JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

30 May 2006 *

In Case T-87/94,

J.C. Blom, residing in Blokker (Netherlands), and the other applicants whose names appear in the annex, represented initially by H. Bronkhorst and E. Pijnacker Hordijk, lawyers, and subsequently by Mme Pijnacker Hordijk,

applicant,

v

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

defendant,

* Language of the case: Dutch.

Commission of the European Communities, represented initially by T. van Rijn, acting as Agent, assisted by H.-J. Rabe, lawyer, and subsequently by Mr van Rijn, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation, under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC), for damage allegedly suffered by the applicant as a result of his having been prevented from marketing milk by virtue of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68 (OJ 1984 L 132, p. 11),

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

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

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2005,

gives the following

Judgment

Legal context

1 Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1) provided for the payment of a non-marketing premium or a conversion premium to producers who undertook to cease marketing milk or milk products for a non-marketing period of five years or to cease marketing milk or milk products and to convert their dairy herds to meat production for a conversion period of four years.

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

3 Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10) and Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13)

introduced, from 1 April 1984, an additional levy on quantities of milk delivered beyond a reference quantity to be determined per purchaser within a guaranteed total quantity for each Member State. The reference quantity to be exempt from the additional levy was equal to the quantity of milk or milk equivalent, either delivered by a producer or purchased by a dairy, as decided by the Member State, during the reference year, which in the case of the Netherlands was 1983.

4 The detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68 were laid down by Commission Regulation (EEC) No 1371/84 of 16 May 1984 (OJ 1984 L 132, p. 11).

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

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

7 Following the *Mulder I* and *von Deetzen* judgments referred to in paragraph 6 above, on 20 March 1989 the Council adopted Regulation (EEC) No 764/89 amending Regulation No 857/84 (OJ 1989 L 84, p. 2), which entered into force on 29 March 1989, in order that the category of producers covered by those judgments might be allocated a special reference quantity representing 60% of their production during

the 12 months preceding their undertaking, given under Regulation No 1078/77, to cease marketing or to convert.

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

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

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

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

12 Following the judgment in *Spagl*, cited in paragraph 11 above, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35) which, by removing the conditions which the Court declared invalid and which dealt, in particular, with the point in time at which the non-marketing undertaking expired, made it possible for the producers concerned to be awarded a special reference quantity. They are known as 'SLOM II producers'. As a sub-category of SLOM II producers, producers whose non-marketing undertaking under Regulation No 1078/77 expired in 1983 are known as 'SLOM 1983 producers'.

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

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

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

16 The Council then established those practical arrangements by adopting Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6). That regulation provided, for producers who obtained a definitive reference quantity, for an offer of flat-rate compensation for the damage sustained as a result of the application of the rules referred to in the *Mulder II* judgment.

17 The third paragraph of Article 14 of Regulation No 2187/93 provides:

'Failure to accept the offer within two months of its receipt shall mean that it shall not be binding in the future on the Community institutions concerned.'

18 By its judgment of 13 January 1999 in case T-1/96 *Böcker-Lensing and Schulze-Beiering* v *Council and Commission* [1999] ECR II-1 (hereinafter 'the *Böcker-Lensing* judgment'), the Court of First Instance held that the Community could not be held liable to producers whose SLOM undertaking had expired in 1983 and who had neither resumed milk production before the entry into force of Regulation No 857/84 nor shown that they had taken steps which could have borne out their intention to resume production at the end of the non-marketing period.

19 In the *Böcker-Lensing* judgment, the Court of First Instance also held that the fact that the applicants had obtained a reference quantity from the national authorities could not alter the conclusion which it had reached concerning the incurring of Community liability, since, as the conduct of national authorities is not binding on the Community, the allocation of a reference quantity did not pre-judge the question whether there was a right to compensation under the second paragraph of Article 288 EC.

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

21 By its Decision of 28 November 2000 (C(2000) 3592 final), the Commission, empowered, under Article 15 of Council Regulation (EC) No 2330/98 of 22 October 1998 providing for an offer of compensation to certain producers of milk and milk products temporarily restricted in carrying out their trade (OJ 1998 L 291, p. 4), to authorise the transmission of offers of compensation to producers whose circumstances were such as to satisfy the requirements for establishing the liability of the Community, but who had not obtained compensation pursuant to Regulation No 2187/93 or other provisions adopted under Regulation No 2330/98, offered to certain Netherlands producers compensation corresponding to that which had been ordered by the Court in the *Mulder III* judgment.

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

23 In paragraph 45 of the *Bouma* judgment (and paragraph 44 of the *Beusmans* judgment), the Court of First Instance deduced from the *Spagl* judgment that producers whose undertaking had expired in 1983 could validly base their actions for compensation on infringement of the principle of the protection of legitimate expectations only where they showed that their reasons for not resuming milk production during the reference year were connected with the fact that they had ceased production for a certain time and that they were unable, for reasons to do with the organisation of that production, to resume it immediately.

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

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

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

'As the applicant did not resume milk production between the date on which his non-marketing undertaking expired ... and the date on which the quota scheme entered into force, 1 April 1984, he must show, in order for his claim for compensation to be well founded, that he had the intention of resuming milk production upon the expiry of his non-marketing undertaking and that he found it impossible to do so owing to the entry into force of Regulation No 857/84.'

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

27 In paragraphs 62 and 63 of the *Bouma and Beusmans* judgment, cited in paragraph 26 above, the Court of Justice held:

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

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

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

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

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

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

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

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

'100 In that regard, it is appropriate to point out that, as the Advocate General stated in point 125 of her Opinion, the way in which the Court of First Instance apportioned the burden of proof in the judgments under appeal is in accordance with the established case-law that it is for the applicant to show that the various conditions relating to non-contractual liability on the part of the Community are met. Since the Community may be held so liable only where a producer proves his intention to resume the marketing of milk,

either by resuming production after the expiry of his non-marketing undertaking, or by other manifestations of that intention, it is for the person claiming compensation to prove the genuineness of that intention.

101 As regards the complaint that Mr Bouma and Mr Beusmans could not presume the consequences that failure to resume production before 1 April 1984 would have, it should be pointed out that they should have expected, like any operator seeking to begin milk production, to be subject to any rules of market policy adopted in the meantime. They could not therefore legitimately expect to be able to resume production under the same conditions as those which applied previously (see, to that effect, the *Mulder I* judgment, paragraph 23).'

Facts

31 The applicant, a producer of milk in the Netherlands, entered on 1 October 1978, under Regulation No 1078/77, into a non-marketing undertaking which expired on 1 October 1983.

32 The applicant did not resume milk production either on the expiry of his undertaking or before the entry into force of Regulation No 857/84.

33 Following the adoption of Regulation No 1639/91, the applicant sought from the Netherlands authorities the grant of a provisional special reference quantity, which was allocated to him from 15 June 1991 and which, subsequently, became a definitive special reference quantity.

34 Under Regulation No 2187/93, an offer of compensation in the sum of 114 778.61 Netherlands florins (NLG) was sent to the applicant by the Netherlands authorities on behalf of the Community.

35 The applicant, having decided that the valuation of the damage per kilo was too low and in view of the fact that the offer made no provision for compensatory interest or, at the very least, any compensation for the depreciation in the value of money over the period up to 19 May 1992, rejected the offer of compensation made under Regulation No 2187/93.

36 The applicant was sent no offer of compensation under Regulation No 2330/98.

37 Following negotiations conducted in the course of the second half of 2000 between the representatives of SLOM producers and the Commission's representatives, agreement was reached on the amounts which the SLOM 1983 producers, among whom is the applicant, could claim as compensation if Community liability to that group was established.

Procedure

38 By application lodged at the Registry of the Court of First Instance on 25 February 1994, the applicants, T.H. Clemens, N.J.G.M. Costongs, W.A.J. Derks, R.P. Geertsema, W. Hermsen, P. Hogenkamp, J.H. Kelder, B.A. Kokkeler, G.M. Kuijs, E.J. Liefting, J.H. Nieuwenhuizen, D.J. Preuter, H. Rossel, A.J.M. Sturkenboom, J.J. de Wit, J.C. Blom, A.J. Keurhorst, A.J. Scholten and G.E.J. Wilmink, brought this action. The action was registered under number T-87/94.

39 By order of the President of the Second Chamber of 31 August 1994, the Court of First Instance decided to join Cases T-530/93 to T-533/93, T-1/94 to T-4/94, T-11/94, T-53/94, T-71/94, T-73/94 to T-76/94, T-86/94, T-87/94, T-91/94, T-94/94, T-96/94, T-101/94 to T-106/94, T-118/94 to T-124/94, T-130/94 and T-253/94.

40 By order of the Second Chamber of 31 August 1994, the Court of First Instance stayed proceedings in those cases pending delivery of the *Mulder III* judgment.

41 By order of the President of the First Chamber (Extended Composition) of 24 February 1995, the Court of First Instance decided to join Cases T-372/94 and T-373/94 to the cases mentioned in paragraph 39 of this judgment.

42 On 30 September 1998 an informal meeting in which the parties' representatives participated took place before the Court of First Instance. In the course of that meeting, the parties had the opportunity of submitting their observations on the analytical classification, made by the Court of First Instance, of the cases concerning the SLOM producers, which included category 'C', concerning the SLOM producers to whom an offer of compensation under Regulation No 2187/93 had been made which they had rejected for reasons connected with the method of evaluating the damage and the pleading of limitation by the institutions.

43 By letter lodged at the Registry of the Court of First Instance on 24 January 2001, the applicants, T.H. Clemens, N.J.G.M. Costongs, W.A.J. Derks, R.P. Geertsema, W. Hermsen, P. Hogenkamp, J.H. Kelder, G.M. Kuijs, E.J. Liefting, J.H. Nieuwenhuizen, D.J. Preuter, A.J.M. Sturkenboom and J.J. de Wit discontinued their action in case T-87/94.

44 By order of the President of the Fourth Chamber (Extended Composition) of 15 March 2001, the Court of First Instance ordered the striking out of the names of the parties mentioned above from the list of applicants in Case T-87/94.

45 On 17 January 2002, there was an informal meeting in which the parties' representatives participated before the Court of First Instance. An agreement was reached between the parties concerning the choice of a test case among category I of SLOM producers in case the Court of Justice confirmed the *Bouma* and *Beusmans* judgments, and the applicant J. Blom was given leave to lodge an updated application in the test case.

46 On 5 February 2003, the applicant, J. Blom, lodged an updated application at the Registry of the Court of First Instance and applied, in the letter accompanying it, for the stay on proceedings in his action to be lifted and for that case to be chosen as a test case.

47 The Council and the Commission lodged their observations on the lifting of the stay of proceedings in Case T-87/94 as regards the applicant by letters lodged, respectively, on 21 February and 7 March 2003.

48 The Council requested that the proceedings be limited to the questions set out in the updated application, which had not been the subject of argument in the cases covered by the judgments in *Bouma* and *Beusmans*. The Commission's consent as regards the choice of Case T-87/94 as a test case was conditional on the Court of First Instance not adopting any decision prior to the delivery of the *Bouma and Beusmans* judgment.

49 By order of the President of the First Chamber of 26 March 2003, the Court of First Instance, after hearing the parties, ordered the disjoinder of Case T-87/94 from the joined cases mentioned in paragraph 39 of this judgment as regards the applicant and lifted the stay of proceedings in Case T-87/94 as regards him.

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

51 By decision of the President of the First Chamber of 28 May 2004, the Court of First Instance ordered, under Article 55(2) of its Rules of Procedure, that this case be given priority over others.

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

53 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without undertaking prior measures of inquiry. However, by way of procedural organisation measures, the Court invited the applicant to reply to certain written questions and the Council to reply to one written question, which they did within the prescribed period. The Court of First Instance also requested the Commission to produce a document. The Commission complied with that request within the prescribed period.

54 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 29 November 2005.

Forms of order sought by the parties

55 The applicant claims that the Court should:

— order the Community to pay a sum of EUR 68 896.57 plus interest thereon at the rate of 8% per year from 19 May 1992 to the date of payment;

— order the Community to pay the costs.

56 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

57 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs of the proceedings.

Law

58 The applicant alleges that the conditions for the Community to incur liability are met and that the partial time-barring of his claim pleaded by the Council cannot be upheld, a question which, moreover, goes outside the limits of the legal issues in these proceedings, as defined by the parties during the consultation meetings.

59 The Court of First Instance considers that, in this case, the examination of the question of limitation necessitates prior determination of whether the liability of the Community under the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) can be incurred and, if so, until what date (see, to that effect, the *Bouma* judgment, paragraph 28; the *Beusmans* judgment, paragraph 27; and Case T-199/94 *Gosch* v *Commission* [2002] ECR II-391, paragraph 40).

Community liability

Arguments of the parties

60 The applicant's argument breaks down into three parts. In the first part, the applicant notes the rights which flow from his being a SLOM producer and submits that there is no need to distinguish between the different categories of SLOM producers in question as regards the recognition of Community liability resulting, in particular, from the offer of compensation which was addressed to him under Regulation No 2187/93 and from the institutions' conduct after the adoption of that regulation. In the second part, the applicant maintains that there are differences

between his own position and that of the applicants in the cases affected by the *Böcker-Lensing*, *Bouma*, and *Beusmans* judgments. In the third part, he disputes the requirements for the award of compensation proposed under Regulation No 2330/98 as set out by the defendants.

61 In the first part of his argument, the applicant observes, first, that he is a SLOM producer and that all SLOM producers have in common the fact that they were deliberately excluded by the Community legislature, when it established the milk quotas scheme in 1984, from the possibility of receiving a milk quota which was exempt from the additional levy, known as a 'reference quantity'. He states that, under that scheme, all Community producers were allocated a quota directly connected to actual production in the course of the 'reference year', but that scarcely any SLOM producer produced milk during the 1983 reference year because of non-marketing undertakings entered into in 1978 and the years following it, with the result that they could not lay claim to a milk quota at the end of their non-marketing undertaking.

62 He observes next the tenor of the *Mulder I*, *Spagl*, and *Mulder II* judgments and the fact that the Community is bound, under the *Mulder II* judgment, to make good the damage resulting from the loss of profits suffered by SLOM producers, of whom he is one, as regards the period during which they were wrongfully excluded from milk production, that is between the date on which their non-marketing undertaking expired and the point at which they could have claimed a special reference quantity.

63 The applicant maintains, finally, that it is clear from the offers of compensation made under Regulation No 2187/93, which covered all milk producers who could claim, according to the defendants, compensation under the *Mulder II* judgment, including himself, that the Community expressly recognised its liability to SLOM

producers who had obtained a definitive reference quantity under Regulations Nos 764/89 and 1639/91, the applicant belonging to the category of producers who had received a reference quantity under the latter regulation.

64 In support of that recognition of the Community's liability, the applicant puts forward not only arguments based on the *Spagl* and *Mulder II* judgments, prior to the adoption of Regulation No 2187/93, on the text of the Notice of 5 August 1992, on the Commission's proposal of 21 April 1993 (COM(93) 161. final, hereinafter 'the proposal of 21 April 1993') concerning Regulation No 2187/93 and on Regulation No 2187/93, but also on the institutions' conduct and on the case-law following the adoption of that regulation, arguments which show clearly that no distinction had ever been drawn between SLOM 1983 producers and the producers he describes as 'SLOM 1984 producers'.

65 In that regard the applicant makes the following observations.

66 As regards matters prior to the adoption of Regulation No 2187/93, the applicant argues, first, that, in the *Spagl* judgment, the principal subject of which was the determination of the rights and obligations of SLOM 1983 producers, a category to which he belongs, the Court held that those producers were entitled to a reference quantity, in the same way as SLOM 1984 producers. That judgment was one of the reasons which led the Council to repeal Regulation No 1639/91, under which SLOM 1983 producers were treated identically to SLOM 1984 producers as regards entitlement to be allocated reference quantities, with the sole difference being the allocation of special reference quantities from a later date.

67 Secondly, the applicant notes that the case which gave rise to the *Mulder II* judgment, which was a test case, applied, like that which gave rise to the *Spagl* judgment, for all SLOM II producers, including SLOM 1983 producers who, in

addition, grouped themselves together in a body to defend their interests (Stichting SLOM) and were jointly represented by lawyers both at the formal and informal hearings before the Court of Justice and the Court of First Instance, and in the negotiations with the defendants on the amount of compensation to be awarded according to the yardstick of the *Mulder II* judgment. That was also the conviction of the defendants, who, in that regard, never drew any distinction between SLOM 1983 producers and SLOM 1984 producers.

68 Thirdly, the applicant points out that, in the Notice of 5 August 1992, the defendants, following the *Mulder II* judgment, announced that they were going to adopt the practical arrangements for the compensation to be paid to all SLOM producers and not only to the applicants concerned by that judgment, no distinction being drawn in that regard, under the *Spagl* judgment, between SLOM 1983 producers and SLOM 1984 producers.

69 The fact that the Commission thought that it should treat SLOM I and SLOM II producers in the same way is clear from the statement of reasons in the proposal of 21 April 1983.

70 In that regard, the applicant draws attention to the following terms of the proposal of 21 April 1983 which appear under the title 'Legal aspects: the principle':

'The solution adopted is to make, through the Member States, an offer of settlement to all the producers concerned, which is to be accepted in full and final settlement. In case of refusal, the producer has no other choice than to prove before the Court that his loss is greater than the offer, with the corresponding costs, risks and increased delays in payment. Given that the amounts of the offers are generously calculated, the hope is thus to settle the great majority of cases.'

71 According to the applicant, it is clear from that proposal that the institutions were reserving exclusively the right to contest the extent of the damage, and not the circle of 'producers concerned', if the proposal was not accepted.

72 In addition, the applicant claims that, as follows from the text of the recitals in the preamble to Regulation No 2187/93, it was a collective settlement proposal addressed to all milk producers entitled to a definitive reference quantity, including himself, and that no distinction was drawn between SLOM I and SLOM II producers nor between SLOM 1983 and SLOM 1984 producers.

73 As regards the institutions' conduct and the case-law following the adoption of Regulation No 2187/93, the applicant notes that the Commission's representatives never gave the slightest indication, first, in the course of the regular contacts which it had maintained for several years with the Netherlands SLOM producers' lawyers, second, in the course of the informal meetings before the Court of First Instance, third, in the course of other actions for damages brought before the Court of First Instance, fourth, more particularly, in the course of 'limitation cases' and their settlement, and fifth, in the context of the settlement of compensation claims in respect of which the Community's liability was recognised only after 1993, that they wished to retain the right to go back on the recognition of the Community's liability set out in Regulation No 2187/93 and from the offers of compensation made on the basis of that regulation.

74 The applicant points out, first, that the proceedings in the actions for damages brought before the Court of First Instance by producers who had refused offers of compensation under Regulation No 2187/93, including himself, were stayed pending delivery of the *Mulder III* judgment. He submits that the defendants were convinced, from the outset, that the case which gave rise to that judgment was the test case for all the Netherlands SLOM producers to whom a definitive reference quantity had been granted, which is clear particularly from the various informal meetings that the Court of First Instance organised in order to discuss the pursuit of the proceedings

in numerous cases brought by SLOM producers. In that context, the applicant avers that the defendants do not dispute the fact that there had never been any distinction between the SLOM 1983 and the SLOM 1984 producers. Furthermore, with the sole exception of his case, the defendants have not contested the Community's liability towards producers who have brought proceedings after having refused offers of compensation made under Regulation No 2187/93, producers in whose regard that liability had been recognised hitherto.

75 The applicant adds that, from the time when Regulation No 2187/93 was adopted, the defendants knew that the majority of SLOM producers could not accept the proposal of compensation defined by that regulation for the reasons set out in the pleadings in the case which gave rise to the *Mulder II* judgment, as well as in numerous applications submitted to the Court of First Instance in 1993 and 1994 on behalf of Netherlands SLOM producers, including himself. Furthermore, the prior consultation with the applicants' lawyers in the cases covered by the *Mulder II* judgment and by the *Mulder III* judgment, would have sufficiently shown to the Commission that the sums per kilo of compensation set out in Regulation No 2187/93 were too low to cover the Netherlands producers' losses.

76 In the applicant's submission, it is in that perspective that the other SLOM producers did not object to the proceedings in the actions which they had brought before the Court of First Instance being stayed and remaining so pending the delivery by the Court of Justice of the *Mulder III* judgment, since they considered that they would be treated in exactly the same way as the applicants in the cases covered by the *Mulder II* judgment and by the *Mulder III* judgment. At the time of the contacts between the defendants' representatives and the Netherlands SLOM producers' lawyers, the thought was never raised that the defendants could go back, with regard to some of the Netherlands SLOM producers, on the recognition of the Community's liability resulting from the offers made under Regulation No 2187/93.

77 In particular, the applicant claims that, in the defendants' conduct following the judgments of the Court of First Instance in Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595 and Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, no distinction was drawn between the SLOM 1983 producers and the SLOM 1984 producers, with the result that nothing gave rise to the thought that they could in the end go back on the recognition of the Community's liability.

78 In that regard, the applicant makes clear that the Commission, by letter of 27 February 1998, informed the Court of First Instance that it envisaged making an offer of compromise to the applicants in all the cases concerning SLOM I and SLOM II producers of the '*Hartmann* type' and that all the producers in those categories, without distinction, actually received a renewed offer on the part of the Commission. He adds that, while it is true that the settlement offer did not cover those of the Netherlands producers in those categories who had refused the offers of compensation made under Regulation No 2187/93 and who had then brought proceedings for compensation before the Court of First Instance, that method of proceeding complied with what had been raised between the parties and that what is important is the fact that the SLOM 1983 and SLOM 1984 producers were treated identically.

79 The Council also created the conditions for a collective compensation proposal on the basis of the judgment in Joined Cases T-195/94 and T-202/94 *Quiller and Heusmann* v *Council and Commission* [1997] ECR II-2247 ('the *Quiller* judgment'), to be addressed to the group of producers concerned by that judgment, a proposal in which no distinction between the SLOM 1983 and the SLOM 1984 producers was made, since one of the producers in the case which gave rise to that judgment was a SLOM 1983 producer. He recognises that a non-marketing undertaking encumbers his entire holding, whereas Mr Quiller was both transferee of a part of a holding encumbered by a non-marketing undertaking which expired in 1983 and owner of another holding where he continued to produce milk. He points out, however, that, in the *Quiller* judgment, the Court of First Instance stated solely that Mr Quiller did not need to take account of the fact that he had to resume, from 1983, milk production on the part of the holding of which he was transferee in order to avoid being affected by the quota scheme, like, moreover, the applicant in the case which gave rise to the *Spagl* judgment.

80 The applicant points out, furthermore, that it is clear from the minutes of the informal meeting of the Court of First Instance of 30 September 1998 that the Judge Rapporteur identified as category 'C' the producers to whom the institutions had offered compensation, but who rejected it having regard to the method of evaluating the damage. That category included all the SLOM I and SLOM II producers in respect of whom settlement negotiations had been held with the Commission after the *Mulder III* judgment. The applicant argues that the defendants never suggested that the sub-group of SLOM 1983 producers had taken account of the possibility that the institutions could ultimately go back on the recognition of the Community's liability.

81 Secondly, the applicant notes that, in the recitals in the preamble to Regulation No 2330/98 which empowers the Commission to settle various live compensation claims, the Council states that, following the *Mulder II* judgment, the institutions 'undertook to give full effect to that ruling' and notes 'whereas the producers concerned were essentially those who were entitled to apply for a special reference quantity pursuant to the provisions added to ... Regulation No ... 857/84 ... by Regulation ... No 764/89 or Regulation ... No 1639/91'. The applicant states that, in that context, the SLOM I and SLOM II producers were treated identically and that nothing indicates that the SLOM 1983 producers, as a sub-group of SLOM II producers, had to take account of the possibility that they might ultimately be deprived of entitlement to compensation. He also points out that, when in 2000 the Commission contested the Community's liability to him and to other SLOM 1983 producers in the course of negotiations on the effects of the *Mulder II* judgment, the Commission's position was that every SLOM producer entitled to a definitive reference quantity was to receive 'at least once' an offer of compensation. He submits that the Commission was not making, even then, any distinction between the SLOM 1983 producers and the SLOM 1984 producers.

82 Thirdly, the applicant states that the *Mulder III* judgment established that the Netherlands SLOM producers, including himself, had rejected in 1992, for at the very least, legitimate reasons, the offer of compensation submitted under Regulation No 2187/93.

83 In his view, it was common ground in the cases covered by the *Mulder II* judgment and the *Mulder III* judgment that the latter judgment should have served as a model for a collective arrangement with all the other Netherlands SLOM producers. Moreover, in the course of the second half of 2000, the SLOM producers' lawyer and Mr Kleinlangevelsloo, representing the Stichting SLOM, on the one hand, and some Commission representatives, on the other, engaged in an intensive consultation covering, in essence, all the SLOM producers who had been allocated a definitive SLOM reference quantity in 1991 or in 1993 and to whom a settlement proposal had been made under Regulation No 2187/93.

84 According to the applicant, it was therefore to the Netherlands SLOM producers' amazement that the Commission, in reliance on the *Böcker-Lensing* judgment, refused in 2000 to award any compensation to the SLOM 1983 producers, even if they had a definitive reference quantity, as in his case. The Commission was still disposed to recognise, in principle, the Community's liability only to the SLOM 1983 producers who could still adduce irrefutable written evidence proving that they had taken specific steps, in 1983, to resume milk production on the expiry of their non-marketing undertaking.

85 The applicant submits that the Commission's going back belatedly on the recognition of the Community's liability to him and the other Netherlands SLOM 1983 producers entitled to a reference quantity must be regarded as being contrary to the most fundamental principles of sound administration. He declares himself to be indifferent to the manner in which the Court of First Instance classifies the defendants' conduct in law: infringement of the principle of sound administration, infringement of the principle of equal treatment, bad faith, breach of the rules of forfeiture or of lapse of rights (rechtsverwerking) or otherwise. What the applicant wishes to demonstrate is that that conduct is legally impermissible. He submits, furthermore, that such conduct amounts to stark bad faith and that the defendants are abusing the exceptionally long duration of the legal proceedings in the cases covered by the *Mulder II* and *Mulder III* judgments.

86 According to the applicant, it follows that, by its long-standing and logical attitude, the Commission gave rise to the SLOM producers' legitimate expectation that it would not subsequently contest the Community's liability recognised in Regulation No 2187/93 and that, in those circumstances, the Commission is estopped from contesting it, since it did so for the first time in 2000. In his view, the mere fact that the Court of First Instance delivered the *Böcker-Lensing* judgment cannot result in the Commission finally contesting the Community's liability to SLOM producers, since the Commission should have reached, and had reached, an agreement with the applicants in the cases covered by the *Mulder II* and *Mulder III* judgments on the amount of compensation.

87 He notes, finally, that the facts which he set out in the application concerning the attitude of the Commission's representatives in its relations with the Netherlands SLOM producers over the years have not been disputed by the Commission.

88 In the second part of his argument, the applicant draws attention to the fact that there are differences between his own position and that of the applicants in the cases concerned by the *Böcker-Lensing*, *Bouma* and *Beusmans* judgments, in which the Court of First Instance held that the Community's liability could not be incurred to the Netherlands SLOM 1983 producers, on the ground that they had not sufficiently demonstrated that they intended to resume production on the expiry of their non-marketing undertaking.

89 He submits that the outcome of the appeals brought in the cases covered by the *Bouma* and *Beusmans* judgments is not irrelevant to the outcome of this case. In his view, if the Court of Justice holds, definitively, that the Community is liable to the applicants in those two cases, it will follow that the Community is also liable to the applicant in this case and, more generally, to all the other SLOM 1983 producers

entitled to a definitive reference quantity. None the less, he argues, if the Court rejected the appeals, it would not mean that the Community is not liable to the applicant in this case as well as to the other SLOM 1983 producers entitled to a definitive reference quantity.

90 According to the applicant, his position is different from that of the applicants in the cases concerned by the *Böcker-Lensing, Bouma* and *Beusmans* judgments. He points out that he has had, since 1991, a definitive reference quantity obtained in accordance with Regulation No 1639/91 and that the Community's liability to him was not disputed since the *Mulder II* judgment. It is clear, moreover, from that judgment and from Regulations Nos 2187/93 and 2330/98 that no distinction should have been drawn between the SLOM I and SLOM II producers. By contrast, Messrs Bouma and Beusmans did not always have a definitive reference quantity whereas Mr Böcker-Lensing was allocated a reference quantity only in 1995. The applicant notes also that no settlement offer under Regulation No 2187/93 was made to any of the three producers mentioned above. The defendants never recognised the Community's liability to the three producers covered by the three above-cited judgments and the Commission would not therefore be going back, in their cases, on an express recognition of the Community's liability.

91 Finally, the applicant avers that it is impermissible, in law, to determine the Community's liability towards the SLOM 1983 producers on a different basis from that used in respect of the SLOM I producers and he submits that the determination made by the Court of First Instance in the *Bouma* and *Beusmans* judgments is incorrect, in that the Court held that the burden of proof on the SLOM 1983 producers was heavier than that on the SLOM I producers, although their situation was identical. He repeats the pleas in law which Mr Beusmans raised on the appeal against the judgment of the Court of First Instance in Case T-73/94, by stating that he adopts them, but makes clear that the Court of First Instance does not have to rely on their being well founded.

92 Thus, as regards the evidence, the applicant alleges that in view of the defendants' conduct following the *Mulder I* judgment, none of the SLOM 1983 producers dreamt of keeping documents relating to the management of his or their holdings in 1983. The applicant points out that most of the SLOM 1983 producers, including himself, could no longer furnish evidence, in 2000, that they had taken specific steps, in 1983, to resume milk production, even if a certain number of SLOM 1983 producers, who still had available, by chance, certain evidence, produced it to the Commission without prejudice to their not being bound to do so. In that context, the Commission considered the evidence sufficient in only a very small number of cases, which led to compensation without other court action.

93 On that point, the applicant observes that, at the time of the facts, it was not necessary to produce documents in support of an application for a quota or of an application for compensation. He adds that the current requirements for proof, more than 10 years after the events, were formulated after the expiry of the legal duty on producers to keep their accounting papers and after several re-organisations within the Netherlands Ministry of Agriculture, which, as a result, can no longer furnish items of information.

94 The applicant points out, moreover, that the Commission states that it 'accepted in the past' that producers entitled to a definitive reference quantity were deemed to have intended, on the expiry of the non-marketing undertaking, to resume milk production. He states that the Commission never imposed any requirements, in terms of additional evidence of their intention to resume milk production, on the SLOM 1983 producers entitled to a definitive reference quantity before it broke off negotiations, in 2000, with the Netherlands SLOM producers' lawyer on the settlement of the effects of the *Mulder III* judgment.

95 In the third part of his argument, the applicant disputes the allegation, made implicitly by the Council, that he had not been made an offer of compensation from

the Commission under Regulation No 2330/98 because there was no proof of his intention to resume milk production on the expiry of his non-marketing undertaking. Regulation No 2330/98, in so far as it concerned only the SLOM producers in respect of whom no Community liability had up to then been recognised, could not have covered those who, like him, had already obtained recognition on the part of the Community of its liability.

96 The applicant submits, furthermore, that it is an incorrect allegation. First, it is suggested that the demonstration of an intention to resume milk production on the expiry of the non-marketing undertaking had an effect on the decision to suggest offers of compensation under Regulation No 2330/98.

97 Second, the Commission, in certain cases even after the *Böcker-Lensing* judgment, made offers of compensation under Regulation No 2330/98 without imposing conditions, in particular, regarding proof of an intention to resume milk production, on Netherlands SLOM 1983 producers in respect of whom it had refused to recognise the Community's liability because of the absence of a definitive reference quantity.

98 The applicant states that such was the case, in particular, of the applicants J.I.M., W. Spikker and T.J.W. Kraaienvanger in Case T-533/93, who received offers of compensation under Regulation No 2330/98, respectively, on 29 April 1999 and in May 2000.

99 Furthermore, before even the adoption of Regulation No 2330/98, the Commission sent offers of compensation to some Netherlands SLOM 1983 producers, such as the applicant W. Brouwer (Case T-533/93), to whom an offer of compensation was made in 1997 and compensation paid, after acceptance, in April 1999.

100 According to the applicant, the facts relied on above show that, in accordance with a consistent course of conduct, even after the time-limit set by Regulation No 2187/93 had expired, and after the *Böcker-Lensing* judgment, the Commission continued to make new offers of compensation to SLOM 1983 producers in respect of whom the Community's liability had been recognised only at a later stage because those producers had received a definitive reference quantity only after the time-limits imposed by Regulation No 2187/93 had expired.

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

Findings of the Court

102 It is appropriate to recall that, according to the case-law, the Community's non-contractual liability for damage caused by the institutions, under the second paragraph of Article 288 EC, can be incurred only if a number of conditions, as regards the illegality of the conduct complained of, the occurrence of actual damage and a causal link between the illegal conduct and the damage alleged, are satisfied (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 10; Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 18; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80; the *Bouma* judgment, paragraph 39, and the *Beusmans* judgment, paragraph 38, confirmed by the *Bouma and Beusmans* judgment, paragraph 43, and *Gosch* v *Commission*, paragraph 41).

103 As regards the situation of milk producers who entered into a non-marketing undertaking, the Community's liability is incurred in respect of each producer who

suffered loss because he was prevented from delivering milk by Regulation No 857/84 (the *Mulder II* judgment, paragraph 22). That liability is based on breach of the principle of the protection of legitimate expectations (the *Bouma* judgment, paragraph 40, the *Beusmans* judgment, paragraph 39, confirmed by the *Bouma and Beusmans* judgment, paragraphs 45 to 47, and *Gosch* v *Commission*, paragraph 42).

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

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

106 Furthermore, it follows from the *Spagl* judgment that the Community could not, without infringing the principle of protection of legitimate expectations, automatically preclude from the grant of quotas all producers whose non-marketing or conversion undertakings had expired in 1983, in particular those who, like Mr Spagl, had been unable to resume production for reasons connected with their undertaking (the *Bouma* judgment, paragraph 43, and the *Beusmans* judgment, paragraph 42, confirmed by the *Bouma and Beusmans* judgment, paragraph 53, and *Gosch* v *Commission*, paragraph 45). The Court of Justice thus held in paragraph 13 of that judgment:

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

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

108 Furthermore, it follows from paragraph 23 of the *Mulder II* judgment that Community liability is subject to the condition that the producers clearly manifested their intention to resume milk production upon expiry of their non-marketing undertaking. In order for the illegality which led the Court of Justice to declare the regulations giving rise to the situation of the SLOM producers invalid to entitle those producers to damages, the producers must have been prevented from resuming milk production. That means that the producers whose undertaking expired before the entry into force of Regulation No 857/84 resumed production, or at least took steps to do so, such as making investments or repairs, or maintaining the equipment necessary for such production (the *Bouma* judgment, paragraph 46, and the *Beusmans* judgment, paragraph 45, confirmed by the *Bouma and Beusmans* judgment, paragraphs 89 to 91, and *Gosch* v *Commission*, paragraph 48).

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

110 Here, as the applicant did not resume milk production between the date on which his non-marketing undertaking expired, 1 October 1983, and the date on which the quota scheme entered into force, 1 April 1984, he must show, in order for his claim for compensation to be recognised as being well founded, that he had the intention

of resuming milk production upon the expiry of his non-marketing undertaking and that he found it impossible to do so owing to the entry into force of Regulation No 857/84 (the *Bouma* judgment, paragraph 48, and the *Beusmans* judgment, paragraph 47, confirmed by the *Bouma and Beusmans* judgment, paragraphs 99 to 102).

111 In the first place, it must be stated, in that regard, that the applicant has adduced no evidence either that he contacted the national authorities with a view to obtaining a reference quantity in 1984, when the milk quota scheme entered into force, or that he took any other steps that might evince an intention to resume milk production upon expiry of his non-marketing undertaking.

112 As regards evidence concerning the applicant's intention to resume his activity as a milk producer on the expiry of his non-marketing undertaking, it must be stated, first of all, that in his e-mail of 20 January 2003, which was produced at the Court's request, the applicant's Counsel states that this case was chosen as a test case since the applicant was no longer in a position to show that he had taken, in 1983, any steps to resume production, with the result that the outcome of this case depends solely on the question of what is the legal position of producers who received an offer of compensation and rejected it.

113 Next, while, contrary to the defendants' position, the applicant submits that the abovementioned evidence is no longer available since the Netherlands ministry concerned can no longer provide items of information, the fact remains that, in reply to a question asked by the Court at the hearing, the applicant stated that he had taken no steps to obtain such items of information.

114 Finally, the applicant stated at the hearing that, after 1983 and until the end of 1984, he had continued to maintain his stables and meadows in good condition because he wished to resume, at a given moment, milk production. He added that, because of the milk quota scheme, he had let his land by successive annual contracts, in spite of his intention to resume dairy farming in the course of the summer of 1984.

115 In the light of all the foregoing matters it must be held that the applicant's possible intention to resume milk production is supported by no objective evidence, but only by his own declarations, and that is so even though he had six months to take tangible steps for the purposes of such a resumption.

116 Secondly, as regards the applicant's argument concerning the alleged differences between his own situation and that of the applicants in the cases covered by the *Bouma, Beusmans*, and *Böcker-Lensing* judgments, to the effect that, unlike his case, Messrs Bouma and Beusmans did not always have a definitive reference quantity, whereas Mr Böcker-Lensing was granted a reference quantity only in 1995, it is appropriate to observe that the fact that the applicant obtained a provisional reference quantity when Regulation No 1639/91 entered into force does not imply that he was entitled to be compensated for the purposes of the Community's non-contractual liability being incurred (the *Bouma* judgment, paragraph 49, and the *Beusmans* judgment, paragraph 48).

117 In that regard, the allocation of quotas was provided for in regulations of the Council and the Commission designed to repair a situation caused by a previous unlawful measure. In order to ensure that the quotas would benefit those who had actually intended to produce milk and to prevent producers from seeking quotas for the sole purpose of deriving economic advantages therefrom, the legislature made their grant subject to a series of conditions (the *Bouma* judgment, paragraph 51, and the *Beusmans* judgment, paragraph 50).

118 The fact that a producer was refused a quota because, when he applied for it, he did not fulfil the conditions laid down in the Community legislation designed to cure the invalidity of Regulation No 857/84, does not exclude his having, upon expiry of his undertaking, a legitimate expectation in the possibility of resuming milk production and therefore his being entitled to compensation in the terms defined in the *Mulder II* judgment. On the other hand, it may also be the case that producers did not intend to resume milk production upon expiry of their undertaking and were allocated a reference quantity some years later, in so far as they fulfilled the conditions then required (the *Bouma* judgment, paragraph 52, and the *Beusmans* judgment, paragraph 51).

119 Consequently, the fact that the applicant subsequently obtained a provisional reference quantity, which was later converted into a definitive reference quantity, does not in itself prove that upon expiry of his non-marketing undertaking he had the intention to resume milk production (the *Bouma* judgment, paragraph 53, and the *Beusmans* judgment, paragraph 52).

120 Lastly, the applicant's argument that Regulation No 2187/93 covered all milk producers who can claim compensation under the *Mulder II* judgment, and contained express recognition on the part of the Community of its liability in respect of producers who had obtained a definitive reference quantity under Regulations Nos 764/89 and 1639/91, including him, who, in addition, received an individual offer of compensation under Regulation No 2187/93, cannot be accepted.

121 In that regard, it must be held, first, that, contrary to the applicant's submission, the institutions did not announce in the Notice of 5 August 1992 that they were going to compensate all the SLOM producers concerned. They expressly limited the possibility of compensation to 'all producers ... who have suffered reparable injury falling within the terms of the [*Mulder II*] judgment owing to their not having, as a

result of their participation in the system introduced by Regulation ... No 1078/77, received a milk quota in good time and who satisfy the terms and criteria of that judgment'.

122 Secondly, Regulation No 2187/93 was intended to put in place a collective arrangement for the benefit of SLOM producers who satisfy certain criteria. It is expressly stated, first, in the fourth recital of the preamble, that the sheer number of those potentially eligible makes it impossible to take each case into account on an individual basis and, second, in the last recital in the preamble and in Article 14, that failure by milk producers to accept the offer of compensation made in accordance with the provisions of that regulation would amount to refusal of the Community offer and mean that it was not binding in the future on the Community institutions concerned. In such a case, the Community's compensation obligation would have to be established on a case-by-case basis by a Court.

123 It is clear, without ambiguity, from the wording of Regulation No 2187/93, in particular from the statement that individual situations could not be taken into consideration because of the large number of producers potentially concerned, that the offer of compensation referred to therein corresponded to an attempt at a collective flat rate out-of-court settlement of all situations resulting from the application of Regulation No 857/84, in accordance with the general parameters established in the *Mulder II* judgment. As such, that offer does not involve, by definition, the recognition of liability in respect of each of the potentially concerned producers.

124 As the Court of First Instance held, the fact that the applicant received an offer of compensation under Regulation No 2187/93 cannot constitute proof of fulfilment of the conditions necessary for establishing the liability of the Community for the damage alleged in this case, as set out in the case-law cited in paragraph 102 of this judgment. That regulation was in the nature of a proposal by way of settlement addressed to certain producers, acceptance of which was optional, and constituted

an alternative to judicial resolution of the dispute. In the event that a producer did not accept the offer, he retained the right to bring an action for damages under the second paragraph of Article 288 EC (see *Gosch* v *Commission*, paragraph 69, and the case-law there cited).

125 The Court of First Instance therefore held that, by rejecting the offer made to him under Regulation No 2187/93, the applicant put himself outside the framework established by that regulation and that it therefore behoved him to establish that the conditions necessary for the establishment of the Community's liability were fulfilled (see, to that effect, *Gosch* v *Commission*, paragraph 70).

126 In those circumstances, the applicant cannot validly rely, for the purposes of these legal proceedings, on an alleged recognition of liability on the part of the Community because of the receipt of an offer of compensation made under Regulation No 2187/93. He can no more validly put forward the conduct of the Council and the Commission in the course of the negotiations with the SLOM producers' representatives, until 2000, to argue that a legitimate expectation prevents the defendants from contesting their liability in these proceedings.

127 Both the offer of compensation and the abovementioned conduct took place in the context of the attempt at a collective out-of-court settlement on the basis of which certain producers were offered compensation. The Court of First Instance cannot, in determining whether the conditions for incurring the Community's non-contractual liability are met, with regard to the given situation of a SLOM producer, be bound, in any way whatsoever, by that collective out-of-court settlement.

128 The applicant cannot, therefore, argue that the receipt of an offer of compensation from the Netherlands authorities under Regulation No 2187/93 entails express recognition of liability on the part of the Community and that the fact that, unlike

the applicants in the cases covered by the *Bouma, Beusmans* and *Böcker-Lensing* judgments, he received such an offer distinguishes him from those applicants and discharges him from the obligation to produce evidence that he intended to resume milk production on the expiry of his undertaking.

129 It follows from all the foregoing that the applicant has not established the causal link between Regulation No 857/84 and the damage alleged. Consequently, it must be held that the Community's liability cannot be incurred in respect of the applicant because of the application of Regulation No 857/84, without the necessity of reviewing whether the other conditions for such liability are met.

130 Therefore, it is also unnecessary to consider whether the application in this case was made out of time.

131 It follows that the application must, in so far as it was brought by Mr J.C. Blom, be dismissed. The disposal of the action in the same case must, in so far as it was brought by the applicants whose names appear in the annex, be reserved.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action, in so far as it was brought by Mr J.C. Blom;**

2. **Orders the applicant to pay the costs;**

3. **Reserves the disposal of the action in the same case, in so far as it was brought by the applicants whose names appear in the annex.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 30 May 2006.

E. Coulon M. Vilaras

Registrar President

ANNEX

Names of the other applicants in Case T-87/94

— B.A. Kokkeler, residing in Denekamp (Netherlands)

— H.Rossel, residing in Zutphen (Netherlands)

— A.J. Keurhorst, residing in Nijbroek (Netherlands)

— A.J. Scholten, residing in De Krim (Netherlands)

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