ORDER OF THE COURT (Third Chamber)
6 January 2004 *

In Case C-104/89 DEP,

J.M. Mulder and Others, residing in the Netherlands, represented by E.H. Pijnacker Hordijk, advocaat,

applicants,

v

Council of the European Union, represented by A.-M. Colaert, acting as Agent,

Commission of the European Communities, represented by T. van Rijn, acting as Agent, with an address for service in Luxembourg,

defendants,

APPLICATION for the taxation of the costs recoverable following the Court's judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, D.A.O. Edward and N. Colneric (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

Background to the dispute and forms of order sought

1 By interlocutory judgment of 19 May 1992, *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 ('the interlocutory judgment'), delivered in Joined Cases C-104/89 *Mulder and Others* v *Council and Commission* ('*Mulder II*') and C-37/90 *Heinemann* v *Council and Commission*, the Court ordered the European Community to make good the damage suffered by the applicants in the

present case, Mulder, Brinkhoff, Muskens and Twijnstra, 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), 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), in so far as those regulations did not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking given under Council 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), did not deliver any milk during the reference year adopted by the Member State concerned.

2 In the interlocutory judgment, the Court also ruled that interest — at an annual rate of 8% in *Mulder II* — should be payable on the amounts of compensation as from the date of that judgment. For the rest, the applications were dismissed.

3 Since the negotiations subsequently carried out, in accordance with point 4 of the operative part of the interlocutory judgment, failed to result in an agreement between the parties, concerning the amounts of damages payable, within the prescribed period of 12 months from the date of delivery of that judgment, the applicants in *Mulder II* lodged a submission with supporting figures on 19 June 1993, while the submissions of the Council and Commission, each relating to both of the cases mentioned in paragraph 1 of the present order, were lodged on 3 November and 29 October 1993 respectively.

4 By letter of 20 June 1994, the Court sent a number of questions to the parties. The applicants' response in *Mulder II* was lodged at the Registry of the Court on 2 September 1994.

5 On 20 May 1996, the Court held a hearing for the parties. Since certain facts remained contentious following that hearing, the Court required, by order of 12 July 1996, that an expert's report be obtained. The expert's report was lodged at the Registry of the Court on 27 February 1997. At the request of the Court the applicants communicated their written observations on that report by document of 4 June 1997.

6 In its judgment of 27 January 2000 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203 ('the final judgment'), the Court fixed the amounts to be paid to the applicants by way of compensation. Together with the sum allocated to each was interest at the annual rate of 1.85% from a given date to the date of delivery of the interlocutory judgment. To that sum default interest at the annual rate of 8% was to be added from the date of the interlocutory judgment until the date of actual payment. The Court dismissed the applications as to the remainder. Furthermore, it ordered the Council and Commission to bear their own costs and jointly and severally to pay 90% of the applicants' costs apart from the expenses of the expert's report commissioned by the Court.

7 Following the communication to the Commission, in 2000, of a general statement of expenses together with annexes, the applicants provided that institution and the Council with a detailed analysis of those expenses, by letter of 23 March 2001. That analysis corresponded approximately with the statement of lawyers' expenses drawn up by the applicants. The Council and Commission sent a detailed reply by letter of 18 March 2002 proposing to pay the applicants 124 437.29 euros in recoverable costs.

8 Having failed to agree on the amounts proposed by the Council and Commission, the applicants, by application lodged on 14 May 2002 in accordance with Article 74(1) of the Rules of Procedure, claim that the Court should:

— evaluate the nominal procedural expenses payable by the Council and Commission at 373 304.90 euros (that is 90% of 408 591.90 euros), or at another amount to be fixed by the Court on the basis of equity;

— determine the corrective factor for inflation to be applied; and

— order the Council and Commission to pay the costs of the present proceedings and fix that amount.

9 The Council and Commission consider, in their joint statement lodged at the Registry of the Court on 11 July 2002, that the recoverable costs should be fixed at a figure of 124 437.29 euros, that is 90 000 euros for lawyers' expenses and 34 437.29 euros for expenses relating to advisers other than lawyers ('external advisers').

Substance

Arguments of the parties

...

Findings of the Court

41 It must first be noted that, under Article 74 of the Rules of Procedure, the Court is not empowered to tax the fees payable by the parties to their own lawyers, but it

may determine the amount of those fees which may be recovered from the party ordered to pay the costs (see, in particular, Order of 30 November 1994 in Case C-294/90 DEP *British Aerospace* v *Commission* [1994] ECR I-5423, paragraph 10).

42 Under Article 73(b) of the Rules of Procedure 'the following shall be regarded as recoverable costs... 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'.

43 According to settled case-law recoverable costs are limited, first, to expenses incurred for the purposes of the proceedings before the Court of Justice and, secondly, to expenses necessarily incurred for such purposes (see Orders in Case C-89/85 DEP *Ahlström Osakeyhtiö and Others* v *Commission*, not published in the ECR, paragraph 14, and in *British Aerospace* v *Commission*, cited above, paragraph 11).

Lawyers' fees

44 Certain periods may automatically be excluded when calculating such fees.

45 According to equally settled case-law of the Court, 'proceedings' under Article 73(b) of the Rules of Procedure refers only to proceedings before the

Court and does not include any prior stage (see Orders in Case C-107/91 DEP *ENU* v *Commission*, not published in the ECR, paragraph 21, and in *British Aerospace* v *Commission*, cited above, paragraph 12).

...

47 Lawyers' fees for periods during which no procedural documents were notified must also be excluded since they are not necessary to the proceedings....

48 Nor may lawyers' fees relating to negotiations in order to arrive at an extra-judicial settlement and those relating to periods subsequent to the oral procedure before the Court be considered to be expenses necessarily incurred for the purposes of the proceedings (see, to that effect, Order of 16 December 1999 in Case C-137/92 P-DEP *Hüls* v *Commission*, not published in the ECR, paragraph 19).

49 However, fees relating to negotiations carried out by the parties with a view to coming to an agreement on the amount of damages payable as compensation are considered to be necessary expenses where the Court itself expressly requested the parties, in the operative part of an interlocutory judgment, to send to it, within a prescribed period from the date of delivery of that judgment, details of the amounts payable. Where, in the interests of economy of procedure, the Court does not itself rule on the amounts payable, but requests that the parties come to an agreement on such amounts, the successful party would be placed at a disadvantage if the recovery of costs incurred as a result of such negotiations was not taken into account. Thus, in the present case, the fees relating to negotiations to establish an agreement concerning the amount of damages payable to the

applicants must be considered to be expenses necessarily incurred for the purpose of the proceedings.

50 By contrast, the expenses claimed by the advisor in respect of reviewing the Advocate General's Opinion in order to establish a possible position relate only to a period subsequent to the oral procedure, since that procedure was closed following the delivery of that Opinion on 10 December 1998. Such expenses cannot be recovered. Consequently, the period subsequent to that date must be excluded for the calculation of recoverable costs.

51 In so far as notes of fees may be taken into account, it must be noted that Community law does not provide for fee scales or rules relating to the length of time necessary for the work to be done. The Court must therefore freely consider the circumstances of the case, having regard to the subject-matter and nature of the dispute and its significance from the point of view of Community law, as well as to the difficulties presented by the case, the amount of work generated by it for the agents or lawyers involved and the financial interest which the parties had in the proceedings (see Orders of 28 June 2002 in Case C-320/96 P-DEP *Métropole télévision*, not published in the ECR, paragraph 21; in *British Aerospace* v *Commission*, cited above, paragraph 13; of 30 November 1994 in Case C-222/92 DEP *SFEI and Others* v *Commission* [1994] ECR I-5431, paragraph 14; of 4 February 1993 in Case C-191/86 DEP *Tokyo Electric* v *Council*, not published in the ECR, paragraph 8, and of 26 November 1985 in Case 318/82 *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 3727, paragraph 3).

52 The amount of costs which may be recovered must be assessed on the basis of those criteria.

53 As regards the subject-matter, nature and significance of the *Mulder II* case from the point of view of Community law, it must be noted that, as acknowledged by the Council and Commission, the interest of the case exceeds the personal interest of the applicants. Those institutions thus acknowledge that the case is a pilot case.

54 The action was in no way unusual as regards the proceedings up until the interlocutory judgment. However, the procedure for establishing the amount of damages payable to the applicants was complex. Not only did it require an in-depth examination both of the complex financial situation of each of the four applicants and of the development of statistical data concerning milk production between 1984 and 1989, but it also raised new and important questions of law, concerning the principles governing the calculation of compensation for damage suffered by SLOM producers, such as the applicants, and, in particular, the method of calculating their loss of earnings.

55 The parties' financial interest in the proceedings must also be assessed. The applicants stood to obtain damages for substantial damage consisting in the loss of income over a four-year period, since they could not produce milk for that amount of time. The Council and Commission could not overlook the fact that the case would have implications, as regards amounts payable, for similar cases that have not yet been resolved.

56 As regards the difficulties presented and the amount of work generated by the case for the applicants' legal advisors, the degree of complexity of the *Mulder II* case in relation to the assessment of the compensable damage must be noted. Criteria to calculate the various elements of loss of earnings must be established, as set out in the interlocutory judgment, and more specifically the elements to be retained for the calculation of hypothetical income. Largely in relation to that latter income, the case required the use of mean statistical values, the choice and content of which were largely controversial. By reason in particular of the

calculations based on hypothetical data derived from statistics, the Court was obliged to order the submission of an expert's report.

57 That expert's report itself produced work for the applicants' legal advisors. Furthermore the institutions' offer to compensate the applicants in accordance with 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) gave rise to extra work for those legal advisors.

58 The same applies to the fact that the action had to be brought against the Council and the Commission, which presented separate defences.

59 The necessity for four parallel procedures to be carried out greatly increased the work generated. It is true that the legal questions to be resolved were essentially the same in all four procedures. However, account must be taken of the burden resulting from the need to calculate the damage suffered in each individual case, a burden which related not only to the stage subsequent to the interlocutory judgment, but also to the stage prior to that judgment.

60 However, in relation to the main proceedings giving rise to the interlocutory judgment, it is common ground that the applicants' legal advisors were well aware of the issues in the case since they had already acted in the case that gave rise to the *Mulder* judgment, cited above. With regard to the procedure to establish the amounts payable in damages, the written and oral interventions of those legal advisors were largely based on the work of the LEI and GIBO.

61 The notes of fees which may be taken into account include the fees of two lawyers, Mr Pijnacker Hordkijk and Mr Bronkhorst....

62 While, in principle, the remuneration of only one agent, legal advisor or lawyer is recoverable, it is possible that, depending on the individual circumstances, and most importantly, the complexity of each case, the fees of a number of lawyers may be considered 'necessary expenses' under Article 73(b) of the Rules of Procedure (see, in particular, Orders in *ENU* v *Commission*, paragraph 22, and in *Hüls* v *Commission*, paragraph 26, both cited above).

63 Such is the case, in principle, in the present action. However, account should only be taken of the total number of hours worked which were deemed objectively necessary for the purpose of the proceedings before the Court.

64 Thus, the lawyers' fees relating to the coordination of the proceedings in question with those brought by an applicant in a joined case are not recoverable costs. Such fees cannot be regarded as expenses incurred for the purpose of the proceedings in so far as that coordination was not ordered by the Court (see Orders in *Métropole télévision*, cited above, paragraph 29, and in *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 16). Therefore, the work relating to that coordination cannot be taken into account in the estimate of hours worked which were objectively necessary for the purpose of the proceedings.

65 Furthermore, such an estimate can only include those hours worked which can be clearly ascribed to the *Mulder II* case.

...

69 In those circumstances, having taken account of a total of... hours worked over different periods with hourly rates which have varied during those periods, an amount of 130 000 euros for lawyers' fees is fixed.

Lawyers' expenses

70 In respect of office expenses, it can be accepted that a flat rate of 5% of the fees fixed in the preceding paragraph does not go beyond what was necessary to bring the proceedings before the Court. Therefore account must be taken of a sum of 6 500 euros in respect of such expenses.

71 The applicants also claim travel and subsistence expenses. However, the application for taxation of costs does not detail which costs were attributable to which journey.

...

73 In the light of the complexity of the case, the expenses occassioned by those journeys, other than that of the first quarter of 1997, must be considered necessary for the purposes of the proceedings, although at the time of the oral submissions two lawyers had travelled in order to participate together in the hearing.

74 By contrast, travel and subsistence expenses relating to the expert's investigation (the first quarter of 1997) cannot be taken into account in so far as the collaboration with the experts did not comply with the rules imposed by the order of 12 July 1996 in joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission*, not published in the ECR, by which the Court commissioned that experts' report. Point IV of the operative part of that order authorised the parties only to request the Court to send to the experts other documents or parts of documents and their annexes.

75 It is true that, by decision of the second chamber taken at its administrative meeting of 13 November 1996, the experts were authorised to consult the parties. However, a personal interview in Luxembourg, in connection with those consultations, was neither requested by the experts nor provided for by the Court, and furthermore it was not necessary. In that regard it must be noted that, in accordance with Article 49(2) of the Rules of Procedure, the expert is placed for the duration of the investigation under the supervision of the Judge-Rapporteur. The order in *Mulder and Others* v *Council and Commission*, cited above, provided for the parties to communicate with the expert through the Court. As to the authorisation granted at the administrative meeting of 13 November 1996, it was in response to the expert's request, set out in a letter of 31 October 1996, to 'consult the parties in order to obtain clarification on the sources of figures produced during the proceedings'. Finally, in its decision of 13 November 1996, the Court had excluded any transmission to the parties of a draft expert's report since a debate on an expert's report is provided for under Article 49(5) of the Rules of Procedure only after the expert has presented that report before the Court. In the present case, such a debate was arranged at the hearing of 28 May 1998.

76 In the absence of any precise information relating to travel and subsistence expenses, their amount must be fixed at the flat rate of 1 000 euros.

77 Account must be taken, therefore, of a sum of 7 500 euros for lawyers' expenses.

External advisors' expenses

78 As to external advisors' expenses, namely those of the LEI and GIBO, it is clear from the file that the intervention of those two bodies was necessary in order accurately to carry out the different calculations of the compensation claimed in each of the applicants' pleadings. Essentially, the annexes to the applicants' pleadings in *Mulder II* show that the LEI provided statistics, while GIBO carried out the detailed calculations of the damage allegedly suffered by each applicant. Therefore, the expenses relating to the intervention of those two bodies are 'necessary expenses' within the meaning of Article 73(b) of the Rules of Procedure in so far as they relate directly to the various pleadings submitted by the applicants.

79 According to the applicants, the external advisors' expenses were 59 541 euros. However, three invoices cannot be ascribed sufficiently clearly to the applicants' pleadings in *Mulder II*.

...

82 It follows that a sum of 52 638.55 euros for external advisors' expenses must be taken into account.

SLOM Foundation expenses

83 The expenses of the SLOM Foundation cannot be taken into account since that body instructed Mr Pijnacker Hordijk and acted on behalf of the applicants who themselves did not receive notes of fees and expenses. The assistance provided by that foundation to Mr Pijnacker Hordijk is thus equivalent to the assistance provided by an applicant to its legal advisor.

The costs to be borne by the Council and the Commission

84 In accordance with the operative part of the final judgment, the Council and the Commission are to bear 90% of the applicants' costs, with the exception of the expenses of the expert's report ordered by the Court.

85 It follows from the above that the institutions must bear 90% of 190 138.55 euros (130 000 euros + 7 500 euros + 52 658.55 euros), that is a sum of 171 124.65 euros.

The application for adjustment in line with inflation

86 The application for adjustment in line with inflation for the period prior to the final judgment must be considered an application for compensatory interest. It must therefore be dismissed. In that regard it should be noted that it follows from the consistent case-law of the Court that an application for an award of default interest calculated from a date prior to the date on which the order that fixed the costs was made must be dismissed (Orders in *ENU* v *Commission*, cited above, paragraph 26, and of 6 November 1996 in Case C-220/91 P-DEP *Preussag* v *Commission*, not published in the ECR, paragraph 11). The right of applicants to the recovery of costs has its legal basis in the order fixing the sum (Order of 18 April 1975 in Case 6/72 *Europemballage and Continental Can* v *Commission* [1975] ECR 495, paragraph 5). That reason relating to default interest is also applicable to compensatory interest. Furthermore, the objective of a procedure for taxation of costs is not to compensate for any damage, but to determine the recoverable costs, whereas, in an action for damages, compensatory interest is compensation for loss incurred as a result of inflation.

The expenses of the present proceedings

87 Unlike Article 69(1) of the Rules of Procedure, which provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings, there is no such provision in Article 74 of those Rules. The reason for that is that the Court, when determining the recoverable costs, takes account of all the circumstances of the case up until the time that the order for taxation of costs is made. Therefore, there is no need to rule separately on the expenses incurred for the purpose of the present proceedings (see Orders in *Europemballage and Continental Can* v *Commission*, cited above, paragraph 5; in *ENU* v *Commission*, cited above, paragraph 26, and in *Métropole télévision*, cited above, paragraph 33).

88 In the light of the outcome of the present proceedings, the amount of recoverable costs should not be increased by adding an amount relating to the present proceedings for taxation of costs.

On those grounds,

THE COURT (Third Chamber)

hereby orders:

The total amount of the costs payable by the Council of the European Union and the Commission of the European Communities to Mr Mulder, Mr Brinkhoff, Mr Muskens and Mr Twijnstra is fixed at 171 124.65 euros.

Luxembourg, 6 January 2004.

R. Grass — Registrar

A. Rosas — President of the Third Chamber