ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

13 January 1995 *

In Case T-524/93,

Humphrey Hennessy, residing in Timoleague (Ireland), and the other milk producers whose names appear in the annex to this order, represented by James O'Reilly SC, of the Bar of Ireland, and Philippa Watson, Barrister-at-Law, instructed by Oliver Ryan-Purcell, Solicitor, with an address for service in Luxembourg at Fyfe Business Centre, 29 Rue Jean-Pierre Brasseur,

applicants,

v

Council of the European Union, represented by Arthur Brautigam, Legal Adviser, and Michel Bishop, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

and

* Language of the case: English.

Commission of the European Communities, represented by Dierk Booß, Legal Adviser, and Christopher Docksey, of its Legal Service, acting as Agents, and Hans-Jürgen Rabe, of the Hamburg Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for compensation, under Article 178 and the second paragraph of Article 215 of the EEC Treaty, for the damage which the applicants consider they have suffered as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By applications lodged at the Registry of the Court of First Instance on 28 October 1993, Humphrey Hennessy and the other applicants named in the annex to this order brought an action under Articles 178 and 215, second paragraph, of the EEC Treaty seeking compensation for the damage which they consider they have suffered as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in

Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13, 'Regulation No 857/84') inasmuch as that regulation did not provide for the allocation of a representative reference quantity to producers of milk who, pursuant to an undertaking entered into under 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), delivered no milk during a limited period.

2 The applicants are also parties to Case T-541/93 *McCutcheon and Others* v *Council* in which they seek the annulment of Council Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6, 'Regulation No 2187/93'). They were also parties to Case T-541/93 R, in which they applied for the suspension of operation of that regulation. That application was dismissed by an order of the President of the Court of First Instance in Joined Cases T-278/93 R and T-555/93, T-280/93 R and T-541/93 R *Jones and Others* v *Commission and Council* [1994] ECR II-11.

3 By letters received at the Registry of the Court of First Instance between 24 February and 26 July 1994, the applicants, with the exception of Terry Wall, withdrew from the proceedings.

4 Under the first sentence of Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. In this case, however, the applicants request the Court of First Instance to apply the second sentence of Article 87(5) of the Rules, according to which the other party may be ordered to bear the costs if this appears justified by the conduct of that party.

5 In their observations lodged at the Registry between 10 May and 10 August 1994, the Council and the Commission opposed the applicants' claim concerning costs.

6 In support of their claim, the applicants rely on three main arguments.

First, the applicants state that, as the Court of Justice already held in its judgment in Joined Cases C-104/89 *Mulder* v *Council and Commission* and C-37/90 *Heinemann* v *Council and Commission* [1992] ECR I-3061, the defendant institutions are liable for damage caused to milk producers who undertook not to deliver milk during a limited period by reason of the fact that no reference quantity was allocated to them in Regulation No 857/84. In Regulation No 2187/93, which was adopted in compliance with the judgment in *Mulder*, cited above, the defendant institutions invoked a time-bar against producers in the applicants' situation. Moreover, under Article 14 of the regulation, in order to receive the compensation offered to them, producers must relinquish any application against Community institutions for the damage in respect of which the offer of compensation is made. According to the applicants, the result of that approach is to deprive them of their entitlement to compensation for a part of the damage which they consider they have suffered. Secondly, the applicants rely on the fact that since, by Regulation (EEC) No 2648/93 of 28 September 1993 laying down detailed rules for the application of Council Regulation (EEC) No 2187/93 (OJ 1993 L 243, p. 1, 'Regulation No 2648/93'), the Commission agreed to pay on a flat-rate basis the fees of lawyers acting for all milk producers before the communication of 5 August 1992 (OJ 1992 C 198, p. 4), it should also, by analogy, pay lawyers' fees incurred subsequently to 5 August 1992 on the ground that intervention by the lawyers concerned proved to be necessary in order to improve the position of producers. Thirdly, the applicants point out that it follows from the order in *Jones and Others*, cited above, that were the provisions of Regulation No 2187/93 at issue in the main proceedings to be adjudged unlawful, acceptance of the offer of

compensation contained in that regulation would entail no adverse consequences for them. The applicants explain that, in the light of the increased legal certainty which that order affords them, they are now in a position to withdraw from the proceedings.

7 In their written observations, the Council and the Commission state that it was unnecessary to bring these proceedings and dispute the second and third arguments of the applicants, stating that the order in *Jones and Others* v *Council and Commission*, cited above, does no more than acknowledge the need for the institutions to take all measures necessary in order to comply with the judgment of the Court of First Instance or of the Court of Justice which, if it is appropriate to do so, will annul Regulation No 2187/93 for misapplication of the Rules of the Statute of the Court of Justice of the EEC on prescription. That order does not warrant the withdrawal by the milk producers concerned of their individual actions for damages. The offer of payment of legal fees contained in Regulation No 2648/93 is said, for its part, to be tied to the acceptance of the offer of compensation the details of which are laid down in Regulation No 2187/93 and cannot be applied outside that context.

8 It should first be noted that under Article 8 of Regulation No 2187/93 the flat-rate compensation provided for is offered only for the period for which the right to compensation is not time-barred and that the five-year time bar in matters arising from non-contractual liability set by Article 43 of the Statute of the Court of Justice of the EEC is considered to have been interrupted either on the date of the application addressed by the producer to a Community institution, the date on which an action is brought before the Court or the date of the communication of 5 August 1992 whereby the Council and the Commission undertook to apply the judgment in *Mulder*, cited above, to all affected milk producers. Under Article 14 of Regulation No 2187/93, acceptance of the offer means that the producers must relinquish any claim against the Community institutions for the damage for which they seek compensation.

9 Next, it should be observed that, during the interlocutory proceedings in Case T-541/93 R *McCutcheon and Others* v *Council*, in which the applicants in this case were parties, and in other analogous cases (*Jones and Others* v *Council*, cited above) the Council and the Commission stated during the written procedure that acceptance by the applicants of the offer of compensation and relinquishment of any claim against the institutions did not necessarily mean the loss of all their rights to compensation for the whole period for which they consider themselves to be entitled in the event that the Court of First Instance or the Court of Justice were to find that the time-bar provisions in Article 8 of Regulation No 2187/93 were illegal. As far as the Council is concerned, in such circumstances compensation would then be payable, in principle, for the whole of the disputed period.

10 At the hearing on 6 January 1994 in the interlocutory proceedings referred to above, the Agents of the Council and the Commission gave their consent to inclusion in the minutes of the interlocutory hearing of a statement to that effect (see the Order in *Jones and Others* v *Council and Commission*, cited above, paragraph 51).

11 In those circumstances, it cannot be denied that, even though the application for interim measures was dismissed, that statement by the institutions is likely to have prompted the applicants' decision to withdraw their actions for damages which were brought after the publication of Regulation No 2187/93 inasmuch as it clarified to them the position of the Council and the Commission as to the consequences of acceptance of the offer of compensation contained in the regulation at issue in the event that it should be annulled.

12 However, that statement is not of such a nature as to be capable of justifying, under Article 87(5) of the Rules of Procedure of the Court of First Instance, an order that the applicants' costs should be borne by the defendant institutions. Under those circumstances, each party must bear its own costs. That conclusion is not affected by Regulation No 2648/93 which merely provides in Article 2 for the payment of lawyers' fees incurred prior to 5 August 1992.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1) **The names of Humphrey Hennessy and of the other milk producers named in the annex to this order shall be removed from the list of applicants in Case T-524/93, except that of Terry Wall.**

2) **Each party is to bear its own costs.**

Luxembourg, 13 January 1995.

H. Jung
Registrar

J. L. Cruz Vilaça
President