ORDER OF THE PRESIDENT
28 August 2015

(Action for discontinuance of proceedings - Costs)

In Case E-22/14,

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Auður Ýr Steinarsdóttir, Officer, and subsequently Markus Schneider, Acting Director, and Auður Ýr Steinarsdóttir, Officer, acting as Agents,

defendant,

supported by **Posten Norge AS**, established in Oslo, Norway, represented by Beret Sundet, advokat,

intervener,

APPLICATION for annulment of EFTA Surveillance Authority ("ESA") Decision of 9 September 2014, in Case No 75697 (*DB Schenker*), by which ESA, for a second time, after its first decision was partially annulled in Case E-5/13 *DB Schenker* v *ESA* on 7 July 2014, has denied DB Schenker access to the complete version of Decision No 321/10/COL of 14 July 2010, in Case No 13115 (*Norway Post – loyalty/discount system*) and certain case documents, either undated or dated 2001-2004, which led to that decision. The contested decision was made under the new rules on public access to documents ("RAD") that ESA enacted on 5 September 2012, by way of Decision No 300/12/COL.

THE PRESIDENT,

makes the following

Order

I Introduction

1 Schenker North AB and Schenker Privpak AB, both established in Sweden, and Schenker Privpak AS, established in Norway, ("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 the transport and logistics activities of Deutsche Bahn AG except passenger transport. All three applicants operate in that sector.

2 The present case is related to the annulment of ESA decision of 9 September 2014 in Case No 75697 (*DB Schenker*) ("contested decision"). This decision concerns DB Schenker's public access request for documents belonging to the case files that led to ESA's Decision No 321/10/COL (Norway Post – loyalty/discount system) of 14 July 2010 as well as to the complete version of ESA Decision No 321/10/COL.

3 Decision No 321/10/COL concerns an investigation commenced by ESA *ex officio* in 2001 following competition concerns raised in an investigation of a complaint regarding possible cross-subsidisation in breach of Article 54 EEA on the part of Posten Norge AS ("Norway Post") (Case No COM020.0 171 HTL/Norway Post, closed in March 2002).

4 The public version of Decision No 321/10/COL notes that concerns were identified in the light of case law that the discount system applied by Norway Post in the field of B-to-C parcel services might be contrary to Article 54 EEA. The decision pointed, inter alia, to possible loyalty-inducing effects of retroactive rebates used by Norway Post; the grant of discounts which depended on whether customers reached certain targets fixed on an annual basis; indications that targets were equivalent or close to the total requirement of customers thereby discouraging customers from buying from competitors; the use of rebate criteria with seemingly little or no relation to cost savings made by Norway Post; indications that Norway Post discriminated between customers depending on whether there was competition for the customers or not; indications that volume rebates did not apply equally to all customers; a lack of transparency regarding the rebate criteria giving Norway Post more flexibility to grant differentiated discounts for the same volumes; and finally, clauses in Norway Post's standard contracts that might induce buyers not to buy from competitors.

5 Norway Post presented to ESA a "revised discount system" in 2001. While ESA "had no objections to the cost allocation system that formed part of the new discount scheme, concerns about several aspect [sic] of the rebate scheme remained". A "new and improved discount model" was presented to ESA in 2006. In 2008, Norway Post submitted to ESA "information on recent market developments" "indicating that competing distributors of B-to-C parcels had been able to conclude distribution agreements with leading daily consumer goods retail groups and were expanding their activities in Norway".

6 ESA closed the case on the grounds that "on the basis of the information in the Authority's possession, there is insufficient evidence for pursuing a possible infringement of Article 54 of the EEA Agreement on part of Norway Post".

7 The present case arises from Case E-5/13 *DB Schenker* v *ESA* [2014] EFTA Ct. Rep. 306 ("*DB Schenker V*") in which the same applicants sought the annulment of ESA's decisions of 25 January 2013 and 18 February 2013, in ESA Case No 73075, to deny access to documents belonging to the case files that led to ESA Decision No 321/10/COL (*Norway Post – loyalty/discount system*), under the RAD.

8 In its judgment of 7 July 2014 in *DB Schenker V*, the Court annulled the decision of 25 January 2013 in ESA Case No 73075 (*DB Schenker*) in so far as it refused full or partial access under Articles 4(4) and 4(6) RAD to documents belonging to the case files that led to ESA Decision No 321/10/COL (*Norway Post – loyalty/discount system*) and refused to grant access to the complete version of Decision No 321/10/COL. The remainder of the application was dismissed.

II Procedure and forms of order sought

9 On 10 November 2014, by way of an application lodged at the Court, DB Schenker brought an action seeking the annulment of the decision by ESA ("the defendant") of 9 September 2014.

10 The applicant requested the Court to:

- annul ESA's decision of 9 September 2014 in Case No 75697 (*DB Schenker*);

- order ESA and any intervener to bear the costs.

11 On 26 January 2015, ESA's defence was registered at the Court. ESA requested the Court to:

- dismiss the application;

- order the applicants to bear the costs.

12 On 17 February 2015, by a document lodged at the registry of the Court, Norway Post ("the intervener") sought leave to intervene in support of ESA.

13 On 23 February 2015, DB Schenker wrote to the Court stating that it had elected not to submit a reply pursuant to Article 36 of the Court's Rules of Procedure ("RoP").

14 On 6 March 2015, written observations on the application to intervene were received both from the applicants and ESA.

15 On 24 March 2015, by Order of the President, Norway Post was granted leave to intervene.

16 On 16 April 2015, Norway Post submitted a statement in intervention. The deadline for comments on the statement in intervention was 28 April 2015. The intervener requests the Court to:

- dismiss the application;

- order the applicants to bear the costs of ESA and Norway Post.

17 On 28 April 2015, ESA submitted comments on the statement in intervention.

18 On 30 April 2015, DB Schenker submitted comments on the statement in intervention. In these submissions, the applicants amended their form of order sought and requested the Court to:

- annul ESA's decision of 9 September 2014 in Case No 75697 (DB Schenker);

- annul ESA's decision of 23 February 2015 in Case No 76472 (DB Schenker);

- order ESA and Norway Post to bear the costs.

19 On 17 July 2015, DB Schenker made an application to discontinue proceedings pursuant to Article 74 RoP.

20 The applicants requests the Court to:

- order Case E-22/14 *DB Schenker* v *ESA* to be removed from the register;

- order ESA to bear its own costs and 50 percent of the costs of DB Schenker and DB Schenker to bear 50 percent of its own costs;

- order Norway Post to bear its own costs.

21 The deadline for comments on the application to discontinue proceedings was set for 10 August 2015.

22 On 31 July 2015, ESA requested an extension of the deadline to submit comments on the application to discontinue proceedings. On the same day the President granted the request, with an extension granted to 14 August 2015.

23 On 14 August 2015, ESA submitted its comments.

24 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 in so far as is necessary.

III Law

Arguments of the parties

DB Schenker

25 DB Schenker requests that these proceedings be discontinued and that the case be removed from the register. Discontinuance is sought as a consequence of DB Schenker's settlement agreement with Norway Post in proceedings before the Oslo District Court.

26 DB Schenker requests that ESA be ordered to pay its own costs and 50 percent of the costs of DB Schenker in accordance with Article 66(5) RoP. This is justified on account of ESA's conduct. ESA stated that it decided to release two of the three redacted passages in ESA Decision No 321/10/COL to DB Schenker on 23 February 2015 as a consequence of the handing down of the General Court's judgment of 7 October 2014 in Case T-534/11 *Schenker AG* v *Commission*, published electronically, paragraphs 137 and 138.

27 DB Schenker rejects that Case T-534/11 *Schenker AG* v *Commission* justifies ESA's decision to release two of the three redacted passages. It highlights the time taken to release two passages of the two and a half page decision and submits that delay was unjustified and refers to Article 7(2) RAD, the Order of the ECJ in Case C-122/07 P *Eurostrategies* v *Commission* [2007] ECR I-179 and the Order of the President of the General Court of 29 November 2012 in Case T-164/12 R *Alstom* v *Commission*, paragraphs 9 to 14. It notes that ESA's letter to DB Schenker of 23 February 2015 was sent approximately one month after ESA submitted its defence.

28 DB Schenker argues that ESA's letter of 23 February 2015 did not clarify its legal nature whether it was to constitute a response to its original public access request or whether the letter constituted a decision that replaced, or supplemented, the decision at issue. This caused needless additional work and compelled it to amend its pleas and form of order sought.

29 DB Schenker submits that the Court has found reason to censure ESA's conduct in several other recent access to document cases and refers to Case E-14/11 *DB Schenker* v *ESA ('DB Schenker I')* [2012] EFTA Ct. Rep. 1178, Case E-7/12 *DB Schenker* v *ESA ('DB Schenker II')* [2013] EFTA Ct. Rep. 356, and Joined Cases E-4/12 and E-5/12 *Risdal Touring AS and Konkurrenten.no AS* v *ESA* [2013] EFTA Ct. Rep. 668. The unjustified delay and extra legal costs that ESA has also been willing to cause in these proceedings are at odds with the core of the public right of access.

ESA

30 ESA requests that the applicants, as the party that has discontinued the present proceedings, be ordered to pay the costs. ESA submits that its conduct does not justify that it be ordered to pay half of the costs of the proceedings. Nor does it appear justified that ESA should bear, in particular, 50% of the costs of either the applicants or the intervener. Indeed, the potential costs claims of the applicants and intervener will likely be substantially higher than its own costs.

31 ESA submits that the present situation is not a case that does not proceed to judgment as provided for in Article 66(6) RoP, which essentially covers applications which become devoid of purpose. However, a minor part of the present case had become devoid of purpose as regards the passages of Decision 321/10/COL which were subsequently disclosed. Nevertheless, the present application denies the Court the opportunity of determining whether it did, or did not, become devoid of purpose in part.

32 Article 66(4) and 66(5) RoP are identical in substance to Articles 138(3) and 136 of the General Court's Rules of Procedure 2015. It is appropriate to take into account the reasoning of the European Union courts when interpreting expressions of the Court's Statute and Rules of Procedure which are identical in substance to expressions in equivalent provisions of EU law. Reference is made to Case E-15/10 *Posten Norge AS* v ESA [2012] EFTA Ct. Rep. 246, paragraph 110. To its best knowledge, the General Court seems to uphold requests to deviate from the rule that applicants who withdraw their applications shall bear the costs essentially in situations where applications for annulment largely become devoid of purpose because the defendant institutions reversed the decisions challenged. Reference is made *inter alia* to the Order of the President of the Seventh Chamber of the General Court of 27 February 2014 in Case T-439/13 *Fard and Sarkandi* v *Council*, published electronically; the Order of the President of the Fourth Chamber of the General Court of 6 July 2012 in Case T-173/12 *Areva SA* v *Commission*, published electronically; the Order of the President of the Third Chamber of the General Court of 29 January 2013 in Case T-650/11 *Dimension Data Belgium SA* v *Parliament*, published electronically; and Order of the President of the First Chamber of the General Court of 31 March 2014 in Case T-338/13 *Energa Power Trading* v *Commission*, published electronically. However, ESA submits that this is not the situation in the present case.

33 First, the applicants' arguments refer only to the two passages of Decision 321/10/COL that were disclosed on 27 February 2015, which when one considers the other 12 documents at issue, concern less than 0.4 percent of the pages of documents to which the application for annulments relates. Second, ESA reiterates that the applicants' new plea to annul an alleged ESA decision of 23 February 2015 did not fulfil Article 19 of the Statute and Article 33(1)(c) RoP. Reference is made to Case E-15/10 *Posten Norge* v *ESA*, cited above, paragraphs 108 and 111. This further militates against the conclusion that ESA should bear its own costs and 50 percent of the costs of DB Schenker.

34 ESA contends that neither the applicants nor the intervener informed either it or the Court of the negotiations that were being conducted towards a settlement. In such a situation, the applicants should have informed the Court that the oral hearing could have been postponed until, perhaps, after the summer break. Finally, ESA recalls that this case is a follow-up to *DB Schenker V* in which the Court considered it appropriate that the applicants and ESA bear their own costs.

Findings

35 Pursuant to Article 74 RoP, "if the applicant informs the Court in writing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(5)" RoP. On 17 July 2015, DB Schenker made such an application to discontinue proceedings in writing.

36 Pursuant to Article 66(5) RoP a "party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party".

37 DB Schenker has requested that ESA pay its own costs and half of DB Schenker's costs of the proceedings. It was appropriate to invite the other parties to the proceedings to submit comments on the application for discontinuance of proceedings.

38 DB Schenker has submitted that the present access to documents case was brought as part of a follow-on private damages action before a national court.

39 The Court held in *DB Schenker I* and reiterated in *DB Schenker V*, 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. 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 (see *DB Schenker I*, cited above, paragraphs 132 and 133). Referencing

the Court's *DB Schenker I* judgment, Advocate General Kokott in her Opinion of 30 January 2014 in Case C-557/12 *Kone and Others*, published electronically, point 60, and the General Court in Case T-345/12 *Akzo Nobel and Others* v *Commission*, published electronically, paragraph 80, emphasised the importance of private enforcement.

40 In that regard, the Court has held that ESA may base its decisions, pursuant to Article 4(4) RAD, on general presumptions that apply to certain categories of documents, since similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (see *DB Schenker I*, cited above, paragraph 130 and case law cited; for the scope of such general presumptions in competition law see *DB Schenker I*, cited above, paragraphs 131 to 133 and 224).

41 However, these considerations cannot apply in the present case, as it is a follow-up to *DB Schenker V*. There, the Court found that the request for access to documents at issue is not part of a follow-on damages case before a national court concerning Article 53 or 54 EEA (see, *DB Schenker V*, cited above, paragraph 135).

42 During the hearing in particular, the applicants discussed at length the actions in this case of the former President of ESA during his time in office, and hence of ESA as a whole. The former President of ESA was, before being appointed to ESA, a high official in the Ministry of Transport and Communications which owns Norway Post. However, no concrete charge of serious misconduct or "abandoning responsibility or impartiality of his office" was made. The President therefore limits himself to note, for the sake of order, that Articles 7 to 9 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice lay down detailed rules on the independence and impartiality of ESA College Members who, incorporate, form the EFTA Surveillance Authority.

43 On 23 February 2015, ESA wrote to DB Schenker and made reference to the present proceedings. ESA stated that it wished to inform the applicants that in light of the General Court's judgment in Case T-534/11 *Schenker AG* v *Commission*, cited above, paragraphs 137 and 138, it had disclosed two of the three redacted passages of ESA Decision 321/10/COL to the public. Paragraphs 137 and 138 of that judgment read:

> "*There was therefore nothing to prevent the Commission from communicating to the applicant the part of the non-confidential version of the airfreight decision which was not the subject-matter of any requests for confidentiality.*
>
> *Consequently, the Commission should have sent the applicant, at its request, such a non-confidential version of the contested decision without waiting for all the requests for confidentiality submitted by the undertakings concerned to be finally settled."*

44 Given the nature of the General Court's reasoning in that passage, and that it took ESA four and a half months to release a new public version of ESA Decision 321/10/COL, which now contains only one redacted sentence, and given the remaining scope of the present proceedings, it is justified to order the applicants and ESA to bear their own costs in this case pursuant to Article 66(5) RoP. Norway Post is to bear its own costs.

On those grounds,

THE PRESIDENT

Hereby orders:

1. Case E-22/14 is removed from the Register.

2. The applicants and the EFTA Surveillance Authority are to bear their own costs.

3. The intervener is to bear its own costs.

Luxembourg, 28 August 2015.

Gunnar Selvik
Registrar

Carl Baudenbacher
President