Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

1 October 2013 *

((Taxation of costs)

In Case C-521/09 P-DEP,

APPLICATION for taxation of recoverable costs on the basis of Article 145 of the Rules of Procedure of the Court of Justice, brought on 14 January 2013,

Elf Aquitaine SA, established in Courbevoie (France), represented by E. Morgan de Rivery and É. Chassaing, avocats,

applicant,

v

European Commission, represented by F. Ronkes Agerbeek and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Eighth Chamber),

composed of E. Jarašiūnas, President of the Chamber, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after hearing the Advocate General,

makes the following

Order

1 The subject-matter of this action is the taxation of the costs incurred by Elf Aquitaine SA ('Elf Aquitaine') in the proceedings at first instance which gave rise to the appeal leading to the judgment in Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947.

* Language of the case: French.

2 By that appeal, Elf Aquitaine had in particular requested the Court to set aside the judgment of the Court of First Instance of the European Communities of 30 September 2009 in Case T-174/05 *Elf Aquitaine* v *Commission* ('the judgment under appeal in the context of the appeal').

3 By its judgment in Case C-521/09 P *Elf Aquitaine* v *Commission*, the Court of Justice set aside the judgment under appeal in the context of the appeal, disposed of the case and annulled Commission Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA).

4 As both Elf Aquitaine and the European Commission were unsuccessful in part on some heads in the appeal proceedings, the Court decided that they would each bear their own costs in relation to those proceedings.

5 As regards the costs of the proceedings at first instance, on the other hand, as the Commission was ultimately unsuccessful, it was ordered to pay the costs of those proceedings.

6 Since no agreement has been reached between Elf Aquitaine and the Commission on the amount of the recoverable costs relating to those proceedings, Elf Aquitaine has made the present application.

Arguments of the parties

7 Elf Aquitaine asks the Court to set the amount of its costs relating to the proceedings at first instance, which has to be repaid by the Commission, at EUR 255 620.45 net of taxes, of which EUR 251 097.99 represents lawyers' fees and EUR 4 522.46 represents disbursements and travel expenses. That company argues, in essence, that the amounts claimed have been assessed in accordance with the criteria set down in the case-law of the Court of Justice and the General Court. In that regard, it notes, in particular, the difficulty of the case which gave rise to the judgment in Case C-521/09 P *Elf Aquitaine* v *Commission*, the importance of that case from the perspective of European Union law ('EU law'), the amount of work carried out and the economic interest which that case presented for it.

8 The Commission considers that Elf Aquitaine's application, for a total of over 1 000 hours of work carried out by 19 lawyers, far exceeds that which can be considered to be necessary expenses for the purposes of the proceedings at first instance. In that regard, the Commission disputes the fact that the case was one of particular difficulty and was significant from a competition law perspective or, for the applicant, in terms of economic interest. Furthermore, as regards the amount of the work giving rise to the fees claimed, the Commission submits that the fee notes at issue include services which were not necessary for the purposes of the proceedings at first instance. Since the Commission is of the opinion that the average hourly rate arising from Elf Aquitaine's application, namely EUR 244, is acceptable, it considers that the recoverable amount for lawyers' fees ought to be fixed at EUR 24 400, which corresponds to 100 hours of work. As for disbursements and expenses other than the lawyers' fees, the Commission is of the opinion that the recoverable amount in this respect must be limited to EUR 2 000.

Findings of the Court

9 At the outset, it must be borne in mind that, under Article 137 of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) of those Rules, and under Article 87(1) of the Rules of Procedure of the General Court, '[a] decision as to costs shall be given in the judgment or order which closes the proceedings'. Accordingly, under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

10 Since the judgment under appeal in the context of the appeal has been set aside and the Court has disposed of the case, it is clear that the judgment in Case C-521/09 P *Elf Aquitaine* v *Commission* terminated the proceedings at first instance. Furthermore, since the judgment under appeal in the context of the appeal was set aside in its entirety, there is no longer any decision of the General Court relating to the costs incurred before it in respect of that action.

11 In a comparable situation, the Court has already held that it had jurisdiction to rule on an application for taxation covering, inter alia, the costs of the proceedings followed before the General Court (see, to that effect, order of 3 September 2009 in Case C-326/05 P-DEP *Industrias Químicas del Vallés* v *Commission*, paragraphs 9 and 37).

12 In those circumstances, unlike the applications which gave rise to the orders of 17 November 2005 in Case C-3/03 P-DEP *Matratzen Concord* v *OHIM*, paragraphs 2 and 14, and of 11 January 2008 in Joined Cases C-105/04 P-DEP and C-113/04 P-DEP *CEF and CEF Holdings* v *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie*, paragraphs 21 and 22, the present application for taxation of costs, while covering the costs at first instance, falls within the jurisdiction of the Court.

13 Therefore it is necessary to bear in mind that under Article 144(b) of the Rules of Procedure of the Court of Justice, applicable to the appeal proceedings by virtue of Article 184(1) of those Rules, and, moreover, also under Article 91(b) of the Rules of Procedure of the General Court, '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 to be regarded as recoverable costs.'

14 It is apparent from Article 144(b) that recoverable expenses are limited, first, to those incurred for the purpose of the proceedings, and, second, to those which were necessarily incurred (see, to that effect, orders of 9 November 1995 in Case C-89/85 DEP *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 14, and of 28 February 2013 in Case C-465/09 P-DEP *Comunidad autónoma de La Rioja* v *Diputación Foral de Vizcaya and Others*, paragraph 22).

15 According to settled case-law, the Courts of the European Union are authorised, not to tax the fees payable by the parties to their own lawyers, but to determine the amount up to which that remuneration may be recovered from the party ordered to pay the costs (see, inter alia, orders of 26 November 1985 in Case 318/82 *Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 3737, paragraph 2 and of 7 June 2012 in Case C-451/10 P-DEP *France Télévisions* v *TF1*, paragraph 19). In ruling on the application for taxation of costs, those courts are not obliged to take account of any national scales of lawyers' fees or any agreement in relation to fees concluded between the party concerned and his agents or advisers (see, inter alia, orders in *Leeuwarder Papierwarenfabriek* v *Commission*, paragraph 2, and of 30 November 1994 in Case C-294/90 DEP *British Aerospace* v *Commission* [1994] ECR I-5423, paragraph 10).

16 It has also consistently been held that, in the absence of any provisions of EU law laying down fee-scales or the length of time necessary for the work to be done, the Courts of the European Union must freely assess the details of the case, taking account of the subject-matter and the nature of the dispute, its importance from the point of view of EU law and also the difficulties presented by the case, the amount of work which the contentious proceedings generated for the agents or counsel involved and the economic interests which the dispute presented for the parties (see, inter alia, orders of 1 July 1981 in Joined Cases 241/78, 242/78 and 246/78 to 249/78 *DGV and Others* v *EEC* [1981] ECR 1731, paragraph 3, and of 16 May 2013 in Case C-498/07 P-DEP *Deoleo* v *Aceites del Sur-Coosur*, paragraph 20).

17 It is in the light of those factors that the Court must assess the amount of the recoverable costs in the present case.

18 In the first place, as regards the subject-matter and the nature of the dispute, it must be recalled that in the present case it is necessary to tax not the costs of the appeal proceedings before the Court of Justice, but those relating to the proceedings at first instance. To that extent, Elf Aquitaine's arguments relating to the appeal proceedings which gave rise to the judgment in Case C-521/09 P *Elf Aquitaine* v *Commission* are of no relevance.

19 That being the case, as the Commission has noted, although the facts relating to the infringement which led to the decision referred to in paragraph 3 of this order were not at issue before the General Court, it is apparent from paragraphs 40 and 129 to 176 of the judgment under appeal in the context of the appeal that the proceedings at first instance included, in addition to several questions of law, the factual question whether the body of evidence adduced by the applicant in response to the Commission's statement of objections demonstrated the independence on the market of a subsidiary of the applicant, formerly known as Elf Atochem SA, then Atofina SA, and, at the date of the appeal in the case which gave rise to the judgment in Case C-521/09 P *Elf Aquitaine* v *Commission*, Arkema SA.

20 In the second place, as regards the importance of the dispute from the point of view of EU law and the difficulties presented by the case, it is clear from that judgment that at first instance several questions of law were raised which were complex and were plainly important for a proper understanding and the correct application of EU competition law. In that regard, it must be borne in mind that, contrary to what the Commission suggests, certain of the questions raised, with regard to EU law, by the rebuttable presumption that a parent company which holds 100% of the capital of its subsidiary exerts decisive influence over its conduct had not been clearly resolved at the time the proceedings before the General Court took place, that is, before the delivery, in particular, of the judgment in Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237.

21 In the third place, as regards the economic interests which the dispute raised for the parties, it must be considered, contrary to what the Commission claims, that it involves a fine of EUR 45 million, the economic importance of which for the applicant is, at the least, not inconsiderable.

22 In the fourth place, as regards the amount of the work provided, it follows from settled case-law that, depending on the specific characteristics of each case, foremost among which is its complexity, the remuneration of a number of lawyers may be regarded as coming within the concept of 'expenses necessarily incurred' within the meaning of Article 144(b) of the Rules of Procedure of the Court of Justice (see, to that effect, inter alia, order of 15 March 1994 in Case C-107/91 DEP *ENU* v *Commission*, paragraph 22, and order in *Deoleo* v *Aceites del Sur-Coosur*, paragraph 27). Accordingly, when fixing the amount of the recoverable costs, the Court should, in particular, take account of the total number of hours' work which could be shown to be objectively necessary for the purposes of the proceedings, irrespective of the number of lawyers who may have provided those services (see, to that effect, inter alia, order in *CEF and CEF Holdings* v *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie*, paragraph 42; *France Télévisions* v *TFI*, paragraph 28; and *Deoleo* v *Aceites del Sur-Coosur*, paragraph 28).

23 In that regard, taking account, in particular, of the case-law mentioned in paragraphs 14 and 15 of the present order, it must be noted that part of the 1 000 hours of work completed by the 19 lawyers concerned did not appear to have been necessarily incurred for the purposes of the proceedings, within the meaning of Article 144(b) of the Rules of Procedure of the Court of Justice. By way of example, it is clear from the fee notes attached by Elf Aquitaine to its application that those fees relate in particular to very extensive research into company law or environmental law which, taking account of the concept of 'undertaking', well established in EU competition law, was of little relevance for the purposes of the case.

24 Finally, since, in its application for taxation of costs, the applicant expressed its lawyers' fees on a 'net of taxes' basis, it must be borne in mind that that company, as a commercial undertaking, is subject to value added tax and that, consequently, it is entitled to recover the amounts paid by way of that tax at the time of paying those fees, so that those amounts must not be taken into account for the purposes of calculating the recoverable expenses (see, inter alia, to that effect, order of 16 December 1999 in Case C-137/92 P-DEP *Hüls* v *Commission*, paragraph 20; order of 10 July 2012 in Case C-191/11 P-DEP *Norma Lebensmittelfilialbetrieb* v *Yorma's*, paragraph 24; and *Deoleo* v *Aceites del Sur-Coosur*, paragraph 32).

25 On the basis of the foregoing considerations and an examination of the documents produced by the applicant, the Court considers that it is appropriate to fix the amount of the recoverable lawyers' fees under Article 144 of the Rules of Procedure of the Court of Justice at EUR 90 000.

26 As regards the disbursements and travel expenses, suffice it to state that, in the absence of further particulars in the application for taxation of costs, it has not been demonstrated, for the purposes of the proceedings at first instance, that part of the disbursements and expenses forming the object of that application were necessarily involved.

27 Therefore the amount of the disbursements and expenses other than the lawyers' fees should be estimated at EUR 3 000.

28 In light of all the foregoing considerations, the recoverable costs, including those relating to the proceedings at first instance, can be assessed on an equitable basis at a total amount of EUR 93 000.

On those grounds, the Court (Eighth Chamber) hereby orders:

The total amount of the costs to be reimbursed by the European Commission to Elf Aquitaine SA under the judgment of 29 September 2011 in Case C-521/09 P is fixed at EUR 93 000.

[Signatures]