

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
6 December 1999 *

In Case T-178/99,

Sonia Marion Elder and Robert Dale Elder, residing in Dundee, Scotland, United Kingdom, represented by Scott Crosby, Solicitor, 9 Rond-Point Schuman, Brussels,

applicants,

v

Commission of the European Communities, represented by Ulrich Wölker and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of that service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for annulment of the decision of the Commission of 8 June 1999 refusing the applicants access to the minutes of the Advisory Committee on Value Added Tax,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, C.W. Bellamy and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

- ¹ On 6 December 1993, the Commission and the Council approved a joint code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter 'the Code of Conduct').

- 2 The Commission adopted that Code of Conduct by Decision 94/90/ECSC, EC, Euratom, of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58, hereinafter 'Decision 94/90').

- 3 Article 2 of Decision 94/90 provides:

'...

2. The relevant Director-General or Head of Department, the Director designated for the purpose in the Secretariat-General or an official acting on their behalf shall inform the applicant in writing, within one month, whether the application is granted or whether he intends to refuse access. In the latter case the applicant shall also be notified that he has one month in which to apply to the Secretary-General of the Commission for review of the intention to refuse access, failing which he shall be deemed to have withdrawn his initial application.

...

4. Failure to reply to an application for access to a document within one month of application being made constitutes an intention to refuse access.

Failure to reply within one month of an application for review being made constitutes a refusal.'

- 4 The Code of Conduct, as adopted by the Commission, provides, in the third paragraph under the heading 'Processing of initial applications':

'Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.'

Facts and procedure

- 5 By letter of 30 November 1998, the applicants requested access from the Commission, pursuant to Decision 94/90, to the minutes of the Advisory Committee on Value Added Tax (hereinafter 'the Committee' or 'the VAT Committee') concerning consultations of the Committee by the United Kingdom under Articles 4 and 29 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'). In support of their request, the applicants explained that certain provisions of the British legislation

on value added tax directly affected their legal position and that they wished to ascertain whether the United Kingdom had consulted the VAT Committee in accordance with Article 4(4) of the Sixth Directive on the basis of which those provisions were adopted.

- 6 In the absence of any reply to their request, the applicants, by letter of 6 January 1999, sent to the Secretary-General of the Commission a confirmatory application under Article 2(2) of Decision 94/90.
- 7 At the same time, by letter notified to the applicants' solicitor on 11 January 1999, the Director-General for Taxation and the Customs Union at the Commission (DG XXI) informed the applicants that, under the rules of procedure of the VAT Committee, its deliberations are confidential unless the participating Member States unanimously decide to the contrary. Consequently, he took the view that, in order to safeguard the confidentiality of the VAT Committee's deliberations and not to prejudice the financial interests of the Communities, he was not in a position to allow them access to the minutes of the Committee.
- 8 By letter of 9 February 1999, the Secretariat-General of the Commission informed the applicants that their request would be considered as quickly as possible but that it would probably be more than a month before they received a reply.
- 9 On 3 March 1999 the applicants received a letter from the Secretary-General of the Commission which stated that, although the minutes of the VAT Committee were drawn up by the Commission which provides secretarial services for the Committee, they were formally adopted by the Committee itself. As the Committee had to be considered to be the author of the documents under the terms of the Code of Conduct, a request such as that submitted by the applicants

had to be sent directly to the Committee. However, the Secretary-General added, first, that, in order to be helpful, he had sent the applicants' request to the Committee for it to decide on the action to be taken and, second, that the United Kingdom had consulted the Committee on several occasions between 1979 and 1996 regarding the application of Article 4(4) of the Sixth Directive.

- 10 By application lodged at the Registry of the Court of First Instance on 1 April 1999, the applicants brought an action registered under No T-78/99 for annulment of the decision of the Commission refusing them access to the documents at issue.
- 11 By letter of 8 June 1999, the Chairman of the VAT Committee informed the applicants that the representatives of the Member States sitting on the Committee had decided unanimously not to allow them access to the minutes.
- 12 Taking the view that this letter was to be considered to be a definitive decision of the Commission rejecting their request, the applicants, by application lodged at the Registry of the Court of First Instance on 6 August 1999, brought this action for annulment of that decision of 8 June 1999 (hereinafter 'the contested measure').
- 13 Consequently, the applicants discontinued the action for annulment in Case T-78/99, which was subsequently removed from the register by order of the Court of First Instance of 13 October 1999.

- 14 By letter of 3 August 1999, the Commission informed the applicants that DG XXI had been asked to re-examine their request for access to the minutes of the VAT Committee on the ground that it followed from the judgment of the Court of First Instance of 19 July 1999 in Case T-188/97 *Rothmans International v Commission* [1999] ECR II-2463 that it was for the Commission to decide on requests for access to the minutes of advisory committees such as the VAT Committee.
- 15 In its defence lodged at the Registry of the Court of First Instance on 30 September 1999, the Commission asked the Court of First Instance to declare that there was no need to adjudicate on the application on the grounds that the applicants' request for access to the minutes of the VAT Committee was to be re-examined by DG XXI and that the decision made thereafter would result in withdrawal of the contested measure.
- 16 By letter lodged at the Registry of the Court of First Instance on 20 October 1999, the Commission forwarded to the Court of First Instance the letter of 30 September 1999 from the Director-General of DG XXI to the applicants in which, after re-examining their request in the light of the judgment in *Rothmans International*, cited above, he repeated his refusal to allow access to the minutes of the Committee, this time citing the Code of Conduct and, in particular, the exception based on the protection of confidentiality. The Commission draws the inference that the contested decision has been withdrawn and that there is, therefore, no need to adjudicate.
- 17 In their observations on the application for a declaration that there is no need to adjudicate, lodged at the Registry of the Court of First Instance on 8 November

1999, the applicants state that they do not oppose the discontinuance of the present proceedings. They explain that they have submitted a confirmatory application for access to the documents to the Secretary-General of the Commission and accept that his decision, whatever its import, will supersede the letter of 8 June 1999. None the less, they take the view that that letter was a definitive measure which they were justified in contesting and that, in view of the conduct of the Commission, it should be ordered to pay the costs.

The application for a declaration that there is no need to adjudicate

- 18 By its application for a declaration that there is no need to adjudicate, the Commission has raised a preliminary issue which may be settled without opening the oral procedure under Article 114(3) of the Rules of Procedure.
- 19 By adopting the decision of 30 September 1999, the Commission implicitly withdrew the contested measure after it had come to the view that the Community rules on access to documents, as clarified by the judgment in *Rothmans International*, cited above, required it to decide on applications for access to documents of the VAT Committee.
- 20 In the circumstances, it must be held that the withdrawal of the contested measure is equivalent in effect to a judgment annulling the measure, without

prejudice to any right of the applicants to contest in separate proceedings the lawfulness of the decision of the Secretary-General of the Commission ruling definitively on the application. A judgment annulling the contested measure now withdrawn would entail no more far-reaching legal consequences than the withdrawal itself.

- 21 The applicants thus retain no interest in seeking the annulment of the contested decision. It follows that the present action has become devoid of purpose (see order of the Court of First Instance in Case T-145/95 *Proderec v Commission* [1997] ECR II-823, paragraph 27, and the case-law cited there).
- 22 It follows from the foregoing that there is no need to adjudicate on the application.

Costs

- 23 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance.
- 24 In the present case, the Commission withdrew the contested measure after the application had been lodged on a ground cited by the applicants in that application. In the circumstances the Commission must be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. There is no need to adjudicate on the present application.
2. The Commission shall bear all the costs.

Luxembourg, 8 December 1999.

H. Jung

Registrar

B. Vesterdorf

President