JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

27 September 2007 *

In Joined Cases T-8/95 and T-9/95,

Wilhelm Pelle, residing at Kluse-Ahlen (Germany),

Ernst-Reinhard Konrad, residing at Löllbach (Germany),

represented by B. Meisterernst, M. Düsing, D. Manstetten, F. Schulze and W. Haneklaus, lawyers,

applicants,

v

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

* Language of the case: German.

and

Commission of the European Communities, represented by D. Booß, T. van Rijn and M. Niejahr, acting as Agents, assisted initially by H.-J. Rabe and G. Berrisch, subsequently by H.-J. Rabe and M. Núñez-Müller, and latterly by H.-J. Rabe, lawyers,

defendants,

APPLICATIONS for compensation under Article 178 of the EC Treaty (now Article 235 EC) and under the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) for damage allegedly 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 Council 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 23 January 2007,

gives the following

Judgment

Legal context

The system of reference quantities

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 (EEC) 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 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 Federal Republic of Germany was 1983.

4 The detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products (OJ 1968 L 148 p. 13) were laid down by Commission Regulation (EEC) No 1371/84 of 16 May 1984 (OJ 1984 L 132, p. 11).

5 Producers who did not deliver any milk during the reference year adopted by the Member State concerned, pursuant to an undertaking entered into under Regulation No 1078/77, were excluded from the allocation of a reference quantity.

6 In Case 120/86 *Mulder* [1988] ECR 2321 (*'Mulder I'*) and Case 170/86 *von Deetzen* [1988] ECR 2355, the Court of Justice ruled that Regulation No 857/84, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p 11), 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, did not deliver any milk during the reference year adopted by the Member State concerned.

7 Following *Mulder I* and *von Deetzen*, cited 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 to allow the allocation, to the producers who fell within the scope of those judgments, of a special reference quantity representing 60% of their production during the 12 months preceding their undertaking to cease marketing or to convert given under Regulation No 1078/77.

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'.

The rules concerning compensation and limitation

9 By an interlocutory judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 (*'Mulder II'*), the Court of Justice 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 as supplemented by Regulation No 1371/84. The Court called upon the parties to agree on the amounts of damages payable.

10 Following that judgment, the Council and the Commission published Communication 92/C 198/04 in the *Official Journal of the European Communities* of 5 August 1992 (OJ 1992 C 198, p. 4, 'the Communication of 5 August 1992'). The Communication reads:

'Following the judgment [*Mulder II*, paragraph 9 above] ..., the Community institutions deem it necessary to notify the parties concerned of the following:

(1) The Court of Justice has recognised the Community's non-contractual liability under Article [288 EC] vis-à-vis all producers as defined in Article 12(c) of Regulation (EEC) No 857/84 who have suffered reparable injury falling within the terms of the abovementioned judgment owing to their not having, as a result of their participation in the system introduced by Regulation (EEC) No 1078/77, received a milk quota in good time and who satisfy the terms and criteria of that judgment.

(2) The institutions undertake, with regard to all producers covered by paragraph 1 and until the end of the period mentioned in paragraph 3, not to plead that entitlement to claim is barred by lapse of time in accordance with the provisions of Article 43 (now Article 46) of the Statute of the Court of Justice, provided that entitlement to compensation has not already been barred on grounds of time on the date of publication of this Communication in the Official Journal of the European Communities or was not already barred on the earlier date on which the producer applied to one of the institutions.

(3) In order to give full effect to [*Mulder II*, paragraph 9 above] the institutions will adopt practical arrangements for compensating the persons concerned. Payment of interest will be dealt with in these arrangements.

The institutions will specify to what authorities and within what period claims are to be made. Producers are assured that the possible recognition of their rights will be in no way affected if before the opening of this period they do not make an approach to the Community institutions or the national authorities.'

11 Following the Communication of 5 August 1992 the Council adopted Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6). That regulation provided for an offer to producers who had obtained a definitive special reference quantity of flat-rate compensation for the damage sustained as a result of the application of the rules referred to in *Mulder II*, cited in paragraph 9 above.

12 Article 10(2) of Regulation No 2187/93 states:

'The producer shall send his application [for compensation] to the competent authority. The producer's application shall reach the competent authority, subject to rejection, by 30 September 1993 at the latest.

The limitation period pursuant to Article 43 of the Statute of the Court shall start to run afresh for all producers on whichever of the two dates referred to in the first subparagraph is appropriate if the application referred to in that subparagraph has not been made by that date, save where the limitation period has been interrupted by an application to the Court of Justice made in accordance with the same Article 43.'

13 The first paragraph of Article 14 of Regulation No 2187/93 provides:

'Within four months o[f] receipt of an application the competent authority referred to in Article 10 shall, in the name and on behalf of the Council and the Commission, make an offer of compensation to the producer ...'

14 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.'

15 Article 43 [now Article 46] of the Statute of the Court of Justice (the Statute) provides:

'Proceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The limitation period shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Communities. In the latter event the proceedings must be instituted within the period of two months provided for in Article 230 of the EC Treaty ... the provisions of the second paragraph of Article 232 of the EC Treaty ... shall apply where appropriate.'

Facts

16 The applicants are milk producers in Germany. In accordance with Regulation No 1078/77 they entered into a non-marketing undertaking which expired on 1 March 1985 as regards the applicant in Case T-8/95 and on 30 June 1984 as regards the applicant in Case T-9/95. As SLOM I producers they obtained a special reference quantity under Regulation No 764/89.

17 By letter of 23 December 1991 to the defendants, the applicant in Case T-8/95 asserted that he was entitled to compensation from the Community. The applicant in Case T-9/95 did the same by letter of 4 December 1990. The Council, in letters of 13 January 1992 (Case T-8/95) and 20 December 1990 (Case T-9/95) and the Commission, in letters of 16 January 1992 (Case T-8/95) and 19 December 1990 (Case T-9/95), refused to compensate the applicants. The defendants, in the same letters, stated that they were prepared to waive any right to plead limitation until the expiry of the period of three months following the publication in the *Official Journal of the European Communities* of *Mulder II*, paragraph 9 above. That waiver, restricted in duration, held good however only for applications which were not already time-barred at the date of the letters referred to above.

18 Following adoption of Regulation No 2187/93, the applicants submitted claims for compensation in reliance on the first paragraph of Article 10(2) of that regulation to the competent authority in Germany.

19 By letters of 17 December 1993 (Case T-8/95) and 2 December 1993 (Case T-9/95), the German authority sent to the applicants, in accordance with the first paragraph of Article 14 of Regulation No 2187/93, offers of flat-rate compensation in the name and on behalf of the Community.

20 The period of two months specified in the third paragraph of Article 14 of Regulation No 2187/93 was allowed by the applicants to expire. The offers of compensation referred to in the preceding paragraph were thus implicitly rejected.

Procedure

21 The applicants brought the present actions by applications lodged at the Registry of the Court of First Instance on 23 January 1995.

22 By order of the First Chamber of 3 July 1995, the Court stayed proceedings until delivery of the judgment of the Court of Justice in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission*. The judgment of 27 January 2000 in Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203 ended the stay of proceedings.

23 By order of the President of the First Chamber of 6 July 1995, Cases T-366/94, T-3/95, T-7/95, T-8/95, T-9/95, T-14/95, T-16/95, T-20/95, T-22/95, T-100/95, T-120/95 and T-124/95 were joined. Cases T-366/94, T-3/95, T-7/95, T-14/95, T-16/95, T-20/95, T-22/95, T-100/95, T-120/95 and T-124/95 have since been removed from the Register of the Court of First Instance.

24 By order of the Fourth Chamber of 10 April 2000, the Court stayed proceedings pending delivery of the judgment in Case T-187/94 *Rudolph* v *Council and Commission*. The judgment of 7 February 2002 in Case T-187/94 *Rudolph* v *Council and Commission* [2002] ECR II-367 ended the stay of proceedings.

25 By decision of 2 July 2003, the Court decided to refer the present cases to a chamber composed of three judges, in this instance the First Chamber.

26 After a change in the composition of the Chambers of the Court, the judge rapporteur was assigned to the Fifth Chamber. The present cases were then assigned to the Fifth Chamber.

27 By a written question of 20 September 2006, the parties were asked to express their opinions as to the significance of the judgment of the Court of Justice in Case C-164/01 P *van den Berg* v *Council and Commission* [2004] ECR I-10225 ('*van den Berg*') on the calculation of the limitation period in the present cases. The parties replied to that question within the time allowed.

28 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 23 January 2007.

Forms of order sought by the parties

29 In Case T-8/95 the applicant claims that the Court should:

— order the defendants jointly and severally to pay him the sum of DEM 81 159. 764 by way of SLOM I damages for the period from 2 March 1985 until 29 March 1989, together with default interest at the rate of 8% per annum from 19 May 1992;

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

30 In his reply, the applicant states that he claims compensation for the period from 31 December 1986 until 29 March 1989.

31 In Case T-9/95 the applicant claims that the Court should:

— order the defendants jointly and severally to pay him the sum of DEM 83 670. 155 by way of SLOM I damages for the period from 1 July 1984 until 29 March 1989, together with default interest at the rate of 8% per annum from 19 May 1992;

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

32 In his reply, the applicant states that he claims compensation for the period from 7 December 1985 until 29 March 1989.

33 In both cases, the applicants further request that the Court join the cases with Case T-77/93 *Hülseberg and Others* v *Council and Commission* and that the Court stay proceedings until delivery of the judgment in that case. However, that case was removed from the Register of the Court by order of 4 February 1997.

34 In Cases T-8/95 and T-9/95, the defendants contend that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

Arguments of the parties

35 The applicants refer to *Mulder II*, paragraph 9 above, and claim that, as SLOM I producers, they are entitled to compensation for their losses. The fact that the national authorities made an offer of compensation under the first paragraph of Article 14 of Regulation No 2187/93 confirms the liability of the Community. The applicants' refusal to accept that offer does not in any way affect their entitlement to compensation.

36 As regards the damage allegedly suffered by them, the applicants state that lack of space prevented their holdings being converted to other products and consequently the damage suffered is considerably higher than the compensation provided for in Regulation No 2187/93.

37 The applicants maintain that their applications are not time-barred. First, referring to the conditions of limitation laid down in Article 43 of the Statute, they submit that it cannot be considered that they, as mere private individuals, ought to have been aware, before delivery of *Mulder II*, cited in paragraph 9 above, on 19 May 1992, that the conditions for the bringing of an action in damages were satisfied.

38 Secondly, the applicants assert that it is clear from Article 10(2) of Regulation No 2187/93 that the limitation period of five years provided for in Article 43 of the Statute began to run afresh from 30 September 1993 for all milk producers who had not submitted their claim or brought their action before that date. Since the limitation period did not expire until 1998, the actions brought on 23 January 1995 were not out of time.

39 Thirdly, the applicants argue that the period of two months laid down by the third sentence of Article 43 of the Statute is applicable only in the event of a refusal by an institution of a prior application. According to the applicants, the offer of compensation which was made to them under the first paragraph of Article 14 of Regulation No 2187/93 is not a refusal. Their prior applications of 23 December 1991 (Case T-8/95) and of 4 December 1990 (Case T-9/95) had accordingly not been rejected by the defendants. Further, an application made under the first paragraph of Article 10(2) of Regulation No 2187/93 did not constitute a prior application within the meaning of Article 43 of the Statute and consequently, neither the offer made in accordance with the first paragraph of Article 14 of Regulation No 2187/93 nor the expiry of the period of two months laid down in the third paragraph of that provision constituted a negative decision as envisaged by Article 43 of the Statute. The period of two months laid down in Article 43 of the Statute for the bringing of an action is accordingly not applicable.

40 Fourthly, in the alternative, the applicants submit that they made an excusable error as to the date of commencement of the limitation period for the bringing of an

action. The defendants' conduct had been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the minds of the applicants, who acted in good faith and exercised all the diligence required of a normally experienced trader (Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 29, and order in Joined Cases T-148/98 and T-162/98 *Evans and Others* v *Commission* [1999] ECR II-2837, paragraph 31).

41 They claim that the defendants required the producers of milk who had suffered damage not to submit an application for compensation and not to bring legal proceedings by offering the prospect of adoption of a scheme of flat-rate compensation. That came about when the Communication of 5 August 1992 and Regulation No 2187/93 were adopted. The defendants knew that the damage had often arisen in 1984 and 1985, but they stated on several occasions that they waived the right to plead limitation. In the applicants' opinion, a normally experienced trader might accordingly believe and expect that postponement of his asserting his entitlement to compensation would not entail that his right to bring legal proceedings would be time-barred.

42 Moreover, since the wording of the second paragraph of Article 10(2) of Regulation No 2187/93 indicates that a new period of five years is to begin to run afresh from 30 September 1993, a normally experienced trader could not have foreseen the development of the case law in Case T-222/97 *Steffens* v *Council and Commission* [1998] ECR II-4175.

43 Fifthly, in accordance with the principles of European contract law (*Principles of European Contract Law, Parts 1 and 2*, O. Lando and H. Beale (ed.), 2000; ZEuP 1995, p. 8644, and ZEuP 2000, p. 675), the Community cannot justifiably plead limitation since, by adopting Regulation No 2187/93, it recognised the principle of its liability in damages to producers of milk who had suffered loss.

44 In reply to the written question of the Court (see paragraph 27 above), the applicants argued in their letters of 5 October 2006 that *van den Berg*, cited in paragraph 27 above, should be interpreted to mean that the period from the interruption of the limitation period until 30 September 1993 could not be taken into account in the calculation of the five-year limitation. Application of the principles set forth in *van den Berg* led to the conclusion that the applicants' entitlement to compensation is only partly time-barred.

45 The defendants do not dispute that the applicants are members of a group of producers who, as a rule, following the *Mulder II* judgment, are entitled to compensation for damage resulting from their temporary exclusion from milk production. However, they submit that it is clear from *Steffens* v *Council and Commission*, cited in paragraph 42 above, *Rudolph* v *Council and Commission*, cited in paragraph 24 above, and Case T-201/94 *Kustermann* v *Council and Commission* [2002] ECR II-415 that the applicants' entitlement to compensation is time-barred in its entirety. Consequently, the present actions are inadmissible.

46 The defendants contend that the limitation period of five years specified in Article 43 of the Statute begins to run when all the requirements governing the obligation by the Community to make good the damage are satisfied. In a case such as the present, where liability stems from a legislative measure, it is necessary that the injurious effects of the measure have been produced (*Steffens* v *Council and Commission*, cited in paragraph 42 above, paragraph 31). They state on that point that, for SLOM I producers, those conditions were satisfied at the point when Regulation No 857/84 prevented them, for the first time, from resuming milk production, which is to say the day following expiry of their respective undertakings of non-marketing or conversion, at the earliest however, on 1 April 1984 (Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, paragraph 87, and Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraphs 2 and 130). Since the undertakings of non-marketing or conversion given by the applicants in Cases T-8/95 and T-9/95 expired, respectively, on 1 March 1985 and 30 June 1984, the limitation period began to run on 2 March 1985 in Case T-8/95 and 1 July 1984 in Case T-9/95.

47 However, the damage caused by the Community to milk producers recurred from day to day, for as long as the producers were not allocated a reference quantity. In this case, SLOM I producers such as the applicants were prevented from producing milk until the entry into force of Regulation No 764/89, on 29 March 1989.

48 With a view to assessing which claims for compensation for damage suffered between 2 March 1985 and 29 March 1989 (Case T-8/95) or between 1 July 1984 and 29 March 1989 (Case T-9/95), are time-barred, the defendants contend that, in their replies to the applicants' claims for compensation in Cases T-8/95 and T-9/95, dated respectively 23 December 1991 and 4 December 1990, they waived any objection on the ground of limitation until the expiry of a period of three months following publication in the Official Journal of *Mulder II*, cited in paragraph 9 above. Since that judgment was published in the Official Journal on 17 June 1992, that waiver came to an end on 17 September 1992. However, in the interval, in the Communication of 5 August 1992, the defendants gave an undertaking vis-à-vis all the SLOM producers affected by *Mulder II*, to waive any objection on the ground of limitation until adoption of the detailed practical rules for their compensation. As regards producers such as the applicants, against whom the defendants stated that they were prepared not to plead limitation until 17 September 1992, that waiver was thus extended until adoption of the detailed practical rules for their compensation. The detailed practical rules referred to in the Communication of 5 August 1992 were adopted by Regulation No 2187/93.

49 The defendants emphasise moreover that the applicants did not accept the offer of compensation made to them on the basis of the first paragraph of Article 14 of Regulation No 2187/93 within the period of two months provided for, and did not bring an action for damages in the two months following expiry of that period. In those circumstances, the limitation period laid down in Article 43 of the Statute was not interrupted by the Communication of 5 August 1992 and, consequently, was also not interrupted by the applications made by the applicants, by letters of 23 December 1991 (Case T-8/95) and of 4 December 1990 (Case T-9/95) (*Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 137; *Steffens* v *Council and Commission*, cited in paragraph 42 above, paragraphs 37 to 40; *Rudolph*

v *Council and Commission*, cited in paragraph 24 above, paragraphs 60 to 64, and *Kustermann* v *Council and Commission*, cited in paragraph 45 above, paragraphs 72 to 76). The limitation period was interrupted only by the bringing of the actions on 23 January 1995.

50 It follows, according to the defendants, that the applicants' rights to compensation which came into being more than five years before the interruption of the limitation are time-barred. Given that limitation was interrupted only by the bringing of the actions on 23 January 1995, all rights which arose before 23 January 1990 are time-barred. Since the applicants can only claim compensation for the period from 2 March 1985 (Case T-8/95) or from 1 July 1984 (Case T-9/95) until 29 March 1989, their rights are, consequently, time-barred in their entirety. The actions should therefore be dismissed as inadmissible.

51 In their rejoinders, the defendants add, firstly, that the interpretation of Article 10(2) of Regulation No 2187/93 to mean that a new five-year limitation period began running from 30 September 1993 is incompatible with Article 43 of the Statute.

52 Secondly, the applicants' argument based on the period of two months referred to in the third sentence of Article 43 of the Statute in no way explains why, in the case of a rejection of an offer of compensation, the applicants have the benefit of a new limitation period. The Commission adds that it is clear from *Steffens* v *Council and Commission*, cited in paragraph 42 above (paragraph 40) that the waiver by the defendants of pleading limitation is a unilateral act which was of no further effect at the end of the period for acceptance of the offer of compensation.

53 Thirdly, the defendants consider that the applicants' error as to the commencement date of the limitation period is not excusable. The applicants were negligent.

54 Fourthly, as regards the alleged relevance of the principles of European contract law, the defendants consider that they have no bearing on the present case. The Commission contends that there is no contractual relationship between the defendants and the applicants.

55 In reply to the Court's written question (see paragraph 27 above) the defendants dispute, in their letters of 5 October 2006, the relevance of *van den Berg*, paragraph 27 above, for the purposes of calculating the limitation period in the present case. The Commission states on that point that *van den Berg* (paragraph 100) is explicitly concerned with the situation where no application within the meaning of Article 10(2) of Regulation No 2187/93 has been made. Since, in the present case, the producers did make such an application, the solution adopted in *van den Berg* cannot be transposed to them and the limitation period should be calculated solely in the light of the Court's case-law cited in paragraph 49 above.

56 The Commission adds that, if the approach adopted in *van den Berg* is to be applied, account should be taken, for the purposes of calculating the limitation period, of a suspension of the limitation period which began running on the day when the Commission's reply was sent to the applicants' initial applications of 23 December 1991 in Case T-8/95 and of 4 December 1990 in Case T-9/95. The starting date for suspension of the limitation period is thus 16 January 1992 in Case T-8/95 and 19 December 1990 in Case T-9/95. At the hearing however, the Commission acknowledged that the starting date for suspension of the limitation period might also be set as the day when the defendants received the applicants' initial applications, namely 31 December 1991 in Case T-8/95 and 7 December 1990 in Case T-9/95. The end-date for the suspension of limitation within the meaning of *van den Berg* is either 30 September 1993 in both cases, or the date of expiry of the period for acceptance of the offer of compensation made on the basis of the first paragraph of Article 14 of Regulation No 2187/93. On the basis of the last two hypotheses, and applying the date of receipt of the Commission's reply to the applicants' initial claim as the starting point of the suspension of the limitation, all

rights to compensation which arose before 5 May 1988 or before 18 December 1987 are time-barred in Case T-8/95. The same holds true in Case T-9/95 for rights to compensation which came into being before 12 April 1987 or before 8 December 1986.

Findings of the Court

57 It is clear from *Mulder II*, cited in paragraph 9 above, that the Community is liable to every producer who has suffered a reparable loss owing to the fact that he was prevented from delivering milk by Regulation No 857/84 (*Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 71, and *Rudolph* v *Council and Commission*, cited in paragraph 24 above, paragraph 45).

58 It is common ground that the applicants are in the situation of producers covered by *Mulder II*.

59 It follows that the applicants are entitled to be compensated by the defendants for their losses, unless their claims are time-barred.

60 What must be examined therefore is whether and to what extent the present claims are time-barred.

61 It is important to note that the limitation period laid down by Article 43 of the Statute cannot begin to run until all the conditions governing the obligation to make

good the damage are satisfied and, in particular, in cases where liability stems from a legislative measure, until the injurious effects of the measure have been produced. Those conditions are the existence of unlawful conduct on the part of the Community institutions, the fact of the damage alleged and the existence of a causal link between that conduct and the loss claimed (*Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 107).

62 The Court has consistently held that damage from an inability to use a reference quantity arises on the date when, following the expiry of his non-marketing undertaking, the producer concerned would have been able to resume milk deliveries, without having to pay the additional levy, if he had not been refused allocation of a reference quantity. Therefore it is on that date that the conditions for an action for damages against the Community are satisfied (Order in Case T-332/99 *Jestädt* v *Council and Commission* [2001] ECR II-2561, paragraph 41; see also, to that effect, *Saint and Murray* v *Council and Commission*, cited in paragraph 46 above, paragraph 87, and *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 130).

63 Consequently, in the present cases, the limitation period began to run on 2 March 1985 in Case T-8/95 and 1 July 1984 in Case T-9/95, namely the day after the expiry of the non-marketing undertakings entered into by the applicants. On those dates, Regulation No 857/84, as supplemented by Regulation No 1371/84, began to have injurious effects on the applicants by preventing them from resuming the marketing of milk (see, to that effect, *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 130, and *Rudolph v Council and Commission*, cited in paragraph 24 above, paragraph 50, order in *Jestädt* v *Council and Commission*, cited in paragraph 62 above, paragraph 42).

64 The fact that, before delivery of *Mulder II*, cited in paragraph 9 above, the applicants may not have been aware that the conditions for an action for damages against the Community were satisfied in no way affects the starting point for the calculation of the limitation period, since, in the present cases, they could not doubt that their

inability to deliver milk, from respectively 2 March 1985 and 1 July 1984, was the result of the application of Regulation No 857/84, as supplemented by Regulation No 1371/84 (see, to that effect, *Saint and Murray* v *Council and Commission* cited in paragraph 46 above, paragraph 85, and *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 112).

65 For the purposes of determining the period over which the damage was suffered, the Court notes that the damage was not caused instantaneously. The damage continued, so long as the applicants were unable to obtain a reference quantity, namely, until 28 March 1989, the day prior to the date of entry into force of Regulation No 764/89 which, by allowing the allocation of special reference quantities to SLOM I producers, brought an end to the damage suffered by the applicants. The damage was continuous and recurred on a daily basis (see, to that effect, *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraphs 132 and 140; *Kustermann* v *Council and Commission*, cited in paragraph 45 above, paragraphs 63 and 77; and *Rudolph* v *Council and Commission*, cited in paragraph 24 above, paragraph 65).

66 Consequently, the period over which the applicants suffered damage as a result of the application of Regulation No 857/84, as supplemented by Regulation No 1371/84, was, for the applicant in Case T-8/95, the period between 2 March 1985 and 28 March 1989 and, for the applicant in the Case T-9/95, the period between 1 July 1984 and 28 March 1989.

67 In assessing which claims for compensation for damage suffered over the periods stated in the preceding paragraph are time-barred, the Court points out that, as laid down in Article 43 of the Statute, the limitation period is interrupted if proceedings are instituted before the Community judicature or if, prior to such proceedings, an application is made to the relevant institution of the Communities. In the latter event, however, the interruption is effective only if the application is followed by the institution of proceedings within the period laid down in Article 230 EC or Article

232 EC, as the case may be (Case 11/72 *Giordano* v *Commission* [1973] ECR 417, paragraph 6; *Steffens* v *Council and Commission*, cited in paragraph 42 above, paragraphs 35 and 42; and *Kustermann* v *Council and Commission*, cited in paragraph 45 above, paragraph 67).

68 In the present case, it must be held that, first of all, the applicants made prior applications within the meaning of Article 43 of the Statute by letters of 23 December 1991 (Case T-8/95) and of 4 December 1990 (Case T-9/95) and that the Council rejected those prior applications by letters of 13 January 1992 (Case T-8/95) and 20 December 1990 (Case T-9/95). The Commission did the same by letters of 16 January 1992 (Case T-8/95) and of 19 December 1990 (Case T-9/95).

69 It must be held, next, that the defendants, in the letters referred to in the preceding paragraph, stated that they were prepared to waive the right to plead limitation vis à vis the applicants until the expiry of a period of three months following the publication in the Official Journal of the judgment in *Mulder II*, cited in paragraph 9 above. However, before expiry of the period during which that waiver applied, the waiver was extended by virtue of the Communication of 5 August 1992. In that Communication, the defendants undertook, vis-à-vis any producer who met the conditions stemming from *Mulder II* and whose right to compensation was not yet time-barred as at 5 August 1992, to waive the right to plead limitation under Article 43 of the Statute until the time when the detailed practical rules for compensation of producers had been determined (*Saint and Murray* v *Council and Commission*, cited in paragraph 46 above, paragraph 90).

70 Those practical rules were adopted by means of Regulation No 2187/93. Under the second paragraph of Article 10(2) of that regulation, the defendants' self-imposed restriction of their right to plead limitation came to an end on 30 September 1993 as regards producers who had not made an application for compensation under that regulation (*Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 137, and *Saint and Murray* v *Council and Commission*, cited in

paragraph 46 above, paragraph 91). On the other hand, as regards producers who had submitted an application under the first paragraph of Article 10(2) of Regulation No 2187/93, that self-imposed restriction came to an end on the expiry of the period for acceptance of the offer of compensation made under the first paragraph of Article 14 of Regulation No 2187/93 (*Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 137; *Saint and Murray* v *Council and Commission*, paragraph 91; *Steffens* v *Council and Commission*, cited in paragraph 42 above, paragraph 40; and Case T-261/94 *Schulte* v *Council and Commission* [2002] ECR II-441, paragraph 67). That last period expired, in accordance with the third paragraph of Article 14 of Regulation No 2187/93, two months after the receipt of the offer of compensation which itself, in accordance with the first paragraph of Article 14 of that regulation, had to be made within a period of four months following receipt of the claim.

71 Contrary to the applicants' claims, the Communication of 5 August 1992 did not cause a new limitation period of five years to run from 30 September 1993 (*van den Berg*, cited in paragraph 27 above, paragraph 100; see also, to that effect, *Steffens* v *Council and Commission*, cited in paragraph 42 above, paragraph 36).

72 Nonetheless, the waiver by the defendants of their right to plead limitation set out in the Communication of 5 August 1992, and in the earlier correspondence which followed the prior claims for compensation, does have an effect on the calculation of the limitation period.

73 In that regard, it is clear from *van den Berg* that the suspension of the limitation period resulting from the defendants' unilateral waiver of the right to plead limitation in the Communication of 5 August 1992, and possibly also in earlier correspondence, retains its validity regardless of the point in time at which an applicant brought an action in damages before the Court (*van den Berg*, paragraphs 100 and 101).

74 In the present cases, in relation to whether the approach adopted in *van den Berg*, cited in paragraph 27 above, is applicable, the defendants stated that, as distinct from the applicant in the case giving rise to that judgment, the applicants in the present cases had submitted an application within the meaning of the first paragraph of Article 10(2) of Regulation No 2187/93. It follows, according to the defendants, that the approach adopted by the Court of Justice in *van den Berg* is not simply transposable to the present cases.

75 In that regard, the Court has consistently held that the sending of an application for compensation to a Community institution merely postpones the expiration of the five-year period and does not shorten the five-year limitation period laid down by Article 43 of the Statute (*Giordano* v *Commission*, cited in paragraph 67 above, paragraphs 6 and 7, and Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 30). It follows that, for the purposes of calculating the limitation period, the situation of a milk producer, such as those in these proceedings, who has made an application for compensation under the first paragraph of Article 10(2) of Regulation No 2187/93 cannot be less favourable than the situation of a producer who has not made such an application for compensation.

76 In such circumstances, it must be held that, in *van den Berg*, cited in paragraph 27 above, the Court of Justice did not intend to restrict the benefit of the unconditional suspension of limitation brought about by the defendants' unilateral waiver solely to that group of milk producers who had not made an application for compensation within the meaning of the first paragraph of Article 10(2) of Regulation No 2187/93. It must be held that the Court referred to the absence of such an application in paragraph 100 of *van den Berg* solely for the purposes of establishing the end date of the suspension of limitation brought about by that waiver, which varies according to whether or not there has been such an application under the first paragraph of Article 10(2) of Regulation No 2187/93 (see paragraph 70 above).

77 At the hearing, the defendants stressed that the applicant in *van den Berg*, cited in paragraph 27 above, had not been able to make an application under the first paragraph of Article 10(2) of Regulation No 2187/93, since his situation did not fall within the scope of that regulation. According to the defendants, the Court held in *van den Berg* that the applicant in that case could claim suspension of limitation until 30 September 1993 since he was not in a position to foresee that his situation was not governed by Regulation No 2187/93.

78 That, however, is not an adequate justification for not applying the approach adopted in *van den Berg* to the situation of the applicants in the cases before this Court. In fact, like the applicant in *van den Berg*, the applicants in the present cases were equally unable to foresee the scope of Regulation No 2187/93 before it was adopted.

79 The Court must therefore determine, in the light of *van den Berg*, cited in paragraph 27 above, the damage suffered between 2 March 1985 and 28 March 1989 (Case T-8/95) or between 1 July 1984 and 28 March 1989 (Case T-9/95), in respect of which applications for compensation were time-barred when the actions were brought on 23 January 1995.

80 First, to that end, it must be noted that the applicants sent a prior application to the defendants, which interrupted the five-year limitation period upon receipt of that application by either of the two institutions. It follows from Article 43 of the Statute, and from the case-law, that the date of receipt of the application determines the interruption of limitation and not, as claimed by the defendants, the date on which the institution concerned replied to the application (see, to that effect, *van den Berg*, cited in paragraph 27 above, paragraph 101, and *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraph 139).

81 The applicant in the Case T-8/95 made that application by means of the letter of 23 December 1991 sent to the defendants. The Council received that letter on 31 December 1991. The date of receipt of the letter by the Commission cannot be established with any certainty. At the hearing however, the parties agreed that it might be considered that that letter also reached the Commission on 31 December 1991. In those circumstances, upon receipt of the prior application, the right to compensation was time-barred for the period prior to 31 December 1986 (see, to that effect, *Hartmann* v *Council and Commission*, cited in paragraph 46 above, paragraphs 139 and 140). It must also be noted that the applicant in Case T-8/95 himself stated in his reply that he was asserting his right to compensation for the period 31 December 1986 to 29 March 1989.

82 In Case T-9/95, the applicant sent a prior application to the defendants by letter of 4 December 1990. That letter reached the Council on 7 December 1990. The date of receipt of the letter by the Commission cannot be established with any certainty. At the hearing however, the parties agreed that it might be considered that that letter also reached the Commission on 7 December 1990. In those circumstances, upon receipt of the prior application, the right to compensation was time-barred for the period prior to 7 December 1985 (see, to that effect, *Hartmann* v *Council and Commission*, paragraphs 139 and 140). It must also be noted that the applicant in Case T-9/95 himself stated in his reply that he was asserting his right to compensation for the period from 7 December 1985 to 29 March 1989.

83 Secondly, in accordance with the approach adopted in *van den Berg* (paragraphs 100 and 101), there should be disregarded, for the purposes of calculating of the limitation period, the period between, respectively, 31 December 1991 (Case T-8/95) and 7 December 1990 (Case T-9/95), and the date of expiry of the waiver by the defendants of the right to plead limitation.

84 However, as distinct from the facts of *van den Berg*, the applicants submitted an application under the first paragraph of Article 10(2) of Regulation No 2187/93 and

received an offer under the first paragraph of Article 14 of that regulation, which they implicitly rejected by allowing the period for acceptance of the offer to expire. In those circumstances, the relevant factor, as regards the end of the period of suspension of the limitation, is the expiry of the period for acceptance of the offer of compensation made on the basis of the first paragraph of Article 14 of Regulation No 2187/93 (*Hartmann* v *Council and Commission*, paragraph 137; *Saint and Murray* v *Council and Commission*, paragraph 91; *Steffens* v *Council and Commission*; and *Schulte* v *Council and Commission*, paragraph 67).

85 It must be held that the offer of compensation under the first paragraph of Article 14 of Regulation No 2187/93 was made to the applicant in Case T-8/95 by letter of 17 December 1993, which reached him on 18 December 1993. The date of receipt of the offer of compensation made to the applicant in Case T-9/95 by the letter of 2 December 1993 cannot be established with any certainty. At the hearing however, the parties agreed that the applicant in Case T-9/95 received that offer of compensation on 3 December 1993.

86 Given that, under the third paragraph of Article 14 of Regulation No 2187/93 the period allowed for acceptance of an offer under the first paragraph of Article 14 of that regulation was two months from the date of receipt of the offer, it must be concluded that, in the Case T-8/95, the period between 31 December 1991 and 18 February 1994 and, in the Case T-9/95, the period between 7 December 1990 and 3 February 1994 cannot be taken into account for the purposes of calculating of the limitation period of five years.

87 At the hearing the applicants submitted, in response to a question from the Court, that the period of suspension of limitation should be extended by two supplementary months in accordance with the principles which can be identified in *Rudolph* v *Council and Commission*, cited in paragraph 24 above, and *Kustermann* v *Council and Commission*, cited in paragraph 45 above.

88 However, it must be noted that in those judgments the Court wished to mitigate the consequences of the approach under which the effects of the suspension of limitation were held to be nullified if the action in damages was not brought before the Court within the period allowed to the institutions for the waiver of pleading limitation. Accordingly, the Court held in those cases that producers who had waited, on the basis of the undertaking given by the institutions to make them an offer of compensation, before instituting proceedings for compensation before the Court, and then instituted such proceedings within a period of two months following the expiry of the time-limit for accepting the offer made to them as prescribed by the third paragraph of Article 14 of Regulation No 2187/93, continued to have the benefit of the undertaking given by the institutions to waive the right to plead limitation (*Kustermann* v *Council and Commission*, paragraph 76, and *Rudolph* v *Council and Commission*, paragraph 64).

89 However, having regard to the fact that, in accordance with *van den Berg*, the suspension of the limitation period resulting from the unilateral waiver by the institutions of the right to plead limitation retains its validity regardless of the point in time at which the applicant brought the action, it is unnecessary to apply the case-law cited in the preceding paragraph in the cases now before this Court.

90 Having regard to all of the foregoing, it must be held, as concerns Case T-8/95, that limitation period was suspended between 31 December 1991 and 18 February 1994 which is a period of two years, one month and 18 days. By adding that period to the period of five years preceding the bringing of the action on 23 January 1995, the Court finds that the rights to compensation of the applicant in the Case T-8/95 are time-barred for the period prior to 5 December 1987. Since the loss suffered by the applicant ended on 28 March 1989 (see paragraph 65 above), the applicant in Case T-8/95 must be compensated for the loss suffered as a result of the application of Regulation No 857/84, as supplemented by Regulation No 1371/84, for the period between 5 December 1987 and 28 March 1989.

91 In Case T-9/95, the period which must be discounted for the calculation of the limitation period is from 7 December 1990 to 3 February 1994. That is a period of three years, one month and 26 days. Adding that period to the period of five years preceding the bringing of the action on 23 January 1995, the Court finds that the rights to compensation of the applicant in Case T-9/95 are time-barred for the period prior to 27 November 1986. Since the loss suffered by the applicant ended on 28 March 1989 (see paragraph 65 above), the applicant in Case T-9/95 must be compensated for the loss suffered as a result of the application of Regulation No 857/84, as supplemented by Regulation No 1371/84, for the period between 27 November 1986 and 28 March 1989.

92 Since the applications for compensation are in part time-barred, it is necessary to examine the applicants' alternative argument that they committed an excusable error as to the commencement date of the limitation period.

93 It is settled case-law that the concept of excusable error must be strictly construed and can concern only exceptional circumstances in which, in particular, the conduct of the institutions concerned had been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader. In such circumstances, the administration may not rely on its own failure to observe the principles of legal certainty and the protection of legitimate expectations out of which the party's error arose (Case T-12/90 *Bayer* v *Commission*, cited in paragraph 40 above, paragraph 29, confirmed on appeal in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26; order in Case T-321/04 *Air Bourbon* v *Commission* [2005] ECR II-3469, paragraph 38).

94 In the present case, although the defendants' desire to restrict the number of legal actions prompted the statement in the Communication of 5 August 1992 that they were temporarily waiving reliance on limitation, they did not at any time affect the freedom of the producers concerned to bring an action for damages before the

Community courts. The applicants' argument that the defendants made it a requirement that milk producers who had suffered loss should not bring legal actions must accordingly be rejected.

95 Further, the defendants did not at any time foster confusion as to the duration of their undertaking not to plead limitation under Article 43 of the Statute. In their Communication of 5 August 1992 they declared that the waiver would hold good until the practical rules for the compensation of producers had been determined.

96 The alternative argument of the applicants accordingly cannot be accepted.

97 Lastly, the argument which refers to the principles of European contract law is of no relevance since the action is concerned with the compensation of non-contractual loss.

98 As regards the amount of the compensation payable by the defendants, the Court notes that they did not consider it necessary to consider that issue in the course of the written pleadings, since they took the view that the actions were time-barred in their entirety and that, in any event, the applicants had stated that they were ready to come to an agreement on the basis of the principles of Regulation No 2187/93. At the hearing, the defendants asked the Court, should it be held that the actions were not time-barred in their entirety, to specify the periods which were not time-barred in an interlocutory judgment so that the parties might seek an amicable settlement as to the amount of the compensation.

99 In those circumstances, the Court requests the parties to seek agreement, within six months, on the amount of the compensation to be paid by the defendants to the applicants. In the absence of agreement, the parties shall transmit to the Court, within the same period, a statement of their views with supporting figures.

Costs

100 Having regard to what has been stated in paragraph 99 of this judgment, the decision as to costs must be reserved.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby

1. Orders the Council and the Commission to make good the damage suffered by Wilhelm Pelle et Ernst-Reinhard Konrad as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, in so far as those regulations did not 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, did not deliver any milk during the reference year adopted by the Member State concerned;

2. **Orders that Wilhelm Pelle, applicant in Case T-8/95, be compensated for losses suffered as a result of the application of Regulation No 857/84 for the period commencing 5 December 1987 and ending 28 March 1989;**

3. **Orders that Ernst-Reinhard Konrad, applicant in Case T-9/95, be compensated for losses suffered as a result of the application of Regulation No 857/84 for the period commencing 27 November 1986 and ending on 28 March 1989;**

4. **Requests the parties to inform the Court within six months from the date of delivery of this judgment of the amounts of damages agreed to be payable;**

5. **Orders that, in the absence of agreement, the parties shall transmit to the Court within the same period a statement of their views with supporting figures;**

6. **Reserves the costs.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 27 September 2007.

E. Coulon M. Vilaras

Registrar President