



ORDER OF THE PRESIDENT

1 July 2013

(Intervention – Interest in the result of the case)

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

defendant,

APPLICATION seeking the annulment of ESA's decisions of 25 January 2013 and 18 February 2013 in ESA Case No 73075 to deny access to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system), under the new rules on public access to documents that ESA enacted on 5 September 2012 by way of ESA Decision No 300/12/COL ('RAD 2012') (not published in the Official Journal),

THE PRESIDENT

makes the following

Order**I Background**

- 1 Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (hereinafter ‘the applicants’ or, collectively, ‘DB Schenker’) are part of the DB Schenker group. The group is a large European freight forwarding and logistics undertaking. It combines all the transport and logistics activities of Deutsche Bahn AG except passenger transport. Schenker Privpak AS, a limited liability company incorporated under Norwegian law, has handled DB Schenker’s domestic business-to-customer (‘B-to-C’) parcel service in Norway. Schenker Privpak AB is a company incorporated in Sweden. Both Schenker Privpak AB and Schenker Privpak AS have handled international customers seeking B-to-C distribution in Norway.
- 2 The present case is a related follow-up of Case E-14/11 *DB Schenker v ESA* [2012] EFTA Ct. Rep. 1178, in which the same applicants sought the annulment of ESA’s Decision in Case No 68736 of 16 August 2011 denying DB Schenker access to certain documents relating to Case No 34250 Norway Post / Privpak on the basis of the Rules on Access to Documents (‘RAD’) established by the College of the EFTA Surveillance Authority on 27 June 2008.
- 3 The inspection documents obtained during ESA’s inspection of Posten Norge AS’ (‘Norway Post’ or ‘applicant intervener’) premises were obtained as part of two investigations.
- 4 The first was ESA Case No 34250 Norway Post / Privpak.
- 5 The second was ESA Case No 13115 concerning a discount system applied by Norway Post in relation to the provision of B-to-C parcel services to distance selling companies in Norway.
- 6 On 14 July 2010 ESA issued Decision 321/10/COL closing its investigation in ESA Case No 13115 reasoning that ‘[o]n 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 Judgment in Case E-14/11 *DB Schenker v ESA* was handed down on 21 December 2012. The Court annulled ESA's decision of 16 August 2011 'Norway Post/Privpak – Access to documents' insofar as it denied full or partial access to inspection documents in Case No 34250 Norway Post/Privpak.

II Facts and procedure

- 8 On 8 April 2013, DB Schenker lodged an application pursuant to Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA').
- 9 DB Schenker seeks the annulment of ESA's decisions of 25 January 2013 and 18 February 2013 in ESA Case No 73075 (DB Schenker) 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 ESA Decision No 300/12/COL to adopt revised Rules on public access to documents, and repealing Decision 407/08/COL ('revised RAD').
- 10 Firstly, DB Schenker seeks the annulment of ESA's decision of 25 January 2013 in ESA Case No 73075 (DB Schenker) insofar as it refuses full or partial access under Article 3(a) revised RAD and Articles 4(4) and 4(6) revised RAD 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 321/10/COL.
- 11 Secondly, DB Schenker seeks the annulment of 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 Articles 4(4) and 4(6) revised RAD to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system).
- 12 Thirdly, DB Schenker requests the Court to order ESA (and any intervener) to bear the costs.
- 13 On 13 May 2013, Posten Norge AS sought leave to intervene in support of the form of order sought by the defendant. The application to intervene was served on the parties in accordance with Article 89(2) of the Rules of Procedure ('RoP').
- 14 On 22 May 2013, ESA lodged its written observations on the application to intervene at the Court's Registry.

15 On 23 May 2013, DB Schenker lodged their written observations on the application to intervene at the Court's Registry.

16 On 11 June 2013, ESA lodged its defence at the Court's Registry.

III Observations of the parties

17 Norway Post requests leave to intervene in support of the form of order sought by ESA in accordance with Article 36 (3) of the Statute. It submits that the application was lodged within the time limit set in Article 89(1) RoP since notice of the application in Case E-4/13 has not yet been published in the EEA Supplement to the Official Journal.

18 Norway Post submits further that it has a direct and existing interest in the result of the case since DB Schenker's application concerns a request for access to documents which contain business secrets or other confidential information that would cause serious harm to Norway Post's commercial interests if disclosed.

19 In particular, the applicant intervener notes that DB Schenker has requested access to ESA's internal documents belonging to the files in a case concerning an investigation of a discount system applied by Norway Post. According to ESA's decision of 25 January 2013, access was refused to some of the contested documents 'for reasons of not undermining the protection of commercial interests [...]'. Norway Post submits that it is likely that many of these internal documents may contain information that could seriously undermine the protection of its commercial interests.

20 Moreover, Norway Post submits that after it was consulted, ESA also refused by decision of 18 February 2013 partial access to two documents and full access to two documents because it would undermine the protection of Norway Post's commercial interests.

21 The applicant intervener therefore contends that it should be granted leave to intervene pursuant to Article 36(2) of the Statute and Article 89(1) RoP.

22 ESA submits that pursuant to Article 36(2) of the Statute and Article 89 RoP in order to intervene, a person must establish a direct and existing interest in the grant of the specific form of order sought by the party whom that person intends to support and makes reference by comparison to the Order of the President of the Court of Justice of the European Union ('ECJ') of 19 February 2013 in Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg AG*, paragraph 7.

- 23 ESA submits that such direct interest clearly exists for Norway Post as regards the second contested decision of 18 February 2013. In that decision, ESA states that it – besides granting full access to event 181683 – decided to only partially disclose two documents with explicit reference to commercial considerations of the applicant intervener (events 259948 and 383760). Moreover, ESA refused public access to two documents on the same basis (events 181665 and 181691). Therefore, ESA contends Norway Post is eligible to support ESA as regards the potential annulment of that decision and makes reference to the Order of the President in Case E-14/11 *DB Schenker v ESA* [2012] EFTA Ct. Rep. 1255, paragraph 16.
- 24 Similarly, ESA submits that its decision of 25 January 2013 explicitly sets out that full or partial public disclosure of certain documents would undermine the protection, inter alia, of the applicant intervener's commercial interests under Article 4(4) revised RAD. ESA notes by way of an example that one of these documents is ESA Decision 321/10/COL closing the rebate case against Norway Post.
- 25 ESA additionally contends that Norway Post's direct and existing interest in supporting it against an annulment of the first decision is not affected by the fact that by that decision ESA also refused public access to 21 drafts that fall outside the scope of the revised RAD. ESA submits that Norway Post is sufficiently distinguished from other potential, non-privileged interveners: as similar to the internal documents concerned, the relevant drafts, too, form part of ESA's records of its competition investigation into Norway Post's commercial practices and makes reference to the Order of the President of 21 December 2012 in Case E-7/12 *DB Schenker v ESA*, paragraphs 46-48 as compared to the Order of the President in Case E-14/11 *DB Schenker v ESA*, cited above, paragraph 16.
- 26 Furthermore, ESA submits that Norway Post enjoys EEA fundamental rights to the protection of its professional secrets, and, accordingly, to effective judicial protection regarding 'possible public access granted by the EFTA institutions to documents allegedly containing such professional secrets' and makes reference to the Order of the President of General Court of 11 March 2013 in Case T-462/12 R *Pilkington Group v Commission*, paragraph 45.
- 27 ESA notes that the application for leave to intervene is timely.
- 28 DB Schenker submits that pursuant to established case law, it is the applicant intervener which has the burden of proving that it has a direct and existing interest in the outcome that it assumes ESA will seek from the Court in relation the documents at issue. DB Schenker submits that the applicant intervener has failed to refer to the specific case law on the legal standard required for an intervention, and refers, inter alia, to the Order of the President of 21 December 2012 in Case E-7/12 *DB Schenker v ESA*, paragraph 43.

- 29 DB Schenker submits that Norway Post has merely superficially asserted that it has such an interest – and only with regard to some of the contested documents – without attempting to substantiate why that is so for those documents.
- 30 DB Schenker submits that Norway Post has already obtained a copy of ESA’s decisions of 25 January 2013 and 18 February 2013 and consequently should have been able to substantiate how its alleged interest is tied to the subject matter at hand.
- 31 DB Schenker submits that Norway Post has not submitted any reasons to demonstrate that it has a direct and existing interest in relation to ESA’s decision of 14 July 2010 although it asserts that Norway Post is obviously aware that the refusal to grant public access to the complete version of that decision forms part of the subject matter. It is submitted that it is not for the Court to construct a direct and existing interest for an applicant intervener. As Norway Post has failed to demonstrate that it has standing, the application must be dismissed in so far as the case concerns ESA’s decision of 25 January 2013 to deny public access to the complete version of its decision of 14 July 2010.
- 32 DB Schenker submits that the remaining subject matter of ESA’s decision of 25 January 2013 consists only of internal ESA documents. In that Decision, ESA did not refer to the protection of Norway Post’s commercial interests and notes that Norway Post only asserts that ‘it is likely that many of these internal documents may contain information that could seriously undermine the protection of the commercial interests of Norway Post.’
- 33 The remaining four documents were denied full or partial release by ESA’s second decision of 18 February 2013 following a third party consultation. DB Schenker asserts that as a consequence, ESA’s decision of 25 January 2013 does not support Norway Post’s assertions in its application. Therefore, having failed to demonstrate a direct and existing interest in the case, the application must be dismissed in so far as the case concerns ESA’s refusal to grant full or partial public access to any of the internal ESA documents covered by ESA’s decision of 25 January 2013.
- 34 In contrast to ESA’s first decision of 25 January 2013, Norway Post was consulted as a third party concerning the four internal ESA documents to which access was subsequently denied in ESA’s second decision of 18 February 2013. That Norway Post was consulted as a third party does not, DB Schenker submits, mean *per se* that Norway Post also has a direct and existing interest in the result of the present case.
- 35 DB Schenker submits that the legal standard that is effectively sought by the applicant intervener would allow ESA to effectively bind the Court as regards intervention. It is submitted that this is erroneous and could have wider ramifications for a number of third parties that could be entitled to demand standing

to intervene in similar cases. It is therefore for good reason that the EU court and this Court have required a substantial effort to be made by an applicant intervener because the interests of such an applicant in intervening must be balanced against the additional costs and delays that an intervention causes.

- 36 Therefore, the application for leave to intervene should be dismissed in so far as the case concerns the four internal ESA documents covered by ESA's decision of 18 February 2013.

IV Law

- 37 Under Article 36(2) of the Court's Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority, may intervene in that case. Article 36(3) of the Statute provides that an application to intervene shall be limited to supporting the form of order sought by one of the parties.

- 38 The Court has recognised the principle of procedural homogeneity and held that homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see Orders of the President in Case E-14/11 *DB Schenker v ESA*, cited above, paragraphs 77-78; and of 23 April 2012 in Case E-16/11 *ESA v Iceland* ('*Icesave*'), paragraph 32). The need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent with regard to rules concerning the modalities of the procedure when they mainly relate to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, it is also in such cases appropriate, as a rule, to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure that are identical in substance to expressions in the equivalent provisions of Union law (see the Orders of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 17, and of 30 April 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 24).

- 39 Article 36 of the Statute is essentially identical in substance to Article 40 of the Statute of the Court of Justice of the European Union. Accordingly, the principle of procedural homogeneity must also apply to the assessment of whether an applicant for intervention has established an interest in the result of the case (see the Orders of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 18, in Case E-14/11 *DB Schenker v ESA*, cited above, paragraph 14, and in Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep. 332 paragraph 9).

- 40 An interest in the result of a case within the sense of the Statute is to be understood as meaning that a person must establish a direct and existing interest in the grant of the form of order sought by the party whom it intends to support and, thus, in the ruling on the specific act whose annulment is sought (see Orders of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 19, in Case E-14/11 *DB Schenker v ESA*, cited above, paragraph 15, of 25 March 2011 in Case E-14/10 *Konkurrenten.no v ESA*, paragraph 10, and in Case E-15/10 *Posten Norge v ESA*, cited above, paragraph 9).
- 41 The two contested ESA decisions of 25 January 2013 and 18 February 2013 are both a part of ESA Case No 73075 (*DB Schenker*). In the present case, *DB Schenker* seeks the annulment of both decisions as it seeks access to documents belonging to the case files that led to ESA Decision No 321/10/COL (Norway Post – loyalty/discount system) pursuant to the Revised RAD.
- 42 By Decision No 321/10/COL, ESA closed its investigation into Norway Post’s practices concerning a discount system applied by Norway Post in relation to the provision of B-to-C parcel services to distance selling companies in Norway, reasoning that ‘[o]n 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.’
- 43 Norway Post has submitted that *DB Schenker* has requested access to ESA’s internal documents belonging to the files in a case concerning an investigation into a discount system applied by Norway Post. Norway Post notes that ESA’s decision of 25 January 2013 stated that access was refused to some of the contested documents ‘for reasons of not undermining the protection of commercial interests [...]’. Norway Post submits that it is likely that many of these internal documents may contain information that could seriously undermine the protection of the commercial interests of Norway Post.
- 44 Norway Post submits further that ESA also refused by its decision of 18 February 2013 partial access to two documents and full access to two documents because it would undermine the protection of Norway Post’s commercial interests.
- 45 Moreover, Norway Post contends that many of the contested documents that *DB Schenker* has requested access to contain business secrets or other confidential information that would cause serious harm to Norway Post’s commercial interests if disclosed.
- 46 Consequently, Norway Post has established a direct and existing interest in supporting the defendant in the case pursuant to the second paragraph of Article 36 of the Statute.

- 47 The Rules of Procedure of the ECJ, as last amended on 24 May 2011 ('ECJ RoP 2011'), were repealed and replaced by new Rules of Procedure adopted on 25 September 2012 ('ECJ RoP 2012'), which entered into force on 1 November 2012. Article 89 RoP and Article 93 ECJ RoP 2011 are identical in substance. Articles 129 to 132 ECJ RoP 2012 constitute the refreshed procedural rules, and their interpretation remains of relevance in construing the same procedural notion (see, Orders of the President of 30 May 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 21, and of 30 April 2013 in Case E-4/13 *DB Schenker v ESA*, paragraph 24).
- 48 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. Notice of the action was published on 20 June 2013 in the EEA Section of and the EEA Supplement to the Official Journal of the European Union. Consequently, the present application to intervene, which was lodged at the Court's Registry on 13 May 2013, is timely.
- 49 In light of the above, Posten Norge AS is granted leave to intervene in the case in support of the form of order sought by the defendant.

On those grounds,

THE PRESIDENT

hereby orders:

- 1. Posten Norge AS is granted leave to intervene in Case E-5/13 in support of the form of order sought by the defendant.**
- 2. Costs are reserved.**

Luxembourg, 1 July 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President