

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

18 March 2005 *

In Case T-243/01 DEP,

Sony Computer Entertainment Europe Ltd, established in London (United Kingdom), represented by P. De Baere, lawyer, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for taxation of the costs to be paid following the judgment of the Court of First Instance of 30 September 2003 in Case T-243/01 *Sony Computer Entertainment Europe v Commission* [2003] ECR II-4189,

* Language of the case: English.

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Third Chamber)

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

- ¹ By judgment of 30 September 2003 in Case T-243/01 *Sony Computer Entertainment Europe v Commission* [2003] ECR II-4189 ('the judgment in the main proceedings'), the Court of First Instance annulled Commission Regulation (EC) No 1400/2001 of 10 July 2001 concerning the classification of certain goods in the Combined Nomenclature (OJ 2001 L 189, p. 5; corrigendum published in OJ 2001 L 191, p. 49) in so far as it classified the console described in column 1 of the table in the Annex to that regulation under CN Code 9504 10 00 and the accompanying CD-ROM under CN Code 8524 39 90, and ordered the Commission to pay the costs.

- 2 By letter of 10 March 2004, the applicant informed the defendant that the total amount of recoverable costs, including lawyers' fees and other expenses, was EUR 157 862.50.
- 3 By letter of 24 March 2004, the defendant informed the applicant that that amount was much higher than could be justified. The defendant proposed to pay EUR 51 000 (EUR 50 000 for fees and EUR 1 000 for expenses).
- 4 By letter of 30 March 2004, the applicant replied to the defendant that the amount proposed was unacceptable.
- 5 By letter of 16 April 2004, the defendant replied, maintaining the position expressed in its letter of 24 March 2004.
- 6 By document lodged with the Registry of the Court on 5 May 2004, the applicant lodged an application for taxation of costs pursuant to Article 92(1) of the Rules of Procedure of the Court of First Instance.

Forms of order sought

- 7 The applicant claims that the Court of First Instance should assess the recoverable costs to be paid by the Commission at EUR 157 862.50.

- 8 The Commission contends that the Court should assess the amount of recoverable costs at EUR 51 000 euros.

Law

Arguments of the parties

- 9 In its letter of 10 March 2004, to which the applicant refers in its application for taxation of costs, it tabled a breakdown of costs as follows :

- lawyers' fees: fees for 600.5 hours of work, including 276.5 hours performed by lawyers billed at an hourly rate of EUR 325, 312 hours performed by lawyers billed at an hourly rate of EUR 200, and 12 hours performed by a lawyer billed at an hourly rate of EUR 175;

- travel expenses, EUR 650;

- accommodation expenses (4 persons), EUR 600;

- outside presentation (support + material), EUR 1 500;

— photocopies and express courier services, EUR 750.

- 10 The applicant emphasises the importance of the case from the point of view of Community law. The judgment in the main proceedings marked the first time that the Court admitted an action for annulment of a tariff classification regulation. The judgment thus sets out the general conditions under which private parties may challenge similar regulations and constitutes a precedent to be followed in the future. It gives a better understanding of the general rules of interpretation of the Combined Nomenclature (CN) as established by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), in particular General Rule 3(b). The applicant adds that it is also the first time the Court has interpreted Note 1(p) to Section XVI concerning Chapters 84 and 85 of the CN.
- 11 According to the applicant, the difficulties of the main proceedings arose from the complex and limited case-law in relation to the standing of private parties to challenge the validity of a regulation. Moreover, additional difficulties arose due to inexistent or limited case-law on the interpretation of the CN codes at issue as well as on the general rules of interpretation of the CN. Finally, the questions posed by the Court to the applicant on intellectual property rights were complex, requiring an additional analysis of the exhaustion of international trade marks.
- 12 The applicant further submits that the amount of work caused by the main proceedings justified the expenses claimed. First, in the light of the previous case-law indicating the impossibility of challenging a tariff classification regulation, it was necessary to draw the distinctions between the present case and previous cases dismissing the admissibility of an action by private parties for annulment of a tariff classification regulation. Second, since the case-law in relation to General Rule 3(b) of the CN was very limited, it was necessary to interpret this and to examine the history and evolution of the CN codes at issue. The applicant maintains that it also

had to draw analogies with case-law from other jurisdictions, by referring to the interpretation of the CN Code 9504 made by the Harmonised System Committee of the World Customs Organisation (WCO). Third, it submits that the questions put to it by the Court concerning the logo of the PlayStation®2 and its protection by intellectual property rights required additional research.

- 13 Regarding the other expenses generated in the case, the applicant submits that they were due mainly to the necessity of hiring a technical expert for a demonstration in relation to the PlayStation®2 during the hearing.
- 14 Lastly, the applicant states that the main proceedings represented considerable financial interest. The adoption of the contested regulation had the effect of invalidating the Binding Tariff Information (BTI) which had been issued to the applicant by the national customs authorities. The financial impact of that measure on the applicant can be estimated, in its view, as amounting to more than EUR 50 million.
- 15 The defendant states, first, that the applicant overestimates the significance of the main proceedings, because the judgment in the main proceedings affects only the case at hand and is not of general importance. The Court dismissed the applicant's first argument concerning the impossibility of classifying an automatic data processing machine like the PlayStation®2 under heading 9504. It found only that the Commission had committed an error of law by determining, on the basis of General Rule 3(b), the classification of consoles like the PlayStation®2 having regard to the function which gives it its essential character.

- 16 With respect to the difficulties of the case, the defendant states that, although the case did raise a number of interesting questions regarding the status of a private party to challenge the validity of a regulation and the interpretation of the CN, those questions of interpretation are not different in kind from those raised in other legal proceedings brought before the Court.

- 17 The defendant considers that the amount of work generated by the case does not justify the payment of fees for 600 hours of legal work. An estimate of 200 hours is more realistic.

- 18 The defendant states that it is not in a position to express a view on the applicant's estimate of its financial interest in the outcome of this case.

- 19 Lastly, the defendant contests the amount of expenses incurred by the applicant. It considers that the sum is excessive, particularly because the Court had decided to refuse 'for the time being' the applicant's request to proceed with a technical demonstration of the PlayStation®2 at the hearing. Nor in fact was any such demonstration carried out.

- 20 The defendant concludes that a payment of EUR 50 000 for lawyers' fees and EUR 1 000 for expenses is reasonable in all the circumstances.

Findings of the Court

General

- 21 According to Article 91(b) of the Rules of Procedure of the Court of First Instance, ‘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. It follows from that provision that recoverable costs are limited to those incurred for the purpose of the proceedings before the Court of First Instance and which were necessary for that purpose (orders of the Court of First Instance in Case T-38/95 DEP *Groupe Origny v Commission* [2002] ECR II-217, paragraph 28, and Joined Cases T-226/00 DEP and T-227/00 DEP *Nan Ya Plastics v Council* [2003] ECR II-685, paragraph 33).
- 22 It is settled case-law 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 case for the agents or advisers involved and the financial interest which the parties had in the proceedings (orders of the Court of First Instance in Case T-2/93 DEP *Air France v Commission* [1995] ECR II-533, paragraph 16; Case T-64/99 DEP *UK Coal v Commission* [2001] ECR II-2547, paragraph 27; and in Case T-251/00 DEP *Lagardère and Canal+ v Commission* [2004] ECR II-4217, paragraph 23). In that respect, the ability of the Court to assess the value of work carried out is dependent on the accuracy of the information provided (orders of the Court of First Instance in Case T-120/89 DEP *Stahlwerke Peine-Salzgitter v Commission* [1996] ECR II-1547, paragraph 31, and in Case T-337/94 DEP *Enso-Gutzeit v Commission* [2000] ECR II-479, paragraph 16).
- 23 It is also settled case-law that 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. In

ruling on the application for taxation of costs, the Court is 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 (orders in *Stahlwerke Peine-Salzgitter v Commission*, paragraph 27, and *UK Coal v Commission*, paragraph 26).

Application to the present case

24 It is in the light of those criteria that the amount of recoverable costs in the present case is to be determined.

25 As regards, first, the purpose and nature of the proceedings and their significance from the point of view of Community law, the Court notes that, in the main proceedings, the Court admitted for the first time an action pursuant to the fourth paragraph of Article 230 EC for annulment of a tariff classification regulation. Thus the judgment lays down for the first time the general conditions under which private parties may challenge Commission regulations pertaining to the CN classification of goods. It must also be borne in mind that admissibility in this case hinged on quite particular circumstances, established on the basis of a set of factors and various types of indications provided by the applicant.

26 It is, moreover, apparent from the judgment that, in order to rule on the main proceedings, the Court had to examine for the first time the question of the classification of a 'game console' in the CN, which resolved problems of interpretation which were highly complex and of general importance, particularly as regards the interpretation of certain general rules, headings and subheadings and also chapter and section notes of the CN.

- 27 Second, regarding the amount of work generated by the case for the lawyers, the Court recognises that, in this case, the question of the admissibility of the action required additional work. In order to show that it was directly and individually concerned by the contested regulation, the applicant had to demonstrate in great detail the specific nature of its situation, using a set of distinct and elaborate arguments. In that connection additional research on the applicant's behalf was also required, *inter alia* in order for it to be able to answer questions put by the Court concerning the fundamental differences between the PlayStation®2 and other game consoles.
- 28 The admissibility issue thus generated an unusual amount of legal work. As regards specifically the production of information required concerning intellectual property rights, however, the Court finds that the applicant is part of the same corporate group as the producer and the owner of the intellectual property rights pertaining to the product in question. Accordingly, the obtaining of that information could justify only a limited amount of work for the applicant's lawyers.
- 29 Regarding the substance of the case, it must be borne in mind that a large number of the arguments put forward by the applicant were held to be unfounded.
- 30 Third, regarding the applicant's financial interest in the outcome of the case, the Court is unable to establish the veracity of the amount put forward by the applicant, as it has not been given specific information on this point. The Court notes, however, that the PlayStation®2 is a product sold in large quantities in the Community.
- 31 Nor has the applicant provided the Court with detailed information on the breakdown of the hours worked by the lawyers concerned by reference to the different tasks performed as part of the proceedings before the Court. The first table annexed to the applicant's note of 10 March 2004, reproduced in Annex A.1 to the

application (pages 16 and 17), lists only different work done by each lawyer with an overall figure for all of the hours allegedly worked by the lawyer. The application does not contain any detailed breakdown of that overall figure as regards the number of hours spent on each of the legal tasks which would enable the Court to check whether the calculation is correct. In any event, the legal work relating to the preparation of a possible demonstration of the PlayStation®2 cannot be considered as being necessary for the resolution of the dispute (see, in that connection, paragraph 33 below).

32 In those circumstances and in the light of the foregoing, it seems appropriate to fix the number of hours included as recoverable costs at 250 hours.

33 As regards the other expenses attributed to the proceedings by the applicant, it claims EUR 1 500 by way of expenses incurred for a demonstration of the functions of the PlayStation®2. It should be borne in mind, first of all, that it was the applicant who, without having been asked to do so by the Court, proposed to it to make such a demonstration at the hearing. In his letter of 3 February 2003, the Registrar informed the applicant of the Chamber's decision to refuse the applicant's request 'for the time being', but informed it that such a demonstration might be allowed, if necessary, during the hearing. In the event, no demonstration was necessary and none was therefore carried out. In those circumstances, the expenses allegedly incurred by that demonstration cannot be considered as being necessarily incurred for the purposes of the proceedings.

34 As for the other expenses, the costs of photocopies and couriers, as well as travel and accommodation for four people involved in the main proceedings before the Court, are to be included as recoverable in so far as they were necessary. However, given the lack of detail on how travel and accommodation expenses of EUR 1 250 and photocopy costs of EUR 750 were allocated and broken down, it is appropriate to set the recoverable costs under this heading at EUR 1 000.

35 In view of the foregoing, the Court will make an equitable assessment of the costs recoverable by the applicant in the main proceedings by fixing the amount at EUR 66 175.

36 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 costs incurred by the parties in relation to these proceedings for the taxation of costs (see, to that effect, order of the Court of First Instance in Case T-80/97 DEP *Starway v Council* [2002] ECR II-1, paragraph 39).

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

The amount of costs to be paid by the Commission to the applicant is fixed at EUR 66 175.

Luxembourg, 18 March 2005.

H. Jung

Registrar

M. Jaeger

President