E-4/13-50

REPORT FOR THE HEARING
in Case E-4/13

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Schenker North AB, established in Gothenburg, Sweden,

Schenker Privpak AB, established in Borås, Sweden, and

Schenker Privpak AS, established in Oslo, Norway,

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's ("ESA") 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. 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.

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. By its decision of 14 July 2010, Decision No 322/10/COL, ESA found that Posten Norge AS ("Norway Post") had committed an infringement of Article 54 of

the EEA Agreement ("EEA") in abusing its dominant position in the B-to-C parcel market with over-the-counter delivery in Norway between 2000 and 2006. ESA's investigation in that case was initiated following a complaint received from DB Schenker on 24 June 2002 concerning the agreements made by Norway Post establishing Post-in-Shops in retail outlets. In the course of the investigation, ESA conducted an unannounced inspection of Norway Post's premises between 21 and 24 June 2004 and seized various documents ("the inspection documents").

3. 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 the inspection documents in 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.

5. In its judgment in *DB Schenker I* of 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.

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; (ii) an infringement of the commercial interest exception in Article 4(4) RAD 2012 and the duty to state reasons in Article 16 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. As a consequence, DB Schenker also submits that ESA has infringed Article 38 SCA.

II Legal background

EEA law

9. Article 1 EEA reads:

> *1. The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA.*
>
> *2. In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement:*
>
> *(a) the free movement of goods;*
>
> *(b) the free movement of persons;*
>
> *(c) the free movement of services;*
>
> *(d) the free movement of capital;*
>
> *(e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as*
>
> *(f) closer cooperation in other fields, such as research and development, the environment, education and social policy.*

10. Article 122 EEA reads:

> *1. 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.*

11. Article 2 of the Act referred to at point 6 of Annex XVI to the Agreement on the European Economic Area (Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits), as adapted to the Agreement by way of Protocol 1 thereto reads as follows:

> *1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.*
>
> *To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the Official Journal of the European Communities the lists transmitted by*

the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

12. Article 13 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Surveillance Authority shall adopt its own rules of procedure.

13. Article 14 SCA reads:

The EFTA Surveillance Authority shall appoint officials and other servants to enable it to function.

The EFTA Surveillance Authority may consult experts or decide to set up such committees and other bodies as it considers necessary to assist it in accomplishing its tasks.

In the performance of their duties, officials and other servants of the EFTA Surveillance Authority shall neither seek nor accept instructions from any Government or from any body external to the EFTA Surveillance Authority.

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.

14. Article 16 SCA reads:

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

15. 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.

16. 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.*

Protocol 5 on the Statute of the EFTA Court

17. The first and second paragraphs of Article 17 of Protocol 5 on the Statute of the EFTA Court read:

> *The EFTA States, the EFTA Surveillance Authority, the Community and the EC Commission shall be represented before the Court by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.*
>
> *Other parties must be represented by a lawyer.*

Rules of Procedure of the EFTA Court

18. Article 33 (5) and (6) of the Rules of Procedure of the EFTA Court ("RoP") reads:

> *5. An application made by a legal person governed by private law shall be accompanied by:*
>
> > *(a) the instrument or instruments constituting or regulating that legal person or a recent extract from the register of companies, firms or associations or any other proof of its existence in law;*

(b) proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

6. If an application does not comply with the requirements set out in paragraphs 3 to 5 of this Article, the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the above-mentioned documents. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the Court shall decide whether the non-compliance with these conditions renders the application formally inadmissible.

19. Article 61 RoP reads:

1. The judgment shall be delivered in open court; the parties shall be given notice to attend to hear it.

2. The original of the judgment, signed by the President, by the Judges who took part in the deliberations and by the Registrar, shall be sealed and deposited at the Registry; the parties shall be served with certified copies of the judgment.

3. The Registrar shall record on the original of the judgment the date on which it was delivered.

20. Article 62 RoP reads:

The judgment shall be binding from the date of its delivery.

21. The Court has complied a synopsis 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 ("Regulation No 1049/2001"), EFTA Surveillance Authority Decision of 27 June 2008 to adopt new Rules on Public Access to documents, Decision 407/08/COL ("RAD"), and EFTA Surveillance Authority Decision of 5 September 2012 to adopt revised Rules on public access to documents, and repealing Decision 407/08/COL, Decision 300/12/COL ("RAD 2012").

Regulation 1049/2001	*RAD*	*RAD 2012*
Preamble **THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION**,	Preamble **THE EFTA SURVEILLANCE AUTHORITY,**	Preamble **THE EFTA SURVEILLANCE AUTHORITY,**
(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. (2) 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. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental	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,	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,

Rights of the European Union.		
(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.	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,	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,
(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.		

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.	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,	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,
Article 1. **Purpose** The purpose of this Regulation is: (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,	Article 1. **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 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,	Article 1. **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 on access to documents.	(b) to establish rules ensuring the easiest possible exercise of this right, (c) and to promote good administrative practice on access to documents.	(b) to establish rules ensuring the easiest possible exercise of this right, and (c) to promote good administrative practice relating to access to documents.
Article 2. **Beneficiaries and scope** 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation. 2. The institutions 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 a Member State. 3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of	Article 2. **Beneficiaries and scope** 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	Article 2. **Beneficiaries and scope** 1. Any natural or legal person has a right to request access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules. 2. These Rules shall apply to documents drawn up or received by the Authority and in its possession, in all areas of activity of the Authority.

activity of the European Union.	activity of the Authority.	
4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.	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.	3. 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.
6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.	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.	4. 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.

Article 3.	Article 3.	Article 3.
Definitions	**Definitions**	**Definitions**
For the purpose of this Regulation:	For the purpose of these Rules:	For the purpose of these Rules:
(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;	(a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the Authority's sphere of responsibility;	(a) ‘document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the Authority's sphere of responsibility, except unfinished documents or drafts of documents;
(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.	(b) 'third party' shall mean any natural or legal person, or any entity other than the Authority, including the EFTA States, EFTA and European Community institutions and bodies and third countries.	(b) ‘third party' shall mean any natural or legal person, or any entity other than the Authority, including the EFTA States, EFTA and institutions and bodies of the European Union and third countries.

Article 4. **Exceptions**	Article 4. **Exceptions**	Article 4. **Exceptions** 2. Unless there is an overriding public interest in disclosure, the Authority shall refuse access to a document: (a) relating to any pending proceedings or open investigation conducted by the Authority pursuant to its powers laid down in Protocols 3 and 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Proceedings are pending and investigations are open within the meaning of this provision until such time as the Authority can no longer be called upon to recommence them; (b) relating to gathering, obtaining or receiving information from natural or legal persons in the framework of investigations conducted by the Authority pursuant to its powers laid down in Protocols 3 and 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice;

1. The institutions 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 Community legislation regarding the protection of personal data. 2. The institutions 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.	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.	3. 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. 4. 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.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.	3. Access to a document, drawn up by the Authority for internal use or received by the Authority, which relates to a matter where the decision has not been taken by the Authority, shall be refused if disclosure of the document would seriously undermine the Authority's decision-making process, unless there is an overriding public interest in disclosure	5. The Authority shall refuse access to a document which relates to a matter where the decision has not been taken by the Authority, if disclosure of the document would seriously undermine the Authority's decision-making process, unless there is an overriding public interest in disclosure.
Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.	4. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the Authority concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the Authority's decision-making process, unless there is an overriding public interest in disclosure.	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. The Authority shall refuse access to its internal manuals, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution 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 or shall not be disclosed.	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.	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.
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.	6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.	9. 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 3 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.	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.	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.

Article 7. **Processing of initial applications** 1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.	Article 7. **Processing of applications** 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.	Article 7. **Processing of applications** 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 very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.	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.	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.
4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.		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.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.		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.

Article 15. **Administrative practice in the institutions** The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.	Article 11. **Administrative practice of the Authority** The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.	Article 11. **Administrative practice of the Authority** The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.
Article 19. **Entry into force** This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities. This Regulation shall be binding in its entirety and directly applicable in all Member States.	Article 13. **Entry into force** 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.	Article 13. **Entry into force** These Rules shall enter into force on the day following the adoption of the present Decision and shall apply 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.

Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")

22. Article 8 ECHR reads:

> ***Right to respect for private and family life***
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

EU law referred to by the parties

Treaty on the Functioning of the European Union ("TFEU")

23. Article 15(3) TFEU reads:

> *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.*

24. Article 339 TFEU reads:

> *The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union 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.*

The Charter of Fundamental Rights of the European Union

25. Article 7 of the Charter of Fundamental Rights of the European Union ("the Charter") reads as follows:

> *Everyone has the right to respect for his or her private and family life, home and communications.*

26. Article 42 of the Charter reads:

> *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.*

III Facts and pre-litigation procedure

27. 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 No 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.

28. On 14 September 2010, Norway Post lodged an application with the Court under the second paragraph of Article 36 SCA seeking annulment of Decision No 322/10/COL. In a judgment handed down on 18 April 2012, the Court in *Norway Post* 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.

29. 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.

30. On 27 June 2008, ESA adopted Decision No 407/08/COL 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.

31. 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.

32. Subsequently, there were numerous communications between DB Schenker and ESA concerning the scope of the request for access to the file, the deadline for

completion of the request and delays. DB Schenker contacted ESA by email on 4 August 2010, 11 August 2010, 30 August 2010, 6 September 2010, 14 September 2010, 17 September 2010 and 18 February 2011, 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, 18 August 2010, 30 August 2010, 1 September 2010 and 17 September 2010, and by letter on 5 November 2010, 10 November 2010, 16 February 2011, 18 February 2011 and 16 August 2011.

33. 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.

34. 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. This decision was challenged before the Court in *DB Schenker I*. In that case, 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 which had been obtained by the ESA during an inspection of the premises of Norway Post between 21 and 24 June 2004.

35. The Court stated that it required ESA "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" (see *DB Schenker I*, paragraph 283).

36. 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. The letter included instructions as to how to submit confidentiality claims.

37. On 21 January 2013, Norway Post requested an extension of the deadline by three working days (Event No 660973).

38. On 23 January 2013, ESA granted Norway Post's request so that the deadline was extended to 28 January 2013 (Event No 660974).

39. 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.

40. 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.

41. On 30 January 2013, ESA granted public access to 86 inspection documents in full by email (Event No 661256): "CKO 1, 22-28; COD 1, 2; PAB 1, 3-5, 9-10, 16,18, 21, 24, 25; KBJ 2-3, 9, 14, 19 -35, 43, 53, 54, 57, 60, 71-75, 77, 80, 85; TJO 3, 62, 69, 70, 72-77, 79, 81-83, 85-89, 95, 99, 100; LKP 19, 20; MH 18; JMJ 2-6, 8". 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 2013 in Case E-14/11 DB Schenker. The Authority will take a position and address a decision to you shortly".

42. 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."

43. 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.

44. 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.

45. On 7 February 2013, ESA adopted the contested decision.

46. By application lodged at the Court on 6 April 2013, DB Schenker brought an action seeking the annulment of the decision insofar as it denied access to inspection documents in Case No 34250 (*Norway Post* / *Privpak*).

IV The contested decision

47. The relevant paragraphs at issue in the contested decision are set out in full below.

"2. DECISION UNDER THE AUTHORITY'S REVISED RULES OF 2012 ON PUBLIC ACCESS TO DOCUMENTS

[14] As the *Schenker* judgment annulled the decision contained in the Authority's letter of 16 August 2011, insofar as it had denied full or partial public access to the inspection documents related to the Authority's case no 34250 (Norway Post /Privpak), that decision must be replaced. Whereas the annulled decision was adopted under the Authority's previous Rules on public access to documents (Decision 407/08/COL; 'RAD'), the new decision replacing it is hereby adopted under the Authority's revised Rules on public access to documents (Decision 300/12/COL; 'RAD 2012').

[15] As from 6 September 2012, the RAD 2012 replaced the RAD 2008: according to Article 13 of the RAD 2012, the RAD 2008 were 'repealed' and the RAD 2012 'shall be applicable to all access requests decided upon from that date onwards'. The *Schenker* judgment did not re-enact the RAD 2008 and did not invalidate the RAD 2012. The Authority must, therefore, apply its RAD 2012.

[16] However, when applying the RAD 2012 in adopting a new decision to replace the annulled decision, it follows from the judgment delivered in this case that it is no longer open to the Authority in the present case to 'raise arguments based on the applicability of a general presumption' against public access. More specifically, this is because the EFTA Court found that the annulled decision in this case made 'no reference ... to a general presumption' and, 'in as many words, states that ESA conducted a concrete, individual assessment of the content of all the documents' (para. 190 of the judgment). Accordingly, in order to abide by its obligation under Article 38 SCA to take the necessary measures to comply with the judgment, the Authority finds that, in the present case, it also cannot rely on Article 4(2)(b) of the RAD 2012, which foresees that, as a rule, access to inspection documents shall be refused. This provision is equally a form of presumption against public access that, in the present case, it is no longer open to the Authority to rely on. Whereas the Authority would otherwise be obliged to apply this provision, it follows from Article 38 SCA that, when adopting a new decision in the present case, the provision must be left unapplied."

…

“4. PUBLIC ACCESS IS GRANTED IN PART TO 23 INSPECTION DOCUMENTS

Protection of commercial interests

[19] The Authority considers that the 23 inspection documents addressed in this section contain information that would undermine the protection of commercial interests of Norway Post’s within the meaning of Article 4(4) first indent of the RAD 2012.

> For the sake of good order the Authority notes that the exception now set out in Article 4(4) first indent of the RAD 2012, which is relied upon here, remains the same as Article 4(2) first indent of the RAD 2008 and Article 4(2) of Regulation (EC) No 1049/2001.

[20] The 23 inspection documents at issue may be addressed in three groups, of respectively 11, 2 and 10 documents.

[21] For the first group Norway Post claims that the **11 documents** identified and described below contain, on the pages indicated, certain information on Norway Post’s strategic business policies, priorities, plans and/or practices - information that Norway Post regards as core business secrets. According to Norway Post, full public access to these documents would cause significant and irreparable harm to its commercial interests. The sensitive information contained in the documents could, inter alia, be misused by Norway Post’s competitors to predict, and adapt to Norway Post’s market behaviour. The information could, moreover, be misused by Norway Post’s customers for instance in relation to contractual negotiations with Norway Post. Norway Post has submitted redacted versions of the documents accordingly.

- CKO 5 (pp. 2, 4): Internal strategy document concerning joint promotion with B2C customers, as well as certain information on Norway Post’s assessment of specific customers and suggested test customers.
- COD 3 (p. 2), COD 4 (p. 2): Information on price developments/assessment of price increases to certain customers.
- PAB 6 (pp. 6 – 15): Internal presentation on consumer strategy.
- PAB 7 (pp. 6 – 8): Internal presentation. Certain slides contain analyses of competitors.
- PAB 8 (pp. 7 – 9): Internal presentation concerning consignee strategies.
- KBJ 67 (p. 2): Internal strategy document. Information on/assessment of possible alliance partner.
- KBJ 81 (p. 3): Internal report. Detailed information on specific customers of competitors, as well as assessment of volumes and the prospects of concluding a commercial agreement.
- TJO 46 (p. 1): Internal agenda for a leader meeting. Strategic assessments of competitors and customers.

- TJO 47 (pp. 8 – 26): Internal report. Information on/assessment of Norway Post's discount model which constitutes the basis for the current discount model.
- KBJ 1 (pp. l, 2, 4, 7, 14, 15): Internal status report to Norway Post's board of directors. Information on/assessment of various customer relations as well as a specific arbitration case.

[22] The Authority has reassessed the documents and sees that the information that Norway Post has proposed to redact is indeed information on the undertaking's strategic business policies, priorities, plans and/or practices; and that this is information that Norway Post may justifiably regard as its core business secrets, even today. It is clear that the information contained in the documents could, inter alia, be exploited by Norway Post's competitors to predict, and adapt to its market behaviour; and that the information could be exploited by Norway Post's customers for instance in relation to contractual negotiations.

[23] Whilst the documents are all more than five years old (cf. the Schenker judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today. Whereas according to the Authority's Notice on 'Access to file' (to be distinguished from public access to documents) point 23, '[a]s a general rule', the 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', information may remain sensitive for longer.1 The presumption in the Notice on Access to file is not without exception and does not squarely fit the specific circumstances of the present case. In particular, the present case concerns a market that is still very much the same today as it was at the time the documents were produced. Largely the same services and products are offered, and to largely the same customers. Against this background, and in light of Norway Post's submissions, the Authority is satisfied that the information, despite its age, still constitutes essential elements of Norway Post's commercial position.

[24] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of the documents. The Authority therefore considers that the information constitutes business secrets;[2] that the information is of the kind covered by the obligation of

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[1] The Authority's 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 2007 C 250, p. 16 and EEA Supplement to the OJ 2007 No 50, p. 1, point 23. The corresponding EU document is the Commission's Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005 C 325, p. 7, point 23.

[2] Compare the Authority's 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, cited, above, point 18. The corresponding EU document is the Commission's Notice on the rules for access to the Commission file in cases pursuant to Articles 8l and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, cited above, point 18.

professional secrecy pursuant to Article 122 EEA (corresponding to Article 339 TFEU), Article l4 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

[25] For the second group Norway Post claims that the **2 documents** identified and described below contain, on the pages indicated, information on specific discounts in two distribution agreements with Norway Post's customers. According to Norway Post, this information is still sensitive today as it reveals Norway Post's bargaining range, either if viewed in isolation or if such information is publicly available and aggregated across several customers. This information may be misused by customers in negotiations with Norway Post, by Norway Post's customers in their competitive relations with other customers or by Norway Post's competitors. Norway Post has submitted redacted versions of the documents accordingly.

- KBJ 48 (pp. 1 – 4): Internal document concerning overview of agreements. The list includes discounts to specific customers. The discounts are redacted.
- KBJ 78 (pp. 1 – 2): Internal document concerning overview of agreements. The list includes discounts to specific customers. The discounts are redacted.

[26] The Authority has reassessed the documents and sees that the information that Norway Post has proposed to redact is indeed information on specific discounts in two distribution agreements with the undertaking's customers. The Authority also sees that the information remains sensitive, even today, as it reveals Norway Post's bargaining range, either if viewed in isolation or if publicly available and aggregated across several customers. To the Authority it is clear that the information may be exploited by customers of Norway Post's in negotiations with the undertaking, by customers in their competitive relations with other customers or by Norway Post's competitors.

[27] Whilst the documents are all more than five years old (cf. the *Schenker* judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today; the same considerations apply as set out in para. 23 above.

[28] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of the documents. The Authority therefore considers 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), Article 14 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

[29] For the third group Norway Post claims that the **10 documents** identified and described below contain, on the pages indicated, various information on volumes, prices, names of important customers, prices for various weight groups and zones, etc. The information is very detailed, and is still considered very sensitive by Norway Post. The sensitive information contained in the documents could, inter alia, be misused by Norway Post's competitors to predict, and adapt to Norway Post's market behaviour. The information could, moreover, be misused by Norway Post's customers for instance in relation to contractual negotiations with Norway Post.

- CKO 7 (pp. 9 – 12): Detailed information on volumes, prices, and revenue related to specific product groups. The names of certain product groups have been deleted.
- KBJ 52 (p. 3; and 4): Detailed information on revenues from certain product groups; and top l0 customers' turnover vs. budget.
- KBJ 55 (p. 9): Name of top ten customers within a specified segment and information on number of parcels/cash on delivery by post and ratio.
- KBJ 61 (pp. 2 – 4) and KBJ 62 (pp. 4 – 7): Internal strategy documents. Assessment of per cent number of future price increase, per cent number of parcels/zone ratio, price effect per cent number.
- KBJ 65 (pp. 4, 7, 8): Internal strategy document. Detailed information on customers within a certain product segment.
- KBJ 70 (pp. 3 – 6) and KBJ 76 (pp. 3 – 6): Internal strategy documents. Top 10 customers' turnover vs. budget, name of customers and top 10 customers within logistics (budget vs. sales).
- KBJ 83 (pp. 1 – 5): Detailed information on price developments showing volumes and prices divided by weight groups and zones.
- KBJ 4 (p. 22): Internal report. Information on 10 largest customers.

[30] The Authority has reassessed the documents and sees that the information that Norway Post has proposed to redact is indeed information on volumes, prices, names of important customers, prices for various weight groups and zones, etc. Moreover, the information is very detailed, and the Authority sees how the information can still be very sensitive to Norway Post. The information could, inter alia, be exploited by Norway Post's competitors to predict, and adapt to its market behaviour. Also, the information could clearly be exploited by customers e.g. in relation to contractual negotiations with Norway Post.

[31] Whilst the documents are all more than five years old (cf. the *Schenker* judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today; the same considerations apply as set out in para. 23 above.

[32] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of

the documents. The Authority therefore considers 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), Article 14 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

No overriding public interest

[33] Next, the Authority must assess whether there is an overriding public interest in disclosure.

[34] As set out above, the Authority considers the information at issue to be of the kind covered by the obligation of professional secrecy under Article 122 EEA, which corresponds to Article 339 TFEU. Accordingly, the members and officials of the Authority are obliged not to disclose such information. A corresponding obligation is laid down in Article 14 fourth paragraph SCA, and in Article 28(2) of Chapter II of Protocol 4 SCA. Whereas these provisions cannot be read in isolation (cf. para. 27l of the *Schenker* judgment), it must follow that any public interest would have to be very strong in order to override this obligation, and accordingly justify disclosure of the information to the public in general, with no restrictions on the use of the information. The Authority recalls that when granting public access to documents pursuant to the RAD 2012, as under the RAD 2008 and equally Regulation (EC) No 1049/2001, no restrictions can be placed on the use of the information.

[35] In the *Schenker* judgment, para. 240, the EFTA Court held that transparency 'may constitute an overriding public interest by enabling the public to ensure that ESA is acting in an adequate and proper manner in the light of the principle of good administration'; and in the *Schenker* judgment, para. 24l, the EFTA Court held that 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'. Given that transparency and private enforcement of competition must thus be considered public interests, the issue in the present case is whether these interest override the obligations to protect the commercial interests at issue.

[36] Accordingly, the Authority has in particular assessed whether the interest in transparency and/or the interest in private enforcement of competition law in this case may override the protection of the commercial interests at issue, and justify unrestricted disclosure of the information to the public in general. However, the Authority finds this not to be the case here, even taking particular account of the age of the documents. In the present case, the Authority cannot see that the interests in transparency and private enforcement of competition law could be considered strong

enough, individually or together, to override the protection of the commercial interests at issue.

[37] As to transparency, this conclusion is further strengthened by the fact that the Authority's handling of case no 34250 (Norway Post / Privpak) has already been reviewed by the EFTA Court, namely in Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, not yet reported.

[38] As to the private enforcement of competition law, the conclusion is further strengthened by the fact that public enforcement has taken place (see again Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, not yet reported).

[39] Also the existence of the so-called *Zwartveld* procedure further strengthens the conclusion in this respect. This procedure is a more proportionate means of aiding private enforcement of competition law, than granting access to the information to the public in general, with no restrictions on use. Your clients may avail themselves of their EEA right to request the Norwegian courts to be provided, under the rules on sincere cooperation between national courts and the Authority, with case specific pieces of evidence from the Authority's case file. This so-called *Zwartveld* procedure grants privileged access to such information, and under certain circumstances even to business secrets.[3] The right exists in the EFTA pillar of the EEA Agreement pursuant to Article 6 EEA.

[40] The Authority adds that public access to the information at issue in the present case could entail a risk of undermining competition: first, public access to the information could possibly allow competitors (potential and actual) to align their practices, with a collusive effect on the market in result, or, second, provide competitors with an unfair advantage in the competition with Norway Post. Such effects would be contrary to the objective of the EEA Agreement to provide for a system ensuring that competition is not distorted, see Article 1(2)(e) EEA.

[41] Finally, the Authority has assessed whether any other public interest could justify public access in the present case. However, the Authority has not been able to identify any such public interest.

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[3] Order of the Court of Justice of 13 July 1990 in Case C-2/88--IMM Zwartveld a.o. [1990] ECR I-3365 and the Authority's Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement, OJ 2006 C 305, p. 19 and EEA Supplement to the OJ 2006 No 62, p. 21 points 15 and 21 – 26. The corresponding EU document is the Commission's Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101, p. 54, points 15 and 21 – 26.

Conclusion

[42] In accordance with the above, the Authority grants partial access to the said 23 documents, in accordance with Article 4(9) of the RAD 2012, and as proposed by Norway Post. Copies of the redacted versions of the documents are annexed to the present letter.

> For the sake of good order the Authority notes that the rule now set out in Article 4(9) of the RAD 2012, which is relied upon here, remains the same as Article 4(6) of the RAD 2008 and Article 4(6) of Regulation No 1049/2001.

5. PUBLIC ACCESS IS REFUSED TO 229 INSPECTION DOCUMENTS

Protection of commercial interests

[43] The Authority considers that the 229 inspection documents addressed in this section contain information that would undermine the protection of commercial interests of Norway Post's within the meaning of Article 4(4) first indent of the RAD 2012. The 229 inspection documents at issue may be addressed in three groups, of respectively 61, 124 and 42 documents.

[44] For the first group Norway Post claims that the **61 documents** identified and described below contain information on its strategic business policies, processes, priorities, plans and/or practices – information that Norway Post regards as its core business secrets. According to Norway Post, public access to these documents would cause significant and irreparable harm to its commercial interests. The sensitive information contained in the documents could, inter alia, be misused by Norway Post's competitors to predict, and adapt to Norway Post's market behaviour. The information could, moreover, be misused by Norway Post's customers for instance in relation to contractual negotiations with Norway Post. By consequence, Norway Post claims, the Authority should refuse public access to these documents to prevent the infliction of serious harm to its business operations.

- CKO 2: An internal presentation concerning volume calculations for ready-to wear clothing customers. The presentation contains assessments of different methods for calculation of volumes/prices. The presentation also includes information on volumes and prices to specific customers.
- CKO 3, 4: Two internal presentations concerning business cases of two specific B2B customers of Norway Post's. The presentations contain strategic internal assessments of alternative logistic solutions and offers, as well as detailed information about costs, volumes, prices, and profit margins.
- CKO 6: An internal presentation concerning the discount scheme of a specific service. The presentation contains detailed information and assessments about the structure of the discount scheme.

- CKO 15 – 21: Internal customer plans. Contain detailed assessments on different aspects of the relationship between Norway Post and Norway Post's customers, strengths and weaknesses as well as prices, discounts, volumes.
- PAB 19, 20: Internal minutes from meetings between Norway Post and a customer of Norway Post's. Evaluation of the negotiations, strengths and weaknesses, plans for the future etc. Detailed information about pricing, volumes and discounts.
- KBJ 56, 63: Internal business cases concerning the assessment of volumes. Detailed information about how Norway Post assesses volumes, different strategies, future plans, market evaluation, competitive and economic analysis etc.
- KBJ 58, 59: Internal business cases concerning the assessment of volumes. Detailed information about how Norway Post assesses volumes, different strategies, future plans, market evaluation, competitive and economic analysis etc.
- KBJ 64: Internal report containing detailed assessment of current and possible future prices, price-setting factors, price strategy, volumes, income etc.
- KBJ 84: Product accounts. Contains detailed information and assessments concerning revenues, costs, prospects for the future etc.
- TJO 5: Internal user guidance concerning discount scheme. Detailed information about different elements and structure of the discount scheme.
- TJO 45: Internal document concerning strategic processes. Strategic assessment of competitors.
- TJO 52, 53: Internal reports concerning Post-in-Shop concept. Strategic assessment of strengths and weaknesses of concept and detailed assessment of different products.
- TJO 54: Internal strategy plan concerning the segmentation of the logistics market.
- TJO 56, 57: Internal reports concerning strategic assessment of price level, competitive edge, customer loyalty, profitability analysis etc.
- TJO 68: Assessment of individualised discounts to customers and specific criteria for discounts.
- TJO 66, 101: Internal strategy documents concerning a specific project/service.
- MH 12 – 15: Documents including various internal strategic assessments of Post-in-Shop concept and agreements.
- KBJ 15, 16: Documents with internal strategic assessment concerning the establishment of new Post-in-Shops.
- KBJ 36 – 42, 46, 47: Internal documents concerning negotiation strategies, evaluation of strengths and weaknesses etc.
- LKP 2: Internal document concerning negotiation strategies in relation to Post-in-Shop, evaluation of strengths and weaknesses.

- KBJ 5 – 8, 10 – 13: Various internal strategy documents and a consultancy report concerning inter alia the Post-in-Shop concept.
- PAB 11 – 15, 17: Internal strategy documents of various nature.
- LKP 1: Internal strategy document concerning Post-in-Shop.
- KBJ 82: Minutes from an internal meeting regarding discounts.

[45] The Authority has reassessed the documents and sees that the documents indeed contain information on Norway Post's strategic business policies, processes, priorities, plans and/or practices; and that this is information that Norway Post may justifiably regard as its core business secrets. It is clear that the information contained in the documents could, inter alia, be exploited by Norway Post's competitors to predict, and adapt to its market behaviour. The information could, moreover, be exploited by Norway Post's customers for instance in relation to contractual negotiations with Norway Post.

[46] Whilst the documents are all more than five years old (cf. the *Schenker* judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today; the same considerations apply as set out in para. 23 above.

[47] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of the documents. The Authority therefore considers 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), Article 14 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

[48] For the second group Norway Post claims that **124 documents** (CKO 9 – 14; COD 5 – 16, 18 – 38; PAB 22, 23, 26 – 29; KBJ 68, 79; TJO 1, 2, 6 – 44, 48, 50, 58 – 61, 63 – 65, 67, 78, 80, 84, 90 – 94, 96 – 98, 102 – 106) contain various concluded distribution agreements with Norway Post's customers, as well as related documents such as offers, settling of accounts, correspondence with customers and internal correspondence concerning the agreement, internal minutes from meetings with customers and lists of volumes and rebates to specific customers. Most of the agreements include customer specific discounts. In some agreements, Norway Post's contracting parties are not afforded discounts. This information is sensitive today as it reveals Norway Post's bargaining range, either if viewed in isolation or if such information is made publicly available and aggregated across several customers. This information may be misused by customers in negotiations with Norway Post, by customers in their competitive relations with other customers or by competitors. By consequence, Norway Post claims, the Authority should refuse public access to these documents to prevent the infliction of serious harm to its business operations.

[49] The Authority has reassessed the documents and sees that the documents indeed contain distribution agreements with Norway Post's customers, as well as related documents such as offers, settling of accounts, correspondence with customers and internal correspondence concerning the agreement, internal minutes from meetings with customers and lists of volumes and rebates to specific customers. Most of the agreements include customer specific discounts. In some agreements, Norway Post's contracting parties are not afforded discounts. The Authority also sees how this information can still be sensitive today: it reveals Norway Post's bargaining range, either if viewed in isolation or if made publicly available and aggregated across several customers. It is clear that this information may be exploited by customers in negotiations with Norway Post, by Norway Post's customers in their competitive relations with other customers or by Norway Post's competitors.

[50] Whilst the documents are all more than five years old (cf. the *Schenker* judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today; the same considerations apply as set out in para. 23 above.

[51] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of the documents. The Authority therefore considers 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), Article 14 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

[52] For the third group Norway Post claims that **42 documents** (TJO 51; LKP 3 – 18, 23 – 26; MH 1 – 11, 16, 17, 19 – 22; KBJ 17, 18, 44, 45) relate to Norway Post's Post-in-Shop agreements. The documents include concluded agreements, letters of intent, summaries from meetings between Norway Post and its contracting parties as well as possible future and actual Post-in-Shop partners, correspondence, evaluations of the agreements etc. This information can be misused by Norway Post's contracting parties or competitors in future negotiations. By consequence, Norway Post claims, the Authority should refuse public access to these documents to prevent the infliction of serious harm to its business operations.

[53] The Authority has reassessed the documents and sees that the documents indeed relate to Norway Post's Post-in-shop agreements. The documents are constituted by concluded agreements, letters of intent, summaries from meetings between Norway Post and its contracting parties as well as possible future and actual Post-in-shop partners, correspondence, evaluations of the agreements, etc. The Authority does see that this information can be exploited by Norway Post's contracting parties or competitors in future negotiations.

[54] Whilst the documents are all more than five years old (cf. the *Schenker* judgment, para. 277), the Authority takes the view that the information at issue can still be considered sensitive today; the same considerations apply as set out in para. 23 above.

[55] Accordingly, public access to this information about Norway Post's business activity could result in a serious harm to Norway Post, even considering the age of the documents. The Authority therefore considers 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), Article 14 fourth paragraph SCA and Article 28(2) of Chapter II of Protocol 4 SCA; and that it is covered by the protection of commercial interests under Article 4(4) first indent of the RAD 2012.

No overriding public interest

[56] Next, the Authority must assess whether there is an overriding public interest in disclosure.

[57] As set out above, the Authority considers the information at issue to be of the kind covered by the obligation of professional secrecy under Article 122 EEA, which corresponds to Article 339 TFEU. Accordingly, the members and officials of the Authority are obliged not to disclose such information. A corresponding obligation is laid down in Article 14 fourth paragraph SCA, and in Article 28(2) of Chapter II of Protocol 4 SCA. Whereas these provisions cannot be read in isolation (cf. para. 271 of the *Schenker* judgment), it must follow that any public interest would have to be very strong in order to override this obligation, and accordingly justify disclosure of the information to the public in general, with no restrictions on the use of the information. The Authority recalls that when granting public access to documents pursuant to the RAD 2012, as under the RAD 2008 and equally Regulation (EC) No 1049/2001, no restrictions can be placed on the use of the information.

[58] In the *Schenker* judgment, para. 240, the EFTA Court held that transparency "may constitute an overriding public interest by enabling the public to ensure that ESA is acting in an adequate and proper manner in the light of the principle of good administration"; and in the *Schenker* judgment, para. 241, the EFTA Court held that 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". Given that transparency and private enforcement of competition must thus be considered public interests, the issue in the present case is whether these interest override the obligations to protect the commercial interests at issue.

[59] Accordingly, the Authority has in particular assessed whether the interest in transparency and/or the interest in private enforcement of competition law in this case may override the protection of the commercial interests at issue, and justify unrestricted disclosure of the information to the public in general. However, the Authority finds this not to be the case here, even taking particular account of the age of the documents. In the present case, the Authority cannot see that the interests in transparency and private enforcement of competition law could be considered strong enough, individually or together, to override the protection of the commercial interests at issue.

[60] As to transparency, this conclusion is further strengthened by the fact that the Authority's handling of case no 34250 (Norway Post / Privpak) has already been reviewed by the EFTA Court, namely in Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, not yet reported.

[61] As to the private enforcement of competition law, the conclusion is further strengthened by the fact that public enforcement has taken place (see again Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 18 April 2012, not yet reported).

[62] Also the existence of the so-called *Zwartveld* procedure further strengthens the conclusion in this respect; see para. 39 above.

[63] The Authority adds that public access to the information at issue in the present case could entail a risk of undermining competition: first, public access to the information could possibly allow competitors potential and actual) to align their practices, with a collusive effect on the market in result, or, second, provide competitors with an unfair advantage in the competition with Norway Post. Such effects would be contrary to the objective of the EEA Agreement to provide for a system ensuring that competition is not distorted, see Article 1(2)(e) EEA.

[64] Finally, the Authority has assessed whether any other public interest could justify public access in the present case. However, the Authority has not been able to identify any such public interest.

No partial access

[65] The Authority has assessed whether partial access could be given to some or all of these documents, pursuant to Article 4(9) of the RAD 2012, but finds that they would have to be redacted so severely as to leave no meaningful content. Whereas meaningful redacting is feasible for the 23 documents dealt with under section 4 above, the Authority finds this not to be the case for the 229 documents at issue in the present section.

Conclusion

[66] In accordance with the above, the Authority refuses access to the abovementioned 229 inspection documents."

V Procedure and forms of order sought by the parties

48. 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 for a second time, 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 RoPthat the case be determined pursuant to an expedited procedure.

49. The applicants, DB Schenker, request the Court to:

> *(i) annul the 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.*

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

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

52. 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.

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

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

55. 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.

56. On 10 June 2013, ESA submitted its defence.

57. 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.

58. In the alternative, the defendant requests the Court to:

(i) Dismiss the application as unfounded; and

(ii) Order the applicants to bear the costs.

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

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

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

62. 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.

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

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

65. On 29 August 2013, ESA submitted its rejoinder.

VI Written observations

66. Pleadings have been received from:

- the applicants, represented by Jon Midthjell, advokat;
- the defendant, represented by Markus Schneider, Deputy Director, Gjermund Mathisen and Auður Ýr Steinarsdóttir, Officers, Department of Legal & Executive Affairs, acting as agents; and
- the intervener, represented by Beret Sundet, advokat.

Admissibility

DB Schenker

67. DB Schenker submits that the application is admissible under the second paragraph of Article 36 SCA. It notes that the contested decision is addressed to DB Schenker and asserts, referring to paragraphs 13 to 14 of the contested decision, that ESA has specifically confirmed that the decision replaces the decision annulled in *DB Schenker I*.

68. To comply with the Court's judgment in *DB Schenker I*, ESA was under a legal obligation pursuant to Article 38 SCA to replace the annulled decision with a new and final decision.[4] As regards the findings in paragraph 283 of that judgment, DB Schenker asserts that the Court intended to refer to the time limits set out in Article 7 RAD and not those in Article 7 RAD 2012.[5] Moreover, DB Schenker submits that, in ESA's response to the applicants' letter to the President of ESA of 31 January 2013 complaining that the time limit had expired and calling on ESA to take a 'final decision', ESA did not contest the legal basis for the complaint or contend that it had not overrun the time limit for a final decision. In DB Schenker's view, the contested decision is therefore actionable.

69. For the sake of completeness DB Schenker contends that the two-step administrative procedure established in Article 7 RAD 2012 (requiring an initial application followed by a confirmatory application prior to a final decision being made on an access request) has no effect on the admissibility of the present action. This is not only because the applicants had not filed a request for the contested documents pursuant to the RAD 2012 but also because Article 7 RAD 2012 by its very wording does not apply to cases where the Court has annulled ESA's final decision on an access request. In such cases, it follows from Article 38 SCA that ESA is legally obliged to replace its annulled decision with a new and final decision as paragraphs 13 to 14 of the contested decision indeed set out to do.

70. Moreover, had a new access request for the inspection documents been filed for the inspection documents pursuant to the RAD 2012, the contested decision would still have been actionable because ESA's time limit for replying under the first step of its administrative procedures expired on 8 January 2013 pursuant to Article 7(2) RAD 2012 without having been extended by ESA under Article 7(3) RAD 2012. Once DB Schenker had requested a 'final decision' on 31 January 2013, ESA could only take such a decision as the second and final step of its

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4 Reference is made to *DB Schenker I*, cited above, paragraph 283.

5 Ibid., paragraph 99.

administrative procedure pursuant to Article 7(5) and (6) RAD 2012. DB Schenker asserts that ESA has overlooked this point in the contested decision.

71. The contested decision was received by email on 7 February 2013. DB Schenker notes, therefore, that the time limit for bringing the present action was 8 April 2013. Consequently, the application is timely.

72. In its reply, DB Schenker contends that ESA's inadmissibility plea rests on the premise that Article 7 RAD 2012 controls the legal effects of a judgment of the Court. In DB Schenker's view, however, Article 7 RAD 2012 does not, even on its wording, apply to a situation where a final decision on an access request has been annulled by the Court pursuant to Article 36 SCA. Nor do any other provisions in RAD 2012. In addition, Article 7 RAD 2012 does not require that a confirmatory application be reasoned, which, in DB Schenker's view, the defence has already conceded. Moreover, ESA lacks the competence to regulate the legal effects of judgments of the Court. It follows from Article 38 SCA that ESA had a legal obligation to replace the annulled decision with a final decision in compliance with the judgment in *DB Schenker I* and within the time limits that the Court had laid down. According to the applicants, that is what the contested decision explicitly set out to do in paragraphs 13 and 14.[6] The inadmissibility plea is therefore without merit.

73. 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. This would have required that ESA send an acknowledgement of receipt to the applicants pursuant to Article 7(2) RAD 2012, which it did not. DB Schenker contends that this notification is important because it confirms from which date the time limits in Article 7 RAD 2012 will be calculated. Second, ESA would have had to send the contested decision to the applicants before midnight 8 January 2012, when the time limit of ten working days provided for in Article 7(2) RAD 2012 expired, without having been extended. In that connection, DB Schenker contends that the first and second annexes to the defence are internal documents, which have been submitted "without explaining what the documents contain and what [ESA] seeks to demonstrate." In DB Schenker's view, it is questionable whether the documents may be considered admissible.[7]

74. In its reply, DB Schenker notes all the same that the titles of the two documents refer to 'Staff Rule 39.6' and appear to set out internal arrangements with regard to holidays and working hours. However, pursuant to Article 2(2) regard in

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6 Reference is made to Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraphs 53 and 60.

7 Reference is made to *Norway Post*, cited above, paragraph 112.

conjunction with Article 2(1) of Regulation No 1182/71 on the rules applicable to periods, dates and time limits, only the published list of holidays in the Official Journal is relevant. According to the Official Journal, ESA was not closed during the Christmas period with the exception of 25 and 26 December 2012, and 2 January 2013.[8]

75. Consequently, the time limit for the defendant to provide an initial reply had, expired and, in any event, the applicants were entitled to submit a confirmatory application pursuant to Article 7(5) RAD 2012. According to DB Schenker, in the circumstances, its email of 31 January 2013 to the President of ESA would constitute, at any rate, a confirmatory application for a final decision.

76. In its reply, DB Schenker responds to ESA's submissions concerning the scope of the applicants' power of attorney. DB Schenker expresses surprise to see this particular challenge to the admissibility of the action. 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" As is evident from the subject matter of the case, 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. Moreover, DB Schenker stresses, that the EU courts use a similar mechanism.[9]

ESA

77. ESA submits that the application for annulment is inadmissible because the applicants failed to submit a confirmatory application. In addition, ESA has serious doubts that the present application conforms to a number of formal requirements, in particular Article 17 of the Court's Statute and Article 33(5) RoP. ESA submits in its rejoinder that silence on any point in the defence or rejoinder cannot be interpreted as ESA concurring with the applicants.

78. ESA notes that the RAD 2012 provides for a two-stage procedure allowing an applicant for public access to make a confirmatory application if he remains dissatisfied with any refusal by ESA to grant public access. This confirmatory application procedure corresponds to that of Regulation No 1049/2001 and helps the

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[8] Reference is made to OJ 2012 C 10/, p.7 and OJ 2013 C 42, p.4. Further reference is made to Case C-362/08 P *Internationaler Hilfsfonds* v *Commission*, cited above, paragraphs 53 and 60.

[9] Reference is made to Article 44(6) RoP of the General Court and Article 119 and where appropriate, also 168(4) RoP of the Court of Justice.

proper administration of justice in the case of judicial review of 'refusal of access situations'.[10]

79. ESA notes that the contested decision in the present case was received by the applicants on 7 February 2013. The time limit for submitting a confirmatory application therefore expired on 21 March 2013. However, the applicants failed to submit such an application despite being individually and explicitly informed of this fact in the contested decision.

80. ESA submits that, according to settled case law concerning the corresponding EU provision in Regulation No 1049/2001, an applicant must make a confirmatory application before he can challenge by way of an action for annulment any refusal by EU institutions to disclose documents to the general public.[11] For reasons of procedural homogeneity, the same applies in the present case, under the two-stage procedure established by the RAD 2012.[12] ESA asserts there is no reason why the procedure set out in Article 7(6) RAD 2012 should not apply in the present case. In its view, a decision on a confirmatory application could not have been less favourable to the applicants, stating that a confirmatory application "would in all likelihood have triggered a further consultation of Norway Post" and in any event a reassessment of ESA's decision of 7 February 2013.

81. ESA asserts that, instead, the applicants chose to seise the Court with an inadmissible action for annulment and with an action in which the Court cannot positively order the disclosure to the public of specific documents.[13] In its rejoinder, ESA submits that the applicants' reference to Case C-208/11 P *Internationaler Hilfsfonds* v *Commission* cannot alter this conclusion and distinguishes that judgment from the present case.[14]

82. ESA submits that, in light of the final paragraph of the contested decision, it is clear that this decision cannot be equated to a confirmatory decision adopted following a confirmatory application.[15] Moreover, there is nothing wrong in initially

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[10] Reference is made to Case C-362/08 P *Internationaler Hilfsfonds*, cited above, paragraph 54.

[11] Reference is made to Case C-208/11 P *Internationaler Hilfsfonds* v *Commission*, order of 15 February 2012, not yet reported, paragraph 30, referring to Case C-362/08 P *Internationaler Hilfsfonds*, cited above, paragraphs 53 and 54, and Case T-392/07 *Strack* v *Commission*, judgment of 15 January 2013, not yet reported, paragraphs 41 to 43.

[12] Reference is made by comparison to *Norway Post*, cited above, paragraph 110.

[13] Reference is made to *Strack*, cited above, paragraph 90 and case law cited.

[14] Reference is made to Case C-362/08 P *Internationaler Hilfsfonds*, cited above, paragraphs 53, 58 and 60. Additional reference is made to Case C-208/11 P *Internationaler Hilfsfonds* cited above, paragraphs 29 to 31.

[15] Reference is made to Case C-362/08 P *Internationaler Hilfsfonds*, cited above, paragraphs 51 and 52, and *DB Schenker I*, cited above, paragraphs 80 and 81.

replacing an annulled decision with an intermediate measure (the contested decision), in preparation for a definitive one (the confirmatory decision) that would have been adopted had the applicants lodged a confirmatory application. The two-stage procedure constitutes a measure of general benefit both to applicants for public access and the judicial process, if legal proceedings are brought.

83. As the RAD was repealed on 6 September 2012, the RAD 2012 were the only rules in force when the contested decision was adopted. Consequently, according to ESA in its rejoinder, "[p]ractically speaking, [ESA] was obliged to adopt a fresh decision on public access to the documents at issue."

84. ESA continues, "in a situation such as the present one, the general EEA principle of legal certainty even obliges [ESA] to avail itself of the relevant (two-stage) procedure set out in its RAD 2012".[16] It asserts that the matter concerned the public right to access documents, the implementation of a judgment, and, at the same time, Norway Post's fundamental right to the protection of its professional secrets under EEA law.[17] "In those circumstances, [ESA] could not act lawfully otherwise than by applying the relevant rules governing the subject-matter; and this in particular as the EFTA Court has found the preceding version of [ESA's] public access rules to form part of EEA law; and as the Court has done so in the very judgment whose implementation was the object of the administrative follow-up procedure in which [ESA] adopted the contested decision (Article 38 SCA)."[18]

85. In its rejoinder, ESA contends that, whilst substantive rules only exceptionally apply to situations existing before their entry into force,[19] procedural rules generally do apply to all proceedings pending at the time when they enter into force.[20] It asserts that "Decision No 300/12/COL, which established the RAD 2012, makes no provision for any transitional scheme. Thus, the rule that public access to documents held by [ESA] must be granted under the procedure set out in the RAD 2012 is unconditional."[21] It refers in that regard to the Court's finding that in an

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[16] Reference is made to Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 99 and case law cited.

[17] Reference is made by comparison to the order of the President of the General Court of 11 March 2013 in Case T-462/12 R *Pilkington Group* v *Commission*, not yet reported, paragraph 45 (the appeal against this order was dismissed by the Vice-President of the Court of Justice in his order of 10 September 2013 in Case C-278/13 P(R) *Commission* v *Pilkington*), *DB Schenker I*, cited above, paragraph 166.

[18] Reference is made to *DB Schenker I*, cited above, paragraph 118.

[19] Reference is made to Case C-369/09 P *ISD Polska and Others* v *Commission* [2011] ECR I-2011, paragraph 98 and case law cited.

[20] Reference is made to Case C-399/11 *Stefano Melloni* v *Ministerio Fiscal*, judgment of 26 February 2013, not yet reported and case law cited.

[21] Reference is made to Case C-129/12 *Magdeburger Mühlenwerke GmbH* v *Finanzamt Magdeburg*, judgment of 21 March 2013, not yet reported, paragraph 38.

action for annulment based on Article 36 SCA the lawfulness of the measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted.[22] Moreover, it notes that in *DB Schenker I* the Court did indeed "urge" ESA to adopt a new decision on public access within the applicable time limits.[23] ESA avers that this is what it did, respecting the time limits in Article 7 RAD 2012. In its view, contrary to what the applicants suggest, what the Court required in *DB Schenker I* cannot be understood as an obligation on ESA to apply a set of procedural rules from the RAD that are no longer in force or to apply a special procedure flowing from Article 38 SCA and the judgment, to the exclusion of the existing procedure under the RAD 2012.

86. ESA submits in its rejoinder that the Court's judgment is not declaratory but "merely orders annulment"[24] and that it is for the institution concerned to take the measures necessary to comply with the judgment.[25]

87. ESA contends that "[t]he applicants' criticism that the RAD 2012 were applied '*retroactively*' to a request for public access initially lodged under the RAD does not change this". It continues: "[i]n accordance with established case law, the procedural changes brought about by the RAD 2012 took immediate effect.[26] Further, the contested decision was carefully drafted in light of [ESA's] duty under Article 38 SCA to implement the Court's judgment, … so as to apply the same substantive rules as would have been under the RAD, if those rules were still in force; or as would have been the situation under the EU Transparency Regulation No 1049/2001, if that Regulation were part of EEA law. It follows that the contested decision neither put 'DB Schenker', nor the applicants in a less favourable position as regards the right to seek public access to the inspection documents under the since repealed [RAD]."

88. ESA submits that the applicants' alternative argument that, in effect, they lodged a confirmatory application on 31 January 2013 is flawed. The two

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[22] Reference is made to Case E-9/12 *Iceland* v *ESA*, judgment of 22 July 2013, not yet reported, paragraph 100, Case E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 79, and Case E-11/12 *Koch and Others* v *Swiss Life (Liechtenstein) AG*, judgment of 13 June 2013, not yet reported, paragraph 42. Further reference is made to Case C-501/11 P *Schindler Holding Ltd and Others* v *Commission*, judgment of 18 July 2013, not yet reported, paragraph 13.

[23] Reference is made to *DB Schenker I*, cited above, paragraph 283.

[24] Reference is made to Case T-135/09 *Nexans France and Others* v *Commission*, judgment of 14 November 2012, not yet reported, paragraph 136 and case law cited (under appeal in Case C-37/13 P *Nexans and Nexans France* v *Commission*) and *Strack*, cited above, paragraph 90 (under appeal in Case C-127/13 P *Strack* v *Commission*).

[25] Reference is made to Joined Cases T-339/10 and T-532/10 *Cosepuri* v *European Food Safety Authority*, judgment of 29 January 2013, not yet reported, paragraph 77 and case law cited.

[26] Reference is made by comparison to Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 80 and the case law cited.

cumulative preconditions under Article 7(6) RAD 2012 are not met in the present case: the time limit for ESA to adopt a first decision had not expired prior to 31 January 2013, nor did the applicants' complaint of that day constitute a confirmatory application.

89. As regards the time limit, ESA contends that Friday 4 January 2013 was the first working day at ESA following delivery of the judgment in *DB Schenker I* on Friday 21 December 2012. The judgment was delivered on the very last working day before ESA's Christmas closure from Monday 24 December 2012. ESA asserts that it was only four days into the period within which to respond when it initiated the consultation with Norway Post on 9 January 2013 and that, accordingly, the time limit was suspended pursuant to Article 7(4) RAD 2012 pending the outcome of the consultation.

90. ESA submits in its rejoinder that, as "has been demonstrated in the defence … based on the implicit assumption that the judgment in [*DB Schenker I*] was formally served on [ESA] on Friday 21 December 2012," its decision of 7 February 2013 was adopted within the relevant time limits. It contends, however, that it "is obvious from the Court file" that 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, "*in any case* [ESA], unlike the applicants, had not indicated during the procedure in Case E-14/11 [*DB Schenker I*] that service could be effected electronically".[27] ESA asserts that, as these facts concern a matter of public policy, it no longer seeks to maintain its "initial (but mistaken) hypothesis" that it was already four days into the time limit on Wednesday 9 January 2013. Instead, the relevant time limit prescribed by Article 7 RAD 2012 was triggered by "ESA's formal notification of the judgment, on Thursday 10 January 2013." Thus, according to ESA, the contested decision of 7 February 2013 was within the relevant deadlines.

91. In its rejoinder, ESA submits that nothing different follows from Article 62 RoP according to which the Court's judgments are binding from the date of delivery. In its view, the fact that the judgment was not served on ESA pursuant to Article 61(2) RoP "before the New Year" renders moot the applicants' submission that the days over Christmas must be counted as working days. Consequently, according to ESA, "there is no need for the Court to address the issue of any discrepancy between the information provided on [ESA's] website and in the contested decision itself, on the one hand, and the information published in the EEA supplement to the EU Official Journal, on the other".

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[27] Reference is made to Article 33(2) RoP and point B.5.b. of the Court's Notes for the guidance of Counsel 2012.

92. As regards the applicants' letter to ESA's President of 31 January 2013, ESA asserts that this "complaint" was not phrased as a confirmatory application and could not be interpreted as one even if it were in time, which ESA denies. Moreover, ESA contends that the contested decision was adopted within 25 working days of the delivery of DB Schenker I. Accordingly, in its view, the present application seeking the partial annulment of "what constitutes but a preparatory act within the relevant administrative procedure" is inadmissible.

93. ESA argues that the applicants have failed to produce the necessary documentation to demonstrate that they are duly represented by a lawyer as required pursuant to the second paragraph of Article 17 of the Statute of the Court.[28]

94. In ESA's view, 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 does not appear to meet the requirements set out in Article 33(5)(b) RoP. 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.

95. ESA submits that the powers of attorney issued by the applicants in 2010 were unambiguously limited to representation of the three companies in their intervention in support of ESA in *Norway Post.* It notes, moreover, that Deutsche Bahn AG is not an applicant in the present proceedings nor are staff members of Deutsche Bahn AG publically registered as being authorised to act in the name of any of the three companies that have lodged the present application.

96. In ESA's view, it remains questionable whether these and other formal defects can still be rectified under Article 33(6) RoP.[29] In footnote 27 of its defence, ESA gives the following example for another formal defect. It states: "[f]or instance, the pre-litigation procedure was carried out on behalf of 'DB Schenker' ..., a large international group of companies that consists of numerous legal entities most of which are not incorporated in Scandinavia ... Yet so far, none of the three Norwegian and Swedish applicants has made clear in the present application why *it*

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[28] Reference is made by way of comparison to Article 19(2) of the Statute of the Court of Justice of the European Union.

[29] Reference is made to Case E-6/94 *Helmers* v *ESA* [1994-1995] EFTA Ct. Rep. 97, paragraphs 2 to 8; Case E-6/94 REV *Helmers* v *ESA*, order of 27 April 1995, paragraphs 3 to 8; Case E-5/08 *Bergling* v *ESA* [2008] EFTA Ct. Rep. 316, paragraph 7; and Order of the President of 5 June 2012 in Case E-16/11 *ESA* v *Iceland*, paragraph 31. Reference is also made to Case C-581/11 P *Muhamad Mugraby* v *Council and Commission*, judgment of 12 July 2012, not yet reported, paragraph 36; Case C-69/12 P *Noscira SA* v *OHIM*, order of 21 September 2012, not yet reported, paragraphs 23 and 33 and case law cited; Opinion of Advocate General Sharpston in Case C-426/10 P *Bell & Ross* v *OHIM* [2011] ECR I-8849, point 51; and the judgment in the same case, paragraph 42.

is directly and individually concerned by the contested confirmatory decisions on public access to documents on behalf of the DB Schenker Group."[30]

97. ESA stresses that admissibility is a matter of public policy that concerns legal certainty as well as equal access to justice in the EEA. Procedural homogeneity calls for a concurring interpretation of corresponding EU and EFTA rules on judicial procedure.[31]

Substance

98. In the alternative, ESA submits that the application should be dismissed as not well founded. Since the applicants have not challenged the part of the contested decision explaining that nine document numbers are unused, ESA notes that the scope of the application is limited.

First plea: concerning the legal status of the new rules on public access to documents and the lawfulness of their retroactive applicability to DB Schenker's access request in the contested decision

DB Schenker

99. DB Schenker submits that while the annulled decision was adopted pursuant to the RAD, the contested decision has been adopted pursuant to the RAD 2012. Article 13 RAD 2012 gives the RAD 2012 retroactive effect to access requests submitted pursuant to the RAD.

100. The RAD 2012 contain a new set of exceptions and a new definition of a "document" which restricts the public right of access significantly beyond what was permitted under the RAD and what is permitted in EU law under Regulation No 1049/2001. Article 4(2)(b) RAD 2012, which encompasses all documents "relating to gathering, obtaining or receiving information from natural or legal persons in the framework of investigations", appears on its wording to cover the inspection documents at issue.

101. DB Schenker submits that the RAD 2012, like the RAD, must be considered part of EEA law and subject to the principle of homogeneous interpretation.[32] The public right of access must also be considered a fundamental right in EEA law as it

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[30] Reference is made to Case C-362/08 P *Internationaler Hilfsfonds*, cited above, paragraph 51. In its rejoinder, ESA made additional reference to Case T-304/08 *Smurfit Kappa Group plc* v *Commission*, judgment of 12 July 2012, not yet reported, paragraphs 37 and 39 and case law cited.

[31] Reference is made to *Norway Post*, cited above, paragraph 110.

[32] Reference is made to *DB Schenker I*, cited above, paragraphs 118 and 121.

is in EU law pursuant to Article 42 of the Charter of Fundamental Rights of the European Union.

102. On that basis, DB Schenker submits, the retroactive effect of the new rules would not prejudice the rights enjoyed by the applicants under the RAD because the outcome of the present case would be the same as if the contested decision had been made in accordance with the RAD.

103. DB Schenker submits that, in contrast, ESA has taken an unlawful starting point by considering the RAD 2012 not to be part of EEA law and not subject to the principle of homogeneous interpretation. According to DB Schenker, in the contested decision, ESA has, *de facto*, given retroactive effect to Article 4(2)(b) RAD 2012, which by itself must lead to an annulment.

104. If, contrary to DB Schenker's submission, the Court were to agree with ESA's reasoning that the RAD 2012 are not part of EEA law and not subject to the principle of homogeneous interpretation, DB Schenker contends that any retroactive effect given to the RAD 2012 negatively affecting the applicants' rights would infringe the principle of legal certainty and the right to an effective remedy.[33] In that regard, were the rules to be given such retroactive effect, DB Schenker submits that ESA's failure to properly publish the RAD 2012 in itself leads to an infringement of the principle of legal certainty. The RAD 2012 were adopted without any prior public notice or consultation and have been published only on ESA's website. The RAD – which, in any event, ESA had omitted to publish in the Official Journal – were immediately removed from ESA's website. In DB Schenker's view, a further infringement of the principle of legal certainty would follow from the lack of explanation proffered concerning the need to give the RAD 2012 retroactive effect, prejudicial to the rights previously enjoyed by the public.

105. In its reply, DB Schenker submits that the defence takes the erroneous position that, unless an action for annulment has been brought in good time against an EEA law that has been given retroactive effect, any retroactive effect that flows from that law must be accepted. According to DB Schenker, the correct position is that the Court has a legal duty under Article 36 SCA to annul any decision insofar as ESA has given unlawful retroactive effect to EEA law, on the same basis as it must in relation to any other infringement of EEA law.

106. In its reply, DB Schenker stresses that it seeks the annulment of the contested decision insofar as "the unlawful retroactive effects have adversely affected DB Schenker's rights".

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[33] Ibid., paragraph 98.

ESA

107. ESA submits that the first plea is "rather unclear" as there is no form of order sought. Paragraphs 14 to 16 of the contested decision clarify the relationship between the judgment in *DB Schenker I*, the RAD, Article 38 SCA and the RAD 2012 which, according to ESA, "have since 6 September been the only rules on public access that [ESA] can apply; there are no other rules after the express *repeal*, in full, of the [RAD])". ESA emphasises that, in paragraph 16 of the contested decision, it specifically stated that the judgment in *DB Schenker I* and Article 38 SCA oblige ESA "to leave unapplied the one provision in the RAD 2012 – its Article 4(2)(b) – that could have lead [sic] to granting less public access than under the [RAD]".

108. ESA avers that the contested decision takes great care to show that any refusal of public access is based on rules that remain the same under the RAD 2012, the RAD and Regulation No 1049/2001. Homogeneity is thus ensured. In its view, the decision would have been the same had Regulation No 1049/2001 been [ESA's] legal basis. It contends, therefore, that the result is "a decision that substantively is precisely the same as it would have been under the [RAD] if those rules were still in force…". In its rejoinder, ESA submits that even had it wrongly applied the rule established in Article 4(2)(b) RAD 2012, which it denies, such a mistake would not involve any unlawful retroactive effect but would, instead, be a matter of misinterpretation or misapplication.

109. ESA contends that nothing adduced in the first plea has any bearing on the present action for partial annulment. In its view, the applicants' "many complaints and speculations about potential implications" of applying the RAD 2012 are outside the scope of the present action. According to ESA, those complaints belong in an action for annulment of the RAD 2012, although, in the case of the present applicants, they would be out of time to bring such a plea in the current application on the basis that they have been aware of Decision No 300/12/COL "for the very least since 14 September 2012".[34]

110. In its rejoinder, ESA submits – as regards both the first and the third plea – that Norway Post enjoys a fundamental right to the protection of its professional secrets and that there may well be a "conflict of fundamental rights in the present case". ESA asserts that in EU law, a fundamental right to the protection of a company's professional secrets is enshrined in Article 339 TFEU (corresponding to Article 122 EEA), Article 8 ECHR and Article 7 of the Charter. In its view, Norway Post should have no lesser protection in the EEA legal order. In keeping with the principle of homogeneity, Norway Post must enjoy, as a matter of EEA law, a

[34] Ibid., paragraphs 67 to 68.

fundamental right to the protection of its professional secrets in both administrative and court proceedings.[35] ESA contends that the "legal status as a fundamental right must have a significant impact in the assessment of whether there are other public interests at issue that may *override* the protection of Norway Post's professional secrets".

Second plea: infringement of the commercial interests exception in Article 4(4) RAD 2012 and the duty to state reasons in Article 16 SCA

DB Schenker

111. According to DB Schenker, Article 4(4) RAD 2012 establishes an exception from the public right of access in Article 2(1) RAD 2012 where disclosures would undermine the protection of commercial interests of a natural or legal person. A similar exception existed in Article 4(2) RAD.

112. DB Schenker submits that, in relying on this exception, ESA's decision to grant only partial access to 23 inspection documents and deny complete access to 229 inspection documents infringes Article 4(4) RAD 2012 and contains manifest errors of assessment in addition to the breach of Articles 16 and 38 SCA.

113. DB Schenker submits, first, in relation to the annulled decision, that ESA has still not recorded each individual inspection document on its file and continues to default on the principle of good administration.[36]

114. DB Schenker submits, second, that the contested decision has not meaningfully improved upon the level of information provided in relation to the inspection documents.[37] Instead, the contested decision has "deferentially imported" Norway Post's own description of the documents in its letter to ESA of 28 January 2013. The inspection documents have only been identified and separated by the initials of the ESA officer who seized them in 2004 followed by a number. Nor does the contested decision contain any information about the age of any of the documents.

115. Third, DB Schenker submits that, in the contested decision, ESA has bundled the inspection documents into six groups thus producing only six "group

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[35] Reference is made to the order of the President of the General Court of 25 April 2013 in Case T-44/13 R *AbbeVie* v *European Medicines Agency*, not yet reported, paragraphs 47, 48, 52 and 66; the order of the President of the General Court of 25 April 2013 in Case T-73/13 R *InterMune* v *European Medicines Agency*, not yet reported, paragraphs 35 to 37 and 41, and case law cited; and the order in *Pilkington Group* v *Commission*, cited above, paragraphs 44 and 45 (the appeal against this order was dismissed in *Commission* v *Pilkington*, also cited above).

[36] Reference is made to *DB Schenker I*, cited above, paragraph 182.

[37] Ibid., paragraph 191.

explanations" as to why the documents cannot be released. Moreover, those groupings were taken from Norway Post's letter to ESA of 28 January 2013. This means, DB Schenker submits, that Norway Post has been permitted to depart from the standard instructions sent by ESA on 9 January 2013, which required individual confidentiality claims, and also from the reasoning in *DB Schenker I*.[38]

116. In DB Schenker's view, the contested decision contains no explanation as to why these six groups were found appropriate by ESA for a complete assessment of the present harm that disclosure of any individual documents would have for Norway Post. DB Schenker contends that ESA has departed from its obligation to conduct an individual review of the documents.[39] Although it concedes that case law allows for certain exceptions from the obligation to conduct an individual review, it asserts that none has been invoked in the contested decision.[40] Instead, the contested decision repeatedly states that ESA had "reassessed the documents" and reached a conclusion as to the protection warranted for the "information contained in the documents". The applicants contend that the groupings made by Norway Post contain very different categories of document. By relying on these wide groups, the contested decision has, in effect, turned a narrow case law based exception into the main rule. DB Schenker submits that, in essence, Norway Post reduced its business documents into only three categories: internal documents, contact with customers, and contact with suppliers. ESA adopted Norway Post's groupings and shaped its decision around them.

117. Fourth, DB Schenker asserts that the contested decision does not provide any information about the dates of the individual documents and has, therefore, not determined their age.[41] The applicants assert that "the passage of time", which in their view was the central issue in *DB Schenker I*, has only been given superficial consideration. ESA's explanations as to why disclosure would undermine the commercial interests of Norway Post, even today, are brief, vague and general, and are also, for the most part, mere restatements of assertions made in Norway Post's letter to ESA of 28 January 2013.[42] The applicants note that whether the group consists of 124 documents, or only of two, ESA's explanations consist of three paragraphs. According to the applicants, ESA's claims that it "can see" or that it "is clear" what harm would befall Norway Post were not substantiated by Norway Post itself in its letter of 28 January 2013. Instead of conducting an independent and critical review of the inspection documents, ESA has readily accepted Norway Post's non-substantiated confidentiality claim.

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38 Ibid., paragraph 280.

39 Ibid., paragraph 127.

40 Ibid., paragraphs 128 and 135.

41 Ibid., paragraphs 192, 193 and 278.

42 Reference is made to the contested decision, paragraphs 22, 26, 30, 45, 49, and 53.

118. Fifth, the contested decision states that the inspection documents fall under the professional secrecy obligation in Article 122 EEA, the fourth paragraph of Article 14 SCA, and Article 28(2) of Chapter II of Protocol 4 SCA. According to the applicants, no explanation has been given for the relationship between the commercial interest exception in Article 4(4) RAD 2012 and the professional secrecy obligation. This reflects the lack of any such explanation in the standard instructions sent to Norway Post on 9 January 2013 where there was not even a reference to the rules on public access to documents. However, as ESA stated in those instructions, professional secrecy only extends to information that is objectively "worthy of protection". The contested decision fails to provide any explanations as to why the inspection documents all meet that requirement. In the applicants' view, this is a serious flaw as the documents to which access is refused are the by-product of an extensive antitrust investigation. DB Schenker contends that ESA has failed to critically consider whether, in denying access to these documents, in reality, it has assisted Norway Post in committing price discrimination in violation of Article 54 EEA.

119. For those reasons, individually and collectively, DB Schenker contends that the contested decision must be annulled insofar as it denies access to any of the inspection documents.

120. In its reply, DB Schenker stresses that it does indeed recognise that case law allows for certain exceptions from the obligation to conduct an individual review. What it contests, however, is the fact that ESA allowed Norway Post to depart from the standard instruction it was sent which required individual confidentiality claims and that was "demanded in the judgment".[43] In the applicants' view, the contested decision contains no explanation as to why the six groups were found appropriate for a complete assessment of the present harm that full disclosure of any of the 252 inspection documents would have for Norway Post. In doing so, ESA departed from its obligation to conduct an individual review of the documents.

ESA

121. ESA considers that the second plea consists of one substantive and one procedural part.

122. The substantive part alleges an infringement of the commercial interests exception laid down in Article 4(4) RAD 2012 in conjunction with an infringement of Article 38 SCA. ESA submits that the alleged infringement of Article 38 SCA is simply the contention that the contested decision is not "lawful". ESA asserts that the relevant rule under Article 4(4) RAD 2012 "is not merely '*similar*'; it remains

[43] Reference is made to *DB Schenker I*, cited above, paragraph 280.

the same as under Article 4(2) RAD, and also Article 4(2) of Regulation No 1049/2001". It avers that this was expressly stated in the contested decision.

123. ESA submits that the lists of the inspection documents attached to the contested decision provide the date of each inspection document ("except, of course, for any documents that bear no date"), a brief description of each document, and give the number of pages of each document. These lists assist in substantiating the fact that the different groups of documents assessed in the contested decision contain documents that belong to the same category or contain the same type of information.

124. ESA avers that the contested decision explicitly addresses whether "the information at issue", despite its age, can still be considered sensitive today and explains why ESA was satisfied that "the information, despite its age, still constitutes essential elements of Norway Post's commercial position".[44]

125. ESA submits that "[t]he fact that the contested decision refuses public access to agreements that are no longer in force ..., or to agreements that have been amended, does not change the fact that the information in these agreements nonetheless '*reveals Norway Post's bargaining range, either if viewed in isolation or if made publicly available and aggregated across several customers*' and that it '*can be exploited by Norway Post's contracting parties or competitors in future negotiations*'" (paragraphs 49 and 53 of the contested decision). ESA also emphasises the fact "that the present case concerns a market that is still very much the same today as it was at the time the documents were produced. Largely the same services and products are offered, and to largely the same customers" (paragraph 23 of the contested decision, referred to in paragraphs 50 and 54).

126. ESA stresses that where reference was made in the contested decision to the obligation of professional secrecy in Article 122 EEA, the fourth paragraph of Article 14 SCA and Article 28(2) of Chapter II of Protocol 4 SCA ("obligation of professional secrecy") it concluded that the documents or passages at issue fell within the scope of those provisions and with the exception provided for in the first indent of Article 4(4) RAD 2012. While not excluding the possibility that the first indent of Article 4(4) RAD 2012 might have a greater scope than the obligation of professional secrecy, for the purposes of adopting the contested decision, it did not prove necessary, according to ESA, to discuss the relationship between those provisions more generally.

127. The obligation of professional secrecy is pertinent to the assessment of whether there is an overriding public interest in disclosure. ESA contends that such public interest "would have to be very strong" in order to "override" both the first

[44] Reference is made to the order in *Pilkington* v *Commission*, cited above, paragraph 70 and case law cited (the appeal against this order was dismissed in *Commission* v *Pilkington*, also cited above).

indent of Article 4 RAD 2012 and the obligation of professional secrecy. In its view, disclosure of the undisclosed documents "could cause serious (additional) harm" both to the public EEA interest in maintaining undistorted competition and to Norway Post's private interest, that is, unrelated to any harm that it could suffer in private damages actions. ESA asserts that it has not taken account of the latter kind of harm.[45]

128. ESA stresses that the mere fact that an undertaking has a dominant position is not in itself a ground for criticism.[46] That the documents were seized during an inspection does not imply that their commercially sensitive content would be wholly, or "as such, illegitimate". Consequently, ESA submits that "the present circumstances cannot be compared to a situation where, for instance, an unannounced inspection would have focused on evidence for the existence of a specific, suspected cartel agreement".

129. As regards the procedural part of the plea, the alleged failure to state reasons in breach of Article 16 SCA, ESA refers to the criteria laid down in *Hurtigruten.*[47] ESA asserts that its duty to state reasons for a refusal to disclose documents or parts of them cannot go so far as to reveal the confidential content concerned. In its view, the reasoning in the contested decision has enabled the applicants to defend their rights and for the Court to exercise its power of review.

130. ESA submits that the applicants' assertions regarding the individual identification of the inspection documents are erroneous. It avers that the applicants have been provided with this information in the 26 lists of documents enclosed with the contested decision. It contends, further, that, when giving reasons for refusing public disclosure, it is permitted to group documents together that belong together. ESA submits that the groups of documents addressed in the contested decision are appropriate. There are three groups of two documents each; a group of 10 documents; a group of 11 documents; a group of 61 documents; a group of 124 documents and a final group of 42 documents. Each grouping is properly made on the substance. ESA also avers that it provided "numerous individual descriptions of the documents within each group".

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[45] Reference is made to *DB Schenker I*, cited above, paragraph 189 and Case T-344/08 *Energie Baden-Württemberg*, judgment of 22 May 2012, not yet reported, paragraphs 147 and 148 (under appeal in pending Case C-365/12 P *Commission* v *Energie Baden-Württemberg*).

[46] Reference is made to Case C-209/10 *Post Danmark* v *Konkurrencerådet*, judgment of 27 March 2012, not yet reported, paragraph 21 et seq.

[47] Reference is made to Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA* [2012] EFTA Ct. Rep. 758, paragraphs 252, 254, 255, and 261. Further reference is made to Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA* [2012] EFTA Ct. Rep. 114, paragraph 165.

131. ESA asserts that, contrary to the "applicants' implied, yet wholly unsubstantiated accusation of Norway Post of a further infringement",[48] the contested decision does indeed consider the implications of "releasing the information concerned" to the general public. Public access to the "information at issue" in the present case "could entail a risk of undermining competition. First, public access to the information could possibly allow competitors (potential or actual) to align their practices, with a collusive effect on the market in result. Second, it could provide competitors with an unfair advantage in the competition with Norway Post. Such effects would be contrary to the objective of the EEA Agreement to provide for a system ensuring that competition is not distorted." In that regard, ESA refers to Article 1(2) EEA.

Third plea: infringement of the overriding public interest rule in Article 4(4) RAD 2012 and the duty to state reasons in Article 16 SCA

DB Schenker

132. DB Schenker argues that the exception to the right of public access for commercial interests provided for in Article 4(4) RAD 2012 does not apply when there is an "overriding public interest" in disclosure. A similar provision existed in Article 4(2) RAD. It contends that, in the contested decision, ESA has denied that there are any overriding public interests in the disclosure of the inspection documents. DB Schenker asserts that ESA adopted the same reasoning whether no or only partial access has been granted.

133. DB Schenker submits that those parts of the decision (paragraphs 33 to 41 and 56 to 64) infringe Article 4(4) RAD 2012 and contain manifest errors of assessment, in addition to breaching the duty to state reasons under Article 16 SCA. Moreover, ESA has breached its duty resulting from Article 38 SCA to take "the necessary measures to comply with the judgment" in *DB Schenker I*.

134. First, DB Schenker asserts, the contested decision rests on the premise that all the inspection documents fall under the professional secrecy obligation provided for in Article 122 EEA, the fourth paragraph of Article 14 SCA, and Article 28(2) of Chapter II of Protocol 4 SCA. On that basis, ESA has implicitly claimed that the inspection documents therefore belong to a higher grade of protectable material than documents that fall "only" under the commercial interests exception in Article 4(4) RAD 2012. DB Schenker notes that, on that basis, according to ESA's analysis, "it must follow that any public interest would have to be very strong in order to override this obligation …".[49] In DB Schenker's view, the premises for that

[48] Reference is made to *Post Danmark*, cited above, paragraph 21 et seq.

[49] Reference is made to the contested decision, paragraphs 34 and 57.

conclusion are without foundation. ESA has not explained the relationship between those rules. Moreover, the standard instruction sent to Norway Post did not mention Article 4(4) RAD 2012. Consequently, according to DB Schenker, the contested decision has failed to explain how ESA has distinguished between "high grade" and "low grade" material. In any event, Norway Post had only claimed that some of the inspection documents contain "core business secrets". Furthermore, DB Schenker alleges, ESA has failed to explain why each document at issue satisfies the legal requirements for professional secrecy. In addition, it continues, ESA failed to demonstrate that the inspection documents "are worthy of protection".

135. Therefore, the applicants contend that the foundation for ESA's review of the overriding public interest rule contains manifest errors of assessment, and in addition conflicts with the duty to state reasons.

136. Second, DB Schenker observes that the contested decision states that neither institutional transparency nor the private enforcement of competition law represents an overriding public interest in disclosure. It contends that ESA has failed to state reasons for that conclusion. As regards institutional transparency, ESA has not taken into consideration the alleged nexus between its former President, Norway Post and "the owner of the company represented by the Norwegian Ministry of Transport and Communication" during the infringement. In DB Schenker's view, the failure to take this into consideration only strengthens the interest in institutional transparency.

137. As regards the interest in private enforcement of competition law, DB Schenker asserts that the contested decision has ignored the reality that follow-on actions necessarily occur subsequent to public enforcement.[50] Moreover, the contested decision has overlooked the fact that the inspection documents contain evidence which could potentially be relied upon in order to claim damages from Norway Post in relation to the rebate scheme investigation. In its reply, DB Schenker challenges ESA's interpretation of Article 4(4) RAD 2012 evidenced in the defence, erroneous in the view of DB Schenker, to the effect that it will only consider a public interest that has been specifically invoked by an applicant. DB Schenker contends, however, that Article 6(1) RAD 2012 does not require an applicant to state reasons for an access request and it remains ESA's responsibility to consider the public interests involved of its own initiative.

[50] Reference is made to *DB Schenker I*, cited above, paragraph 241.

138. Moreover, DB Schenker notes that ESA has sought to argue that the *Zwartveld* procedure weakens the public interest in disclosure of the contested documents.[51] DB Schenker firmly disagrees with such a view.

139. For those reasons, both individually and collectively, DB Schenker contends that the contested decision must be annulled insofar as it denies access to any of the inspection documents on the basis that no overriding public interest exists.

140. In its reply, DB Schenker submits that the defence remains silent on whether ESA agrees that Article 4(4) RAD 2012 forms part of EEA law and is, thus, subject to the principle of homogeneous interpretation.

141. DB Schenker contends that the defence fails to address the absence of explanation in the contested decision as regards the relationship between the obligation of professional secrecy derived from Article 122 EEA and the commercial interest exception and the RAD 2012. Moreover, it observes that ESA did not refer to the commercial interest exception and the RAD 2012 when it invited confidentiality claims from Norway Post on 9 January 2013. In those circumstances, according to the applicants, ESA cannot seriously contend that its failure to clarify the relationship between those different rules and their different effects on the public interest rule have not affected the confidentiality claims that Norway Post submitted and ESA's assessment of such.

142. According to DB Schenker, the defence appears to be under a misconception that the two separate requirements necessary to demonstrate that an individual document falls under the professional secrecy obligation are not separate. In its view, this contradicts ESA's previous position adopted in the standard instructions sent to Norway Post on 9 January 2013 and the case law referred to in those instructions.

143. In DB Schenker's view, ESA has proposed a line of reasoning in the defence which was not included in the contested decision and which is therefore irrelevant for the assessment of its legality. It contends that the premise for ESA's argument in the defence is a speculative extrapolation from the ECJ's judgments in *Pfleiderer* and *Donau Chemie*[52] concerning access requests under national law. In contrast, DB Schenker notes that, in the European Commission's proposal for a directive on certain rules governing actions for damages under national law for infringements of

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[51] Reference is made to the order of the President of the General Court of 29 November 2012 in Case T-164/12 R *Alstom* v *Commission*, not yet reported, and the order of the President of the General Court of 16 November 2012 in Case T-345/12 R *Akzo Nobel* v *Commission*, not yet reported.

[52] Reference is made to Case C-536/11 *Donau Chemie and Others*, judgment of 6 June 2013, not yet reported, paragraphs 25 to 27.

the competition law provisions of the Member States and of the European Union,[53] the Commission states that "to date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered"[54] and that "obtaining the evidence needed to prove a case"[55] remains an obstacle. In particular, the Commission notes that "a claim under the law of one Member State may lead to full recovery of the claimant's loss, while a claim for an identical infringement in another Member State may lead to a significantly lower award or even no award at all".[56] On the other hand, in DB Schenker's view, the defence appears to contend that access to ESA's evidence, and by extension that of the Commission, concerning their "central investigations and infringement decisions" should be subject to national court procedures. It rejects that position as flawed.

ESA

144. ESA considers that the third plea consists of one substantive and one procedural part.

145. The substantive part alleges an infringement of the overriding public interest rule in Article 4(4) RAD 2012 in conjunction with an infringement of Article 38 SCA. ESA submits that the alleged infringement of Article 38 SCA is simply the contention that the contested decision is not "lawful". ESA avers that the contested decision does give several reasons why it concluded that although the case "does involve public interests (relating to institutional transparency and private enforcement), speaking in favour of disclosure, these public interests cannot, in the present case, *override* the protection of the commercial interests at issue and professional secrecy".

146. ESA submits that the application does not take issue with the contested decision insofar as it concludes at paragraphs 40 and 63 that in the present case unfettered public access to the "information at issue" could entail a risk of undermining competition. In that regard, ESA refers to Article 1(2) EEA.

147. ESA relies on the argument made in the contested decision, namely, that the existence of the *Zwartveld* procedure strengthens the conclusion that there is no overriding public interest in unconditional disclosure to the public on the basis that such procedure is "an appropriate procedure, a better targeted framework and a more proportionate measure than public access to support private enforcement of the EEA

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[53] Reference is made to COM(2013) 404 final.

[54] Ibid., p. 4.

[55] Ibid., p. 4.

[56] Ibid., p. 11.

competition rules".[57] Moreover, it contends that the Court must not "disregard the national rules governing the follow-on action in the Oslo District Court".

148. ESA makes reference to ECJ case law on the right to obtain damages in competition law. It acknowledges that those private actions before national courts can make a significant contribution to the maintenance of effective competition.[58] At the same time, it refers also to ECJ case law on the importance of ensuring the effectiveness of cartel leniency programmes.[59] In ESA's view, it would not serve the purpose of a uniform application of EEA law were that law to oblige the Contracting Parties to design their relevant laws on discovery and disclosure in conformity with EEA competition law and, at the same time, ignore the existence of appropriately balanced national rules when appraising the proportionality of making commercially sensitive information available to the public at large and not simply to potential claimants under national procedures that conform to the requirements laid down in *Pfleiderer* and *Donau Chemie*.

149. ESA refers to the national rules on discovery in the Norwegian Dispute Act. It asserts that in *Pfleiderer* and *Donau Chemie* the ECJ essentially applied proportionality considerations. ESA notes that the principle of proportionality is a general principle of EEA law[60] that applies if different means to achieve the same public interest objective have to be weighed. ESA contends that the principle is no less relevant where different public interest objectives must be balanced.

150. ESA contends that "it is precisely for reasons of proportionality that the Authority disagrees that the public interest in private enforcement in the present case overrides the protection of the commercial interests at issue and professional secrecy. As set out in the contested decision, unrestricted disclosure of documents containing commercially sensitive information to the general public at large would lead to disproportionate effects. Disproportionate, as measures exist that are less deleterious to the professional secrecy and the maintenance of undistorted competition; but which are, for the very least, equally well suited to serve the specific information interest of those who claim to have suffered loss and damages as a consequence of a breach of the EEA competition rules."

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[57] Reference is made to ESA's Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement, OJ 2006 C 305, p. 19, points 22 and 24.

[58] Reference is made to *Donau Chemie and Others*, cited above, paragraphs 20 and 21, and Case C-360/09 *Pfleiderer AG* v *Bundeskartellamt* [2011] ECR I-5161, paragraph 28 and case law cited.

[59] Reference is made to *Pfleiderer*, cited above, paragraphs 25 to 27 and 29 to 31 and case law cited, and *Donau Chemie and Others*, cited above, paragraphs 24, 44 to 48 and case law cited.

[60] Reference is made to Case E-4/04 *Pedicel AS* v *Sosial- og helsedirektoratet* [2005] EFTA Ct. Rep. 1, paragraphs 55 and 56.

151. ESA contends that, "as in the present abuse investigation concerning an industrial services market" that gave rise to the inspection in question, those capable of pursuing private enforcement will "always be a small group of potential litigants. And indeed a very small one compared to the unlimited number of addressees of [ESA's] RAD 2012."

152. In ESA's view, the application presupposes an additional infringement of the EEA competition rules notwithstanding the absence of any public competition authority or court decision to that extent.[61] It contends that there is nothing in the contested decision to support the assertion that ESA failed to take account of the fact that the "information in the remaining inspection documents" might also be relevant to other cases, actual or potential, aside from the follow-on action pending before the Oslo District Court. In its view, the application is the first time that DB Schenker has raised this argument.

153. As regards the procedural part of the plea, the duty to state reasons under Article 16 SCA, ESA makes reference to its earlier arguments, summarised in paragraph 129 above. ESA contends that, contrary to the argument advanced in the application, it is not required to adduce additional explanations on the "general relationship" between Article 4(4) RAD 2012 and the obligation of professional secrecy. While not excluding the possibility that the first indent of Article 4(4) RAD 2012 might have a greater scope than professional secrecy, for the purposes of adopting the contested decision, it was unnecessary, according to ESA, to discuss the relationship between those provisions more generally.

154. Moreover, in ESA's assessment, the contested decision does not fail to set out why the documents concerned are covered by professional secrecy. It demonstrates, in addition, that the documents concerned are worthy of protection. The contested decision describes each document, both individually on the attached lists of documents, and as part of groups of documents. Moreover, the contested decision explains that the "non-disclosed information", despite its age, still constitutes essential elements of Norway Post's "commercial position". ESA asserts that, on its understanding, it requires "no further elaboration than already provided in the decision that current essential elements of a company's commercial position are worthy of protection".

155. Finally, ESA contends that the contested decision, in paragraphs 33 to 41 and 56 to 64, specifically addresses the issue of whether the public interests involved in the present case could override the protection of the commercial interests at issue and professional secrecy.

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[61] Reference is made to *Post Danmark*, cited above, paragraph 21 et seq.

156. In its rejoinder, ESA contends that the European Ombudsman has stated that the "existence of a public interest in private enforcement does not mean that, in every case, this public interest would be an 'overriding' public interest".[62] The European Ombudsman also considered that the existence of an alternative channel of private enforcement of EU competition law through Article 15 of Regulation No 1/2003 "diminishes significantly the weight of the need to grant public access in the context of the balancing exercise".[63] According to ESA, the need to protect documents containing confidential information and business secrets weighs heavily on the "other side of the scales" because the "protection of professional secrets is a fundamental right".[64]

157. As for the European Commission's proposed directive on the disclosure of evidence, ESA observes in its rejoinder that this remains only a proposal and that, in any event, the EEA Joint Committee would need to incorporate it into the EEA Agreement.[65]

Fourth plea: infringement of the right to partial access in Article 4(9) RAD 2012 and the duty to state reasons in Article 16 SCA

158. DB Schenker submits that Article 4(9) RAD 2012 grants a right to partial access to those parts of a document that are not covered by any exception ("the remaining parts of the documents shall be released"). In its view, ESA's refusal to grant partial access to the documents dealt with in section 5 of the decision infringes the public's right to partial access under Article 4(9) RAD 2012 and contains manifest errors of assessment in addition to the breach of Articles 16 and 38 SCA.

159. First, DB Schenker contests ESA's conclusion that "redacting is feasible" only in relation to the documents that Norway Post provided in its letter of 28 January 2013.

160. Second, DB Schenker notes that in the annulled decision – in which ESA claimed to have reviewed all of the inspection documents – ESA did not argue that partial access could not provide access to "any meaningful" part of the documents but rather that the "burden of work" would be unreasonable and disproportionate. The applicants contend, therefore, that ESA thus contradicted itself in the contested decision.

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62 Reference is made to Decision of the European Ombudsman 3699/2006/ELB, paragraph 55.

63 Ibid., paragraphs 106 and 113.

64 Reference is made to Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 90, and to Decision of the European Ombudsman 3699/2006/ELB, paragraph 106.

65 Reference is made to *Wahl*, cited above, paragraph 73.

161. Third, according to DB Schenker, the contested decision contains no explanation of what ESA regards as "no meaningful content". In DB Schenker's view, to allow ESA to set aside the right to partial access whenever it claims that the right would not yield any "meaningful content" would in reality deprive that statutory right of substance. DB Schenker notes that the right to partial access is a manifestation of the principle of proportionality in EEA law and that the Court has previously held that an exception to that right must be interpreted exceptionally narrowly.[66] ESA's interpretation must therefore be held unlawful.

162. For those reasons, individually and collectively, DB Schenker contends that the contested decision must be annulled insofar as it denies partial access to any of the inspection documents.

ESA

163. ESA considers that the fourth plea consists of one substantive and one procedural part.

164. The substantive part alleges an infringement of the overriding public interest rule in Article 4(9) RAD 2012 in conjunction with an infringement of Article 38 SCA. ESA submits that the alleged infringement of Article 38 SCA is simply the contention that the contested decision is not "lawful". ESA avers that the contested decision does give several reasons why it concluded that although the case "does involve public interests (relating to institutional transparency and private enforcement), speaking in favour of disclosure, these public interests cannot, in the present case, *override* the protection of the commercial interests at issue and professional secrecy".

165. ESA rejects the view that, in its implementation of the judgment in *DB Schenker I*, there is any breach of Article 38 SCA and refers to its earlier arguments summarised above in paragraph 84. ESA states that it understands the plea as relating only to the 229 inspection documents to which access was refused in full.

166. ESA contends that, in the context of plea concerning an alleged failure to grant partial access, it fails to understand the relevance of the complaint that it had not individually registered the inspection documents in its case file. It avers that, in any event, the contested decision identifies the inspection documents individually and that the lists attached to the contested decision describe "each individual document in further detail".

167. ESA states that it registered all the inspection documents in Case 34250 by scanning each page of the documents copied during the inspection. Document

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[66] Reference is made to *DB Schenker I*, cited above, paragraph 264.

("event") numbers were not assigned to individual documents, but to batches of documents as listed per inspector, by the inspectors and during the inspections.

168. ESA asserts that it is "living up to its obligation to ensure the EEA rights of all private companies involved in the matter". It acknowledges that the Court previously found that "the burden of work" could not be relied upon in the circumstances.[67] As a consequence, following that ruling, it did not allow "the burden of work implied to stand in the way of granting public access, in part or in full". ESA asserts that there has been nothing inconsistent in its approach.[68]

169. As regards the procedural part of the plea, the duty to state reasons under Article 16 SCA, ESA makes reference to its earlier arguments, summarised in paragraph 129 above. ESA reiterates that, contrary to the argument advanced in the application, it did not contradict itself in the contested decision. Furthermore, in paragraph 65 of the contested decision, it clarified that the documents at issue would have to be "*redacted so severely as to leave no meaningful content*". When read in the context of the reasons for refusing public access, as it must, ESA asserts that this reasoning suffices for the purposes of Article 16 SCA. In its view, it cannot be decisive in and of itself that the specific reasoning on partial access is "brief" if it is sufficiently clear when read in light of the decision as a whole.

170. In its rejoinder, ESA observes that, pursuant to Article 66(2) RoP, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.[69] It contends that none of the exceptions specified in Article 66(3) RoP are applicable in the present case.

Statement in intervention

Norway Post

171. Norway Post fully supports the form of order sought by ESA. Norway Post stresses the fact that no limitations on use may be placed on documents released pursuant to the RAD 2012.

172. Norway Post submits that as the "owner of the inspection documents" it has a profound interest in preventing general access by all to an even greater scope of its commercial information and its business relations than has already been provided for in the contested decision. Further disclosure would undermine the protection of its commercial interests by enabling the exploitation of strategic information and

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[67] Ibid., paragraph 270.

[68] Ibid., paragraph 263.

[69] Reference is made to point A.4.a., second paragraph, second sentence, of the Court's Notes for the guidance of Counsel 2012.

subsequent market adaptations. Moreover, its interest in the non-disclosure of the contested documents coincides with the public interests in professional secrecy and undistorted competition.

173. Norway Post contends that ESA is correct in maintaining that the level of access granted in the contested decision is appropriate and, furthermore, "in accordance with RAD 2012 and thus lawful".

First plea in intervention: the action for annulment is inadmissible due to the applicants' failure to submit a confirmatory application

174. Norway Post fully supports ESA's contention that, in accordance with the case law of the ECJ concerning Regulation No 1049/2001 and the principle of homogeneity, DB Schenker's failure to submit a confirmatory application, as required by Article 7(6) RAD 2012, prior to initiating proceedings before the Court renders the application for annulment inadmissible.

175. Norway Post notes that the relevant provision of the RAD 2012 applies to all access requests "decided upon" after its entry into force in September 2012. Consequently, even though the initial request was made under the RAD, and even though the contested decision replaces the original annulled decision, in Norway Post's view, the confirmatory application procedure nevertheless remains applicable in relation to the contested decision.

176. Irrespective of the applicability of the material provisions of the RAD 2012 to the contested decision, the requirement that the applicants comply with the relevant procedural rules of the RAD 2012 in no way jeopardises their established rights of legitimate expectations. According to Norway Post, the "purported controversy" regarding the material provisions of RAD 2012 is "merely theoretical" as the relevant provisions forming the basis for the contested decision remain the same as under the RAD. Consequently, the application of the confirmatory application procedure in Article 7(6) RAD 2012 does not constitute an illegal retroactive application capable of adversely affecting the applicants' established legal position.

177. Norway Post contends that to disregard the procedural requirements of RAD 2012 would place it in an unreasonably adverse position when compared with any EU national counterparts seeking to ensure their corresponding interest in avoiding excessive document disclosure under the relevant EU rules.

Second plea in intervention: disclosure of the exempt documents would undermine the protection of Norway Post's commercial interests

178. Norway Post asserts that further disclosure of the inspection documents would undermine the protection of its commercial interests. Not only the potential

harm resulting from the disclosure of individual documents should be considered; due consideration should also be given to the potential collective impact of granting access to numerous commercial documents that may together provide a comprehensive information as to the "inner workings" of Norway Post's business.

179. Norway Post contends that "[to] a large extent, the [inspection documents] were never liable to substantiate [ESA's] case against Norway Post". Norway Post alleges that the disclosure to its competitors of information contained in the inspection documents may well constitute an illegal exchange of information. Moreover, it would amount to a violation of Norway Post's contractual obligations to maintain confidentiality. Further disclosure than has already been provided for would "easily amount to a disproportionate intrusion on its and its business [partners'] private commercial affairs".

180. Norway Post asserts that the general nature of the RAD 2012 calls for a restrictive approach to extensive disclosure of an undertaking's private commercial information particularly where the "relevant information is only peripherally related to [ESA's] governance".

181. Norway Post submits that the "exempt information" in the inspection documents consisting of strategies, reviews, analyses and agreements does not constitute information "similar" to that referred to in *DB Schenker I* that is presumed no longer to be confidential when over 5 years old.[70] Norway Post stresses that the relevant market remains largely the same as it was when the documents in question were produced.

182. According to Norway Post, the disclosure "of further information contained in the partially or wholly exempt inspection documents" may unreasonably harm Norway Post in providing its competitors with an unfair advantage, enabling them to predict and adapt to Norway Post's market behaviour, and enabling Norway Post's customers to exploit the information in contractual negotiations.

183. The inspection documents may appropriately be grouped according to their content.[71] According to Norway Post, the applicants have been provided with an appropriately detailed "explanation of the documents" in the contested decision and in the 26 document lists annexed to it.

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[70] Reference is made to *DB Schenker I*, cited above, paragraph 277.

[71] Ibid., paragraph 135.

Third plea in intervention: there is no overriding public interest warranting more extensive document disclosure than provided for in the contested decision

184. Norway Post stresses that, pursuant to Article 4(4) RAD 2012 (compare Article 4(2) RAD), a refusal to provide access to documents in order to protect commercial interests may only be upheld if there is no overriding public interest in disclosure. Institutional transparency and the facilitation of private competition law enforcement constitute relevant public interests. Norway Post notes that private enforcement of competition law must always be pursued before national courts. A private action seeking to enforce competition law will therefore always be subject to national litigation rules as well as any relevant EEA-related procedural measures, and in particular the *Zwartveld* procedure.

185. Norway Post emphasises that national litigation rules and any relevant EEA-related measures are not primarily an alternative to rules on access to documents but, in relation to ensuring the public interest in facilitating private competition law enforcement, the rules concerned have a supplementary function capable of meeting a potential claimant's needs at different stages of the procedure. Norway Post considers that, prior to the initiation of any private competition law action before a national court, an access to documents request may indeed serve to facilitate private competition law enforcement. Pursuant to Article 16 of Chapter II of Protocol 4 SCA and section 8 of the Norwegian EEA Competition Law, a Norwegian court is bound by ESA's finding of an infringement of Article 53 EEA. Accordingly, the existence of an ESA infringement decision and subsequent Court judgment would disburden potential claimants from the obligation to substantiate a breach of the competition rules as part of its claim for damages. Norway Post submits that this should be taken into account in balancing the opposing interests under Article 4(4) RAD 2012. Norway Post submits that the fact that the applicants lodged their application for damages before the Oslo District Court on 24 June 2010 supports this contention.

186. Norway Post contends that it would be wholly inappropriate for a claimant to rely upon the RAD 2012 to substantiate a damages claim. It considers that the applicants have placed "unreasonably excessive reliance on the RAD 2012, the primary objective of which is to ensure transparency" of ESA's "administrative governance". Moreover, an interpretation "compliant" with the applicants' "apparent expectations" would likely lead to an excessively wide scope of application of the public interest reservation "implied by Article 4(4) RAD 2012 (cf. Article 4(2) [RAD])". This is further supported by the existence of national litigation rules aimed precisely at enabling a claimant to sufficiently substantiate his claim. However, as a

national court would be able to restrict the subsequent use of the "information in question" beyond the purposes of a damages action, the national court could still be able to afford any third party concerned appreciable protection of their private information in comparison with a situation of general public disclosure. Thus, the availability of more suitable national disclosure provisions constitutes an important consideration when determining the level of access to be granted under the RAD 2012. Therefore, Norway Post contends that there is no overriding public interest in the present case that would justify a wider scope of access to Norway Post's commercial information than has already been provided for in the contested decision.

Written observations on the statement in intervention

DB Schenker

187. The applicants have contested all of Norway Post's pleas. DB Schenker asserts that Norway Post has not adduced any support for its claim that its "legitimate interests" as "the owner" of the inspection documents would have led the EU courts to rule the action inadmissible and that, consequently, the Court should do the same on the basis of homogeneity. Norway Post is not the "owner" of the documents, as these were lawfully copied by ESA during its inspection. These copies belong to ESA but have the status of "third-party documents" pursuant to Article 4(8) RAD 2012.

188. DB Schenker contends that, pursuant to Article 4(8) RAD 2012, the responsibility for "vetting" third-party documents rests with ESA. Noting that Norway Post was consulted three times by ESA, DB Schenker submits that it was open to Norway Post to bring an action for annulment in order to prevent disclosure.[72]

189. According to DB Schenker, Norway Post has not sought to substantiate its "group claims" for confidentiality. In addition, Norway Post did not put forward any support for its contention that the disclosure of the inspection documents may well constitute "an illegal information exchange".

[72] Reference is made to the order in *Alstom* v *Commission*, cited above, the order in *Akzo Nobel* v *Commission*, cited above.

ESA

190. ESA expresses its surprise on learning that the applicants have petitioned Oslo District Court in their follow-on action for disclosure of evidence. ESA contends that it only became aware of such a petition on reading paragraph 35 of the Statement in Intervention. It notes that this petition was made prior to the applicants' initial access to documents request of 3 August 2010.

Carl Baudenbacher
Judge-Rapporteur