

ORDER OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
24 January 2002 *

In Case T-38/95 DEP,

Groupe Origny SA, established in Paris (France), represented by X. de Roux,
lawyer, 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,

* Language of the case: French.

APPLICATION for taxation of the costs to be paid by the defendant to an applicant pursuant to the judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491,

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

composed of: M. Jaeger, President, R. García-Valdecasas, K. Lenaerts, P. Lindh and J. Azizi, Judges,

Registrar: B. Pastor, Principal Administrator,

makes the following

Order

Facts and Proceedings

- ¹ By its Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1, hereinafter ‘the Cement Decision’), the Commission imposed fines on

42 undertakings and associations of undertakings operating in the grey and white cement sector for infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC).

- 2 The infringements with which Cedest SA, whose rights passed to Groupe Origny SA (hereinafter 'the applicant'), was charged in the Cement Decision were the following: participation, from 14 January 1983, in an agreement designed to ensure non-transshipment to home markets and to regulate cement transfers from one country to another (Article 1); participation, from 23 June 1982 to at least 30 September 1989, in an agreement and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France (Article 3(3)(a)). Under Article 9 of the Cement Decision, Cedest was fined ECU 2 522 000.
- 3 By application registered at the Registry of the Court of First Instance on 17 February 1995 under number T-38/95, the applicant sought the annulment of Articles 1, 3(3)(a) and 9 of the Cement Decision, in so far as they concerned it.
- 4 By judgment of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491 (hereinafter 'the Cement judgment'), the Court of First Instance annulled, in Case T-38/95 *Groupe Origny v Commission*, with regard to the applicant, Articles 1, 3(3)(a) and 9 of the Cement Decision and ordered the Commission to pay the costs.
- 5 By letter of 31 May 2000, the applicant claimed payment from the Commission of a total sum of FRF 1 469 281.64 (EUR 223 990.54) for lawyers' fees incurred from the start of the proceedings before the Commission until the delivery of the Cement judgment.

- 6 By letter of 11 August 2000, the Commission rejected that claim on the grounds that the lawyers' fees relating to the proceedings before it were not recoverable costs, that certain fee notes submitted by the applicant related to the period after the hearing in Case T-38/95, that there was no indication of the nature of the work carried out or the number of hours worked and that the applicant was not one of the principal undertakings involved, which enabled it to limit the extent of the pleadings submitted to the Court of First Instance. It made, moreover, a counter-proposal amounting to FRF 300 000 (EUR 45 734.70) for the costs and LUF 112 230 (EUR 2 782.11) for the costs of having an address for service in Luxembourg.
- 7 Since it considered the Commission's reasoning and proposal unacceptable, the applicant, by application lodged at the Registry of the Court of First Instance on 1 August 2001, asked for the costs to be taxed.
- 8 By a document lodged at the Registry of the Court of First Instance on 5 October 2001, the Commission submitted its observations on that application.

Forms of order sought by the parties

- 9 The applicant requests the Court to fix the amount of the costs payable by the Commission at FRF 1 469 281.64 (EUR 223 990.54).

- 10 The Commission requests the Court to fix the recoverable costs, including the costs of taxation, at FRF 600 000 (EUR 91 469.41).

Arguments of the parties

- 11 The applicant puts forward four arguments in support of its claim. The first is that the costs relating to the proceedings before the Commission and those relating to the period after the hearing before the Court of First Instance in Case T-38/95 are recoverable costs. The second, third and fourth points draw attention, respectively, to the financial stake which the dispute represented for the applicant, the interest and the difficulty of the dispute from the point of view of Community law and the extent of the work done by its advisers.
- 12 First, the applicant submits, in relation to the costs of the proceedings before the Commission, that they are to be regarded as 'expenses necessarily incurred ... for the purpose of the proceedings', within the meaning of Article 91 of the Rules of Procedure of the Court of First Instance. Claiming that, according to settled case-law of the Court of First Instance, the term 'proceedings' in the sense contemplated in that provision is to be understood as meaning the contentious proceedings, it maintains that the statement of objections marks, in cases such as the present, the end of the inquiry phase prior to the contentious proceedings and the opening of those proceedings, since it is liable to lead to the finding of an infringement of Article 81(1) EC, or of Article 82 EC and to the imposition of a fine.
- 13 That explains, according to the applicant, why, in the course of the proceedings before the Commission, the rights of the defence have to be observed, which include, in particular, access to the documents upon which the Commission relies

in support of its objections, as well as the *audi alteram partem* rule by virtue of which the undertaking concerned is allowed to submit its written and oral observations on those objections. The appointment of a Hearing Officer, responsible for ensuring the impartiality of the proceedings, and the presence, ordinarily, of the advisers of the parties concerned confirm the contentious nature of those proceedings.

- 14 Furthermore, the work required for the applicant's defence was done, essentially, in the course of the proceedings before the Commission. The Court proceedings were based on all the arguments, evidence and documents discussed and exchanged in the course of the proceedings before the Commission.
- 15 In this case, the notification of the objections took place on 25 November 1991, so that the applicant is entitled to claim payment of the costs incurred for the purposes of the proceedings as from that date, the more so since the Court has found that the complaints raised against it were unfounded.
- 16 In respect of the costs incurred after the hearing in Case T-38/95, the applicant submits that it had to analyse the various oral submissions made at the hearings which took place before the Court between 16 September and 21 October 1998 in the other cases which gave rise to the Cement judgment (hereinafter 'the Cement Cases'), as well as the situations which could be foreseen if the Cement Decision were upheld or annulled.
- 17 Second, the applicant submits that the amount at stake in the dispute was considerable, in view of the amount of the fine which was imposed on it by the Cement Decision. Its action for annulment therefore justified the taking of all steps necessary for the conduct of its defence.

- 18 Third, the applicant claims that the difficulty of the case, from the point of view of Community law, lay, in particular, in the specific nature of the questions relating to the rights of the defence and in the criteria for imputing an infringement to an undertaking by reason of its membership of a national association, which was itself a member of a European association. With regard to the rights of defence, the Cement judgment clarified the scope of the principle of access to the Commission's file, and it was in light of documents to which it had not had access in the course of the proceedings before the Commission that the case against the applicant was dismissed. The applicant adds that, on the substance of the case, it had to develop detailed arguments to overcome the Commission's reasoning according to which the practices observed on the French and German cement markets constituted implementation of a wider agreement concluded at the level of the European association Cembureau, to which Cedest had to be considered a party by reason of its membership of the French cement producers' association.
- 19 The applicant adds that it had to set out and analyse, in its pleadings before the Court, the structural characteristics of the cement industry in order to draw from them the appropriate conclusions concerning competition.
- 20 Fourth, the applicant emphasises that it had to examine, like the other parties concerned, tens of thousands of pages containing the case for and against each of the parties, and that it had had to reply to the same complaints as those raised against the other parties, in view of the Commission's case concerning the participation of the various undertakings and associations concerned in a widespread European cartel. It also had to defend itself against the specific complaint concerning the alleged Franco-German agreement. Furthermore, in the course of the proceedings before the Court of First Instance, it had to draw up, apart from the application and reply, several procedural documents as a result of the measures taken by the Court to compel the Commission to give access to its administrative file.
- 21 Emphasising that it was represented by two lawyers in this case, the applicant, taking into account the hourly rate of those lawyers as well as the number of hours and the nature of the work, calculates the amount of the costs payable by the Commission at FRF 1 469 281.64 (EUR 223 990.54).

- 22 In response to those arguments, the Commission submits, first, that the applicant's contention concerning the concept of costs relating to contentious proceedings cannot be upheld inasmuch as it implies disapplying the consistent case-law of the Court of Justice and the Court of First Instance, according to which 'recoverable costs', in the sense contemplated in Article 91 of the Rules of Procedure of the Court of First Instance, are limited to those incurred for the purposes of the proceedings before the Court, to the exclusion of those relating to the phase prior to the Court proceedings.
- 23 In respect of the costs relating to the period after the hearing in Case T-38/95, the Commission argues that, according to the case-law, such costs cannot be regarded as expenses necessarily incurred for the purpose of the proceedings (order in Case C-137/92 P-DEP *Hüls v Commission*, not published in the European Court Reports). It adds that, in this case, the applicant has not proved the necessity of those costs.
- 24 Second, the Commission does not dispute that the fine imposed on the applicant by the Cement Decision represented a substantial sum. The size of that fine is, however, to be seen in the context, on the one hand, of the fact that it represented about 2.8% of the applicant's turnover and, on the other hand, of the total amount of fines imposed by the Cement Decision (about EUR 250 000 000). A comparison of the latter amount with the amount of the fine imposed on the applicant reflects the marginal role of the latter in the cartel which was the subject of the Cement Decision and in the proceedings.
- 25 Third, the Commission submits that Case T-38/95 did not raise novel or important questions of law. So far as access to the file is concerned, the Court of First Instance applied the principles established in previous case-law. With regard to the question of the applicant's participation in the infringement, it was posed in terms quite similar to those in the other cartel cases.

- 26 Fourth, the Commission does not dispute that the measures of organisation of measures taken by the Court of First Instance in order to afford, particularly to the applicant, full access to the administrative file gave rise to additional work. It contends, however, that the work done by the applicant's advisers was somewhat out of proportion to the difficulty, complexity and size of the case.
- 27 The Commission does not deny that the case justified the instruction of two lawyers. It makes no observations on the hourly rates charged by them in this case.

Findings of the Court

- 28 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 remuneration of agents, advisers or lawyers are to be 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 are necessary for that purpose (see, by analogy, the order of the Court of First Instance of 9 November 1995 in Case T-89/95 DEP *Ahlström Osakeyhtiö and Others v Commission*, not published in the European Court Reports, paragraph 14; Case T-115/94 DEP *Opel Austria v Council* [1998] ECR II-2739, paragraph 26, and Case T-64/99 DEP *UK Coal v Commission* [2001] ECR II-2547, paragraph 25).
- 29 Even though, as a rule, substantial legal work is carried out in the course of the proceedings preceding the judicial phase, it must be pointed out that by

‘proceedings’ Article 91 of the Rules of Procedure refers only to proceedings before the Court of First Instance, to the exclusion of any prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to ‘proceedings before the Court of First Instance’ (see, by analogy, the orders of the Court of Justice in Case 75/69 *Hake v Commission* [1970] ECR 901, 902, and Case C-294/90 DEP *British Aerospace v Commission* [1994] ECR I-5423, paragraphs 10 to 12, and the Cement judgment, cited above, paragraph 5134).

- 30 Therefore the applicant’s claim must be rejected in so far as it seeks payment by the Commission of the costs relating to the proceedings before it.
- 31 The applicant must also be refused recovery from the Commission of the costs relating to the period after the oral procedure in Case T-38/95. The Cement Cases were not joined for the purposes of the oral procedure and no procedural step was taken after 16 September 1998, the date of the hearing in Case T-38/95. In those circumstances, the costs incurred by the applicant after that date do not appear to be directly connected to its defence before the Court and cannot, therefore, be regarded as costs necessary for the purpose of the proceedings, within the meaning of Article 91 of the Rules of Procedure (see, to that effect, *Hüls v Commission*, cited above, paragraph 19, and order in Case T-78/99 *Elder v Commission* [2000] ECR II-3717, paragraph 17).
- 32 With regard to the costs of the proceedings before the Court of First Instance, it should be pointed out that, according to settled case-law, the Community judicature 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. When ruling on an application for

taxation of costs, the Court is not obliged to take account of any national scales of lawyers' fees or any agreement in that regard between the party concerned and his agents or advisers (see order in Case T-120/89 DEP *Stahlwerke Peine-Salzgitter v Commission* [1996] ECR II-1547, paragraph 27; *Opel Austria v Council*, cited above, paragraph 27, and *UK Coal v Commission*, cited above, paragraph 26).

- 33 It is also settled case-law that since there are no 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 dispute for the agents and advisers involved and the financial interests which the parties had in the proceedings (see orders in Case 318/82 *Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 3727, paragraphs 2 and 3; Case T-2/93 DEP *Air France v Commission* [1995] ECR II-533, paragraph 16; *Opel Austria v Council*, cited above, paragraph 28, and *UK Coal v Commission*, cited above, paragraph 27).
- 34 It is according to those criteria that the amount of the recoverable costs is to be assessed in this case.
- 35 So far as concerns the legal difficulties and the importance of the case from the point of view of Community law, it is clear that the case was relatively complex and involved in particular, with regard to the rights of defence, a question of access to the Commission's file. Although, admittedly, that question was not new, it had none the less, in the Cement Cases, and, in particular, in this case, a number of particular features which led the Court of First Instance to provide some important clarification on the scope of the principle of access to the administrative file in the context of a proceeding under Article 81 EC.

- 36 On the substance, the case raised, in particular, the question, new in law, whether an undertaking can be held to be a party to an agreement contrary to Article 81(1) EC, on account, on one hand, of its membership of a national association, itself a member of a European association at the level of which that agreement was concluded, and, on the other hand, of its participation in a particular measure implementing that agreement.
- 37 Therefore, the nature of the dispute justified both high fees and the representation of the applicant by two lawyers (see, to that effect, *Stahlwerke Peine-Salzgitter v Commission*, cited above, paragraph 30, and *Opel Austria v Council*, cited above, paragraph 29).
- 38 So far as concerns the amount of work involved in the proceedings before the Court of First Instance, it should be noted that, apart from the application and reply, two written statements of observations were submitted by the applicant after the Court had ordered the Commission to allow the parties concerned access to its administrative file.
- 39 Although it is true that the situation mentioned in the preceding paragraph increased the workload of the applicant's advisers in this case and that the dispute raised some complex questions of law (paragraphs 34 and 35 above), it is however necessary to point out that the applicant was among the addressees of the Cement Decision against whom a limited number of infringements were charged, which reduced the volume of the pleadings it submitted to the Court.
- 40 So far as concerns the financial interests in the applicant's case, it must be stated that the fine imposed on it in the Cement Decision was a substantial sum (paragraph 2 above).

- 41 In the light of the foregoing analysis, all the properly evidenced expenses incurred by the applicant for the purpose of the proceedings before the Court of First Instance in Case T-38/95, are to be regarded in this case, as recoverable costs in the sense contemplated in Article 91 of the Rules of Procedure.
- 42 From the information provided by the applicant in the annex to its claim, it appears that, as the Commission noted in its observations, the expenses incurred by the applicant between 1 December 1994, the day after the adoption of the Cement Decision, and the end of the month of September 1998, in the course of which the hearing in Case T-38/95 took place, amount to about FRF 760 000 (EUR 115 861.25). From that amount, however, there must be deducted about FRF 60 000 (EUR 9 146.94), mentioned in the letter sent to the applicant by its advisers on 29 June 1998, which is not a bill for fees and expenses, but a request for a payment on account of fees.
- 43 Thus, having regard to the circumstances of the case, a just assessment of the fees and expenses recoverable by the applicant is EUR 106 714.31 (FRF 700 000).
- 44 Since the Court has taken account, in fixing the recoverable costs, of all the circumstances of the case up to the date of this order, there is no need to give a ruling on the costs incurred by the parties in relation to these proceedings for the taxation of costs (orders in Case T-84/91 *DEP Meskens v Parliament* [1993] ECR II-757, paragraph 16; *Opel Austria v Council*, cited above, paragraph 33, and *UK Coal v Commission*, cited above, paragraph 33).

On those grounds,

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

hereby orders:

The amount of the costs recoverable by the applicant in Case T-38/95 is fixed at EUR 106 714.31 (FRF 700 000).

Luxembourg, 24 January 2002.

H. Jung

Registrar

M. Jaeger

President