ORDER OF THE COURT
11 October 2017

(Taxation of costs – Recoverable costs – Default Interest)

In Case E-7/12 COSTS,

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

applicants,

v

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

defendant,

APPLICATION for the taxation of costs awarded by the Court in its judgment of 9 July 2013 in Case E-7/12 *Schenker North and Others* v *ESA* [2013] EFTA Ct. Rep. 356,

THE COURT,

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

Registrar: Gunnar Selvik,

makes the following

Order

I Facts, procedure and forms of order sought

1 By application lodged at the Court on 9 July 2012, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS ("the applicants" or collectively "DB Schenker") brought an action under the third paragraph of Article 37 and the second paragraph of Article 46 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The applicants sought a declaration that the EFTA Surveillance Authority ("ESA") had failed to act on a request, submitted on 3 August 2010, for public access to documents in ESA Case No 34250, and that ESA be held liable to pay damages for losses incurred by its failure to take a timely decision and otherwise handle the request in a lawful manner.

2 By judgment of 9 July 2013 in Case E-7/12 *DB Schenker* v *ESA* [2013] EFTA Ct. Rep. 356 ("*DB Schenker II*"), the Court found that there was no need to adjudicate on whether ESA had failed to act in relation to remaining documents in Case No 34250 and dismissed the claims for non-contractual liability of ESA. The Court nevertheless awarded the applicants the costs incurred in relation to the claim alleging a failure to act, and half of the costs incurred in relation to the claim for non-contractual liability.

3 By a letter dated 3 November 2015, DB Schenker served on ESA its cost claim of EUR 124 978, requesting payment by 25 November 2015.

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

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

6 On 17 November 2015, ESA addressed the bills submitted by DB Schenker in another letter to Deutsche Bahn AG. Deutsche Bahn AG replied by letter dated 18 November 2015, maintaining that it was in a position to verify any documents submitted in accordance with the relevant jurisprudence in this regard.

7 By letter of 25 November 2015, ESA replied to the initial cost claim and stated that it acknowledged that it was to bear the applicants' costs. ESA informed DB Schenker, that it had ordered payment of EUR 1 996 to cover the part of the cost claim which corresponds to the shipping (EUR 1 262) and travel costs (EUR 734). However, as for the remainder, ESA considered the claim to be excessive in light of what the Court had previously considered necessary in other cases on the

taxation of costs. ESA also considered the information submitted as lacking specification. Accordingly, ESA requested clarification and justification of the cost claim. ESA requested DB Schenker to provide any such documentation by 14 December 2015.

8 On 27 November 2015, DB Schenker requested full payment of its costs no later than 10 December 2015.

9 By a letter dated 10 December 2015, ESA proposed to pay a sum of EUR 25 680 (representing 60 billable hours at the rate of EUR 428) to settle the dispute.

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

11 By a letter dated 18 January 2016, ESA repeated that it was not satisfied, "on the basis of the documentation submitted to date", that the costs in question had been incurred. ESA re-opened its offer for settlement made in its letter of 10 December 2015.

12 By a letter dated 22 January 2016, DB Schenker repeated its cost claim, which, after ESA's payment of EUR 1 996, amounted to a remaining balance of EUR 122 982.

13 On 15 February 2016, ESA sent a letter to DB Schenker stating that its settlement offer had now expired and that it saw "no basis for payment or further discussions on this matter".

14 In a letter dated 22 March 2016, DB Schenker once more requested payment of EUR 122 982, with a deadline of 22 April 2016.

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

16 By an application lodged on 7 December 2016, registered at the Court on the same day, DB Schenker brought an action under Article 34 of the Statute of the Court and Article 70(1) of the Rules of Procedure ("RoP") for taxation of the costs awarded by the Court in the *DB Schenker II* judgment. DB Schenker requests that:

> *1. The total amount of the remaining costs to be paid by the EFTA Surveillance Authority to Schenker North AB, Schenker Privak AB and Schenker Privak AS, is fixed at EUR 125 657.*
>
> *2. The amount shall bear interest for late payment from the date on which the present order is served on the parties until the date of actual payment. The rate of interest to be applied shall be calculated on the basis of the operations in force on the first calendar day of the month*

in which the deadline falls, increased by three and a half percentage points.

17 After having been granted an extension of the time limit to submit observations on the application, ESA submitted its observations on 19 January 2017, registered at the Court on the same day. ESA requests the Court to:

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

2. *In any event, dismiss the claim as it is supported by invoices addressed to Deutsche Bahn AG (Germany).*

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

3. *Set the costs at a value to be determined by the Court but in any event not more than EUR 14 911 for Case E-7/12.*

19 In any event ESA requests the Court to:

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

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

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

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

21 DB Schenker submitted its response on 3 July 2017.

II Law and assessment of the case

Arguments of the parties

DB Schenker

22 DB Schenker submits that the parties are in disagreement over the amount of costs that are recoverable pursuant to Article 69(b) RoP. According to case law, recoverable costs are limited, first, to those incurred for the purpose of the

proceedings before the Court and, second, to those which are necessary for that purpose. DB Schenker contends that the costs in the present case meet those criteria.

23 DB Schenker submits, first, that *DB Schenker II* raised novel and complex legal issues, as it was the first combined passivity and damages action to come before the Court under Article 37 and the second paragraph of Article 46 SCA. Second, DB Schenker had a significant financial interest in the case as it was pursuing a claim for damages of NOK 460 million against Posten Norge AS before the national courts. Third, the proceedings generated a significant amount of work, which is illustrated by the sheer volume of pleadings, evidence and court documents which led up to an extensive judgment.

24 With regard to the preparation of the application, DB Schenker argues that the combined application for failure to act and non-contractual liability was the first of its kind to be lodged with the Court, hence requiring both comprehensive factual clarifications and articulation of a legal basis. There was an uncertainty surrounding the legal status of ESA's Rules on Access to Documents ("RAD") at the time, especially due to the differences between these rules and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). The combined application had a length of 66 pages, exceeding normal page limitations, which is allowed only in complex cases. In light of this, DB Schenker claims 78.25 hours of legal assistance for the preparation of the application on the issue of failure to act and 17.25 hours of preparation on the issue of non-contractual liability.

25 With regard to the assessment of the defence, DB Schenker notes that the defence submitted by ESA was 42 pages long. ESA therein referred to arguments made in Case E-14/11 *Schenker North and Others* v *ESA* [2012] EFTA Ct. Rep. 1178 ("*DB Schenker I*"), but also included new arguments based on the judgments of the Court of Justice of the European Union ("ECJ") in *Commission* v *Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393 and *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394). The ECJ's judgments were only rendered after the oral hearing in *DB Schenker I* took place. Furthermore, ESA argued that the RAD were not part of EEA law, and hence not subject to homogeneous interpretation with EU law. In addition, various issues of admissibility and procedure were raised, which required legal assistance. DB Schenker thus claims costs for 24.5 hours of work in relation to the application for failure to act, and for 6.5 hours of work in relation to the application for non-contractual liability.

26 Moreover, DB Schenker submitted a request to stay the proceedings under Article 79(a) RoP until the Court had rendered its judgment in *DB Schenker I* in order to limit the scope of the conflict. As a judgment in *DB Schenker I* was imminent, the Court refused the request to stay the proceedings. However, it found that DB Schenker needed time to analyse the effects of the judgment in *DB Schenker I* on the principal action. DB Schenker claims costs for 2.5 hours of legal assistance for this part of the case.

27 With regard to the application from Posten Norge AS for leave to intervene, DB Schenker submits that it filed a comprehensive response to the request. Ultimately, the application for leave to intervene was rejected as inadmissible. DB Schenker claims 11.5 hours of legal assistance for this part of the case.

28 With respect to its reply to the defence, DB Schenker submits that ESA's defence included numerous procedural, factual and legal issues with regard to all constitutive elements of the application. Clarifications were needed since, in the applicants' view, ESA distorted its pleas, especially with regard to the argument concerning the differences between the RAD and Regulation (EC) No 1049/2001. The complexity entailed by the reply was reflected in the fact that the Court granted DB Schenker a two weeks' extension to prepare the reply. DB Schenker thus claims 38.5 hours of legal assistance in relation to the application for failure to act, and 9 hours of legal assistance in relation to the application for non-contractual liability.

29 In addition, DB Schenker filed an application for measures of organization of procedure to compel the defendant to disclose certain documents in its possession. This was necessary to contest the position of the defendant. DB Schenker claims 10.5 hours of legal assistance for this part of the case.

30 With regard to the rejoinder submitted by ESA, DB Schenker submits that a number of contentious factual and legal issues necessitated further work. DB Schenker claims costs for 15 hours of work in relation to the application for failure to act and 4.25 hours of work in relation to the application for non-contractual liability.

31 At the end of the written procedure, the Court invited the parties to review the Report for the Hearing and propose corrections or amendments. DB Schenker reviewed the report and submitted proposals for corrections and amendments; hence, it claims costs for 12.25 hours of work in relation to the application for failure to act and 2.25 hours of work in relation to the application for non-contractual liability.

32 DB Schenker argues that extensive preparation for the hearing was needed for the opening and closing statements, as well as for rebuttals and questions and answers on all issues involved. DB Schenker thus claims 34.25 hours of legal assistance in relation to the application for failure to act and 9.25 hours of legal assistance in relation to the application for non-contractual liability.

33 DB Schenker was represented at the hearing by its counsel. This required counsel to spend one working day in Luxembourg, away from the office. Accordingly, DB Schenker claims 8 hours of legal assistance for this part of the case.

34 Finally, the applicants claim costs for 6.25 hours of legal assistance for the preparation of the application for the present taxation of costs.

35 DB Schenker submits, that it has already deducted half of the hours of legal assistance necessary for the application for non-contractual liability in accordance with the judgment in *DB Schenker II*. The deducted amount consists of 48.75 hours of legal assistance.

36 Consequently, DB Schenker claims that the recoverable hours of legal assistance amount, in total, to 290 hours. Of this amount 38.75 hours of legal assistance are claimed for both parts of the application of the principal action, 202.5 hours in relation to the application for failure to act and 48.75 in relation to the application for non-contractual liability.

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

38 On the basis of the above, DB Schenker claims in total EUR 124 120 in legal costs (290 hours at a rate of EUR 428), EUR 2 799 in shipping and copying costs, as well as EUR 734 for expenses for travel, accommodation and subsistence in the context of the oral hearing. This adds up to EUR 127 653.

39 DB Schenker acknowledges that ESA has already reimbursed its claims relating to travel and shipping costs, by transferring the amount of EUR 1 996, before the present proceedings were lodged. This amount has, as a consequence, been subtracted from the total claim.

40 Thus, according to DB Schenker, the present cost claim amounts to EUR 125 657.

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

42 In response to the measures of organization of procedure prescribed by the Court, DB Schenker maintains that its legal costs in *DB Schenker II* amounted to NOK 1 116 475 which corresponds to 350.75 hours of work. The legal costs claimed in the present proceedings – excluding the 6.25 hours on the application for taxation of costs – correspond to EUR 121 445 or approximately NOK 901 389 at the material time. This represents 302 hours of work. A breakdown of that work has been set out in the application. The difference concerns 48.75 hours of work that were excluded in accordance with the judgment in *DB Schenker II*.

43 For the sake of completeness, DB Schenker further submits that some internal deliberations were included in the bills. Some of these internal deliberations concerned another case which was pending before the Court and where no costs were awarded to DB Schenker, namely Case E-8/12 *Schenker North and Others* v *ESA*, [2014] EFTA Ct. Rep 148. A copy of these invoices have nevertheless been attached to DB Schenker's response to the Court's measure of organisation of procedure. In this context, DB Schenker adds that the legal costs in Case E-8/12 amounted to NOK 1 494 000 or approximately EUR 191 342 at the time. In retrospect, it has proven difficult to separate which parts of internal deliberations

were spent discussing which of the two cases. However, DB Schenker estimates that the internal deliberations in *DB Schenker II* amounted to 40 hours of work.

44 As regards, in particular, invoice No 61338 of 26 October 2012, DB Schenker states that this invoice relates merely in part to *DB Schenker I*, and only to the extent DB Schenker's counsel carried out work in relation to the application to reopen the oral procedure. This part corresponds to 18.5 hours of legal work, which have already been deducted by DB Schenker in its initial cost claim.

ESA

45 ESA submits that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose.

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

47 Two of the invoices submitted by DB Schenker (Invoices No 61338 and No 61369, Annex 3 of Annex A.1) are, moreover, addressed to Deutsche Bahn AG, the parent company of the applicants. If invoices have been paid by a third party, there is a need for the payments to be traceable. No evidence establishing a link between these invoices and payment has been submitted. Moreover, Deutsche Bahn AG was neither a party to the principal action nor is it a party to the present proceedings (reference is made to the order in *Le Levant 015 and Others* v *Commission*, cited above).

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

49 Moreover, ESA adds that the total costs claimed are unclear, since, in its view, it is almost impossible to match the amount of the invoices with the amounts claimed. It cannot be excluded that parts of the costs claimed in the present case have also been claimed in *DB Schenker I*. ESA has repeatedly sought clarifications from the applicants, regarding the basis and methods for calculating the costs. ESA submits it is for the applicants to clarify the basis for all costs and not a matter for the Court to decide.

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

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

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

53 With regard to the purpose and nature of the proceedings, ESA observes that the applicants brought two pleas in the principal action, neither of which was successful since the Court held that there was no need to adjudicate on the first plea and the remainder of the application was dismissed. The legal questions addressed in the principal action did not raise novel and complex issues. The simple fact that the application grouped an action for failure to act and one for non-contractual liability does not make it significant, as both types of action had already been adjudicated upon by the Court in previous cases. Furthermore, access to document cases are of no economic interest as such for those who seek public access. The amount of legal fees should be assessed accordingly.

54 ESA submits that the hourly rate should be assessed at a maximum of EUR 403, which is the hourly rate previously accepted by the Court (reference is made to Joined Cases E-4/12 and E-5/12 COSTS *ESA* v *Risdal Touring and Konkurrenten.no* [2014] EFTA Ct. Rep. 934). According to the General Court, EUR 400 as hourly rate already greatly exceeds the appropriate remuneration even for a particularly experienced professional capable of working very quickly and efficiently (reference is made to the order in *Le Levant 015 and Others* v *Commission*, cited above, paragraph 54 and case law cited). Moreover, a high hourly rate requires a strict assessment of the number of hours charged (reference is made to the order in *Al Shanfari* v *Council and Commission*, T-121/09 DEP, EU:T:2012:607, paragraph 40).

55 With regard to the preparation of the application, ESA argues that the claimed costs for 78.25 hours of legal work for the part relating to failure to act and 17.25 hours of legal work for the part relating to non-contractual liability are excessive. It is settled case law that where the counsel has already worked on the same case in earlier stages and is hence familiar with the facts of the case, compensation for costs in proceedings before the Court should be reduced. In this case, the same counsel had assisted the applicants during the administrative stage before ESA.

Furthermore, the counsel had already been involved in several similar cases, namely *DB Schenker I* and *ESA* v *Risdal Touring and Konkurrenten.no*, cited above. As such, the hours necessary to work on the present case should be reduced. This is all the more true since the case in question was of limited significance for EEA law. The recoverable costs should thus be limited to 13 hours for the preparation of the application (8 hours for failure to act and 5 hours for non-contractual liability).

56 As for the applicants' cost claims for 24.5 hours (failure to act) and 6.5 hours (non-contractual liability) of legal assistance in relation to the defence, ESA notes that, since neither the factual issues nor the legal issues were unfamiliar to the counsel at this stage of the proceedings, not more than 4 hours (3 hours for failure to act and 1 hour for non-contractual liability) of legal assistance were necessarily incurred for this stage of the proceedings.

57 With regard to the application for stay of the proceedings, ESA underlines that this application was ultimately rejected by the Court. Accordingly, none of the costs claimed in this regard were necessary for the purpose of the proceedings.

58 As for Posten Norge AS's application for leave to intervene, ESA submits that the application was short (6 pages, including a schedule of Annexes) and an application for leave to intervene cannot introduce any new elements to the case. Hence, no more than 2 hours of work were necessary for this part of the case.

59 As to the preparation of the reply, ESA points out that the reply amounted only to 21 pages in total and its object was limited by the defence. No new pleas could have been added. Accordingly, it is excessive to claim further 47.5 hours of legal assistance in addition to the 31 hours already claimed for assessment of the defence. Recoverable costs in this regard should be limited to 8 hours (6 hours for failure to act and 2 hours for non-contractual liability) of legal assistance.

60 With regard to the applicants' claim of costs for 10.5 hours of work for preparation of the application for measures of organization of procedure, ESA also maintains that this application was rejected. Accordingly, none of the costs incurred in this regard were necessary for the purpose of the proceedings.

61 As regards the assessment of the rejoinder, ESA submits that just as the reply, the rejoinder cannot bring any new pleas in law pursuant to Article 37 RoP. The rejoinder is also the final step of the written procedure and DB Schenker could not even reply to it in writing. The assessment of the rejoinder should thus be seen as a part of the preparation for the oral hearing. ESA submits that a total of 3 hours of legal assistance (2 hours for failure to act and 1 hour for non-contractual liability) were necessary.

62 As regards the review of the Report for the Hearing and the preparation of a response, ESA submits that the Court previously held that a total of 3 hours were appropriate for the review of the Report for the Hearing and the preparation of a response (reference is made to *ESA* v *Risdal Touring and Konkurrenten.no*, cited

above). The Report for the Hearing was even shorter in the present principal action than in *ESA* v *Risdal Touring and Konkurrenten.no*; accordingly, no more than 2 hours (1.25 hour for failure to act and 0.75 hour for non-contractual liability) of legal assistance were necessary.

63 With regard to the preparation for the oral hearing, ESA submits that a total of 43.50 hours clearly exceeds what was necessary in the case at issue. This is particularly so since the counsel was already familiar with all aspects of the case and the time allocated to DB Schenker to present its arguments at the hearing was limited. Hence, ESA submits that costs for 3 hours (2 hours for failure to act and 1 hour for non-contractual liability) of legal assistance are recoverable for the preparations for the oral hearing.

64 As regards the participation in the hearing, ESA maintains that the hearing lasted less than 2 hours and accordingly only 2 hours should be considered as necessarily incurred expenses.

65 In total, ESA sustains that costs for 37 hours of legal work at an hourly rate of EUR 403 were necessarily incurred. The total maximum recoverable costs for legal assistance would accordingly be EUR 14 911.

66 ESA further notes it has already paid EUR 1 996 in travel, shipping and copying costs. There exists however no evidence that these invoices have been paid by the applicants or by Deutsche Bahn AG. Accordingly, this amount should be taken off the global sum for costs to prevent double payment.

67 With regard to the DB Schenker's request to be granted default interest on any costs awarded by the Court in this case, ESA sustains that such a decision would be unnecessary as it would pay any costs awarded as soon as practically possible.

Findings of the Court

68 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.

69 According to Article 69(b) RoP, "expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers", shall be regarded as costs, which are recoverable from the party ordered to pay the costs. It follows that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose (see *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 111 and case law cited).

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

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

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

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

74 The Court notes that the only requirement in this regard is that evidence presented must substantiate the claims made by the applicant and be sufficiently precise and detailed so as to enable assessment by the Court (compare *Lagardère* v *Éditions Odile Jacob*, cited above, paragraphs 31 to 34, as well as the order in *Tetra Laval* v *Commission*, T-5/02 DEP and T-80/02 DEP, EU:T:2011:129, paragraphs 69 and 70). There are no further requirements as to the manner in which the evidence shall be presented. In particular, there are no conditions for when the account of the hours should have been drafted.

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

76 ESA's fourth argument is that the invoices for legal costs presented cannot be traced to the particular case, since they partly overlap with invoices presented in *DB Schenker I*.

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

78 Moreover, the overlap between the two cases was, moreover, clarified and accounted for by DB Schenker in their application and in their response to the measures of organization of procedure. The information provided in the present application for taxation of costs is also consistent with the information provided

for in DB Schenker's application for taxation of costs in the context of Case E-14/11 COSTS *DB Schenker* v *ESA* (see Case E-14/11 COSTS *Schenker North and Others* v *ESA*, order of 11 October 2017, not yet reported, paragraph 87).

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

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

81 Finally, ESA contends that the manner in which the applicants have calculated the exchange rate of NOK into EUR is imprecise. The applicants have calculated the exchange rate on the average of the official daily exchange rates of the Norwegian Central Bank during the time when the work was carried out. The Court recalls that this method of calculation has already been accepted in previous cases (see *ESA* v *Risdal Touring* and *Konkurrenten.no*, cited above, paragraph 121). Thus, also this part of ESA's submissions does not merit the rejection of the present application for taxation of costs.

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

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

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

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

86 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).

87 The applications at issue concerned access to documents *en gros*. When the application was lodged, the Court had not yet decided any case concerning access to documents. In that regard, the Court notes that in cases where parties seek access to documents, their financial interest in the proceedings is unlikely to be a determinative factor in the Court's assessment as the value of the information contained within the relevant document is both uncertain and unknown (see *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 113).

88 Moreover, at the time of the application, the applicants pursued a case on access to documents, namely *DB Schenker I*. DB Schenker was represented by the same counsel in that case.

89 Nevertheless, the legal issues addressed in the present case, *DB Schenker II*, were, by their very nature, different from those addressed in *DB Schenker I*. While the latter case concerned the refusal for access to documents, the former concerned an application for failure to act on a request and an application for non-contractual damages.

90 As regards the application for failure to act, the Court notes that the factual background leading up to the judgment of *DB Schenker II* stretched over a period of two years. ESA defined its position on some of the documents concerned only on 5 September 2012 (see *DB Schenker II*, cited above, paragraphs 87 and 89). This was almost two months after *DB Schenker II* was already pending before the Court. Nevertheless, it is also true that *DB Schenker I* addressed some of the legal issues relevant for this part of the case at issue (see, for example, *DB Schenker II*, cited above, paragraphs 72 and 84).

91 These circumstances must be taken into consideration when assessing the complexity of this part of DB Schenker's application in *DB Schenker II*.

92 As regards DB Schenker's second part of that application, which concerned a claim for compensation for legal fees, allegedly due to ESA's passivity, the Court notes that this part of the application raised new issues under EEA law.

93 With regard to the non-contractual liability for the legal fees incurred before ESA, DB Schenker had a certain economic interest, in the sense that a successful application might have resulted in the award of damages to the applicants.

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

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

96 For the purposes of determining the amount of recoverable legal fees these can usefully be assessed by the Court as a number of hours' work at a certain hourly rate. The primary consideration of the Court is the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court (see, to that effect, *ESA* v *Risdal Touring and Konkurrenten.no*, cited above, paragraph 124 and case law cited).

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

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

99 In this regard, the Court notes that the main proceedings generated a significant amount of work for the applicants' counsel. The legal proceedings before the Court concerned an application for a failure to act and for damages. It included two sets of statements being exchanged, observations concerning Posten Norge AS's application for leave to intervene, an oral hearing, as well as an application for the stay of the procedure and an application for a measure of organization of procedure.

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

101 The applicants' counsel had represented them before ESA with regard to the claim for access to documents. Moreover, the counsel had already pursued several cases before the Court which had an influence on the legal problems raised in *DB Schenker II*. He did so partly on behalf of the same applicants. Consequently, he was familiar with the subject matter and facts of the case. Also with regard to the

application for non-contractual liability, it is reasonable to consider that he was familiar with the factual background of the case.

102 In the following assessment, the Court notes that the applicants have, in their application, already taken account of the fact that ESA is to bear only half of the applicants' costs in relation to the part of the original action, which related to non-contractual liability. This is in accordance with the operative part of the Court's judgment in *DB Schenker II*. Accordingly, the Court will assess the present claim on basis of those figures.

103 As regards the preparation of the application, DB Schenker claims 78.25 hours of legal assistance for the part relating to failure to act and 17.25 hours for the part relating to non-contractual liability. ESA submits that 8 hours of preparation relating to failure to act and 5 hours of preparation relating to non-contractual liability are recoverable. The Court finds a total of 45 hours appropriate for this stage of the procedure, comprising 38 hours of legal assistance for the part relating to failure to act and 7 hours for the part relating to non-contractual liability. In that context, regard must be had, on the one hand, to the fact that the application raised new legal issues and that, on the other hand, the counsel represented the applicants already in the pre-litigation phase and similar legal proceedings before the Court.

104 As regards the review of the defence, the applicants seek to recover 24.5 hours of legal assistance in relation to the application for failure to act, and 6.5 hours of legal assistance in relation to the application for non-contractual liability. ESA submits that merely 4 hours of legal assistance are recoverable. The Court finds 17 hours of legal assistance appropriate, 15 hours with regard to legal assistance in relation to the application for failure to act and 2 hours with regard to legal assistance in relation to the application for non-contractual liability, considering the scope of the defence and the issues raised therein.

105 As regards the application for stay of proceedings, the applicants seek to recover 2.5 hours of legal assistance. ESA submits that no costs are recoverable, since the application was unsuccessful. The Court finds 1 hour appropriate for this application, as the application for stay of proceedings was, albeit unsuccessful, not unreasonable.

106 For the assessment of Posten Norge AS's application for leave to intervene and the preparation of the respective response, the applicants claim 11.5 hours of legal assistance. ESA submits that 2 hours of legal assistance are sufficient. The Court finds that, in view of the scope of the application and the response to it as well as the fact that the application was rejected as inadmissible, 8 hours of legal assistance are recoverable.

107 As regards the preparation of the reply, the applicants seek to recover costs of 38.5 hours of legal assistance in relation to the application for failure to act, and 9 hours of legal assistance in relation to the application for non-contractual liability. ESA submits that, in total, 8 hours are recoverable (6 hours of work in relation to the application for failure to act and 2 hours of work in relation to the application for

non-contractual liability). The Court finds that costs for 24 hours of work were objectively necessary for this part of the procedure, considering the scope of both reply and defence and the fact that the applicants have already been granted 17 hours for the review of the defence alone (see, above, paragraph 104). These 24 hours comprise 19 hours of legal assistance in relation to the application for failure to act and 5 hours of legal assistance in relation to the application for non-contractual liability.

108 DB Schenker claims 10.5 hours of legal assistance for the preparation of the application for measures of organization of procedure. ESA submits that the legal assistance related to this stage of the procedure was not necessary for the procedure, since the application was unsuccessful. The Court finds that costs for 4 hours of work are recoverable.

109 As regards the assessment of the rejoinder, DB Schenker seeks to recover costs for 15 hours of work in relation to the application for failure to act and for 4.25 hours of work in relation to the application for non-contractual liability. ESA submits that costs for 3 hours of work should be deemed necessary. The Court finds that a total of 10 hours were necessary to assess the rejoinder, considering that the rejoinder was the last document exchanged between the parties before the hearing and that the legal counsel could have been expected to have a thorough understanding of the case at this point. The hours considered necessary for this stage of procedure comprise 8 hours of work in relation to the application for failure to act and for 2 hours of work in relation to the application for non-contractual liability.

110 As regards the review of the Report for the Hearing and the preparation of a response, DB Schenker claims 12.25 hours of legal assistance in relation to the application against failure to act and 2.25 hours of legal assistance in relation to the application against non-contractual liability. ESA submits that costs for 2 hours of legal assistance are recoverable. The Court finds that a total of 8 hours of legal assistance were necessary to read the Report and to prepare comments. Of these 8 hours, 7 relate to the application against failure to act and 1 to the application against non-contractual liability.

111 As regards the preparation of the oral hearing, the applicants seek to recover costs for 34.25 hours of legal assistance in relation to the application for failure to act and for 9.25 hours in relation to the application for non-contractual liability. ESA submits that 3 hours of legal assistance are recoverable. The Court finds that 15 hours were necessary to review the relevant case law and to prepare the opening statement, having regard to the fact that DB Schenker claimed already substantial hours of legal assistance for the review of the rejoinder and the review of the Report for the Hearing. The 15 hours of legal assistance considered necessary for this stage of the proceedings comprise, on the one hand, 12 hours of legal assistance in relation to the application for failure to act, and, on the other hand, 3 hours in relation to the application for non-contractual liability.

112 The applicants seek to recover costs for 8 hours of legal assistance in relation to the oral hearing, whereas ESA submits that 2 hours are sufficient. The Court finds that 8 hours are appropriate for the participation in the oral hearing.

113 As regards the application for the preparation of the cost claim, DB Schenker seeks to recover costs for 6.25 hours of legal assistance. The Court finds that 6.25 hours are appropriate.

114 Consequently, the Court finds that a total of 146.25 hours of legal fees, which equals EUR 62 595, were necessarily incurred for the purpose of the proceedings before the Court, taking due account of the fact that the applicants were to bear half of their own costs concerning the action for non-contractual liability.

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

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

Total amount of recoverable costs

117 It follows from the foregoing that the Court finds it justified to order ESA to meet the lawyer's fees of DB Schenker at a total of EUR 62 595 and reimburse the expenses of EUR 500.

118 As a consequence, the Court holds that the total remaining costs to be paid by ESA to the applicants are fixed at EUR 63 095.

Default Interest

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

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

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

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

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

On those grounds,

THE COURT

hereby orders:

1. **The total remaining costs to be paid by ESA to the applicants are fixed at EUR 63 095.**

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

Carl Baudenbacher Per Christiansen Ása Ólafsdóttir

Luxembourg, 11 October 2017

Gunnar Selvik
Registrar

Carl Baudenbacher
President