OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 28 January 1992 *

Summary

1. The levy scheme and the Court's case-law ..... I -3095

2. The applicants ..... I -3099

3. The admissibility of the applications ..... I -3100

4. Assessment of the Community's liability ..... I -3102

4.1. The requirements for liability applied by the Court in connection with legislative measures ..... I -3102

4.2. Liability on account of the Court's declaration that Regulation No 857/84 is invalid ..... I -3105

4.2.1. Liability as a result of the judgments in Mulder and von Deetzen declaring the regulation invalid ..... I -3106

(i) Breach of a superior rule of law for the protection of the individual ..... I -3106

(ii) Serious and inexcusable nature of the breach of the principle of protection of legitimate expectations ..... I -3106

(iii) A limited and clearly defined group of producers are adversely affected by the breach ..... I -3110

(iv) The alleged damage went beyond the bounds of the economic risks inherent in activities in the milk sector ..... I -3112

4.2.2. (No) liability as a result of the declaration of invalidity in the Spagl and Pastätter cases ..... I -3114

4.3. The existence of damage and the causal link ..... I -3115

5. Assessment of the damage ..... I -3117

5.1. The period and reference quantity to be taken into account in calculating the damage ..... I -3118

5.1.1. The period to be taken into account ..... I - 3118

5.1.2. The reference quantity to be taken into account ..... I -3118

(i) Basis for the calculation ..... I -3118

(ii) The reduction coefficient ..... I -3119

* Original language: Dutch.

5.2. Assessment of the damage suffered by way of loss of profit ..... I -3121

5.3. Interest due ..... I -3123

5.3.1. Legal interest ..... I -3123

5.3.2. Compensatory interest ..... I -3124

Conclusion ..... I -3124

Mr President,
Members of the Court,

1. The applicants in the joined cases which I am now to consider are farmers who, in accordance with undertakings given pursuant to Council Regulation (EEC) No 1078/77 of 17 May 1977, [1] delivered no milk or dairy products during the reference year that their Member States adopted for the application of the additional levy introduced by Council Regulations Nos 856/84 [2] and 857/84 [3] of 31 March 1984 (hereinafter referred to as 'the levy scheme'). As a result, they received no reference quantity, that is to say, a quantity exempted from the additional levy by virtue of Article 2 of Regulation No 857/84. Pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, the applicants claim that the European Economic Community, represented by the Council and the Commission, should be ordered to pay compensation for the damage which they have sustained and are still to sustain as a result.

1 — Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1).

2 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10).

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 (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13).

These cases are the first two applications of a great number — at present more than one hundred — with that object which have been received at the Court. The Court has suspended the proceedings in the other cases until judgment has been given in these proceedings.

1. The levy scheme and the Court's case-law

2. The applicants' actions follow on from the Court's judgments of 28 April 1988 in *Mulder* [4] and *von Deetzen*, [5] which were concerned with the application of Regulation No 857/84 to producers who, pursuant to a non-marketing undertaking given under Regulation No 1078/77, had not delivered any milk during the reference year adopted by the Member State concerned. Regulation No 1078/77, which has since been repealed, provided for two types of premium, namely a non-marketing premium and a conversion premium. Only the former is relevant to these proceedings. The non-marketing premium was granted on request to any producer undertaking not to dispose of milk or milk products from his holding whether for

4 — Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321.

5 — Case 170/86 *von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355.

a consideration or free of charge for a period of five years. For the sake of brevity I shall refer to producers who took advantage of the scheme introduced by Regulation No 1078/77 as 'non-marketers'.

3. In the judgment in *Mulder* the Court answered two questions which were referred by the College van Beroep voor het Bedrijfsleven (administrative court of last instance in matters of trade and industry) for a preliminary ruling. In its first question, the national court asked whether in establishing the reference quantities referred to in Article 2 of Regulation No 857/84 Member States might not take account of the specific situation of non-marketers. The Court stated in reply that the Member States might take account of the special circumstances of non-marketers 'only in so far as each producer fulfils the specific conditions laid down in Regulation No 857/84 and if the Member States have reference quantities available for that purpose'.

The second question in *Mulder*, which was also raised in *von Deetzen*'s case, was whether or not in the light of that interpretation Regulation No 857/84 was valid. I shall set out *in extenso* the reasoning followed by the Court in answering that question (paragraphs 23 to 28 of the judgment in *Mulder* and paragraphs 12 to 17 of that in *von Deetzen*):

'It must be conceded, as the Netherlands Government and the Commission have correctly observed, that a producer who has voluntarily ceased production for a certain period cannot legitimately expect to be able to resume production under the same conditions as those which previously applied and not to be subject to any rules of market or structural policy adopted in the meantime.

The fact remains that where such a producer, as in the present case, has been encouraged by a Community measure to suspend 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 availed himself of the possibilities offered by the Community provisions.

However, the regulations on the additional levy on milk give rise to such restrictions for producers who, pursuant to an undertaking entered into under Regulation No 1078/77, did not deliver milk during the reference year. As stated in the reply to the first question, those producers may in fact be denied a reference quantity under the new system precisely because of that undertaking if they do not fulfil the specific conditions laid down in Regulation No 857/84 or if the Member States have no reference quantities available.

Contrary to the Commission's contention, total and continuous exclusion of that kind for the entire period of application of the regulations on the additional levy, preventing the producers concerned from resuming the marketing of milk at the end of the five-year period, was not an occurrence which those producers could have foreseen when they

entered into an undertaking, for a limited period, not to deliver milk. There is nothing in the provisions of Regulation No 1078/77 or in its preamble to show that the non-marketing undertaking entered into under that regulation might, upon its expiry, entail a bar to resumption of the activity in question. Such an effect therefore frustrates those producers' legitimate expectation that the effects of the system to which they had rendered themselves subject would be limited.

It follows that the regulations on the additional levy on milk were adopted in breach of the principle of protection of legitimate expectations. Those regulations must therefore be declared invalid on that ground, and it is unnecessary to consider the other arguments as to their invalidity put forward in the course of the proceedings.

The reply to the second question submitted must therefore be that Council Regulation (EEC) No 857/84 of 31 March 1984, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984, is invalid in so far as it does not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking entered into under Council Regulation (EEC) No 1078/77 of 17 May 1977, did not deliver milk during the reference year adopted by the Member State concerned.'

4. Approximately one year after the judgments in *Mulder* and *von Deetzen*, the Council, by means of Regulation No 764/89, [6] added an Article 3a to Regulation No 857/84 providing for the grant of provisional special reference quantities to non-marketers. The grant of such reference quantities was subject to certain conditions with a view to ensuring, in the words of the second recital in the preamble to the new regulation, that the producers concerned

'intend and are really able to resume milk production and find it impossible to obtain a reference quantity pursuant to Article 2 of Regulation (EEC) No 857/84'.

The provisional special reference quantity is equal to 60% of the quantity of milk delivered by the producer concerned during the twelve calendar months preceding the month in which the application for the non-marketing premium was made. This reference quantity is to be allocated to the producer definitively if, within two years from 29 March 1989, the producer can prove that he has actually resumed deliveries [7] and that the deliveries have attained during the previous twelve months a level equal to or greater than 80% of the provisional reference quantity. If the holding is sold or leased before 1 April 1992, the special reference quantity will be returned to the Community reserve.

5. In order to make the allocation of the special reference quantity provided for in Article 3a possible, the Council proceeded as follows. In order to achieve the objective of production control, it first reduced the guar-

6 — Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 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 1989 L 84, p. 2).

7 — Since none of the applicants sold the milk which he used to produce direct, I shall, for the sake of brevity, make no reference to the provisions of the levy scheme which deal with 'direct sale'.

anteed total quantity of each Member State. [8] It compensated for the impact of the reduction on producers' individual reference quantities by decreasing the rate of withdrawal introduced by Regulation No 775/87 [9] from 5.5% to 4.5%. [10] By Regulation No 3881/89 [11] the Council increased the Community reserve referred to in Article 5c(4) of Regulation No 804/68 [12] to 2 082 887.750 tonnes for 1989-1990 (the corresponding figure for 1988-1989 was 443 000 tonnes), [13] of which 600 000 tonnes was earmarked for the allocation by the Member States of the special reference quantities provided for in Article 3a of Regulation No 857/84. [14]

6. In the judgments given on 11 December 1990 in the *Spagl* [15] and *Pastätter* [16] cases the Court answered the question whether the 60% rule laid down in Article 3a(2) of Regulation No 857/84 was valid. On the one hand, the Court held that the Community legislature was entitled to apply a reduction coefficient to the volume of milk delivered by the producers concerned, in order to ensure that they were not accorded an undue advantage by comparison with the producers who had continued to deliver milk during the reference year. On the other hand, it held that, in comparison with the percentages by which the reference quantities of the latter producers had been reduced — which in no case exceeded 17.5% —, the reduction coefficient might not be fixed at such a high level as specifically to affect non-marketers by very reason of the non-marketing undertaking which they had given. The Court took the view that a 40% reduction was in breach of the principle of protection of legitimate expectations. Accordingly, it declared Article 3a(2) of Regulation No 857/84 invalid. [17]

7. By Regulation No 1639/91 of 13 June 1991 [18] the Council amended the Article 3a(2) which the Court had declared invalid, replacing it by a provision of which the first subparagraph reads as follows:

'The special reference quantity shall be determined by the Member State in accordance with objective criteria, by deducting from the quantity in respect of which the premium entitlement under Regulation (EEC) No 1078/77 has been preserved or acquired a percentage representative of all the abatements applied to the reference quantities established in accordance with Article 2,

8 — Council Regulation (EEC) No 3879/89 of 11 December 1989 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1989 L 378, p. 1).

9 — Council Regulation (EEC) No 775/87 of 16 March 1987 temporarily withdrawing a proportion of the reference quantities mentioned in Article 5c(1) of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1987 L 78, p. 5).

10 — Council Regulation (EEC) No 3882/89 of 11 December 1989 amending Regulation (EEC) No 775/87 temporarily withdrawing a proportion of the reference quantities mentioned in Article 5c(1) of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1989 L 378, p. 6).

11 — Council Regulation (EEC) No 3881/89 of 11 December 1989 establishing, for the period 1 April 1989 to 31 March 1990, the Community reserve 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 1989 L 378, p. 5).

12 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176.

13 — For the 1990-91 and 1991-92 periods see Council Regulation (EEC) No 1184/90 of 7 May 1990 (OJ 1990 L 119, p. 30) and Council Regulation (EEC) No 1636/91 of 13 June 1991 (OJ 1991 L 150, p. 35).

14 — The balance of the increase in the Community reserve (1 039 885.740 tonnes) was intended for the producers referred to in Article 3b of Regulation No 857/84, a provision added by Council Regulation No 3880/89 of 11 December 1989 (OJ 1989 L 378, p. 3).

15 — Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539 .

16 — Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585.

17 — In the judgment of 22 October 1991 in Case C-44/89 *von Deetzen* [1991] ECR I-5119, (hereinafter referred to as '*von Deetzen No 2*') the Court confirmed, by reference to the judgments in *Spagl* and *Pastätter*, that Article 3a(2) of Regulation No 857/84 was invalid.

18 — Council Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation (EEC) No 857/84 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 1991 L 150, p. 35).

including in any case a basic reduction of 4.5%, or Article 6.'

In the second recital in the preamble to that regulation the Council stated that a greater increase in the Community reserve could not be envisaged for the allocation of new special reference quantities without prejudicing the equilibrium of the milk market. The Council added that:

'therefore, in order to grant new special reference quantities to producers having given a non-marketing or conversion undertaking, the possibility of reducing the reference quantities for other producers should be provided for, as suggested by the Court of Justice; ... provision should therefore be made to increase national reserves and Articles 3 and 5 of Regulation (EEC) No 857/84 should be amended to this end'.

2. The applicants

8. The applicants in Case C-104/89, Messrs Mulder, Brinkhoff, Muskens and Twijnstra, are dairy farmers resident in the Netherlands who gave five-year non-marketing undertakings. The premiums which they received in return were calculated on the basis of the following production quantities respectively: 463 566 kg, 296 507 kg, 300 340 kg and 591 905 kg. None of the applicants delivered any milk in 1983, the reference year adopted by the Netherlands. Mr Mulder's undertaking expired on 30 September 1984, Mr Brinkhoff's on 4 May 1989, Mr Muskens's on 21 November 1984 and Mr Twijnstra's on 9 April 1985.

Before their undertakings expired, the applicants applied to the competent Netherlands authority for a reference quantity. Their applications were turned down. They then appealed to the College van Beroep voor het Bedrijfsleven. In the course of the proceedings brought by Mr Mulder, a number of questions were referred to the Court of Justice for a preliminary ruling. They were answered in the judgment of 28 April 1988. On 30 November 1988 the College van Beroep, acting on the basis of that judgment, annulled the decision of the Netherlands authorities refusing to grant Mr Mulder a reference quantity. Mr Mulder's claim for damages was, however, dismissed on the ground that:

'the authority which adopted the Order had no power to take in that Order a specific measure in respect of producers such as the applicants which deviated from the provisions of Regulation No 857/84. That power was vested in the Council of the European Communities when it adopted the regulation. It follows from the judgment that there was a legal obligation on the Council itself to take such a measure. Consequently, since the contested decision was taken within the limits — laid down by Community law — of the Order and the defendant, as held above, was not empowered to step outside those limits, no obligation can arise on the part of the defendant to pay compensation for the damage sustained by the applicant.'

By judgments of 10 May 1989 the College van Beroep reached the same decision regarding the actions brought by Messrs Brinkhoff, Muskens and Twijnstra for the annulment of the decisions refusing to grant them reference quantities.

Following the Court's judgments in *Mulder* and *von Deetzen* — but before Regulation No 764/89 was issued — Messrs Mulder, Brinkhoff and Twijnstra resumed milk production (on 10 July 1988, 3 February 1989 and 1 May 1988, respectively). They were not granted provisional special reference quantities, in the amounts of 278 140 kg, 176 481 kg and 245 653 kg respectively, until August 1989, pursuant to the Netherlands legislation enacted in order to implement Article 3a of Regulation No 857/84 which had been adopted in the meantime. Mr Muskens, for his part, deferred resumption of milk production until winter 1989 following the allocation of a provisional special reference quantity of 180 204 kg in late July that year.

9. The applicant in Case C-37/90, Mr Heinemann, a dairy farmer resident in the Federal Republic of Germany, also entered into a non-marketing undertaking pursuant to Regulation No 1078/77. His premium was calculated on the basis of a production quantity of 39 102 kg. In accordance with the undertaking which he gave, he delivered no milk during 1983, the reference year adopted by Germany. Mr Heinemann's undertaking expired on 20 November 1984.

Before the undertaking expired, Mr Heinemann applied to the Landwirtschaftskammer (chamber of agriculture) Hannover for a certificate on the basis of which he could apply to a dairy for an individual reference quantity. The Landwirtschaftskammer refused to issue him such a certificate and Mr Heinemann challenged that decision in the Verwaltungsgericht (Administrative Court) Hannover. When in July 1989 the Landwirtschaftskammer did issue such a certificate granting him a provisional special 60% reference quantity under the German legislation adopted pursuant to Article 3a, which had been adopted in the meantime, there was no longer any reason for those proceedings.

In December 1985 Mr Heinemann had also applied to Hauptzollamt (Principal Customs Office) Hannover to grant him a reference quantity of its own motion, but his request was refused. Mr Heinemann contested that decision by bringing proceedings in the Finanzgericht (Finance Court) Hannover. As he has since been allocated a provisional special reference quantity of 22 023 kg pursuant to the 60% rule, those proceedings can only relate to the refusal to grant him a reference quantity of 100%.

In August 1989 Mr Heinemann resumed deliveries of milk.

3. The admissibility of the applications

10. The Council and the Commission contest the admissibility of the applications brought before the Court. Referring to the Court's judgment in *Krohn* [19] they argue that a claim based on non-contractual liability on the part of the Community is admissible only if the decision adversely affecting the applicant can be attributed to a Community institution. They claim that in the cases before the Court the refusal to allocate a reference quantity must, however, be attributed to the relevant national authorities, since Articles 3, 4 and 4a of Regulation No 857/84 give the national authorities the power to allocate special or additional refer-

19 — Judgment of 26 February 1986 in Case 175/84 *Krohn* v *Commission* [1986] ECR 753.

ence quantities to producers such as the applicants.

11. I agree with the applicants that that objection of inadmissibility must be rejected. In *Krohn* (paragraphs 18 and 19) the Court stated as follows:

'The Court wishes to point out that the combined provisions of Articles 178 and 215 of the Treaty only give jurisdiction to the Court to award compensation for damage caused by the Community institutions or by their servants in the performance of their duties, or in other words for damage capable of giving rise to non-contractual liability on the part of the Community. Damage caused by national institutions, on the other hand, can only give rise to liability on the part of those institutions, and the national courts retain sole jurisdiction to order compensation for such damage.

Where, as in this case, the decision adversely affecting the applicant was adopted by a national body acting in order to ensure the implementation of Community rules, it is necessary, in order to establish the jurisdiction of the Court, to determine whether the unlawful conduct alleged in support of the application for compensation is in fact the responsibility of a Community institution and cannot be attributed to the national body.'

On the basis of that reasoning the Court concluded in that case that the Commission and not the national authority was responsible for the unlawful conduct which had been established, on the ground that the national authority was bound to comply with the Commission's instructions (paragraph 23). [20] In the present cases, too, it must be held, as will be shown below, that the measures adversely affecting the applicants must be attributed to the Community institutions.

12. In support of their action for damages against the Community institutions the applicants rely in the first place on the invalidity of Regulation No 857/84 as held by the Court in *Mulder* and *von Deetzen*. The Court considered that that regulation was invalid on the ground that, because it did not provide for the allocation of a reference quantity to non-marketers, it frustrated that class of producers' legitimate expectations that the effects of the non-marketing undertaking which they had entered into would be temporary. As the Court stated in *von Deetzen No 2* (paragraph 21), non-marketers were

'legitimately entitled to expect to be able to resume the marketing of milk at the end of their non-marketing or conversion period, and to carry on that activity under conditions that involved no discrimination between them and other milk producers'.

20 — In contrast, in the judgment of 7 July 1987 in Joined Cases 89 and 91/86 *L'Etoile commerciale and CNTA* v *Commission* [1987] ECR 3005, in which the Court based itself on the same considerations (paragraphs 17 and 18) as I have quoted above, it was decided that the national authority bore the responsibility on the ground that in that case the Commission's act was not at the root of the damage found (paragraph 19).

It can be inferred from that case-law (as the College van Beroep did; see section 8 above) that the obligation to comply with the principle of protection of legitimate expectations is incumbent on the Community legislature, and that, under that obligation, it was under a duty to give non-marketers such an *entitlement* to a reference quantity that they were not disadvantaged, compared with milk producers referred to in Article 2 of Regulation No 857/84, precisely because they had entered into a non-marketing undertaking. If the Community legislature had properly complied with that obligation and granted non-marketers a right to a reference quantity, the competent authorities in the Netherlands and in the Federal Republic of Germany would have been unable to refuse to grant the applicants a reference quantity. Consequently, the refusal must be attributed to the Community legislature and not to the national authorities.

The argument which the institutions derive from Articles 3, 4 and 4a of Regulation No 857/84 is unfounded, since those provisions give the Member States merely the *possibility* of allocating special or additional reference quantities to certain categories of producer. Furthermore, that possibility is open only in so far as the specific conditions set out in those provisions are fulfilled (and not all non-marketers meet those conditions) and the Member States have sufficient reference quantities available.

Consequently, the exception of inadmissibility cannot be upheld.

13. The institutions also rely on other pleas of inadmissibility. In their defences in Case C-104/89, for instance, the Council and the Commission argued that the application did not satisfy the requirements of Article 38 of the Rules of Procedure. They maintained that it did not set out the factual grounds necessary in order to found a claim for non-contractual liability on the part of the Community. In their rejoinders they dropped that plea.

The Commission entered a further plea of inadmissibility in connection with Article 38 of the Rules of Procedure regarding more specifically the alleged damage suffered by the applicant in Case C-37/90 as from 1989 and the damage which the applicants in Case C-104/89 claim they will sustain in the future. There is no need for me to consider that plea of inadmissibility, since, as I shall explain (in sections 34, 35 and 36), I have concluded that the applicants' action must in any event be dismissed as regards all damage which allegedly arose after a reference quantity was allocated in accordance with the 60% rule.

4. Assessment of the Community's liability

4.1. *The requirements for liability applied by the Court in connection with legislative measures*

14. As the Court has consistently held, 'the liability of the Community on account of its legislative powers depends on the coincidence of a set of conditions as regards the unlawfulness of the act of the institution, the fact of damage and the existence of a direct link in the chain of causality between the act and the damage complained of'. [21] The requirements for a direct link in the chain of

21 — Judgment of 8 December 1987 in Case 50/86 *Grands Moulins de Paris* v *EEC* [1987] ECR 4833, paragraph 7.

causality and for actual damage and also the problems arising in connection with the assessment of the damage will be discussed later (sections 37, 38 and 39 and 40 to 53 inclusive). I shall first consider the requirement for the legislative measures to have been unlawful.

According to equally well-established case-law of the Court, where the damage alleged, as in these cases, is the result of a legislative measure involving economic-policy choices, the fact that the measure is unlawful is not sufficient in itself to cause the Community to incur liability. The Community can be held liable in respect of such a measure only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals, which 'in the context of Community provisions in which one of the chief features is the exercise of a wide discretion indispensable for the implementation of the common agricultural policy' means that 'the Community can incur liability only in exceptional cases, namely where the institution manifestly and gravely disregarded the limits on the exercise of its powers'. [22] [23]

15. In my view, it appears from this wording — although a clear pronouncement is warranted [24] — that the expression 'manifestly and gravely disregarded the limits on the exercise of its powers' qualifies the words 'a sufficiently serious breach'. [25] It indicates more specifically that in the case of legislative measures carried out pursuant to a broad discretion the public authority is allowed a certain margin of error. Only where the public authority's error is inexcusable [26], that is to say where it could reasonably not have committed it [27], have powers been manifestly and gravely disregarded and there therefore has been a sufficiently serious breach (of a superior rule of law for the protection of individuals).

16. The Court's case-law fleshes out the criterion 'manifest and grave disregard of the limits on powers' and therefore also the requirement for there to have been a 'sufficiently serious breach'. It appears from the case-law that that criterion is made up of two components: on the one hand, a component related to the type and seriousness of the breach, in other words related to unlawfulness; on the other, a component relating to the type of the damage caused thereby. More specifically, in the judgments of 4 October 1979 in the 'Quellmehl' and

22 — *Grands Moulins de Paris*, paragraph 8. See also the judgment of 18 April 1991 in Case C-63/89 *Assurances du Crédit* v *Council and Commission* [1991] ECR I-1799, paragraph 12, and the judgment of 27 June 1991 of the Court of First Instance in Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, which in paragraph 74 provides an extensive review of the case-law of the Court of Justice.

23 — In my estimation, that case-law remains intact following the judgment of 17 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357. Even if one shares the view taken by Mr Advocate General Mischo in his Opinion on those cases (see section 71 in particular) that the same requirements must apply in order for the Community to incur liability on account of legislative measures as apply in order for the Member States to incur liability in that area, it must be borne in mind that the situation in *Francovich and Bonifaci* was one in which the relevant Member State to attain a result clearly prescribed by a directive and hence had only a limited discretion. In contrast, the case-law discussed in this context applies to situations in which the (Community) legislature has a broad measure of discretion.

24 — The case-law of the Court is not unambiguous. Sometimes the use of the word 'or' gives the impression that alternative criteria are involved (see, for example, the judgment of 30 May 1989 in Case 20/88 *Roquette frères* v *Commission* [1989] ECR 1553, paragraph 26); at others the criteria are joined by 'and' and therefore used conjunctively (see the judgment in *Assurances du Crédit*, cited above, paragraph 12).

25 — See also F. Schockweiler, in collaboration with G. Wivenes and J. M. Godart, 'Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne', *Revue trimestrielle de droit européen*, January-March 1990, p. 27, at p. 60.

26 — In *Peine-Salzgitter* (see in particular paragraph 108), the Court of First Instance speaks of the Commission manifestly and gravely and 'therefore inexcusably' disregarding the limits of its powers.

27 — See also my Opinion of 19 November 1991 in Joined Cases C-363 and C-364/88 *Finsider and Falck* v *Commission*, paragraph 25.

'Maize Gritz' cases, [28] the Court invoked the following circumstances in deciding that the Council had manifestly and gravely disregarded the limits on its powers through the exercise of a wide discretionary power essential for the implementation of the common agricultural policy: (i) the particular importance of the principle infringed by the regulation (in those cases, the principle of equality) and hence the (objective) seriousness of the breach; (ii) the fact that the disregard of that principle affected a limited and clearly defined group of commercial operators; (iii) the fact that the damage alleged by the applicants went beyond the bounds of the economic risks inherent in the operators' activities in the sector concerned; (iv) the fact that the principle in question was infringed without sufficient justification (which points to the inexcusable nature of the error made by the authority: see section 15 above).

Accordingly, the circumstances which, according to that line of cases, point to the existence of a manifest, grave disregard of the limits of a discretionary power or of a sufficiently serious breach of a superior rule of law (which means the same thing) include *both* circumstances relating to the serious (i) and unjustifiable or inexcusable (iv) nature of the breach, which are thus concerned more specifically with the unlawful nature of the act, *and* circumstances relating to the group adversely affected (ii) and to whether or not the adverse effect exceeded a normal risk (iii), which therefore are concerned more specifically with the damage caused by the act.

17. As regards the unacceptable or inexcusable character of the breach, the judgment of 26 June 1990 in *Sofrimport* [29] contains an important pointer for the present cases. That case, like these proceedings, was concerned with regulations which the Court had declared invalid for infringing the principle of protection of legitimate expectations and which had caused the applicant undertaking to sustain damage in so far as they made it impossible for it to carry on a particular commercial activity (importation of dessert apples).

In ruling on the issue of the liability of the Community, the Court held that there had been a breach of a superior rule of law (paragraph 26), accepted that the breach was sufficiently serious (paragraph 27) and held that the damage alleged by the applicant undertaking went beyond the limits of the economic risk inherent in the business at issue (paragraph 28). The Court did not go into the requirement that the breach must have affected a limited and clearly defined group of commercial operators, because — I presume — that condition was plainly satisfied. As far as the present cases are concerned, what is interesting above all is the way in which the Court (in paragraph 27) inferred the existence of a sufficiently serious breach from the unacceptable nature of the breach of the Community provision that gave rise to a legitimate expectation:

'by failing completely to take account of the position of traders such as Sofrimport, without invoking any overriding public interest (in French: "sans faire état d'un intérêt public péremptoire"), the Commission commit-

28 — Judgments in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 11, Joined Cases 241, 242 and 245 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017, paragraph 11, Joined Cases 261 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045, paragraph 14, and Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *P. Dumortier Frères* v *Council* [1979] ECR 3091, paragraph 11.

29 — Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477.

ted a sufficiently serious breach of Article 3(3) of Regulation No 2707/72'. [30]

The Court considers therefore that the requirement of a sufficiently serious breach is satisfied where an institution fails completely to take account of the specific situation of particular traders *without* its being possible to invoke any overriding public interest by way of justification. [31]

18. It is also appropriate to refer to previous cases decided by the Court in connection with the kind of damage, in particular the judgment in *HNL* v *Commission*. [32] In that case the Court stated (in paragraph 6) that:

'individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void'.

In that case, the Court concluded therefore that the Community could not be held liable, because the regulation which had been declared void could not be regarded as having caused damage going beyond the bounds of the normal economic risks inherent in the operators' activities in the sector concerned, partly in view of its limited impact on the price of feeding-stuffs. More specifically, according to subsequent cases the Court regards as damage going beyond such bounds and hence qualifying for compensation damage which is *unforeseeable*. For instance, in the judgment in *Biovilac* [33] (paragraph 29) the Court held that 'the foreseeability of the risks inherent in the market conditions ... excludes the possibility of any recompense for the loss of competitiveness which [the applicant] has suffered'. Again, in the *Grands Moulins de Paris* case (cited above; see paragraph 21 of the judgment) the Court inferred from the finding that the 'legislative trend was foreseeable and the applicant had been aware of it for some time' that the alleged damage 'could not be regarded as going beyond the bounds of the economic risks inherent in applicant's business'.

4.2. *Liability on account of the Court's declaration that Regulation No 857/84 is invalid*

19. In the light of the case-law which has just been discussed, I shall now consider — having regard to the Court's decision relating to the invalidity of Regulation No 857/84, first in *Mulder's* and *von Deetzen's* cases and then in *Spagl's* and *Pastätter's* cases — the question whether there was a sufficiently serious breach of a superior rule of law for the protection of individuals. In

30 — See also the judgment of 14 May 1975 in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, in which (paragraph 44) the Court declared as follows: 'In the absence of an overriding matter of public interest (in French: "un intérêt public péremptoire"), the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation No 189/72 transitional measures for the protection of the confidence which a trader might legitimately have had in the Community rules.'

31 — On the basis of the judgment in *Amylum* (Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, paragraph 19) the Council and the Commission argue that the Community may be held liable only if blame can be attributed to a Community institution and to arbitrary conduct. Arbitrary conduct is one of the least acceptable ways, but not therefore the only way, in which a public authority may seriously and manifestly disregard the limits of its powers. Furthermore, failure to take account of the specific situation of economic operations (in this case the non-marketers: sections 22-26 *infra*), without its being possible to invoke any overriding public interest comes close to amounting to arbitrary treatment of those operators.

32 — Judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* v *Council and Commission* [1978] ECR 1209.

33 — Judgment of 6 December 1984 in Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057.

accordance with that case-law I shall consider the following four points, namely whether

(i) there was a breach of a superior rule of law for the protection of individuals;

(ii) the breach was serious and unjustifiable, that is to say, inexcusable;

(iii) a limited and clearly defined group of commercial operators were adversely affected by the breach;

(iv) the alleged damage went beyond the bounds of the economic risks inherent in activities in the milk sector.

4.2.1. *Liability as a result of the judgments in Mulder and von Deetzen declaring the regulation invalid*

(i) Breach of a superior rule of law for the protection of the individual

20. In *Mulder* (paragraph 26) and *von Deetzen* (paragraph 15), the Court declared Regulation No 857/84 partially invalid on the ground that it frustrated the legitimate expectation of non-marketers, having regard to the provisions of Regulation No 1078/77, that the effects of the scheme would be temporary. The Court accordingly held that the Council had created a situation which was such as to arouse expectations in individuals in a system from which they derived certain rights, and that, by frustrating those expectations, the Council had acted contrary to the principle of protection of legitimate expectations. In the aforementioned judgments in *CNTA* and *Sofrimport* the Court has already held that that principle, in conjunction with provisions of Community law from which individuals may derive rights, constitutes a superior rule of law for the protection of individuals the breach of which may cause the Community to incur liability. Moreover this is not contested by the institutions.

For completeness' sake I would further point out that in his Opinion in *Mulder*'s case Advocate General Sir Gordon Slynn concluded that Regulation No 857/84 also offended against another superior rule of law for the protection of individuals, namely the prohibition of discrimination. In any event, the Court held that it did not have to consider other possible grounds for invalidity as it had already established that there had been a breach of the principle of protection of legitimate expectations. However, it appears from the passage quoted (in section 12 above) from *von Deetzen No 2* that the Court does in fact take the view that Regulation No 857/84 was contrary to the prohibition of discrimination, on the ground that it did not allow the non-marketers to resume deliveries 'under conditions that involved no discrimination between them and other milk producers'.

(ii) Serious and inexcusable nature of the breach of the principle of protection of legitimate expectations

21. The Council and the Commission argue that the invalidity of Regulation No

857/84 as held by the Court in *Mulder* and *von Deetzen* cannot be regarded as a sufficiently serious breach. They point out that Regulation No 1078/77 came into being in a market situation characterized by substantial and increasing milk surpluses. As appears from the first recital in the preamble to the regulation, the Community legislature considered it worthwhile in the circumstances to encourage the trend among farmers to cease milk production through the grant of a premium. 90% of non-marketers, the applicants included, opted to take advantage of the system of the non-marketing premiums [34] and committed themselves to marketing no milk or milk products for a period of five years.

The Council and Commission further argue that the intention behind the non-marketing premium was to give mainly weak farms the chance to give up milk production *definitively* on acceptable terms. In view of the type of persons interested in the non-marketing premium — chiefly elderly persons, persons with no successor, physically handicapped persons or persons with barely viable or downright unviable farms — and also the fact that the amount of the premium was significantly lower than the profit which a structurally sound farm could normally expect to make from milk production, the institutions argue that in 1984 when the levy scheme was introduced they were entitled to assume, absolutely reasonably, that producers who had received a non-marketing premium would no longer wish to resume milk production after an interruption of five years.

Also according to the Council and the Commission, the Community legislature was conscious that not all producers would be granted a reference quantity under Article 2 of Regulation No 857/84. For that very reason Articles 3, 4 and 4a (the latter having been added by Regulation No 590/85 [35]) made it possible for Member States to grant a special or an extra reference quantity in particular situations. In the light of the judgments in *Mulder* and *von Deetzen*, the Council and the Commission accept the charge that they did not expressly mention non-marketers as being a category of producers to whom Member States might grant a special reference quantity. They argue, however, that, since it was improbable that many non-marketers would resume production and since the Member States had been empowered to assist producers in certain specific situations, negligence or an oversight capable of being regarded as being a sufficiently serious breach was not involved here. What is more, the Council adds, non-marketers could always have obtained a reference quantity by purchasing or leasing a farm or part of a farm.

22. I do not agree. As can be seen from the passage cited above (section 17) from *Sofrimport*, to fail completely to take account of the

34 — The others opted for the conversion premium, which can be left out of account in the present cases. For more information about the system of premiums see the Special report of the Court of Auditors on the application of Regulations (EEC) No 1078/77 and (EEC) No 1041/78 introducing a system of premiums for the non-marketing of milk products and for the conversion of dairy herds (OJ 1983 C 278, p. 1).

35 — Council Regulation (EEC) No 590/85 of 26 February 1985 amending Regulation (EEC) No 857/84 laying down 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 1985 L 68, p. 1).

particular situation of traders, without invoking any overriding public interest, constitutes a serious, inexcusable breach.

In my view, such a situation seems to obtain in this instance also: (1) the institutions knew, or were in a position to know, that a not insignificant number of non-marketers would resume production and hence would be in a special situation; (2) they failed to take sufficient measures to cope with that special situation; (3) they are unable to invoke any overriding public interest by way of justification. I shall now explain each of these points.

23. *First*, the institutions knew, or were in a position to know, that a not insignificant number of non-marketers would wish to resume production after the expiry of their non-marketing undertakings. Although it can be accepted, as the institutions maintain, that one of the aims [36] of Regulation No 1078/77 was to encourage a number of producers to cease milk production early and *for good*, the institutions knew, or in any case were in a position to know, that the means which had been chosen, that is to say the grant of a premium to persons undertaking *temporarily* to give up the production of milk and dairy products, was not capable of achieving that aim in all cases.

24. *Secondly*, Regulation No 857/84 made no provision for measures to deal sufficiently certainly with the non-marketers' special situation, of which the institutions were, or should have been, aware. The possibility of procuring a reference quantity by purchasing or leasing a farm certainly does not deal with the non-marketers' special situation. That possibility — which is not reserved specifically for non-marketers — requires an unforeseen financial effort that is unjustified on the part of producers who are entitled to resume milk production. Neither are Articles 3, 4 and 4a of Regulation No 857/84 appropriate to secure non-marketers' rights, since they merely empower and do not oblige the Member States to grant a special or an extra reference quantity under certain conditions. Moreover, those provisions cannot assist, or at best can only partly assist, non-marketers wishing to resume milk deliveries:

— the first subparagraph of Article 3(1) of Regulation No 857/84 can help non-marketers to obtain a specific reference quantity only if they lodged a milk production development *plan* pursuant to Directive 72/159/EEC [37] during the currency of the non-marketing undertaking;

— on the basis of Article 3(2) of Regulation No 857/84 a specific reference quantity

36 — For more information about the aims of Regulation No 1078/77, see sections 1.1.3 and 1.1.4 of the Court of Auditors' report to which reference has already been made.

37 — Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms (OJ, English Special Edition 1972(II), p. 324).

can be granted only to *young* farmers who set up after 31 December 1980;

— Article 4(1) of Regulation No 857/84 offers non-marketers no solution whatsoever, since it merely provides for the grant of *additional* reference quantities and therefore assumes that a basic reference quantity has already been granted under other provisions of the regulation;

— neither is Article 4a of Regulation No 857/84 appropriate to assist the non-marketers. It authorizes the Member States to allocate *non-utilized* reference quantities. Whether there are any non-utilized reference quantities can be determined only after the event. Non-marketers could not reasonably be expected to resume production without knowing beforehand the reference quantity to the extent of which they might deliver milk without having to pay a levy.

25. In their defences, the institutions attach particular importance to the second subparagraph of Article 3(1) of Regulation No 857/84. That provision authorizes the Member States to grant a special reference quantity to producers who have carried out investment even without a development plan. It is indeed broadly worded and permits a special reference quantity to be granted to non-marketers who, like the applicants in these proceedings, invested in dairy cattle with a view to resuming milk production. Despite this, I take the view that the institutions were not entitled to assume that the Member States would actually take advantage of that possibility (again, it was not an obligation) in order to enable the non-marketers to resume milk deliveries. [38]

Article 5 of Regulation No 857/84 provides that Member States may grant specific or additional reference quantities only within their guaranteed quantity limit. A Member State taking advantage of one of the possibilities provided for in Articles 3 and 4 of Regulation No 857/84 (on behalf, for instance, of non-marketers) must therefore also, as required by Article 2(3) of the regulation, adapt the reference quantities of those producers who did in fact deliver milk in the course of the reference year. To my mind, the Member States could not be expected to impose on those producers such an effort of solidarity vis-à-vis non-marketers because the Community legislature itself had not made specific provision for them. Is it not significant in this regard that in 1989 (that is to say, after the judgments in *Mulder* and *von Deetzen*) the Council itself took the initiative of increasing the Community reserve by 600 000 tonnes in order to enable the Member States to grant non-marketers a special reference quantity of 60% of their former production (see section 5 above)? The Council manifestly assumed that in the absence of such an increase the Member States could not be expected to release reference quantities for non-marketers within their guaranteed quantity limits.

38 — It emerges from *Spronk*'s case how sparingly the possibility afforded by this provision has been taken up in the Netherlands. In its judgment of 12 July 1990 in that case (Case C-16/89 *Spronk* v *Minister van Landbouw* [1990] ECR I-3185) the Court held that the relevant Netherlands implementing provision was not contrary to Regulation No 857/84.

26. *Thirdly* and lastly, the institutions cannot invoke any overriding grounds of public interest in order to justify the failure to accommodate in Regulation No 857/84 the special situation of non-marketers who wished to resume milk production. Of course, I do not deny that the levy system itself pursues an important aim in the public interest. Nevertheless, I can see no reason — and have searched in vain for justification in the statement of reasons of the system introduced in 1984 — for the Community legislature's failure to take any account at all of the non-marketers' special situation.

(iii) A limited and clearly defined group of producers are adversely affected by the breach

27. According to the Council and the Commission, the breach did not affect a 'limited and clearly defined group of commercial operators'. To that end they refer to the Court's statement in *Ireks-Arkady* (paragraph 11) and *Interquell* (paragraph 14) to the effect that only a small number (namely 18) quellmehl producers were affected and hence that requirement was satisfied. They further point out that in *HNL* (paragraph 7) the Court stated that the regulation which had been declared invalid 'affected very wide categories of traders, in other words all buyers of compound feeding-stuffs containing protein'. In their view, that was one of the reasons why in that case the Court did not hold the Community liable.

The Council and the Commission observe that in all 122 787 dairy farmers took advantage of the premium system introduced by Regulation No 1078/77. They acknowledge that the number of non-marketers entitled to claim compensation is not necessarily the same, but point out that neither may that number be reduced to the number of non-marketers who applied for a provisional special reference quantity of 60% of their former production pursuant to Regulation No 764/89. [39] Other non-marketers, that is to say non-marketers who abandoned their plans to resume milk production sometime between the time when their non-marketing undertakings expired and the time when a provisional special 60% reference quantity could be applied for, may well be entitled to claim compensation.

The applicants argue in the reply that in *HNL* the Court took the size of the group affected into account because as a result the 'effects [of the regulation which was declared invalid] on individual undertakings were considerably lessened'. They infer from this that the Court did not wish to attach importance to the large number of persons affected *per se*, but rather saw it as an indication for assessing the extent of the damage sustained individually by the persons affected. They further consider that, compared with the total number of dairy farmers in the

39 — It appears from the answer given by Mr MacSharry on behalf of the Commission to Mr John Hulme (OJ 1990 C 93, p. 26) that 13 187 non-marketers applied for such a reference quantity. It does not appear from the case-file how many non-marketers actually obtained such a reference quantity.

Community, the number of non-marketers constitutes a limited and clearly defined group.

28. A 'clearly defined group' and a 'limited group' (in terms of numbers) are two different criteria. The fact that the group concerned must be 'clearly defined' in order for the Community to be able to be held liable means that the number of persons affected must be capable of being determined at the time when the ruling is given on the compensation. That requirement is met in this instance.

In that regard, it is important to point out in the first place that the circle of potential persons affected is established *a priori*. Only non-marketers are eligible for compensation. Their number and identity are known. In *HNL*, where the Court rejected the claims for compensation, the situation was different. The Court referred in that judgment to the very large categories of traders affected, 'in other words, all buyers of compound feeding-stuffs containing protein' namely essentially *all* poultry farmers and egg producers. In the present cases, not all non-marketers can actually be regarded as having been adversely affected, but only those who, on the expiry of their non-marketing undertaking, had not definitively abandoned milk production and suffered damage as a result because Regulation No 857/84 prevented them from resuming production. Admittedly, the number of those non-marketers is not definitely fixed, since whether they are entitled to compensation depends on proof that they had not yet ended milk production when their non-marketing undertakings expired. However, their number is certainly capable of being determined on the basis of such proof, as will be explained later (in section 30).

29. As far as the criterion of the 'limited group' is concerned, I can find no support in the case-law of the Court for making the Community's liability depend on the (absolute) number of persons adversely affected. Even apart from the fact that it would be impossible for the Court to set a figure on that number, the words 'limited group' should be construed as referring to a group of undertakings on which the unlawful act imposed a specific disadvantage, in comparison with other groups of undertakings, which those other groups did not have to bear. That condition is clearly satisfied in the present cases: compared with milk producers who did not interrupt their milk production, the non-marketers concerned were affected by the levy system specifically — and, moreover, seriously — since they alone were prevented by the contested rules from producing milk and, as a result, could not resume milk deliveries.

In *HNL*, the position in that respect was also different. The Court determined that the effect of the unlawful measure at issue in that case on the individual undertakings concerned was small, since the price increase caused by the measure was definitely modest and the resultant burden was spread over the whole economic sector, since essentially all poultry farmers and egg producers were affected.

30. In connection with the determinacy and the number of persons adversely affected, I would, moreover, qualify the institutions' view that the number of non-marketers who are entitled to claim compensation is much in excess of those who applied for a special 60% reference quantity.

Whether non-marketers suffered damage as a result of the failure to grant them a special reference quantity depends on whether, at time when their non-marketing undertakings expired, they had already abandoned for good the intention to resume milk production. If they had, they cannot claim that they had to stop production owing to Regulation No 857/84 and therefore can lay no claim to compensation. Admittedly, it cannot be inferred with certainty from the fact that a non-marketer did not apply for a 60% reference quantity in 1989 — even though it was open for him to do so — that he had already stopped milk production at the end of his non-marketing period. Nevertheless, that fact is a serious indication that that is the case and therefore justifies reversing the burden of proof. As a result, non-marketers who did not apply for a 60% reference quantity can argue that, when the non-marketing undertaking expired, they were still minded to resume milk production but that they subsequently abandoned that plan. In order to be able to argue that, they must provide concrete proof that they actually made an effort towards or after the end of the non-marketing period to obtain a reference quantity.

I would further point out that some non-marketers applied for a provisional 60% reference quantity but did not receive it, because they did not satisfy the criteria laid down in Regulation No 764/89, which were designed to make sure that the non-marketers in question intended and were really able to resume milk production and found it impossible to obtain a reference quantity pursuant to Article 2 of Regulation No 857/84 (see Article 3a(1) of Regulation No 857/84 and the second recital in the preamble to Regulation No 764/89). As regards those operators, the institutions may assume, unless evidence is adduced to the contrary, that those operators would not have been eligible for the grant of a special reference quantity for non-marketers if Regulation No 857/84 had provided for one and that they are therefore not entitled to compensation.

(iv) The alleged damage went beyond the bounds of the economic risks inherent in activities in the milk sector

31. The Council and the Commission maintain that the criterion applied by the Court in the quellmehl and maize gritz cases that the damage alleged by the applicants should have gone beyond the bounds of the normal economic risks inherent in the operators' activities in the sector concerned is not satisfied in the present cases. Each of the institutions sets forth a number of arguments.

The Council asks whether the later grant of a reference quantity pursuant to Article 3a of

Regulation No 857/84, which was added by Regulation No 764/89 (and subsequently amended by Regulation No 1639/91), does not in itself constitute sufficient compensation, in view of the monetary value which such a reference quantity represents. That argument cannot be accepted. The monetary value undoubtedly possessed by a reference quantity is the present value of the future earnings which can be obtained from milk production by virtue of the quantity granted. I cannot see how this value, which relates to future earnings — and which in any event is not peculiar to the reference quantities granted (*ex post*) to non-marketers —, can constitute compensation for past loss of earnings resulting from the failure to grant a reference quantity.

For its part, the Commission adds that the applicant in Case C-37/90 was not compelled by events to enter into a non-marketing undertaking and that during the non-marketing period instead of producing milk he fattened bullocks. Those arguments cannot be accepted either. It is irrelevant whether or not a producer was compelled by events to enter into a non-marketing undertaking, just as it is irrelevant what activities he carried out during the non-marketing period. In so far as replacement activities were carried on *after* the expiry of that period, an argument may, however, be inferred therefrom with regard to the limitation of the damage sustained, a question which I shall be considering later (in section 49).

32. The Commission further argues that, in view of the large amount of intervention and adjustments in the milk sector, carrying on an activity in that sector entails not only the general risks to which every economic operator is subject, but also specific risks peculiar to activities in that sector. As a result, the alleged damage does not qualify for compensation.

That argument goes to the heart of the precondition for establishing liability which is now under discussion. Above (in section 18) I pointed out that that precondition is met if the persons adversely affected suffered *unforeseeable* damage. As far as the present cases are concerned, it is established that the levy system placed the applicants in an unforeseeable situation, since in *Mulder* (paragraph 26) and *von Deetzen* (paragraph 15) the Court declared that:

'total and continuous exclusion of that kind for the entire period of application of the regulations on the additional levy, preventing the producers concerned from resuming the marketing of milk at the end of the five-year period, was not an occurrence which those producers could have foreseen when they entered into an undertaking, for a limited period, not to deliver milk'.

33. In view of the foregoing, it must be concluded that the invalidity of Regulation No 857/84 as found by the Court in *Mulder*'s and *von Deetzen*'s cases is such as to cause

the Community to incur liability for the damage suffered by the applicants.

4.2.2. (No) liability as a result of the declaration of invalidity in the Spagl and Pastätter cases

34. In *Spagl* and *Pastätter* and subsequently also in *von Deetzen (No 2)* the Court declared that Article 3a(2) of Regulation No 857/84, as amended by Regulation No 764/89, was invalid in so far as it restricted the special reference quantity provided for in that provision to 60% of the quantity of milk delivered by the producer during the twelve calendar months preceding the month in which the application for the premium was made. I consider that the declarations of invalidity in the *Spagl* and *Pastätter* cases, unlike the invalidity found in the *Mulder* and *von Deetzen* cases, cannot cause the Community to incur liability. Admittedly, the Court also held in *Spagl* (paragraph 29) and in *Pastätter* (paragraph 20) that the restriction was void for breach of the principle of protection of legitimate expectations and therefore in breach of a superior rule of law. However, it appears to me that the Community legislature's decision to restrict to 60% the reference quantity to be granted to non-marketers cannot be regarded as a manifest and serious misjudgment of its powers and therefore does not constitute a sufficiently serious breach of the principle of legitimate expectations.

35. The fixing of the 60% rule is the outcome of the policy choices which the Community legislature made with regard to the way in which account is be taken of the non-marketers' special situation. Following the judgments in *Mulder* and *von Deetzen* it was plain to the Community legislature that the non-marketers in question could invoke an entitlement to the allocation of a reference quantity (see the third recital in the preamble to Regulation No 764/89). However, it also had to take account of 'the overriding necessity of not jeopardizing the fragile stability that currently obtains in the milk products sector' (fifth recital in the preamble to Regulation No 764/89) and of the interests of other producers and of the disadvantage at which they would be put if the reference quantities allocated to them had to be reduced in order to enable a reference quantity to be granted to the non-marketers. The balancing of these interests led the Community legislature to increase the Community reserve by 600 000 tonnes for the benefit of the non-marketers and to decrease commensurately the total guaranteed quantity of each Member State, whilst offsetting the impact of that cut on individual reference quantities by decreasing the rate of withdrawal introduced by Regulation No 775/87 (see section 5 above). The limitation of the reference quantity to be allocated to non-marketers to 60% — which is very different from their being completely excluded from having a reference quantity — remains in my view within the scope of the broad discretion which the Community legislature has in this sphere and cannot therefore be regarded as being a sufficiently serious breach, even though it turned out that the 60% rule was invalid.

My conviction is reinforced by the fact that it appears from Mr Advocate General Jacobs' Opinion in the *Spagl* and *Pastätter* cases (in particular at paragraph 40) that the Court's judgments in *Mulder* and *von Deetzen* can also be understood as meaning that, whilst it

is true that non-marketers may not be *excluded* from milk production, the principle of protection of legitimate expectations does not preclude a *limitation* of the reference quantity at a level such that production may be resumed. In any event, in *Sofrimport* (paragraph 27), too, the Court attached importance to the fact that there was a *complete failure* to take account of the special position of the trader concerned and concluded that there had therefore been a sufficiently serious breach of the principle of protection of legitimate expectations.

36. I therefore conclude that the adoption by the Community legislature of the 60% rule in Article 3a(2) of Regulation No 857/84 did not constitute a sufficiently serious breach of the principle of protection of legitimate expectations. Consequently, the Community cannot be held liable on account of the declarations of invalidity in *Spagl* and *Pastätter* and the applicants' action must be dismissed as regards the damage which they maintain they sustained as a result of that invalidity. Neither can the Community be held liable for the damage which the applicants maintain that they are still to suffer following the grant of an additional reference quantity pursuant to Article 3a(2) as amended by Regulation No 1639/91, since the arrangements introduced by that regulation go even further towards accommodating the non-marketers' special situation than the arrangements introduced by Regulation No 764/89 and do not manifestly and seriously disregard the Council's discretion with regard to the size of the percentage reduction, as that discretion was established in *Spagl* and *Pastätter* (see section 6 above).

4.3. *The existence of damage and the causal link*

37. The applicants claim that they could not carry on their occupation as dairy farmers from the time when their non-marketing undertaking expired until the time when they resumed milk deliveries to the extent of the 60% reference quantity which they were granted. During that period they were not entitled to receive a reference quantity as a result of Regulation No 857/84 and therefore, owing to the magnitude of the additional levy, obtained no income from the normal exercise of their occupation. They therefore had to resort to other — in some cases, loss-making — agricultural activities.

In order to qualify for compensation the damage must be *certain* and not be based merely on suppositions. The loss of profit invoked by the applicants satisfies that requirement. Admittedly, in *Kampffmeyer* [40] the Court showed some reluctance with regard to damage in the form of loss of profit 'based on facts of an essentially speculative nature'. The loss of profit at issue here is, however, more than speculative. To begin with, the applicants applied for and obtained a provisional 60% reference quantity under Regulation No 764/89, and hence they do not come into the class of non-marketers which, in my view, may be assumed, until proof to the contrary is forthcoming, to have already stopped milk production when their non-marketing undertaking expired (see section 30 above). Moreover, in the normal course of events milk production within the ambit of the common agricultural policy

40 — Judgment in Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer* v *Commission* [1967] ECR 245, at 266.

yields a profit. The institutions do not contest this, nor do they contest that milk production without a reference quantity cannot be profitable. However, as has already been mentioned, they ask whether the later grant to the applicants of a reference quantity pursuant to the arrangements introduced after the event by Article 3a does not in itself constitute sufficient compensation on the ground that that reference quantity caused an increase to take place in the applicant's assets. I have already discussed, and rejected, that argument above (in section 31).

38. The institutions argue that there is no *causal link* between the relevant Community act and the alleged damage. In this connection, they rely, first, on the possibilities provided for in Articles 3, 4 and 4a whereby Member States may grant reference quantities in certain specific situations and, secondly, on the opportunities which were available to the applicants to take action themselves in order to limit the damage.

It must be granted to the Community institutions that the causal link between an unlawful act and the damage sustained may be broken entirely or partially by conduct (wrongful or otherwise) on the part of a third party or the injured party himself.

As regards the institutions' first argument, namely that the Member States could have granted a special or additional reference quantity pursuant to Articles 3, 4 and 4a of Regulation No 857/84, it must be pointed out, however, that the competent authorities in the Netherlands and the Federal Republic of Germany *de facto* did *not* grant any reference quantity to the applicants, because it was not possible to do so under the national implementing legislation in the circumstances in which the applicants found themselves. The institutions do not argue that the Netherlands or German implementing legislation conflicts with the levy scheme. However, they consider that the causal link was nevertheless broken because of those Member States' *failure* to grant non-marketers such as the applicants a reference quantity, although it was possible to do so more specifically under the second paragraph of Article 3(1) of Regulation No 857/84, which enables a reference quantity to be granted to producers who have invested in dairy cattle (see section 25 above). That argument is unfounded because it fails to appreciate the *right* which the Court recognized in *Mulder* and *von Deetzen* for non-marketers to be granted a non-discriminatory reference quantity. As has already been stated (in section 12), the obligation to grant such a reference quantity which corresponds to that right is not incumbent on the Member States but on the Community legislature itself. It follows that the *inaction* of the Member States cannot break the causal link between the damage and the unlawful conduct of the Community.

As far as the second argument relied on by the institutions is concerned, it is sufficient to observe that the applicants did not fail to apply for a reference quantity, rather their efforts were fruitless (see sections 8 and 9 above). Whether the applicants were under a duty to limit the damage they suffered by engaging in replacement activities and, if so,

whether failed to fulfil that duty will be considered later on in this Opinion (in section 49).

39. It appears from the foregoing that all the preconditions have been established for the Community to incur liability as a result of the declarations of invalidity in the judgments in *Mulder* and *von Deetzen* but that that is not the case as regards the declaration of invalidity in the *Spagl* and *Pastätter* judgments. In the next part of this Opinion I shall therefore consider how the damage caused in connection with the first finding of invalidity only is to be assessed.

5. Assessment of the damage

40. As the starting point for assessing the damage, the applicants in Case C-104/89 assume that financially they must be put in the situation in which they would normally have been had they been able to resume milk deliveries immediately after the expiry of the non-marketing undertaking on terms which did not discriminate against them compared with the producers referred to in Article 2 of Regulation No 857/84. In my view, that seems to be a proper starting point, although its working out will involve a number of practical difficulties with which the Court has not yet been faced.

The most significant difficulty is of course how to reconstruct the situation in which the applicants would have found themselves if deliveries had been resumed immediately. In order to avoid that difficulty the institutions suggest that, if they are held liable, the amount of the compensation payable should be calculated on the basis of the amounts of the premiums provided for in Regulation No 1078/77. Although that solution has the merit of simplicity, I consider that it must be rejected on the ground that the amounts of the premiums would not be suitable compensation for the damage. The Council and the Commission have themselves admitted that the amounts of the premiums provided for in Regulation No 1078/77 are significantly lower than the profit which a structurally sound farm can normally achieve from milk production (see section 21 above). In addition, Article 4 of Regulation No 1078/77 provided for tapering non-marketing premiums (the higher the production the lower the premium per 100 kilogrammes). Hence they are not related — quite the contrary — to the actual damage sustained by the applicants.

41. How, then, is the damage to be assessed? I consider that it is necessary to draw a distinction in this regard. First, the period to be taken into account for the purposes of calculating the damage has to be established together with the reference quantity which the applicants could normally have claimed during that period. It appears to me that the Court has sufficient information to rule definitively on these aspects now.

Secondly, it is a question of calculating the profit which the applicants could normally have obtained during the period concerned on the basis of the reference quantity to which they were entitled, and which they lost as a result of the invalidity established by the judgments in *Mulder* and *von Deetzen*, while taking into account the replacement activities which they carried out

during that period. Each of the parties has produced documents purporting to show how the loss of profit is to be calculated. However, those documents do not allow the Court to establish with sufficient certainty what compensation is due to each applicant. Consequently, it appears to me that the Court should be induced to rule on this point in an interlocutory judgment in which it should provide a few general indications while leaving it to the parties to assess the damage (more specifically, the loss of profit) by mutual agreement. In the event that they should fail to reach an agreement within, say, twelve months, it should be for the Court to settle in a final judgment those points on which no agreement has been reached.

5.1. *The period and reference quantity to be taken into account in calculating the damage*

5.1.1. *The period to be taken into account*

42. Since I have already reached the conclusion that the Community cannot be held liable for the damage which the applicants maintain they suffered and have still to suffer as a result of the unlawfulness of the 60% rule laid down in Article 3a(2) of Regulation No 857/84 as established in the judgments in *Spagl* and *Pastätter*, the applicants are entitled to seek compensation only for the period during which they had no reference quantity at all, that is to say for the period between the expiry of their non-marketing undertakings and, in principle, the entry into force of Regulation No 764/89, Article 3a of which introduced the 60% rule.

I say in principle, because some applicants (Mulder, Brinkhoff and Twijnstra) resumed milk deliveries even before Regulation No 764/89 entered into force. Since milk deliveries made before the grant of a 60% reference quantity pursuant to that regulation are free of levy in so far as they did not exceed the 60% level (see Article 3a(5) of Regulation No 857/84 as amended by Regulation No 764/89 and the seventh recital in the preamble to the latter regulation), in such cases the date when deliveries actually resumed should be taken as the end date. [41]

5.1.2. *The reference quantity to be taken into account*

(i) Basis for the calculation

43. The starting point for determining the reference quantity which the applicants could normally have claimed during the period in question must be Article 2(1) of Regulation No 857/84, which provides that the reference quantity to be granted is to be equal to the quantity of milk delivered by the producer in 1981, plus 1%. However, under Article 2(2) the Member States were free to choose 1982 or 1983 as the reference year (in fact they all opted for 1983) provided that the quantity produced in that year was 'weighted by a percentage established so

41 — I would point out again (see section 30 above) that, in my view, non-marketers who did not apply for a 60% reference quantity pursuant to Regulation No 764/89 should be deemed, in the absence of proof to the contrary, to have given up milk production for good during the currency of their non-marketing undertakings, with the result that normally they cannot argue that they suffered damage as a result of Regulation No 857/84. That presumption that they discontinued milk production does not operate in the present cases, since the applicants did in fact apply for and obtain a 60% reference quantity.

as not to exceed the guaranteed quantity defined in Article 5c of Regulation (EEC) No 804/68'. Article 2(3) further provides that the percentages referred to in Article 2(1) and (2) may be adapted by the Member States with a view to the grant of special or additional reference quantities pursuant to Articles 3 and 4 of Regulation No 857/84. [42]

In *Spagl* (paragraph 21) and *Pastätter* (paragraph 12) the Court accepted that in the case of non-marketers who did not deliver any milk during the reference year adopted by the Member States the reference quantity could be calculated on another footing, namely on the basis of the volume of deliveries which they made during a representative period preceding the non-marketing period. It is therefore uncontested that the basis for calculation provided for in Article 3a(2) of Regulation No 857/84 must be used as the starting point, in other words the volume of deliveries during the twelve calendar months preceding the month in which application was made for the non-marketing premium (called hereinafter 'the non-marketers' reference year').

However, the applicants in Case C-104/89 maintain that that basic figure should be increased by 1%. I consider that they are right. For the purposes of determining the reference quantity the Community legislature took as its basis milk deliveries in 1981, plus 1% (see Article 2(1) of Regulation No 857/84 and the second recital in the preamble to that regulation). Since in the case of non-marketers the starting point must be milk deliveries during the non-marketers' reference year preceding 1981 — which means that they cannot take advantage of increased productivity between that year and 1981 — it would be particularly unreasonable and even discriminatory if they were additionally denied the 1% increase.

(ii) The reduction coefficient

44. The Court expressly recognized in *Spagl* (paragraph 21) and *Pastätter* (paragraph 12) that the Community legislature was entitled to apply to the basic figure for calculating the reference quantity to be allocated to non-marketers a 'reduction coefficient designed to ensure that the category of producers concerned was not accorded an undue advantage by comparison with the producers who continued to deliver milk during the reference year'. However, the Court considered that a reduction coefficient of 40% was too high, on the ground that it appeared from the information provided to the Court that in no case did the reduction coefficient applied in the Member States pursuant to Article 2 of Regulation No 857/84 (inclusive of the rate of withdrawal discussed in section 46) exceed 17.5%. In this way, the Court indicated how an appropriate reduction coefficient for non-marketers has to be determined, namely by applying a percentage which in the Member State of the producer concerned is representative of all the abatements which were applied there pursuant to Article 2 of Regulation No 857/84 to the reference quantity

42 — Regulation No 1639/91 amended Article 2(3) of Regulation No 857/84 so that the percentages in question may now also be adapted with a view to the grant of a special reference quantity to non-marketers pursuant to Article 3a of Regulation No 857/84.

allocated to the producers referred to in that article. [43]

As far as the period qualifying for compensation (section 42 above) is concerned, this means more specifically that the basic reference quantity for the applicants (namely their production in the non-marketers' reference year plus 1%) for each of the years in that period (corresponding to the first to the fifth year of application of the levy system [44]) is to be reduced by a percentage representative of the reduction coefficient which was applicable in each of those years in the Member State concerned.

The applicants point out, however, that if non-marketers are not to suffer discrimination compared with producers referred to in Article 2, account must be taken of their particular situation. In that regard, they object that, on the lines of the Netherlands and German legislation (which was adopted after the *Spagl* and *Pastätter* judgments in order to implement Regulation No 1639/91), account is taken of two specific reduction coefficients: the reduction coefficient which was applied in the first year to producers referred to in Article 2 and the rate of withdrawal introduced by Regulation No 775/87, which currently amounts to 4.5%.

45. The origin of the *first* objection lies in the fact that, as already mentioned, all the Member States opted for 1983 as the reference year, rather than for the volume produced in the (basic) reference year 1981, plus 1%. In order in those circumstances to avoid exceeding the guaranteed total quantity per Member State, the Member States had — as expressly provided for in Article 2*(2)* of Regulation No 857/84 — to reduce the individual reference quantities by a certain percentage.

I agree with the applicants that when a representative reduction coefficient is determined for non-marketers no account may be taken of the percentage determined as described above in accordance with Article 2(2). That percentage compensates for the fact that the reference quantity of producers referred to in Article 2 was established on the basis of a reference year (1983) in which in most cases, in view of the steady rise in productivity in the sector, producers delivered more milk than they did in 1981. Since the basis applying to non-marketers is milk deliveries made during the non-marketers' reference year *prior* to 1981 (plus 1%), it would be unreasonable and discriminatory to apply to them the reduction coefficient determined pursuant to Article 2(2) of Regulation No 857/84, since that coefficient is designed to compensate for the advantage of the higher production achieved between 1981 and 1983, the later reference year adopted by the Member States.

The foregoing does not, however, mean that the *entire* reduction coefficient which was

43 — The Council also took this view, as appears from the new version of Article 3a(2) of Regulation No 857/84 introduced by Regulation No 1639/91 (as set out in section 7 above).

44 — The levy scheme was originally introduced for five successive periods of 12 months (see Article 5c(1) of Regulation No 804/68 as added by Regulation No 856/84).

applied in the relevant Member State pursuant to Article 2 of Regulation No 857/84 should be left out of account, but only the reduction referred to in *paragraph 2* thereof, not the reductions laid down by the Member States pursuant to *paragraph 3*. The latter reductions are intended to make it possible to grant a special or additional reference quantity to producers in one of the special situations referred to in Articles 3 and 4 of the regulation. The applicants would be placed at an advantage in comparison with other producers if in determining the reference quantity to be granted to them no account were to be taken of such reduction coefficients, which were provided for on grounds of solidarity.

45. The applicants' *second* objection relates to the taking into account of the withdrawal of a uniform proportion of each reference quantity, as laid down by Regulation No 775/87. That withdrawal was not introduced until the fourth year of application of the levy scheme and may therefore not be taken into account when calculating the damage which the applicants suffered during the first three years of application of the scheme. However, as from the fourth year the reference quantity taken as the basis for calculating the damage may be reduced by the same percentage as was applied to producers referred to in Article 2, provided, however, that when the damage is assessed account is taken of the compensation which was received by those producers under Article 2 of Regulation No 775/87 in respect of the withdrawal. The non-marketers would also have received that compensation when the reference quantity to which they would normally have been entitled was withdrawn.

5.2. *Assessment of the damage suffered by way of loss of profit*

47. As I have already observed, this is a point on which, owing to the lack of sufficiently certain and precise evidence, the Court can for the time being provide only general indications with a view to the parties' reaching agreement. Such indications can relate only to the situation of the applicants in the present joined cases but may, nevertheless, be useful when assessing the compensation claims of other non-marketers who are in a similar situation.

It is for the injured parties to prove the truth and extent of the damage suffered by way of loss of profit. I understand loss of profit to mean the profit which the applicants would have made from milk production had they been able to resume production at the proper time. The parties are in agreement about the starting point: account must be taken of the profit from the delivery of a quantity of milk — equal to the reference quantity to which the applicants would have been entitled during the relevant period — which corresponds to the profits made by milk producers with the same reference quantity during the same period and under circumstances similar to those in which the applicants would have been had they been producing. However, the parties are not in agreement about the amount of the profit expressed as a percentage of sales (that is to say, the reference quantity).

The guideline to be used in order to determine loss of profit should be the normal

course of events, having regard to the special circumstances. [45] This means that the basis for calculation to be employed is the profit which, according to reliable statistical data, is representative of the relevant Member State or region with specific characteristics in the relevant year in the case of a farm of the same size as the applicant's.

48. As regards the calculation of loss of profits, there are two specific problems which the Court can resolve as of now. First, there is a problem raised by the institutions. According to them, it is not possible for the applicants to have actually produced, after the expiry of the non-marketing period, from young cows whose milk yield had not yet developed a quantity of milk equal to the reference quantity which they claim. The applicants state in the reply in response to this claim that they were in fact able to exploit the reference quantity in full since they purchased more mature cattle.

That, after the expiry of the non-marketing undertaking, the applicants had to *start up* milk production afresh should, in the normal course of events, have had an impact on profitability during the starting period seems to me to be correct. Depending on the circumstances, this will be caused either by the lower yield of young cows (the Commission talks about young cows' productivity being 25% below that of more mature animals) or by the higher purchase price of more mature cows. It is for the institutions to adduce reliable general data in support of this defence argument. If the applicants consider that their actual circumstances differ from the normal course of events, they must provide sufficient proof that that is the case.

49. The second problem is concerned with setting income from replacement activities against lost profits. After their non-marketing undertakings expired all the applicants took up replacement activities when Regulation No 857/84 made it impossible for them to resume milk production. By so doing they undoubtedly acted in accordance with a general legal principle to the effect that the injured party must display ordinary vigilance in order as far as possible to contain the damage within reasonable limits. [46] The institutions consider, however, that the applicants did not make enough efforts to obtain adequate profits from the replacement activities. The applicants disagree, although it appears that the applicants in Case

45 — To have regard to the normal course of events seems to be a general principle common to the legal systems of the Member States. See the references to Belgian, English, French, German, Netherlands and Swiss law in the Belgian standard work by J. Ronse, 'Schade en schadeloosstelling (onrechtmatige daad)', *Algemene Praktische Rechtsverzameling*, 1957, Nos 73 and 74. See more specifically the wording of § 252 of the German Bürgerliches Gesetzbuch (Civil Code), which reads as follows: 'Der zu ersetzende Schaden umfasst auch den entgangenen Gewinn. Als entgangen gilt der Gewinn, welcher nach dem gewöhnlichen Laufe der Dinge oder nach den besonderen Umständen, insbesondere nach den getroffenen Anstalten und Vorkehrungen, mit Wahrscheinlichkeit erwartet werden konnte.' ['The compensation shall also include lost profits. Profit is deemed to have been lost which could probably have been expected in the ordinary course of events, or according to the special circumstances, especially in the light of the preparations and arrangements made.' (The German Civil Code, trans. by Forrester, Goren and Ilgen, North-Holland Publishing Co., Amsterdam.)]

46 — The Court has recognized this principle in staff cases. More specifically, in the judgment in Case 58/75 *Sergy* v *Commission* [1976] 1139 (paragraphs 46 and 47) the Court held that a lack of ordinary vigilance was partly responsible for the damage suffered by the applicant and that that had to be taken into account when assessing the extent to which the defendant had to make good the damage. For a recent study in comparative law, see R. Kruithof, 'L'obligation de la partie lésée de restreindre la dommage', *Revue critique de jurisprudence belge*, 1989, p. 12 et seq., which includes numerous references to Belgian, English, French, German and Netherlands law.

C-104/89 recorded operating losses in a large number of financial years during which they carried on replacement activities. They claim that the Community must also compensate them for those losses.

Also as regards that dispute it is for the institutions to prove with the help of reliable statistical data what profit can be obtained in the relevant Member State or region with specific characteristics in the relevant year in the normal course of events on a farm with similar infrastructure to that of the applicant in the sector to which the replacement activity belongs. It is then again for the applicants to adduce counter-evidence supported by sufficient data and possibly to prove personal reasons (such as serious illness or other exceptional setbacks) which explain why the operating result which they achieved was lower than a normal operating result. The normal profit so determined — even if the actual profit was lower — should consequently be deducted from the amount of the proved loss of profits. [47] As for any operating losses incurred in the relevant period, they are not normally eligible for compensation on the ground that there is no causal link between those losses and the regulation which was declared invalid; in view of the fact that the replacement activities undertaken by the applicants are normally profitable, it must be assumed that any losses are to be attributable to factors for which the Community does not have to answer. [48]

50. I would make one final observation concerning the circle of persons entitled to claim compensation — mainly only those non-marketers who applied for and obtained a provisional 60% reference quantity pursuant to Regulation No 764/89 (see section 30 above) — with whom the institutions will have to reach agreement in the event that the Court decides that the Community is liable for the damage suffered as a result of the invalidity of Regulation No 857/84.

In my view, there is nothing to prevent the institutions from drawing up an overall settlement which takes account of the standard types of injured party. Indeed this is appropriate in view of the need to treat in the same way injured parties who are in similar circumstances. It is open to individual injured parties to show by producing sufficient evidence, as has been emphasized above, that a different arrangement is justified for them on account of exceptional personal circumstances.

5.3. *Interest due*

5.3.1. *Legal interest*

51. The parties agree that if the Community is held liable to pay compensation, it will

47 — If it should appear that the applicants obtained a higher profit than the normal profit from the replacement activities, that extra profit should not be deducted from the lost profits, since the Community should not derive an advantage from special efforts made by the applicants.

48 — There may in fact be a causal connection between some losses and the regulation which was declared invalid, for example in the case of the loss alleged by some applicants in Case 104/89 on the sale of cows purchased in 1983 or 1984 with a view to the resumption of milk production, which was subsequently made impossible by Regulation No 857/84.

have to pay legal interest on the amount payable as from the day on which judgment is given. However, their opinions differ about the rate of interest. The applicants in Case C-104/89 claim 8%. The applicant in Case C-37/90 proposes 7%. The institutions put the rate of interest at 6%.

The Court has repeatedly held, most recently in *Sofrimport*, that as a general rule the obligation to pay interest arise on the date on which judgment is given. However, at one time it set the rate without further explanation at 6% (in the quellmehl and maize gritz cases), at another at 8% (in the more recent *Sofrimport* case). In my view, the guideline should be the level of legal interest which is applied at the time when the Court gives its judgment in the Member State in which the applicants worked and in which they would therefore normally use or invest the compensation due to them.

5.3.2. *Compensatory interest*

51. In their application, the applicants in Case C-104/89 assessed the damage which they sustained allowing for an amount for interest not received for each year from 1984 to 1989. In their reply they claim compensatory interest only from 30 March 1989 (that is to say, from the date of the application) on the total amount of the damage which they allege they suffered up until the end of 1989. The applicant in Case C-37/90 has not applied for compensatory interest in this application or in his reply. At the hearing, however, he asked the Court to assess the damage allowing for compensatory interest. He observed that that unreceived interest constituted part of the damage sustained, since he had to pay interest on a bank loan which he had taken out.

53. It is for the Court to order the Community to pay compensation for the whole of the damage suffered by the applicants, which would therefore include compensatory interest in so far as the amount of compensation fixed by the parties by mutual agreement after the interlocutory judgment does not already take full account of the time which has elapsed until that date. For the reasons set out above (in section 51) that interest also must be calculated on the basis of the usual rate of interest in the applicants' Member State.

Conclusion

54. For the reasons set out in the foregoing I propose that, before deciding further, the Court should:

(1) declare that the European Economic Community must pay the applicants an amount commensurate with the damage which they sustained in the period between the expiry of the non-marketing undertaking which they entered into pursuant to Council Regulation No 1078/77 of 17 May 1977 and the grant to

them of a provisional reference quantity pursuant to Article 3a of Council Regulation No 857/84 of 31 March 1984 (which was added by Council Regulation No 764/89 of 20 March 1989) or the time at which they resumed milk deliveries if they did so before the grant of the aforesaid reference quantity;

(2) dismiss the remaining claims for compensation;

(3) declare that, within 12 months of the delivery of the judgment, the parties are to provide the Court with a calculation of the amount of damage determined by mutual agreement which takes account of the fact that, for each year of the period referred to in paragraph 1, the applicants could have delivered a quantity of milk corresponding to the milk deliveries which they made during the year preceding the month in which they applied for the premium, plus 1%, which amount is to be diminished by a percentage representative of the reductions which the Member State concerned applied in each year of the aforementioned period to the reference quantity fixed in accordance with Article 2 of Regulation No 857/84 for the milk producers referred to in that article — with the exception of the reduction connected with the adoption of a reference year later than 1981, but including the reduction resulting from the application of the rate of withdrawal introduced by Regulation No 775/87 —, *and* which further takes account, in assessing loss of profit, of the profit which, in the normal course of events and subject to the applicant's proving exceptional circumstances, would have been made by a producer in comparable circumstances who received the same reference quantity as the applicants were entitled to, but less the normal income obtained by the applicants from their replacement activity, which is to be assessed in accordance with the same criterion and established by means of the same methods of proof;

(4) declare that legal interest is due on the amount of compensation to be paid as from the date on which the judgment is given at the rate applying in the Member State concerned on that date, and possibly also compensatory interest at the usual rate applying in the Member State concerned, in so far as the amount of compensation to be paid does not already take fully into account the time which has elapsed up until then;

(5) declare that if the parties fail to agree or to agree on all points within 12 months of the date on which the judgment is given, the parties must forward their calculations to the Court with a view to the settlement of the outstanding points in issue;

(6) reserve the costs.