

JUDGMENT OF THE COURT OF FIRST INSTANCE (Single Judge)

21 June 2000 *

In Case T-537/93,

Hervé Tromeur, residing in Fuzunec, France, represented by C. Larzul and F. Buffet, and subsequently by A. Delanoé, of the Rennes Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

applicant,

v

Council of the European Union, represented by A.M. Colaert, of its Legal Service, acting as Agent, assisted by M. Núñez Müller, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

* Language of the case: French.

Commission of the European Communities, represented by G. Berscheid, of its Legal Service, acting as Agent, assisted by M. Núñez Müller, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for compensation under Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 288 EC) for damage suffered by the applicant as a result of his having been prevented from marketing milk by virtue 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), as 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),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Single Judge),

Judge: R.M. Moura Ramos,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2000,

gives the following

Judgment

Legislative background

- 1 In 1977, in view of 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). That regulation gave producers the opportunity of undertaking not to market milk, or undertaking to convert their herds, for a period of five years, in return for a premium.

- 2 Despite the fact that many producers gave such undertakings, overproduction continued in 1983. The Council therefore 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 organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176). The new Article 5c of the latter regulation introduced an 'additional levy' on milk delivered by producers in excess of a 'reference quantity'.

- 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 No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13) fixed the reference quantity for each producer on the basis of production delivered during a reference year, namely the 1981 calendar year, subject to allowing the Member States to

choose the 1982 or 1983 calendar year. The French Republic chose 1983 as reference year.

- 4 The non-marketing undertakings entered into by certain producers under Regulation No 1078/77 covered the reference years chosen. Since they produced no milk in those years, they could not be allocated a reference quantity, and were consequently unable to market any quantity of milk exempt from the additional levy.

- 5 By judgments of 28 April 1988 in Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321 ('*Mulder I*') and Case 170/86 *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECR 2355 the Court of Justice declared Regulation No 857/84, as 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 No 804/68 (OJ 1984 L 132, p. 11), invalid on the ground that it infringed the principle of protection of legitimate expectations.

- 6 To comply with those judgments, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2). Pursuant to that amending regulation, producers who had entered into non-marketing undertakings received a reference quantity known as a 'special' reference quantity (or 'quota').

- 7 Allocation of that special reference quantity was subject to several conditions. Certain of those conditions, in particular those dealing with the time when the non-marketing undertaking expired, were declared invalid by the Court in judgments of 11 December 1990 in Case C-189/89 *Spagl v Hauptzollamt Rosenheim* [1990] ECR I-4539 and Case C-217/89 *Pastätter v Hauptzollamt Bad Reichenhall* [1990] ECR I-4585.

8 Following those judgments, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35) which, by removing the conditions which had been declared invalid, made it possible for the producers concerned to be granted a special reference quantity.

9 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 ('*Mulder II*'), the Court of Justice held the Community liable for the damage caused to certain milk producers who had been prevented from marketing milk owing to the application of Regulation No 857/84 because they had given undertakings under Regulation No 1078/77.

10 Following that judgment, the Council and the Commission published Communication 92/C 198/04 on 5 August 1992 (OJ 1992 C 198, p. 4). After setting out the implications of the *Mulder II* judgment, and in order to give it full effect, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned. Until such time as those arrangements were adopted, the institutions undertook not to plead against any producer entitled to compensation that his claim was barred by lapse of time under Article 43 of the EEC Statute of the Court of Justice. However, that undertaking was subject to the condition that entitlement to compensation was not already time-barred on the date of publication of the communication or on the date on which the producer had applied to one of the institutions.

11 The Council then 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). That regulation provides for an offer of flat-rate compensation to producers who, in certain circumstances, have suffered damage as a result of application of the rules at issue in *Mulder II*.

Facts of the dispute

- 12 The applicant, a farmer in Fuzunec, France, gave an undertaking to convert his dairy herd to meat production in the context of Regulation No 1078/77. The undertaking expired on 15 November 1983 and the applicant did not resume milk production after that date.

- 13 In a letter of 6 October 1988 to the prefect of the *département* of Finistère, the applicant manifested his dissatisfaction with the situation he found himself in after the introduction of milk quotas. He also stated that he could not produce milk without a quota because of the intolerable financial burdens.

- 14 On 20 February 1992 the applicant applied to be allocated a reference quantity under Regulation No 1639/91. By decision of 30 September 1992, the national authorities refused his application on the ground that it had been made out of time. The applicant never obtained a reference quantity from the national authorities.

- 15 After the entry into force of Regulation No 2187/93, the applicant applied to the Commission for an offer of compensation. That request was turned down on the ground that, contrary to the requirements of the regulation, the applicant had not been allocated a definitive reference quantity.

Procedure and forms of order sought by the parties

- 16 By application lodged on 12 October 1993, the applicant brought the present action.

- 17 By order of 12 November 1993, the Court of First Instance suspended the proceedings pending final judgment of the Court of Justice in Joined Cases C-104/89 (*Mulder and Others v Council and Commission*) and C-37/90 (*Heinemann v Council and Commission*).

- 18 By order of 10 February 1999, the President of the Fourth Chamber, Extended Composition, of the Court of First Instance, after hearing the parties at an informal meeting on 30 September 1998, ordered that the proceedings be resumed.

- 19 By decision of 6 July 1999, the case was assigned to a chamber of three judges.

- 20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and requested the applicant to reply in writing to certain questions.

- 21 Pursuant to Articles 14(2) and 51 of the Rules of Procedure, the Fourth Chamber assigned the case to Mr Moura Ramos, sitting as a single judge.

22 The parties presented oral argument and replied to the Court's oral questions at the hearing on 28 January 2000.

23 The applicant claims that the Court should:

— order the defendants to pay him compensation of FRF 1 299 643.76 with interest at 8% per annum from 19 May 1992;

— order the defendants to pay the costs.

24 The defendants contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

Arguments of the parties

- 25 The applicant claims to have suffered loss because under Regulation No 857/84, which was declared invalid by the Court of Justice in *Mulder I*, he was not allocated a reference quantity. The Court then further held in *Mulder II* that that regulation infringed the legitimate expectations of producers who had entered into non-marketing or conversion undertakings and who intended to resume milk production after the undertakings expired. In those circumstances, it is for the Council and the Commission to make good the damage caused.
- 26 The applicant contests the defendants' assertion that he voluntarily abandoned milk production. He states that following the *Mulder I* judgment he applied on 6 October 1988 to the prefect of the *département* of Finistère to be allocated a reference quantity, which demonstrated his intention to produce milk.
- 27 To calculate the amount of compensation, the applicant relies on the case-law which states that the damage to be made good is the difference between, on the one hand, the income which he should have obtained in the normal course of events from the milk deliveries which he would have made if he had obtained a quota during the period between 1 January 1984 and 29 March 1989 (hypothetical income) and, on the other hand, the income which he actually obtained from any replacement activities (alternative income). He assesses his loss at FRF 1 299 643.76, corresponding to the annual quantity of milk used to determine his conversion premium, 156 509 litres, multiplied by the average price of a litre of milk, FRF 2, which is equivalent over five years and three months to FRF 1 643 344, less income of FRF 343 701.24 from his replacement activity.

- 28 He further states that the replacement activity he took up, namely meat production, proved economically disastrous, as the price of meat fell sharply from 1984 whereas that of milk doubled from that date.
- 29 Moreover, his application is not out of time, inasmuch as the institutions undertook to give full effect to the *Mulder II* judgment with respect to all producers who showed that they had suffered loss as a result of not having been able to have a reference quantity from 1984.
- 30 The defendants submit, first, that the applicant's claim is unfounded, second, that it is largely out of time and, third, that the amount of damage alleged is too high.

Findings of the Court

- 31 The non-contractual liability of the Community for damage caused by the institutions, provided for in the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC), may be incurred only if a set of conditions relating to the illegality of the conduct complained of, the occurrence of actual damage and the existence of a causal link between the unlawful conduct and the harm alleged is fulfilled (Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others v Council and Commission* [1981] ECR 3211, paragraph 18, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 80).
- 32 As regards the position of milk producers who have signed a non-marketing undertaking, the Community is liable to every producer who has suffered a

reparable loss owing to the fact that he was prevented from delivering milk by Regulation No 857/84 (*Mulder II*, paragraph 22).

- 33 That liability is based on breach of the legitimate expectation which producers who were encouraged by a Community measure to suspend marketing of milk for a limited period in the general interest and against payment of a premium were entitled to have in the limited scope of their non-marketing undertakings (see *Mulder I*, paragraph 24, and *Von Deetzen*, paragraph 13). However, the principle of protection of legitimate expectations does not preclude, in the case of a scheme such as that concerning the additional levy, the imposition of restrictions on a producer by reason of the fact that he has not marketed milk during a given period prior to the entry into force of that scheme, for reasons which have nothing to do with his non-marketing undertaking (Case T-1/96 *Böcker-Lensing and Schulze-Beiering v Council and Commission* [1999] ECR II-1, paragraph 41).
- 34 The applicant claims that he was unlawfully deprived of a reference quantity between 1 January 1984 and 29 March 1989 as a result of the application of Regulation No 857/84. That regulation, it is claimed, frustrated his legitimate expectation to be able to resume milk production at the end of his conversion period.
- 35 In the circumstances of the case, it must first be examined whether the allegations made by the applicant in support of the right to compensation are proven, in particular with regard to the existence of unlawful conduct on the part of the institutions and the occurrence of actual damage.
- 36 On this point, it must be noted that, according to settled case-law, it is for the party seeking to establish the Community's liability to adduce conclusive proof as to the existence or extent of the damage he alleges and to establish the causal link between that damage and the conduct complained of on the part of the

Community institutions (see, in particular, Case C-401/96 P *Somaco v Commission* [1998] ECR I-2587, paragraph 71).

- 37 The applicant did not resume milk production when his conversion period ended on 15 November 1983, despite the fact that Regulation No 857/84 did not enter into force until 1 April 1984 and he possessed dairy cows at that time (see the letter of 6 October 1988 referred to above).
- 38 Although the applicant submits that he approached the French authorities in 1984 in order to resume milk production, the fact is that he did not apply to be allocated a reference quantity until 20 February 1992, after the entry into force of Regulation No 1639/91. Moreover, it appears from the documents in the case and the replies to the Court's written questions that the applicant did not ask to be allocated a reference quantity within the period prescribed by that regulation because of a lack of information, for which he holds the French administrative authorities responsible.
- 39 Furthermore, the applicant has not shown that he took other steps which could have borne out his intention to resume milk production at the end of the conversion period. The only items in the case-file, namely the letters by which the applicant informed the French authorities that he wished to resume milk production, date from 6 October 1988 at the earliest and consequently do not establish that he intended to resume milk production when his conversion undertaking expired in 1983.
- 40 Consequently, the applicant cannot claim to have had a legitimate expectation of being able to resume milk production which could have been frustrated by the Community legislation at issue.

- 41 While the applicant did ask to be allocated a reference quantity in 1992, he cannot claim to have had a legitimate expectation in the possibility of resuming milk production at some unspecified future date. In the sphere of the common organisations of the market, whose purpose involves constant adjustments to meet changes in the economic situation, economic operators cannot legitimately expect that they will not be subject to restrictions which may arise out of future rules of market or structural policy (see Joined Cases 424/85 and 425/85 *Frico v Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755, paragraph 33, *Mulder I*, paragraph 23, *Von Deetzen*, paragraph 12, and *Böcker-Lensing and Schulze-Beiering*, paragraph 47).
- 42 Consequently, the Community cannot be held liable to the applicant as a result of the application of Regulation No 857/84, and it is unnecessary to ascertain whether the other conditions for such liability are satisfied.
- 43 In those circumstances, it is also unnecessary to consider whether the application was out of time.
- 44 The application must accordingly be dismissed.

Costs

- 45 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 applicant has been unsuccessful, he must be ordered to pay the costs, in accordance with the form of order sought by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Single Judge)

hereby:

1. Dismisses the application;
2. Orders the applicant to pay the costs.

Delivered in open court in Luxembourg on 21 June 2000.

H. Jung

Registrar

R.M. Moura Ramos

Judge