E-8/12-35

REPORT FOR THE HEARING
In Case E-8/12

APPLICATION to the Court pursuant to Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Schenker North AB, established in Gothenburg, Sweden,

Schenker Privpak AB, established in Borås, Sweden,

Schenker Privpak AS, established in Oslo, Norway,

and

EFTA Surveillance Authority,

seeking the annulment of three decisions of the defendant, as notified on 18 May 2012, on 23 May 2012, and on 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case files, under the Rules on Access to Documents ('RAD') established by ESA Decision No 407/08/COL on 27 June 2008 (unpublished).

I Introduction

1. Schenker North AB, Schenker Privpak AB and Schenker Privpak AS (hereinafter '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.

Schenker Privpak AS, a limited liability company incorporated under Norwegian law, has handled DB Schenker's domestic business-to-consumer ('B-to-C') parcel service in Norway. Schenker Privpak AB is a company incorporated in Sweden. Both Schenker Privpak AB and Schenker Privpak AS have handled international customers seeking B-to-C distribution in Norway.

2. 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').

3. Previously, on 16 August 2011, the EFTA Surveillance Authority ('the defendant' or 'ESA') issued a partial decision on the access request of 3 August 2010 pursuant to the RAD for full access to documents in the file leading to ESA's decision in Case No 34250 (*Norway Post* / *Privpak*) of 14 July 2010.

4. ESA's investigation in that case was initiated following a complaint received from DB Schenker on 24 June 2002 concerning the agreements made by Posten Norge AS ('Norway Post') establishing Post-in-Shops in retail outlets. During the course of ESA's investigation, it conducted an inspection of Norway Post's premises between 21 and 24 June 2004 and seized various documents ('the inspection documents').

5. By its decision of 14 July 2010, ESA found that Norway Post had committed an infringement of Article 54 of the EEA Agreement ('EEA') by abusing its dominant position in the B-to-C parcel market in Norway between 2000 and 2006. 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*, judgment of 18 April 2012, not yet reported).

6. DB Schenker is pursuing a follow-on damages claim against Norway Post in the Norwegian courts for losses caused by the infringement of Article 54 EEA.

7. The Court has already given judgment in a case concerning DB Schenker's first access request of 3 August 2010 in Case E-14/11 *DB Schenker* v *ESA*, judgment of 21 December 2012, not yet reported. In that case, 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.

8. 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 2012, 23 May 2012 and 2 July 2012, 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.

9. This case has been brought in parallel with Case E-7/12 *DB Schenker* v *ESA*, in which the Court's judgment is pending. In that case, DB Schenker has brought an action against ESA pursuant to Article 37(3) SCA for failure to act upon DB Schenker's first access request for the remaining and unidentified part of the file in ESA Case No 34250, and seeking damages pursuant to Article 46(2) SCA for losses resulting from the failure to handle that access request in a timely and otherwise lawful manner.

II Legal background

EEA law

10. Article 108(1) EEA reads as follows:

> *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.*

11. Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA') reads as follows:

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

12. Article 36 SCA reads as follows:

> *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 ('RAD') - Decision 407/2008/COL of 27 June 2008

13. Article 1 RAD reads as follows:

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.

14. Article 2 RAD on beneficiaries and scope reads as follows:

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.

...

15. Article 3(a) RAD on exceptions reads as follows:

(*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;*

16. Article 6 RAD on applications reads as follows:

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.

17. Article 7 RAD on the processing of applications reads as follows:

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.

18. Article 8 RAD on access following an application reads as follows:

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.

19. Article 9 RAD on registers reads as follows:

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.

20. Article 10 RAD on direct access in electronic form or through a register reads as follows:

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.

21. Article 11 RAD on the administrative practice of ESA reads as follows:

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

22. Article 13 RAD on entry into force reads as follows:

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

23. On 3 August 2010, DB Schenker sent an email to ESA requesting access to the file in Case No 34250 (*Norway Post* / *Privpak*) in preparation of its damages claim against Norway Post in the Norwegian courts.

24. Subsequently, there were numerous communications between DB Schenker and ESA concerning the scope of the request for access to the file, the deadline for completion of the request and delays. DB Schenker contacted ESA by email on 4 August 2010, 11 August 2010, 30 August 2010, 6 September 2010, 14 September 2010, 17 September 2010 and 18 February 2011, and by letter on 9 November 2010, 6 January 2011 and 17 February 2011. ESA replied to DB Schenker by email on 4 August 2010, 10 August 2010, 18 August 2010, 30 August 2010, 1 September 2010 and 17 September 2010, and by letter on 5 November 2010, 10 November 2010, 16 February 2011, 18 February 2011 and 16 August 2011.

25. DB Schenker was granted access to documents in Case No 34250 on 30 August 2010, 5 November 2010, 16 February 2011 and 16 August 2011.

26. ESA's letter of 16 August 2011 denied access to 352 of 354 inspection documents in the case file obtained during the inspection of Norway Post's premises in June 2004. This decision was challenged before the Court in Case E-14/11 *DB Schenker* v *ESA*, judgment of 21 December 2012, not yet reported. In that case, 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.

27. On 8 March 2012, DB Schenker served a pre-litigation notice on ESA pursuant to Article 37(2) SCA.

28. On 12 March 2012, DB Schenker submitted a second access request entitled ‘Case No 68736 – Request for public access to the statement of content of the file (index)’. This letter stated that DB Schenker sought access to the ‘index of the file’ pursuant to Article 2(1) RAD.

29. On 15 March 2012, ESA wrote to DB Schenker stating that there was ‘no document extant which is an “index” of the file’ in Case No 68736. Therefore, ‘[a]s no index, exists, I cannot grant access to it’.

30. There were further communications between DB Schenker and ESA. DB Schenker contacted ESA by letter on 19 March 2012, 27 March 2012, 30 March 2012 and 11 April 2012.

31. ESA replied to DB Schenker on 30 March 2012, and 5 April 2012. ESA’s email of 5 April 2012contained an enclosure, ‘a list of the documents in the file from the date of the Statement of Objections’. This file was entitled ‘ESA_BXL - #629366-v1-Generated_list_of’.

32. DB Schenker’s letter of 11 April 2012, which reiterated its request that ESA provide the correct statement of content in Case No 68736, also included a third access request. This third request concerned ESA’s internal procedures/instructions for handling public access requests and administering case files. DB Schenker also requested access to the decisions containing the empowerment of ESA’s directors in charge of the competition, legal and administrative departments.

33. In a letter dated 9 May 2012, ESA partially defined its position in relation to the pre-litigation notice of 8 March 2012 (‘first contested correspondence’).

34. On 23 May 2012, ESA emailed DB Schenker with ‘a list of documents’ in ESA Case No 68736. The letter attached to the email (‘second contested correspondence’) stated that ‘[t]his list was prepared in a timely manner to respond to your request of 23 March 2012. For reasons I cannot account for it has become clear that it has never reached you […]’.

35. On 14 June 2012, DB Schenker notified ESA that ESA’s letter of 23 May 2012 was considered to be a denial of the third access request and it notified ESA that it

intended to contest the decision before the Court if 'no reversal is made in this matter before 22 June 2012'.

36. On 2 July 2012, ESA sent a letter to DB Schenker by email. This is the third decision being challenged by DB Schenker ('third contested correspondence').

IV The three contested correspondences

First contested correspondence

37. In a letter dated 9 May 2012 and referenced as 'Event No 633455' in Case No 68736, as stated above in paragraph 33, ESA wrote to DB Schenker.

38. The letter reads as follows:

> 'RE: DB Schenker – Formal notice re failure to act.
>
> Access to documents in Case 34250 Norway Post/Privpak
>
> Your letter of 8 March 2012.
>
> [a] Reference is made to your letter of 8 March 2012, received on 9 March 2012, on behalf of DB Schenker.
>
> [b] Your client has requested the Authority to produce the following under its rules on public access to 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.

[c] 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] 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, 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.'

39. Enclosed with the letter were the following:

[a] 'Annex 1: List of Documents to which access is granted

[b] Annex 2: List of all documents from DB Schenker in redacted form as sent to Norway Post

[c] CD Rom containing documents listed in Annexes 1 or 2.'

Second contested correspondence

40. On 23 May 2012, as stated above in paragraph 34, ESA emailed DB Schenker with an attached letter dated 22 May 2012 and referenced as 'Event No 635333' in Case No 68736.

41. 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 I 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.'

42. Enclosed with the letter was the following:

[a] 'Annex I: List of Documents on file in Case 68736'

Third contested correspondence

43. On 2 July 2012, as stated in paragraph 36 above, ESA emailed DB Schenker with an attached letter dated 2 July 2012 and referenced as 'Event No 639495' in Case No 68736.

44. 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.'

V Procedure and forms of order sought by the parties

45. 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.

46. 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.

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

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

49. On 2 October 2012, the defendant, the EFTA Surveillance Authority, lodged an application for a decision on a preliminary objection on grounds of inadmissibility pursuant to Article 87 of the Rules of Procedure ('RoP').

50. ESA requests the Court to:

(1) Dismiss the application as inadmissible.

(2) Order the Applicants to bear the costs.

51. DB Schenker, pursuant to Article 87(2) RoP, submitted its response to the defendant's inadmissibility plea on 7 November 2012. 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.

52. By way of letters of 17 December 2012, the Court communicated to 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.

53. 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.

54. ESA submitted its defence on 31 January 2013. In its defence, ESA requests the Court to:

(1) dismiss the application as inadmissible;

(2) order the Applicants to bear the costs.

55. 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.

56. Or, in the further alternative, ESA requests the Court to:

(1) dismiss the application'

(2) order the Applicants to bear the costs.

57. DB Schenker submitted its reply on 5 March 2013.

58. ESA submitted its rejoinder on 26 March 2013.

VI Written observations

59. Pleadings have been received from:

- the applicants, represented by Jon Midthjell, advokat;
- the defendant, represented by Markus Schneider, Deputy Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents.

Admissibility

60. DB Schenker submits that the application is admissible. It asserts that the contested correspondences are all reviewable acts that have been addressed to the applicants, which they have a legal interest in challenging. The applicants therefore assert that they have standing to institute these proceedings pursuant to Article 36(2) SCA.

61. DB Schenker states that it received notification of the first contested correspondence on 18 May 2012, in a letter dated 9 May 2012. The time limit for contesting the first contested decision therefore expires on 18 July 2012.

62. DB Schenker states that it received notification of the second contested correspondence by email on 23 May 2012, with a letter attached dated 22 May 2012. The time limit for contesting the first contested decision therefore expires on 23 July 2012.

63. DB Schenker states that it received notification of the third contested correspondence by email on 2 July 2012, with a letter attached of the same date. The application has therefore been lodged within the time limit set by Article 36(2) SCA. Consequently, the application is admissible.

ESA

General remarks

64. In its application for a decision on a preliminary objection on grounds of inadmissibility, ESA contends that the application is inadmissible. ESA submits that admissibility is a matter of public order which the Court can examine on its own motion,[1] but the onus must be on the applicant to demonstrate that the relevant criteria are fulfilled.

65. ESA submits that none of the contested correspondence actually concerns ESA decisions within the meaning of Article 36 SCA, as they are neither binding upon the

[1] Reference is made to Case C-208/11 P *Internationaler Hilfsfonds* v *Commission*, Order of 15 February 2012, paragraphs 33-34.

applicants nor bring about any other distinct change in their legal position, whether explicitly or implicitly.

66. ESA submits that, since the SCA does not provide a specific definition of what constitutes an ESA decision, it is appropriate to note how the corresponding provision in EU law, now Article 263 TFEU, is framed. ESA notes that, while there are differences between the two provisions to a certain extent, the principle of procedural homogeneity dictates that there should be a confirming interpretation of Article 36 SCA. ESA notes that the different wording in Article 263 TFEU on this point is effectively such that it codifies older case law. Accordingly, ESA submits that, pursuant to Article 36 SCA, an ESA decision must be an act that is intended to produce legal effects vis-à-vis third parties. The decision must have binding force on the applicant or produce legal effects altering an applicant's legal position.[2]

67. ESA recalls that the mere fact that a letter, or an email, is sent by an institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision.[3] ESA acknowledges that the test of whether a decision has been adopted is one of substance and not of form[4] and it distinguishes the present case from the scenario in Case E-14/11 *DB Schenker.*

68. ESA submits that nothing in the challenged passages of the contested correspondence points to ESA having adopted decisions explicitly or implicitly refusing the applicants public access to documents. The three items of contested correspondence are part of an ongoing exercise to address the applicants' access requests. ESA submits that it was only by its letter of 5 September 2012 (listed as Event No 642007) that it concluded this exercise, disclosing or refusing to disclose all the remaining documents in or relating to the file concerning the administrative proceedings against Norway Post (Case no 34250 Norway Post/Privpak).

69. ESA submits that a binding legal effect cannot be based upon an analogy with Article 8(3) of Regulation 1049/2001 since there is no corresponding provision in the RAD. Moreover, while it is not excluded that, in certain particular circumstances, an institution's silence or inaction may exceptionally be considered to constitute an implied refusal, as a rule, mere silence on the part of an institution cannot be placed on the same

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[2] Case T-437/05 *Brink's Security Luxembourg SA* v Commission [2009] ECR II-3233, paragraph 63

[3] Reference is made to Case T-437/05 *Brink's Security Luxembourg SA* v *Commission*, cited above, paragraph 63; T-22/98 *Scottish Soft Fruit Growers*, cited above, paragraph 34; Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 50; Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10.

[4] Reference is made to Case 60/81 *International Business Machines* v *Commission* [1981] ECR 2639, paragraph 9; Case 346/87 *Bossi* v *Commission* [1989] ECR 303, 322.

footing as an implied refusal, except where that result is expressly provided for by a provision of Community law.[5]

First contested correspondence

70. ESA contends that the applicants lack the legal interest and, thus, standing required to challenge alleged refusals to provide documents that had already been disclosed to the applicants. In particular, as regards its letter of 9 May 2012, the first challenged correspondence, ESA submits that it had disclosed two lists to the applicants by letter of 30 August 2010 and by an email of 5 April 2012. From those lists, together with those attached to ESA's letter of 5 September 2012, it is apparent that there are no other documents from the period at issue that belong to Case No 34250 but that the applicants have not been made aware of by means of a list. ESA submits that, in light of the necessary conditions of Article 36 SCA, an inference cannot replace substantiation of why the disclosure of 'less' than expected or that the applicants claimed to have a right to, would imply an implicit measure binding upon the applicants or changing their legal position. ESA submits that, in the absence of an explicit refusal, all that receiving 'less' means is that documents of the kind requested have *de facto* not been released. The mere inference that this constitutes an implicit refusal decision is not sufficient to show that the present action for annulment is admissible. If ESA were under a legal obligation to provide such documents, and all the other conditions of Article 37 SCA were fulfilled, an action for failure to act would be possible.

71. Moreover, ESA contends that there is nothing that constitutes grounds for assuming that the non-transmission of documents in the context of the disclosure of other documents at the same time implies a refusal challengeable under Article 36 SCA.

72. Therefore, ESA contends that the application should be dismissed as inadmissible in so far as DB Schenker seeks the annulment of an alleged refusal to disclose a 'complete statement of content of the file' in Case No 34250.

73. As regards the alleged letter from Norway Post of 13 July 2010, as addressed in the first contested correspondence, ESA asserts that the application for annulment should be dismissed as inadmissible on the basis of an alleged refusal to disclose it. ESA submits that the applicants in any case lack legal interest, and thus standing. The document at issue was registered by ESA as Event No 534500 in Case No 34250. It is a letter of 13 July 2009 a non-confidential version of which ESA granted DB Schenker partial public access to in November 2010. ESA asserts that, while there was a mix-up 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.

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[5] Reference is made to Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45.

74. Therefore, 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 from Norway Post dated 13 July 2010, since no challengeable refusal decision to that effect exists, and since the applicants lack standing for the assertion that ESA has fully refused DB Schenker public access to Event No 524500.

75. Turning to 'certain minutes of meetings' referred to in the first contested decision, ESA asserts that DB Schenker simply infers from its indication that no such documents exist that ESA implicitly refused the applicants access to them, presupposing that, contrary to ESA's indication, such documents exist at ESA. ESA therefore submits that, 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 any minutes of meetings between ESA and Norway Post, and/or the Norwegian Government.

Second contested correspondence

76. 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.

77. ESA submits that, in light of the necessary conditions of Article 36 SCA, an inference cannot replace substantiation of why the disclosure of 'less' than expected or that the applicants claimed to have a right to, would imply 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.

78. ESA refers to its submissions regarding the alleged refusal to disclose a complete statement of content of the file in Case No 34250 above (paragraph 70).

79. ESA therefore submits that, 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 Case No 68736.

Third contested correspondence

80. ESA asserts that DB Schenker has contended that a statement in the third contested correspondence is a refusal to disclose documents concerning ESA's procedures for administering files. ESA contends that the applicants' argument is based upon an inference from its statements to the effect that ESA implicitly refused them access. ESA submits that it is clear from Article 8(2) RAD that the applicants' contentions are not well founded.

81. ESA contends that, 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 documents relevant to ESA's procedures for administering files without having demonstrated that any challengeable ESA decision to that extent is present in the third contested correspondence.

82. ESA notes that it had already made available to counsel for the applicants, albeit in his capacity as counsel for a different applicant for public access to documents, 'relevant internal procedures governing the registration of documents' and it refers to Article 8(2) RAD. ESA contends that both criteria in Article 8(1) RAD are met. ESA notes, however, that the counsel for the applicants has not contested that he had received the relevant documents but has asserted that he was 'not at liberty to disclose correspondence relating to other clients'.

83. ESA submits that such a situation is based on an incorrect understanding of the purpose of public access to documents. What is important is that the documents had already been released by ESA and that they were 'easily accessible' to the applicants within the meaning of Article 8(2) RAD. Although the release occurred in the context of a different mandate in relation to the applicants' counsel, the documentation was disclosed to the general public rather than to the particular applicant for access to the documents.

84. Accordingly, ESA submits that the present application should be dismissed as inadmissible in so far as the applicants seek the annulment of an alleged refusal regarding documents that ESA had already publicly disclosed by letter of 30 April 2012 to counsel for the applicants, since no challengeable refusal decision to that effect exists, and since the applicants in any case lack standing for that assertion in light of ESA's earlier disclosure.

85. Turning to access to the 'public access procedures' in the third contested correspondence, ESA refers to its arguments in paragraphs 80- 84 above.

86. Turning to 'College decisions empowering the Authority's directors' in the third contested correspondence, ESA contends that the applicants have simply inferred that ESA implicitly refused them access, presupposing that such documents exist at ESA.

87. ESA contends that DB Schenker has not shown that the alleged omission to disclose such documents implied any measures binding on it, or that they brought about distinct changes in its legal position.

88. The application should therefore be dismissed as inadmissible in so far as the applicants seek the annulment of an alleged refusal to disclose the ESA decisions taken by the College empowering the directors of ESA's departments.

Additional arguments

89. ESA also submits that the applicants lack the legal interest and, thus, standing required to bring an application for annulment in so far as that action concerns matters about which the same applicants have already seized the Court in the pending application in Case E-7/12 for failure to act.

DB Schenker's response

90. In its response to the inadmissibility plea, DB Schenker states that it is in agreement with ESA as regards what constitutes a reviewable 'decision' pursuant to Article 36 SCA. In the present case this should be interpreted homogeneously to a reviewable 'act' under Article 263 TFEU and EU case law, in order to ensure equal access to justice.[6]

91. DB Schenker contends that ESA's analysis overlooks the fact that the EU courts have consistently held that admissibility must be decided on the basis of the specific administrative procedure that applied to the institution in question at the time, and of the contents of that institution's correspondence when read in that procedural context. DB Schenker submits that ESA has not contended that it contacted the applicants on the basis that it found the access requests to be unclear.[7]

92. DB Schenker contends that, as a main rule, it is only an institution's reply to an access request at the end of the administrative procedure that is actionable.[8] DB Schenker submits that the three contested correspondences challenged in the present case came at the end of the one-step administrative procedure in Article 7 RAD in relation to the contested documents, and that ESA has not given any explanation as regards what work remained before it would have made an actionable decision.

93. DB Schenker submits that when an institution has wrongfully denied the existence of a document, or wrongfully withheld the complete version of a document, this has been held to be an actionable refusal of access.[9] Moreover, when an actionable refusal to

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6 Reference is made to Case E-15/10 Norway Post v EFTA Surveillance Authority, judgment of 18 April 2012, not yet reported, paragraph 109.

7 Reference is made to Case T-463/09 *Julien Dufour* v *ECB*, judgment of 26 October 2011, paragraphs 29 and 30.

8 Reference is made to Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II 1, paragraphs 34-36; Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission;* and Case T-40/01 *Co-Frutta* v *Commission* [2003] ECR II 4441, paragraphs 29-31.

9 Reference is made to Case T-436/09 *Julien Dufour* v *ECB*, cited above, paragraphs 27-38; Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II 3269, paragraph 30; Case T-311/00 *British American Tobacco* v *Commission* [2002] ECR II 2781, paragraph 31.

disclose a document has been set out in an institution's correspondence, it is not the format of the refusal which is important, but whether the contents of the correspondence show that the defendant has set out a definitive position on whether to disclose the document when read in the procedural context.[10] DB Schenker submits that both the content and the context of the first contested correspondence show that ESA has set out a definitive position which the Court can review.

First contested correspondence

94. DB Schenker submits that the pretext for the first contested decision was its access request of 3 August 2010 for full access to the file in Case No 34250 (Norway Post/Privpak). DB Schenker submits that ESA granted access to parts of the file in four subsequent decisions dated 30 August 2010, 5 November 2010 and 16 February 2011, and it recalls that it challenged a letter of 16 August 2011 in Case E-14/11. In that case, DB Schenker notes, ESA did not contest the admissibility of the application. DB Schenker submits that there is nothing in the content or context of the first contested correspondence to suggest that ESA had not reached a definitive position on the contested documents.

95. As regards the lists of documents, DB Schenker submits that the previously disclosed lists sent to them by email on 5 April 2012 (which the applicants submit ESA had sent in error in response to a separate access request) and by email dated 30 August 2010 (described as 'a list of the documents on the file to which Norway Post was granted access when the Statement of Objections was issued') were only actionable on the basis of the first contested correspondence. The first contested correspondence classified them as the 'index over the documents attached to the file' and asserted that 'no other documents from that period exist that belong to the case but are not on the list.' The administrative procedure had therefore come to an end for this part of the access request through that decision. The extent to which those lists are complete is a substantive issue, and ESA's view in that regard is irrelevant to the admissibility of the present action.[11]

96. DB Schenker submits that ESA's policy is that it may deny requests for access to the statement of content of a file on the basis that the document is stored electronically in its database, as stated by the President of ESA in a letter dated 1 October 2012 to the applicants. It would therefore be an unreasonable and hypothetical exercise to submit a

[10] Reference is made to Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I 669, paragraph 58.

[11] Reference is made to Case T-436/09 *Julien Dufour* v *ECB*, cited above, paragraphs 27-38; and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II 3269, paragraph 30.

new request for complete access to the statement of content in order to obtain a new decision.[12]

97. As regards the letter from Norway Post to ESA of 13 July 2010, the issue of whether or not the documents exist is a matter of substance and not admissibility.[13] DB Schenker submits that the administrative procedure had ended for this part of the access request on the basis that ESA had laid down a definitive position to refuse access to the document by asserting that no such letter exists.[14]

98. As regards the refusal to disclose minutes from any meetings with Norway Post and/or the Norwegian Government on the basis that there are 'not any meetings on the file from [such] meetings' is a substantive issue concerning whether such documents exist and not grounds for inadmissibility.[15] DB Schenker submits that the administrative procedure had ended for this part of the access request on the basis that ESA had laid down a definitive position to refuse access to the minutes by asserting that no such minutes exist.

Second contested correspondence

99. DB Schenker submits that the content and context of the second contested correspondence make clear that ESA was responding to its second access request of 23 March 2012, and, given that ESA had not sent any further correspondence or offered any explanation as to what work remains before an actionable decision would be taken, the administrative procedure came to an end through this letter. The principal inadmissibility plea is therefore unfounded.

Third contested correspondence

100. DB Schenker submits that ESA has not sent any further correspondence in response to this access request or offered any explanation as to what it believes remains to be done before an actionable decision will be taken. The administrative procedure has therefore come to an end through this decision.

101. As regards the alleged refusal to disclose the procedures for administering case files, DB Schenker submits that files that one company has paid for are not accessible to another client of counsel's clients, nor do they have a right to be informed of the existence and contents of an access request made by another company. DB Schenker would have to submit its own request. It is submitted that, in any event, ESA has never provided the complete version of the document in question but released certain 'extracts'

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[12] Reference is made to Case T-437/08 CDC v Commission, judgment of 15 December 2011, not yet reported; and Case C-362/08 P Internationaler Hilfsfonds v Commission, cited above, paragraphs 59-61.

[13] Reference is made to Case T-311/00 *British American Tobacco* v *Commission*, cited above, paragraph 31

[14] Reference is made to Case T-436/09 *Julien Dufour* v *ECB*, cited above, paragraphs 29-30.

[15] Reference is made to Case T-264/04 *WWF* v *Council* [2007] ECR II 911, paragraph 61.

considered to be relevant to another company's access request, and that ESA did not consider that letter to be a final decision on the other access request. As regards the refusal to disclose the procedures for handling public access requests, DB Schenker rebuts the inadmissibility claim on the same basis as the refusal to disclose the procedures for administering case files.

102. As regards the alleged refusal to disclose the ESA College decisions empowering its directors, DB Schenker submits that ESA has not sent any further correspondence in response to this access request or offered any explanation of what it believes remains to be done before an actionable decision will be taken. The administrative procedure has therefore come to an end through this decision. The contents and context of the third contested correspondence demonstrate that ESA has laid down a definitive position to refuse access by asserting that no such ESA College decisions exist. Consequently, DB Schenker submits that the principal inadmissibility plea is unfounded and section 5.4 of the application for annulment must be held to be admissible.

Additional arguments

103. DB Schenker submits that ESA has conceded in its alternative plea contesting the applicants' legal interest in seeking annulment of the decision on the first and third access requests (sections 5.2(a) and (b); and section 5.4(a) and (b) of the application for annulment) that it remains partially admissible. In addition, ESA has not challenged the admissibility of the decision on the second access request (section 5.3). DB Schenker submits that the alterative plea is completely unfounded.

104. DB Schenker submits that the applicants have a legal interest in annulling the first contested correspondence. ESA's letter of 5 September 2012 by which it sent additional lists, so that all documents allegedly remaining on the file in Case 34250 relating to the antitrust proceedings were brought to the attention of the applicants, did not revoke or modify the first contested correspondence but merely referred to it. The letter of 5 September 2012 only covered the allegedly remaining documents in the file. Under Article 36(2) SCA, the applicants could not have contested the letter dated 5 September 2012 on this point, as ESA merely referred to the first contested correspondence, which was no longer actionable. The alternative inadmissibility plea is therefore without merit.

105. DB Schenker submits that it retains a legal interest in annulling the third contested correspondence and submits that the alternative plea is without merit as the company has not had access to the contested documents. The alternative inadmissibility plea is therefore unfounded and section 5.4 of the application for annulment must be held to be admissible.

106. Finally, DB Schenker rebuts the alternative plea claiming what it assumes is *lis pendens* for the decision on its first access request. 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.[16] While DB Schenker assumes that ESA pleads *lis pendens* it questions whether the plea is admissible.

107. DB Schenker submits that *lis pendens* requires that three cumulative conditions 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.[17] Those requirements are not met in the present case. DB Schenker submits that the plea is legally flawed as neither the subject matter or the legal pleas nor the form of order in the present case are the same as in the passivity and damages action in 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.

Substance

DB Schenker

Legal background

108. DB Schenker submits that the right of access to ESA's documents follows not only from Article 2(1) RAD, but that it must also be considered to be established under the EEA and SCA Agreements and to constitute a fundamental right in EEA law. DB Schenker states that, when it refers to Article 2(1) RAD, its reference also extends to that fundamental right.

109. DB Schenker refers to Articles 1, 2(1), 2(3), and 3 RAD and submits that the definition of a document includes databases in which data about ESA's correspondence and other documents are registered, including, inter alia, the dates of correspondence, when it was received, the dates of internal documents and later amendments, who is the author/recipient of correspondence and internal documents.[18] DB Schenker notes that, pursuant to Article 13 RAD, ESA was obliged to publish the RAD in the EEA Supplement to the Official Journal of the European Union, but that it has still not done so.

110. DB Schenker submits that the right of access to documents has long been a central piece of EU law, referring to Article 2(1) Regulation 1049/2001 and Article 15(3) of the Treaty on the Functioning of the European Union ('TEU'). The applicants submit that,

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[16] Reference is made to Case E-15/10 *Norway Post* v *EFTA Surveillance Authority*, judgment of 18 April 2012, paragraph 111 and case law cited; and Case T-209/01 *Honeywell v Commission* [2005] ECR II 5527, paragraph 55.

[17] Reference is made to Case T-332/08 *Melli Bank* v *Council* [2009] ECR II 2629, paragraphs 354 and 35 and case law cited.

[18] Reference is made to COM (2008) 229 final, pages 5 and 17, and, by analogy, Case T-436/09 *Dufour* v *ECB*, cited above, paragraph 160.

pursuant to Article 6(1) of the Treaty of the European Union ('TFEU'), the right of access must also be considered to be a fundamental right by virtue of Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter'). It is submitted that the EFTA Member States were legally obliged to establish a similar right of access in relation to ESA under Article 108(1) EEA.

111. The EFTA Member States met that obligation when the RAD was established by ESA pursuant to Article 13 SCA. After Article 42 of the Charter was made binding in EU law through Article 6(1) TEU, the right of access must now also be recognised as a fundamental right in EEA law.

112. DB Schenker submits in its reply that the Court must rule on the contested correspondence on the basis of the law and facts as they stood at the time. Moreover, DB Schenker notes that the Court held in Case E-14/11 *DB Schenker* v *ESA*, cited above, that the principle of homogeneity is applicable to the RAD and that the RAD must be considered part of EEA law. The reasoning in Case E-14/11 *DB Schenker* v *ESA*, cited above, must apply even if the revised RAD should be found applicable. The applicants assert that ESA failed to systematically record the case documents and evidence belonging to the Norway Post file during the investigation.

First contested correspondence

113. DB Schenker submits that the refusal to disclose a complete statement of content of the file in ESA Case No 34250 infringes Article 2(1) RAD and Article 16 SCA.[19] DB Schenker submits that, in the first contested correspondence, ESA classified the two lists referred to [by email of 5 April 2012 and of 30 August 2010] as the only lists to which the applicants will be granted access. These lists do not, it is asserted, represent a complete statement of content of the file, properly itemising all documents attached to the file.

114. First, the list sent on 30 August 2010 only contains 'the documents on file to which [Norway Post] was granted access' during the course of the investigation and administrative procedure. It does not contain all the documents in the case. Inter alia, the list excludes the 2,800 pages of evidence seized from Norway Post in 2004, ESA's working documents, and it fails to account for all correspondence from 2002-2008/2009.

115. Second, the list sent on 5 April 2012 was sent in error in response to a different access request. This list fails to account for all working documents and correspondence from 2008-2009 – 2010, including the letter from Norway Post on 13 July 2010 whose existence ESA first confirmed but that it now asserts it can no longer find.

116. Third, the two lists have not been provided in the same format.

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[19] Reference is made to Case T-437/08 *CDC Hydrogene Peroxide* v *Commission*, cited above.

117. Fourth, neither list, and in particular the latter list, identifies consistently the origin/author of each document/event listed, and whether the document/event is incoming/outgoing or internal.

118. Fifth, the date column does not distinguish between the dates of the actual documents/events and the dates on which they were registered in the file. DB Schenker asserts that ESA has failed to chronologically register the incoming and outgoing correspondence and other events in its file and it may even have been registering documents as late as March/April 2012.

119. The missing data from the two lists referred to in the first contested correspondence are data that ESA registered in its database in some form, or, at the very least, that it has a legal obligation to record under the RAD and the fundamental right and general principle of sound administration, and which are therefore covered by Article 2(1) RAD. Furthermore, the contested first correspondence failed, contrary to Article 16 SCA, to state reasons for the decision not to disclose a complete statement of content of the case file. DB Schenker therefore respectfully asks the Court to annul the first contested correspondence in so far as it denies access to a compete statement of the contents of the file as set out in the form of order.

120. DB Schenker submits in its reply that it is irrelevant under Article 3 RAD that ESA stores the statement of content of its files electronically in its database. Moreover, the applicants note that ESA itself stated to the Court in its reply to the measures of inquiry ordered in Case E-14/11 *DB Schenker* v *ESA* that 'it is fairly simple to produce a list of events stored in a case'. In reaching the conclusion that it has no legal obligation to print out the statement of content it has stored electronically, the defence ignores Article 3 RAD.

121. DB Schenker submits in its reply that it is settled case law that the public right of access covers the statement of content of antitrust files and asserts that the defence has chosen to ignore this and instead put forward an interpretation of the Court's judgment in Case E-14/11 *DB Schenker* v *ESA* to the effect that it is only in exceptional circumstances that the public right of access extends to the statement of content of an antitrust file. DB Schenker rejects this interpretation as misconceived. ESA has a legal obligation to chronologically register incoming and outgoing correspondence and other events in its files, including the origin/author of each document; whether the document is incoming/outgoing or internal; the date of the actual document; and the date when it was registered by ESA.

122. DB Schenker submits that ESA's refusal to disclose the letter from Norway Post dated, and/or received, on 13 July 2010 infringes Article 2(1) RAD and Article 16 SCA. It is submitted that the contested first correspondence only states that ESA has been unable to 'identify' the letter. This is not an assertion that the document no longer exists.

The first contested correspondence therefore infringes the right of access in Article 2(1) RAD, which extends by virtue of Article 2(3) RAD to all documents in ESA's possession. It is asserted that ESA cannot circumvent the right of access simply by stating that it is unable to find a specific document. Furthermore, the reasoning in the first contested correspondence falls short of Article 16 SCA in light of the circumstances of the case, since ESA, in its email of 30 August 2010, had confirmed that the document existed but described it as 'the only document of evidential value' after its administrative hearing. DB Schenker notes that the first contested correspondence does not explain the circumstances that have led to the document disappearing or describe what efforts have been made to search for it, or, indeed, whether the letter was dated or received on 13 July 2010.

123. The first contested correspondence deprives the applicants and the Court of any meaningful opportunity to verify what has happened to the document. DB Schenker therefore respectfully asks the Court to annul this part of the first contested correspondence as set out in the form of order.

124. DB Schenker submits in its reply that the defence now contends that ESA erred when it confirmed the existence of a letter from Norway Post on 13 July 2010 in an email to DB Schenker of 30 August 2010. The correct date should have read 13 July 2009. DB Schenker notes that, according to the defence, it should have understood that the date was incorrect because '(532500)' was placed next to the date in parenthesis.

125. The same parenthesis was listed in an annex in ESA's letter of 5 November 2010 to DB Schenker as 'Brev til ESA – oppfølgning fra høringen.pdf' dated '14/07/2009' with the following comments: 'Partial access granted. Sensitive business information remains confidential.'

126. DB Schenker submits that the defence is therefore baseless.

127. DB Schenker submits that the refusal to disclose the minutes of any meetings with Norway Post and/or the Norwegian government to discuss the subject matter in ESA Case No 34250 infringes Article 16 SCA. DB Schenker notes that the contested first correspondence states that there are no such minutes in the file. However, the applicants contend that there have been a number of both formal and informal meetings during the investigation.[20] Moreover, the statement in the contested first correspondence is remarkable in that it suggests that ESA has not made a single note of any of its meetings.

128. DB Schenker submits that the first contested correspondence infringes the obligation pursuant to Article 16 SCA to state reasons, in particular because ESA has failed to respond clearly to the formal pre-litigation notice of 8 March 2012 on this point. DB Schenker submits that it is impossible for the applicants and the Court to establish the

[20] Reference is made to ESA Decision No 322/10/COL (Norway Post/Privpak), paragraphs 20 and 22.

factual basis for, as well as the scope of, ESA's refusal to disclose any minutes. It is recalled that ESA has refused to disclose a complete statement of content of the file that could have been used to verify the accuracy of the contested decision. The applicants therefore respectfully ask the Court to annul this part of the contested first correspondence as set out in the form of order sought.

129. In its reply, DB Schenker submits further evidence pursuant to Article 37(1) RoP relating to ESA's letter to DB Schenker of 5 September 2012 and the contents of an enclosed CD-ROM. In addition to the letter, DB Schenker refers to: an enclosed internal memo of 25 February 2005 (Event No 311392 in Case No 34250) entitled '[p]reparing for access to file'; an undated internal memo (Event No 550682 in Case No 34250) entitled '[c]hronological overview of ESA's correspondence with Norway Post'; and the attached list of internal documents (dated 4 September 2012 and registered as Event No 645583 in Case No 68736).

Second contested correspondence

130. DB Schenker asserts that the second contested correspondence constitutes an abuse of power and infringes Article 2(1) RAD and Article 16 SCA. The refusal to disclose a complete statement of content of the file in ESA Case No 68736 (DB Schenker) is a clear infringement of Article 2(1) RAD as encompassed by Article 3 RAD.

131. The second contested correspondence has, without stating reasons, only disclosed a 'list of the documents on the file in Case 68736' in which the column with dates for its correspondence and other events has been removed, although some dates have been included in the description column of the documents/events but without any consistent recording. Since ESA electronically registered the dates on which correspondence is sent or received, the second contested correspondence has unlawfully withheld that data.

132. DB Schenker notes that the list provided failed to consistently describe the origin/author of each document/event listed, or whether the document/event was incoming/outgoing or internal; and the dates on each document/event. DB Schenker submits that these are all data that ESA registers in some form on its database or has a legal obligation to record pursuant to the RAD and the fundamental right and general principle of sound administration, and it submits that they should therefore have been disclosed. DB Schenker submits that the second contested correspondence, which took ESA 69 days to decide on, breaches Article 16 SCA because it fails to give reasons for why the dates had been suppressed and why the minimum data of each case document was not included on the list.

133. DB Schenker submits in its reply that the arguments in the defence that the document 'sufficiently listed the documents held' in the case file, and that the applicants do not have a legal interest in the 'complete print-out' because many of the documents listed are correspondence between them and ESA, and that they have 'not adduced any

reason' why the list should be considered 'insufficient', are legally irrelevant. DB Schenker asserts that ESA has not contested that it electronically registered a statement of content of ESA Case No 68736 (DB Schenker) showing all documents belonging to that case. Moreover, DB Schenker contends that ESA, by its own admission, has conceded that the 'print-out' it provided in the second contested correspondence does not represent the complete contents of the statement of content of the file, as it has been stored electronically.

134. On the basis of the contents of the correspondence, and the combined circumstances set out in the application, DB Schenker submits that the second contested correspondence must also be annulled pursuant to Article 36 SCA because it constitutes an abuse of power.[21] Pursuing an improper or even unlawful purpose constitutes such abuse.

135. DB Schenker submits that the facts demonstrate that the purpose behind the decision to suppress the column with dates in the print-out of the statement of content of the file in the applicants' own access case can only have been to withhold evidence that ESA knew would be relevant in relation to establishing that it had failed to handle the first access request in a lawful manner. To accomplish that objective, ESA violated the applicants' right of access.

136. DB Schenker submits in its reply that the defence fails to offer any credible, alternative explanation for ESA's motive for suppressing the dates in the print-out it disclosed to the company. DB Schenker therefore maintains that the second contested correspondence, which suppresses the dates in the print-out of ESA's electronically stored statement of content of the file, constitutes an abuse of power under Article 36 SCA because the only reason for that decision was that ESA wished to prevent the applicants from obtaining evidence that would be relevant and important in establishing how extensively ESA had failed to handle the process and actively misled the company. DB Schenker submits that, regrettably, the only way of stopping the continuation of serious infringements of its access rights is to begin placing responsibility at a senior level.

137. DB Schenker submits that the defence is unfounded.

138. DB Schenker therefore respectfully asks the Court to annul the second contested correspondence in so far as it denies access to a complete statement of content of the file, as set out in the form of order sought.

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[21] Reference is made to Case T-87/05 *EDP* v *Commission* [2005] ECR II 3745, paragraph 87 and case law cited.

Third contested correspondence

139. DB Schenker submits that refusal to disclose the procedures for administering case files infringes Article 2(1) RAD. Noting that ESA took 82 days to process the access request, DB Schenker submits that the third contested correspondence refers to 'the required information' as opposed to the documents containing the internal procedures/instructions for administering case files, and that ESA's response to the measures of inquiry ordered in Case E-14/11 *DB Schenker* v *ESA* does not contain those documents.

140. DB Schenker submits that it has not received any letter or email from ESA on 30 April 2012, 4 May 2012 or 7 May 2012, or later, containing such documents. DB Schenker submits that ESA is apparently referring to a decision addressed to another company represented by counsel. Counsel is not at liberty to disclose correspondence relating to other clients.

141. DB Schenker submits that the third contested correspondence appears to merely be another attempt to stall its third access request. By refusing to disclose documents on the erroneous basis that they have been provided to the applicants in a previous decision, ESA has infringed Article 2(1) RAD.

142. DB Schenker submits in its reply that Article 8(2) RAD applies to documents that are 'easily accessible', such as those published on ESA's website or in the EEA Supplement to the Official Journal. DB Schenker submits that the intended purpose of the provision is to enable an applicant to gain faster access to a document. Moreover, Article 8(2) RAD requires that ESA, in its decision, inform an applicant about 'how to obtain the requested document', which must of course be by lawful means. No such explanation was given in the second contested correspondence as there was none that would not involve a breach of confidentiality, a breach of the professional code of ethics or unlawful copying of client files paid for by another company. In addition, assuming that DB Schenker could have gained lawful access to that document, that letter only included 'extracts' of ESA's administrative procedures believed to be relevant to that company's access request, and that ESA did not consider that letter to be a final decision on the other access request.

143. Moreover, the third contested correspondence also infringes Article 16 SCA because it fails to exhaustively identify for the applicants the documents containing the internal procedures/instructions for administering case files and explain why the applicants should be referred to decisions relating to other companies' access requests and correspondence with ESA that they have not been provided with. The Court is therefore respectfully asked to annul this part of the contested third correspondence as set out in the form of order sought.

144. DB Schenker submits that the refusal to disclose the procedures for handling public access requests under the RAD is challenged on the same basis. The Court is therefore respectfully asked to annul this part of the contested third correspondence as set out in the form of order sought.

145. DB Schenker submits that the refusal to disclose the ESA College decisions empowering the directors of the competition and state aid department, the legal and executive department and the administrative department infringes Article 2(1) RAD.

146. DB Schenker submits that the reasoning put forward in the third contested correspondence took 82 days to decide on, was signed by the deputy legal director and is incorrect.

147. DB Schenker notes that ESA Decision No 142/11/COL, dated 11 May 2011, empowers the legal director and the deputy legal director to represent ESA before 'the EFTA Court, the Court of Justice of the European Communities, or any other court of law in proceedings brought by or against the Authority, including proceedings in which the Authority, although not being a party to the case, has decided to submit statements of case or written observations or to intervene before the court'.

148. The applicants submit that all powers vested in ESA must be exercised by the College members pursuant to Articles 7 and 15 SCA. Its directors have no other authority than has been delegated to them on that basis. Such decisions of empowerment are not internal matters that ESA can prevent the public from reviewing.[22]

149. The statement that ESA's 'administrative setup is not such as to necessitate' any College decisions empowering its directors has such inferences that the applicants find it difficult to accept the implication of the statement that, previously, the ESA College has only delegated power on an oral and/or ad hoc basis. The applicants therefore submit that the basis for refusing this part of the access request must be factually incorrect and that the contested third correspondence therefore infringes their right of access in Article 2(1) RAD. DB Schenker submits in its reply that the defence demonstrates that the defendant's motive for asserting that the Court should dismiss the action and that DB Schenker should bring an application pursuant to Article 37 SCA is simply to continue to obstruct the applicants' access rights.

150. DB Schenker submits that the reasoning in the third contested correspondence also falls short of Article 16 SCA because ESA failed to provide any clarification as to what was meant by the statement that the 'administrative setup is not such as to necessitate' decisions to empowers its directors when all powers vested in ESA must be derived from its College pursuant to Article 7 and 15 SCA. Moreover, the reasoning in the third contested correspondence is that ESA does not have 'specific College decisions' while

[22] Reference is made to Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraph 39.

the access request was not limited to 'specific' decisions. ESA has thereby failed to explain whether its directors have been empowered in 'general' decisions. DB Schenker submits that it is impossible to establish the factual basis for, as well as the scope of, ESA's refusal to disclose any decisions containing the empowerment of its directors. The Court is therefore respectfully asked to annul this part of the third contested correspondence as set out in the form of order sought.

ESA

151. ESA recalls that the RAD was repealed as of 6 September 2012 by Article 13 of ESA Decision 300/12/COL of 5 September 2012 and notes that the revised RAD has not been the object of an action for annulment in this Court. However, as Article 36 SCA is essentially identical in substance to Article 263 TFEU, the present dispute must be assessed under the legislation or, in this case, the rules applicable at the time or times to which the contested correspondence relates.[23] ESA notes that the Court has held that it is indispensable that the RAD be interpreted homogenously to Regulation 1049/2001 by the ECJ.[24]

First contested correspondence

152. ESA submits that, as Article 36 SCA is identical in substance to Article 263 TFEU, an action for annulment brought under Article 36 (2) SCA by a natural or legal person can only succeed in so far as that person has an interest in the annulment of the contested measure. However, such an interest presupposes that the annulment of that measure must of itself be capable of having legal consequences; or, that the action must be liable, if successful, of procuring an advantage for the party that has brought it and that that person has a vested and present interest in the annulment of that measure.[25]

153. ESA submits that, in light of its subsequent letter of 5 September 2012, in which it set out a comprehensive and conclusive position to the applicants in writing, this part of the present action for annulment can no longer succeed.

154. To the extent that the general public was entitled to access to ESA Case No 34250, ESA granted DB Schenker's request. Likewise, to the extent that ESA had to fully or partially refuse the general public access, it did so. Consequently, there is no longer any

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[23] Reference is made to Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I 6307, paragraph 80 and case law cited.

[24] Reference is made to Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 121.

[25] Reference is made to Case T-19/06 *Mindo* v *Commission* [2011], not yet reported, paragraph 77 and Case E-14-11 *DB Schenker* v *ESA*, cited above, paragraphs 79 and 80.

need to adjudicate on this part of the present case.[26] In particular, it is no longer decisive for the present action whether or to what extent ESA may have partially refused the applicants' public access request at the time when the present case was lodged.

155. Any partial refusal decision contained in the first contested correspondence has been superseded by the comprehensive decision of 5 September 2012.[27] ESA notes that DB Schenker has not challenged its letter of 5 September 2012 under Articles 36 or 37 SCA. Therefore, the applicant can no longer claim to have a vested and present interest in the annulment of the first contested correspondence.[28] In the alternative to its plea of inadmissibility, ESA therefore requests that the Court declare that there is no longer any need to adjudicate on the application as regards decisions alleged to be implied in the first contested correspondence concerning the request for public access to ESA Case No 34250.

156. In its rejoinder, ESA submits that the General Court has recently found no need to adjudicate on a claim that an earlier Commission decision had contained an implicit refusal to grant public access to certain documents, where the Commission subsequently adopted an explicit decision with regard to those documents.[29] ESA submits that the applicants have not contested the relevant facts or case law relied upon in the defence. Nor have the applicants demonstrated a continued vested interest in the annulment of the first contested correspondence.

157. In any event, the contested passages of the first contested correspondence are not vitiated by any error of law.

158. Turning to the alleged implicit refusal decision to disclose a 'complete' statement of content of the file in ESA Case No 34250 in the first contested correspondence, ESA submits that neither the contention that such an alleged refusal infringed Article 2(1) RAD nor Article 16 SCA is well founded.

159. ESA submits that, in the circumstances of the present case, none of the applicants' submissions establishes a breach of the RAD.

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[26] Reference is made to Case C-44/00 P *Sodima* v *Commission*, [2000] I 11231, paragraph 83; Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II 743, paragraph 31; Case T-423/07 *Ryanair* v *Commission*, cited above, paragraph 26.

[27] Reference is made to Joined Cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk* v *Commission* [2006] ECR II 2023, paragraph 26.

[28] Reference is made to Case T-392/07 *Strack* v *Commission* [2013] ECR II 0000, paragraphs 61-66 and case law cited.

[29] Reference is made to Case T-301/10 *Sophie in't Veld* v *Commission*, judgment of 19 March 2013, not yet reported, paragraphs 69 to 71.

160. ESA submits that, pursuant to both the RAD and the revised RAD [referring to Articles 1(1) and 2(3) RAD], ESA is under no duty to grant access to any document that it does not possess. Nor are the EU institutions under such a duty pursuant to Regulation 1049/2001. EEA institutions are not obliged to create new documents if documents to which an applicant requests access, or suspects may be in an institution's possession, do not actually exist.

161. In its rejoinder, ESA submits that, contrary to the reply, *CDC Hydrogene Peroxide* is irrelevant to the present plea because, in that case, the General Court was concerned with a request for access to specific documents that already existed in the Commission's case file.[30]

162. The concept of a document must be distinguished from that of information. Access to documents presupposes the existence of particular documents.[31]

163. ESA states that lists of documents in case files are not created and stored as a kind of document unless there is a specific need to do so. What exists are individual metadata for each document, which can be displayed in ESA's information management system ('AIM'). Combining metadata to create lists requires writing and running a computer script in the database underlying the system and exporting the data to a (new) document.

164. ESA cannot, therefore, as a general rule, be obliged to create a list with specific information from the documents so listed. ESA submits that, *strictu sensu*, as it did not raise a general presumption against public access, but instead granted the request for public access to such a list, paragraph 134 in Case E-14/11 *DB Schenker* v *ESA*, cited above, does not apply. Second, even if this principle had applied to the present case at the time the application was lodged, it would no longer be relevant in this case as DB Schenker chose not to challenge ESA's letter of 5 September 2013. In any event, ESA submits that the documentation sent to the applicants in this case would meet that test.

165. ESA submits that it sent to the applicants on 30 August 2010, a complete list of all the documents in the file to which Norway Post had been granted access when the Statement of Objections was issued in December 2008 and that it sent by email of 5 April 2012 the list of documents in the case from 16 December 2008. It states that no other documents from that period exist that belong to the case but that are not on that list. ESA contends that DB Schenker can no longer claim to have a vested and present interest in the annulment of this part of the first contested correspondence since the applicants have been sent additional lists in ESA's letter of 5 September 2012. With all the lists provided,

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[30] Reference is made to Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* v *Commission*, cited above.

[31] Reference is made to Case T-264/04 *WWF* v *Council* [2007] ECR II 911, paragraph 76; Case T-380/04 *Terezakis* v *Commission* [2008] ECR II 11, paragraphs 152-156; and Case T-392/07 *Strack* v *Commission*, cited above, paragraph 75.

including those attached to ESA's letter of 5 September 2012, there are no other documents relating to the antitrust proceedings conducted by ESA in Case 34250 that the applicants have not been made aware of by way of a list, except for the inspection documents (which at the time were at issue in Case E-14/11).

166. ESA contends that DB Schenker has not adduced any reason why the specific list of documents provided to it would as such have been insufficient or not have enabled an applicant for public access to further pursue any public access intention.[32] ESA contends that DB Schenker's submissions are repetitive and general and that they wrongly presuppose that ESA must extract certain categories of information contained in the documents held on the file and add them to the list. ESA therefore contends that the plea alleging a breach of Article 2(1) RAD should be dismissed.

167. In the alternative to its inadmissibility submissions concerning the contention that ESA failed to state reasons for an allegedly implied decision not to disclose a 'complete' statement of content of the relevant case file contrary to Article 16 SCA, ESA submits that whether an ESA decision sets out the required degree of reasoning depends on the circumstances of each case and, in particular, on the legal rules governing the matter in question.[33]

168. ESA contends that an unfounded plea challenging the legality of a given decision cannot succeed in the guise of a plea relating to procedure.[34] ESA submits that, in the present case, the applicants have failed to adduce any reasons for their contention that Article 16 SCA was breached. All that is claimed is that ESA failed to state reasons for an allegedly implied decision not to disclose a 'complete' statement of content of the relevant case file. ESA submits that it is clear from its wording that the plea in question relates to the substantive completeness or, in other words, soundness of the contested documentation and not to any reasoning in an alleged decision. The alleged lack of reasoning invoked by the applicants in this case is only implicit, and it rests solely on the applicants' own contention that ESA was legally obliged to produce a list that was different from the one publicly disclosed to the applicants. Thus, in light of the RAD, the plea alleging a breach of Article 16 SCA should be dismissed.

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[32] Reference is made by comparison to Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraphs 87 and 93.

[33] Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 172; Joined Cases E-10/11 and E-11/11 *Hurtigruten* v *ESA*, judgment of 8 October 2012, not yet reported, paragraph 254.

[34] Reference is made to Joined Cases T-4-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission* [2010] ECR II 5723, paragraph 97 and case law cited; Joined Cases E-10/11 and E-11/11 *Hurtigruten* v *ESA*, cited above, paragraph 261; and Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 165.

169. ESA submits that the reply does not respond to the arguments in the defence concerning the absence of a breach of Article 16 SCA. In addition, ESA contends that the plea has become devoid of purpose and therefore need not be considered.[35]

170. ESA submits that the plea concerning the alleged implicit refusal to disclose an alleged letter from Norway Post of 13 July 2010 cannot succeed. ESA submits that the document at issue was registered as Event No 524500 in Case No 34250 and that it is a letter of 13 July 2009 rather than 2010. ESA states that it granted DB Schenker partial access to a non-confidential version of that document in November 2010. ESA submits that the correct reference year has long been easily identifiable since ESA's email of 30 August 2010 referred to the letter by date and 'event' number.

171. ESA submits that DB Schenker's quotation in its application is incomplete since it omits the event number referred to in the original email. The plea alleging a breach of Article 2(1) RAD should therefore be dismissed.

172. As regards the assertion that its reasoning breached Article 16 SCA, ESA submits that DB Schenker's plea concerning Norway Post's letter, in the alternative to its inadmissibility plea, is not well founded and reiterates *mutatis mutandis* its arguments in paragraphs 168- 170 above.

173. Concerning the alleged implicit refusal in the first contested correspondence to disclose minutes of meetings between ESA and the Norwegian government, or between the President of ESA and Norway Post or the Norwegian government, in the file, which is allegedly vitiated by a failure to state reasons contrary to Article 16 SCA, ESA submits that this plea should be rejected.

174. In the alternative to its inadmissibility plea, ESA submits that the plea is not well founded. ESA submits that it can only affirm its explicit statement made in the pre-litigation procedure that Case 34250 does not contain any minutes of meetings between ESA and the Norwegian government and/or Norway Post held to discuss the case. ESA adds in its rejoinder that no such documents have been drawn up and stored elsewhere. ESA maintains that, as is clear from the application, the subject of DB Schenker's initial request was 'the index over the documents attached to the file'. No such index of the documents held on Case 34250 ever existed, and nor is an index a feature of any ESA case file, which prompted ESA's reply. Only in subsequent correspondence did the applicants vary their request to 'a statement of content (index)' and the matter was clarified.

175. ESA states that the meetings between it and Norway Post referred to in recitals 20 and 22 of ESA Decision 322/10/COL (Norway Post/Privpak) of 14 July 2010 did of course take place. However, at the time, no specific records of these meetings were taken

[35] Reference is made to Case T-310 *Sophie in't Veld* v *Commission*, cited above, paragraph 215.

other than registering any documentation presented during these meetings. Nor was Case 34250 discussed with the Norwegian government during the so-called package meetings that ESA regularly holds with the EFTA States' governments on internal market or State aid issues.

176. In its rejoinder, ESA responds to the new evidence raised in the reply. ESA submits that it is settled case law, which should apply on the basis of procedural homogeneity, that a presumption of legality and a presumption of veracity attach to a statement by the institutions relating to the nonexistence of requested documents.[36] This presumption can be rebutted by relevant and consistent evidence, which, however, ESA submits the applicants have failed to provide. ESA submits that it is not possible to positively prove the non-existence of such documents, nor is it for a defendant to disprove assertions of that kind.

177. Accordingly, ESA, in the alternative to its maintained plea of inadmissibility, requests the Court to declare that there is no longer any need to adjudicate on the application as regards alleged decisions implied in the first contested correspondence.

178. In the second alternative, the pleas seeking an annulment of the first contested correspondence should be dismissed as not well founded.

Second contested correspondence

179. ESA submits that none of the pleas concerning the second contested correspondence are well founded.

180. ESA submits that the plea presented on the basis of Article 2(1) RAD should be rejected because, in the case at hand, the information sent to the applicants sufficiently listed the documents held in case file no 68736 and thereby granted DB Schenker's public access request.

181. Since the access request concerned the applicants own application for public access, the vast majority of documents listed were correspondence between the applicants and ESA and thereby already in their possession. This, ESA submits, cannot be without consequence as regards the procedural obligation that the applicants must show a vested and present interest in the annulment of the second contested correspondence. Nor did the documentation provided infringe the general public's derived right under the RAD to be sent a list of documents held on file.

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[36] Reference is made to Order of the General Court of 25 November 2010 in Case T-277/10 *AJ* v *Eurojust*, paragraph 6; Case T-380/04 *Terezakis* v *Commission*, cited above, paragraphs 155, 156 and 163 and case law cited.

182. ESA submits that the applicants have not adduced any reason why the specific list of documents provided would, as such, have been insufficient or would not have enabled an applicant for public access to further pursue any 'public access intention'.[37] It is contended that DB Schenker's arguments remain repetitive and general, and, moreover, that they presuppose that ESA must extract certain categories of information contained in the documents held on the file and add them to the list, which is denied. The plea alleging a breach of Article 2(1) RAD should therefore be dismissed.

183. Concerning the submission that there was a breach of Article 16 SCA, ESA reiterates *mutatis mutandis* its arguments in paragraphs 168-170 above. Further, ESA considers that it matters that DB Schenker's access request in question concerned its own application for public access and that, accordingly, the vast majority of documents so listed were correspondence between DB Schenker and ESA and therefore already in the applicants' possession.[38] Consequently, the plea alleging a failure to state reasons is inoperative, but in any event unfounded.

184. Concerning the assertion that ESA abused its powers by wilfully violating the applicants' right of access by 'suppressing' a column with dates in the print-out of the list at issue in order to withhold evidence from them, ESA submits that, pursuant to Article 6 EEA, the Court should assess the assertion in light of the settled case law on the corresponding EU law concept of misuse of powers. [39]

185. ESA asserts that, in that light, the applicants' plea cannot succeed. DB Schenker has failed to show that ESA, in granting the access request, acted with the exclusive or main purpose of achieving an end other than publicly disclosing the requested list or otherwise evading the RAD. On the contrary, the second contested correspondence concerns 'correspondence under the Authority's RAD 2008 by which the Authority granted DB's request for public access to a list of the documents held on case no. 68736.' The list enclosed with the second contested correspondence was 'drawn up anew and specifically for this purpose'. Conversely, the degree of detail required under the RAD for such a newly created record is an issue relating to the scope of the general public's rights in relation to ESA decisions. ESA submits that the list sent with the second contested correspondence was sufficient pursuant to Article 2(1) RAD. The application should therefore be dismissed in so far as it asserts that ESA misused its powers.

186. ESA concludes by requesting the Court to dismiss the pleas seeking the annulment of the second contested correspondence as unfounded in the alternative to its maintained plea of inadmissibility.

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[37] Reference is made, by comparison, to Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 93.

[38] Reference is made to Case C-501/00 *Spain* v *Commission* [2004] ECR I 6717, paragraph 73.

[39] Reference is made to Case T-417/05 *Endesa* v *Commission* [2006] ECR II 2533, paragraph 258 and case law cited, and Case 2/54 *Italy* v *High Authority* [1954] ECR 37, 54.

187. In its rejoinder, ESA adds that nothing in the reply corroborates the allegation of an abuse of power.

Third contested correspondence

188. Concerning the alleged implied refusal decision to not disclose documents concerning its procedures for administering files in the third contested correspondence, ESA asserts that it is clear from Article 8(2) RAD that neither the contention that it breached Article 2(1) RAD nor Article 16 SCA is well founded.

189. As regards Article 2(1) RAD, ESA submits that the applicants' submissions that the right of public access relates to documents, not information such as that contained in ESA's submissions in the context of proceedings in Case E-14/11 *DB Schenker* v *ESA*; that the applicants have not received the correspondence referred to by ESA on the basis that they were entitled to have documents directly addressed to them by means of a reasoned ESA decision; and, because of an alleged attempt by ESA to stall the access request, should be rejected.

190. ESA contends that by its statements in the third contested correspondence, it, inter alia, referred correctly to the fact that it had already made available extracts of the 'relevant internal procedures governing the registration of documents etc.' under the RAD to counsel for the applicants, albeit in his capacity as counsel for another applicant for public access to documents, in its letter of 30 April 2012.

191. ESA submits that both the criteria in Article 8(2) RAD are met. ESA notes that counsel for the applicants has not contested that he has not received these documents but has asserted that he was "not at liberty to disclose correspondence relating to other clients."

192. ESA submits that it is irrelevant that the information was divulged to the counsel for the applicants in the context of a mandate for a different client. ESA submits that the application is based on an incorrect understanding of the purpose of public access to documents. What counts is that the documents 'had already been released' by ESA, and that they were 'easily accessible' to the applicants within the meaning of Article 8(2) RAD, which, in the present case, means in the possession of the applicants' counsel. Although released to the counsel in the context of a different mandate, the documentation was disclosed to the general public and not individually to the company that had made the first public access request for those documents. ESA had therefore satisfied DB Schenker's right to public access to the requested documentation before the present application was lodged.

193. ESA adds in its rejoinder that 'nothing supports [the applicants'] unsubstantiated claim than an Authority reference to publicly (*sic!*) disclosed documents would instigate its counsel to commit breaches of confidentiality or of '*professional code of ethics'* or to

'*unlawful copying of client files paid for my* [sic] *another company*'. ESA submits that when it 'disclosed the documents as enclosures to event no 632494, these were so released *to the general public.'* ESA contends that this is precisely what public access entails.

194. ESA contends that the applicants' claims that the third contested correspondence infringes Article 16 SCA in that it fails to exhaustively identify the documents concerning 'internal procedures etc.', and to explain why correspondence with other companies is relevant to DB Schenker, fail to demonstrate a breach of that provision. ESA refers to its arguments above in paragraphs 168-170, which apply *mutatis mutandis.* ESA contends that the plea alleging a failure to state reasons is inoperative, but in any event unfounded. Consequently, the application should be dismissed in so far as it seeks the annulment of an alleged refusal regarding documents that ESA had already publicly disclosed to counsel for the applicants and that ESA had discharged its obligation under Article 8(2) RAD.

195. ESA notes that DB Schenker's plea concerning an alleged implied decision refusing to disclose ESA's procedures for handling public access requests is limited to the submission that it is based on the same grounds as the previous plea concerning the documents relevant to ESA's procedures for administering files. ESA submits that it is for the Court to determine whether these submissions fulfil the requirements of Article 33(1)(c) RoP. If they do, ESA refers in turn to its defence against the previous plea.

196. Concerning the alleged decision to refuse public disclosure of ESA College decisions on the current empowerment of its directors, ESA notes that the applicants have contended that ESA's reply in the third contested correspondence may be factually incorrect. ESA also notes that DB Schenker referred to ESA Decision No 142/11/COL of 11 May 2011 authorising the representation of the EFTA Surveillance Authority in legal proceedings and to the collegiate responsibility with which the College Members are entrusted under Articles 7 and 15 SCA.

197. ESA states that it does not hold in its files specific College decisions containing the 'current empowerment' of each of its four directors and that it stated this in the third contested correspondence. However, in light of the applicants' submissions, and with the benefit of hindsight, ESA cannot rule out that it misunderstood the request of 11 April 2012, which was repeated on 14 June 2012. Nonetheless, ESA maintains that an alleged failure to produce certain documents, or documents including specific information, is a circumstance in which effective judicial protection is available under Article 37(3) SCA. Accordingly, the present plea seeking the annulment of a specific statement in that context should be dismissed.

198. In its rejoinder, ESA adds in furtherance of this point that the matter must be appraised on the basis of the information available to it on 2 July 2012 when it issued its third contested correspondence.

199. ESA disagrees that the third contested correspondence infringes Article 16 SCA and refers *mutatis mutandis* to its arguments in paragraphs 168-170 above. ESA adds in its rejoinder that DB Schenker has not contested its submissions on this point.

200. ESA submits that the plea alleging a failure to state reasons is inoperative, but in any event unfounded. The application should therefore be dismissed in so far as the applicants seek the annulment of an alleged refusal to disclose ESA College decisions empowering its directors.

201. ESA concludes, in the alternative to its plea of inadmissibility, by requesting the Court to dismiss DB Schenker's pleas seeking the annulment of the third contested correspondence as unfounded.

Carl Baudenbacher
Judge-Rapporteur