



ORDER OF THE PRESIDENT

30 April 2013

(Expedited procedure – Priority in the oral procedure)

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; and Gjermund Mathisen and Auður Ýr Steinarsdóttir, Officers, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION seeking, by way of an expedited procedure, the annulment of ESA's decision of 7 February 2013 to deny, for a second time, 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 *DB Schenker*. 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 (not published in the Official Journal), which was given retroactive effect to DB Schenker's access request of 3 August 2010,

THE PRESIDENT

makes the following

Order

I Background

- 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 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 present case is a follow-up to Case E-14/11 *DB Schenker v ESA* 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”) established by the College of the EFTA Surveillance Authority on 27 June 2008.
- 3 Judgment in Case E-14/11 *DB Schenker v ESA* was handed down on 21 December 2012. 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.

II Facts and procedure

- 4 On 6 April 2013, DB Schenker made an application pursuant to Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) and separately lodged an application pursuant to Article 59a of the Rules of Procedure (“RoP”) that the case be determined pursuant to an expedited procedure.

- 5 DB Schenker seeks the annulment of ESA's decision of 7 February 2013, denying access to the inspection documents in Case No. 34250 (Norway Post/Privpak) following the Court's judgment of 21 December 2012 in Case E-14/11 *DB Schenker v ESA*.
- 6 On 16 April 2013, ESA submitted comments on the application for an expedited procedure.

III Observations of the parties

- 7 DB Schenker notes that an expedited procedure may be granted pursuant to Article 59a RoP "where the particular urgency of the case requires the Court to give its ruling with the minimum of delay". DB Schenker asserts that the application for annulment concerns, in essence, whether ESA has lawfully complied with the Court's judgment in Case E-14/11 *DB Schenker v ESA*. The applicants argue that the case is particularly well suited for an expedited procedure because the Court has extensive and recent knowledge of the subject matter, and has previously reviewed the contested inspection documents.
- 8 DB Schenker submits further that Article 59a RoP must be interpreted in light of the fundamental rights in EEA law (see Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraph 63; and Case E-3/11 *Sigmarsson*, [2011] EFTA Ct. Rep. 432, paragraph 29). This includes the fundamental right to an effective remedy that must be afforded within a reasonable time (the principle of effective judicial protection) in Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6(1) and 13 of the European Convention of Human Rights, which have been given equal effect in EEA law (see Case E-15/10 *Norway Post*, judgment of 18 April 2012, not yet reported, paragraph 86).
- 9 DB Schenker submits that the Court has specifically confirmed that the principle of effective judicial protection extends to ESA's decisions taken pursuant to the Rules on Access to Documents (see Case E-14/11 *DB Schenker*, cited above, paragraph 123). Therefore, the applicants assert that where there has already been an infringement of the fundamental right to an effective remedy within a reasonable time, or where such a situation is about to occur, there will be a 'particular urgency' under Article 59a RoP for a ruling with the minimum of delay to prevent, or at least mitigate, the infringement of that right.
- 10 DB Schenker recalls that ESA's investigation in Case No 34250 (Norway Post/Privpak) of 14 July 2010 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 (“Norway Post”), establishing Post-in-Shops in retail outlets.

- 11 In its decision of 14 July 2010, ESA found that Norway Post had infringed Article 54 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 in Case E-15/10 *Norway Post* on 18 April 2012.
- 12 DB Schenker contends that as a consequence of Norway Post’s infringement of Article 54 EEA and ESA’s failure to provide timely and adequate protection against it, the applicants are seeking damages from Norway Post for the losses caused by the infringement. The applicants state that they informed ESA of their follow-on damages claim before the national courts on 16 March 2009.
- 13 DB Schenker contends that it is seeking access to the inspection documents in order to establish the full extent of its damages claim. DB Schenker’s first request seeking access to those inspection documents was made on 3 August 2010. ESA’s Decision on that request of 16 August 2011 ‘Norway Post/Privpak – Access to documents’ was annulled by the Court insofar as it denied full or partial access to inspection documents in Case No 34250 Norway Post/Privpak in its judgment of 21 December 2012 in Case E-14/11 *DB Schenker*.
- 14 DB Schenker notes that its damages claim before the Oslo District Court was originally stayed upon the request Norway Post until the Court had handed down its judgment in Case E-15/10 *Norway Post*. While that stay was lifted, the case has been stayed again, this time upon DB Schenker’s request, on 29 October 2012 while it seeks access to additional evidence.
- 15 DB Schenker asserts that it has no effective means to gain access to the inspection documents, including petitioning the Oslo District Court to ask ESA for a transmission of the contested documents according to the ‘*Zwartveld* procedure’, other than through access to documents requests. It contends that the European Commission finds itself unable to transmit evidence any faster under the *Zwartveld* procedure than under the rules on public right of access to documents.
- 16 DB Schenker submits that while the Oslo District Court’s order states that “neither party will suffer substantial loss, whether financial or otherwise” as a result of the stay in national proceedings, it does not absolve the Court from the obligation to protect the applicants’ fundamental right to an effective remedy within a reasonable time, which is an autonomous right under EEA law, in proceedings where the Court has exclusive jurisdiction.

- 17 DB Schenker concludes that there is, therefore, a particular urgency justifying an expedited procedure in the present case pursuant to Article 59a RoP. Alternatively, the applicants request that the case be granted priority pursuant to Article 42(2) RoP.
- 18 ESA in its observations states that it would not object to the procedure being expedited, whether pursuant to Article 59a RoP or Article 42(2) RoP, but does not urge the choice of one or the other.
- 19 ESA notes that the General Court has recently stayed similar proceedings in at least four cases brought in 2012 in which German insurers seek the annulment of European Commission decisions refusing requests for public access under Regulation 1049/2001 to certain documents of the Commission's investigation of the car glass cartel. Those cases have been stayed until the judgment is rendered in the pending appeal in Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*. ESA further notes that the President of the Court of Justice of the European Union ("ECJ") in his Order of 19 February 2013 in Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg* rejected, for the purposes of an application for leave to intervene, the arguments based on the fundamental right to effective judicial review (Article 47 EU Charter) and that the swift handling of the proceedings in the European Courts is essential for the effectiveness of their actions for damages and interest lodged in a national court.
- 20 ESA submits that the *Zwartveld* procedure is a fully operational EEA law instrument which the national court has an EEA law right to use. ESA has a corresponding EEA law obligation pursuant to the *Zwartveld* procedure. The applicants have not sought to petition the national court to make use of that procedure despite lodging their damages action on 24 June 2010.

IV Law

- 21 Pursuant to Article 59a RoP, upon application by the applicant or the defendant, the President may exceptionally decide, on the basis of a recommendation by the Judge-Rapporteur and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of the Rules of Procedure, where the particular urgency of the case requires the Court to give its ruling with the minimum of delay.
- 22 DB Schenker has essentially contended that the Court's ruling in the present case must be given with the minimum of delay on the basis that the period since it filed its complaint with ESA regarding Norway Post's abuse of its dominant position, and its presently stayed follow-on damages action before the national court, is such

that any further delay negatively impacts upon its fundamental rights under EEA law.

- 23 The Court has recognised the principle of procedural homogeneity and held that the homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see Case E-14/11 *DB Schenker v ESA*, cited above, paragraphs 77-78; Order of the President of 23 April 2012 in Case E-16/11 *ESA v Iceland* (“*Icesave*”), paragraph 32). 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 with regard to 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.
- 24 The Rules of Procedure of the ECJ as last amended on 24 May 2011 (“ECJ RoP 2011”) were repealed and replaced by new Rules of Procedure adopted on 25 September 2012 (“ECJ RoP 2012”) which entered into force on 1 November 2012. Article 59a RoP and Article 62a ECJ RoP 2011 are identical in substance. Article 133 ECJ RoP 2012 constitutes the refreshed procedural rule, and its interpretation remains of relevance in construing the same procedural notion.
- 25 In applying Article 59a(1) RoP, fundamental rights must be respected (see *DB Schenker v ESA*, cited above, paragraph 78 and *Norway Post v ESA*, cited above, paragraph 110). This includes the general principle of effective judicial protection (see *Norway Post v ESA*, cited above, paragraph 86). In the present case, *DB Schenker* seeks the annulment of ESA’s decision of 7 February 2013 which ESA adopted following the Court’s annulment of its previous decision concerning access to the inspection documents in Case no. 34250 (*Norway Post/Privpak*) on 21 December 2012 in Case E-14/11.
- 26 *DB Schenker* seeks access to the inspection documents ESA seized at *Norway Post*’s premises in 2004 in order to provide evidence for its follow-on damages claim against *Norway Post* in national proceedings. The Court has recognised the importance of private enforcement of competition law as having the ability to make a significant contribution to the maintenance of effective competition in the EEA (see *DB Schenker*, cited above, paragraph 132 and with regard to the parallel rules in EU law, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 paragraphs 26 to 28). While pursuing his private interest, a plaintiff in such proceedings

contributes at the same time to the protection of the public interest and thereby also benefits consumers (see *DB Schenker*, cited above, paragraph 132; compare the Opinion of Advocate General Kokott in Case C-681/11 *Schenker and Co. AG and Others*, Opinion of 28 February 2013, not yet reported, footnote 78).

- 27 The applicants have acknowledged that the national court stayed its proceedings in the follow-on damages case before it on 29 October 2012. In its respective decision, the national court held that it was a “reasonable consequence” that DB Schenker requested the stay on account of the EFTA Court proceedings in order to obtain access to the evidence seized at Norway Post in 2004, and that such “evidence may be of major importance for the final result of the case”.
- 28 The national court also noted that “[t]he case is already old however, neither party will suffer substantial loss, whether financial or otherwise, should the case be stayed again.” The national court concluded by finding ‘that compelling reasons speak in favour of staying the case until the extent of the evidence disclosure obligation is clarified.’
- 29 In the light of the above, the applicants have not demonstrated to a sufficient extent that there is a particular urgency in the case at hand within the meaning of Article 59a(1) RoP, having regard to the general principles of EEA law (compare Order of the President of the ECJ of 23 October 2009 in Case C-69/09 P, *Makhteshim-Agan*, paragraph 10). The application is consequently denied.
- 30 Nevertheless, given the particular circumstances of the case at hand, and the Court’s familiarity with the underlying subject matter of the proceedings it is appropriate to give the case priority in the oral procedure pursuant to Article 42(2) RoP.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The application for Case E-4/13 to be determined pursuant to Article 59a RoP is denied.**
2. **The application that Case E-4/13 be given priority during the oral procedure pursuant to Article 42(1) RoP is granted.**
3. **Costs are reserved.**

Luxembourg, 30 April 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President