ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
15 July 1994 *

In Cases T-343/93 and others listed in the annex hereto,

Michael McCullough, residing in Omagh (United Kingdom), and the other milk producers whose names appear in the annex hereto, represented by James O'Reilly SC, and by Philippa Watson, Barrister-at-Law, instructed by Oliver Ryan-Purcell, Solicitor, with an address for service in Luxembourg at the Fyfe Business Centre, 29 Rue Jean-Pierre Brasseur,

applicants,

v

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

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, assisted by 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 Court Registry between 21 and 26 April 1993, Michael McCullough and the other applicants whose names appear in the annex hereto brought actions under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Council and the Commission for 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), inasmuch as it failed to provide for the allocation of reference quantities to producers who, pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 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), had withdrawn from milk production for a limited period.

2 By a decision of the President of the Court of 23 April 1993, proceedings in these cases were suspended until 19 May 1993. By a decision of the President of the Court of 14 September 1993 proceedings were suspended until delivery of the final judgment in Joined Cases C-104/89 and C-37/90 (*Mulder and Others* v *Council and Commission* [1992] ECR I-3061).

3 By orders of 27 September 1993 the Court referred the actions to the Court of First Instance pursuant to Article 47 of the Protocol on the Statute of the Court of Justice of the EEC (hereinafter 'the Statute') and in accordance with Article 3 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ L 144, p. 21).

4 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 for compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6). They were also parties to Case T-541/93 R in which they sought the suspension of operation of the abovementioned regulation. That application for suspension of operation was refused by order of the President of the Court of First Instance in Cases T-278/93 R and T-555/93 R, T-280/93 R and T-541/93 R *Jones and Others* v *Council and Commission* [1994] ECR II-11.

5 By letters registered at the Court of First Instance on 24 February 1994 the applicants withdrew their applications in the cases referred to.

Under the first sentence of Article 87(5) of the Rules of Procedure the party withdrawing 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 are asking for the second sentence of Article 87(5) to be applied. Under this provision the costs are to be borne by the other party if this appears justified by the conduct of that party.

6 By application received at the Registry of the Court of First Instance on 8 November 1993, the United Kingdom applied for leave to intervene in the cases referred to in support of the form of order sought by the Council. Since the cases are to be removed from the register following the applicants' withdrawal no decision need be given on those applications for leave to intervene.

7 In their observations received at the Registry of the Court of First Instance on 10 and 16 May 1994 respectively, the Council and the Commission opposed the claim for costs made on behalf of the applicants.

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

First, the applicants assert that the defendant institutions are responsible for the proliferation of litigation in the field of milk quotas because in the communication of 5 August 1992 (OJ C 198, p. 4) and in Regulation No 2187/93 they invoked a time-bar against producers in the applicants' situation. In the applicants' view, the effect of that is to deprive them of their entitlement to compensation for 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) 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, it should 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* v *Council and Commission*, cited above, and in particular paragraph 52 thereof, that in the event that the provisions of Council Regulation (EEC) No 2187/93 at issue in the main proceedings were to be adjudged unlawful acceptance of the offer of compensation contained in that regulation would entail no adverse consequences for them. That paragraph follows on from a statement to that effect made by the agents of the defendant institutions at the hearing and recorded at paragraph 51 of the order. The applicants explain that, in the light of the increased legal certainty resulting for them from the order, they are now in a position to withdraw from the proceedings.

9 In their written observations the Council and the Commission dispute the applicants' arguments.

As to the first argument, the defendant institutions assert that, as a result of the communication of 5 August 1992 and the guarantees given by the Commission to the applicants, the filing of these applications was absolutely unnecessary. In that communication the institutions are said to have undertaken to find a general solution for all milk producers affected. At the same time they are also said to have undertaken not to plead prescription against those producers provided that their entitlement to compensation had not already been barred on grounds of time as at 5 August 1992. Under those circumstances, it is contended by the institutions

that no producer will suffer adverse consequences as a result of not instituting proceedings before publication of the instrument laying down the detailed rules for the general offer to resolve the question of compensation for milk producers.

With regard to the other two arguments, the Council and the Commission state that the order in *Jones and Others* v *Council and Commission* merely acknowledges the need for the institutions to take all measures necessary to comply with the judgment of the Court of First Instance or 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 on prescription. That order does not warrant the filing by the applicants after 5 August 1992 of individual applications for compensation. For its part, the offer of payment of legal fees contained in Regulation No 2648/93 is said to be tied to acceptance of the offer of compensation the details of which are laid down by Regulation No 2187/93 and cannot be applied outside that context.

10 It must be borne in mind first of all, that the communication of 5 August 1992 from the Council and the Commission, as elucidated by its wording and by the contents of the explanatory memorandum to the communication by the Council and the Commission regarding milk and milk products (Doc. SEC 1480 final), pursued a twofold objective. On the one hand, the institutions sought to place on record their intention to take measures of a general nature in order to comply with the judgment of the Court in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 which established the Community's non-contractual liability to milk producers who as a result of their participation in the non-marketing scheme for milk contained in Regulation No 1078/77 were thereafter not granted any reference quantity for milk production. Secondly, the institutions sought to give to the milk producers concerned the guarantee that, until the adoption of general compensation measures, prescription would not be relied on against them provided that the prescription period had not already expired on the date of the communication or on the earlier date on which the producers applied to the institutions for compensation.

The Commission reaffirmed this position in an exchange of letters with the applicants after the publication of the communication.

11 In the light of the assurances given by the institutions, in particular in the abovementioned communication, the producers concerned did not need to bring applications in the period which elapsed between the publication of the communication and the publication of Regulation No 2187/93 in order to avoid the application to them of the time-bar concerning their entitlement to compensation.

12 This conclusion cannot be altered by the publication after the end of the abovementioned period of Regulation No 2648/93 which in Article 2 provides only for the payment of lawyers' fees incurred before 5 August 1992. Nor can it be altered by the terms of the order in *Jones and Others* v *Council and Commission* made in the light of the provisions of Regulation No 2187/93 which merely gave effect to the communication of 5 August 1992 (see paragraph 9 above). As regards actions for damages brought after 5 August 1992 and before the publication of Regulation No 2187/93, that order cannot therefore warrant the charging to the defendant institutions of the applicants' costs under the terms of the second sentence of Article 87(5).

13 Nor, however, would it be justified for the applicants to bear the costs incurred by the defendant institutions whose conduct, as the Court of Justice has already held, most recently in its judgment in *Mulder and Others* v *Council and Commission*, cited above, gave rise to the litigation concerning milk quotas.

14 It is therefore equitable in these circumstances for the parties to bear their own costs.

15 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs shall be in the discretion of the Court of First Instance. Since a decision on the application by the United Kingdom for leave to intervene is not necessary, the Court of First Instance considers that the applicant for leave to intervene should bear its own costs.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The cases shall be removed from the register,**

2. **The parties shall bear their own costs,**

3. **No decision on the application by the United Kingdom for leave to intervene is necessary,**

4. **The applicant for leave to intervene shall bear its own costs.**

Luxembourg, 15 July 1994.

H. Jung

Registrar

J. L. Cruz Vilaça

President