

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

16 December 1994 *

In Case T-541/93,

Norman McCutcheon, residing in Aldhogan (United Kingdom), and the other milk producers whose names appear in the annex hereto, represented by James O'Reilly SC, of the Bar of Ireland, and by Philippa Watson, Barrister, 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,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and by Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

and

United Kingdom of Great Britain and Northern Ireland, represented initially by J. D. Colahan, then by S. T. Braviner, of the Treasury Solicitor's Department, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION under Article 173 of the EEC Treaty for 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), and in particular Articles 8 and 14 thereof,

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

makes the following

Order

- 1 By an application lodged at the Registry of the Court of First Instance on 14 October 1993 Norman McCutcheon and the other applicants whose names appear in the annex hereto brought an action under Article 173 of the EEC Treaty against the Council seeking 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) and in particular Articles 8 and 14 thereof.
- 2 By separate document received at the Registry of the Court of First Instance on 19 November 1993 the applicants applied by way of interim measures for the suspension of operation of Regulation No 2187/93 and in particular the fourth paragraph of Article 14 thereof, and also for a declaration that the applicants might receive the flat-rate compensation provided for in that regulation without being required to withdraw the pending actions.
- 3 By order of 1 February 1994 the President of the Court of First Instance dismissed that application for interim measures and reserved the decision as to costs (Cases T-278/93 R and T-555/93 R and T-280/93 and T-541/93 *Jones v Council and Commission* [1994] ECR II-11).
- 4 By a letter received at the Registry of the Court of First Instance on 5 January 1994 the Commission requested leave to intervene in the case in support of the form of order sought by the defendant. By order of 30 August 1994, the President of the Second Chamber of the Court of First Instance granted that request.

- 5 By letter received at the Registry of the Court of First Instance on 2 March 1994, the United Kingdom requested leave to intervene in the case in support of the form of order sought by the defendant. By order of 30 August 1994 the President of the Second Chamber of the Court of First Instance granted that request.
- 6 By letters received at the Registry of the Court of First Instance between 25 February and 7 October 1994, the applicants, with the exception of Messrs Gregory Walsh, Patrick Hefferman, Thomas Fitzsimons, Patrick Wall, Patrick Griffin, John Harris, Sean Coughlan and James Connaughton, withdrew from the proceedings.
- 7 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. The applicants' request in this connection also covers costs relating to the interlocutory proceedings.
- 8 In its observations received at the Registry of the Court of First Instance between 19 May 1994 and 4 November 1994, the Council opposed the applicants' claim for costs. In its observations received at the Registry on 4 November 1994, the Commission, which as an intervener must bear its own costs in accordance with Article 87(4) of the Rules of Procedure, likewise took issue with the applicants' arguments with regard to the claim that the Council should bear the costs.

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

First, they assert that the defendant institutions are responsible for the proliferation of litigation in the field of milk quotas because in Regulation No 2187/93 they invoked a time-bar against producers in the applicants' situation. Moreover, under Article 14 of that Regulation, in order to receive the offer of compensation the producers are required to renounce all applications against the Community institutions for the damage in respect of which the offer of compensation is made. The offer of compensation contained in that Regulation does not therefore, it is said, cover losses actually incurred. According to the applicants, that approach is tantamount to depriving 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) 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 v Council and Commission*, cited above, and in particular paragraph 52 thereof, 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. 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.

- 10 As to the applicants' first argument, the Council asserts that the filing of several individual applications for the annulment of Regulation No 2187/93 was absolutely unnecessary, inasmuch as were the Court of Instance to annul that Regulation such annulment would have effect *erga omnes*. For its part, the Commission asserts that the filing of actions for annulment was not necessary for the applicants to recover compensation. The withdrawal by the applicants is a purely voluntary act which they chose to take in order to receive the offer of compensation provided for in Regulation No 2187/93 and does not result from a change of attitude by the institutions.
- 11 As to the other two arguments, the Council and the Commission state that the order in *Jones v Council and Commission*, cited above, 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 withdrawal by the applicants from the annulment proceedings filed. The offer of payment of legal fees contained in Regulation No 2648/93 is said, for its part, to be tied to 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.
- 12 It must be borne in mind first of all 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 set by Article 43 of the EEC Statute of the Court of Justice for proceedings against the Community in matters arising from its non-contractual liability is considered to have been interrupted either on the date of an application addressed to a Community institution by the producer who considers he has suffered damage, or the date on which the application is entered in the Register of the Court of Justice, or the date of the communication of 5 August 1992 in which the Council and the Commission undertook to apply the judgments of the Court of 19 May 1992 in Joined Cases C-104/89 (*Mulder v Council and Commission*) and C-37/90 (*Heinemann v Council and Commission* [1992] ECR I-3061), 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.

- 13 During the interlocutory proceedings in this case and in analogous cases, the Council, like the Commission, the defendant in certain of these cases, stated during the written procedure that acceptance by the applicants of the offer of flat-rate compensation and relinquishment of any claim against the institutions does not necessarily entail 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 period.
- 14 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 the inclusion in the minutes of the interlocutory hearing of a statement to that effect (see order in *Jones v Council and Commission*, mentioned above, paragraph 51).
- 15 Under those circumstances it cannot be denied that, even if the interlocutory application was dismissed, that statement by the institutions is likely to have prompted the applicants' decision to withdraw, 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.
- 16 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 institution. 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 Norman McCutcheon and of the other milk producers appearing in the annex hereto shall be removed from the list of applicants in Case T-541/93, with the exception of those of Gregory Walsh, Patrick Hefferman, Thomas Fitzsimons, Patrick Wall, Patrick Griffin, John Harris, Sean Coughlan and James Connaughton.
2. The parties shall bear their own costs including those relating to the interlocutory proceedings.
3. The interveners shall bear their own costs.

Luxembourg, 16 December 1994

H. Jung

Registrar

J. L. Cruz Vilaça

President