitimate expectations (Case T-521/93 *Atlanta and Others* v *EC* [1996] ECR II-1707, paragraph 57). The failure to observe such assurances has not even been put forward in this case, however. As for the alleged absence of Community BSE inspections between 1990 and 1994, the Commission states that its task consists merely of monitoring the inspection activity of the Member States.

2. The existence of damage

82 The applicants rely, first, on the existence of 'damage due to infection', namely personal non-economic harm covering all the physiological, physical and psychological problems and suffering endured by each of the victims of the disease, which were exceptional in this case. This damage due to infection has been evaluated by the French courts, in cases of iatrogenic infection (that is to say, infection caused by medical treatment) with CJD following the injection of growth hormones, at EUR 340 000. The applicants complain, secondly, of non-material damage, stating that the suffering of their relatives infected with the disease, the uncertainty of the diagnosis and the possibility of being infected themselves have had an exceptional impact on them. They seek compensation, thirdly, for material damage, as a result both of the losses sustained and of the loss of earnings suffered as a result of their relatives' disease. Lastly, they claim compensatory interest at a rate of 10% from the respective dates of death of the victims and default interest from the date on which interlocutory judgment is delivered.

83 In particular, the following claims for compensation are set out in respect of the infection and death of L. D.: an amount of EUR 457 347.05 should go to the victim's heirs as compensation for damage due to infection; EUR 45 734.71 for the victim's mother in respect of non-material damage resulting from that infection; EUR 30 489.80 for each of the victim's brothers and for her sister in respect of their non-material damage.

84 In the case of A. E., the following claims for compensation are set out: a sum of EUR 457 347.05 should go to the victim's heirs as compensation for damage due to infection; a sum of EUR 76 224.51 for each of his parents as compensation for the non-material damage resulting from that infection; a sum of EUR 76 224.51 also to her parents, as the statutory representatives of their minor daughter, in respect of the non-material damage suffered by her as the result of the infection of her older brother.

85 As regards F. R., the following claims for compensation are set out: an amount of EUR 457 347 should go to the victim's heirs as compensation for damage due to infection; an amount of EUR 76 224.51 for the victim's widow, in respect of non-material damage resulting from that infection; also to the victim's widow, as statutory representative of her minor son, an amount of EUR 76 224.51 as compensation for non-material damage and the same amount for the material damage suffered by him; an amount of EUR 45 735 for each of the victim's parents in respect of non-material damage resulting from the infection; an amount of EUR 30 489 for each of the victim's three sisters as compensation for non-material damage.

86 Lastly, as for S. C. S., the following claims for compensation are set out: a sum of EUR 457 347 for the victim's widower, as her heir and statutory representative of their minor children, by way of compensation for damage due to infection; a sum of EUR 76 224.51 in respect of the widower's own non-material damage resulting from the infection of his dead wife; also, in his capacity as statutory representative of his three minor children, a sum of EUR 76 224.51 for each of them as compensation for the non-material damage suffered by them and the same sums in respect of their material damage.

87 The defendants contend that the application provides scarcely any explanation of how the compensation for the damage has been calculated. The defendants also observe that in order to assess the material damage suffered as the result of a disease it is necessary to take into account the costs in connection with care and assistance

for the patients, the loss of income for the duration of the disease, the material damage deriving directly from the death and the material loss due to loss of earnings that is suffered by the persons who are financially dependent on the victim. However, the application contains no such information. Moreover, the defendants contend that the non-material damage sustained by the patients' relatives is not damage that can be compensated (Joined Cases 169/83 and 136/84 *Leussink and Others* v *Commission* [1986] ECR 2801, paragraph 22) and dispute that a victim's own non-material damage is transmissible to his heirs. Lastly, the defendant institutions dispute application of the 10% interest rate claimed by the applicants.

88 In addition, the Commission contends that in this case liability for the damage claimed lies mainly with the Member States and maintains that any sum of compensation that may be decided upon should be reduced in consequence.

3. The existence of a causal link

89 The applicants contend that today the link between BSE and nvCJD is established both on medical or scientific grounds and on epidemiological grounds. They also note that in the present case medical expert reports establish a definite diagnosis of nvCJD for each of the victims who died.

90 The applicants point out that BSE was described for the first time in the United Kingdom in November 1986 and state that the authorities in that country identified nvCJD on 20 March 1996. There have been 163 000 cases of BSE and over 150 cases of nvCJD in the United Kingdom. In France, BSE appeared in 1991 with the

declaration of five cases in animals which had not been imported from the United Kingdom but whose infection was linked to the consumption of meat meal from the United Kingdom. France has experienced the highest incidence of BSE among continental countries, with a total of 679 cases as at 29 August 2002, and had recorded six definite or likely cases of nvCJD up to 2002.

91 The applicants state that, when determining the period during which consumers were exposed to the risk of BSE, it is necessary to take into account this trend in the incidence of the bovine disease in different European countries, the trend in the movement of bovine animals and bovine products from the United Kingdom, and the development of the rules for protecting the health of consumers over the period concerned. The first preventive measures in respect of BSE were adopted in the United Kingdom in 1989. Those measures gave rise to a sharp increase in imports of meat-and-bone meal from the United Kingdom to France. Although the incidence of BSE subsequently fell in the United Kingdom, the disease made its appearance in continental Europe, in particular in France, from 1991 onwards. In 1996 a Community embargo on bovine animals and bovine products originating in the United Kingdom was adopted and, in France, specified risk offal was withdrawn from the food chain, although its withdrawal did not take effect at Community level until 2000. Meanwhile, France had imported 48 000 tonnes of offal from the United Kingdom from 1988 to 1996, as compared with 3 180 tonnes from 1978 to 1987. The applicants contend, on the basis of those statements, that the main exposure of French consumers to the risk of BSE took place in the period from July 1988 to 1996, since the adoption of protective measures in the United Kingdom and the fall in the risk of exposure in that country had been accompanied by an increase in the risk of exposure in the other countries of the Community, due to the inertia of the national and Community authorities.

92 The applicants state more specifically that several scientific opinions concluded that it was appropriate and expedient to withdraw SRM from the food chain in order to protect human health. The applicants also challenge the argument that the damage results from the activity of operators who engaged in unlawful trading in bovine products, since it is clear from the scientific opinions and medical expert reports

that the victims in question became infected by the ingestion of contaminated tissues before they were banned in France in April 1996, and hence before the general embargo on the marketing of bovine animals and bovine products originating in the United Kingdom.

93 Lastly, the applicants state that they do not hold the Commission and the Council exclusively liable for the infection of their relatives. They contend that the French authorities did not adopt the measures needed in order to prevent the exposure of French consumers to the risk of BSE. However, the fact that a Member State has acted wrongfully does not mean that the Community has not contributed to the occurrence of the damage. In such a case, the victim can put the Member State's liability at issue before the national courts and that of the Community before the Community judicature (*Kampffmeyer and Others* v *EEC Commission*).

94 The defendants contend that the applicants have not substantiated the existence of a direct causal link between the conduct alleged against them and the damage claimed.

95 The defendants contend that it cannot be established conclusively from the medical reports provided by the applicants that the victims in the present case were infected with the BSE pathogen via food. Nor have the applicants provided evidence, or offered to provide evidence, on the precise nature of the products which were the vector for the pathogen, or on the eating habits of the deceased persons. In particular, they have not stated whether the infection was caused by French products or by products imported from the United Kingdom. In view of the extremely small number of cases of BSE recorded outside the United Kingdom, in particular in France (between 1988 and 1996, 25 cases were confirmed in France compared with 167 875 cases detected in the United Kingdom), it is statistically very unlikely that

French victims contracted the infection following consumption of French meat coming from animals infected with BSE. It is more logical to assume that the victims consumed, in France or elsewhere, meat originating in the United Kingdom from animals infected during the 1980s.

96 The defendants consider that no direct causal link can be accepted in the present case due to the scientific uncertainty still surrounding the research into BSE, nvCJD and the link between those two diseases. According to the SSC opinion of 10 December 1999, those uncertainties concern in particular the maximum period of incubation — or latency — of nvCJD, which may be from one year to over 25 years, the minimum infective dose, the precise nature of the infective agent and the distribution of the infectivity among the various tissues of an infected animal or human being.

97 The defendants maintain that, due in particular to the length of the incubation period of nvCJD, it is not possible to identify the date on which the deceased persons could have been infected (see, in that connection, the report of the BSE Subgroup of the ScVC of 7 November 1995). The impossibility of determining the exact date of infection means it is not possible to investigate whether the defendant institutions were in a position to take appropriate protection measures at that time.

98 The Commission observes moreover that, as is clear from Special Report No 14/2001 of the Court of Auditors, some Member States displayed reluctance to transpose the Community measures into their national law, thereby delaying the implementation of effective protection for public and animal health, and did not fully monitor the application of Community rules.

B — *Findings of the Court*

99 It is settled case-law that non-contractual liability of the Community for the unlawful acts of its institutions and servants, for the purposes of the second paragraph of Article 288 EC, depends on fulfilment of a set of conditions, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damaged complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

100 As regards the first of those conditions, the case-law requires there to be a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). So far as concerns the requirement that the breach must be sufficiently serious, the decisive test for determining whether that requirement is met is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

101 Where one of those conditions is not satisfied the action must be dismissed in its entirety and it is unnecessary to examine the other conditions (*KYDEP* v *Council*

*and Commission*, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

102 In this case, it is necessary to examine, first, whether there is a causal link between the allegedly unlawful conduct of the defendant institutions and the damage pleaded by the applicants.

103 It is settled case-law that there is a causal link for the purposes of the second paragraph of Article 288 EC where there is a definite and direct causal nexus between the fault committed by the institution concerned and the injury pleaded, the burden of proof of which rests on the applicants (Case 253/84 *GAEC de la Ségaude* v *Council and Commission* [1987] ECR 123, paragraph 20; Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25; and *Coldiretti and Others* v *Council and Commission*, paragraph 101).

104 In this case, the unlawful conduct alleged by the applicants against the Council and the Commission consists essentially of wrongful omissions in carrying out their obligations in the area of animal and human health, and of the adoption of insufficient, incorrect, inadequate or belated standards and measures to deal with the risks resulting from BSE and nvCJD. The applicants assert that the damage sustained originates directly from the infection of their family members with nvCJD and the deaths of those family members from that disease. They contend that the Council and the Commission must be considered liable, although not exclusively, for that infection.

105 It is therefore necessary to consider whether the applicants have adduced evidence or indicia proving, first, that their relatives were infected with nvCJD and that the

infection was the result of consuming meat from bovine animals infected with BSE and, second, that the actions and omissions alleged against the defendants can be regarded as being at the origin of their relatives' infection.

106 As regards the first question, namely the cause of death of the members of the applicants' families, it should be stated from the outset that it is clear from the two sets of medical expert reports produced by the applicants — first, the reports dated 1 October 2002, and 13 April, 20 May and 6 June 2003 prepared at the request of the Regional Court, Paris, and, second, the reports dated 29 January 2004 prepared at the request of the Administrative Court, Paris — that in the case of each of the victims the diagnosis of nvCJD was established beyond doubt, with the express exclusion of any alternative diagnosis. Those reports also conclude that the most likely route of infection for those cases of nvCJD was orally, by infected food. Thus, the possibility of iatrogenic CJD (that is to say, CJD caused by medical treatment) has been dismissed. Those reports confirm more specifically that they were infections transmitted to humans from BSE.

107 Also, it appears to be generally accepted now in scientific circles that nvCJD results from infection by the BSE agent. The defendants themselves have accepted that it has been scientifically proved that BSE and nvCJD have certain physical, chemical and biological characteristics in common. In addition, the SSC opinion of 10 December 1999 on the human exposure risk via food with respect to BSE (see paragraph 48 above) states that scientific evidence indicates that BSE and nvCJD are most likely caused by the same agent and infers from this that human victims probably became infected as a result of consuming BSE-contaminated material orally. Lastly, it is stated in the preamble to Decision 2000/418 that '[e]vidence is accumulating that the agent causing BSE is identical to that causing [nvCJD]'.

108 In the light of all the above considerations, it has been satisfactorily established that the applicants' relatives died of nvCJD and that this disease was caused by the consumption of meat from bovine animals infected with BSE.

109 As regards the second question, namely whether the actions and omissions alleged against the defendants may be regarded as being at the origin of the infection of the applicants' family members who have died, the applicants maintain in essence that the Council and the Commission did not adopt, at the right time, the appropriate measures necessary in order to deal with the risks that the BSE crisis posed for public health. Those institutions are therefore responsible for not preventing the spread of BSE — which was passed on from livestock in the United Kingdom, where it first appeared, to livestock in other Member States — and not preventing it from being transmitted to humans in the form of nvCJD.

110 In order to examine this question, it is necessary to consider first of all the dates on which the victims became infected and the incubation period of the disease and then to investigate the possible existence of a causal link between the damage established and the various instances of purportedly unlawful conduct specifically alleged against the Council and the Commission.

111 It is important to note, in any event, that the possibility of BSE being transmitted to humans was not scientifically established until March 1996 when the SEAC issued its statement referring to a probable link between BSE and nvCJD. As the defendants point out, their action must be judged in the light of the state of scientific knowledge and the degree of care and caution that could be required at the relevant time.

1. The dates on which the victims became infected and the incubation period of the disease

112 It is clear from the documents before the Court that the dates on which the members of the applicants' families became infected cannot be established

accurately. The applicants contend in that regard that the main exposure of French consumers to the risk of BSE was during the period from July 1988 — when the United Kingdom authorities introduced the first protective measures against BSE — until March or April 1996 — when the Community imposed an embargo on bovine products and meat-and-bone meal originating in the United Kingdom and France prohibited the consumption of specified risk offal (see paragraph 91 above). In particular, the applicants have stated that their relatives became infected no later than 1996 (see paragraph 92 above). It should also be noted that the reports of the experts commissioned by the Regional Court, Paris, and by the Administrative Court, Paris, after finding that the dates on which the members of the applicants' families who died had became infected could not be established accurately, placed the likely dates of infection between 1980 and 1996.

113 In that regard, it is to be observed that nvCJD has a long incubation period. The SSC opinion of 10 December 1999 on the human exposure risk via food with respect to BSE (see paragraph 48 above), whilst stating that this period is unknown, also states that it may be from a few years to more than 25 years. The applicants themselves have observed that transmissible spongiform encephalopathies have a long latency period in an infected individual, which may be as long as 30 years in humans (see paragraph 103 of the application). Lastly, the expert reports prepared at the request of the Regional Court, Paris, and of the Administrative Court, Paris, state that '[c]linical data and modelling relating to the length of incubation suggest a period of 15 to 20 years between exposure to the BSE agent and the appearance of the new variant in humans'; they also state that, 'whatever the form of [CJD] and whatever its origin, it is a disease which has a very long incubation period (a number of years)', that 'this incubation period varies in length according to the particular case' and that 'the variant linked to [BSE] has not escaped this adaptive characteristic of the disease'. Lastly, it should be noted that BSE, which is at the origin of infection with nvCJD, also has an incubation period in bovine animals which may extend to several years. According to the SSC opinion of 10 December 1999, the incubation period of BSE is five years on average, and in the majority of cases is between four and six years.

114 On the basis of the above findings, it is to be concluded that in the present case the members of the applicants' families infected with nvCJD could have become infected by the agent of that disease not only between 1988 and 1996, as the applicants contend, but even before 1988. It should be noted, first, that it is generally accepted that the possibility of BSE being transmitted to humans was not scientifically recognised until 1996. Second, as the SSC opinion of 10 December 1999 (see paragraph 48 above) states, BSE is a new disease which first appeared in the United Kingdom probably between 1980 and 1985 but was not identified and described until November 1986. The infection of the victims at issue may therefore well have occurred at a time when the risks associated with BSE, in particular those to human health, were largely unknown in scientific circles.

115 More specifically, as the infection may have occurred before 1988 it cannot be considered established that the purportedly unlawful conduct which the applicants allege against the Council and the Commission, all of which took place after that date, is necessarily and directly at the origin of the damage claimed.

2. The existence of a causal link between the damage pleaded and the conduct alleged against the Council and the Commission

116 The applicants' two fundamental criticisms regarding the management of BSE and nvCJD by the Council and the Commission concern, first, their alleged delay in banning the feeding of meat-and-bone meal to livestock, which, according to the applicants, led to the spread of BSE outside the United Kingdom, and, second, their alleged delay in withdrawing SRM from the food chain, which was at the origin of the infection of the human victims with nvCJD. Moreover, the applicants identify other conduct of the defendants which constitutes a manifest error of assessment and also allege that the defendants misused their powers and infringed the principles of the protection of legitimate expectations and of sound administration.

(a) The alleged delay in banning meat-and-bone meal

117 The applicants contend that BSE spread in continental Europe, especially in France, particularly as a result of the use in livestock feed of contaminated meat-and-bone meal imported from the United Kingdom. They observe that the authorities in that country prohibited the feeding of ruminants with meal derived from ruminants in 1988, but they did not prohibit the export of such meal to other Member States. That gave rise to a significant increase in imports of contaminated meal from the United Kingdom to France, the consumption of which by French cattle led to the appearance of BSE in that country. The applicants state that the defendants did not prohibit the feeding of meat-and-bone meal derived from mammalian tissues to ruminants until June 1994, with the adoption of Decision 94/381. The partial ban on the use of meat-and-bone meal imposed by the decision did not, moreover, prevent the exposure of bovine animals to the infective agent as a result of cross-contamination. At the hearing, the applicants explained that, as human exposure to nvCJD was linked to the spread of BSE, that allegedly unlawful conduct of the defendants in their management of the bovine disease had repercussions with regard to risks to human health.

118 It should be stated at the outset that, even though the precise origin of BSE does not appear to be fully known, scientific work carried out on that disease shows that — apart from the small number of cases (fewer than 10%) caused by maternal transmission — BSE most likely results from the ingestion of meat-and-bone meal containing the infective agent. As stated in Decision 94/381, the origin of BSE in cattle is considered to be ruminant protein which contained the scrapie agent, and, later on, the BSE agent, and which had not been sufficiently processed to inactivate the infective agents. It follows that, in order to combat the spread of the disease, it was necessary, in particular, to prevent tissues liable to contain the BSE agent from being introduced into the animal feed chain.

119 Although in July 1988 the United Kingdom authorities prohibited breeders established in their territory from feeding ruminants with meat-and-bone meal containing proteins derived from ruminants, the defendants initially did not adopt similar measures at Community level. As the applicants point out, the defendants did not prohibit the feeding of mammalian derived protein to ruminants throughout the Community until June 1994, with the adoption of Decision 94/381. Furthermore, the export of meat-and-bone meal from the United Kingdom to other Member States was not expressly prohibited until 1996, by Decision 96/239.

120 It is true that at that time the characteristics of the disease, and more specifically the causes of its transmission, were not fully known. Also, before 1994 the incidence of BSE in countries other than the United Kingdom — and to a much lesser extent Ireland — was considerably limited. Between 1988 and 1994, BSE had been detected in continental Europe only in Germany (4 cases), in Denmark (1 case), in France (10 cases), in Italy (2 cases) and in Portugal (18 cases).

121 It should be noted, in any event, that, as is clear from the answer given by the Commission in September 1996 to questions from the Parliament's committee of inquiry, by 1991 all the Member States had already adopted national measures prohibiting the import of meat-and-bone meal from the United Kingdom, following the Commission's recommendations in that regard.

122 Also, in 1989 and 1990, seven Member States adopted measures prohibiting the feeding of protein derived from mammalian tissues to ruminants. In particular, the French Republic prohibited the feeding of mammalian derived protein to bovine animals in July 1990. Under Article 1 of the Order of 24 July 1990 prohibiting the use of certain proteins of animal origin in the feeding of, and manufacture of feed for, animals of the bovine species (JORF of 11 August 1990, p. 9837), as amended by Article 1 of the Order of 26 September 1990 (JORF of 7 October 1990, p. 12162),

'[t]he use of bone meal and proteins of animal origin, except for protein from milk products, poultry, egg products, fish or marine animals where they have been collected, processed and stored separately, is prohibited for the feeding of animals of the bovine species or the manufacture of feed for such animals'.

123 Moreover, from 1994 onwards the defendants progressively put in place a strategy designed specifically to prevent, throughout the Community, tissues liable to contain the BSE agent from being introduced into the animal feed chain. It is appropriate to highlight from among those measures Decision 94/381, which prohibited the feeding of mammalian derived protein to ruminants throughout the Community, with, however, the possibility of authorising on a case-by-case basis the application of systems enabling protein from ruminants to be distinguished from that of non-ruminants.

124 The applicants contend, however, that those provisions were inadequate, in particular because Decision 94/381 prohibited the feeding of mammalian derived protein only to ruminants, and therefore not to other livestock — pigs and poultry in particular. In their view, that partial ban later proved to be a source of cross-contamination and, hence, contributed to the spread of BSE.

125 It should be noted in that regard that the total ban on feeding animal protein to all livestock did not apply throughout the Community until Decision 2000/766, which entered into force on 1 January 2001. It is to be observed, in any event, that the adoption of that decision was needed due to systematic failures in the implementation of Community rules on meat-and-bone meal in several Member States (see recitals 4 and 5 in the preamble to Decision 2000/766).

126 As is clear from Special Report No 14/2001 of the Court of Auditors (paragraph 31), a certain level of contamination was tolerated by most Member States, including the French Republic, despite the fact that Community legislation did not allow any such tolerance. In addition, the inspections carried out by the Commission's Food and Veterinary Office (FVO) in 1998 to 2000 found weaknesses in the control of trade in such meal in the majority of Member States. There is also evidence from the FVO inspections that the agro-feed industry did not do enough to avoid contamination of cattle feed by meat-and-bone meal, and that feed containing meat-and-bone meal was not always correctly labelled, including in France. These failures contributed to farmers inadvertently using potentially infective feed for their cattle (see Special Report No 14/2001 of the Court of Auditors, paragraph 33).

127 Consequently, the conclusion must be drawn that it has not been demonstrated that the defendants' management of the issues linked to the feeding of meat-and-bone meal to livestock, including ruminants, was a determining cause of the spread of BSE outside the United Kingdom, in particular in France, and hence of the infection of members of the applicants' families with nvCJD. In the light, in particular, both of the measures adopted by several Member States, including France, prohibiting the import of meat-and-bone meal from the United Kingdom and the feeding of protein derived from mammalian tissues to ruminants, and of the shortcomings of the national authorities and private operators in the application of Community rules, the Court does not consider that it has been established that if the Commission and the Council had adopted — or had adopted earlier — the measures which the applicants criticise them for not having taken, the damage alleged would not have occurred. A fortiori, it has not been established that the conduct identified by the applicants in that regard may constitute the definite and direct cause of the infection of members of the applicants' families with nvCJD.

(b) The alleged delay in banning the use of SRM

128 The applicants contend in essence that banning the use of SRM is the most significant of the measures for protection against the risk which nvCJD poses to human health, since such material is the main source of infection for humans. They observe that although several scientific opinions had, from 1989, advocated the need for that measure the defendants adopted it only very belatedly. Indeed, the ban on the use of any type of SRM was not decided upon until 1997, with the adoption of Decision 97/534. The applicants add that the entry into force of that decision, which was to have taken place on 1 January 1998, was successively delayed by the Commission and the Council by almost three years. The ban did not therefore enter into force throughout the Community until 1 October 2000, following the adoption of Decision 2000/418.

129 It should be noted at the outset that, contrary to what the applicants appear to claim, the opinion of the ScVC of 27 November 1989 concluded that at the time there was no evidence that animal spongiform encephalopathies were transmissible to man, although it did state that the possibility of a slight risk to human health from tissues with a significant level of infectivity could not be excluded. In those circumstances, the ScVC merely recommended excluding from the human food chain specified bovine offal (namely brain, spinal cord, thymus, tonsils, spleen and intestines) from animals coming from countries where BSE was widespread.

130 Until 1989 cases of BSE had been identified only in the United Kingdom. Subsequently, between 1989 and 1996, the vast majority of cases of BSE were also detected in that country. In fact, the United Kingdom recorded 165 402 cases of BSE over that period. Ireland recorded only 189 cases. Finally, only 25 cases of BSE were

identified in France in that period, and the other Member States of continental Europe also had very few cases (64 cases in Portugal, 4 cases in Germany, 2 cases in Italy and 1 case in Denmark).

131 From 1989 the defendants adopted an initial series of measures to prevent the spread of BSE from the United Kingdom, introducing in particular certain restrictions on intra-Community trade in bovine animals from that country (see in particular Decisions 89/469, 90/59 and 90/261). Also, in April 1990 the Commission adopted Decision 90/200, which prohibited the sending from the United Kingdom — the only country where BSE was widespread at that time — of brain, spinal cord, thymus, tonsils, spleen and intestines derived from bovine animals aged more than six months at slaughter.

132 The applicants criticise the defendants, however, for not adopting at that time a general ban on the use of SRM throughout the Community and consider that this inaction was at the origin of the infection of their relatives.

133 In an area such as that of animal and human health, the existence of a causal link between conduct and damage must be established from an analysis of the conduct that could be required of the institutions on the basis of the state of scientific knowledge at the time. Until March 1996 the possibility of BSE being transmitted to humans had not been scientifically established (see paragraphs 8, 9 and 111 above). Also, before October 1996 the Community scientific and veterinary committees did not suggest the introduction of a general ban on the use of SRM throughout the Community, as measures in respect of such material were regarded as necessary only in the United Kingdom. Therefore, before 1996 the defendants cannot be criticised for not imposing a total ban on the use of SRM throughout the Community.

134 It should also be noted that in order for a causal link to exist the conduct complained of must be the definite and direct cause of the alleged damage and that in cases such as the present one, where the conduct which allegedly causes the damage pleaded consists in refraining from taking action, it is particularly necessary to be certain that that damage was actually caused by the inaction complained of and could not have been caused by conduct separate from that alleged against the defendant institutions.

135 In the present case, the Court considers that there is no such certainty.

136 It is not possible to conclude with adequate certainty that even if the defendant institutions had adopted a total ban on the use of SRM earlier the members of the applicants' families would still not have become infected. In particular, in the present case the regulatory measures to be adopted by the defendant institutions depended particularly for their effectiveness on action by the Member States, which have not always been rigorous enough in ensuring that the veterinary rules have been strictly applied (see paragraph 144 below).

137 It should also be noted, as stated in the SSC opinion of 10 December 1999 (see paragraph 48 above), that although SRM appears to be by far the main source of nvCJD infection, the 'ideal' level of protection of consumers from the disease would require a total absence of animals infected with BSE from the human food chain, the removal of SRM constituting only 'the second level of protection'. The SSC points out that neither the minimum dose of material contaminated with BSE inducing human infection nor the distribution of the infection within the different tissues of an animal is fully known, and concludes that any human exposure to the infective agent should therefore be avoided.

138 In the light of the above, the Court finds that even though a total ban at an early stage on the consumption and use of SRM throughout the Community, applied rigorously and effectively in all Member States, could, had it been decided upon sooner, have reduced the risk of infection of European consumers with nvCJD, it is not, however, possible to conclude with adequate certainty that in the present case the adoption of such a ban by the defendant institutions would have prevented the members of the applicants' families from becoming infected. In any event, in view in particular of the likely dates on which they became infected and the respective incubation periods of BSE and nvCJD (see paragraphs 112 to 114 above), in order to have been capable of being effective in the present case such a measure would have had to have been adopted not only well before 1996 — the year in which the transmissibility of BSE to humans became scientifically recognised — but even before 1990 — the year in which the first case of BSE was detected in continental Europe — not to say before 1986 — the year in which the disease BSE was identified and described for the first time in the United Kingdom. As was concluded in paragraph 133 above, the defendants cannot be criticised for not imposing a total ban on the use of SRM throughout the Community before 1996.

139 Lastly, as regards the delays in adopting measures concerning the use of SRM alleged against the defendant institutions between 1997 and 2000, those criticisms are not relevant for the purposes of the present case. According to the applicants themselves, their relatives became infected with nvCJD no later than 1996 (see paragraph 92 above). Also, the reports of the experts commissioned by the Regional Court, Paris, and by the Administrative Court, Paris, found that the members of the applicants' families who had died most likely became infected before 1996 (see paragraph 112 above). Consequently, the defendants' alleged unlawful conduct which took place after 1996 cannot be considered to have caused the damage pleaded in the present case.

140 In the light of the above considerations, the Court holds that the conduct which the applicants allege against the defendant institutions concerning the ban on SRM cannot be regarded as a definite and direct cause of the damage pleaded in this case.

(c) Other conduct alleged against the Council and the Commission

141 Besides the alleged unlawful conduct concerning the management of meal and SRM, considered above, the applicants make several other criticisms of the defendants' action to combat BSE and nvCJD. In particular, they consider that the defendants committed manifest errors of assessment in the management of risks associated with those diseases. Also, the applicants allege that the defendants misused their powers in that, in order to protect the interests of the beef and veal sector and the market in beef and veal, those institutions tried to dissuade Member States from adopting unilateral protective measures in the light of the risks presented by BSE. Lastly, the applicants allege infringement of the principles of the protection of legitimate expectations and of sound administration, as a result in particular of disorganisation in the Commission departments, failures and inadequacies of the Community veterinary checks relating to BSE, and defects in the monitoring of veterinary checks by the Member States.

142 It must be found that the applicants have by no means established a causal nexus existing specifically between this alleged unlawful conduct and the damage pleaded in this case, which resulted, as stated, from the infection with nvCJD and subsequent deaths of members of their families.

143 It should also be noted that responsibility for the actual monitoring of the application of veterinary legislation lies principally with the Member States. With regard, in particular, to the veterinary checks applicable in intra-Community trade, it is clear from Directives 89/662 and 90/425 that such checks are the responsibility first and foremost of the authorities of the Member State of dispatch and, to a lesser extent, of those of the State of destination. Specifically, in the event of the outbreak in their territory of a zoonosis or a disease likely to constitute a serious hazard to animals or human health, Member States must immediately implement the control or precautionary measures laid down by Community legislation and adopt any other appropriate measure.

144 It should also be noted that, as stated in Special Report No 14/2001 of the Court of Auditors, FVO inspections since 1996 reveal that most Member States have not been rigorous enough in ensuring that BSE measures have been adequately implemented in their territory. According to the Court of Auditors, this poor implementation by Member States of the Community legislation would have contributed to preventing BSE from being eradicated, and to the spread of the disease. Account should also be taken of the responsibility of some private economic operators for the spread of the disease. Thus, the report of the Court of Auditors found that the agro-feed industry had not been rigorous enough in implementing the Community BSE legislation.

145 In the light of the above, the Court holds that the applicants have not shown that these allegedly unlawful actions can be considered to be a definite and direct cause of the infection of their relatives with nvCJD.

3. Conclusion

146 In the light of the foregoing, the Court does not consider that it has been established that the allegedly unlawful actions and omissions of the Council and the Commission can be considered to be a definite and direct cause of the infection — which is at the origin of the damage pleaded in this case — of the members of the applicants' families who have died in France of nvCJD. It has thus not been shown in the circumstances of this case that if those institutions had adopted — or had adopted earlier — the measures which the applicants criticise them for not adopting, the damage in question would not have occurred.

147 Consequently, it must be concluded that no causal link has been established between the damage pleaded and the allegedly unlawful conduct of the Community institutions.

148 Hence the applicants' claims in respect of non-contractual Community liability for unlawful conduct of the defendant institutions must be rejected as unfounded and there is no need to rule on whether the other conditions for such liability are met in this case, that is to say, whether the conduct alleged against the defendant institutions is unlawful and whether there is actual damage.

## II — *Non-contractual liability of the Community in the absence of unlawful conduct on the part of the defendant institutions*

### A — *Arguments of the parties*

149 The applicants point out that French law recognises, in addition to a legal regime of fault-based liability, a fundamental right of victims to compensation for damage they have suffered by the charging of the cost to the public authorities. This regime is founded on the constitutional values of equality and solidarity. In that context, the French legislature established, in 1991, a special fund to provide compensation for persons infected with the human immunodeficiency virus following injections of blood products and, in 1993, an independent committee to provide compensation for victims of an iatrogenic form of CJD linked to the injection of growth hormones.

150 The applicants observe that Community case-law has not rejected the principle of the Community having strict liability (Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125). They maintain, on the basis of the constitutional traditions common to the Member States and of fundamental rights, which the Community institutions are bound to observe, that where the principle of equality is breached in an usual and special way it is legitimate to place the cost of compensation for the damage on the Community. The applicants accept that it

would be desirable for the provision of compensation on the basis of the principle of solidarity to be decided by the 'political' institutions, but contend that it is also possible to recognise the Community judicature as having that power. They observe that the European Parliament, in a resolution of 19 November 1997, requested the Commission and the Member States concerned to grant the financial resources needed in order to demonstrate their solidarity with the families of victims of nvCJD.

151 The applicants state that as a result of the infection of their relatives with the BSE pathogen and of their relatives' deaths from nvCJD, they suffered damage of exceptional intensity having an exceptional impact on them. Moreover, due to the failure to identify the infective agent and the difficulty in establishing the precise date and the source of the infection, they cannot base their actions for damages on national or Community rules concerning manufacturers' and distributors' liability. It would therefore be fair if they could place the cost of their compensation on the Community institutions.

152 The defendants point out that the Community can incur non-contractual liability in the absence of unlawful conduct only where three strict conditions are all met, namely actual damage must be suffered, a causal link must exist and the damage in question must be unusual and special (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19). In the present case, the condition concerning the causal link is not met. Furthermore, the non-material damage suffered by family members must be excluded and the sums sought in respect of material damage are unsubstantiated and disproportionate. The Commission also contends that the applicants have not established that the damage was unusual and special, stating that, although it is true that death is particularly serious damage, the fact remains that the applicants have not adduced evidence that the victims were exposed to a particular risk that differed from that to which other consumers of bovine products would have been exposed.

B — *Findings of the Court*

153 The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the 'general principles common to the laws of the Member States' and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual liability of the Community for unlawful conduct of its institutions. National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage (Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* [2005] ECR II-5393, paragraphs 158 and 159, and Case T-383/00 *Beamglow* v *Parliament and Others* [2005] ECR II-5459, paragraphs 172 and 173). When damage is caused by conduct of the Community institutions not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institutions and to the unusual and special nature of the damage in question are all met (*Dorsch Consult* v *Council and Commission*, paragraph 19; *FIAMM and FIAMM Technologies* v *Council and Commission*, paragraph 160; and *Beamglow* v *Parliament and Others*, paragraph 174).

154 It has been held that in the present case no causal link has been established between the conduct of the defendants described by the applicants and the damage alleged by the latter. It is therefore necessary to reject as unfounded the applicants' claims relating to non-contractual liability of the Community in the absence of unlawful conduct on the part of the defendants, and there is no need to rule on whether the other conditions for such liability are met in this case, namely whether there is actual damage and whether the damage is unusual and special.

155 It should moreover be observed that the Court has no jurisdiction, in the absence of a finding that Community institutions are non-contractually liable, to rule on the

award of compensation to victims of a disease, on the basis in particular of an alleged principle of solidarity. It should be noted, in any event, that in the present case 'solidarity allowances' were granted to the applicants by the French Government in June 2004 and in January 2005 on grounds of the damage sustained by the victims and their heirs as a result of the disease nvCJD. The compensation in question includes sums in respect of the damage suffered by each of the victims and also sums in respect of the damage suffered by each of the members of their families.

156 In the light of the above, the applicants' claims relating to non-contractual liability of the Community in the absence of unlawful conduct on the part of the defendants must be rejected.

157 The action must therefore be dismissed in its entirety.

## Costs

158 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. However, under Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

159 In view of the circumstances of the present case, in particular the fact that the Commission and the Council have for the most part been unsuccessful in their claims on the admissibility of the action, the Commission and the Council must be ordered to bear the costs arising from the pleas relating to admissibility, which the Court sets at one quarter of the total costs. The applicants will bear three quarters of the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the action as inadmissible as regards É. R., O. O., J. R., A. R. and B. P. R;**

2. **Dismisses the remainder of the action as unfounded;**

3. **Orders the applicants to bear three quarters of the costs and the Council and the Commission to bear one quarter of the costs.**

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 13 December 2006.

E. Coulon J.D. Cooke

Registrar President

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