REPORT FOR THE HEARING
in Case E-7/12

APPLICATION to the Court pursuant to Articles 37(3) and 46(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the cases between

Schenker North AB
Schenker Privpak AB
Schenker Privpak AS

and

EFTA Surveillance Authority

seeking a declaration that the EFTA Surveillance Authority has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No 34250 (Norway Post) under the Rules on access to documents established by ESA Decision No 407/08/COL on 27 June 2008 and damages for the losses incurred by reason of the failure to take a timely decision and otherwise handle the request in a lawful manner.

I Introduction

1. In the present action Schenker North AB, Schenker Privpak AB and Schenker AS ("the applicants" or "Schenker") pursue two claims. First, they request that the Court establish that the EFTA Surveillance Authority ("ESA") failed to act in relation to documents to which the applicants requested access. Second, the applicants seek damages from ESA as a matter of non-contractual liability in respect of losses incurred by them by reason of ESA's failure to take a timely decision and otherwise handle the request in a lawful manner.

II Legal context

EEA law

2. 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.*

3. According to Article 46(2) 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.*

4. 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, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within 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.*

III Background

The procedure leading up to the pre-litigation notice

5. On 3 August 2010, the applicants requested by email "access to the file" in ESA Case No 34250 (*Norway Post*/*Privpak*). They indicated their assumption that during the investigation Norway Post had been asked to submit non-confidential versions of its submissions to ESA.

6. 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.

7. On the same day, the applicants specified that the "request concerns the entire file".

8. On 10 August 2010, ESA replied that "the file is quite voluminous. Preparation of non-confidential versions of its content will take some time."

9. During the course of numerous communications between the parties over a considerable period of time, ESA handed over some of the requested documents to the applicants.

10. The applicants were granted access to documents from ESA on the following dates: 30 August 2010, 5 November 2010, 16 February 2011, 16 August 2011, 5 April 2012 and 9 May 2012.

11. In its letter of 16 February 2011, ESA also denied access to certain documents. This decision was reviewed by the Court in Case E-14/11.[1]

12. On 8 March 2012, the applicants served a pre-litigation notice on ESA pursuant to Article 37(2) SCA in relation to the remainder of the documents not yet subject to any decision by ESA.

13. In a letter of 9 May 2012, ESA defined its position in part.

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

The content of the pre-litigation notice

15. In the pre-litigation notice of 8 March 2012, the applicants made it clear that they would take legal action under Article 37 SCA if ESA failed to adopt a

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[1] Case E-14/11 *Schenker and Others* v *ESA*, judgment of 21 December 2012, not yet reported.

position on the remaining documents belonging to Case 34250 within the statutory two-month pre-litigation period.

16. 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.

Definition of position by ESA

17. ESA responded to the formal pre-litigation notice in a letter dated 9 May 2012, and defined its position 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.”

18. 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 applicant 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.

19. On 5 September 2012, after the present case had been lodged and before the defence was submitted, ESA sent a letter to DB Schenker 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. In this letter, 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 [DB Schenker] requested access”.

20. Before the Court, Schenker has contested the assertion that the letter of 5 September 2012 effectively covers all remaining documents on the file.

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

21. On 9 July 2012, the applicants brought an action under Articles 37(3) and 46(2) SCA seeking a declaration that ESA had failed to act on the request, submitted on 3 August 2010, for public access to ESA Case 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.

22. ESA submitted a defence which was registered at the Court on 25 September 2012. The reply from the applicants was registered at the Court on 12 November 2012. The rejoinder from ESA was registered at the Court on 13 December 2012.

23. 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.

24. In relation to their claim for damages, the applicants contend that the Court should:

(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 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.

25. 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.

V Written procedure before the Court

26. Written arguments have been received from the parties:

- The applicants, represented by Jon Midthjell, advokat;
- ESA, represented by Xavier Lewis, Director, Gjermund Mathiesen and Markus Schneider, Officers, Department of Legal & Executive Affairs, acting as Agents.

VI Summary of the pleas in law and arguments

27. The applicants present two pleas in law.

The first plea: failure to act

Arguments of the applicants

28. The applicants claim that ESA has infringed Article 37 SCA by failing to meet its legal obligation to decide on the access request that the applicants submitted on 3 August 2010.

29. At the time of the formal pre-litigation notice, served on 8 March 2012, the applicants claim that ESA had committed an ongoing infringement of its legal obligation to decide on the access request for a significant time. In their view, ESA committed a clear infringement of Article 37 SCA in failing to take a decision on the remaining parts of the access request, after having been duly called upon to act, even after the pre-litigation period expired on 8 May 2012.

30. The arguments of the applicants focus on three separate issues.

31. First, the applicants contend that the right of access has been established under the EEA and SCA Agreements and is a fundamental right in EEA law.

32. They assert that the right of access to documents flows from Article 2(1) of the RAD which provides that any citizen of an EEA State, and any natural or legal person residing or having its registered office in an EEA State, has a right to access documents of ESA. The applicants refer further to Articles 1, 2(3) and 3 of the RAD, pursuant to which the rules shall ensure, *inter alia*, the widest possible access to documents and promote good administrative practice.

Moreover, they cover all documents held by ESA, that is, any content whatever its medium.

33. According to the applicants, this includes databases in which data on ESA's correspondence and other documents are registered, *inter alia*, with the dates on which correspondence was received, the dates of internal documents and later amendments, and the authors/recipients of correspondence and internal documents, etc.[2]

34. The applicants observe that the RAD took effect on 30 June 2008, and according to Article 13 of the RAD, ESA was obliged to publish the rules in the EEA Supplement to the Official Journal of the European Union. However, more than four years later, ESA has still not published the rules in accordance with its obligation.

35. The applicants assert that a similar right of access under EU law has existed, and been properly published, for almost 20 years. In that connection, they refer to Regulation No 1049/2001.[3] The applicants also underline the importance of the right of access to documents in EU law, notably as established in Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union.

36. They contend that, pursuant to Article 108(1) EEA, the EFTA Member States were legally obliged to establish a similar right of access in relation to ESA. Article 108(1) EEA provides that the EFTA States shall establish procedures similar to those existing in the EU including procedures for ensuring the fulfilment of obligations under the EEA Agreement.

37. The applicants assert that the right of access to documents in Article 2(1) of the RAD is derived from Article 108 EEA and Article 13 SCA. The preamble to the RAD explicitly reflects the obligation in Article 108(1) EEA to establish a right of access to ESA's documents similar to that established in Union law.

38. It follows, the applicants contend, that the three EFTA Member States met their obligation under Article 108(1) EEA to provide a right of access to ESA's documents through the adoption of the RAD on 30 June 2008. After Article 42 of the Charter was made binding in EU law, as a result of Article 6(1) TEU, the right of access must now also be recognised as a fundamental right in EEA law. Consequently, they argue, the right of access is a right based on the SCA and EEA Agreement, and is also a fundamental right in EEA law.

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[2] Reference is made to COM(2008) 229 final, p. 17, and Case T-436/09 *Dufour* v *ECB*, judgment of 26 October 2011, not yet reported, paragraph 160.

[3] Reference is made to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43, Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, OJ 1993 L 340, p. 43, and Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, OJ 1994 L 46, p. 46.

39. Second, the applicants contend that ESA failed to meet its legal obligation to take a decision within the extended time limit provided in Article 7(2) of the RAD.

40. They assert that the right of access results in a corresponding duty on ESA to decide on individual requests from citizens who choose to exercise that right. This principle is established in Article 7 of the RAD, which provides that an application shall be handled as quickly as possible. ESA shall either grant access or, in a written reply, state the reasons for the total or partial refusal within five working days from registration of the application. Furthermore, pursuant to Article 7(2) of the RAD, this time limit can be extended by twenty working days but only in "exceptional cases" and if detailed reasons are given.

41. The applicants observe that the duty to take a decision on individual access requests within the time limits set out in Article 7 of the RAD is complemented by a specific duty, established in Article 6(1) of the RAD, to examine the requests and a specific duty, established in Article 6(2) of the RAD, to assist the applicant if a request is not found sufficiently precise. Moreover, according to Article 8 of the RAD, ESA has a duty to provide the documents to which public access is granted in the format of the applicant's choice.

42. Consequently, according to the applicants, the duty on ESA to decide on individual requests follows from the substance of the right to access and, in addition, from the direct expression of that duty in Article 7 of the RAD and the complementing duties, set out in particular in Articles 6(1) and (2) and 8(1) of the RAD, interpreted in light of the fundamental right to and general principle of sound administration and the overall purpose of the right of access, as established in Article 1 of the RAD, that is "to ensure the easiest possible exercise of this right" and, as stated in its preamble, "to ensure at least the same degree of openness" as under EU law.

43. On the same basis, the applicants argue, the specific time limits set out in Article 7 of the RAD entail that the duty to take a decision on an individual request must be discharged, as a main rule, within five working days of the registration of the request, or sooner, if possible. In their view, the time limit is reinforced by the duty established in Article 7(1) of the RAD to provide the applicant with an "acknowledgment of receipt", the purpose of which, at least in part, is to establish when the access request has been duly registered, and thereby when time begins to run for the defendant to discharge its duty to take a decision.

44. The applicants observe that, according to Article 7(2) of the RAD, the time limits in Article 7(1) of the RAD can only be extended in exceptional circumstances, and then only by twenty working days. As examples of exceptional circumstances, Article 7(2) of the RAD mentions "a very large number of documents". It follows, the applicants assert, that it is the responsibility of ESA to organise its files and internal processes, including in cases concerning large files, in such a manner that it can comply at least with the

extended time limit, *inter alia*, by properly registering documents during an investigation, requesting non-confidential versions to be put on file continuously, starting third party consultation immediately after an access request has been submitted, etc.

45. According to the applicants, the ECJ has held the time limits in Regulation No 1049/2001 to be mandatory. Their purpose is to counter the risk that the administration would choose not to reply to an application for access to documents.[4] By contrast, they observe that Article 7 of the RAD establishes only a one-step procedure, sets different time limits and lacks a mechanism similar to that of Article 8(3) of Regulation No 1049/2001. However, the absence of such a mechanism means that the expiry of the time limit in Article 7 of the RAD does not in itself constitute a negative decision that can be challenged in court.[5] Instead, they assert, the inactivity of ESA must be challenged under Article 37 SCA, which itself requires that ESA is allowed an additional two-month pre-litigation period before legal action can be brought to challenge its inactivity.

46. The applicants contend that, since the access request in the present case concerned the complete file and ESA failed to take a decision on all the documents that belong to the file by the end of its extended time limit provided for in Article 7(2) of the RAD, that is on 7 September 2010, ESA infringed its legal obligation to decide on the access request.

47. Third, the applicants contend that ESA has failed to meet its legal obligation to take a decision within reasonable time under the general principle and right to sound administration.

48. The applicants claim that, even if the time limit in Article 7(2) of the RAD were not held mandatory, the defendant would in any case be under a legal obligation to take a decision within a reasonable time, under the general principle and right to sound administration.

49. They note that the principle of sound administration is a general principle of EEA law and that the Court has specifically held that rendering decisions within reasonable time is part of that principle, which is consistent with Union case law.[6]

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[4] Reference is made to Joined Cases T-355/04 and T-446/04 *Co-Frutta Soc. coop*. v *Commission* [2010] ECR II-1, paragraphs 55-56 and 59.

[5] Reference is made to Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraphs 44-45. The applicants add that, in the present case, a negative decision can be inferred from correspondence with ESA and the accompanying circumstances. The expiry of the time limit established in Article 7 RAD will, obviously, be a relevant factor. Reference is made in addition to the pending Joined Cases E-4/12 and E-5/12 *Konkurrenten.no and Others* v *ESA*.

[6] Reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 205, paragraph 22, and Joined Cases T-400/04, T-402/04 to T-404/04 *Arch Chemicals and Arch Timber* v *Commission*, judgment of 20 September 2011, not yet reported, paragraph 65.

50. The applicants assert that the principle is also part of EU law. Consequently, on the basis of the principle of homogeneity, that right must also be regarded as a fundamental right in EEA law since the Court has already recognised that the principle of sound administration forms part of EEA law.

51. In the view of the applicants, the standard of reasonable time must be interpreted with due regard to the principle of homogeneity and the objective set out in the preamble to the RAD, that is to ensure "at least the same degree of openness" as under Regulation No 1049/2001. If ESA could delay access requests significantly longer than EU institutions are allowed (60 days according to Regulation No 1049/2001), this would circumvent the very purpose behind the RAD. They assert that in a similar case the Commission would have been required to take a decision by 26 October 2010. It follows from this alone that ESA failed to take a decision on DB Schenker's access request, submitted on 3 August 2010, within reasonable time.

52. In the present case, the applicants maintain, ESA has failed to conduct a diligent process. ESA repeatedly gave the impression that a decision was immediately impending. Although ESA must have understood that it would not meet the expectations of the applicants, the institution did not provide proper advance notice to extend the time limit under Article 7(2) of the RAD. Instead, ESA censured the applicants for not being willing to limit their access request. While DB Schenker was given two to four working days to submit confidentiality claims, the third parties concerned were contacted after three months. ESA refuses to disclose the dates concerning the correspondence with third parties. ESA claims that the third party consultation process is still ongoing, almost two years after the access request was submitted. ESA waited two months before starting consultations with Norway Post. ESA allowed Norway Post to submit a global confidentiality claim and waited six months before denying the applicants' access request, more than one year after the access request was submitted. ESA repeatedly ignores invitations from DB Schenker to discuss a reasonable extension of the time limits. The applicants have, to no avail, repeatedly complained directly to the President of ESA on four occasions.

53. According to the applicants, the excessive use of time is not only the result of the defendant's own failure to organise its files and internal processes properly. The evidence points, if anything, towards a lack of adequate leadership in its organisation.

54. In their reply, the applicants make the following remarks.

55. First, the applicants contend that the principal defence advanced by ESA, namely, that it was not under a duty to act even on 8 March 2012, and also its first alternative defence, that ESA laid down a definitive position in a letter and decision dated 9 May 2012, have not been accompanied by a request to the Court for the corresponding form of order, as required by Article 35(1)(c) of the Rules of Procedure ("RoP"). Therefore, these pleas must be held inadmissible.

56. In this regard, the applicants identify two points on which ESA contradicts itself. In relation to ESA's contention that as late as 8 March 2012 it was under no obligation to act, the applicants observe that in its letter of 9 May 2012, ESA did not contest that it was under a duty to act when it received the pre-litigation notice. Instead, by the words "[t]he Authority is pleased to define its position on your letter of 8 March 2012 pursuant to Article 37(2) SCA", ESA conceded that the notice was well-founded for the purposes of Article 37(2) SCA. Moreover, during its long period of correspondence with the applicants, ESA never once objected that it was under no legal obligation to act on the access request.

57. According to the applicants, ESA's defence does not contest the fact that the RAD is binding.

58. Finally, the applicants claim that ESA has confused its duty to act, that is, to take a decision on the access request, with the substantive content of the right of access.[7] The applicants contend that they are not seeking a declaration from the Court that Schenker is entitled to "access to the complete antitrust file" in the present case. Instead, they seek a finding that ESA breached its duty by not taking a decision on their access request by the time the extended time limit in Article 7(2) of the RAD expired on 7 September 2010.

59. The applicants claim that ESA cannot be regarded as having ended its failure to act by its letter and decision of 9 May 2012. They aver that they filed a single request for access to the file and, in relation to that request, ESA failed to define its position. More specifically, ESA never defined its position in full.

60. According to the applicants, ESA has failed to demonstrate that it has yet taken a decision on all parts of the Norway Post/Privpak file. ESA has refused to disclose a complete statement of content of the file throughout the entire process. Moreover, ESA gave repeated written assurances that the applicants had received a full list, only to send a second list with more documents at a later stage in the proceedings, including a limited number of internal documents. Of the internal documents listed, there are no regular status reports; no minutes from meetings with anyone except the applicants; hardly any memos on the preparation and planning of information gathering such as the many information requests that were sent out, and hardly any memos analysing the 2 800 pages of evidence seized from Norway Post; hardly any emails between the team members; etc. Furthermore, taking into account the turnover of officers working on the case during the eight years, and the absence of reports from outgoing to incoming officers on the case, ESA's claim that there are no other internal documents than these is simply not credible. Finally, two internal memos show that ESA has repeatedly failed to register and scan documents onto the case file. Correspondence has been registered up to five years after it was received by

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[7] Reference is made to Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397 and case law cited. The applicant stresses that, contrary to what ESA suggests, a failure to act comes before and not after the pre-litigation notice.

ESA. Finally, ESA has admitted that it did not register the documents seized from Norway Post during the dawn raid in 2004.

61. In those circumstances, the applicants conclude that a number of documents, in particular internal documents, have either not been registered on the case file or been kept off the various lists that the defendant has hitherto provided. As a consequence, the defendant has failed to demonstrate that it has yet taken a decision on all remaining parts of the Norway Post/Privpak file and, thus, according to the applicants, the present action is, unfortunately, still not devoid of purpose.

Arguments of ESA

62. According to the defendant, an action under Article 37(2) SCA must be preceded by a formal notice calling on ESA to act.[8] The applicant must also have standing.[9] In addition, it follows from EU case law that at the time when ESA was formally called upon to define its position it must have been under a duty to act.[10] In any event, ESA contends, the general public's right to access in this case extended only to partial access to a limited number of documents.

63. In ESA's view, this right existed only after 18 April 2012, the day the Court handed down its judgment in Case E-15/10 *Norway Post*, since the antitrust investigation was concluded only by means of that judgment. It observes further that, pursuant to Article 37 SCA, a declaration that a failure to act is contrary to the EEA Agreement requires ESA to take the necessary measures to comply with the judgment of the Court. Accordingly, in circumstances where the challengeable 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 37 SCA.[11]

64. Moreover, ESA continues, if ESA responds 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.[12]

65. In that connection, ESA underlines, first, that the public's access to the antitrust file 34250 was very limited before 18 April 2012.

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[8] Reference is made to Case E-7/96 *Paul Inge Hansen* v *ESA* [1997] EFTA Ct. Rep. 101, paragraph 15, and Case E-5/08 *Yannike Bergling* v *ESA* [2008] EFTA Ct. Rep. 316, paragraph 4.

[9] Reference is made to Case E-6/09 *Magasin- og Ukepresseforeningen* v *ESA* [2009-2010] EFTA Ct. Rep. 144, paragraph 39.

[10] Reference is made to *Ryanair*, cited above, paragraph 25, and case law cited.

[11] Ibid., paragraph 26.

[12] Reference is made to Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 38, Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743, paragraph 31, and *Ryanair*, cited above, paragraph 26.

66. ESA acknowledges that documents collected or exchanged in the course of antitrust proceedings fall within the scope of the RAD. However, in light of the judgments of the ECJ in *Technische Glaswerke Ilmenau* ("*TGI*"), *Éditions Odile Jacob* and *Agrofert*,[13] it was under no obligation to disclose the documents submitted by or exchanged with Norway Post or other third parties.

67. ESA recognises that it must abide by the RAD. However, it considers itself also bound by the provisions of Protocol 23 EEA and Protocol 4 SCA, which are provisions of primary law. In that light, ESA regards it as paramount to interpret its own procedural rules on access to documents so as not to breach primary law, in particular Protocol 4 SCA and Protocol 23 EEA.

68. ESA contends that, in light of *Éditions Odile Jacob*, *Agrofert* and *TGI*, it is clear that documents collected or drawn up in merger control proceedings and State aid proceedings are subject to a general presumption against disclosure on the basis of the exceptions relating, inter alia, to the protection of commercial interests.[14] This is possible regardless whether the request for access concerns proceedings which have already been closed or proceedings which are pending.

69. ESA submits that this is equally true in antitrust proceedings. Such a presumption must extend to all correspondence with undertakings and information exchanged with the Commission and national competition authorities, including the Advisory Committee.

70. ESA asserts that it was entitled to rely on this general presumption that disclosure of the documents collected or exchanged during antitrust proceedings undermines, in principle, the protection of the commercial interests of the undertakings involved and of other third parties as well as the protection of the purpose of investigations. Further, it submits that, in so relying, it did not need to carry out a concrete, individual examination of those documents.

71. Accordingly, in its letter of 5 September 2012, ESA relied on the general presumption that disclosure of documents held by ESA in antitrust proceedings against Norway Post other than its internal documents undermines, in principle, the protection of the commercial interests of the undertakings involved and of other third parties as well as the protection of the purpose of investigations. In its view, this applies regardless of the fact that, in any event, the Court upheld Decision 322/10/COL.

72. ESA adds that correspondence with undertakings and exchange of information with the Commission and national competition authorities, including

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[13] Reference is made to Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraphs 50-64, in particular paragraphs 61-63, Case C-404/10 P *Commission* v *Éditions Odile Jacob*, judgment of 28 June 2012, not yet reported, paragraph 107 et seq., and Case C-477/10 P *Commission* v *Agrofert Holding*, judgment of 28 June 2012, not yet reported, paragraph 47 et seq.

[14] Reference is made to *Technische Glaswerke Ilmenau*, *Odile Jacob* and *Agrofert Holding*, all cited above.

the Advisory Committee, fall under the presumption, since they are in principle protected by the exception relating to the decision-making process of ESA and the protection of legal advice.

73. ESA further submits that this limited right of partial access to the file remained applicable also after the judgment of the Court in Case E-15/10 *Norway Post* on 18 April 2012. Pending the delivery of that judgment, ESA was entitled to rely on the general presumption that disclosure of those internal documents would seriously undermine its decision-making process. Further, it contends that, as a result of the Court's judgment in that case, the proceedings regarding ESA's antitrust case 34250 are considered closed.

74. ESA concludes that there was never a right to public access to all the documents on ESA's file 34250. Only a right to public access to some internal ESA documents existed and this only took effect after the judgment of the Court on 18 April 2012.

75. Consequently, according to ESA, the applicants are wrong to contend that it has failed to adopt in relation to them a measure which they were legally entitled to claim by virtue of the rules of EEA law, i.e. access to the complete antitrust file 34250.[15] Since the pre-litigation notice was not limited in this way, ESA contends that the application should be dismissed.

76. Second, ESA claims that its definition of its position on 9 May 2012 was ignored by the applicants.

77. ESA refer to its letter of 9 May 2012 defining its position and its subsequent letter of 5 September 2012. ESA claims that it follows from those letters that, in fact, ESA granted the applicants access to certain documents in the past on a voluntary basis, although it was under no legal obligation to do so.

78. Therefore, ESA contends, the declaration sought by the applicants that ESA infringed Article 37(1) SCA by failing to act on its duty, under the RAD, the SCA 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 34250 must be dismissed as inadmissible.[16]

79. Third, ESA claims that the action has become devoid of purpose following ESA's letter of 5 September 2012.

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[15] Reference is made to Case 246/81 *Lord Bethel* v *Commission* [1982] ECR 2277, paragraph 13.

[16] Reference is made in the rejoinder to Case E-12/11 *Asker Brygge AS* v *ESA*, judgment of 17 August 2012, not yet reported, paragraphs 30 and 33, and Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 40, in the light of which ESA calls on the Court to assess of its own motion the admissibility of the present action.

80. ESA contends that any failure to act comes to an end on the day on which the person who called upon ESA to act receives the document by which the latter defines its position.[17]

81. ESA adds that, in any event, its letter of 5 September 2012 meets those conditions. In that letter, ESA disclosed, or refused to disclose, all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which the applicants had requested access. ESA contends that in that letter it set out its position as regards disclosure to the applicants of the remaining documents saved under or related to ESA Case 34250 not yet covered by previous correspondence with those parties. Further, ESA stresses that in that letter it clarified that there were no other documents on the file or otherwise related to the case.

82. Fourth, ESA claims that the 2008 RAD is not part of the EEA Agreement or the SCA. Moreover, there is no legal basis for the applicants' inference that the EFTA States took action by means of an ESA decision.

83. ESA contends that, although it is authorised by Article 13 SCA to adopt rules on public access to documents, there is nothing in EEA law to suggest that Decision 407/2008/COL forms part of the EEA Agreement within the meaning of Article 2 EEA.[18] It follows from case law that rules adopted by ESA of its own motion pursuant to the authorisation of Article 13 SCA but without any involvement of the EEA Joint Committee or the EFTA States cannot be construed to materially change the EEA Agreement or the SCA.[19]

84. Fifth, as regards the argument of the applicants that ESA failed to take a decision by 7 September 2010, ESA claims that it was under no legal obligation to disclose any documents relating to its competition investigation in Case 34250 before the EFTA Court handed down its judgment in Case E-15/10 *Norway Post* on 18 April 2012. Moreover, it continues, the relevant point in time for the purposes of an application alleging failure to act is the expiry of the pre-litigation notice served pursuant to Article 37(2) SCA. In the view of ESA, this did not expire before 9 May 2012.

85. Sixth, as regards its alleged failure to take a decision within a reasonable time, ESA refutes the claim.

86. It notes that the Court has already held that rendering decisions within a reasonable time is part of good administration under EEA law. An excessive

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[17] Reference is made to Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 55, *Sodima*, cited above, paragraph 83, and *Ryanair*, cited above, paragraph 26 and case law cited.

[18] Reference is made to Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraphs 37-38, and to the Opinion of Advocate General Tesauro in the same case, point 22.

[19] Reference is made to Case E-3/97 *Jan og Kristian Jæger AS* v *Opel Norge AS* [1998] EFTA Ct. Rep. 1, paragraphs 29-32.

length of procedure may render a decision unlawful.[20] ESA submits that, in the present case, the length of the procedure should not be considered excessive. ESA was under no obligation to disclose any documents relating to the competition investigation in Case 34250 before the EFTA Court handed down its judgment in Case E-15/10 *Norway Post* on 18 April 2012.

87. ESA avers that, following that judgment, it carried out a concrete and individual examination of its internal documents stored in Case 34250 and by letter of 5 September 2012 decided to either refuse or to grant the applicants full or partial public access to those documents.

88. As regards the documents it refused to disclose, ESA indicates that it considered disclosure would undermine the protection of the decision-making process. In its view, a private interest in the disclosure of documents that might serve as evidence in claims for damages before national courts should not be considered an "overriding public interest" within the meaning of the RAD. Moreover, the individual interest which a party may invoke when requesting access to documents of personal concern to it cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under the second subparagraph of Article 4(3) of the RAD.

89. Given the absence of meaningful cooperation with the applicants and the considerable volume of documents to be evaluated with regard to full or partial disclosure, in ESA's view, the time from the expiry of the pre-litigation notice on 9 May 2012 to its letter concluding the access request on 5 September 2012 (just under four months including summer holidays) cannot be regarded as excessive in the circumstances.

90. Finally, ESA comments on certain claims made by the applicants outside their pleas in law.

91. In that regard, it denies, contrary to the applicants' claim, that it was under an obligation to disclose a document denoted as a "complete statement of content of the file". Instead, according to ESA, the list transmitted to counsel for the applicants on 30 August 2010 with all the documents on file 34250 to which Norway Post had been granted access met the requirements of case law.[21] Moreover, the additional list provided by letter of 5 September 2012 covered the remaining documents. It observes that the list requested by the applicants did not exist at the time of the request and that it is not in a position to release documents which do not exist.

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[20] Reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22.

[21] Reference is made to Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* v *Commission*, judgment of 15 December 2011, not yet reported, paragraphs 40, 45 and 48.

92. As regards the alleged letter from Norway Post of 13 July 2010, ESA contends that this is actually a letter from 2009 and has event number 524500. The applicants were granted access to a non-confidential version already in 2010.

93. ESA contends that in relation to the meetings referred to in recitals 20 and 22 in the preamble to ESA Decision 322/10/COL no minutes exist. It does not deny that the meetings took place. However, no specific records of those meetings were made other than to register any documentation presented at the meetings.

94. As for the registering of the inspection documents in Case 34250, ESA avers that it scanned each page of the inspection documents copied during the inspection and assigned "event" numbers not to individual documents but to batches of documents as listed per inspector, by the inspectors and during the inspection. In its view, whether the applicants approve or not of this registration method is irrelevant in the context of the present action for failure to act.

95. In its rejoinder, ESA makes the following remarks.

96. It asserts that, unless specific circumstances justify different treatment, procedural provisions such as Article 37 SCA must be interpreted in the same way in both pillars of the EEA Agreement.[22] In that regard, it emphasises that any legal interest to bring an action under Article 37(3) SCA comes to an end if and when ESA takes the action whose absence constitutes the subject-matter of the court proceedings.[23] Article 37 SCA refers to a failure to take a decision or to define a position, no matter whether the measure subsequently adopted is the one desired or considered necessary by the person that initiated the court proceedings.[24]

97. Contrary to the assertions of the applicants in their reply, ESA avers that it is no longer decisive for the present action initiated under Article 37(3) SCA whether and, if so, to what extent ESA may have failed to act on the applicants' public access request at the time when the present case was lodged. Hence, the subject-matter of the present action under Article 37(3) SCA ceased to exist as of the adoption of the allegedly missing act by ESA.[25]

98. If the applicants took the view that the full or partial refusals set out in the letter of 5 September 2012 were unlawful, ESA contends that they could have challenged those refusals by means of an action for annulment under Article 36

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[22] Reference is made to Case E-14/10 COSTS *Konkurrenten.no AS* v *ESA*, order of 9 November 2012, not yet reported, paragraph 23 and case law cited.

[23] Reference is made to *Ryanair*, cited above, paragraph 26 and the case law cited.

[24] Reference is made to *Sodima*, cited above, paragraph 83, and *Ryanair*, cited above, paragraph 26 and case law cited.

[25] Reference is made to *Sodima*, cited above, paragraph 83, *SIC*, cited above, paragraph 31, and *Ryanair*, cited above, paragraph 26.

SCA. Furthermore, in so far as the applicants take the view that the position adopted by ESA on 5 September 2012 was incomplete the applicants could start a new, fresh procedure under Article 37 SCA.[26]

99. As regards the internal documents registered in Case 34250, ESA contends that the applicants are seriously distorting the facts. It is clear from the list enclosed with the letter of 5 September 2012 that a total of 198 internal documents were listed and at issue and not 98. The applicants have received 166 of these documents fully or partially. As for the treatment of the documents, ESA stresses that the documents were available in hardcopy but scanned at a later stage in the (then) new document handling system of ESA. As regards the alleged incompleteness of the list, ESA refers to the presumption of legality and presumption of veracity attached to a statement by the institutions relating to the nonexistence of documents requested.[27] This presumption may be rebutted by relevant and consistent evidence, which the applicants have failed to provide.

100. Finally, ESA observes that the present case concerns an alleged failure to act on the request for public access to documents and not the duty of ESA to register certain documents on a given case file.

The second plea: damages

Arguments of the applicants

101. As regards the non-contractual liability of ESA, the applicants start by asserting that, in relation to the corresponding provision of EU law, the courts of the EU have aligned the conditions that must be met, in relation to Union institutions, with the conditions governing State liability.[28] 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.

102. Since the Court has established that these conditions apply to State liability in relation to the three EFTA Member States,[29] the applicants contend that the same conditions developed in case law from the EU courts must also apply under Article 46(2) SCA in relation to ESA.

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[26] Reference is made to the nature of the Article 37 SCA proceedings and *Ryanair*, cited above, paragraphs 25 and 26.

[27] Reference is made to Case T-277/10 AJ *K* v *Eurojust*, order of 25 November 2010, not published, paragraph 6, and Case T-380/04 *Terezakis* v *Commission* [2008] ECR II-11*, paragraphs 155-156 and 163, and case law cited.

[28] Reference is made to Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41-42, and Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 160.

[29] Reference is made to Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 66, and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 37-38 and 47.

103. As regards the first criterion, the applicants submit that they had a right of access, which ESA has infringed. 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.

104. The applicants submit that ESA also infringed the legitimate expectation of a timely decision, encouraged by specific provisions set out in the RAD and ESA's specific and repeated assurances that access would be granted "as soon as possible".

105. The applicants assert that the right to timely access is by its nature intended to confer rights on individuals. Furthermore, the general principle of protection of legitimate expectations in EEA law also constitutes an individual right for which, if breached, the defendant can be held liable.[30]

106. As regards the second criterion, the applicants submit that the standard for demonstrating a sufficiently serious breach depends on whether the institution had a discretion or no or considerably reduced discretion.[31] In the former case, the standard is whether the institution "manifestly and gravely disregarded the limits on its discretion", whereas in the latter case, the standard is significantly lower and can result from the "mere infringement" of the law.[32]

107. The applicants argue that the correct standard in this case is the lower standard because the right of access and the duty of ESA to take a timely decision on access requests is a law-bound process in which the defendant has no discretion. The applicants submit that the outcome in this case does, however, not depend on the choice of standard because the facts set out in the application, through the defendant's own correspondence and admissions, shows a staggering lack of diligence and care, over a long period, and at high level within the organization of the defendant, towards the applicants.

108. 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 have stated that they estimated those fees to be at 22 500 EUR at the time of the application. They also claim that they have incurred legal expenses in their efforts to have the follow-on action in Oslo City Court against Norway Post stayed until ESA has

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[30] Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, paragraphs 170-173, and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 64.

[31] Reference is made to *Bergaderm and Goupil*, cited above, paragraphs 43-44.

[32] Reference is made to Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica* v *Commission* [2001] ECR II-1975, paragraph 134, and Case T-285/03 *Agraz* v *Commission* [2005] ECR II-1063, paragraph 40.

lawfully decided on the access request and have stated that they estimated those fees to be at 26 000 EUR at the time of the application.

109. The applicants contend that the direct and causal link between those losses set out above and the infringements committed by ESA follows from a comparison of the current situation with the situation as it would have been had the defendant taken a timely and otherwise lawful decision.[33]

110. The applicants request that the Court decide on the action for damages by way of an interlocutory judgment, with the liability of the defendant determined separately from the calculation of the final loss. In support of this request, they argue, first, that the losses that have already materialised are likely to increase in the near future. Second, for reasons of procedural economy, they contend that, given the modest quantum of damages claimed, it would be better for all involved if the Court were first to decide on Case E-14/11 (the parallel annulment action), then the action for failure to act and, finally, the issue of liability in the damages claim.

111. In their reply, the applicants make the following remarks.

112. The applicants contend that the inadmissibility plea raised by ESA is itself inadmissible. They assert that, pursuant to Article 87(1) of the RoP, the defendant must state the pleas of fact and law relied on. Moreover, case law has held that a pleading must be sufficiently clear and precise to allow the opposing party to prepare a rebuttal and the Court to give a ruling. In addition, they assert that, in terms of the form of sought, ESA has failed to seek to have the action ruled inadmissible. For that reason alone, this plea must be held inadmissible in light of Article 35(1)(c) of the RoP.

113. The applicants contend further that, in any event, ESA's inadmissibility plea is unfounded. The defendant cannot avoid adjudication on the non-contractual liability claim simply by pleading that it disagrees with the applicants on the substance in the action for failure to act and, in any event, it has not offered any legal support to that effect.

114. As regards the first criterion, the applicants emphasise that their action concerns ESA's legal obligation to take a timely decision on the access request and not what ESA now believes the substantive content of that decision should have been, i.e. to what extent it should have granted the applicants full or partial access to the various documents on the file. Contrary to what ESA suggests, in their application, the applicants have not argued for an unlimited right of access. Furthermore, they contend, ESA has not denied that the general principle of protection of legitimate expectations in EEA law constitutes an individual right

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[33] Reference is made to Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237, paragraph 264.

for which, if breached, ESA can be held liable. Moreover, ESA repeatedly assured the applicants that it would deal with their request to access documents.

115. According to the applicants, the second criterion has also been met. On their interpretation of the pleadings, ESA admits that it took a decision after the expiration of the pre-litigation period, that it refused to disclose the dates for correspondence showing the progress and work on its supposedly ongoing consultation process and that it refused to state when it planned to complete the process even 704 days after the access request was submitted.

116. Moreover, the applicants contend, ESA has not contested that it refused to disclose a complete statement of the file. Instead, it has argued that, as a matter of law, the applicants did not have the right to see the complete statement of content of the file. In the applicants' view, ESA also misconstrued their arguments concerning its failure to register all documents properly. In any event, the applicants allege, ESA has not offered any arguments why simply the non-contested parts of the evidence do not in themselves amount to a sufficiently serious breach.

117. According to the applicants, the third condition for imposing liability has also been met. All the costs in question arose after the breach was committed. Had it not been for the breach, the applicants would not have incurred the costs in question. The applicants have no in-house EU/EEA department which could deal with the issues and have had to rely on external representation.

118. Had ESA taken a timely decision, in the applicants' view, they would not have incurred costs to secure a stay of their damages action against Norway Post in the national court. The costs in those proceedings were the direct consequence of ESA's breach.

119. According to the applicants, the case law invoked by ESA is not applicable. It shows that the recoverability of legal costs will depend on whether the applicable statutory provisions must be interpreted to the effect that legal costs should not be compensated at all, or be compensated according to specific procedural rules. The applicants contend that, in the absence of any specific statutory provision to the contrary, legal costs must be treated like any other business costs pursuant to the express wording of Article 46(2) SCA. Moreover, the parallel which ESA seeks to draw with proceedings before the Ombudsman is flawed, since the Ombudsman can neither award nor impose costs on the applicant. Further, they reject ESA's reliance on *Nölle*, observing that the case concerns the preliminary ruling procedure, which is fundamentally different to the present direct action.

120. Finally, the applicants emphasise that ESA has not contested their submission that the Court can give an interlocutory ruling on liability and defer the assessment of the quantum of damages to a later stage.

Arguments of ESA

121. ESA contests the claim for damages.

122. ESA shares the view that the principle of homogeneity calls for Article 46(2) SCA to be interpreted in line with the corresponding EU provision (Article 340(2) TFEU). Moreover, it agrees that State liability has been made part of EEA law.[34]

123. ESA asserts that three cumulative conditions must be met. 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. ESA submits that the applicants have not shown that these conditions are met in the present proceedings, neither individually nor cumulatively.

124. Since the contentions of the applicants on which they base their damages action are not well founded, ESA asserts that the claim for damages is inadmissible simply in light of the applicants' own submissions.

125. On the substance, ESA submits, first, that the two amounts claimed by the applicants represent loss and damage which is irrecoverable in an action brought pursuant to Articles 39 and 46(2) SCA. Consequently, the action for damages is inadmissible or manifestly unfounded for that reason alone.

126. According to established case law, ESA asserts, the specific rules on recovery of lawyers' fees as costs under the rules of judicial procedure cannot be circumvented by claiming that irrecoverable legal expenses are recoverable as damages under the general rules on non-contractual liability. Consequently, neither head of claim concerns recoverable damages, and in particular this is true for the first head of claim that explicitly relates to legal costs incurred in Case E-14/11 in so far as they are not recoverable within the meaning of Article 69 of the RoP.[35]

127. Further, ESA continues, as regards the second claim for compensation relating to legal expenses allegedly incurred in the national court in the applicants' follow-on action, the General Court already held that actions for compensation for damage consisting in the burden of costs incurred in proceedings before the national courts are outside the jurisdiction of the EU courts.[36] This case law is relevant for the present proceedings.

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[34] Reference is made to *Sveinbjörnsdóttir* and *Karlsson*, both cited above.

[35] Reference is made to Case T-88/09 *Idromacchine Srl and Others* v *Commission*, judgment of 8 November 2011, not yet reported, paragraphs 100-101.

[36] Reference is made to Case T-167/94 *Detlef Nölle* v *Council and Commission* [1995] ECR II-2589, paragraphs 36-39, and Case T-336/06 *2K-Teint SARL and Others* v *Commission and EIB* [2008] ECR II-52*, paragraph 121.

128. Second, ESA submits that there is no direct causal link between the alleged breach and the damage.[37] In relation to the first claim for compensation, ESA stresses that the administrative procedure applicable to requests for public access to documents does not require members of the public to retain a lawyer to assist them. The procedure before ESA for access to documents is free of charge, just like the procedure before the EU Ombudsman.[38]

129. In addition, the applicants have not shown any direct link between alleged breaches and their second head of claim where they seek legal expenses in the context of motions brought by a third party. Counsel for the applicants had not even charged Schenker the alleged expenses at the time the present application was brought before the EFTA Court.

130. Third, and finally, ESA maintains that the applicants have not managed to demonstrate any breach of a rule intended to confer rights on them.

131. In relation to the alleged failure to act, ESA refers to its submissions set out above made in its defence in the action for failure to act.

132. As for legitimate expectations, ESA submits that the protection of a legitimate interest extends to any individual who is in a situation in which it is apparent that ESA has led him to entertain such prospects. On the other hand, a person may not plead a breach of that principle unless the administration has given him precise assurances.[39]

133. In the present case, ESA contends that the applicants are wrong to claim that it assured them access to the entire antitrust file 34250, when what it did was to assure them that it would continue to deal with their access request to that file as soon as practically possible.

134. ESA stresses that assessing whether disclosure of the entire antitrust file 34250 can be made, and actually granting the general public access to all documents held on the file are not the same.

135. ESA contends that if a prudent and alert applicant could have foreseen the likely rejection, or partial rejection, of his request for public access to all documents stored on an antitrust file, he cannot plead legitimate expectations to the contrary.[40] ESA avers that, in the present case, it was under no legal

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[37] Reference is made to Case C-440/07 P *Commission* v *Schneider Electric*, cited above, paragraph 192.

[38] Reference is made to Case 54/77 *Anton Herpels* v *Commission* [1978] ECR 585, paragraphs 45-50; Case T-294/04 *Internationaler Hilfsfonds eV* v *Commission* [2005] ECR II-2719, paragraphs 50-55; Case C-331/05 P *Internationaler Hilfsfonds eV* v *Commission* [2007] ECR I-5475, paragraphs 24-29; and Case C-481/07 P *SELEX Sistemi Integrati SpA* v *Commission* [2009] ECR I-127*.

[39] Reference is made to Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 134 and case law cited.

[40] Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 143.

obligation to disclose any documents before the judgment in Case E-15/10 *Norway Post* on 18 April 2012. Moreover, ESA had refused to disclose the inspection documents as early as by letter of 16 August 2011.

136. ESA claims that the applicants have failed to demonstrate that a sufficiently serious breach occurred in the circumstances of the present proceedings.[41]

137. ESA submits that the arguments of the applicant (i.e. that ESA had no discretion, that ESA showed a lack of diligence and care and disregarded its obligations to take a timely decision) essentially repeat earlier assertions related to the alleged breach of the RAD and the protection of legitimate expectations. Both contentions have already been rejected by ESA. In the absence of any wrongful act and with no sufficiently serious breach demonstrated, the applicants are wrong to claim that ESA is liable to them under Article 46(2) SCA for their legal expenses allegedly incurred.

138. Finally, ESA submits that the applicants have failed to substantiate the loss and damage allegedly incurred. This applies in particular as the alleged losses referred to by the applicants are not recoverable.

139. According to ESA, the requirement of Article 33(1)(c) of the RoP that an application be sufficiently precise means that in an action for compensation under Article 46(2) SCA any alleged losses that have already been incurred must be substantiated and quantified in the application.[42] In relation to future losses, the applicant must at least demonstrate the certainty of those losses, even if he cannot yet quantify them.

140. ESA rejects the applicants' contention that it has been given a precise presentation of the nature and type of losses. In ESA's view, the applicants have not substantiated a single item of recoverable loss in the present proceedings.

141. ESA claims that the application neither enables it nor the Court to make any appraisal regarding the nature and type of the alleged losses and their factual basis, let alone how the alleged losses are calculated, with these apparently consisting of certain legal expenses.

142. In its rejoinder, ESA makes the following remarks.

143. ESA maintains that the losses claimed are not recoverable. It is clear from the submissions of the applicants that the expenses pursued under the two heads

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[41] Reference is made to Case C-440/07 P *Commission* v *Schneider Electric*, cited above, paragraphs 160-161.

[42] Reference is made to Case E-15/10 *Posten Norge AS* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 111, Case T-195/95 *Guérin Automobiles* v *Commission* [1997] ECR II-679, paragraphs 21 and 22, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107.

of claims – for which damages are sought in the present case – have not been incurred for the purposes of the present proceedings and are not necessary for that purpose.[43] Moreover, the non-recoverable nature of both legal expenses incurred in national proceedings and of legal expenses which exceed what can be recoverable as costs has been confirmed in recent case law.[44]

144. In any event, the damages claimed have not been substantiated.[45] While it is possible to seek only partial compensation for losses allegedly incurred, it is not possible to omit the substantiation of damage that allegedly has already occurred.

145. If the Court finds that the action is devoid of purpose, ESA maintains that the costs of the proceedings should be borne by the applicant.

Páll Hreinsson
Judge-Rapporteur

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[43] Reference is made to Case E-14/10 COSTS *Konkurrenten.no AS* v *ESA*, cited above, paragraph 24.

[44] Reference is made to Case T-340/11 *Régie Networks and Others* v *Commission*, order of 17 October 2012, not published, paragraphs 47 and 50.

[45] Reference is made to Case T-574/08 *Syndicat des thoniers méditerranéens and Others* v *Commission*, judgment of 7 November 2012, not published, paragraphs 56 and 59, and Case T-501/10 *TI Media Broadcasting and Others* v *Commission*, order of 21 September 2012, not published, paragraph 74.