ORDER OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
12 December 1997 *

In Case T-167/94 (92),

Detlef Nölle, trading as 'Eugen Nölle', of Remscheid (Germany), represented by Frank Montag and Hans-Joachim Prieß, Rechtsanwälte, Brussels,

applicant,

v

Council of the European Union, represented by Jorge Monteiro and Jürgen Huber, Legal Advisers, acting as Agents, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, of Hamburg and Brussels, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented by Eric White, of its Legal Service, assisted by Claus-Michael Happe, a national official on secondment to the Commission, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendants,

* Language of the case: German.

APPLICATION for taxation of costs following the judgment of the Court of 18 September 1995 in Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589,

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

composed of: A. Kalogeropoulos, President, C. P. Briët, C. W. Bellamy, A. Potocki and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

1 By application lodged at the Registry of the Court of Justice on 25 June 1993, the undertaking Eugen Nölle ('Nölle') brought an action against the Council and Commission under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage which it had allegedly suffered by reason of the adoption of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (OJ 1989 L 79, p. 24, hereinafter 'Regulation No 725/89'), declared invalid by the Court of Justice in its judgment of 22 October 1991 in Case C-16/90 *Nölle* v *Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163.

2 By order of the Court of Justice of 18 April 1994, the case was referred to the Court of First Instance.

3 In its judgment of 18 September 1995 in Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, the Court of First Instance (First Chamber, Extended Composition) dismissed Nölle's application and ordered it to pay the costs.

4 By letter of 18 January 1996 the Council requested Nölle to pay DM 27 324.71 in respect of recoverable costs. This sum comprised travelling costs incurred by the Council's agent, amounting to DM 364.71, and the fees and expenses attributable to the input of the lawyer who assisted him, which came to DM 26 960, corresponding to 76 hours' work.

5 By letter of 2 May 1996 Nölle refused to meet the Council's above request and proposed to reimburse costs in a total amount of DM 7 000.

6 By application lodged at the Registry of the Court of First Instance on 15 October 1996, the Council, pursuant to Article 92(1) and (2) of the Rules of Procedure, requested that the recoverable costs be fixed at DM 27 324.71 and that Nölle be ordered to pay the costs of the present proceedings in the amount of DM 1 500.

7 By document lodged at the Registry of the Court of First Instance on 19 November 1996, Nölle submitted its observations on the application for taxation of costs.

Arguments of the parties

8 The Council argues that the subject-matter and nature of the dispute, its significance from the point of view of Community law, its difficulties and the economic interests at issue necessitated a considerable volume of work on the part of its agent and the lawyer assisting him. The fact that Regulation No 725/89 had been declared invalid by the Court of Justice did not at all simplify the dispute, given that Nölle's claim for compensation was based on grounds of illegality of the regulation which differed from those relied on in the case resulting in the judgment of the Court of Justice in *Nölle*, cited above.

9 In law, the Council argues, the dispute raised two fundamental questions: first, whether the Community's incurring of liability through the adoption of an anti-dumping regulation subsequently declared invalid depended on the nature of the alleged infringement or on the nature of the Community measure giving rise to the damage suffered, and, second, whether recovery of the costs incurred before the national courts, which were not recoverable under the provisions of the national law applicable, could be claimed on the ground that the Community had incurred non-contractual liability. Furthermore, the dispute also raised difficult issues of admissibility and required that 'detailed facts' be established, including the calculation of interest allegedly due to Nölle.

10 Regarding the significance of the economic interests at issue, the Council states that if, as Nölle maintained, the Community could incur non-contractual liability simply by reason of adopting an anti-dumping regulation in breach of a procedural rule, the risk of the Community's being required in such cases to pay damages to the traders affected would be appreciably increased. A decision by the Court to this effect would also inevitably have led the Council to review its entire anti-dumping policy and also the applicable legislation.

11 In response to Nölle's argument that the Council need not have been assisted by an external lawyer but could have been represented solely by one of its agents, the Council points out that, according to the first paragraph of Article 17 of the EC Statute of the Court of Justice, also applicable to the procedure before the Court of First Instance pursuant to Article 46 thereof, the Community institutions may seek the assistance of a lawyer, whose remuneration forms part of the expenses necessarily incurred for the purpose of the proceedings (order of 6 February 1995 in Case T-460/93 DEP *Tête and Others* v *EIB* [1995] ECR II-229). Furthermore, contrary to what Nölle maintains, the presence of the Council's agent in addition to that of its external lawyer during the hearing was necessary in view of its agent's detailed knowledge of the case-file.

12 Nölle submits that, in so far as it exceeds the proposed amount of DM 7 000, the Council's application for taxation of the costs is manifestly disproportionate in relation to Nölle's own claim for compensation of DM 79 834.45; were the Council's application to be upheld, this would have the result of forcing Nölle to bear the damage which it had incurred as well as a substantial portion of its lawyers' costs, even though it had succeeded in having the contested Regulation No 725/89 annulled on the ground that it was defective in significant respects. In contrast, the Council, which, according to the judgment of the Court of Justice in *Nölle*, cited above, had acted unlawfully, would recover its costs in full.

13 According to *Nölle*, the nature of the dispute and the organization of the Council's Legal Service made it unnecessary for that institution to be represented by an external lawyer. As regards the travelling expenses of the Council's agent, Nölle claims that where the institution concerned chooses to be represented at the hearing by an external lawyer, the presence of an agent is not in the least necessary. The fact that the Council's lawyer could not take certain procedural steps without first consulting the Council's agent is a matter falling within the Council's internal arrangements regarding its representation and does not fall within the ambit of 'expenses necessarily incurred ... for the purpose of the proceedings'. In any event, the Council's agent did not actively participate in the oral procedure.

14 As regards the nature of the dispute, Nölle points out that it concerned the question of the extent to which the findings of the Court of Justice in *Nölle* as to the illegality of Regulation No 725/89 had to be taken into account by the Court of First Instance for the purposes of Nölle's claim for compensation, a question which did not involve any special or unusual aspect from the procedural point of view. So far as concerns the difficult issues of admissibility which, according to the Council, were raised by the dispute, Nölle points out that the examination of the admissibility of an action always precedes the examination of its merits. Finally, the dispute did not make it necessary to establish 'detailed facts', and the Council's argument to that effect, based on the calculation of the interest due, has not been adequately set out.

15 Furthermore, Nölle argues, the dispute did not raise 'fundamental' questions and did not represent a major economic stake for the Community in so far as the question of the criteria governing the Community's non-contractual liability is one which arises regularly in this type of case. The case-law of the Court of Justice, moreover, provided an answer to the question whether lawyers' costs that are not recoverable under national law may none the less be recoverable under Article 178 and the second paragraph of Article 215 of the Treaty, as follows from the references in that regard made by the Court of First Instance in paragraph 37 of its judgment. As for the financial interests brought into issue by the dispute, Nölle argues that no account of such interests, which have not yet been specified and are indirect by nature, should be taken in the context of recovery of costs.

16 Finally, Nölle takes the view that the statement of costs drawn up by the Council's lawyer is not itemized in detail and also fails to show the basis on which the remuneration for the services provided has been calculated. Furthermore, in so far as the Council had coordinated its representation with that of the Commission, the amount of work carried out ought for that reason to have been extensively reduced. In any event, and on the basis of the relevant provisions of German law, the Council can, according to Nölle, recover no more than DM 3 730 by way of costs.

Findings of the Court

17 Under Article 91(b) of the Rules of Procedure, expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers, are to be regarded as constituting recoverable costs.

18 It is thus appropriate to consider, first, whether the fees invoiced by the Council's lawyer can be treated as recoverable costs in a case where the Council was represented by an agent, and, second, whether, as Nölle argues, the presence of the Council's lawyer made it unnecessary for its agent to travel for the purposes of the oral procedure.

19 It should be noted in this regard that, under Article 17 of the Statute of the Court of Justice, applicable to the procedure before the Court of First Instance pursuant to Article 46 thereof:

'The States and the institutions of the Community shall be represented before the Court by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer ...'.

20 It is clear from that provision that, contrary to Nölle's argument, the institutions are free to have recourse to the assistance of a lawyer, whose remuneration therefore falls within the ambit of expenses necessarily incurred for the purpose of the proceedings (orders of 21 June 1979 in Case 126/76 — Costs *Dietz* v *Commission* [1979] ECR 2131, paragraphs 5 and 6, of 15 September 1994 in Case C-370/89 DEP *EIB* v *SGEEM and Etroy*, not published in the European Court Reports, paragraph 9, and the order in *Tête and Others* v *EIB*, cited above, paragraph 10).

21 It follows, with regard to the reimbursement of travel expenses incurred by the Council's agent for the purpose of the oral procedure, that the fact that the Council's lawyer was present during the hearing in no way precluded its agent from also being present, given that the latter's presence met the need, in conformity with Article 17 of the Statute of the Court of Justice, for the institution concerned to be appropriately represented. It follows that the travel expenses of the Council's agent fall within the ambit of 'expenses necessarily incurred ... for the purpose of the proceedings'.

22 The amount of recoverable costs must accordingly be determined. It has consistently been held that, in the absence of Community provisions laying down fee scales, the Community judicature must freely assess the facts of the case, taking into account the purpose and nature of the proceedings, their significance from the point of view of Community law, as well as the difficulties presented by the case, the amount of work generated by the dispute for the agents and advisers involved and the financial interest which the parties had in the proceedings. In so doing, it is not obliged to take account of any national scales of lawyers' fees or any agreement concluded in that regard between the party concerned and his agents or advisers (see, most recently, the order of 12 May 1997 in Case T-561/93 (92) *Tiercé Ladbroke* v *Commission*, not published in the European Court Reports, paragraph 22).

23 Those criteria must form the basis for determining the amount of recoverable costs.

24 So far as concerns the significance of the case from the point of view of Community law, the Court finds that the action raised questions of undoubted legal importance which had not been expressly examined in earlier case-law. In its action, Nölle contended, first, that it was not the nature of the Community measure giving rise to the damage claimed that determined the existence and extent of the obligation devolving on the Community to make reparation, but rather the nature of the rule of law thereby breached, with the result that, apart from those cases in which superior rules of law for the protection of individuals have been breached, the Community could, in cases involving anti-dumping law, also incur

non-contractual liability on the basis of a breach of a procedural rule or a rule that was purely administrative in nature. Second, the action raised a new question concerning admissibility, namely whether costs incurred in national legal proceedings which were not recoverable under the applicable domestic provisions could none the less be recovered in an action to establish non-contractual liability on the part of the Community.

25 The Court, however, takes the view that, while the case was undoubtedly important, the economic interest which it represented was, in contrast, limited. The possible financial consequences flowing, according to the Council, from the outcome of the dispute in question cannot be taken directly into account in this case in so far as such consequences were, in any event, merely hypothetical and not directly connected to the outcome of the dispute.

26 Furthermore, while the dispute did indeed raise legal issues that were undoubtedly important, the work which the case may have called for on the part of the Council's lawyer was not so extensive as to justify the level of recoverable costs sought by the Council.

27 In light of the foregoing, and regard being had to the circumstances of the case, it is appropriate to fix the recoverable fees and expenses in the total sum of DM 20 000.

28 Since this amount takes account of all the circumstances of the case up to the date on which this order is made, it is unnecessary to rule separately on the application for recovery of the costs incurred by the parties for the purposes of the present proceedings on taxation of costs.

On those grounds,

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

hereby orders:

The total amount of the costs to be reimbursed by the applicant to the Council, including the costs incurred by the parties for the purposes of the present proceedings, is fixed at DM 20 000.

Luxembourg, 12 December 1997.

H. Jung — Registrar

A. Kalogeropoulos — President