JUDGMENT OF THE COURT
21 December 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – Measures of Organization of Procedure – Reopening of oral procedure)

In Case E-14/11,

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, advocate,

applicants,

v

EFTA Surveillance Authority, represented by Florence Simonetti, Deputy Director, and Markus Schneider, Senior Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by

Posten Norge AS, established in Oslo (Norway), represented by Beret Sundet and Arne Torsten Andersen, advocates,

Intervener,

APPLICATION for annulment of the EFTA Surveillance Authority's Decision in Case No 68736 of 16 August 2011 denying the applicants access to certain documents relating to Case No 34250 *Norway Post* / *Privpak* on the basis of the Rules on Access to Documents established by the College of the EFTA Surveillance Authority on 27 June 2008,

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the applicants, the defendant and the intervener, and the written observations of

- the European Commission (hereinafter 'the Commission'), represented by Piedade Costa de Oliveira and Manuel Kellerbauer, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral argument of the applicants, represented by Jon Midthjell; the defendant, represented by Markus Schneider and Florence Simonetti; and the intervener, represented by Beret Sundet and Arne Torsten Andersen; at the hearing on 5 June 2012,

gives the following

Judgment

I Introduction

1 Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (hereinafter 'the applicants' or, collectively, 'DB Schenker') are part of the DB Schenker group. The group is a large European freight forwarding and logistics undertaking. It combines all transport and logistics activities of Deutsche Bahn AG except passenger transport. Schenker North AB owns and controls the group's businesses in Norway, Sweden and Denmark. Schenker Privpak AS, a limited liability company incorporated under Norwegian law, has handled DB Schenker's domestic business-to-consumer (hereinafter 'B-to-C') parcel service in Norway. Schenker Privpak AB is a company incorporated in Sweden. Both Schenker Privpak AB and Schenker Privpak AS have handled international customers seeking B-to-C distribution in Norway.

2 The case concerns the decision taken by the EFTA Surveillance Authority (hereinafter 'the defendant' or 'ESA') on 16 August 2011 regarding the applicants' request of 3 August 2010, under the Rules on Access to Documents (hereinafter 'RAD') established by the College of the EFTA Surveillance

Authority, for full access to documents in the file leading to ESA's decision in Case No 34250 (Norway Post / Privpak) of 14 July 2010.

3 ESA's investigation in that case was initiated following a complaint from DB Schenker received on 24 June 2002 concerning the agreements made by Posten Norge AS, a state-owned company (hereinafter 'Norway Post'), establishing Post-in-Shops in retail outlets. During the course of its investigation, ESA conducted an inspection of Norway Post's premises between 21 and 24 June 2004 and seized various documents (hereinafter 'the inspection documents').

4 In its decision of 14 July 2010, ESA found that Norway Post had infringed Article 54 of the EEA Agreement (hereinafter 'EEA') by abusing its dominant position in the B-to-C parcel market in Norway between 2000 and 2006. Norway Post applied to the Court to have ESA's decision annulled. The Court gave judgment in those proceedings on 18 April 2012 (Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported).

II Legal background

EEA law

5 Recital 4 of the preamble to the EEA Agreement reads as follows:

> *CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties.*

6 Recital 8 of the preamble to the EEA Agreement reads as follows:

> *CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;*

7 Recital 15 of the preamble to the EEA Agreement reads as follows:

> *WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;*

8 Article 108(1) EEA reads as follows:

> *The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.*

9 Article 122 EEA reads as follows:

> *The representatives, delegates and experts of the Contracting Parties, as well as officials and other servants acting under this Agreement shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*

10 Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA') reads as follows:

> *In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.*

11 Article 14(4) SCA reads as follows:

> *Members of the EFTA Surveillance Authority, officials and other servants thereof as well as members of committees shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*

12 Article 27 of Chapter II of Protocol 4 SCA on the hearing of the parties, complainants and others reads as follows:

> *1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the EFTA Surveillance Authority shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the EFTA Surveillance Authority the opportunity of being heard on the matters to which the EFTA Surveillance Authority has taken objection. The EFTA Surveillance Authority shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.*
>
> *2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the EFTA Surveillance Authority's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the EFTA Surveillance Authority or the competition authorities of the EFTA States. In particular, the right of access shall not extend to correspondence between the EFTA Surveillance Authority and the competition authorities of the EFTA States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the EFTA Surveillance Authority from disclosing and using information necessary to prove an infringement.*

3. If the EFTA Surveillance Authority considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the EFTA States may also ask the EFTA Surveillance Authority to hear other natural or legal persons.

…

13 Article 28 of Chapter II of Protocol 4 SCA on professional secrecy reads as follows:

1. Without prejudice to Article 9 of Protocol 23 to the EEA Agreement and Articles 12 and 15 of this Chapter, information collected pursuant to Articles 17 to 22 or of Article 58 of the EEA Agreement and Protocol 23 thereto, shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the EFTA Surveillance Authority and the competition authorities of the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the EFTA States shall not disclose information acquired or exchanged by them pursuant to this Chapter or Article 58 of the EEA Agreement and Protocol 23 thereto and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of EFTA States attending meetings of the Advisory Committee pursuant to Article 14.

This obligation shall also apply to the representatives of the EC Commission and of the EC Member States who participate in the Advisory Committee pursuant to Article 14(3) and in the hearing pursuant to Article 14(3) of Chapter III.

14 Article 6 of Chapter III of Protocol 4 SCA on the participation of complainants in proceedings reads as follows:

1. Where the EFTA Surveillance Authority issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The EFTA Surveillance Authority may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

15 Article 8 of Chapter III of Protocol 4 SCA on access to information reads as follows:

1. Where the EFTA Surveillance Authority has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the EFTA Surveillance Authority

bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the EFTA Surveillance Authority under Articles 53 and 54 of the EEA Agreement may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those provisions of the EEA Agreement.

16 Article 16 of Chapter III of Protocol 4 SCA on the identification and protection of confidential information reads as follows:

1. Information, including documents, shall not be communicated or made accessible by the EFTA Surveillance Authority in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) of this Chapter or subsequently submits further information to the EFTA Surveillance Authority in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the EFTA Surveillance Authority for making its views known.

3. Without prejudice to paragraph 2 of this Article, the EFTA Surveillance Authority may require undertakings and associations of undertakings which produce documents or statements pursuant to Chapter II to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The EFTA Surveillance Authority may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Chapter II or a decision adopted by the EFTA Surveillance Authority which in their view contains business secrets.

The EFTA Surveillance Authority may set a time-limit within which the undertakings and associations of undertakings are to:

(a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;

(b) provide the EFTA Surveillance Authority with a non-confidential version of the documents or statements, in which the confidential passages are deleted;

(c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the EFTA Surveillance Authority may assume that the documents or statements concerned do not contain confidential information.

Rules on access to documents (hereinafter 'RAD') - Decision 407/08/COL of 27 June 2008

17 The preamble to the RAD reads as follows:

> *HAVING REGARD to the agreement on the European Economic Area, in particular Article 108 thereof,*
>
> *HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 13 thereof,*
>
> *HAVING REGARD to the Rules of Procedures of the EFTA Surveillance Authority,*
>
> *Whereas openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, based on democracy and human rights, as referred to in recital 1 of the preamble of the EEA Agreement,*
>
> *Whereas the purpose of these Rules is to ensure the highest degree possible of openness and transparency at the Authority, while still showing due concern to the necessary limitations due to protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed necessary in order to safeguard the Authority's ability to carry out its tasks,*
>
> *Whereas the Authority wishes to adopt rules on access to documents substantively similar to Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents,*
>
> *Whereas the Authority will in the application of the rules strive to achieve a homogeneous interpretation with that of the Community Courts and the European Ombudsman when interpreting a provision of these which is identical to a provision in Regulation 1049/2001 so as to ensure at least the same degree of openness as provided for by the Regulation,*
>
> *Whereas the EFTA Surveillance Authority should take the necessary measures to inform the public of the new Rules on access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate for citizens to exercise their rights, the Authority should provide access to a register of documents.*

18 Article 1 RAD reads as follows:

> *The purpose of these Rules is:*
>
> *(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to EFTA Surveillance Authority (hereinafter 'the Authority') documents produced or held by the Authority in such a way as to ensure the widest possible access to documents,*

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

19 Article 2 RAD on beneficiaries and scope reads as follows:

1. Any citizen of an EEA State, and any natural or legal person residing or having its registered office in an EEA State, has a right of access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules.

2. The Authority may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in an EEA State.

3. These Rules shall apply to all documents held by the Authority, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the Authority.

4. Without prejudice to Article 4, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.

5. These Rules shall be without prejudice to rights of public access to documents held by the Authority which might follow from instruments of international or EEA law.

20 Article 4 RAD on exceptions reads as follows:

1. The Authority shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with EEA legislation regarding the protection of personal data.

2. The Authority shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

5. As regards third-party documents, the Authority shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall not be disclosed or, when the document does not originate from an EFTA State, it is clear that the document shall be disclosed.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 4 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

21 Article 6 RAD on applications reads as follows:

1. The Authority shall examine applications by any natural or legal person for access to a document made in any written form, including electronic form, in one of the languages referred to in Article 129 of the EEA Agreement and Article 20 of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in a sufficiently precise manner to enable the Authority to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the Authority shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution.

4. The Authority shall provide information and assistance to citizens on how and where applications for access to documents can be made.

22 Article 7 RAD on the processing of applications reads as follows:

1. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within 5 working days from registration of the application.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

23 Article 9 RAD on registers reads as follows:

1. The Authority shall, as soon as possible, provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without undue delay.

2. For each document the register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

24 Article 10 RAD on direct access in electronic form or through a register reads as follows:

The Authority shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the Authority.

25 Article 11 RAD on the administrative practice of ESA reads as follows:

The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.

26 Article 13 RAD on entry into force reads as follows:

These Rules shall be applicable from 30 June 2008 and apply to requests for access to documents submitted to the Authority after that date.

The Authority shall publish these Rules in the EEA Supplement to the Official Journal of the European Union.

Communication from the EFTA Surveillance Authority: Notice on the rules for access to the EFTA Surveillance Authority file in cases pursuant to Articles 53, 54 and 57 of the EEA Agreement (OJ C 250, 25.10.2007, p. 16)('Notice on rules for access to the ESA file')

27 Point 3.2.1 of the Notice on rules for access to the ESA file reads as follows:

Business secrets

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

28 Point 3.2.2 of the Notice on rules for access to the ESA file reads as follows:

Other confidential information

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the

specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. It is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

...

29 Point 3.2.3 of the Notice on rules for access to the ESA file reads as follows:

23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential (2). Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the EFTA Surveillance Authority presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential.

...

III Background to the dispute

30 In the course of the investigation concerning Norway Post's behaviour under Article 54 EEA, ESA conducted inspections of Norway Post's premises between 21 and 24 June 2004. On 14 July 2010, ESA adopted Decision 322/10/COL in which it found that Norway Post had abused its dominant position in the B-to-C parcel market with over-the-counter delivery in Norway between 20 September 2000 and 31 March 2006. ESA ordered Norway Post, insofar as it had not already done so, to bring the infringement to an end and to refrain from further abusive conduct, and imposed a fine of EUR 12 890 000 on Norway Post.

31 On 14 September 2010, Norway Post lodged an application with the Court under the second paragraph of Article 36 SCA seeking annulment of Decision 322/10/COL. In a judgment handed down on 18 April 2012, the Court in Case E-15/10 *Posten Norge* v *ESA* reduced the fine imposed by ESA on Norway Post to EUR 11 112 000 due to the excessive duration of ESA's investigation, and dismissed the remainder of the application.

32 DB Schenker is pursuing a follow-on damages claim against Norway Post in the Norwegian courts for losses allegedly caused by the infringement of Article 54 EEA.

33 On 27 June 2008, ESA adopted Decision 407/2008 on Rules on Access to Documents. These rules essentially reproduce the provisions of 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. While the contents of the RAD and Regulation No 1049/2001 are essentially the same, the RAD does not include the recitals to the Regulation.

34 On 3 August 2010, DB Schenker sent an email to ESA requesting access to the file in Case No 34250 (*Norway Post* / *Privpak*), in preparation of its damages claim against Norway Post in the Norwegian courts.

35 There were numerous communications between DB Schenker and ESA concerning the scope of the request for access to the file, the deadline for the completion of the request and delays. DB Schenker contacted ESA by email on 4 August 2010, 30 August 2010, 6 September 2010, 14 September 2010, 17 September 2010, and by letter on 9 November 2010, 6 January 2011 and 17 February 2011. ESA replied to DB Schenker by email on 4 August 2010, 10 August 2010, 30 August 2010, 1 September 2010, 17 September 2010, and by letter on 5 November 2010, 10 November 2010, 16 February 2011, 18 February 2011 and 16 August 2011.

36 On 30 August 2010, DB Schenker was provided with a draft non-confidential version of ESA's Decision 322/10/COL, a non-confidential version of Norway Post's reply to ESA's Statement of Objections, and a list of the documents on the file to which Norway Post was granted access when the Statement of Objections was issued.

37 By letter of 5 November 2010, ESA provided access to further documents. Annex I to that letter contained a list of correspondence and other documents containing information about Norway Post (to which access was granted to all documents in their entirety) and Annex II to that letter contained a list of documents for which Norway Post claimed confidentiality during the administrative procedure.

38 Full access was granted to the following documents:

- Event # 296227 – ECON Report (Rebate case) – 13/06/2002;
- Event # 95585 – Fax Reply from Norway Post – Memo re Sections 1-3 and 5 – 23/06/2003;
- Event # 313884 – Norway Post Reply (Thommessen) to ESA's letter of 18.02.2005 – 22/03/2005;
- Event # 354014 – Reply from Norway Post – 09/12/2005;
- Event # 378457 – Reply from Norway Post June 2006 – 16/06/2006;

- Event # 379462 – Reply from Norway Post – Annex 1 – Table 2 – Other PiS – 27/062006;

- Event # 415750 – Letter from Norway Post – 29/03/2007; Event # 437351 – Reply by Norway Post – 29/08/2007;

- Event # 449481 – Reply by Norway Post (BAHR) – confidential version – 29/08/2007;

- Event # 449853 – Reply by Norway Post (BAHR) – annex 1 – confidential version – 29/08/2007;

- Event # 449890 – Reply by Norway Post (BAHR) – annex 2 – confidential version – 29/08/2007;

- Event # 524501 – Bilag til oppfølgningsbrev etter høringen nr 1.PDF – 14/07/2009. In addition, partial access was granted to some of Norway Post's submissions.

39 On 16 February 2011, full access was granted to the first batch of third party documents relating to communication with eight third parties during the administrative procedure.

40 On 16 August 2011, ESA sent DB Schenker the contested letter.

IV The contested letter

41 By way of its contested letter of 16 August 2011, ESA granted DB Schenker access to Norway Post's 2004 price list, a presentation by Norway Post to the Norwegian Mail Order Association of 4 March 2004, and documents obtained from another twelve third parties (to which full access was granted to several documents).

42 Additionally, ESA permitted the disclosure of two letters addressed to Privpak dated 3 January 2002 but did not provide them, assuming that they were already in DB Schenker's possession.

43 ESA denied DB Schenker access to the remaining 350 documents in the case file seized during the inspection of Norway Post's premises in June 2004 (hereinafter 'inspection documents').

44 ESA stated that providing DB Schenker with access to such documents from the file would undermine the privacy and the integrity of private individuals who were involved in the practices of Norway Post, and that those documents contained information that must be regarded as commercially sensitive or would likely undermine the protection of commercial interests of natural or legal persons. ESA considered that partial access to the inspection documents could not be granted and found that there were no overriding public interests in the

disclosure of those documents. It was further contended that the remaining third party documents were still subject to assessment and third party consultation.

45 ESA also stated that it had consulted Norway Post in accordance with Article 4(5) RAD regarding the documents obtained during the inspection of its premises between 21 and 24 June 2004.

46 In its response to the consultation, Norway Post highlighted the sheer volume of the documents obtained during the inspection, claiming that they contained information that remained sensitive in terms of business secrets as well as information about private persons. Norway Post contended that it would be difficult and demanding to produce non-confidential versions of those documents, which, in any event, would be of limited value to DB Schenker. Furthermore, it argued that there was a risk that future ESA inspections might be less effective if access was granted to the type of information in question, as undertakings would be less inclined to cooperate. Instead, undertakings could have incentives to obstruct inspections and withhold information.

Privacy and integrity of the individual

47 In its assessment, ESA noted that the documents were obtained from employees' lockers, PCs and offices. A significant part of the documents obtained consist of emails with attachments that were exchanged between Norway Post's employees or between Norway Post's employees and employees of its business partners. ESA stated that the inspection concerned both the exclusivity agreements and practices addressed in Decision 322/10/COL and, additionally, Norway Post's discount system for parcel services. The latter investigation was closed on 14 July 2010 without any breach of the EEA competition rules having been found.

48 ESA contended that disclosing the names or identity of private individuals involved in Norway Post's practices under investigation would undermine their privacy and integrity protected under Article 4(1)(b) RAD.

Business secrets and other commercially sensitive information

49 ESA stated that the information obtained during the inspection amounted to approximately 2 800 pages and consisted of 352 different documents grouped and registered under 26 document numbers in ESA's information management system. These documents were internal emails, reports and agreements or draft agreements with customers or partners, evaluations of competitors and markets, or they contained other strategic information. ESA noted that it had reviewed all 352 documents and concluded that they contained commercially sensitive information and were of such a nature that the disclosure of any meaningful part of them to the general public would undermine the protection of commercial interests of natural or legal persons provided for in Article 4(2) RAD.

50 ESA stated further that it had considered the concern that the disclosure of documents obtained during an inspection could undermine the protection of the

purpose of such inspections in competition cases. Infringements of the competition rules will often be carried out in conditions of secrecy, and knowledge of such infringements will often be confined to senior executives and a limited number of trusted staff. ESA also noted that evidence confirming illegal conduct is often kept to a minimum and held in a form that can be readily concealed, withheld or destroyed in the event of an inspection. ESA contended, furthermore, that undertakings subject to competition inspections have a duty to cooperate actively with ESA when the inspection takes place. For competition inspections to be effective, it is of significant importance that they are carried out in a sphere of trust. Uncertainty about the extent to which the general public could have access to information obtained during competition inspections at a later stage could therefore threaten the effectiveness of such inspections.

51 ESA found that the exceptions provided for in Article 4(2) RAD did not apply to Norway Post's 2004 price list, or a presentation by Norway Post to the Norwegian Mail Order Association dated 4 March 2004, and it stated that the two letters to Privpak of 3 January 2002 already seemed to be in DB Schenker's possession. Consequently, and notwithstanding the concerns, ESA, after having consulted Norway Post a second time, determined that those documents could be disclosed to DB Schenker.

Partial access and proportionality

52 ESA stated that it had considered whether partial access to the documents could be granted pursuant to Article 4(6) RAD. However, it concluded that it was not in a position to safeguard Norway Post's interests and to ensure compliance with its obligations under Article 28 of Chapter II of Protocol 4 SCA and Article 122 EEA without consulting Norway Post as required by Article 4(5) RAD. ESA noted that, if it were to draw up a large number of non-confidential versions of the inspection documents, this would require significant involvement on the part of Norway Post. This would place a significant burden on Norway Post and it could create considerable uncertainty as to the extent to which undertakings that are required to open their books and records for inspection must share that information with the general public at a later stage. In ESA's view, this could in turn threaten to undermine the purpose of competition inspections.

53 ESA stated that, in those exceptional circumstances, it had to balance the interest in public access to the documents against the burden of such work on ESA and Norway Post, in order to safeguard the interests of good administration. The administrative burden of drawing up non-confidential versions would be particularly heavy in this case and would require the use of an unreasonable and disproportionate amount of resources. Consequently, ESA decided that partial access to the inspection documents could not be granted.

54 ESA concluded that there was no overriding public interest in the disclosure of the documents concerned, and, save for the four documents mentioned above, it rejected the request for access to the inspection documents in Case No 34250 *Norway Post* / *Privpak* under the RAD provisions.

V Procedure

55 By application lodged with the Court on 19 October 2011, DB Schenker brought an action seeking the annulment of the contested decision insofar as it denied access to inspection documents in Case No 34250 (*Norway Post* / *Privpak*).

56 On 22 December 2011, ESA lodged its defence with the Court.

57 On 1 February 2012, DB Schenker submitted its reply.

58 By document lodged with the Court's Registry on 3 February 2012, Norway Post sought leave to intervene in support of the form of order sought by the defendant. Following receipt of the parties' comments on the application, leave to intervene was granted on 29 February 2012 by Order of the President of the Court.

59 By letter of 23 February 2012, DB Schenker requested measures of organization of procedure. Following the receipt of comments from the parties, the Court requested ESA, by way of measures of organization of procedure 9 May 2012, to produce those initial letters it had sent to Norway Post and to third parties prior to 16 August 2011, requesting their response to DB Schenker's request for access to documents, as well as statistical information in the case file. ESA complied with this request.

60 On 5 March 2012, the European Commission submitted written observations.

61 On 6 March 2012, ESA submitted its rejoinder.

62 Following an application for the extension of the time-limit, which was granted by the President on 9 March 2012, Norway Post submitted its statement in intervention on 22 March 2012.

63 By decision of 30 March 2012, the Court requested ESA, by way of measures of organization of procedure, to produce the inspection documents and two emails of 4 August 2010. ESA complied with that request.

64 On 14 and 26 May 2012, respectively, DB Schenker made a second and a third request for measures of organization of procedure. The requests were denied by way of letters of 29 May 2012.

65 On 29 May 2012, by way of measures of inquiry, the Court ordered ESA to answer questions concerning the publication of EFTA Surveillance Authority Decision No 407/08/COL in the EEA Supplement to the Official Journal of the European Union; to describe in detail its system or method of registering documents in a case file; to describe how it processes requests for access to documents under the RAD or by any other means; and to provide the statement of the content of the file in the present proceedings. ESA complied with the order.

66 The parties presented oral argument and answered questions put to them by the Court at the hearing on 5 June 2012.

67 On 5 September 2012, i.e. between the oral hearing and the judgment being rendered in the case at hand, ESA issued Decision 300/12/COL on the adoption of revised Rules on public access to documents, and repealing Decision 407/08/COL.

68 On 14 September 2012, DB Schenker made an application for the oral procedure to be reopened. This application was rejected by the Court on 25 September 2012.

VI Forms of order sought

69 The applicants request the Court to:

(i) annul the contested decision insofar as it denies access to inspection documents in Case No 34250 (Norway Post / Privpak);

(ii) order the defendant and any interveners to bear the costs.

70 The defendant requests the Court to:

(i) dismiss the application;

(ii) order the applicants to bear the cost of the proceedings.

71 The intervener requests the Court to:

(i) dismiss the application;

(ii) order Schenker to bear the costs of the EFTA Surveillance Authority and Posten Norge AS.

72 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

VII Law

Procedure

Admissibility

Arguments of the parties

73 The applicants submit that the application is admissible. The letter rejecting access to the inspection documents is dated 16 August 2011. It was received by unregistered mail on 23 August 2011. Consequently, the application of 19

October 2011 is timely. The applicants further submit that the letter constitutes a decision and a reviewable act of direct and individual concern to them. Consequently, they argue that they have standing and the legal interest required to institute these proceedings pursuant to Article 36(2) SCA.

74 ESA does not contest the admissibility of the application and notes that the letter is a challengeable act that concerns the applicants directly and individually.

Findings of the Court

75 By their application, the applicants seek the partial annulment of ESA's decision of 16 August 2011 denying them access under RAD to the documents obtained during ESA's inspections of Norway Post's premises between 21 and 24 June 2004.

76 Pursuant to Article 36(2) SCA, any natural or legal person may, under the same conditions as an EFTA State, institute proceedings before the Court against an ESA decision addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

77 The Court has recognised the procedural branch of the principle of homogeneity and referred in particular to considerations of equal access to justice and compliance with judgments rendered in infringement proceedings for parties appearing before the EEA courts (see Case E-18/10 *ESA* v *Norway* [2011] EFTA Ct. Rep. 202, paragraph 26, and *Posten Norge v ESA*, cited above, paragraphs 109 f.; Order of the Court in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3, paragraph 24; Order of the Court of 9 November 2012 in Case E-14/10 COSTS *Konkurrenten.no* v *ESA*, paragraph 23; Order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266, paragraph 9; and Order of the President of 15 February 2011 in *Posten Norge* v *ESA*, cited above, paragraph 8).

78 The application of the principle of homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see Order of the President of 23 April 2012 in Case E-16/11 *ESA* v *Iceland*, paragraph 32). Nevertheless, the need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent as regards rules concerning the modalities of the procedure, when they relate mainly to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, the Court considers it also in such cases appropriate, as a rule, to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure which are identical in substance to expressions in the equivalent provisions of Union law. Moreover, the Court notes that, in any event, in the application of its procedural rules it must respect fundamental rights (see *Posten Norge* v *ESA*, cited above, paragraph 110).

79 Consequently, in assessing the application for partial annulment pursuant to Article 36(2) SCA, it is appropriate to take account of the reasoning in the case law of the Union courts concerning Article 263(4) TFEU.

80 First, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (compare, *inter alia*, Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 54, and case law cited).

81 Second, in order to ascertain whether a measure can be the subject of an action under Article 36 SCA, it is necessary to look to its substance, rather than the form in which it is presented (compare Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

82 It is apparent from the substance of the contested letter that ESA had definitively determined its position as part of the administrative procedure under Decision 407/2008/COL on the request for access to the inspection documents. Consequently, the contested letter addressed to the applicants constitutes a measure open to challenge that may be the subject of an action for annulment under Article 36(2) SCA (compare, to that effect, Cases C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraphs 51 to 62 and T-33/01 *Infront WM* v *Commission* [2005] ECR II-5897, paragraphs 88 to 95).

83 Article 36(3) SCA requires that proceedings be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. As it is apparent, and this has not been challenged by the defendant, that the contested letter was received by the applicants on 23 August 2011, the application brought before the Court on 19 October 2011 is timely.

84 As legal persons with their registered office in an EEA State, the applicants have a right of access to ESA documents, subject to the principles, conditions and limits defined in the Rules pursuant to Article 2(1) RAD.

85 The application is therefore admissible.

Measures of organization of procedure

86 DB Schenker made a second and a third request for measures of organization of procedure by way of letters registered at the Court on 14 May 2012 and 26 May 2012, respectively.

87 By its second request of 14 May 2012, DB Schenker asked the Court to order the defendant pursuant to Article 49(3)(d) of the Rules of Procedure (hereinafter ‘RoP’) to disclose the statement of content of the file in Case No 68736 (DB Schenker’s access request of 3 August 2010), showing the origin/author of each

document/event registered; whether each document is incoming, outgoing or internal; the date of each document/event and the date when it was registered in the statement of content of the file. ESA contended that the request should be refused.

88 By its third request of 26 May 2012, DB Schenker asked the Court to order the Defendant pursuant to Article 49(3)(c) RoP to disclose a copy of the original Decision No 407/08/COL (Rules on Public Access to Documents), with preamble, as signed by President Sanderud and College Member Jäger on 27 June 2008. ESA contended that the request should be refused.

89 These requests were denied by way of letters of 29 May 2012.

90 The Court may, at any stage of the proceedings, prescribe any measure of organisation of procedure under Article 49 RoP or any measure of inquiry under Article 50 RoP. Pursuant to Article 49(4) RoP, each party may, at any stage of the procedure, propose the adoption or modification of measures of organization of procedure.

91 Article 49 RoP is identical in substance to Article 64 of the Rules of Procedure of the General Court. The reasoning of the General Court is consequently relevant to the understanding of Article 49 RoP in accordance with procedural homogeneity (see paragraphs 76 and 77 above).

92 However, in order to enable the Court to determine whether it is conducive to the proper conduct of the procedure to prescribe such a measure, the applicant must, in an application under Article 49(3)(d) RoP, identify the documents requested and provide the Court with at least a minimum of information indicating the utility of those documents for the purposes of the proceedings (see, by comparison, Cases T-151/05 *NVV* v *Commission* [2009] ECR II-1219, paragraph 218; and C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 93). Moreover, the Court may order such a measure for the organisation of procedure only if the applicants make a plausible case that the documents are necessary and relevant for the purposes of judgment (see, by comparison, *NVV* v *Commission*, cited above, paragraph 218; and T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 201).

93 In the second request of 14 May 2012, the applicants clearly identified the document requested and provided the Court with at least the minimum information indicating the utility of those documents for the purpose of these proceedings. However, the applicants failed to make a plausible case that the documents were necessary and relevant to arrive at a judgment. Consequently, the request for measures of organization of procedure was denied.

94 The third request of 26 May 2012 was rejected because the document in question had already been submitted by the Defendant as an annex to its comments on the

Report for the Hearing, received by the Court by email on 24 May 2012. The document was provided to the applicant.

Reopening of the oral procedure

95 On 14 September 2012, DB Schenker made an application seeking the reopening of the oral procedure pursuant to Article 47 RoP. It requested that such reopening of the oral procedure by the Court be limited to the scope that the Court should deem necessary to be fully informed about the implications of the new rules on access to documents that the defendant adopted on 5 September 2012 by ESA Decision 300/12/COL, and in particular Article 13 of that Decision.

96 Article 47 RoP must be considered identical in substance to Article 61 of the Rules of Procedure of the Court of Justice of the European Union (hereinafter 'ECJ'). The reasoning of the ECJ is consequently relevant to the understanding of Article 47 RoP in accordance with the principle of procedural homogeneity (see paragraphs 76 and 77 above).

97 Having regard to the very purpose of the adversarial procedure, which is to avoid a situation in which the Court may be influenced by arguments that have not been discussed by the parties, the Court may of its own motion, or at the request of the parties, in accordance with Article 47 RoP, order the reopening of the oral procedure if it considers that it lacks sufficient information or that the case should be examined on the basis of an argument that has not been debated between the parties (compare Cases C-229/09 *Hogan Lovells International* v *Bayer CropScience*, [2010] ECR I-11335 paragraph 27 and case law cited; and C-323/09 *Interflora Inc. and Interflora British Unit*, judgment on 22 September 2011, not yet reported, paragraph 22, and case law cited). It is clear that the applicants may request the Court to reopen the oral procedure pursuant to Article 47 RoP.

98 While Article 13 of ESA Decision 300/12/COL would *prima facie* appear to jeopardise legal certainty by denying submitted requests for access to documents that have not yet been decided upon from being adjudicated upon the basis of the RAD rules in effect on the date of their submission, the Court has sufficient information to render judgment in the instant case. The revised RAD rules do not constitute the basis of an argument that has not been the subject of debate between the parties.

99 Consequently, the revised RAD rules, and their impact, lie outside the scope of the present case.

100 The Court therefore rejected this application by way of a letter of 25 September 2012.

Substance

101 The application is based on five pleas, namely that the contested decision infringed: (i) the exception in Article 4(1)(b) RAD concerning the protection of privacy and personal integrity; (ii) the exception in Article 4(2) RAD concerning the protection of commercial interests; (iii) the exception in Article 4(2) RAD concerning the protection of the purpose of inspections and investigations; (iv) Article 4(2) RAD concerning an overriding public interest in disclosure; and (v) the right in Article 4(6) RAD to partial access to documents.

The nature of the rules on access to documents

Arguments of the parties

102 ESA states that Decision 407/08/COL on public access to documents reproduces, with the necessary adaptations, the provisions of Regulation No 1049/2001 but not its preamble. The Decision was adopted on ESA's own motion. It does not constitute an act incorporated into the EEA Agreement or linked in any manner to the SCA. In those circumstances, ESA submits that the act is binding upon itself but is not part of EEA law. It questions whether the principle of homogeneity of interpretation applies in the present case.

103 ESA considers that the Court is not bound by Article 3 SCA in the present case. However, a certain degree of homogeneity in the interpretation of these acts is desirable as the provisions of Decision 407/08/COL and Regulation No 1049/2001 are, in substance, identical and ESA's aim was to align its rules on access to documents with the EU rules. Homogeneous rules on access to information ought to ensure the equal treatment of economic operators as regards the conditions of competition. At the same time, ESA submits that Regulation No 1049/2001 and Decision 407/2008 could be interpreted as not 'identical in substance' within the meaning of Article 3(2) SCA.

104 ESA argues, however, that a similar interpretation of Regulation No 1049/2001 and Decision 407/2008 is only possible if it does not entail a breach of Protocol 4 SCA.

105 ESA contends that the application of the RAD cannot ensure the same level of protection as the application of procedural rules on access to competition files.

106 DB Schenker submits that the fundamental principle of homogeneity applies in full. In its view, Regulation No 1049/2001 and the preceding transparency rules from 1993-1994 have been raised to the level of a fundamental right in EU law.

107 In its rejoinder, ESA states that the EU provisions on public access are intended as a general rule to give the fullest possible effect to the right of public access to documents of the EU institutions. However, Chapters II and III of Protocol 4 SCA provide for a much more limited regime for access to documents held in antitrust case files. While access to such case files is limited to undertakings

under investigation, alleged victims of antitrust infringements may only consult the case file to a significantly lesser degree. The public access rules and the sector-specific EEA procedure governing access to antitrust files must be reconciled, and, in ESA's view, this is best done by applying the principles set out in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I 5885.

108 The Commission notes that the RAD rules reproduce to a large extent the provisions of Regulation No 1049/2001. The exceptions to the right of access are identical in both legal acts. Therefore, even if, as ESA submits, the Court is not bound by Article 3 SCA, the Commission considers that the interpretation of these exceptions by the ECJ and by the Court should converge. Chapter II of Protocol 4 SCA sets out general procedural rules. They reproduce to a large extent the rules established for the EU pillar in Regulation No 1/2003.

109 The Commission submits that the obligation of professional secrecy set out in Article 28 of Chapter II of Protocol 4 SCA aims not only to ensure respect for the confidentiality of companies' business and commercial secrets, but also to guarantee their rights of defence and thereby protect the fundamental rights of the undertakings concerned.

110 Safeguarding the fundamental rights of a third party or an important public interest can, in the Commission's view, justify limits to the adversarial principle even though this principle aims to guarantee the fundamental right to a fair trial. The right to respect for private life set out in Article 8 of the European Convention on Human Rights ('ECHR') can constitute such a limitation. In that connection, the Commission observes that, in light of ECHR case law on a 'private life', the ECJ held in Case C-450/06 *Varec* [2008] ECR I-581 that the notion of private life can include participation in a contract award procedure.

111 The Commission submits that there is a need for a coherent interpretation and application of the rules on public access to documents and the provisions governing the cartel procedure to which the requested documents belong. It considers it inconceivable that the Union legislature or ESA would have intended to jeopardise the protection guaranteed to undertakings by other provisions, particularly where, as in this case, they are provisions of primary law. A coherent interpretation of the rules on access to documents and Protocol 4 SCA thus requires the existence of a general presumption according to which the documents gathered by ESA during a cartel inspection are covered by one or more exceptions to the right of access to documents.

112 Norway Post points to its profound and direct interest in ensuring that the inspection documents are maintained and handled with professional secrecy, and that access to the documents is not granted to the public in any way that would undermine its legitimate interests.

113 Norway Post contends that there is no overriding public interest in granting such access, especially not on the basis of the applicants' reference to the damages

claim they intended to lodge. Norway Post asserts that the protection afforded under the third indent of Article 4(2) RAD to the purpose of inspections and investigations would be seriously undermined should ESA grant access to the inspection documents.

114 Norway Post agrees with DB Schenker that, in general, the principle of transparency is prominent in EU and EEA law. However, that does not mean that the detailed RAD rules have become a source of primary law within the EEA. Regulation No 1049/2001 cannot be read and interpreted in isolation, but must be reconciled with sector-specific rules on the handling of documents, even if such an approach results in a lesser degree of access than the application of the general rules of access alone would provide. Norway Post requests the Court to adopt a similar approach in the present case and asserts that this would not undermine the principle of homogeneity. On this basis alone, the intervener requests the Court to dismiss the application.

Findings of the Court

General

115 Chapter II of Protocol 4 SCA contains general procedural rules implementing Articles 53 and 54 EEA. These provisions largely transpose Regulation EC/1/2003, without explicitly reproducing that Regulation's preamble. However, Article 1 of Protocol 1 EEA states that the preamble is relevant to the extent necessary for the proper interpretation and application, within the framework of the EEA Agreement, of relevant provisions. The Court holds that a proper interpretation and application must be made in accordance with the principle of homogeneity.

116 EFTA Surveillance Authority Decision 407/08/COL of 27 June 2008 to adopt the RAD reproduces, with certain adaptations, the provisions of 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.

117 The only express limit on the disclosure of documents in the EEA Agreement and the SCA is the obligation of professional secrecy enshrined in Article 122 EEA and Article 14(4) SCA. Other rules, such as those contained in Protocols 3 and 4 SCA, contain other, specific provisions regulating the treatment of documents.

118 While Decision 407/08/COL was adopted by ESA on its own motion, it is part of EEA law. Rules on access to documents are an embodiment of the principles of transparency and good administration common to, and fostered by, the democratic traditions of the EEA/EFTA States. Furthermore, as the Court has previously held, the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU

and EFTA pillars of the EEA (see Case E-18/11 *Irish Bank Resolution Corporation* v *Kaupthing Bank*, judgment of 28 September 2012, not yet reported, (‘*Irish Bank’*) paragraph 122).

119 Decision 407/08/COL is directly linked to the EEA Agreement by its first recital, which refers to Article 108 EEA in particular. Article 108(1) EEA provides that procedures similar to those existing in the Union, including procedures for ensuring the fulfilment of obligations under the Agreement and for control of the legality of acts of ESA regarding competition shall be established. Similarly, recital 2 of the Decision refers to Article 13 SCA, pursuant to which ESA is obliged to adopt its own rules of procedure.

120 As well as being identical in substance to the provisions of Regulation 1049/2001, recital 6 of the preamble to the RAD identifies the intention to adopt substantively similar rules on access to documents. The Court’s findings in paragraph 115 above are equally applicable when interpreting the preamble to the RAD.

121 Furthermore, recital 7 provides that, in the application of the RAD, ESA will strive to achieve a homogeneous interpretation with that of the Union courts and the European Ombudsman so as to ensure at least the same degree of openness as provided for by Regulation 1049/2001. It is thus evident that ESA itself aimed to ensure procedural homogeneity by adopting the RAD. In fact, it was required to do so for reasons of reciprocity (see recital 4 of the preamble to the EEA Agreement, and *Irish Bank*, cited above, paragraph 58). A homogeneous interpretation of the RAD and Regulation 1049/2001 is therefore indispensable.

122 Pursuant to Article 2(3), the RAD rules apply to all documents in ESA’s control in all areas of its activity without exception. Article 13 RAD provides that the respective rules apply to requests for access to documents submitted to ESA after 30 June 2008. Article 1 RAD lays down the purpose of the rules as being to ensure the widest possible access to these documents and to ensure that the exercise of this right of access is as easy as possible. The RAD rules are additionally intended to promote good administrative practice by ESA on access to documents.

123 All decisions made by ESA must comply with fundamental rights in order to ensure the protection of individuals and economic operators in the EEA (see *Posten Norge* v *ESA*, cited above, paragraphs 85 and 86 and case law cited). Likewise, ESA decisions taken upon the basis of the RAD are justiciable pursuant to the Court’s normal power of review laid down in Article 36 SCA in accordance with the principle of effective judicial protection (see, *inter alia*, *Posten Norge* v *ESA*, cited above, paragraph 86).

124 In support of its action to annul the contested decision insofar as it denies access to inspection documents in Case No. 34250 (Norway Post/Privpak), the applicant raises five pleas in law, alleging (i) infringement of Article 4(1)(b) RAD concerning privacy and personal integrity; (ii) infringement of the exception in

Article 4(2) RAD concerning commercial interests; (iii) infringement of the exception in Article 4(2) RAD concerning inspections and investigations; (iv) infringement of Article 4(2) RAD concerning overriding public interest in disclosure; and (v) infringement of Article 4(6) RAD concerning the right to partial access.

125 Prior to assessing these pleas, it is important to state, contrary to ESA's submissions, that access to documents is the rule and that a decision refusing access is only valid if it is founded on one of the exceptions provided for by Article 4 RAD (see, by comparison, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 83). The Court also recalls that ESA is obliged to undertake a concrete, individual assessment of the content of the documents covered by all applications based on the RAD. This is an approach that is to be adopted as a matter of principle, and that applies whatever the field to which the requested documents relate. That does not mean, however, that such an examination is required in all circumstances (see, by comparison, Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121 (*'VKI'*), paragraphs 74 and 75).

126 Consequently, the Court must ascertain whether ESA has either undertaken such an examination or demonstrated that the documents to which access was refused were manifestly covered in their entirety by an exception laid down in Article 4 RAD. Moreover, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (compare, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 43, *VKI*, cited above, paragraph 69, and Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56).

127 If ESA decides to refuse access to a document that it has been asked to disclose, it must explain, first, how access to that document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 of Regulation No 1049/2001 and, secondly, in the situations referred to in Article 4(2) and (3) and (4) RAD, whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned.

128 Pursuant to Regulation 1049/2001, the Union courts have found exceptions that may be understood as concerning the 'nature' of the documents, the content of the documents and the level of administrative burden involved in undertaking a concrete, individual examination of the documents requested.

129 Firstly, these exceptions include circumstances in which it is obvious, in the circumstances of the case, that access must be refused or, on the contrary, granted. Such situations may arise, for example, if certain documents (i) are manifestly covered in their entirety by an exception to the right of access or, conversely, (ii) are manifestly accessible in their entirety, or, finally, (iii) have already been the subject of a concrete, individual assessment by ESA in similar circumstances (see, by comparison, *VKI*, cited above, paragraph 75). Should a document fall within an activity mentioned in Article 4(2) RAD, it is not

sufficient, on that basis, to merely refuse access to a document whose disclosure has been requested. Such a refusal must be properly justified by ESA. Explanations must be given as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (see, by comparison, *Sweden and Turco* v *Council*, paragraph 49).

130 However, for the purpose of explaining how access to the documents requested could undermine the interest protected by an exception laid down in Article 4(2) RAD, ESA may base its decisions on general presumptions that apply to certain categories of document, since similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (see, by comparison, *Sweden and Turco* v *Council*, paragraph 50; and *VKI*, paragraphs 54 and 55, both cited above, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I- 8533 paragraph 74).

131 General presumptions based on the nature of certain categories of documents have been accepted by the Union courts in interpreting Article 4(2) of Regulation 1049/2001 in cases concerning access to documents in State aid and merger cases (see, to that effect, as regards State aid: *Technische Glaswerke Ilmenau*, cited above, paragraph 58 and, as regards merger control: Case C-404/10 P *Commission* v *Editions Odile Jacob*, judgment of 28 June 2012, not yet published, paragraph 123, and Case C-477/10P *Commission* v *Agrofert Holding*, judgment of 28 June 2012, not yet reported, paragraph 59). The document access system specific to a particular procedure, whether in the matter of State aid, cartels, abuse of a dominant position, or mergers, is only applicable throughout the procedure in question.

132 However, specific policy considerations arise in requests for access to documents as part of follow-on damages cases brought before national courts concerning Articles 53 and 54 EEA. The private enforcement of these provisions ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA (see, with regard to the parallel rules in EU law, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 paragraphs 26 to 28). ESA's and the Commission's view that follow-on damages claims in competition law cases only serve the purpose of defending the plaintiff's private interests cannot be maintained. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers.

133 Moreover, general presumptions regarding the purpose of inspections and investigations cannot apply in a situation in which ESA has already adopted a final negative decision pursuant to Protocol 4 EEA, closing the file to which access is sought and where the relevant information has not been obtained by way of a voluntary submission from a leniency applicant, as is the case here. Such a view is compounded by the circumstances in the present case whereby ESA's original decision has already been reviewed by the Court.

134 If ESA raises a general presumption, so as to shift the burden of proof onto an applicant, the applicant must first be furnished with sufficient and adequate information, for example an appropriately detailed list of documents, in order to have an opportunity to rebut such a presumption.

135 Second, a single justification may be applied to documents belonging to the same category, which will be the case, in particular, if they contain the same type of information. In such a case, it is for the Court to ascertain whether the documents within that category are manifestly covered in their entirety by the exception relied on. In contrast to the situations mentioned in paragraphs 129 to 132 above, the criterion applied to all the documents in question thus concerns their content, since it is by reference to the information contained in the requested documents that the institution to which the request has been made must justify its refusal to disclose them under the various exceptions to the right of access in Article 4 RAD.

136 Third, in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents would prove particularly heavy, thereby exceeding the limits of what may reasonably be required, a derogation from the obligation to examine the documents may be permissible (see *VKI*, cited above, paragraph 112 and case law cited).

137 It is in light of these considerations that the pleas of the applicant must be assessed.

First plea: Infringement of Article 4(1)(b) RAD concerning the protection of privacy and personal integrity

Arguments of the parties

138 DB Schenker submits that, pursuant to Article 2(1) RAD, any legal person that has its registered office in an EEA State has a right of access to ESA documents. That right extends to all documents drawn up or received by ESA and in its possession, as provided for in Article 2(3) RAD. The applicants submit that they availed themselves of that right when seeking access to the inspection documents on 3 August 2010.

139 DB Schenker notes that, pursuant to Article 1 RAD, the purpose of the rules is to ensure the widest possible access, the easiest possible exercise of this right of access and the promotion of good administration in this regard. Consequently, in its view, any exception to Article 1 RAD relied upon to refuse access must be both narrowly interpreted and applied.

140 DB Schenker observes that, in relying on the exception provided for in Article 4(1)(b) RAD, the contested decision does not indicate which documents have been withheld on this basis or how many documents to which Article 4(1)(b) RAD has been applied, and it contends that the application for annulment must prevail for this reason alone.

141 DB Schenker asserts that ESA's broad interpretation and application of Article 4(1)(b) RAD is manifestly wrong, and that ESA has consequently violated the applicants' right of access established in Article 2(1) RAD. In its view, the exception provided for in Article 4(1)(b) RAD is intended to protect individuals, not companies. Furthermore, the decision should, firstly, have shown that the documents concern the privacy and integrity of an individual, and, secondly, that the disclosure of those documents is capable of undermining that privacy.

142 DB Schenker submits that most, if not all, of the documents at issue fall outside the scope of Article 4(1)(b) RAD as properly, i.e. narrowly, construed. Therefore, the reasoning of the contested decision does not show that the documents concern the privacy and integrity of individuals. Moreover, even if those documents do contain such information, the contested decision does not establish how disclosure of that information could undermine that privacy. On the contrary, the decision ignores that the risk of harm must be reasonably foreseeable and set out in the reasoning of the decision.

143 DB Schenker argues that it would appear that the exception in Article 4(1)(b) RAD is being interpreted as extending to business correspondence *per se*. In any event, Article 4(1)(b) RAD cannot be applied *en bloc*.

144 ESA contends that it properly examined whether each document is actually covered by the exception relating to commercial interests and privacy and the integrity of legal or natural persons. In its view, the notion of privacy inherent in Article 4(1)(b) RAD does not protect individuals alone, but must be interpreted in light of the notion of private life protected under Article 8 ECHR, which may include the activities of a professional or business nature of natural or legal persons.

145 ESA submits that the inspection documents contain information that could undermine the privacy and personal integrity of Norway Post employees and that the file contains emails that contain both commercially sensitive and personal information.

146 In its reply, DB Schenker submits that ESA's contention that the contested decision sought to protect the 'privacy and personal integrity' of Norway Post as a company and its business partners in accordance with Article 4(1)(b) RAD is not mentioned in the contested decision itself. Consequently, these arguments are inadmissible. Moreover, the need to protect the privacy and integrity of legal persons as provided for in Article 4(1)(b) RAD is flawed as a basis for restricting access to business files in the context of Article 8 ECHR following a lawful search, when other RAD safeguards, such as Articles 4(2) or 4(5) RAD, are applicable. In addition, DB Schenker argues that the inspection documents were lawfully seized.

147 In its reply, DB Schenker further notes that the Commission did not propose to refer to companies or legal persons in its proposal that led to the adoption of Regulation No 1049/2001. Indeed, the right of access to documents is itself

considered a fundamental right. In those circumstances, ESA has failed to establish that Article 4(1)(b) RAD must be extended against its wording, by reason of Article 8 ECHR, to include companies.

148 The Commission submits that the applicants' narrow interpretation of Article 4(1)(b) RAD was rejected by the ECJ in Case C-28/08 P *Commission* v *The Bavarian Lager* [2010] ECR I-6055 Moreover, professional activities of individuals cannot be excluded from the protection afforded to personal data. As the documents were collected from the lockers, offices and computers of individual employees of Norway Post, they might be protected under the exception provided for in Article 4(1)(b) RAD if they contain personal data, and, in light of the description set out in the contested decision, the Commission believes this to be the case. However, even if the exception in Article 4(1)(b) RAD is held not to apply to all the documents concerned, the Commission maintains that this would not result in their disclosure, as they remain covered by other exceptions.

149 Given that ESA conducted a concrete and individual examination of the documents requested by the applicants and consulted Norway Post pursuant to Article 4(4) RAD, with the result that certain documents were disclosed while others were not, when adopting the contested decision, ESA did not, in the Commission's view, infringe the RAD. In fact, ESA went beyond what was legally required.

150 Norway Post supports ESA's position. It asserts that, although the exceptions set out in Article 4 RAD should be given general application, case law provides that the specific circumstances in which a document was collected or drafted are highly relevant for the interpretation of the rules.

151 The intervener submits further that, when considering an application for access to documents, the institution concerned must normally explain how access to each document could specifically and effectively undermine the interest protected by an exception laid down in Article 4 RAD and, in situations referred to in Article 4(2) RAD, assess whether or not there is an overriding public interest that might nevertheless justify disclosure of the documents concerned.

152 According to the intervener, it is clear from ECJ case law that EU institutions may, under certain circumstances, base their decision to refuse access to documents on general presumptions that can apply to certain categories of documents. If a general presumption can be established, the burden of proof falls on the interested parties who are seeking access to demonstrate that either a document is not covered by the presumption or that there is an overriding public interest justifying disclosure. The applicants' argument that ESA 'has failed to demonstrate' that the inspection documents fall under the RAD exceptions contradicts the notion of the presumption and is therefore fundamentally flawed.

153 Norway Post submits that during inspections ESA usually gathers substantial information of peripheral interest and it states that much of the information

seized by ESA was not used as a basis for ESA's decision of 14 July 2010 in Case No 34250 *Norway Post / Privpak.*

154 The inspection documents expose Norway Post's internal workings and contain other extremely sensitive information. Disclosure of information contained in each document could in itself, or viewed in connection with information contained in the inspection documents as a whole, seriously undermine the protection of Norway Post's commercial interests. Norway Post therefore argues that the content and nature of the documents show that they fall within the category covered by the general presumption.

155 Norway Post contends that ESA may only use an inspection document for the purpose for which it was acquired and shall not disclose information acquired or exchanged with them pursuant to Chapter II of Protocol 4 SCA, and of the kind covered by the obligation of professional secrecy. At the same time, complainants in competition law proceedings are only to be provided with a non-confidential version of the statement of objections. Article 16 of Chapter III of Protocol 4 SCA provides that '[i]nformation, including documents, shall not be communicated or made accessible by the EFTA Surveillance Authority in so far as it contains business secrets or other confidential information of any person'.

156 Norway Post asserts that it must be generally presumed that disclosure of inspection documents is capable of adversely affecting the inspected undertaking's commercial interests.

157 Norway Post submits that information about its strategies, reviews, analysis and agreements do not fall within the category of similar information regarded by the Commission, pursuant to paragraph 23 of the Commission Guidelines for access to antitrust files, as ceasing to be confidential after a period of five years. This information is highly likely to reveal the company's future behaviour on the market even though it is more than five years old. In its view, the age of the documents does not release them from the general presumption against disclosure.

Findings of the Court

158 ESA's contested decision, in the brief section headed 'Assessment – The privacy and personal integrity of the individual employees of Norway Post and its business partners', concludes that '[a]gainst this background, disclosing the names or identity of private individuals who were involved in the practices of Norway Post subject to the Authority's investigations by making the seized documents publically available under the Authority's rules of access to information would undermine the privacy and the integrity of these individuals within the meaning of Article 4(1)(b) of the Rules on access to documents'.

159 As noted above in paragraph 121, the purpose of the rules on access to documents is clearly laid out in Article 1 RAD and in recital 2 of the preamble. Rules on access to documents are intended to ensure the highest possible degree

of openness and transparency. However, it also follows, particularly from the remainder of recital 2 of the preamble and Article 4(1) to (4) RAD, which provides for a series of restrictions in that regard, that the important right of access to documents is subject to certain limitations on grounds of public or private interest. Since they derogate from the principle of the widest possible public access to documents, such exceptions must be interpreted and applied strictly (see, by comparison, Case C-266/07 P *Sison* v *Council* [2007] ECR I-1233, paragraphs 61 to 63 and case law cited).

160 ESA's reasoning, quoted above at paragraph 158, based upon Article 4(1)(b) RAD, is general in nature and fails to identify to which documents it relates and to what extent. In that regard, it must be recalled that ESA is required by Article 16 SCA to ensure that its reasoning be set out in a clear and unequivocal fashion and in such a manner as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review. While the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, it not necessary for the reasoning to go into all the relevant facts and points of law, since the question of whether the statement of reasons meets the requirements of Article 16 SCA must be assessed not only with regard to its wording but also to its context and all the legal rules governing the matter in question (see Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraphs 171 to 173; and Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA*, judgment of 8 October 2012, not yet reported, paragraphs 252, 253 and 255).

161 In addition, Article 4(7) RAD provides that the exceptions laid down in Article 4(1) to (4) RAD shall only apply for the period during which protection is justified on the basis of the content of the document. As ESA contends, if related to the privacy exception in Article 4(1)(b) RAD, this may extend beyond the maximum period of 30 years, depending on the content of the document. At this point, the Court notes that such justifications adduced may not be hypothetical in nature. However, the contested decision fails to state any reasons why the defendant considered that the privacy and personal integrity of the individual would continue to be undermined six years after the inspection took place.

162 With respect to Norway Post's contention that ESA may gather information that is not of direct relevance to a concrete case, the Court notes that, pursuant to Article 20 of Chapter II of Protocol 4 SCA, the scope of ESA's investigatory powers in inspections does not extend as far as covering, in particular, documents of a non-business nature, that is to say, documents not relating to the market activities of the undertaking (compare Cases C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 45; and 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575, paragraph 16). More importantly, the relationship between the document and an alleged infringement of the competition rules must be such that ESA could reasonably suppose, at the time of the inspection, that the document would help it to determine whether the alleged infringement had taken place

(compare the Opinion of Advocate General Jacobs in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, point 21).

163 Moreover, ESA's obligation to specify the subject matter and purpose of the inspection is a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is justified, thereby enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence (see, for comparison, Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 26).

164 The reasons given for an inspection decision need not necessarily delimit the relevant market precisely, provided that the decision contains the essential information set out in Article 20(4) of Protocol 4 SCA (*Dow Chemical Ibérica and Others* v *Commission*, cited above, paragraph 46). ESA is nonetheless required to state in that decision the essential characteristics of the suspected infringement, indicating *inter alia* the market thought to be affected (see, to that effect, Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 52).

165 Although, at the inspection stage, ESA is not required to delimit precisely the market covered by its investigation, it must identify the sectors covered by the alleged infringement with which the investigation is concerned with a sufficient degree of precision to enable the undertaking in question to limit its cooperation to its activities in the sectors in which ESA has reasonable grounds for suspecting an infringement of the competition rules that justifies interference in the undertaking's sphere of private activity, and to enable the Court to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes (compare, Cases T-135/09 *Nexans France and Nexans* v *Commission*¸ judgment of 14 November 2012, not yet reported, paragraph 45; and T-140/09 *Prysmian and Prysmian Cavi e Sistemi Energia* v *Commission*, judgment of 14 November 2012, not yet reported, paragraph 40).

166 It must also be recalled that, in certain circumstances, Article 8 ECHR protects the right to respect for a company's business premises, and that seizure of documents under an administrative investigative procedure may constitute an interference with a company's rights pursuant to Article 8 ECHR (compare the European Court of Human Rights *Société Colas Est and Others* v. *France*, no. 37971/97, 16 April 2002, §§ 41 and 42). Thus, there should be particular reasons to allow the search of all other data, beyond what is encompassed by ESA's specific investigation, having regard to the specific circumstances prevailing in a particular undertaking, so that the seizure and examination of data does not go beyond what is necessary to achieve the legitimate aim (compare the European Court of Human Rights *Robathin* v. *Austria*, no. 30457/06, 3 July 2012, §§ 51 and 52; § 32 *Société Canal Plus et autres* v. *France* (no. 29408/08), 21 December 2010 § 55). The Court notes that ESA's inspection of Norway Post's premises was part of two investigations, one of which was closed on 14 July 2010 without any breach of the EEA competition rules being found.

167 The Commission's arguments based on Regulation 45/2001 and Case C-28/08 P *Commission* v *The Bavarian Lager*, cited above, are irrelevant since that Regulation has not been made part of the EEA Agreement by the EEA Joint Committee.

168 In addition, while not mentioned in the part of the contested decision entitled '[t]he privacy and personal integrity of the individual employees of Norway Post and its business partners', ESA has stated that it has reviewed all the 352 documents obtained during the inspection. In its defence, ESA contended that it properly examined whether each document is actually covered by the exception relating to privacy and the integrity of legal or natural persons.

169 Consequently, ESA's failure to provide adequate reasoning, which is in any event vitiated by being manifestly erroneously applied *en bloc*, means that the first plea must succeed and that the contested Decision must be annulled insofar as it relies on Article 4(1)(b) RAD.

Second plea: Infringement of Article 4(2) RAD concerning the protection for commercial interests

Arguments of the parties

170 The applicants point to the right of access laid down in Article 2(1) RAD and the purpose of the measure set out in Article 1 RAD. They contend that the documents to which the exception in Article 4(2) RAD concerning the protection of commercial interests has been applied have not been listed even in redacted form and that no meaningful information has been provided.

171 The applicants submit that ESA's interpretation and application of Article 4(2) RAD is manifestly incorrect and that, in going beyond the limits of the exception, ESA has violated the applicants' rights under Article 2(1) RAD. Article 4(2) RAD involves a three-part test. Firstly, the documents must concern commercial interests; secondly, disclosure of those documents must be capable of undermining those interests; and, thirdly, there must be no overriding public interest in disclosure.

172 In response, ESA submits that this argument ignores case law to the effect that it is possible for an institution to make a general presumption in respect of certain categories of documents that, because of the procedure to which they relate, are governed by special accessibility arrangements.

173 ESA argues that, as the RAD rules are general rules, the exceptions to the right of access were drafted in broad terms and must be interpreted in a way that safeguards those interests which benefit from specific protection under EEA law. ESA contends that access to documents collected during investigations conducted pursuant to Articles 53 and 54 EEA is also regulated by the rules of procedure laid down in Protocol 4 SCA and in the Notice on rules for access to the ESA file. In its view, the RAD, and in particular the exceptions relating to the

protection of investigations, commercial interests and privacy, should be interpreted in light of the specific rules concerning complainants' and third parties' access in relation to competition procedures.

174 In its reply, DB Schenker contends that Article 2(3) RAD does not distinguish between ESA's specific areas of activity. The level of protection of privacy and personal integrity should therefore be the same in antitrust cases as in all other cases.

175 DB Schenker states that the contested decision refers to 'business secrets' and 'other commercially sensitive information' without defining these terms. These terms are not used in Article 4(2) RAD and the Union courts have been reluctant to accept that the notion of 'commercial interests' extends beyond the traditional scope of business secrets.

176 It is unlikely that all the documents gathered during the inspection qualify as business secrets or commercial interests objectively worthy of protection as a matter of law. The documents at issue are at least seven years old and the exclusivity agreements at the heart of the infringement of the Article 54 EEA investigation were discontinued in 2006. The contested decision does not consider whether any of the inspection documents have lost their protection as a result of the passage of time. In that regard, the applicants point to the Commission's general presumption in antitrust cases that information related to turnover, sales, market share data and similar information which is more than five years old is no longer confidential. Furthermore, they contend that Norway Post does not appear to have submitted specific claims for confidentiality.

177 DB Schenker asserts that the contested decision makes it impossible for the Court to review how the exception has been interpreted and applied in this case, neither generally nor in relation to the individual documents, as is required. Consequently, the general and abstract manner in which ESA has referred to the reasons for refusing to disclose the documents must lead the Court to annul the decision in the manner requested.

178 ESA states that certain documents collected during the inspection would, if read in combination with other documents in the same category, reveal a lot of information about the inner working of the company. In that connection, ESA concedes that the exception relating to commercial interests and privacy may only apply, pursuant to Article 4(7) RAD, 'for the period during which protection is justified on the basis of the document'. However, ESA contends that the protection can be extended beyond the maximum period of 30 years.

179 ESA states that it did not create a register listing each individual document and that the reason for its non-disclosure is because the documents collected were of the same nature and were all covered by the commercial interests exception.

180 The Commission contends that, since the documents at issue were collected during an inspection and relate to Norway Post's business activities, it is manifest

that they are covered by the commercial interests exception. The interpretation of this exception in the context of a competition investigation is inextricably linked to the obligation of professional secrecy set out in Article 28 of Chapter II of Protocol 4 SCA. Furthermore, given the presumption that they were covered by the exception resulting from the need to protect commercial interests, there was no need to assess the documents individually in the first place.

181 The Commission further argues that, contrary to the applicants' submissions, the notion of 'commercial interests' has been extended beyond the traditional scope of business secrets. Moreover, while the documents at issue may be more than eleven years old, the Commission notes that, pursuant to Article 4(7) RAD, the exception relating to commercial interests may continue to apply beyond the initial period of 30 years.

Findings of the Court

182 With regard to ESA's argument that it did not create a register listing each individual document and the reasons for its non-disclosure because the documents collected were of the same nature and were all covered by the commercial interests exception, the Court recalls that, under Article 9 RAD, ESA was required as soon as possible to provide access to a register of documents. Article 9(1) RAD provides that references to documents shall be recorded in the register without undue delay. It must consequently be held that the defendant has, through this inaction, manifestly failed to comply with the principle of good administration.

183 Under the heading 'assessment – business secrets and other commercially sensitive information', the contested decision provides that, from its inspection of Norway Post's premises, ESA obtained 'detailed information concerning the internal workings of Norway Post and its relations with business partners relevant to the investigations of Norway Post's practices under the EEA competition rules'. It goes on to state that this information amounted to 'around 2800 pages' consisting of '352 different documents grouped and registered under 26 numbers in the Authority's information management system'. This was attached as Annex I to the contested decision.

184 The contested decision states that 'these documents were mainly internal e-mail correspondence, internal reports, presentations used for internal purposes, agreements and drafts [sic] agreements with customers or commercial partners, evaluations of competitors and markets or contained other strategic information.' The contested decision goes on to say that ESA has reviewed all 352 inspection documents 'and has come to the conclusion that in the light of their content and the context in which they were obtained those documents contain information that must be regarded as commercially sensitive and are of such a character that the disclosure of any meaningful part of those documents to the general public would likely undermine the protection of commercial interests of natural or legal persons (Article 4(2) of the rules on access to documents).'

185 The contested decision states that ‘this does however not apply to the following two documents’: Norway Post’s price list 2004 and a presentation by Norway Post to the Norwegian Mail Order Association on 4 March 2004 (Norsk Postorderforening). The contested decision continues by noting that ‘[i]n addition, two documents appear already to be in the possession of DB Schenker’. Those documents are two letters to Privpak both dated 3 January 2002.

186 It must therefore be concluded that the defendant considered that Article 2(1) RAD, first indent, was applicable to no fewer than 350 of the 352 documents. Moreover, the inspection document list attached to the contested decision describes each and every one of the 26 numbered entries as ‘confidential’.

187 Article 2(1) RAD, first indent, provides that ESA shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property. Such a refusal shall be made unless there is an overriding public interest in disclosure.

188 The concept of commercial interests has not been defined by the Union courts when interpreting Regulation 1049/2001. Nevertheless, it is not possible to regard all information concerning a company and its business relations as requiring the protection that must be guaranteed to commercial interests under Article 2(1) RAD, first indent, if the application of the general principle of giving the public the widest possible access to documents held by ESA is not to be frustrated (see, by comparison, Cases T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* v *Commission*, judgment of 15 December 2011, not yet reported, paragraph 44, and T-380/04 *Terezakis* v *Commission*, not published in the ECR, paragraph 93).

189 The interest of a company that abused its dominant position on the market to avoid private actions for damages cannot be regarded as a commercial interest. In any event, it does not constitute a legitimate interest deserving of protection. In this respect, regard must be had to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (see, by comparison, *Courage and Crehan* [2001] ECR I-6297, paragraphs 24 and 26, and *CDC Hydrogene Peroxide Cartel Damage Claims* v *Commission*, paragraph 49, both cited above, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61; see paragraph 132 above).

190 The contested decision, in as many words, states that ESA conducted a concrete, individual assessment of the content of all the documents. It is therefore not open to ESA to raise arguments based on the applicability of a general presumption as described above in paragraphs 130 to 133, which, in any event, must be rejected as manifestly unfounded, as no reference was made to a general presumption in the contested decision itself.

191 The Court holds that the level of information contained in Annex I to the contested decision is manifestly deficient in terms of both quantity and quality.

Annex I lists the inspection documents under 26 ‘documents numbers’ grouped by where documents were obtained during the inspection: whether from the office of an unnamed individual, archives, or documents from an unidentified computer. Without being broken down, to the requisite legal standard, into groups of documents of the same category or nature, or being listed individually, it is impossible for either the applicant or the Court to determine the nature of the documents or ESA’s grounds for determining that they contain commercial interests that would likely specifically and effectively be undermined if the documents were disclosed.

192 Moreover, Article 4(7) RAD provides that the exceptions laid down in Article 4(1) to (4) RAD shall only apply for the period during which protection is justified on the basis of the content of the document. If related to the commercial interests exception in Article 4(2) RAD, first indent, this may extend beyond the maximum period of 30 years, depending on the content of the document. However, the contested decision fails to state any reasons why the defendant considered that the commercial interests of a natural or legal person would continue to be undermined six years after the inspection took place.

193 Consequently, ESA’s manifest error of assessment of the inspection documents on the basis of Article 4(2) RAD, first indent, that access to each of the inspection documents is likely to specifically and effectively undermine the commercial interests of Norway Post or to take account of the temporal aspect of the justification to protect the content of the inspection documents pursuant to Article 4(7) RAD, means that the second plea must succeed.

Third plea: Infringement of Article 4(2) RAD concerning protection for inspections and investigations

Arguments of the parties

194 DB Schenker points to the right of access laid down in Article 2(1) RAD and the purpose set out in Article 1 RAD, including the promotion of good administrative practice. In that connection, it notes that, on page 3 of the contested decision, ESA specifically refers to the need to protect inspections. DB Schenker interprets this as invoking this particular exception under Article 4(2) RAD. As regards the substance, it asserts that this interpretation and application of Article 4(2) RAD is manifestly incorrect and that, in going beyond the limits of the exception, ESA has violated the applicants’ rights under Article 2(1) RAD. Article 4(2) RAD involves the three-part test mentioned above. The applicants observe that their request for access to the case file was made after ESA had completed its investigation and taken its decision against Norway Post. In that regard, they assert that it has been established in case law that Article 4(2) RAD concerns the completion of investigations or inspections.

195 ESA submits that this argument is flawed and that it correctly refused to grant access to the inspection documents and documents collected from third parties even though Decision 322/10/COL had already been adopted. In its rejoinder,

ESA submits that the contested decision expressly referred to the concern that the disclosure of documents obtained during an antitrust inspection could undermine the protection of the purpose of inspections in competition investigations.

196 DB Schenker argues that ESA's interpretation of Article 4(2) RAD would allow the refusal of access to documents in all antitrust investigations, even after completion. Such an approach must be rejected as vague, general and hypothetical.

197 ESA observes that the exception refers to 'the purpose of inspections, investigations and audit'. If this were to apply when such inspections were pending, then either ESA or the EU legislature would have drafted the exception differently.

198 Furthermore, ESA argues that, in *Technische Glaswerke Ilmenau*, the ECJ found that the protection of the State aid investigation was still relevant even though the Commission had already adopted a definitive decision. Moreover, documents do not lose their confidential character upon the closure of administrative proceedings. Indeed, while Article 4(7) RAD establishes that the exceptions provided for in Article 4(1) to (4) may apply for a maximum of 30 years, the exceptions relating to privacy or commercial interests may, if necessary, continue to apply even after such time.

199 In its reply, DB Schenker asserts that the contested decision does not rely on the need to protect the eventuality of a reopening of the investigation against Norway Post and that, consequently, that argument should be ruled inadmissible. Even if such an argument were admissible, it would be ineffective.

200 DB Schenker argues further that the contested decision does not establish that the destruction of evidence as a direct result of a fear that business documents may potentially be disclosed in the future once an investigation has ended is a problem that ESA has encountered. Moreover, EU/EEA law has established a right to claim damages for losses incurred as a result of antitrust infringements. In that connection, DB Schenker asserts that Article 4(2) RAD cannot be interpreted in such a way that plaintiffs are effectively prevented from seeking evidence to support a follow-on damages claim.

201 ESA submits that the EEA competition rules impose far-reaching obligations to communicate information and documents to itself or the Commission. Anything that affects ESA's powers to inspect and the likelihood of an undertaking complying with an inspection affects the core of competition law enforcement. If undertakings involved in competition law proceedings fear that inspection documents could be disclosed to the general public, they might refuse to submit to inspections, thus requiring ESA to request the assistance of the State authorities, which would seriously complicate its task. In addition, the fear of disclosure of documents could lead undertakings to conceal, withhold or destroy certain documents. Third parties could also become reluctant to disclose certain documents.

202 ESA argues further that its investigative powers are counterbalanced by provisions that protect the company's legitimate interest that such disclosed information may only be used for the purpose of the investigation and may not be disclosed to third parties.

203 Consequently, ESA submits, the documents obtained in inspections have a special status, and greater weight must therefore be given to the RAD non-disclosure exceptions. In particular, great weight must be attached to the opinion of the undertaking subject to inspection, provided in accordance with Article 4(5) RAD. ESA states that the contested decision makes clear that Norway Post was consulted and that it refused to allow ESA to disclose the inspection documents.

204 ESA contends that it may rely on a general presumption that the disclosure of certain documents can undermine the purpose of competition inspections and investigations. Although *Technische Glaswerke Ilmenau* concerned a State aid procedure and not an antitrust matter, the ECJ drew a clear distinction between cases where the EU institutions act in the capacity of a legislature, in which wider access to documents should be given, and cases where they act in an administrative capacity. In ESA's view, case law makes it clear that the administrative activity of the Commission does not require as extensive access to documents as in the case of the legislative activity of an EU institution.

205 In its rejoinder, ESA notes that, in *Technische Glaswerke Ilmenau*, the ECJ held that the Commission was entitled to refuse access to all the documents relating to procedures for the review of State aid covered by the request for access in that case, and that it could do so without first carrying out a concrete, individual examination of those documents.

206 In ESA's view, that general presumption also applies to documents obtained during the administrative procedures carried out in antitrust cases under Articles 53 and 54 EEA since such documents are subject to special accessibility arrangements.

207 ESA submits that Advocate General Cruz Villalón's view in Case C-477/10 P *Commission* v *Agrofert Holding*, cited above, that the ECJ's reasoning in *Technische Glaswerke Ilmenau* should be transposed to merger control cases is also applicable in the instant case. It is justified to acknowledge the existence of a general presumption that the disclosure of documents submitted by undertakings placed in competition files is, as a matter of principle, likely to undermine the protection of the objectives of investigation activities.

208 In ESA's view, the fact that the documents at issue were collected during an inspection is sufficient to conclude that they are all within the category of documents to which the general presumption applies. Furthermore, internal documents such as emails may also contain personal information.

209 ESA therefore contends that it can rely on this general presumption and that the burden is consequently on the applicant requesting access to specifically

demonstrate that a given document is not covered by the presumption, or that there is a higher public interest justifying the disclosure of that particular document. ESA argues further that DB Schenker has not done this during the pre-litigation process. Furthermore, it submits that the defence of private interests such as follow-on damages claims globally does not in itself constitute public interest grounds capable of prevailing over the presumption.

210 ESA notes that, in any event, it decided on its own motion to carry out a more complete examination of the documents in question. Each document was examined to verify whether it contained confidential information. This individual examination also ensured that the classification of each document as falling within the category covered by the presumption was justified.

211 ESA submits that the general presumption shall only cease to apply when it is obvious that the documents at issue do not contain any information worthy of protection.

212 ESA distinguishes between documents submitted voluntarily by undertakings or collected during inspections, and internal documents drafted by an institution. ESA contends that, if it could not rely on the general presumption, this would enable complainants and third parties to circumvent the prohibition in Article 8(2) of Chapter II of Protocol 4 SCA.

213 ESA submits that the applicants can obtain the documents in the case file during the course of their litigation before the national court. However, once communicated, it would be the responsibility of the national court to guarantee protection of the confidentiality of such information or business secrets.

214 ESA contends that, even if the Court were to hold that the general presumption may only apply while the specific investigation is still ongoing, this would not be relevant in the present case. At the time it submitted its pleadings, although the administrative procedure had been completed, the Court had yet to rule on Norway Post's challenge to Decision 322/10/COL. In its view, the case at hand is therefore distinguishable from *Cartel Damage Claims*. A further distinguishing feature is that *Cartel Damage Claims* did not concern access to documents obtained during an inspection, but the statement of contents of the case file.

215 In its reply, DB Schenker observes that ESA's contention, namely that the contested decision sought on the basis of Article 4(2) RAD to protect against the eventuality of a reopening of the investigation, is not mentioned in the contested decision itself. Consequently, these arguments are inadmissible. Moreover, DB Schenker asserts that ESA's understanding of *Cartel Damage Claims* is incorrect and it submits that, in that case, the General Court confirmed its earlier case law. Furthermore, even if the Court in *Posten Norge* v *ESA* were to have annulled Decision 322/10/COL and ESA had reopened the investigation, no reasons have been put forward to demonstrate that it 'would undermine' that investigation if the inspection documents were to be disclosed now.

216 DB Schenker refutes the existence of a general presumption against access to documents seized from companies found to have committed antitrust infringements, and to any documents obtained from third parties as evidence in such cases, even in completed investigations and cases which have been finally decided by the Court. Such reasoning has largely been rejected by the General Court. DB Schenker asserts that, independently of the RAD, national discovery rules already create significant insecurity for companies under antitrust investigation, and that this can also apply to third parties.

217 Norway Post also submits that the applicants can obtain the documents in the case file during the course of their litigation before the national court.

218 The Commission supports ESA's view that disclosure of the inspection documents would be capable of undermining the exception relating to the purpose of inspections and investigations. The protection of commercial interests and the purpose of inspections/investigations are closely intertwined in a cartel procedure. Consequently, ESA must protect its files, as the Commission does, from unauthorised access in closed cartel cases.

219 If termination of the procedure automatically resulted in the inapplicability of the exceptions, undertakings would no longer be willing to cooperate in such proceedings. If undertakings participating in the procedure no longer trusted ESA's capacity to protect their right to confidentiality and rights of defence, future competition investigations, and possibly even investigations of a different kind, would be rendered virtually impossible. In the Commission's view, had the Union legislature or ESA intended to limit the application of the exception only to a specific investigation and for as long as the investigation is ongoing, it would have drafted the provision accordingly.

220 The Commission asserts that, in any event, since the Court had not ruled on *Posten Norge* v *ESA*, the investigation cannot be considered closed. That assessment is unaffected by the reasoning in *MyTravel*. Consequently, the Commission asserts that the applicants' plea and arguments are wholly unfounded.

Findings of the Court

221 The Court notes at the outset that, pursuant to Article 20(4) of Chapter II of Protocol 4 SCA, undertakings and associations of undertakings are required to submit to a competition inspection ordered by a decision of ESA. Where ESA officials and other accompanying persons so authorised by ESA find that an undertaking opposes such an ordered inspection, the EFTA State concerned shall, pursuant to Article 20(6) of Chapter II of Protocol 4 SCA, afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection. The undertaking is placed under a duty of active cooperation (see, by comparison, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl*

Maatschappij and Others v *Commission (PVC II)* [1999] ECR II-931, paragraph 444).

222 Non-compliance by an undertaking under investigation is liable to attract a significant fine or penalty payment pursuant to Articles 23 and 24 of Chapter II of Protocol 4 SCA, respectively. The strict imposition of such fines or penalty payments is intended to ensure the compliance of an undertaking under investigation with the inspection. ESA's concern that uncertainty as to the extent to which the general public could have access at a later stage to information obtained during competition inspections could threaten the effectiveness of such investigations, where the relevant information has not been obtained by way of a voluntary submission from a leniency applicant, has not been substantiated to a sufficient degree.

223 With regard to ESA's argument that the applicants may obtain the documents in question via the national court, the Court finds that the RAD rules have established a regime that is independent of national procedural rules.

224 ESA is correct in asserting that general presumptions based on the nature of certain categories of documents may apply in situations where disclosure would undermine the protection of the purposes of inspections, investigations and audits. Such general presumptions are, of course, applicable in active, ongoing investigations. They have been held to exist by the Union courts when interpreting Regulation 1049/2001 in cases concerning access to documents in State aid and merger cases. However, general presumptions regarding the purpose of investigations and inspections cannot apply in a situation in which ESA has already adopted a final decision concerning abuse of a dominant position under 54 EEA pursuant to Protocol 4 SCA, closing the file to which access is sought, where the relevant information has not been obtained by way of a voluntary submission from a leniency applicant, and where that decision has not been appealed or where the Court has dismissed an appeal against such a decision (see above paragraphs 131 to 133).

225 The contested decision states that, 'despite these concerns, and after having consulted Norway Post a second time on the four documents', ESA decided that these four documents could be disclosed to DB Schenker. It is apparent from the contested decision that ESA's refusal to grant access to the inspection documents in the subsection entitled 'business secrets and other commercially sensitive information' is not based upon Article 4(2) RAD, third indent, but rather on the likely undermining of the protection of commercial interests of Norway Post pursuant to Article 4(2) RAD, second indent.

226 Consequently, ESA's submissions concerning the applicability of a general presumption that the disclosure of documents collected in the course of investigations carried out pursuant to Articles 53 or 54 EEA could adversely affect the purpose served by competition procedures are without foundation in the contested decision.

227 Moreover, the Court finds that the contested decision, in as many words, states that ESA conducted a concrete, individual assessment of the content of all the documents. It is therefore not open to ESA to raise arguments based on the applicability of a general presumption as described above in paragraphs 130 to 133 which, in any event, must be rejected as manifestly unfounded, as no reference was made to a general presumption in the contested decision itself.

228 Therefore, the third plea of the applicant is dismissed as ineffective.

Fourth plea: Infringement of Article 4(2) RAD concerning overriding public interest in disclosure

Arguments of the parties

229 DB Schenker submits that Article 4(2) RAD cannot be relied upon by ESA if there is an overriding public interest in disclosure. Article 4(2) RAD obliges ESA to review on its own initiative whether there is such an overriding interest. This requires ESA, at a minimum, to consider the most striking aspects of the matter in question of its own volition.

230 DB Schenker argues that its private motivation in seeking evidence that can be relied on to claim damages from Norway Post corresponds with the strong public interest in seeing private and public antitrust enforcement work alongside one another. In contrast, an antitrust violator's interest in avoiding follow-on damages claims does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for a loss caused to him by conduct that is liable to restrict or distort competition. It is further submitted that there is a strong public and transparency interest in allowing for an outside review of the conduct of ESA's investigation.

231 As the contested decision does not acknowledge that these public interests exist, the Court cannot, in the applicants' view, approve ESA's assessment, pursuant to Article 4(2) RAD, concerning an overriding public interest. The Court is therefore requested to annul the decision.

232 In its alternative defence, ESA acknowledges the significant contribution made to the maintenance of effective competition by follow-on damages actions. However, ESA asserts that it follows from settled case law that, even if the inspection documents prove necessary for the applicants' position in the action for damages, such circumstance is irrelevant for the purpose of assessing the balance of the public interest.

233 ESA contends that, although the EEA Agreement does not include a provision equivalent to Article 15 TFEU and the RAD rules do not contain a preamble, for the sake of homogeneity, the aim of the RAD should be understood as not granting undertakings or individuals access to evidence that they could use against others.

234 ESA notes that the contested decision does not concern its own internal working documents. It thus fails to understand how the disclosure of the inspection documents could facilitate an understanding of its conduct of the investigation or how it reached its decision. Even if one assumes that there is a public interest of that kind, in ESA's view, the applicants have not explained or established how such interest is capable of outweighing the interest in the protection of the confidentiality of the inspection documents.

235 In its reply, DB Schenker asserts that ESA cannot require anyone who wishes to exercise the right pursuant to Article 2(1) RAD to put forward reasons for the request. This also follows from the construction of both the exceptions and the proviso for overriding public interests set out in Article 4 RAD.

236 According to the Commission, the ECJ has confirmed that the need for transparency does not carry the same weight in administrative matters as in legislative matters. The applicants are essentially invoking a personal and individual interest in seeking access, and an individual interest is not decisive for the purpose of assessing the existence of an overriding interest and is, in fact, irrelevant.

237 In the Commission's view, the existence of an overriding public interest in the disclosure of the documents concerned has not been demonstrated by the applicants. Since ESA, as stated in the contested decision, did not identify an interest of that kind, it must be concluded that such an overriding public interest does not exist.

238 Norway Post asserts that, once the general presumption applies, the burden of proof lies with the party requesting access to the contested document. The applicant must show that a particular document is not covered by the general presumption or that there is a higher public interest justifying disclosure, not a mere private interest.

Findings of the Court

239 Article 4(2) RAD provides that ESA must refuse access to a document where a protected interest is undermined, unless there is an overriding public interest in disclosure. ESA must explain whether or not there is an overriding public interest that might nevertheless justify disclosure of the document concerned (see, by comparison, *Sweden and Turco* v *Council*, cited above, paragraph 49). It must therefore consider on its own motion at least the most striking aspects of the individual case (see, by comparison, *Sweden* v *API and Commission*, paragraph 152, and *Sweden and Turco* v *Council*, paragraph 67, both cited above).

240 Transparency may constitute an overriding public interest by enabling the public to ensure that ESA is acting in an adequate and proper manner in light of the principle of good administration (see, to that effect, the Opinion of Advocate General Kokott in Case C-506/08 P *Sweden* v *Commission*, opinion of 3 March 2011, not yet reported, point 108, and recital 2 to the RAD).

241 It is also settled case law that any individual has the right to claim damages for a loss caused to him by conduct which is liable to restrict or distort competition (see paragraph 190 above and case law cited). The private enforcement of competition law may constitute an overriding public interest and should be encouraged, since it can make a significant contribution to the maintenance of effective competition in the EEA (see paragraph 132 above).

242 Under the subheading ‘overriding interest in the disclosure of the documents concerned’, the contested decision states that ESA ‘has also examined whether there is any overriding interest in the disclosure of the information and found that not to be the case.’

243 However, ESA manifestly erred by failing to consider in the instant case whether the private enforcement of competition law and institutional transparency may constitute overriding public interests in disclosure pursuant to Article 4(2) RAD.

244 Consequently, the fourth plea must succeed.

Fifth plea: Infringement of Article 4(6) RAD concerning the right to partial access to documents

Arguments of the parties

245 The applicants submit that, pursuant to Article 4(6) RAD, where only parts of a document are covered by an exception from the right of access in Article 2(1) RAD, the remaining parts must be released. ESA’s interpretation of Article 4(6) RAD on the basis of exceptional circumstances overrides the precise wording of the right to partial access, the purpose of Article 1 RAD, the principle of proportionality, and the only case law cited in the contested decision. Where there is a choice between several appropriate measures, ESA must opt for the least onerous, and the disadvantages caused by that measure must not be disproportionate to the legitimate purpose pursued.

246 The applicants contend that ESA’s decision deemed three circumstances to be exceptional: first, the burden on Norway Post; second, that the right to partial access could undermine the purpose of inspections; and, third, the administrative burden on ESA. Although conceding that the General Court in *VKI* held that an institution retains the right to balance the interest in public access to documents against the burden of work so caused in order to safeguard the interests of good administration, ESA has failed to substantiate that the present proceedings involve exceptional circumstances.

247 According to DB Schenker, the relevant legal test requires that the circumstances must be exceptional and that the administrative burden must be particularly heavy. This burden cannot be established simply by referring to the number of documents or pages in question. Moreover, the burden of proof concerning the scope of the work is on ESA, which is obliged to first consult the applicant and genuinely investigate all other conceivable options.

248 DB Schenker observes that the request related to 2 800 pages of documents, whereas the burden on the Commission in *VKI* amounted to 47 000 pages and was not considered exceptional. The applicants stress the age of the documents involved and note that the decision does not indicate whether the number of business secrets in those documents is substantial. Moreover, according to the applicants, it is for Norway Post to identify and substantiate for ESA the existence of any such business secrets, thereby limiting ESA's administrative burden to reviewing specific claims concerning business secrets. Furthermore, the applicants note that ESA claims, in any event, that it has reviewed the 352 documents in question for business secrets.

249 DB Schenker submits that the assertion that the right to partial access could undermine the purpose of antitrust investigations cannot be relied upon to override the right to partial access established in Article 4(6) RAD.

250 DB Schenker rejects the contention that the burden placed on Norway Post by the request for access qualifies as a particularly heavy burden. Moreover, even if that burden were considered extraordinary, this cannot constitute a relevant legal factor. The applicants contend that, under those circumstances, it was not open to ESA in the contested decision to set aside their right to partial access under Article 4(6) RAD.

251 ESA submits that, in light of its earlier arguments, it is clear that it did not breach the applicants' right to partial access to the documents at issue.

252 Furthermore, ESA avers that it found that the disclosure of any meaningful part of the inspection documents to the general public would likely undermine the protection of commercial interests of natural or legal persons. In any event, had it found certain meaningful parts of these documents to not be covered by the exceptions, the administrative burden of drawing up non-confidential versions would have been particularly heavy.

253 ESA submits that an institution is entitled to invoke exceptional circumstances in order to dispense with the provision of non-confidential versions of documents, provided that strict conditions based on the principle of proportionality are observed. In ESA's view, these conditions are satisfied in the present case.

254 According to ESA, first, the workload has to be considered within the context of the request for access to the file made on 3 August 2010, which concerned the entire file and not only access to the inspection documents. ESA states that it has spent considerable time and resources examining the documents in the file. Second, ESA asserts that an individual document assessment is insufficient, since an assessment would also have to be made of what information would be revealed through disclosure of certain parts of all the documents as a whole. Third, it notes that, pursuant to Article 6(3) RAD, where a request for access relates to a very large number of documents, it may confer with the applicant informally with a view to finding a fair solution.

255 ESA submits that it invited the applicants in three different letters to identify in more concrete terms those documents to which it would be in their interest to have access. DB Schenker never agreed to cooperate and, instead, simply insisted on its global request for access to the entire file. Furthermore, even if ESA had found that certain meaningful parts of these documents were not covered by the exceptions, it would have had to seek the cooperation of Norway Post and its business partners in preparing non-confidential versions in accordance with Article 4(5) RAD.

256 The applicants deny that they have been unwilling to cooperate with ESA and assert that, for eighteen months, ESA has been unwilling to provide a list of the documents in question and that the list provided in 2010 does not reveal any contacts between Norway Post, its owner and ESA after the delivery of its Statement of Objection, or provide a list of ESA's own working documents.

257 ESA submits that DB Schenker is incorrect in asserting that, in applying the RAD, ESA should take account of the applicants' private interest in collecting evidence that could support a follow-on damages action.

258 ESA contends that, had it decided to disclose parts of the inspection documents without the consent of Norway Post, it would have breached Article 28 of Chapter II of Protocol 4 SCA and Norway Post's right to confidential treatment. In that connection, it notes that, at the time of the inspection, it had not adopted the RAD. Consequently, ESA submits that it obtained the documents from Norway Post on the assumption that they could only be disclosed to the complainant or third parties under the conditions set out in Article 27(1) and (2) of Chapter II of Protocol 4 SCA for the purposes of judicial or administrative proceedings for the application of Articles 53 and 54 EEA.

259 ESA contends that, even if the Court were to consider the need to protect commercially sensitive information and the investigation to be limited, in the absence of any public interest in the disclosure of these documents, the balancing of interests should give priority to the protection of business secrets and competition investigation.

260 In its reply, DB Schenker asserts that the contested decision does not refer to the protection of professional secrecy as a reason why partial access could not be granted under Article 4(6) RAD. Consequently, ESA's arguments are inadmissible. In addition, even if admissible, they are ineffective since partial access only concerns those parts of the documents that fall outside the scope of interests protected under Article 4 RAD. In its view, the decision does not even refer to this issue. Moreover, case law has held that professional secrecy does not extend to information contained in documents to which the public has a right of access.

261 The Commission considers that the manner in which ESA proceeded and its conclusion that the administrative burden entailed in drawing up non-confidential versions of the inspection documents would be disproportionate is entirely

supported by *Hautala*. Therefore, in its view, ESA did not infringe Article 4(6) RAD. The Commission considers that ESA lawfully refused to grant partial access to the documents concerned.

Findings of the Court

262 The Court recalls that Article 4(6) RAD provides that, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

263 It follows from the reasoning of the contested decision that ESA considered that, partial access could have been granted were it not for the 'burden of work' that would have been imposed on ESA and Norway Post in preparing non-confidential versions of the inspection documents. Although, ESA was also of the view that if partial access were granted to 'any meaningful part of the inspection documents', this would likely undermine the protection of commercial interests of natural or legal persons.

264 Article 4(6) RAD does not require that partial access be made in all cases (see, by comparison, Case T-111/07 *Agrofert Holding* v *Commission* [2010] ECR II-128, paragraph 109). However, such an exception to the rule contained in Article 4(6) RAD which goes against both Article 1 RAD and the purpose of access to documents, while legitimate, must be given an exceptionally narrow interpretation.

265 ESA retains the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration (compare Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 86). However, that possibility remains applicable only in exceptional cases (see, by comparison, *VKI*, cited above, paragraphs 104 to 111).

266 Accordingly, it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that derogation from that obligation to examine the documents may be permissible (compare *Kuijer* v *Council*, cited above, paragraph 57).

267 In order to rely upon this exception, ESA must adduce proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request. Where such proof is adduced, ESA is additionally obliged to attempt to consult with the applicant in order to ascertain, or to ask him to specify, his interest in obtaining the documents in question and to consider specifically whether and how it may adopt a less onerous measure than a concrete, individual examination of the documents. Since the right of access to documents is the principle, ESA remains obliged, against that background, to prefer the option which, while not itself constituting a

task that exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access (see, to that effect, *VKI*, cited above, paragraphs 113 to 115).

268 The contested decision states that ESA has examined all 352 inspection documents. ESA effectively contends that, despite having examined each inspection document, it is not required to provide partial access to the documents if the burden of work entailed by preparing partially redacted versions of the inspection documents would exceed the limits of what may reasonably be required in the interests of good administration and proportionality.

269 ESA has submitted that the drawing up of non-confidential versions of the inspection documents, which amount in their full form to some 350 documents and around 2 800 pages, would be unreasonable and disproportionate given their 'very large number'.

270 The Court finds that, since the exception to Article 4(6) RAD must be given an exceptionally narrow interpretation, neither the volume of the inspection documents, amounting to three ring binders of material, nor the complexity of the documents is such that the administrative burden entailed by the preparation of partially redacted versions exceed the limits of what may reasonably be required in the interests of good administration and proportionality. In addition, the Court notes that the release of remaining parts of documents pursuant to Article 4(6) RAD may not be likely to undermine the protection of commercial interests of natural or legal persons.

271 However, ESA was correct in consulting Norway Post with a view to assessing whether an exception in Article 4(1) or (2) RAD was applicable, pursuant to Article 4(5) RAD. It follows from that provision that ESA bears sole responsibility for deciding whether the respective documents are to be released. For the sake of order, the Court adds that Article 28 of Chapter II of Protocol 4 SCA cannot be read in isolation.

272 The task of preparing those documents, which are partially covered by exemptions within the meaning of Article 4(6) RAD, properly falls upon ESA.

273 However, as part of this consultation, ESA should have required, if such a requirement had not already been made, Norway Post to identify, among the inspection documents, the documents or parts of documents that it considered to contain business secrets or other confidential information belonging to it, and to identify the undertakings with regard to which such documents were to be considered confidential, in accordance with Article 16(3) of Chapter III of Protocol 4 SCA and paragraph 36 of the Notice on rules for access to the ESA file. If ESA had made such a requirement of Norway Post, recalling the result should an undertaking fail to comply with this requirement pursuant to paragraph 39 of the Notice on rules for access to the ESA file, its own administrative burden would have been substantially eased.

274 Moreover, ESA wilfully failed to comply with the time limits laid down in Article 7 RAD. Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases. Indeed, despite ESA's view that the application related to a very large number of documents and was consequently an exceptional case, ESA nevertheless failed to notify the applicant in advance, giving detailed reasons, in order to extend the deadline by 20 working days in accordance with Article 7(2) RAD. Instead, ESA finally issued the contested decision 54 weeks after the application was made. By doing so, ESA violated the principle of good administration. In light of the above, ESA's manifest error of assessment of the inspection documents on the basis of Article 4(6) RAD means that the fifth plea must succeed.

Conclusion

275 It follows from all of the foregoing that the contested decision is vitiated both by manifest errors of assessment of several issues and an error of law insofar as the defendant breached the principle of good administration.

276 In light of what is stated in paragraph 126 above, the Court has reviewed the inspection documents in order to determine whether ESA was correct in refusing to disclose any of the documents on the basis that their disclosure would undermine, in a reasonably foreseeable and not purely hypothetical manner, the protection of the privacy and the integrity of the individual pursuant to Article 4(1)(b) RAD; the protection of the purpose of inspections, investigations and audits pursuant to Article 4(2) RAD; the existence and applicability of an overriding public interest in disclosure according to Article 4(2) RAD; Article 4(6) RAD; and Article 4(7) RAD.

277 The Court has taken into consideration that ESA, pursuant to Point 3.2.3 of the Notice on rules for access to the ESA file, presumes, as a general rule, that information pertaining to parties' turnover, sales, market share data and similar information that is more than five years old is no longer confidential.

278 The Court recalls that eight years and five months have passed since ESA conducted its inspection of Norway Post's premises. The passage of time, as understood by Article 4(7) RAD, must therefore be a significant consideration in determining whether the exceptions to the general rule of access to documents contained in Article 4(1) to (4) RAD are justified on the basis of the content of each document.

279 Article 4(7) RAD specifies that the exceptions laid down in Article 4(1) to (4) RAD apply for a maximum of thirty years. Unless other provisions of applicable EEA or national law provide differently, it may be generally presumed that interests of minor weight protected by Article 4(1) to (4) RAD may only be exempted from disclosure for up to five years.

280 Those interests of more than minor weight protected by Article 4(1) to (4) RAD, may, unless other provisions of applicable EEA or national law provide differently, only be exempted from disclosure for as long as is necessary and proportionate in all the circumstances, with a maximum duration of thirty years. In that regard, a third party consulted pursuant to Article 4(5) RAD must set out its reasoning as to why the disclosure of each document would, at that time, undermine its interest protected by Article 4(1) or (2) RAD and why such protection from disclosure remains necessary and proportionate in all the circumstances.

281 However, documents covered by the exceptions relating to privacy or commercial interests and sensitive documents, may, if necessary, remain protected beyond the thirty year maximum period. The final sentence of Article 4(7) RAD must necessarily only be applicable in the most exceptional of cases.

282 Accordingly, the contested decision must be annulled insofar as it denies access to the inspection documents obtained by the defendant during an inspection of the premises of Norway Post between 21 and 24 June 2004.

283 The Court requires in the interests of justice, transparency and good administration ESA to adopt a new decision within the time limits contained in Article 7 RAD on access to the inspection documents by the applicant.

IX Costs

284 Under Article 66(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has requested that the defendant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Posten Norge AS shall bear its own costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Annuls ESA's decision of 16 August 2011 'Norway Post/Privpak – Access to documents' insofar as it denies full or partial access to inspection documents in Case No 34250 Norway Post / Privpak;**

2. **Dismisses the action as to the remainder;**

3. **Orders ESA to bear its own costs and the costs incurred by the applicant;**

4. **Orders Posten Norge AS to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 21 December 2012.

Michael-James Clifton
Acting Registrar

Carl Baudenbacher
President