JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

12 December 2006 *

In Case T-373/94,

R.W. Werners, residing in Meppel (Netherlands), represented initially by H. Bronkhorst and E. Pijnacker Hordijk, lawyers, and subsequently by E. Pijnacker Hordijk,

applicant,

v

Council of the European Union, represented initially by A. Brautigam and A.-M. Colaert, acting as Agents, and subsequently by A.-M. Colaert,

and

Commission of the European Communities, represented initially by T. van Rijn, acting as Agent, assisted by H.-J. Rabe, lawyer, and subsequently by T. van Rijn,

defendants,

* Language of the case: Dutch.

ACTION for compensation pursuant to Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) for the damage allegedly suffered by the applicant by reason of the fact that he was prevented from marketing milk in accordance with 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 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),

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

composed of M. Vilaras, President, E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2006,

gives the following

Judgment

Legal context

1 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 (OJ 1977 L 131, p. 1) provided for the payment of a non-marketing premium or a conversion premium to producers who undertook to cease marketing milk or milk products for a non-marketing period of five years or to cease marketing milk or milk products and to convert their dairy herds to meat production for a conversion period of four years.

2 Milk producers who entered into an undertaking under Regulation No 1078/77 are commonly known as 'SLOM producers', the acronym originating from the Dutch expression 'slachten en omschakelen' (slaughter and conversion) describing their obligations under the non-marketing or conversion scheme.

3 Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10) and 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 No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13) introduced, from 1 April 1984, an additional levy on quantities of milk delivered beyond a reference quantity to be determined per purchaser within a guaranteed total quantity for each Member State. The reference quantity to be exempt from the additional levy was equal to the quantity of milk or milk equivalent, either delivered by a producer or purchased by a dairy, as decided by the Member State, during the reference year, which in the case of the Netherlands was 1983.

4 The detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common

organisation of the market in milk and milk products (English Special Edition: Series I Chapter 1968(I) p. 176) were laid down by Commission Regulation (EEC) No 1371/84 of 16 May 1984 (OJ 1984 L 132, p. 11).

5 Producers who, pursuant to an undertaking entered into under Regulation No 1078/77, delivered no milk during the reference year adopted by the Member State concerned, were excluded from the allocation of a reference quantity.

6 In its judgments in Case 120/86 *Mulder* [1988] ECR 2321 ('the *Mulder I* judgment') and Case 170/86 *von Deetzen* [1988] ECR 2355 ('the *von Deetzen* judgment') the Court ruled that Regulation No 857/84, as supplemented by Regulation No 1371/84, was invalid in so far as it did not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking entered into under Regulation No 1078/77, delivered no milk during the reference year adopted by the Member State concerned.

7 Following the *Mulder I* and *von Deetzen* judgments, on 20 March 1989 the Council adopted Regulation (EEC) No 764/89 amending Regulation No 857/84 (OJ 1989 L 84, p. 2), which entered into force on 29 March 1989, in order that the category of producers covered by those judgments might be allocated a special reference quantity representing 60% of their production during the 12 months preceding their undertaking, given under Regulation No 1078/77, to cease marketing or to convert.

8 Article 3a(1)(b) of Regulation No 857/84, as amended by Regulation No 764/89, made the provisional award of a special reference quantity subject, in particular, to the condition that producers 'establish in support of their request ... that they [were] able to produce on their holding up to the reference quantity requested'.

9 The first indent of Article 3a(1) of that regulation referred to producers 'whose period of non-marketing or conversion, pursuant to the undertaking given under Regulation ... No 1078/77, expire[d] after 31 December 1983, or after 30 September 1983 in Member States where the milk collection in the months April to September is at least twice that of the months October to the March of the following year'.

10 Article 3a(3) of Regulation No 857/84, as amended by Regulation No 764/89, provides:

'If, within two years from 29 March 1989, producers can prove to the satisfaction of the competent authority that they have actually resumed direct sales and/or deliveries, and that such direct sales and/or deliveries have attained during the previous 12 months a level equal to or greater than 80% of the provisional reference quantity, the special reference quantity shall be definitively allocated to the producers. Should this not prove to be the case, the provisional reference quantity shall be returned in its entirety to the Community reserve ...'

11 In pursuance of Regulation No 764/89, Commission Regulation (EEC) No 1033/89 of 20 April 1989 amending Regulation (EEC) No 1546/88 laying down detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68 (OJ 1989 L 110, p. 27), inserted an Article 3a in Regulation No 804/68. The first subparagraph of Article 3a(1) reads:

'The requests [for a special reference quantity] referred to in Article 3a(1) of Regulation ... No 857/84 shall be made by the producers concerned to the competent authority designated by the Member State, in accordance with the procedure laid down by it and provided that the producers can prove that they still

operate, in whole or in part, the same holdings as those they operated at the time of the approval, referred to in Article 5(2) of Commission Regulation (EEC) No 1391/78, of their premium applications.'

12 Producers who had entered into non-marketing or conversion undertakings and who, pursuant to Regulation No 764/89, received a 'special' reference quantity are known as 'SLOM I producers'.

13 In its judgment in Case C-189/89 *Spagl* [1990] ECR I-4539, the Court of Justice held that the first indent of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, was invalid in so far as it excluded from the grant of a special reference quantity under that provision producers whose period of non-marketing or conversion, pursuant to an undertaking given under Regulation No 1078/77, had expired before 31 December 1983 or, in some cases, before 30 September 1983.

14 Following the judgment in *Spagl*, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35) which, by removing the conditions which the Court declared invalid, made it possible for the producers concerned to be awarded a special reference quantity. They are known as 'SLOM II producers'.

15 By an interim judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 ('the *Mulder II* judgment'), the Court ruled that the European Economic Community was liable for the damage suffered by certain milk producers who had given undertakings under Regulation No 1078/77 and had subsequently been prevented from marketing milk as a result of the application of Regulation No 857/84. The Court called upon the parties to agree on the amounts of damages payable.

16 Following that judgment, the Council and the Commission published Notice 92/C 198/04 in the *Official Journal of the European Communities* of 5 August 1992 (OJ 1992 C 198, p. 4; 'the notice of 5 August 1992'). After setting out the implications of the *Mulder II* judgment, the institutions stated their intention to make practical arrangements to compensate the producers concerned in order to give full effect to that judgment.

17 Until such time as those arrangements were adopted, the institutions undertook not to plead, against any producer who met the conditions arising from the *Mulder II* judgment, that his claim was time-barred under Article 46 of the Statute of the Court of Justice. However, that undertaking was subject to the condition that entitlement to compensation was not already time-barred on the date of publication of the notice of 5 August 1992 or on the date on which the producer had applied to one of the institutions.

18 By its judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203 ('the *Mulder III* judgment'), the Court ruled on the amount of compensation sought by the applicants in the cases covered by the *Mulder II* judgment.

19 By its judgments of 31 January 2001, in Case T-533/93 *Bouma* v *Council and Commission* [2001] ECR II-203 ('the *Bouma* judgment') and Case T-73/94 *Beusmans* v *Council and Commission* [2001] ECR II-223 ('the *Beusmans* judgment'), the Court of First Instance dismissed the actions based on the Community's non-contractual liability brought under Article 235 EC and the second paragraph of Article 288 EC by two producers of milk in the Netherlands who had, under Regulation No 1078/77, entered into non-marketing undertakings which expired in 1983.

20 In paragraph 45 of the *Bouma* judgment (and paragraph 44 of the *Beusmans* judgment), the Court of First Instance deduced from the *Spagl* judgment that producers whose undertaking had expired in 1983 could validly base their actions

for compensation on infringement of the principle of the protection of legitimate expectations only where they showed that their reasons for not resuming milk production during the reference year were connected with the fact that they had ceased production for a certain time and that they were unable, for reasons to do with the organisation of that production, to resume it immediately.

21 In paragraph 46 of the *Bouma* judgment (and paragraph 45 of the *Beusmans* judgment), the Court of First Instance referred to the *Mulder II* judgment as follows:

'Furthermore, it follows from the *Mulder II* judgment, and more specifically from paragraph 23 thereof, that Community liability is subject to the condition that the producers clearly manifested their intention to resume milk production upon expiry of their non-marketing undertaking. In order for the illegality which led the Court of Justice to declare the regulations giving rise to the situation of the SLOM producers invalid to entitle those producers to damages, the producers must have been prevented from resuming milk production. That means that the producers whose undertaking expired before the entry into force of Regulation No 857/84 resumed production or at least took steps to do so, such as making investments or repairs, or maintaining the equipment necessary for such production (see, on that subject ... Opinion of Advocate General Van Gerven in the case which gave rise to the *Mulder II* judgment at [1992] ECR I-3094, point 30).'

22 With regard to the applicants' position, the Court of First Instance made the following observation in paragraph 48 of the *Bouma* judgment (and paragraph 47 of the *Beusmans* judgment):

'As the applicant did not resume milk production between the date on which his non-marketing undertaking expired ... and the date on which the quota scheme entered into force, 1 April 1984, he must show, in order for his claim for compensation to be well founded, that he had the intention of resuming milk

production upon the expiry of his non-marketing undertaking and that he found it impossible to do so owing to the entry into force of Regulation No 857/84.'

23 By its judgment in Joined Cases C-162/01 P and C-163/01 P *Bouma and Beusmans* v *Council and Commission* [2004] ECR I-4509 ('the *Bouma and Beusmans* judgment'), the Court of Justice dismissed the appeals against the *Bouma* judgment and the *Beusmans* judgment.

24 In paragraphs 62 and 63 of the *Bouma and Beusmans* judgment, the Court of Justice held:

'62 The Court of First Instance merely inferred from the *Spagl* judgment, in paragraph 45 of the *Bouma* judgment (paragraph 44 of the *Beusmans* judgment), that producers whose undertaking expired in 1983 [had to] show that their reasons for not resuming milk production during the reference year [were] connected with the fact that they [had] ceased production for a certain time and that they were unable, for reasons to do with the organisation of that production, to resume production immediately.

63 There is no error in that interpretation of the *Spagl* judgment.'

25 In paragraph 72 of the *Bouma and Beusmans* judgment, the Court of Justice found as follows:

'... the conditions that must be met in order for Mr Bouma and Mr Beusmans to be able to claim compensation in their capacity as SLOM 1983 producers can only stem

from the interpretation which the Court has given to the rules on that subject. Regulation No 1639/91 amends Article 3a of Regulation No 857/84, as amended by Regulation No 764/89, with regard to the grant of a special reference quantity, but does not stipulate the conditions under which a SLOM 1983 producer can claim compensation. Compensation under Regulation No 2187/93 remains a separate issue since the system set up by that regulation constitutes an alternative to the settlement of disputes by the courts and offers an additional means of making damage good (Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 47)'.

26 In paragraphs 89 and 90 of the *Bouma and Beusmans* judgment, the Court of Justice concluded in these terms:

'89 Contrary to what Mr Bouma and Mr Beusmans argue, the Court of First Instance could draw the general conclusion from this, in paragraph 46 of the *Bouma* judgment (paragraph 45 of the *Beusmans* judgment), that Community liability is subject to the condition that the producers must have clearly manifested their intention to resume milk production upon expiry of their non-marketing undertaking.

90 As a result, it was permissible for the Court of First Instance, in paragraph 46 of the *Bouma* judgment (paragraph 45 of the *Beusmans* judgment), to require a SLOM 1983 producer to manifest upon expiry of his non-marketing undertaking under Regulation No 1078/77, his intention to resume milk production either by producing milk again [that is], at the very least, like SLOM I producers, by taking steps to do so, such as making investments or repairs, or maintaining the equipment necessary for such production.'

27 In paragraphs 100 and 101 of the *Bouma and Beusmans* judgment, the Court of Justice held as follows:

> '100 In that regard, it is appropriate to point out that, as the Advocate General stated in point 125 of her Opinion, the way in which the Court of First Instance apportioned the burden of proof in the judgments under appeal is in accordance with the established case-law that it is for the applicant to show that the various conditions relating to non-contractual liability on the part of the Community are met. Since the Community may be held so liable only where a producer proves his intention to resume the marketing of milk, either by resuming production after the expiry of his non-marketing undertaking, or by other manifestations of that intention, it is for the person claiming compensation to prove the genuineness of that intention.
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> 101 As regards the complaint that Mr Bouma and Mr Beusmans could not presume the consequences that failure to resume production before 1 April 1984 would have, it should be pointed out that they should have expected, like any operator seeking to begin milk production, to be subject to any rules of market policy adopted in the meantime. They could not therefore legitimately expect to be able to resume production under the same conditions as those which applied previously (see, to that effect, the *Mulder I* judgment, paragraph 23).'

The facts

28 On 24 May 1980, the applicant, a producer of milk in the Netherlands, entered into a non-marketing undertaking under Regulation No 1078/77 which expired on 24 May 1985.

29 On 2 June 1989, following the adoption of Regulation No 764/89, the applicant applied to the Netherlands authorities for the grant of a special reference quantity, stating that he 'was able effectively to produce on his holding the special reference quantity allocated'.

30 By decision of 21 July 1989, a provisional special reference quantity was allocated to the applicant.

31 By decision of 31 October 1990 a definitive reference quantity was allocated to the applicant, which was subsequently withdrawn by a decision of the Netherlands Ministry of Agriculture, Nature and Fisheries of 11 October 1991 following an inquiry which showed that he did not fulfil the conditions for allocation of a definitive reference quantity, because he did not produce the milk referred to in the Beschikking Superheffing SLOM-deelnemers (rules on the additional levy on the participants in the SLOM scheme) on the initial SLOM holding.

32 Moreover, the applicant's wife managed a milk production operation on the initial SLOM holding.

33 The applicant lodged an objection against the decision of the Ministry of Agriculture, Nature and Fisheries. That objection having been dismissed, the applicant brought an action before the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry, Netherlands), which was also dismissed by decision of 16 January 1997.

Procedure

34 By application lodged at the Registry of the Court of First Instance on 22 November 1994, the applicant brought this action. The action was registered under number T-373/94.

35 By order of the First Chamber (Extended Composition) of 24 January 1995, the Court of First Instance stayed proceedings in the present case pending delivery of the *Mulder III* judgment.

36 By order of the President of the First Chamber (Extended Composition) of 24 February 1995, the Court of First Instance decided to join Cases T-372/94 and T-373/94 with Joined Cases T-530/93 to T-533/93, T-1/94 to T-4/94, T-11/94, T-53/94, T-71/94, T-73/94 to T-76/94, T-86/94, T-87/94, T-91/94, T-94/94, T-96/94, T-101/94 to T-106/94, T-118/94 to T-124/94, T-130/94 and T-253/94.

37 On 30 September 1998 an informal meeting with the parties' representatives took place before the Court of First Instance. In the course of that meeting, the parties had the opportunity of submitting their observations on the analytical classification by the Court of First Instance of the cases concerning the SLOM producers, which included category 'D', concerning the SLOM producers who had not obtained a definitive reference quantity or from whom such a reference quantity had been withdrawn, and to whom, consequently, no offer of compensation under Council 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) had been made.

38 On 17 January 2002, there was a second informal meeting with the parties' representatives before the Court of First Instance. An agreement was reached between the parties concerning the choice of a test case among category III of SLOM producers and the Court of First Instance ordered the other cases involving that category to be stayed pending delivery of the judgment in the test case chosen.

39 By order of the President of the Second Chamber (Extended Composition) of 27 June 2002, the Court of First Instance ordered the removal of Case T-2/94 from the list of joined cases set out in paragraph 36 of the present judgment.

40 By letter of 25 July 2002 sent to the Court, the Council and Commission proposed the reopening of the procedure in Case T-373/94 as a test case for category III of SLOM producers. The applicant did not submit observations in that regard.

41 By order of the President of the First Chamber (Extended Composition) of 2 December 2002, the Court of First Instance ordered the disjoinder of Case T-373/94 from the joined cases mentioned in paragraph 36 of this judgment and lifted the stay of proceedings in Case T-373/94.

42 On 5 February 2003, the applicant lodged an updated application at the Registry of the Court of First Instance intended to replace the initial application.

43 By decision of the Plenary Meeting of 2 July 2003, the Court of First Instance decided to refer this case to a chamber composed of three judges, in this instance the First Chamber.

44 The composition of the Chambers of the Court of First Instance changed at the beginning of the new judicial year and the Judge-Rapporteur was assigned to the Fifth Chamber, to which this case was itself accordingly assigned.

45 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any prior measures of inquiry.

46 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 6 April 2006.

47 At the hearing, the applicant's lawyer requested the Court to organise an informal meeting in the present case and in the other cases in which he is instructed in order to determine the cases in which the intention to resume milk production upon expiry of the non-marketing undertaking was proven. The Commission opposed that request on the ground that the purpose of the present case, which is a test case, was to resolve a specific question of law and that the evidence necessary in each case should be submitted to the Court in accordance with normal procedure.

48 At the hearing, the Court decided to reserve its decision on the request to organise an informal meeting and, if necessary, to reopen the oral procedure. With regard to the other cases in which the applicant's lawyer is instructed, the Court decided that a decision would be taken in the context of those cases.

49 The applicant also claimed during the oral procedure that, having regard to the judgment in Case C-164/01 P *van den Berg* v *Council and Commission* [2004] ECR I-10225, his application for compensation was not entirely time-barred. At the

request of the Council, the Court of First Instance granted it three weeks to set out its position and state whether it intended to withdraw its plea concerning the total time-bar of the application. The Commission indicated that it shared the Council's view. The defendants argued that the application was in part time-barred.

50 By letter of 4 May 2006, the Council replied that it would not plead before the Court of First Instance that there was a time-bar for the period from 25 September 1988 to 29 March 1989.

51 By decision of 15 May 2006, the President of the Fifth Chamber of the Court of First Instance decided to add that document to the file and to close the oral procedure.

Forms of order sought

52 The applicant claims that the Court should:

— order the Community to pay a sum of EUR 5 908.52 plus interest thereon at the rate of 8% per year from 19 May 1992 to the date of payment;

— order the Community to pay the costs.

53 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

54 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

55 The applicant alleges that the conditions for the Community to incur liability are met and that the Council's plea that his claim is partially time-barred cannot be upheld.

56 The Court of First Instance considers that, in this case, the examination of the question of limitation necessitates prior determination of whether the Community can incur liability under the second paragraph of Article 215 of the EC Treaty (now

the second paragraph of Article 288 EC) and, if so, until what date (see, to that effect, the *Bouma* judgment, paragraph 19 above, paragraph 28; the *Beusmans* judgment, paragraph 19 above, paragraph 27; and Case T-199/94 *Gosch* v *Commission* [2002] ECR II-391, paragraph 40).

Arguments of the parties

57 The applicant disputes the defendants' contention that the SLOM I producers who, like him, had their quota withdrawn may claim compensation for the period up to 1 April 1989 provided that they show that they had taken concrete steps to resume production following the expiry of their SLOM undertaking.

58 The applicant takes the view that such a requirement of proof is not valid on the ground, firstly, that it is in no way justified by the facts appertaining to the SLOM I producers and, secondly, that it amounts to unlawful discrimination against the SLOM I producers whose quotas were withdrawn compared to the SLOM I producers who were awarded a definitive quota.

59 He observes that the requirement put forward by the defendants is based on the reasoning of the Court of First Instance in the *Bouma* judgment and the *Beusmans* judgment, but takes the view that it cannot be transposed to the situation of SLOM I producers, since the reason that the Court considered, in those judgments, that the producers in question had to prove their intention to resume milk production on expiry of their SLOM undertakings was related to the fact that the SLOM undertakings expired during the reference year, in that case 1983.

60 According to the applicant, the SLOM producers who, like him, had entered into non-marketing undertakings which expired before the end of the reference year were in a fundamentally different situation from that of the SLOM II producers, such as the applicants in the cases which gave rise to the *Bouma* judgment and the *Beusmans* judgment. Since, at the end of the reference year, that is to say 1983, there were therefore still 17 months before his non-marketing undertaking expired, it would not be reasonable to require that, in order to establish that the Community is liable, he prove that he took concrete measures during the reference year to resume milk production at the end of his non-marketing undertaking.

61 The applicant adds that, from 1 April 1984, all SLOM producers knew that they were excluded from the quota scheme and that, in those circumstances, it would have been unreasonable to make investments with a view to resuming milk production when it was clear that milk production could not be resumed. The same applies to the requirement of proof of an application for a reference quantity after expiry of the non-marketing undertaking, in the present case in 1985, since it was established that such an application would simply be rejected like those made by the SLOM producers. Moreover, the competent authorities informed the SLOM producers in 1985 that there was no realistic prospect, for those in the applicant's situation, of their being allocated a reference quantity.

62 Thus the applicant takes the view that, having regard to the circumstances, the requirement to prove that a SLOM I producer has taken concrete steps with a view to recommencing milk production at the end of his non-marketing undertaking has never been laid down either by the Court or by the defendants.

63 In that regard, the applicant cites Case T-184/94 *Rudolph* v *Commission* [2002] ECR II-367, in which the Court held, in paragraph 47, that the applicant in that case, whose non-marketing undertaking had expired on 31 March 1985, that is to say,

after the entry into force of the milk quota scheme, was not required to prove, in order to justify her entitlement to compensation, that she intended to resume milk production following the expiry of that undertaking, since the expression of such an intention was, in practice, rendered impossible from the time when that scheme entered into force.

64 The Council and the Commission submit that the conditions for the non-contractual liability of the Community are not met in this case and the action should therefore be dismissed.

Findings of the Court

65 According to the case-law, the Community may incur non-contractual liability under the second paragraph of Article 215 of the EC Treaty for damage caused by the institutions only if a number of conditions, as regards the illegality of the conduct complained of, the occurrence of actual damage and a causal link between the illegal conduct and the damage alleged, are satisfied (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 10; 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; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80; the *Bouma* judgment, paragraph 19 above, paragraph 39, and the *Beusmans* judgment, paragraph 19 above, paragraph 38, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraph 43, and *Gosch* v *Commission*, paragraph 56 above, paragraph 41).

66 As regards the situation of milk producers who entered into a non-marketing undertaking, the Community incurs liability in respect of each producer who suffered loss because he was prevented from delivering milk by Regulation No 857/84 (the *Mulder II* judgment, paragraph 15 above, paragraph 22). That

liability is based on breach of the principle of the protection of legitimate expectations (the *Bouma* judgment, paragraph 19 above, paragraph 40, the *Beusmans* judgment, paragraph 19 above, paragraph 39, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraphs 45 to 47, and *Gosch* v *Commission*, paragraph 56 above, paragraph 42).

67 However, that principle may be invoked against Community legislation only to the extent that the Community itself previously created a situation which could give rise to a legitimate expectation (Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14; the *Bouma* judgment, paragraph 19 above, paragraph 41, and the *Beusmans* judgment, paragraph 19 above, paragraph 40, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraphs 45 to 47, and *Gosch* v *Commission*, paragraph 56 above, paragraph 43).

68 Thus, an operator who was encouraged, by a Community measure, to suspend marketing of milk for a limited period in the general interest and against payment of a premium can legitimately expect not to be made subject at the end of his undertaking to restrictions which affect him in a specific way, precisely because of the fact that he had made use of the possibilities offered by the Community legislation (the *Mulder I* judgment, paragraph 24, and the *von Deetzen* judgment, paragraph 13). By contrast, in the case of a scheme such as that of the additional levy, the principle of the protection of legitimate expectations does not preclude the imposition of restrictions on a producer because of the fact that he has not marketed milk, or has marketed only a reduced quantity, during a given period prior to the entry into force of that scheme as a result of a decision which he freely took, without having been encouraged to do so by a Community measure (*Kühn*, paragraph 15; the *Bouma* judgment, paragraph 19 above, paragraph 42, and the *Beusmans* judgment, paragraph 19 above, paragraph 41, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraphs 45 to 47, and *Gosch* v *Commission*, paragraph 56 above, paragraph 44).

69 Furthermore, it follows from the *Spagl* judgment that the Community could not, without infringing the principle of protection of legitimate expectations, automatically preclude from the grant of quotas all producers whose non-marketing or

conversion undertakings had expired in 1983, in particular those who, like Mr Spagl, had been unable to resume production for reasons connected with their undertaking (the *Bouma* judgment, paragraph 19 above, paragraph 43, and the *Beusmans* judgment, paragraph 19 above, paragraph 42, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraph 53, and *Gosch* v *Commission*, paragraph 56 above, paragraph 45). The Court of Justice thus held in paragraph 13 of that judgment:

'[T]he Community legislature was able validly to set a cut-off date by reference to the expiry of the period of non-marketing or conversion of the persons concerned, with a view to excluding from the benefit [of the provisions on the allocation of a special reference quantity] those producers who had not delivered milk during the whole or part of the reference year for reasons unconnected with the undertaking as to non-marketing or conversion. On the other hand, by virtue of the principle of the protection of legitimate expectations, as interpreted in the cases cited above, the cut-off date cannot be set in such a way that it has the effect of also excluding from the benefit [of those provisions] producers whose failure to deliver milk for the whole or part of the reference year derives from the fulfilment of an undertaking given under Regulation No 1078/77.'

70 It is therefore a reasonable inference from that judgment that producers whose undertaking expired in 1983 can validly base their actions for compensation on infringement of the principle of the protection of legitimate expectations only where they show that their reasons for not resuming milk production during the reference year are connected with the fact that they had ceased production for a certain time and that they were unable, for reasons to do with the organisation of that production, to resume production immediately (the *Bouma* judgment, paragraph 19 above, paragraph 45, and the *Beusmans* judgment, paragraph 19 above, paragraph 44, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraphs 62 and 63, and *Gosch* v *Commission*, paragraph 56 above, paragraph 47).

71 Furthermore, it follows from the *Mulder II* judgment (paragraph 23) that Community liability is subject to the condition that producers who gave a non-

marketing undertaking clearly manifested their intention to resume milk production upon expiry of that undertaking. According to the *Bouma* judgment (paragraph 46) and the *Beusmans* judgment, (paragraph 45), in order for the illegality which led the Court of Justice to declare the regulations giving rise to the situation of the SLOM producers invalid to entitle those producers to damages, they must have been prevented from resuming milk production by the entry into force of the additional levy scheme.

72 If a producer has not manifested that intention, he cannot claim to have had a legitimate expectation in the possibility of resuming milk production at some future date. In those circumstances, his position is no different from that of economic operators who did not produce milk and who, after the introduction of the milk quota scheme in 1984, were prevented from commencing such production. It is settled case-law that, in the sphere of the common organisations of the market, which involve constant adjustments to meet changes in the economic situation, economic operators cannot legitimately expect that they will not be subject to restrictions which may arise out of future rules of market or structural policy (see the *Bouma* judgment, paragraph 19 above, paragraph 47, and the *Beusmans* judgment, paragraph 19 above, paragraph 46, and the case-law cited there, confirmed by the *Bouma and Beusmans* judgment, paragraph 23 above, paragraphs 99 to 102, and *Gosch* v *Commission*, paragraph 56 above, paragraph 49).

73 With regard to the producers whose non-marketing undertakings expired after the entry into force of the additional levy scheme, the Court of Justice inferred from the actions taken by the producers in the *Mulder II* case and referred to in the first sentence of paragraph 23 of *Mulder II* — that is to say an application, before the expiry of the non-marketing undertaking, for allocation of a reference quantity under the additional levy and the resumption of milk production at the latest immediately after having obtained a special reference quantity under Regulation No 764/89 — that they had manifested in an appropriate manner their intention to

resume milk production. It concluded that the loss of income from milk deliveries could not be regarded as being the consequence of the applicants' freely deciding to give up milk production (*Bouma and Beusmans*, paragraph 88).

74 In the present case, it is common ground that the applicant gave a non-marketing undertaking which expired on 24 May 1985, after the entry into force of the additional levy scheme.

75 In that regard, it should be noted, firstly, that the applicant, like the producers in the case which gave rise to the *Mulder II* judgment, whose non-marketing undertakings also expired after the entry into force of the additional levy scheme, did not apply for allocation of a reference quantity under that scheme before his non-marketing undertaking expired. Furthermore, the applicant did not make such an application immediately after the end of the period covered by that undertaking.

76 Secondly, it is also common ground that the applicant, unlike the producers in the case which gave rise to the *Mulder II* judgment, did not resume marketing milk immediately after having obtained a special reference quantity under Regulation No 764/89 on the initial SLOM holding.

77 It is indeed clear from the file, first of all, that, following the adoption of Regulation No 764/89, the applicant applied for a special reference quantity which was allocated to him on 21 July 1989. The definitive reference quantity allocated to him on 31 October 1990 was, however, withdrawn by decision of 11 October 1991 of the Ministry of Agriculture, Nature and Fisheries on the ground 'that it emerged from an inquiry carried out by the Ministry's General Inspection Service that [the

applicant] did not fulfil the conditions for such a definitive allocation', since he did not produce 'on [his] initial SLOM holding the milk referred to by the Beschikking Superheffing SLOM-deelnemers'.

78 Next, the action brought against that decision before College van Beroep voor het Bedrijfsleven was dismissed by judgment of 16 January 1997 on the ground, inter alia, that 'the production units of the initial SLOM holding [were] ... not involved in the resumption of milk production in such as way that the view [could] be taken that the applicant [had] resumed that production from the initial SLOM holding'.

79 Furthermore, it is also apparent from the judgment of 16 January 1997 of the College van Beroep voor het Bedrijfsleven that 'the decision taken by the applicant not to turn to the initial SLOM holding to produce the quantity corresponding to the SLOM quota provisionally allocated, because his wife kept a milk herd on that SLOM holding, must be regarded as a management decision the consequences of which must be borne by the applicant'.

80 As the Council observed, production could not be resumed on the initial SLOM holding since it was being used by the applicant's wife for milk production, the applicant having put that holding to a new use.

81 Finally, it should be noted that, according to the case-law of the Court of Justice, it follows from a combined reading of the provisions of Article 3a(1) of Regulation No 857/84, as amended by Regulation No 764/89, and of Article 3a(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68 (OJ 1988 L 139, p. 12), as amended by Regulation No 1033/89 on the

conditions for allocation of a special reference quantity, that milk production must be carried out from the initial SLOM holding (see, to that effect, Case C-86/90 *O'Brien* [1992] ECR I-6251, paragraphs 11 and 12; Case C-98/91 *Herbrink* [1994] ECR I-223, paragraphs 12 and 13, and *van den Berg* v *Council and Commission*, paragraph 71).

82 As the Council was right to point out, where the Community, following the *Mulder I* judgment, adopted new regulations permitting the grant of a reference quantity to SLOM producers, it was obliged to limit that grant to those who had a genuine claim thereto, that is to say those who actually intended to resume production at the end of the non-marketing period, and to exclude those who did not have that intention and who were therefore in the same situation as other farmers who had not produced milk during the reference year and who were therefore unable to obtain a reference quantity on institution of the additional levy scheme.

83 To that effect, the second recital in the preamble to Regulation No 764/89 states that, 'however, producers may claim such special quantities only if they comply with certain eligibility criteria thus making clear that they intend and are really able to resume milk production and find it impossible to obtain a reference quantity pursuant to Article 2 of Regulation No 857/84'.

84 In view of all the elements mentioned in paragraphs 74 to 83 of the present judgment, examined in the light of the *Mulder II* judgment, it must be held that, as the definitive reference quantity allocated to the applicant was withdrawn from him precisely because he did not meet the conditions laid down by Regulation No 857/84, as amended by Regulation No 764/89, for entitlement to such a reference quantity, and in particular because he did not produce milk on the initial SLOM holding, the non-marketing of milk on expiry of the undertaking which he

gave cannot, in the absence of any proof presented by the applicant of his intention to resume milk production, be attributed to the entry into force of the additional levy scheme.

85 On that point, it should be noted, as Advocate General Van Gerven observed in point 30 of his Opinion in *Mulder II*, the Community may presume, with regard to milk producers whose non-marketing undertakings expired after the entry into force of the additional levy scheme and who applied for a special reference quantity under Regulation No 764/89 but who did not obtain one since they did not satisfy the conditions set out in that regulation, that, failing proof to the contrary by them, they would not have been able to obtain a reference quantity if Regulation No 857/84 had provided for it, and thus they are in the same position as SLOM producers who never applied for a reference quantity.

86 Such a presumption must also apply to producers who, like the applicant, obtained a special reference quantity under Regulation No 764/89 which was withdrawn from them on the ground that they did not meet the conditions set out therein.

87 That analysis is in accordance with the interpretation by the Court of Justice of the conditions for the Community's non-contractual liability in connection with the introduction in 1984 of the additional levy scheme, which, as was found in the case-law cited in paragraphs 66 and 72 of this judgment, is incurred only in respect of those producers who had temporarily ceased milk production, resumption of which was prevented precisely because of the entry into force of the additional levy scheme. However, the refusal to compensate producers who had not resumed marketing of milk upon the expiry of the non-marketing undertaking for reasons other than those connected with the entry into force of that scheme is justified by the need to prevent the former from seeking the allocation of a special reference

quantity in order, not to resume the marketing of milk on an enduring basis, but to derive from that allocation a purely financial advantage by realizing the market value which the reference quantities have acquired in the meantime (see, to that effect, Case C-44/89 *von Deetzen* [1991] ECR I-5119, paragraph 24).

88 Thus, it is for producers who, like the applicant, ceased marketing milk under Regulation No 1078/77 and applied for a special reference quantity following adoption of Regulation No 764/89, which was allocated to them and then withdrawn, to prove that they intended to resume milk production on expiry of their non-marketing undertaking.

89 On that point, and contrary to the submissions of the applicant, the judgment in *Rudolph* v *Council and Commission*, paragraph 63 above, in particular paragraph 47 thereof, cannot be interpreted as meaning that proof of the applicant's intention to resume milk production on expiry of his non-marketing undertaking is no longer required.

90 That judgment can be read only in the light of the facts of that case. Thus, Ms Rudolph, a milk producer who, under Regulation No 1078/77, had entered into a non-marketing undertaking which had expired on 31 March 1985, had obtained, after the entry into force of Regulation No 764/89, a special reference quantity which allowed her to resume milk production.

91 The judgment in *Rudolph* v *Council and Commission* (paragraph 47), must therefore be read as meaning that proof of the applicant's intention to resume milk production on expiry of his non-marketing undertaking is always required, but that such proof is deemed to be established where producers whose non-marketing undertaking

expired after the entry into force of the additional levy scheme demonstrate that they fulfil the conditions laid down by the applicable legislation permitting them to resume milk production by applying for and retaining a special reference quantity for the purposes of resumption of the activity of milk producer.

92 In the present case, firstly, the applicant's special reference quantity, allocated to him following adoption of Regulation No 764/89, was withdrawn on the ground that he did not meet the conditions under the abovementioned Community legislation for allocation of such a reference quantity.

93 Secondly, it was not until the hearing that the applicant referred to a set of documents which still existed and could be produced to the Court at an informal meeting which he suggested the Court should organise in order to analyse those documents. He claimed that they show that his son, who was 17 years old in 1985, had followed a course of vocational training with a view to working as a milk producer and thus to taking over his father's activities since he was close to retirement age. Moreover, he submitted that a statement could have been produced by his accountant in order to confirm his intention to resume milk production.

94 However, apart from the fact that the vocational training and the abovementioned statement cannot constitute steps taken by the producer to demonstrate his intention to produce milk after expiry of his non-marketing undertaking, it must be held that the submissions in that regard were made only at the hearing, whereas the documents alleged to support them could have been added to the file during the written procedure. It follows that the applicant's request that the Court organise an informal meeting for the purposes of adding those documents to the file and examining them must be rejected.

95 Finally, as the Council observed, no proof has been adduced to demonstrate, if it be the case, that the reasons which prevented the applicant from resuming milk production under the conditions laid down in Regulation No 764/89 did not exist on expiry of the non-marketing undertaking and that they would not have prevented that resumption.

96 In those circumstances, it must be held that the applicant has failed to establish that, in accordance with the principles set out above, on expiry of his non-marketing undertaking, he intended to resume milk production.

97 It must also be held that the applicant's argument that there was discrimination between milk producers according to whether they were in the category of SLOM I producers whose special reference quantity was withdrawn or that of SLOM I producers who had a definitive special reference quantity cannot be accepted, since there is an objective difference between those two categories of producers and thus they should not be treated identically.

98 It is settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (see Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 22; Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9; Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 113; and Case T-119/95 *Hauer* v *Council and Commission* [1998] ECR II-2713, paragraph 63).

99 It follows from all the foregoing that the applicant has not established the causal link between Regulation No 857/84 and the damage alleged. Consequently, it must be concluded that the Community cannot incur liability in respect of the applicant because of the application of Regulation No 857/84 and there is no need to consider whether the other conditions for such liability are met.

100 Therefore, it is also unnecessary to consider whether the application in this case was time-barred.

101 It follows that the application must be dismissed.

Costs

102 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful he must, in accordance with the forms of order sought by the Council and the Commission, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr R.W. Werners to pay the costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 12 December 2006.

E. Coulon M. Vilaras

Registrar President