ORDER OF THE PRESIDENT OF THE FIRST CHAMBER (EXTENDED COMPOSITION) OF THE COURT OF FIRST INSTANCE

20 January 1995 *
In Case T-124/93,

Georg Werner, residing at Niddatal (Federal Republic of Germany), represented by Volker Zuleger, Rechtsanwalt, Niddatal, with an address for service in Luxembourg at the Chambers of Roger Nothar, 17 Boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Dierk Booß, Legal Adviser, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation under Article 178 and the second paragraph of Article 215 of the EEC Treaty for the damage allegedly suffered by the applicant as

* Language of the case: German.

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 FIRST CHAMBER
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OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 7 September 1990, the applicant brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Commission for compensation for the damage suffered by him 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 that regulation failed to provide for the allocation of representative 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for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1), had withdrawn from milk production for a limited period.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 decision of the President of the Court of Justice, the proceedings were suspended until delivery of the final judgment in Joined Cases C-104/89 *Mulder* v

Commission and C-37/90 *Heinemann* v *Council and Commission*. By order of the Court of Justice of 27 September 1993, the action was referred to the Court of First Instance.

3 By a letter received at the Registry of the Court of First Instance on 21 October 1994, the applicant, who had in the meantime accepted an offer of compensation made to him pursuant to 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), withdrew his application and sought an order for costs against the defendant.

4 The Commission raised no objection to the withdrawal of the application and applied, pursuant to the first sentence of the first subparagraph of Article 87(5) of the Rules of Procedure, for an order requiring the applicant to pay the costs of the proceedings. In support, the Commission submits that its conduct has not been such as to justify an order that it should bear the costs, since it must have been clear to the applicant that, in the event of the applications in the *Mulder* and *Heinemann* test cases succeeding, he would receive compensation without having to bring an action and that, were the applicant to have approached the Commission with any such request, it would have waived the plea of prescription against him. Furthermore, the amount of compensation obtained by the applicant under Regulation No 2187/93 was considerably less than that claimed by him in the action. The applicant has moreover already received, under Commission 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), a payment of ECU 500 towards the legal costs incurred by him, which also constituted reimbursement, pursuant to Article 87(5) of the Rules of Procedure, of the costs claimed by him in respect of the work done by his lawyer in the proceedings. Lastly, in accepting the offer of compensation pursuant to the third paragraph of Article 14 of Regulation (EEC) No 2187/93, the applicant relinquished all further claims, including any claim relating to legal costs in excess of the said lump sum of ECU 500.

5 Under the first sentence of the first subparagraph 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. According to the second sentence of that provision, however, upon application by the party who withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

6 It should be stated in that regard, first, that the justification of the applicant's claim for compensation against the Community was recognized by the offer of compensation made to him pursuant to Regulation (EEC) No 2187/93 after the commencement of his action. It follows that the applicant in principle had reason to bring the action.

7 The applicant brought the action before 5 August 1992, that is to say, before the publication of the communication of 5 August 1992 (OJ 1992 C 198, p. 4) in which the Council and the Commission acknowledged their liability and, with a view to a planned global settlement, undertook not to plead prescription. At that time, the applicant had no means of knowing which approach the Commission would adopt *vis-à-vis* other claimants. Since Article 178 of the EC Treaty does not provide for any pre-litigation procedure to be followed at an administrative level prior to the commencement of proceedings, the applicant cannot be blamed for the fact that, before bringing proceedings, he did not first call upon the Commission not to plead prescription. It was for the Commission to take the necessary steps to provide legal clarification for all persons suffering damage and to remove any cause for the institution of proceedings, as was in fact subsequently done by the Council and the Commission, by means of the communication of 5 August 1992 and Regulation (EEC) No 2187/93.

8 It should also be noted that the amount of the compensation subsequently accepted by the applicant in that connection is not decisive. On the contrary, the decisive factor as regards the decision on costs is the fact that the institution of the proceedings has been shown in essence to be justified. In the circumstances, there is no reason for the costs to be shared, as would be possible under Article 87(3) of the Rules of Procedure where the applicant is only partially successful, because no

additional costs were incurred and no additional work had to be done by reason of the claim in the application for greater compensation.

9 In so far as the Commission also relies on the payment, pursuant to Regulation (EEC) No 2648/93, of the sum of ECU 500 in respect of legal costs, it should be stated that the Court's decision on costs in the event of withdrawal from proceedings must be based solely on the Rules of Procedure, and in particular on Article 87(5). There are no other provisions which affect the question as to who should bear the costs arising. In particular, an agreement on costs concluded between the parties within the meaning of the second subparagraph of Article 87(5) is relevant only if it is expressly confirmed by the parties to the Court in statements made by them in connection with the withdrawal of the proceedings. It is not for the Court to enquire, in the context of its decision on costs under Article 87(5), whether any other agreement on costs may possibly have been reached between the parties independently of such statements.

10 Finally, it should be pointed out in that connection that a decision on costs made pursuant to Article 87 of the Rules of Procedure determines only who should bear the costs, not the amount of the costs to be recovered. The latter issue is to be determined, in the event of any dispute, under the procedure provided for in Article 92(1) of the Rules of Procedure. It is settled case-law (see the order of the Court of Justice of 26 November 1985 in Case 318/82 *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 3727; also the orders of the Court of First Instance of 25 February 1992 in Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1992] ECR II-153 and of 5 July 1993 in Case T-84/91 *Meskens* v *Parliament* [1993] ECR II-757) that the task of the Community judicature in such circumstances is not to determine the fees payable by the parties to their own lawyers but to fix the maximum amount of those fees which may be recovered from the party ordered to pay the costs. In so doing, the Court is not obliged, in particular, to take account of any national scale of lawyers' fees or any agreement on fees concluded between the party concerned and his agents or advisers. In the context of the independent assessment required by that case-law of all the circumstances of the case under the procedure laid down by Article 92(1) in the event of dispute, it would also be necessary to determine whether the applicant has already received any other reimbursement in respect of the work done by his lawyers which forms the subject-

matter of the costs decision under Article 87(5), and whether, and to what extent, in addition to the normal work done by a lawyer in asserting a compensation claim such as that in the present case, for which ECU 500 has already been reimbursed, cognizance should exceptionally be taken of any substantial additional work done by the applicant's lawyer in drafting the application and representing the applicant in the proceedings before the Court.

11 It follows from the foregoing that the Commission's arguments contesting the claim for an order for costs against it are unfounded and that, in view of the circumstances of the case, the conduct of the Commission is such as to justify an order requiring it to pay the costs pursuant to the second sentence of the first subparagraph of Article 87(5) of the Rules of Procedure.

On those grounds,

THE PRESIDENT OF THE FIRST CHAMBER
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hereby orders:

1) Case T-124/93 shall be removed from the register;

2) The Commission shall pay the costs.

Luxembourg, 20 January 1995.

H. Jung

Registrar

J. L. Cruz Vilaça

President