ORDER OF THE COURT
12 May 2014

(Action for annulment of decisions of the EFTA Surveillance Authority – Access to documents – Admissibility)

In Case E-8/12,

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, advocate,

applicants,

v

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for annulment of three EFTA Surveillance Authority Decisions, as notified on 18 May 2012, 23 May 2012, and 2 July 2012, denying access to specific documents in ESA Case No 34250 (Norway Post/Privpak – an antitrust infringement case) and in ESA Case No 68736 (DB Schenker – a public access request case concerning the antitrust infringement case above), and also denying access to the procedures for handling public access requests and administering case files, under the Rules on Access to Documents ("RAD 2008") established by ESA Decision No 407/08/COL of 27 June 2008 (unpublished).

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicants and the defendant,

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Jon Midthjell, and the defendant, represented by Markus Schneider and Gjermund Mathisen, at the hearing on 1 July 2013,

makes the following

Order

I Introduction

1 Schenker North AB, Schenker Privpak AB, both established in Sweden, and Schenker Privpak AS, established in Norway, ("the applicants" or, collectively, "DB Schenker") are part of the DB Schenker group. The group is a large European freight forwarding and logistics undertaking. It combines all the transport and logistics activities of Deutsche Bahn AG except passenger transport. All three applicants operate in that sector.

2 On 24 June 2002 DB Schenker complained to the EFTA Surveillance Authority ("the defendant" or "ESA") concerning the agreements made by Posten Norge AS ("Norway Post") establishing Post-in-Shops in retail outlets. Between 21 and 24 June 2004 ESA conducted an inspection of Norway Post's premises and seized various documents ("the inspection documents").

3 ESA subsequently initiated an investigation. By a decision of 14 July 2010, ESA found that between 2000 and 2006 Norway Post had committed an infringement of Article 54 of the EEA Agreement ("EEA") by abusing its dominant position in the business-to-consumer parcel market in Norway. Norway Post applied to the Court to have ESA's decision annulled. The Court gave judgment in those proceedings on 18 April 2012 (Case E-15/10 *Norway Post* v *ESA* [2012] EFTA Ct. Rep. 246).

4 DB Schenker is pursuing a follow-on damages claim against Norway Post in the Norwegian courts for losses caused by that infringement. For the purposes of that procedure, the applicants have sought access to the documents in ESA's possession as regards its investigation of DB Schenker's complaint.

5 The present case concerns three requests for access to documents submitted on 3 August 2010 ("first access request"), 12 March 2012 ("second access request"), and 11 April 2012 ("third access request").

6 On 16 August 2011, ESA issued a partial decision on the first access request pursuant to the RAD 2008 for full access to documents in the file which led to ESA's decision in Case No 34250 (*Norway Post* / *Privpak*) of 14 July 2010. In its judgment of 21 December 2012 in Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178 ("*DB Schenker I*"), the Court annulled ESA's decision of 16 August 2011 "Norway Post/Privpak – Access to documents" in so far as it denied full or partial access to inspection documents in Case No 34250 Norway Post/Privpak.

7 In the present case, DB Schenker seeks the annulment of the three alleged ESA decisions relating to its three requests for access to documents as notified on 18 May, 23 May and 2 July 2012, respectively denying access to specific documents in ESA Case No 34250 (Norway Post/Privpak) and in ESA Case No 68736, and also denying access to the procedures for handling public access requests and administering case files pursuant to the RAD 2008.

8 This case has been brought in parallel with Case E-7/12 *DB Schenker* v *ESA* ("*DB Schenker II*"). The judgment in that case was handed down on 9 July 2013.

II Legal background

EEA law

9 Article 108(1) EEA reads:

> *The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.*

10 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

11 Article 36 SCA reads:

> *The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.*
>
> *Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA*

Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

Rules on access to documents - Decision No 407/08/COL of 27 June 2008

12 Article 1 RAD 2008 reads:

The purpose of these Rules is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to EFTA Surveillance Authority (hereinafter 'the Authority') documents produced or held by the Authority in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

13 Article 2 RAD 2008 on beneficiaries and scope reads:

1. 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 of access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules.

2. The Authority may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in an EEA State.

3. These Rules shall apply to all documents held by the Authority, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the Authority.

4. Without prejudice to Article 4, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.

...

14 Article 3(a) RAD 2008 on definitions reads:

> (*a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the Authority's sphere of responsibility;*

15 Article 6 RAD 2008 on applications reads:

> *1. The Authority shall examine applications by any natural or legal person for access to a document made in any written form, including electronic form, in one of the languages referred to in Article 129 of the EEA Agreement and Article 20 of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in a sufficiently precise manner to enable the Authority to identify the document. The applicant is not obliged to state reasons for the application.*
>
> *2. If an application is not sufficiently precise, the Authority shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.*
>
> *3. In the event of an application relating to a very long document or to a very large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution.*
>
> *4. The Authority shall provide information and assistance to citizens on how and where applications for access to documents can be made.*

16 Article 7 RAD 2008 on the processing of applications reads:

> *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.*

17 Article 8 RAD 2008 on access following an application reads:

> *1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies.*

Consultation on the spot, copies of less than 100 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the Authority and is easily accessible to the applicant, the Authority may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3 Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

18 Article 9 RAD 2008 on registers reads:

1. The Authority shall, as soon as possible, provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without undue delay.

2. For each document the register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

19 Article 10 RAD 2008 on direct access in electronic form or through a register reads:

The Authority shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the Authority.

20 Article 11 RAD 2008 on the administrative practice of ESA reads:

The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.

21 Article 13 RAD 2008 on entry into force reads:

These Rules shall be applicable from 30 June 2008 and apply to requests for access to documents submitted to the Authority after that date.

The Authority shall publish these Rules in the EEA Supplement to the Official Journal of the European Union.

III Facts and pre-litigation procedure

22 On 3 August 2010, in preparation for their damages claim against Norway Post, the applicants requested by email access to the file in ESA Case No 34250 (*Norway Post*/*Privpak*). The applicants also asked for a non-confidential version of the

decision in that case, which they wished to submit in copy as soon as possible to Oslo City Court in the context of a follow-on action against Norway Post following the decision in ESA Case No 34250.

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

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

25 On 10 August 2010, the 5-day time limit specified in Article 7(1) RAD 2008 expired.

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

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

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

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

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

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

32 The email ended with the following paragraph:

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

33 The first list, which was included in the email, is a 33-page document. It contains around 900 event numbers. The documents in the first list are dated between 2001 and 2008 and were gathered during the investigation into the business practices of Norway Post, leading to ESA Decision 322/10/COL. The list includes references to the inspection documents, which were the subject of the judgment in *DB Schenker I*. In the first list, the names and sources of the documents have not been redacted or otherwise rendered unintelligible.

34 On 30 August 2010, the applicants replied by email. First, they asked for an extension of the deadline to reply, which was granted in an email from ESA on 1 September 2010. Second, the applicants confirmed that the request concerned the entire file and that, in emails of both 10 August 2010 and 18 August 2010, ESA had confirmed that it was in the process of preparing the documents. In addition, the applicants stated the purpose of their request for access to documents and offered to discuss a reasonable extension to the deadline in the RAD 2008:

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

As to the issue of whether certain documents contain protected information, we assume that [ESA] has continuously requested NPO to provide non-confidential versions of the documents in question, as [ESA] continuously asked of [the applicants] during the eight year investigation, which we also stated in our email

on 3 August 2010 without hearing differently from [ESA]. [The applicants have] a right to access those parts of the documents that do not contain protected information and we assume that [ESA] has made use of the last 18 working days since the request was filed, to ask NPO or other third parties for a release of any remaining documents, in accordance with its Rules of Procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

…

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

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

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

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

…

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

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

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

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

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

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

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

Moreover, significant parts of the file concerning Norway Post have not been released, even though Norway Post has been required to submit non-confidential versions of its submissions during the course of the investigation. As you will recall, there is also a general presumption in antitrust proceedings that information older than five years old is no longer confidential.

…

[ESA] has also ceased to reply to our correspondence, following up the request for access to the file, presumably because there is no acceptable explanation for

the significant delay. I had hoped that [ESA], nevertheless, would resolve the matter during the two months that have passed since I last contacted you on 9 November 2010. Since that is not the case and no further documents have been released, I must trouble you with this matter, once again.

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

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

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

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

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

On 15 February 2011, the EFTA Court granted DB Schenker permission to intervene in support of [ESA] against Norway Post. A copy of the order is enclosed. The Court also decided that DB Schenker shall receive a copy of the written pleadings by 23 February 2011. These documents will only include parts of the file held by [ESA].

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

[ESA] has so far only provided a minor part of the file and is even withholding documents which clearly cannot be contested. Moreover, [ESA] has failed to

provide a complete list showing all documents registered on file. [ESA] had also ceased to reply to our correspondence, following up the request for access to the file. Clearly, [ESA] cannot cease to respond to correspondence for several months, without infringing the principle of good administration (maladministration).

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

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

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

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

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

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

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

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

44 The applicants replied to ESA's letter of 18 February 2011 by email on the same day:

"*In your letter, received by telefax you state that [ESA] sent a CD-ROM with documents on 16 February 2011. …*

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

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

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

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

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

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

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

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

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

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

47 In the letter of 16 February 2011 from ESA to the applicants, which was received by the latter on 22 February 2011, ESA explained the legal reasons for its treatment of the third-party documents in the file. The letter concluded:

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

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

[ESA] has decided to grant you full access to several of those documents. They are all marked access granted. Access is not granted to documents or part of documents where [ESA] considers that it is reasonably foreseeable that disclosure of this information would undermine the protection of the commercial interests of other undertakings. [ESA] has also examined whether there is any overriding interest in the disclosure of the information and found that not to be the case.

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

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

48 By its letter of 16 August 2011, ESA granted DB Schenker access to Norway Post's 2004 price list, a presentation of 4 March 2004 by Norway Post to the Norwegian Mail Order Association, and documents obtained from another twelve third parties.

49 Additionally, ESA permitted the disclosure of two letters dated 3 January 2002 addressed to Privpak but did not provide them to the applicants, assuming that they were already in DB Schenker's possession. ESA then denied the applicants access to the remaining 352 inspection documents.

50 By the time ESA wrote its letter of 16 August 2011 it had reviewed approximately 1450 documents following the applicant's original request of 3 August 2010. In the letter, ESA stated, however, that the remaining third party documents were "still subject to assessment and third party consultation" and that there were "24 such third parties". Moreover, it stated that it would "continue its assessment" of the applicants' request for access to documents and revert to them "with further information in this regard as soon as practically possible".

51 By a letter of 8 March 2012, the applicants served a pre-litigation notice on ESA pursuant to the second paragraph of Article 37 SCA. The letter, refers to "Case No 68736". However, in the letter itself reference is made to "the request for public access to documents in Case No 34250 (Norway Post/Privpak) that DB Schenker submitted on 3 August 2010". The letter states:

"*Based on the information available to the company, the progress and organization of ESA's work indicate that the process has not been handled with proper diligence and efficacy:*

- *For the last seven months, from 16 August 2011 to 8 March 2012, ESA has not been able to process a single document.*

- *During the preceding six months, from 16 February 2011 to 16 August 2011, ESA initially explained that the time was mainly used to process documents seized from Norway Post in 2004, ESA decided on 16 August 2011 to deny access to all the 352 documents in question. The decision has been contested in Case E-14/11. In the written procedure before the Court, ESA has now stated that the documents were never registered individually in the index of the case file, that ESA found it too burdensome to review the documents individually, that Norway Post had not been asked to submit individual non-disclosure claims for the same reason, and that the public right to partial access in Article 4(6) RAD must be set aside due to the hardship it would require of ESA and Norway Post to process the documents in accordance with that right.*

- *This suggests that ESA spent most of the time, from 16 February 2011 to 16 August 2011, on what it has referred to as a 'second round' of third party correspondence. However, all the third parties in question had earlier been required to submit non-confidential versions of these documents during the investigation of Norway Post. Although the parties had the right to be consulted again under Article 4(5) RAD in the context of the present access request, it is difficult to see how this work could take six months. This is also borne out by the low number of documents granted full or partial non-disclosure (26 documents), which translates into 4.3 documents per month that might have required more than a routine round of correspondence.*

- *According to ESA, the initial six months, from 3 August 2010 to 16 February 2011, were mainly used to process correspondence with third parties (the 'first round') and Norway Post. However, as noted above, all the parties had already submitted non-confidential versions of these documents during the investigation. Although the parties had the right to be consulted again under Article 4(5) RAD in the context of the present access request, it is equally difficult to see how the work in this round could take six months. This is also borne out by the low number of documents granted full or partial non-disclosure (32 documents) during that time, which translates*

into 4.9 documents per month that might have required more than a routine round of correspondence.

- *ESA has throughout the process refused to provide a copy of the index of the file that lists all the documents belonging to the case. The only list that ESA has provided contains a selected pool of documents that represents a minor part of the complete file. ESA has never explained why DB Schenker should not be allowed to review the index over the complete file. Neither has ESA openly clarified which documents were excluded from the selected list.*

- *DB Schenker understands from the written procedure in Case E-14/11 and indirectly from previous correspondence that the documents not included on the selected list are all of ESA's working documents; all the documents seized from Norway Post in 2004 covering more than 2700 pages; all correspondence from Norway Post and other third parties after 17 December 2008, including a letter from Norway Post to former ESA president, Mr Per Sanderud, on 13 July 2010.*

- *This means that the excluded documents may show, e.g. why ESA waited two years before conducting a dawn raid to secure evidence from Norway Post; the evidence that ESA came into possession of at that time and how the investigation was organized after that; why the investigation lasted for eight years; why ESA decided to reduce the fine with EUR 1 million due to the long investigation while stating that it was not required to do so; why ESA did not take Norway Post's profit into account in accordance with its fining guidelines when the fine was calculated, to ensure that the fine exceeded what Norway Post had unlawfully gained; why the fine was set at only 3 % of the turnover in a market where Norway Post had enjoyed a de facto monopoly for at least six years; whether the risk of damages claims against Norway Post has been taken into account in ESA's decision making process; etc.*

- *Remarkably, ESA has repeatedly criticized DB Schenker for not being willing to limit its access request to the documents on the selected list.*

DB Schenker takes the view that ESA has failed to handle the request in accordance with the principle of good administration, which is considered a fundamental right in EU/EEA law, by failing to register all documents belonging to the case in the index of the file; by failing to organize the work in relation to the access request properly and taking excessive time to process the request; by refusing to indicate when it plans to finalize the work even though it has exceeded the extended time limit in Article 7(2) RAD; by providing the company with an incomplete list of documents covering only a minor part of the file and criticizing the company for not being willing to limit its access request to the documents on the selected list; by failing to explain openly the documents that were excluded from the selected list or provide a complete index over the case file.

The company calls on ESA to take a decision on all remaining documents that have not yet been processed under the request that was submitted on 3 August 2010, ***within two months of this notice****, or face legal action under Article 37 SCA if it should fail to adopt a position on any of those documents by the expiry of the statutory time limit.*

For obvious reasons, DB Schenker cannot identify all the remaining documents, but expects a decision on the following documents or type of documents:

- *the index over the documents attached to the file; ESA's working documents;*
- *any remaining correspondence, including, but not limited to, Norway Post; third parties; and the Norwegian government;*
- *any minutes from meetings between ESA and the Norwegian government to discuss the case to the extent that these are not considered working documents; 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;*
- *all documents from DB Schenker in the redacted form they were sent to Norway Post to protect business secrets and confidential information; a letter from Norway Post to ESA on 13 July 2010;*
- *any other documents not listed in the index of the file but belonging to the case*

ESA is put on notice that DB Schenker could consider the merits for bringing a damages claim under Articles 46(2) and 39 SCA for losses caused, or augmented by, a failure to provide timely access, in particular to documents that can be used against Norway Post in its pending damages claim where DB Schenker is relying on its EU/EEA guaranteed right to seek full compensation for its losses."

First contested correspondence

52 By a letter dated 9 May 2012, notified on 18 May ("first contested correspondence" and referenced as "Event No 633455" in Case No 68736), ESA responded to the applicants' pre-litigation notice. In the letter ESA stated:

"*The Authority is pleased to define its position on your letter of 8 March 2012 pursuant to Article 37(2) SCA.*

1 Index over the documents attached to the file

[d] I have already sent to 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 that period exist that belong to the case but are not on that list. On 30 August 2010 your 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.

2 Further documents to which access is granted.

[e] I am pleased to grant you access to 50 further documents.

[f] 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.

3 All documents from DB Schenker in redacted form as sent to Norway Post

[g] I am pleased to grant you access to all of the documents in this category.

[h] A list of those documents is attached as annex 2 to this letter.

[i] The documents themselves are contained on the CD-ROM mentioned above enclosed with this letter.

4 Remaining documents

[j] 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.

[k] Some of the remaining documents are purely clerical and have no substantive content, such as letters merely transmitting documents (already in your possession) to others.

[l] Please confirm whether you wish to receive such letters or not.

[m] 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.

[n] We have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010.

[o] <u>The Authority continues to review the remaining documents to which you have requested access, including those on the list sent to you on 5 April 2012 and which are not listed in annexes 1 and 2</u>, in order to give you access whenever possible to the complete document or in redacted form in compliance with the Authority's rules on access to documents."

53 Enclosed with the letter were annexes with a list of documents to which access was granted and a list of all documents from DB Schenker in redacted form as sent to Norway Post, along with a CD-ROM containing documents listed in Annexes 1 or 2.

54 On 5 September 2012, ESA wrote a letter to the applicants concerning the disclosure of the remaining documents referred to in paragraph (o) in the first contested correspondence. The letter of 5 September 2012 states that these documents included "any remaining correspondence saved in Case No 34250 or saved in another case but relevant to Case No 34250", as well as "internal documents in Case 34250". In the letter ESA also stated the following:

> "*this 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 your client has requested access*".

55 By the letter ESA adopted a position as regards the applicants' right to access of more than 733 documents, along with a list of these documents. The three annexed lists comprised 51 pages.

Second contested correspondence

56 By an email of 12 March 2012, the applicants made a specific request for access to the "index of the file in Case No 68736, which concerns the applicants' request for public access to the documents in Case No 34250". In the email, the applicants indicated that the request must be regarded as a preparatory step were the matter to proceed to court under Article 37 SCA following the pre-litigation notice of 8 March 2012.

57 By an email of 15 March 2012, ESA replied that it had found no document in existence which was an "index" of the file in the case.

58 The applicants replied by letter of 19 March 2012 and stated:

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

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

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

On that basis, I would respectfully ask you to reconsider the access request that was submitted on 12 March 2012."

59 The applicants sent ESA a follow-up letter on 27 March 2012 stating the following:

"*Reference is made to DB Schenker's access request on 12 March 2012 to the statement of content of the file (index); to your email on 15 March 2012 stating that no such document exists; and our letter on 19 March 2012 asking ESA to reconsider the matter in light of the circumstances.*

Pursuant to Article 7(1) [RAD 2008], the time limit for ESA to respond to ordinary access requests is five working days. ESA has now had more than 10 working days to consider the present request.

As explained in our last letter, should ESA maintain that it is unable to produce an index showing all documents (events) registered to the case that has been ongoing more than 20 months, DB Schenker intends to introduce that fact as evidence against the hardship defence that ESA has relied on in Case E-14/11 in the EFTA Court. If the file should be in such disarray that ESA is unable to produce an index that accounts for the documents that belong to the case, including the dates of all its correspondence with Norway Post, DB Schenker and other third parties, that fact would be relevant to the Court's assessment of the alleged hardship that ESA has relied on to set aside the public right to partial access to the documents and evidence in question under Article 4(6) RAD.

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

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

60 In a letter of 11 April 2012, the applicants reiterated their request to ESA to produce a statement of content in Case No 68736 (other aspects of this letter are addressed in paragraph 64 below). The applicants stated:

"*DB Schenker expects to receive a complete statement of content, i.e. also describing the origin/author of each document/event registered; whether the document/event is incoming, outgoing or internal; the date of each document/event and the date when it was registered. Unless such a complete statement of content can be provided, ESA is requested to explain whether it has provided a print-out from its database directly or whether certain information about the documents, available in the database, has been edited away from the statement of content of the file and, in that case, to provide reasons for denying disclosure of that information.*"

61 On 23 May 2012, ESA emailed DB Schenker with an attached letter dated 22 May 2012 ("second contested correspondence" and referenced as "Event No 635333" in Case No 68736).

62 The letter reads as follows:

"*RE: DB Schenker - Access to documents in Case 68736*

Your letter of 23 March 2012

[a] Please find attached a list of the documents on the file in Case 68736 concerning your request for access to the file in Case 34250 Norway Post / Privpak.

[b] This list was prepared in a timely manner to respond to your request of 23 March 2012. For reasons I cannot account for it has become clear that it has never reached you.

[c] Please accept my apologies for this.

[d] The list, as you will see, is the list as generated by the computer without amendments and changes."

63 Enclosed with the letter was the following:

[a] "*Annex I: List of Documents on file in Case 68736.*"

Third contested correspondence

64 In the letter of 11 April 2012 (other aspects of this letter are addressed in paragraph 60 above), the applicants submitted a third access request to ESA for access to the following additional documents:

- "*ESA's internal procedures/instructions for administering case files, including its routines for registering incoming/outgoing correspondence*

and internal documents; who is authorized to open/close case numbers and register documents/events on a case; what kind of information must be registered about each document/event in ESA's database; etc.

- *ESA's internal procedures/instructions for handling public access requests under RAD.*

- *The College decision(s) containing the current empowerment of the director of the administration department; the director of the competition and state aid department; and the director of the legal and executive department.*"

65 On 14 June 2012 the applicants served a pre-litigation notice on ESA as regards the access request of 11 April 2012. In the letter, the applicants stated:

"*Regrettably, ESA has still not provided the documents sought on 11 April 2012 in the third access request, to the procedural framework and the routines for handling access requests, etc. In light of the circumstances, the company must therefore assume that the decision it received on 23 May 2012 constitutes an implied decision to refuse access to those documents.*

On that basis, ESA is hereby notified that the company intends to contest decision before the EFTA Court under Article 36 SCA if no reversal is made in this matter before 22 June 2012. In the event that ESA should reverse its decision after the application for annulment has been submitted, DB Schenker will still ask the EFTA Court to award costs, see by analogy the order of the General Court in Case T-291/10 (Martin v *Commission) on 8 April 2011, at 24-27.*"

66 On 2 July 2012, ESA emailed DB Schenker with an attached letter dated 2 July 2012 ("third contested correspondence" referenced as "Event No 639495" in Case No 68736).

67 The letter reads as follows:

"*RE: YOUR PRE-LITIGATION NOTICE OF 14 JUNE 2012*

[a] Reference is made to your letter of 14 June 2012.

[b] Your letter is understood to the effect that you reiterate an earlier access request to:

(1) *'ESA's internal procedures/instructions for administering case files, including its routines for registering incoming/outgoing correspondence and internal documents; who is authorized to open/close case numbers and register documents/events on a case; what kind of information must be registered about each document/event in ESA''s database; etc.*

(2) *ESA's internal procedures/instructions for handling public access requests under RAD [the Authority's Rules on Public Access to Documents]*.

(3) *The College decision(s) containing the current empowerment of the director of the administration department; the director of the competition and state aid department; and the director of the legal and executive department.'*

[c] As for the documents requested in points (1) and (2) it seems the required information has already been provided to you by the letter from Mr Lewis of 30 April 2012 (Event No 632494) with enclosures, sent to you by e-mail on 4 May 2012 and regular post on 7 May 2012, and by the Authority's Reply to the Measures of Inquiry prescribed by the EFTA Court on 29 May 2012 in Case E-14/11 DB Schenker v ESA (Event No 636469), forwarded to you from the EFTA Court Registry by e-mail of 4 June 2012, and made available to you in hard copy at the EFTA Court on 5 June 2012.

[d] As for your point (3) the Authority does not have specific College decisions containing a "current empowerment of the director" of each of its departments. The Authority's administrative setup is not such as to necessitate this. Accordingly, the Authority has been, and remains, unable to provide access to documents under this point of your request."

IV Procedure and forms of order sought by the parties

68 By application lodged at the Court on 15 July 2012, DB Schenker brought an action seeking the annulment of three decisions of the defendant, as notified on 18 May 2012, 23 May 2012 and 2 July 2012, denying access to specific documents in ESA Case No 34250 (Norway Post/Privpak – an antitrust infringement case) and in ESA Case No 68736 (DB Schenker – a public access request case concerning the same antitrust infringement case), and also denying access to the procedures for handling public access requests and administering case files, under the RAD 2008.

69 The applicants request the 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 authorized 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.

70 On 20 July 2012, ESA requested an extension to the deadline for submitting its defence. The extension was granted by the President on 24 July 2012 and a new deadline was set for 3 October 2012.

71 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. 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".

72 On 2 October 2012, the defendant lodged an application for a decision on a preliminary objection on grounds of inadmissibility pursuant to Article 87 of the Rules of Procedure ("RoP"). ESA requests the Court to:

(1) Dismiss the application as inadmissible.

(2) Order the applicants to bear the costs.

73 On 7 November 2012, DB Schenker submitted its response to the defendant's inadmissibility plea pursuant to Article 87(2) RoP. DB Schenker requests the Court to:

(1) Dismiss the defendant's inadmissibility plea as unfounded; and

(2) Grant the form of order sought in the application for annulment.

74 By way of letters of 17 December 2012, the Court informed the parties that, pursuant to Article 87(4) RoP, it had decided to reserve its decision on the defendant's application for a decision on a preliminary objection on grounds of inadmissibility for the final judgment.

75 On 18 December 2012, ESA requested that it receive a copy of DB Schenker's statement in reply to its plea of inadmissibility. The request was granted and the statement in reply was sent to ESA on the same day.

76 ESA submitted its defence on 31 January 2013. It requests the Court to:

(1) dismiss the application as inadmissible;

(2) order the applicants to bear the costs.

77 Or, in the alternative, ESA requests the Court to:

(1) declare that there no longer is any need to adjudicate on the application as regards decisions allegedly implied in the Authority's letter of 9 May 2012 (event 633455) to counsel for the Applicants regarding their request for public access to file no. 34250;

(2) dismiss the application for the remainder;

(3) order the applicants to bear the costs.

78 Or, in the further alternative, ESA requests the Court to:

(1) dismiss the application;

(2) order the applicants to bear the costs.

79 DB Schenker submitted its reply on 5 March 2013 and ESA submitted its rejoinder on 26 March 2013. The parties presented oral argument and answered questions put to them by the Court at the hearing on 1 July 2013.

80 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V Law

Admissibility

Authority granted to the applicants' lawyer

81 At the hearing, ESA raised a point concerning inadmissibility that it claimed had only come to its attention after the submission of the written pleadings. ESA contended that counsel for the applicants did not submit a valid mandate when initiating proceedings. Noting that a further mandate was submitted, ESA contends in that regard that a defect can be rectified only before the expiry of the period for bringing proceedings. As regards the further mandate, ESA refers to its defences in Case E-4/13 *DB Schenker* v *ESA* and Case E-5/13 *DB Schenker* v *ESA* which are both pending before the Court. ESA therefore contends that the application is inadmissible.

82 ESA contends, first of all, that the authority supplied by the applicants' lawyer to prove that he is instructed to act is defective. In essence, ESA appears to be of the view that the powers of attorney annexed to the application do not satisfy the requirements laid down by Article 17 of the Statute and Article 33(5)(b) RoP.

83 In its final intervention at the hearing, DB Schenker submitted that ESA had invoked an entirely new plea in this case without even offering the Court a reason for coming with it belatedly. It asserted that the original power of attorney submitted was sufficient and that ESA's interpretation is contrary to Article 33(6) RoP.

Findings of the Court

84 The Court recalls that, under Article 33(5)(b) RoP, "an application made by a legal person governed by private law shall be accompanied by … (b) proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose".

85 If an application does not comply with that requirement, Article 36(6) RoP provides that the Registrar "shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the above-mentioned documents". According to the same provision, the Court shall decide whether the non-compliance with these conditions renders the application formally inadmissible, if the applicant fails to put the application in order or to produce the required documents within the time prescribed.

86 Counsel for the applicants submitted two powers of attorney. The first was granted by Schenker North AB. The second was granted by Schenker Privpak AB and Schenker Privpak AS. Both documents are similarly worded.

87 Admittedly, as ESA points out, these powers of attorney refer in particular to Case E-15/10 *Posten Norge* v *ESA*, cited above. However, as is shown especially by the

use of the words "the right to take such steps as may be necessary for the commencement and presentation of the intervention including (without limitation) the … lodging … of any application or submission of any kind" and "at any hearings in relation to the proceedings", the powers of attorney explicitly make clear that they did not concern solely the conduct of the proceedings seeking annulment of ESA Decision 322/10/COL.

88 In this regard it must be noted that the present action concerns the applicants' requests to access the case file in a particular ESA investigation which has subsequently been the subject of those previous actions in Case E-15/10 *Posten Norge* v *ESA*, Case E-14/11 *DB Schenker I*, and Case E-7/12 *DB Schenker II*. Moreover, the applicants have repeatedly stated in their correspondence with ESA that the objective of the access requests at issue in the present case is to gain evidence to support their claim in the national courts for damages, which is alleged to arise from the same actions of Norway Post that were at issue in Case E-15/10 *Posten Norge* v *ESA*.

89 As such, the case is inextricably linked to Case E-15/10 *Posten Norge* v *ESA*. For those reasons, ESA's proposition that the authority is defective must be rejected. This action cannot therefore be declared inadmissible on such grounds.

Application raising a preliminary objection

90 In its application raising a preliminary objection, ESA submits that the applicants, in their existing application for failure to act, registered as Case E-7/12, have introduced the very correspondence challenged as "decisions" in the present action for annulment as evidence of an alleged failure by ESA to define its position on the applicants' public access request of 3 August 2010 regarding ESA Case No. 34250.

91 ESA argues that this overlap bars the applicants from bringing a subsequent action for annulment based on the same facts, while the first action is still pending. In its view, there is nothing to suggest that an applicant which has seised the Court on a specific issue with an action for failure to act may, in addition to that application, bring a subsequent action for annulment on the same factual basis regarding alleged decisions that predate both court applications.

92 DB Schenker submits that the plea does not state the law relied on as required by Article 87(1) RoP and notes that a pleading must be sufficiently clear and precise to allow the opposing party to prepare a rebuttal and for the Court to give a ruling. While DB Schenker assumes that ESA pleads *lis pendens* it questions whether the plea is admissible.

93 DB Schenker submits that *lis pendens* requires three cumulative conditions to be met: the action must be between the same parties; it must seek the same object; and it must rely on the same legal basis. Those requirements are not met in the present case. The plea is legally flawed as neither the subject matter nor the legal pleas nor the form of order sought in the present case are the same as in the action

for failure to act and damages (Case E-7/12). Therefore, this inadmissibility plea, even if it is admissible itself, is unfounded, and section 5.2 of the application for annulment must be held to be admissible.

Findings of the Court

94 Pursuant to Article 87(1) RoP, an application for a decision on a preliminary objection or other preliminary plea shall be made by a separate document and must state, *inter alia*, the pleas of fact and law relied on.

95 To that end, the information given must be sufficiently clear and precise to enable the other party to prepare its rebuttal and the Court to give a ruling, if appropriate, without recourse to other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible, the essential facts and the law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (see, by analogy, *Posten Norge* v *ESA*, cited above, paragraph 111).

96 On that basis, the Court finds that ESA's submissions are sufficiently clear and precise on this point and notes that DB Schenker has correctly recognised that ESA has argued *lis pendens*.

97 If an action is to be declared inadmissible on grounds of *lis pendens* three conditions must be met: the action must be between the same parties, seek the same object and do so on the basis of the same submissions (compare, to this effect, Joined Cases T−246/08 and T−332/08 *Melli Bank* v *Council* [2009] ECR II−2629, paragraph 34 and case law cited).

98 In this instance, it is apparent that the parties are the same in both Case E-7/12 *DB Schenker II* and the present proceedings. In *DB Schenker II*, the applicants sought a declaration that ESA had infringed the first paragraph of Article 37 SCA by failing to define its position on the request the applicants submitted on 3 August 2010 for access to the complete file in ESA Case No 34250.

99 However, in its judgment of 9 July 2013 in *DB Schenker II*, the Court found that there was no need to adjudicate, as the action had become devoid of purpose.

100 In principle, the conditions for the admissibility of an action must be fulfilled at the time when the action is brought (see, for comparison, Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain* v *Council* [2002] ECR I-3439, paragraph 23). However, inadmissibility because of *lis pendens* cannot apply where the Court has not ruled on the merits of a similar action.

101 In this regard, the Court notes that inadmissibility because of *lis pendens* is, in fact, designed to prevent identical actions from being examined twice. This should, among other things, prevent contradictory decisions from being made. However,

there is no longer any risk of that where the Court has found that an earlier action has become devoid of purpose.

102 Accordingly, the applicants' action cannot be held inadmissible because of *lis pendens*.

The contested correspondences

103 In the present case, DB Schenker effectively seeks the partial annulment of three alleged ESA decisions, as notified on 18 May 2012, 23 May 2012, and 2 July 2012, denying access to specific documents in ESA Case No 34250 (Norway Post/Privpak – an antitrust infringement case) and in ESA Case No 68736 (DB Schenker – a public access request case concerning the antitrust infringement case above), and also denying access to the procedures for handling public access requests and administering case files. It is appropriate to address those contested correspondences in turn.

First contested correspondence

Statement of content

104 ESA denies that the first contested correspondence constitutes a decision challengeable under the second paragraph of Article 36 SCA. In addition, ESA submits that, whatever interest, if any, DB Schenker may have had at the time the present case was lodged, its interest came to an end, at the latest, when ESA concluded the relevant administrative procedure in a letter of 5 September 2012, addressing a comprehensive and conclusive position to the applicants in writing. This letter entails an express decision on the access request and supersedes any refusal that is allegedly implicit in the first contested correspondence.

105 The applicants argue that, by the first contested correspondence, ESA refused to disclose a complete statement of content of the file in ESA Case No 34250, and thereby infringed Article 2(1) RAD 2008 and Article 16 SCA. To that end, the applicants submit that the lists to which they have been granted access by ESA's letters of 30 August 2010 and 5 April 2012 do not represent a complete statement of the file.

Findings of the Court

106 It must be recalled that, in their letters of 2 and 4 August 2010, the applicants originally requested access to the entire case file in ESA Case No 34250. The applicants did not specifically request access to a list of the documents in the case. However, in a letter of 30 August 2010, ESA furnished the applicants with a 33-page list of the documents to which Norway Post was granted access during the administrative procedure.

107 In its letter of 5 November 2010, ESA provided the applicants with two annexes listing documents concerning the correspondence between ESA and Norway Post during the administrative procedure in ESA's investigation. In the letter, the applicants were notified that ESA was in the process of examining the remainder of the documents on the case file and that ESA would revert to them as soon as the examination had been completed.

108 In their letter of 17 February 2011 to the President of ESA, the applicants complained that they had not been provided with a complete list showing all the documents registered on file. By a letter of 16 February 2011, however, ESA took a decision regarding the applicants' right to access 123 documents, sending a 14-page list setting out the documents in question to the applicants. In the letter, ESA specifically mentioned that it was in the process of examining the remainder of the documents on the case file and that it would revert to the applicants as soon as this examination had been completed.

109 However, it does not emerge from the case file that the applicants specifically requested access to the statement of content in ESA Case No 34250 or other documents at issue in these proceedings prior to their formal pre-litigation notice of 8 March 2012. By that notice, the applicants called on ESA to take a decision on "the following documents or type of documents", specifying in that regard "the index over the documents attached to the file", "ESA's working documents", "any remaining correspondence, including, but not limited to Norway Post; third parties; and the Norwegian Government", "any minutes from meetings between ESA and the Norwegian Government to discuss the case to the extent that these are not considered working documents" and "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".

110 On 5 April 2012, ESA sent a letter to the applicants to which ESA attached an updated list starting from the date of the Statement of Objections in relation to the documents in ESA Case No 34250.

111 In its response by letter of 9 May 2012 to the applicants' pre-litigation notice, i.e. the first contested correspondence, ESA expressly stated that in its email of 5 April 2012 it had sent an updated list of the documents in the case starting from 16 December 2008. Furthermore, ESA explicitly stated that no other document from that period existed that belonged to the case but was not on that list, and, in addition, that on 30 August 2010 the applicants had received a complete list of all the documents on the file to which Norway Post was granted access when the Statement of Objections was issued in December 2008.

112 Attached to the first contested correspondence were two annexes, of which the first listed "[f]urther documents to which access [was] granted", and the second listed "[a]ll documents from DB Schenker in redacted form as sent to Norway Post".

113 ESA then explicitly stated in its letter that it continued to "review the remaining documents to which [the applicants had] requested access, including those on the

list sent to [them] on 5 April 2012 and which are not listed in annexes 1 and 2, in order to give [them] access whenever possible to the complete document or in redacted form in compliance with [ESA's] rules on access to documents".

114 ESA decisions taken upon the basis of the RAD 2008 are justiciable pursuant to the Court's normal power of review laid down in Article 36 SCA in accordance with the principle of effective judicial protection (see *DB Schenker I*, cited above, paragraph 123 and case law cited).

115 Pursuant to the second paragraph of Article 36 SCA, any natural or legal person may, under the same conditions as an EFTA State, institute proceedings before the Court against an ESA decision addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

116 First, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant, by bringing about a distinct change in his legal position, may be the subject of an action for annulment (see *DB Schenker I*, cited above, paragraph 80 and case law cited).

117 Second, in order to ascertain whether a measure can be the subject of an action under Article 36 SCA, it is necessary to look to its substance, rather than the form in which it is presented (see *DB Schenker I*, cited above, paragraphs 80 to 81 and case law cited). In addition, in order to classify a measure, it is necessary to look to the intention of those who drafted it (see Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten.no* v *ESA*, order of 7 October 2013, not yet reported, paragraph 106 and case law cited). In that regard, it is in principle those measures which definitively determine ESA's position upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period (see *Risdal Touring and Konkurrenten.no* v *ESA*, cited above, paragraph 106 and case law cited).

118 However, in addition to the requirement that the measure be a challengeable act, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. Furthermore, the interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it. If an applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court on the merits cannot bring him any benefit (see *Risdal Touring and Konkurrenten.no* v *ESA*, cited above, paragraph 133 and case law cited).

119 On 5 September 2012, ESA wrote a letter to the applicants. The letter concerned the disclosure of the remaining documents it had referred to in the first contested correspondence in paragraph (o). The letter states that these documents include "any remaining correspondence saved in Case No 34250 or saved in another case but relevant to Case No 34250", as well as "internal documents in Case 34250". ESA also wrote the following:

> "*[T]his 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 your client has requested access.*"

120 In its letter of 5 September 2012, ESA adopted a position as regards the applicants' right to access more than 600 documents, furnishing them with a list of those documents. The three annexed lists comprised 51 pages.

121 By its letter of 5 September 2012, ESA has effectively replaced with an express refusal any implied refusal included in its letter of 9 May 2012 concerning the statements of content. If an implied decision is replaced by an express decision, an action against the implied decision becomes devoid of purpose.

122 Where an applicant's interest in bringing proceedings disappears in the course of proceedings, an applicant may retain an interest in claiming the annulment of an ESA decision in order to prevent its alleged unlawfulness from recurring in the future. However, that interest can only exist if the alleged unlawfulness is liable to recur in the future regardless of the circumstances of the case which gave rise to the action brought by the applicant (see *Risdal Touring and Konkurrenten.no* v *ESA*, cited above, paragraphs 134 and 135). However, that exception is not applicable when the implied decision has been superseded by an express decision. In such a case it is always possible to contest the express decision.

123 Furthermore, if the contested decision is replaced in the course of the proceedings by a decision with the same subject-matter, that must be regarded as a new factor enabling the applicant to amend his pleadings pursuant to Article 37(2) RoP in order to challenge the new decision (compare, in particular, Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8, and Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131, paragraph 11). However, the applicants have not put forward a new plea to challenge ESA's express decision of 5 September 2012.

124 It must therefore be held that there is no longer any need to adjudicate in the case in so far as it is directed against the statement of content of the file. The applicants no longer have an interest in bringing proceedings challenging the first contested correspondence in this respect as, to this extent, the action is devoid of purpose.

Letter dated or received on 13 July 2010 from Norway Post

125 The applicants have sought the annulment of the first contested correspondence in so far as it denies access to a letter dated or received on 13 July 2010 from Norway Post.

126 According to the applicants, ESA does not claim that the letter from Norway Post does not exist; only that it has not been able to identify it. Consequently, the applicants submit that the first contested correspondence infringes the right of access in Article 2(1) RAD 2008, which extends, by virtue of Article 2(3) RAD 2008, to all documents in ESA's possession, in all areas of its activity.

127 Furthermore, the applicants argue that the reasoning in the letter falls short of the requirements of Article 16 SCA, as ESA had previously, in an email of 30 August 2010, confirmed that the document existed and labelled it as "the only document of evidential value" after its administrative hearing.

128 The applicants contend that the first contested correspondence deprives them and the Court of any meaningful opportunity to verify whether the document must be considered lost or whether ESA, for some reason, does not want to disclose it, without having any legal basis not to disclose it.

129 ESA asserts that the application for annulment should be dismissed as inadmissible in relation to the alleged refusal to disclose the alleged letter of 13 July 2010. In any event, the applicants lack legal interest and thus standing.

130 ESA submits that the document at issue was registered by ESA as Event No 534500 in ESA Case No 34250. It is a letter of 13 July 2009, to which, in a non-confidential version, ESA granted DB Schenker partial public access in November 2010. While there was confusion regarding the year of the document, the letter was readily identifiable from ESA's email of 30 August 2010, which included the letter's internal "event" number.

131 Therefore, in ESA's view, the application should be dismissed as inadmissible in so far as the applicants seek the annulment of an alleged refusal to disclose an alleged letter of 13 July 2010 from Norway Post, since no challengeable refusal decision to that effect exists, and, moreover, the applicants lack standing to assert that ESA has fully refused DB Schenker public access to Event No 524500.

Findings of the Court

132 As regards the applicants' assertion that ESA has refused to disclose a letter dated 13 July 2010 from Norway Post, the first contested correspondence merely states that "[w]e have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010".

133 ESA has contended that the applicants lack interest in challenging this part of the contested correspondence since they have already been granted partial access to the document at issue (Event No 524500). ESA acknowledges that, in its email to

the applicants of 30 August 2010, the letter of Norway Post to ESA registered as Event No 524500 was erroneously dated 13 July 2010 and not 13 July 2009.

134 In its correspondence with ESA, DB Schenker has contested whether the letter in question was identifiable. However, it has not contested the veracity of ESA's claim that it has, in fact, already been granted partial access to the letter in question.

135 While in ESA's email to the applicants of 30 August 2010 Event No 524500 was erroneously dated, the document in question was, in fact, transmitted to DB Schenker by CD-ROM as part of Annex II to ESA's letter of 5 November 2010. Annex II to that letter details Event No 524500 as "Brev til ESA – oppfølgning fra høringen.pdf" dated "14/07/2009" and notes: "Partial access granted. Sensitive business information remains confidential".

136 According to Article 1 RAD 2008 and recital 2 in the preamble to the RAD 2008, the rules on access to documents are intended to ensure the highest degree possible of openness and transparency at ESA with a view to strengthening its accountability and legitimacy (see *DB Schenker I*, cited above, paragraph 159). Moreover, Article 6(1) RAD 2008 specifically provides that an applicant is not obliged to state reasons in an application seeking access to documents.

137 A person who is refused access either wholly or in part to a document has an interest in the annulment of the refusal by virtue of having requested access. However, in the light of the purpose of the action, an applicant's interest in bringing proceedings must exist at the stage of lodging the action. Otherwise, the action will be inadmissible (see paragraph 118 above).

138 Nevertheless, without calling into question the settled case law referred to above in paragraph 118, account must also be taken of the fact that, in adopting the RAD 2008, ESA was conscious of the difficulty in identifying documents which arises, first and foremost, for individuals seeking information. In most cases, they do not know which documents contain the information and must therefore rely on the administrative authorities which hold the documents and thus the information also (compare Case T-436/09 *Dufour* v *European Central Bank* [2011] ECR II-7727, paragraph 29).

139 Thus, the wording of Article 6(2) RAD 2008, with its use of the verbs "ask" and "assist", appears to indicate that whenever ESA encounters a lack of clarity in an application for access, for whatever reason, it must contact the applicant in order to define the documents sought as well as possible. The provision is one which, in the field of public access to documents, formally embodies the principle of sound administration. The duty to assist is therefore fundamental to ensuring the effectiveness of the right of access defined by the RAD 2008 (compare *Dufour* v *European Central Bank*, cited above, paragraph 30).

140 Therefore, ESA may not at the outset reject an application for access on the ground that the document to which it refers does not exist. On the contrary, it must in such a case ask the applicant to clarify his request, pursuant to Article 6(2) RAD 2008,

and assist him to that end, in particular by indicating to him the documents which it does hold that are similar to those referred to in the application for access or which are likely to contain some or all of the information which he seeks. It is only when, despite such clarification, the applicant persists in requesting access to a non-existent document that ESA is entitled to reject the application for access on the ground that the subject-matter of that application does not exist (compare *Dufour* v *European Central Bank*, cited above, paragraph 31).

141 Since the letter referred to in the first contested correspondence is, in fact, a document to which the applicants have been given partial access without them having claimed access to the remainder, they have no legal interest in obtaining the annulment of a decision allegedly contained in the first contested correspondence, in so far as it relates to a "a letter dated or received on 13 July 2010 from Norway Post".

142 In view of the foregoing, the applicants' application for the annulment of the first contested correspondence is inadmissible in so far as it relates to "a letter dated or received on 13 July 2010 from Norway Post".

Minutes from meetings between ESA, including its President, and Norway Post and/or the Norwegian Government

143 As regards whether and, if so, to what extent ESA has refused access to minutes from meetings between the defendant, including its President, and Norway Post and/or the Norwegian Government, the applicants submit that the statement in the contested decision is remarkable in the sense that it suggests that ESA has not made a single note, on paper or electronically, from any of its meetings, during an eight-year period of investigating Norway Post. They contend that, on this point, the contested correspondence infringes the obligation to state reasons, in particular because ESA has failed to respond clearly to the formal pre-litigation notice.

144 As regards "certain minutes of meetings" referred to in the first contested correspondence, ESA asserts that, from its indication that no such documents exist, DB Schenker simply infers an implicit refusal to grant access, presupposing, contrary to ESA's indication, that such documents do indeed exist at ESA. However, given the absence of a challengeable decision, ESA contends that the application should be dismissed as inadmissible in so far as the applicants seek the annulment of an alleged refusal to disclose any minutes of meetings between ESA and Norway Post, and/or the Norwegian Government.

Findings of the Court

145 Where a decision amounts to a rejection, it must be appraised in the light of the nature of the request to which it constituted a reply.

146 Thus, in order to establish whether that part of the first contested correspondence that concerns the minutes from meetings between ESA and Norway Post and/or the Norwegian Government contains an implicit rejection of the applicants'

request to gain access to it, the Court must appraise it in the light of the requests submitted by the applicants to ESA and the rules applicable to the handling of such requests.

147 The applicants' request for access to the minutes was lodged under the provisions of the RAD 2008. In that regard, it should be observed, first, that, pursuant to Article 2(3) RAD 2008, the scope of RAD 2008 extends only to "documents" held by ESA. That is to say, it extends to "documents drawn up or received by it and in its possession". The notion of "document" as defined in Article 3(a) RAD 2008 extends to any content whatever its medium (written or paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within ESA's sphere of responsibility.

148 Second, case law provides that a document must be distinguished from the concept of information. The public's right under RAD 2008 covers documents and not information in the wider meaning of the word and does not require the institutions to reply to any request for information from an individual (compare, by analogy, Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273, paragraphs 35 and 36, and Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 76).

149 In the present case, ESA has unequivocally stated that in ESA Case No 34250 no minutes or other documents exist with the content described.

150 The Court notes that a presumption of legality attaches to any ESA statement relating to the nonexistence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by adducing relevant and consistent evidence (compare Case T-380/04 *Terezakis* v *Commission* [2008] ECR II-11*, paragraph 155).

151 In the present case the applicants have not adduced any relevant or consistent evidence to rebut this simple presumption.

152 Nonetheless, it would be contrary to the principle of transparency laid down in the rules on access to documents for ESA to rely on the fact that documents do not exist in order to avoid the application of the rules. Although ESA has a degree of discretion when establishing the level of documentation required for its operations, ESA must take into account, *inter alia*, the general public interest in gaining access to documents. If ESA is found to have failed to draw up and retain documentation to an extent that may render the public right to access to documents nugatory, ESA may be required, depending on the circumstances, to draw up and retain documentation relating to its activities (compare to that effect *WWF European Policy Programme* v *Council*, cited above, paragraph 61).

153 The applicants have not demonstrated that ESA's statement, that the minutes of its meetings with Norway Post and/or the Norwegian Government did not exist in the

form of a document that could be disseminated, is incorrect. Accordingly, ESA's statement does not amount to a denial of access to a document within the meaning of RAD 2008 that may be the subject of an action for annulment. This does not exclude that a statement such as at issue in the current proceedings may be challenged under Article 37 SCA.

154 In this regard, the Court notes that the legal situation is different in the EU under Regulation (EC) No 1049/2001, where a similar decision by the Commission amounts to a refusal to grant access which may be challenged in an action for annulment under the fourth paragraph of Article 263 TFEU (see Case T-392/07 *Strack* v *Commission*, judgment of 15 January 2013, not yet reported, paragraphs 79 to 83). However, this must be seen in light of the procedure under Article 8(3) of Regulation No 1049/2001, where also silence on the part of an EU institution is deemed to be a negative decision. Conversely, the RAD 2008 do not contain any clear rules that are capable of qualifying inaction to produce a document as action. Therefore, under the RAD 2008, a decision not to hand over a document on the basis that it does not exist, does not produce such legal effects.

155 Accordingly, the action against the first contested correspondence must be dismissed as inadmissible to the extent that it concerns the annulment of the alleged decision of 18 May 2012 in ESA Case No 68736 (DB Schenker) in so far as it does not grant access to minutes from meetings between the defendant, including its president, and Norway Post and/or the Norwegian Government.

Second contested correspondence

156 DB Schenker asserts that ESA has refused to disclose a complete statement of content of ESA Case No 68736 (DB Schenker), the case number assigned to its access to documents request of 3 August 2010, which is a separate case concerning the applicants' request to access the documents in ESA Case No 34250.

157 In this regard, the applicants submit that a failure to include the dates of ESA's correspondence in the list and to describe consistently the "origin/author of each document/event listed, as well as whether the document/event is incoming/outgoing or internal; and the dates on each document/event (which comes in addition to the dates referred to above, concerning the time when correspondence and other events have been registered on the file)" constitutes a violation of Article 2(1) RAD 2008, a violation of the obligation to state reasons under Article 16 SCA and a misuse of powers.

158 ESA contends that the applicants have simply inferred from the list sent to counsel, attached to the second contested correspondence, that ESA implicitly refused them access. Having regard to the requirements imposed by Article 36 SCA, ESA argues that an inference cannot replace the substantiation of why the disclosure of "less" than expected or the quantity to which the applicants claim to be entitled implies an implicit measure binding upon the applicants or changing their legal position. ESA submits that, in the absence of any explicit refusal, all that receiving "less" means is that documents of the kind requested have *de facto* not been released.

159 In ESA's view, in the absence of a challengeable decision, the application should be dismissed as inadmissible in so far as the applicants seek the annulment of an alleged refusal to disclose a "complete statement of content" of the file in ESA Case No 68736.

Findings of the Court

160 As regards the second contested correspondence, the parties essentially dispute whether, by not including in a list of documents attached to the second contested correspondence information on the dates of and authors of documents and whether those documents are outgoing, incoming or internal, ESA has implicitly rejected the applicants' request for a document under the RAD 2008 and thus taken a decision that is challengeable under the second paragraph of Article 36 SCA.

161 At the hearing of 1 July 2013, ESA submitted that, at the time the applicants filed their request for a statement of content, it did not have in its possession a document listing the files in ESA Case No 68736. According to ESA, this entailed that it needed to generate such lists from its internal case management each time it was asked to provide such a list. However, when such lists were generated, the dates automatically attributed to individual documents listed were not the dates found in the documents in question, but other dates, which sometimes only signified when the document was opened or printed, without being modified at all. Moreover, some of the dates generated in this way had no relation to the content of the documents at all, but only indicated that the system had been unable to attribute a date to document, by, for instance, attributing the date 1 January 1753 to certain documents.

162 According to ESA, it decided for these reasons, and in order to avoid giving out misleading information, to remove the dates attributed to the documents included in the statement of content before it provided the list to the applicants.

163 It is necessary to examine whether the contested correspondence constitutes a decision that is challengeable pursuant to Article 36 SCA. Only measures the legal effects of which are binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (see paragraphs 116 and 117 above).

164 In this regard, it must be recalled, as noted in paragraph 148 of this order, that the right to access under Article 2(1) RAD 2008 extends only to "documents" within the meaning of Article 3(1) RAD 2008 and not to information within the wider meaning of the word. Although the concept of "document", within the meaning of the RAD, is defined in Article 3(1) RAD as "any content whatever its medium", it follows from Article 6(1) RAD that ESA is only obliged to examine applications for access that are made in a sufficiently precise manner to enable ESA to identify the document.

165 Accordingly, Article 6(1) RAD 2008 is based on the presumption that it must be possible for an applicant in its request to describe the content in a sufficiently precise manner for ESA to be able to identify it.

166 For that purpose, however, certain information must be made available. According to the provisions of the RAD 2008, information may become available as a result of (1) ESA assisting the applicant in clarifying an application, in accordance with Article 6(2) RAD 2008, (2) ESA conferring with the applicant informally, in the event of an application relating to a very long document or to a very large number of documents, with a view to finding a fair solution, or (3) the applicant himself having recourse to the public register that ESA is required to establish pursuant to Article 9 RAD 2008.

167 However, a failure by ESA to provide information concerning a statement of content may bring about a distinct change in the applicants' legal position only if the alleged deficiencies are of such a nature that they are capable of preventing an applicant from identifying documents in the case file or from rebutting the general presumption, if invoked by ESA.

168 As regards the statement of content provided by ESA to the applicants in the second contested correspondence, a document which had been specifically generated by ESA subsequent to the applicants' request of 12 March 2012, the Court finds that the fact ESA did not provide the applicants with the information on the dates for its correspondence and other events listed was not in itself capable of precluding the applicants from identifying the documents in the file of this particular case that they might have wished to request access to and thus from exercising their rights to public access under the RAD 2008. The same applies as regards the lack of information on authors, and whether the documents are outgoing, incoming or internal.

169 The second contested correspondence is thus not a measure that is challengeable under the second paragraph of Article 36 SCA. Therefore, in view of the foregoing, the applicants' application for the annulment of the second contested correspondence is inadmissible.

Third contested correspondence

170 In the third contested correspondence three parts have been challenged: (1) ESA's procedures for administering case files; (2) ESA's procedures for handling public access requests; and (3) the ESA College decisions containing the current empowerment of its directors.

171 As regards parts (1) and (2), the applicants have been given access to the relevant documents in Annex 6 to ESA's plea of inadmissibility pursuant to Article 87(1) RoP. Thus, the applicants no longer have any legal interest in bringing the proceedings.

172 As noted above, an applicant may nevertheless retain an interest in claiming the annulment of an act in order to prevent its alleged unlawfulness from recurring in the future (see *Risdal Touring and Konkurrenten.no* v *ESA*, cited above, paragraphs 134 and 135). The documents in question are specific and unlike other categories of documents such as, for example, inspection documents. It is therefore unlikely that the alleged unlawfulness is liable to recur in the future.

173 It must therefore be held that the action has become devoid of purpose as regards parts (1) and (2) of the third contested correspondence. Consequently there is no need to adjudicate on the substance. Neither is it necessary for the Court to assess whether there are other absolute bars to proceedings as regards parts (1) and (2) of the third contested correspondence, in particular whether it is to be regarded as a challengeable act pursuant to the second paragraph of Article 36 SCA.

174 As regards part (3), ESA has consistently stated that it does not have specific College decisions for each of its departments containing a current empowerment of the director.

175 A presumption of legality attaches to any statement by ESA relating to the nonexistence of documents requested and, thereby, also a presumption of veracity. Moreover, an applicant may rebut such a simple presumption in any way by relevant and consistent evidence (see paragraph 150 above).

176 In the present case, the applicants have challenged ESA's statements in the third contested correspondence indicating that there was nothing irregular about the lack of any ESA College decisions empowering its directors on the basis that ESA's administrative setup was not such as to necessitate this. In their reply to ESA's defence, the applicants submit that these statements are false, referring to an ESA College decision of 11 May 2011 on authorising the representation of ESA in legal proceedings (Annex A 55).

177 The evidence adduced by the applicants does not rebut the presumption of veracity. An authorisation for court proceedings relates to ESA's external representation before the Court and the Court of Justice of the European Union. This must be distinguished from the empowerment of a director which concerns only internal matters of ESA.

178 Accordingly, it follows that the applicants have not demonstrated that ESA's statement to the effect that it did not have in its possession any documents concerning decisions containing the current empowerment of its directors amounts to a denial of access to a document under the RAD 2008 that may be the subject of an action for annulment under Article 36 SCA. As noted in paragraph 153 of this judgment, this does not exclude that a statement to the effect that ESA does not have in its possession certain documents may be challenged under Article 37 SCA. The Court recalls that the legal situation in the EU under Regulation No 1049/2001, where also silence on the part of an EU institution is deemed to be a negative decision, has to be distinguished from the situation under RAD 2008. The latter does not contain any such rules.

179 Accordingly, the action against part (3) of the third contested correspondence must be dismissed as inadmissible, in so far as it concerns ESA College decisions containing the current empowerment of ESA's directors.

180 Based on all of the above, the Court concludes that the action with regard to the third contested correspondence must be dismissed as devoid of purpose in so far as it concerns ESA's procedures for administering case files and its procedures for handling public access requests, and that it must be dismissed as inadmissible in so far as it concerns ESA College decisions containing the current empowerment of its directors.

VI Costs

181 Under Article 66(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has requested that the applicants be ordered to pay the costs and the latter have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Finds that there is no need to adjudicate on the action directed towards ESA's letter of 9 May 2012 as notified on 18 May 2012 (Event No 633455) to the extent that it concerns access to a statement of content in ESA Case No 34250.**

2. **Dismisses as inadmissible the action directed towards ESA's letter of 9 May 2012 as notified on 18 May 2012 (Event No 633455) to the extent that it concerns access to "a letter dated or received on 13 July 2010 from Norway Post" and "minutes from meetings between ESA, including its president, and Norway Post and/or the Norwegian Government".**

3. **Dismisses as inadmissible the action directed towards ESA's letter of 22 May 2012 as notified on 23 May 2012.**

4. **Finds that there is no need to adjudicate on the action directed towards ESA's letter dated 2 July 2012 as notified on 2 July 2012 (Event No 639495) to the extent that it concerns ESA's procedures for administering case files or ESA's procedures for handling public access requests.**

5. **Dismisses as inadmissible the action directed towards ESA's letter dated 2 July 2012 as notified on 2 July 2012 (Event No 639495) to the extent that it concerns access to ESA College decisions containing the current empowerment of its directors.**

6. **Orders the applicants to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 12 May 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President