JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 January 1999 *

In Case T-1/96,

Bernhard Böckner-Lensing and **Ludger Schulze-Beiering**, farmers carrying on business in a partnership under German civil law, residing in Borken (Germany), represented by Bernd Meisterernst, Mechtild Düsing, Dietrich Manstetten, Frank Schulze and Klaus Kettner, Rechtsanwälte, Münster, with an address for service in Luxembourg at the Chambers of Dupong et Dupong, 4-6 Rue de la Boucherie,

applicants,

v

Council of the European Union, represented by Arthur Brautigam, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe, Georg M. Berrisch and Marco Núñez-Müller, Rechtsanwälte, Hamburg, and members of the Brussels Bar, with an address for service in Luxembourg at the office of Alessandro Morbili, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented by Dierk Boo, Principal Legal Adviser, and Michael Niejahr, of its Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe, Georg M. Berrisch and Marco Núñez-Müller,

* Language of the case: German.

Rechtsanwälte, Hamburg, and members of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for compensation, under Article 178 and the second paragraph of Article 215 of the EC Treaty, for damage suffered by the applicants as a result of their being 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 (OJ 1984 L 132, p. 11),

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

composed of: B. Vesterdorf, President, R. M. Moura Ramos and P. Mengozzi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 September 1998,

gives the following

Judgment

Legal framework

1 In 1977, in order to reduce 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, hereinafter 'Regulation No 1078/77'). Under that regulation, producers were offered a premium in return for an undertaking not to market milk or convert their herds for a period of five years.

2 Notwithstanding the fact that many producers gave such undertakings, overproduction continued in 1983. The Council thus 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 (OJ 1984 L 90, p. 13, hereinafter 'Regulation No 857/84') fixed the reference quantity for each producer on the basis of production delivered during a reference year, that is to say the 1981 calendar year, subject to allowing the Member States to choose the 1982 or 1983 calendar year. Germany chose 1983 as its 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 were awarded no reference quantity and, consequently, were unable to produce 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 (hereinafter '*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 No 804/68 (OJ 1984 L 132, p. 11), invalid on the ground that it infringed the principle of protection of legitimate expectations.

6 In order 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 The award of that special reference quantity was subject to several conditions. Certain of those conditions, in particular those dealing with the point in time when the non-marketing undertaking expired, were declared invalid by the Court in its 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, hereinafter 'Regulation No 1639/91') which, by removing the conditions 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, hereinafter '*Mulder II*', the Court 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 given undertakings under 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). After setting out the implications of the judgment in *Mulder II*, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned in order to give full effect to that judgment. Until such time as those arrangements were adopted, the institutions undertook not to plead against any producer entitled to compensation that entitlement to claim was barred by lapse of time under Article 43 of the EEC Statute of the Court of Justice. However, that undertaking was made subject to the proviso that entitlement to compensation had not already been barred through lapse of time on the date of publication of the aforesaid Communication or on the date on which the producer had applied to one of the institutions.

11 Next, 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 of flat-rate compensation to producers who, in certain circumstances, had suffered losses as a result of application of the rules at issue in *Mulder II*.

Background to the dispute

12 Mr Bocker-Lensing, a farmer in Borken (Germany), signed a non-marketing undertaking under the aegis of Regulation No 1078/77. That undertaking came to an end on 18 March 1983. On its expiry, the applicant did not resume milk production.

13 By an agreement dated 13 September 1988, the applicant entered into a partnership with another farmer, Mr Schulze-Beiering, to operate a farm with effect from 15

September 1988. He brought into the partnership the farmland in respect of which he had signed the non-marketing undertaking.

14 By a letter dated 28 June 1989 he applied to the national authorities for the grant of a reference quantity.

15 By letters dated 21 December 1990 and addressed to the Council and the Commission, the first applicant sought compensation for the losses suffered. In their replies, dated 11 January 1991 and 19 February 1991, the institutions declared that they were minded not to claim that his rights were barred by lapse of time until after the expiry of a period of three months from the date of publication in the *Official Journal of the European Communities* of the judgment in *Mulder II*, provided that his rights were not already time-barred.

16 Following the adoption of Regulation No 1639/91, the national authorities refused to allocate a reference quantity to the first applicant on the ground that, since he had brought into the partnership the farmland subject to the non-marketing undertaking, he could no longer be regarded as a 'producer' within the meaning of Article 12(c) of Regulation No 857/84.

17 After the adoption of Regulation No 2187/93 on 22 July 1993, the first applicant asked for the offer of compensation provided for therein to be addressed to him. That request was turned down on the ground that, contrary to the requirements of the regulation, neither applicant had been allocated a definitive reference quantity.

18 Following the judgment of the Court of 27 January 1994 in Case C-98/91 *Herbrink* [1994] ECR I-223, which upheld a partnership's right to the grant of a special reference quantity, the Bocker-Beiering partnership received from the national authorities on 10 April 1995 a provisional special reference quantity which became definitive on 5 July 1996.

19 By a letter dated 5 April 1995, the applicants wrote to the Commission, claiming that they were entitled to compensation. By a letter dated 30 May 1995, the Commission replied that checks were being made in order to determine to what extent compensation might be granted to them. That letter was not followed up.

20 By an agreement dated 27 June 1996, the first applicant assigned to the partnership his rights to compensation as against the Community.

Procedure and forms of order sought by the parties

21 By an application lodged on 2 January 1996, the applicants brought these proceedings. In addition to the form of order mentioned above, they also requested that the case be suspended.

22 By a document lodged on 5 February 1996, the Council and the Commission opposed that request which was rejected by order of 27 February 1996 of the President of the First Chamber of the Court of First Instance.

23 On hearing the Report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry, but requested the parties to reply to certain questions in writing.

24 The applicants claim that the Court should:

— order the defendants to pay to them for the period from 2 April 1984 to 13 June 1991 compensation in the amount of DM 118 436.52, together with interest at the rate of 8% per annum with effect from 19 May 1992;

— order the defendants to pay the costs including experts' fees amounting to DM 1961.90.

25 The defendants contend that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicants to pay the costs.

Law

26 The applicants claim that the conditions under which the Community may be held liable for the losses suffered by them are satisfied. The defendants deny that those conditions are satisfied and plead the inadmissibility of the action on the ground that it is in breach of Article 44(1)(c) of the Rules of Procedure and that the rights claimed are barred by lapse of time.

Admissibility

27 The defendants contend that the application does not meet the requirements of Article 44(1)(c) of the Rules of Procedure. The application, they argue, did not demonstrate by what means the first applicant assigned to the partnership the rights to compensation claimed.

28 They go on to point out that those rights are barred by lapse of time. The letters sent by the first applicant to the Council and the Commission on 21 December 1990 were not such, it is alleged, as to interrupt the limitation period, since the

applicants did not bring an action within the period of two months laid down in Article 173 of the Treaty, to which the third sentence of Article 43 of the Statute of the Court refers. In those circumstances, when the action was brought on 2 January 1996, all rights arising prior to 2 January 1991 were barred by lapse of time.

29 The Court points out that, under Article 44(1)(c) of the Rules of Procedure, the application must indicate the subject-matter of the dispute and give a summary account of the pleas raised.

30 In the present case, proof of the assignment to the partnership of the first applicant's rights to compensation is provided by the agreement entered into between the two parties on 27 June 1996 and annexed to the file by the applicants at the stage of the reply. It is clear from that document that the first applicant assigned to the partnership the rights to compensation which he held prior to its creation.

31 In regard to the time-bar, the Court considers that this is a plea which is likely to affect the scope of the right to compensation relied on by the applicants. It is therefore appropriate to examine first of all whether the conditions under which the Community may be held liable under Article 215 of the Treaty are satisfied.

32 It follows from the foregoing that the application is admissible.

Liability of the Community

Arguments of the parties

33 The applicants claim to have suffered loss owing to the fact that Regulation No 857/84, declared invalid by the Court, did not grant them a reference quantity. On the basis of the judgment in *Mulder II*, they maintain, the Community institutions are liable in damages for that loss.

34 The period during which the applicants were prevented from producing extended, it is claimed, until the time when a provisional reference quantity was granted to them in 1995 following the abovementioned judgment in *Herbrink*. However, with effect from adoption of Regulation No 1639/91 which granted a reference quantity to producers in their position, responsibility for withholding that quantity rests with the national authorities. Accordingly, the period in respect of which compensation is payable in the present case extends only until 13 June 1991, the date on which Regulation No 1639/91 entered into force.

35 In reply to the defendants' arguments to the effect that there is no causal link between the loss and the Community act, the applicants assert that, in the *Spagl* and *Pastätter* judgments cited above, the Court held that producers who had signed a non-marketing undertaking could not be required to resume milk production immediately upon the expiry of that undertaking. Consequently, every producer whose non-marketing period expired in 1983 ought to have been given time to modernise his plant and stock before resuming production.

36 The applicants state that they were intending to resume milk production after modernising their stock, which they were prevented from doing by Regulation No 857/84. In any event, it follows, in their view, from the judgment of the Court in Case C-85/90 *Dowling* [1992] ECR I-5305 that producers envisaging a resumption of milk production ought to have had at least the period from 1 January 1983 until the entry into force in 1984 of Regulation No 857/84 in which to do so.

37 As regards their status as producers, which was called in question by the defendants, the applicants state that a definitive reference quantity was granted to them by the national authorities, thereby recognising them as producers. The Community institutions are bound by that recognition.

38 The defendants deny that the Community has incurred liability to the applicants. The first applicant decided voluntarily not to resume production on the expiry of his non-marketing undertaking in 1983. Accordingly, since he decided to abandon production for reasons which had nothing to do with the undertaking or its

consequences, the principle of the protection of legitimate expectations cannot be alleged to have been breached. The loss of income pleaded is therefore not causally linked in any way to the Community's legislative activity.

Findings of the Court

39 Under the second paragraph of Article 215 of the Treaty, the Community can incur non-contractual liability for damage caused by the institutions only if a set of conditions relating to the illegality of the conduct complained of, the occurrence of actual damage and the existence of a causal link between the unlawful conduct and the harm alleged are fulfilled (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, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

40 As regards the position of milk producers who have signed a non-marketing undertaking, 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 (*Mulder II*, paragraph 22).

41 That liability is based on breach of the principle of protection of the legitimate expectation which a producer who has been encouraged by a Community measure to suspend marketing of milk for a limited period in the general interest and against payment of a premium is entitled to have in the limited scope of his non-marketing undertaking (see *Mulder I*, paragraph 24, and *Von Deetzen*, paragraph 13). On the other hand, the principle of protection of legitimate expectations does not preclude, in the case of a scheme such as that concerning the additional levy, the imposition of restrictions on a producer by reason of the fact that he has not marketed milk during a given period prior to the entry into force of that scheme, for reasons which have nothing to do with his non-marketing undertaking.

42 The applicants plead that they were unlawfully deprived of a reference quantity between 2 April 1984 and 13 June 1991 as a result of the application of Regulation No 857/84. That regulation, it is claimed, frustrated the first applicant's aspiration to resume milk production at the end of his non-marketing period.

43 In the circumstances of the case, it must first be examined whether the allegations made by the applicants in support of the right to compensation are proven, in particular, in regard to the existence of unlawful conduct on the part of the institutions and the occurrence of the alleged loss.

44 The first applicant did not resume milk production at the end of his non-marketing period in March 1983 nor did he evince the intention of doing so until several years later. As the Commission rightly points out, the experts' report produced by the applicants shows that installations were properly maintained throughout the period of the undertaking's validity. The applicant could therefore have resumed production in 1983 and thus been allocated a reference quantity on the entry into force of the additional levy in 1984.

45 Moreover, the reasons why milk production was not resumed on the expiry of the non-marketing undertaking had nothing to do with the fact that an undertaking had been entered into under Regulation No 1078/77. As counsel for the applicants stated at the hearing, the first applicant wanted time in which to build up the capital needed for modernisation of the installations.

46 Unlike the applicants in *Spagl* and *Pastätter*, cited above, the first applicant has not in this case shown that he took steps which would have borne out his intention to resume production at the end of the non-marketing period.

47 Having voluntarily decided not to resume milk production, he cannot claim to have a legitimate expectation in the possibility of resuming production at some unspecified future point in time. Indeed, in the sphere of the common organisations of the market, whose purpose involves constant adjustments to meet changes in the economic situation, economic agents cannot legitimately expect that they will not be subject to restrictions arising out of future rules of market or structural policy (see, to that effect, Joined Cases 424/85 and 425/85 *Frico* [1987] ECR 2755, paragraph 33; *Mulder I*, paragraph 23; and *Von Deetzen*, cited above, paragraph 12).

48 In those circumstances, the first applicant was not a producer to whom Regulation No 764/89 of 20 March 1989 and Regulation No 1639/91 applied, since those legislative acts were merely intended to bring to an end the refusal to allocate a reference quantity to producers who had been prevented from resuming marketing on the expiry of their undertaking.

49 It follows from the foregoing that the Community cannot be held liable to the applicants as a result of the application of Regulation No 857/84.

50 The fact that the applicants obtained a reference quantity from the national authorities on 10 April 1995 in no way alters that conclusion. Since the conduct of national authorities is not binding on the Community, the allocation of a reference quantity does not prejudge the question whether there is a right to compensation under the second paragraph of Article 215 of the Treaty.

51 Furthermore, the applicants cannot claim to have suffered loss during the period from 2 April 1984 to 28 June 1989 on the ground that that they were prevented from resuming milk production. Indeed, the first applicant did not seek the allocation of a reference quantity until 28 June 1989.

52 Thus, in the absence of any unlawful act on the part of the defendants giving rise to the loss claimed, the Community cannot be held liable. Accordingly, it is not necessary to examine whether the other preconditions of such liability are met.

53 Nor, in those circumstances, is there any need to examine the question whether the rights in question are barred by lapse of time.

54 It follows from all the foregoing that the action must be dismissed.

Costs

55 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 applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicants to pay the costs.

Vesterdorf Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 13 January 1999.

H. Jung B. Vesterdorf

Registrar President