ORDER OF THE COURT
14 October 2014

(Taxation of costs – Recoverable costs – VAT)

In Joined Cases E-4/12 and E-5/12 COSTS,

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, Gjermund Mathisen and Auður Ýr Steinarsdóttir, Officers, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Risdal Touring AS, established in Evje, Norway,

Konkurrenten.no AS, established in Evje, Norway,

represented by Jon Midthjell, advokat,

defendants,

APPLICATION for the taxation of costs recoverable following the order of the Court of 7 October 2013 in Joined Cases E-4/12 and E-5/12 *Risdal Touring AS and Konkurrenten.no AS* v *EFTA Surveillance Authority* [2013] EFTA Ct. Rep. 668,

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 Risdal Touring AS ("Risdal Touring") operates in the tour bus market in Norway and several EU Member States. It is owned by Olto Holding AS ("Olto group") which also owns Konkurrenten.no AS ("Konkurrenten"). Konkurrenten operates in the regional express bus market between the Southern and Central region in Norway.

2 Case E-4/12 concerned an access to document request made by Risdal Touring to the EFTA Surveillance Authority ("ESA") under Article 2(1) of the Rules on Access to Documents 2008 ("RAD") seeking public access to the statement of content in ESA Case No 70506 and to specific documents believed to be included in that file concerning ESA's handling of the Olto group's State aid complaint. The Olto group's complaint, submitted on 8 September 2011, concerned potentially unlawful aid granted by the City of Oslo to Kollektivtransportproduksjon AS ("KTP") (formerly known as AS Oslo Sporveier ("Oslo Sporveier")). KTP is a company owned and controlled by the City of Oslo, and is a direct competitor of Konkurrenten and Risdal Touring in the express bus and tour bus markets.

3 Risdal Touring sought the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the complete statement of content in ESA Case No 70506 and certain documents believed to be included in that file.

4 Case E-5/12 concerned a request submitted by Konkurrenten to ESA on 21 March 2012 pursuant to Article 2(1) RAD seeking public access to the statement of content in ESA Case No 60510 concerning ESA's handling of the group's State aid complaint submitted on 11 August 2006. The complaint concerned potentially unlawful aid granted by the City of Oslo to KTP. Konkurrenten sought the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, which denies public access to the complete statement of content of that file.

5 In its judgment in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266, the Court annulled ESA Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene) to close Case No 60510 on the grant of State aid by the Norwegian authorities to Oslo Sporveier and AS Sporveisbussene ("Sporveisbussene") for the provision of scheduled bus services in Oslo.

6 By its action in Case E-5/12, Konkurrenten sought access to the complete statement of content of ESA Case No 60510 such that it could fully identify documents on file that might be relevant to understanding how its complaint was

handled until ESA Decision No 254/10/COL was taken in 2010 and how ESA handled the case after that decision was overturned by the Court in 2011.

7 In its order of 7 October 2013 in Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten* v *ESA*, as regards Case E-4/12 *Risdal Touring*, the Court (i) dismissed the part of the application directed at specific documents as inadmissible; (ii) found that there was no longer any need to adjudicate on the remainder of the application; (iii) ordered ESA to bear its own costs and half of the costs incurred by Risdal Touring; and (iv) ordered Risdal Touring to bear half of its costs. As regards Case E-5/12 *Konkurrenten*, the Court (i) dismissed the application as inadmissible; and (ii) ordered ESA to bear its own costs and the costs incurred by Konkurrenten.

8 In paragraph 182 of that order, as regards Case E-4/12 *Risdal Touring*, the Court held that ESA had provided what, only in the context of that case, might be considered an appropriate statement of content of the file in ESA Case No 70506 in its rejoinder. As a result, there was no longer any need to adjudicate upon that part of the case. The Court held that only furnishing such a list 47 weeks after the request was made was unreasonable. However, the Court stated that ESA was correct, in the circumstances, in bringing the general presumption to the attention of Risdal Touring and inviting that party to make document specific submissions to rebut the presumption. Thus, the Court found it appropriate to order ESA to bear its own costs and half of the costs incurred by Risdal Touring. Risdal Touring was ordered to bear half of its own costs.

9 In paragraph 183 of the order, as regards Case E-5/12 *Konkurrenten*, the Court held that ESA itself had characterised its own conduct as regrettable. The Court found that, since ESA had sought the dismissal of the case for reasons of inadmissibility yet had refrained from taking measures to rectify its willingly acknowledged failure to act, it was necessary to order ESA to bear not only its own costs but also the costs incurred by Konkurrenten.

10 On 14 February 2014, Risdal Touring and Konkurrenten served cost claims on ESA requesting payment no later than 28 February 2014. Konkurrenten sought a total of EUR 34 395. Risdal Touring sought a total of EUR 27 982, i.e. half of the full sum of EUR 55 964.

11 On 21 February 2014, ESA replied to Risdal Touring and Konkurrenten. ESA acknowledged its obligation to pay half of Risdal Touring's costs and all of Konkurrenten's costs, but asserted that the sums claimed were excessive and disputed some elements of the claims. ESA offered a total of EUR 5 390 to Risdal Touring and EUR 7 363 to Konkurrenten. ESA requested Risdal Touring and Konkurrenten to confirm whether, and, if so, to what extent, its offers were accepted no later than 7 March 2014.

12 Given the considerable discrepancy between the parties' views as regards the costs recoverable under Article 69 of the Rules of Procedure ("RoP") by Risdal Touring in Case E-4/12 and by Konkurrenten in Case E-5/12, ESA stated that it

would consider making an application for taxation of costs if no agreement could be reached by 7 March 2014. ESA stressed that that the offers, in sum and in all their constituent elements, were wholly without prejudice to ESA's claims and arguments should the matter be referred to the Court for taxation of costs.

13 Also on 21 February 2014, both Risdal Touring and Konkurrenten wrote to ESA requesting ESA to make full use of the remaining period before 28 February 2014 to review the cost claims again.

14 On 28 February 2014, ESA responded to the letters of Risdal Touring and Konkurrenten of 21 February 2014. ESA indicated that it had reviewed its offers to settle costs. ESA now offered a total of EUR 5 994.50 to Risdal Touring and EUR 8 985 to Konkurrenten and requested Risdal Touring and Konkurrenten to confirm whether, and, if so, to what extent, its offers were accepted no later than 7 March 2014. ESA's letters stated that these offers were without prejudice to ESA's claims and arguments should the matters be referred to the Court for taxation of costs.

15 On 3 March 2014, both Risdal Touring and Konkurrenten wrote to ESA giving ESA a final opportunity to take a formal position on the costs claims by 10 March 2014. Both letters state that, to the extent that ESA wished to contest the costs claims, it would have to set out its reasons for doing so in a formal manner disclosable to the Court and to pay the non-contested part of the claim. If ESA also wished to make a non-disclosable settlement offer, it would have to do so by way of a separate letter.

16 On 4 March 2014, ESA emailed both Risdal Touring and Konkurrenten, attaching its letters of 28 February 2014, and stated, in addition, that "[a]s is clear from the terms of the attached letter, it does not constitute a refusal to pay the costs ordered by the EFTA Court. The letter is an offer to settle and to engage in a negotiation to find a settlement on the quantum of costs of your client."

17 Also on 4 March 2014, both Risdal Touring and Konkurrenten emailed ESA with attached letters. Both companies referred to their letters of 3 March 2014 and ESA's email of 4 March 2014 and asserted that, in resending an earlier letter in which it was stated that ESA's position was non-binding and non-disclosable, ESA had reiterated that it would not take a formal position on the cost claim. Both companies stated that, as had been explained in their letters of the previous day, the time limit for paying the costs claims had expired on 28 February 2014 and noted that ESA had failed both to make any payment and to take a formal position on the cost claim.

18 Therefore, both companies gave ESA a final opportunity to take a formal position on the cost claims by 10 March 2014. They asserted that, to the extent that ESA wished to contest the costs claims, it would have to set out its reasons for doing so in a formal manner disclosable to the Court and to pay the non-contested part of the claims. If ESA also wished to make a non-disclosable settlement offer, it would have to do so by separate letter. In the event that ESA

continued not to take formal positions on the cost claims, both companies stated that they would have no choice but to consider this a refusal to pay any part of the claims.

19 On 10 March 2014, ESA emailed both companies. In its emails, ESA noted that it had not received by 7 March 2014, the date by which it had requested a reply to its letters of 21 February 2014, a reply to its offers to settle the claims for costs. ESA observed that although the companies may have read ESA as having taken a "non-binding" and "non-disclosable" position, it wished to confirm that its offer for settlement was indeed a binding offer and that, as far as ESA was concerned, none of the correspondence between the parties in the present case was confidential. Indeed, ESA indicated that it would find it only appropriate that the entire correspondence between the parties be disclosed in full to the Court. Moreover, as the parties seemed to find themselves at an impasse, ESA stated that it was prepared to take the issue of taxation of costs to the Court in their mutual interest of resolving the matter as quickly as possible. However, if the companies informed ESA without delay that they would rather be the applicants in such proceedings, ESA would await such applications for a reasonable period.

20 On 14 March 2014, both Risdal Touring and Konkurrenten emailed ESA with attached letters. The two companies both contended that ESA had failed to pay the non-contested part of the cost claims and alleged that ESA had failed to provide any explanation for its refusal to do so. Both companies requested ESA to pay the non-contested part of the costs claims no later than 21 March 2014 and indicated that, once payment had been received, they would review and respond to ESA's "(now) formal reasons for contesting the remaining part, with the aim of considering the prospects for reaching a settlement on that part of the claim[s]".

21 On 21 March 2014, ESA emailed Risdal Touring and Konkurrenten notifying them that, in its view, the two companies still had not engaged with the substance of ESA's offers to settle the costs claims and informed them that it was submitting an application to the Court for taxation of costs. ESA contended that at no stage in its correspondence on this matter had it made any "request that all correspondence in this matter be considered non-binding and non-disclosable in the EFTA Court". Hence, it had also not "reversed" any such request. Moreover, ESA observed that it had not headed any of its correspondence "without prejudice", "confidential" or similar, and that it had not attempted to give any impression that it would in any way object to full disclosure of all correspondence in this matter.

22 On 21 March 2014, ESA lodged an application for taxation of costs pursuant to Article 70(1) RoP in Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten* v *ESA*. ESA requests that:

> 1. *The total amount of the costs to be paid by the EFTA Surveillance Authority to Risdal Touring AS is fixed at the discretion of the Court, though they should not exceed EUR 5 000 in legal fees, with no*

reimbursement of VAT, but with the addition of such copying costs exclusive of VAT, shipping costs and travel/accommodation/subsistence costs as properly documented before the Court.

2. *The total amount of the costs to be paid by the EFTA Surveillance Authority to Konkurrenten.no AS is fixed at the discretion of the Court, though they should not exceed EUR 7 000 in legal fees, with no reimbursement of VAT, but with the addition of such copying costs exclusive of VAT, shipping costs and travel/accommodation/subsistence costs as properly documented before the Court.*

23 On 5 May 2014, Risdal Touring and Konkurrenten submitted their joint response to ESA's application for taxation of costs. In Case E-4/12, Risdal Touring respectfully asks that the Court:

Set the recoverable costs from the EFTA Surveillance Authority in Case E-4/12 to Risdal Touring AS to EUR 29 328.

24 In Case E-5/12, Konkurrenten respectfully asks that the Court:

Set the recoverable costs from the EFTA Surveillance Authority in Case E-5/12 to Konkurrenten.no AS to EUR 35 795.

II Law and assessment of the case

Arguments of the parties

EFTA Surveillance Authority

25 ESA notes that while the application for taxation of costs is most often lodged by the party claiming costs, pursuant to Article 70(1) RoP, the provision does allow for an application to be made from the party ordered to pay the costs (see, for instance, Case C-554/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, order of 24 October 2013, published electronically, and Case C-208/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, order of 16 May 2013, published electronically).

VAT

26 ESA submits that both Risdal Touring and Konkurrenten are subject to VAT in Norway. This entails that they are entitled to recover VAT paid on services purchased by them, including legal services, from the national tax authorities. It notes that both companies are listed on the Norwegian Register of Business Enterprises as being registered for VAT. Therefore, the input VAT claimed by Risdal Touring and Konkurrenten does not represent an expense as such for them, and consequently they cannot claim reimbursement from ESA of the VAT paid on the legal services at issue as they cannot be reimbursed by ESA for what they are also reimbursed by the Norwegian tax authorities. Thus, the VAT paid by Risdal Touring and Konkurrenten cannot be taken into account for the

purposes of calculating the expenses recoverable in accordance with Article 69 RoP. ESA refers in this respect to Case C-582/11 P-DEP *Schwaaner Fischwaren*, order of 14 November 2013, published electronically, paragraph 31, and Case C-521/09 P-DEP *Elf Aquitaine* v *Commission*, order of 1 October 2013, published electronically, paragraph 24 and case law cited. ESA alleges that the companies have remained silent on the fact that their claim for reimbursement of Norwegian VAT has no basis in EEA law.

27 ESA submits that the situation in Case E-9/04 COSTS *European Banking Federation* v *ESA* [2007] EFTA Ct. Rep. 74 was different, as the European Banking Federation, a non-profit organisation under Belgian law, was not subject to VAT, and therefore the VAT paid by it represented an expense it could claim for reimbursement. ESA notes that, in Case E-9/04 COSTS II *Bankers' and Securities' Dealers Association of Iceland* v *ESA* [2007] EFTA Ct. Rep. 220, the reimbursement of VAT was not claimed. Moreover, it was seemingly in error that VAT was included in the costs to be paid by the defendant in Case E-14/10 COSTS *Konkurrenten.no* v *ESA* [2012] EFTA Ct. Rep. 900.

Legal fees

28 ESA submits that costs recoverable under Article 69 RoP are strictly limited to expenses necessarily incurred for the purpose of the relevant proceedings. It is settled case law, according to ESA, that in the absence of any provisions of EEA law relating to tariffs or to the necessary working time, the Court must take account in its assessment: the purpose and nature of the proceedings; their significance from the point of view of EEA law; the difficulties presented by the case; the economic interests which the parties had in the proceedings and the amount of work which the contentious proceedings generated for counsel. In that respect, ESA recalls that the ability of the Court to assess the value of the work carried out is dependent on the accuracy of the information provided. ESA refers to Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraphs 26 and 27.

29 ESA submits that where a party's lawyer has already assisted that party during proceedings or procedures prior to the relevant action, it is necessary to have regard to the fact that the lawyer is aware of matters relevant to the action, which is likely to have facilitated his work, and so reduced the preparation time required for the judicial proceedings (refers to Case T-34/02 DEP *Le Levant 015 and Others* v *Commission* [2010] ECR II-6375, paragraphs 42 to 44 and case law cited). It contends, however, that no discounts of that kind are discernible thus far from the documentation presented by the two companies, despite the fact that counsel for the two companies had represented them both throughout the pre-litigation procedure for public access to documents, and had also represented Konkurrenten as a State aid complainant in the investigation concerned (ESA refers in that regard to the pending Case E-19/13 *Konkurrenten.no* v *ESA*).

30 ESA submits that the present case did not call for an in-depth legal analysis but could be solved by the mere application of EEA law. ESA refers to Joined Cases

E-4/12 and E-5/12 *Risdal Touring and Konkurrenten* v *ESA*, paragraphs 101 to 106, and Case C-252/10 P-DEP *EMSA*, order of 13 December 2012, published electronically, paragraph 19. As the Court did not have to consider the substance of the case, the proceedings were of only limited significance from the point of view of EEA law.

31 Nor did the case raise new questions of law and so did not present particular difficulties. ESA refers in this regard to Case C-254/09 P-DEP *Zafra Marroquineros*, order of 12 October 2012, published electronically, paragraphs 29 and 34; Case C-197/07 P-DEP *TDK Kabushiki Kaisha*, order of 19 September 2012, published electronically, paragraph 19; Case C-406/11 P-DEP *Atlas Air*, order of 5 December 2013, published electronically, paragraph 16; and, *Schwaaner Fischwaren*, cited above, paragraph 29.

32 ESA submits that the proceedings were of no economic interest as such for Risdal Touring. ESA refers in this regard to Case C-554/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above, paragraph 22, and Case C-208/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above, paragraph 23, and submits that this case law is relevant on grounds of homogeneity, making reference to Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraphs 20 to 23 and case law cited.

33 Moreover, according to ESA, the interests of Risdal Touring must be contrasted with the economic interests of an interested third party, the publication of whose documents is at stake. ESA refers in this regard to Case C-404/10 P-DEP *Lagardère* v *Éditions Odile Jacob*, order of 28 November 2013, published electronically, paragraph 36, Case C-554/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above, paragraph 22, and Case C-208/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above, paragraph 23.

34 ESA notes that these proceedings involved three exchanges of written pleadings and an oral hearing. In these circumstances, ESA submits that 107 billable hours at an hourly rate of NOK 3 000 [an effective rate of EUR 403.55 as calculated by counsel for the applicants] exceeds what can be considered indispensable legal fees.

35 ESA states that it would find it difficult to agree to the calculation being based on an hourly rate of EUR 340, a rate the parties in previous taxation proceedings explicitly agreed and which the Court approved in Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 29. However, those cases were substantially more complex. ESA submits therefore that an hourly rate of EUR 400 greatly exceeds what could be considered appropriate remuneration, even for the services of a particularly experienced professional, capable of working very quickly and efficiently, and refers in this regard to *Le Levant 015 and Others* v *Commission*, cited above, paragraph 54 and case law cited.

36 ESA submits that, in any event, there must be a strict assessment of the total number of hours of work necessary for the purposes of the proceedings before

the Court and refers in this regard to Case T-121/09 DEP *Al Shanfari* v *Council and Commission*, order of 20 November 2012, published electronically, paragraph 40 and the case law cited.

37 ESA submits that the Court may find a rate of EUR 200 appropriate as a basis for calculation, which cannot be considered as low, and refers to Case T-47/03 DEP *Sison* v *Council* [2009] ECR II-1483, paragraph 49; Case T-85/04 DEP *Strack* v *Commission*, order of 27 September 2012, published electronically, paragraph 32; Case T-389/09 DEP *Labate* v *Commission*, order of 19 October 2011, published electronically, paragraph 45; Case C-191/11 P-DEP *Norma Lebensmittelfilialbetrieb* v *Yorma's*, order of 10 July 2012, published electronically, paragraph 23; and Joined Cases C-12/03 P-DEP and C-13/03 P-DEP *Tetra Laval* v *Commission* [2010] ECR I-67*, paragraphs 63 and 64.

38 ESA submits that, in setting the hourly rate, the Court is invited to take into account that the present case did not require expert knowledge. It contends that the proceedings centred on procedural issues and, on the substance, concerned public access to documents in the field of State aid, which the Court of Justice of the European Union ("ECJ") had addressed, it submits, in Case C-139/07 P *Technische Glaswerke Illmenau* [2010] ECR I-5885.

39 ESA submits that 107 hours' work cannot reasonably be claimed to have been essential. In its view, the documentation submitted lacks any detail beyond the total number of hours billed at each stage of the procedure. ESA contends that it would appear impossible for the Court to verify that the hours claimed relate exclusively to the contentious proceedings, and not to work undertaken during the pre-litigation procedure and refers in this regard to Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 27.

40 In detail, as regards Case E-4/12 *Risdal Touring*, ESA submits that it would consider a reasonable number of billable hours to be limited to 12 hours for the preparation of the application for annulment as counsel was already familiar with the case having represented Risdal Touring throughout the administrative procedure, 8 hours for the review of the preliminary objection of inadmissibility and the preparation of the response thereto, 18 hours for counsel to review the defence and to prepare the reply, 8 hours' work for the review of the rejoinder and preparation for the oral hearing, 3 hours for the review and commenting upon the draft report for the hearing, and 1 hour for the hearing. As regards the hearing costs, ESA refers to Case C-38/09 P-DEP *CPVO* v *Schräder*, order of 10 October 2013, paragraph 37.

41 ESA submits that an appropriate numbers of hours would thus not exceed a total of 50 hours. ESA refers in this regard to Case C-554/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above, and Case C-208/11 P-DEP *Internationaler Hilfsfonds* v *Commission*, cited above.

42 Upon ESA's calculations, total legal fees would amount to no more than EUR 10 000, presupposing an hourly rate of EUR 200. Therefore, as ESA is obliged to

cover 50% of the costs, that would equal EUR 5 000. ESA observes that these calculations are indicative only and not agreed between the parties and underlines the fact that the Court is in no way bound by the parties' views as it always remains unfettered in its assessment. ESA notes that the Court is also free to award costs calculated on the basis of a lower hourly rate and refers in this regard to *Al Shanfari* v *Council and Commission*, cited above, paragraphs 39 and 40.

43 Turning to Case E-5/12 *Konkurrenten*, as regards the purpose and nature of the contentious proceedings, ESA submits that the case did not call for an in-depth legal analysis but could be solved by the application of EEA law as already interpreted by the Court and the ECJ. Moreover, as the case was dismissed as inadmissible, it did not raise new questions of law and thus did not present particular difficulties. In addition, as the case at hand was a transparency case, it must be considered to be of no economic interest as such to Konkurrenten.

44 ESA notes that these proceedings involved three exchanges of written pleadings and an oral hearing. ESA submits that 64.25 hours at an hourly rate of EUR 400 exceeds what can be considered indispensable legal fees. ESA contends that the hourly rate is overly high. While ESA leaves the taxation of an appropriate hourly rate to the wisdom of the Court, ESA refers to its arguments set out above in paragraphs 28 to 42, which apply *mutatis mutandis*.

45 In addition, ESA submits that 64.25 hours of work cannot reasonably be claimed as essential for the purposes of the proceedings. ESA submits that the documentation submitted lacks any detail beyond the total number of hours billed at each stage of the procedure.

46 In detail, as regards the costs in Case E-5/12 *Konkurrenten*, ESA submits that 10 hours to prepare the application for annulment would seem more reasonable in light of the fact that counsel was already familiar with the case having represented Konkurrenten throughout the administrative procedure, as would 3 hours to review the preliminary objection of inadmissibility and to prepare its response, with 12 hours for counsel to review the defence and to prepare the reply, 2 hours for the review of comments on the draft report for the hearing, 6 hours to review the rejoinder and prepare the oral hearing, and 1 hour for the oral hearing.

47 In ESA's estimation, an appropriate number of hours would thus not exceed a total of 35 hours. Therefore, legal fees would equate to a maximum of EUR 7 000, presupposing an hourly rate of EUR 200. ESA observes that these calculations are indicative only and not agreed between the parties and underlines the fact that the Court is in no way bound by the parties' views as it always remains unfettered in its assessment.

Copying and shipping costs

48 ESA indicates its willingness to pay the copying costs specified by Risdal Touring and Konkurrenten but only exclusive of VAT and contends that the sums claimed "may seem to include Norwegian VAT".

49 In relation to shipping costs, ESA states that it offered in the pre-litigation correspondence to pay these as specified.

Travel, accommodation and subsistence costs

50 In relation to these costs, ESA states that it offered in the pre-litigation correspondence to pay these as specified.

Risdal Touring

51 Risdal Touring notes that the Court ordered ESA to bear its own costs and 50% of the costs of Risdal Touring in Case E-4/12.

Legal costs

52 Risdal Touring notes that recoverable costs, pursuant to Article 69(b) RoP 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, and refers to Case E-14/10 COSTS *Konkurrenten* v *ESA*, cited above, paragraph 24. Risdal Touring submits that its costs meet those criteria.

53 Risdal Touring submits that it is only seeking to recover costs incurred in the period starting with the application for annulment and ending with the oral hearing. The only exception to this is a claim for 3.5 hours of additional legal work required for the preparation of the pleading in the present costs case.

54 Risdal Touring submits that its costs were necessary for the purpose 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. Risdal Touring refers to *European Banking Federation*, cited above, paragraph 17, *Bankers' and Securities' Dealers Association of Iceland* v *ESA*, cited above, paragraph 29, and Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 26.

55 As regards the amount of work generated by the proceedings, Risdal Touring observes that the length of the pleadings totalled 206 pages with 44 annexes which themselves totalled a further 274 pages.

56 As to the purpose and nature of the proceedings, the case involved an annulment action challenging a refusal to disclose the statement of content of a State aid case and a refusal to disclose three specific groups of documents believed to be

included in that case file. Risdal Touring submits that, as the Court reserved its decision on ESA's inadmissibility plea, ESA cannot now contend that it was unnecessary for the company to prepare a full rebuttal of both the procedural and substantive issues.

57 Risdal Touring submits that the case was the first of its kind before the Court under the RAD and that the case raised novel and complex admissibility issues which, due to the differences between the RAD and Regulation No 1049/2001, could not be easily solved by reference to case law of the European Union Courts. Moreover, ESA replaced the RAD with RAD 2012 four months after the action had been commenced and those new rules purported to have retroactive effect.

58 Risdal Touring submits that the group to which the company belongs has a substantial financial interest in the proceedings through its sister company Konkurrenten, the complainant in the underlying State aid investigation. Risdal Touring contends that the alleged aid in question has led to substantial distortions in its sister company's primary market, even threatening its survival. In that regard, Risdal Touring submits that it has shouldered part of the financial burden in pursuing the evidence needed for the corporate group to make effective use of its right to be heard during ESA's State aid investigation.

59 Finally, on this point, Risdal Touring submits that there is no intrinsic link between the scope of Article 69 RoP and the scope of the RAD provisions in question. Consequently, it rejects ESA's attempts to limit Risdal Touring's right to recover costs under Article 69(b) RoP on the basis that it had no private financial interest in the proceedings simply because the RAD, in some respects, requires that an overriding public interest be shown.

Preparation of the application for annulment

60 Risdal Touring is seeking to recover 18.75 hours of legal work for the drafting of the application. This cannot be considered unusual for the preparation of a 40-page application with 33 annexes. Risdal Touring submits that the case raised novel and complex issues concerning the interpretation of the case law, the general presumption against public access to State aid files in relation to three specific groups of State aid documents, and the exception for overriding public interests from that general presumption, which had not been reviewed before by the EU courts.

61 Risdal Touring also notes that its low use of time to produce the application reflects the fact that counsel had prior knowledge of the case, from which ESA ultimately now benefits in the taxation procedure.

Analysis of ESA's inadmissibility pleading and preparation of Risdal Touring's response

62 Risdal Touring is seeking to recover 12.5 hours of legal work to analyse ESA's inadmissibility pleading and for the drafting of its response. According to Risdal Touring, this cannot be considered out of the ordinary for the preparation of a response which dealt with complex admissibility issues that the Court itself chose to reserve for its final judgment.

63 Risdal Touring also notes that the factual basis leading to the contested refusals was not identical to that which applied in Konkurrenten's case and that there was only a limited overlap in which the companies benefited from any joint effort.

Analysis of the defence and preparation of Risdal Touring's reply

64 Risdal Touring is seeking to recover 45.25 hours of legal work for the analysis of the defence and for the drafting of the reply. Given that the defendant submitted a comprehensive 35-page defence, Risdal Touring asserts that this volume of work cannot, in any way, be considered out of the ordinary. A major part of the work on the reply fell on Risdal Touring simply because its case extended significantly beyond that of Konkurrenten. There was no EU case law on point and the issues before the Court were novel and complex in nature. Moreover, the procedural issues differed from EU law because the RAD contained an administrative procedure governing decisions on public access requests different to that laid down in Regulation No 1049/2001.

Analysis of the rejoinder and preparations for the oral hearing

65 Risdal Touring is seeking to recover 19.5 hours of legal work for the analysis of the rejoinder and preparation of its contribution to the hearing, which includes preparing a new round of rebuttals, preparing responses to anticipated questions from the Court, and drafting talking points and the hearing manuscript.

Review of the hearing report and preparations of comments

66 Risdal Touring is seeking to recover 7 hours of legal work for the review of the hearing report and for the preparation of comments. This cannot, in any way, be considered out of the ordinary for the review of a 60-page hearing report, of which large parts related exclusively to Risdal Touring's action.

Oral hearing

67 Risdal Touring had a right to be represented by counsel at the hearing, which inherently required a full day away from the office. The company is seeking to recover a half-day, i.e. 4 hours; the other part being borne by Konkurrenten.

Total number of hours and average hourly rates incurred

68 In total, Risdal Touring's claim totals 107 hours of legal fees. The average hourly rate charged was NOK 3 000. Risdal Touring submits that, in a similar and comparable case, the ECJ awarded hourly legal fees of EUR 390 and EUR 450 in the General Court and in the subsequent appeal before the Court of Justice, respectively, and refers to *Lagardère* v *Editions Odile Jacob*, cited above.

69 Risdal Touring notes that ESA assigned three agents to the main proceedings and suspects that if ESA were compelled to disclose its own use of time, the total time spent on the main proceedings by ESA's agents would far exceed the hours incurred by counsel for Risdal Touring.

Legal costs for the preparation of Risdal Touring's response to ESA's application for taxation of costs

70 Risdal Touring seeks to recover EUR 1 400 in legal costs for the present proceedings, which represents 3.5 hours of work.

Norwegian VAT outside the scope of EEA secondary law

71 Risdal Touring seeks to recover Norwegian VAT on the legal costs that it has incurred. The VAT amounts to EUR 10 795. Reference is made to Konkurrenten's submissions on this point, set out in paragraphs 99 to 102 below.

Travel costs

72 Risdal Touring seeks to recover EUR 548 in travel costs pursuant to Article 69(b) RoP. This includes the costs of counsel making a round trip from Oslo to Luxembourg (EUR 362) and staying one night in Luxembourg (EUR 186) for the hearing on 17 April 2013.

73 These costs represent half of the actual hotel costs; the other half being borne by Konkurrenten because the oral hearing took place on the same day as Konkurrenten's hearing. Moreover, the airfare represents one third of the actual ticket price; the other two thirds being borne by Konkurrenten and another client of counsel that had an oral hearing before the Court the next day, 18 April 2013.

Copying costs

74 Risdal Touring seeks to recover EUR 390 in copying costs pursuant to Article 69(b) RoP. This includes only the copying of the application for annulment, its 33 annexes and 6 sets of copies that were submitted to the Court, in addition to a copy for counsel and a copy for the company.

Shipment costs

75 Risdal Touring seeks to recover EUR 1 051 in shipment costs pursuant to Article 69(b) RoP. This includes the shipments of the application for annulment on 7

June 2012 (EUR 757) and the response to the defendant's inadmissibility plea on 6 September 2012 (EUR 294).

Conclusion

76 In conclusion, Risdal Touring seeks to recover EUR 43 180 in legal costs before the Court, Norwegian VAT (25%) on those legal costs of EUR 10 795, EUR 548 for travel costs for counsel to attend the hearing, copying costs of EUR 390, and EUR 1 051 for shipping of pleadings. Thus, in accordance with the Court's order in Case E-4/12 *Risdal Touring*, this is halved to EUR 27 982. In addition, Risdal Touring seeks EUR 1 400 in legal costs for the present taxation procedure. This results in a final total of EUR 29 382.

Konkurrenten

77 Konkurrenten observes that the Court ordered ESA to bear its own costs and those of Konkurrenten in Case E-5/12.

Legal costs

78 Konkurrenten observes that the parties are in disagreement over the amount of legal costs that are recoverable under Article 69(b) RoP. Konkurrenten 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. On this point, Konkurrenten makes reference to Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 24. Konkurrenten submits that its costs meet those criteria.

79 Konkurrenten submits that it is only seeking to recover costs that it incurred in the period starting with the application for annulment and ending with the oral hearing. No prior or subsequent costs have been included in the claim other than for the preparation of the pleading in the present costs case.

80 Konkurrenten submits that its costs were necessary for the purpose 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. On this point, Konkurrenten makes reference to *European Banking Federation*, cited above, paragraph 17, *Bankers' and Securities' Dealers Association of Iceland* v *ESA*, cited above, paragraph 29, and Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 26.

81 Konkurrenten submits that the volume of the pleadings and evidence was significant. In total, the pleadings totalled 181 pages, with 40 annexes. Those annexes totalled 258 pages in addition.

82 Konkurrenten observes that the case at issue was an annulment action challenging a refusal to disclose the statement of content in a State aid case in a context in which the Court had previously annulled ESA's closing of its case without a formal investigation in Case E-14/10 *Konkurrenten.no* v *ESA*, cited above. Following the Court's judgment in that case, Konkurrenten issued a formal pre-litigation notice to ESA, as ESA had not acted in the subsequent six months, prior to taking legal action challenging the failure to act. Only at the last moment did ESA finally open a formal investigation. Konkurrenten therefore made a request for public access to the statement of content of the file that would identify how ESA had conducted its investigation and to identify specific pieces of correspondence and evidence to which Konkurrenten would be entitled to demand public access, in order to make full use of its right to be heard during the formal investigation.

83 Konkurrenten contends, in this regard, that the format of ESA's refusal to grant public access to that key document, without which the public right of access is rendered illusory, bears no intrinsic link to the actual work that the main proceedings required. The proceedings required a full review of the facts of the case and all legal issues needed to be addressed, particularly bearing in mind that the Court decided to reserve its decision on ESA's inadmissibility plea.

84 Konkurrenten submits that the case was the first of its kind before the Court under the RAD and that it raised novel and complex admissibility issues which, due to the differences between the RAD and Regulation No 1049/2001, could not be easily solved by reference to case law of the EU Courts. Moreover, ESA replaced the RAD with RAD 2012 four months after the action had been commenced and those new rules purported to have retroactive effect. In addition, Konkurrenten observes that the Court found the "final print-outs" ESA eventually provided appropriately detailed only in the context of the present case and refers to paragraphs 127 and 179 of the Order of the Court.

85 Konkurrenten submits that it had a substantial financial interest in the proceedings as it is the complainant in the underlying State aid investigation. It contends that the alleged aid in question has led to substantial distortions in its primary market, even threatening its survival.

86 Finally, on this point, Konkurrenten submits that there is no intrinsic link between the scope of Article 69 RoP and the scope of the RAD provisions in question. Consequently, it rejects ESA's attempts to limit Konkurrenten's right to recover costs under Article 69(b) RoP on the basis that it had no private financial interest in the proceedings simply because the RAD, in some respects, requires that an overriding public interest be shown.

Preparation of the application for annulment

87 Konkurrenten is seeking to recover 15.5 hours of legal work for the drafting of the application. This cannot be considered unusual for the preparation of a 25-page application with 29 annexes. Konkurrenten submits that the case raised

novel and complex issues concerning public access under the RAD to electronically stored statements of content.

88 Konkurrenten also notes that its low use of time to produce the application reflects the fact that counsel had prior knowledge of the case, from which ESA ultimately now benefits in the taxation procedure.

Analysis of ESA's inadmissibility pleading and preparation of Konkurrenten's response

89 Konkurrenten is seeking to recover 4.5 hours of legal work to analyse ESA's inadmissibility pleading and for the drafting of its response. According to Konkurrenten, this cannot be considered out of the ordinary for the preparation of a response which dealt with complex admissibility issues that the Court itself chose to reserve for its final judgment.

90 Konkurrenten also notes that the factual basis for Risdal Touring's parallel action was different to that which applied in Konkurrenten's case, thus limiting the scope for "cross-work benefit".

Analysis of the defence and preparation of Konkurrenten's reply

91 Konkurrenten is seeking to recover 26 hours of legal work for the analysis of the defence and for the drafting of the reply. Given that the defendant submitted a comprehensive 35-page defence, Konkurrenten asserts that this cannot, in any way, be considered out of the ordinary. That a joint reply was submitted does not detract from the fact that Konkurrenten incurred costs in preparing its part of that reply.

Analysis of the rejoinder and preparations for the oral hearing

92 Konkurrenten is seeking to recover 9.75 hours of legal work for the analysis of the rejoinder and preparation of its contribution to the hearing, which includes preparing a new round of rebuttals, preparing responses to anticipated questions from the Court, and drafting talking points and the hearing manuscript.

Review of the hearing report and preparations of comments

93 Konkurrenten is seeking to recover 4.5 hours of legal work for the review of the relevant parts of the report for the hearing and for the preparation of comments. This cannot, in any way, be considered out of the ordinary for the review of a 60-page report for the hearing.

Oral hearing

94 Konkurrenten had a right to be represented by counsel at the hearing, which inherently required a full day away from the office. The company is seeking to recover a half-day, i.e. 4 hours; the other part being borne by Risdal Touring.

Total number of hours and average hourly rates incurred

95 In total, Konkurrenten's claim totals 64.25 hours of legal fees. The average hourly rate charged was NOK 3 000. Konkurrenten submits that in a similar and comparable case, the ECJ awarded hourly legal fees of EUR 390 and EUR 450 in the General Court and in the subsequent appeal before the Court of Justice, respectively, and refers to *Lagardère* v *Editions Odile Jacob*, cited above.

96 Konkurrenten notes that ESA assigned three agents to the main proceedings and suspects that if ESA were compelled to disclose its own use of time, the total time spent on the main proceedings by ESA's agents would far exceed the hours incurred by counsel for Konkurrenten.

Preparation of Konkurrenten's response to ESA's application for taxation of costs

97 Konkurrenten seeks to recover EUR 1 400 in legal costs for the present cost proceedings, which represents 3.5 hours of work.

Norwegian VAT outside the scope of EEA secondary law

98 Konkurrenten seeks to recover Norwegian VAT on the legal costs that it has incurred, which amounts to EUR 6 482.

99 Konkurrenten notes that the Court awarded compensation for Norwegian VAT on Konkurrenten's legal costs on 9 November 2012 in its order in Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above. Konkurrenten submits that ESA now seeks to contest this part of the claim on the basis of EU case law which predates the Court's last order on this point. Konkurrenten submits that ESA is seeking to convince the Court to change its stance on VAT.

100 Konkurrenten disagrees with ESA's view on this matter for three main reasons. First, VAT is not regulated by secondary EEA law, and falls outside the scope of the EEA Agreement altogether to the extent that it does not amount to an unlawful restriction on the four freedoms or unlawful State aid. Second, the EU case law is premised on the fact that VAT is fully harmonised among the EU Member States. Konkurrenten submits that this provides the Court with the necessary foundation to maintain its present stance on VAT in its taxation orders.

101 Third, there are important differences between Norwegian VAT law and EU VAT law and it remains unclear how Norwegian VAT law applies to legal costs. This lack of clarity stems in part from a recent judgment by the Norwegian Supreme Court of 11 October 2012, which appears to hold that legal work carried out in relation to litigation in a non-Norwegian court might fall outside the scope of Norwegian VAT, even though the work is carried out by a Norwegian law firm for a Norwegian client. Whereas most Norwegian law firms continue to apply VAT to their litigation services, at home and abroad, in relation to national clients (VAT which in the present case has long since been paid to the

tax authorities), the ultimate risk is inherently borne by the client, as the final link in the chain, with regard to the deductibility of that VAT. This means, in essence, according to Konkurrenten, that as long as the Court awards compensation for Norwegian VAT incurred on legal costs there is never any risk that Konkurrenten will be "overcompensated" but an inherent risk will be created that the company may end up "undercompensated" if no such compensation is awarded.

102 In sum, Konkurrenten asserts that as long as ESA has no reason to contest the fact that Konkurrenten has paid VAT on its legal costs due to the law firm, the Court should not alter its stance and shift the deductibility risk to Konkurrenten. Under the circumstances, Konkurrenten continues, the Court might be wise to consider the implications of making bold assumptions concerning the interpretation of Norwegian VAT law in the context of a taxation procedure, in as much as that national law falls outside the scope of the EEA Agreement.

Travel costs

103 Konkurrenten seeks to recover EUR 548 in travel costs pursuant to Article 69(b) RoP. This includes the costs of counsel making a round trip from Oslo to Luxembourg (EUR 362) and staying one night in Luxembourg (EUR 186) for the hearing on 17 April 2013.

104 These costs represent half of the actual hotel costs; the other half being borne by Risdal Touring because the oral hearing took place on the same day as Risdal Touring's hearing. Moreover, the airfare represents one third of the actual ticket price; the other two thirds being borne by Risdal Touring and another client of counsel that had an oral hearing before the Court the next day, 18 April 2013.

Copying costs

105 Konkurrenten seeks to recover EUR 363 in copying costs pursuant to Article 69(b) RoP. This includes only the copying of the application for annulment, its 29 annexes and 6 sets of copies that were submitted to the Court, in addition to a copy for counsel and a copy for the company.

Shipment costs

106 Konkurrenten seeks to recover EUR 1 074 in shipment costs pursuant to Article 69(b) RoP. This includes the shipments of the application for annulment on 7 June 2012 (EUR 449) and the response to the defendant's inadmissibility plea on 6 September 2012 (EUR 294) and the reply on 10 January 2013 (EUR 331).

Conclusion

107 In conclusion, Konkurrenten seeks to recover EUR 25 928 in legal costs before the Court, Norwegian VAT (25%) on those legal costs of EUR 6 482, EUR 548 for travel costs for counsel to attend the hearing, copying costs of EUR 363 and EUR 1 074 for shipping of pleadings. In addition, Konkurrenten seeks EUR

1 400 in legal costs for the present taxation procedure. This results in a final total of EUR 35 795.

Findings of the Court

108 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. In that regard, it is of no consequence that ESA is the applicant in these proceedings.

109 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.

110 The Court has recognised the principle of procedural homogeneity and held that, where necessary, 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*, cited above, paragraph 23 and case law cited, and Case E-15/10 COSTS *DB Schenker* v *Posten Norge*, order of 28 August 2014, not yet reported, paragraph 57).

111 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 Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 24 and case law cited, and *DB Schenker* v *Posten Norge*, cited above, paragraph 58).

112 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 Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 26 and case law cited, and *DB Schenker* v *Posten Norge*, cited above, paragraph 59).

113 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.

114 Where a party's lawyers have already assisted that party during proceedings or procedures prior to the relevant action, it is also necessary to have regard to the fact that those lawyers are aware of matters relevant to the action, which is likely

to have facilitated their work and reduced the preparation time required for the judicial proceedings (compare Case T-331/94 DEP *IPK-München* v *Commission* [2006] ECR II-51, paragraph 59 and case law cited).

115 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 Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, cited above, paragraph 27 and case law cited, and *DB Schenker* v *Posten Norge*, cited above, paragraph 60).

116 The amount of costs recoverable in the present cases must be assessed in the light of those criteria.

117 The dispute in the present cases concerned access to documents requests made by Risdal Touring and Konkurrenten prior to ESA opening its formal investigation procedure into potential State aid to Oslo Sporveier and Sporveisbussene (see Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten* v *ESA*, cited above, paragraph 112). The cases were significant as they were the first access to documents cases before the Court to concern State aid and were brought by a sole counsel. Furthermore, the Court decided to reserve its decision on ESA's preliminary objection concerning inadmissibility for the final judgment pursuant to Article 87(4) RoP, and a hearing was held on 17 April 2013.

118 The Court recalls that in Case E-4/12 *Risdal Touring* the application was partially dismissed as inadmissible and there was no longer a need to adjudicate upon the remainder. The Court held at paragraph 182 that, "ESA provided, what only in the present circumstances may be considered an appropriate statement of content of the file in ESA Case No 70506 in its rejoinder. The result of which is that there is no longer any need to adjudicate upon this part of the case. Only furnishing such a list 47 weeks after the request was made was unreasonable. However, ESA was correct in bringing the general presumption to the applicant's attention, in the circumstances, and inviting Risdal Touring to make document specific submissions to rebut the presumption. It is therefore appropriate that ESA be ordered to bear its own costs and half of the costs incurred by Risdal Touring. Risdal Touring is to bear half of its own costs."

119 In Case E-5/12 *Konkurrenten*, the case was dismissed as inadmissible as the first contested correspondence did not amount to a decision. The Court held at paragraph 183 that "ESA itself has characterised its conduct as regrettable. The Court finds that since ESA was seeking the dismissal of the case for reasons of inadmissibility yet refraining from taking measures to rectify its willingly acknowledged failure to act, it must be ordered to bear not only its own costs but also the costs incurred by Konkurrenten."

120 ESA has submitted that an hourly rate of EUR 400 for legal fees would be excessive in the present cases, and that EUR 200 might be more appropriate. ESA contends that the cases did not require expert knowledge and submits that

the proceedings centred on procedural matters and asserts that the substance of the case had already been addressed by previous ECJ case law.

121 The Court notes that the hourly rate charged by counsel to Risdal Touring and Konkurrenten was NOK 3 000. This was converted into euro by Risdal Touring's counsel when invoicing ESA at an effective rate of EUR 403.55, on the basis of Norges Bank's monthly average of daily NOK/EUR rates between May 2012 and April 2013.

122 The Court finds that recoverable lawyers' fees in the cases at hand can reasonably be assessed on the basis of an hourly rate of EUR 403.55. This rate presupposes that the work was carried out by an experienced lawyer in the relevant field (see *DB Schenker* v *Posten Norge*, cited above, paragraph 67 and case law cited).

123 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 *DB Schenker* v *Posten Norge*, cited above, paragraph 68 and case law cited).

124 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 *DB Schenker* v *Posten Norge*, cited above, paragraph 69 and case law cited).

Case E-4/12 *Risdal Touring*

125 As regards the preparation of its application for annulment, Risdal Touring claims 18.75 hours of legal assistance. ESA submits that 12 hours seems appropriate. While this was the first application of its type to come before the Court, the Court finds that 15 hours is sufficient.

126 As regards the preparation of its response to ESA's inadmissibility pleading, Risdal Touring seeks to recover 12.5 hours to analyse ESA's pleading and to draft its response. In this regard, it observes that the factual basis leading to the contested correspondence was not the same as in Konkurrenten's case and there was only a limited overlap of work from which Risdal Touring and Konkurrenten could benefit. ESA contends that 8 hours seems more reasonable for this part of the case. The Court finds that 12.5 hours of legal fees are appropriate.

127 As regards the preparation of its reply and to analyse the defence, Risdal Touring claims 45.25 hours of legal assistance. Risdal Touring submits that this period of time is not out of the ordinary and that a major part of the work on the reply fell on Risdal Touring because its case extended significantly beyond that of Konkurrenten. In addition, there was no case law on point and the issues before the Court were both novel and complex. ESA submits that 18 hours could be

considered acceptable for this part of the case. The Court finds that 32 hours of legal fees are appropriate.

128 As regards its preparations for the oral hearing and to review the rejoinder, Risdal Touring claims 19.5 hours of legal assistance. ESA contends that 8 hours could be regarded as acceptable. The Court finds that 12.5 hours of legal fees are appropriate.

129 As regards its review of the Report for the Hearing and for the preparation of comments, Risdal Touring claims 7 hours of legal assistance. ESA contends that 3 hours could be regarded as acceptable. The Court finds that 3 hours of legal fees are appropriate.

130 As regards the oral hearing, Risdal Touring claims a half-day, i.e. 4 hours of legal assistance. ESA asserts that, on splitting the legal fees for the oral hearing equally between the joined cases, only 1 hour could be reasonably attributed to Case E-4/12 *Risdal Touring*. The Court finds that 4 hours of legal fees are appropriate.

131 Consequently, the Court finds that a total of 79 hours of legal fees were necessarily incurred.

132 As regards the preparation of its response to the application for taxation of costs, Risdal Touring seeks to recover EUR 1 400 in legal costs, which represents 3.5 hours of legal assistance. The Court finds these legal fees to be appropriate.

133 Risdal Touring has claimed the cost of Norwegian VAT on its legal fees.

134 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 (see *DB Schenker* v *Posten Norge*, cited above, paragraph 79 and case law cited).

135 Risdal Touring is listed on the Norwegian Register of Business Enterprises as being registered for VAT. Consequently, Risdal Touring is not entitled to claim reimbursement of VAT on its recoverable costs as it has been able to deduct the amounts paid in VAT and, as a result, has not had to bear those sums itself.

136 As regards the attendance of its counsel at the hearing, Risdal Touring seeks to recover EUR 548 in travel costs pursuant to Article 69(b) RoP. This includes a one-third share of the costs of counsel making a round trip between Oslo and Luxembourg and half the cost of one night's accommodation in Luxembourg (EUR 186) for the hearing. The Court finds that these costs amounting to EUR 548 were necessarily incurred.

137 As regards the copying of its pleadings, Risdal Touring seeks to recover EUR 390 in copying costs pursuant to Article 69(b) RoP. This includes the costs of copying the application for annulment, its 33 annexes and 6 sets of copies submitted to the Court, in addition to a copy for counsel and a copy for the company itself. ESA states its willingness to pay the copying costs as specified but only exclusive of VAT. The Court finds that these costs, exclusive of VAT, charged to Risdal Touring of EUR 390 were necessarily incurred.

138 As regards the shipping of its pleadings, Risdal Touring seeks to recover EUR 1 051 in shipment costs pursuant to Article 69(b) RoP. This includes the costs of shipments made on 7 June 2012 for the application for annulment (EUR 757), and on 6 September 2012 for the response to ESA's inadmissibility plea (EUR 294). ESA states that it offered to pay these costs, as specified in the pre-litigation correspondence. The Court finds that these costs, amounting to EUR 1 051, were necessarily incurred.

139 It follows from the foregoing that the costs which the Court has found to be recoverable are lawyers' fees for the original proceedings of EUR 31 880.45, travel and subsistence expenses for the applicant's counsel of EUR 548, copying expenses of EUR 390 and shipping expenses of EUR 1 051. These costs amount in total to EUR 33 869.45. Bearing in mind that ESA is to pay only half of Risdal Touring's costs, the sum recoverable is EUR 16 934.73 to which must be added EUR 1 400 for Risdal Touring's response to the application for taxation of costs. The final total is EUR 18 334.73.

Case E-5/12 *Konkurrenten*

140 As regards the preparation of its application for annulment, Konkurrenten claims 15.5 hours of legal assistance. ESA submits that 10 hours seems appropriate. The Court recalls that counsel for Konkurrenten had prior knowledge of the case having been the company's representative throughout the administrative procedure. The Court finds that 11.5 hours of legal fees were reasonably incurred.

141 As regards the preparation of its response to ESA's inadmissibility pleading, Konkurrenten seeks to recover 4.5 hours to analyse ESA's pleading and to draft its response. In this regard, it observes that the factual basis for Risdal Touring's parallel action was different from Konkurrenten's own, thus limiting the scope for cross-work benefit. ESA contends that 3 hours seems more reasonable for this part of the case. The Court finds that 4.5 hours of legal fees are appropriate.

142 As regards the preparation of its reply and to analyse the defence, Konkurrenten claims 26 hours of legal assistance. Konkurrenten submits that this period of time is not out of the ordinary. In addition, there was no case law on point and the issues before the Court were both novel and complex. That a joint reply was submitted does not detract from the fact that Konkurrenten incurred costs in preparing its part of that reply. ESA submits that 12 hours could be considered

acceptable for this part of the case. The Court finds that 12 hours of legal fees are appropriate.

143 As regards its preparations for the oral hearing and to review the rejoinder, Konkurrenten claims 9.75 hours of legal assistance. ESA contends that 6 hours could be regarded as acceptable. The Court finds that 7 hours of legal fees are appropriate.

144 As regards its review of the Report for the Hearing and for the preparation of comments, Konkurrenten claims 4.5 hours of legal assistance. ESA contends that 2 hours could be regarded as acceptable. The Court finds that 2.5 hours of legal fees are appropriate.

145 As regards the oral hearing, Konkurrenten claims a half-day, i.e. 4 hours of legal assistance. ESA asserts that, on splitting the legal fees for the oral hearing equally between the joined cases, only 1 hour could be reasonably attributed to Case E-5/12 *Konkurrenten*. The Court finds that 4 hours of legal fees are appropriate.

146 Consequently, the Court finds that a total of 41.5 hours of legal fees were necessarily incurred.

147 As regards the preparation of its response to the application for taxation of costs, Konkurrenten seeks to recover EUR 1 400 in legal costs, which represents 3.5 hours of legal assistance. The Court finds these legal fees to be appropriate.

148 Konkurrenten has claimed the cost of Norwegian VAT on its legal fees. Konkurrenten is listed on the Norwegian Register of Business Enterprises as being registered for VAT. Consequently, Konkurrenten is not entitled to claim reimbursement of VAT on its recoverable costs as it has been able to deduct the amounts paid in VAT and as a result has not had to bear those sums itself (see paragraph 134 above and case law cited).

149 As regards the attendance of its counsel at the hearing, Konkurrenten seeks to recover EUR 548 in travel costs pursuant to Article 69(b) RoP. This includes a one-third share of the costs of counsel making a round trip between Oslo and Luxembourg and half the cost of one night's accommodation in Luxembourg (EUR 186) for the hearing. The Court finds that these costs of EUR 548 were necessarily incurred.

150 As regards the copying of its pleadings, Konkurrenten seeks to recover EUR 363 in copying costs pursuant to Article 69(b) RoP. This includes the costs of copying the application for annulment, its 29 annexes and 6 sets of copies submitted to the Court, in addition to a copy for counsel and a copy for the company itself. ESA states its willingness to pay the copying costs as specified but only exclusive of VAT. The Court finds that these costs, exclusive of VAT, amounting to EUR 363 were necessarily incurred.

151 As regards the shipping of its pleadings, Konkurrenten seeks to recover EUR 1 074 in shipment costs pursuant to Article 69(b) RoP. This includes the costs of shipments made on 7 June 2012 for the application for annulment (EUR 449), on 6 September 2012 for the response to ESA's inadmissibility plea (EUR 294), and on 10 January 2013 for the reply (EUR 331). ESA states that it offered to pay these costs, as specified in the pre-litigation correspondence. The Court finds that these costs, amounting to EUR 1 074, were necessarily incurred.

152 It follows from the foregoing that the costs which the Court has found to be recoverable are lawyers' fees for the original proceedings of EUR 16 747.33, travel and subsistence expenses for the applicant's counsel of EUR 548, copying expenses of EUR 363 and shipping expenses of EUR 1 074. These costs amount a recoverable sum of EUR 18 732.33 to which must be added EUR 1 400 for Konkurrenten's response to the application for taxation of costs. The final total is EUR 20 132.33.

On those grounds,

THE COURT

hereby orders:

In Case E-4/12 *Risdal Touring AS* v *EFTA Surveillance Authority*:

The EFTA Surveillance Authority is to pay Risdal Touring AS EUR 18 334.73 in costs.

In Case E-5/12 *Konkurrenten.no AS* v *EFTA Surveillance Authority*:

The EFTA Surveillance Authority is to pay Konkurrenten.no AS EUR 20 132.33 in costs.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 14 October 2014

Gunnar Selvik
Registrar

Carl Baudenbacher
President