

JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
16 April 1997 *

In Case T-541/93,

James Connaughton, Thomas Fitzsimons and Patrick Griffin, residing respectively at Kilbeggan, Askeaton and Clonmel (Ireland), represented by James O'Reilly SC, of the Irish Bar, and Philippa Watson, Barrister, of the Irish Bar, 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 General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

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

* Language of the case: English.

and

United Kingdom of Great Britain and Northern Ireland, represented initially by John D. Colahan, subsequently by Steven 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, pursuant to Article 173 of the EEC Treaty, for 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), in particular Articles 8 and 14 thereof,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: A. Saggio, President, C. W. Bellamy, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 May 1996,

gives the following

Judgment

Facts and relevant legislation

- 1 In 1977, faced with surplus milk production in the Community, the Council adopted Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1). Under that regulation, producers had the opportunity to enter into an undertaking not to market milk or to convert their herds for five years in return for the payment of a premium.

- 2 Under the system introduced by that regulation, the applicants, who are milk producers in Ireland, entered into non-marketing or conversion undertakings.

- 3 In 1984, in order to cope with persistent overproduction, the Council adopted Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), amending Regulation (EEC) No 804/68 of the Council of 27 June 1968 establishing a common organization of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176). The new Article 5c of that regulation introduced an 'additional levy' on milk delivered by producers in excess of a 'reference quantity'.

- 4 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') fixed the reference quantity for each producer on the basis of production delivered during a reference year, namely the 1981 calendar year, subject to the Member States' opting for the 1982 or 1983 calendar year. That regulation was supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11; 'Regulation No 1371/84').

5 The non-marketing or conversion undertakings entered into by the applicants covered those reference years. Since they produced no milk in those years, they were ineligible for a reference quantity and, as a result, unable to market any quantity of milk exempt from additional levy.

6 By judgments of 28 April 1988 in Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, the Court of Justice declared invalid Regulation No 857/84, as supplemented by Regulation No 1371/84, on the ground that it infringed the principle of protection of legitimate expectations.

7 In order to comply with those judgments, the Council adopted 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, 'Regulation No 764/89'). Pursuant to that amending regulation, producers who had entered into non-marketing or conversion undertakings received a reference quantity known as a 'special' reference quantity. Such producers are referred to as 'SLOM I producers'.

8 Allocation of a special reference quantity was subject to several conditions. Some of those conditions were declared invalid by the Court of Justice by judgments of 11 December 1990 in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585.

9 Following those judgments, the Council adopted 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; 'Regulation No 1639/91'), which granted the producers concerned a special reference quantity. Such producers are referred to as 'SLOM II producers'.

- 10 In the meantime, one of the producers who had brought the action resulting in Regulation No 857/84 being declared invalid had instituted proceedings, together with other producers, against the Council and the Commission in which they sought compensation for the loss which they had sustained on account of their not having been granted a reference quantity under that regulation. By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, hereinafter '*Mulder II*', the Court of Justice held that the Community was liable for the damage in question. The effect of the judgment in *Mulder II* is that all producers who were prevented from producing milk solely because they had entered into non-marketing or conversion undertakings are, in principle, entitled to compensation for the damage sustained.
- 11 In view of the large number of producers affected and the difficulty in negotiating individual settlements, the Council and the Commission published on 5 August 1992 Communication 92/C 198/04 (OJ 1992 C 198, p. 4; hereinafter 'the Communication' or 'the Communication of 5 August'). After setting out the implications of the judgment in *Mulder II*, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned in order to give full effect to that judgment. Until such time as those arrangements were adopted, the institutions undertook not to plead against any producer entitled to compensation that entitlement to claim was barred by lapse of time under Article 43 of the Statute (EEC) of the Court of Justice. However, that undertaking was given subject to the provision that entitlement to compensation had not already been barred on grounds of time on the date of publication of the Communication or on the date when the producer had applied to one of the institutions. Lastly, the institutions assured producers that the fact that they did not make an approach to them as from the date of the Communication and until such time as the practical arrangements for compensation were adopted would not adversely affect them.
- 12 Following the Communication of 5 August, the Council adopted Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6; 'Regulation No 2187/93'). The regulation provided for an offer of flat-rate compensation to producers who had received special reference quantities under the terms laid down by Regulations Nos 764/89 and 1639/91.

- 13 Article 8 of Regulation No 2187/93 provides that compensation is to be granted only for the period for which the right to compensation is not time-barred. The date of interruption of the five-year time bar set by Article 43 of the Statute of the Court of Justice is to be the date of the application addressed to a Community institution or the date of registration of an application brought before the Court of Justice or, at the latest, 5 August 1992, the date on which the aforementioned Communication was published [Article 8(2)(a)]. The starting date of the compensation is to be five years before the date of interruption of the bar and the closing date the date when the producer received a special reference quantity pursuant to Regulations Nos 764/89 and 1639/91.
- 14 Under the fourth paragraph of Article 14 of Regulation No 2187/93, acceptance of the offer is to imply relinquishment of any claim whatsoever against Community institutions in respect of the loss at issue.

Procedure and forms of order sought by the parties

- 15 By application received at the Court Registry on 14 October 1993, the applicants sought the annulment of Regulation No 2187/93, in particular Articles 8 and 14.
- 16 On 19 November 1993, the applicants applied for interim measures in the form of an order suspending the application of Regulation No 2187/93, in particular the fourth paragraph of Article 14, and enjoining the Council and the Commission to adopt measures which would enable the applicants to receive the flat-rate compensation provided for by the contested regulation without being required to withdraw their pending actions for damages. The President of the Court of First Instance refused that application by order of 1 February 1994 in Joined Cases T-278/93 R, T-555/93 R, T-280/93 R and T-541/93 R *Jones and Others v Council and Commission* [1994] ECR II-11.
- 17 By order of 30 August 1994, the Commission and the United Kingdom were given leave to intervene in support of the form of order sought by the Council. The applicants failed to submit observations within the prescribed period on the statements in intervention.

18 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry. The parties were heard at the hearing on 21 May 1996, with the exception of the United Kingdom, intervening, which was not represented.

19 The applicants claim that the Court should:

— annul Regulation No 2187/93, in particular Articles 8 and 14;

— order the defendant to pay the costs.

20 The defendant claims that the Court should:

— dismiss the application as inadmissible or, in the alternative, as unfounded;

— order the applicants to pay the costs.

21 The Commission, intervening, claims that the Court should dismiss the application as inadmissible or, in the alternative, as unfounded.

22 The United Kingdom, intervening, claims that the Court should dismiss the application as unfounded.

Pleas and arguments of the parties

23 The applicants rely on three pleas for annulment. The first alleges that the contested regulation gives effect in an erroneous manner to the judgment in *Mulder II*

and infringes the principles of good faith, estoppel and protection of legitimate expectations, the second that the provisions of Article 43 of the Statute (EC) of the Court of Justice have been erroneously applied and the third that the regulation imposes economic duress on producers. In its defence, the Council, supported by the Commission and the United Kingdom, intervening, contests those pleas and submits that the application is inadmissible.

Admissibility

- 24 The Council raises two pleas as to inadmissibility. In its first plea, it alleges that the applicants are not individually and directly concerned by Regulation No 2187/93. In its second, it submits that the regulation is not open to legal challenge by the producers as addressees of an offer of compensation.
- 25 In its statement in intervention, the Commission supports the form of order sought by the Council, yet without adding any submissions of its own.
- 26 The Court finds that it should first consider the second plea alleging inadmissibility, since the effects of the contested measure should logically be appraised before the question whether the measure is of direct and individual concern to the applicants.

The effects of the contested measure

Arguments of the parties

- 27 The Council maintains that Regulation No 2187/93 is not amenable to judicial review. The regulation has no binding effects, since it does not change producers' legal position without their consent, that is to say, unless they accept the offer made in it.

- 28 The Commission raises the same argument in disputing that the applicants are directly affected by the contested measure, while stressing that the regulation makes the applicants an offer which they are free to accept or to refuse.
- 29 The applicants have not responded to this plea.

Findings of the Court

- 30 Only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; orders of 30 November 1992 in Case T-36/92 *SFEI and Others v Commission* [1992] ECR II-2479, paragraph 38, and of 21 October 1993 in Cases T-492/93 and T-492/93 R *Nutral v Commission* [1993] ECR II-1023, paragraph 24; Case T-154/94 *Comité des Salines de France and Compagnie des Salins du Midi et des Salines de l'Est v Commission* [1996] ECR II-1377, paragraph 37).
- 31 It is clear from the fourth recital in the preamble to Regulation No 2187/93 and from Articles 1, 8 and 14 read together that the regulation introduces a system of offers of compensation for SLOM I and SLOM II producers. Indeed, the fourth recital and Articles 8 and 14 use the term 'offer', the words 'compensation shall be granted only [...]' and 'compensation shall be offered' and the expression 'offer of compensation'. It also appears from the fourth recital and, in particular, Article 11 of the contested regulation that the offers are made on a flat-rate basis inasmuch as the amount is to be calculated without taking account of losses actually sustained or the details of each producer's situation. Producers have two months in which to accept the offer. Acceptance of the offer implies relinquishment of any claim against the institutions in respect of any loss (fourth paragraph of Article 14). In contrast, if the offer is refused, the Community institutions are not bound thereby in the future (third paragraph of Article 14 of the regulation) and producers are not precluded from bringing an action for damages against the Community.

32 Therefore, as the Council states, Regulation No 2187/93 is confined to providing for an offer of compensation to be made for the period fixed in Article 8 to milk producers who sustained loss as a result of the application of Regulation No 857/84. More specifically, under the rules governing that flat-rate offer, producers may apply for an offer of compensation and have two months in which to accept it. It is inherent in the offer that certain consequences attach to accepting it, in so far as acceptance implies relinquishment of any claim against the institutions. Nevertheless, it is left to producers to decide whether to opt to accept it.

33 In the event that a producer does not accept the offer, he remains in exactly the same position as if the regulation in question had not been adopted, in so far as he retains the right to bring an action for damages under Articles 178 and 215 of the Treaty.

34 It therefore appears from the content of the contested regulation that the Council has in fact opened up a new avenue for compensation to producers entitled to compensation. As has been mentioned, producers could already avail themselves of an action for damages under Articles 178 and 215 of the Treaty. Since the sheer numbers of producers involved (see paragraph 11 of this judgment) meant, according to the preamble to Regulation No 2187/93, that each individual situation could not be taken into account, the contested measure gives them an opportunity to obtain the compensation to which they are entitled without bringing an action for damages.

35 Accordingly, as far as producers are concerned, Regulation No 2187/93 is in the nature of a proposal by way of settlement, acceptance of which is optional, and constitutes an alternative to judicial resolution of the dispute. The situation of the producers concerned is not adversely affected in so far as the contested measure does not restrict their rights. On the contrary, it simply opens up an additional avenue for obtaining compensation.

- 36 As for Articles 8 and 14 of Regulation No 2187/93, whose annulment is more specifically sought by the applicants, they merely prescribe the period for which the offer of compensation is open and determine the consequences of accepting the offer. Since acceptance is optional, whether those provisions have any effects remains subject to the will of each producer to whom a proposal for settlement is made.
- 37 In those circumstances and having regard to what has been held with regard to measures reflecting only an intention on the part of an institution (Case 114/86 *United Kingdom v Commission* [1988] ECR 5289), the Court considers that, in so far as Regulation No 2187/93 provides for an offer addressed to producers, it is not a measure amenable to challenge by producers in an action for annulment.
- 38 It should be added that, apart from the offer of compensation and the conditions to which it is subject, Regulation No 2187/93 has no legal effect with regard to producers. The provisions of the regulation which do not deal with the offer of compensation and its conditions apply only to the national authorities.
- 39 Consequently, the application must be dismissed as inadmissible without there being any need to consider the first plea as to inadmissibility.

Costs

- 40 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the Council's costs, as applied for by that institution. In accordance with Article 87(4) of the Rules of Procedure, the United Kingdom and the Commission, as interveners, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

- 1. Dismisses the application as inadmissible;**

- 2. Orders the applicants to bear their own costs and to pay those incurred by the Council;**

- 3. Orders the United Kingdom and the Commission to bear their own costs.**

Saggio

Bellamy

Kalogeropoulos

Tiili

Moura Ramos

Delivered in open court in Luxembourg on 16 April 1997.

H. Jung

A. Saggio

Registrar

President