JUDGMENT OF THE COURT (Sixth Chamber)
27 January 2000 *

In Joined Cases C-104/89 and C-37/90,

J.M. Mulder,

W.H. Brinkhoff,

J.M.M. Muskens,

Tj. Twijnstra,

represented by H.J. Bronkhorst, of the Hague Bar, and E.H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 11 Rue Goethe,

applicants in Case C-104/89,

and

Otto Heinemann, represented by M. Düsing, Rechtsanwalt, Münster, with an address for service in Luxembourg at the Chambers of Lambert, Dupong and Konsbruck, 14a Rue des Bains,

applicant in Case C-37/90,

* Languages of the case: in Case C-104/89: Dutch; in Case C-37/90: German.

Council of the European Union, represented, in Case C-104/89, by Arthur Brautigam, Legal Adviser, and G. Houttuin, of its Legal Service, and, in Case C-37/90, by A. Brautigam, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented,

— in Case C-104/89, by T. van Rijn, Legal Adviser, acting as Agent,

— in Case C-37/90, by D. Booß, Legal Adviser, acting as Agent, assisted by H.-J. Rabe, Rechtsanwalt, Hamburg,

with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty (now Article 235 EC and the second paragraph of Article 288 EC),

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, acting for the President of the Sixth Chamber, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing and the two addenda thereto,

after hearing oral argument from the parties at the hearing on 28 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1998,

gives the following

Judgment

1 By interlocutory judgment of 19 May 1992 ([1992] ECR I-3061, hereinafter 'the interlocutory judgment') delivered in the present joined cases, the Court ordered the European Community, represented by the Council of the European Union and the Commission of the European Communities, to make good the damage suffered by the applicants 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 (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), in so far as those regulations did not provide for the allocation of a reference quantity to producers who, pursuant 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 (OJ 1977 L 131, p. 1), did not deliver any milk during the reference year adopted by the Member State concerned.

2 The Court ruled that interest at the annual rate of 8% in Case C-104/89 and 7% in Case C-37/90 should be payable on the amounts of compensation as from the date of the interlocutory judgment. For the rest, the applications were dismissed.

3 According to points 4 and 5 of the operative part of the interlocutory judgment, the parties were ordered to inform the Court within twelve months from the date of delivery of that judgment of the amounts of damages payable arrived at by agreement, or, in the absence of agreement, to transmit to the Court within the same period a statement of their views with supporting figures. The costs were reserved.

4 Following delivery of the interlocutory judgment, the parties entered into negotiations with a view to assessing the damage. Those negotiations were not concluded within the prescribed time-limit. The applicants then lodged statements of their views with supporting figures on 19 June 1993 in Case C-104/89

and on 30 June 1993 in Case C-37/90. The Council and the Commission lodged statements of their views, relating jointly to the two cases, on 3 November 1993 and 29 October 1993 respectively.

5 With a view to giving effect to the interlocutory judgment in favour of all the producers concerned, the Council adopted on 22 July 1993 Regulation (EEC) No 2187/93 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). That regulation was supplemented by Commission Regulation (EEC) No 2648/93 of 28 September 1993 laying down detailed rules for the application of Regulation No 2187/93 (OJ 1993 L 243, p. 1).

6 Pursuant to those regulations, in particular the first of them, the Commission offered all the producers concerned flat-rate compensation calculated, in essence, on the basis of the quantity of milk and the relevant compensation period. For the purposes of determining the amount of the flat-rate compensation due, Regulation No 2187/93 establishes a method of calculation and lays down the criteria applicable in that regard. The annex to the regulation specifies, for each marketing year and with reference to three production volume bands, a flat-rate sum per 100 kg of milk, expressed in green ecus.

7 Under Article 10(2) of Regulation No 2187/93, the time-limit for submission of an application for compensation expired on 30 September 1993. Having submitted to the Court, prior to the entry into force of that regulations, statements of their views with supporting figures, the applicants did not take up that offer of compensation.

I — The arguments of the parties and the conclusions reached in the expert's report

A — *The parties' arguments in Case C-104/89*

8 In their application in Case C-104/89, the applicants claimed damages in the following sums, together with statutory interest at the annual rate of 8% to the date of payment of the compensation due, and without prejudice to any further damage which they might suffer in the future:

— Mr Mulder: NLG 533 937,

— Mr Brinkhoff: NLG 288 473,

— Mr Muskens: NLG 448 099,

— Mr Twijnstra: NLG 787 366.

9 They subsequently increased their compensation claims, first in their reply and then following delivery of the interlocutory judgment. In pursuance of that judgment, they claimed, in respect of loss of earnings, the sums of NLG 1 159 000 in the case of Mr Mulder, NLG 1 166 000 in the case of Mr Brinkhoff, NLG 778 500 in the case of Mr Muskens and NLG 1 069 000 in the case of Mr Twijnstra.

10 As regards interest, the applicants claimed in their reply 'interest at the annual rate of 8% for the period from 30 March 1989 to the date of payment'. They subsequently claimed, in their statement lodged following delivery of the interlocutory judgment, 'annual interest of 8% from the date of delivery of the interlocutory judgment in the present case, that is to say, from 19 May 1992 until the date of payment'.

11 In addition, as well as seeking an order requiring the Community to pay the costs, the applicants claimed that those costs should include 'the expenses connected with the evaluation of the damage suffered by the applicants'.

12 In the statement lodged by them in response to the expert's report, the applicants claim that they should be awarded the following sums by way of reparation:

— Mr Mulder: NLG 703 090,

— Mr Brinkhoff: NLG 570 020,

— Mr Muskens: NLG 535 762,

— Mr Twijnstra: NLG 751 141,

together with compensatory interest up to the date of delivery of the interlocutory judgment, at the rate applied to State loans by the Netherlands authorities. The

applicants also claim that the Council and the Commission should be ordered to pay the costs of the proceedings, including the expenses connected with the evaluation of the damage suffered by them.

13 The Council adopts the figures produced and the arguments submitted by the Commission. However, it states that it is willing, in the alternative, to offer compensation in accordance with Regulation No 2187/93.

14 The Commission, basing its position as far as possible on the individual situation of the applicants for the purposes of determining the quantum of the damage suffered by them, considers that such damage amounts:

— in the case of Mr Mulder, to NLG 50 579.15,

— in the case of Mr Brinkhoff, to NLG 109 675.55,

— in the case of Mr Muskens, to NLG 120 090.83,

— in the case of Mr Twijnstra, to NLG 137 299.20.

15 However, in so far as the Commission declares, in the alternative, its readiness to pay compensation in accordance with Regulation No 2187/93, it assesses the compensation due as amounting to the following sums:

— Mr Mulder: NLG 377 240.60,

— Mr Brinkhoff: NLG 308 241.20,

— Mr Muskens: NLG 291 121.49,

— Mr Twijnstra: NLG 393 014.95.

16 The Council and the Commission contend that the applicants should be ordered to pay the costs in so far as their claims are rejected.

B — *The parties' arguments in Case C-37/90*

17 In his application, Mr Heinemann sought an order requiring the Council and the Commission jointly and severally to pay him compensation of DEM 52 652 in respect of the damage suffered by him, together with statutory interest at the annual rate of 7% from the date on which the action was brought. In his reply, he claimed that the defendant institutions should be ordered to pay the costs.

18 In the statement lodged by him following delivery of the interlocutory judgment, Mr Heinemann seeks, first, compensation in the sum of DEM 71 826, together with default interest at the annual rate of 7% from 19 May 1992, and, second, an additional sum of DEM 4 000 by way of compensation for the higher-rate income tax payable on the amount of the compensation awarded to him.

19 The Council states that it is willing to offer compensation calculated in accordance with Regulation No 2187/93.

20 The Commission has agreed to pay the applicant compensation in the sum of DEM 1 239, but also states, in the alternative, that it is willing to pay compensation in accordance with Regulation No 2187/93.

21 In addition, the Council and the Commission contend that the applicant should be ordered to pay the costs in so far as his claims are rejected by the Court.

C — *The results of the expert's report*

22 By order of 12 July 1996 the Court, after hearing oral argument from the parties at an informal hearing held on 20 May 1996, ordered an expert's report to be drawn up. The expert lodged his report at the Court Registry on 27 February 1997. That report concerns the assessment of the loss of earnings suffered by each of the applicants and the determination of the various factors to be applied in calculating the damage, on which the Court formulated a number of questions.

23 In Case C-104/89, the expert proposes the following sums by way of compensation for loss of earnings:

— Mr Mulder: NLG 475 767,

— Mr Brinkhoff: NLG 386 891,

— Mr Muskens: NLG 318 938,

— Mr Twijnstra: NLG 517 186.

24 In Case C-37/90, it is apparent from the expert's report that the sum payable to Mr Heinemann in respect of his loss of earnings depends on the different rates of reduction applicable to the reference quantities to which the applicant would have been entitled in the normal course of events. Depending on whether a reduction is applied of 2%, 4% or 7% for the whole of the period, or a 'progressive' reduction — of 2% for the first three marketing years and 7.5% for the last two —, the total damage, as assessed by the expert, amounts to DEM 13 096, DEM 11 648, DEM 13 325 or DEM 17 167 respectively.

II — Admissibility

25 In Case C-104/89, the Commission and the Council have raised an objection of inadmissibility, to the effect that the sums latterly claimed in respect of loss of earnings (hereinafter referred to as 'the quantified claims') have been revised upwards, in such a way as to exceed those claimed in the application.

26 According to the Commission, the claim raised by the applicants following delivery of the interlocutory judgment, seeking compensation in respect of three further heads of damage ('the further losses'), is likewise inadmissible in the present case. That claim seeks reparation of the loss arising from the progressive nature of the sliding tax scale ('the tax loss'), the economic loss flowing from the fall in the value of money and the Court's refusal to award default interest in respect of the period prior to delivery of the interlocutory judgment. The Commission submits that those further losses were not pleaded until after the interlocutory judgment had been delivered.

27 For the same reason, the two defendant institutions plead the inadmissibility of the heads of claim under which the applicants, in their most recent written pleadings, seek compensatory interest.

28 In Case C-37/90, the Council and the Commission have raised an objection of inadmissibility, primarily to the effect that the quantified claims include a further claim in addition to those initially made, corresponding to the capitalised compensatory interest for the period prior to delivery of the interlocutory judgment. The Commission further contends that the claim for reparation of loss allegedly caused by the progressive nature of the sliding tax scale is inadmissible.

29 In each of the two cases, the Council additionally pleads failure on the part of the applicants to respect the binding authority of the interlocutory judgment, having regard to the fact that the Court awarded default interest only from 19 May 1992 and dismissed the remainder of the actions.

30 In each of the two cases, the applicants counter by saying that the precise amounts and constituent elements of the damage suffered by them have not yet been debated in the proceedings, inasmuch as the Court has ruled only on the merits concerning the liability of the Community. They refer to the judgment in Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, according to which an amendment made in the course of proceedings to the amount of the damages claimed falls outside the scope of Article 42(2) of the Court's Rules of Procedure. In support of their entitlement to compensatory interest, they cite the judgment in Case C-271/91 *Marshall* v *Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367.

31 In complaining that the applicants have disregarded the fact that Article 42(2) of the Rules of Procedure prohibits the introduction of new pleas in law during the course of proceedings, the defendant institutions rely in the two cases on the argument that all the new claims made by the applicants are out of time.

32 In addition, the Council pleads, solely with regard to the claims for compensatory interest, the principle of *res judicata*.

33 It is appropriate, in those circumstances, to consider separately the objection of inadmissibility alleging that the claims were submitted belatedly and the plea of failure to have regard to the principle of *res judicata*.

A — *The belated nature of the claims*

34 For the purposes of ensuring that its reasoning is clear, the Court proposes to deal separately with the quantified claims, on the one hand, and the remainder of the claims for damages, on the other.

35 First of all, in Case C-104/89, the applicants revised their quantified claims upwards following delivery of the interlocutory judgment, by including therein a sum claimed in respect of the further losses, despite the lack of precise details in that regard. That revision of the amount of damages sought is also intended to take into account the manner in which the loss is to be calculated, as defined by the interlocutory judgment and stated during the course of the procedure; in addition, it arises from the fact that other statistics were used to establish the amount in question, such as those applied in the expert's report.

36 In Case C-37/90, by contrast, the increase in Mr Heinemann's quantified claims arises, in essence, from his wish to include in them a sum corresponding to capitalised compensatory interest.

37 In those circumstances, the Court proposes initially to examine only the admissibility of the quantified claims in Case C-104/89 in so far as the increase in those claims arises solely from changes in the method of calculation and the statistics. Next, it is appropriate to deal jointly with the question of the admissibility of the quantified claims seeking, in Case C-104/89, compensation for the further losses, and with that of the admissibility of the claims made in both cases for compensatory interest. That manner of proceeding is all the more justified since, in Case C-104/89, the further losses turn out to be the same as those in respect of which compensatory interest is sought.

1. The belated nature of the quantified claims

38 The objection of inadmissibility alleging that the quantified claims in Case C-104/89 are out of time cannot be accepted in so far as those claims were amended to take into account the method of calculating the loss as laid down by the interlocutory judgment and are based on statistical data used by the expert.

39 The claims thus amended which have been put forward following the production of the expert's report cannot be held to be out of time. In the light of the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 108, they represent a permissible, indeed necessary, amplification of the claims contained in the application, especially inasmuch as, first, the Court determined the criteria necessary in order to calculate the damage for the first time in its interlocutory judgment and, second, the exact composition of the damage and the precise method of calculating the compensation payable have not yet been debated.

40 Moreover, in the operative part of its interlocutory judgment, the Court ordered the parties to submit statements of their views with supporting figures in the event of their failing to reach agreement on the quantum of damages. That order would be pointless and meaningless if, following delivery of that judgment, the parties were precluded from formulating claims different from those contained in their application.

2. The belated nature of the claims for compensatory interest

41 As a preliminary point, it must be stated that it is sufficient, as regards both cases, to examine only the belated nature of the applicants' claims for compensatory interest. Those claims are, in fact, indissociable from the quantified claims which have been increased with a view to obtaining compensation for the further losses.

Since the two sets of claims have one and the same object, namely, in essence, reparation of a loss characterised by the applicants as financial, it is, in effect, the claim for compensation for the further losses by means of the award of compensatory interest which explains the increase in the quantified claims.

42 It is true that the explanations given in that regard by the applicants when stating the nature, content and extent of those further losses are not wholly unequivocal. On a sensible interpretation of the claims, however, it is apparent that, although those losses also include possible tax consequences, they are essentially composed of compensatory interest and of a sum corresponding to the fall in the value of money.

43 The claims for compensatory interest in the two cases are in fact aimed at obtaining compensation for a financial loss alleged to be due — save as regards the fall in the value of money — to the inability to make any profit from milk production.

44 In the light of such an interpretation, it is only with regard to the final claims of the applicants in Case C-104/89 that there is any need to examine the objection of inadmissibility alleging them to be out of time.

45 As regards Case C-37/90, Mr Heinemann is also seeking compensatory interest, albeit without formulating any express claims in that connection, and has, to that end, increased his quantified claims by a sum corresponding to such interest.

46 It follows that the only matter still to be verified in the two cases, apart from the tax loss in Case C-37/90, is the admissibility of the claims for compensatory interest.

47 In that regard, it is apparent from the Court's case-law, particularly its decisions concerning the belated settlement of the remuneration of officials (see, for example, Case 737/79 *Battaglia* v *Commission* [1985] ECR 71, paragraph 13, and Case 158/79 *Roumengous Carpentier* v *Commission* [1985] ECR 39, paragraph 14) that additional claims seeking the payment of compensatory interest are inadmissible where they are put forward for the first time during the course of the proceedings and, in particular, following delivery of an interlocutory judgment. That case-law is based on Article 19 of the EC Statute of the Court of Justice and Article 38 of the Rules of Procedure, which preclude the addition of new claims in the course of proceedings, by contrast with Article 42(2) of the Rules of Procedure, which expressly prohibits only the introduction of new pleas in law.

48 Nevertheless, in Case C-104/89, the complaints alleging that the claims for compensatory interest are out of time cannot be accepted, since those claims do not constitute new pleas in law. The annexes to the application registered on 30 March 1989, headed 'Schadeberekening verzoeker', reveal, in fact, that the quantified claims put forward by the applicants on that date already included a sum corresponding to capitalised default interest in respect of the period for which compensation was sought. Consequently, there is no longer any need to examine the precise meaning and scope of the initial claims for 'statutory interest at the annual rate of 8%' which the applicants made to the Court in their application and specified in their reply; nor, in particular, is there any need to consider the question whether the latter claims included, at least in part, an application for the same type of interest running from the date on which the damage materialised.

49 In Case C-37/90, by contrast, the claim for compensatory interest must be rejected as being out of time. Mr Heinemann expressly stated in his application that he did not intend to seek compensatory interest, since that would be likely to give rise to increased costs, despite the fact that he was clearly aware, when making that statement, of the link between an entitlement to compensatory interest and proof of non-contractual liability.

50 It is settled case-law that, in order for an applicant to be able to claim compensatory interest, he must establish non-contractual liability on the part of the defendant (see *Kampffmeyer and Others* v *Commission and Council* and *Roumengous Carpentier* v *Commission*, cited above, Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli and Others* v *Commission* [1992] ECR II-293, paragraph 35, and Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 42).

51 However, according to the judgment in Case C-308/87 *Grifoni* v *EAEC* [1994] ECR I-341, paragraph 40, compensation for loss in the context of non-contractual liability is intended so far as possible to provide restitution for the victim. Accordingly, since the criteria giving rise to non-contractual liability are fulfilled, the adverse consequences resulting from the lapse of time between the occurrence of the event causing the damage and the date of payment of the compensation cannot be ignored, despite the abovementioned express statement by the applicant, in so far as it is appropriate to take into account the fall in the value of money.

52 Thus, the amendment of the quantified claims based on the application for compensatory interest in respect of the fall in the value of money — which was made after delivery of the interlocutory judgment establishing non-contractual liability on the part of the Community — would appear to be a necessary adjustment.

53 On the other hand, the increase in the quantified claims based on the inability to make any profit from milk production must be declared inadmissible, as must the claims for compensation for the tax loss.

B — *The objection of inadmissibility based on the principle of* res judicata

54 To the extent to which the claim for compensatory interest is not found to have been made out of time, the Council's plea contesting the applicants' claim is based on the principle of *res judicata*. It maintains that, by awarding default interest as from the date of delivery of the interlocutory judgment, the Court has ruled on all the interest at issue and, in particular, that it has refused to award compensatory interest to the applicants.

55 In that regard, it is clear from a consistent line of decisions by the Court, relating in particular to disputes concerning the belated settlement of the remuneration of officials, that a distinction must be drawn between default interest and compensatory interest (see *Commission* v *Brazzelli Lualdi and Others*, cited above, paragraph 35). Consequently, the decision regarding default interest cannot affect the decision to be made in respect of compensatory interest.

56 It follows that the objection of inadmissibility of the claim for compensatory interest, based on the principle of *res judicata*, must be rejected.

57 In response to all the complaints alleging the inadmissibility of the claims latterly submitted to the Court, it must be held, in Case C-104/89, that none of the objections raised by the defendant institutions can be upheld and that the claims latterly put forward by the applicants are therefore admissible (see paragraphs 38 to 40 and 48 and 56 of this judgment).

58 In Case C-37/90, by contrast, in so far as the quantified claims of Mr Heinemann exceed the amount initially sought, they are admissible only to the extent that the increase in those claims reflects the account taken of capitalised interest corresponding to the fall in the value of money. For the rest, the increased

claims and the applicant's claim for compensation for an alleged tax loss are inadmissible (see paragraphs 53 and 56 of this judgment).

III — The common substance of the two cases

A — *Calculation of the loss of earnings on the basis of the interlocutory judgment*

59 The first point to note is that, in accordance with the interlocutory judgment, the damage to be made good in the two cases corresponds to the loss of earnings actually suffered by each of the applicants during the period in respect of which compensation is to be paid.

60 According to paragraph 26 of the interlocutory judgment, the loss of earnings consists in the difference between, on the one hand, the income which the applicants would have obtained in the normal course of events from the milk deliveries which they would have made if, during the period between 1 April 1984 (the date of the entry into force of Regulation No 857/84) and 29 March 1989 (the date of the entry into force of Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2)), they had obtained the reference quantities to which they were entitled ('the hypothetical income') and, on the other hand, the income which they actually obtained from milk deliveries made during that period in the absence of any reference quantity, plus any income which they obtained, or could have obtained, during that period from any replacement activities ('the alternative income').

61 After taking a view, in paragraphs 28 to 31 of the interlocutory judgment, on the determination of the reference quantity, the Court went on to state, in paragraph 32, that the basis to be used for calculating the hypothetical income

corresponding to the milk deliveries which the applicants would have made had they been granted the reference quantities to which they were entitled is the profitability of a farm representative of the type of farm run by each of the applicants, where account can be taken of reduced profitability during the period when milk production is started up.

62 In accordance with paragraph 33 of the interlocutory judgment, the alternative income includes not only that which the applicants actually obtained from replacement activities ('the actual alternative income') but also that income which they could have obtained had they reasonably engaged in such activities ('the average alternative income').

B — *The principles governing reparation of the damage suffered by the applicants*

63 As previously noted in paragraph 51 of this judgment, it is settled case-law that compensation for the loss suffered is intended so far as possible to provide restitution for the victim of the unlawful conduct of the Community institutions (*Grifoni* v *EAEC*, cited above, paragraph 40). In order to restore victims to the situation in which they would have found themselves if the harmful act had not been perpetrated, it is primarily the damage actually suffered which must be made good. Thus, loss of earnings must be assessed, so far as possible, on the basis of the individual data and figures reflecting the actual situation of each applicant and of his farm.

64 In the present case, however, such an assessment based on individual, factual data runs up against structural and material obstacles concerning both the hypothetical income and the alternative income.

65 As is apparent from the interlocutory judgment, the income which the applicants would have obtained from milk deliveries in the normal course of events — that is to say, if their milk production had corresponded to the reference quantities to which they were entitled — is hypothetical. Consequently, that income cannot, by its very nature, be established by recourse to mean statistical values corresponding — as the interlocutory judgment prescribes — to a farm representative of the type of farm run by each of the applicants.

66 Such a method may be applied with equal validity to the alternative income inasmuch as that income includes, in accordance with paragraph 33 of the interlocutory judgment, the average alternative income which the applicants could have obtained had they reasonably engaged in replacement activities.

1. The calculation method

67 On account of those difficulties, the parties have agreed the principles which must govern the method of calculating loss of earnings. The agreement relates to most of the different elements making up the hypothetical income and the alternative income. Those various elements, which are relevant for determining the income at issue, broadly correspond to those proposed by the defendant institutions. The expert's report ordered by the Court likewise followed that calculation method.

68 For the purposes of determining the hypothetical receipts, the parties have taken into account, in addition to receipts from hypothetical milk deliveries, hypothetical income from the sale of cull cows and calves.

69 Given that certain expenses are inherent in all dairy production, the parties have agreed to deduct the variable costs of the gross hypothetical income, that is to say,

costs which are no longer payable on cessation of milk production (hereinafter referred to as 'the variable costs' or 'the variable charges'). On the other hand, the fixed costs do not fall to be deducted, since the farmer has to bear them even when he stops producing milk.

70 Although the principle of the deduction of the variable costs is not contested as such in the two cases, they way in which they are made up and the elements constituting them are disputed in Case C-104/89.

71 In that case, the deduction of costs relating to the employment of external labour, taken either as one of the elements constituting variable costs or as an isolated element, is a point which is contested with particular vehemence. The discussions between the parties in that regard relate both to the principle of the deductibility of such costs and to the question whether they have actually been incurred.

72 For the purposes of establishing the alternative income of each of them, the applicants, apart from Mr Heinemann, have in the result agreed that it is legitimate to take into account the average alternative income, calculated in accordance with three types of production expense, namely capital expenditure, spending on land and labour costs, which ceased to arise when milk production was discontinued and the amounts in respect of which could then be used for other economic activities.

2. The statistical values

73 The parties have also reached agreement on the sources of the relevant data and figures in the two cases. The have ultimately expressed their willingness to accept those used for the calculations carried out by the expert. The statistics, figures and data used emanate from the competent State bodies specialising in such matters. In Case C-104/89 the body concerned is the Landbouw Economisch

Instituut (Agricultural Economics Research Institute, hereinafter 'the LEI') and in Case C-37/90 it is, essentially, the Landwirtschaftskammer Hannover (Hanover Chamber of Agriculture).

74 Nevertheless, the defendant institutions, emphasising their preference for the use of actual figures, are opposed to the use of a combination of statistical data and actual figures, the validity of which they contest. They maintain that such a combination may distort the true picture as regards the losses actually suffered by each applicant.

75 It is noteworthy that, although the defendant institutions criticise the combination of statistical values and actual figures, they none the less accepted, at the hearing on 20 May 1996, the accuracy and relevance of some of the figures concerned, for example the price paid for milk by the dairies to which deliveries were made. Nor are they able to disregard the fact that recourse to statistical values is inevitable when it comes to evaluating hypothetical activities.

76 However, given that both the hypothetical income and the alternative income, determined on the basis of statistical values, reflect only the average situation in the category of farms to which the applicants' holdings belong, the use of actual figures, in so far as they are available, allows a more precise approach to the individual circumstances of each applicant.

77 Nevertheless, the risk indicated by the defendant institutions, and by the expert at the hearing, cannot be ignored. First, it is conceivable that the concomitant use of statistical data and actual figures in fact distorts the calculation of the compensation and produces erroneous results. However, for the purposes of reconstructing as far as possible the loss actually suffered by the applicants, the actual figures available cannot be totally disregarded, unless the defendant

institutions or a party taking the view that that method of evaluating the loss works to his disadvantage is able to show the extent to which the calculation is distorted by recourse to the actual figures.

78 Second, recourse to average incomes does not guarantee a correct assessment of the economic situation of each of the applicants, since the specific economic circumstances of each farm are not taken into account.

79 It should be noted that, in the present cases, the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage.

80 The arguments of the applicants in Case C-104/89 alleging a failure to differentiate, or at any rate to differentiate adequately, between countries or regions have become devoid of purpose, since the statistics on the basis of which the evaluation of the loss has been calculated relate to regions in which the applicants' farms are located. Thus, the data specific to the northern clay and peat regions ('Nördliches Klei- und Moorbodengebiet') are applied to the situation of Mr Mulder, Mr Brinkhoff and Mr Twijnstra, whilst the data in respect of the western grassland region ('Westliches Weidegebiet') are applied to the situation of Mr Muskens.

81 In so far as the applicants in Case C-104/89 complain of a manifestly over-rigorous approach to the regionalisation of the data, that objection must be rejected on the ground that it is not substantiated in sufficient detail. As regards

Mr Muskens in particular, no evidence is adduced to establish that his situation would be more accurately assessed by applying the data specific to the other region.

3. The burden of proof

82 In the event of disagreement concerning the factual data and the elements constituting the loss, it is for the applicants in the two cases to prove, first, the existence of the loss thus sustained and, second, its constituent elements and scope. Since the existence of loss has been established in the present case by the interlocutory judgment, the applicants are required to prove only the different constituent elements and the scope of that loss.

83 In so far as the defendant institutions contest the data and figures put forward by the applicants, it is not enough for them to deny the existence of those data or the accuracy of those figures. They are required, in particular, to provide a detailed statement of their criticisms.

84 Furthermore, because of the essentially hypothetical nature of the evaluation of loss of earnings, the expert's report plays a leading role where none of the parties is able to prove the accuracy of the data or figures on which that party relies and those data or figures are contested.

IV — The substance of the dispute in Case C-104/89

A — *The relevant periods for the purposes of compensation*

85 In accordance with paragraph 26 of the interlocutory judgment, the period to be taken into consideration for the purposes of determining the damage to be made good is the period between 1 April 1984 and 29 March 1989, during which the applicants would, in the normal course of events, have received income from milk deliveries had they been granted the reference quantities to which they were entitled.

86 The individual compensation period in respect of each applicant commenced on the date on which his non-marketing undertaking expired. It is agreed between the parties that that date is, in the case of Mr Mulder, 1 October 1984, in the case of Mr Brinkhoff, 5 May 1984, in the case of Mr Muskens, 22 November 1984, and in the case of Mr Twijnstra, 10 April 1985.

87 According to paragraph 26 of the interlocutory judgment, the compensation period expired, at the latest, on 29 March 1989, that being the date of the entry into force of Regulation No 764/89. The Commission maintains that all the applicants, in particular Mr Brinkhoff and Mr Muskens, resumed production prior to 31 December 1988 and that they appear to regard that date as marking the end of the period to be taken into consideration. As regards Mr Brinkhoff, the Commission referred, at the hearing on 28 May 1998, to a communication from the Netherlands Ministry of Agriculture to the effect that he resumed production on 25 December 1988.

88 With the exception of Mr Muskens, in respect of whom there is no evidence to suggest that he resumed milk production prematurely, such an early resumption is confirmed in the case of the other three applicants. The reply clearly indicates that Mr Mulder resumed production on 10 July 1988 and that Mr Twijnstra did

so on 1 May 1988. As to Mr Brinkhoff, he himself volunteered, at the hearing on 28 May 1998, the information that he had resumed production on 31 December 1988.

89 As regards Mr Mulder, Mr Brinkhoff and Mr Twijnstra, therefore, the relevant compensation period ended on the day on which, prematurely, they actually resumed their milk production, even though the interlocutory judgment states that that period expired, at the latest, on 29 March 1989.

90 It is true that the full exclusion period ended on the date of the entry into force of Regulation No 764/89, which allowed the producers concerned ('the SLOM producers') to resume milk production following the grant of the special reference quantity to which they were entitled. However, that period was capable of ending before that date, upon actual resumption of production, where such resumption was in accordance with the additional levy scheme and the Court's case-law in the matter. The interlocutory judgment is intended to enable the applicants to obtain compensation in respect of the period during which they were excluded from the initial additional levy scheme and, in consequence, from producing any milk. In the present case, provided that the conditions were fulfilled, the applicants were able to resume production on the day after 28 April 1988, that being the date of delivery of the judgments in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355.

91 It follows from the foregoing that the compensation period runs from 1 October 1984 to 10 July 1988 in the case of Mr Mulder (amounting to 182 days in the 1984/1985 marketing year, 365 days in each of the three subsequent marketing years and 100 days in the 1988/1989 marketing year), from 5 May 1984 to 31 December 1988 in the case of Mr Brinkhoff (amounting to 331 days in the 1984/1985 marketing year, 365 days in each of the three subsequent marketing years and 275 days in the 1988/1989 marketing year), from 22 November 1984 to 29 March 1989 in the case of Mr Muskens (amounting to 130 days in the 1984/1985 marketing year and 365 days in each of the four subsequent marketing years) and from 10 April 1985 to 1 May 1988 in the case of Mr Twijnstra (amounting to 365 days in the 1985/1986 marketing year, 365 days in each of the two subsequent marketing years and 30 days in the 1988/1989 marketing year).

B — *The applicants' hypothetical income*

1. The hypothetical income from milk deliveries

92 The income which the applicants would have earned in the normal course of events from milk deliveries is calculated by multiplying the quantities of milk which they could have delivered during the compensation period by the price of the milk. It is therefore necessary, first of all, to determine the reference quantities to which the applicants would have been entitled during that period ('the hypothetical reference quantities').

(a) The hypothetical reference quantities

93 The hypothetical reference quantities must be calculated, in accordance with paragraphs 28 to 32 of the interlocutory judgment, on the basis of the quantities used in order to determine the non-marketing premium. It is common ground that that quantity amounts to 463 566 kg in the case of Mr Mulder, 296 507 kg in the case of Mr Brinkhoff, 300 340 kg in the case of Mr Muskens and 591 905 kg in the case of Mr Twijnstra.

94 The 1% rate of increase and the rates of reduction indicated in paragraphs 29 to 31 of the interlocutory judgment should be applied to those quantities. The parties do not differ in their views concerning the different rates of reduction to be applied in respect of each milk marketing year. However, where a marketing year can only be taken into account in relation to one party alone — because the non-marketing period ended during the currency of a marketing year or because the applicant in question resumed milk production during a marketing year —,

the reference quantity falls to be reduced on a pro rata basis. Consequently, as regards the actual quotas per marketing year, the hypothetical reference quantities amount, according to the estimations carried out by the expert, to the following:

— 228 049 kg of milk for the 1984/1985 marketing year, 454 015 kg of milk for the 1985/1986 and 1986/1987 marketing years, 444 932 kg of milk for the 1987/1988 marketing year and 118 859 kg of milk for the 1988/1989 marketing year, as regards Mr Mulder;

— 265 282 kg of milk for the 1984/1985 marketing year, 290 398 kg of milk for the 1985/1986 and 1986/1987 marketing years, 284 588 kg of milk for the 1987/1988 marketing year and 209 069 kg of milk for the 1988/1989 marketing year, as regards Mr Brinkhoff;

— 105 536 kg of milk for the 1984/1985 marketing year, 294 152 kg of milk for the 1985/1986 and 1986/1987 marketing years, 288 267 kg of milk for the 1987/1988 marketing year and 281 078 kg of milk for the 1988/1989 marketing year, as regards Mr Muskens;

— 565 416 kg of milk for the 1985/1986 marketing year, 579 710 kg of milk for the 1986/1987 marketing year, 568 112 kg of milk for the 1987/1988 marketing year and 45 530 kg of milk for the 1988/1989 marketing year, as regards Mr Twijnstra.

(b) The price of the milk

95 The price of the milk in respect of the hypothetical reference quantities thus applied has been the subject of debate, as the Advocate General notes in point 56 of his Opinion.

96 At the hearing on 20 May 1996 the parties agreed to apply the prices actually paid during the compensation period by the dairies to which the applicants made their deliveries before and also, for most of them, after they gave their non-marketing undertaking. In those circumstances, the expert drew up, on page 18 of his report, a table of prices per dairy, expressed in NLG per 100 kg of milk, including Netherlands value added tax. Those are the prices set out in table A in point 57 of the Advocate General's Opinion.

97 The multiplication of the prices thus adopted by the hypothetical reference quantities which each applicant would have delivered in the normal course of events results, after the correction of certain errors of calculation and taking into account both the compensation periods determined in respect of each applicant and the dairies to which the deliveries would have been made, in the following total income figures:

— in the case of Mr Mulder: NLG 1 353 918,

— in the case of Mr Brinkhoff: NLG 1 075 069,

— in the case of Mr Muskens: NLG 1 002 178,

— in the case of Mr Twijnstra: NLG 1 399 748.

98 According to the submissions made by the Council and the Commission in response to the expert's report, the prices to be applied in the case of Mr Twijnstra are those of the Twee Provinciën dairy, and not those of the De Goede Verwachting dairy. Indeed, the applicant himself has stated that he made his deliveries to the same dairy as Mr Mulder. As it is, even though the De Goede Verwachting dairy took over the Twee Provinciën dairy, the latter continues to apply its own prices, as is shown by the case of Mr Mulder. Moreover, neither the expert nor the party concerned has produced any evidence capable of justifying the reason for which that party should be hypothetically linked to a dairy other than that to which he made his deliveries.

99 On the other hand, the applicants' criticism that the expert should have applied prices relating to a milk marketing year and not a calendar year cannot be accepted. The prices notified by the diaries in question are average prices which do not lend themselves to conversion into prices per milk marketing year. Thus, in the case of milk production commencing in 1984, the application of a higher price from 1 January 1985 benefits the producer as from the 1984/1985 marketing year onwards, whereas, if the price were calculated not on the basis of a calendar year but per marketing year, the increase would not have affected the 1984/1985 marketing year.

2. The hypothetical income from the sale of cull cows and calves

100 The second element to be taken into account for the purposes of establishing the applicants' hypothetical income is the receipts resulting from the sale of (a) cull cows, that is to say, cows intended for slaughter, and (b) calves.

101 Having agreed in principle that such income should be taken into account, the applicants arrive, in their calculation tables headed 'Begroting inkomstenschade' and the annexes to their written statement of 18 June 1993, at figures in respect

of receipts which are lower than those reached by the Commission in its calculation tables entitled 'Schadeberekening' and the annexes to its written statement of 28 October 1993.

102 Thus, taking the case of Mr Mulder in isolation, the applicants mention, under the heading 'omzet en aanwas' (turnover and reorganisation), an income of NLG 13.24/100 kg of milk for 1984, NLG 13.99/100 kg of milk for 1985, NLG 11.84/100 kg of milk for 1986 and NLG 13.51/100 kg of milk for 1987, whereas the corresponding amounts mentioned by the Commission under the heading 'receipts = sale of calves and cows' total NLG 18.11/100 kg of milk for the 1984/1985 marketing year, NLG 18.63/100 kg of milk for the 1985/1986 marketing year, NLG 19.46/100 kg of milk for the 1986/1987 marketing year, NLG 20.27/100 kg of milk for the 1987/1988 marketing year and NLG 21.12/100 kg of milk for the final marketing year. That difference is due, in particular, to the fact that the applicants used statistics established by a private organisation.

103 At the hearing on 20 May 1996 the parties reached agreement concerning the prices of cull cows and calves, which were fixed, as regards cull cows, at NLG 1 600 for 1984/1985, NLG 1 650 for 1985/1986, NLG 1 700 for 1986/1987, NLG 1 750 for 1987/1988 and NLG 1 800 for 1988/1989 and, as regards calves, at NLG 385 for 1984/1985, NLG 395 for 1985/1986, NLG 418 for 1986/1987, NLG 440 for 1987/1988 and NLG 465 for 1988/1989.

104 The receipts from sales of cull cows and calves also depend on the number of animals which each applicant could have sold per marketing year. In that connection, the parties have agreed that 25% of the dairy cows in a given herd are intended for slaughter each year and that 90% of those cows produce calves which can be sold.

105 However, that agreement between the parties regarding the prices referred to above and the percentages of cull cows and calves within each herd which could have been sold is not sufficient to enable the Court to determine the precise

number of animals capable of being sold. The very size of the herd, and more particularly the number of dairy cows needed by each applicant in order to produce the relevant hypothetical reference quantities per marketing year, remains in issue.

106 In addition, the Commission continues to take the view that it is necessary — given that the profitability of the applicants' farms is alleged to be higher than the average for the Netherlands — to ascertain the total number of dairy cows held by each applicant as at the date on which his non-marketing undertaking commenced. The applicants, by contrast, refer to the increase in milk productivity per cow and are therefore of the opinion that they would have needed considerably fewer cows.

107 On the other hand, the expert, basing his conclusions on the prices indicated by the parties, considers that, in order to establish the number of cull cows and calves available for sale, it is necessary to take into account the need to adapt the number of dairy cows to the reference quantities, which change in each marketing year, the need to replace the cull cows sold, losses due to bovine mortality and the adjustments made to the herd with a view to ensuring its self-regeneration.

108 In addition, for the purposes of establishing the number of cull cows and calves in each applicant's herd capable of being sold, the expert initially determines the increase in average productivity per cow on the basis of statistics relating specifically to the two regions concerned.

109 Expressed in kg of milk per cow and per marketing year, the average quantities, as shown in the first table appearing in point 70 of the Advocate General's Opinion, represent, in relation to the average quantities actually produced, only a proportion of the quantities which may be delivered to the dairies. That proportion of milk delivered constitutes between 95.51% and 97.54% of the milk produced; the remainder is used to feed calves, for his own consumption by the farmer concerned and for other purposes.

110 Having established, on the basis of the average quantity of milk delivered per cow and per marketing year, the number of dairy cows which each applicant would have had to keep, as shown in the second table appearing in point 70 of the Advocate General's Opinion, and having reconstructed the total size of each herd by reference to the need for its self-regeneration, the expert arrives at a determination of the precise numbers of cull cows and calves capable of being sold.

111 On the basis of the numbers of cull cows and calves thus established, and of the prices agreed by the parties, the expert arrives at income figures totalling NLG 255 980 in the case of Mr Mulder, NLG 174 324 in the case of Mr Brinkhoff, NLG 157 090 in the case of Mr Muskens and NLG 228 641 in the case of Mr Twijnstra.

112 Those results are criticised both by the applicants and by the defendant institutions, on the ground, in particular, that the expert has rounded off the number of cows needed for production of the quantities granted so as to make it correspond to the upper unit figure, instead of basing his calculations on 'tenths of animals' corresponding to the precise quantity of such animals needed for production. According to the Commission, the fact that the figures have been rounded upwards could result in between 5 000 and 6 000 extra litres of milk being taken into account; the applicants maintain that it could lead to their being placed at a disadvantage to the extent of several thousand guilders.

113 That argument alleging a divergence between the actual state of each farm and the statistics cannot be accepted. Without really contesting the validity of the exercise whereby the number of cows is rounded off so as to make it correspond to the upper unit figure — which leads to the attribution of one extra cow per applicant and per marketing year —, the parties essentially disagree over the disadvantages flowing from the over-evaluation of milk production. Without

going into detail, it is sufficient to refer to paragraphs 137 to 139 of this judgment, which state that the expert took that over-evaluation into account in the context of the variable costs, in such a way that the quantities regarded as falling within the scope of the overproduction constitute neither an advantage nor a disadvantage for any of the parties.

114 In addition, the Commission repeats its criticism regarding the low profitability of the applicants' farms and complains that the expert has neither established the individual level of profitability of each of the farms in question nor expressed a view on the structural problems encountered by them. It argues, in particular, that, with the exception of Mr Twijnstra's farm, the profitability of the other farms is lower that the average profitability of a comparable holding.

115 The Commission's arguments must be rejected. For the purposes of assessing the growth of hypothetical milk production, it is not possible, on account of a complete absence of evidence relating to the specific situation of each applicant, to reconstruct the productivity trend without having recourse to statistical data reflecting the average progress characteristic of farms in the same category as those of the applicants in the two regions in which they are located. Furthermore, the Commission has provided no precise, detailed evidence indicating a lower level of profitability.

116 It follows from the foregoing that, since the parties do not contest the general data relating to the composition of the herd and have not disputed in any detail the way in which the number of cull cows and calves held on each farm has been established, the Court must adopt the expert's assessments.

C — *The variable charges to be deducted*

1. The variable costs, apart from the cost of external labour

(a) The calculations submitted by the parties and by the expert

117 Although they are in agreement as to the principle of deducting variable costs (see paragraph 69 of this judgment), the parties are at variance on a number of points, particularly concerning the validity of the calculation of both the reference quantities attributed and the size of each holding, concerning certain factors potentially forming an integral part of those costs — such as the cost of external labour — and concerning the calculation of a number of elements constituting variable costs, such as those relating to fodder.

118 The different results arrived at by the parties, as noted by the Advocate General in point 63 of his Opinion, are due, first and foremost, to disagreement regarding the number of dairy cows needed for production of the hypothetical reference quantities attributed; by contrast, the parties appear to be in agreement concerning the principle that the cost of fodder, taken as the most significant element of the variable costs, must be specifically determined according to the number of cows needed to produce the hypothetical reference quantities. As is pointed out in paragraph 106 of this judgment, the Council and the Commission attach the greatest significance to the herd maintained by each applicant at the start of the non-marketing period, whereas the applicants base their arguments on a smaller number of cows, on account of the increase in productivity per animal.

119 The applicants also criticise the calculation method applied by the Commission inasmuch as it takes as its point of reference the amount of the variable costs per

hectare. According to the applicants, the Commission, in linking the variable costs to the surface area of the land farmed, wrongly assumes that the variable costs per kg of milk increase in proportion to the decrease in production per hectare. The larger the farm, the less its size affects the total production cost.

120 In addition, the applicants contest the expenses arising from the feeding of poultry and pigs. Whilst they do not deny that such animals are frequently to be found on farms, including holdings specialising primarily in dairy production, they point out that the receipts obtained from rearing such animals exceed the cost of feeding them.

121 The expert, diverging from the figures relied on by the parties, puts forward two tables containing calculations of the variable costs, which are based on the productivity differential characterising the two regions in which the applicants' farms are located.

122 The tables appearing in the expert's report, as reproduced by the Advocate General in point 64 of his Opinion, show, in the light of the explanations provided by the expert at the hearing, that the elements constituting the variable costs represent, first, statistical values expressed in NLG per animal and, second, items taken into account by the expert, expressed in NLG per hectare and resulting from the calculations made by him.

123 The first category is made up, as is shown by the first two items in the two tables, of 'fodder' and 'other variable costs'. The second category includes the following items: 'energy costs', 'cultivation costs', 'products obtained from cultivation and other activities', 'sub-contracting', 'hire and maintenance of machinery', 'maintenance of buildings' and 'feed for other animals'.

124 The total amount arrived at by the expert in respect of variable costs is likewise expressed by him in NLG per hectare.

125 Having regard to the number and significance of the criticisms raised by the parties concerning the calculation of the variable costs, it is appropriate to consider them separately.

(b) The notion of variable costs

126 The applicants criticise, in essence, the notion of variable costs as applied by the expert. As in the case of the method chosen by the defendant institutions in the context of Regulation No 2187/93, they characterise those costs by reference to the definitions contained in Annex I to Commission Decision 85/377/EEC of 7 June 1985 establishing a Community typology for agricultural holdings (OJ 1985 L 220, p. 1). In accordance with that decision, they state, on the basis of a report prepared by the LEI, that none of the headings mentioned by the expert corresponds exactly to the definition of variable costs. That is the case, in particular, as regards the items relating to energy, maintenance and sub-contracting costs and, more especially still, the charges relating to 'hire and maintenance of machinery', in respect of which the definitions of the costs concerned have not been respected. The applicants therefore consider that reference should be made to the definitions of variable costs adopted by Decision 85/377.

127 In addition to making that criticism, they consider that there should be deducted from the gross hypothetical income not only variable costs such as manure costs but also a number of other, non-variable costs which cease to arise upon the termination of milk production. The latter costs include 'fuel', 'hire of machinery', 'wages' and expenses relating to 'water and electricity' and 'equipment', as shown in tables A and B, which are also reproduced by the Advocate General in point 64 of his Opinion.

128 In response to the criticisms expressed by the applicants with regard to that notion of variable costs, the expert stated at the hearing that the divergent definitions of those costs were of no consequence, inasmuch as the applicants also submit that the same cost items should be deducted from the hypothetical income, irrespective of the distinction drawn by them between 'variable costs' and 'other non-variable costs to be deducted'.

(c) The cost of fodder

129 As indicated in paragraphs 122 and 123 of this judgment, the expert merely shows the fodder costs per cow, expressed in NLG, as they appear from the statistics relating to each region. Unlike the parties, he omits to calculate a total amount corresponding to fodder costs per marketing year and per herd, in order to avoid having to base such a calculation on the total number of cows in the herd which are needed to produce the quantities attributed to each applicant. Consequently, the fodder costs per animal amount, in respect of the northern region, to NLG 1 391 in 1984/1985, NLG 1 398 in 1985/1986, NLG 1 319 in 1986/1987, NLG 1 129 in 1987/1988 and NLG 1 142 in 1988/1989 and, in respect of the western region, to NLG 1 622 in 1984/1985, NLG 1 589 in 1985/1986, NLG 1 517 in 1986/1987, NLG 1 286 in 1987/1988 and NLG 1 229 in 1988/1989.

130 Thus, given that the applicants' criticism concerning the failure to differentiate between data according to region has become devoid of purpose, as stated in paragraph 80 of this judgment, there is no reason not to treat those figures as fair and reasonable.

(d) The costs in respect of the item headed 'hire and maintenance of machinery'

131 The applicants maintain that the item headed 'hire and maintenance of machinery' is incorrect. That item comprises charges relating to the cost of tools and, generally, of equipment such as tractors, reaping machines, cowsheds, milking machines and refrigerated tanks.

132 However, the applicants' criticism of the manner in which those charges were calculated cannot be accepted, despite the considerable divergence between the amounts indicated by them in that regard and those cited by the expert.

133 According to the explanations provided by the expert at the hearing, the difference in the results arrived at is due not to the fact that different items have been selected as constituting the variable costs but to the fact that the expert, using different source material from that used by the applicants, included in those items expenses corresponding respectively to depreciation and the cost of financing machinery. By way of justification for that method, the expert points out that he has omitted from the calculation of the alternative income any amount corresponding to the capital sums released in respect of machinery and equipment.

134 The Court finds that the evaluation of the costs relating to that item forms part of the rationale behind the method chosen by the expert in order to determine the capital sums released. That method is based, in particular, on the premiss that the capital released is comprised only of the sums needed in order to reconstitute the herd of dairy cows upon resumption of production. Instead, it is apparent from his explanations that the cessation of milk production leads to savings for the applicants on the costs of hiring and maintaining machinery and equipment. Consequently, the expert does not attach any value to such machinery and equipment in his evaluation of the capital released; instead, he takes them into account in his assessment of the variable costs.

135 It cannot be denied that such economic assessments make sense and appear to correspond to the actual economic situation on the applicants' farms. Moreover, they have not been the subject of any detailed criticism by the applicants.

(e) The question whether excess milk production should be taken into account

136 Whilst the applicants state that they are unable to accept the expert's conclusions in respect of charges for 'products obtained from cultivation and other activities', the Commission maintains that the figure relating to 'products obtained from cultivation and other activities' which are not consumed on the farm itself should be replaced by that for the 'costs of producing those cultivated products'.

137 According to the expert, the items appearing under that heading of 'products obtained from cultivation and other activities' comprise amounts used by him in an attempt to assess the economic effects of an over-evaluation of milk production. As stated in paragraph 113 of this judgment, such over-evaluation is due to the fact that the expert thought it sensible to round off the number of cows needed for production of the milk quantities granted, so as to make it correspond to the upper unit figure. Whilst, according to his explanations, that item includes fodder sold, the surplus of milk over and above the quantities sold and consumed on the farm itself and any subsidies granted in the context of the reduction of milk quotas, the item headed 'feeding of other animals' represents an attempt to evaluate, on a flat-rate basis, the benefit received by each applicant from the quantities consumed on the farm itself and the fodder intended to be used as feed for the other animals kept on a dairy farm.

138 The sums entered under those two headings fall, the expert maintains, to be deducted from the variable costs. According to his own statements, he takes into account, under those headings, economic advantages which attach to, and are connected with, the hypothetical production of milk.

139 The deduction of those amounts in respect of variable costs appears plausible in the light of the expert's statements concerning the difference between the quantities of milk delivered and the quantities produced. In so far as the applicants enjoy the benefit of the economic advantages arising from the production of milk in excess of the hypothetical reference quantities — which are the only ones for which compensation is payable —, the economic value of such advantages is equivalent either to an additional hypothetical income or to expenses saved.

140 Moreover, the item headed 'feeding of other animals' cannot be contested, since the applicants acknowledge that other animals, particularly poultry, are kept even on farms specialising primarily in milk production.

141 Consequently, there is no reason why such a reduction in the costs relating to milk production should not be taken into account.

(f) The account taken, twice over, of insemination costs and other expenses

142 In response to the applicants' claim that the costs of seeds, seedlings and phytosanitary products were taken into account twice over, once as 'other variable charges' and a second time as 'cultivation charges', the expert explained at the hearing that the first item includes the costs of insemination, health care, seeds and seedlings and the protection of seedlings and litter, whilst the second item covers fertiliser expenses.

143 That explanation is persuasive. Consequently, the applicants' arguments alleging that certain items, such as insemination costs, were taken into account twice over cannot be accepted.

(g) The criticism regarding the surface areas taken or to be taken into account

144 The applicants' criticism of the fact that the costs per hectare of the fodder grown and per hectare of the land under cultivation have been taken into account, on the ground that the surface area of fodder cultivation, which is the only area to be taken into consideration, does not correspond to the total surface area of the land under cultivation, cannot be accepted. The applicants have not specified in detail the extent to which that difference in cultivation may affect the results arrived at by the expert.

145 The Commission considers that the absence of any indication of the number of hectares held by each applicant, expressed in terms of the type of cultivation, may affect the determination of the variable costs, but it does not state in detail the significance of that effect.

146 Consequently, it is clear from the outset that that criticism cannot be accepted.

(h) Individual profitability

147 In so far as any relevance attaches, in the context of the variable costs, to the Commission's criticism that the expert failed to examine the individual profitability of each farm, it suffices to refer to paragraphs 114 to 116 of this judgment.

148 It follows from all the foregoing considerations that the explanations given by the expert for the purpose of determining the amount of the variable costs appear to be fair and reasonable, particularly as regards the method by which those costs

are calculated, which differs from that used by the parties. It is therefore appropriate to adopt the expert's figures, especially since the applicants have not made any decisive criticism of that calculation method and have not put forward any argument or plea capable of invalidating the method used by the expert.

149 Thus, the total variable costs which the applicants would have had to bear in the normal course of events amount to NLG 756 323 in the case of Mr Mulder, NLG 607 116 in the case of Mr Brinkhoff, NLG 574 588 in the case of Mr Muskens and NLG 773 196 in the case of Mr Twijnstra.

2. The cost of external labour

150 The parties disagree as to the justification for, and significance of, the costs relating to the employment of paid workers. It is common ground that that issue does not concern the costs relating to the subcontracting of certain seasonal work of a limited duration.

151 The Commission maintains that it is necessary to take into account, as being connected with the variable costs, the production costs arising from the number of hours' work done by paid workers. In that regard, it takes into account the amounts, attributable to each applicant and to each marketing year, referred to by the Advocate General in point 74 of his Opinion. The figures are based on an annual working period of 60 hours per cow, multiplied by the number of cows on each farm at the start of the non-marketing period; from that total number of hours devoted to the herd, it deducts 2 496 hours which the owner is deemed to have worked himself, so that the remaining number of hours corresponds to the hours worked by paid workers.

152 The applicants state that they have never had recourse to paid workers. They contest the principle that the cost of external labour should be taken into account, in particular on the ground that recourse to paid workers on farms in the Netherlands does not normally exceed the threshold of 4% of the total labour force working on the holding. They point out in that regard that the Commission itself left such wage costs out of account, both in Decision 85/377 and in its Proposal of 13 May 1993 for a Council Regulation (EEC) providing for an offer of compensation to certain producers of milk or milk products temporarily prevented from carrying on their trade (COM(93) 161 final, OJ 1993 C 157, p. 11), which subsequently became, after amendment by the Council, Regulation No 2187/93.

153 At the hearing on 20 May 1996 the applicants accepted the figure of 60 hours' work per cow per annum proposed by the Commission.

154 In contrast to, in particular, the view put forward by the Commission, the expert considers that, in order to establish the number of hours available to the holder of a hypothetical reference quantity, it is necessary to take into account not only the work done by the farmer himself but also that done by members of his family. Relying on the statistics produced by the LEI, he bases his calculation on the period of 2 496 hours (equivalent to 312 8-hour days) worked each year by the farmer himself on his holding, adding to that figure the time spent working on the farm by members of the farmer's family, which must be assessed, according to the expert, as amounting to 80% of the hours worked by the farmer himself. Thus, the amount of time worked by the farmer and his family totals 4 492 hours per year.

155 According to the expert, recourse to external labour becomes necessary only when additional hours need to be worked on the farm over and above the 4 492 hours worked by the farmer and his family. The number of hours of work needed by each farm falls to be established in accordance with the size of the herd.

156 In those circumstances, having assessed, by reference to a 'standard production unit', the annual working time needed per cow, the expert concludes that external labour was needed only in the case of Mr Twijnstra's farm, and only during the 1985/1986 marketing year; that requirement is equivalent, as shown by the table reproduced in point 75 of the Advocate General's Opinion, to a sum of NLG 1.35 per 100 kg of milk delivered.

157 Whilst the applicants profess to agree with the expert's conclusion that the hours worked by members of a farmer's family should be included in the assessment, they nevertheless repeat their criticisms, denying, on the basis of detailed information, that they had any recourse to external labour or received any assistance from members of their families. They submit that the number of hours worked per cow depends more on a farm's size and operation than on the region in which it is located. Furthermore, farmers are permitted by law to work longer hours than those indicated by the expert.

158 The Commission invokes the agreement reached at the hearing on 20 May 1996, according to which Mr Mulder and Mr Twijnstra worked 60 hours per cow per year and Mr Brinkhoff and Mr Muskens worked 65 hours.

159 It should be noted that the statistical approach chosen by the expert is based on the premiss that, during the period in question, members of the applicants' families assisted in performing the tasks involved in milk production. That assumed assistance would have enabled the applicants — save as regards one milk marketing year in the case of Mr Twijnstra — to avoid having to engage paid workers.

160 According to the expert's reasoning, the consequence of that premiss, as regards the alternative income, must be that the income which the members of each applicant's family are deemed to have received from other paid work done by them during the period of suspension of milk production falls to be added to the alternative income of each applicant. He maintains that, if the position were otherwise, the economic approach would not be consistent.

161 At the hearing, the expert did not dispute the applicants' claims that the method used by him, based on statistics relating to the use of external labour, does not rule out the possibility that they could have produced the quantities attributed to them without recourse to such labour. Nor did the expert rebut the applicants' assertions that they have never in fact employed paid workers; the results arrived at in the expert's report merely point to an average, and are not such as to provide an accurate picture of the individual situation of each of the applicants.

162 Nevertheless, those assertions are not wholly unequivocal. The applicants consider, in effect, that the annual number of hours of work needing to be devoted to each cow is greater than that indicated by the expert; yet, at the same time, they maintain that they are able to cope on their own with a greater workload, without having recourse to assistance from members of their families or from paid workers.

163 The Court finds in that regard that the results arrived at by the expert by applying statistical figures are not such that recourse to external labour may be assumed; nor do they nullify the applicants' assertion that they received no assistance from members of their families. However, since the use of statistical figures does not necessarily mean that the actual circumstances characterising the applicants' occupational activities must be ignored, they should be taken into account.

164 Nevertheless, as the Advocate General observes in point 77 of his Opinion, the Commission, on being called upon, first, to justify the need to include the cost of external labour in the variable costs and to establish the extent to which such labour was used and, second, to show that the applicants have in fact had recourse to paid workers, has failed to put forward any argument to justify taking the costs of external labour into account and does not rely on any firm evidence from which it may be concluded that paid workers were used. For the rest, it should be borne in mind that the Commission itself refrained from taking that factor into account when drawing up its proposal for a regulation.

165 In those circumstances, since the applicants' assertions that they have never employed paid workers are not impugned by a statistical approach or refuted by the Commission's arguments, the Court should exclude from the variable costs the charges corresponding to the use of paid workers.

166 Consequently, only the variable costs determined in paragraph 149 of this judgment fall to be deducted from the hypothetical income.

D — *The alternative income*

1. The relevance of the average alternative income and the actual alternative income

167 As the Advocate General observes in point 79 of his Opinion, the alternative income is in principle comprised of real income obtained from activities actually carried on. It is therefore necessary to take into account all sums actually received by the applicants in that respect, particularly since it is only the damage actually suffered which must be made good.

168 Nevertheless, in accordance with the general principle, referred to in paragraph 33 of the interlocutory judgment, that an injured party must show reasonable diligence in limiting the extent of his loss, the alternative income encompasses that which an applicant could have obtained if he had reasonably engaged in replacement activities. The application of that principle means that the average alternative income is at all events relevant in so far as it is not exceeded by the actual income.

169 The applicants do not dispute the fact that they are themselves relying, in essence, on statistics in order to establish their alternative income and, in so far as they put forward data and figures relating to activities actually carried on by them, those data and figures are incomplete and lacking in detail.

170 It follows from those considerations that it is necessary to establish, first of all, the average alternative income which the applicants should have earned by virtue of the various production factors, and then to compare that income with the amounts which they claim to have received from the activities actually carried on by them. In order to avoid the risk, pointed out both by the defendant institutions and by the expert, of distorting the elements involved in that comparison, it is the total amounts applicable in respect of the whole of the relevant compensation period which should be considered, and not the respective amounts per marketing year.

2. The income derived from the release of capital

171 First of all, the applicants dispute the principle that interest is to be regarded as income earned from a given capital sum. They maintain that the capital obtained from the sale of cows would have been re-invested in replacement activities. In any event, from a more general standpoint, the interest can be taken into account only if it is also regarded as such in the context of the hypothetical income.

172 Next, the parties have been unable to agree either the total amounts to be taken into account in respect of the capital released or the elements of which that capital is comprised. In particular, it is apparent from the arguments advanced in the proceedings that they are at odds as to the price of cows, the justification for taking into account certain other constituent elements of the capital released and the rates of interest applicable to the capital to be taken into consideration.

173 The Council and the Commission estimate that the income which each applicant could have received from the capital released on the cessation of dairy production amounts to NLG 6 700 per cow. According to the details provided by the Commission, that sum is made up of NLG 3 800 in respect of the capital relating to cowsheds, silos and agricultural equipment, NLG 1 100 in respect of the capital representing milking machines and refrigerating installations, and NLG 1 800 in respect of the price of a dairy cow.

174 The Commission further states that that capital sum of NLG 6 700 per cow, which was released on suspension of milk production, should have remained available until the resumption of such production and might have yielded interest at the rate of 5.5% during that intervening period. In those circumstances, the annual income per cow would have amounted to NLG 368.50.

175 The applicants, on the other hand, initially considered that the average value of a dairy cow for accounting purposes amounted to NLG 3 100. However, towards the end of the 1970s, the slaughter value of such a cow, which is more appropriate, in their view, for the purposes of determining the alternative income, was NLG 1 630. By converting that value into forgone production per kg of milk, on the basis of interest calculated at the annual rate of 5.5% and an annual productivity figure of 5 500 kg of milk per cow, they arrive at a sum of NLG 1.63 per 100 kg. According to the applicants, the income derived from the capital released could not, under any circumstances, have exceeded NLG 3.10 per 100 kg of milk.

176 Lastly, as noted by the Advocate General in points 87 to 89 of his Opinion, the applicants criticise in three respects the defendant institutions' conclusions concerning the elements comprised in the capital released. First, they do not accept the legitimacy of taking into account released capital representing means of production such as cowsheds, milking machines and refrigerating installations; second, they maintain that the market value of a cow sold at the beginning of the period covered by their non-marketing undertaking was much lower than that accepted by the Commission; and, third, they do not agree with the interest rates taken into consideration for the purpose of calculating the income obtained from the capital released.

177 As regards the means of production, the applicants state that, contrary to the view taken by the Commission, they had to maintain the installations, in particular with a view to carrying on other activities, and derived no income therefrom. Had the equipment been sold, its market value would have been minimal.

178 The Commission's response to this is that it provided for the re-use of the means of production for other economic purposes by taking only 50% of the maintenance costs into account.

179 As regards the value of each cow, the applicants themselves state that that value is based on the price paid at the start of their non-marketing period. As to the difference between the sum of NLG 3 100 put forward by the applicants and the Commission's figure of NLG 6 700, the Commission points out that the sum in question includes the cost of milk production per cow. With regard to the slaughter value of each animal, the Commission states that the difference between the applicants' figure of NLG 1 630 per cow and its own figure, amounting to NLG 1 800, is relatively insignificant.

180 The expert's valuation of the number of cows needed on the planned resumption of production in 1984 or 1985, based on a released capital figure of NLG 2 358 per cow, and of the rates of return on that capital, as reduced by inflation or increased by deflation, is reflected in the income figures set out in the table incorporated by the Advocate General in point 91 of his Opinion.

181 By way of explanation of those figures, the expert recalls the economic reasons which prompted him to take into account only the capital produced by the sale of cows. According to the expert, each farmer must on ceasing production have saved, by means of book-keeping depreciation and the sale of the herd, the amount needed to reconstitute the herd. Consequently, for the purposes of assessing the capital needed, the expert bases his conclusions on a value composed of, first, the capital obtained by the farmer from the sale of the cows

and, second, the cumulative depreciation as at the date of suspension of production, that value corresponding to the cost of acquiring dairy cows as at that date.

182 The expert uses a different price per cow from that applied by the Commission, on the ground that, in order to recommence milk production, the farmer concerned needs to invest in a herd composed, as to 25%, of cows in the first stage of lactation, as to 25%, of cows in the second stage of lactation, as to 25%, of cows in the third stage of lactation and, as to the remaining 25%, of cows in the fourth stage of lactation. For such a herd, the expert's calculations result in an average purchase price of NLG 2 358 per cow.

183 The Commission's response to this is that the composition of such a herd is inadequate; in its view, the expert should have taken into account not only the number of dairy cows but also the number of heifers over two years old and the number of heifers less than two years old; it suggests a price of NLG 2 390 for a dairy cow and a price of NLG 2 265 for a heifer over two years old.

184 It should be recalled that, in the expert's calculation, the two other elements on which the Commission's calculation is based — namely (a) milking machines and refrigerating installations and (b) cowsheds and silos — either form part of the variable costs, in the same way as the expenses respectively corresponding to depreciation and the costs of financing or leasing machinery and installations (see paragraph 133 of this judgment), or are incorporated, like the cowsheds and silos, in the income derived from the land released.

185 The rate of remuneration applied by the expert to the value per cow is that offered by the local savings banks, reduced by the rate of inflation.

186 The Commission does not accept that the interest rates applicable to the capital released should be reduced by the rate of inflation.

187 The calculation method used by the expert appears to be reasonable and persuasive, save as regards the deduction of the rate of inflation.

188 First, the information provided by the expert at the hearing clearly shows that taking into account only the cows forming part of the herd at the time of suspension of production does not, in itself, distort the calculation of the capital derived from the sale of the cows. For the purposes of reconstituting that herd on resumption of production, only those cows which are needed for production of the milk quota are taken into account. Having regard to increased productivity, the number of those cows is lower than the number sold at the time of cessation of milk production.

189 Second, the Commission's criticism concerning the different categories of cows to be included in the composition of the herd cannot be accepted either, since, according to the statements made at the hearing, those categories have been taken into account.

190 On the other hand, its criticism regarding the deduction of the inflation rate from the interest rates must be upheld, as the Advocate General observes in point 94 of his Opinion. Since the nominal value of the currency remains constant, and given the rise in consumer prices, the income from the capital diminishes in proportion to the fall in the purchasing power of that currency. In order to counter that diminution, which operates to the detriment of the holder of the capital, the interest rate, forming, as it were, the income derived from the capital, must be taken into account. If the situation were otherwise, the losses due to inflation would be borne by those to whom the compensation is payable, that is to say, the applicants.

191 Having regard to the foregoing considerations, and applying the rates used by the expert before deducting the inflation rate, namely 7.65% for 1984/1985, 6.46% for 1985/1986, 6.36% for 1986/1987, 5.97% for 1987/1988 and 7.4% for 1988/1989, the total income which would have been derived from the capital released must be determined as NLG 49 370 in the case of Mr Mulder, NLG 40 596 in the case of Mr Brinkhoff, NLG 37 499 in the case of Mr Muskens and NLG 47 179 in the case of Mr Twijnstra.

3. The income derived from the land released

192 The applicants maintain that they did not let their land during the period of suspension of milk production, and therefore dispute, in principle, the Commission's method, whereby that category of income is determined on the basis of the average rent per hectare of agricultural land in the regions in which the applicants' farms are situated.

193 Nevertheless, at the hearing on 20 May 1996 the applicants withdrew their opposition to the rental figures per hectare of agricultural land proposed by the Commission, namely NLG 435 for the 1984/1985 marketing year, NLG 443 for the 1985/1986 marketing year, NLG 468 for the 1986/1987 marketing year, NLG 490 for the 1987/1988 marketing year and NLG 478 for the 1988/1989 marketing year, those rents being calculated on the basis of the average rent per hectare of agricultural land in the region in which the farm in question is situated.

194 Despite the agreement reached with regard to the rental figures, the expert refrains from using them as they stand, on the ground that they exclude the rental of buildings. The latter element, by adding the rental value of the buildings to that of the land, gives rise to the following rental figures per hectare of agricultural land in the northern region: NLG 642 in 1984/1985, NLG 653 in 1985/1986, NLG 659 in 1986/1987, NLG 699 in 1987/1988 and NLG 685 in 1988/1989,

and in the western region: NLG 538 in 1984/1985, NLG 558 in 1985/1986, NLG 528 in 1986/1987, NLG 529 in 1987/1988 and NLG 577 in 1988/1989.

195 According to the expert, the buildings released during the period of suspension of production do not constitute available capital, but could be let together with the land released. Consequently, the value of the buildings should be included in the replacement income deriving from the land released, by applying the average rental figure for the land including the buildings.

196 Furthermore, in order to calculate the total amount of the income derived from the letting of land, including buildings and appurtenances, the expert has multiplied the rental figure by the number of hectares that each applicant would have needed in order to produce the quantities hypothetically attributed, which, as he himself states, varies from one marketing year to the next in proportion to the number of cows needed for milk production.

197 In the defendant institutions' view, that value in respect of the buildings forms part of the income derived from capital, as stated in paragraph 173 of this judgment. In addition, the Commission argues that the source of those rental figures for the land and the buildings is uncertain. The applicants maintain that the method used by the expert would have forced them to seek alternative accommodation, which would have given rise to expenses falling to be deducted from the income yielded by the land released.

198 It is clear — and, moreover, not disputed by the parties — that the buildings released by the suspension of milk production were capable of being used, and should have been used, in the context of alternative activities. Their use for other purposes constitutes an increase in value which must be taken into account in order to establish the average alternative income. Whilst the Commission considers that that increase in value should be taken into account in the

calculation of the capital released, the expert takes it into account as part of the income derived from the land, providing convincing justification for the economic reasons underlying the use of that method. Since there exist no grounds on which that method is capable of being impugned, it should be accepted.

199 As regards the calculation of the total income derived from the letting of land and buildings, it should be noted that the adjustment of the surface areas per marketing year in proportion to the number of cows needed has not prompted the expert to state the number of hectares per applicant and per marketing year which he himself regards as necessary. All that can be deduced from the table relating to that income, which is set out by the Advocate General in point 95 of his Opinion, is that the expert refers to an average surface area per applicant of 42 hectares in the case of Mr Mulder, 24 hectares each in the case of Mr Brinkhoff and Mr Muskens and 54 hectares in the case of Mr Twijnstra.

200 The particulars provided by the applicants in their 'schadereports' annexed to their reply appear — save in the case of Mr Twijnstra — to correspond more closely to the actual situation, all the more so since the number of dairy cows regarded by the applicants as being needed in that context is approximately the number indicated by the expert. It therefore appears more equitable to take the following surface areas into account, as the Advocate General does in footnote 22 to his Opinion: for Mr Mulder, 46 hectares in 1984, 43.5 hectares in 1985, 41.5 hectares in 1986, 38 hectares in 1987 and 36 hectares in 1988; for Mr Brinkhoff, 27 hectares in 1984, 1985 and 1986, 25 hectares in 1987 and 23 hectares in 1988; for Mr Muskens, 29 hectares in 1984, 28 hectares in 1985, 26.5 hectares in 1986, 24.5 hectares in 1987 and 23.5 hectares in 1988; and for Mr Twijnstra, 54 hectares from 1984 to 1988.

201 As regards the category of income derived from the land released, and having regard to the corrections needing to be made in respect of the surface areas, as set out in the preceding paragraph, there is no evidence before the Court which casts doubt on the results arrived at by the expert. In those circumstances, the total alternative income derived from the land released must be assessed at

NLG 103 796 in the case of Mr Mulder, NLG 80 746 in the case of Mr Brinkhoff, NLG 61 692 in the case of Mr Muskens and NLG 110 764 in the case of Mr Twijnstra.

4. The income derived from the working time released

202 The Commission considers, and the applicants do not dispute, that the income arising from the working time made available by the suspension of milk production is that which the farmer alone could have earned from carrying on one or more other activities. On the other hand, its calculation does not take into account the members of the farmer's family.

203 As to the method of determining that income, the Commission bases its calculations, as in the case of the cost of external labour, on an annual working time of 2 496 hours. That figure is then multiplied by the average hourly wage of agricultural workers per marketing year, being NLG 14.80 for 1984/1985, NLG 15.14 for 1985/1986, NLG 15.46 for 1986/1987, NLG 15.62 for 1987/1988 and NLG 15.88 for 1988/1989. By dividing the result by the reference quantity attributed to each applicant, and after multiplying the result so obtained by 100, the Commission arrives at a salary figure expressed in NLG per 100 kg of milk.

204 At the hearing on 20 May 1996, the applicants accepted the figures and calculations produced by the Commission. Nevertheless, they pleaded their actual circumstances, as described in the statement of case submitted by them following delivery of the interlocutory judgment.

205 As regards the hypothetical income earned by the farmer alone, the expert applies the same annual number of hours of work and the same average hourly wage as indicated in paragraph 203, which the parties have agreed.

206 On the other hand, the expert considers it necessary to take into account, in addition to the alternative income earned by the farmer alone from devoting his working time thus made available to other activities, the income received by the members of his family from other activities carried on by them. He points out that to leave the hours worked by the family out of account for the purposes of calculating the variable charges is justifiable only if those hours are included in the calculation of the replacement income.

207 The Court is not convinced of the validity of that method, which involves taking into account, when calculating loss of earnings, the value of assistance rendered by the members of the farmer's family. Consequently, the income derived from the working time made available cannot include an amount corresponding to any alternative income earned by members of the family.

208 As the Advocate General observes in point 99 of his Opinion, it has not been established that the applicants could have received any substantial assistance from members of their families. That conclusion is not in any way invalidated by the detailed, unchallenged information provided by the applicants concerning their family situation in response to the expert's report, even though, according to that information, it is not inconceivable that one or other of them may at certain times have been able to count on members of the family to provide a measure of assistance in carrying out agricultural work.

209 Even assuming that, in reality, the members of a farmer's family customarily perform certain tasks and help out with certain activities, there is nothing to indicate that such assistance takes the form of a real occupation or is rendered in the same way in the event that the farmer devotes himself to other activities or alters his method of farming his land.

210 Furthermore, where the family members carry on an alternative activity unconnected with the running of the farm, it cannot be assumed that they pass to the farmer the income received by them in their personal capacity. On the contrary, they may dispose of the income from such activity as they wish.

211 In addition, if the family members were to decide of their own free will to make their income available to the farmer and thus to contribute to the family income, that would be a purely personal decision and could not affect the finding that any income earned by family members must be left out of account for the purposes of calculating loss of earnings.

212 In the light of the foregoing, the table produced by the expert, as set out by the Advocate General at the end of point 97 of his Opinion, must be modified so as to take into account only the time spent working by the applicants themselves.

213 On the basis that — as agreed by the parties — it is only the alternative income obtained by the applicants themselves during the working time released that is to be taken into account, that income must be assessed at NLG 144 591 in the case of Mr Mulder, NLG 158 532 in the case of Mr Brinkhoff, NLG 160 575 in the case of Mr Muskens and NLG 117 680 in the case of Mr Twijnstra.

E — *Compensatory interest*

214 The analysis of the various claims contained in paragraphs 41 to 45 of this judgment shows that the applicants are seeking compensatory interest in respect of the period prior to the date of delivery of the interlocutory judgment. That interest is intended to make up for the losses suffered by them as a result of, first, the fall in the value of money since the damage materialised and, second, their inability to reap the profits which they might have earned in the normal course of events from milk production. In that respect, they maintain that the interest in question is to be calculated from the date on which the damage arose, in accordance with the rates applying to State loans in the Netherlands, namely: 7.91% for the 1984/1985 marketing year, 7.08% for the 1985/1986 marketing year, 6.36% for the 1986/1987 marketing year, 6.30% for the 1987/1988 marketing year, 6.39% for the 1988/1989 marketing year, 7.66% for the 1989/1990 marketing year, 8.94% for the 1990/1991 marketing year and 8.63% for the 1991/1992 marketing year.

215 As regards compensation for the losses caused by the fall in the value of money, it suffices to refer to paragraph 51 of this judgment and paragraph 40 of the judgment in *Grifoni* v *EAEC*, which show that this head of claim is well founded.

216 As to the damage caused by the unavailability of profits from milk production, it is appropriate to refer, as the Advocate General rightly does in point 105 of his Opinion, to the principle, universally applied in all the Member States and also cited in paragraph 40 of the judgment in *Grifoni* v *EAEC*, that full restitution is to be made for the damage suffered. In accordance with that principle, it is only the damage actually suffered that is to be made good.

217 The applicants merely allege in that regard that they would have invested the profits deriving from their milk production in an interest-bearing bank account. By contrast, the expert, with whose view the Advocate General concurs, stated at the hearing that the income from milk production — and, indeed, the replacement income — is intended to meet daily living expenses and is not income likely to be invested in a bank.

218 In the light of both the statements made by the expert and the Advocate General's Opinion, it is clear that the income which the applicants would have derived from milk production would have been intended, in essence, to meet their daily needs and those of their families. The applicants have produced no evidence capable of rebutting that conclusion.

219 In that regard, whilst it is not wholly inconceivable that a part of the income, however small, might be available for investment in a bank or in some other form of savings, such an investment cannot be taken into account, since the applicants, on whom the relevant burden of proof lies, have provided no detailed evidence in that connection.

220 It follows from the foregoing considerations that the applicants are entitled to claim interest corresponding to the rate of inflation in respect of the period from the date on which the damage arose to the date of delivery of the interlocutory judgment. In point 105 of his Opinion, the Advocate General observes that, according to data provided by Eurostat, the average inflation rate during the period from 1984 to 1992 was 1.85%, which reflects the rate that can be deduced from the particulars given by the expert.

221 Furthermore, it appears equally reasonable and appropriate from a financial standpoint that, in order to mitigate the loss caused by the fall in the value of money, the applicants should receive, in addition to the total compensation which they are entitled to claim, interest thereon at the annual rate of 1.85%, covering the period from the date on which each of them could, in the normal course of events, have recommenced milk production to the date of delivery of the interlocutory judgment.

F — *The individual compensation*

222 Having regard to the foregoing considerations, it is necessary to draw up an account of the loss of earnings of each individual applicant and, in so doing, to adjust the assessment of the average alternative income by reference to an analysis of the actual alternative income, since the latter is relevant only if it exceeds the average income.

1. The compensation due to Mr Mulder

223 As regards Mr Mulder, the prices to be taken into account are those paid by the Twee Provinciën dairy to which he makes his deliveries. Those prices amount, per 100 kg of milk, to NLG 77.87 for 1984, NLG 78.97 for 1985, NLG 78.77 for 1986, NLG 80.55 for 1987, NLG 85.63 for 1988 and NLG 84.35 for 1989. Taking those data into account, the total income which Mr Mulder would have received from the hypothetical delivery of milk must, in accordance with the expert's calculation, be fixed at the sum of NLG 1 353 918 (see paragraph 97 of this judgment).

224 As stated in paragraph 111 of this judgment, the sale of cull cows and calves would have earned him the total sum of NLG 255 980, corresponding to the figure arrived at by the expert.

225 From the above sums there fall to be deducted the variable costs, which correspond, in accordance with paragraph 149 of this judgment, to those calculated by the expert and which total NLG 756 323.

226 As regards the three production factors constituting the average alternative income, the income which Mr Mulder would have obtained from the capital released must be assessed at NLG 49 370, whilst that which he would have earned from the land which became available amounts to NLG 103 796 and that which he would have received from alternative work totals NLG 144 591 (see, respectively, paragraphs 191, 201 and 213 of this judgment).

227 In accordance with the principle that the damage actually suffered must be made good in its entirety, the actual alternative income must be used to calculate the compensation due where that income exceeds the amount of the average alternative income.

228 As regards Mr Mulder's actual alternative income, his own observations show that in 1984, following the refusal of a milk quota, he sold a herd comprising 70 dairy cows and ten heifers. It is not disputed that he was forced to sell those animals on unfavourable terms. In addition, the particulars provided by him show that from a total of 68 sheep in 1985 he built up a flock amounting to 463 sheep in 1988. He also kept a varying number of fattening bulls, ranging from

two in 1985 to 49 one year later, as well as a herd of suckler cows, calves and heifers.

229 Those data confirm that Mr Mulder had actual alternative income, and it is for him to state the nature and size of that income; however, he has not provided the Court with information precise enough to show that his actual alternative income was greater than the average alternative income and that the latter should be disregarded, in accordance with the principle of full reparation for the damage suffered, in such a way as to take the actual alternative income into account.

230 Consequently, the individual account of Mr Mulder should be drawn up in accordance with the figures appearing in the following table:

	Totals (in NLG)
Milk sales	1 353 918
Sales of cows and calves	255 980
Total (gross hypothetical income)	1 609 898
Variable costs	756 323
Hypothetical income	853 575
Average alternative income	
— Income earned from capital	49 370
— Income earned from land	103 796
— Income earned from work	144 591
Total average alternative income	297 757
Loss of earnings	555 818

231 Having regard to all the foregoing considerations, the Council and the Commission must be ordered jointly and severally to pay to Mr Mulder, in

respect of loss of earnings, compensation totalling NLG 555 818, together with interest at the annual rate of 1.85% from 1 October 1984 to the date of delivery of the interlocutory judgment.

232 To that sum must be added default interest at the annual rate of 8% from the latter date until the date of actual payment.

2. The compensation due to Mr Brinkhoff

233 As regards Mr Brinkhoff, the prices to be applied are the average prices paid by the Noord Nederland and Nestlé Nederland Friesland dairies to which he makes his deliveries. Those prices amount, per 100 kg of milk, to NLG 77.66 for 1984, NLG 79.55 for 1985, NLG 79.20 for 1986, NLG 80.20 for 1987 and NLG 86 for the final year. Taking those data into account, the total income which Mr Mulder would have received from milk deliveries must be fixed, in accordance with the expert's calculation, at NLG 1 075 069 (see paragraph 97 of this judgment).

234 As stated in paragraph 111 of this judgment, the sale of cull cows and calves would have earned him the total sum of NLG 174 324, corresponding to the figure arrived at by the expert.

235 From the above sums there fall to be deducted the variable costs, which correspond, in accordance with paragraph 149 of this judgment, to those calculated by the expert and which total NLG 607 116.

236 As regards the three production factors constituting the average alternative income, the income which Mr Brinkhoff would have obtained from the capital released must be assessed at NLG 40 596, whilst that which he would have earned from the land which became available amounts to NLG 80 746 and that which he would have received from alternative work totals NLG 158 532 (see, respectively, paragraphs 191, 201 and 213 of this judgment).

237 In accordance with the principle that the damage actually suffered must be made good in its entirety, the actual alternative income must be used to calculate the compensation due where that income exceeds the amount of the average alternative income.

238 As regards Mr Brinkhoff's actual alternative income, he himself refers to certain agricultural and other activities, such as boarding young cattle, selling fodder, starting up a subcontracting business and working as a lorry driver. Although he claims to have had little success with those activities, he does not dispute the Commission's allegations that his actual alternative income during the first three years for which compensation is payable was greater than the average alternative income.

239 However, neither the particulars provided by Mr Brinkhoff nor those of the Commission, which contain no detailed information and are partially based on statistics, enable the Court accurately to establish, per marketing year, the amount of the actual alternative income earned by the applicant.

240 Consequently, the individual account of Mr Brinkhoff should be drawn up in accordance with the figures appearing in the following table:

	Totals (in NLG)
Milk sales	1 075 069
Sales of cows and calves	174 324
Total (gross hypothetical income)	1 249 393
Variable costs	607 116
Hypothetical income	642 277
Average alternative income	
— Income earned from capital	40 596
— Income earned from land	80 746
— Income earned from work	158 552
Total average alternative income	279 894
Loss of earnings	362 383

241 Having regard to all the foregoing considerations, the Council and the Commission must be ordered jointly and severally to pay to Mr Brinkhoff, in respect of loss of earnings, compensation totalling NLG 362 383, together with interest at the annual rate of 1.85% from 5 May 1984 to the date of delivery of the interlocutory judgment.

242 To that sum must be added default interest at the annual rate of 8% from the latter date until the date of actual payment.

3. The compensation due to Mr Muskens

243 As regards Mr Muskens, the prices to be applied are the average prices paid by the Campina dairy to which he makes his deliveries. Those prices amount, per 100 kg of milk, to NLG 76.73 for 1984, NLG 77.09 for 1985, NLG 78.63 for 1986, NLG 79.57 for 1987, NLG 82.12 for 1988 and NLG 86.32 for the final year. Taking those data into account, the total income which Mr Muskens would have received from hypothetical milk deliveries must be fixed, in accordance with the expert's calculation, at NLG 1 002 178 (see paragraph 97 of this judgment).

244 As stated in paragraph 111 of this judgment, the sale of cull cows and calves would have earned him the total sum of NLG 157 090, corresponding to the figure arrived at by the expert.

245 From the above sums there fall to be deducted the variable costs, which correspond, in accordance with paragraph 149 of this judgment, to those calculated by the expert and which total NLG 574 588.

246 As regards the three production factors constituting the average alternative income, the income which Mr Muskens would have obtained from the capital released must be assessed at NLG 37 499, whilst that which he would have earned from the land which became available amounts to NLG 61 692 and that which he would have received from alternative work totals NLG 160 575 (see, respectively, paragraphs 191, 201 and 213 of this judgment).

247 In accordance with the principle that the damage actually suffered must be made good in its entirety, the actual alternative income must be used to calculate the compensation due where that income exceeds the amount of the average alternative income. Mr Muskens does not dispute the Commission's allegation that he earned a monthly income of between NLG 8 000 and NLG 9 000 during the first three years of the period for which compensation is payable. He maintains, however, that those amounts represent the turnover obtained from his various activities, not the profit remaining after deduction of the costs relating thereto.

248 Those particulars, provided both by the Commission and by Mr Muskens, confirm that he actually carried on alternative activities; they also make it possible to assess the amount of the applicant's alternative income, even though he provides no precise evidence in that regard. However, those particulars show that the actual income scarcely exceeds the average amounts indicated in paragraph 246 of this judgment. Those amounts should therefore be taken as constituting Mr Muskens' alternative income.

249 Consequently, the individual account of Mr Muskens should be drawn up in accordance with the figures appearing in the following table:

	Totals (in NLG)
Milk sales	1 002 178
Sales of cows and calves	157 090
Total (gross hypothetical income)	1 159 268
Variable costs	574 588
Hypothetical income	584 680
Average alternative income	
— Income earned from capital	37 499
— Income earned from land	61 692
— Income earned from work	160 575
Total average alternative income	259 766
Loss of earnings	324 914

250 Having regard to all the foregoing considerations, the Council and the Commission must be ordered jointly and severally to pay to Mr Muskens, in respect of loss of earnings, compensation totalling NLG 324 914, together with interest at the annual rate of 1.85% from 22 November 1984 to the date of delivery of the interlocutory judgment.

251 To that sum must be added default interest at the annual rate of 8% from the latter date until the date of actual payment.

4. The compensation due to Mr Twijnstra

252 As regards Mr Twijnstra, the prices to be applied are the average prices paid by the Twee Provinciën dairy to which, according to the statements made by him, he makes his deliveries. Those prices amount, per 100 kg of milk, to NLG 78.97 for 1985, NLG 78.77 for 1986, NLG 80.55 for 1987 and NLG 85.63 for the final year. Taking those data into account, the total income which Mr Twijnstra would have received from milk deliveries must be fixed, in accordance with the expert's calculation, at NLG 1 399 748 (see paragraph 97 of this judgment).

253 As stated in paragraph 111 of this judgment, the sale of cull cows and calves would have earned him the total sum of NLG 228 641, corresponding to the figure arrived at by the expert.

254 From the above sums there fall to be deducted the variable costs, which correspond, in accordance with paragraph 149 of this judgment, to those calculated by the expert, apart from the cost of external labour, and which total NLG 773 196.

255 As regards the three production factors constituting the average alternative income, the income which Mr Twijnstra would have obtained from the capital released must be assessed at NLG 47 179, whilst that which he would have earned from the land which became available amounts to NLG 110 764 and that which he would have received from alternative work totals NLG 117 680 (see, respectively, paragraphs 191, 201 and 213 of this judgment).

256 In accordance with the principle that the damage actually suffered must be made good in its entirety, the actual alternative income must be used to calculate the compensation due where that income exceeds the amount of the average alternative income.

257 As regards the actual alternative income, Mr Twijnstra acknowledges that he spent the years 1985, 1986 and 1987 growing vegetables on an area of land extending over 10 hectares. According to his own statements, which are not disputed, he earned approximately NLG 9 000 per month from that activity. However, he maintains that the expenses relating to that activity should be deducted from that sum.

258 Mr Twijnstra states that the restriction of that activity to an area of 10 hectares, constituting approximately one fifth of his land, is due to three factors: first, not all of his land lent itself to that type of activity; second, he had only a limited amount of working time at his disposal; and finally, it was necessary for him to acquire the necessary knowledge in order successfully to undertake that new production.

259 Although Mr Twijnstra, on whom the relevant burden of proof rests, has not provided any detailed particulars in that regard, the Court, with the help of that

information, is in a position to assess the amount of the alternative income alleged. However, the information in question does not enable it to conclude that his actual alternative income was greater than the average alternative income, since the expenses to be deducted from the profits made are taken into account.

260 Consequently, the individual account of Mr Twijnstra should be drawn up in accordance with the figures appearing in the following table:

	Totals (in NLG)
Milk sales	1 399 748
Sales of cows and calves	228 641
Total (gross hypothetical income)	1 628 389
Variable costs	773 196
Hypothetical income	855 193
Average alternative income	
— Income earned from capital	47 179
— Income earned from land	110 764
— Income earned from work	117 680
Total average alternative income	275 623
Loss of earnings	579 570

261 Having regard to all the foregoing considerations, the Council and the Commission must be ordered jointly and severally to pay to Mr Twijnstra, in respect of loss of earnings, compensation totalling NLG 579 570, together with interest at the annual rate of 1.85% from 10 April 1985 to the date of delivery of the interlocutory judgment.

262 To that sum must be added default interest at the annual rate of 8% from the latter date until the date of actual payment.

V — The substance of the dispute in Case C-37/90

263 It should be recalled, first of all, that loss of earnings is to be established in accordance with the principles laid down in the interlocutory judgment and set out in paragraphs 63 to 84 of this judgment. The most recent quantified claims in respect of loss of earnings put forward by Mr Heinemann following delivery of the interlocutory judgment are based on calculations carried out in the context of a new expert's report prepared at his request by Mr Spandau (hereinafter referred to as 'the Spandau report'). It is not disputed that Mr Spandau himself bases his conclusions on the data contained in the statistics supplied by the Hanover Chamber of Agriculture, apart from the figures relating to the variable costs and the prices of cull cows and calves. The Commission, on the other hand, relies on the figures resulting from the three expert's reports previously commissioned on the applicant's initiative.

A — *The relevant periods for the purposes of compensation*

264 Mr Heinemann claims compensation in respect of the period from the start of the first marketing year, that is to say, 1 April 1984, to 28 August 1989, on which date he effectively resumed milk production. The Council and the Commission accept neither the initial date nor the final date of the compensation period, as the Advocate General notes in point 128 of his Opinion.

265 At the hearing on 20 May 1996 the parties agreed that the relevant period for the purposes of compensation commenced on 20 November 1984, that being the date of expiry of the non-marketing undertaking previously given by the applicant.

266 As to the date on which the period in question came to an end, the defendant institutions infer from paragraph 26 of the interlocutory judgment that no

compensation is due in respect of any period following the period indicated in that paragraph. They maintain that, with effect from 29 March 1989, the consequences of the delay in resuming his milk production should be borne by the applicant alone.

267 By contrast, Mr Heinemann, in disputing the final date of 29 March 1989, asserts that the belated resumption by him of milk production in August 1989 was entirely due to the fact that he was unable to obtain a milk quota before then. According to the applicant, no German producer was in a position to resume milk production prior to August 1989.

268 The Advocate General correctly observes, in point 129 of his Opinion, that the compensation must be calculated in accordance with the actual duration of the period during which the farmer in question was prevented from producing milk. However, on the basis of paragraph 26 of the interlocutory judgment, the only period capable of being regarded as relevant for compensation purposes is that between 1 April 1984 and 29 March 1989. It follows that the period in respect of which compensation is payable cannot extend beyond 29 March 1989; following that date, the Community cannot in any circumstances be held responsible for any delay in the resumption of milk production.

269 Consequently, the relevant period for the purposes of the payment of compensation extends, in the case of Mr Heinemann, from 20 November 1984 to 29 March 1989. In those circumstances, 365 days are to be taken into account in respect of each of the 1985/1986, 1986/1987 and 1987/1988 marketing years, whilst the first marketing year is of only 132 days' duration and the last extends over 363 days.

B — *The applicant's hypothetical income*

270 Mr Heinemann's hypothetical income consists, in accordance with the calculation method specified in paragraphs 67 to 69 of this judgment, of the income

which he would have obtained in the normal course of events from milk deliveries and from the sale of cull cows and calves, less the variable costs.

271 Although the Commission contests the result arrived at by the evaluation of the loss suffered by Mr Heinemann, it does not dispute the various elements comprised in the latter's calculation, apart from the rates of reduction applicable to the initial reference quantity in accordance with paragraphs 29 to 32 of the interlocutory judgment.

1. The hypothetical income from sales of milk and sales of cull cows and calves

272 In accordance with the method laid down in paragraph 92 of this judgment, the income which Mr Heinemann would in the normal course of events have obtained from milk deliveries must be calculated by multiplying the quantity of milk which he could have delivered during the relevant compensation period by the price of the milk; to the amount thus obtained it is necessary to add the income derived from the sale of cull cows and calves.

(a) The hypothetical reference quantities

273 The parties are agreed as to the quantity of milk to be taken as the basis for establishing the hypothetical reference quantities per milk marketing year. That quantity must be calculated, in accordance with paragraphs 28 to 32 of the interlocutory judgment, on the basis of the quantities used to determine the non-marketing premium. The quantity in question amounts to 36 705 kg.

274 In accordance with paragraph 29 of the interlocutory judgment, that basic quantity, increased by 1%, is subject to a reduction representative of the rates of reduction applicable to the deliveries referred to in Article 2(2) of Regulation No 857/84. That reduction is in issue between the parties.

275 Whilst it is not disputed that the normal rate of reduction is 4% in accordance with the Milch-Garantiemengen-Verordnung (Regulation implementing the Community additional levy scheme, hereinafter 'the MGVO'), the applicant seeks the application of a rate of 2%, on the ground that this is appropriate for minimal quantities such as his.

276 Given that the general rate of reduction is 4%, the Commission maintains that the application of that rate is favourable to the applicant, since higher rates of reduction were applicable for the marketing years subsequent to 1984/1985.

277 The Council states, with particular reference to Case C-21/92 *Kamp* [1994] ECR I-1619, that it is willing to agree to a representative reduction of 7.5%.

278 Having regard to those differences of opinion, the expert refers to the German rules on rates of reduction laid down in Paragraph 4(2) and (3) of the MGVO, and in particular to the derogation in favour of farms delivering less than 161 000 kg of milk per marketing year. He considers that the most appropriate solution is to adopt the differentiated rates which would result from hypothetically applying the German rules alone. According to the expert, the rate of reduction for the first three marketing years amounts to 2% and, for the last two, 7.5%.

279 The expert also refers to a subsidy of DEM 300 payable for 1 000 kg of milk not produced as a result of the 5.5% increase in the initial rate of reduction for the 1987/1988 marketing year and to a further subsidy of DEM 241 payable on the same terms for the following marketing year. As the Advocate General observes at the end of point 130 of his Opinion, the expert includes the sums of DEM 600 for the 1987/1988 marketing year and DEM 482 for the final marketing year in the calculation of the hypothetical income derived from milk sales.

280 The applicant accepts the expert's proposal, subject to recognition of his right to receive compensation up to the amount of the subsidy in question. Owing to a further reduction which he claims to have sustained, he additionally seeks, pursuant to the MGVO, an allowance of DEM 440 in respect of each of the last two marketing years. In support of that claim, he maintains that he had to bear another reduction of 3% from 1 April 1987.

281 The Commission restates its arguments, submitting that the choice of applicable rates of reduction is a question of law which it is for the Court to answer.

282 It must be observed in that regard that such a question falls within the scope of the domestic law of a Member State. Consequently, it is not for the Court to interpret domestic law, even where it transposes Community legislation.

283 It is agreed between the parties that neither the uniform rate of reduction of 4% proposed by the Commission in respect of the whole of the relevant compensation period, nor the rate of 7.5% which the Council is willing to accept, reflects the actual rates of reduction which would have been applicable to the applicant in the normal course of events. The Commission itself acknowledges the existence of a higher rate towards the end of the period in question and the Council itself proposes the application of the rate used in the context of the offer of compensation made pursuant to Regulation No 2187/93.

284 On the other hand, it is clear — as, moreover, the Court has held on several occasions (see, for example, Case C-22/94 *Irish Farmers Association and Others* v *Minister for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR I-1809) — that the reference quantities attributed to the applicant would have undergone various reductions in respect of different periods, either on account of the reductions applied or as a result of suspension of marketing for part of those quantities.

285 In those circumstances, the method used by the expert would appear to be more appropriate to Mr Heinemann's actual situation. Consequently, a reduction should be applied to the initial quantity of 36 705 kg of milk, at the rate of 2% for the first three marketing years in question and 7.5% for the last two. In view of the fact that the German legislature has provided for a subsidy to offset the 5.5% increase in the reduction applicable to the last two years, that subsidy must be taken into account for the purposes of the calculation of compensation. On the other hand, the DEM 440 subsidy sought by Mr Heinemann cannot be accepted, since he has not provided any information in support of his claim on the basis of which the Court can assess its merits.

286 Consequently, having regard to the relevant duration of each marketing year for compensation purposes, it is appropriate to apply hypothetical milk reference quantities amounting to 13 139 kg for the 1984/1985 marketing year, 36 331 kg for the 1985/1986 and 1986/1987 marketing years, 34 292 kg for the 1987/1988 marketing year and 34 104 kg for the 1988/1989 marketing year.

(b) The price of milk

287 Mr Heinemann relies on the milk prices shown by the Spandau report. The Council maintains that those prices are approximately the same as those used for the purposes of the offer of compensation made to certain producers under Regulation No 2187/93.

288 At the hearing on 20 May 1996, the parties expressly agreed those prices. On the basis of that agreement, the expert has applied prices per marketing year, and per 100 kg of milk delivered, amounting to DEM 67.10 for 1984/1985, DEM 70.10 for 1985/1986, DEM 69.30 for 1986/1987 and 1987/1988 and DEM 75.20 for 1988/1989.

289 In order to obtain the amounts corresponding to the sums resulting from sales of milk in each marketing year, those prices should be multiplied by the quantities indicated in paragraph 286 of this judgment; this yields the sums of DEM 8 816 for 1984/1985, DEM 25 468 for 1985/1986, DEM 25 177 for 1986/1987, DEM 24 364 for 1987/1988 and DEM 26 128 for 1988/1989.

290 To the income in respect of the last two marketing years, there must be added the sums of DEM 600 and DEM 482 respectively, relating to subsidies forgone.

291 It follows from the foregoing that, on the basis of the expert's figures and calculations, the hypothetical income which Mr Heinemann could have obtained from milk production must be assessed at DEM 111 035.

(c) Sales of cull cows and calves

292 The parties have also succeeded in reaching agreement on the prices of cull cows and calves, as well as, first, the number of cull cows to be slaughtered each year and, second, the number of calves born each year within the herd. Although the Commission originally argued in favour of applying the figures resulting from an initial expert's report annexed to Mr Heinemann's application, the defendant institutions accept the amounts per kg of milk indicated by him, namely DEM 0.159 for 1984/1985, DEM 0.154 for 1985/1986, DEM 0.140 for

1986/1987, DEM 0.130 for 1987/1988 and DEM 0.141 for 1988/1989. According to the applicant, those figures are taken from statistics produced by the Chamber of Agriculture of the neighbouring district of Westfalen-Lippe, since the Hanover Chamber of Agriculture is unable to provide figures relating to sales of cull cows and calves.

293 On the basis of those figures, the expert arrives at an income from the sale of cull cows and calves amounting to DEM 2 089 for 1984/1985, DEM 5 595 for 1985/1986, DEM 5 086 for 1986/1987, DEM 4 458 for 1987/1988 and DEM 4 809 for 1988/1989.

294 It follows from the foregoing that there is no reason not to adopt the expert's calculations, which are based — save as regards the reference quantities to be applied — on figures which are not in dispute.

295 Consequently, the hypothetical income which the applicant would have earned from the sale of cull cows and calves must be fixed at DEM 22 037 in all.

296 In those circumstances, the total hypothetical income which Mr Heinemann would have obtained from sales of milk and of cull cows and calves must be assessed at DEM 133 072.

2. The variable costs

297 The parties are in agreement concerning the method of calculating the variable costs, but remain at odds over the amounts to be used for that purpose.

298 Without putting forward any figures of its own, the Commission criticises the fact that the applicant has used the figures contained in the Spandau report instead of relying on those contained in the application and the annexes thereto.

299 It is common ground, first, that the figures referred to by Mr Heinemann are those appearing in the Spandau report and, second, that, for the purposes of calculating the variable costs, that report exceptionally uses statistics produced by the Westfalen-Lippe Chamber of Agriculture.

300 In order to determine the variable costs, the expert, extrapolating from the increase in average productivity per cow, establishes the number of cows which the applicant would have needed to keep in order to produce the hypothetical reference quantities indicated in paragraph 286 of this judgment.

301 The expert, relying, unlike the Spandau report, on the statistics compiled by the Hanover Chamber of Agriculture for the purposes of determining the increase in productivity, arrives at an average quantity of milk per cow of 4 515 kg in 1984/1985, 4 630 kg in 1985/1986, 4 705 kg in 1986/1987, 4 400 kg in 1987/1988 and 4 390 kg in 1988/1989. The expert states in that regard that the statistics compiled by the Westfalen-Lippe Chamber of Agriculture show a higher productivity than that emerging from the statistics of the Hanover Chamber of Agriculture, and that they do not therefore reflect the situation actually prevailing on the applicant's farm.

302 Having pointed out that it is necessary, in order to arrive at a certain quantity of milk delivered to the dairies, for a higher quantity to be produced, the expert observes that the increase in productivity indicated in the preceding paragraph relates to the quantities of milk delivered and states that, for the purposes of determining the ratio between the quantity delivered and the quantity produced by Mr Heinemann's farm, he has relied on the rates applying in the Netherlands.

303 In arriving at his assessments, the expert ultimately concludes that the number of dairy cows required amounts to nine for the first marketing year, eight for the next three marketing years and seven for the last marketing year.

304 Thus, using the statistics compiled by the Hanover Chamber of Agriculture, the expert applies — as noted by the Advocate General in point 136 of his Opinion — the following amounts in respect of the variable costs incurred by the applicant: DEM 7 157 in 1984/1985, DEM 18 120 in 1985/1986, DEM 17 736 in 1986/1987, DEM 18 136 in 1987/1988 and DEM 15 608 in 1988/1989. According to his calculations, the variable costs therefore amount to DEM 76 757.

305 The criticism levelled at the expert by the Commission, to the effect that he was wrong in considering that the rates applying in the Netherlands were appropriate for the purposes of determining, in the context of the increase in productivity, the ratio between the quantity of milk delivered and the quantity produced, cannot be upheld. The justifications provided by the expert in support of the method used by him are persuasive and adequate.

306 It therefore follows from all the foregoing considerations that, as regards the variable costs, the amounts calculated by the expert, which are fair and reasonable, should be accepted.

C — *The average alternative income*

307 The first point to note is that, whilst maintaining his argument that it is solely the actual alternative income derived from the fattening of bulls that is relevant, Mr Heinemann has produced evidence on the basis of which the three production factors can be calculated.

1. The income derived from the capital released

308 Although the applicant continues to argue that he has never in actual fact had any released capital at his disposal, the parties have reached agreement, in the context of the calculation method ultimately adopted, concerning the representative amount of the capital released. According to the applicant, that capital amounts to DEM 6 200 per cowshed space. That sum is made up of half the value of a cowshed space, estimated at DEM 8 000, and the average purchase price of a heifer, valued at DEM 2 200.

309 The Commission asserts that the cost of the investment needed for the renewal of machinery, in particular the milking installations, has not been included in the abovementioned sum.

310 The applicant maintains that the applicable interest rate is 3.5%, being the rate applied by the German Government in its agricultural statistics. The Commission and the Council consider that a fixed rate of around 5.5% is more reasonable. The Commission points out, in particular, that the default interest payable from the date of delivery of the interlocutory judgment is at the rate of 8% and that the applicant himself contemplated, in relation to the compensatory interest, a rate of between 5% and 6.5%.

311 The expert considers that the capital released comprises only the amount needed for reinvestment in dairy cows on the resumption of production in 1984. He bases his calculation in that regard on the price agreed by the parties, namely DEM 2 200 per heifer, which he multiplies by the number of cows needed for milk production. He points out that, as in Case C-104/89, the amounts relating to, first, the capital representing the milking machines and refrigerating installations in terms of variable charges and, second, the buildings needed to accommodate the herd, are taken into account in his assessment of the income deriving from the land released (see paragraph 184 of this judgment).

312 In view of the progressive reduction applied to the reference quantity, namely 2% during the first three marketing years and 7.5% during the last two, the expert arrives at a sum of DEM 17 600 in respect of the total capital released.

313 To the capital sum so obtained the expert applies the interest rates offered by the local savings banks, reduced, as stated in paragraph 185 of this judgment, by the annual rate of variation in the consumer price index for family households. On that basis, the rate applied is 0.99% for 1984/1985, 1.25% for 1985/1986, 2.88% for 1986/1987, 2.18% for 1987/1988 and 0.95% for 1988/1989.

314 It is apparent from those considerations that the figures proposed by the expert in respect of income derived from the capital released amount to DEM 71 for 1984/1985, DEM 248 for 1985/1986, DEM 570 for 1986/1987, DEM 432 for 1987/1988 and DEM 187 for 1988/1989.

315 The applicant maintains that, were the rate of inflation to be deducted from the yield on the capital released, he would have had no income, since the interest rate would have been negative during the relevant period.

316 The defendant institutions likewise contest the deduction of the rate of inflation. The Commission points out that, if the applicant had invested the capital released in a bank, he would have received interest calculated at the normal rate, without any deduction on account of inflation.

317 In addition, they dispute the fact that it is only the price of heifers that has been taken into account. They argue that all categories of dairy cows should be taken into account, so as to have regard to the fact that the herd is made up of cows which are at different stages of lactation.

318 As to the composition of the herd taken by the expert as the basis for determining the capital released, the Court finds that the expert has adopted the same method as that described in paragraph 188 of this judgment, inasmuch as he has taken into account only the cows needed to produce the quantities hypothetically granted at once following the resumption of milk production.

319 It should be noted that, in the case of Mr Heinemann, the expert bases his conclusions solely on the price of a heifer, omitting — in contrast to the approach taken by him in Case C-104/89 — to have regard to the different categories of cows of which the herd is necessarily composed upon the resumption of milk production (see paragraph 182 of this judgment).

320 Nevertheless, the method adopted by the expert must be regarded as fair and reasonable, for two reasons. First, the restricted size of Mr Heinemann's herd makes it impossible to take into account all the characteristics of the cows of which a larger herd would be composed; moreover, the variation in the prices of the animals according to their different categories is minimal, as the analysis of the Netherlands prices shows. Second, despite its criticism, the Commission itself has based its own calculations on a price of DEM 2 200.

321 On the other hand, for the reasons stated in paragraph 191 of this judgment, it is appropriate to disregard the deduction of the rate of inflation and, in consequence, to allow the application of the interest rates offered by the local savings banks.

322 Taking into account rates of 3.39% for 1984/1985, 3.25% for 1985/1986, 2.78% for 1986/1987, 2.38% for 1987/1988 and 2.25% for 1988/1989, the capital needed in 1984 to purchase nine heifers at a cost of DEM 2 200 each would have earned the applicant income amounting to DEM 243, DEM 643, DEM 550, DEM 471 and DEM 443 respectively.

323 It follows from the foregoing considerations that the average alternative income accruing to Mr Heinemann from the capital released totals DEM 2 350.

2. The income derived from the land released

324 On the basis of the statistics produced by the Hanover Chamber of Agriculture, as used by Mr Heinemann, or by the Westfalen-Lippe Chamber of Agriculture, to which the Commission refers, the parties rely on different figures with regard to both agricultural rental levels and the number of hectares needed for each cow, as is apparent from the tables set out by the Advocate General in point 142 of his Opinion.

325 In accordance with the calculation method applied in Case C-104/89, the expert takes into account, in addition to the rent payable for the land released, the cost of renting the buildings located on that land. Referring to the same statistical data as that used by the applicant, he estimates the rental per hectare and the total surface area released at, respectively, DEM 560 and 5.06 hectares in 1984/1985, DEM 520 and 4.74 hectares in 1985/1986, DEM 717 and 4.46 hectares in 1986/1987, DEM 644 and 4.27 hectares in 1987/1988 and DEM 610 and 4.26 hectares in 1988/1989.

326 On the basis of those data, he arrives at an agricultural rental income figure of DEM 1 026 for 1984/1985, DEM 2 463 for 1985/1986, DEM 3 289 for 1986/1987, DEM 2 749 for 1987/1988 and DEM 2 585 for 1988/1989, yielding a total income of DEM 12 112 in respect of the land released.

327 Mr Heinemann considers, first, that the expert was wrong to include the rent of buildings in his calculations and that, in any event, the amounts applied in respect of rental per hectare could not exceed those referred to by the Commission.

Second, he repeats his argument that the sole category of income to be taken into account is that deriving from the work done by him in fattening nine bulls.

328 In view of the fact that the cessation of milk production resulted in the release only of the land occupied by the herd of dairy cows and that it was that land alone which was capable of being let, the surface area of that land must be determined by multiplying the number of cows needed in each marketing year by the rate of occupancy per hectare; the latter factor indicates, in adult bovine units ('ABU'), the number of cows which can be reared per hectare.

329 According to the expert, the divergences arising, despite the use of the same statistics, between the result relied on by the applicant and that arrived at by the expert are due to a misinterpretation by Mr Heinemann of the figures relating to the occupancy rate, expressed in ABU.

330 The explanations provided by the expert with regard to the mistake made by the applicant are logical and persuasive. Moreover, the parties have not produced any evidence in rebuttal of the expert's analysis, which must therefore be accepted, subject to the correction of a number of minor errors of calculation which it contains. Thus, it appears justifiable and reasonable to assess the hypothetical income which the applicant would have received from the letting of the land released in the sum of DEM 12 112.

3. The income derived from the working time released

331 The applicant states that the working time devoted to dairy cows was one and a half hours per day, that is to say, 45 minutes in the morning and 45 minutes in the evening. Consequently, the cessation of milk production released 547.5 working hours per year.

332 According to the Commission, the total time needed to rear a dairy cow is 80 hours per year. That figure may vary according to the size of the herd; in principle, a large herd takes up fewer working hours per cow than a smaller one. In the Commission's view, the applicant would have needed, for 9 dairy cows, a total working time of 720 hours per year.

333 As regards remuneration for the work, the applicant repeats his argument that the income to be taken into account is that which the farmer or a member of his family would have earned from an activity relating to the fattening of bulls. However, he states that working in that sector produced, in terms of remuneration, a net loss, save in the 1985/1986 marketing year, from which he derived an income of DEM 8 567.

334 The Commission, on the other hand, bases its assessment on an average hourly wage per agricultural worker of DEM 9.79 in 1984/1985, DEM 8.15 in 1985/1986, DEM 4.50 in 1987/1988 and DEM 9.77 in 1988/1989. Multiplied by the number of hours released, those figures yield an income of DEM 25 390 in respect of working time released.

335 The expert notes that, according to the statistics produced by the Hanover Chamber of Agriculture, the working time devoted each year to the rearing of cows amounts to approximately 60 hours per cow. He confirms the Commission's statement that the number of working hours needed is greater in the case of small herds such as the applicant's. For that reason, taking into consideration the figure of 547.5 hours of work per year put forward by the applicant, he arrives at an annual figure of 68.44 hours per cow, which he rounds off to 70 hours in order to take into account the small size of Mr Heinemann's herd, making a total of 560 hours per year.

336 By multiplying the time which the applicant would thus have had to devote to the rearing of his herd in each marketing year by the minimum hourly wage, net of

the social charges payable by an agricultural worker, namely DEM 9.67 in 1984/1985, DEM 9.97 in 1985/1986, DEM 10.17 in 1986/1987, DEM 10.40 in 1987/1988 and DEM 10.55 in 1988/1989, the expert arrives at income figures of DEM 2 203 in 1984/1985 for 227.84 hours of work needed, DEM 5 583, DEM 5 695 and DEM 5 824 in 1985/1986, 1986/1987 and 1987/1988 respectively for 560 hours of work and DEM 5 141 in 1988/1989 for 487.32 hours of work. It follows from this that the average alternative income which the applicant would have earned from the working time released totals, according to the expert, DEM 24 446.

337 The parties disagree with the expert's assessments. The applicant considers that the total income is too high, on account of the fact that the hourly wages applied by the expert in respect of each marketing year are unrealistic. The Commission, maintaining its criticism of the fact that the expert has failed to take into account ancillary work connected with the rearing of cows, such as the cultivation and storage of fodder, continues to contend that an annual figure of 80 hours per cow is closer to reality.

338 The parties' criticisms cannot be upheld. Given that the expert, for the purposes of establishing the number of working hours released as a result of the cessation of milk production, refers both to the data produced by the competent chamber of agriculture and to the information provided by the applicant himself, the conclusions reached by him must be regarded as correct. As to the hourly wage of an agricultural worker, alleged by the applicant to be too high, Mr Heinemann has produced no detailed evidence casting doubt on the correctness of the amounts applied by the expert.

339 It follows from the foregoing that the sum of DEM 24 446 must be taken as corresponding to the average alternative income which Mr Heinemann would have earned from the working time released.

D — *The actual alternative income earned from the fattening of bulls*

340 In accordance with the case-law to the effect that compensation for loss is intended so far as possible to provide restitution for the victim of unlawful acts on the part of the Community institutions (see *Grifoni* v *EAEC*, paragraph 40), it is necessary to take account of the actual alternative income for the purposes of calculating the compensation payable where that income exceeds the average alternative income.

341 In the present case, it is not disputed that Mr Heinemann devoted the working time which became available to him to the fattening of bulls. On the other hand, the parties disagree as to the number of bulls concerned and the earnings received from that activity.

342 Despite the uncertainty concerning the number of bulls to be fattened, the applicant acknowledges that he kept a herd comprising an average of 14.4 cattle. He also claims to have kept dairy cows for over a year after the expiry of the non-marketing period, in the expectation of being granted a milk quota. For that reason, he could not have reared more than nine bulls. In that regard, he merely refers to the size of his cowshed, which is designed to accommodate nine cows.

343 The Commission disputes the statement that a space for a cow corresponds to a space for a bull, and estimates the number of bulls on the applicant's farm at 35. In addition, it casts doubt on the applicant's statement that he kept a dairy herd for one year.

344 As regards the sums earned from the fattening of bulls, there is no need to examine the applicant's figures in detail, since he claims that it resulted in losses, save during the 1985/1986 marketing year, in respect of which he refers to a profit of DEM 8 567.

345 The Commission puts forward different figures in respect of the actual alternative income. First, it relies on a certificate issued by a firm of accountants, annexed to the application but containing no details, which refers to an actual alternative income of DEM 15 227.

346 Second, on the basis of a total of 35 bulls and a gross profit per bull and per marketing year, the origin of which is not clear, the Commission makes a calculation which it describes as 'specific' and which yields an actual alternative income of DEM 67 541, corresponding to an actual profit of DEM 9 303 in 1984/1985, DEM 15 227 in each of the subsequent three marketing years and DEM 12 557 in 1988/1989.

347 Third, carrying out the same calculation, but basing it this time on the gross profits per bull and per marketing year indicated in the application and the Spandau report respectively, the Commission arrives at figures of DEM 50 252 and DEM 57 286.

348 Assuming, as the Advocate General does in point 149 of his Opinion, that the gross profits per bull resulting from the Spandau report — namely, DEM 356 in 1984/1985, DEM 340 in 1985/1986, DEM 432 in 1986/1987, DEM 325 in 1987/1988 and DEM 389 in 1988/1989 — are not in dispute and that the number of bulls to be fattened is 21, as estimated by the expert, the applicant would have earned an actual income of DEM 33 448, being the sum arrived at by the Advocate General in point 149.

349 The difference in the various amounts corresponding to the alternative income actually earned by the applicant from the fattening of bulls is such that the Court

finds that the Commission has not produced any sufficiently detailed evidence to rebut the figures relied on by Mr Heinemann himself. None of the computations put forward by the Commission is actually based on the precise number of bulls kept by the applicant, since, despite the expert's attempts to assess it, the number in question remains unclear. Moreover, the gross profits earned from the fattening of bulls is taken from statistics and is therefore of a more or less hypothetical nature.

350 Consequently, the Court finds that the applicant has not been shown to have earned from the fattening of bulls an actual alternative income which is greater than the average alternative income.

E — *Compensatory interest*

351 To the extent to which the applicant's claim for compensatory interest seeks to augment the quantified claims contained in his application, it must be borne in mind that such a claim is admissible only in so far as it concerns reparation of loss caused by the fall in the value of money (see paragraphs 52, 53 and 58 of this judgment).

352 In that regard, it seems fair and reasonable that the total compensation payable should bear interest at the rate of 1.5% from 20 November 1984, the date on

which the non-marketing undertaking expired. That rate is due to the fact that, according to the expert's report, the average rate of inflation during the relevant period was 1.2%.

F — *The compensation payable to Mr Heinemann*

353 The total income which the applicant would have earned from the hypothetical delivery of milk, determined in accordance with the quantities of milk to be taken as having been delivered and the prices corresponding to his circumstances, must be fixed, on the basis of those data, at DEM 111 035 (see paragraph 291 of this judgment).

354 As stated in paragraph 295 of this judgment, the sale of cull cows and calves would have earned him a total of DEM 22 037, which corresponds to the sum established by the expert.

355 From the above sums there fall to be deducted the variable costs, which correspond, in accordance with paragraph 304 of this judgment, to those calculated by the expert and which are said to have totalled DEM 76 757.

356 As regards the three production factors constituting the average alternative income, the income which Mr Heinemann would have obtained from the capital released must be assessed at DEM 2 350, whilst that which he would have earned

from the land which became available amounts to DEM 12 112 and that which he would have received from alternative work totals DEM 24 446 (see paragraphs 323, 330 and 336 of this judgment).

357 In accordance with the principle that the damage actually suffered must be made good in its entirety, the actual alternative income must be used to calculate the compensation due where that income exceeds the amount of the average alternative income. The applicant states that, save in the case of one marketing year, he did not earn any net income. Since the particulars provided by the Commission in that regard do not invalidate the figures relied on by Mr Heinemann, the Court finds that he did not receive an actual alternative income in excess of the average alternative income.

358 Consequently, the individual account of Mr Heinemann should be drawn up in accordance with the figures appearing in the following table:

	Totals (in DEM)
Milk sales	111 035
Sales of cows and calves	22 037
Total (gross hypothetical income)	133 072
Variable costs	76 753
Hypothetical income	56 319
Average alternative income	
— Income earned from capital	2 350
— Income earned from land	12 112
— Income earned from work	24 446
Total average alternative income	38 908
Loss of earnings	17 411

359 Having regard to all the foregoing considerations, the Council and the Commission must be ordered jointly and severally to pay to Mr Heinemann, in respect of loss of earnings, compensation totalling DEM 17 411, together with

interest at the annual rate of 1.5% from 20 November 1984 to the date of delivery of the interlocutory judgment.

360 To that sum must be added default interest at the annual rate of 7% from the latter date until the date of actual payment.

VI — Costs

361 Under Article 69(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 a claim for costs may be submitted at the hearing, the fact that Mr Heinemann formulated such a claim in his reply does not affect its admissibility. Consequently, it must be held that all the parties have put forward claims in respect of costs.

362 Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

363 As is apparent both from the operative part of the interlocutory judgment and from the grounds set out in support thereof, the applicants have essentially been successful. The Court has recognised their right to compensation for the damage

suffered by each of them on account of the invalidity of the rules introduced by Regulations Nos 857/84 and 1371/84 in so far as those rules did not provide for the allocation of a reference quantity to SLOM producers such as the applicants.

364 Furthermore, even though the applicants' claims for compensation have been partially unsuccessful, inasmuch as the Court has not upheld all the claims in respect of loss of earnings, the fact remains that all the applicants have obtained compensation greater than that which the defendant institutions were willing to grant them.

365 Consequently, having regard to the significance of the dispute and of the heads of claim on which the applicants have been successful, the defendant institutions must be ordered to bear their own costs and to pay, jointly and severally, 90% of the applicants' costs apart from the costs of the expert's report.

366 Since the latter costs constitute recoverable costs in accordance with Article 73(a) of the Rules of Procedure, they must be borne by the parties.

367 Consequently, it is appropriate to rule that 90% of the costs of the expert's report should be borne jointly and severally by the Council and the Commission. Since

the remaining 10% of those costs is to be borne by all of the applicants in the two cases, that percentage must — having regard to the proportion of the total amount of compensation respectively claimed by them, and since each of them has been successful — be borne as to 22% each by the applicants in Case C-104/89 and as to 12% by Mr Heinemann.

368 No relevance attaches, for the purposes of apportioning the costs, to the fact that the Council and the Commission have declared their willingness, in the alternative, to pay the applicants compensation based on Regulation No 2187/93, since that declaration has not been accompanied, or at any rate not followed, by any payment of the corresponding amounts, which would have limited the subject-matter of the dispute to the sums remaining due after such payment had been made.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

— in Case C-104/89 orders:

1. (a) The Council of the European Union and the Commission of the European Communities jointly and severally to pay to Mr Mulder compensation in the sum of NLG 555 818;

(b) Interest at the annual rate of 1.85% to be paid on that sum in respect of the period from 1 October 1984 to the date of delivery of the interlocutory judgment;

(c) Default interest at the annual rate of 8% to be paid on that sum in respect of the period from the latter date to the date of actual payment;

2. (a) The Council and the Commission jointly and severally to pay to Mr Brinkhoff compensation in the sum of NLG 362 383;

(b) Interest at the annual rate of 1.85% to be paid on that sum in respect of the period from 5 May 1984 to the date of delivery of the interlocutory judgment;

(c) Default interest at the annual rate of 8% to be paid on that sum in respect of the period from the latter date to the date of actual payment;

3. (a) The Council and the Commission jointly and severally to pay to Mr Muskens compensation in the sum of NLG 324 914;

(b) Interest at the annual rate of 1.85% to be paid on that sum in respect of the period from 22 November 1984 to the date of delivery of the interlocutory judgment;

(c) Default interest at the annual rate of 8% to be paid on that sum in respect of the period from the latter date to the date of actual payment;

4. (a) The Council and the Commission jointly and severally to pay to Mr Twijnstra compensation in the sum of NLG 579 570;

(b) Interest at the annual rate of 1.85% to be paid on that sum in respect of the period from 10 April 1985 to the date of delivery of the interlocutory judgment;

(c) Default interest at the annual rate of 8% to be paid on that sum in respect of the period from the latter date to the date of actual payment;

— in Case C-37/90 orders:

5. (a) The Council and the Commission jointly and severally to pay to Mr Heinemann compensation in the sum of DEM 17 411;

(b) Interest at the annual rate of 1.5% to be paid on that sum in respect of the period from 20 November 1984 to the date of delivery of the interlocutory judgment;

(c) Default interest at the annual rate of 7% to be paid on that sum in respect of the period from the latter date to the date of actual payment;

— in both cases:

6. Dismisses the remainder of the actions;

7. Orders the Council and the Commission to bear their own costs and jointly and severally to pay 90% of the applicants' costs apart from the costs of the expert's report commissioned by the Court. The costs of that report shall be borne jointly and severally, as to 90%, by the Council and

the Commission. Since the remaining 10% of those costs is to be borne by all of the applicants in the two cases, that percentage shall be borne as to 22% each by the applicants in Case C-104/89 and as to 12% by Mr Heinemann.

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 27 January 2000.

R. Grass J.C. Moitinho de Almeida

Registrar President of the Sixth Chamber

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