JUDGMENT OF THE COURT
7 July 2014

(Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – Measures of organization of procedure – EFTA Surveillance Authority's Rules on access to documents 2012)

In Case E-5/13,

Schenker North AB, established in Gothenburg, Sweden,

Schenker Privpak AB, established in Borås, Sweden,

Schenker Privpak AS, established in Oslo, Norway,

represented by Jon Midthjell, advokat,

applicants,

v

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

defendant,

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

intervener,

APPLICATION for annulment of EFTA Surveillance Authority (ESA) Decisions of 25 January 2013 and 18 February 2013 in ESA Case No 73075 to deny access to documents, belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system), under the new rules on

access to documents enacted by ESA on 5 September 2012 in ESA Decision No 300/12/COL ("RAD 2012") (not published in the Official Journal).

THE COURT,

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

Registrar: Gunnar Selvik,

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

having regard to the Report for the Hearing,

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

gives the following

Judgment

I Introduction

1 Schenker North AB and Schenker Privpak AB, both established in Sweden, and Schenker Privpak AS, established in Norway, ("the applicants" or, collectively, "DB Schenker") are part of the DB Schenker group. The group is a large European freight forwarding and logistics undertaking. It combines all the transport and logistics activities of Deutsche Bahn AG except passenger transport. All three applicants operate in that sector.

2 The present case concerns the annulment of two EFTA Surveillance Authority ("ESA") decisions: the first of 25 January 2013 ("first contested decision") and the second of 18 February 2013 ("second contested decision"). These decisions concern DB Schenker's public access request for "the internal documents belonging to the file (or files) that led to ESA's Decision No 321/10/COL (Norway Post – loyalty/discount system) of 14 July 2010" as well as to the complete version of ESA Decision No 321/10/COL.

3 ESA annexed to the first contested decision a list of the internal documents in the cases relating to ESA's Decision No 321/10/COL, Case No 13115 and No 14474, and an "updated final version" of that list to the second contested

decision. The list contained 76 different documents, of which one was part of both files. Of the 76 documents, ESA granted access to 21 documents in full and to 19 in part. To the other 36 documents access was denied.

4 Decision No 321/10/COL concerned an investigation commenced by ESA *ex officio* in 2001 as regards the possible abuse by Posten Norge ("Norway Post") of a dominant position under Article 54 EEA by having used an unlawful discount system in the field of business-to-consumer parcel services.

5 According to the redacted and publicly available version of Decision No 321/10/COL, some of ESA's concerns related to possible loyalty-inducing effects of retroactive rebates used by Norway Post. Other concerns related to the grant of discounts "which depended on whether customers reached certain targets fixed on an annual basis; indications that targets were equivalent or close to the total requirement of customers thereby discouraging customers from buying from competitors; the use of rebate criteria with seemingly little or no relation to cost savings made by Norway Post; indications that Norway Post discriminated between customers depending on whether there was competition for the customers or not; indications that volume rebates did not apply equally to all customers; a lack of transparency regarding the rebate criteria giving Norway Post more flexibility to grant differentiated discounts for the same volumes; and, finally, clauses in Norway Post's standard contracts that might induce buyers not to buy from competitors."

6 However, on 14 July 2010, ESA closed the case stating that "on the basis of the information in the Authority's possession, there is insufficient evidence for pursuing a possible infringement of Article 54 of the EEA Agreement on the part of Norway Post".

7 On the same day, ESA adopted Decision No 322/10/COL, by which ESA concluded that Norway Post had committed an infringement of Article 54 EEA by abusing its dominant position between 2000 and 2006 in the business-to-consumer parcel market in Norway. Norway Post applied to the Court to have Decision No 322/10/COL 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). Accordingly, the two investigations were conducted in the same period and market.

II Legal background

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA")

8 Article 16 SCA reads:

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

9 Article 36 SCA reads:

> *The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.*
>
> *Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.*
>
> *The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*
>
> *If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.*

RAD 2012

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

> *THE EFTA SURVEILLANCE AUTHORITY.*
>
> *HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular its Article 13,*
>
> *Whereas:*
>
> *Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system based on democracy and human rights, as referred to in recital I of the preamble of the EEA Agreement,*
>
> *The purpose of these Rules is to ensure openness and transparency at the Authority, while still showing due concern for the necessary limitations due to protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed necessary in order to safeguard the Authority's ability to carry out its tasks,*
>
> *The Authority should take the necessary measures to inform the public of the new Rules on public access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate the exercise by citizens of their rights, the Authority should provide access to a register of documents.*

11 Article 1 of the RAD 2012 reads as follows:

> ***Purpose***
>
> *The purpose of these Rules is:*
>
> *(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to documents held by the Authority,*
>
> *(b) to establish rules ensuring the easiest possible exercise of this right, and*
>
> *(c) to promote good administrative practice relating to access to documents.*

12 Article 2 of the RAD 2012 reads as follows:

> ***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 activity of the Authority.*
>
> …
>
> *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.*

13 Article 3(a) of the RAD 2012 reads as follows:

> ***Definitions***
>
> *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 Authority's sphere of responsibility, except unfinished documents or drafts of documents;*

14 Article 4 of the RAD 2012 reads as follows:

Exceptions

Under these Rules:

…

4. The Authority shall refuse access to a document, unless there is an overriding public interest in disclosure, where disclosure would undermine the protection of:

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

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits.

5. …

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

7. …

8. As regards third-party documents, the Authority shall consult the third party with a view to assessing whether an exception in paragraph 3 or 4 is applicable, unless it is clear that the document shall not be disclosed or, when the document does not originate from an EFTA State, it is clear that the document shall be disclosed.

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

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

15 Article 7 of the RAD 2012 reads as follows:

> ***Processing of Applications***
>
> *1. …*
>
> *2. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within l0 working days from registration of the application.*
>
> *3. In exceptional cases, for example in the event of an application relating to a long document or to a large number of documents, the time-limit provided for in paragraph 2 may be extended by 30 working days. The Authority shall notify the applicant thereof as quickly as possible.*
>
> *4. In cases where the Authority consults third parties in accordance with Article 4(8) of these Rules, the time-limit provided for in paragraph2 or 3 above may be suspended, for the documents concerned and for as long as the consultation is pending. The Authority shall inform the applicant of any such suspension as quickly as possible, and the Authority shall endeavour to complete any such consultation within a reasonable time.*
>
> *5. Failure by the Authority to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application under paragraph 6 below.*
>
> *6. In the event of total or partial refusal the applicant may, within 30 working days of receiving the Authority's reply, make a confirmatory application asking the Authority to reconsider its position. Paragraphs 1 to 4 above apply. The Decision of the Authority shall be adopted by the College Member responsible for public access to documents. In the event of confirmation of the total or partial refusal, the Authority shall inform the applicant of the remedies open to him or her by instituting court proceedings against the Authority under the conditions laid down in Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Failure by the Authority to reply within the prescribed time-limit shall be considered as a negative reply and thus also entitle the applicant to institute such court proceedings.*

16 Article 13 of the RAD 2012 reads as follows:

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

These Rules shall enter into force on the day following the adoption of the present Decision and shall be applicable to all access requests decided upon from that date onwards. From the same time, Decision 4071081COL of 27 June 2008 to adopt new Rules on Public Access to documents, is repealed.

The Authority shall make these Rules available on its website.

III Pre-litigation procedure

17 On 11 August 2012, DB Schenker submitted a request to ESA asking for access to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system) of 14 July 2010 and the complete statement of content for all documents belonging to the case file, or case files which led to that decision. DB Schenker informed ESA of the reasons for its request and noted that ESA should expect additional access requests after DB Schenker had received the complete statement of content of the relevant file or files.

18 On 17 August 2012, DB Schenker was granted access to a redacted copy of ESA Decision No 321/10/COL of 14 July 2010.

19 On 5 September 2012, ESA adopted the new RAD 2012 by College Decision No 300/12/COL.

20 On 19 September 2012, DB Schenker sent a confirmatory application to ESA under Article 7(5) and (6) RAD 2012 for the documents it had requested on 11 August 2012.

21 On 1 October 2012, ESA sent an email with an attached letter, signed by its President and referenced as Event No 647297 Case No 72372, in response to DB Schenker's confirmatory application of 19 September 2012.

22 On 27 November 2012, DB Schenker sent an email to ESA with a letter containing a new access request for the internal documents belonging to the file or files which led to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system) on 14 July 2010.

23 In its reply of 6 December 2012, ESA refused to grant public access to any of the documents at issue, invoking Article 4(6) RAD 2012. ESA stated that within 30 working days of receiving that email DB Schenker had the right to make a confirmatory application pursuant to Article 7(6) RAD 2012 asking ESA to reconsider its position.

24 On 14 January 2013, DB Schenker sent an email together with a letter to the President of ESA. The letter contained a confirmatory application for the internal documents asking ESA to reconsider its position.

25 On 25 January 2013, the President of ESA sent a letter to DB Schenker in response to the confirmatory application. This letter constitutes the first contested decision.

26 To that first contested decision, ESA annexed a list of the internal documents in Cases No 13115 and No 14474 containing 76 different documents, of which one was listed in both files. ESA took a definitive position on 71 of the 76 documents concerned. The remaining five documents were subject to a suspended deadline pending consultation with Norway Post on the protection of business secrets.

27 On 18 February 2013, the President of ESA sent a letter to DB Schenker concerning the five remaining documents. This letter constitutes the second contested decision.

28 As regards the remaining five documents on which ESA had not taken a final position in the first contested decision, ESA granted full access in the letter of 18 February 2013 to one document, granted partial access to two documents in accordance with Article 4(9) RAD 2012 and denied access as regards two documents by reference to Article 4(4) and (6) RAD 2012, after having consulted Norway Post in accordance with Article 4(8) RAD 2012.

IV The contested decisions

First contested decision

29 In a letter of 25 January 2013 and referenced as Event No 659700 in Case No 73075, ESA wrote to DB Schenker:

> "RE: DB Schenker - confirmatory application for public access to internal documents concerning ESA Decision 321/10/COL
>
> I refer to your confirmatory application submitted by email of 14 January 2013.
>
> The Authority has, after carrying out a concrete, individual examination of the relevant documents, reconsidered its position and decided to grant access to a part of the internal documents concerning ESA Decision 321/10/COL (cases 13115 and 14474), based on article 4(10) of the Authority's Rules on public access to documents ('RAD').
>
> Partial access in accordance with article 4(9) RAD is granted to several documents, where information on private individuals in accordance with article 4(3)(b) RAD has been blocked out.
>
> Access is however denied to documents that are considered to be unfinished or drafts of documents, in accordance with article 3(a)

RAD. Access is also denied to some of the documents for reasons of not undermining the protection of commercial interests and the purpose of investigations, with reference to articles 4(4) and 4(6) RAD. There is no overriding public interest that might justify disclosure of these documents. The reasoning for refusal for each document can be found in the list of documents that is annexed to this letter.

As regards event no. 496763, the applicant was on 17 august 2012 granted partial access to the final version of Decision 321/10/COL. As is stated in a Letter from the President of 1 October 2012 (event no. 647297), partial access was granted to the Decision for reasons of not undermining the protection of commercial interests, with reference to articles 4(4) and 4(9) RAD. There is no overriding public interest in disclosure which could possibly alter this conclusion.

Finally, a few of the internal documents contain information from third parties. According to article 4(8) RAD, the Authority is under an obligation to consult with those third parties in order to assess whether the exceptions in articles 4(3) or 4(4) should be applied. For that reason the time-limit according to article 7(2) RAD must be suspended in accordance with Article 7(4) as regards those documents.

Please find enclosed in annex to this letter a list over the internal documents in cases no. 13115 and 14474 and a DVD with the documents to which access has been granted.

We will get back to you as soon as possible with a reply regarding access to the remaining documents.

Yours sincerely,

Oda Helen Sletnes

President

Encl.:

Annex: List of internal documents in cases 13115 and 14474.

DVD with documents to which access is granted.”

Second contested decision

30 In a letter of 18 February 2013 and referenced as Event No 662696 in Case No 73075, ESA wrote to DB Schenker:

> "Re: DB Schenker - confirmatory application for public access to internal documents - remaining documents
>
> I refer to your confirmatory application submitted by e-mail of 14 January 2013 and a Letter from the President of 25 January 2013.
>
> The Authority has, after consulting with relevant third parties in accordance with article 4(8) of the Authority's Rules on public access to documents ('RAD'), decided to grant full access to one document (event no. 181683).
>
> Partial access in accordance with article 4(9) RAD is granted to two documents (events no. 259948 and 383760). Parts of the documents have been redacted as they are considered to contain business secrets in accordance with article 4(4) RAD. The events both contain internal minutes from telephone conversations with Norway Post's legal counsel. As regards event no. 259948, the redacted parts of the document include commercial considerations that are still considered to be relevant in relation to the existing standard agreements. The redacted part of the other event, no. 383760, concerns the relationship between rebate systems, which is still of relevance for the new rebate system.
>
> Access is however denied as regards the two remaining documents (events no. 181665 and 181691) for reasons of not undermining the protection of commercial interests, with reference to articles 4(4) and 4(6) RAD. The documents both contain internal overviews of Norway Post's customer agreements drawn up by the Authority, a customer specific information that is considered to be sensitive still today. Due to the fact that the documents both consist of lists with sensitive information, it is not possible to grant partial access to them.
>
> The Authority has not been able to identify any overriding public interest that might justify disclosure of the documents that access has been denied to in full or partially. 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.

Please find enclosed the events to which access has been granted and an updated final version of the list of internal documents in cases 13115 and 14474.

Yours sincerely,

Oda Helen Sletnes
President

Encl.:
Annex List of internal documents in cases 13115 and, 14474.
Event no. 181683.
Non-confidential versions of events no.259948 and 383760."

V Procedure and forms of order sought

31 By application lodged on 8 April 2013 and registered at the Court on 10 April 2013, DB Schenker brought the present action. The defendant lodged a defence on 11 June 2013, registered at the Court on 13 June 2013. A reply by the applicants was lodged on 18 July 2013 and registered at the Court on 22 July 2013. A rejoinder by the defendant was lodged on 29 August 2013 and registered at the Court on 4 September 2013.

32 The applicants request the Court to:

- Dismiss the inadmissibility plea;

- Annul ESA's decision of 25 January 2013 in ESA Case No 73075 (DB Schenker) in so far as it refuses full or partial access under Article 3(a) RAD 2012 and Article 4(4) and (6) RAD 2012 to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post - loyalty/discount system) and refuses to grant access to the complete version of ESA Decision No 321/10/COL;

- Annul ESA's decision of 18 February 2013 in ESA Case No 73075 (DB Schenker) in so far as it refuses full or partial access under Article 4(4) and (6) RAD 2012 to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post - loyalty/discount system);

- Order ESA (and any intervener) to bear the costs.

33 The defendant requests the Court to:

- Dismiss the application, either as inadmissible, or as unfounded;

- Order the applicants to bear the costs.

34 By document lodged at the Registry of the Court on 13 May 2013, Posten Norge AS sought leave to intervene in support of the defendant. Written observations on the application to intervene were received from both the applicants and the defendant on 23 May 2013. By order of the President of the Court of 1 July 2013, Posten Norge AS was granted leave to intervene.

35 The intervener requests the Court to:

- Dismiss the application as inadmissible or as unfounded;

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

36 In their reply, the applicants requested the Court to order the defendant pursuant to Article 49 of the Rules of Procedure ("RoP") to produce a copy of the decisions it relied on for the purposes of codifying a practice allegedly existing under the RAD 2008. This request was denied by letter of 2 December 2013, since the Court did not consider it necessary for the proper conduct of the proceedings, i.e. it was not deemed necessary for ensuring that the dispute at hand was resolved under the best possible conditions.

37 By letter of 6 November 2013 and having regard to Article 33 RoP, the Registrar prescribed 26 November 2013 as the time limit by which the applicants were to provide the Registry of the Court with further proof that the authority granted to the applicants' lawyer had been properly conferred on him. By document registered at the Court on 13 November 2013, the applicants submitted three affirmations of the Power of Attorney on behalf of Schenker North AB, Schenker Privpak AB and Schenker Privpak AS.

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

VI Law

Admissibility

Arguments of the parties

39 ESA raises two pleas of inadmissibility challenging DB Schenker's application. First, it contends that 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. None of the three Norwegian and Swedish applicants has made clear in the present application why, on behalf of the DB Schenker Group, it is directly and

individually concerned by the contested confirmatory decisions on public access to documents.

40 Second, ESA argues that the applicants have failed to produce the necessary documentation evidencing that they are duly represented by a lawyer as required pursuant to the second paragraph of Article 17 of the Statute of the Court. The powers of attorney granted by the applicants on 11 November 2010 and 20 December 2010 as well as the additional power of attorney subsequently granted by the applicants' ultimate parent company, Deutsche Bahn AG, on 29 April 2013 to the lawyer representing DB Schenker do not appear to meet the requirements set out in Article 33(5)(b) RoP. In ESA's view, the three applicants have failed to establish that any of them has individually conferred any valid authority on their counsel to represent them in the present case.

41 According to ESA, it remains questionable whether the formal defects can be rectified under Article 33(6) RoP.

42 DB Schenker contends that, according to their wording, the powers of attorney cover any application relating to Case E-15/10 *Norway Post*. This is also made clear by the last paragraph of the powers of attorney which explicitly refers, in the plural, to proceedings for and behalf of the applicants. DB Schenker notes that the case at hand is directly connected to the investigation of Norway Post and the evidence to which access is sought belongs to ESA's case file(s) on the latter.

43 DB Schenker contends that the inadmissibility plea is without merit and notes that the mechanism set out in Article 33(6) RoP clearly renders the plea ineffective.

Findings of the Court

First inadmissibility plea

44 As regards the first inadmissibility claim, the Court notes that the current proceedings are not brought on behalf of the DB Schenker Group. As is stated in the application, "DB Schenker" is used as an abbreviation to refer to the three applicants collectively. Accordingly, whether the three applicants were directly and individually concerned on behalf of the DB Schenker Group is not an issue in the case at hand.

45 Accordingly, the first plea of inadmissibility raised by ESA must be rejected.

Second inadmissibility plea

46 By its second inadmissibility plea, ESA contends that the application does not satisfy the obligations resulting from Article 33(5)(b) RoP.

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

48 By letter of 6 November 2013, the Registrar required the applicants' lawyer to provide the Registry of the Court with further proof that the authority to represent his clients as their lawyer in Case E-5/13 has been properly conferred on him.

49 In reply, the applicants' lawyer provided three "affirmations of power of attorney" on behalf of Schenker North AB, Schenker Privpak AB and Schenker Privpak AS, within the time period prescribed. According to the substance of those affirmations, the applicants' lawyer "has been duly authorized to represent [their] affairs in proceedings with and concerning ESA and/or Norway Post from 2010 and onwards (namely in Cases E-5/13, E-4/13, E-8/12, E-7/12, E-14/11 and E-15/10), and any future proceedings with and concerning ESA and/or Norway Post". The attached "Articles of Association" of the three applicants provide that the undersigned – all board members – were authorised by the applicants for that purpose.

50 Accordingly, the applicants have presented sufficient proof to the Court that the authority granted to the applicants' lawyer has been properly conferred on him by someone authorised for the purpose. Moreover, ESA's contention that the obligations specified in Article 33(5)(b) RoP cannot be fulfilled in the course of the proceedings must be rejected since that possibility is provided for in Article 33(6) RoP.

51 The second plea of inadmissibility raised by ESA, alleging that the application does not satisfy the obligations resulting from Article 33(5)(b) RoP, must therefore be rejected.

Decision No 321/10/COL

52 On 17 August 2012, the applicants were granted partial access to the final version of Decision No 321/10/COL. In its reply to the applicants' confirmatory application of 19 September 2012, ESA took a final decision to grant only partial access to Decision No 321/10/COL. The letter of 1 October 2012 (Event No 647297) from the President of ESA stated that partial access was granted to the Decision for reasons of not undermining the protection of commercial interests,

in accordance with Article 4(4) and (9) RAD. There was no overriding public interest in disclosure which could possibly alter this conclusion.

53 The Court notes that a decision which has not been challenged by the addressee within the time-limit of two months laid down by Article 36 SCA becomes definitive against him. Furthermore, time-limits for bringing proceedings, which are a matter of public policy, are not subject to the discretion either of the Court or of the parties (compare Case C-208/11 P *Internationaler Hilfsfonds* v *Commission*, order of 15 February 2012, published electronically, paragraph 34).

54 The applicants did not institute court proceedings against ESA under the conditions laid down in Article 36 SCA within the time-limit described therein. In those circumstances, the decision of 1 October 2012 became definitive against the applicants.

55 However, in reply to the applicants' confirmatory application of 14 January 2013, concerning their request to obtain access to the internal documents in the case file, ESA sent the first contested decision to the applicants on 25 January 2013 and included the partially redacted version of Decision No 321/10/COL.

56 On this basis, the Court has to address whether the first contested decision must be regarded as a new and actionable decision on the re-disclosure of the partially redacted version of Decision No 321/10/COL (Norway Post – loyalty/discount system).

57 According to settled case law, an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for initiating proceedings is inadmissible. A measure is regarded as merely confirmatory of a previous decision if it contains no new factor as compared with the previous measure and was not preceded by a re-examination of the circumstances of the person to whom that measure was addressed (compare, in that regard, Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14; and Case T-82/92 *Cortes Jiminez and Others* v *Commission* [1994] ECR-SC I-A-69 and II-237, paragraph 14).

58 However, the confirmatory or other nature of a measure cannot be determined solely by reference to its content as compared with that of the previous decision which it confirms. The nature of the contested measure must also be appraised in the light of the nature of the request to which it constitutes a reply (see Case E-8/12 *DB Schenker* v *ESA*, order of 12 May 2014, not yet reported, paragraph 145).

59 In the case at hand, the applicants argue that the first contested decision has to be considered actionable also in respect of granting partial access to Decision No 321/10/COL. The earlier decisions concerning access to that decision were taken before the Court rendered its judgment in Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178 ("*DB Schenker I*") and that judgment resulted in a

material change to the basis on which ESA's previous decision was made. Indeed, ESA concurs with the applicants' contention that it adopted a new decision regarding public access, including Decision No 321/10/COL on the list of the internal documents to which access had been requested.

60 Independently of the question whether Decision No 321/10/COL can be qualified as an internal document within the meaning of Article 4(6) RAD 2012, its inclusion in the reasoning of the first contested decision, and in the list attached to it, shows that ESA has made a new assessment in that respect, in response to the confirmatory application. On this point, ESA expressly states in its defence that it included Decision 321/10/COL in the list of internal documents since it is not explicitly addressed to anyone and could, therefore, technically be categorised as an internal document. ESA also reconsidered its final decision of 1 October 2012 as regards justification. Accordingly, the first contested decision cannot be regarded as a mere confirmation of the previous decision but as the definitive outcome of a reconsideration of its position. Therefore, the application is admissible insofar as it challenges the decision on the partial disclosure of Decision No 321/10/COL.

61 The application is therefore admissible in its entirety.

Substance

Initial remarks on the nature and interpretation of the RAD 2012

62 The EEA Joint Committee has not enacted rules on the right of public access to documents held by ESA. Therefore, it is incumbent upon ESA to adopt rules on the processing of access to documents requests, by virtue of its power of internal organisation, which ensure that its internal operation is in conformity with the general principles of EEA law, in particular the principles of procedural homogeneity (see *DB Schenker I*, cited above, paragraphs 77 to 78), good administration, and respect for fundamental rights.

63 Decision No 300/12/COL of 5 September 2012 to adopt revised rules on public access to documents, and repealing Decision No 407/08/COL, was adopted by ESA of its own motion based on Article 13 SCA.

64 The fact that the RAD 2012 have legal effect vis-à-vis third parties cannot call into question their general categorisation as a measure of internal organisation. There is nothing to prevent rules on the internal organisation of the work of an institution having such effects, whenever these are also intended to protect natural or legal persons (see, for comparison, Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 38).

65 ESA can also not depart from the rules set out in the RAD 2012 without infringing the principle of equal treatment (see, for comparison, Case 148/73 *Louwage* [1974] ECR 81, paragraph 12, and Joined Cases 181/86 to 184/86 *Del*

Plato [1987] ECR 4991, paragraph 10). Therefore, natural and legal persons are entitled to require ESA to comply with rules which it has imposed upon itself for the purpose of examining applications for access to documents.

66 Moreover, all decisions made by ESA must comply with fundamental rights and general principles in order to ensure the protection of individuals and economic operators in the EEA (see *DB Schenker I*, paragraph 136, and case law cited, and Case E-7/12 *DB Schenker* v *ESA* ("*DB Schenker II*") [2013] EFTA Ct. Rep. 356, paragraph 125). Specifically, recital 1 in the preamble to the RAD 2012 states that "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". Based on the above, an ESA decision, even if in full compliance with its self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of those rights and principles.

67 Finally, pursuant to recital 2 in the preamble to the RAD 2012, the purpose of these rules is to ensure openness and transparency while still showing due concern for the limitations necessary to the protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed necessary in order to safeguard ESA's ability to carry out its tasks.

The first plea

Arguments of the parties

68 By the first branch of their first plea, the applicants contend that ESA infringed their right under Article 2(1) RAD 2012 by denying access to 21 documents pursuant to Article 3(a) RAD 2012.

69 The applicants claim that the exclusion of "unfinished documents" and "drafts" from the RAD 2012 conflicts with Article 2(1) RAD 2012. In essence, the applicants claim that for reasons of homogeneity the notion of "document" under Article 3(a) RAD 2012 must be interpreted to correspond with the notion under Article 2(1) 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 (OJ 2001 L 145, p. 43) ("Regulation No 1049/2001").

70 By the second branch of their first plea, the applicants argue that ESA has failed to state reasons for its refusal to grant access to the documents at issue and that therefore there has been a breach of Article 16 SCA.

71 As regards the first branch of the first plea, ESA submits that the applicants are wrong to assert that considerations of homogeneity or reciprocity effectively

oblige it to adopt rules that are identical in substance to provisions of Regulation No 1049/2001 when it exercises its powers under Article 13 SCA to organise its procedures. Consequently, it contends that the application is unfounded with respect to Article 3(a) RAD 2012.

72 The intervener underlines the fact that, pursuant to Article 13 SCA, ESA shall adopt its own rules of procedure. Consequently, ESA is afforded a considerable margin of discretion in drafting its public access rules and is not obliged to introduce rules which correspond to those at national or EU level.

73 Although the principle of homogeneity calls for a consistent interpretation of identical rules in the EU and EFTA pillars, the intervener contends that said principle does not require ESA to adopt access rules identical to those applicable in the EU. In its view, this is supported by the fact that ESA's power to adopt its own procedural rules follows directly and explicitly from primary EEA law.

74 As regards the second branch of the first plea, ESA argues that, even though the first contested decision is drafted in a brief manner with respect to the denial of access pursuant to Article 3(a) RAD 2012, it permitted the applicants to safeguard their rights and enables the Court to exercise its review. There should be no need to reason any further the application of a clear rule, such as Article 3(a) RAD 2012, than to make reference to that provision. It is not a matter of reasoning whether the rule is considered lawful.

Findings of the Court

75 As regards the first branch of the first plea, the Court notes that the definition of a document in the RAD 2012 is, in principle, identical with that provided for in Article 3(a) of the RAD 2008 (on the notion of a document, see Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten.no* v *ESA* [2013] EFTA Ct. Rep. 668, paragraph 130). However, under the new Article 3(a) "unfinished documents or drafts of documents" are excluded from the definition and consequently from the scope of the RAD 2012.

76 As the applicants have rightly submitted, those exclusions have no equivalent in Regulation No 1049/2001 and have not been defined in the RAD 2012.

77 However, the applicants' plea that Article 3(a) RAD 2012 has to be interpreted in a manner that corresponds with the definition set out in Article 3(a) of Regulation No 1049/2001 cannot be followed. The principle of procedural homogeneity cannot be used in order to fully set aside ESA's discretion in establishing the RAD 2012. Consequently, the first branch of the applicants' first plea must be dismissed. The Court recalls, however, that an ESA decision would have to be regarded as unlawful if in fact it resulted in a negation of the essential substance of the rights and principles mentioned above (see paragraph 66).

78 The Court will now assess the second branch of the first plea, i.e. whether ESA has breached Article 16 SCA with regard to its denial of access to 21 documents pursuant to Article 3(a) RAD 2012. In this regard, the Court notes that the applicants have not contested ESA's application of Article 3(a) RAD 2012 to the documents in question and thereby the legality of the decision.

79 It results from Article 16 SCA that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case. The statement of reasons must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion ESA's reasoning. The duty has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Court to exercise its power to review the legality of the decision (see, *inter alia*, *DB Schenker I*, cited above, paragraph 160, and Case E-9/12 *Iceland* v *ESA* [2013] EFTA Ct. Rep. 454, and case law cited).

80 In the case that a request for access to documents is refused, ESA must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought fall within the exceptions listed in the RAD 2012, and that there is a genuine need for the protection granted by those exceptions (see, for comparison, Case T-300/10 *Internationaler Hilfsfonds* v *Commission*, judgment of 22 May 2012, published electronically, paragraph 182, and case law cited).

81 In its first contested decision ESA states: "Access is however denied to documents that are to be considered unfinished or drafts. … The reasoning for refusal for each document can be found in the list of documents that is annexed to this letter."

82 The said list contains six columns: "Event no.", "Name", "End date", "Event type", "Event type descr." and "Reason for refusal/Comments (blank if access granted)". The content of the column bearing the header "Reason for refusal/Comments (blank if access granted)" is the same for all 21 contested documents: "Access denied. Unfinished document/draft in accordance with art.3(a) RAD".

83 As has been stated by the applicants, the remarks made in that column simply reiterate the derogation specified in Article 3(a) RAD 2012. However, such brevity must normally be considered sufficient in the context of the exception relating to unfinished documents or drafts. This is a concept essentially understandable in itself. Therefore, in the absence of specific circumstances suggesting the contrary, the fact that the statement of reasons appears formulaic does not constitute a failure to state reasons. The applicants should be fully able to understand the reasons for the refusals given to them and the Court has been able to carry out its review.

84 On this basis, the first plea must be dismissed.

The second plea

Arguments of the parties

85 DB Schenker submits at the outset that the second plea applies to both contested decisions.

86 DB Schenker argues in the first branch of its second plea that the two contested decisions are unclear with respect to the application of Article 4(6) RAD 2012. As regards the first contested decision, the applicants add that ESA referred to Article 4(6) RAD 2012, whilst stating that access was refused for the protection of the purpose of investigations. In this connection, the applicants argue that the exceptions provided for in Article 4(6) RAD 2012 do not concern investigations and that it is therefore "entirely unclear why it has been invoked as a legal basis".

87 Also as regards both contested decisions, DB Schenker argues in the second branch of its second plea that the principle of homogeneity requires Article 4(6) RAD 2012 to be construed in line with standard exceptions that can be invoked under the third indent of Article 4(2) and Article 4(3) of Regulation No 1049/2001 and their interpretation in case law. Consequently, ESA has infringed Article 2(1) RAD 2012 by denying access to the documents at issue pursuant to Article 4(6) RAD 2012.

88 As regards the alleged lack of clarity with respect to the application of Article 4(6) RAD 2012, ESA argues that that the first contested decision has to be read in its context. That is, in light of ESA's initial refusal to grant access, which was clearly based on Article 4(6) RAD 2012, and in light of the confirmatory application of 14 January 2013, where the applicants specifically referred to the fact that the refusal had been based on Article 4(6) RAD 2012.

89 As regards the second branch of the second plea, ESA submits that reasons of homogeneity and reciprocity do not require the right of access to documents to be the same in the two EEA pillars. A proper interpretation of Article 4(6) RAD 2012 must duly ensure the effectiveness of the newly introduced ESA-specific exception. Consequently, it contends that the application is unfounded with respect to Article 4(6) RAD 2012.

90 Based on the arguments set out in paragraphs 75 and 76, the intervener submits that the principle of homogeneity does not require ESA to adopt access rules identical to those applicable in the EU.

Findings of the Court

The first contested decision

91 The Court recalls that it is necessary to distinguish a plea based on an absence of reasons or inadequacy of the reasons stated from a plea based on an error of fact

or law. This last aspect falls under the review of the substantive legality of the contested decision and not the review of an alleged violation of infringement of essential procedural requirements within the meaning of Article 16 SCA. A plea alleging absence of reasons or inadequacy of the reasons stated within the meaning of Article 16 SCA may, as it involves a matter of public policy, be raised by the Court of its own motion. By contrast, a plea based on an error of fact or law, which goes to the substantive legality of the contested decision, can be examined by the Court only if raised by the applicant (see Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA* [2012] EFTA Ct. Rep. 114, paragraphs 165 and 166).

92 The Court finds that the applicants' claim of a "lack of clarity" in the first branch of the second plea has to be understood not as an attack on the substantive legality, but on the inadequacy of the reasoning within the meaning of Article 16 SCA, as further explained in the applicants' reply. In this regard, it must be observed that the applicants do not at any point in their application contest ESA's actual application of Article 4(6) RAD to the documents in question. The Court will thus assess whether the reasoning provided constitutes a breach of Article 16 SCA.

93 The Court notes that ESA states in its first contested decision:

"…

I refer to your confirmatory application submitted by email of 14 January 2013. The Authority has, after carrying out a concrete, individual examination of the relevant documents, reconsidered its position and decided to grant access to a part of the internal documents concerning ESA Decision 321/10/COL (cases 13115 and 14474), based on article 4(10) of the Authority's Rules on public access to documents ('RAD').

Partial access in accordance with Article 4(9) RAD is granted to several documents, where information on private individuals in accordance with article 4(3)(b) RAD has been blocked out.

Access is however denied to documents that are considered to be unfinished or drafts of documents, in accordance with article 3(a) RAD. Access is also denied to some of the documents for reasons of not undermining the protection of commercial interests and the purpose of investigations, with reference to articles 4(4) and 4(6) RAD. There is no overriding public interest that might justify disclosure of these documents. The reasoning for refusal for each document can be found in the list of documents that is annexed to this letter.

…"

94 To comply with the duty to give reasons, ESA must demonstrate in each individual case that the documents to which access is refused fall within one or

more of the exceptions in the RAD 2012. Against this background, the reasoning of a confirmatory decision must at least enable the Court to identify the exceptions ESA relied upon. This is of particular importance in light of the fact that a brief reasoning may be justified, as regards application of the exceptions to right for access in RAD 2012, by the need not to undermine the interests protected by them through disclosure of the very information which those exceptions are designed to protect (compare, to that effect, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 82).

95 The system established under Article 7 of the RAD 2012 makes refusal to grant access to documents subject to a two-step procedure, in which only the confirmatory decision pursuant to Article 6(6) RAD 2012 constitutes the institution's final statement of position. The subsequent review procedure is intended to enable the responsible ESA College Member to reconsider the matter without being constrained by previous statements of the competent services. The purpose of a confirmatory decision is to enable a reassessment. In that context it must therefore be possible to rely on different exceptions and reasoning in comparison with the initial decision. Moreover, nothing in the RAD 2012 prevents ESA from applying several exceptions to a single document (compare Case T-42/05 *Williams* v *Commission* [2008] ECR II-156, paragraph 126).

96 However, when ESA, in a confirmatory decision, confirms the rejection of an application on the same grounds as in its original decision, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between ESA and the applicant, taking into account also the information available to the applicant about the nature and content of the requested documents (see, for comparison, Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 44).

97 Whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances (compare *Kuijer* v *Council*, cited above, paragraph 45).

98 That is the case where, during the procedure in which application is made for access to documents, the applicant puts forward factors challenging the grounds upon which the first refusal was based and ESA subsequently decides to base its decision on different grounds. In those circumstances, the requirements governing the statement of reasons mean that ESA is obliged, when replying to a confirmatory application, to state clearly what factors have led to the change in its position and to what extent the grounds of its original decision are still relevant. Otherwise, the applicant would not be able to understand the reasons for which and to what extent the author of the reply to the confirmatory application has decided to confirm the refusal on the same grounds.

99 In its initial decision, ESA denied access to all documents to which the applicants have requested access based solely on Article 4(6) RAD 2012. This finding was

specifically challenged by the applicants in their confirmatory application of 14 January 2013. They argued that, in relying on the new rule in Article 4(6) RAD 2012, ESA sought to override the principle of homogeneity and to limit public rights of access beyond what was allowed under Union law and also in relation to ESA's own previous practice. In its confirmatory decision, ESA indicates that it has reconsidered its position and, on the basis of Article 4(10) RAD 2012, has granted full or partial access to some of the internal documents at issue.

100 As regards the remaining documents, it appears from the decision that ESA decided to rely on different exceptions, i.e. on the protection of commercial interests and the purpose of investigations for the documents at issue, and for other documents on the exclusion in relation to unfinished documents and drafts. This understanding is not changed by the fact that Article 4(6) RAD 2012 is mentioned in the reasoning of the decision. It follows from the wording used – "with reference to Article 4(4) and 4(6)" – that the sole purpose of reference to such provisions was to indicate the legal bases of the exceptions now relied upon, i.e. commercial interests and the purpose of investigations. Equally, it follows from the reasoning of the decision that as regards the remainder of the documents ESA invoked Article 3(a) RAD and not Article 4(6) RAD 2012 as the legal basis for its denial.

101 Reading the decision in context of the list attached does not assist the Court in its assessment since the reasoning used in that list repeats verbatim that used in the decision itself, i.e. "Access denied with reference to art. 4(4) and 4(6) RAD".

102 Equally, reading the first contested decision in the context of the foregoing correspondence between the parties cannot alter this assessment since ESA had the possibility – and seems to have made use of it – to rely on different exceptions as regards the documents at issue.

103 Therefore, it is not clear whether in its confirmatory decision ESA still sought to rely on Article 4(6) RAD 2012.

104 Due to a lack of clarity as to the exceptions on which ESA relied, ESA has therefore failed to provide adequate reasoning in relation to all documents at issue with respect to Article 4(6) RAD 2012. This means that the second plea must succeed with regard to the first contested decision, which must be annulled insofar as it allegedly relies on Article 4(6) RAD 2012.

The second contested decision

105 As regards the second contested decision, the Court will also assess whether the reasoning provided constitutes a breach of Article 16 SCA. The applicants' claim of a "lack of clarity" in the first branch of their second plea has to be seen as an attack on the appropriateness of the reasoning, as further explained in the applicants' reply.

106 In the second contested decision, ESA has denied access to the two documents at issue based on the following reasoning: "… for reasons of not undermining the protection of commercial interests, with reference to articles 4(4) and 4(6) RAD. The documents both contain internal overviews of Norway Post's customer agreements drawn up by the Authority, a customer specific information that is considered to be sensitive still today. Due to the fact that the documents both consist of lists with sensitive information, it is not possible to grant partial access to them."

107 The Court notes that, unlike the first contested decision, it follows from the relevant reasoning in the second contested decision that ESA still sought to rely on Article 4(6) RAD 2012. Consequently, there is no lack of clarity as to the exceptions relied upon by ESA. The first branch of the second plea must therefore be dismissed with regard to the second contested decision.

108 Nor can the second branch of the second plea, that the principle of homogeneity requires Article 4(6) RAD 2012 to be construed in line with standard exceptions that can be invoked under the third indent of Article 4(2) and Article 4(3) of Regulation No 1049/2001, succeed. The principle of procedural homogeneity cannot be used in order to fully set aside ESA's discretion in establishing the RAD 2012.

109 In those circumstances the first contested decision must be annulled insofar it allegedly relies upon Article 4(6) RAD 2012. However, as regards the second contested decision, the second plea must be dismissed.

The third plea

Arguments of the parties

110 As regards the first contested decision, the applicants submit that ESA has infringed Article 16 SCA since neither the first contested decision nor the attached list contains sufficient reasoning (first branch of the third plea). The applicants allege that a plain reading of the application shows that it has explicitly challenged the contested decision for having failed to state reasons in relation to the first and third indents of Article 4(4) RAD 2012. The applicants also dispute any suggestion that ESA can rely on its alleged reasoning in the original refusal to grant full access to Decision No 321/10/COL in order to remedy its failure to state reasons in the renewed decision taken on 25 January 2013.

111 The applicants further claim a breach of Article 2(1) RAD 2012 by denying access to 12 documents in full for reasons of not undermining the protection of commercial interests by reference to Article 4(4) RAD 2012 since ESA has manifestly failed to consider, as is, in their view, required under Article 4(4) RAD 2012, whether institutional transparency and the interest in private

enforcement of competition law might entail an overriding public interest in disclosure (second branch of the third plea).

112 As regards the second contested decision, the applicants allege that the brief and general reasoning in the contested decision, which does not take account of the present age of the documents, demonstrates a manifest error of assessment and therefore constitutes an infringement of Article 4(4) RAD 2012 (third branch of the third plea).

113 The applicants also consider ESA's argument, namely, that it does not see the interest in transparency and private enforcement of competition law as strong enough, either individually or together, to override the protection of the commercial interests at issue, to demonstrate its manifest error of assessment in relation to the overriding public interest rule (second branch of the third plea).

114 In relation to the first contested decision, ESA submits that DB Schenker's plea concerning an infringement of Article 2(1) RAD 2012 is ineffective, insofar as it is based on Article 4(4) RAD 2012. ESA argues that its refusal is explicitly based on the first and third indents of Article 4(4) RAD 2012, whereas DB Schenker challenged only the application of the first indent (protection of commercial interests) and not the third indent (protection of the purpose of investigations). Thus, the refusal decision stands on the third indent of Article 4(4) RAD 2012. In that regard, ESA submits further that an application must state the form of order sought and that no new plea may be introduced during proceedings unless it is based on matters of law or fact that come to light in the course of the proceedings.

115 As regards its renewed refusal to disclose the complete version of Decision No 321/10/COL, ESA submits that this is the only document of the first contested decision to which its arguments on the ineffectiveness of the plea do not apply. As regards its reasoning concerning the renewed refusal, ESA submits that this was sufficient, as it must be read in light of the previous refusal and the two-step administrative procedure leading up to that. The fact that the partial refusal of access was renewed does not invalidate it.

116 In relation to the second contested decision, where access was refused to two documents in full and two in part on the basis of Article 4(4) RAD 2012, ESA refutes DB Schenker's contention that the decision demonstrates a manifest error of assessment by referring to the substance of the decision.

117 ESA also submits that the second contested decision contained sufficient explanations as to how granting access could undermine the commercial interests of Norway Post. The content of all four documents concerned is described in that decision, followed by explanations why it is, from the outset, not possible to grant full access to them. Finally, the decision sets out why, in any event, there is no overriding public interest such as to justify disclosure. The applicants' contentions that the second contested decision contains a manifest error of

assessment in relation to the overriding public interest rule must therefore be rejected.

Findings of the Court

The first contested decision

118 As regards the first contested decision, the Court will initially examine the breach of the obligation to state reasons pursuant to Article 16 SCA (first branch of the third plea).

119 As argued by ESA, the Court notes that it seems likely that the applicants did not challenge the refusal pursuant to the third indent of Article 4(4) RAD 2012 on the merits. However, the applicants have contested the adequateness of the reasoning concerning ESA's reliance on both the first and third indents of Article 4(4) RAD 2012.

120 In section 4.4 of their application ("Infringement of the public right of access to documents in Article 2(1) RAD 2012 and breach of duty to state reasons with regard to the documents suppressed, in full or in part, under Article 4(4) RAD 2012") the applicants have contended globally that "the decision contains no reasoning and constitutes a clear breach of Article 16 SCA". The applicants also asserted that ESA was wrong to claim that the list attached to the first contested decision contained adequate reasoning since it solely stated "for each of the contested documents: 'Access denied with reference to art. 4(4) and 4(6) RAD'." For the sake of completeness, the Court notes that the applicants have also alleged a breach of Article 16 SCA in relation to Article 4(4) RAD 2012 in their summary of pleas, a document which they submitted to the Court together with their application in accordance with the Court's Guidance for Counsel. Finally, it is recalled that the Court may assess the adequateness of the reasoning pursuant to Article 16 SCA of its own motion.

121 Where ESA refuses access to documents, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought fall within the sphere of the exceptions listed in the RAD 2012 and, second, that there is a genuine need for protection granted by that exception.

122 ESA has relied on the reasoning that is set out in paragraphs 81 and 82 above in relation to all the documents at issue, except for its refusal to grant access to the complete version of Decision No 321/10/COL. The Court can identify from the first contested decision and the attached list that the exceptions on which ESA based its denial of access to the documents were those set out in the first and third indents of Article 4(4) RAD 2012. Moreover, some of the information provided in the "Name" column of the list attached to the first contested decision sheds light on why those exemptions might play a role:

- Event no. 181711; Name: *"ME Discount CSA concerns 0901"*

- Event No. 258704; Name: *"Discount system assessment"*

- Event no. 286207; Name: *"Inspection report – Posten Norge AS 2004"*

- Event no. 403830; Name: *"Discussion note on rebate system"*

123 However, this is not clear as regards the other documents at issue, i.e.:

- Event no. 181667; Name: *"ME follow up meeting 13.02.02"*

- Event no. 181672; Name: *"ME meeting notes 0202"*

- Event no. 181674; Name: *"ME summary of replies 1203"*

- Event no. 181710; Name: *"ME 1002"*

- Event no. 260499; Name: *"Intermediary report"*

- Event no. 284164; Name: *"COD Briefing note final"*

- Event no. 287958; Name: *"Comments on NP Letter (reporting) 6 July 2004*

- Event no. 402469; Name: "*Memo proposing that the case be closed*

124 The remainder of the reasoning in the first contested decision and the attached list is limited to stating that:

- ESA has reconsidered its position for the internal documents after having carried out an individual examination, based on Article 4(1) RAD 2012, of the documents at issue; and

- Article 4(4) RAD 2012 applies; and

- there is no overriding public interest which could possibly alter this conclusion.

125 The reasoning at issue is mainly limited to a bare restatement of the law. As set out above, a formulaic statement of reasons does not necessarily constitute a failure to state reasons if it does not prevent either the understanding or the ascertainment of the reasoning followed. However, in the present circumstances, the reasoning provided in the first contested decision does not enable the Court to exercise its review, in particular:

- as to which of the exceptions were relevant in relation to the documents listed in paragraph 123;

- why the exceptions continued to apply pursuant to Article 4(4) and (10) RAD 2012 after the case had been closed; and

- why partial access pursuant to Article 4(9) RAD 2012 could not be granted.

126 As regards the refusal in the first contested decision to disclose the complete version of Decision No 321/10/COL, the applicants relied upon the commercial interests exception and explicitly referred to the reasoning given in the decision that had been taken on 1 October 2012 (Event No 647297). In the latter decision, ESA stated that "the three blacked out parts in the copy that you have received contain information deemed to constitute business secrets of Norway Post's". Moreover, in both decisions reference was made to Article 4(4) and (9) of the RAD 2012 and it was mentioned that there is no overriding public interest in disclosure which could possibly alter this conclusion. The list attached to the first contested decision did not include additional reasoning regarding that document.

127 It follows from the reasoning provided that the disclosure of the black-lined parts might undermine the protection of commercial interests in general. However, ESA's reasoning fails to address why the exception must continue to apply pursuant to Article 4(4) and (10) of the RAD 2012 to business-related information that appears to stem from before 2004 – at least in two out of three instances.

128 Furthermore, the reasoning concerning the third indent of Article 4(4) RAD 2012 – the purpose of investigations – fails to address why this exception continues to apply when the case has been closed by ESA.

129 In sum, in relation to all documents at issue, ESA has failed to provide adequate reasoning pursuant to Article 16 SCA. The first branch of the third plea must therefore succeed. Consequently, the first contested decision must be annulled insofar as it relies on the first and third indents of Article 4(4) RAD 2012.

The second contested decision

130 The Court finds that the third branch of the third plea, where the applicants allege that the brief and general reasoning in the contested decision does not take account of the present age of the documents, has to be understood not as an attack on the substantive legality, but as an attack on the inadequacy of the reasoning within the meaning of Article 16 SCA.

131 It is recalled that partial access had been denied to two documents (Event Nos 259948 and 383760) with the following reasoning: "… Parts of the documents have been redacted as they are considered to contain business secrets in accordance with Article 4(4) RAD. The events both contain internal minutes from telephone conversations with Norway Post's legal counsel. As regards event no. 259948 the redacted parts of the documents include commercial

considerations that are still considered to be relevant in relation to the existing standard agreements. The redacted part of the other event, no. 383760, concerns the relationship between rebate systems, which is still of relevance for the new rebate system."

132 The information contained in ESA's reasoning puts the Court in a position to determine whether, based on the nature of the documents, Norway Post's commercial interests would likely be undermined specifically and effectively if the documents were disclosed. Moreover, the reasoning also explains why ESA considered that the commercial interests of Norway Post would continue to be undermined at the time the decision was taken. Against this background, the reasoning concerning the application of Article 4(4) and (10) RAD 2012 satisfies the requirements to be met in terms of quantity and quality of the reasoning (see *DB Schenker I*, cited above, paragraphs 279 to 281).

133 In addition, the applicants claim that the second contested decision demonstrates a manifest error of assessment of the overriding public interest rule since "ESA has merely stated that: 'The Authority cannot see that the interest 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.'"

134 As the Court held in *DB Schenker I*, specific policy considerations arise in requests for access to documents as part of follow-on damages cases brought before national courts concerning Articles 53 and 54 EEA. The private enforcement of these provisions ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA. While pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers (see *DB Schenker I*, cited above, paragraphs 132 and 133; as regards the importance of private enforcement compare also the Opinion of Advocate General Kokott in Case C-557/12 *Kone and Others*, opinion of 30 January 2014, published electronically, point 60).

135 However, the request for access to documents in the case at hand is not part of a follow-on damages case before a national court concerning Article 53 or 54 EEA. In general, it is sufficient to note that the case was closed on the grounds that "on the basis of the information in the Authority's possession, there is insufficient evidence for pursuing a possible infringement of Article 54 of the EEA Agreement on part of Norway Post", as has been rightly submitted by the intervener.

136 Based on the above, the contested reasoning in the second contested decision does not demonstrate a manifest error of assessment of the overriding public interest rule. Consequently, the third plea must be dismissed in its entirety as regards the second contested decision.

137 For the sake of completeness, the Court adds that since the application mainly concerned the adequacy of the reasoning applied by ESA, and only to a very limited extent attacked the substantive legality of the contested decisions, it considered that it had sufficient information to assess the application in its entirety and therefore did not consider it necessary to ask ESA, pursuant to Article 49 RoP, to furnish the Court with the underlying documents at issue.

VII Costs

138 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 66(3) RoP provides that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

139 The applicants have been unsuccessful in their claim that the two contested decisions should be annulled in their entirety. ESA and the intervener have been unsuccessful in their claim that the entirety of the application should be dismissed as inadmissible or unfounded. In those circumstances, it is appropriate to order each party and the intervener to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls ESA's decision of 25 January 2013 in ESA Case No 73075 (DB Schenker) in so far as it refuses full or partial access under Article 4(4) and (6) RAD 2012 to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post - loyalty/discount system) and refuses to grant access to the complete version of ESA Decision No 321/10/COL.**

2. **Dismisses the application as to the remainder.**

3. **Orders each party and the intervener to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 7 July 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President