ORDER OF THE COURT
9 November 2012

(Taxation of costs)

In Case E-14/10 COSTS,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Department of Legal & Executive Affairs, acting as Agent,

defendant,

APPLICATION for the taxation of costs recoverable following the judgment of the Court of 22 August 2011 in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

makes the following

Order

I Facts, procedure and forms of order sought

1 By an application lodged at the Registry of the Court on 2 September 2010, Konkurrenten.no AS (“Konkurrenten” or “the applicant”) brought an action under Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) for annulment of EFTA Surveillance Authority (“ESA” or the “defendant”) Decision No 254/10/COL of 21 June 2010 concerning AS Oslo Sporveier and AS Sporveisbussene (“the contested decision”).

2 By judgment of 22 August 2011 in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266, the Court annulled the contested decision and, pursuant to Article 66(2) of the Rules of Procedure (“RoP”), ordered ESA to pay the costs incurred by the applicant.

3 As the parties have not been able to agree on the costs to be recovered, Konkurrenten lodged an application at the Registry of the Court on 5 March 2012, pursuant to Article 70(1) RoP, where it applied for taxation of the costs it may recover from ESA. In the application, the Court is requested to fix the total amount of those costs at EUR 136 322 together with default interest for payment made later than 14 days after the Court order.

4 By observations lodged at the Registry of the Court on 12 March 2012, ESA requested the Court to fix the total amount of the said costs at EUR 65 000.

5 The applicant claims that it has incurred the following costs:

- EUR 102 130 in legal fees, including EUR 1 700 for the present proceedings in Case E-14/10 COSTS, recoverable under Article 69(b) of the Court’s RoP. With the addition of 25% VAT amounting to EUR 25 532, total legal fees claimed amount to EUR 127 662.

- EUR 1 070 in costs for the travel and subsistence of the applicant’s Chief Executive Officer (“CEO”) to attend the oral hearing in Case E-14/10 on 10 May 2011.

- EUR 1 288 in costs for the travel and subsistence of the applicant’s CEO in meeting with counsel in Oslo for three full-day meetings on 28 July and 28 August 2010, to review the evidence and discuss drafts for the application for annulment, and on 25 March 2011 to review the case in detail after the conclusion of the written procedure and discuss the challenges and tactical decisions ahead of the oral hearing.

- EUR 1 379 in costs for travel and subsistence of counsel to attend a court hearing.

- EUR 1 616 in travel and subsistence costs for a witness to attend a court hearing.

- EUR 3 307 in copying and shipment of court pleadings.

II Law and assessment of the case

1. Recoverable legal fees

Arguments of the parties

6 As regards the purpose and nature of the proceedings, the applicant asks the Court to recall that its objective was to prevent the defendant from closing a major State aid case involving the second largest bus operator in Norway where the defendant erroneously had allowed the aid recipient to keep a potentially significant amount of unlawful aid granted in the period leading up to the liberalisation of the largest regional market in the country. In this regard, the applicant submits that KTP/Unibuss received NOK 800 million in a capital injection in 2004 and more than NOK 435 million in annual grants from 1997-2008.

7 In terms of how significant the proceedings were from the perspective of the EEA Agreement, the applicant notes that the case dealt with a cornerstone premise of the internal market, namely, that EEA States cannot distort competition in open markets by favouring selected undertakings with unlawful aid.

8 With regard to the difficulties presented by the case, the applicant submits that the body of case law of the Courts of the European Union on the distinction between new and existing aid requires a careful investigation of the aid measure in question and a reasoned analysis of whether any relevant alterations have been made by the EEA State during the period of review. The applicant submits that the relevant period in the case stretched over 14 years and the case presented particular difficulties due to the defendant's opaque reasoning and cursory investigation. These difficulties were exacerbated when the defendant shifted its position in the defence and put forward a new description of the aid measure and a new analysis of whether any relevant changes had occurred.

9 As for the financial interests the applicant has in the proceedings, it maintains that it has a direct and strong interest in seeing that unlawful aid is recovered from KTP/Unibuss. The aid recipient moved into the express bus market in 2005 and later entered the key market where it was able to invest in an aggressive pricing strategy and a major renewal, upgrade and expansion of its bus fleet, intended to drive the applicant out of its home market.

10 Altogether, the applicant states that the legal work involved in the case amounts to 291 hours. According to the applicant, the work consists of:

- application for annulment, a total of 137.50 hours;

- reply to the defence, a total of 84.25 hours;

- application for measures of organisation leading to the calling of the Court's first witness, a total of 29 hours; response to the application for intervention from KTP/Unibuss, a total of 4.25 hours;

- oral hearing on 10 May 2011 in Luxembourg and necessary preparations for the hearing, a total of 31 hours, and finally,

- application for the taxation of costs in the case, excluding the attempts to come to an agreement with the defendant and the correspondence between the parties in that regard, a total of 5 hours.

11 ESA does not contest the significance of the proceedings, the difficulties in presenting the case, nor the financial interest involved. ESA claims, however, that the applicant has not furnished the requisite supporting documentation to allow a proper and detailed evaluation of the costs actually incurred. Although ESA is prepared to accept, in the light of invoices which the applicant has now produced, that fees have been charged by counsel to the applicant, it is argued that the documentation furnished does not permit ESA or the Court for that matter to determine whether those costs actually incurred are expenses necessarily incurred within the meaning of Article 69 RoP.

12 ESA submits that counsel for the applicant presented it with a peremptory demand for the payment of EUR 126 960. That claim was accompanied by a two-page document which contained no details, no supporting evidence, no bills, no invoices, no time sheets and no explanations which could possibly serve to examine the claim in the light of Article 69 RoP.

13 ESA states that it responded with a letter dated 19 October 2011 clearly headed "without prejudice". However, counsel for the applicant has now produced that letter to the Court without ESA's knowledge or consent.

14 ESA argues that, instead of supplying the supporting documents requested, which would have afforded it the opportunity to make a reasonable offer to settle this matter, the applicant brought the present application for taxation of costs. In ESA's view, there are grounds in such circumstances to dismiss the application for taxation of costs as premature. Nevertheless, ESA would prefer the matter to be brought to a definitive conclusion and consequently asks the Court to rule on the application as it stands.

15 In this regard, ESA points out that no clear and precise indication is given of what the legal assistance charged for actually related to, for example, whether it comprised the drafting of the application, reply, other pleadings or some form of

research. ESA argues that, given the lack of any details, such items are usually disallowed.

16 According to ESA, it is normal, habitual and indeed expected that proper, detailed timesheets will be produced to the Court in taxation of costs proceedings.

17 ESA claims that the applicant has produced barely any more useful supporting documents, and that it is therefore left with only one option which is to estimate what costs the applicant might have necessarily incurred in the proceedings.

18 Given the nature of the case and the fact that the applicant was the complainant in the administrative proceedings and thus fully conversant with the facts and law applicable, ESA estimates reasonable legal fees to amount to 126.25 billable hours. In this estimate, ESA assigns

- 56 billable hours to the drafting of the application;
- 40 hours to drafting the reply;
- 14 hours to measures of organisation;
- 4.25 hours to observations on intervention; and
- 12 hours for preparing and attending the hearing.

19 That totals 126.25 billable hours. Accordingly, the sum of EUR 42 925 corresponds to a reasonable estimate of costs necessarily incurred in these proceedings.

Findings of the Court

20 Under Article 70(1) RoP, the Court shall, if there is a dispute concerning the costs to recovered, on application by the party concerned and after hearing the opposite party, make an order.

21 According to Article 69(b) RoP, "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", shall be regarded as costs which are recoverable from the party ordered to pay the costs.

22 These provisions mirror Articles 74(1) and 73(b) of the Rules of Procedure of the Court of Justice of the European Union ("ECJ") and Articles 92(1) and 91(b) of the Rules of Procedure of the General Court of the European Union.

23 According to the principle of procedural homogeneity, the provisions of the Rules of Procedure must be interpreted in the same way in the EFTA pillar of the EEA as in the EU pillar unless specific circumstances justify different treatment (see order of the President of 23 April 2012 in Case E-16/11 *ESA* v *Iceland*

(*Icesave*), paragraph 32, and, with regard to the taxation of costs specifically, see order of the Court in Case E-9/04 COSTS II *Bankers' and Securities' Dealers Association of Iceland* v *ESA* [2007] EFTA Ct. Rep. 220, paragraph 28).

24 It follows from Article 69(b) RoP that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose (see, for comparison, order of the ECJ in Case C-104/89 DEP *Mulder and Others* v *Council and Commission* [2004] ECR I-1, paragraph 43, and case law cited, and of 7 June 2012 in Case C-451/10 P-DEP *France Télévisions* v *TF1*, not yet reported, paragraph 17).

25 As regards ESA's observation that counsel for the applicant has produced to the Court its letter of 19 October 2011 clearly headed "without prejudice", the Court notes that EEA law does not contain any rules on the effects of such statements in relation to proceedings for the taxation of recoverable costs. Accordingly, the Court finds no reason to address this submission for the purposes of the current proceedings.

26 When taxing the recoverable costs, it is settled case law that the Court must, in the absence of EEA 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 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 (see, *mutatis mutandis*, order of the Court in Case E-9/04 COSTS *European Banking Federation* v *ESA* [2007] EFTA Ct. Rep. 74, paragraph 17, and in *Bankers' and Securities' Dealers Association of Iceland* v *ESA*, cited above, paragraph 29).

27 In that respect, it must also be recalled that the ability of the Court to assess the value of work carried out is dependent on the accuracy of the information provided (see, to that effect, order of the General Court in Joined Cases T-226/00 DEP and T-227/00 DEP *Nan Ya Plastics* v *Council* [2003] ECR II-685, paragraph 35, and case law cited).

28 The amount of costs recoverable in the present case must be assessed in the light of those criteria.

29 As regards the hourly rate invoiced, the Court notes that the parties agree that the recoverable lawyers' fees in the case at hand can reasonably be assessed on the basis of an hourly rate of EUR 340. Taking into account that Article 66(5) RoP provides that a decision on costs shall be in accordance with the agreements of the parties, where the parties come to such an agreement, the Court concurs with the parties that the hourly rate of EUR 340 applies for the purposes of the present case.

30 However, it must be noted that this rate presupposes that the work was carried out by an experienced lawyer in the relevant field (compare order of the General Court of 19 December 2006 in Case T-233/99 DEP *Land Nordrhein-Westfalen* v *Commission*, not published in the ECR, paragraph 39). The fact that remuneration at that rate is taken into account requires moreover in return a strict assessment of the total number of hours' work essential for the purposes of the proceedings in question (see, to that effect, order of the ECJ in Joined Cases C-12/03 P-DEP and C-13/03 P-DEP *Tetra Laval* v *Commission* [2010] ECR I-67*, paragraph 63).

31 As regards the difficulties presented by the case and its significance from the perspective of EEA law, it did not raise new points of EEA law. However, the Court notes that the subject-matter and character of the main proceedings involved a degree of complexity in relation to the substance of the action. The Court was required to rule not only on whether ESA's decision contained sufficient reasoning on whether a State measure could be classified as a part of an existing aid scheme, but also on a matter concerning an error of law with regard to ESA's decision not to initiate the formal investigation procedure. The Court also recalls that it took ESA four years to investigate the case before it took the decision contested in the main proceedings.

32 Moreover, the subject-matter of the proceedings covered a long period in time and the applicant's lawyer was not familiar with the case, as he did not represent the applicant in the administrative procedure which resulted in the adoption of the contested decision. Those factors are likely to have, in part, increased the time which the lawyer had to spend on the preparation of the application.

33 As regards the extent of the work involved in the proceedings before the Court, it follows from the foregoing considerations that the dispute may indeed have required not an inconsiderable amount of work by the applicant's lawyer. Moreover, it must be observed that ESA does not deny that the financial interest of the applicant in the case was significant.

34 However, for the purposes of determining the amount of recoverable legal fees these can usefully be assessed by the Court as a number of hours' work at a certain hourly rate. The primary consideration of the Court is the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court (see, to that effect, order of the General Court in Case T-342/99 DEP *Airtours* v *Commission* [2004] ECR II-1785, paragraph 30).

35 Referring to the applicant's specification of the number of hours worked by its counsel at each stage of the procedure, the Court considers the 137.50 hours claimed with regard to the application for annulment and 84.25 hours for reply to the defence, 29 hours for the application for measures of organisation leading to the calling of a witness and 31 hours for the oral hearing on 10 May 2011 in Luxembourg and necessary preparations for that hearing are in excess of what could be considered necessary for the purposes of Article 69(b) RoP. The Court finds that, in the present case, 105 hours spent on the drafting of the application,

55 hours on the reply to the defence, 18 hours relating to the application for measures of organisation, and 26 hours for the preparation of the oral hearing are the maximum which could be regarded as necessary for those purposes.

36 Accordingly, the amount of time claimed for these tasks must be considered more than objectively necessary for the purposes of the proceedings before the Court. However, the Court finds 5 hours for the application for the taxation of costs and 4.25 hours for response to an application for intervention from KTP/Unibuss to be reasonable.

37 Taken together with an hourly rate of EUR 340 and considering all the elements set out above, the Court fixes the equitable assessment of the costs recoverable by the applicant in Case E-14/10 at EUR 69 360 which corresponds to 189 hours of work. In addition to the lawyers' fees, VAT levied at 25% amounts to EUR 17 340.

2. Travel and subsistence costs for the applicant's CEO

38 The applicant also claims that Article 69(b) ROP allows for reasonable travel and subsistence costs where the presence of a company representative during the oral hearing is necessary for the applicant to make full use of its right to be heard. In this case, the applicant's CEO and Chairman of the Board of Directors both attended the hearing. However, the applicant seeks only to recover costs in relation to its CEO.

39 In support of this claim, the applicant submits that it was not represented by counsel during the four years that ESA investigated the State aid complaint that led to the contested decision. Second, neither the intervener, KTP/Unibuss, nor the Norwegian Government were able to submit written observations in time and relied instead on their oral presentations during the hearing, the content of which the applicant had no way of knowing in advance.

40 The applicant further argues that the overall complexity of the issues and the hearing of a witness from the Norwegian Government made the CEO an important source for counsel to be able to consult with during the hearing. It also notes that the ESA was represented by two agents during the hearing and had other officers attend in the audience, and that the Commission and the Norwegian Government were each represented by two agents and that KTP/Unibuss had seven officers of the company attend in addition to its counsel.

41 On this basis, the applicant contends that the presence of the CEO was necessary for counsel to be able to effectively represent the company's interests during the hearing.

42 The applicant seeks to recover travel and subsistence to a total of EUR 1 070. This consists of a roundtrip with KLM (Economy Flex) Kristiansand/Luxembourg at the cost of EUR 499 and subsistence costs, including food, local travel and 2 hotel nights, from 9 to 11 May 2011 in the

amount of EUR 571. The applicant adds that there was no available flight the same evening and that travel and subsistence costs of the CEO are lower than what the Court has found reasonable for the witness making a comparable trip.

43 As regards travel and subsistence costs for the applicant's CEO to attend three meetings in Oslo with its counsel on 28 July 2010, 27 August 2010 and 25 March 2011, the applicant maintains that Article 69(b) ROP includes reasonable travel and subsistence costs for meetings in person between counsel and company representatives to prepare for and follow through with the litigation. In this case, the CEO travelled to Oslo to meet with counsel for full day meetings, on 28 July and 27 August 2010 to review the evidence and discuss drafts for the application for annulment, and on 25 March 2011 to review the case in detail after the written procedure and discuss the challenges and tactical decisions ahead of the oral hearing. The applicant seeks to recover a total of EUR 1 288 for these costs. This consists of car travel costs between Evje and Oslo (680 km) for each meeting and subsistence costs (hotel/food for 1 night for each trip).

44 As regards travel and accommodation costs for the hearing, the defendant indicates that it is willing to pay for counsel only.

45 As regards the travel and subsistence costs of the applicant's CEO for meetings in Oslo in July and August 2010 and March 2011, ESA argues that the applicant has provided no justification for the meetings, no explanation of why they were necessary and no link with the different stages or procedures of these proceedings. Consequently, those costs cannot be considered necessarily incurred in the course of these proceedings.

46 As for the costs relating to the attendance of the applicant's CEO at the hearing, the defendant states that, while the travel expenses of counsel are necessarily incurred, the costs relating to officers and employees of the parties are not necessarily incurred unless their presence has been requested by the Court or because they are likely to help explain complex facts essential for the elucidation of the proceedings.

47 In the present case, the defendant maintains that the physical presence of two officers – even of one officer – of the applicant was predictably unnecessary and it could be foreseen that they would not be called upon to help out with complicated factual matters that had, in any event, been adequately canvassed in the written pleadings. Consequently, those costs are not reimbursable as they are not necessarily incurred in these proceedings.

Findings of the Court

48 As regards the costs incurred by the applicant's CEO to attend the oral hearing in Luxembourg, the Court notes that, pursuant to Article 69(b) RoP, "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", shall be regarded as costs which are recoverable from the party ordered to pay the costs.

49 It follows from this provision that the travel and subsistence expenses subject to recovery are primarily those incurred by the agents, advisers and lawyers of the applicant. However, the same costs incurred by the applicant's officers may also be recoverable, but only to the extent their participation was necessary for the purposes of the oral hearing.

50 This may be the case if the presence of the applicant's representatives is required because the Court has requested it, or because the hearing is concerned with the taking of evidence relating to events experienced by the applicant, or because the course of such events is extremely complicated and is the main point at issue before the Court (see, to that effect, order of the ECJ in Case C-204/07 P-DEP *C.A.S.* v *Commission* [2009] ECR I-140*, paragraph 35). As these conditions are not met in the case at hand, the Court finds that they are not recoverable.

51 As regards the claims made for the travel and subsistence costs of the applicant's CEO for meetings in Oslo in July and August 2010 and March 2011, the applicant has not demonstrated that these meetings were objectively necessary for the purpose of the proceedings, nor why it was necessary to hold these meetings in Oslo (see, for comparison, *C.A.S.* v *Commission*, cited above, paragraph 32, and case law cited). Consequently, these costs are not recoverable under Article 69(b) RoP.

3. Other costs

52 The Court notes that the costs of EUR 1 616 for travel and subsistence of a witness to attend the Court hearing on 4 April 2011 and expenses covering shipping and copying at a total of EUR 3 307 and EUR 1 379 for the applicant's counsel's travel expenses and subsistence are not contested. Accordingly, the Court finds that these costs are recoverable under Article 69(b) RoP.

53 It follows from the foregoing that the costs which the Court has found to be recoverable, that is, lawyers' fees at a total of EUR 69 360, VAT at a total of EUR 17 340, travel and subsistence expenses for the applicant's counsel at a total of EUR 1 379, travel expenses and subsistence for one witness at a total of EUR 1 616, and expenses covering shipping and copying at a total of EUR 3 307, amount in total to a recoverable sum of EUR 93 002.

On those grounds,

THE COURT

hereby orders:

The total amount of the costs to be paid by the EFTA Surveillance Authority to Konkurrenten.no AS is fixed at EUR 93 002.

Carl Baudenbacher　　Per Christiansen　　Páll Hreinsson

Luxembourg, 9 November 2012

Gunnar Selvik
Registrar

Carl Baudenbacher
President