



ORDER OF THE COURT

25 November 2014

(Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – Article 38 SCA – ESA’s Rules on public access to documents 2012)

In Case E-4/13,

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 Markus Schneider, Deputy Director, Gjermund Mathisen, Officer, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

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

intervener,

APPLICATION for annulment of the EFTA Surveillance Authority’s (“ESA”) Decision of 7 February 2013 to deny access to the inspection documents in Case No 34250 (Norway Post / Privpak) after the Court annulled ESA’s first decision on 21 December 2012 in Case E-14/11. The contested decision was made under the new rules on public access to documents that ESA enacted on 5 September

2012 by way of Decision No 300/12/COL (“RAD 2012”) (not published in the Official Journal), which was given retroactive effect to DB Schenker’s access request of 3 August 2010.

THE COURT,

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

Registrar: Gunnar Selvik,

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

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Jon Midthjell, the defendant, represented by Gjermund Mathisen, and the intervener, represented by Beret Sundet, at the hearing on 5 December 2013,

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 Following a complaint received from DB Schenker on 24 June 2002 concerning the agreements made by Posten Norge AS (“Norway Post”) establishing Post-in-Shops in retail outlets, ESA initiated an anti-trust investigation. In the course of the investigation, ESA conducted an inspection of Norway Post’s premises between 21 and 24 June 2004 and seized various documents (“the inspection documents”).
- 3 By its decision of 14 July 2010, ESA found that Norway Post had committed an infringement of Article 54 of the EEA Agreement (“EEA”) in abusing its dominant position in the business-to-consumer 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* [2012] EFTA Ct. Rep. 246 (“*Norway Post*”).

- 4 The present case is a follow-up to Case E-14/11 *DB Schenker v ESA* [2012] EFTA Ct. Rep. 1178 (“*DB Schenker I*”) in which the same applicants sought the annulment of ESA’s Decision in Case No 68736 of 16 August 2011 denying DB Schenker access to certain documents relating to Case No 34250 Norway Post / Privpak on the basis of the Rules on Access to Documents (“RAD 2008”) established by the College of the EFTA Surveillance Authority on 27 June 2008.
- 5 In its judgment of 21 December 2012 in *DB Schenker I*, the Court annulled ESA’s decision of 16 August 2011 “Norway Post/Privpak – Access to documents” insofar as it denied full or partial access to inspection documents in Case No 34250 Norway Post/Privpak.
- 6 On 5 September 2012, ESA took Decision No 300/12/COL to adopt revised Rules on public access to documents (“RAD 2012”), and repealing Decision No 407/08/COL.
- 7 In its contested decision of 7 February 2013, ESA denied access to 229 of the inspection documents in full, granted partial access to 23 documents and granted full access to 91.
- 8 The application is based on four pleas, namely (i) that there has been an infringement of the principles of legal certainty and effective judicial protection insofar as the RAD 2012 have been given retroactive effect that is prejudicial to the rights that DB Schenker enjoyed under the RAD 2008; (ii) an infringement of the commercial interest exception in Article 4(4) RAD 2012 and the duty to state reasons in Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”); (iii) an infringement of the overriding public interest rule in Article 4(4) RAD 2012 and the duty to state reasons in Article 16 SCA; and (iv) an infringement of the right to partial access in Article 4(9) RAD 2012 and the duty to state reasons in Article 16 SCA.

II Legal background

- 9 Article 122 EEA reads:

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 16 SCA reads:

Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.

11 Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

The proceedings provided for in this Article shall 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.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

12 Article 38 SCA reads:

If a decision of the EFTA Surveillance Authority has been declared void or if it has been established that the EFTA Surveillance Authority, in infringement of this Agreement or of the provisions of the EEA Agreement, has failed to act, the EFTA Surveillance Authority shall take the necessary measures to comply with the judgment.

This obligation shall not affect any obligation which may result from the application of Article 46, second paragraph.

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

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(2) of this Chapter and in the hearing pursuant to Article 14(3) of Chapter III.

RAD 2012

- 14 The introduction and recitals 1 to 3 in the preamble to Decision No 300/12/COL read as follows:

THE EFTA SURVEILLANCE AUTHORITY.

HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular its Article 13,

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,

The purpose of these Rules is to ensure openness and transparency at the Authority, while still showing due concern for 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,

The Authority should take the necessary measures to inform the public of the new Rules on public access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate the exercise by citizens of their rights, the Authority should provide access to a register of documents.

15 Article 1 of the RAD 2012 reads as follows:

Purpose

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 documents held by the Authority,

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

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

16 Article 4 of the RAD 2012 reads as follows:

Exceptions

Under these Rules:

...

4. The Authority shall refuse access to a document, unless there is an overriding public interest in disclosure, 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.

5. ...

6. The Authority shall refuse access to Authority internal memos or notes and Authority internal communication except if such memos, notes or communication set out a final decision unavailable in any other form or if there is an overriding public interest in disclosure.

7. ...

8. As regards third-party documents, the Authority shall consult the third party with a view to assessing whether an exception in paragraph 3 or 4 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.

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

10. The exceptions as laid down in paragraphs 1 to 7 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.

17 Article 7 of the RAD 2012 reads as follows:

Processing of Applications

1. ...

2. 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 10 working days from registration of the application.

3. In exceptional cases, for example in the event of an application relating to a long document or to a large number of documents, the time-limit provided for in paragraph 2 may be extended by 30 working days. The Authority shall notify the applicant thereof as quickly as possible.

4. In cases where the Authority consults third parties in accordance with Article 4(8) of these Rules, the time-limit provided for in paragraph 2 or 3 above may be suspended, for the documents concerned and for as long as the consultation is pending. The Authority shall inform the applicant of any such suspension as quickly as possible, and the Authority shall endeavour to complete any such consultation within a reasonable time.

5. Failure by the Authority to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application under paragraph 6 below.

6. In the event of total or partial refusal the applicant may, within 30 working days of receiving the Authority's reply, make a confirmatory application asking the Authority to reconsider its position. Paragraphs 1 to 4 above apply. The Decision of the Authority shall be adopted by the College Member responsible for public access to documents. In the event

of confirmation of the total or partial refusal, the Authority shall inform the applicant of the remedies open to him or her by instituting court proceedings against the Authority under the conditions laid down in Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Failure by the Authority to reply within the prescribed time-limit shall be considered as a negative reply and thus also entitle the applicant to institute such court proceedings.

18 Article 13 of the RAD 2012 reads as follows:

Entry into force, publication and repeal of Decision 407/08/COL

These Rules shall enter into force on the day following the adoption of the present Decision and shall be applicable to all access requests decided upon from that date onwards. From the same time, Decision 407/08/COL of 27 June 2008 to adopt new Rules on Public Access to documents, is repealed.

The Authority shall make these Rules available on its website.

III Pre-litigation procedure

- 19 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.
- 20 DB Schenker was granted access to documents in Case No 34250 on 30 August 2010, 5 November 2010, 16 February 2011 and 16 August 2011.
- 21 ESA's letter of 16 August 2011 denied access to 352 of 354 inspection documents in the case file obtained during the inspection of Norway Post's premises in June 2004.
- 22 By application lodged with the Court on 19 October 2011, DB Schenker brought an action seeking the annulment of the contested decision of 16 August 2011 insofar as it denied access to inspection documents in Case No 34250 (*Norway Post / Privpak*).
- 23 On 5 September 2012, ESA adopted the new RAD 2012 by College Decision No 300/12/COL.
- 24 By judgment of 21 December 2012 in Case E-14/11 *DB Schenker v EFTA Surveillance Authority* [2012] EFTA Ct. Rep. 1178, the Court annulled ESA's decision of 16 August 2011 "Norway Post/Privpak – Access to documents"

insofar as it denied full or partial access to inspection documents in Case No 34250 Norway Post / Privpak.

- 25 On 9 January 2013, ESA wrote to and emailed Norway Post (Event No 658190) inviting the company to identify any confidential information and justification for any refusal of public access to the inspection documents. ESA made clear that if Norway Post made no substantiated claims of confidentiality within 10 working days, i.e. by 23 January 2013, ESA would assume that it had no objections to full disclosure of the documents concerned and would proceed accordingly without further delay.
- 26 On 21 January 2013, Norway Post requested an extension of the deadline by three working days (Event No 660973).
- 27 On 23 January 2013, ESA granted Norway Post's request so that the deadline was extended to 28 January 2013 (Event No 660974).
- 28 By emails of 28 January 2013, Norway Post replied to ESA's letter of 9 January 2013 (Event Nos. 660977 and 660978) with both a confidential (Event No 660976) and non-confidential version (Event No 660982) of its reply.
- 29 On 29 January 2013, ESA informed DB Schenker that it had received Norway Post's reply the previous day and was "now re-assessing the file against the background of the reply" and would "get back to you shortly" (Event No 661007). This included a copy of the non-confidential version of Norway Post's reply.
- 30 On 30 January 2013, ESA granted public access to 86 inspection documents in full by email (Event No 661256). ESA stated in this email "[t]o be clear, the present e-mail does not entail that a position has been taken on the remaining inspection documents at issue and does not imply a refusal, in whole or in part, of public access to those documents. The Authority is now re-assessing those documents in light of the abovementioned letter from Norway Post and the EFTA Court's judgment of 21 December 2012 in Case E-14/11 DB Schenker. The Authority will take a position and address a decision to you shortly."
- 31 On 31 January 2013, DB Schenker wrote to (Event No 661364) and emailed (Event No 661362) the President of ESA asserting that the time limit for ESA to take the necessary measures to comply with the judgment in *DB Schenker I*, pursuant to Article 38 SCA, expired on 30 January 2013. DB Schenker noted that "since your staff has already overrun ESA's extended time limit, DB Schenker expects to see only a minor delay before a final decision is made, in full compliance with the reasoning of the Court".
- 32 On 1 February 2013, ESA responded to DB Schenker's letter of the previous day (Event No 661442). ESA stated that it would take a decision on public access to

the remaining inspection documents, and communicate the decision to DB Schenker by 7 February 2013.

- 33 On 5 February 2013, Norway Post sent an email (Event No 661841) to ESA concerning three inspection documents that it had failed to address in its emails of 28 January 2013.
- 34 By a letter of 7 February 2013, ESA adopted the contested decision. This decision states that it is to finalise ESA's follow-up of the Court's judgment of 21 December 2012 in Case E-14/11 by taking a position on the remaining 262 documents with respect to public access and thus adopting a decision to replace the one contained in ESA's letter of 16 August 2011, and annulled by the judgment.
- 35 The decision was adopted under ESA's revised rules on public access (RAD 2012), which replaced ESA's previous rules on the same matter, under which the annulled decision was adopted.
- 36 By its decision, ESA granted partial access to 23 inspection documents. However, ESA found that disclosure of certain information in the documents would undermine the commercial interests of Norway Post within the meaning of the first indent of Article 4(4) RAD 2012, which entailed that full access could not be granted to these documents.
- 37 ESA found that, even having regard to the age of the documents, full public access to the information requested on Norway Post's business activities could result in a serious harm to Norway Post. Therefore, ESA considered that the information constitutes business secrets; that the information is of the kind covered by the obligation of professional secrecy pursuant to Article 122 EEA (corresponding to Article 339 TFEU), the fourth paragraph of Article 14 SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the commercial interests exception specified in the first indent of Article 4(4) RAD 2012. Moreover, ESA did not find that there was any overriding public interest in the disclosure of these documents.
- 38 In its decision, ESA also refused access to 229 other inspection documents, finding that the information contained therein constituted business secrets and was of the kind covered by the obligation of professional secrecy pursuant to Article 122 EEA (corresponding to Article 339 TFEU), the fourth paragraph of Article 14 SCA and Article 28(2) of Chapter II of Protocol 4 SCA, as well as being covered by the commercial interests exception specified in the first indent of Article 4(4) RAD 2012. Furthermore, ESA found that there was no overriding public interest in the disclosure of these documents.
- 39 In the decision, the applicants were informed that the refusal of access to documents entitled them to make a confirmatory application asking ESA to reconsider its position, pursuant to Article 7(6) of the RAD 2012. Moreover, if

they made a confirmatory application, the ESA decision would be adopted by the College Member responsible for public access to documents (the President).

IV Procedure and forms of order sought

40 By application lodged at the Court on 6 April 2013, DB Schenker brought an action seeking the annulment of the defendant's decision of 7 February 2013, denying access to the inspection documents in ESA Case No 34250 (Norway Post/Privpak) following the annulment of ESA's first decision on 21 December 2012 in *DB Schenker I*. On the same day, DB Schenker separately lodged an application pursuant to Article 59a of the Rules of Procedure ("RoP") that the case be determined pursuant to an expedited procedure.

41 The applicants, DB Schenker, request the Court to:

(i) annul ESA's decision of 7 February 2013 in Case No 73038 (DB Schenker – access to documents) in so far as it denies access to inspection documents in Case No 34250 (Norway Post / Privpak);

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

42 On 16 April 2013, ESA submitted comments on the application for an expedited procedure.

43 On 24 April 2013, Posten Norge AS sought leave to intervene in support of the form of order sought by the defendant.

44 On 30 April 2013, by an Order of the President, the application for Case E-4/13 to be determined pursuant to Article 59a RoP was denied. However, the application that the case at hand be given priority during the oral procedure, pursuant to Article 42(1) RoP, was granted.

45 On 8 May 2013, ESA lodged its written observations on the application to intervene at the Court's Registry.

46 On 15 May 2013, DB Schenker lodged its written observations on the application to intervene at the Court's Registry.

47 On 30 May 2013, by an Order of the President, Posten Norge AS was granted leave to intervene in support of the form of order sought by the defendant.

48 On 10 June 2013, ESA submitted its defence.

49 The defendant, the EFTA Surveillance Authority, requests the Court to:

(i) dismiss the application as inadmissible; and

(ii) order the applicants to bear the costs.

50 In the alternative, the defendant requests the Court to:

(i) dismiss the application as unfounded; and

(ii) order the applicants to bear the costs.

51 On 3 July 2013, Norway Post submitted its statement in intervention.

52 On 17 July 2013, DB Schenker submitted its reply.

53 On 29 July 2013, ESA requested an extension of the deadline to lodge the rejoinder to 29 August 2013.

54 On 30 July 2013, the President, pursuant to Article 36 RoP, granted an extension of the time limit for submitting a rejoinder until 29 August 2013.

55 On the same day, ESA submitted written observations on Norway Post's statement in intervention.

56 On 31 July 2013, DB Schenker submitted written observations on Norway Post's statement in intervention.

57 On 29 August 2013, ESA submitted its rejoinder.

58 The parties presented oral argument and answered questions put to them by the Court at the hearing on 5 December 2013.

59 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 for the reasoning of the Court.

V Law

Admissibility

Arguments of the parties

60 ESA raises two pleas of inadmissibility challenging DB Schenker's application. ESA submits that the application for annulment is inadmissible as DB Schenker failed to submit a confirmatory application prior to bringing its action before the Court. In its rejoinder, ESA contends that, whilst substantive rules only exceptionally apply to situations existing before their entry into force, procedural rules generally do apply to all proceedings pending at the time when they enter into force.

61 In any event, ESA submits that the applicants' alternative contention that their letter of 31 January 2013 constitutes a confirmatory application is equally flawed as it was not in time. In its rejoinder, ESA further submits that its decision of 7

February 2013 was adopted within the relevant time limits as it was not until Thursday 10 January 2013 that the Court served that judgment on ESA pursuant to Article 61(2) RoP by a letter of 8 January 2013. This was the first and only signed and authenticated copy of the judgment that ESA received and ESA had not indicated that service could be effected electronically. ESA submits that nothing different follows from Article 62 RoP, according to which the Court's judgments are binding from the date of delivery. Accordingly, ESA submits that the present application seeks the partial annulment of what constitutes but a preparatory act and is therefore inadmissible.

- 62 Second, ESA argues that the applicants have failed to produce the necessary documentation evidencing that they are duly represented by a lawyer as required pursuant to the second paragraph of Article 17 of the Statute of the Court. The powers of attorney granted by the applicants on 11 November 2010 and 20 December 2010 as well as the additional power of attorney subsequently granted by the applicants' ultimate parent company, Deutsche Bahn AG, on 29 April 2013 to the lawyer representing DB Schenker do not appear to meet the requirements set out in Article 33(5)(b) RoP. In ESA's view, the three applicants have failed to establish that any of them has individually conferred any valid authority on their counsel to represent them in the present case.
- 63 According to ESA, it remains questionable whether the formal defects can be rectified under Article 33(6) RoP.
- 64 DB Schenker submits that the application is admissible under the second paragraph of Article 36 SCA. The contested decision is addressed to DB Schenker, and ESA has specifically confirmed that the contested decision replaced the decision that was annulled by the Court in Case E-14/11 *DB Schenker I*. DB Schenker submits that ESA was legally obliged to replace the annulled decision with a new and final decision to comply with the Court's judgment in Case E-14/11 *DB Schenker I* pursuant to Article 38 SCA and paragraph 283 of that judgment. It contends that ESA did not contest the legal basis for DB Schenker's complaint or the fact that it had overrun the time limit for a final decision. Consequently, in the applicants' view, the contested decision is actionable.
- 65 DB Schenker adds that Article 7 RAD 2012, which provides that access to documents requests submitted after 5 September 2012 are subject to a two-step administrative procedure, has no effect on the admissibility of the present action. It avers that it did not file an access to documents request pursuant to the new rules. Further, in its view, Article 7 RAD 2012 does not apply to cases where the Court has annulled ESA's final decision on an access request as the Court did in Case E-14/11. Moreover, for the sake of completeness, DB Schenker asserts in its reply that ESA's correspondence and actions demonstrate that it did not process the access request as a new request subject to the two-step administrative procedure established in Article 7 RAD 2012.

66 In its reply, DB Schenker responds to ESA’s submissions concerning the scope of the applicants’ power of attorney. The powers of attorney cover by their wording “any application” relating to Case E-15/10 *Norway Post*, which is also made clear in the last paragraph which explicitly refers, in the plural, to “proceedings for and on behalf of us”. The present action is directly connected to the investigation of Norway Post, and the evidence belonging to the Norway Post case file or files. DB Schenker therefore regards the inadmissibility plea to be without merit. The mechanism set out in Article 33(6) RoP makes the inadmissibility plea clearly ineffective.

Findings of the Court

Authority granted to the applicants’ lawyer

67 ESA contends that the application does not satisfy the obligations resulting from Article 33(5)(b) RoP.

68 Under Article 33(5)(b) RoP, an application made by a legal person governed by private law is to be accompanied by proof that the authority granted to the applicant’s lawyer has been properly conferred on him by someone authorised for the purpose. Pursuant to Article 33(6) RoP, if an application does not comply with the aforementioned requirement, the Registrar shall prescribe a reasonable period within which the applicant is to comply with it whether by putting the application itself in order or by producing any of the abovementioned documents. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the Court will decide whether the non-compliance with these conditions renders the application formally inadmissible.

69 Counsel for the applicants originally submitted two powers of attorney. The first was granted by Schenker North AB. The second was granted by Schenker Privpak AB and Schenker Privpak AS. Both documents are similarly worded.

70 These powers of attorney refer in particular to Case E-15/10 *Posten Norge v ESA*, cited above. However, the use of the words “the right to take such steps as may be necessary for the commencement and presentation of the intervention including (without limitation) the ... lodging ... of any application or submission of any kind” and “at any hearings in relation to the proceedings” in the powers of attorney makes clear that they did not concern solely the conduct of the proceedings seeking annulment of ESA Decision 322/10/COL.

71 In this regard it must be noted that the present action concerns the applicants’ requests to access the case file in a particular ESA investigation which has subsequently been the subject of those previous actions in Case E-15/10 *Posten Norge v ESA*, Case E-14/11 *DB Schenker I*, both cited above, and Case E-7/12 *DB Schenker II* [2013] EFTA Ct. Rep. 356 and Case E-8/12 *DB Schenker III*, order of 12 May 2014, not yet reported. Moreover, the applicants have repeatedly

stated in their correspondence with ESA that the objective of the access requests at issue in the present case is to gain evidence to support their claim in the national courts for damages, which is alleged to arise from the same actions of Norway Post that were at issue in Case E-15/10 *Posten Norge v ESA*.

- 72 As such, the case is inextricably linked to Case E-15/10 *Posten Norge v ESA*. For those reasons, ESA’s proposition that the authority is defective must be rejected.
- 73 For the sake of order, the Court notes that the applicants’ lawyer additionally provided three “affirmations of power of attorney” on behalf of Schenker North AB, Schenker Privpak AB and Schenker Privpak AS on 12 November 2013. According to the substance of those affirmations, the applicants’ lawyer “has been duly authorized to represent [their] affairs in proceedings with and concerning ESA and/or Norway Post from 2010 and onwards (namely in Cases E-5/13, E-4/13, E-8/12, E-7/12, E-14/11 and E-15/10), and any future proceedings with and concerning ESA and/or Norway Post”. The attached “Articles of Association” of the three applicants provide that the signatories – all board members – were authorised by the applicants for that purpose.
- 74 Accordingly, the applicants have presented sufficient proof to the Court that the authority granted to the applicants’ lawyer has been properly conferred on him by someone authorised for the purpose. Moreover, ESA’s contention that the obligations specified in Article 33(5)(b) RoP cannot be fulfilled in the course of the proceedings must be rejected since that possibility is provided for in Article 33(6) RoP.
- 75 The action cannot therefore be declared inadmissible on this basis.

Assessment of the application

- 76 Procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, inter alia, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9; Case C-467/05 *Dell’Orto* [2007] ECR I-5557, paragraph 48; and Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 80). Pursuant to its Article 13, RAD 2012 entered into force on 6 September 2012 and thus is applicable.
- 77 In the present case, because ESA’s previous decision had been annulled by the Court, the date of the “registration of the application”, upon which the time limits are calculated pursuant to Article 7(2) RAD 2012, must be the date of the delivery of the Court’s judgment in Case E-14/11 *DB Schenker I*, that is Friday 21 December 2012.
- 78 Article 7(2) RAD 2012 provides that “as a main rule” ESA shall either grant access or state the reasons for the total or partial refusal within 10 working days

from registration of the application. In “exceptional cases” this time limit “may be extended by 30 working days”. If ESA decides to extend the time limit in this way it shall notify the applicant thereof as quickly as possible.

- 79 Article 7(4) RAD 2012 provides that where ESA consults with third parties in accordance with Article 4(8) RAD 2012 the time limit provided for in Article 7(2) or (3) RAD 2012 may be suspended for the documents concerned and for as long as the consultation is pending. ESA shall inform the applicant of any such suspension as quickly as possible, and it shall endeavour to complete any such consultation within a reasonable time.
- 80 On 9 January 2013, ESA emailed and wrote to Norway Post inviting it to make substantiated confidentiality claims to the remaining inspection documents at issue. ESA stated that if Norway Post did not make substantiated claims of confidentiality within 10 working days, it would assume that the undertaking had no objections to full disclosure of the documents concerned, and ESA would proceed accordingly without further delay. The applicants were copied into these communications by ESA, with copies transmitted to the applicants’ lawyer.
- 81 On that basis, while not made explicit, it could be seen that ESA had suspended the time limit provided for in Article 7(2) RAD 2012, pursuant to Article 7(4) RAD 2012, because the deadline set for Norway Post to submit confidentiality claims would exceed the prescribed deadline of 10 working days.
- 82 Although the time limit pursuant to Article 7(2) RAD 2012 expired on 30 January 2013, DB Schenker accepted that it expected “to see only a minor delay before a final decision is made” in its email and letter to ESA of 31 January 2013. On that basis alone, it appears reasonable that ESA issued the contested decision on 7 February 2013.
- 83 The system established under Article 7 RAD 2012 makes refusal to grant access to documents subject to a two-step procedure, in which only the confirmatory decision pursuant to Article 7(6) RAD 2012 constitutes the final statement of position (see *Case E-5/13 DB Schenker V*, judgment of 7 July 2014, not yet reported, paragraph 95).
- 84 Therefore as the application has been brought against ESA’s initial decision and not against any confirmatory decision, it is inadmissible.

VI Costs

- 85 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the defendant has requested that the applicants be ordered to pay the costs and the latter have been unsuccessful, they must be ordered to pay their costs and those of the defendant. Posten Norge AS shall bear its own costs.

On those grounds,

THE COURT

Hereby orders:

- 1. The application is dismissed as inadmissible;**
- 2. The applicants are to bear their own costs and the costs incurred by the EFTA Surveillance Authority;**
- 3. Posten Norge AS is to bear its own costs.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Luxembourg, 25 November 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President