# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
31 January 2001 *

In Case T-533/93,

**Edouard Bouma**, residing in Rutten (Netherlands), represented by E.H. Pijnacker Hordijk and H.J. Bronkhorst, lawyers, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by A.-M. Colaert, acting as Agent, with an address for service in Luxembourg,

and

**Commission of the European Communities**, represented by T. van Rijn, acting as Agent, with an address for service in Luxembourg,

defendants,

* Language of the case: Dutch.

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 No 804/68 (OJ 1984 L 132, p. 11),

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

composed of: V. Tiili, President, R.M. Moura Ramos and P. Mengozzi, Judges,
Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2000,

gives the following

## Judgment

### Legislative framework

1 In 1977, in view of 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 undertaking not to market milk, or undertaking to convert their herds, for a period of five years, in return for a premium.

2 Despite the fact that many producers gave such undertakings, overproduction 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 Kingdom of the Netherlands 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 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 that special reference quantity was subject to several conditions. Certain of those conditions, 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* v *Hauptzollamt Rosenheim* [1990] ECR I-4539 and Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [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 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 *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 or on the date on which the producer had applied to one of the institutions.

12 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 application of the rules referred to in *Mulder II*.

13 By judgment 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 of the dispute

14 The applicant is a milk producer in the Netherlands. In the context of Regulation No 1078/77, the applicant's father gave a non-marketing undertaking, which

expired on 20 April 1983. Before that date he transferred his farm to the applicant, who himself agreed to comply with the non-marketing undertaking.

15 The applicant did not resume milk production when his undertaking expired.

16 Following the adoption of Regulation No 1639/91, the applicant applied to be allocated a provisional reference quantity, which was allocated by decision of 28 October 1991.

17 On 22 March 1993, the Algemene Inspectiedienst (General Inspectorate Service) carried out an inspection to check the circumstances in which the applicant had resumed milk production. Following the report made by that service, the competent Netherlands authority, by decision of 4 May 1993, withdrew the provisional reference quantity allocated to the applicant.

**Procedure and forms of order sought by the parties**

18 By application lodged at the Registry of the Court of First Instance on 30 September 1993, the applicant initiated the present proceedings.

19 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*).

20 By order of 11 March 1999, the President of the Fourth Chamber, Extended Composition, of the Court of First Instance, after hearing the parties at an informal meeting on 30 September 1998, ordered that the proceedings be resumed.

21 By decision of 7 October 1999, the case was assigned to a chamber of three judges.

22 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure. Within the context of the measures of organisation of procedure, the Court invited the applicant to submit certain documents and to reply in writing to a question.

23 The parties presented oral argument and replied to the Court's oral questions at the hearing on 17 May 2000.

24 The applicant claims that the Court should:

— order the Community to pay him the sum of 376 511 Netherlands guilders (NLG) by way of compensation for the harm which he sustained between 1 April 1984 and the day on which he resumed milk production, together with default interest at the rate of 8% per annum from 19 May 1992;

— in the alternative, order the Community to make such award as the Court deems appropriate, being not less than NLG 149 032, which corresponds to the sum payable pursuant to Regulation No 2187/93, together with default interest at the rate of 8% per annum from 19 May 1992;

— order the Community to pay the costs.

25 The Council contends that the Court should:

— declare the action inadmissible in part and, in any event, dismiss it as unfounded;

— in the alternative, determine the period over which the harm suffered by the applicant extends and determine a period of 12 months from the date of judgment so that the parties can agree the quantum of compensation;

— order the applicant to pay the costs.

26 The Commission contends that the Court should:

— declare the action inadmissible in part and, in any event, dismiss it as unfounded;

— in the alternative, declare that the period in respect of which compensation is payable runs from 5 August 1987 to 14 June 1991 and determine a period of 12 months from the date of judgment so that the parties can agree the quantum of compensation;

— order the applicant to pay the costs.

## Law

27 The applicant claims that the conditions which render the Community liable for the harm which he has sustained are fulfilled. The defendants maintain that the action is inadmissible in part because the rights to compensation on which the applicant relies are in part time-barred.

28 The Court considers that in the present case before it can examine the limitation period it must first determine 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.

### *Arguments of the parties*

29 The applicant states, first of all, that the damage in respect of which he claims compensation relates only to the period expiring on the day on which he was able to resume milk production. On the other hand, the damage which he sustained following the withdrawal of his provisional milk quota forms the subject-matter of the case registered at the Registry of the Court of First Instance as Case T-94/98.

30 The applicant claims that the Community is liable for the harm which he sustained owing to the fact that the Community legislation deprived him of a

quota from 1984 and which did not cease until Regulation No 1639/91 entered into force and he was allocated a provisional quota on 28 October 1991. He bases his claim on the judgment in *Mulder II*.

31 He disputes the defendants' argument that he is not entitled to compensation because he did not resume milk production upon expiry of the non-marketing undertaking. He states that he was unable to resume milk production in 1983 because he lacked the financial means to do so, or during the winter of 1983/84 because he had no fodder. Had he known that the supplementary levy scheme would enter into force in April 1984, he would have immediately resumed milk production in 1983 by borrowing money from his family. Since he did not know that it would, he decided, for reasons of economic efficiency, to delay resuming production.

32 On 1 April 1984, the applicant was surprised by the announcement and immediate entry into force of the supplementary levy. He immediately contacted the Districtbureauhouder, the competent Netherlands authority, and was informed that producers who, pursuant to an undertaking given under Regulation No 1078/77, had not delivered milk during the reference year, commonly known as SLOM producers, were precluded from the quota scheme and that there was no point in applying for a quota.

33 When Regulation No 764/89 entered into force, the applicant again contacted the Districtbureauhouder, and was informed that producers whose undertakings had expired in 1983 continued to be precluded from the allocation of quotas. It was only in 1991 that the applicant was able to request the allocation of a reference quota.

34 In any event, the applicant disputes the defendants' argument that SLOM producers whose non-marketing period expired in 1983 and who did not resume milk production before 1 April 1984 are not entitled to compensation. It is clear

from *Spagl*, cited above, that it is contrary to the principle of legitimate expectations to impose a cut-off date the effect of which is to preclude all producers who did not deliver milk in 1983 owing to the undertaking given pursuant to Regulation No 1078/77. In other words, those producers cannot legitimately be criticised for failing to anticipate regulations which did not exist when their non-marketing undertaking expired and which were introduced with retroactive effect. The applicant further emphasises that the reasons why the plaintiff in *Spagl* had not resumed milk production did not influence the findings of the Court of Justice. It was irrelevant whether he had not done so for personal reasons or on other grounds.

35 As regards the defendants' argument that the applicant does not satisfy the criteria set out in *Mulder II*, namely the manifestation of an intention to resume milk production, the applicant claims that those criteria do not constitute an exhaustive list of the factors capable of establishing such an intention.

36 The applicant further disputes the Commission's assertion that even in 1991, after being allocated a provisional quota, he had no intention of resuming milk production and that his sole purpose in obtaining a quota had been to participate in the trade in quotas. In any event, that argument is invalid, having regard to the fact that the harm in respect of which he seeks compensation was sustained during the period preceding the withdrawal of the provisional quota.

37 As regards the calculation of damages, the applicant maintains that he is entitled to compensation in an amount greater than that proposed in Regulation No 2187/93 to SLOM producers.

38 The defendants contend that the applicant's claim is unfounded.

*Findings of the Court*

39 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).

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). That liability is based on infringement of the principle of legitimate expectations.

41 However, that principle may be relied on in order to challenge Community rules only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation (Case C-177/90 *Kühn* v *Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, paragraph 14).

42 Thus, where an economic operator has been encouraged by a Community measure to suspend milk marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he has availed himself of the possibilities offered by the Community provisions (*Mulder I*, paragraph 24, and *Von Deetzen*, paragraph 13). On the other hand, the principle of the 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 or has marketed only a reduced quantity of milk during a period prior to the entry into force of that scheme, in consequence of a decision

which he freely took without being encouraged to do so by a Community measure (*Kühn*, paragraph 15).

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

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

44 Contrary to what the applicant claims, that judgment can be read only in the light of the facts of the case before the national court. Mr Spagl was a farmer who, upon expiry of his undertaking on 31 March 1983, was not in a position to resume milk production immediately because he lacked capital to buy a new dairy herd. Instead, he bought dairy calves and raised them himself, resuming production with 12 cows in May or June 1984 (see the Opinion of Advocate General Jacobs in *Spagl*, at [1990] ECR I-4554, paragraph 2). Furthermore, it is clear from the Report for the Hearing that while milk production was suspended he carried out maintenance work on the buildings and machinery used for milk production ([1990] ECR I-4541, point I 2).

45 It is therefore a reasonable inference from that judgment that producers whose undertaking expired in 1983 can validly base their actions for compensation on infringement of the principle of the protection of legitimate expectations only where they show that their reasons for not resuming milk production during the reference year are connected with the fact that they stopped production for a certain time and that they were unable, for reasons to do with the organisation of that production, to resume production immediately.

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

47 If a producer has not manifested that intention, he cannot claim to have had a legitimate expectation in the possibility of resuming milk production at some unspecified future date. In those circumstances, his position is no different from that of economic operators who did not produce milk and who, after the introduction of the milk quota scheme in 1984, were prevented from commencing such production. It is settled case-law that, in the sphere of the common organisations of the market, whose purpose involves constant adjustments to meet changes in the economic situation, economic operators cannot legitimately expect that they will not be subject to restrictions which may arise out of future rules of market or structural policy (see, in that regard, Joined Cases 424/85 and 425/85 *Frico and Others* v *Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755, paragraph 33, *Mulder I*, paragraph 23, and *Von Deetzen*, paragraph 12).

48 As the applicant did not resume milk production between the date on which his non-marketing undertaking expired, 20 April 1983, and the date on which the quota scheme entered into force, 1 April 1984, he must show, in order for his claim for compensation to be well founded, that he had the intention of resuming milk production upon the expiry of his non-marketing undertaking and that he found it impossible to do so owing to the entry into force of Regulation No 857/84.

49 The fact is, first of all, that although his non-marketing undertaking expired more than 11 months before the date of the entry into force of the milk quota scheme, the applicant had not resumed milk production on that date. Furthermore, the applicant has adduced no evidence to show that he contacted the national authorities with a view to obtaining a reference quantity in 1984 when the milk quota system entered into force. Last, he has failed to show that he took any other steps that might evince an intention to resume milk production upon expiry of his undertaking. In that regard, it must be held that the order forms for grass seed dated in part August 1983 do not suffice to show such an intention.

50 Furthermore, contrary to the argument put forward by the applicant, the fact that he obtained a provisional reference quantity upon the entry into force of Regulation No 1639/91 does not mean that he is entitled to compensation in the context of the non-contractual liability of the Community.

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

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

53 Consequently, the fact that the applicant obtained a provisional reference quantity at a later date does not in itself prove that upon expiry of his non-marketing undertaking he had the intention to resume milk production.

54 It follows that the Community cannot be held liable to the applicant as a result of the application of Regulation No 857/84, and it is unnecessary to ascertain whether the other conditions for such liability are satisfied.

55 In those circumstances, it is also unnecessary to consider whether the application in this case was made out of time.

56 The application must accordingly be dismissed.

## Costs

57 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, in accordance with the form of order sought by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

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

Tiili Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 31 January 2001.

H. Jung
Registrar

P. Mengozzi
President