ORDER OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

28 June 2004 *

In Case T-342/99 DEP,

Airtours plc, represented by M. Nicholson, solicitor, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for taxation of the costs to be recovered from the Commission by Airtours plc following the judgment of the Court of First Instance of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585,

* Language of the case: English.

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

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges,

Registrar: H. Jung,

makes the following

Order

Facts, procedure and forms of order sought

1 By application lodged at the Court Registry on 2 December 1999, Airtours plc (now renamed My Travel Group plc) brought an action for annulment of the Commission's decision of 22 September 1999 declaring a concentration to be incompatible with the common market and with the EEA Agreement (Case IV/M.1524 — Airtours/First Choice, 'the Decision'), published under No 2000/276/EC (OJ 2000 L 93, p. 1).

2 By its judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, ('the judgment in Airtours') the Court of First Instance annulled the Decision and ordered the Commission to pay the costs.

3 By letter of 10 September 2002, the applicant applied to the Commission for reimbursement of GBP 1 464 441.55 in respect of fees paid to its advisers and disbursements other than value added tax (VAT), to which GBP 253 543.47 was added by way of VAT, giving a total amount of GBP 1 717 985.02.

4 By letter of 14 October 2002, the Commission rejected that claim on the ground that it was not justified and made a counter-offer in respect of the costs incurred by Airtours, which amounted to GBP 130 000.

5 By letter of 30 January 2003, the applicant explained to the Commission why it seemed to it that the sums claimed were justified and rejected the Commission's offer to pay GBP 130 000.

6 By application lodged at the Court Registry on 4 February 2003, the applicant brought an application for taxation of costs in which it asked the Court to fix, pursuant to Article 92 of the Rules of Procedure, the total amount of recoverable costs at GBP 1 464 441.55 in respect of fees and costs other than VAT, together with GBP 253 543.47 in respect of VAT, giving a total amount of GBP 1 717 985.02.

7 By a document lodged at the Court Registry on 18 March 2003, the Commission submitted its observations and called on the Court to fix the total amount of recoverable costs, including the costs of the present application, at GBP 170 000.

Law

8 The applicant relies, in essence, on two lines of argument in support of its application for the taxation of costs. First, it argues that by analogy with English procedural rules, it is entitled to a generous settlement of its costs in this case. Second, it maintains that the amount claimed meets the criteria established by the case-law on recoverable costs and covers costs which were necessarily incurred in this case.

A — *The right to a generous settlement of the costs*

Arguments of the parties

9 The applicant claims that it is entitled to a generous settlement of its costs. It submits that the assessment of the amount of recoverable costs must take into account the severity of the Court of First Instance's criticism of the Decision (judgment in *Airtours*, paragraph 294). It also points out that the assessment of that amount must take into account the need for effective judicial review, in particular as regards merger control, and refers in that connection to the Commission's press release following delivery of the judgment in *Airtours*, several articles in the press and the report published on 23 July 2002 by the House of Lords Select Committee on the European Union.

10 The applicant submits that, by analogy with English procedural rules, it is entitled to have its costs reimbursed on an indemnity basis. All the costs generated by the action should thus be repaid to it, unless they are unreasonably high or were unreasonably incurred. If it were otherwise, applicants would be deterred from bringing an action or would have an incentive to limit their exposure to costs, with the result that the Court of First Instance might not have all the factual, economic or legal matters before it to enable it to carry out its review adequately.

11 The Commission states that the case-law does not give scope for inflating the level of costs in order to punish the unsuccessful party.

Findings of the Court

12 Under Article 92(1) of the Rules of Procedure:

'If there is a dispute concerning the costs to be recovered, the Court of First Instance hearing the case shall, on application by the party concerned and after hearing the opposite party, make an order, from which no appeal shall lie.'

13 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 regarded as recoverable costs. It follows from that provision that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court of First

Instance and, second, to those which were necessary for that purpose (orders of 24 January 2002 in Case T-38/95 DEP *Groupe Origny* v *Commission* [2002] ECR II-217, paragraph 28, and of 6 March 2003 in Joined Cases T-226/00 DEP and T-227/00 DEP *Nan Ya Plastics and Far Eastern Textiles* v *Council* [2003] ECR II-685, paragraph 33).

14 By virtue of those principles, the amount of recoverable costs cannot exceed the amount of expenses necessarily incurred by the applicant for the purpose of the proceedings before the Court of First Instance. The applicant is not therefore entitled to rely on what was said in the judgment in *Airtours*, on views expressed by the Commission or by the House of Lords following that judgment or, more generally, on the need for effective judicial review in order to obtain more than that to which it is entitled under Article 91(b) of the Rules of Procedure.

15 Furthermore, the rules which apply to the fixing of the amount of recoverable costs are laid down in the Rules of Procedure and cannot be inferred, by analogy, from the English procedural rules to which the applicant refers.

16 It is therefore on the basis of Article 91(b) of the Rules of Procedure that the amount of the costs recoverable in this instance must be assessed.

B — *Assessment of recoverable costs*

17 It is settled case-law that the Community Courts are not empowered to tax the fees payable by the parties to their own lawyers, but may determine the amount of those fees to be recovered from the party ordered to pay the costs. When ruling on an application for taxation of costs, the Court of First Instance is not obliged to take

account of any national scale of lawyers' fees or any agreement in that regard between the party concerned and his agents or advisers (orders of the Court of First Instance in Case T-120/89 DEP *Stahlwerke Peine-Salzgitter* v *Commission* [1996] ECR II-1547, paragraph 27, and in Case T-80/97 DEP *Starway* v *Council* [2002] ECR II-1, paragraph 26).

18 It has also consistently been held that, in the absence of Community provisions laying down fee-scales, the Court must make an unfettered assessment of 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 proceedings for the agents and advisers involved and the financial interests which the parties had in the proceedings (order of the President of the Third Chamber of the Court of Justice in Case 318/82 DEP *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 3727, paragraph 3, and the order in *Starway* v *Council*, paragraph 27).

1. *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*

Arguments of the parties

19 The applicant submits that the purpose and nature of the proceedings in this case raised novel and complex economic and legal issues, to which the length of the Decision, the application and the judgment bears witness. It also points out that the judgment in *Airtours* has had a considerable impact in the sphere of merger control, both from the point of view of defining the notion of collective dominance and from the point of view of the efficacy of judicial review, as is clear from a number of articles in the press and academic legal writing in the wake of the judgment. In

particular, the applicant draws attention to the fact that the Court of First Instance did not simply mechanically reapply the test laid down in the judgment in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753 but used the case to develop and refine the test to be applied to situations of collective dominance, particularly as regards whether the Commission may prohibit a concentration in an oligopolistic and non-collusive market.

20 The Commission acknowledges that the proceedings raised numerous issues of fact and law. It does not consider, however, that the case has had a decisive influence on the development of Community law. As regards the definition of collective dominance, the Commission contends that the key elements of that notion had already been examined in *Gencor* v *Commission* and that they have been amply explained in standard legal text books. The applicant cannot therefore claim that it has drawn the Commission back into the path of doctrinal rectitude after its attempt to apply new criteria in the Decision, since that claim is based on an incorrect and tendentious interpretation of the Decision. The Commission acknowledges, however, that there was disagreement as to the retaliation mechanism, a relatively minor issue. As regards the efficacy of judicial review, the Commission is unable to understand in what way this case is of particular significance, since the Court exercised detailed scrutiny in the same way as it does in any case. Furthermore, the Commission contends that, even though conduct of such a case demands considerable work, the costs claimed by the applicant are in any event excessive by far.

Findings of the Court

21 It must be stated at the outset that the action concerned the application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected version in OJ 1990 L 257, p. 13) and, more specifically, a Commission decision, adopted following a full investigative procedure, declaring the proposed acquisition notified

by the applicant to be incompatible with the common market. Furthermore, apart from the difficulties inherent in merger control, which requires a prospective analysis of the reference market, it was a feature of the Decision that it prohibited the proposed transaction on the ground that it would create a situation of collective dominance, something which involves a thorough examination of the effects of the transaction on competition.

22 Further, it should be stated that, even though two judgments of the Court of Justice and the Court of First Instance (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission (Kali & Salz)* [1998] ECR I-1375 and *Gencor* v Commission) had previously dealt with the notion of collective dominance in relation to Regulation No 4064/89, the term is nevertheless difficult to define and to apply.

23 Thus, this case raised new issues concerning (i) the definition and characteristics of collective dominance, which is not defined in the relevant legislation, (ii) the existence of tacit coordination between the members of a dominant oligopoly, (iii) the need to identify the deterrents which secure unity within such an oligopoly and (iv) — more generally — the level of proof required from the Commission when it intends to prohibit a concentration on the ground that it would result in the creation of a collective dominant position, the effect of which would be significantly to impede competition in the common market. In that regard, the Court notes that, unlike the situation in the *Gencor* case, which concerned the creation of a duopoly in relation to platinum, a raw material which is negotiable throughout the world, this case concerned the creation of an oligopoly on a market for holiday services, brought about by the removal of one of the four major United Kingdom tour operators. The concept of collective dominance was thus more difficult to apply in this instance.

24 Consequently, the case in question was important from the point of view of Community competition law and gave rise to a large number of complex economic and legal questions which had to be examined by the applicant's advisers in bringing the action for annulment.

2. *The financial interest which the parties had in the proceedings*

Arguments of the parties

25 The applicant submits that Airtours' takeover of First Choice was valued at GBP 850 million, which represents a considerable financial interest and that the transaction could not be completed as a result of the Decision. The applicant was also deprived of the opportunity to expand and to achieve savings and synergies as a result of the proposed merger. Furthermore, it was also unable to take part in the subsequent consolidation of the tourism industry.

26 The Commission acknowledges that the applicant was deprived of an opportunity. It contends, however, that its financial interest is hard to evaluate because of the fact that it was unlikely that Airtours would have been in a position to acquire First Choice following the Court of First Instance's judgment. The applicant's financial interest was above all in defining its position for possible future operations. On that point, the Decision did not exclude Airtours from the subsequent market consolidation, since that consolidation (Cases COMP/M.2002 — Preussag/Thomson and COMP/M.2228 — C&N/Thomas Cook) took the form of cross-border mergers and there was nothing to prevent the applicant from pursuing such transactions.

Findings of the Court

27 The Decision blocked the takeover of an undertaking valued at around GBP 850 million. It follows, without there being any need to assess the way in which the relevant market evolved in the wake of the Decision, that this case was of major financial interest to the applicant.

3. *The amount of work required by the proceedings from the applicant's advisers*

(a) General considerations

28 As a preliminary point, the Court notes that it follows from the foregoing considerations that the case did in fact require a substantial amount of work on the part of the applicant's advisers.

29 However, it is important to state that the applicant's advisers already had extensive knowledge of the case as they had represented Airtours throughout the full investigative administrative procedure. The applicant had thus already put forward, in the course of the administrative procedure, certain of the arguments advanced before the Court, as regards particularly the definition of the market and tacit coordination between the members of the dominant oligopoly. That factor, in part, facilitated the work and reduced the time which had to be devoted to preparation of the application (orders in Case T-65/96 DEP *Kish Glass* v *Commission* [2001] ECR II-3261, paragraph 25, and *Nan Ya Plastics and Far Eastern Textiles* v *Council*, paragraph 43).

30 Furthermore, it must be borne in mind that the primary consideration of the Court is the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court, irrespective of the number of lawyers who may have provided the services in question (orders of the Court of First Instance in Case T-290/94 DEP *Kaysersberg* v *Commission* [1998] ECR II-4105, paragraph 20, Case T-337/94 DEP *Enso-Gutzeit* v *Commission* [2000] ECR II-479, paragraph 20, and *Nan Ya Plastics and Far Eastern Textiles* v *Council*, paragraph 44). In that regard, the ability of the Court to assess the value of work carried out is dependent on the accuracy of the information provided (order of the Court of Justice of 9 November 1995 in Case C-89/85 DEP *Ahlström and Others* v *Commission*, not published in the ECR, paragraph 20, and the order in *Stahlwerke Peine-Salzgitter* v *Commission*, paragraph 31).

31 It is in the light of the foregoing considerations that the various classes of costs, recovery of which is sought from the Commission, must be assessed.

32 The applicant explains in that connection that the total amount claimed, GBP 1 464 441.55 excluding VAT (GBP 1 717 985.02 includingVAT), can be broken down as follows:

	GBP
Specialist legal advisers (Mr J. Swift QC and Mr R. Anderson, barrister)	
Fees	279 375.00
VAT	*48 890.62*
Legal advisers (solicitors)	
Fees	850 000.00
Disbursements (other than VAT)	19 509.68
VAT	*152 163.33*
Economic advisers (Lexecon)	
Fees	281 051.52
VAT	*49 184.02*
Economic Experts (Professors Binmore and Neven)	
Fees	33 885.35
VAT	*3 305.50*
Counsel for service in Luxembourg	
Fees and disbursements	620.00
Total	1 464 441.55 (without VAT) *1 717 985.02 (with VAT)*

(b) Legal advisers (barristers and solicitors)

Arguments of the parties

33 By way of recoverable costs relating to legal advisers' fees, the applicant claims, first, GBP 279 375 in respect of the fees marked by two barristers specialising in competition law (GBP 150 500 for Mr J. Swift QC and GBP 128 875 for Mr R. Anderson), who were involved throughout the proceedings before the Court of First Instance. In that regard, it points out that, as would have been the case before the English courts, the use of two barristers to supplement the work of the solicitors was justified by the importance and complexity of the case.

34 The applicant also claims reimbursement of GBP 850 000 in respect of fees invoiced by its solicitors, Slaughter & May. In that respect, the team responsible for the proceedings included a partner (who worked 413 hours and 45 minutes on the case), assisted throughout by a senior solicitor (who worked 315 hours and 25 minutes) and by another solicitor (one solicitor initially spending 307 hours on the case before being replaced by another solicitor who worked 204 hours and 45 minutes towards the end of the case). The team also used a number of trainees at various stages of the proceedings. Thus, two trainees worked 115 hours and 100 hours and 15 minutes respectively at the stage of the application, another trainee spent 193 hours and 20 minutes on the case at the reply stage and 13 trainees spent between 15 minutes and 35 hours (a total of 110 hours and 30 minutes) on the case, which can be explained by the fact that the trainees rotate every three months and that the legal proceedings lasted almost three years. The applicant also points out that the firm spent 1 760 hours on the case and that it kept the core team responsible for the case to the minimum required in order to ensure that the service supplied to the client met the requisite standard.

35 The applicant explains that of the 1 760 hours billed by the 19 lawyers from the firm who worked on the case from preparation of the application at the end of September 1999 until the hearing on 11 October 2001 around 500 hours were devoted to analysing the Decision and to preparing the application (October to December 1999), around 500 hours to analysing the defence and preparing the reply (from March to April 2000), some time was spent analysing the rejoinder (June 2000), around 100 hours were spent responding to the measures of organisation of procedure (July to August 2001) and around 500 hours on reviewing the report for the hearing and on preparing for and attending the hearing, which was attended by five people representing Airtours (September to October 2001).

36 The Commission objects both to the number of lawyers (barristers and solicitors) involved, as well as to the level of fees and the number of hours billed.

37 As regards the number of lawyers, it submits that only the fees of two, or at the very most three, lawyers can be regarded as recoverable. So the Commission maintains that Slaughter & May's use of 19 persons entailed wasted effort. Although the Commission acknowledges that only six of those 19 persons spent substantial amounts of time on the case, it contends in any event that such a team is larger than necessary. In addition, that team was supplemented by two barristers, which was excessive and wholly unnecessary. That team of eight included three senior lawyers, when one, backed by a competent small team would have been enough. In comparison, the Commission's case was prepared and presented by a single member of its Legal Service, with the support of two economists from the Directorate General for Competition, who had been involved in the administrative proceedings.

38 As regards the number of hours spent on the case, the Commission denies that it was necessary or reasonable to spend over 1 760 hours on it (indeed well over 2 000 hours if the work of the two barristers is taken into account), given in particular the fact that those lawyers had already represented the applicant in the administrative

procedure and that they were therefore well acquainted with the facts of the case and the economic debate. Moreover, the way that time was split between the various stages of the legal proceedings indicates that that time was wasted. Hence, it is hard to understand how it could be necessary to spend 500 hours (some three months' work) analysing the Decision and preparing the application for annulment or how it was possible to spend the same number of hours analysing and replying to the Commission's defence at a stage when there could be no further novelty to the case. Seven hundred hours would seem more reasonable than the 1 760 hours invoiced.

39 The Commission contends that the level of fees charged is exorbitant. The bill of GBP 850 000 for 1 760 hours of work entails an hourly rate of almost GBP 500 per hour, in respect of all categories of lawyers involved (partner, senior assistant, assistant and trainee). At the time it was unusual for fees paid to all but the most senior partners in the best-known firms to exceed GBP 350. In Brussels, rates for lawyers specialising in Community law are generally lower. As a general rule, hourly rates for assistant solicitors would not have exceeded, depending on their experience, GBP 200, whilst those for trainees should have been in the vicinity of GBP 50 to GBP 80. Given the normal distribution of work between senior and junior staff and the fact that senior lawyers are paid more, a reasonable average hourly rate for a team could be expected to be well below GBP 200.

Findings of the Court

40 In this case, the applicant chose to be represented both by solicitors and barristers (counsel). It therefore claims recovery of GBP 1 129 375 in respect of recoverable costs for the fees of its legal advisers, namely GBP 279 375 for the barristers' fees and GBP 850 000 for the solicitors' fees.

41 Accordingly, it is for the Court to determine whether, and to what extent, those fees represent expenses necessarily incurred for the purpose of the proceedings as provided for in Article 91(b) of the Rules of Procedure.

42 In a number of common-law jurisdictions, including that of England and Wales, it is a feature of the legal profession that it is split into two branches, solicitors, on the one hand, and counsel, on the other, between which there existed until recent times a division of complementary but distinct functions. The solicitor acted as his client's adviser in many areas of the law; he did not have the right to appear before the higher courts but, where necessary, engaged the services of counsel for that purpose. Barristers specialised in the oral pleading of cases and could not be engaged directly by the client.

43 As regards cases before the Community Courts, the relevant professional rules have been amended, so that there now exists no legal or deontological obstacle to a party being represented solely by either a solicitor or a barrister of England and Wales for the purpose of both the written and the oral procedure. However, it does not follow that where a client decides to be represented by both a solicitor and counsel, the fees due to each of them are not to be regarded as costs necessarily incurred for the purpose of the proceedings, as provided for in Article 91(b) of the Rules of Procedure.

44 In taxing costs in those circumstances, the Court must examine the extent to which the services supplied by all the advisers concerned were necessary for the conduct of the legal proceedings and satisfy itself that the fact that both categories of lawyers were instructed did not entail any unnecessary duplication of costs. When, as in this instance, the applicant's action seeks annulment of a Commission decision adopted

following an administrative procedure during which the applicant was represented by the same team of lawyers, the costs necessarily incurred before the Court consist essentially of costs relating to the preparation and drafting of pleadings and responses to measures of organisation or inquiry ordered by the Court and to attendance at the hearing.

45 It follows that where, for example, a client decides, on the advice of his solicitor, to retain counsel for advice as to whether to bring an action for annulment and counsel is instructed to draft pleadings and briefed to appear at the hearing, the costs which are necessarily incurred by the solicitor are limited to those involved in instructing counsel, acting upon counsel's advice, engrossing and lodging the pleadings and attending upon counsel at the hearing.

46 In this case, it is, first, apparent from the documents before the Court that, although it is not possible to ascertain from the two barristers' various fees notes how many hours they spent on the case, those documents none the less provide a brief description of the services carried out for the applicant. Thus, Mr Anderson's fee notes cover preparation of a note on procedure before the Court of First Instance, perusal of papers at various stages of the proceedings, time spent advising in conference with the solicitors or in discussion with Mr Swift, drafting and reviewing the application, drafting the reply, research for and preparation of responses to the measures of organisation of procedure, preparation for the hearing and travel and subsistence expenses in Luxembourg. Likewise, Mr Swift's fee notes describe his work on the pleadings ('settling application' or 'reading and considering rejoinder'), time spent discussing the case with the solicitors or Mr Anderson in relation, in particular, to the responses to the measures of organisation of procedure and preparation for the hearing, and travel and subsistence expenses in Luxembourg. The Court thus finds that the barristers' work concerned all stages of the proceedings before it.

47 Second, in addition to the two barristers referred to above, two senior solicitors with considerable experience of competition law were also involved in the case and were throughout assisted by a solicitor (one solicitor at the start of the proceedings and subsequently another at the end) and by more than a dozen trainees.

48 Furthermore, it can be seen from a comparison of the number of hours spent by the solicitors on the various stages of the Court proceedings and the barristers' fee notes that the solicitors' work largely coincided with the barristers' work. By way of example, the applicant indicates that the solicitors devoted 500 hours to preparing the application, which represents 62 days' work on the basis of 8 chargeable hours per day. Mr Anderson's fee notes indicate that, having read the various documents between 9 and 12 November 1999, he drafted or reviewed the application between 15 November and 1 December 1999. Mr Swift's fee notes also show that he spent 29 and 30 November 1999 settling the application. The barristers also worked, following the same procedures, on preparing and drafting the reply, whilst the applicant states that its solicitors devoted 500 hours to preparing that document.

49 Thus, the use of two barristers and two senior solicitors in tandem resulted in considerable duplication of labour, since their work served in part the same purpose.

50 Third, like the barristers, the solicitors' firm had represented the applicant in the full investigative administrative procedure. Furthermore, the Commission's pleadings merely rebutted the applicant's arguments and did not introduce any new arguments liable to change the analysis set out in the application and the reply, which facilitated the work of the barristers and the solicitors in the Court proceedings.

51 In view of the foregoing, the Court finds that the time which the applicant claims was spent on the case is excessive and that it cannot all represent 'expenses necessarily incurred' for the purposes of Article 91(b) of the Rules of Procedure.

52 Furthermore, attention must be drawn to the fact that the information supplied by the applicant about the solicitors' fees does not specify the hourly rate billed by the various categories of persons who worked on the case, namely a partner, a senior solicitor, two solicitors and a number of trainees. In the absence of such information, it must be stated that, if the sum claimed (GBP 850 000) is divided by the number of hours billed (1 760), the average hourly rate for those various categories of persons is around GBP 483. Although an hourly rate of that amount may in some circumstances be contemplated for the services of a particularly experienced professional, it undoubtedly cannot apply to all the categories of persons involved in this case, such as the senior solicitor, the assistant solicitors and the trainees, who together worked 1 346 of the 1 760 hours billed by the solicitors, that is to say 75% of the work.

53 Therefore, fixing the legal fees recoverable from the Commission at GBP 420 000, namely GBP 95 000 as regards Mr Swift, GBP 75 000 as regards Mr Anderson and GBP 250 000 as regards the solicitors, represents an equitable assessment.

(c) Economic advisers and experts

54 The applicant submits that the involvement of economists was necessary in the present case.

55 In that regard, the Court notes that, given the essentially economic nature of the findings made by the Commission in the context of merger control, the involvement of economic advisers or experts specialising in that field may sometimes prove necessary and entail costs which may be recovered under Article 91(b) of the Rules of Procedure (see, in a different economic area, the orders in Case T-85/94 DEP and Case T-85/94 OP-DEP *Branco* v *Commission* [1998] ECR II-2667, paragraph 27, and Case T-271/94 DEP *Branco* v *Commission* [1998] ECR II-3761, paragraph 21).

56 However, the number of economists involved in the legal proceedings is substantial. The case in question entailed the involvement of a team of three economic consultants, assisted by a number of researchers, and two further experts. The applicant does not explain, however, how this case could require the involvement of five economists.

(i) Lexecon's fees

— Arguments of the parties

57 As regards the recovery of GBP 281 051.52 in respect of Lexecon's fees, the applicant states that the firm was involved at the stage of preparing the application, the stage of preparing the reply and the stage of responding to the measures of organisation of procedure, and that the value of its contribution is apparent from the *Airtours* judgment, in particular in the arguments relating to the definition of collective dominance and the need to establish the existence of a deterrent mechanism. In response to the Commission's argument that it is incomprehensible that Lexecon should have spent 1 501 hours working on the case when it had already been involved in the administrative procedure, the applicant states that Lexecon's involvement in that procedure ensured that there was no superfluous reading-in time.

58 The Commission observes that the amount claimed for Lexecon, which had already advised the applicant during the administrative procedure, is substantial. In its submission, no further analysis was necessary, since there was no difference between the economic questions raised in the administrative procedure and those raised before the Court. The Commission also notes that the applicant was not able to show any real contribution by Lexecon to the conduct of the case.

— Findings of the Court

59 The sum claimed, GBP 281 051.52, covers 1 501 hours of work by a team of three persons, assisted by a number of researchers. In that regard, the only information supplied by the applicant concerns, first, a breakdown of the hours worked by the members of the team responsible for the case, Mr B. Bishop (18 hours at GBP 360 per hour), Mr A. Overd (643 hours at GBP 220 per hour), Ms D. Jackson (709 hours at GBP 180 per hour) and 'Research Economists/Associates' (131 hours at GBP 120 per hour) and, second, an indication that the work concerned 'professional services' provided between November 1999 and October 2001 without further detail.

60 Although the nature of the case could justify the involvement of one economic adviser at all stages of the proceedings before the Court, the number of hours billed appears excessive given that Lexecon had been involved in the administrative procedure and given the absence of detail in the fee notes supplied by the applicant.

61 Accordingly, the fees recoverable are fairly assessed by fixing the amount relating to Lexecon at GBP 30 000.

(ii) The fees of Professors Binmore and Neven

— Arguments of the parties

62 As regards recovery of GBP 18 900 in respect of Professor Binmore's fees, the applicant points out that his work involved inter alia preparation of a report annexed to the application and referred to in the report for the hearing. The costs generated by that work are thus justified.

63 Similarly, as regards recovery of GBP 14 985.35 in respect of Professor Neven's fees, the applicant submits that the Professor's work involved inter alia preparation of a report annexed to the application and referred to in the report for the hearing. Furthermore, the Court referred on a number of occasions to another economic report by the same author prepared in the course of the administrative procedure. The costs generated by that work are thus justified.

64 The Commission contends that the work done by Professors Binmore and Neven was superfluous. It was natural that their reports should be mentioned in the report for the hearing, since that is the purpose of a document of that kind. Further, the applicant explains the significance of Professor Neven's involvement by referring to submissions which he made during the administrative procedure, not during the legal proceedings.

— Findings of the Court

65 It must be stated at the outset that the amount claimed by way of reimbursement of costs in relation to Professor Binmore's fees (GBP 18 900) consists of (i) GBP 16 400 in respect of his role in preparing the documentation relating to the application and (ii) GBP 2 500 in respect of a report entitled 'The Failure of the Commission to Understand the Economics of Tacit Collusion', which was annexed to the reply.

66 The fee notes provided by the applicant do not give any information explaining what Professor Binmore's role was in preparing annexes to the application. The various economic assessments annexed to the application consisted of extracts from various text books and journals. In that regard, the Court holds that, although those assessments allowed it to have the benefit of an overall economic view of certain aspects of the case in question, spending GBP 16 400 on assembling such documents cannot be regarded as an expense necessarily incurred.

67 The Court notes that the report entitled 'The Failure of the Commission to Understand the Economics of Tacit Collusion', prepared by Professor Binmore and annexed to the reply, examined the issue of economic concepts relating to tacit collusion and may thus be regarded as necessary for the purpose of the present case.

68 Consequently, the amount recoverable in respect of Professor Binmore's fees is fairly assessed at GBP 4 500 (GBP 2 000 for the preparation of documents relating to the application and GBP 2 500 for the report).

69 The Court further notes that the amount which the applicant seeks to recover in respect of the costs of Professor Neven's fees (GBP 14 985.35) includes, first, GBP 5 583.17 for preparation of a report entitled 'Case No IV/M.1524 Airtours/First Choice: an Economic Analysis of the Commission Decision', which was annexed to the application, second, GBP 3 479.40 in respect of Professor Neven's contribution to preparing the reply and his preparation of a report entitled '*Airtours* v *Commission of the European Communities* — Case T-342/99: Collective Dominance in the Commission's Statement of Defence, A Comment', which was annexed to the reply, and, third, GBP 5 922.78 in respect of preparation for and attending the hearing.

70 In that regard, the Court observes that Professor Neven's contribution to the legal proceedings was necessary to allow the Court to have available a precise, detailed and well-argued economic report relating to a number of aspects of the present case in relation to both the Decision and the substance of the defence.

71 As a consequence, given that the costs relating to Professor Neven's fees were objectively necessary for the purpose of the proceedings before the Court, recovery of the amount incurred in that regard, GBP 14 985.35, must therefore be allowed.

72 In conclusion, the Court will make an equitable assessment of the fees recoverable by fixing the amount in respect of the applicant's economic advisers and experts at GBP 49 485.35 (GBP 30 000 for Lexecon's contribution, GBP 4 500 for Professor Binmore's contribution and GBP 14 985.35 for Professor Neven's contribution).

(d) Costs for service in Luxembourg

73 The applicant claims reinmbursement of GBP 620 for fees in respect of costs for service in Luxembourg, which are necessarily incurred. The Commission has not submitted any observations on this point.

74 Since the fees in respect of service in Luxembourg were necessarily incurred when the application was lodged and since the amount is not disputed by the Commission, their recovery must therefore be allowed.

(e) Disbursements other than VAT

75 The applicant seeks recovery of GBP 19 509.68 for costs relating to disbursements other than VAT on the ground that those disbursements relate to reasonable photocopying charges, travel and subsistence (including for more than one lawyer and for the economic advisers) and must be regarded as expenses necessarily incurred. The Commission has not submitted any observations on this point.

76 Since these disbursements are not challenged by the Commission, the Court must allow them as recoverable costs and order their reimbursement.

(f) VAT

77 The applicant seeks recovery of GBP 253 543.47 in respect of VAT on recoverable costs, which is also recoverable (order in *Leeuwarder Papierwarenfabriek* v *Commission*, paragraph 4).

78 The Commission challenges that analysis and refers in this connection to paragraph 20 of the order of the Court of Justice of 16 December 1999 in Case C-137/92 P-DEP *Hüls* v *Commission*, not published in the ECR.

79 The Court notes that, since the applicant is a taxable person, it is entitled to recover from the tax authorities VAT paid on goods and services purchased by it. VAT thus does not represent an expense for it and, accordingly, it cannot claim reimbursement of VAT on costs which are recoverable from the Commission under Article 91(b) of the Rules of Procedure. There can be no reimbursement of VAT on legal fees and disbursements, since it is not disputed that the applicant was able to deduct the amounts paid in that respect and thus has not had to bear those amounts itself (see, to that effect, the order in *Hüls* v *Commission*, paragraph 20).

Conclusion

80 In view of the foregoing, the amount of costs recoverable by the applicant from the Commission is fixed at GBP 489 615.03 excluding VAT, namely GBP 420 000 in respect of legal fees (GBP 95 000 as regards Mr Swift, GBP 75 000 as regards Mr Anderson, and GBP 250 000 as regards the solicitors), GBP 30 000 in respect of Lexecon's fees, GBP 4 500 in respect of Professor Binmore's fees, GBP 14 985.35 in

respect of Professor Neven's fees, GBP 620 in respect of costs for service and GBP 19 509.68 in respect of disbursements other than VAT.

81 Since that amount takes account of all the circumstances of the case up to the date of this order, there is no need to give a separate ruling on the application for reimbursement of the expenses incurred by the applicant for the purpose of these proceedings for the taxation of costs (see, to that effect, the orders in *Groupe Origny* v *Commission*, paragraph 44, and *Nan Ya Plastics and Far Eastern Textiles* v *Council*, paragraph 49).

On those grounds,

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

hereby orders:

The total amount of the costs to be paid by the Commission to Airtours is fixed at GBP 489 615.03 (four hundred and eighty-nine thousand, six hundred and fifteen pounds and three pence).

Luxembourg, 28 June 2004.

H. Jung — P. Lindh

Registrar — President