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

In Case T-261/94,

Bernhard Schulte, residing in Delbrück (Germany), represented by R. Freise, lawyer,

applicant,

v

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

and

Commission of the European Communities, represented by D. Booß and M. Niejahr, acting as Agents, and M. Núñez-Müller, lawyer, 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 his having been prevented from marketing milk by virtue of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (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 26 April 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). The new Article 3a of the latter regulation provided, in essence, that producers who refrained, pursuant to an undertaking given under Regulation No 1078/77, from delivering milk during the reference year would receive, under certain conditions, a special reference quantity (or 'quota') calculated on the basis of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the 12 months preceding the month in which the application for the non-marketing or conversion premium was made.

7 Article 3a of Regulation No 857/84, as amended, made the allocation of reference quantities subject to a number of conditions, requiring in particular that producers:

'(a) did not... transfer the whole of their dairy enterprise before the end of the non-marketing or conversion period;

(b) establish in support of their request... that they are able to produce on their holding up to the reference quantity requested;

...'.

8 That provision was supplemented by Article 7a of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12), as amended by Commission Regulation (EEC) No 1033/89 of 20 April 1989 (OJ 1989 L 110, p. 27), which provides, in its first subparagraph, that '[t]he special reference quantity granted under the conditions laid down in Article 3a of Regulation (EEC) No 857/84 shall, in the event of the transfer of the holding by inheritance or by any similar transaction, be transferred... provided that the producer to whom the holding is transferred in whole or in part undertakes in writing to comply with the undertakings of his predecessor'.

9 By judgment in Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 23, the Court of Justice interpreted Article 3a of amended Regulation No 857/84 as meaning that 'for the purposes of that provision "producers" includes not just farmers who themselves entered into an undertaking pursuant to Regulation No 1078/77 but also those who, after the expiry of the undertaking entered into by the farmer, have taken over the holding in question by succession or by a similar transaction'.

10 Other conditions for the allocation of a special reference quantity, in particular those dealing with the time when the non-marketing undertaking expired, were declared invalid by the Court in 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.

11 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.

12 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.

13 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 *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.

14 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 or on the date on which the producer had applied to one of the institutions.

15 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*.

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 to the dispute

17 The applicant is a milk producer in Germany, whose father signed a non-marketing undertaking, expiring on 5 October 1984, under Regulation No 1078/77.

18 By deed of gift dated 17 November 1988, authenticated by decision of the Amtsgericht Paderborn (District Court, Paderborn) (Germany) of 20 June 1990, the applicant acquired by way of anticipatory succession the farm which had been the subject-matter of that undertaking.

19 Following the entry into force of Regulation No 764/89, the applicant applied, by letter of 12 June 1989, to be allocated a provisional special reference quantity. After being refused that quantity by final decision of the competent national authorities of 1 December 1989, on the ground that he did not satisfy the conditions laid down for the grant of a quota, he challenged that decision before the competent German court.

20 Following the entry into force of Regulation No 1639/91, the applicant again applied, by letter of 30 September 1991, to be granted a provisional special reference quantity. By decision of the national authorities of 17 March 1992, the certificate necessary for the allocation of such a reference quantity was issued to him. The applicant therefore discontinued the action which he had brought against the national authorities' decision of 1 December 1989. The case was removed from the register by order of 15 April 1993.

21 On 1 May 1992 the applicant resumed milk production. By decision of 29 June 1993, he was allocated a definitive reference quantity.

22 Following the judgment in *Mulder II*, the applicant applied to the defendants, by letter of 23 June 1992, for compensation for the losses which he had allegedly sustained.

23 On 27 January 1994 the Bundesamt für Ernährung und Forstwirtschaft (German Federal Office for Food and Forestry, 'the BEF') made him a compensation offer under Regulation No 2187/93.

24 By letter of 18 March 1994, the applicant rejected that offer and claimed a higher amount of compensation. By letter of 18 April 1994, the BEF made him a new, higher compensation offer, which he rejected by letter of 22 April 1994.

Procedure and forms of order sought by the parties

25 By application lodged at the Registry of the Court of First Instance on 8 July 1994, the applicant initiated the present proceedings.

26 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*).

27 The present proceedings were resumed following delivery of the judgment of the Court of Justice in the abovementioned cases.

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

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure. In the context of the measures of organisation of procedure, it invited the parties to reply in writing to certain questions. The parties complied with that request.

30 The hearing scheduled for 29 March 2001 could not be held owing to the absence, for reasons of health, of the applicant's counsel.

31 The parties presented oral argument and replied to the Court's oral questions at the hearing on 26 April 2001.

32 The applicant claims that the Court should order the defendants to pay him the sum of 254 922.45 German marks (DEM) together with interest.

33 The defendants contend that the Court should:

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

— order the applicant to pay the costs.

34 By letter of 17 April 2001, the applicant informed the Court that he had recalculated the amount of the damages in the light of the parameters determined by the Court of Justice in the judgment of 27 January 2000 in *Mulder and Others* v *Council and Commission*, cited above, and that he was accordingly reducing the amount of his claim for compensation to DEM 30 000 together with interest.

35 At the hearing, the defendants requested the Court not to include that document in the file, on the ground that it had been lodged after the end of the written procedure with no reason to justify such lateness. In addition, irrespective of the outcome of the present proceedings, they requested that the applicant be ordered, under Article 87(3) of the Rules of Procedure of the Court of First Instance, to pay the costs incurred on 29 March 2001 for the purpose of attending the hearing which in the end did not take place.

Law

Arguments of the parties

36 The applicant claims that the conditions for putting in issue the Community's liability for the damage which he has suffered are satisfied. He argues that he is entitled to compensation for the loss sustained as a result of his being prevented from producing milk under Regulation No 857/84.

37 The period in respect of which he is applying for compensation runs from 23 June 1987, that is, five years before the letter of 23 June 1992, which interrupted the limitation period, to 5 April 1992. He quantifies the loss at DEM 30 000 together with interest.

38 Contrary to what the defendants claim, the applicant submits that he should be regarded as a SLOM II producer, that is, a producer whose loss caused by the refusal to grant a quota ended only with the entry into force of Regulation No 1639/91.

39 He maintains that the limitation period of five years laid down in Article 43 of the Statute of the Court of Justice was interrupted by his letter of 23 June 1992 to the defendants and that, therefore, only entitlements existing prior to 23 June 1987 are time-barred.

40 The defendants contend that the applicant's claim is unfounded and that, in any event, it is time-barred in its entirety.

Findings of the Court

41 As a preliminary point, the Court would observe that, in the present case, before the question whether the action is time-barred can be examined, it must first be determined whether the liability of the Community under Article 215 of the EC Treaty (now Article 288 EC) is susceptible of being incurred and, if so, until what date.

42 The non-contractual liability of the Community for damage caused by the institutions, provided for in the second paragraph of Article 215 of the EC Treaty, may be incurred 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 is 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).

43 As regards the position of milk producers who have entered into 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).

44 That liability is based on breach of the legitimate expectation which producers who were encouraged by a Community measure to suspend marketing of milk for a limited period in the general interest and against payment of a premium were entitled to have in the limited scope of their non-marketing undertakings (*Mulder I*, paragraph 24, and *Von Deetzen*, paragraph 13, cited above).

45 The defendants argue that the Community cannot incur liability in the present case because the applicant's father voluntarily abandoned milk production before the expiry of his non-marketing undertaking. The applicant's father did not intend to resume milk production on the expiry of that undertaking and the applicant may not, therefore, claim to have suffered harm as a result of the entry into force of the milk quota scheme.

46 There is no need, in the present case, to rule on that argument advanced by the defendants. Even if it were to prove to be the case that Regulation No 857/84 gave rise to the loss of earnings alleged by the applicant, it is clear from the documents before the Court that the liability which could be imputed to the Community on that account ceased before Regulation No 764/89 entered into force on 29 March 1989 and that any entitlement to compensation which existed before that date is time-barred.

47 It must be borne in mind that the applicant claims to be a SLOM II producer by reason of the fact that he was only granted a quota after the entry into force of Regulation No 1639/91 on 15 June 1991. According to him, the reasons which led the national authorities to refuse him a milk quota in 1989 were based on the fact that Regulation No 764/89 did not provide for the allocation of such quotas to producers who, like himself, had taken over a SLOM holding by way of succession after the expiry of the non-marketing undertaking entered into by their predecessor in title, a situation which was similar to that dealt with by the Court of Justice in *Rauh*, cited above. Since that situation was only remedied with the entry into force of Regulation No 1639/91, which finally made it possible for those producers to be granted a milk quota, the loss of earnings attributable to the Community extended until the day when, after the abovementioned date, the applicant received a quota allowing him to resume milk production.

48 Although it is not disputed that the applicant only obtained a milk quota after the entry into force of Regulation No 1639/91, the fact remains that the documents

before the Court show that the reasons which underlay the national authorities' refusal to grant his application in 1989 were not connected solely with his capacity as heir, but with the fact that the applicant's situation did not satisfy the conditions for the allocation of a milk quota under Article 3a of Regulation No 857/84, as amended.

49 It is clear from the decision of the national authorities of 1 December 1989, by which they refused to grant the applicant the certificate necessary to obtain a milk quota, that, regardless of the question concerning his capacity as heir, the applicant could not claim to be entitled to a milk quota under Article 3a of Regulation No 857/84, as amended by Regulation No 764/89, for three reasons. First, by leasing out virtually all his land until 1991, the applicant's father voluntarily abandoned milk production during the non-marketing period; second, the SLOM holding was only farmed to a very small extent by the applicant since a very large proportion of the agricultural area had been leased out; and third, the little remaining area cannot be regarded as an agricultural holding (decision of 1 December 1989, p. 4 et seq.).

50 The national authorities concluded that decision as follows:

'A certificate under Article... must therefore be refused not only because the non-marketing period which ended after 31 December 1983 was not yours (point (a)), but also because the holding in respect of which the non-marketing premium was applied for has in practice already been completely abandoned during the non-marketing period (point (b)) and is in any event no longer "operated" by you, even in part (point (c)), since the use of 0.5 hectare of pasture for sheep cannot be regarded as an agricultural holding. In addition, it is doubtful whether, in the case of that small area, it can be certified that you are capable of producing on your holding the reference delivery quantity of 38 060 kg..., particularly since up to now no proof of the claimed leasing of additional land has been provided.'

51 Consequently, the effect of that decision is that, even if the applicant had been the person who entered into the non-marketing undertaking, the national authorities would not have allocated him a reference quantity after the entry into force of Regulation No 764/89, because they took the view that he did not satisfy the conditions for such an allocation.

52 It follows that the decision giving rise to the damage alleged by the applicant, namely the decision of 1 December 1989 refusing the issue of a certificate necessary to obtain a quota, does not stem from any lacuna or lack of precision in Regulation No 764/89 with regard to the position of producers who have taken over a SLOM holding through an inheritance or a similar transaction, but is based on the assessment which the national authorities made, independently, of the applicant's position in the light of the conditions for the grant of a quota (see paragraph 7 above), the legality of which, moreover, is not called in question by the applicant.

53 It must therefore be concluded that, even if a causal link had been established between the illegality of Regulation No 857/84 and the damage alleged by the applicant, which the defendants dispute, that link would have been broken by that decision of the national authorities.

54 That conclusion cannot be invalidated by the fact that the applicant obtained a reference quantity after the entry into force of Regulation No 1639/91, after the national authorities issued the necessary certificate to him on 17 March 1992.

55 In that connection, the documents before the Court, in particular the order of the Verwaltungsgericht Minden (Administrative Court, Minden) (Germany) of 15 April 1993, show that the proceedings instituted by the applicant against

the decision of the national authorities of 1 December 1989 ended because the two sides reached an amicable settlement. At the hearing on 26 April 2001 the applicant explained to the Court that that settlement came about after the national authorities finally decided to allocate a milk quota to him. According to the applicant, that decision is directly linked to the amendment of the Community legislation effected as a result of the entry into force of Regulation No 1639/91 which expressly provided that producers who, like him, had taken over a SLOM holding through an inheritance could receive a quota.

56 On the assumption that that assessment is correct, it nevertheless does not mean that the unequivocal terms in which the decision of 1 December 1989 is couched can be disregarded. Those terms embody the grounds for rejection, which, as the Court has already stated (see paragraph 52 above), go beyond the reasons which prompted the Community legislature to adopt the abovementioned amendment introduced by Regulation No 1639/91 following, in particular, the judgment in *Rauh*, cited above.

57 It follows that the refusal of a milk quota after the entry into force of Regulation No 764/89, namely on 29 March 1989, is the result of an autonomous decision by the national authorities, based on considerations which are, to a very large extent, different from those mentioned by the Court of Justice in *Rauh*. Consequently, the Community's liability for losses resulting from the application of Regulation No 857/84 cannot be incurred with respect to losses sustained after that date.

58 It is appropriate to set out, next, the reasons for which the applicant's claim is time-barred.

59 The limitation period laid down by Article 43 of the Statute of the Court of Justice, which applies to the procedure before the Court of First Instance in

accordance with Article 46 of that Statute, cannot start to run before all the requirements governing the obligation to make good the damage are satisfied and, in particular, in cases where liability stems from a legislative measure, before the injurious effects of the measure have been produced (judgment of the Court of First Instance in Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107).

60 In this case, the damage arising from the impossibility of utilising a reference quantity was suffered as from the day on which, following the expiry of the non-marketing undertaking entered into by the applicant's father, the applicant could have resumed milk deliveries if he had not been refused such a quantity, that is to say, from 6 October 1984, the date on which Regulation No 857/84 became applicable to him. It was on that date, therefore, that the requirements for bringing an action for compensation against the Community were fulfilled and that the limitation period started to run.

61 For the purposes of determining the period during which the damage was suffered, it must be noted that that damage was not caused instantaneously. It continued over a certain period, that is to say, for so long as the applicant was unable to obtain a reference quantity. The damage was continuous and recurred on a daily basis (*Hartmann*, cited above, paragraph 132). Entitlement to compensation relates, therefore, to consecutive periods commencing on each day on which it was not possible to market milk.

62 Since it has been held that the losses which the applicant claims to have sustained after 29 March 1989, the date of the entry into force of Regulation No 764/89, are no longer linked to the illegality of the Community legislation and therefore attributable to the Community, the limitation period expired five years after that date, namely on 29 March 1994, unless it was interrupted before that date.

63 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 instituted within the time-limits determined by reference to Article 173 of the 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). The reference in the last sentence of Article 43 of the Statute to Articles 173 and 175 of the Treaty has the effect of rendering applicable, as far as interruption of the limitation period is concerned, the rules for calculating the time-limits laid down by those provisions (Joined Cases T-195/94 and T-202/94 *Quiller and Heusmann* v *Council and Commission* [1997] ECR II-2247, paragraph 132).

64 The applicant submitted to the Commission an application for compensation for losses by letter of 23 June 1992 and the Communication of 5 August 1992 was adopted within the time-limits laid down by the articles cited above.

65 In those circumstances, it must be examined to what extent the applicant may rely on the undertaking given by the Community institutions not to plead limitation, which is contained in that communication, in order to benefit from interruption of the limitation period on the date of his application of 23 June 1992.

66 It must 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). 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.

67 Having regard to its purpose, that waiver ceased to have effect at the end of the period allowed for accepting the compensation offer or upon the explicit rejection of that offer, if it took place before the expiry of that period. Consequently, the institutions once again became entitled, from that time onwards, to plead limitation (*Steffens* v *Council and Commission*, cited above, paragraphs 39 and 40).

68 It must be held that when a producer has received a compensation offer under Regulation No 2187/93, he may enjoy the benefit of the waiver of the right to plead limitation, contained in the Communication of 5 August 1992, only if he has instituted proceedings for compensation within two months following the expiry of the period allowed for accepting the compensation offer or if that offer is explicitly rejected before the expiry of that period. In such a case, the limitation period was interrupted on 5 August 1992.

69 However, if that producer sent an application for compensation to the institutions on a date prior to the Communication of 5 August 1992, and if that application was made within the period laid down by the last sentence of Article 43 of the Statute of the Court of Justice for instituting proceedings before the Court of First Instance, it must be held that the limitation period was interrupted on the day on which the application for compensation was made. In that case, the undertaking given by the institutions results in suspension of the period laid down for instituting proceedings, mentioned in the last sentence of Article 43 of the Statute of the Court of Justice, for as long as the waiver referred to above produces effects.

70 In the light of the foregoing, since the applicant received a revised offer of compensation by letter from the national authorities of 18 April 1994 and refused it by letter of 22 April 1994, he should, in order to be entitled to plead interruption of the limitation period on the date of his letter of 23 June 1992, have instituted proceedings for compensation at the latest within the period of two months following the date of his refusal, plus the extension on account of distance, namely on 28 June 1994.

71 The applicant failed to do so, since the present proceedings were instituted on 8 July 1994.

72 Since the last time that the applicant suffered loss was more than five years before that date, namely on 28 March 1989, that being the day before the entry into force of Regulation No 764/89, which terminated the Community's liability *vis-à-vis* the applicant, it must be concluded that the proceedings were instituted too late, when all the applicant's rights to compensation had already become time-barred.

73 It follows from all the foregoing considerations that the application must be dismissed and that there is no need to rule on the defendants' request concerning the inclusion of the letter of 17 April 2001 in the file.

Costs

74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs, as applied for by the defendants.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

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

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 7 February 2002.

H. Jung
Registrar

P. Mengozzi
President