JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
7 February 2002 *

In Case T-187/94,

Theresia Rudolf, residing in Rasdorf-Grüsselbach (Germany), represented by B. Meisterernst, M. Düsing, D. Mannstetten, F. Schulze and C.-H. Husemann, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by A.-M. Colaert, acting as Agent,

and

Commission of the European Communities, represented by D. Booß and M. Niejahr, acting as Agents, and H.-J. Rabe and M. Núñez-Müller, lawyers, with an address for service in Luxembourg,

defendants,

* Language of the case: German.

APPLICATION for compensation under Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 288 EC) for damage suffered by the applicant as a result of her 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 (EEC) No 804/68 (OJ 1984 L 132, p. 11),

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2001,

gives the following

Judgment

Legislative background

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

2 Despite the fact that many producers entered into such undertakings, over-production continued in 1983. The Council therefore adopted Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), amending Regulation (EEC) No 804/68 of the Council of 27 June 1968 establishing a common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176). The new Article 5c of the latter regulation introduced an 'additional levy' on milk delivered by producers in excess of a 'reference quantity'.

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

quantity for each producer on the basis of production delivered during a reference year, namely the 1981 calendar year, subject to allowing the Member States to choose the 1982 or 1983 calendar year. The Federal Republic of Germany chose 1983 as reference year.

4 The non-marketing undertakings entered into by certain producers under Regulation No 1078/77 covered the reference years chosen. Since they produced no milk in those years, they could not be allocated a reference quantity, and were consequently unable to market any quantity of milk exempt from the additional levy.

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

6 To comply with those judgments, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2). Pursuant to that amending regulation, producers who had entered into non-marketing undertakings received a reference quantity known as a 'special' reference quantity (or 'quota').

7 Allocation of a special reference quantity was subject to a number of conditions. Some of those conditions, in particular those dealing with the time when the

non-marketing undertaking expired, were declared invalid by the Court of Justice, by judgments of 11 December 1990 in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585.

8 Following those judgments, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35) which, by removing the conditions which had been declared invalid, made it possible for the producers concerned to be granted a special reference quantity.

9 By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 ('*Mulder II*'), the Court of Justice held the Community liable for the damage caused to certain milk producers who had been prevented from marketing milk owing to the application of Regulation No 857/84 because they had entered into undertakings pursuant to Regulation No 1078/77.

10 Following that judgment, the Council and the Commission published Communication 92/C 198/04 on 5 August 1992 (OJ 1992 C 198, p. 4, 'the Communication of 5 August 1992'). After setting out the implications of the *Mulder II* judgment, and in order to give it full effect, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned.

11 Until such time as those arrangements were adopted, the institutions undertook not to plead against any producer entitled to compensation that his claim was barred by lapse of time under Article 43 of the EEC Statute of the Court of Justice. However, that undertaking was subject to the condition that entitlement

to compensation was not already time-barred on the date of publication of the Communication of 5 August 1992 or on the date on which the producer had applied to one of the institutions.

12 Point 3(2) of the Communication of 5 August 1992 states:

'[T]he 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.'

13 The Council then 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 provides, 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 *Mulder II*.

14 Article 10(2) of that regulation states:

'[T]he producer shall send his application to the competent authority. The application for production 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.'

15 The third paragraph of Article 14 of that regulation provides:

'[F]ailure 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.'

16 By judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203 the Court of Justice determined the amount of compensation claimed by the applicants.

Facts giving rise the dispute

17 The applicant is a milk producer in Germany. Under Regulation No 1078/77, she entered into a non-marketing undertaking which expired on 31 March 1985.

18 In 1991, following the entry into force of Regulation No 764/89, she obtained a special reference quantity allowing her to resume milk production.

19 By letter of 28 January 1994, the competent national authorities made her an offer, under Regulation No 2187/93, of flat-rate compensation covering the period from 5 August 1987 to 29 March 1989. The applicant failed to accept that offer within the period of two months laid down in the third paragraph of Article 14 of that regulation.

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the Court of First Instance on 6 May 1994, the applicant initiated the present proceedings.

21 By order of 31 August 1994, the Court of First Instance stayed proceedings pending final judgment of the Court of Justice in Joined Cases C-104/89 (*Mulder and Others* v *Council and Commission*) and C-37/90 (*Heinemann* v *Council and Commission*).

22 The proceedings were resumed after delivery of the judgment of the Court of Justice disposing of the abovementioned cases.

23 By decision of the Court of First Instance of 6 June 2000, the case was assigned to a chamber of three Judges.

24 By decision of 13 March 2001, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

25 The parties presented oral argument and replied to the Court's oral questions at the hearing on 3 May 2001.

26 The applicant claims that the Court should:

— order the defendants to pay her the sum of 94 349.74 German marks (DEM) together with interest;

— order the defendants to pay the costs.

27 The Commission contends that the Court should:

— declare the application inadmissible and, in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

28 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

Arguments of the parties

29 The applicant argues that she is entitled to compensation for the damage which she sustained as a result of her being prevented from producing milk under Regulation No 857/84 from 1 April 1985, that being the day following the date of expiry of her non-marketing undertaking, to 29 March 1989, that being the date of entry into force of Regulation No 764/89, under which she was able to obtain a quota.

30 The applicant disputes the defendants' arguments to the effect that the application is time-barred in its entirety.

31 As regards the calculation of the damage, she maintains that she is entitled to a higher amount of compensation than that offered to her under Regulation No 2187/93 on the ground that the fat content of the milk produced on her holding and, therefore, the price of the milk were higher than the average taken into account in that regulation.

32 The Commission does not dispute that the applicant is one of a group of producers who, in principle, following the *Mulder II* judgment, are entitled to compensation for injury resulting from their temporary exclusion from milk production. However, it submits that the applicant's rights to compensation are time-barred in their entirety.

33 For its part, the Council submits that it is for the party putting the liability of the Community in issue to prove the existence and extent of the damage alleged by it and to establish the causal link between that damage and the conduct of the Community institutions which is complained of. Since the documents before the Court do not contain sufficient information about the applicant's situation during the period preceding her non-marketing undertaking and during the period of that undertaking, the Council submits that the applicant has failed to provide the evidence needed to prove the existence of actual damage and of a causal link between such damage and the illegality of the Community legislation.

34 In any event, the Council argues that the application for compensation is time-barred in its entirety.

35 As regards limitation, the defendants point out that the period of five years laid down in Article 43 of the Statute of the Court of Justice started to run from the day on which the applicant would have been able to resume milk deliveries if she had not been refused a reference quantity, that is, 1 April 1985.

36 The defendants raise the point that, since the damage alleged in the present case was not caused instantaneously but continued on a daily basis for so long as the applicant was unable to obtain a reference quantity and, as a result, to deliver milk, the time bar under Article 43 of the Statute of the Court of Justice applies to the period preceding by more than five years the date of the event which interrupted the limitation period and does not affect rights which arose during subsequent periods (Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraphs 130 to 132).

37 They point out that the applicant is alleging a loss of earnings suffered between 1 April 1985 and 29 March 1989, the date of entry into force of Regulation No 764/89. In order to determine which losses sustained between those dates are time-barred, the defendants submit that it is necessary to determine the date of interruption of the limitation period.

38 According to the defendants, the limitation period was interrupted only by the institution of proceedings on 6 May 1994.

39 The applicant may not rely on suspension of the limitation period on the basis of the undertaking given by the defendants in their Communication of 5 August 1992. The waiver of the right to plead limitation contained in that communication applies only until the adoption of practical arrangements for compensating the producers concerned, which were laid down by Regulation No 2187/93.

40 The defendants argue that, as the Court of First Instance stated in the judgment in *Hartmann* v *Council and Commission*, cited above, at paragraph 137, it follows from the system of that regulation that, in the case of producers who had made an

application for compensation under that regulation, the institutions' self-imposed restriction on their right to plead limitation ended at the end of the period for accepting the compensation offer made in response to that application.

41 The defendants also argue that, as the Court of First Instance held in Case T-222/97 *Steffens* v *Council and Commission* [1998] ECR II-4175, paragraphs 36 to 41, a producer who has not accepted the compensation offer made to him under Regulation No 2187/93 within the time-limit laid down or initiated proceedings within that period is not entitled to rely on the waiver of the right to plead limitation, which the institutions granted at the time to all the producers concerned.

42 In the present case, since the applicant neither accepted the offer of 28 January 1994 nor initiated proceedings within the time allowed for accepting the offer, she is unable, according to that case-law, to rely on the waiver of the right to plead limitation contained in the Communication of 5 August 1992.

43 Consequently, according to the defendants, since the applicant interrupted the limitation period only by instituting proceedings on 6 May 1994, that is, more than five years after the expiry, on 29 March 1989, of the period in respect of which she was entitled to compensation, the present application is time-barred in its entirety.

Findings of the Court

44 As a preliminary point, the Court would observe that, contrary to what the Council maintains, the applicant does not base her application on Regulation

No 2187/93, but on the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) and that, although she refers to the parameters in that regulation, she does so only in order to facilitate the calculation of the damage alleged.

45 Next, as regards the entitlement to compensation claimed by the applicant, it must be noted that, according to settled case-law on milk quotas, it follows from *Mulder II* that the Community incurred liability *vis-à-vis* each producer who suffered reparable injury owing to his having been prevented from delivering milk as a result of the application of Regulation No 857/84 (see, in particular, *Hartmann*, cited above, paragraph 71).

46 In the light of the documents before the Court, which the defendants have not challenged, the applicant is in the situation of producers referred to in *Mulder II*. Since she had entered into a non-marketing undertaking pursuant to Regulation No 1078/77, she was prevented, as a result of Regulation No 857/84, from resuming the marketing of milk when that undertaking expired.

47 Moreover, since her non-marketing undertaking expired on 31 March 1985, that is to say, after the entry into force of the milk quota scheme, the applicant is not required to prove, in order to justify her entitlement to compensation, that she intended to resume milk production following the expiry of that undertaking, since the expression of such an intention was, in practice, rendered impossible from the time when that scheme entered into force.

48 It follows that the Council's argument in that connection must be rejected, and that it must be held that, unless the applicant's claim is time-barred, she is entitled to be compensated for her loss by the defendants.

49 It must therefore now be examined whether and to what extent the applicant's claim is time-barred.

50 In that regard, it must be observed that in this case the limitation period started to run on 1 April 1985, that being the day after the non-marketing undertaking expired and the date on which Regulation No 857/84 began to have injurious effects on the applicant by preventing her from resuming marketing milk (*Hartmann*, cited above, paragraph 130).

51 Moreover, as is clear from the case-law on milk quotas, the damage suffered by the applicant was not caused instantaneously but continued over a certain period, that is to say, for so long as the applicant was unable to obtain a reference quantity and, as a result, to deliver milk. The damage was continuous and recurred on a daily basis (*Hartmann*, cited above, paragraph 132, and Case T-76/94 *Jansma* v *Council and Commission* [2001] ECR II-243, paragraph 78).

52 As a result, the time bar under Article 43 of the Statute of the Court of Justice applies to the period preceding by more than five years the date of the event which interrupted the limitation period and does not affect rights which arose during subsequent periods (see, in particular, *Hartmann*, cited above, paragraph 132).

53 It follows that, in order to determine whether and to what extent the applicant's rights are time-barred, the date on which the limitation period was interrupted must be determined.

54 In order to determine that date, it is necessary to examine the undertaking given by the defendants not to plead limitation against actions brought by producers who were covered by the Communication of 5 August 1992 and to ascertain to what extent that undertaking, interpreted in the light of the rules derived from Article 43 of the Statute of the Court of Justice, produces effects *vis-à-vis* the applicant.

55 Thus, it must be borne in mind that under Article 43 of the Statute of the Court of Justice the limitation period is interrupted only if proceedings are instituted before the Community judicature or if, prior to such proceedings, an application is made to the relevant Community institution, provided always that, in the latter case, interruption only occurs if the application is followed by proceedings brought within the time-limits determined by reference to Article 173 of the EC Treaty (now, after amendment, Article 230 EC) or Article 175 of the EC Treaty (now Article 232 EC), depending on the case (Case 11/72 *Giordano* v *Commission* [1973] ECR 417, paragraph 6, and Case T-222/97 *Steffens* v *Council and Commission* [1998] ECR II-4175, paragraphs 35 and 42).

56 It must next be pointed out that the waiver of the right to plead limitation contained in the Communication of 5 August 1992 was a unilateral act which was intended to limit the number of actions brought by encouraging producers to await the introduction of the flat-rate compensation scheme provided for by Regulation No 2187/93 (*Steffens* v *Council and Commission*, cited above, paragraph 38).

57 Under that regulation, producers could apply for a compensation offer to be made to them, the time-limit for acceptance of which was two months. In the present case, the compensation offer was received by the applicant on 28 January 1994 and she failed to accept it within the period of two months which expired on 28 March 1994. Consequently, under Article 14 of Regulation No 2187/93, as from 29 March 1994 the institutions were no longer bound by that offer.

58 As to whether the Council and the Commission were once again entitled to plead limitation when the period of two months allowed for accepting the offer expired, the applicant argues that, since she brought the present action within two months following the expiry of the period allowed by Regulation No 2187/93 for accepting the settlement offer made to her, she must be able to rely on the undertaking given by the institutions in the Communication of 5 August 1992 in order to be able to plead interruption of the limitation period on the date of that communication.

59 Against that argument the defendants invoke the judgment in *Steffens* v *Council and Commission*, cited above (paragraphs 39 and 41), and argue that, in order to be able to rely on that undertaking, the applicant should have brought the action within the period allowed for accepting the offer.

60 In the light of the facts of this case, it is clear that applying that case-law to the present claim would lead to an outcome which could not be consistent with Article 43 of the Statute of the Court of Justice as interpreted in conjunction with Article 14 of Regulation No 2187/93 and that, therefore, it is necessary to limit the scope of what the Court of First Instance held in that judgment.

61 It must be held that, where the offer of compensation for damage falls within a context such as that of this case, in which producers were asked not to make a preliminary application or institute proceedings for compensation, because the institutions were introducing a system of flat-rate compensation by way of settlement, refusal of the compensation offer, whether express or resulting from expiry of the period for acceptance laid down in that context, may not have stricter consequences as regards the calculation of the limitation period than those which would ensue from a decision by the administration rejecting an application for compensation made by an individual. Such a refusal embodies, in the same way as a decision rejecting such an application, the disagreement between the administration and the person applying for compensation.

62 It follows that, in a case such as this, the event which causes the period of two months laid down in Article 43 of the Statute of the Court of Justice by reference to Article 173 of the Treaty to start to run is the date of expiry of the period for accepting the offer or, as the case may be, the date of express refusal of the offer.

63 Only that interpretation allows due regard to be had to the purpose of the period for acceptance, which is to afford the individual a certain time for reflection before making a decision on the compensation offered to him by way of settlement, a decision which, depending on its nature, will avoid recourse to legal action.

64 Thus, producers who, like the applicant, 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 of First Instance, then instituted such proceedings within a period of two months following the expiry of the period for accepting the offer made to them, must be entitled to rely on the undertaking given by the institutions to waive the right to plead limitation, and to have the period of limitation of their action interrupted, in accordance with Article 43 of the Statute of the Court of Justice, on the date of the Communication of 5 August 1992.

65 In the light of the foregoing, 5 August 1992 must be held to be the date of interruption of the limitation period for the purposes of the application. Consequently, in accordance with case-law (Joined Cases 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 and 282/82 *Birra Wührer and Others* v *Council and Commission* [1984] ECR 3693, paragraph 16, and *Hartmann*, cited above, paragraph 140), the period in respect of which compensation is payable is the five years preceding that date. That period therefore covers the period from 5 August 1987 to 28 March 1989, which was the day before the entry into force of Regulation No 764/89, which put an end to the damage sustained by the applicant by enabling producers who were in the same situation as the applicant thereafter to be allocated special reference quantities.

66 As regards the amount of compensation, it must be pointed out that the parties have not yet had the opportunity to express their views specifically on the quantum of damages in respect of the period determined by the Court.

67 When the proceedings in the present case were resumed, the parties were requested to concentrate on the problem of the existence of entitlement to damages, first because the quantum of damages depends on the period during which the damage sustained by the applicant is found by the Court to have to be made good by the Community and, second, in order to provide the parties with the opportunity to negotiate the amount of compensation according to the criteria laid down by the Court of Justice in *Mulder and Others* v *Council and Commission*, cited above.

68 In those circumstances, the Court asks the parties to attempt to reach, within six months, an agreement on this point in the light of this judgment and of the explanations contained in the judgment in *Mulder and Others* v *Council and Commission*, cited above, as regards the manner in which the damage is to be calculated. In the event of failure to reach agreement, the parties shall submit to the Court within that period their quantified claims.

Costs

69 Having regard to what has been stated in paragraph 68, the decision as to costs must be reserved.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

by way of interim decision, hereby:

1. Declares that the defendants are bound to make good the damage sustained by the applicant as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, in so far as those regulations did not make provision for the allocation of a reference quantity to 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 milk during the reference year opted for by the Member State concerned;

2. Declares that the period in respect of which the applicant must be compensated for the losses sustained as a result of the application of Regulation No 857/84 is that beginning on 5 August 1987 and ending on 28 March 1989;

3. **Orders the parties to forward to the Court, within six months of this judgment, particulars of the amounts to be paid, established by mutual agreement;**

4. **Orders the parties, in the absence of such agreement, to submit to the Court within the same period their quantified claims;**

5. **Reserves the costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 7 February 2002.

H. Jung

Registrar

P. Mengozzi

President