JUDGMENT OF THE COURT
9 July 2013

(Action for failure to act – Non-contractual liability of the EFTA Surveillance Authority – Access to documents – Legitimate expectations – Principle of good administration – Failure of the EFTA Surveillance Authority to take a decision within a self-imposed time limit)

In Case E-7/12,

Schenker North AB, Gothenburg, Sweden,

Schenker Privpak AB, Borås, Sweden,

Schenker Privpak AS, Oslo, Norway,

represented by Jon Midthjell, advokat,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Gjermund Mathisen, Officer, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION under Articles 37 and 46 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for a declaration of a failure to act and non-contractual liability of the EFTA Surveillance Authority,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Jon Midthjell, and of the EFTA Surveillance Authority ("ESA"), represented by Markus Schneider and Gjermund Mathisen, at the hearing on 16 April 2013,

gives the following

Judgment

I Legal context

EEA law

1 Article 37 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established.

The action shall be admissible only if the EFTA Surveillance Authority has first been called upon to act. If, within two months of being so called upon, the EFTA Surveillance Authority has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the EFTA Court that the EFTA Surveillance Authority has failed to address to that person any decision.

2 According to Article 46, second paragraph, SCA:

In the case of non-contractual liability, the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties.

3 According to Article 7 of the Rules on access to documents ("RAD"), adopted by ESA as Decision No 407/08/COL of 27 June 2008:

1. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, [ESA] shall either grant access to the document requested and provide access in accordance with Article 8 [RAD] or, in a written reply, state the reasons for the total or partial refusal within 5 working days from registration of the application.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

II Facts

4 On 3 August 2010, the applicants requested by email "access to the file in preparation of its damages claim against [Norway Post]" in ESA Case No 34250 (*Norway Post*/*Privpak*). The applicants also asked for a non-confidential version of the decision in that case, which they wished to submit in copy as soon as possible to Oslo City Court in the context of a follow-on action against Norway Post following the decision in ESA Case No 34250.

5 The Director of Legal and Executive Affairs at ESA replied on 4 August 2010 and noted, "given the size of the file and the many documents it contains", that it would be appreciated if the applicants were to specify the documents requested. He added: "As to the documents to which you have already been granted access in the course of the administrative proceedings, do you wish to request a waiver of the restriction on the use of those documents in order to produce them to the court which will be seized of a claim in damages?"

6 On the same day, the applicants thanked ESA for its "swift response" and specified that the "request concerns the entire file".

7 On 10 August 2010, the 5-day time limit in Article 7(1) RAD expired.

8 That same day, the Director of Legal and Executive Affairs at ESA sent an email to the applicants and stated that "the file is quite voluminous. Preparation of non-confidential versions of its contents will take some time. We will send you the documents as soon as they are available."

9 On 11 August 2010, the applicants informed ESA that it would be sufficient to receive the documents on CD-ROM and not in hard copy.

10 On 18 August 2010, the Deputy Director for Competition at ESA sent an email to the applicants informing them that ESA intended to "soon revert to you regarding your request for access to documents in the above-mentioned case". In the email, the applicants were informed that Norway Post had requested access to correspondence between ESA and Privpak and they were asked to inform ESA by 24 August 2010 whether the documents contained business secrets or other confidential information.

11 On 30 August 2010, the Deputy Director for Competition at ESA sent another email to the applicants. Included were a draft non-confidential version of ESA Decision 322/10/COL of 14 July 2010 in Case No 34250 (*Norway Post/Privpak*), a non-confidential version of Norway Post's reply to ESA's Statement of Objections in that case, and a list of the documents on the file to which Norway Post was granted access when the Statement of Objections was issued in the case ("the first list").

12 In that email, the applicants were informed that if they failed to reply by 2 September 2010 indicating whether they considered any business secrets or other confidential information to be found in the draft decision, ESA might assume that the decision did not contain such information.

13 In the email ESA noted that the only document of evidential value submitted after the oral hearing in Case No 34250 in June 2009 was a letter from Norway Post dated "13 July 2010 (524500)". There was no non-confidential version of the document on ESA's file at that stage.

14 The email ended with the following paragraph:

"*The administrative file in case 34250 contains a very large number of documents and many very long documents. We would assume that many of these documents would be of limited interest to Schenker Privpak, in particular those which are of a procedural nature without any evidential nature. Further, the volume of work required to process a request for access to all documents in the administrative file is very substantial. In order to find a fair solution we would therefore propose that Schenker Privpak reviews the material submitted by this e-mail with a view to identify in more concrete terms the documents to which it would be in Schenker Privpak's interest to have access. However, [ESA] cannot in any case grant Schenker Privpak access to documents which contain business secrets or other confidential information about Norway Post or other third parties.*"

15 The first list, which was included in the email, is a 33-page document. It contains around 900 event numbers. The documents in the first list are dated between 2001 and 2008, during the investigation into the business practices of Norway Post, leading to ESA Decision 322/10/COL. It may be noted that the list includes a detailed list of the inspection documents from the raid on the offices of Norway Post in 2004, which were the subject of the judgment of Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep.

1178 (‘*Schenker I*’). In the first list, the names and sources of the documents have not been blacked out or otherwise rendered unintelligible.

16 On 30 August 2010, the applicants replied by email. First, they asked for an extension of the deadline to reply, which was granted in an email from ESA on 1 September 2010.

17 Second, the applicants confirmed that the request concerned the entire file and that in emails both of 10 August 2010 and 18 August 2010, ESA had confirmed that it was in the process of preparing documents.

18 In addition, the applicants stated the purpose of their request for access to documents and offered to discuss a reasonable extension to the deadline in the RAD:

“*As DB Schenker has explained earlier, the company is pursuing a damages claim against NPO in national court. NPO has also publicly stated on 14 July 2010 as well as during its recent Q2 presentation on 27 August 2010 that it will in all likelihood bring an appeal against the decision. It should therefore be clear that the request for access is entirely legitimate. It is in any case not for [ESA] to assume whether parts of a file could be of interest to [the applicants] or to require that the company justify its interest in each document referred to in the excel file that was sent through today, before releasing those documents.*

As to the issue of whether certain documents contain protected information, we assume that [ESA] has continuously requested NPO to provide non-confidential versions of the documents in question, as [ESA] continuously asked of [the applicants] during the eight year investigation, which we also stated in our email on 3 August 2010 without hearing differently from [ESA]. [The applicants have] a right to access those parts of the documents that do not contain protected information and we assume that [ESA] has made use of the last 18 working days since the request was filed, to ask NPO or other third parties for a release of any remaining documents, in accordance with its Rules of Procedure.

We assume on this basis that [ESA] will comply with the request for access to the entire file, within the deadline set out in its own Rules of Procedure, which also includes an extended working day period for processing voluminous files. To reduce the administrative burden, [the applicants have] confirmed that [they] will receive the documents on CD-ROM. We are also ready to discuss a reasonable extension if [ESA] has met unforeseen difficulties in preparing the file. At the moment, it is difficult to appreciate what those difficulties could be in light of the long investigation time which [ESA] has had to prepare for requests on access to the file and the fact that we are only requesting an electronic copy of the file.”

19 On 6 September 2010, the applicants sent an email to ESA accepting the non-confidential draft of Decision 322/10/COL and added:

"*We would also like to remind you that the deadline for processing the request for access to the file, which was made on 3 August 2010, expires by the end of business tomorrow. We assume that a CD-ROM with the file has already been sent since you have not contacted us to request a reasonable extension beyond that deadline, to accommodate for any unforeseen reasons of delay, as invited in our email of 30 August 2010 below.*"

20 On 7 September 2010, the extended time limit in Article 7(2) RAD expired.

21 On 14 September 2010, the applicants sent an email to the Deputy Director for Competition at ESA noting that there had been no reply to the email of 6 September 2010. The applicants added:

"*Norway Post confirmed today that an appeal has been lodged with the EFTA Court. As you know, DB Schenker has a right to intervene in the case but will need access to the file in order to exercise that right effectively and protect its right to seek damages from Norway Post. However, [ESA] has still not handed over a copy of the file, even though the request was filed more than six weeks ago on 3 August 2010. [ESA] has also failed to offer any reasons which could justify the delay, in contravention of its own Rules of Procedure. DB Schenker invited [ESA] to discuss a reasonable extension of the deadline which expired on 7 September 2010, if [ESA] had encountered unforeseen reasons of delay. [ESA] never replied to the invitation.*

DB Schenker cannot accept that [ESA] continues to stall the request and infringe the procedural rights of the company in this matter. We expect that you will release the file by the close of business on Thursday 16 September 2010, in the form of a CD-ROM as requested. Your confirmation to that effect would be appreciated in accordance with the principle of good administration."

22 The Director of Legal and Executive Affairs at ESA replied by email on 17 September 2010:

"*Thank you for your email concerning your request for public access to documents in the file in this case made on behalf of your client DB Schenker.*

I had hoped that my previous emails to you had made clear that the file contains a very large number of documents and many of those contain business secrets or otherwise commercially sensitive information with the consequence that it would not be possible to give you the access you request within the deadlines that normally apply.

The rules on access, as you are aware, mean that it is necessary to examine each of the documents in the file and consider whether any of the exceptions provided for in our rules on public access apply.

The following documents were sent to you as soon as non-confidential versions were available:

- *A non-confidential version of [ESA's] Statement of Objections*
- *Norway Post's non-confidential reply to [ESA's] Statement of Objections*
- *A non-confidential version of [ESA's] decision*
- *A list of the documents to which Norway Post was granted access when the SO was issued*

As to the remainder of the documents in the file of which you seek disclosure, because of their very large number, you have been asked to provide us with guidance as to which documents in particular you seek disclosure in accordance with Article 6(2) and (3) of our Rules on access. Unfortunately, your response was not conducive to reaching a fair solution as you insist on receiving all documents including those to which you already have had access.

Consequently, [ESA] is in the process of examining the documents and consulting the authors of the third-party documents in accordance with Article 4(5) of the rules. Again, there are many such authors, the documents are numerous and thus time is needed.

Rest assured that we will disclose documents (or edited versions) as soon as practically possible in accordance with our rules. In order to expedite matters and in another endeavour to reach a fair solution, I would be grateful if you could confirm that you do not seek access to documents that are purely administrative in nature and are devoid of substantive content, such as exchanges by letter or email requesting, refusing or granting extensions to deadlines and such like. I can easily imagine that such exchanges are completely irrelevant for your purposes and would only serve as a distraction in an action for damages in a domestic court."

23 On the same day, 17 September 2010, the applicants replied to ESA:

"*Thank you for finally answering our two last emails to [ESA]. Unfortunately, your answer does not address the key question – when will [ESA] release a copy of the file to DB Schenker?*

Given that you have already spent six weeks on the request that was sent on 3 August 2010 and also passed the deadline set in your own Rules of

Procedure for handling large files, [ESA] should be able to give an answer on this point, in accordance with the principle of good administration.

We continue to have difficulties in understanding that [ESA] could have encountered unforeseen reasons of delay. DB Schenker has for its part consistently been asked by [ESA] to provide non-confidential versions of all submissions it has made during the eight year long investigation. Has [ESA] followed a different practice in relation to all other third parties to which you are referring to? We were also under the impression that you had already obtained non-confidential versions from those that you included in the copy of the file that was surrendered to NPO in 2009.

Moreover, we are surprised to learn that [ESA] has consistently failed to ask NPO to provide non-confidential versions of its submissions during the eight year long investigation. Are we to understand that you first started that work when our request for access was filed and that [ESA] was not anticipating such requests in a case as contentious as this?

As for your regrets that DB Schenker has requested access to the entire file, including procedural documents which allegedly take up much of your time, we note that such documents rarely contain business secrets and should be fairly easy to process. Unfortunately, we cannot rely on [ESA] to identify documents that are of interest to DB Schenker. If a serious mistake should be committed, who would then be left with the professional responsibility?

You also mention that the company is burdening [ESA] by including requests for documents that it has already received a copy of. Please note that this concerns at most a handful of documents, that for most part were released prior to the Rules of Procedure and which we cannot present in a court of law without your authorisation. The company must also ensure that the documents that it considers using as evidence are identical and complete to the ones NPO submitted to [ESA]. These documents cannot possibly be used as an explanation for your significant delay.

We have no interest in burdening the work of [ESA] but, as you can appreciate, the company cannot accept that poor administration of the file during a period of eight years be allowed to undermine its rights in this matter.

For the avoidance of doubt, you are invited to release the documents you have already processed over the last six weeks. We take it that you will have no problem in forwarding those on a CD-ROM immediately.

We look forward to hearing when the rest of the file will be released to DB Schenker."

24 On 9 November 2010, the applicants sent a letter to the President of ESA. In that letter, the applicants referred to the previous communication relating to the access request and noted:

"*The decision which [ESA] made on 14 July 2010 established that DB Schenker's complaint against Norway Post on 24 June 2002, eight years earlier, was justified. As you will recall from our meeting on 4 September 2008, you expressed regret on behalf of [ESA] that the investigation had taken a long time to conclude.*

Unfortunately, DB Schenker has again experienced that [ESA] fails to respond on time. Since 3 August 2010, the company has tried to obtain access to an electronic copy of the non-confidential version of the file (hereinafter 'the file'), in order to pursue its significant damages claim against Norway Post, to make effective use of its right to intervene before the EFTA Court, and to better understand what caused the investigation to last for so long.

[ESA]'s deadline for surrendering a copy of the file expired on 7 September 2010 pursuant to Article 7(2) of the Rules of Procedure. I am turning to you because, after having waited for more than three months, we still have not received a copy of the file. We have not even received an answer when [ESA] intends to give the company access […]

[ESA]'s handling of the request for access to the file over the last three months is unacceptable and in contravention of the Rules of Procedure, established case-law and the principle of good administration. Given that [ESA] has ceased to respond to our correspondence, we have no other choice but to take legal action if [ESA] persists in infringing the company's right to access the file.

I sincerely hope that we can avoid a legal conflict and that [ESA] now will provide a copy of the file so that the company can effectively protect its lawful rights. I am confident that you will agree with me that [ESA] should not have any interest in undermining the private enforcement policy which the Commission encourages against those who commit serious antitrust violations. Timely access to the evidence is, of course, a cornerstone in that policy."

25 On 10 November 2010, the Director of Legal and Executive Affairs at ESA replied and noted that:

"*On 5 November 2010 I sent you a letter enclosing a CD-ROM including a considerable number of documents from Norway Post to which you are granted access. You were also sent, on 30 August 2010, the non-confidential versions of the Decision, of Norway Post's Reply to the Statement of Objections and the list of documents to which Norway Post was granted access during the administrative procedure. You may rest*

assured that all of the documents sent to you have been transmitted to you as soon as non-confidential versions were available.

…

As my letter of 5 November 2010 makes clear, [ESA] is currently examining all the remaining documents on the case file and consulting the many third parties who sent them and will revert to you as soon as this examination has been completed … ."

26 The letter of 5 November 2010 from ESA to the applicants – which the applicants claim they did not receive until 11 November 2010 – contains around 100 documents which were released either partially or in full to the applicants.

27 On 6 January 2011, the applicants sent another letter to the President of ESA. Attached to that letter was a copy of the first list:

"*On 31 December 2010, DB Schenker filed its application for leave to intervene before the EFTA Court in the pending case between Norway post and [ESA]. The application was served on [ESA], by the Court, on 4 January 2011.*

DB Schenker has now waited for more than five months for [ESA] to process the request for access to the file which was submitted on 3 August 2010. The time-limit for [ESA] expired on 7 September 2010.

[ESA] has so far only provided a minor part of the file. In the list attached to this letter, the documents that we have received have been highlighted in dark green (full access) and light green (partial access). Please note that the list itself is incomplete and does not account for documents included in the file after 16 December 2008, although [ESA] released the list as late as on 30 August 2010. [ESA] was apparently unable to provide an updated register of the documents belonging to the file, 18 months later.

As you will recall, all third parties have been required to submit non-confidential versions of their submissions to [ESA] during the course of the investigation. Moreover, the third party correspondence was vetted for business secrets when Norway post was granted access to the file already in 2008. However, [ESA] has still not granted DB Schenker access to a single third party document. [ESA] has not even granted access to the initial information requests that it sent out in 2003 and which could not possibly contain business secrets from the third parties which it then contacted for the first time.

Moreover, significant parts of the file concerning Norway Post have not been released, even though Norway Post has been required to submit non-confidential versions of its submissions during the course of the

investigation. As you will recall, there is also a general presumption in antitrust proceedings that information older than five years old is no longer confidential.

…

[ESA] has also ceased to reply to our correspondence, following up the request for access to the file, presumably because there is no acceptable explanation for the significant delay. I had hoped that [ESA], nevertheless, would resolve the matter during the two months that have passed since I last contacted you on 9 November 2010. Since that is not the case and no further documents have been released, I must trouble you with this matter, once again.

The decision which [ESA] made on 14 July 2010 confirmed that DB Schenker's complaint against Norway Post eight years earlier was justified, and that a serious antitrust violation had been committed. As you will recall from our meeting on 4 September 2008, you expressed regret on behalf of [ESA] that the investigation had taken a long time to conclude. Under different circumstances, such a long investigation could have caused structural damage to the market, by forcing more efficient competitors than Norway Post to leave in the face of the unlawful and exclusionary conduct, absent the backing of a financially strong and committed group as DB Schenker.

When DB Schenker now seeks timely access to the file, it does so also to protect its rights as an antitrust plaintiff in a significant damages action pending before Oslo [City] Court, to recover its loss from Norway post. The claim is derived from [ESA]'s decision which the EFTA Court is reviewing. The Commission is actively promoting private antitrust actions, in addition to the significant fines it levies, to deter antitrust infringements. [ESA] should not take more lightly on the consequences of antitrust violations, by not offering plaintiffs timely access to evidence in cases relating to the three EFTA Member States, under the EEA Agreement.

I must therefore ask that you take the necessary steps to ensure that DB Schenker is granted access to the file in time to make effective use of its rights, and I hope we can put this matter at rest without ending up in a legal conflict."

28 On 17 February 2011, the applicants sent a third letter to the President of ESA:

"*Reference is made to my letters on 9 November 2010 and 6 January 2011, which have not been answered.*

On 15 February 2011, the EFTA Court granted DB Schenker permission to intervene in support of [ESA] against Norway Post. A copy of the order is

enclosed. The Court also decided that DB Schenker shall receive a copy of the written pleadings by 23 February 2011. These documents will only include parts of the file held by [ESA].

DB Schenker has now waited for more than six months for [ESA] to process the request for access to the file which was made on 3 August 2010. The time-limit for [ESA] expired on 7 September 2010. As also explained earlier, this significant delay is impairing DB Schenker's right to effectively review the file before its statement of intervention is submitted to the Court.

[ESA] has so far only provided a minor part of the file and is even withholding documents which clearly cannot be contested. Moreover, [ESA] has failed to provide a complete list showing all documents registered on file. [ESA] had also ceased to reply to our correspondence, following up the request for access to the file. Clearly, [ESA] cannot cease to respond to correspondence for several months, without infringing the principle of good administration (maladministration).

DB Schenker must therefore ask again that [ESA] respect its right to timely access the documents in question and release the remaining parts of the file as soon as possible."

29 On 18 February 2011, ESA replied by email, providing a letter from the Director of Legal and Executive Affairs, dated the same day:

"*Thank you for your letter of 17 February addressed to President Sanderud.*

In your letter you claim that [ESA] has not responded to your letters of 9 November 2010 and 6 January 2011. You also seek to give the impression that [ESA] has not granted you access to the documents you requested and has ceased to respond to your correspondence 'for several months'.

I responded to your letter dated 9 November 2010 on 10 November 2010, the following day. I enclose a copy of that letter.

I responded to your letter of 6 January 2011 on 16 February 2011 enclosing a CD-ROM containing a large number of the documents you had asked for.

I point out that [ESA] has sent you a considerable number of documents you have requested. Those documents were sent to you on 30 August 2010, 5 November 2010 and most recently on 16 February 2011.

In order to avoid further difficulties, I would be grateful if you could check your law firm records and confirm that you are in receipt of the documents and letters sent to you on 30 August 2010, 5 November 2010, 10 November 2010 and 16 February 2011."

30 On 18 February 2011, the applicants replied by email to ESA:

"*Thank you for your reply to our letter yesterday to President Sanderud.*

In your letter, received by telefax, you state that [ESA] sent a CD-ROM with documents on 16 February 2011. The reason why we have not yet received that shipment is probably because [ESA] has used a regular mail service (which can take up to a week) as it did the last time we received a CD-ROM, instead of an overnight express service. If [ESA] has relied on an express service, please forward the shipment number and identify the carrier so we can track down the CD-ROM immediately.

Your letter leaves some doubt as to whether [ESA] now has processed our request for access to the file of 3 August 2010 – in full. Since, under the circumstances, you have not clearly stated otherwise and indicated any time for an additional delivery, I am led to believe that [ESA] has processed our request in full and that we will find all remaining documents on the CD-ROM (including a current list showing all the documents that have been registered to the file). For the avoidance of doubt, I would appreciate if you could verify that the CD-ROM in transit is indeed complete.

Leaving this issue aside, I would express hope that we may further our working relationship on a constructive level."

31 In an email the same day, the Director of Legal and Executive Affairs replied:

"*Thank you for your message. My letter of 16 February 2011 makes it clear that the bundle of documents that is contained in the CD-ROM does not process your request in full. Another bundle of documents is being prepared for you according to the procedure described in the letter and will be sent as soon as possible.*

You state that you have received a CD-ROM in the past from [ESA]. Is that the one sent on 5 November 2010? May I take it that you thus confirm that you have received the documents sent to you on that date?

Would you be so kind as to confirm that you have also received the documents sent to you on 30 August 2010, please?"

32 In a final email that day, 18 February 2011, the applicants replied:

"*Thanks for your swift reply. I actually confirmed in my letter on 6 January 2011 the documents that we received on the CD-ROM which you refer to (a copy of that annex has been attached to this email for your convenience). The letter also confirms that we did receive the email on 30 August 2010 by referring to the case list that was transmitted in that email. To my knowledge, we have not missed out on any files that [ESA] has sent over but I appreciate your initiative to verify this point.*

I am greatly worried that we will not have time to review all relevant parts of the file before we file our statement of intervention. (The court will probably ask for the submission by the end of March). Please note in that respect, that we are pursuing a regular and supportive intervention and will not seek to duplicate the arguments that you have already presented. Although we have strong held views on the investigation, which commenced long before you took office, we will not seek to bring those before the court. I hope this is not a concern which ha[s] contributed to the delay in some quarters of [ESA]. As you can surmise also from the different courses taken in other recent cases where we have crossed paths, we only take sharp differences public when it serves a specific purpose, legally or politically, and then try to do that carefully.

Could you please forward a copy of your last letter dated 16 February 2011, which I assume contain a list of the documents included on the CD-ROM, as you did the last time, so that we can get a clearer picture of the volume and nature of the unreleased documents on file? I must also bother you again with my request for a time estimate for when we can expect the complete file. I am sure that you can appreciate the situation from our side."

33 In the letter of 16 February 2011 from ESA to the applicants, which was received by the latter on 22 February 2011, ESA thoroughly explained the legal reasons for its treatment of the third-party documents in the file. Of interest here is the distinction in treatment accorded to the addressee of the statement of objection/the final decision and the applicants. The letter concluded:

"*While [ESA] fully endorses the initiatives which have been taken in recent years, in particular by the European Commission, with a view to promote action for damages in relation to competition law infringements, [ESA] must at the same time comply with its obligation to protect commercially sensitive information. In this respect, I trust that your client will understand that [ESA] has to strike a balance between the sometimes conflicting interests which are at play.*

The obligatory consultation with all third parties before disclosing the documents they sent to [ESA] during the competition investigation and the assessment of all those documents, as provided for in general rules on access to documents, is on-going. However, the first batch of third party documents to which access can be granted have now been prepared. These documents are all stored on a CD-ROM attached to this letter. A list of these documents is enclosed as Annex I.

[ESA] has decided to grant you full access to several of those documents. They are all marked access granted. Access is not granted to documents or part of documents where [ESA] considers that it is reasonably foreseeable that disclosure of this information would undermine the protection of the

commercial interests of other undertakings. [ESA] has also examined whether there is any overriding interest in the disclosure of the information and found that not to be the case.

We will revert to you as soon as we have finalised the processing of the remaining parts of your application for access to documents."

Annex I to the letter listed 122 documents. Access was granted to 113 documents.

34 On 16 August 2011, ESA again released a number of documents from the file. In the same letter, ESA denied access to 352 of 354 inspection documents obtained during the inspection of Norway Post's premises in June 2004 (this decision was challenged before the Court in *Schenker I*, cited above. In that case, 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). Unlike the first list, the names and sources of the documents had been blacked out or otherwise rendered unintelligible. Annex II to the letter of 16 September 2011 listed 138 documents, of which access was granted to 128.

35 On 8 March 2012, the applicants served a pre-litigation notice on ESA pursuant to Article 37(2) SCA.

36 In the pre-litigation notice, the applicants made it clear that they would take legal action under Article 37 SCA if ESA failed to adopt a position on the remaining documents belonging to Case No 34250 within the statutory two-month pre-litigation period. The applicants claimed that they could not identify the remaining documents, but expected a decision on the following documents or type of documents:

a. the index to the documents attached to the file;

b. ESA's working documents;

c. any remaining correspondence, including, but not limited to, Norway Post, third parties, and the Norwegian Government;

d. any minutes from meetings between ESA and the Norwegian Government to discuss the case to the extent that these are not considered working documents;

e. any minutes from meetings between the president of ESA and Norway Post or the Norwegian Government to discuss the case to the extent that these are not considered working documents;

f. all documents from DB Schenker in the redacted form they were sent to Norway Post to protect business secrets and confidential information;

g. a letter from Norway Post to ESA of 13 July 2010; and

h. any other documents not listed in the index of the file but belonging to the case.

37 On 12 March 2012, the applicants submitted a separate request for access to the file in Case No 68736, that is the case concerning the applicants' access request (included here for the sake of completeness; see pending Case E-8/12 *DB Schenker* v *ESA*, '*Schenker III*'). The letter carries the heading "Case No 68736 – Request for public access to the statement of content of the file (index)":

"*Reference is made to the pre-litigation notice that DB Schenker submitted in this matter on 8 March 2012 pursuant to Article 37 SCA. The company has decided to request public access to the index of the file in Case No 68736 (*DB Schenker's request for public access to the documents in Case No 34250 – Norway Post/Privpak*) under Article 2(1) of the Rules on Access to Documents (RAD) as a preparatory step if the matter should proceed to court.*"

38 On 15 March 2012, the Director of Legal and Executive Affairs at ESA answered:

"*Thank you for your letter of 12 March 2012 asking for access to the index of the file in Case no. 68736.*

I have made inquiries about the existence of such a document. I have found no document extant which is an 'index' of the file in that case.

As no index exists, I cannot grant access to it."

39 This reply was followed by a letter on 19 March 2012 from the applicants to ESA, carrying the heading "Case No 68736 – Request for public access to the statement of content of the file (index)". The letter was addressed directly to the Director of Legal and Executive Affairs:

"…

You have been designated as the case handler in charge of Case No 68736 in the correspondence with DB Schenker. The company was therefore surprised to learn that you had to make enquiries elsewhere in your organization to investigate whether a statement of content of the file (index) exists and that no such case register could be identified. The company recalls that ESA has made several decisions in Case No 68736; on 30 August 2010; 5 November 2010; 16 February 2011 and 16 August 2011. To

that end, ESA has sent and received a number of letters and emails to Norway Post, DB Schenker and other third parties. The legality of the last decision, on 16 August 2011, has also been contested in the EFTA Court and is pending as Case E-14/11 DB Schenker v EFTA Surveillance Authority.

The implication of your email appears to be that ESA is unable to account for the documents that belong to the case, including all correspondence that ESA has sent and received during the past 20 months.

Pursuant to Article 11 RAD, ESA has a legal obligation to 'develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules*'. This includes an embedded routine to continuously register all correspondence and other documents belonging to a specific case. Presumably, ESA has operated on the basis of such a routine since its inception. DB Schenker notes in that regard that all correspondence from ESA carries a case number and an event number. It would therefore seem likely that all correspondence and other documents belonging to a specific case number are registered with separate event numbers electronically, and that ESA, at any given time, easily can provide a list (index) showing all events registered to a specific case number, the origin/author of each document, the recipient of each document, the date of each document as well as the date when each event was registered. This is, obviously, what DB Schenker is seeking with its present access request.*

Moreover, pursuant to Article 6(2) RAD, ESA also has a legal obligation to 'assist the applicant*' if an access request is not sufficiently precise, i.a. where the documents for which a listing is sought have been registered under a different case number or the statement of content (index) is referred to by a different name, etc.*

It should also be noted that ESA's response to the present access request will be considered relevant evidence to support a legal action under Article 37 SCA pursuant to the pre-litigation notice that was served on 8 March 2012. The legality of a decision not to grant access to the statement of content of the file (index) may also be challenged, as such, in a parallel action. Furthermore, the present response could also be introduced as evidence against the hardship defence that has been submitted by ESA in Case E-14/11.

On that basis, I would respectfully ask you to reconsider the access request that was submitted on 12 March 2012. In the event that ESA should conclude that it is still unable to provide a statement of content of the file (index), including any printout from any electronic register listing the correspondence and the other documents concerning DB Schenker's initial access request on 3 August 2010, the company will request access under Article 2(1) RAD to ESA's standard operating procedures for administering

case files, including routines for handling incoming/outgoing correspondence, assigning case numbers, designating event numbers, etc."

40 On 27 March 2012, the applicants again approached ESA with a letter carrying the heading "Case No 68736 – Request for public access to the statement of content of the file (index)":

"…

ESA has now had more than 10 working days to consider the present request.

… If the file should be in such disarray that ESA is unable to produce an index that accounts for the documents that belong to the case, including the dates of all its correspondence with Norway Post, DB Schenker and other third parties, that fact would be relevant to the Court's assessment of the alleged hardship that ESA has relied on to set aside the public right to partial access to the documents and evidence in question under Article 4(6) RAD.

On that basis, I must again ask that ESA either confirm that no index of the file exists or provide access to that index.

In the event that no index of the file can be produced, not even in the form of a database printout, please note that the company has requested public access under Article 2(1) RAD to ESA's standard operating procedures for administering case files, including the routines for handling incoming/outgoing correspondence, assigning case numbers, designating event numbers, etc."

41 On 30 March 2012, the Director of Legal and Executive Affairs at ESA sent an email to the applicants:

"*Your request for public access to an index of documents has caused me some confusion.*

An index is a list in alphabetical order of the names, places and subjects (also sometimes, the terms but those are usually listed in a separate document called a glossary) mentioned in the documents in a file (or in a work such as a book) with references to each page containing a mention of the item concerned.

As I stated previously, no such alphabetical listing was ever generated. The documents in the file were analysed manually, not through some index or similar tool.

However, your letter of 27 March 2012 now indicates that you wish to have access to 'the statement of content of the file (index)'.

May I take it that you mean by a 'statement of content' a list of the documents contained in the file rather than a document containing an alphabetical analysis of the contents of the documents?

If it is indeed a list of the documents to which you seek access, I can arrange for such a list to be sent to you."

42 The same day, 30 March 2012, the applicants replied by email:

"*In reference to ESA's email earlier today, DB Schenker notes that the company on 12 March 2012 requested access to the statement of content of the file in this matter, which was denied on 15 March 2012 on the basis that no such document existed. The access request was clarified by DB Schenker again on 19 March 2012, and absent any reply from ESA, again on 27 March 2012. Given that ESA subsequently has come to the conclusion that such a document exists and is willing to grant access, the company requests that it be sent as a PDF-file via email to avoid further delay.*"

43 On 5 April 2012, the applicants received by email from ESA a list of 220 documents from Case No 34250 ("the second list") with the following explanation:

"*Please find attached a list of the documents in the file from the date of the Statement of Objections. You have already received a list of the documents which predate the SO.*

I was unable to convert this document into the proprietary portable document format (pdf) as you requested. I do not have access to or use of the requisite software programme. I trust that the list as a MS Excel file will be acceptable to you."

44 On 11 April 2012, the applicants sent a letter to ESA, repeating their request for a statement of content of the file (index) in Case No 68736. In that letter they referred to the correspondence of 15 March 2012, 19 March 2012, 27 March 2012, 30 March 2012 and 5 April 2012. In the letter the applicants conclude that the second list covered documents which belonged to the file in Case No 34250.

45 The applicants' letter of 11 April 2012 which repeated its request that ESA provide the correct statement of content in Case No 68736 also included a third access request. This third request covered ESA's internal procedures/instructions for handling public access requests and administering case files. The applicants also requested access to the College decisions "empowering" ESA's directors in charge of the competition and State aid department and the legal and executive department.

46 In a letter dated 9 May 2012 (included here for the sake of completeness; see pending case *Schenker III*), ESA partially defined its position in relation to the pre-litigation notice of 8 March 2012 as follows:

a. Index to the documents attached to the file. "*I have already sent you the list of documents in the case from 16 December 2008 to date by email of 5 April 2012 as your letter of 11 April 2012 acknowledges. No other documents from the period exist that belong to the case but are not on the list. On 30 August 2010 you received a complete list of all the documents on the file to which NP was granted access when the SO was issued in December 2008.*"

b. Further documents to which access is granted. "*I am pleased to grant you access to 50 further documents. A list of those documents is attached as annex 1 to this letter. The documents themselves are all contained on the CD-ROM enclosed with this letter.*"

c. Minutes from meetings. "*There are not any minutes on the file from meetings between ESA and the Norwegian Government. Nor are there any minutes on the file from meetings between the president of ESA and Norway Post or the Norwegian Government.*"

d. All documents from DB Schenker in redacted form as sent to Norway Post. "*I am pleased to grant you access to all of the documents in this category. A list of those documents is attached as annex 2 to this letter. The documents themselves are contained on a CD-ROM mentioned above enclosed with this letter.*"

e. The letter of 13 July 2010. "*We have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010.*"

f. Remaining documents. "*Document event no 521704 which figures on the list sent to you on 5 April 2012 has no content and appears as an 'event' as a consequence of some technical mistake. Consequently it is impossible to grant you access to it.*"

g. "*Some of the remaining documents are purely clerical and have no substantive content, such as letters merely transmitting documents (already in you possession) to others. Please confirm whether you wish to receive such letters or not.*"

47 Fifty documents were released to the applicants, together with around 130 documents from DB Schenker in redacted form as sent to Norway Post.

48 In relation to the rest of the documents, ESA noted that it would continue to review the remaining documents to which the applicants had requested access, including those on the list sent to the applicants on 5 April 2012 and which were not listed in Annexes 1 and 2 to the letter of 9 May 2012, in

order to give the applicants access wherever possible to the complete document or in redacted form in compliance with ESA rules on access to documents.

49 On 23 May 2012 (included here for the sake of completeness; see pending case *Schenker III*), ESA emailed the applicants with "a list of documents" in ESA Case No 68736. The letter attached to the email, dated 22 May 2012, stated that "[t]his list was prepared in a timely manner to respond to your request of 23 March 2012. For reasons I cannot account for it has become clear that it has never reached you. […]"

50 On 9 July 2012, the applicants lodged their action against ESA with the Court for failure to act and for damages.

51 On 5 September 2012, after the present case had been lodged and before the defence was submitted, ESA sent a letter to the applicants concerning the rest of the documents. By this letter, access was granted to certain documents and denied for the remainder of the documents in the file. ESA stated that the "letter discloses or refuses to disclose all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which [the applicants] requested access".

III Procedure before the Court and forms of order sought by the parties

52 On 9 July 2012, the applicants brought an action under Articles 37, second paragraph, and 46, second paragraph, SCA seeking a declaration that ESA had failed to act on the request, submitted on 3 August 2010, for public access to ESA Case No 34250 and damages for losses incurred by reason of ESA's failure to take a timely decision and otherwise handle the request in a lawful manner.

53 ESA submitted a defence which was registered at the Court on 25 September 2012.

54 The reply from the applicants was registered at the Court on 12 November 2012.

55 The rejoinder from ESA was registered at the Court on 13 December 2012.

56 In relation to their application concerning the failure to act, the applicants contend that the Court should:

(1) declare that ESA 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 ESA to bear the costs.

57 In relation to their claim for damages, the applicants contend that the Court should deliver the following judgment:

(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 default interest, under Article 46(2) SCA;

(2) within six months after ESA 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 compete file in ESA Case No 34250 (Norway Post), on 3 August 2010; and

(4) order ESA to bear the costs.

58 ESA contends that the Court should:

(1) declare that the action for failure to act is devoid of purpose;

(2) dismiss the application for the remainder;

(3) order the applicants to bear the costs;

or, in the alternative,

order each party to bear their own costs as regards the action for failure to act; and

order the applicants to bear the costs as regards the action for damages.

59 On 19 October 2012, the applicants requested the stay of the proceedings pending the judgment in *Schenker I.* Following receipt of comments from the defendant, this was rejected by Decision of 26 October 2012 of the President of the Court.

60 On 30 October 2012, Norway Post requested leave to intervene in the present case. Following receipt of comments from the defendant, this request was rejected by Order of 21 December 2012 of the President of the Court.

61 On 14 March 2013, the applicants made a request for measures of organization of procedure. Following receipt of comments from the defendant, the Court rejected the request by way of letter of 27 March 2013.

IV Law

Measures of organization of procedure

62 By way of letter registered at the Court on 14 March 2013, the applicants made a request for measures of organization of procedure.

63 The applicants asked the Court to order the defendant pursuant to Article 49(3)(d) of the Rules of Procedure ("RoP") to disclose certain specific documents and two groups of documents. The applicants requested the Court to order ESA to disclose document #598682 ("Schenker's request for access to documents in case 34250 Norway Post internal update"); documents #569272, #569355, #569398, #569400, #569350, #569351, #569352, #569354, and #569353 (email exchanges with the Commission and templates) ("the specific documents"). The applicants also requested disclosure of "all correspondence (if any) that ESA after 1 January 2011 sent to and received from third parties concerning confidentiality claims" and disclosure of "all invitations that ESA sent to Norway Post for confidentiality claims between 3 August 2010 and 5 September 2012" ("the groups of documents").

64 The applicants submitted that the information was necessary for them to be fully able to contest the defendant's position that it did not take excessive time to process the access request and that the applicants were to blame because they did not provide any meaningful cooperation.

65 For the reasons set out below, the applicants' request was denied by letter of 27 March 2013.

66 At any stage of the proceedings, the Court may prescribe any measure of organization of procedure under Article 49 RoP or any measure of inquiry under Article 50 RoP. Pursuant to Article 49(4) RoP, each party may, at any stage of the procedure, propose the adoption or modification of measures of organization of procedure.

67 Article 49 RoP is identical in substance to Article 64 of the Rules of Procedure of the General Court. The reasoning of the General Court is consequently relevant to the understanding of Article 49 RoP in accordance with the principle of procedural homogeneity (see *Schenker I*, cited above, paragraph 91).

68 However, in order to enable the Court to determine whether it is conducive to the proper conduct of the procedure to prescribe such a measure, an applicant must, in an application under Article 49(3)(d) RoP, identify the

documents requested and provide the Court with at least a minimum of information indicating the utility of those documents for the purposes of the proceedings. Moreover, the Court may order such a measure for the organization of procedure only if an applicant makes a plausible case that the documents are necessary and relevant for the purposes of judgment (see *Schenker I*, cited above, paragraph 92).

69 As regards "Schenker's request for access to documents in Case No 34250 Norway Post internal update" and the specific documents requested, the applicants clearly identified the documents requested and provided the Court with at least the minimum information indicating the utility of those documents for the purpose of these proceedings. However, the applicants failed to make a plausible case that the documents were necessary and relevant to arrive at a judgment.

70 As regards the groups of documents, the applicants failed to sufficiently identify the documents requested and to provide the Court with at least the minimum information indicating the utility of those documents for the purpose of these proceedings.

71 Consequently, the request for measures of organization of procedure was denied.

The first plea – failure to act

72 With regard to the legal force to be attributed to Decision 407/08/COL, the Court has already found that, while it was adopted by ESA of its own motion, it is part of EEA law (see *Schenker I*, cited above, paragraph 118).

73 By their first plea, the applicants submit in essence that ESA has failed to act on the information request of 3 August 2010.

74 Moreover, the applicants contest the assertion that the letter of 5 September 2012 effectively covers all remaining documents on the file.

75 As a preliminary point, it should be noted that an application for failure to act must be preceded by a formal notice calling upon ESA to act, and the subject-matter of that notice must be set out in such a manner as to make it clear what measures ESA should have taken under EEA law (see Order of the Court in Case E-7/96 *Paul Inge Hansen* v *ESA* [1997] EFTA Ct. Rep. 101, paragraph 15, and Order of the Court in Case E-5/08 *Yannike Bergling* v *ESA* [2008] EFTA Ct. Rep. 316, paragraph 4).

76 Moreover, in order to rule on the substance of a claim for a declaration that ESA has failed to act, it is necessary to determine whether, at the time when ESA was formally called upon to define its position within the meaning of Article 37 SCA, it was under a duty to act (see, for comparison, Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397, paragraph 25).

77 It should also be noted that the remedy provided for in Article 37 SCA, which serves different purposes from the remedy provided for in Article 36 SCA, is founded on the premise that the unlawful inaction on the part of ESA enables the matter to be brought before the Court in order to obtain a declaration that the failure to act is contrary to the EEA Agreement, in so far as it has not been repaired by ESA.

78 The effect of that declaration, under Article 38 SCA, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise. In circumstances, where the act whose absence constitutes the subject-matter of the proceedings, was adopted after the action was brought but before judgment, a declaration by the Court to the effect that the initial failure to act is unlawful can no longer bring about the consequences prescribed by Article 38 SCA.

79 It follows that in such a case, as in cases where ESA has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist, so that there is no longer any need to adjudicate. The fact that the position adopted by ESA has not satisfied the applicants is of no relevance in this respect. Article 37 SCA refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (see, for comparison, *Ryanair* v *Commission*, cited above, paragraph 26 and case-law cited).

80 It is in the light of these considerations that the Court must rule on the claim that ESA failed to act in relation to the request for access to documents submitted by the applicants on 3 August 2010.

81 The applicants refer to the right of access to documents established by ESA in the RAD. The applicants claim that ESA's failure to act lies in the fact that ESA delayed the handling of the access request and emphasise that ESA failed to take a decision at the end of the two-month period prescribed in Article 37, second paragraph, SCA in relation to those documents remaining after ESA defined its position in its letter of 9 May 2012.

82 ESA agrees that there is a right of access to documents, but claims that in the present case it extended only to partial access to a limited number of internal ESA documents, and this only after 18 April 2012, the day the Court handed down the judgment in Case E-15/10 *Posten Norge AS* v *ESA* [2012] EFTA Ct. Rep. 246.

83 At the oral hearing ESA expressed regret that the access request of the applicants had been processed over such a long period of time but reiterated its position in the defence that the claim of failure to act in relation to the request for access to the remaining documents is unfounded and that, in any

event, in light of the adoption of the decision of 5 September 2012, the present action has become devoid of purpose.

84 In that respect, it must be noted that Article 7 RAD imposes on ESA a duty to act on the access request submitted on 3 August 2010 within certain well-defined, clear time limits. Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases (see *Schenker I*, cited above, paragraph 274).

85 ESA has repeatedly contended that no right to access existed. However, such an argument cannot be used to show that ESA had no duty to take a position on the access request submitted by the applicants.

86 Nevertheless, by the decision of 5 September 2012, ESA granted access to a large number of documents from its file Case No 34250 whereas access to other documents was denied. In that decision, ESA stated that it "discloses or refuses to disclose all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which [the applicants] requested access".

87 Therefore, it must be held that on 5 September 2012 ESA clearly defined its position concerning the remaining documents.

88 This conclusion cannot be called into question by the arguments of the applicants that the decision of 5 September 2012 did not cover all the remaining documents. As has been noted above in paragraph 79, Article 37 SCA refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned. In the latter case, the applicants could have brought an action under Article 36 SCA.

89 It follows that, by adopting the decision of 5 September 2012, ESA properly defined its position, within the meaning of the second paragraph of Article 37 SCA, on the applicants' request that it should act in that regard.

90 Consequently, although the applicants had a legitimate interest in bringing the present action, it has become devoid of purpose, since it seeks a declaration that ESA unlawfully failed to adopt a position with regard to the remaining documents on which ESA had not yet on 9 May 2012 taken a decision.

91 There is therefore no need to adjudicate on the claim that ESA failed to act in relation to the remaining documents in Case No 34250.

The second plea – non-contractual liability

Arguments of the parties

92 The applicants claim that ESA should be held liable pursuant to Article 46 SCA and request the Court to render an interlocutory judgment. They argue that ESA's failure to handle their access request in a timely and otherwise lawful manner has resulted in losses for which ESA is liable. This also includes losses caused by the infringements that the applicants advanced in *Schenker I*, cited above, concerning ESA's overall refusal to grant access to the inspection documents, and the losses caused by the infringements that the applicants have advanced in pending case *Schenker III*, in relation to certain documents to which the applicants were refused access by ESA correspondence of 9 May 2012 and 23 May 2012.

93 The applicants refer to the rulings of the Court of Justice of the European Union (the "ECJ") in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41-42, and in Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 160. They submit that the conditions that must be met under Article 46 SCA should be aligned with the conditions governing State liability. First, the law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage sustained.

94 As regards the first criterion, the applicants claim that they had a right of access, which ESA has infringed. The right to timely access is by its nature intended to confer rights on individuals. ESA had a duty to take a decision on the access request by the end of the extended statutory time limit provided for under Article 7(2) of the RAD or, in any event, within a reasonable time in accordance with the fundamental right and general principle of sound administration in EEA law and the principle of legitimate expectations.

95 As regards the second criterion, the applicants submit that ESA had no margin of discretion on whether to act on the access request submitted on 3 August 2010. The handling of the case by ESA shows a staggering lack of diligence and care, over a long period, and at high level within ESA's organisation, towards the applicants.

96 As regards the third condition, the applicants claim that they have incurred legal fees in their efforts to establish a true state of affairs regarding ESA's handling of the access request and to bring ESA into compliance and state that they estimate those fees to have stood at EUR 22 500 at the time of the application. They also submit that they have incurred legal expenses in their efforts to have the follow-on action against Norway Post in Oslo City Court stayed until ESA has lawfully decided on the access request and state that

they estimate those fees to have stood at EUR 26 000 at the time of the application.

97 ESA contests these arguments and argues that the claim for damages is inadmissible, since there has not been a failure to act. ESA also submits that the request for an interlocutory judgment must be rejected.

98 ESA agrees that the principle of homogeneity calls for Article 46, second paragraph, SCA, to be interpreted in line with the corresponding provision in the EU pillar, that is, Article 340, second paragraph, of the Treaty on the Functioning of the European Union ("TFEU").

99 However, ESA maintains that the applicants have not managed to demonstrate any breach of a rule intended to confer rights on them, that the breach, if any, was not sufficiently serious to merit liability, and that there is no causal link between the legal fees mentioned by the applicants and the actions of ESA.

100 In relation to the legal fees, ESA specifically claims that these are not recoverable costs and that they cannot be the subject of the present action.

Findings of the Court

Admissibility

101 The action to establish liability is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose. Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct attributable to ESA (see, for comparison, Case C-234/02 P *European Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 59).

102 In that regard, the Court notes that the applicants' plea for damages is not based on a failure to act, but a failure to take a timely decision and handle the request in an otherwise lawful manner.

103 Even if there is no need to adjudicate on the claim that ESA failed to act, the Court must nevertheless consider whether ESA may have incurred liability under Article 46 SCA on those grounds.

104 However, Article 19 of the Statute of the Court provides, inter alia, that an application must specify the subject-matter of the dispute and contain a brief statement of the pleas in law on which the application is based. This means that the application must specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Statute or the RoP. Consequently, a mere

reference to alleged infringements which are subject to parallel proceedings of the kind contained in the application cannot be considered sufficient, in particular as there have been no specific arguments put forward in the present case concerning the letter of 9 May 2012 (see paragraph 46 above) and the letter attached to the email from ESA to the applicants of 23 May 2012 (see paragraphs 37, 38, 39, 40, 41, 42, 44 and 49 above), which are both subject to the parallel application for annulment (see pending case *Schenker III*).

105 Accordingly, the conditions laid down in Article 19 of the Court's Statute are not fulfilled with regard to the applicants' plea that they have suffered losses advanced in the parallel annulment action in Case E-8/12 *Schenker III* in relation to the correspondence of 9 May 2012 and the letter attached to the email from ESA to the applicants of 23 May 2012.

106 As to the general reference made to Case E-8/12 *Schenker III*, it must be added that it is not for the Court to transpose to the present proceedings, concerning a claim for damages under Article 46, second paragraph, SCA, pleas or arguments raised in the course of the other case concerning an application for annulment under Article 36, second paragraph, SCA. To do so would not be consistent with the responsibility of each party for the content of the pleadings which it lodges, in particular Article 33(1) RoP. The question of an infringement of the rights of the defence must be decided by taking into consideration the specific circumstances of each particular case. The Court thus considers that the content of the pleadings lodged in Case E-8/12 *Schenker III* cannot be taken into account in the present case.

107 Therefore the claim for non-contractual damages is admissible except for the part of the application covered by the parallel annulment action in Case E-8/12 *Schenker III*, which is inadmissible.

Preliminary remarks

108 Article 46, second paragraph, SCA provides that, in the case of non-contractual liability, ESA shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants in the performance of its duties.

109 The Court has repeatedly held that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, for the sake of procedural homogeneity, the reasoning which led that court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, inter alia, the Order of the Court in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3, paragraph 24, and case-law cited, and the judgment *Schenker I*, cited above, paragraphs 77-78 and case-law cited).

110 Consequently, in assessing the claim for non-contractual liability pursuant to Article 46, second paragraph, SCA, it is appropriate to take account of the reasoning in the case-law of the EU courts concerning Article 340, second paragraph, TFEU.

111 Moreover, the conditions under which ESA may incur liability for damage caused to individuals by a breach of EEA law should not, in the absence of particular justification, differ from those governing the liability of the European Commission (the "Commission") in similar circumstances, taking into account the shared supervisory role played by the two institutions in the EEA. The protection of the rights conferred on individuals in EEA law should not vary depending on whether ESA or the Commission is responsible for the damage when they exercise powers conferred upon them by the EEA Agreement pursuant to Article 109 EEA (see, *mutatis mutandis*, *Bergaderm*, cited above, paragraph 41).

112 The parties have thus correctly assumed that EEA law confers a right to reparation where the following three conditions are met: first, that the rule of law infringed must be intended to confer rights on individuals; second, that the breach must be sufficiently serious; and third, that there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see, for comparison, *Bergaderm*, cited above, paragraph 43).

The first condition

113 As to the first condition, it must be examined whether the grounds of annulment in the application refer to the infringement of rules of law conferring rights on individuals.

114 The applicants argue that they had a right of access and that ESA had a corresponding duty to take a decision on the request that was submitted on 3 August 2010 by the end of ESA's extended statutory time limit under Article 7(2) RAD or, in any event, within reasonable time in accordance with the fundamental right and general principle of sound administration in EEA law.

115 The applicants also contend that ESA infringed their legitimate expectations in obtaining a timely decision. That argument is linked to "the existence and specific provisions set out in the RAD, and [ESA]'s specific and repeated assurances during the entire process".

116 By adopting Decision 407/08/COL, ESA has indicated to individuals and economic operators who wish to gain access to documents which it has in its possession that their requests will be dealt with according to the procedures, conditions and exceptions laid down for that purpose. Although Decision 407/08/COL is, in effect, a series of obligations which ESA has voluntarily assumed for itself in the interest of the principles of

transparency and good administration, it forms part of the EEA legal order and is therefore capable of conferring on third parties legal rights which ESA is obliged to respect.

117 Finally, the Court recalls that, according to settled case-law, the principle of legitimate expectations is a recognised general principle of EEA law (see Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, paragraphs 170 to 173, and Joined Cases E-17/10 and E-6/11 *Liechtenstein and Others* v *ESA* [2012] EFTA Ct. Rep. 114, paragraph 134).

118 That principle constitutes a rule of law conferring rights on individuals (see, for comparison, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15).

119 It follows that the first condition is satisfied.

The second condition

120 First, it must be noted that application of the condition of a sufficiently serious breach in a case concerning the non-contractual liability of ESA may not necessarily be coextensive with its application under the EEA State liability rules. As has been repeatedly held, the principle of State liability which follows from the EEA Agreement itself differs, as it must, from the development in the case-law of the ECJ of the principle of State liability under EU law (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 30, and Case E-2/12 *HOB-vín III* [2012] EFTA Ct. Rep. 1092, paragraph 120).

121 As regards the liability of ESA under Article 46 SCA, that provision requires that account be taken, *inter alia*, of the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to ESA (see, for comparison, *Bergaderm*, cited above, paragraph 40).

122 The decisive test for finding that a breach of EEA law is sufficiently serious is whether ESA manifestly and gravely disregarded the limits on its discretion.

123 Where ESA has only considerably reduced or even no discretion, the mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach (see, for comparison, Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47 and case-law cited).

124 Therefore, it is necessary first to determine the margin of discretion of ESA in the present case in the light of that principle and, second, whether this has been infringed. The applicants have argued that ESA has committed a

sufficiently serious breach by displaying a staggering lack of diligence and care and in grave disregard of its legal obligation to take a timely decision.

125 As noted above, by adopting Decision 407/08/COL, and in particular Article 7 RAD, ESA has voluntarily assumed for itself a series of obligations, such as specific and binding periods for the processing of applications, in the interest of the principles of transparency and good administration which are capable of conferring on third parties legal rights which ESA is obliged to respect.

126 However, in this case a sufficiently serious breach cannot follow from the application of the principle of legitimate expectations.

127 The right to rely on the principle of legitimate expectations extends to any individual who is in a situation in which it is clear that ESA has, by giving him precise assurances, led him to entertain such legitimate expectations. Regardless of the form in which it is communicated, precise, unconditional and consistent information which comes from authorised and reliable sources constitutes such assurances.

128 However, a person may not plead infringement of that principle unless he or she has been given precise assurances by the authorities (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 134 and case-law cited). Moreover, only assurances which comply with the applicable rules may give rise to legitimate expectations (see, for comparison, Case T-475/07 *Dow AgroSciences Ltd and Others* v *Commission*, judgment of 9 September 2011, not yet reported, paragraph 265).

129 There is nothing in the present case to indicate that ESA gave the applicants any such precise assurances. On the contrary, the communications from ESA to the applicants, in particular those of 4 August 2010 and 30 August 2010, show that ESA informed the applicants that the file was voluminous and did not state a precise date when the assessment would be finished. That the applicants did not entertain any expectations is clear from their email of 30 August 2010 where they offered to discuss a reasonable extension of the deadline in Article 7 RAD.

130 Consequently, this argument must be rejected.

131 However, Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases. Pursuant to Article 7(2) RAD, that time limit may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

132 It follows from this clear rule that the margin of appreciation of ESA for the timely processing of applications under Article 7 RAD was limited to extending the time limit by 20 working days under Article 7(2) RAD.

133 Following the applicants' request of 3 August 2010 for access to documents, ESA was therefore obliged to take a decision at the latest by 7 September 2010.

134 It is clear from the evidence submitted by the parties that ESA failed to respect that time limit. The first documents were released by the letter of 5 November 2010, which reached the applicants on 11 November 2010. A second batch of documents was released to the applicants by the letter of 16 February 2011, which reached the applicants on 22 February 2011. Another batch of documents was released on 16 September 2011, and yet another batch on 9 May 2012. The final documents were released by the letter of 5 September 2012, after this action had been brought before the Court.

135 From this evidence it must be concluded that ESA failed to comply with the clear time limits laid down in Article 7 RAD. This constitutes an infringement of EEA law, sufficient to establish the existence of a sufficiently serious breach.

136 The Court, moreover, makes the following observations.

137 In the letter of 30 August 2010, the applicants referred to their follow-up action before the court in Norway and in their letter of 14 September 2010 called ESA's attention to the fact that they intended to intervene in support of ESA in *Posten Norge AS* v *ESA*, cited above.

138 Nevertheless, ESA remained largely passive. Some documents were released only by the letter of 5 November 2010, but the bulk of the documents were released after the hearing in Case E-15/10, which took place on 5 October 2011. Moreover, as the letters of 6 January 2011 and 17 February 2011 show, ESA seems to have paused in the treatment of the access request and effectively ended communications with the applicants. A small number of documents were released by letters of 16 February 2011 and 16 September 2011, but then the treatment of the file appears to have recommenced only with the threat of the action for a failure to act in 2012, which indicates that ESA did not act on the request during this period.

139 In the circumstances of the present case and given the importance of private enforcement of competition law (see *Schenker I*, cited above, paragraph 132, and with regard to the parallel rules in EU law, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 paragraphs 26 to 28, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 91, and Case C-536/11 *Bundeswettbewerbsbehörde* v *Donau Chemie AG and Others*, judgment of 6 June 2013, not yet reported, paragraph 46), ESA's failure to comply with the clear time limits laid down in Article 7

RAD, as established in paragraph 135 above, is regrettable since it had the potential to undermine private enforcement of that kind.

140 It follows from the foregoing, in particular paragraphs 131 to 135, that ESA has committed a sufficiently serious breach sufficient to satisfy the conditions in Article 46 SCA.

The third condition

141 As to the third condition, it is clear that only a direct link of cause and effect between the allegedly unlawful conduct of the institution concerned and the damage pleaded can give grounds for non-contractual liability on the part of ESA pursuant to Article 46, second paragraph, SCA.

142 The burden of proof for establishing the existence of such a causal link rests on the applicant (see, for comparison, Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraphs 51 to 56, Case 310/81 *Ente Italiano di Servizio Sociale* v *Commission* [1984] ECR 1341, paragraphs 16 and 17, and Order of the General Court in Case T-346/03 *Krikorian and Others* v *European Parliament, Council and Commission* [2003] ECR II-6037, paragraph 23).

143 The applicants have demonstrated the existence of a sufficiently serious breach.

144 The applicants claim damages for two categories of legal costs. The first category consists of legal expenses incurred by the applicants in connection with the correspondence with ESA following their request for access to documents, which are not recoverable before the Court since they fall outside the scope of Article 69 RoP. The second category consists of legal expenses incurred before the national court in the context of staying the proceedings in the follow-on action in Oslo City Court against Norway Post pending the outcome of that request for access to documents.

145 As for the causal link between these costs and the violation of Article 7 RAD, the applicants claim that but for that breach they would not have incurred these losses.

146 ESA claims that the costs incurred by the applicants cannot be recovered by way of damages. First, the legal expenses incurred during the procedure before ESA cannot be reclassified as damages. Second, the costs incurred before the national court in the follow-up action are outside the jurisdiction of the Court.

147 With regard to the causal link required, it is not disputed that, pursuant to Article 69 RoP, the costs of proceedings incurred by the parties are recoverable if they were necessary for the purposes of the proceedings.

148 However, the general principles of law to which the second paragraph of Article 46 SCA refers do not oblige ESA to make good every harmful consequence of its conduct. The condition under Article 46, second paragraph, SCA relating to a causal link concerns a sufficiently direct causal nexus between ESA's conduct and the damage (see, for comparison, Case C-419/08 P *Trubowest and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraph 53, and case-law cited).

149 First, as regards the costs incurred before Oslo City Court, the Court notes that the costs for those proceedings are to be decided by that court. In that respect it must be recalled that a decision on the costs in a case covers all costs recoverable and determines which of the parties shall cover them and how they are to be allocated. Thus, even if the applicants were not to be awarded reimbursement of their expenses before the national court that would remain a matter for those proceedings.

150 Accordingly, costs incurred before the national court in the follow-up action before Oslo City Court cannot be considered harm suffered in the present proceedings but as costs relating to the proceedings before the national court. It follows from Article 97(5) RoP that costs of the parties to proceedings in a national court are a matter for that court to decide (see, for comparison, Case T-167/94 *Nölle* [1995] ECR II-2589, paragraphs 36 to 39).

151 As a result, the claims regarding costs in the proceedings before the national court must be dismissed.

152 Second, as regards costs incurred in connection with correspondence during the administrative procedure, it must be noted first of all that this procedure effectively ended when ESA defined its position by its decision of 5 September 2012.

153 In relation to these losses, ESA claims that the costs cannot be reclassified as damages and that the applicants have not shown that the actual costs have been substantiated.

154 It must be noted that the applicants base their request for damages on the costs incurred for correspondence during the administrative procedure concerning access to documents and refers explicitly to the correspondence submitted in evidence. The applicants claim that the costs incurred for this correspondence – which covers more than 40 annexes to the application, including send receipts, decisions, emails, letters and document lists – should be reimbursed by ESA.

155 According to the evidence submitted by the applicants, correspondence was sent from the applicants to ESA on 18 occasions on 3 August 2010, 4 August 2010, 11 August 2010, 30 August 2010, 6 September 2010, 14 September 2010, 17 September 2010, 9 November 2010, 6 January 2011,

17 February 2011, 18 February 2011, 8 March 2012, 12 March 2012, 19 March 2012, 27 March 2012, 30 March 2012, 11 April 2012, and 18 May 2012.

156 According to the same evidence, correspondence was sent by ESA to the applicants on 18 occasions on 4 August 2010, 10 August 2010, 18 August 2010, 30 August 2010, 1 September 2010, 17 September 2010, 5 November 2010, 10 November 2010, 16 February 2011, 18 February 2011, 16 August 2011, 15 March 2012, 19 March 2012, 20 March 2012, 30 March 2012, 5 April 2012, 9 May 2012 and 22 May 2012.

157 It follows from this evidence – which has not been contested by ESA – that the applicants conducted a lengthy correspondence with ESA. During this correspondence ESA gave inconclusive answers to the applicants' inquiries. As a result the correspondence in the case became vastly greater in scope than can be considered necessary to respond to the applicants' enquiries.

158 However, this does not mean that there is a causal link within the meaning of Article 46 SCA. In the present case, the applicants pursued a negotiated solution with ESA after the clear time limit in Article 7(2) RAD had expired and had recourse to legal representation even though such representation is not mandatory. This is apparent from the correspondence between the applicants and ESA, in particular on 14 September 2010, 9 November 2010 and 17 February 2011.

159 With regard to a claim for compensation for material damage which an applicant alleges to have suffered on account of the costs incurred in seeking legal advice during negotiations with ESA, the Court notes that the contents of administrative complaints must be interpreted and understood by ESA with all the care that a large and well-equipped institution owes to those having dealings with it. Although those concerned may seek legal advice at that stage, it is their own decision and the institution concerned cannot be held liable for the consequences.

160 Thus, there is no causal link between ESA's conduct and the damage alleged, namely the lawyers' fees (see, for comparison, Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraphs 47 to 49, and Case C-331/05 P *Internationaler Hilfsfonds eV* v *Commission* [2007] ECR I-5475, paragraph 24).

161 Similarly, the costs incurred during the negotiations with ESA after the clear time limit in Article 7(2) RAD expired must be distinguished from those incurred in contentious proceedings.

162 Those concerned are free to choose to enter into a negotiated agreement with ESA. The costs thus freely incurred by the applicants cannot therefore be regarded as damage caused by the institution in question (see, for

comparison, by analogy, *Internationaler Hilfsfonds eV* v *Commission*, cited above, paragraph 27).

163 In contrast, the same does not apply to costs incurred by an applicant who has decided to institute legal proceedings which may result in a binding decision to recognise the applicant's rights and to oblige ESA to give effect to them pursuant to Article 38 SCA (see, for comparison, by analogy, *Internationaler Hilfsfonds eV* v *Commission*, cited above, paragraph 28).

164 There is therefore no causal link in law between the harm allegedly suffered by the applicants and the actions (or, in the present case, failure to act) of ESA after the expiry of the clear time limit in Article 7(2) RAD.

165 The second plea in law must therefore be rejected.

The request for an interlocutory judgment

166 The applicants' plea for damages has not been successful. The request for an interlocutory judgment must therefore be rejected.

V Costs

167 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. The applicants have asked for ESA to be ordered to pay the costs.

168 In the present case, as regards, firstly, the main part of the action concerning the failure to act, there is no longer any need for the Court to give a decision. But the applicants cannot be criticised for having brought that action in order to protect their rights without waiting for ESA to adopt its decision, which was adopted after the expiry of the two-month period prescribed in Article 37, third paragraph, SCA. Therefore, the Court orders ESA to bear the costs for that part of the action.

169 Second, as regards the part of the action concerning the non-contractual liability of ESA, the Court considers it appropriate in the circumstances of the case to order ESA to bear its own costs and half of the costs of the applicants and to order the applicants to bear half of their own costs.

On those grounds,

THE COURT

hereby declares:

1. **There is no need to adjudicate on the claim that ESA failed to act in relation to the remaining documents in Case No 34250;**

2. Dismisses the action to the remainder;

3. Orders ESA to pay the costs concerning the failure to act, its own costs concerning the action for non-contractual liability and half of those of the applicants concerning the action for non-contractual liability;

4. Orders the applicants to pay half of their own costs concerning the action for non-contractual liability.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 9 July 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President