



## Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

3 September 2020\*

(Taxation of costs)

In Case C-265/17 P-DEP,

APPLICATION for taxation of recoverable costs under Article 145 of the Rules of Procedure of the Court, brought on 20 January 2020,

**United Parcel Service, Inc.**, established in Atlanta (United States), represented by A. Ryan, Solicitor, and W. Knibbeler, advocaat,

applicant,

v

**European Commission**, represented by N. Khan, acting as Agent,

defendant,

THE COURT (Ninth Chamber),

composed of S. Rodin (Rapporteur), President of the Chamber, D. Šváby and K. Jürimäe, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Advocate General,

makes the following

### Order

- 1 The subject matter of this action is the taxation of the costs incurred by United Parcel Service Inc. ('UPS') in Case C-265/17 P.
- 2 By an appeal lodged on 16 May 2017, the European Commission asked the Court to set aside the judgment of the General Court of the European Union of 7 March 2017, *United Parcel Service v Commission* (T-194/13, 'the judgment under appeal', EU:T:2017:144), whereby that court annulled

\* Language of the case: English.

Commission Decision C(2013) 431 of 30 January 2013 declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 – UPS/TNT Express; ‘the decision at issue’).

- 3 By its judgment of 16 January 2019, *Commission v United Parcel Service* (C-265/17 P, EU:C:2019:23), the Court dismissed that appeal and ordered the Commission to pay the costs.
- 4 Since no agreement was reached between UPS and the Commission on the recoverable costs relating to the appeal proceedings, UPS, by a document lodged at the Registry on 20 January 2020, pursuant to Article 145 of the Rules of Procedure of the Court of Justice, made the present request.

### **Forms of order sought**

- 5 UPS requests the Court to fix the amount of recoverable costs at EUR 866 629.89. That amount corresponds to the expenses necessarily incurred for the purposes of the appeal proceedings, in particular fees for lawyers and economists and travel expenses.
- 6 The Commission contends that the Court should reject that application and fix the amount of recoverable costs in the amount of EUR 45 500 for the lawyers and EUR 5 000 for the economists.

### **Arguments of the parties**

- 7 In support of its application, UPS claims that the costs, which include lawyers’ fees and their disbursements as well as economists’ fees, were incurred for the purposes of the appeal proceedings and were essential. It maintains in that regard that the total amount of the costs and disbursements claimed is reasonable, in the light of the facts of the case and given the complexity of the subject matter and nature of the appeal proceedings.
- 8 In the first place, UPS considers that the dispute in question raised legal issues of considerable complexity, which justified a significant number of hours of work on the part of its lawyers. It submits, first, that the dispute was complex on account of its subject matter and nature, since it concerned a Commission decision under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) (‘the Merger Regulation’); such decisions are often complex, as indeed was recognised by the Advocate General in her Opinion in the present case. UPS maintains that the judgment under appeal concerned the lawfulness of a 450-page decision of that kind, relying to a large extent on economic and econometric analyses.
- 9 UPS submits in that regard that certain of the Commission’s grounds of appeal required it, for the purposes of responding, to carry out in-depth analyses of economic and legal issues. It claims that, by its third ground of appeal, the Commission claimed that the General Court, in the judgment under appeal, failed to address its arguments that UPS could have ‘intuitively’ understood the price concentration model used on the basis of the models disclosed during the administrative procedure. Those arguments prompted UPS to use independent expert economists.
- 10 UPS also maintains that, by its fourth ground of appeal, the Commission claimed that a price concentration analysis vitiated on account of errors it contains could not have led to the annulment of the decision at issue in its entirety. That argument prompted UPS’s representatives and advisers to carry out an in-depth analysis of the judgment of 25 October 2011, *Solvay v Commission* (C-109/10 P, EU:C:2011:686), and the application thereof in the present case by the General Court.

- 11 UPS submits, secondly, that the dispute was significant from the point of view of EU law, because it emphasised a fundamental procedural principle of general application which is relevant to the Commission's everyday practice under the Merger Regulation. It also clearly follows from the judgment of 16 January 2019, *Commission v United Parcel Service* (C-265/17 P, EU:C:2019:23), and the Opinion of Advocate General Kokott in that case, that that case involved a fundamental principle concerning which the Commission had no discretion. That procedure also required the Court, for the first time, to develop further understanding of econometric models.
- 12 UPS submits, thirdly, that the dispute involved particular difficulties which increased the workload of its representatives and their advisers. That volume and complexity are demonstrated by the Commission's request, upheld by the Court, for a second round of written pleadings, in order for the Commission to be able to reply to UPS's response.
- 13 Thus, according to UPS, the total amount of time spent and the amount of the costs claimed, for a dispute which represented a significant economic interest for it, the initial value of the merger transaction concerned being EUR 5.2 billion, are reasonable in the light of the length and particular complexity of that specific procedure.
- 14 Furthermore, UPS considers that the proportionate nature of the costs incurred in the present case must be assessed in the light of the order of the General Court of 28 June 2004, *Airtours v Commission* (T-342/99 DEP, EU:T:2004:192).
- 15 In the second place, UPS maintains that the lawyers' fees were incurred efficiently. It submits that, for the purposes of determining the total number of hours of work which may appear to be objectively necessary, it is necessary only to take into account the level of complexity of the case, irrespective of the number of lawyers who have provided the services in question. It also maintains that it follows from the description of the work carried out that duplication of work was limited to 'the absolute minimum' and was organised on the basis of the level of experience of different advisers. Moreover, UPS claims that its advisers had anticipated a hearing before the Court and prepared for it. Although the Court ultimately considered that a hearing was not necessary in that case, the costs incurred by UPS to that end should nevertheless be taken into account.
- 16 In the third place, UPS maintains that the involvement of expert economists was justified on account of the economic nature of the proceedings, just as in the case giving rise to the order of 28 June 2004, *Airtours v Commission* (T-342/99 DEP, EU:T:2004:192). UPS submits that it used the same economists as for its arguments during the administrative procedure and the proceedings at first instance. Their involvement was prompted by the Commission's claims, at a very late stage in the proceedings. Moreover, it was fully justified in the light of the importance, for the proceedings, of the price concentration model applied. Finally, the total number of hours devoted by the economists for the purposes of the proceedings is relatively limited in the light of the complex economic and econometric assertions underlying the Commission's arguments at the appeal stage.
- 17 The Commission submits that the amount of the costs claimed in the present case is the highest sum ever applied for in relation to an appeal. It maintains that that application is insufficiently substantiated and manifestly excessive.
- 18 It claims, in the first place, that neither the prior correspondence of the parties nor the application for taxation of costs contains evidence of the amounts actually invoiced to UPS or paid by UPS.
- 19 Thus, whereas UPS claims that 212.3 hours were required for the 'final' phase of the appeal, that company does not indicate what work was carried out during those hours, nor explain how it was 'necessary' in the light of the breakdown of each lawyer's hours.

- 20 The Commission maintains that the Courts of the European Union assess the amount and value of the work carried out in the light of precise information supplied by the applicant, in particular signed and dated invoices. However, that evidence has not been provided in the present case.
- 21 The same is true of the fees claimed for the work of economists, whose costs amount to EUR 300 000, which cannot, furthermore, be described as ‘limited costs’.
- 22 The Commission submits, in the second place, that the costs claimed are manifestly excessive. It considers, first, that the total amount granted in one case cannot simply be applied in another case, contrary to what UPS seeks to achieve. The grounds of the order of 28 June 2004, *Airtours v Commission* (T-342/99 DEP, EU:T:2004:192), cannot be applied in the present case because the General Court only gives, in that order, few details of the work it found necessary for the conduct of the proceedings. Moreover, that case concerned first-instance proceedings with all the factual issues that involves and not appeal proceedings as in the present case.
- 23 Secondly, the Commission considers that the use of 13 lawyers for the period from 7 March 2017 to 16 January 2019 to be excessive. The period of work to be taken into account is approximately six months only and starts to run on the day the appeal was notified to UPS and ends on the day UPS’s rejoinder was lodged. The hourly rates applied by the two main lawyers, that is EUR 862 per hour and between EUR 695 and over EUR 820 per hour, are also excessive in the light of the fees of between EUR 360 and EUR 495 that the Court appears to have accepted in previous cases. UPS seeks reimbursement of 878.4 hours of work for lawyers at an average hourly rate of EUR 600 per hour, although many junior lawyers and trainees were involved. The Commission considers that an average rate of EUR 350 per hour should be granted. The use of 13 economists, who the Commission infers, by adding the entries referred to by UPS in its annexes, worked 363.5 hours for an average hourly rate of EUR 824 per hour is also disproportionate.
- 24 The costs incurred for disbursements, namely EUR 36 000 for transport and office costs claimed by UPS, are not properly justified. The Commission points out in that regard that no hearing was held in Luxembourg.
- 25 Thirdly, the Commission submits that the total number of hours of work for which reimbursement is claimed does not appear in the application for taxation of costs. The total number of hours claimed for lawyers in Annex A to the application, for all the stages of the appeal, amount to 878.4 hours. It considers that that total amount, converted into working days corresponds to 110 working days for lawyers, that is to say 22 weeks, on the basis of a 5-day working week, for a 25-page appeal and a 10-page reply, which is disproportionate and exorbitant.
- 26 The Commission maintains that the length of the decision at issue is not relevant in the context of an appeal against a judgment of the General Court, delivered following an action brought by UPS for annulment of that decision, since UPS had, through bringing that action, acquired detailed knowledge of that decision. In addition, the Commission considers that it was possible to use, at the appeal stage, the economic analyses submitted to the General Court and that, in any event, it follows from the nature of an appeal and the Rules of Procedure that no further expert’s report could have been allowed at that stage.
- 27 The Commission submits, consequently, that the observations submitted by the lawyers at that stage of the appeal required only 130 hours of work, which represents, with the application of an average hourly rate of EUR 350 per hour, EUR 45 500 for that purpose. It maintains that the economists fees concern the submission of evidence that was inadmissible, but that, in the event that the Court were to find that the nature of the case justified the use of those consultants, it should not grant more than EUR 5 000 for that purpose. Finally, if the Court were to find that UPS incurred disbursements, only office expenses up to EUR 500 could give rise to reimbursement.

## Findings of the Court

- 28 Under Article 144(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.
- 29 It is thus apparent from the wording of that provision that the remuneration of a lawyer is one of the expenses necessarily incurred within the meaning of that provision. It also follows that the recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which were necessary for that purpose (order of 5 December 2018, *TV2/Danmark v Viasat Broadcasting UK*, C-657/15 P-DEP, not published, EU:C:2018:985, paragraph 13).
- 30 Furthermore, the EU Courts 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 (order of 5 December 2018, *TV2/Danmark v Viasat Broadcasting UK*, C-660/15 P-DEP, not published, EU:C:2018:985, paragraph 14).
- 31 However, in the absence of any provisions of EU law laying down fee scales, the Court must freely assess the details of the case, taking into account the subject matter and nature of the dispute, its importance from the point of view of EU law, the difficulties presented by the case, the amount of work generated by the case for the agents or counsel involved and the economic interests which the dispute presented for the parties (order of 5 December 2018, *TV2/Danmark v Viasat Broadcasting UK*, C-657/15 P-DEP, not published, EU:C:2018:985, paragraph 15).
- 32 It is in the light of all those factors that the amount of the recoverable costs in the present case must be assessed.
- 33 In the first place, as regards the subject matter and the nature of the dispute, it is appropriate to note that the proceedings concerned are appeal proceedings which are, by nature, limited to questions of law and do not concern themselves with findings as to the facts or the assessment of the facts of the dispute (order of 15 October 2015, *Council v Ningbo Yonghong Fasteners*, C-601/12 P-DEP, not published, EU:C:2015:726, paragraph 19).
- 34 However, by their nature, cases relating to Commission decisions under the Merger Regulation raise complex economic and legal issues concerning transactions the amounts of which exceed the usual scope of disputes brought before the Court. The appeal concerned a merger transaction for an initial sum of EUR 5.2 billion, which demonstrates the substantial economic interests of the present case for UPS.
- 35 Accordingly, the involvement of expert economists may, in principle, be considered necessary and the related costs may be recovered under Article 144(b) of the Rules of Procedure, given the economic and legal nature of the assessments made by the Commission in the context of merger control, particularly where the econometric model applied by the Commission in order to declare that merger incompatible with the internal market is at issue.
- 36 In that regard, it must be noted that, in support of its appeal before the Court, the Commission relied on four pleas in law. Since the third and fourth pleas in law were based, in particular, on the taking into account of econometric and price concentration models, the appeal accordingly raised complex issues, of a legal and economic nature, justifying the use of expert economists.
- 37 In accordance with the case-law referred to above, the recoverable expenses are limited to the expenses incurred for the purposes of the proceedings before the Court which were essential for that purpose. It is for the applicant for taxation of costs to establish that that is the case as regards the expenses for

which it seeks reimbursement, in order to allow the EU Court to determine the amount up to which the fees that that applicant paid the lawyers and expert economists it engaged may be recovered from the party ordered to pay the costs.

- 38 As regards, in the second place, the significance of the dispute from the point of view of EU law and the difficulties of the case, it should be noted that the appeal brought by the Commission seeking that the judgment under appeal, in which the General Court upheld UPS's claim, alleging that the Commission had infringed the rights of the defence in adopting the decision at issue on the basis of an econometric model different from that which had been the subject of submissions by both parties during the administrative procedure, be set aside.
- 39 It must, moreover, be held that those grounds raised novel questions of law, which were not covered by a single application of EU law, as interpreted by the Court, which, moreover, justified the allocation of the appeal to a Chamber of five Judges and the fact that the Court has ruled with an Opinion. In consequence, it cannot be disputed that those questions required an in-depth analysis (see, to that effect, order of 30 January 2014, *Éditions Odile Jacob v Commission and Lagardère*, C-553/10 P-DEP and C-554/10 P-DEP, EU:C:2014:56, paragraph 28).
- 40 The main issue raised by the appeal consisted in examining whether an undertaking could 'intuitively' understand the price concentration model used by the Commission on the basis of the models communicated during the administrative procedure, in the context of examining the observance of the rights of defence of undertakings during the merger control procedure before the Commission.
- 41 That question must be regarded as novel and important, the Advocate General having emphasised in her Opinion that, beyond the confines of the present case, the judgment will show the way for the Commission's future administrative practice in complex merger control proceedings, and also for that of national competition authorities and courts, which not infrequently adhere closely to the standards applicable at EU level.
- 42 As regards, in the third place, the amount of work carried out, it must, be recalled that, when fixing the amount of the recoverable costs, the Court should take account of the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings, irrespective of the number of lawyers amongst whom the work was shared (order of 3 September 2009, *Industrias Químicas del Vallés v Commission*, C-326/05 P-DEP, not published, EU:C:2009:497, paragraph 48).
- 43 In the present case, the appeal procedure did not give rise to a hearing.
- 44 It follows that the expenses incurred after the closure of the written part of the procedure before the Court cannot be regarded as objectively essential for the purposes of those proceedings and, accordingly, cannot be included in the present application for taxation of costs. This applies in particular to the expenses incurred in preparing for a possible hearing which was not deemed necessary by the Court, the analysis of the Advocate General's Opinion or the analysis of the Court's judgment, the parties themselves being responsible for the financial consequences of such a litigation strategy.
- 45 In the present case, the present application for taxation of costs is characterised by the failure to submit any detailed invoice, signed and dated, whereby payment is sought from UPS, either by the legal firms or the expert economists involved in the appeal proceedings. Such a lack of precision and evidence must be taken into account in assessing costs essential to the proceedings which may be recovered from the party ordered to pay the costs. As regards the amount of work which the contentious proceedings generated for the agents or counsel who intervened, it should be recalled that the ability of the EU Courts to assess the value of the work carried out by a lawyer is dependent on the accuracy of the information provided (order of 26 September 2018, *Viasat Broadcasting UK v TV2/Danmark*, C-660/15 P-DEP, not published, EU:C:2018:778, paragraph 33 and the case-law cited).

- 46 In those circumstances, UPS has not set out clearly and precisely, in its application for taxation of costs, amounting to EUR 866 629.89, the total number of hours of work invoiced and the average hourly rate for those hours. Accordingly, the present application for taxation is not sufficiently transparent and substantiated.
- 47 In that regard, it is particularly necessary to note that, while, for the legal services, the documents provided by UPS make it possible to identify, for each participant, the hourly rate and the time invoiced, that is not the case for the services of an economic nature. For the latter, only the time spent by the participants is mentioned, without it being possible to determine the hourly rate applied by each of them; UPS merely indicates the overall disbursements in an amount of approximately EUR 300 000 for the expert economic reports it received.
- 48 With regard to the total amount of costs applied for by UPS, it must be noted that the average hourly rate was fixed by UPS at EUR 600 per hour for the lawyers and EUR 824 per hour for the economists. Such hourly rates are considerably in excess of the sums generally accepted by the Court in taxation of costs proceedings.
- 49 It is settled case-law that, in the absence, as EU law now stands, of a scale for the remuneration of lawyers or expert economists, it is only where the average hourly rate invoiced appears manifestly excessive that the EU Court may depart from it and fix, on equitable principles, the amount of recoverable fees for lawyers and expert economists (see, to that effect, order of 4 July 2017, *EASA v Heli-Flight*, C-61/15 P-DEP, not published, EU:C:2017:530, paragraph 16).
- 50 Moreover, it follows from the annexes to the present application for taxation of costs that UPS claims that 878.4 hours of work for lawyers and 363.5 hours of work for economists were required for the purposes of the appeal proceedings in question.
- 51 Lawyers who claim to be highly qualified and very experienced in competition law and whose services are invoiced at an average hourly rate of EUR 600 are presumed to handle the cases entrusted to them, including those involving some complexity, efficiently and speedily (see, to that effect, orders of 3 October 2018, *Orange v Commission*, C-486/15 P-DEP, not published, EU:C:2018:824, paragraph 37, and of 10 April 2019, *Giant (China) v EBMA*, C-61/16 P-DEP, not published, EU:C:2019:298, paragraph 31).
- 52 In that regard, although it is true that, in its submissions, the Commission raised novel questions of law, the principal lawyers instructed by UPS had already had the opportunity to acquire in-depth knowledge of the case in question during the proceedings before the General Court, which must have not only facilitated the work but also reduced the time needed to study the appeal and draft the response and rejoinder (see, to that effect, order of 10 April 2019, *Giant (China) v EBMA*, C-61/16 P-DEP, not published, EU:C:2019:298, paragraph 32).
- 53 The same also applies to the expert economists who had already acquired in-depth knowledge of the case file during the proceedings before the General Court, since the complex econometric models in question were previously central to the arguments.
- 54 It follows that the sum of EUR 866 629.89 claimed from the Commission by UPS in respect of costs incurred by UPS during the appeal proceedings is not, in its entirety ‘necessarily incurred for the purpose of the proceedings’, within the meaning of Article 144(b) of the Rules of Procedure.
- 55 In the light of the above considerations, it is appropriate, in this case, to fix, on equitable principles, the amount of recoverable lawyers’ and expert economists’ fees at an overall sum of EUR 200 000.

- 56 Finally, as regards disbursements other than lawyers' and expert economists' fees, UPS claimed a sum of EUR 35 912.19, for travel costs, copies and communication. In the absence of a hearing and all the necessary supporting documents for each item of that expenditure, it cannot constitute an amount recoverable in respect of those disbursements (see, to that effect, order of 16 May 2013, *Deoleo v Aceites del Sur-Coosur*, C-498/07 P-DEP, not published, EU:C:2013:302, paragraph 34).
- 57 It follows from all of the foregoing considerations that EUR 200 000 constitutes a fair assessment of the costs recoverable from the Commission by UPS in Case C-265/17 P.

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

**The total amount of the costs which the Commission shall pay to United Parcel Service Inc. in Case C-265/17 P is fixed at EUR 200 000.**

Luxembourg, 3 September 2020.

A. Calot Escobar  
Registrar

S. Rodin  
President of the Ninth Chamber