ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
29 November 1996 *

In Case T-179/96 R,

J. Antonissen, a farmer, residing at Giethem, the Netherlands, represented by E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of L. Frieden, 62 Avenue Guillaume,

applicant,

v

Council of the European Union, represented by G. Houttuin, A.-M. Colaert and J.-P. Hix, 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,

and

Commission of the European Communities, represented by T. van Rijn, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

* Language of the case: Dutch.

APPLICATION for an order that the European Community pay, by way of advance, the sum of HFL 258 565.38, with interest thereon at the rate of 5% calculated from 1 September 1996, together with the sum of HFL 20 000 per annum from the date on which the application for interim relief was lodged until the date on which the Court gives judgment in the main case,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and procedure

1 The applicant, Mr J. Antonissen, is successor to his late father-in-law, Mr A. A. Herbrink, established at Giethem, in the Netherlands. Mr Herbrink was a SLOM ('Staking van de Levering van melk en zuivelprodukten en Omschakeling van het Melkveebestand' — cessation of deliveries of milk and milk products and conversion of dairy herds) producer who had not marketed any milk or milk products between 17 May 1979 and 17 May 1984, having given a non-marketing undertaking 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), as subsequently amended.

2 On the expiry of his SLOM agreement, Mr Herbrink applied for a special reference quantity, or 'milk quota', for 1984 under 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), which had just entered into force; however, the Netherlands authorities refused his application on the ground that he had not produced any milk during 1983, the reference year.

3 Mr Herbrink then sought judicial review of that decision. The competent national court, the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry), stayed the proceedings pending a ruling by the Court of Justice on the validity of Regulation No 857/84, which made no provision for a reference quantity for producers who had given a non-marketing undertaking. The Court of Justice delivered its judgment on 28 April 1988 (Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321).

4 In 1988, following the delivery of that judgment, Mr Herbrink equipped the new holding which he had leased in the meantime with a view to resuming milk production. In June 1989, he applied to the national authorities for a special reference quantity. At approximately the same time, he started to produce milk on his new holding, even though he had not obtained a milk quota.

5 By decision of 2 February 1990, the national authorities refused Mr Herbrink's application for a quota. Referring to Article 3a(1) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12), the national authorities considered that he could not claim a special reference quantity because such a quantity could be granted to a SLOM producer only where the applicant still operated, in whole or in part, his initial SLOM holding. Mr Herbrink did not meet that requirement.

6 Mr Herbrink again sought judicial review of that decision by the College van Beroep voor het Bedrijfsleven, which sought a preliminary ruling from the Court of Justice on a number of questions concerning, in particular, the requirement imposed by, *inter alia*, Article 3a(1) of Regulation No 1546/88, that a SLOM producer wishing to obtain a special reference quantity must prove that he still operates, in whole or in part, the same holding as he operated at the time of the approval of his SLOM premium application.

7 In its judgment delivered on 27 January 1994 (Case C-98/91 *Herbrink* v *Minister van Landbouw, Natuurbeheer en Visserij* [1994] ECR I-223), the Court of Justice did not declare the Community provision in question invalid, but interpreted it as not precluding a SLOM producer from being able, even after the expiry of his lease, to benefit from a special reference quantity if he intends to pursue milk production.

8 In the national proceedings resumed before the College van Beroep voor het Bedrijfsleven, the national authorities adhered to a strict interpretation of the conditions for granting a special reference quantity and did not avail themselves of the possibility provided for in Article 7(4) of Regulation No 857/84. They therefore informed Mr Herbrink that he could not benefit from a special reference quantity.

9 The College van Beroep voor het Bedrijfsleven upheld the reasoning of the national authorities and, in its decision of 14 May 1996, dismissed Mr Herbrink's application. Consequently, since no appeal lies against the decision of the College van Beroep voor het Bedrijfsleven, the decision of 2 February 1990 refusing to grant Mr Herbrink a special reference quantity has become conclusive.

10 As a result of that decision, the milk produced on Mr Herbrink's holding since the expiry of his SLOM agreement is subject to a supplementary levy, which must be paid to the dairy to which the milk is delivered.

11 From 1988 onwards, Mr Herbrink operated his holding jointly with the applicant in a partnership which did not have legal personality. Following Mr Herbrink's death in 1995, the applicant continued to operate the holding alone. Salland, the dairy to which Mr Herbrink and the applicant, individually or jointly, have delivered milk since the middle of 1989, has announced that it intends shortly to undertake recovery of the supplementary levy payable since the 1989/90 milk marketing year.

12 On 25 July 1996, the applicant received a letter from Salland indicating that he owes it the sum of HFL 258 565.38 in respect of supplementary levy. The applicant was allowed until 31 August 1996 to pay that sum. The dairy also claims interest at the statutory rate, which has been 5% since 1 July 1996, on the amount due. By letter of 30 October 1996, the dairy informed the applicant of its intention to place the matter in the hands of a bailiff if the amount due was not paid by 1 December 1996.

13 The applicant considers himself unable to pay the amount due and fears that the dairy may not be inclined to take his particular circumstances into account by discharging his obligation to pay or by allowing him special terms or deferred payment.

14 By application lodged at the Registry of the Court of First Instance on 11 November 1996, the applicant claimed that the Court should:

(a) declare that the Community is obliged to make good the damage which the applicant has suffered, and may suffer in the future, as a result of the refusal to allocate a special reference quantity to the applicant or his predecessor in title, Mr A. A. Herbrink, since the termination on 17 May 1984 of the non-marketing undertaking given by Mr Herbrink pursuant to Council Regulation

(EEC) No 1078/77 of 17 May 1977, on the sole ground that, since 1987, for reasons which cannot be attributed to them, neither the applicant nor Mr Herbrink has continued to operate, either wholly or in part, the holding on which Mr Herbrink produced milk prior to giving the aforementioned non-marketing undertaking;

(b) order the Community to pay him the sum of HFL 258 565.38, corresponding to the supplementary levy due from the applicant and the partnership of which he formed part, in respect of the milk produced by them following the expiry of the non-marketing undertaking (production in the milk marketing years 1989/1990 to 1995/1996 inclusive), together with the interest due on that sum to those entitled to claim payment of the said supplementary levy from the applicant (at 5% as from 1 September 1996);

(c) order the Community to pay him the sum of HFL 58 695 (the sum resulting from the application of Regulation (EEC) No 2187/93 over the periods following the expiry of the non-marketing undertaking, during which the applicant or his predecessor in title produced no milk, together with compensatory interest from the date when the damage arose until the date of judgment in the *Mulder II* case (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061), with interest thereon at the rate of 8% per annum until settlement in full, as laid down in the judgment in *Mulder II*;

(d) order the Community to pay him the sum of HFL 180 322.20, representing the costs of obtaining a substitute reference quantity equal to the reference quantity to which he would have been entitled under Article 3a of Regulation (EEC) No 857/84 had he, at the time, been operating the holding in respect of which the non-marketing undertaking was given by Mr Herbrink in 1979; and

(e) order the Community to pay the costs.

15 By application registered at the Court Registry on 11 November 1996, the applicant further claimed, pursuant to Article 186 of the Treaty, that the President of the Court of First Instance should:

(a) order the Community to pay him, by way of advance, the sum of HFL 258 565.38, with interest thereon at the rate of 5% (the statutory rate of interest in the Netherlands) calculated from 1 September 1996, in order to pay the amount owed by him to Salland BV, the dairy to which he owes the supplementary levy;

(b) order the Community to pay him the sum of HFL 20 000 per annum from the date on which this application was lodged until the date on which the Court gives judgment in the main case;

(c) order any other measure which the President considers appropriate; and

(d) order the Community to pay the costs of the present proceedings.

16 The Council and the Commission lodged joint written observations on the application for interim relief at the Court Registry on 22 November 1996.

17 In the light of the documents submitted, the President considers that he has sufficient information to rule on the present application for interim measures and that it is not necessary to hear oral argument from the parties before doing so.

Law

18 Under Article 186 of the Treaty, taken together with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, prescribe any necessary interim measures in any cases before it.

19 The second paragraph of Article 104(1) of the Rules of Procedure of the Court of First Instance specifies that an application for the adoption of any interim measure referred to in Article 186 of the Treaty is admissible only if it is made by a party to a case before the Court of First Instance and relates to that case. Article 104(2) provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures sought must be provisional in that they must not prejudge the decision on the substance (see the order of 3 June 1996 in Case T-41/96 R *Bayer* v *Commission* [1996] ECR II-381, paragraph 13).

20 In the present case, the applicant seeks an order against the European Community, represented by the Council and the Commission, to pay him, by way of advance, the sum of HFL 258 565.38, with interest thereon at the rate of 5% calculated from 1 September 1996, together with the sum of HFL 20 000 per annum from the date on which the application for interim relief was lodged until the date on which the Court gives judgment in the main case.

21 The application therefore seeks an order from the Court prescribing interim measures, which the applicant considers necessary in the light of the circumstances which he alleges, under Article 186 of the Treaty.

22 In order to rule on such an application, it is first necessary to determine whether the measures sought are in fact of a provisional nature.

Whether the measures sought are provisional

Arguments of the parties

23 The applicant maintains that the interim measures sought do not prejudge the Court's decision on the substance of the case. He is endeavouring to avoid being declared bankrupt before the Court has ruled on the action for damages which he has brought and therefore seeks an order against the Community to pay him, by way of advance, the sum of HFL 258 565.38, together with the sum of HFL 20 000 per annum from the date on which the application for interim relief was lodged until the date on which the Court gives judgment in the main case, in order to allow him to lease a milk quota and thus continue producing milk.

24 In his view, 'the interim measures applied for amount to an advance on the damages sought' in the main application. Whilst the possibility of granting a party an interim measure in the form of advance payment of the damages claimed in the main application has not as yet been explicitly envisaged in the Community case-law, such a measure does not appear to be incompatible with the conditions and nature of interim relief proceedings. The applicant points out that under Netherlands law partial compensation may be granted as an interim measure in such circumstances. The same should apply in Community law when an application for interim measures is made in the context of an action for damages under the second paragraph of Article 215 of the EC Treaty, which refers explicitly to the general principles common to the laws of the Member States.

25 The Council and the Commission draw attention to the fact that if the application for interim measures were granted, it would be the first time that payment of money was awarded in the context of the granting of interim measures under Article 186 of the Treaty. They consider that the interim measures sought may not be granted, since they would prejudge the outcome of the main action.

26 The defendants point out that the interim application is for exactly the same sum as that sought in one of the heads of claim in the main action. If that claim were granted as an interim measure, it would prejudge the Court's decision in the main action: should the Court decide that the action for damages was unfounded, it would be difficult, in view of the applicant's financial situation, for the Community to recover the amount paid out. In the defendants' submission, a provisional order for the payment of HFL 258 565.38 would in fact amount to a definitive order benefiting the applicant and his creditor, the cost of which would have to be borne by the Community budget. Such a measure would thus be unacceptable because it would destroy the balance between the parties.

27 The second interim measure sought would also, if granted, amount to a definitive measure in the submission of the Council and the Commission. The applicant seeks HFL 20 000 per annum in order to be able to lease a milk quota. Should the main application be finally dismissed, it would be very difficult for the Community to obtain repayment of the amount paid out. An interim order granting the claim would thus destroy the balance between the parties, since the effect of granting the interim measures sought would be to render the Community finally liable for the amounts claimed, irrespective of the outcome of the action for damages. Such a measure goes beyond what can be ordered by the Court in interlocutory proceedings.

28 The defendants stress that it is misleading to say, as the applicant does, that the interim measures sought amount to an advance on the damages sought in the main action. As regards the payment of HFL 258 565.38, the interim award sought is not an advance, since the claim in the main action is for exactly the same sum. The

second interim measure sought is not even described as an advance, nor can it be one since the payment of such a yearly amount would in no way reduce the amount of the corresponding claim in the main action.

Findings of the President

29 The measures provided for in Articles 185 and 186 of the Treaty cannot have any object other than to safeguard, during the course of the procedure before the Court, the interests of one of the parties to the proceedings in order to prevent the judgment in the main proceedings from being rendered illusory by being deprived of any practical effect. Such measures, in accordance with the Rules of Procedure of the Court of First Instance (Article 107(3) and (4)), are therefore provisional and in principle lapse when final judgment is delivered (see Case C-313/90 R *CIRFS and Others* v *Commission* [1991] ECR I-2557, paragraphs 23 and 24). Consequently, they must not prejudge 'the decision on the substance of the case, that is to say that they [must not already decide] the consequences of the decision to be given subsequently on the substance of the action' (see the order of the President of the Third Chamber of the Court of Justice in Case 206/81 R *Alvarez* v *Parliament* [1981] ECR 2187, paragraph 6).

30 In the present case, Mr Antonissen seeks in his interim application an order that the Community pay him the sum of HFL 258 565.38, which corresponds exactly to the amount which he claims under point (b) of the form of order he seeks in his main application, together with the sum of HFL 20 000 per annum, which he considers necessary in order to be able to lease a milk quota during the course of the proceedings in the main action, and which would amount to payment in advance of compensation for future and uncertain damage. Such measures would anticipate the argument on the substance of the case since, when assessing whether there was a prima facie case, the President would have to rule whether there was prima facie non-contractual liability on the part of the Community and then grant in part the measures sought in the main application — an order against the Community to

pay the amounts claimed — without the merits of that application in the light of the second paragraph of Article 215 of the Treaty having been examined. However, a finding of liability, with the effects thereby entailed, cannot be taken on the basis of a prima facie case; it must be based on a definitive assessment of the facts and pleas in law put forward, and therefore requires that a procedure be followed in which all the parties are guaranteed the right to a fair hearing.

31 The conditions on which the interim measures sought might be granted are, therefore, not met. This application for interim measures must therefore be dismissed, without there being any need to consider whether the pleas in law and arguments put forward by the applicant in justification of the measure sought are well founded.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 29 November 1996.

H. Jung — A. Saggio

Registrar — President