



ORDER OF THE COURT

28 August 2014

(Taxation of costs – Recoverable costs – VAT)

In Case E-15/10 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

Posten Norge AS, established in Oslo (Norway), represented by Beret Sundet, advocate,

defendant,

APPLICATION for the taxation of costs recoverable following the judgment of the Court of 18 April 2012 in Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep. 246,

THE COURT,

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

Registrar: Gunnar Selvik,

makes the following

Order

I Facts, procedure and forms of order sought

- 1 By application lodged at the Court on 14 September 2010, Posten Norge AS (“Norway Post”) 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”) Decision No 322/10/COL of 14 July 2010 relating to a proceeding under Article 54 of the EEA Agreement (Case No 34250 Norway Post / Privpak) or, in the alternative, annulment or reduction of the fine imposed on the applicant in that decision.
- 2 By an order of 15 February 2011, the President of the Court granted Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (“the applicants” or collectively “DB Schenker”) leave to intervene in the proceedings in support of the form of order sought by ESA.
- 3 By judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep. 246, the Court set the fine imposed by Article 2 of Decision No 322/10/COL of 14 July 2010 relating to a proceeding under Article 54 EEA (Case No 34250 Norway Post / Privpak) on Posten Norge AS at EUR 11 112 000 and dismissed the remainder of the application. Pursuant to Article 66(3) of the Rules of Procedure (“RoP”), the Court ordered Norway Post to bear its own costs and to pay 75% of ESA’s costs and the costs of DB Schenker. ESA was ordered to bear the remainder of its own costs.
- 4 On 16 January 2013, DB Schenker served its cost claim of EUR 423 837 on Norway Post requesting payment by 30 January 2013.
- 5 On 17 January 2013, Norway Post’s counsel confirmed receipt of the claim.
- 6 On 1 February 2013, DB Schenker notified Norway Post that it had failed to respond to the claim and asked it to take a position within three additional working days to avoid legal action. The same day, Norway Post’s counsel confirmed receipt of the letter by e-mail.
- 7 On 5 February 2013, Norway Post wrote to DB Schenker stating that it was now being represented by its in-house counsel. Norway Post stated that it disputed DB Schenker’s claim for recoverable costs of EUR 423 837, considering the claim “unfounded and excessive”. Norway Post indicated that it considered “an amount of EUR 200.000 incl. VAT will more than cover your client’s recoverable costs, and that a claim of costs exceeding EUR 200.000 cannot, in any event, be considered ‘necessarily incurred’ by your client for its role in the proceedings in Case E-15/10...”. Norway Post stated that it would pay EUR 200 000 to DB Schenker’s client account that day. It indicated that it thereby considered DB Schenker’s claim for costs to be settled.

- 8 On 6 February 2013, DB Schenker notified Norway Post that it had failed to pay the claim in full, stating that Norway Post's letter did not provide any legal justification for the refusal to pay the balance.
- 9 On 13 February 2013, Norway Post wrote to DB Schenker informing it that Norway Post had changed counsel and was no longer represented by its in-house counsel in the matter. Norway Post reiterated that it regarded the cost claim as excessive and unfounded.
- 10 On 20 February 2013, DB Schenker wrote to Norway Post's new counsel. DB Schenker stated that Norway Post had not disputed any specific part of its breakdown of costs but was simply disputing the total time spent on the case. In addition, it emphasised that Norway Post had refused to provide a comparison of its own costs. DB Schenker invited Norway Post to reconsider its position by 1 March 2013 to avoid the matter being brought before the Court.
- 11 On 1 March 2013, Norway Post replied to DB Schenker stating that it "considers that a claim of costs exceeding EUR 200.000,00 cannot be regarded as 'necessarily incurred' for your client's role in the proceedings in Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*. Posten Norge AS therefore maintains that your client's claim in the total amount of EUR 423,837.00 is unfounded and excessive."
- 12 As the parties have not been able to agree on the costs to be recovered, DB Schenker lodged an application at the Registry of the Court on 28 October 2013, pursuant to Article 70(1) RoP, where it applied for taxation of the costs it may recover from Norway Post. In the application, the Court is requested to fix the total amount of those costs at EUR 426 888.
- 13 By observations lodged at the Registry of the Court on 4 December 2013, Norway Post requested the Court to fix the total amount of the said costs at no more than EUR 200 000.
- 14 The applicants claim that they have incurred the following costs:
 - Legal costs before the Court of EUR 236 220
 - Forensic economist costs before the Court of EUR 128 350
 - Norwegian VAT (25 percent) of EUR 59 055 on legal costs
 - Travel costs for the court hearing of EUR 1 928
 - Shipment of court pleadings of EUR 1 335.
- 15 On 23 May 2014, the Court prescribed measures of organization of procedure pursuant to Article 49(1) and Article 49(3)(a) RoP concerning the ability or otherwise of DB Schenker to recover the cost of VAT paid on legal fees in the present case. The Court requested DB Schenker to answer the following

questions, and provide such supplementary evidence as might be necessary on this point:

- Are Schenker North AB, Schenker Privpak AB and Schenker Privpak AS accountable for VAT (i.e. registered for VAT purposes) and so entitled to recover, from the tax authorities, VAT paid on goods and services purchased by them?
- It appears as though in the present case Schenker North AB was the undertaking invoiced for DB Schenker's legal fees. Were those legal fees borne solely by Schenker North AB or if not, what proportion was borne by Schenker North AB, Schenker Privpak AB and Schenker Privpak AS respectively?
- Are Schenker North AB and Schenker Privpak AB able to recover the VAT paid on the legal fees at issue from the Norwegian tax authorities or any other tax authority?

- 16 A deadline was set for 3 June 2014. DB Schenker submitted its response on 2 June 2014.

II Law and assessment of the case

Arguments of the parties

DB Schenker

- 17 DB Schenker submits that the parties are in disagreement over the amount of legal and forensic economist costs that are recoverable pursuant to Article 69(b) RoP. DB Schenker asserts that, according to the 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 submits that its costs meet those criteria.
- 18 DB Schenker submits that it has not been contested in the correspondence between that parties that the items on the cost claim have been incurred for the purpose of the proceedings. The dispute has been limited to whether or not the costs were necessary to that end. The only exception to that is the claim of an additional 6.25 hours of legal work for the preparation of the present application.
- 19 DB Schenker submits that the legal and forensic economist costs were necessary for the purposes of the proceedings, having regard to the facts of the case and 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 interest which the parties had in the proceedings. For interveners, it follows that it must be considered to what extent they made an independent contribution to the proceedings, or merely duplicated work that had been undertaken by the party which they supported.

- 20 Excluding its own submissions in Case E-15/10, DB Schenker submits that in total there were 721 pages of pleadings and 268 annexes which totalled 4241 pages. Moreover, this was a significant case as it was the first of its kind to come before the Court. DB Schenker stresses that Norway Post successfully argued, without it being contested by DB Schenker, that Case E-15/10 had to be tried against the highest standard of proof and that the applicable standard of review required that the Court try all factual and legal aspects of the case. As a necessary consequence, Norway Post must accept that the nature of the proceedings inherently demanded substantial efforts on behalf of the intervener to contest its case.
- 21 DB Schenker notes that it had a substantial financial interest in the proceedings on account of its follow-on action before the Norwegian national courts to recover damages for the losses it suffered as result of Norway Post's infringement of Article 54 EEA. In addition, DB Schenker submits that Norway Post has not specified what part of its case duplicated that of ESA. DB Schenker stresses that ESA, in its comments on the statement in intervention, asserted that DB Schenker had avoided unnecessary repetition of arguments already advanced to the Court by ESA. Moreover, ESA acknowledged that DB Schenker had "further to the material deficits already pointed out by [ESA] identified significant shortcomings in the methodology and argumentation of those documents".
- 22 DB Schenker submits therefore that it is entitled to recover its legal and forensic economist costs on the basis of the extensive and complex set of facts that governed the case, taking into account in particular the extraordinary amount of work generated by the proceedings, the demanding nature and purpose of the proceedings which required the highest standard of proof and a full judicial review of all parts of the case, the substantial financial interests involved, and the fact that ESA expressed its satisfaction concerning DB Schenker's independent contribution to the proceedings and avoidance of unnecessary repetitions.

Preparation of the application for leave to intervene

- 23 This was the first application of its kind to come before the Court and there was no case law on the point. The legal analysis required had to take account of the fact that Norway Post might attempt to challenge the intervention, which indeed it set out to do.
- 24 DB Schenker claims 22.25 hours of legal assistance for this part of the case.

Preparation of the statement in intervention including legal, factual and forensic analysis of the extensive pleadings and evidence submitted and drafting of the statement in intervention

- 25 DB Schenker was granted an extended eight-week period to prepare the intervention which, when submitted, was 89 pages in length. The work was extremely complex. DB Schenker submits as an illustration that the mere

assessment as to whether the methodology applied in the eight expert reports conformed to the Commission's best practice criteria for the submission of economic evidence and data collection required the completion of 56 tests.

- 26 DB Schenker claims 346.75 hours of legal assistance and 360.50 hours of forensic economist assistance for this part of the case.

Preparation of the application for measures of organization of procedure

- 27 In its reply, Norway Post submitted a wide-ranging human rights violation plea, too late for the Commission or any of the EU/EFTA States to respond in their written observations. The implications of this plea were potentially fundamental to the functioning of the Court and, given the highly unusual circumstances, DB Schenker asked the Court to consider several alternative reasons under Article 88(2) RoP, which ESA had not pursued in its preceding request to the Court, to review Norway Post's new plea on its own initiative even though the plea might otherwise have been considered inadmissible. This was to ensure that the plea was properly addressed by the Court thereby making it difficult for Norway Post to advance the same plea before the national court hearing the follow-on action on the basis that the plea had not been discussed by the Court.

- 28 DB Schenker claims 29.25 hours of assistance from counsel for this part of the case.

Preparations for the oral hearing, including legal, factual and forensic analysis of Norway Post's response to the statement in intervention, legal and factual analysis of ESA's rejoinder, factual analysis of the new evidence that the Court required from ESA, and the drafting of rebuttal points for the oral hearing in preparation of an expected in-depth discussion of Norway Post's substantive objections against the statement in intervention

- 29 DB Schenker observes that Norway Post's comments on its statement in intervention were 54 pages in length.
- 30 This meant that DB Schenker had to make a legal, factual and forensic assessment of the nature, content and reach of Norway Post's extensive rebuttals, in order to be fully prepared to discuss any part of those contentious points at the hearing. The extent of that work can best be illustrated by the detailed 51 pages of rebuttal points that DB Schenker prepared in advance of the hearing. In addition, less than one week before the hearing, Norway Post decided to request an unusually limited amount of time to present its case, both in comparison with similar cases before the General Court, and having regard to what could have been expected given the extensive pleadings in the present case.
- 31 In addition, DB Schenker also had to assess ESA's 116-page rejoinder and the relevance and impact of the 352 pages of new evidence that the Court requested be brought into the proceedings on 2 September 2011.

- 32 DB Schenker claims 179.75 hours of legal assistance and 122.50 hours of assistance from its forensic economists for this part of the case.

Review of the hearing report

- 33 The 54-page Report for the Hearing required careful and detailed review. The necessity of that work is underscored by the complexity of the case.
- 34 DB Schenker claims 12.5 hours of legal assistance for this part of the case.

Oral hearing

- 35 DB Schenker had the right to be represented by counsel at the hearing which required a day.
- 36 DB Schenker claims 8 hours of legal assistance for this part of the case.

Preparation of the application for taxation of costs

- 37 DB Schenker claims 6.25 hours of legal assistance for the preparation of the present application.
- 38 The average hourly rate charged has been EUR 390.60 for counsel and EUR 265.70 for the forensic economists. In addition, the legal costs were subject to Norwegian VAT at 25%. This equates to “a rounded amount” of EUR 236 220 in legal costs, EUR 128 350 in forensic economist costs, and EUR 59 055 in Norwegian VAT.

Travel costs

- 39 DB Schenker seeks to recover EUR 1 928 in travel costs pursuant to Article 69(b) RoP. This includes the costs of counsel making a round trip between Oslo and Luxembourg (EUR 1 503) and one night’s accommodation in Luxembourg (EUR 425) for the hearing.

Shipment costs

- 40 DB Schenker seeks to recover EUR 1 335 in shipment costs pursuant to Article 69(b) RoP. This includes the costs of shipments made on 3 January 2011 for the application for leave to intervene (EUR 439), on 26 April 2011 for the statement in intervention (EUR 752) and on 16 June 2011 for the application for measures of organization of procedure (EUR 144).

Measures of organization of procedure

- 41 In response to the measures of organization of procedure prescribed by the Court, DB Schenker informed the Court that Schenker North AB and Schenker Privpak AB are registered as Swedish VAT companies and Schenker Privpak AS is registered as a Norwegian VAT company. DB Schenker submits that Schenker

North AB was the undertaking invoiced for all the costs in the claim before the Court and that these costs were borne solely by Schenker North AB. DB Schenker submits that Schenker North AB, which was the only undertaking to be invoiced and to bear all the costs in the claim that the Court is considering in the present case, is not entitled to recover VAT from the Norwegian tax authorities or any other tax authority. First, pursuant to Section 10(1)(a) of the Norwegian VAT Act (“NVA”) a recovery claim can only be filed for Norwegian services acquired by a foreign undertaking for the use in its business abroad. This has also been confirmed as settled law by the national tax authorities in their VAT enforcement guidelines. Consequently, in the present case, as the Norwegian services were acquired for the use of the business in Norway, Schenker North AB would not be entitled to recover VAT under Section 10(1)(a) NVA.

- 42 Second, DB Schenker continues, pursuant to Section 10(1)(c) NVA, a recovery claim can only be filed for VAT that would have been deductible in Norway. Where VAT has been applied erroneously, the established practice of the national tax authorities is to consider such VAT as non-deductible, and hence, not recoverable for a foreign undertaking. It is not settled law to what extent work provided by a Norwegian law firm in relation to legal proceedings before an international court such as the EFTA Court is subject to Norwegian VAT. A judgment by the Norwegian Supreme Court of 11 October 2012 (and thus after the legal proceedings in the present case ended) appears to hold *a contrario* that work carried out in relation to legal proceedings before a foreign court may fall outside of the NVA when the work is carried out by a Norwegian law firm for a Norwegian VAT registered company. Were that interpretation also to be applied in relation to work concerning proceedings before an international court such as the EFTA Court in the present case, this would be a further reason why Schenker North AB would not be entitled to recover VAT under Section 10(1)(a) NVA.
- 43 Third, DB Schenker contends that, pursuant to Section 10(1)(2) of the VAT regulation adopted by the Norwegian Government under the NVA, a legitimate recovery claim must be filed within six months of the end of the calendar year to which the VAT charge relates. Under the established practice of the national tax authorities that time limit is absolute. Consequently, even if a legitimate recovery claim could have been made (which DB Schenker denies), it would in any event be time-barred as a result of Section 10(1)(2) of the VAT regulation.
- 44 Finally, DB Schenker contends that this issue has not been contested by the defendant. Moreover, the Court awarded compensation for Norwegian VAT in relation to a cost claim from a Norwegian VAT company against ESA in Case E-14/10 COSTS. In that case, ESA did not contest the VAT claim, and neither did the Court raise the issue *ultra petita*. DB Schenker therefore maintains that it is entitled to full recovery of its costs claim, as set out in its application for the present taxation.

Norway Post

- 45 Norway Post submits that Article 69 RoP should be interpreted and applied in the same way as similar provisions governing such matters before the General Court and ECJ unless specific circumstances justify different treatment. An intervention is, by its nature, subordinate to the main action, and cannot therefore present as many difficulties as that action, save in exceptional circumstances. Moreover, as a general rule, the procedural task of an intervener is significantly aided by the work of the main party in support of which it has intervened.
- 46 Norway Post submits that the comparison and suggestion of a direct correlation between its efforts and DB Schenker's in the context of the proceedings in Case E-15/10 is manifestly inappropriate. Given the background to Case E-15/10, Norway Post submits that it was only natural that it engaged considerable resources in order to defend itself against the infringement decision. Consequently, as their respective positions were different, the costs incurred by Norway Post are hardly indicative of the amount of costs to be considered reasonably incurred by DB Schenker.
- 47 Norway Post submits that DB Schenker greatly exceeded its role as a supporter of ESA and the reasonable limits of intervention. Norway Post submits that its litigation strategy was entirely legitimate and cannot therefore be viewed as warranting any exceptional efforts on DB Schenker's part.
- 48 Second, Norway Post contends that, on the basis of DB Schenker's own arguments that Norway Post had "built its entire application on just three pleas", its perceived concessions and the limited scope of the pleas on Norway Post's part would strongly indicate that efforts reasonably employed by DB Schenker in the context of its intervention need not have been as extensive as are reflected in its claim for costs.
- 49 Third, Norway Post asserts that DB Schenker's less than favourable view of ESA's efforts in the present application for taxation of costs fundamentally contradicts the opinion previously expressed by DB Schenker in its statement in intervention. This undermines DB Schenker's subsequent contention that its extensive submissions and the corresponding costs were in fact necessarily incurred.
- 50 Fourth, Norway Post wishes to emphasise that even if ESA's defence were theoretically to be considered incomplete or insufficient, it would not be the role of DB Schenker as an intervener to assume ESA's obligation to demonstrate an infringement. However, Norway Post stresses that even any negligence by ESA of specific aspects of the relevant facts would not necessarily have amounted to an inadequate defence on its part. By its own contention, DB Schenker decided to submit "a substantial and comprehensive rebuttal of the most important of [the expert reports commissioned by Norway Post], and thereby contest all the affected sections in the application and the reply where Norway Post relied on a wide number of contentions drawn from that evidence". In the view of Norway

Post, this is indicative of the excessive extent to which DB Schenker as an intervener has, by its own choice, undertaken extensive efforts and incurred corresponding costs far exceeding what may be considered reasonably incurred by an intervener.

- 51 In Norway Post's view, the foregoing considerations imply that an appreciable reduction should be made in the costs claimed by DB Schenker in the present case. Norway Post contends that the obtaining by DB Schenker of extensive economic reports cannot be considered reasonably incurred and thus recoverable.
- 52 The number of hours used by Schenker's legal counsel is excessive. In Norway Post's view, having regard to DB Schenker's limited role as intervener, the number of hours applied is greatly excessive. Notably, DB Schenker's legal counsel, having been involved in the case since June 2002, should be expected to have known the case exceptionally well prior to DB Schenker's intervention.
- 53 In this context, Norway Post notes that the fact that the advisors of an intervener were already familiar with the case, having represented the company during the administrative procedure, was found by the General Court to have facilitated their work and also to have reduced the time which they had to devote to the case. Against this background, even if Norway Post recognises that parts of the legal fees incurred by DB Schenker are to be regarded as recoverable costs under Article 69 RoP, Norway Post contends that the claim made by DB Schenker is excessive and should thus be reduced by the Court.
- 54 Norway Post submits that the EUR 200 000 already transferred to DB Schenker by Norway Post covers any costs reasonably incurred by DB Schenker in the context of the present case.

Findings of the Court

- 55 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.
- 56 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.
- 57 The Court has recognised the principle of procedural homogeneity and held that homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see, *inter alia*, Case E-14/11 *DB Schenker v ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 78, and, with regard to the taxation of costs, see, specifically, Case E-14/10 *COSTS Konkurrenten.no v ESA* [2012] EFTA Ct. Rep. 900, paragraph 23 and case law cited).

- 58 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 *Konkurrenten.no v ESA*, cited above, paragraph 24 and case law cited).
- 59 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 *Konkurrenten.no v ESA*, cited above, paragraph 26 and case law cited). In that regard, the Court notes that in major competition law cases, the services of economists may often be required in order to assess any actual or potential economic impact on the relevant market in the particular proceedings at issue. Such costs incurred are in principle recoverable (compare, *inter alia*, Case T-342/99 DEP *Airtours v Commission* [2004] ECR II-1785, paragraph 55, as regards merger control).
- 60 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 *Konkurrenten.no v ESA*, cited above, paragraph 27 and case law cited).
- 61 Finally, account must be taken of the fact that, as a general rule, the procedural task of an intervener is significantly aided by the work of the main party in support of which it has intervened (compare Case C-191/86 DEP *Tokyo Electric v Council*, Order of 4 February 1993, not published in the ECR). As an intervention is, by its nature, subordinate to the main action, it cannot therefore present as many difficulties as that action, save in exceptional cases (compare Case T-65/96 DEP *Kish Glass v Commission* [2001] ECR II-3261, paragraph 20 and case law cited).
- 62 The amount of costs recoverable in the present case must be assessed in the light of those criteria.
- 63 The dispute in the present case concerned complex economic and legal issues, which were studied by a sole counsel and economists engaged by DB Schenker. DB Schenker did not confine itself to reiterating ESA's arguments but put forward further arguments. The observations it submitted were relevant and helped to clarify the issues raised by the dispute. The case was particularly significant from the perspective of EEA law, both in terms of its substance and as a major competition case brought before the Court. It is sufficient to recall that the Court held in Case E-15/10 *Posten Norge v ESA*, cited above, paragraph 290, that in substance, the intervention was not related to Norway Post's only successful plea, namely, that the duration of the administrative proceedings was excessive.

- 64 As regards the economic interest of the dispute, it suffices to note that the complaint that was the subject of the contested decision concerned a serious infringement of Article 54 EEA, filed with ESA by DB Schenker.
- 65 Accordingly, the nature of the dispute and the financial interests which the parties had in the proceedings are such as to justify substantial fees (compare, to that effect, *Kish Glass v Commission*, cited above, paragraph 24, and Case T-2/93 DEP *Air France v Commission* [1995] ECR II-533, paragraph 24).
- 66 Norway Post has argued in essence that the total number of billed hours submitted by DB Schenker's legal counsel and economists are excessive, given the type of case and its role as an intervener. Therefore, Norway Post argues that those costs were not expenses necessarily incurred for the purpose of the proceedings pursuant to Article 69(b) RoP. However, Norway Post has not at all challenged the breakdown of the sums at issue in DB Schenker's claim. In particular, Norway Post has not challenged the hourly rate charged.
- 67 Consequently, the Court finds that recoverable lawyers' fees in the case at hand can reasonably be assessed on the basis of an hourly rate of EUR 390. This rate presupposes that the work was carried out by an experienced lawyer in the relevant field (compare Case T-233/99 DEP *Land Nordrhein-Westfalen v Commission*, Order of 19 December 2006, not published in the ECR, paragraph 39). The Court finds that an hourly rate of EUR 260 for economists' fees is appropriate.
- 68 The fact that remuneration at these rates is taken into account requires 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, Joined Cases C-12/03 P-DEP and C-13/03 P-DEP *Tetra Laval v Commission* [2010] ECR I-67*, paragraph 63).
- 69 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, *Airtours v Commission*, cited above, paragraph 30).
- 70 As regards the preparation of its application for leave to intervene, DB Schenker claims 22.25 hours of legal assistance. While this was the first application of its type to come before the Court, the Court finds that 19 hours was sufficient.
- 71 As regards the preparation of its statement in intervention, DB Schenker claims 346.75 hours of legal assistance and 360.50 hours of forensic economist assistance. The Court recalls the volume of the legal submissions as well as the annexed economic reports and that DB Schenker was granted 8 weeks to prepare its statement in intervention. The Court finds that 320 hours of legal fees and 350 hours of economists' fees are appropriate.

- 72 As regards the preparation of its application for measures of organization of procedure, DB Schenker claims 29.25 hours of legal assistance. The Court recalls that DB Schenker's request for measures of organization of procedure was declined. Consequently, the Court finds that 5 hours of legal fees are appropriate.
- 73 As regards its preparations for the oral hearing, DB Schenker claims 179.75 hours of legal assistance and 122.50 hours of assistance from its forensic economists. The Court recalls in particular the length of both Norway Post's comments on the statement in intervention and the rejoinder. On that basis, the Court finds that 110 hours of legal fees and 115 hours of economists' fees are appropriate.
- 74 As regards its review of the Report for the Hearing, DB Schenker claims 12.5 hours of legal assistance. The Court finds that 6 hours of legal fees are appropriate.
- 75 As regards the oral hearing, DB Schenker claims 8 hours of legal assistance. The Court finds that 8 hours of legal fees are appropriate.
- 76 As regards the preparation of its application for taxation of costs, DB Schenker claims 6.25 hours of legal assistance. The Court finds that 6.25 hours of legal fees are appropriate.
- 77 Consequently, the Court finds that a total of 474.25 hours of legal fees and 465 hours of economists' fees were necessarily incurred.
- 78 The applicants have claimed the cost of Norwegian VAT on their legal fees which the Court notes were invoiced to Schenker North AB on behalf of DB Schenker. While Norway Post has not challenged the applicants' petition for the VAT to be included in the recoverable costs, the Court must raise this matter *ex officio* in order to ensure that there is no potential for unjust enrichment. In this assessment, the court presupposes that VAT was correctly charged.
- 79 VAT on recoverable costs may also be recoverable. However, if an applicant is accountable for VAT, it is usually entitled to recover from the tax authorities VAT paid on goods and services purchased by it. VAT thus does not represent an expense for it and, accordingly, it cannot claim reimbursement of VAT on costs which are recoverable under Article 69(b) RoP. There can be no reimbursement of VAT on legal fees and disbursements, if an applicant is able to deduct the amounts paid in that respect and thus has not had to bear those sums itself (compare, *inter alia*, Case C-582/11 P-DEP *Schwaaner Fischwaren v Rügen Fisch*, Order of 14 November 2013, reported electronically, paragraph 31, Case C-191/11 P-DEP *Norma Lebensmittelfilialbetrieb v Yorma's*, Order of 10 July 2012, not published in the ECR, paragraph 24, and Case C-137/92 P-DEP *Hüls v Commission*, not published in the ECR, paragraph 20).
- 80 Given that pursuant to Section 10(1)(a) of the Norwegian VAT Act a claim for recovery of VAT can only be filed for Norwegian services acquired by a foreign

undertaking for use in its business outside of Norway, it is apparent that Schenker North AB, which bore the entirety of the costs of this case on behalf of DB Schenker, is not entitled to recover the VAT on the legal fees in question from the Norwegian tax authorities. As Schenker North AB was not able to deduct the amounts paid in that respect, it thus has had to bear those amounts itself. Therefore, the sum of VAT paid to the Norwegian tax authorities is recoverable based on the total number of hours of legal fees the Court has found were necessarily incurred. This amounts to EUR 46 239.38.

- 81 As regards the attendance of its counsel for the hearing, DB Schenker seeks to recover EUR 1 928 in travel costs pursuant to Article 69(b) RoP. This includes the costs of counsel making a round trip between Oslo and Luxembourg (EUR 1 503) and one night's accommodation in Luxembourg (EUR 425) for the hearing. The Court finds that these costs of EUR 1 928 were necessarily incurred.
- 82 As regards the shipping of its pleadings, DB Schenker seeks to recover EUR 1 335 in shipment costs pursuant to Article 69(b) RoP. This includes the costs of shipments made on 3 January 2011 for the application for leave to intervene (EUR 439), on 26 April 2011 for the statement in intervention (EUR 752) and on 16 June 2011 for the application for measures of organization of procedure (EUR 144). The Court finds that these costs of EUR 1 335 were necessarily incurred.
- 83 It follows from the foregoing that the costs which the Court has found to be recoverable are lawyers' fees of EUR 184 957.50, VAT of EUR 46 239.38, economists' fees of EUR 120 900, travel and subsistence expenses for the applicant's counsel of EUR 1 928, and shipping expenses of EUR 3 263. These costs amount in total to a recoverable sum of EUR 357 287.88. Bearing in mind that Norway Post has already paid DB Schenker EUR 200 000 in costs, the remaining sum recoverable is EUR 157 287.88.

On those grounds,

THE COURT

hereby orders:

The total remaining costs to be paid by Posten Norge AS to the applicants are fixed at EUR 157 287.88.

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Luxembourg, 28 August 2014

Michael-James Clifton
Acting Registrar

Carl Baudenbacher
President