



ORDER OF THE COURT

24 April 2007

(Taxation of costs)

In Case E-9/04 COSTS,

The Bankers' and Securities Dealers' Association of Iceland, represented by Dr. Hans-Jörg Niemeyer, Rechtsanwalt, Brussels, Belgium and Dr. Ralf Sauer, Rechtsanwalt, Berlin, Germany,

Applicant,

supported by **the European Banking Federation**, represented by Marc Pittie, Avocat, Brussels, Belgium,

Intervener,

v

EFTA Surveillance Authority, represented by Niels Fenger, Director, and Bjørnar Alterskjær, Officer, Department of Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

Defendant,

supported by the Republic of Iceland, represented by Finnur Þór Birgisson, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent, and Peter Christian Dyrberg, acting as Counsel,

Intervener,

APPLICATION for taxation of costs pursuant to the judgment of the Court of 7 April 2006 in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland v EFTA Surveillance Authority* [2006 EFTA Court Report 41],

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THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson and Henrik Bull (Judge-Rapporteur), Judges

Registrar: Skúli Magnússon,

makes the following

Order

I Facts, procedure and forms of order sought

- 1 By an application lodged at the Registry of the Court on 23 November 2004, the Bankers' and Securities Dealers' Association of Iceland brought an action under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA") for annulment of the EFTA Surveillance Authority's Decision No 213/04/COL of 11 August 2004 concerning the Icelandic Housing Financing Fund.
- 2 By an application lodged at the Registry of the Court on 13 May 2005, the European Banking Federation, pursuant to Article 89 of the Rules of Procedure (hereinafter "ROP"), applied for leave to intervene in support of the Bankers' and Securities Dealers' Association of Iceland. Leave to intervene was granted on 2 June 2005 and the Statement in Intervention was lodged at the Registry of the Court on 12 July 2005.
- 3 By judgment of 7 April 2006 in Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland v EFTA Surveillance Authority* [2006] EFTA Court Report 41, the Court annulled the EFTA Surveillance Authority's Decision No 213/04/COL of 11 August 2004 concerning the Icelandic Housing Financing Fund and, pursuant to Article 66(2) of the Rules of Procedure, ordering the EFTA Surveillance Authority to pay the costs incurred by the Bankers' and Securities Dealers' Association of Iceland and those incurred by the European Banking Federation as Intervener.
- 4 By an application lodged at the Registry of the Court on 23 January 2007, the European Banking Federation, pursuant to Article 70(1) of the Rules of Procedure, applied for taxation of the costs it may recover from the EFTA Surveillance Authority. The European Banking Federation requested the Court to fix the total amount of those costs at EUR 80 913.89.
- 5 By observations lodged at the Registry of the Court on 7 March 2007, the EFTA Surveillance Authority requested the Court to fix the total amount of costs to be paid by the EFTA Surveillance Authority to the European Banking Federation as Intervener in Case E-9/04 at EUR 21 023.30.

II Law and assessment of the case

Arguments of the parties

- 6 As recoverable costs under Article 69(b) ROP, the European Banking Federation claims it has incurred a total of EUR 66 200 in lawyers' fees, plus 21% VAT amounting to EUR 13 902; travel expenses for two counsel at a total of EUR 104.55; accommodation expenses for two counsel at a total of EUR 509.73 and expenses covering express courier and special deliveries at a total of EUR 197.61.
- 7 According to the European Banking Federation, referring in particular to Case T-342/99 DEP *Airtours v Commission* [2004] ECR II-1785, at paragraph 18, the EFTA 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 EEA 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.
- 8 The European Banking Federation contends that the EUR 66 200 in lawyers' fees, made up of 100 hours' work by a lawyer billed at an hourly rate of EUR 350 and 48 hours' work by another lawyer billed at an hourly rate of EUR 650, are reasonable and justified under the circumstances. Particular stress is laid on the degree of difficulty of the case and the amount of work necessary in the intervention. In this respect, reference is made, *inter alia*, to the time it took the EFTA Surveillance Authority to adopt Decision No 213/04/COL and the number of parties intervening or submitting written observations before the EFTA Court in Case E-9/04.
- 9 With respect to the need for having two lawyers represent the European Banking Federation at the Hearing, it is noted that the second lawyer was a more junior lawyer involved in the proceedings from the beginning in order to reduce the legal costs incurred by the intervention. In any case, the Court is called upon to assess primarily the 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.
- 10 The parties concur that the travel expenses amounting to EUR 104.55 would have been the same whether two or just one lawyer had attended the Hearing (due to travel by car/taxi) and that these costs are recoverable costs. The parties also concur that 21% VAT on the lawyers' fees which the European Banking Federation may recover from the EFTA Surveillance Authority is a recoverable cost.
- 11 However, the EFTA Surveillance Authority contests, in part, the claim for EUR 66 200 in lawyers' fees, as well as the claims for EUR 509.73 in accommodation expenses and for EUR 197.61 in expenses covering express courier and special deliveries.

- 12 Firstly, with regard to the lawyers' fees, the EFTA Surveillance Authority contends that the hourly rates charged are unreasonably high and that the number of hours billed is excessive. As to the hourly rates, it is argued, with reference to case law from the Court of First Instance of the European Communities (hereinafter the "CFI"), that even the lowest rate charged, i.e. EUR 350, is very high and would only be appropriate for particularly experienced lawyers or experts in the field. As to the total of 148 hours billed, it is argued, in particular, that the burden of proof for the necessity in the number of hours claimed must lie with the European Banking Federation and that the documentation submitted is unsatisfactory. Further, the EFTA Surveillance Authority argues that if one accepts a high hourly rate it must be on the assumption that the work is carried out by an expert lawyer using a substantially lower number of hours. Based in particular on an assessment of the substantive content of the Application for Leave to Intervene, the Statement in Intervention and the oral pleadings of the agents for the European Banking Federation, compared to that of other participants whose written pleadings the Federation and its agents were able to draw on, the EFTA Surveillance Authority suggests that the recoverable lawyers' fees be taxed to 50 hours of work at an hourly rate of EUR 340; in total EUR 17 000.
- 13 Secondly, as regards the accommodation expenses, the EFTA Surveillance Authority notes that the European Banking Federation does not dispute that the sum of EUR 509.73 relates to two hotel rooms so that the accommodation expenses for one counsel would have been half this amount. Referring to case law of the Court of Justice of the European Communities (hereinafter the "ECJ"), in particular Case C-286/95 DEP *ICI* [2004] ECR I-6469, at paragraph 29, the EFTA Surveillance Authority reiterates that the starting point in cases concerning taxation of costs is that only travel costs for one counsel are recoverable. It is then argued that the European Banking Federation has failed to demonstrate a need for having two counsel attend the Hearing in this case. Accordingly, it is suggested that the recoverable costs be taxed at half the amount of EUR 509.73, which would be EUR 254.87.
- 14 Lastly, concerning the expenses covering express courier and special deliveries, the EFTA Surveillance Authority asserts that it follows from case law that only costs relating to the shipment of the necessary documents to the Court are recoverable. On this background, the EFTA Surveillance Authority considers it not to be proven or sufficiently substantiated that three specific deliveries, at a total of EUR 103.73, are recoverable. In conclusion, it is suggested that the recoverable costs be taxed at a total of EUR 93.88.

Findings of the Court

- 15 According to Article 69(b) ROP, the following shall be regarded as costs which are recoverable from the party ordered to pay the costs:

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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.

- 16 The provision mirrors Article 73(b) of the Rules of Procedure of the ECJ and Article 91(b) of the Rules of Procedure of the CFI. Whilst, in interpreting its Rules of Procedure, the EFTA Court is not required to follow the ECJ or the CFI's interpretations of their Rules of Procedure, the Court attaches importance to these provisions being parallel. In the interest of equal treatment and foreseeability for parties appearing before the ECJ, the CFI and the EFTA Court, the provisions should be interpreted and applied in the same way unless specific circumstances would justify different treatment. In the case at hand, the Court can see no such specific circumstances.
- 17 The Court recalls that as concerns the ECJ and the CFI it is settled case law that, when taxing the recoverable costs, the Courts must, in the absence of Community provisions laying down fee-scales, 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, see *inter alia* Joined Cases C-440/01 P(R)-DEP and C-39/03 P-DEP *Artogodan*, Order of 11 January 2007, at paragraph 27, and Case T-214/04 DEP *Royal County of Berkshire Polo Club*, Order of 25 January 2007, at paragraph 14.
- 18 The Court further recalls that only expenses “necessarily incurred” by a party “for the purpose of the proceedings” shall be regarded as recoverable from the party ordered to pay the costs.
- 19 Clearly, this will be the case for reasonable travel and accommodation expenses in connection with an oral hearing before the Court and for reasonable expenses covering the delivery of documents to the Court, provided that the expenses are sufficiently substantiated.
- 20 Subject to the same proviso, i.e. that the expenses are sufficiently substantiated, it follows that also lawyers' fees will be recoverable to the extent they must be considered necessarily incurred for the purpose of the proceedings. In determining whether that is the case, due regard must be paid to a number of factors, as indicated above.
- 21 In the case at hand, the amount of recoverable lawyers' fees can usefully be assessed as a number of hours' work at a certain hourly rate. In this assessment, a primary consideration of the Court must be the number of hours' work which may appear to be objectively necessary for the purpose of the proceedings before the Court, see for comparison Case T-342/99 DEP *Airtours* [2004] ECR II-1785, at paragraph 30. However, in establishing the number of hours, account must also be taken of the hourly rate that has been claimed or may reasonably be claimed. A higher hourly rate presupposes that the work is carried out by a more

experienced lawyer in the relevant field, who should be able to carry out the necessary work not only with improved quality but at least to some extent also in a lesser number of hours.

- 22 As for the hourly rate, the Court finds that the recoverable lawyers' fees in the case at hand can reasonably be assessed on the basis of the hourly rate of EUR 340 suggested by the EFTA Surveillance Authority. In the view of the Court, already this rate presupposes that the work was carried out by an experienced lawyer in the relevant field. See, for comparison, Case T-77/02 DEP *Schneider*, order of 29 October 2004, at paragraph 62, and Case T-233/99 DEP *Land Nordrhein-Westfalen*, order of 19 December 2006, at paragraph 39. The Court sees nothing in the case (cf. paragraph 17 above) to justify an assessment based on an even higher hourly rate.
- 23 The Court finds that Case E-9/04 must be considered one of not more than average difficulty and complexity in the field of State aid law. Moreover, the Court had previously dealt with a system broadly similar to the Icelandic Housing Financing Fund system in Case E-4/97 *Husbanken II* [1999] EFTA Court Report 2.
- 24 Regarding the number of hours' work spent on attendance at the Hearing, it is of particular significance whether the attendance of two counsel can be regarded as necessary. In the same way as the number of hours' work in general, this must be assessed on the basis of what may appear to be objectively necessary for the purpose of the proceedings before the Court, irrespective of how the work of the lawyer or lawyers involved was in fact organised. As a point of departure, only the presence of one counsel for a party to the case would seem necessary at a hearing before the Court. The circumstances of a particular case and the position of the party concerned may certainly demand otherwise, but the Court does not find this to be so for the European Banking Federation as Intervener in Case E-9/04. That only the expenses for one lawyer attending the Hearing in the case can be regarded as recoverable, reasonably translates into 5 hours less spent on transport and 6 hours less spent on attending the Hearing.
- 25 The claim from the European Banking Federation is for another 137 hours' work to be the basis for calculating the recoverable lawyers' fees.
- 26 It is recalled that the ability of the Court to assess the value of the work carried out is dependent on the accuracy of the information provided, see for comparison Case T-342/99 DEP *Airtours* [2004] ECR II-1785, at paragraph 30, and Case T-9/98 DEP *Mitteldeutsche Erdöl-Raffinerie*, order of 15 February 2005, at paragraph 46. According to a letter from counsel for the European Banking Federation to the EFTA Surveillance Authority, dated 3 October 2006 and included as Annex 4 to the Application for taxation of costs, the law firm of Bredin Prat does not make use of time sheets. It thus appears that the number of hours of work on which the claim is based must be the result of an assessment made *ex post facto*.

- 27 The Court further notes that an intervener has the advantage of being able to draw on the factual information and the legal arguments put forward in pleadings already submitted to the Court at the time of intervention. The Statement in Intervention on several points expresses support for the arguments made by the Bankers' and Securities Dealers' Association of Iceland as Applicant, without developing new arguments in support of the position of the Applicant on those points, see the Statement in Intervention at paragraphs 11, 19 and 39.
- 28 On this basis, it is not apparent to the Court that it can be reasonable and appropriate to base the calculation on more than around half of the 15 hours plus 30 hours (for a partner and an associate lawyer respectively) claimed for the study of the case and for legal research. The same goes for the 3 hours plus 20 hours claimed for work on the Application for Leave to Intervene and for the 25 plus 20 hours claimed for preparing and attending the Hearing, account taken of the Court's findings in paragraph 24 above. Also the 5 plus 30 hours claimed for work on the Statement in Intervention seem somewhat excessive.
- 29 Taken together with an hourly rate of EUR 340, which presupposes that the work was carried out by an experienced lawyer in the relevant field, and considering all the elements set out above, the Court finds that 80 hours can reasonably be regarded as necessarily incurred for the purpose of the proceedings. Accordingly, the Court finds it justified to request the EFTA Surveillance Authority to meet lawyers' fees at a total of EUR 27 200.
- 30 In addition to the lawyers' fees comes VAT at 21% amounting to EUR 5 712.
- 31 Concerning the travel expenses amounting to a total of EUR 104.55, the Court concurs with the parties in regarding these expenses as recoverable costs.
- 32 As for accommodation expenses, it follows from the Courts earlier findings that the expenses incurred through the second counsel attending the Hearing cannot be regarded as expenses necessarily incurred for the purpose of the proceedings. Accordingly, the EFTA Surveillance Authority can only be requested to meet accommodation expenses for one counsel, which would amount to EUR 254.87.
- 33 Finally, regarding the expenses said to cover express courier and special deliveries, only such expenses relating to the shipment of documents to the Court can be considered necessarily incurred for the purpose of the proceedings and thus be recoverable. On this background, only the expenses relating to two document deliveries by express courier, on 30 June 2005 and 12 July 2005, respectively, have been sufficiently substantiated as recoverable. These expenses amount to a total of EUR 93.88.
- 34 It follows from the foregoing that the costs which the Court has found to be recoverable, i.e. lawyers' fees at a total of EUR 27 200, VAT at a total of EUR 5 712, travel expenses at a total of EUR 104.55, accommodation expenses at a total of EUR 254.87 and expenses covering document deliveries by express courier at a total of EUR 93.88, in sum amount to EUR 33 365.30. This is the

amount of costs that the European Banking Federation as Intervener in Case E-9/04 may recover from the EFTA Surveillance Authority.

On those grounds,

THE COURT

hereby orders:

The total amount of the costs to be paid by the EFTA Surveillance Authority to the European Banking Federation is fixed at EUR 33 365.30.

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Luxembourg, 24 April 2007

Skúli Magnússon
Registrar

Carl Baudenbacher
President