

EFTA COURT

Action brought on 9 July 2012 by DB Schenker against the EFTA Surveillance Authority

(Case E-7/12)

An action against the EFTA Surveillance Authority was brought before the EFTA Court on 9 July 2012 by Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (collectively DB Schenker), represented by Jon Midthjell, advokat, Advokatfirmaet Midthjell AS, Grev Wedels plass 5, N-0151 Oslo, Norway.

The applicants request the EFTA Court to:

In relation to the application against the failure to act:

- 1. Declare that the defendant has infringed Article 37(1) SCA by failing to act on its duty, under the Rules on Access to Documents, the Surveillance and Court Agreement and the EEA Agreement, to define its position on the request that the applicants submitted on 3 August 2010 for access to the complete file in ESA Case No 34250 (Norway Post/Privpak); and**
- 2. Order the defendant to bear the costs.**

In relation to the application for damages, to give an interlocutory ruling on the liability of the defendant and defer to a subsequent stage of the proceedings the question of assessing the damages attributable to the defendant:

- 1. Find that the inaction of the defendant between 7 September 2010 or any later date, and until the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, is such as to render the defendant liable, including for default interest, under Article 46(2) SCA.**
- 2. Within six months after the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, the applicants shall inform the Court of the amount of damages that they claim and whether the parties agree on that amount.**

- 3. In the event of a failure to agree on the amount of damages, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the defendant's failure to lawfully define its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010.**
- 4. Order the defendant to bear the costs.**

Legal and factual background and pleas in law adduced in support:

- The applicants, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS are part of DB Schenker, an international freight forwarding and logistic group, owned by Deutsche Bahn AG. Schenker North AB runs the group's business operations by land, sea and rail in Norway, Sweden and Denmark, including the subsidiaries Schenker Privpak AS and Schenker Privpak AB (collectively referred to as "DB Schenker").
- On 14 July 2010, the EFTA Surveillance Authority adopted a decision in Case No 34250 (Norway Post/Privpak), finding that Norway Post had abused its dominant position in the Norwegian business-to-consumer parcel delivery market in 2000-2006. The decision was upheld by the EFTA Court in Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*. The applicants are pursuing their rights for compensation from Norway Post for the damage caused by the infringement and want to review how the defendant handled the investigation and administrative procedure. On 3 August 2010, the applicants submitted a request for access to documents belonging to ESA Case No 34250, under the Rules of Access to Documents (RAD), established by a Decision of the EFTA Surveillance Authority No 407/08/COL on 27 June 2008.
- On 8 March 2012, the applicants served a pre-litigation notice on the defendant under Article 37(2) SCA, on the basis that the defendant had failed to take a final decision on their access request, submitted on 3 August 2010. The applicants submit that the defendant subsequently failed to take a decision on their access request after statutory pre-litigation period expired, thereby also causing losses.

The applicants claim that the EFTA Surveillance Authority has:

- infringed Article 37 SCA by failing to meet its legal obligations to decide on the access request that the applicants submitted on 3 August 2010; and
- infringed Article 46(2) SCA by failing to meet its legal obligation to take a timely decision on the access request that the applicants submitted on 3 August 2010 and handle the request in an otherwise lawful manner.