JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
9 December 1997 *

In Joined Cases T-195/94 and T-202/94,

Friedhelm Quiller, residing in Lienen (Germany),

Johann Heusmann, residing in Loxstedt (Germany), represented by Bernd Meisterernst, Mechtild Düsing, Dietrich Manstetten, Frank Schulze and Winfried Haneklaus, Rechtsanwälte, Münster, with an address for service in Luxembourg at the Chambers of Lambert Dupong and Guy Konsbruck, 14A Rue des Bains,

applicants,

v

Council of the European Union, represented by Arthur Brautigam, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, and members of the Brussels Bar, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

* Language of the case: German.

and

Commission of the European Communities, represented by Dierk Booß, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg, and members of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Goméz de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for compensation, under Article 178 and the second paragraph of Article 215 of the EC Treaty, for damage suffered by the applicants as a result of their being prevented from marketing milk by virtue of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 (OJ 1984 L 132, p. 11), amended by Council Regulation (EEC) No 764/89 of 20 March 1989 (OJ 1989 L 84, p. 2),

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

composed of: A. Saggio, President, C. P. Briët, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 13 March 1997,

gives the following

Judgment

1 In 1977, in order to cut back surplus milk production in the Community, the Council adopted Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1, hereinafter 'Regulation No 1078/77'). That regulation offered a premium to producers in return for their signing an undertaking not to market milk or to convert their herds for five years.

2 In 1984, in order to cope with persistent overproduction, the Council adopted Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), amending Regulation (EEC) No 804/68 of the Council of 27 June 1968 establishing a common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176, hereinafter 'Regulation No 804/68'). The new Article 5c of the latter regulation introduced an 'additional levy' on milk delivered by producers in excess of a 'reference quantity'.

3 Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68

in the milk and milk products sector (OJ 1984 L 90, p. 13, hereinafter 'Regulation No 857/84') fixed the reference quantity for each producer on the basis of the production delivered during a reference year.

4 By judgments of 28 April 1988 in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 (hereinafter '*Mulder I*') and Case 170/86 *von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, the Court of Justice declared Regulation No 857/84, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11, hereinafter 'Regulation No 1371/84'), invalid on the ground that it infringed the principle of the protection of legitimate expectations.

5 In order to comply with those judgments, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1989 L 84, p. 2, hereinafter 'Regulation No 764/89'). Pursuant to that amending regulation, producers who had entered into non-marketing or conversion undertakings received a reference quantity known as a 'special' reference quantity (or 'quota'). Such producers are referred to as 'SLOM I producers'.

6 Allocation of a special reference quantity was subject to several conditions; furthermore, the reference quantity was limited to 60% of the quantity of milk or milk equivalent sold by the producer in the 12 months preceding the month in which the application for the non-marketing or conversion premium was lodged.

7 Some of those conditions and the limitation of the specific reference quantity to 60% were declared invalid by the Court of Justice, by judgments of 11 December 1990 in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585.

8 Following those judgments, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35, hereinafter 'Regulation No 1639/91'), which granted a special reference quantity to the producers concerned. Such producers are referred to as 'SLOM II producers'.

9 The second indent of Article 3a(1) of Regulation No 857/84, introduced by Regulation No 764/89, also laid down an 'anti-accumulation rule'. Under that rule, the transferees of a non-marketing premium were entitled to a specific reference quantity only if they had not previously received, in respect of other land not covered by a non-marketing or conversion undertaking, a reference quantity under Article 2 of Regulation No 857/84. Producers deprived of a reference quantity on the ground that such a quantity had already been granted to them for other land are known as 'SLOM III producers'.

10 The anti-accumulation rule laid down in the second indent of Article 3a(1) of Regulation No 857/84 was also declared invalid by judgment of the Court of Justice of 3 December 1992 in Case C-264/90 *Wehrs* [1992] ECR I-6285 on the ground that it breached the principle of the protection of legitimate expectations.

11 In compliance with that judgment, the Council adopted Regulation (EEC) No 2055/93 of 19 July 1993 allocating a special reference quantity to certain producers of milk and milk products (OJ 1993 L 187, p. 8, hereinafter 'Regulation No 2055/93'). That regulation allocated a special reference quantity to those producers who, as transferees of non-marketing premiums, had been excluded from the benefit of Article 3a of Regulation No 857/84 because they had received a reference quantity under Article 2 or Article 6 of the latter regulation.

12 In the meantime, one of the producers who had brought the action resulting in Regulation No 857/84 being declared invalid by the *Mulder I* judgment had, together with other producers, instituted proceedings against the Council and the Commission in which they sought compensation for the losses which they had sustained on account of their not having been granted a reference quantity under that regulation.

13 By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 (hereinafter '*Mulder II*'), the Court of Justice held that the Community was liable for the damage in question and invited the parties to reach agreement on the amount of compensation, subject to a later decision by that court.

14 The effect of that judgment is that all producers who were prevented from marketing milk solely because they had entered into a non-marketing or a conversion undertaking are, in principle, entitled to compensation for the damage sustained. However, in that judgment, the Court of Justice held that the Community had not incurred liability by limiting the special reference quantity to 60% of the quantity of milk sold by the producer in the 12 months preceding the application for a premium, which had been declared invalid in the *Spagl* and *Pastätter* judgments, cited above. It held that that limitation did not constitute a sufficiently serious breach of a superior principle of law, as defined by the case-law, to render the Community liable vis-à-vis producers.

15 In view of the large number of producers affected and the difficulty in negotiating individual settlements, the Council and the Commission published on 5 August 1992 Communication 92/C 198/04 (OJ 1992 C 198, p. 4, hereinafter 'the Communication of 5 August 1992'). After setting out the implications of the judgment in *Mulder II*, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned in order to give full effect to that judgment. Until such time as those arrangements were adopted, the institutions undertook not to plead, with regard to all producers entitled to compensation, that entitlement to claim was barred through lapse of time under Article 43 of the EEC Statute of the Court of Justice (hereinafter 'the Statute'). However, that undertaking was made subject to the proviso that entitlement to compensation had not already been time-barred on the date of publication of the Communication or on the date on which the producer had applied to one of the institutions.

16 Following the Communication of 5 August 1992, the Council adopted Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6, hereinafter 'Regulation No 2187/93').

Facts

17 Messrs Quiller and Heusmann, milk producers in Germany, received on 2 April 1984 under Article 2 of Regulation No 857/84 original reference quantities, that is to say quantities of milk exempt from the levy provided for in Article 5c of Regulation No 804/68, in respect of the agricultural holdings owned by them at Lienen and Loxstedt (Germany) respectively. Those quantities were 142 000 and 536 700 kg respectively.

18 In 1978 Mr Quiller had leased another holding belonging to Friedrich Beckmann. The latter had, under Regulation No 1078/77, entered into a non-marketing undertaking for the period from 1 June 1978 to 31 May 1983 and had received the premium corresponding to that undertaking, on the basis of a quantity of 32 642 kg of milk. By declaration of 26 October 1978 made in accordance with Article 6 of Regulation No 1078/77, the applicant, as lessee of Mr Beckmann's holding (hereinafter 'the Beckmann holding'), undertook to continue to fulfil the obligations entered into by Mr Beckmann.

19 In 1988 Mr Quiller's wife inherited the Beckmann holding. Since then, Mr Quiller has managed the holding on the basis of a 'right of use'.

20 In 1984 Mr Quiller did not obtain a reference quantity for the Beckmann holding to the extent that the obligations which he had assumed applied to the reference year adopted under Regulation No 857/84. He was thus prevented from resuming the marketing of milk produced on that holding.

21 Mr Heusmann's wife owns a dairy holding at Bramel (Germany) (hereinafter 'the Bramel holding') which, in 1980, was farmed by her father, Mr Kriegs. During that year, Mr Kriegs signed, under Regulation No 1078/77, a non-marketing undertaking expiring on 9 October 1985. In return for that undertaking, he was allocated a non-marketing premium on 8 July 1980 on the basis of a quantity of 263 104 kg of milk.

22 On 1 August 1980 Mr Heusmann took over the land farmed by Mr Kriegs and became subject to the latter's non-marketing undertaking.

23 On the expiry of that undertaking on 9 October 1985 he did not obtain a reference quantity for the Bramel holding, to the extent that the undertaking applied to the reference year adopted under Regulation No 857/84. He was thus prevented from resuming marketing of the milk produced on that holding.

24 Following the *Wehrs* judgment, the applicants received special reference quantities from the German authorities. On 2 December 1993 Mr Quiller received a quantity of 27 746 kg of milk. Mr Heusmann received a quantity of 223 638 kg on 1 February 1993.

Procedure

25 By letter sent to the Commission on 12 January 1994 Mr Quiller sought compensation for the damage sustained by him as a result of being unable to deliver milk in the period from 1 April 1984 to 29 July 1993, the date of publication of Regulation No 2055/93. On 29 March 1994 the Commission replied that it was unable to offer him compensation.

26 On 24 May 1994 he brought the first of the present actions, registered as Case T-195/94.

27 By letters sent to the Commission and the Council on 11 April 1991, Mr and Mrs Heusmann sought compensation for the damage sustained through their being

prevented from delivering milk in the period from 9 October 1985 to April 1991 as a result of the refusal to grant them a reference quantity for the Bramel holding. By letters of 2 and 15 May 1991, received on 7 and 17 May, the institutions replied that the conditions to be satisfied for the Community to incur liability were not fulfilled.

28 By letter sent to the Commission on 13 January 1994 Mr Heusmann asked the Commission to state whether it waived the right to rely on any limitation period until publication of the judgment of the Court of Justice to be given following *Mulder II*. On 29 March 1994 the Commission replied that it was not able to offer him compensation.

29 On 1 June 1994 he brought the second of the present actions, registered as Case T-202/94.

30 By order of 31 August 1994 the Court of First Instance joined Cases T-195/94 and T-202/94 for the purposes of the written procedure, the oral procedure and judgment.

31 The written procedure was concluded in both cases on 10 May 1995 upon lodgment of the rejoinder.

32 By letter of 22 January 1996 Mr Heusmann informed the Court that, by notarial deed of 16 June 1995, he and his wife had transferred their agricultural holding to their son, Jan Heusmann, with effect from 1 June 1995. Under that contract ownership of part of the land including the Bramel holding was transferred to Jan Heusmann, whilst for the remaining part a 10-year right of use had been granted to him. Under the contract Mr and Mrs Heusmann also assigned their rights against the Community to their son.

33 Consequently, the applicant requested that the forms of order sought in his application be amended to show that the compensation sought should be paid to Jan Heusmann.

34 By letter of 29 February 1996 the defendants stated that they had no objection to the amendment requested by the applicant.

Forms of order sought

35 In Case T-195/94 the applicant claims that the Court of First Instance should:

— order the defendants jointly and severally to pay him compensation of DM 61 573.60, together with interest at the rate of 8% from 19 May 1992, for the damage sustained between 2 April 1984 and 29 July 1993;

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

36 In his reply he also claims that the defendants should pay the costs of an expert's report drawn up on 9 March 1995, and placed with the documents before the Court.

37 In Case T-202/94 the applicant claims that the Court of First Instance should:

— order the defendants jointly and severally to pay him compensation of DM 600 924, together with interest at the rate of 8% from 19 May 1992, for the damage sustained between 9 October 1985 and 1 February 1993;

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

38 In his reply the applicant also claims that the defendants should pay the costs of an expert's report drawn up in February 1995, annexed to the reply.

39 In his letter of 22 January 1996 he also amends the form of order sought by him to the effect that the compensation sought should be paid to Jan Heusmann.

40 The defendants contend that the Court of First Instance should:

— dismiss the applications as inadmissible or, in the alternative, unfounded;

— order the applicants to pay the costs.

The admissibility of the application in Case T-195/94

Arguments of the parties

41 The defendants contend that, in so far as it merely refers to Regulation No 2187/93 and contains no conclusive pleas in law, the application infringes Article 44(1)(c) of the Rules of Procedure and is therefore inadmissible. In particular, the application does not contain any calculation of loss of profit drawn up in accordance with the principles laid down in *Mulder II*.

42 The applicant denies that his application is inadmissible for infringement of Article 44 of the Rules of Procedure. He asserts that, on the contrary, the application gives detailed particulars of the damage sustained. Moreover, he has attached an expert's report, letters and a certificate from the Chamber of Agriculture of Westfalen-Lippe to substantiate his statements concerning the Beckmann holding.

Findings of the Court

43 Under Article 44(1)(c) of the Rules of Procedure, the application must set out the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

44 In this case, those requirements have been observed. The pleas in law relied on are clear from the application and, moreover, the defendants have been able to respond to them effectively. As regards more particularly the fact that the calculation of the alleged damage was based solely on Regulation No 2187/93, which is not in the defendants' view applicable to this case, it must be pointed out that the application contained information as to the nature and the extent of the damage alleged and its link with a Community measure (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, at 984, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107) and that that evidence was appropriately supplemented in the reply.

45 The objection of inadmissibility must therefore be rejected and the application declared admissible.

The existence and extent of a right to damages under Article 215 of the EC Treaty

46 In support of their claims, the applicants maintain that the conditions for non-contractual liability on the part of the Community are fulfilled. In Case T-195/94 that liability encompasses the damage sustained in the period from 2 April 1984, the date of entry into force of Regulation No 857/84, to 29 July 1993, the date of publication of Regulation No 2055/93. In Case T-202/94 it encompasses the damage sustained in the period from 9 October 1985, the date of expiry of the non-marketing undertaking in respect of the Bramel holding, to 1 February 1993, the date on which the applicant received a reference quantity for that holding. The applicants also claim that their right to damages is not barred through lapse of time.

47 The defendants deny any liability on the part of the Community vis-à-vis the applicants. They contend that, in any event, any right to compensation has been barred through lapse of time.

1. *The existence of Community liability*

48 The Community's non-contractual liability for damage caused by the institutions as provided for in the second paragraph of Article 215 of the EC Treaty is not incurred unless a set of conditions relating to the illegality of the conduct complained of, the occurrence of actual damage and the existence of a causal link between the unlawful conduct and the harm alleged are all fulfilled (Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 18, and Joined Cases T-481/93 and T-484/93 *Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

49 As regards liability arising from legislative measures, the conduct with which the Community is charged must, according to settled case-law (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 4, and Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501, paragraph 52), constitute a sufficiently serious breach of a superior rule of law for the protection of individuals. If the institution has adopted the measure in the exercise of a wide discretion, as is the case in relation to the common agricultural policy, that breach must also be sufficiently serious, that is to say manifest and grave (*HNL* v *Council and Commission*, cited above, paragraph 6, Case 50/86 *Grands Moulins de Paris* v *Council and Commission* [1987] ECR 4833, paragraph 8, *Mulder II*, paragraph 12, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 194).

50 It is therefore necessary to determine whether those conditions are fulfilled in this case.

Breach of a superior rule of law

Arguments of the parties

51 The applicants state that the Court held in the *Wehrs* judgment (paragraphs 13 to 15) that the legitimate expectations of the SLOM III producers were frustrated. A producer who takes over a non-marketing undertaking and the person who entered into it cannot be treated differently. If the applicants had been able to foresee that they would be prevented from producing milk, they would not have taken over the non-marketing undertakings signed by Mr Beckmann and Mr Kriegs. The reduced price at which they took over the holdings in question took account only of the period covered by the non-marketing or conversion undertaking.

52 The defendants state that the applicants freely took over the holdings which were subject to non-marketing commitments. They cannot therefore claim, notwithstanding the *Wehrs* judgment, that the refusal to allocate a reference quantity for those holdings frustrated their legitimate expectations. According to settled case-law, economic operators who, following encouragement from the Community, have interrupted their production for a given period cannot, at the end of that period, be subject to restrictions which specifically affect them by reason of the fact that they took advantage of the opportunities offered by the Community rules. However, in contrast to the first producers who signed a non-marketing undertaking, the SLOM III producers were not encouraged by any Community measure to enter into such an obligation. In any event, the lower price at which those producers took over their holdings reflects the economic risk linked with the possibility of a refusal to allocate a reference quantity to them.

Findings of the Court

53 In paragraphs 13 and 14 of the *Wehrs* judgment the Court of Justice held that SLOM III producers were legitimately entitled to expect not to be subject to a

system like that deriving from the anti-accumulation rule in Regulation No 857/84. In paragraph 15 of that judgment, it declared that rule invalid for infringement of the principle of protection of legitimate expectations. Earlier, in *Mulder II* (paragraph 15), it had pointed out that that principle constitutes a superior rule of law for the protection of individuals.

54 Since the anti-accumulation provision was applied to the applicants — a matter which is not in dispute — the defendants' argument seeks in fact to reopen a question already settled by the *Wehrs* judgment. It must therefore be rejected.

55 As regards in particular the defendants' argument that SLOM III producers were not encouraged by any Community measure to enter into the non-marketing undertaking, it must be emphasized, as did the Court of Justice in the *Wehrs* judgment (paragraphs 13 to 15), that the legitimate expectations of the producers in question are infringed if they are subject, on expiry of a non-marketing undertaking which they have taken over, to restrictions specifically affecting them on account of that undertaking.

56 The defendants' argument concerning the allegedly lower price at which the holdings subject to the SLOM undertakings were taken over must also be rejected. As the applicants state, under normal market conditions that price reduction merely reflects the reduced value of the land for the period covered by the non-marketing or conversion undertaking.

57 It must therefore be held that a superior rule of law has been breached.

The existence of a sufficiently serious breach of the principle of protection of legitimate expectations

58 A sufficiently serious breach of a superior rule of law occurs when the institutions manifestly and seriously disregard the limits of their discretionary power without demonstrating the existence of public interest of a higher order. It is settled case-law that a breach of that kind occurs where the Community legislature fails to take into consideration a clearly distinct category of economic operators, particularly if the measure taken is unforeseeable and falls outside the bounds of normal economic risks (*Mulder II*, paragraphs 16 and 17; see also Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 11).

59 It is thus necessary to ascertain whether those factors are present in this case.

(a) The failure to take into consideration a clearly defined category of economic operators

Arguments of the parties

60 The applicants maintain that SLOM III producers are in exactly the same situation as SLOM I and SLOM II producers. Like the latter, they were excluded by illegal regulations from any reallocation of the quantity covered by their non-marketing undertaking. Moreover, they constitute a clearly defined category in that their names appear in the records of the competent authorities.

61 By failing to allocate a reference quantity to SLOM III producers the Community legislature, without invoking a public interest of a higher order, completely disregarded the situation of a clearly defined category of economic operators. In Regulation No 764/89 it made no economic policy choice, in the sense contemplated in

paragraph 21 of *Mulder II*, with respect to SLOM III producers. In that regulation the Council completely failed to take account of the interests of those producers, who were thus treated in the same way as SLOM I and SLOM II producers were treated by Regulation No 857/84 in its initial version.

62 There is no justification whatever for the failure to allocate a reference quantity to SLOM III producers. Contrary to the defendants' assertion, the general interest in stability in the milk market is not such as to justify that choice, since the quantities of milk necessary for the producers concerned constitute no threat to the balance of the market. The fact that the applicants benefited from a reference quantity granted under Article 2 of Regulation No 857/84 for a holding not subject to a non-marketing undertaking and, in consequence, were not completely excluded from milk production is of no importance. In that connection, it was necessary to take account only of the SLOM holding and to apply the *Mulder II* criteria to it. The fact that the applicants had produced milk on another holding shows that they wished to resume milk production on the SLOM holding after expiry of the non-marketing undertaking.

63 The defendants maintain that, in contrast to SLOM I producers, SLOM III producers do not constitute a distinct category of economic operators. SLOM I producers were identified by the fact that they had delivered no milk because of an undertaking ante-dating the regulation which adversely affected them. SLOM III producers are identified by the fact that they took over a holding subject to an undertaking. They may have done so either before or after the adoption of Regulation No 857/84. Consequently, on the date when that regulation was adopted, the applicants did not form part of a distinct category of economic operators. In response to the claim that SLOM III producers were identified on the basis of the files held by the authorities granting the non-marketing premiums, the defendants

contend that the existence of those records does not alter the fact that the non-marketing obligations could, in law or in fact, have been taken over after the entry into force of Regulation No 857/84 and that, on that date, the producers did not constitute a delimited group.

64 The defendants contend that Regulation No 764/89 did not fail to take account of the situation of SLOM III producers. To the extent to which they had received a reference quantity under Article 2 of Regulation No 857/84, those producers were not excluded totally and permanently from the market and could pursue production despite the fact that they had no reference quantity for the SLOM holding. The Community has thus incurred no liability for the non-allocation to SLOM III producers of a reference quantity by Regulations Nos 857/84 and 764/89. Contrary to what the applicants claim in their replies, the conditions for liability laid down in *Mulder II* (paragraph 17) relate only to cases of total exclusion of the producers concerned from the marketing of milk. Moreover, introduction of the anti-accumulation rule did not result in discrimination against SLOM III producers as compared with SLOM I and SLOM II producers but simply failed to improve their situation.

65 In view of the delicate situation prevailing on the milk products market and the fact that SLOM III producers in the applicants' circumstances were able to continue to produce on their non-SLOM holdings, the defendants, drawing a distinction between the two groups, did not, having regard to their discretionary power, take a manifestly unlawful decision. The institutions took account of a public interest of a higher order by refusing to grant reference quantities to SLOM III producers. When Regulation No 764/89 was adopted, they made an economic policy choice which consisted in not allocating such quantities to SLOM III producers, in order not to jeopardize the stability of the milk market. That option did not exceed the bounds of the discretion available to them for that purpose. The producers in question, having already received an original reference quantity, found themselves in a special situation, which justified different treatment. Those reasons are clearly set out in the second, third and fifth recitals in the preamble to Regulation No 764/89. The legislature took account of conflicting interests and reserved the allocation of reference quantities to those of the producers who had not yet received one.

Findings of the Court

66 The SLOM III producers were those who had not directly participated in the scheme provided for by Regulation No 1078/77 but had taken over a holding the previous operator of which had done so. Even if, for the purposes of Regulation No 857/84, the conditions which applied to them were common to all other SLOM producers, their situation displayed that particular feature and thereby distinguished them. As a result, they were SLOM producers who, following the adoption of Regulation No 764/89, continued to have no special reference quantity. It was only as from the entry into force of that regulation that the basis of the conditions applied to them became different, but their situation as producers had been different ever since they had taken over holdings encumbered by undertakings signed under Regulation No 1078/77.

67 The defendants' argument that formal identification of the category must precede the adoption of the rules declared unlawful has no basis. Whilst that was admittedly the position of SLOM I producers who had signed a non-marketing undertaking before the adoption of Regulation No 857/84, which catered for their situation, the fact that, after the successive amendments to that regulation, only one residual category was maintained, in the sense that it was only to that single category that the earlier common rules remained applicable, does not mean that it cannot be recognized as being a distinct category.

68 Moreover, as is clear from the *Mulder I* and *Mulder II* judgments, the SLOM I and SLOM II producers, taken together, formed a distinct category. SLOM III producers were characterized by the fact that they had been kept in the same situation as the other groups until 1993 and therefore, like the latter, they constitute a distinct category to which a reference quantity was not granted, in breach of a superior rule of law (see paragraph 53 above).

69 Lastly, the defendants' argument based on the fact that in this case there was no total exclusion, in so far as SLOM III producers were able to carry on production on their original holdings, must be rejected. Since the reasoning involved is based

on the fact that those producers had not been totally prevented from marketing milk, the institutions should necessarily have taken account of the ratio existing between the reference quantities for the original holding and those for the SLOM holding. By failing to take account of that ratio in relation to each of those producers, the defendants arbitrarily apportioned, on a basis that differed for each of the SLOM III producers, the charges deriving from the 'overriding necessity of not jeopardizing the fragile stability that currently obtains in the milk products sector' (fifth recital in the preamble to Regulation No 764/89). In those circumstances, the economic sacrifice allegedly needed to respond to that public interest was shared in an objectively unequal manner. Thus, the institutions exceeded the discretionary power vested in them for that purpose.

(b) The unforeseeability of the measure adopted and the failure to observe the bounds of normal economic risks

Arguments of the parties

70 The applicants claim that the economic sacrifices required of them as a result of their being deprived of a reference quantity exceeded the bounds of what is recognized as permissible in the case-law, in particular in *Mulder II*. They state that, having regard to the reference quantities received by them following the *Wehrs* judgment (see paragraph 11 above), the damage sustained by them between 1984 and 1993 was considerable. The reasons which prompted the Court of Justice, in *Mulder II*, to hold that there was no obligation to pay compensation where special reference quantities were limited to 60% by Regulation No 764/89 are not therefore applicable in this case.

71 The applicant in Case T-195/94 claims that the special reference quantity allocated to him in 1993 under the SLOM III regime represented 23.94% of the original reference quantity (see paragraph 18 above). He states that if the compensation sought in these proceedings is calculated in accordance with *Mulder II*, that percentage rises to 26.3%.

72 In Case T-202/94 the applicant maintains that the special reference quantity granted to him under the SLOM III regime, calculated in accordance with the *Mulder II* criteria, represented 31.4% of the original reference quantity (see paragraph 21 above). In his reply he claims that the special reference quantity actually allocated represented 41.67% but that, if account is taken of the reductions imposed as a result of the applicable rules, that percentage rises to 45.55% or 49% of the original reference quantity.

73 In the defendants' view, the fact that the applicants were prevented from resuming production was not unforeseeable, in particular in Case T-195/94, where the applicant acquired his right of use after the adoption of Regulation No 857/84. Moreover, the impossibility of resuming production did not exceed the bounds of normal economic risks. In that connection, the reference quantity of which the applicants were deprived was less than 40% of the sum of the original and specific reference quantities concerned. The Court of Justice accepted in *Mulder II* that the Community did not incur liability for a decrease of less than 40% of the SLOM reference quantity. The position of those producers corresponds to that in respect of which the *Mulder II* judgment excluded Community liability with regard to the 60% rule laid down by Article 3a(2) of Regulation No 857/84, as amended by Regulation No 764/89.

Findings of the Court

74 The applicants, like all SLOM III producers, were totally prevented, on their SLOM holdings, from marketing milk in the period between the expiry of the undertaking signed under Regulation No 1078/77 and the time when, following the *Wehrs* judgment, they received a special reference quantity. Since they were refused a reference quantity in April 1984 and October 1985 respectively and that quantity was not finally allocated to them until December and February 1993, it is unquestionable that a very considerable sacrifice was required of the applicants.

75 Contrary to the defendants' contention, that sacrifice was entirely unforeseeable and was not within the bounds of the normal risks inherent in the economic activity in question.

76 As regards the unforeseeability of the damage, it must be noted that the applicants, as SLOM III producers, were in the same situation as SLOM I producers since, with regard to the holding covered by the non-marketing undertaking, the allocation of a reference quantity was totally and permanently excluded as a result of the application of Regulation No 857/84 (*Mulder II*, paragraph 17). As the Court of Justice held, SLOM I and SLOM III producers were victims of a restriction which specifically affected them because of that undertaking (see *Mulder I*, paragraph 24, and *Wehrs*, paragraph 13).

77 The same finding must apply even if the legal basis on which the applicants carried on business on the SLOM holding changed after the entry into force of Regulation No 764/89. Since they became subject to the non-marketing undertakings before that date, the producers were in fact legitimately entitled to expect to resume marketing on the expiry of those undertakings (see *Wehrs*, paragraph 13).

78 As regards failure to keep within the bounds of normal economic risks, it must be borne in mind that in *Mulder II* (paragraph 17) the Court of Justice held that the Community incurred liability because no reference quantity was allowed to SLOM I producers, with the result that they were totally prevented from producing. On the other hand, the fact of allocating to SLOM II producers a reference quantity reduced to 60% of that normally available to producers was not held to be of such a nature as to entail liability.

79 As pointed out earlier (see paragraph 76 above), the applicants' situation is similar to that of SLOM I producers in that they were totally prevented from engaging in production on the land covered by the undertaking which they had taken over.

80 Moreover, contrary to the defendants' contention, several factors distinguish the applicants' situation from that of the SLOM II producers.

81 The Court observes in that connection that the damage at issue in *Mulder II* had already been inflicted in its entirety when the Court of Justice adjudicated on entitlement to compensation. On all the SLOM holdings the marketing of milk had been impossible for the period between the application of Regulation No 857/84 in its initial version and the date of entry into force of Regulation No 764/89 (see paragraph 5 above). Between the latter date and the entry into application of Regulation No 1639/91, SLOM I and SLOM II producers had the marketing of their products limited to 60% of the original reference quantity (see paragraph 6 above). They finally received a full reference quantity only by virtue of Regulation No 1639/91 (see paragraph 8 above).

82 It follows that, in *Mulder II*, the Court of Justice excluded Community liability only in relation to a limitation (to 60%), which was restricted in time (to about two years), of the quantity of milk delivered or sold during the 12 months prior to the non-marketing or conversion undertaking. The situation of total or partial unavailability was therefore limited to a maximum of seven years, between the expiry of the first undertakings given under Regulation No 1078/77 or the adoption of Regulation No 857/84 and the entry into force of Regulation No 1639/91. SLOM I and SLOM II producers were thus subject to total exclusion for a maximum period of five years, and Community liability was recognized for that period.

83 In this case, the applicants, like all SLOM III producers, were totally deprived of any reference quantity (see the *Wehrs* judgment). That situation extended from the

application to them of Regulation No 857/84 until the allocation of a reference quantity, occurring only after the *Wehrs* judgment, which was delivered on 3 December 1992.

84 In those circumstances, the nature and duration of the unavailability of the reference quantity are factors which clearly differentiate the situation of the applicants from that of the producers in relation to whom the *Mulder II* judgment held that Community liability had not been incurred.

85 That unavailability of a reference quantity exceeds the bounds of the normal risks inherent in the economic activity in question and is such as to cause the Community to incur non-contractual liability.

The existence of the damage and the causal link

86 The applicants maintain that, being producers from whom a reference quantity had been withheld, they sustained damage. The defendants deny the existence of such damage since the applicants, not being producers, could not call for a reference quantity to be allocated to them.

Arguments of the parties

87 According to the applicants, it is clear from documents from the Westfalen-Lippe Chamber of Agriculture dated 19 July 1991 and from the Hanover Chamber of Agriculture of 21 February 1995 that they sustained damage, in so far as they continued to operate the SLOM holdings after becoming subject to the non-marketing

undertakings relating to them. It was only because of the legal uncertainty affecting his situation that the applicant in Case T-202/94 submitted his application for a reference quantity together with his wife.

88 Contrary to the defendants' contentions, it is of no importance that the specific reference quantity was applied for in respect of the holding which had not been subject to the non-marketing undertaking. According to the case-law of the Court of Justice, for a reference quantity to be reallocated or definitively allocated, it is sufficient for the applicant to produce that quantity on his holding and to continue to operate within the latter, at least in part, the holding which was subject to a non-marketing undertaking (Case C-86/90 *O'Brien* [1992] ECR I-6251). Moreover, according to Article 9(d) of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1, hereinafter 'Regulation No 3950/92'), a holding may comprise several separate agricultural units. The applicant in Case T-202/94 intended using the old SLOM holding to produce milk at the end of the non-marketing period. It is clear from the expert's report attached to the reply that he in fact did so after the reference quantity was allocated to him.

89 The defendant institutions state that, regardless of the anti-accumulation rule introduced by Regulation No 764/89, the applicants sustained no damage. They were not entitled to the allocation of any reference quantity since they were not producers within the meaning of Article 3a(1) of Regulation No 857/84 and had not produced any evidence of that status.

90 In Case T-195/94 it is the applicant's spouse, who inherited the SLOM holding, to whom that status attached. The applicant cannot rely on the opinion of the Westfalen-Lippe Chamber of Agriculture of 19 July 1991, since that authority merely reiterated his statements. Reference to the definition of holdings in Regulation No 3950/92 is likewise not conclusive. That definition relates to the operation of a number of production units. However, in this case the problem is whether the applicant actually operated the SLOM holding.

91 In Case T-202/94, it is apparent from the opinion of the Hanover Chamber of Agriculture of 25 January 1990 that it was the applicant's spouse who lodged the application for a reference quantity. The status of producer within the meaning of Article 3a(1) of Regulation No 857/84 therefore attaches to her. The certificate from the Hanover Chamber of Agriculture of 21 February 1995 as to the applicant's status as producer does not dispel all doubts in that regard.

92 In any event, regardless of the anti-accumulation rule in Article 3a(1) of Regulation No 857/84, the applicants were not entitled to the special reference quantities sought from the German authorities since it was clear from their applications that they wished to produce those quantities on their original holdings and not on those which they had taken over. The rules at issue (Article 3a(1), first indent, subparagraph (b), of the regulation) provide for entitlement to a special reference quantity for producers who prove that they are able to engage in production on their holdings. That is confirmed by the judgment in Case C-44/89 *von Deetzen* [1991] ECR I-5119, paragraph 21, in which the Court of Justice held that the impossibility of marketing reference quantities did not adversely affect the legitimate expectations of the producers. By producing the quantity in question on a holding other than that covered by a non-marketing undertaking, they endeavoured to transfer that quantity.

93 The applicants' reference to the *O'Brien* judgment is not, in the defendants' view, conclusive. That judgment refers to Article 3a(3) of Regulation No 857/84, not Article 3a(1). It was held in that judgment that a producer can claim a special reference quantity only if he continues to operate the holding covered by his non-marketing undertaking. However, in this case, the question is whether the applicants actually operated the SLOM holding and whether there is an operation within the meaning of Regulation No 857/84 when that holding is no long used for milk production.

94 Denying the existence of any causal link, the defendants maintain, in their rejoinder, that the applicant in Case T-195/94 could have received an original reference

quantity if he had resumed milk deliveries in 1983 after expiry of the non-marketing undertaking. Article 6(2) of Regulation No 1371/84 and the relevant German legislation allowed the grant of a reference quantity to those producers, calculated on the basis of their actual deliveries. The failure to obtain that quantity was therefore attributable to the applicant and there is no causal link between the damage suffered and Regulation No 857/84.

Findings of the Court

95 Messrs Quiller and Heusmann received from the competent national authorities on 23 December 1993 and 1 February 1993 respectively a special 'SLOM III' reference quantity. According to Article 1 of Regulation No 2055/93, such a quantity was to be granted to milk producers who had already been refused a reference quantity. It follows that, for the competent national authorities, the applicants were at that time producers on the agricultural holdings in question, within the meaning of the Community rules, and therefore that they had been prevented from marketing milk by virtue of Regulation No 857/84. That is confirmed by the certificates from the Chambers of Agriculture of Hanover and Westfalen-Lippe of 25 January 1990 and 19 July 1991.

96 As regards the defendants' argument that the applicants were responsible for the damage they suffered, in that they had applied for reference quantities for their original holdings and not for the SLOM holdings, it is clear from Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, that the conditions applicable to the specific arrangements for production of the special reference quantity, and in particular that laid down in paragraph (b), presuppose the allocation of such a quantity. Those conditions apply, therefore, only where the producer can claim a special reference quantity, the allocation of which is governed by the first and second indents of paragraph 1. In any event, the applicants were excluded from that allocation by application of the anti-accumulation rule in the second indent of that paragraph, since they had already received a reference quantity in respect of their original holdings.

97 As regards the defendants' argument in Case T-195/94 to the effect that there is no causal link between the damage and the conduct of the Community, it must be observed that Regulation No 1371/84 entered into force only on 18 May 1984. The undertaking encumbering the applicant's land expired on 31 May 1983, so that the applicant could not know at that time that resumption of production would enable him to receive a reference quantity. It was only when Regulation No 1371/84 entered into force that he could have learned of that consequence. The interpretation adopted by the institutions thus involves attaching to the applicant's decision not to resume production in 1983 certain consequences which, at the material time, were unforeseeable. Accordingly, that argument must be rejected and the existence of a causal link cannot be called in question in this case.

98 It follows from all the foregoing that the Community must be declared liable for the damage sustained by the applicants.

2. *Time-bar*

99 It is now necessary to consider whether, and if so to what extent, the applicants' claims are time-barred.

Arguments of the parties

100 The applicants maintain that the limitation period cannot start to run either from the date of expiry of the non-marketing undertaking or from 2 April 1984, the date of entry into force of Regulation No 857/84, the application of which gave rise to the damage sustained by them.

101 Although they concede that Regulation No 857/84 caused harm to all SLOM producers and that Regulation No 764/89 further undermined the position of SLOM III producers, they maintain that it was only on the date of the *Wehrs* judgment, which held Regulation No 764/89 to be invalid, that the conditions laid down in Article 43 of the Statute were met as far as they were concerned. Given that the act in question is a legislative measure, those conditions include knowledge that the measure giving rise to the damage is unlawful. A citizen cannot be required to institute proceedings for compensation immediately after the adoption of an unlawful regulation. The legal uncertainty of the situation, the presumption of validity of Regulation No 857/84 and, above all, the need to obtain a special reference quantity account for the fact that proceedings for compensation for damages were not initiated. However, the applicant in Case T-202/94 admits that he could have initiated proceedings as soon as the undertaking affecting his SLOM holding expired.

102 As regards interruption of the limitation period, the applicants state that it is not permissible that SLOM III farmers be treated differently from SLOM I and SLOM II producers. Consequently, the scheme provided for by Article 8 of Regulation No 2187/93 should have been applicable to them, just as it was to the other producers. Moreover, the Communication of 5 August 1992, by which the institutions interrupted the limitation period, should also be applied to them, thereby preventing the defendants from pleading that their action was time-barred. On the date of that communication, their rights had not yet been barred through lapse of time, since the measure giving rise to the damage was Regulation No 764/89. Even if the limitation period had started to run at the end of the non-marketing period, the periods not excluded through limitation commenced on 5 August 1987, that is to say five years before 5 August 1992, the date on which the limitation period was interrupted.

103 The applicant in Case T-195/94 maintains that, in any event, he stopped the limitation period running by the letter he sent to the institutions on 12 January 1994, to which the Commission replied on 29 March 1994, refusing to pay compensation for the harm suffered. Pursuant to Article 43 of the Statute, the application was lodged within two months following receipt of that letter of refusal. At that time, the rights to compensation brought into being by Regulation No 764/89 had not yet been barred through lapse of time.

104 The applicant in Case T-202/94 also states that the running of the limitation period applicable to him was interrupted by his letter to the institutions of 11 April 1991. Article 43 of the Statute does not require an action to be brought immediately after such a letter. In any event, in their replies of 2 May and 15 May 1991, the Commission and the Council expressly waived the right to plead expiry of the limitation period and the applicant relied on those statements. The effects of that waiver were not nullified by Regulation No 2187/93, which was not a measure addressed directly and individually to the applicant and against which an action would not therefore have been possible. Moreover, by letter of 13 January 1994, the applicant asked the institutions whether they maintained their waiver. Only the Commission replied, by letter of 29 March 1994, refusing to compensate the SLOM III producers. Since that letter incorporated a rejection, the application was lodged within the period of two months prescribed in Article 43 of the Statute.

105 The defendants consider that the actions brought by the applicants are time-barred and, consequently, inadmissible. They state that, in accordance with the case-law of the Court of Justice and Article 43 of the Statute, the limitation period starts to run when all the requirements governing the obligation to provide compensation for damage are satisfied and, particularly where the source of the liability is a legislative measure, from the time when the consequences of that measure arose (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, hereinafter '*Birra Wührer*', and Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 10, hereinafter '*De Franceschi*').

106 In this case, the limitation period started to run, in Case T-195/94, on 2 April 1984, the date of entry into force of Regulation No 857/84, and, in Case T-202/84, on 9 October 1985, the date of the end of the non-marketing period. On those dates, the requirements laid down in Article 215 were satisfied: the Community incurred liability at that time by virtue of legislation, namely Regulation No 857/84, in its first version, subsequently declared invalid by the *Mulder I* judgment, because that regulation seriously infringed the principle, of a higher order, of protection of legitimate expectations.

107 The harm alleged by the applicants derives from the fact that they were unable to obtain reference quantities for the SLOM holdings which they had taken over. However, neither the taking-over of those holdings by the applicants nor Regulation No 764/89, which added Article 3a to Regulation No 857/84, altered that legal situation to the detriment of the applicants. Upon the entry into force of Regulation No 857/84 the applicants were thus in a position to seek a declaration that it was illegal. The presumption of legality attaching to every regulation does not prevent economic operators from seeking a declaration that it is unlawful (Case 101/78 *Granaria* v *Hoofproduktschap voor Akkerbowprodukten* [1979] ECR 623, paragraph 5). That is what the applicants did in the cases which gave rise to the *Mulder I* and *Wehrs* judgments: they, unlike the applicants, did not seek to avoid the risks associated with the institution of proceedings.

108 The defendants then contest the applicants' assertion that the limitation period started to run after 2 April 1984 and 9 October 1985 respectively (see paragraph 106 above). First, the starting date of that period cannot be taken to be 28 April 1988, the date on which the Court of Justice, in *Mulder I*, declared Regulation No 857/84 partially invalid. According to the case-law of the Court of Justice, for a limitation period to start to run, the victim of damage must have been aware, or have been in a position to become aware, of the event giving rise to the damage (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 50), not of its illegality. Second, the limitation period could not be dependent on Regulation No 764/89, which introduced the anti-accumulation rule and placed the SLOM III producers in a separate category. That regulation did not make the applicants' situation any worse than it was before the adoption of Regulation No 857/84, in its initial version, since the latter had already, since its entry into force, excluded the grant of reference quantities for the applicants' SLOM holdings. Third, the limitation period likewise did not commence on 3 December 1992, the date of the *Wehrs* judgment, because the event giving rise to the damage suffered by the applicants was the scheme introduced by Regulations Nos 857/84 and 764/89, not the declaration that it was unlawful.

109 The defendants also reject the view that the limitation period was renewed from day to day so far as the applicants were concerned. Even though Article 8 of Regulation No 2187/93 so provides, such a solution does not necessarily have to serve as a basis for interpreting Article 43 of the Statute.

110 The defendants also contend that the Communication of 5 August 1992 does not prevent their raising a plea of inadmissibility based on the limitation period. Paragraph 2 of that Communication made it clear that the undertaking not to invoke the limitation period applied only to the extent to which the right to compensation in question was not already barred through lapse of time on the date of the Communication. In any event, the Communication concerned only SLOM I and SLOM II farmers, as evidenced, first, by the reference to the case which gave rise to the judgment in *Mulder II*, which concerned only those groups of producers, and, second, the wording of paragraph 1 of the Communication, which refers to producers who did not obtain a reference quantity following their participation in the system introduced by Regulation No 1078/77.

111 As regards interruption of the limitation period, the defendants contend, in Case T-195/94, that the letter sent by the applicant to the Commission on 12 January 1994 did not interrupt the period, since the action was not brought within the period of two months laid down in the third sentence of Article 43 of the Statute. That period did not start running from the date of the Commission's reply to the letter in which the applicant asserted his right, but rather from the date of receipt of that letter. In this case, since the action was brought after the expiry of that period, the letter of 12 January 1994 did not interrupt the limitation period.

112 In Case T-202/94, the defendants also contend that the applicant's letter of 11 April 1991 did not interrupt the limitation period, since the action was not brought within the period laid down in Article 43 of the Statute. In their replies of 2 and 15 May 1991 the Commission and the Council waived their right to invoke the limitation period only to the extent to which the rights in question were not yet barred through lapse of time. Since the period started running on 9 October 1985 (see paragraph 106 above), the bar to the institution of proceedings came into being on 9 October 1990, that is to say, before the letter sent by the applicant. Moreover, the waiver of the right to invoke the limitation period expired three months before the *Mulder II* judgment, delivered on 19 May 1992, and the applicant did not institute proceedings within that period. In that connection, the defendants contend that it is absurd for the applicant to argue that the waiver was valid until the publication of the judgment to be given on the amount of compensation following the judgment in *Mulder II*: the latter judgment disposed of all important issues concerning liability, the only matter of interest to all the parties concerned.

113 In conclusion, the defendants contend that, since the limitation periods began to run on 2 April 1984 and 9 October 1985, the applicants' rights have been extinguished, through lapse of time, since 2 April 1989 and 9 October 1990, respectively. At the very least, in Case T-195/94 the time-bar affects all rights arising before 24 May 1989, the date which precedes by five years that of 24 May 1994, when the proceedings were initiated. As regards Case T-202/94, the applicants' rights arising before 1 June 1989, that is to say five years before proceedings were initiated, are barred through lapse of time.

Findings of the Court

114 The limitation period laid down by Article 43 of the Statute cannot begin to run before all the requirements governing the obligation to make good the damage are satisfied and, in particular in cases where liability stems from a legislative measure, before the injurious effects of the measure have been produced (*Birra Wührer* and *De Franceschi*, at paragraph 10; Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107).

115 In determining to what extent the applicants' rights are barred through lapse of time, it is necessary first to determine the date on which the damage arose, and then the date on which an event interrupting the limitation period occurred.

116 In this case, damage was sustained as from the day on which, after the expiry of the non-marketing undertakings to which the applicants became subject by subrogation, the applicants would have been able to deliver milk produced on their SLOM holdings if a reference quantity had not been denied to them in pursuance of Regulation No 857/84.

117 In that connection, the applicants' argument that the limitation period could not have started to run until after the entry into force of Regulation No 764/89 which, amending Regulation No 857/84, introduced the anti-accumulation rule, must be rejected. Even if it was only as from the adoption of that rule that the group of producers in question was placed in a separate category (see paragraph 66 above), that was merely the consequence of introducing a new scheme for those of the SLOM producers who, as from that time, were able to secure the allocation of a special reference quantity. In contrast, the situation of the SLOM III producers remained the same, in that, even if they were covered by the Article 3a added to Regulation No 857/84, the only effect of the new rule was to maintain for those producers the earlier scheme under which marketing was wholly excluded.

118 In the present cases, it is not disputed that the applicants sustained damage resulting from the application of Regulation No 857/84, as initially drafted, and that such damage continued after the insertion into that regulation of Article 3a by Regulation No 764/89. It follows that the measure giving rise to the damage sustained by the applicants was Regulation No 857/84. Since Regulation No 764/89 is unconnected with the cause of that damage, it has no relevance to the limitation period.

119 Accordingly, the applicants sustained damage on the date on which Regulation No 857/84 was applied to them, as is confirmed moreover by the date as from which they seek compensation (see paragraphs 35 and 37 above). In Case T-195/94 that date is the date of entry into force of the regulation, 2 April 1984, since, even though the non-marketing undertaking expired on an earlier date, the applicant was not refused the allocation of a reference quantity until that date. In Case T-202/94 that date is 9 October 1985, the day following expiry of the non-marketing undertaking to which the applicant became subject by subrogation.

120 It is necessary to consider next whether all the requirements governing the Community's obligation to make good the damage, which determines the starting date of the limitation period, were satisfied on the date on which the damage occurred,

as determined above, in accordance with the *Birra Wührer* and *De Franceschi* judgments and as contended by the defendants; or whether, as maintained by the applicants, it occurred only on the dates of the *Mulder I* or *Wehrs* judgments, which, respectively, held Regulation No 857/84 as originally drafted, and then as amended by Regulation No 764/89, to be invalid.

121 The essence of the applicants' argument is that knowledge of the illegality of the measure giving rise to the damage is one of the conditions governing liability of the Community and that the concurrent satisfaction of those conditions, by virtue of *Birra Wührer* and *De Franceschi*, marks the starting point of the limitation period. Consequently, according to the applicants' argument, the period prescribed in Article 43 of the Statute cannot start to run before the measure is declared unlawful.

122 In that regard, it must be borne in mind that, since an action for damages is independent from an action for annulment (*Zuckerfabrik Schöppenstedt* v *Council*, cited above, and order of 21 June 1993 in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraphs 14 and 15), an action based on Article 215 of the Treaty does not necessarily have to be accompanied or preceded by an application for annulment or for a declaration of invalidity, with the result that greater protection is secured for individuals (*Hartmann* v *Council and Commission*, cited above, paragraph 128). It follows that the annulment of Regulation No 857/84 or a finding that it was invalid did not constitute a necessary precondition for the applicants to obtain reparation and that they were therefore entitled to bring their action against the Community as soon as they began to suffer damage under Regulation No 857/84, as initially drafted (see also Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, paragraph 81).

123 In those circumstances, the conditions governing liability of the Community were satisfied on the date on which Regulation No 857/84 was applied to the applicants (see paragraph 119 above). The limitation period therefore began to run on that date.

124 The defendants cannot contend that the applicants' claims were barred in their entirety five years after the limitation period began.

125 The damage which the Community must redress is not damage caused instantaneously. The damage occurred from day to day over a period of time, as a result of the maintenance in force of an unlawful measure, for so long as the applicants were prevented from obtaining a reference quantity and therefore delivering milk. Consequently, having regard to the date of the event which interrupted the limitation period, the time-bar under Article 43 of the Statute applies to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods (*Hartmann* v *Council and Commission*, cited above, paragraph 132).

126 As regards the event interrupting the limitation period, it is necessary first to consider the arguments, common to both actions, relating to the application to these cases of the Communication of 5 August 1992 and Regulation No 2187/93 and then to analyse the effects of the events which, in each action, are claimed to have interrupted the limitation period.

127 The argument that the applicants benefited from the Communication of 5 August 1992 must be rejected. By that Communication the institutions undertook not to invoke the limitation period vis-à-vis producers for whom *Mulder II* had recognized as being entitled to compensation. The only persons to whom that measure applied were thus those producers who had not received a reference quantity under Regulation No 857/84, as originally drafted, but had obtained one following Regulation No 764/89. It was thus addressed only to SLOM I and SLOM II producers. Since the specific situation of SLOM III producers had not been analysed in *Mulder II*, the applicants could not benefit from the judgment given against the institutions. Consequently, the Communication of 5 August 1992 did not concern them and did not have the effect of preventing the institutions from raising the expiry of the limitation period as a plea in bar to the applicants' claims.

128 Nor can the SLOM III producers benefit from Regulation No 2187/93 and, in particular, from the provisions of Article 8 of that regulation concerning interruption of the limitation period. In that connection it need merely be pointed out that, according to Article 2, that regulation applies only to those producers who received special reference quantities under Regulations Nos 764/89 and 1639/91. The applicants, not being in that situation, cannot therefore rely upon Regulation No 2187/93.

129 The fact that that regulation is not applicable to them does not mean that there is any breach of the principle of equal treatment. For there to be a breach of that principle comparable situations must have been treated differently (see Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 55). However, as just pointed out (paragraphs 127 and 128), the situation of the SLOM III producers was different from that of the persons benefiting from Regulation No 2187/93. In any event, as the Court of First Instance has held (Case T-541/93 *Connaughton and Others* v *Council* [1997] ECR II-549, paragraph 35, and *Saint and Murray* v *Council and Commission*, cited above, paragraph 41), that regulation is in the nature of a proposal by way of settlement which merely opens up an additional avenue for the producers recognized as having that right to obtain compensation.

130 As regards the events interrupting the limitation period, it must be pointed out that, in Case T-195/94, the applicant sent to the Commission alone, on 12 January 1994, a letter claiming damages for the harm suffered between 2 April 1984 and the date of allocation of a definitive reference quantity. By letter of 29 March 1994, the Commission refused that request. The Council, for its part, did not contend that the event interrupting the limitation period could not be relied upon against itself.

131 Since the action was brought on 20 May 1994, within two months after the Commission's letter of 29 March 1994, the limitation period was interrupted on 12 January 1994, in accordance with Article 43 of the Statute.

132 The argument put forward by the institutions to show that the action should have been brought within a period of two months after the letter of 12 January 1994 has no basis whatsoever. The reference in the last sentence of Article 43 of the Statute to Articles 173 and 175 of the Treaty has the effect of rendering applicable, as far as interruption of the limitation period is concerned, the rules for calculating time-limits laid down by those provisions. Since the Commission's reply was given more than two months after the applicant's letter, but within the period for challenging an implied rejection, that reply caused a new period to start to run (see Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719). Since the action was brought before the end of that second period, the interruption of the limitation period took place on 12 January 1994.

133 According to the case-law (*Birra Wührer* and *De Franceschi* paragraph 10, *Hartmann* v *Council and Commission*, paragraph 140, and *Saint and Murray* v *Council and Commission*, paragraph 93), the period for which compensation should be paid corresponds to the five years prior to the date on which the limitation period was interrupted. It thus extends from 12 January 1989 to 28 July 1993, the date on which a reference quantity was allocated to the applicant.

134 As regards Case T-202/94, it must be pointed out, first, that on 11 April 1991 the applicant sought from the Council and Commission damages for the harm suffered up to that date. In their replies of 2 and 15 May 1991, the institutions, whilst denying liability, undertook not to invoke the limitation period until three months after publication of the *Mulder II* judgment. However, that undertaking covered only the rights not barred through lapse of time at the date of the letters in question.

135 Contrary to the applicant's assertion, that correspondence cannot be construed as referring to the judgment of the Court of Justice to be given following *Mulder II*. The questions concerning Community liability were disposed of in the latter judgment. As is clear from the operative part of that judgment, only the amount of the compensation remains to be determined. The institutions' letters of 2 and 15 May 1991 therefore concerned the *Mulder II* judgment.

136 Furthermore, by those letters, the institutions waived the right to invoke the limitation period for the period specified in them. As may be seen from the letters their purpose was to avoid the immediate institution of proceedings ('In order to keep proceedings to a minimum, the Council/Commission ... is nevertheless prepared not to invoke the limitation period ...'). That was consistent with the practice of the institutions at that time, which was to send letters to that effect to producers who submitted to them requests to make good the damage sustained by them.

137 It is therefore necessary to determine the effects of the undertaking by the institutions not to invoke the limitation period, which encouraged the producers, in return, not to institute proceedings.

138 It cannot be accepted, as the institutions contend, that, merely as a result of the applicant's not bringing an action within the period prescribed in Article 43 of the Statute, after the expiry of a period of three months following publication of the *Mulder II* judgment, the limitation period could resume running, as against the applicant, on the dates of the letters of 2 and 15 May 1991 as if the undertaking by the institutions had not been given. That undertaking was a unilateral act of the institutions intended to encourage the applicant not to bring an action. The defendants cannot therefore rely on the fact that the applicant behaved in a manner which worked exclusively to their benefit.

139 In those circumstances, the limitation period was suspended from 7 May 1991, the date of receipt of the letter sent by the Commission to the applicant, until 17 September 1992, that is to say the end of a period of three months following publication in the *Official Journal of the European Communities*, on 17 June 1992, of the operative part of the judgment in *Mulder II*.

140 Second, it is necessary to determine the date on which the limitation period was interrupted. The applicant sent to the Commission, on 13 January 1994, a letter in which it asked that institution to confirm that it maintained its waiver of the right to invoke the limitation period until publication of the judgment of the Court of

Justice to be given following *Mulder II*. By letter of 29 March 1994, received on 5 April 1994, the Commission replied that the Community was not liable for the applicant's losses.

141 Since the application was lodged within two months from the receipt of that reply and since the letter of 13 January 1994 must be regarded as containing an application to the institutions within the meaning of Article 43 of the Statute, the limitation period was interrupted on the latter date.

142 In those circumstances, in accordance with the case-law (see paragraph 133 above), the period for which compensation is payable in Case T-202/94 should in principle commence five years before the date of the event interrupting the limitation period and end on 1 February 1993, the date on which a special reference quantity was allocated. However, since the limitation period was suspended from 7 May 1991 to 17 September 1992 (see paragraph 139 above), that is to say for 16 months and 10 days, the period for which compensation is payable is the period from 3 September 1987 to 31 January 1993.

3. *The amount of damages*

143 When the cases were joined, the parties were invited to concentrate on the problem of entitlement to compensation for damage.

144 Consequently, even though in their applications the applicants quantified the amount of the compensation claimed (see paragraphs 35 and 37 above), the parties have not been able to make submissions specifically on the amount of compensation relating to the period determined by the Court.

145 In those circumstances, the Court invites the parties to endeavour to reach agreement on this point within a period of 12 months, in the light of the present judgment and the clarifications contained in *Mulder II* regarding the method of calculating the damage suffered. Failing agreement, the parties shall present to the Court, within the aforesaid period, their submissions as to the amounts to be awarded.

Costs

146 Having regard to paragraph 145 above, the decision on costs will be reserved.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition),

by way of interlocutory judgment, hereby:

1. Orders the defendants to pay compensation for the damage sustained by the applicants, first, as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, in so far as those regulations did not make provision for the allocation of a reference quantity to holdings subject to an undertaking given under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of

premiums for the non-marketing of milk and milk products and for the conversion of dairy herds, where the producers had not delivered milk during the reference year adopted by the Member State concerned, and, second, as a result of application of the said Regulation No 857/84, as amended by Council Regulation (EEC) No 764/89 of 20 March 1989, in so far as the second indent of Article 3a(1) excluded the allocation of a special reference quantity to the transferees of a premium granted under Regulation No 1078/77;

2. Declares that the period in respect of which the applicants must be compensated for the damage sustained as a result of the application of Regulation No 857/84 is, in Case T-195/94, the period from 12 January 1989 to 28 July 1993 and, in Case T-202/94, the period from 3 September 1987 to 31 January 1993;

3. Orders the parties to submit to the Court, within 12 months from this judgment, particulars of the amounts to be paid, as agreed by the parties;

4. In default of such agreement, orders the parties to present to the Court, within the same period, their submissions as to the amounts to be awarded;

5. Reserves the costs.

Saggio Briët Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 9 December 1997.

H. Jung
Registrar

A. Saggio
President