

EFTA COURT

Action brought on 15 July 2012 by DB Schenker against the EFTA Surveillance Authority

(Case E-8/12)

An action against the EFTA Surveillance Authority was brought before the EFTA Court on 15 July 2012 by Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (collectively DB Schenker), represented by Jon Midthjell, advokat, Advokatfirmaet Midthjell AS, Grev Wedels plass 5, N-0151 Oslo, Norway.

The applicants request the EFTA Court to:

- 1. Annul the contested decision, as notified to the applicants on 18 May 2012, in ESA Case No 68736 (DB Schenker), in so far as it denies access to:**
 - (i) A complete statement of content in ESA Case No 34250 (Norway Post/Privpak);**
 - (ii) A letter dated or received on 13 July 2010 from Norway Post;**
 - (iii) Minutes from meetings between the defendant, including its president, and Norway Post and/or the Norwegian government;**
- 2. Annul the contested decision, as notified to the applicants on 23 May 2012, in ESA Case No 68736 (DB Schenker), in so far as it denies access to a complete statement of content of the case file in the same case;**
- 3. Annul the contested decision, as notified to the applicants on 2 July 2012, in ESA Case No 68736 (DB Schenker), in so far as it denies access to:**
 - (a) the procedures for administering case files, including but not limited to routines for registering incoming/outgoing correspondence and internal documents; who is authorised to open/close case numbers and register documents/events on a case; what kind of information must be registered about each document/event in the defendant's database;**

- (b) **the procedures for handling public access requests under the Rules on Access to Documents established by ESA Decision No 407/08/COL on 27 June 2008;**
- (c) **the ESA College decisions containing the current empowerment of the defendant's director of the administration department; the director of the competition and state aid department; and the director of the legal and executive department.**

4. Order the defendant and any interveners to bear the costs.

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

- The applicants, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (collectively referred to as "DB Schenker") are part of an international freight forwarding and logistic group, owned by Deutsche Bahn AG. Schenker North AB runs the group's business operations by land, sea and rail in Norway, Sweden and Denmark, including the subsidiaries Schenker Privpak AS and Schenker Privpak AB.
- On 14 July 2010, the EFTA Surveillance Authority adopted a decision in Case No 34250 (Norway Post/Privpak), finding that Norway Post had abused its dominant position in the Norwegian business-to-consumer parcel delivery market in 2000-2006. The decision was upheld by the EFTA Court in Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority*. The applicants are pursuing a damages claim against Norway Post for losses caused by the infringement, and want to review how the defendant conducted the investigation and administrative procedure. On 3 August 2010, the applicants submitted a request for access to documents belonging to ESA Case No 34250, under the Rules of Access to Documents (RAD), established by a Decision of the EFTA Surveillance Authority No 407/08/COL on 27 June 2008.
- On 8 March 2012, the applicants served a pre-litigation notice on the defendant under Article 37(2) SCA, on the basis that the defendant had failed to take a final decision on their access request, submitted on 3 August 2010. In a separate action, in Case E-7/12, the applicants submit that the defendant subsequently failed to take a decision on their access request after the statutory pre-litigation period expired, and handle their access request in an otherwise lawful manner, thereby also causing them losses.

- The applicants submit, in the present action, that they filed two additional access to documents requests with the defendant, on 12 March 2012 and 11 April 2012, seeking the statement of content in their own access case, registered as ESA Case No 68736, as well as the internal procedure/instructions governing the defendant's administration of its case files and handling of public access requests.
- On 18 May 2012, 23 May 2012 and on 2 July 2012, the defendant notified the applicants of decisions concerning their first access request, of 3 August 2010; their second access request of 12 March 2012 and their third access request of 11 April 2012, respectively. By this action, the applicants seek to annul those decisions, either in full or in part.

The applicants claim that the EFTA Surveillance Authority has:

- In relation to the first decision, on 18 May 2012, infringed Article 2(1) RAD and Article 16 SCA;
- In relation to the second decision, on 23 May 2012, committed a misuse of its powers, infringed Article 2(1) RAD and Article 16 SCA; and
- In relation to the third decision, on 2 July 2012, infringed Article 2(1) RAD and Article 16 SCA.