ORDER OF THE PRESIDENT
21 December 2012

(Intervention – Representation by a lawyer - Interest in the result of case)

In Case E-7/12,

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

applicant,

v

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

defendant,

APPLICATION seeking a declaration that the defendant has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No. 34250 under the Rules on Access to Documents ("RAD") established by ESA Decision No. 407/08/COL on 27 June 2008, and seek damages for the losses incurred by the failure to take a timely decision and otherwise handle the request in a lawful manner,

THE PRESIDENT

makes the following

Order

I Background

1 The present case is a follow-up to Case E-14/11 *DB Schenker* v *ESA* in which the applicant in that case sought the annulment of ESA's Decision in Case No 68736 of 16 August 2011 denying DB Schenker access to certain documents relating to Case No 34250 *Norway Post* / *Privpak* on the basis of the Rules on Access to Documents ("RAD") established by the College of the EFTA Surveillance Authority on 27 June 2008.

2 Judgment in Case E-14/11 *DB Schenker* v *ESA* was handed down on 21 December 2012.

II Facts and procedure

3 On 9 July 2012, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS ("DB Schenker" or "the applicants") made an application pursuant to Article 37(3) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") and Article 46(2) SCA. DB Schenker seeks a declaration that the defendant has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No. 34250 under the RAD. DB Schenker also seeks damages for the losses incurred by the failure to take a timely decision and otherwise handle the request in a lawful manner.

4 On 20 July 2012, ESA requested an extension of the deadline for the defence.

5 On 24 July 2012, the President, pursuant to Article 35(2) of the Court's Rules of Procedure ("RoP"), granted an extension of the time-limit for submitting a defence until 27 September 2012.

6 On 25 September 2012, ESA submitted its defence.

7 On 16 October 2012, the applicant requested an extension of the deadline for the Reply.

8 On 18 October 2012, the notice of the action brought by DB Schenker against ESA in Case E-7/12 was published in the EEA Section of the Official Journal of the European Union (2012/C 314/08) and EEA Supplement No 58/06 to the Official Journal.

9 On 19 October 2012, the President, pursuant to Article 36(2) RoP, granted an extension of the time-limit for submitting a Reply until 12 November 2012.

10 On 19 October 2012, DB Schenker made an application for a stay of the proceedings, pursuant to Article 79(1) RoP, until judgment has been rendered in Case E-14/11 *DB Schenker* v *ESA*.

11 On 26 October 2012, the President, pursuant to Article 79(1) RoP, after hearing the Judge-Rapporteur and ESA, decided not to stay proceedings.

12 On 30 October 2012, Posten Norge AS ("Norway Post") submitted an application for leave to intervene in support of the form of order sought by the defendant pursuant to Article 36(3) of the Statute. Norway Post contends that it has a direct and existing interest in the result of the case, as required by Article 36(2) of the Statute, as DB Schenker's application against the alleged failure to act concerns a request for access to the complete file in ESA Case No. 34250 (Norway Post/Privpak) where Norway Post was the party to the proceedings. Norway Post submits that many of those documents in the Norway Post/Privpak case-file entail detailed information about Norway Post which is liable to seriously undermine the protection of its commercial interest if disclosed. Norway Post states that it believes that ESA has adequately defined its position on DB Schenker's request for access to documents in ESA Case No. 34250 and that no further access to documents may be granted. Insofar as the application concerns an alleged on-going failure to act, the result of the case may force ESA to conduct further assessments as to whether or not DB Schenker can be granted access to additional documents. This may also, it is submitted, inflict an additional workload on Norway Post. Norway Post submits that its application to intervene is made within the time limit set by Article 89(1) RoP.

13 The application to intervene was served on the parties in accordance with Article 89(2) RoP.

14 On 12 November 2012, DB Schenker submitted its Reply.

15 On 19 November 2012, ESA submitted its written observations on Norway Post's application for leave to intervene.

16 On 20 November 2012, DB Schenker submitted its written observations on Norway Post's application for leave to intervene.

III Observations of the parties

17 ESA submits that Article 36 of the Statute is essentially identical in substance to Article 40 of the Statute of the ECJ and that accordingly the principle of procedural homogeneity is applicable. As the present action is twofold, the application to intervene needs to be assessed with regard to both forms of order sought by the applicants, i.e. the declaration that ESA failed to act according to Article 37 SCA and damages pursuant to Article 46(2) SCA. ESA submits that as both parts of the present case are based on the alleged failure of ESA to act upon the applicant's request for public access to its complete case file no. 34250, a competition procedure to which Norway Post was a party, Norway Post has a direct and existing interest in the result of the case within the meaning of Article 36(2) of the Statute.

18 ESA submits that although Norway Post's interest to intervene in relation to the claim for the damages part of the case is not as clear, the two claims are closely connected and arguably even intrinsically linked. ESA therefore contends that in the circumstances of the present case the application to intervene should not be dealt with differently in relation to the two forms of orders sought by the applicants. Consequently, ESA states that Norway Post should be granted leave to intervene in Case E-7/12 in support of the form of order sought by the defendant.

19 DB Schenker submits that the present case concerns an action against ESA for a failure to act pursuant to Article 37(3) SCA and an action against ESA for damages pursuant to Article 46(2) SCA. Norway Post has failed to demonstrate a direct and existing interest in the result of either action under Article 32(2) of the Statute, and that the application for leave to intervene must therefore be rejected.

20 DB Schenker argues that Norway Post has not put forward any reasons to demonstrate that it has a direct and existing interest in the result of the action for damages.

21 DB Schenker contends that Norway Post has failed to establish a direct and existing interest in the result of the action against ESA's failure to act under Article 37(3) SCA. An action against a failure to act is decision-neutral, in the sense that its purpose is to fault the defendant for not taking any decision, positive or negative to the applicant. DB Schenker submits that the very nature of an action against a failure to act makes it inherently difficult for any intervener to demonstrate a direct and existing interest in the result. It is argued that on its own contention, Norway Post has only demonstrated at most a potential or indirect interest in the result of the action. Therefore, the application must be rejected in so far as Norway Post seeks leave to intervene in the action against ESA's failure to act.

22 In addition, DB Schenker submits that the application is inadmissible because Norway Post is not independently represented before the Court. According to Article 17 of the Court's Statute, private parties must be represented by objectively independent counsel who is without an own interest tied to the subject matter. DB Schenker contends that the application for leave to intervene falls short of meeting this objective standard as it cannot be precluded that the law firm representing Norway Post has its own interest tied to the subject matter following the judgment in Case E-15/10 *Norway Post* v *ESA*, judgment of 18 April 2012, not yet reported, in light of the applicant's follow-on damages claim and on-going efforts to obtain ESA's evidence against Norway Post to substantiate the full extent of that claim.

23 DB Schenker contends that reliance placed by Norway Post on allegedly erroneous expert advice provided by its law firm in 2002 means that the law firm in question, which presently represents the applicant intervener, cannot be objectively perceived as being without its own interests tied to the subject matter before the Court in this case following the judgment in *Norway Post* v *ESA*. In any event, the application should be ruled inadmissible on the basis that Norway Post has chosen not to be independently represented pursuant to Article 17 of the Statute.

IV Law

Admissibility

24 Pursuant to Article 17 of the Court's Statute, parties other than any EFTA State, ESA, the European Union and the Commission must be represented by a lawyer. Such a lawyer must be authorized to practice before a court of an EEA State.

25 The Court has recognised the procedural branch of the principle of homogeneity and held that the application of the principle of homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see Case E-14/11 *DB Schenker* v *ESA*, judgment of 21 December 2012, not yet reported, paragraphs 77-78; Order of the President of 23 April 2012 in Case E-16/11 *ESA* v *Iceland*, paragraph 32). The need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent with regard to rules concerning the modalities of the procedure, when they relate mainly to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, the Court considers it also in such cases appropriate, as a rule, to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure which are identical in substance to expressions in the equivalent provisions of Union law. In any event, in the application of its procedural

rules the Court must respect fundamental rights (see *DB Schenker* v *ESA*, cited above, paragraph 78 and *Norway Post* v *ESA*, cited above, paragraph 110).

26 Article 17 of the Court's Statute is identical in substance to Article 19(1) to (6) of the ECJ's Statute. In assessing, pursuant to Article 17 of the Statute, the assertions made by DB Schenker in its written observations that Norway Post's law firm cannot be objectively perceived as being without its own interests tied to the subject matter of the case, and that therefore the application for leave to intervene is inadmissible, it is appropriate to take account of the reasoning in the case-law of the Union courts on Article 19 ECJ Statute.

27 Article 17(2) and (3) of the Court's Statute, must be interpreted, so far as possible, independently, without reference to national law (see by comparison, Order in Case T‑79/99 *Euro-Lex* v *OHIM* ("*EU-LEX"*) [1999] ECR II‑3555, paragraph 26).

28 The term 'represented' in Article 17(2) of the Court's Statute must be understood as meaning that an individual is not authorised to act in person, but must use the services of a third person authorised to practise before a court of an EEA State (see by comparison, Order in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401, paragraph 11; Order in *EU-LEX*, cited above, paragraph 27; and Order in Case T-184/04 *Sulvida* v *Commission* [2005] ECR II-85, paragraph 8).

29 The requirement to have recourse to a third party is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence, and in the overriding interest of justice, such legal assistance as his client needs (Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 24; Order in *EU-LEX*, cited above, paragraph 28, and *Sulvida* v *Commission*, cited above, paragraph 9). The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose (see by comparison, *AM & S* v *Commission,* cited above, paragraph 24).

30 Moreover, in order to be considered independent, a lawyer cannot represent a legal person if he has within the body which he represents, extensive administrative and financial powers (see, to that effect, Order of 29 September 2010 in Joined Cases C‑74/10 P and C‑75/10 P *EREF* v *Commission*, not published in the ECR, paragraphs 50 and 51).

31 However, the requirement imposed by EEA law that a party be represented before the Court by an independent third party is not a requirement designed solely to exclude representation by employees of the principal or by those who are financially dependant upon it. The essence of the requirement is to prevent private

parties from bringing actions in person without recourse to an appropriate intermediary. So far as legal persons are concerned, the requirement of representation by a third party thus seeks to ensure that they are represented by someone who is sufficiently detached from the legal person which he is representing (see by comparison, Order of the General Court of 6 September 2011 in Case T-452/10, *ClientEarth* v *Council*, not yet reported, paragraphs 18 and 19).

32 Therefore, financial or structural relationships that the representative has with his client cannot be such as to give rise to confusion between the client's own interests and the personal interests of its representative. On the contrary, the representative must be objectively perceived as being a genuine intermediary between his client and the Court when he is entrusted with defending his client's best interests, in accordance with the forms and limits defined by the procedural rules applicable (See by comparison to that effect, *ClientEarth* v *Council*, cited above, paragraph 20).

33 However, in interpreting Article 17(2) of the Court's Statute, it is not alone determinative whether there is a relationship of employment between the lawyer, whether internal or external counsel, and his client unless that relationship is such as to put into doubt the independence of that lawyer as required by EEA law (see paragraph 29 above).

34 Consequently, in light of paragraph 25 above, a lawyer may represent a party before the Court, pursuant to Article 17(2) of the Court's Statute, if such counsel is bound by an ethical code of an EEA State bar to provide in full independence, and in the overriding interest of justice, such legal assistance as his client needs, and entitled to make representations before the highest courts.

35 Moreover, if an in-house lawyer has a lesser degree of independence or rights of audience, as described in paragraph 34 above, such in-house counsel may not even represent before the Court a different company which is a part of the same group of companies as his employer (see by comparison, Order of the General Court of 9 November 2011 in Case T-243/11 *Glaxo Group Ltd* v *OHIM*, not yet reported, paragraph 18).

36 Thus, it is only if a lawyer may ethically, as his EEA State bar dictates, provide his client with such legal assistance as may be necessary and appropriate in all the circumstances, in the overriding interest of justice and in its administration before the Court, that he may be considered fully independent.

37 It is unnecessary to consider, upon the present application, the extent to which the notion of full independence is intertwined with the matter of legal professional privilege.

38 In the present proceedings, the applicant intervener has chosen to be represented by a particular law firm as external counsel. Such external counsel must be perceived as a genuine intermediary between Norway Post and the Court unless the conduct of counsel towards the Court is, pursuant to Article 31 RoP, incompatible with the dignity of the Court or with the requirements of justice, or if such adviser or lawyer is using his rights for purposes other than those for which they were granted. No such concerns exist in the present proceedings.

39 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. In accordance with Article 14(6) RoP, notice of the action was given in the EEA Section of the Official Journal of the European Union on 18 October 2012.

40 The present application to intervene was lodged at the Court's Registry on 30 October 2012, and is therefore timely.

41 The application for leave to intervene is therefore admissible.

Interest in the result of the case

42 The subject of the present case is an action against ESA for a failure to act pursuant to Article 37(3) SCA and an action against ESA for damages pursuant to Article 46(2) SCA.

43 An interest in the result of a case within the sense of the Statute is to be understood as meaning that a person must establish a direct and existing interest in the grant of the forms of order sought by the party whom it intends to support and thus, in the present case, ruling on the specific declaration sought concerning an alleged failure to act on behalf of ESA, or, for damages resulting from ESA's non-contractual liability (see compare also Orders of the President of 29 February 2012 in *DB Schenker* v *ESA*, cited above, paragraph 15, 25 March 2011 in Case E-14/10 *Konkurrenten. no* v *ESA*, paragraph 10 and of 15 February 2011 in *Norway Post* v *ESA*, cited above, paragraph 9).

44 In the present case, Norway Post intends to support the defendant who seeks a declaration that the action for failure to act is devoid of purpose and to dismiss the remainder of the application, or, in the alternative, to order each party to bear their own costs as regards the action for failure to act; and order the applicant to bear the costs as regards the action for damages.

Action for Failure to Act

45 Article 37 SCA is identical in substance to Article 265 TFEU. A failure to act means a failure to take a decision or to define a position, and not a failure to adopt a measure different from that desired or considered necessary by an applicant (see by comparison, Order of the President of the ECJ in Case C-258/05 P(R) *Makhteshim-Agan and others* v *Commission*, paragraph 14 and case-law cited). In other words, such an application seeks to fault ESA for not having taken any decision whether positive or negative to the applicant.

46 The applicant intervener asserts that should ESA be found by the Court to have failed to have acted, pursuant to Article 37 SCA, then ESA may be forced "to conduct further assessments as to whether or not DB Schenker can be granted access to additional documents in the case […] [which] may also inflict an additional workload on Norway Post."

47 Such an interest in the result of the case is not direct and existing but rather indirect and speculative. Consequently, the applicant intervener has failed to establish the requisite interest, pursuant to Article 36(2) of the Statute, in the result of the action for failure to act.

Action for damages

48 Norway Post has not established a direct and existing interest in the grant of the forms of order sought by the defendant in the action for damages pursuant to Article 46(2) SCA.

Conclusion

49 Therefore, in light of the above, the application for leave to intervene by Norway Post pursuant to Article 89 RoP must be dismissed as inadmissible.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The application for leave to intervene is dismissed.**

2. **Posten Norge AS is to bear its own costs relating to this application.**

Luxembourg, 21 December 2012.

Michael-James Clifton
Acting Registrar

Carl Baudenbacher
President