ORDER OF THE COURT
11 October 2017

(Taxation of costs – Recoverable costs – Default interest)

In Case E-14/11 COSTS,

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

applicants,

v

EFTA Surveillance Authority, represented by Catherine Howdle and Marlene Lie Hakkebo, members of its Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for the taxation of costs awarded by the Court in its judgment of 21 December 2012 in Case E-14/11 *Schenker North and Others* v *ESA* [2012] EFTA Ct. Rep. 1178,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Ása Ólafsdóttir (ad hoc), Judges,

Registrar: Gunnar Selvik,

makes the following

Order

I Facts, procedure and forms of order sought

1 By application lodged at the Court on 19 October 2011, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS ("the applicants" or collectively "DB Schenker") brought an action under the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for annulment of a decision of the EFTA Surveillance Authority ("ESA") of 16 August 2011 denying the applicants access to certain documents relating to ESA Case No 34250.

2 By an order of 29 February 2012, the President of the Court granted Posten Norge AS ("Posten Norge") leave to intervene in the proceedings in support of the form of order sought by ESA, namely to dismiss the application.

3 By judgment of 21 December 2012 in Case E-14/11 *Schenker North and Others* v *ESA* [2012] EFTA Ct. Rep. 1178 ("*DB Schenker I*"), the Court annulled the decision of 16 August 2011 insofar as it denied full or partial access to inspection documents in Case No 34250. Pursuant to Article 66(2) of the Rules of Procedure ("RoP"), the Court ordered ESA to bear its own costs and the costs of DB Schenker. Posten Norge was ordered to bear its own costs.

4 On 18 December 2014, DB Schenker served on ESA its cost claim of EUR 184 625, requesting payment by 12 January 2015.

5 In its reply, dated 12 January 2015, ESA acknowledged that it was to bear the applicants' costs. However, it considered the claim served to be in stark contrast to what the Court had previously recognised as necessary in other cases on the taxation of costs. ESA also considered the information submitted as lacking sufficient detail. Accordingly, ESA requested clarification and justification of the cost claim.

6 By a letter dated 30 October 2015, DB Schenker asked ESA to take a position on the claim by 16 November 2015. In particular, DB Schenker sought payment of the uncontested part of the cost claim.

7 On 9 November 2015, ESA sent a letter to Deutsche Bahn AG seeking clarification on certain bills, submitted by DB Schenker but originally addressed to Deutsche Bahn AG. The letter inquired, in particular, whether DB Schenker's legal counsel, Jon Midthjell, was instructed by Deutsche Bahn AG.

8 By a letter of 10 November 2015, Deutsche Bahn AG informed ESA that it had been and still was represented by Jon Midthjell in the matters addressed in the letter of 9 November 2015. Accordingly, the correspondence relative to these matters ought to be directed to its legal counsel.

9 By a letter dated 16 November 2015, ESA informed DB Schenker that it had ordered payment of EUR 3 563, corresponding to the shipping of documents (EUR 1 773) and travel costs (EUR 1 790). With regard to the remainder, ESA requested further documentation of the legal work and the payments made to the law firm. ESA requested DB Schenker to provide any such documentation by 2 December 2015.

10 On the same day, ESA addressed the bills submitted by DB Schenker in another letter to Deutsche Bahn AG. Deutsche Bahn AG replied by a letter dated 18 November 2015.

11 On 19 November 2015, DB Schenker requested full payment of its costs no later than 4 December 2015.

12 By a letter dated 4 December 2015, ESA proposed to pay a sum of EUR 34 240 (representing 80 billable hours at the rate of EUR 428) to settle the dispute.

13 DB Schenker replied by a letter dated 18 December 2015 requesting ESA to either pay the claim in full or pay the uncontested part while also disclosing the number of hours ESA's agents worked on the same case by comparison.

14 By a letter dated 18 January 2016, ESA repeated that it was not satisfied, "on the basis of the documentation submitted to date", that the costs in question had been incurred. ESA re-opened its offer for settlement made in its letter of 4 December 2015.

15 By a letter dated 22 January 2016, DB Schenker repeated its cost claim, which, after ESA's payment of EUR 3 563, amounted to a remaining balance of EUR 181 062.

16 By a letter dated 15 February 2016, ESA stated that its offer of 4 December 2015 had expired and that it saw "no basis for payment or further discussions on this matter".

17 In a letter dated 22 March 2016, DB Schenker repeated its request for payment of EUR 181 062, within a deadline of 22 April 2016.

18 In a letter of 11 April 2016, ESA replied that it continued to consider the information and documentation provided did not substantiate the remaining cost claim.

19 By an application lodged on 17 November 2016, registered at the Court on the same day, DB Schenker brought an action under Article 34 of the Statute of the Court and Article 70(1) of the Rules of Procedure ("RoP") for taxation of the costs awarded by the Court in the *DB Schenker I* judgment. DB Schenker requests that:

> *1. The total amount of the remaining costs to be paid by the EFTA Surveillance Authority to Schenker North AB, Schenker Privpak AB, and Schenker Privpak AS, is fixed at EUR 183 951.*

2. *That amount shall bear interest for late payment from the date on which the present order is served on the parties until the date of actual payment. The rate of interest to be applied shall be calculated on the basis of the rate applied by the European Central Bank to its principal refinancing operations in force on the first calendar day of the month in which the deadline falls, increased by three and a half percentage points.*

20 After having been granted an extension of the time limit to submit observations on the application, ESA submitted its observations on 9 January 2017, registered at the Court on the same day. ESA requests the Court to:

1. *Hold that the claimed lawyers' fees cannot be considered to be fees incurred in the course of proceedings in the sense of Article 69(b) of the Court's Rules of Procedure, and that consequently no further costs are payable;*

2. *In any event, dismiss as inadmissible the portion of the claim supported [sic] Invoice No 61338 to Deutsche Bahn AG Germany and reduce any costs awarded by a proportionate amount.*

21 In the alternative, if the Court were to consider the evidence provided as sufficient, ESA requests the Court to:

3. *Set the costs at a value to be determined by the Court but in any event not more than EUR 19 142.50 for Case E-14/11.*

22 In any event, ESA requests the Court to:

4. *Order the Applicants to pay ESA's costs in the present application.*

23 On 19 June 2017, the Court prescribed measures of organization of procedure pursuant to Article 49(1) and Article 49(3)(c) RoP. The Court requested the following from DB Schenker by 3 July 2017:

– *DB Schenker is requested to furnish the Court with a supplementary break down of all costs invoiced by counsel in relation to the present case.*

– *As regards, in particular, invoice No 61338 of 26 October 2012 (Annex A.1) to Deutsche Bahn AG: To what extent do the legal fees invoiced relate to Case E-14/11, or E-7/12, or any other matter?*

24 DB Schenker submitted its response on the 3 July 2017.

II Law and assessment of the case

Arguments of the parties

DB Schenker

25 DB Schenker submits that the parties are in disagreement over the amount of costs that are recoverable pursuant to Article 69(b) RoP. According to case law, 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. DB Schenker contends that the costs in the present case meet those criteria.

26 DB Schenker submits that *DB Schenker I* raised novel and complex legal issues on the rules of public access to documents in the context of a substantial body of evidence obtained by ESA during an unannounced antitrust inspection. Second, DB Schenker had a significant financial interest in the proceedings, as it had brought an action against Posten Norge before the Norwegian courts to recover damages for the losses it alleges to have suffered as result of Posten Norge's infringement of Article 54 EEA. Access to the documents held by ESA was sought in order to demonstrate the necessary causation of its claim. Third, the proceedings generated a significant amount of work, as illustrated by the substantial pleadings accompanied by numerous annexes, and by the Court's judgment itself.

27 As regards the preparation of the application, DB Schenker submits that this was the first application concerning ESA's Rules on Access to Documents 2008 ("RAD 2008") to come before the Court. The legal analysis required it to consider case law of the Court of Justice of the European Union ("ECJ") and extrapolate the findings to the legislation applicable in this case. DB Schenker states that it had to construct a broad application challenging almost all exceptions of the RAD 2008. Accordingly, DB Schenker claims 88.25 hours of legal assistance for the preparation of the application.

28 As regards the assessment of the defence, DB Schenker submits that ESA's broad defence led to a further analysis of the law that was invoked. DB Schenker asserts that it had to review and assess new documents, in addition to the defence itself. Thus, the applicants claim 37 hours of legal assistance for the assessment of the defence.

29 On the preparation of the reply, DB Schenker submits that this task was complex, both in formal and substantial matters. The reply included a table of cross references because the defence was structured differently from the application, and a detailed rebuttal on the legal and factual basis of the exceptions of RAD 2008. For this part of the case, DB Schenker claims 57.5 hours of legal assistance.

30 Turning to the assessment of the rejoinder and the analysis of the law invoked therein, DB Schenker submits that ESA expanded the issue further in its rejoinder including a detailed comparative analysis of access to documents rules governing

State aid, antitrust and merger control procedures. DB Schenker claims 35 hours of legal assistance for this part of the case.

31 As regards Posten Norge's application for leave to intervene, DB Schenker argues that the application was submitted one day after the expiry of the time limit. Accordingly, the need arose to examine case law on excusable errors. DB Schenker claims 20.25 hours of legal assistance for this part of the case.

32 DB Schenker further submits that Posten Norge lodged a 15-page statement of intervention extending and supplementing ESA's defence. This lead to an 18-page rebuttal from DB Schenker. DB Schenker claims 34.75 hours of legal assistance for the assessment of the statement in intervention from Posten Norge, analysis of the law invoked, and preparation of the response to contest the merits of the intervention.

33 As regards the first measure of organization of procedure under Article 49(4) RoP, which was proposed by DB Schenker in order to compel ESA to disclose relevant documents, DB Schenker notes that the Court prescribed the proposed measure. Consequently, ESA provided the requested documents. For this part of the case, the applicants claim 14.5 hours of legal assistance.

34 DB Schenker submits that it proposed two additional measures of organization of procedure which also related to the disclosure of documents by ESA. The Court rejected both requests. Nevertheless, ESA voluntarily disclosed one of the requested documents, the authentic version of RAD 2008. Therefore, DB Schenker claims that 18.75 hours of legal assistance were necessary for the preparation of this part of the case.

35 As regards the Commission's observations, DB Schenker maintains that the observations included detailed case law on Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), the statutory professional secrecy obligation in primary law and case law from the European Court of Human Rights, which had not previously been invoked. DB Schenker needed to assess the law invoked and claims that 32.25 hours of legal assistance for the assessment of the Commission's written observations and the analysis of law and pending cases invoked was necessary.

36 The 47-page Report for the Hearing required, according to DB Schenker, careful and detailed review, which led to a proposal on corrections and amendments. For this part of the case, the applicants claim 8.75 hours of legal assistance.

37 As regards the preparation for the hearing, DB Schenker submits that it included the review and assessment of a new judgment of the ECJ in *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, as well as the review of other cases pending before the General Court and invoked by ESA in its rejoinder. In addition, ESA disclosed new documents which required review. DB Schenker claims in total 47.25 hours for this part of the case, comprising:

- 7 hours for assessment and analysis of new case law,

- 3.75 hours for reviewing the pending cases,

- 3.5 hours for comparing the published with the newly disclosed authentic RAD 2008,

- 9.5 hours for assessment of newly disclosed documents,

- 15.25 hours for drafting the opening statement and

- 8.25 hours for preparing questions and answers.

38 Furthermore, DB Schenker was represented by counsel at the hearing, which required one working day. Accordingly, it claims 8 hours of legal assistance for this part of the case.

39 DB Schenker submits that it filed an application to reopen the oral procedure on 14 September 2012. This was the first time a party invoked Article 47 RoP before the Court. The reason for the application to reopen the oral procedure was that ESA had adopted new rules on the access to documents (“RAD 2012”). The Court rejected this application. Nevertheless, DB Schenker claims 18.5 hours of legal assistance for this part of the case.

40 As regards the preparation for the present application for taxation of costs, DB Schenker claims 7 hours of legal assistance.

41 In total, DB Schenker claims 427.75 hours of legal assistance for the purpose of the proceedings in *DB Schenker I*.

42 On the hourly rate, DB Schenker submits that it was represented by a single counsel at an average hourly rate of EUR 428. This rate does not include Norwegian VAT and the applicants’ claim does not extend to VAT.

43 On the basis of the above, DB Schenker claims in total EUR 183 077 in legal costs (427.75 hours at a rate of EUR 428), EUR 2 647 in shipping and copying costs and EUR 1 790 for expenses for travel accommodation and subsistence. This adds up to EUR 187 514.

44 DB Schenker acknowledges that ESA has already reimbursed its claims relating to travel and shipping costs by transferring the amount of EUR 3 563 before the present proceedings were lodged. This amount has, as a consequence, been subtracted from the total claim.

45 Thus, according to DB Schenker, the present cost claim amounts to EUR 183 951.

46 Finally, DB Schenker requests that the defendant be ordered to pay default interest from the date on which the order is served until the date of actual payment.

47 In response to the measures of organization of procedure prescribed by the Court, DB Schenker maintains that its legal costs in *DB Schenker I* amounted to NOK 1 725 150 which corresponds to 532 hours of work. The legal costs claimed in the present proceedings – excluding the 7 hours on the application for taxation of costs – correspond to EUR 180 188 or approximately NOK 1 366 865 at the material time. A breakdown of that work has been set out in the application.

48 Accordingly, DB Schenker submits that 111.25 hours of the work originally carried out in relation to the proceedings have not been included in the present claim. These 111.25 hours correspond mainly to internal strategic deliberations. Of these 111.25 hours, 53.75 hours concerned internal strategic deliberations with the company, 36.75 concerned deliberations related to legal actions that the company was considering or pursuing in other jurisdictions in order to align them and 20.75 hours concerned internal status and progress deliberations with the company.

49 DB Schenker further contends that it became apparent during the preparation of the response to the measures of organization of procedure prescribed by the Court that an invoice was missing from the annexes to the cost claim. The missing invoice was attached to the reply to the Court's measures of organization of procedure.

50 As regards, in particular, invoice No 61338 of 26 October 2012, DB Schenker states that this invoice relates merely in part to *DB Schenker I*, and only to the extent DB Schenker's counsel carried out work in relation to the application to reopen the oral procedure. This part corresponds to 18.5 hours of legal work.

ESA

51 ESA submits 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.

52 ESA submits that DB Schenker has not provided sufficient evidence to substantiate the cost claim. In particular, the costs claimed cannot be considered costs incurred in the sense of Article 69(b) RoP. The documentation of the legal fees demonstrates neither the amount of legal work related to the principal action nor does it bear a connection to the hours worked by counsel. The amount of the invoices does not match the amount claimed in the present case (reference is made to the orders in *Lagardère* v *Éditions Odile Jacob*, C-404/10 P-DEP, EU:C:2013:808; *Comunidad autónoma de La Rioja* v *Diputación Foral de Vizcaya and Others*, C-465/09 P-DEP to C–470/09 P–DEP, EU:C:2013:112; and *Le Levant 015 and Others* v *Commission*, T-34/02 DEP, EU:T:2010:559).

53 One of the invoices submitted by DB Schenker (Invoice No 61338, Annex 3 of Annex A.1) is, moreover, addressed to Deutsche Bahn AG, the parent company of the applicants. If invoices have been paid by a third party, there is a need for the payments to be traceable. No evidence establishing a link between these invoices

and payment has been provided. Moreover, Deutsche Bahn AG was neither a party to the principal action nor is it a party to the present proceedings (reference is made to the order in *Le Levant 015 and Others* v *Commission*, cited above).

54 ESA submits that the breakdown of hours in the cost claim was not substantiated by any other evidence. It also appears that this breakdown of hours was not made contemporaneously as a part of the billing of the applicants, but *ex post facto* in conjunction with the claims for costs. This is an assertion, not proof, that the costs were incurred.

55 In addition, ESA sustains that the calculation of the exchange rates from NOK to EUR is not sufficiently precise. The exchange rate was calculated on the basis of average monthly rates for the months when the applicants claimed that the legal work took place, whereas ESA contends that such conversion rates should have been set out in relation to the billing dates. A precise numerical value for this conversion should also have been presented.

56 ESA furthermore argues that some of the costs claimed were attributable to the legal counsel, rather than to the applicants. The counsel will bill his clients for these costs. The fact that invoices were sent from the counsel to Deutsche Bahn AG indicates that he had already been reimbursed for the expenses by Deutsche Bahn AG, and hence that these costs should not be paid by ESA.

57 In the event the Court were to find that DB Schenker provided sufficient evidence for the costs incurred, ESA submits that the claimed costs are, in any event, grossly inflated. In this regard, ESA contests both the hourly rate and the number of hours claimed.

58 With regard to the purpose and nature of the proceedings, ESA submits that even though the principal action was the first with regard to RAD 2008, there was already comprehensive case law available in the context of Regulation (EC) No 1049/2001, which is similar to RAD 2008. Furthermore, cases concerning public access to documents do not hold an economic interest as such. The amount of legal fees should be assessed accordingly.

59 ESA submits that the hourly rate should be assessed at a maximum of EUR 403, which is the hourly rate previously accepted by the Court (reference is made to Joined Cases E-4/12 and E-5/12 COSTS *ESA* v *Risdal Touring and Konkurrenten.no* [2014] EFTA Ct. Rep. 934). According to the General Court, such an hourly rate already greatly exceeds the appropriate remuneration even for a particularly experienced professional capable of working very quickly and efficiently (reference is made to the order in *Le Levant 015 and Others* v *Commission*, cited above, paragraph 54 and case law cited). In addition, the hours claimed were not necessarily incurred for the purpose of the proceedings. Moreover, a high hourly rate requires a strict assessment of the number of hours charged (reference is made to the order in *Al Shanfari* v *Council and Commission*, T-121/09 DEP, EU:T:2012:607, paragraph 40).

60 ESA submits that the claimed costs for 88.25 hours of legal work for the preparation of the application are excessive. The contested letter, which was the subject of the application, contained merely five pages, and amounted to only 19 pages including annexes. It should be taken into account that the counsel is an expert in the field. Moreover, the counsel had already represented DB Schenker during proceedings prior to the relevant action, and was thus familiar with the case. Accordingly, no more than 10 hours of legal assistance were necessary for this part of the case.

61 On the assessment of the defence, for which the applicants claim 37 hours of legal assistance, ESA submits that the counsel should have been aware of the legal and factual background at this stage of the proceedings. As it is likely that the counsel already reviewed the case law for a possible defence while drafting the application, there was no need to review this case law again. The defence further relied on principles of EEA law well known even to an inexperienced practitioner of EEA law. Consequently, no more than 5 hours of legal assistance were necessary for this part of the case.

62 ESA notes that, according to Article 37 RoP, a reply cannot contain any new pleas in law. An additional 57.5 hours for drafting the reply is excessive, as DB Schenker already claimed 37 hours for assessing the defence. No more than 8 hours of legal assistance were necessary for this part of the case.

63 As regards the assessment of the rejoinder, ESA notes that Article 37 RoP equally applies to the rejoinder. Consequently, and contrary to the view of DB Schenker, ESA did not expand the scope of the case in its rejoinder; otherwise, the Court would have had to dismiss it according to Article 37 RoP. The rejoinder merely addressed the arguments put forward in the reply and outlined new developments. No more than 3 hours of legal assistance were necessary for this part of the case.

64 The application for leave to intervene contained no more than four pages and the annex contained only documents already known to DB Schenker. ESA considers that no more than 2 hours of legal assistance were necessary for this part of the case.

65 ESA submits that the statement of the intervener did not contain new legal arguments, as the intervener must accept the case as he finds it at the time of the intervention according to Article 89(4) RoP. Therefore, a substantive rebuttal was not necessary and no more than 2 hours of legal assistance were necessary for this part of the case.

66 The preparation of the first application for a measure of organization of procedure was limited to drafting a request for the disclosure of documents. Accordingly, no more than 2 hours of legal assistance were necessary for this part of the case.

67 The Commission's observations supported ESA's defence. The counsel should have been familiar with the case law cited, and, thus, no more than 3 hours of legal assistance were necessary for this part of the case.

68 ESA submits that the Court rejected both the second and the third application for measures of organization of procedure. Therefore, the costs cannot be seen as necessarily incurred. These costs are therefore not recoverable.

69 ESA submits that the Court previously held that a total of 3 hours were appropriate for the review of the Report for the Hearing and the preparation of a response (reference is made to *ESA* v *Risdal Touring and Konkurrenten.no*, cited above). The Report for the Hearing was even shorter in the present principal action than in *ESA* v *Risdal Touring and Konkurrenten.no*; accordingly, no more than 2.5 hours of legal assistance were necessary.

70 As regards the preparation of the oral hearing and the analysis of the new evidence and information submitted by ESA, ESA contends that the claimed 47.25 hours for this part of the case are excessive. The only new development concerned the judgment in *Commission* v *EnBW,* cited above. The comparison of the two versions of ESA's Rules on access to documents was not necessary and, in any event, could have been done electronically. No more than 8 hours of legal assistance were necessary for this part of the case.

71 As regards the participation in the hearing, ESA maintains that the amount of compensation should be set according to its length. As the hearing only lasted for 2 hours, ESA considers no more than 2 hours of legal assistance necessary for this part of the case.

72 ESA submits that the Court rejected DB Schenker's application to reopen the oral procedure. Therefore, the costs in relation to that application cannot be seen as necessarily incurred and are not recoverable.

73 In conclusion, ESA submits that 47.5 hours of legal assistance were necessarily incurred. Based on an hourly rate of EUR 403, the total recoverable costs are therefore EUR 19 142.50.

74 ESA further notes that it has already paid EUR 3 563 in travel, shipping and copying costs. There exists, however, no evidence that these invoices have been paid by the applicants or by Deutsche Bahn AG. Accordingly, this amount should be taken off the global sum for costs to prevent double payment.

75 As regards DB Schenker's claim for default interest, ESA submits that DB Schenker unjustly demands such default interest. This claim should, accordingly be rejected. After a costs order is rendered by the Court against ESA, the corresponding amount will be paid to DB Schenker as soon as practically possible.

76 Finally, ESA notes that the present case may be linked to another case pending before the Court, E-7/12 COSTS, which concerns the same parties and relates to the judgment in Case E-7/12 *Schenker North and Others* v *ESA* [2012] EFTA Ct. Rep. 356 ("*DB Schenker II*"). In both cases (*DB Schenker I* and *DB Schenker II*) the same legal counsel represented DB Schenker. There may be an overlap in documentation because one of the invoices (Invoice No 61338, Annex 3 to the

application) is used to support both cost claims. That invoice does not indicate which part of the legal fees belongs to which case. Accordingly, there is the possibility of double compensation. Both cases dealt with the rules on access to documents. This should be taken into account when considering the hours worked in order to avoid double compensation.

Findings of the Court

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

78 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. It follows 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 *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 111 and case-law cited).

79 As regards, first, ESA's argument that there is no evidence that the costs have actually been incurred, the Court notes that evidence for payment need not be presented (compare the order in *Kronofrance* v *Germany and Others,* C-75/05 P-DEP and C-80/05 P-DEP, EU:C:2013:458, paragraph 30).

80 Second, ESA argues that, since some of the invoices are directed to Deutsche Bahn AG, which is neither a party nor an intervener in the case, the costs have not been incurred by the applicants, and are hence not recoverable.

81 In this regard, the Court recalls that costs covered by a third party are recoverable if they were essential for the proceedings and necessarily incurred by the applicants for that purpose (compare the order in *Fries Guggenheim* v *Cedefop*, T-373/04 DEP, EU:T:2009:43, paragraph 24). As such, the fact that some of the invoices for the costs that the applicants seek to recover were directed to Deutsche Bahn AG is not relevant.

82 Third, ESA argues that the applicants have refused to present any means of evidence for the costs. In this regard, ESA contends more generally that the documentation of the legal fees fails to demonstrate the amount of legal work carried out. The breakdown of the hours billed was, moreover, not made contemporaneously but only *ex post*.

83 The Court notes that the only requirement in this regard is that evidence presented must substantiate the claims made by the applicant and be sufficiently precise and detailed so as to enable assessment by the Court (compare *Lagardère* v *Éditions Odile Jacob*, cited above, paragraphs 31 to 34, as well as the order in *Tetra Laval* v *Commission,* T-5/02 DEP and T-80/02 DEP, EU:T:2011:129, paragraphs 69 and

70). There are no further requirements as to the manner in which the evidence shall be presented. In particular, there are no conditions as to when the account of the hours should have been drafted.

84 In the case at issue, the applicants have submitted a number of invoices relating to the legal costs billed to them. The applicants have furthermore provided a breakdown of the hours worked. Following the Court's measures of organization of procedure, they further supplemented the relevant information. The evidence submitted is thus, in principle, sufficient to substantiate the claims made and lacks neither such an appropriate level of detail nor such a level of precision which would prevent the Court from carrying out its assessment.

85 Fourth, ESA argues that the invoices for legal costs presented cannot be traced to the particular case, since they partly overlap with invoices presented in the cost case relating to Case E-7/12 *DB Schenker* v *ESA* [2013] EFTA Ct. Rep. 356 ("*DB Schenker II*).

86 In this regard, the Court notes that the hearing in *DB Schenker I* was held on 5 June 2012, and the application in *DB Schenker II* was lodged at the Court's Registry on 9 July 2012. DB Schenker's request to reopen the oral hearing in *DB Schenker I* was rejected by the Court. The overlap between those two cases is thus only marginal.

87 The overlap between the two cases was, moreover, clarified and accounted for by DB Schenker in their application and in their response to the measures of organization of procedure. The information provided in the present application for taxation of costs is also consistent with the information provided for in DB Schenker's application for taxation of costs in the context of Case E-7/12 COSTS (see Case E-7/12 COSTS *Schenker North and Others* v *ESA*, order of 11 October 2017, not yet reported, paragraph 78).

88 Thus, the mere fact that one of the invoices presented concerns two cases, which overlap in time, cannot lead to the rejection of the evidence provided, the cost claim itself or parts thereof.

89 Fifth, as regards ESA's argument that some of the expenses claimed were attributable to the legal counsel rather than the applicants, the Court recalls that it has routinely considered such expenses as necessarily incurred by parties to the proceedings before it (compare, for example, *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraphs 137 and 150). Thus, ESA's argument does not provide a sufficient basis for rejecting that part of the claim.

90 Finally, ESA contends that the manner in which the applicants have calculated the exchange rate of NOK into EUR is imprecise. The applicants have calculated the exchange rate on the average of the official daily exchange rates of the Norwegian Central Bank during the time when the work was carried out. This method of calculation has already been accepted in previous cases (see *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 121). Accordingly, this part of

ESA's submissions does not merit the rejection of the present application for taxation of costs.

91 Considering all of the above, there is no reason to reject the cost claim or reduce it on the basis that it includes costs that have not been incurred for the purpose of the proceedings before the Court.

92 For the sake of completeness, the Court recalls that it does not, when ruling on an application for the taxation of costs, tax the amount the party entitled to recovery actually paid. It determines only the amount up to which this party may recover costs, having regard to, in particular, the nature and complexity of the principal action.

93 The ability to assess the value of the work carried out is, nevertheless, dependent on the accuracy of the information provided (see Case E-14/10 COSTS *Konkurrenten.no* v *ESA* [2012] EFTA Ct. Rep. 900, paragraph 27 and case law cited). It is, in particular, not for the Court to search for and identify among the documents those that could make up for the lack of precise information and detailed explanations in the application itself (compare the order in *Tetra Laval* v *Commission,* cited above, paragraph 70). Thus, the quality of the evidence submitted will induce the extent to which the Court is enabled to carry out its assessment of the accuracy of the individual heads of the applicants' claim.

94 The amount of costs recoverable in the present case must, accordingly, be assessed in light of these considerations.

95 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 *ESA* v *Risdal Touring* and *Konkurrenten.no*, cited above, paragraph 112 and case law cited).

96 In that regard, the Court notes that in cases where parties seek access to documents, their financial interest in the proceedings is unlikely to be a determinative factor in the Court's assessment as the value of the information contained within the relevant document is both uncertain and unknown (see *ESA* v *Risdal Touring* and *Konkurrenten.no*, cited above, paragraph 113).

97 *DB Schenker I* was, nevertheless, the first access to documents case to come before the Court. That case involved the interpretation of RAD 2008 which, while based on Regulation (EC) No 1049/2001, bears certain material differences. It was the first time the Court reviewed these rules in substance. The questions raised were new and particularly complex. In its judgment, the Court assessed the legal rules of RAD 2008 in detail, highlighting the importance of the principles of transparency and good administration.

98 DB Schenker claims an hourly rate of EUR 428. This rate presupposes that the work was carried out by an experienced lawyer in the relevant field. The Court finds that rate justified.

99 The fact that remuneration at these rates is taken into account requires in return a strict assessment of the total numbers of hours' work essential for the purposes of the proceedings in question (see *ESA* v *Risdal Touring* and *Konkurrenten.no*, cited above, paragraph 123 and case law cited).

100 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, *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 124 and case law cited).

101 In this regard, the Court notes, at the outset, that the sums displayed in the bills submitted by DB Schenker do not correspond to the costs claimed. This can, to an extent, be explained by the overlap between the different cases that were prepared by the same legal counsel for the same clients. The bills are, nevertheless, less suitable to objectively trace the number of hours worked by the legal counsel in *DB Schenker I*.

102 It is settled case law that the Court must base its assessment strictly on what can be considered as objectively necessary for the purpose of the proceedings before the Court, while having particular regard to the complexity of the case as a whole and the scope of each individual stage of the proceedings.

103 In this regard, the Court notes that the main proceedings generated a significant amount of work for the applicants' counsel. The legal proceedings before the Court involved two sets of statements being exchanged; observations concerning the intervention; observations of the Commission; an oral hearing, as well as measures of organization of procedure and applications for such measures; and an application for the reopening of the oral hearing.

104 Nevertheless, it must be recalled that where the lawyer has already assisted the party during the proceedings or procedures prior to the relevant action, it is necessary to have regard to the fact that he is aware of matters relevant to the action. This is likely to have facilitated his work and reduced the preparation time required for the judicial proceedings (see *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 114).

105 As regards the preparation of the application for annulment, DB Schenker claims 88.25 hours of legal assistance. ESA submits that 10 hours would be sufficient. The Court finds that 60 hours of legal assistance are appropriate taking into account

that, on the one hand, the application raised new legal issues and that, on the other hand, the counsel had already represented the applicants in the pre-litigation phase.

106 As regards the assessment of the defence and the preparation of the reply, DB Schenker claims in total 94.5 hours of legal assistance. ESA submits that 13 hours would be sufficient. The counsel representing DB Schenker was already familiar with the case at this stage of the proceedings. The Court finds that another 60 hours of legal assistance are appropriate considering the scope of the defence.

107 As regards the assessment of the rejoinder, DB Schenker claims 35 hours of legal assistance. ESA submits that 3 hours would be sufficient. The Court finds that 10 hours of legal assistance were necessary to assess the rejoinder, considering that the rejoinder was the last document exchanged between the parties before the hearing and that the legal counsel could have been expected to have a thorough understanding of the case at this point.

108 As regards the assessment of the application for leave to intervene from Posten Norge, the preparation of a response, the assessment of the statement of Posten Norge and the corresponding response, DB Schenker claims 55 hours of legal assistance in total. ESA submits that 4 hours would be sufficient. The Court finds that 20 hours are appropriate considering, in particular, the fact that Posten Norge intervened in support of ESA, which entails that DB Schenker's legal counsel was already aware of some of the arguments raised by the intervention.

109 As regards the preparation of the first application for measures of organization of procedure, DB Schenker claims 14.5 hours of legal assistance. ESA submits that 2 hours would be sufficient. The Court finds that 10 hours of legal assistance were necessary since the Court prescribed the proposed measure.

110 As regards the assessment of the Commission's written observations, DB Schenker claims 32.25 hours of legal assistance. ESA submits that 3 hours would be sufficient. The Court finds that 10 hours of legal assistance were necessary to assess the arguments which were invoked by the Commission, which differed from those already raised by ESA.

111 As regards the preparation of the second and third application for measures of organization of procedure, DB Schenker claims 18.75 hours of legal assistance. The Court notes that, even though both applications were unsuccessful, some of the documents referred to in the applications were submitted by ESA of its own motion. Therefore, the Court finds that 7 hours of legal assistance are appropriate.

112 As regards the preparation for the oral hearing, DB Schenker claims in total 47.25 hours of legal assistance. ESA submits that 8 hours would be sufficient. The Court finds that 20 hours were necessary to review the relevant case law and to prepare the opening statement, having regard to the fact that DB Schenker claimed already a substantial number of hours of legal assistance for the review of the rejoinder, as well as for the review of the observations submitted by the intervener and the Commission, and for the review of the Report for the Hearing.

113 As regards the review of the Report for the Hearing, DB Schenker claims 8.75 hours of legal assistance. ESA submits that 2.5 hours would be sufficient. The Court finds that 6 hours of legal assistance were necessary to read the Report and to prepare comments.

114 As regards the oral hearing, DB Schenker claims 8 hours of legal assistance whereas ESA submits that 2 hours would be sufficient. The Court finds that 8 hours are appropriate.

115 As regards the application for a reopening of the oral procedure, DB Schenker claims 18.5 hours of legal assistance. The Court recalls that the reopening of the oral procedure was rejected. The Court nevertheless finds that 5 hours of legal assistance were necessary.

116 As regards the preparation of the application for taxation of costs, DB Schenker claims 7 hours of legal assistance. The Court finds that 7 hours are appropriate.

117 Consequently, the Court finds that a total of 223 hours of legal fees, which equals EUR 95 444, were necessarily incurred for the purpose of the proceedings before the Court.

118 As regards the counsel's disbursements, the Court notes that ESA accepted the travel and shipment costs and ordered a corresponding payment.

119 As regards the remaining costs claimed by DB Schenker, the Court notes that the invoices produced by the applicants do not contain specific information. Thus, it is impossible to determine to what extent these costs related to *DB Schenker I* or were, indeed, already previously compensated. In those circumstances, the Court finds that the remaining counsel's disbursements should be assessed, as a fixed sum, at EUR 500 (compare, to that effect, the order in *Tetra Laval* v *Commission*, C-12/03 P-DEP and C-13/03 P-DEP, EU:C:2010:280, paragraphs 65 to 67).

Total amount of recoverable costs

120 It follows from the foregoing that the Court finds it justified to order ESA to meet the lawyer's fees of DB Schenker at a total of EUR 95 444 and reimburse the expenses of EUR 500.

121 As a consequence, the Court holds that the total remaining costs to be paid by ESA to the applicants are fixed at EUR 95 944.

Default Interest

122 The obligation to pay default interest and the fixing of the applicable rate fall within the jurisdiction of the Court under Article 70(1) RoP taking into account the principle of procedural homogeneity. Article 70(1) RoP corresponds in substance to Article 74(1) of the Rules of Procedure of the ECJ.

123 Therefore, default interest may be granted for the period between the date of notification of the order of taxation of costs and the date of actual recovery of the costs (compare, *inter alia*, the orders in *Marcuccio* v *Commission*, T-126/11 P-DEP, EU:T:2014:171, paragraph 52; and *Empresa Nacional de Urânio* v *Commission*, C-2/94 SA, EU:C:1995:301, paragraph 10).

124 The Court must, in the absence of EEA law provisions laying down interest rates, make an unfettered assessment to determine a reasonable and proportionate default interest rate.

125 As the costs order allocates the amount in Euros, the Court may refer, in order to determine the base rate, to the interest rate applied by the European Central Bank to its principal refinancing operations in force on the first calendar day of the month in which payment is due.

126 The Court thus finds that default interest shall be due on the amount fixed by the Court in the present order from the date of notification of the order until the date of payment. The applicable interest rate shall be calculated on the basis of the interest rate applied by the European Central Bank to its principal refinancing operations in force on the first calendar day of the month in which payment is due, increased by three and a half percentage points.

On those grounds,

THE COURT

hereby orders:

1. **The total remaining costs to be paid by ESA to the applicants are fixed at EUR 95 944.**

2. **Default interest shall be due on the amount from the date of notification of the present order until the date of payment; the applicable interest rate shall be calculated on the basis of the interest rate applied by the European Central Bank to its principal refinancing operations in force on the first calendar day of the month in which payment is due, increased by three and a half percentage points.**

Carl Baudenbacher Per Christiansen Ása Ólafsdóttir

Luxembourg, 11 October 2017

Gunnar Selvik
Registrar

Carl Baudenbacher
President