JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
25 November 1998 *

In Case T-222/97,

Alfons Steffens, residing at Aschendorf (Germany), represented by Walter Remmers, Willy Meyer and Angelika Kleymann, Rechtsanwälte, Papenburg, with an address for service in Luxembourg at the Chambers of Turk and Prum, 13a Avenue Guillaume,

applicant,

v

Council of the European Union, represented by Jan-Peter Hix, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Marco Núñez Müller, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented by Dierk Booß, Principal Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe and Marco Núñez Müller, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

* Language of the case: German.

APPLICATION for compensation for the damage allegedly suffered by the applicant as a result of his having been prevented from marketing milk pursuant to 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: A. Mair, Administrator,

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

gives the following

Judgment

Legislative background

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 entering into an undertaking not to market milk or to convert their herds for a period of five years.

2 In 1984, in order to cope with persistent overproduction, the Council 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.

4 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.

5 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 new regulation, producers who had entered into non-marketing or conversion undertakings received a reference quantity known as a 'special' reference quantity (or 'quota').

6 The grant of a special reference quantity was subject to various conditions. In addition, the reference quantity was limited to 60% of the quantity of milk or 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 Certain of the conditions of grant of the special reference quantity and its limitation to 60% were declared invalid by judgments of the Court of Justice 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, hereinafter 'Regulation No 1639/91'), which granted the producers concerned a special reference quantity.

9 In the meantime, one of the producers who had brought the action resulting in Regulation No 857/84 being declared invalid in *Mulder I* had instituted proceedings, together with other producers, against the Council and the Commission seeking compensation for the losses which they had sustained on account of their not having been granted a reference quantity under that regulation.

10 By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder* v *Council and Commission* [1992] ECR I-3061 (hereinafter '*Mulder II*'), the Court of Justice held that the Community was liable for the damage in question.

11 Following that judgment, the Council and the Commission published Communication 92/C 198/04 on 5 August 1992 (OJ 1992 C 198, p. 4, hereinafter 'the Communication' or 'the Communication of 5 August 1992'). 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 (hereinafter 'the Statute'). 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 Communication or on the date on which the producer had applied to one of the institutions.

12 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, hereinafter 'Regulation No 2187/93'). 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

13 The applicant is a milk producer in Germany. Having entered, pursuant to Regulation No 1078/77, into an undertaking which came to an end on 12 October 1983, he produced no milk during the reference year fixed under Regulation No 857/84. Consequently, he was ineligible for a reference quantity and, as a result, unable to market any quantity of milk exempt from the additional levy following the entry into force of Regulation No 857/84.

14 The applicant was granted a reference quantity following the adoption of Regulation No 1639/91. He was thus able to resume milk production with effect from 15 June 1991.

15 By letter of 14 January 1993, he applied to the Commission for compensation for the losses suffered by him. In its reply of 10 February 1993, the Commission suggested to the applicant that he should await the adoption of the regulation provid-

ing for the payment of compensation, as envisaged by the Communication of 5 August 1992. It pointed out that the institutions had undertaken to waive their right to plead limitation until the period to be fixed by that regulation expired.

16 By letter of 30 September 1993, the applicant requested the competent national authorities to make him an offer of compensation pursuant to Regulation No 2187/93. By letter from those authorities of 25 January 1994, written for and on behalf of the Council and the Commission, an offer was made to him in the sum of DM 10 061.54. He did not accept that offer within the period of two months laid down by the third paragraph of Article 14 of Regulation No 2187/93.

17 By letter received on 7 June 1994, the applicant informed the Commission that he was unable to accept the offer made to him, since he did not agree with the way in which the proposed compensation was calculated. In its reply of 5 August 1994, the Commission, after pointing out that the offer was open to acceptance on an unconditional basis only and that, in the event of its being refused, the applicant could bring proceedings before the Court of First Instance, granted him an extension of time of ten days in which to accept it. The applicant did not reply to that letter.

Procedure and forms of order sought by the parties

18 By application lodged at the Court of First Instance on 30 July 1997, the applicant brought the present action.

19 He claims that the Court should order the defendants to pay him damages in the sum of DM 69 503.40, together with default interest at the annual rate of 8% from 1 October 1993.

20 The Council and the Commission, as defendants, contend that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Law

21 In support of his claims, the applicant maintains that he is one of the milk producers who were temporarily prevented from carrying on their trade, inasmuch as he was unable to deliver milk between 1984 and 1992. He considers that he is entitled to full compensation for the losses resulting from that situation. According to the applicant, it would be unlawful to apply the limitation rule prescribed by Regulation No 2187/93; consequently, he is entitled to compensation for the loss suffered in the years 1984 to 1987.

22 On the basis of earnings of DM 0.60 per kilogram of milk, he calculates that his losses amount to DM 69 503.40.

23 At the hearing, the applicant submitted, in response to the defendants' arguments concerning limitation, that, in accordance with Regulation No 2187/93, the limitation period was interrupted, as against all the producers, by — at the latest —5 August 1992, the date of the Communication. According to the principles common to the legal orders of most Member States, referred to in the second paragraph of Article 215 of the EC Treaty, that interruption caused a new limitation period to start to run with effect from that date.

24 The fact that the applicant refused the compensation offer made to him under Regulation No 2187/93 did not preclude him, as an interested party, from taking advantage of that new limitation period. The only consequence of his refusal was that the defendants ceased from that time to be bound by the offer.

25 The defendants put forward, in opposition to the applicant's claim, three pleas alleging, respectively, that the applicant could have produced milk during part of the period in respect of which he seeks compensation, that the rights on which he relies are wholly or partially barred by lapse of time and that the amount of the claim is inflated.

26 The Court observes in this regard that the Community can incur non-contractual liability for damage caused by the institutions under the second paragraph of Article 215 of the Treaty 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 Case T-107/96 *Pantochim* v *Commission* [1998] ECR II-311, paragraph 48).

27 As regards liability arising from legislative measures, the Community conduct complained of must, according to settled case-law (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 11, Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 4, and Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501, paragraph 52), constitute a breach of a superior rule of law for the protection of individuals. If the institution has adopted the measure in the exercise of a wide discretion, as is the case in relation to the common agricultural policy, that breach must also be sufficiently serious, that is to say manifest and grave (*HNL and Others* v *Council and Commission*, cited above, paragraph 6, Case 50/86 *Grands Moulins de Paris* v *Council and Commission* [1987] ECR 4833,

paragraph 8, *Mulder II*, paragraph 12, and Joined Cases T-195/94 and T-202/94 *Quiller and Heusmann* v *Council and Commission* [1997] ECR II-2247, paragraphs 48 and 49).

28 As the institutions acknowledged in their Communication of 5 August 1992, it follows from *Mulder II* that the Community incurred liability *vis-à-vis* each producer who suffered injury through having been prevented from delivering milk as a result of the application of Regulation No 857/84.

29 It is apparent from the documents before the Court that the applicant, who was granted a special reference quantity in 1991, is in the position of the producers to whom that Communication relates. Having entered into a non-marketing undertaking pursuant to Regulation No 1078/77, he was prevented from resuming the marketing of milk when that undertaking expired, as a result of the application of Regulation No 857/84. That is confirmed, moreover, by the fact that, on 25 January 1994, the competent German authorities, acting pursuant to Regulation No 2187/93, made him an offer of compensation for and on behalf of the Council and the Commission which he did not accept. Consequently, the applicant was entitled in principle to compensation for his losses.

30 It is necessary, however, to examine whether, and to what extent, his claim is barred by lapse of time.

31 In that regard, it is settled case-law that the limitation period laid down by Article 43 of the Statute cannot begin to run before all the requirements governing the obligation to make good the damage are satisfied and, in particular, in cases such as this, in which liability stems from a legislative measure, before the injurious effects of the measure have been produced (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85,

paragraph 10, Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 10, and Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107).

32 In the present case, the applicant suffered injury from the date on which, following the expiry of his non-marketing undertaking, he could have resumed deliveries of milk if he had not been refused a reference quantity. Since the non-marketing undertaking came to an end in October 1983, he started to suffer that injury from the date on which Regulation No 857/84 entered into force, namely 1 April 1984. It was on that date, therefore, that the limitation period started to run.

33 The defendants cannot claim that the applicant's rights became entirely time-barred five years after the limitation period commenced to run.

34 The damage which the Community must make good was not caused instantaneously. That damage continued to be sustained from day to day for a certain period as a result of the maintenance in force of an illegal measure, that is to say, for so long as the applicant was unable to obtain a reference quantity and, consequently, to deliver milk. As a result, with respect to the date of the event which interrupted the limitation period, the time-bar under Article 43 of the Statute applies to the period more than five years prior to that date and does not affect rights which arose during subsequent periods (*Hartmann*, cited above, paragraph 132).

35 Under Article 43 of the Statute, 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.

36 The applicant's argument that, as a result of the waiver of the right to plead limitation provided for by the Communication of 5 August 1992, a new limitation period started to run must be rejected.

37 As the defendants point out, the wording of the Communication refers to waiver of the right to plead limitation, not to an interruption of the limitation period. The Communication merely provided for a self-imposed restriction of that right, and the producers were able to rely on that waiver in the circumstances referred to in Regulation No 2187/93 (see *Hartmann*, paragraph 137).

38 The waiver 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 (see, to that effect, *Hartmann*, paragraph 136).

39 Under that regulation, producers could call for a compensation offer to be made to them, the time-limit for acceptance of which was two months. In the event of the offer being rejected, it was open to them to bring proceedings for damages within that two-month time-limit, during which they continued to enjoy the benefit of the waiver of the right to plead limitation (*Hartmann*, paragraph 138).

40 Having regard to its purpose (see paragraph 38 above), that waiver ceased to have effect at the end of the period allowed for accepting the compensation offer. Consequently, in the absence of acceptance of the offer or commencement of proceedings, the institutions once again became entitled, from that time onwards, to plead limitation.

41 In the present case, the compensation offer was received by the applicant on 28 January 1994. It was not accepted within the two-month time-limit laid down in Regulation No 2187/93, and no action for damages was brought within that

period. That time-limit was then extended, *vis-à-vis* the applicant, until the expiry of the final ten-day deadline fixed by the Commission's letter of 5 August 1994 (see paragraph 17 above). However, the applicant neither accepted the offer nor brought proceedings within that extended period. He cannot, therefore, rely on the waiver of the right to plead limitation referred to in the Communication of 5 August 1992.

42 Even if the letter sent to the Commission by the applicant in June 1994, in which he contested the amount of the compensation offer, were capable of being regarded as a prior application within the meaning of Article 43 of the Statute, the fact remains that the applicant did not institute proceedings within the period of two months provided for by Article 173 of the Treaty, to which Article 43 of the Statute refers.

43 Since the action was brought on 30 July 1997, the last time that the applicant suffered loss was more than five years before that date, namely in 1991, that being the year in which he was able to resume milk production.

44 Consequently, the action has been brought out of time, all the applicant's rights having already become time-barred.

45 It follows from the foregoing that the application must be dismissed.

Costs

46 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 (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Vesterdorf Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 25 November 1998.

H. Jung B. Vesterdorf

Registrar President