ADVOKATFIRMAET MIDTHJELL

ORIGINAL

Registered at the EFTA Court under N° E-7/12-3
12 day of July 20 12

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

APPLICATION AGAINST A FAILURE TO ACT AND FOR DAMAGES

Pursuant to Article 37(3) SCA and Article 46(2) SCA

Lodged by

Schenker North AB, established in Gothenburg (Sweden)
Schenker Privpak AB, established in Borås (Sweden)
Schenker Privpak AS, established in Oslo (Norway)
(collectively **DB Schenker**)

Applicants

Represented by Jon Midthjell, advokat, and member of the Norwegian Bar and the Brussels Bar, of Advokatfirmaet Midthjell AS, Grev Wedels plass 5, NO-0151 Oslo, Norway, where service can be effected electronically at: jon.midthjell@midthjell.as.

- v –

EFTA Surveillance Authority

Defendant

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

Oslo, 8 July 2012

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1. INTRODUCTION

(1) The applicants are part of DB Schenker, the international freight forwarding and logistics group, owned by Deutsche Bahn AG. Schenker North AB runs the group's business operations by land, sea, and rail in Norway, Sweden, and Denmark, including the subsidiaries Schenker Privpak AS and Schenker Privpak AB (collectively referred to as DB Schenker).

(2) The legal action against ESA today springs out of a request that DB Schenker submitted on 3 August 2010, seeking public access to ESA Case No. 34250 (*Norway Post/Privpak*):

- That case file concerns the investigation of an antitrust complaint, which DB Schenker submitted against the state-owned postal operator, Norway Post, in 2002. ESA's administrative procedure and investigation lasted eight years and culminated in ESA Decision No. 322/10/COL, on 14 July 2010, where the defendant upheld the merits of DB Schenker's complaint.

- DB Schenker was Norway Post's only competitor during the entire infringement period.[1] Unlike Norway Post, which required consumers to come to a post office to pick up or return internet/mail order goods, DB Schenker's distribution model allowed consumers to pick up or return their parcels in supermarkets, kiosks and gas stations, at their choice and convenience within generous opening hours. DB Schenker's network model offered consumers to integrate their pickups into their weekly shopping routines, rather than having to make separate stops at the post office. At the time DB Schenker entered the Norwegian market to roll out its network, the company had already proven, in Sweden, that its business model was profitable and offered significant cost advantages over incumbent postal operators, after having pioneered the model there since 1992.

- In its decision, ESA confirmed that Norway Post had committed an abuse of its dominant position for at least six years, from 20 September 2000 to at least 31 March 2006, through a set of exclusionary agreements.[2] Those agreements prevented DB Schenker from rolling out its network. This also meant that the

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1 See §§ 403-404 in ESA Decision No. 322/10/COL (*Norway Post/Privpak*).

2 *op. cit.*, see § 838.

infringement continued at least four years after ESA had received DB Schenker's antitrust complaint.

(3) DB Schenker is seeking access to the case file for a dual purpose: First, the company is pursuing its rights under EU/EEA law, in a follow-on action in the Oslo City Court, for compensation from Norway Post for the significant damage that the antitrust violation caused. Second, the company wants to review how the defendant handled the investigation and administrative procedure. This includes questions such as:

- why the defendant spent as much as eight years on the case before taking a decision against Norway Post;[3]

- why the defendant decided to secure evidence in a dawn raid against Norway Post as late as in 2004, two years after having received the antitrust complaint from DB Schenker, and only after having made Norway Post aware of the ongoing investigation against the company;

- why the defendant failed to give priority to the matter when it was informed that DB Schenker was considering to close down its business due to the losses it was sustaining as a consequence of the lengthy investigation, and when the company was the only competitor of Norway Post in a nationwide market, relied on by a large number of exporters in other EU Member States to distribute goods directly to consumers, in cross-competition with local retailers in Norway;

- why, at the end of the investigation, the basic amount of the fine against Norway Post was set at only 3 percent of its value of sales in the relevant market in 2005, and why the defendant departed from its own fining guidelines by not taking into

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3 In its judgment in Case E-15/10 *Norway Post v ESA*, on 18 April 2012, the Court upheld ESA Decision No 322/10/COL but found that the duration of the administrative procedure and investigation had been "*excessive*", see § 282. The Court found that the key issues were "*rather straightforward*", see §§ 280-281: [...] *Contrary to what ESA asserts, the Court cannot see that this duration was justified by any particular difficulties of the case which go beyond what is normal for competition law cases. On the contrary, it would seem that both the definition of the relevant market and the question whether Norway Post entertained a dominant position on that market were rather straightforward. Norway Post did not dispute the existence or content of the agreements with its partners"* (emphasis added).

account the profit that Norway Post had gained from the infringement with a *de facto* monopoly for more than six years, when the fine was set;[4]

- why the defendant decided, on the same day as it levied the fine against Norway Post, in 2010, to close another investigation against Norway Post in the same market, concerning another abuse of its dominant position through the use of loyalty rebates, without opening formal proceedings;[5]

- why the defendant decided not to take any action when DB Schenker, in 2009, informed that several important business customers had provided information showing that Norway Post was offering discriminatory rebates leading to substantially higher costs if goods were distributed through DB Schenker; and that this pricing policy had been put in place after Norway Post previously had approached DB Schenker with an offer if DB Schenker would agree to withdraw from the market, which DB Schenker had rejected.[6]

(4) An inherent reason for why the applicants are looking into how the defendant handled the investigation is the nexus between Norway Post; its owner, represented by the Norwegian

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4 The judgment in Case E-15/10 *Norway Post v ESA*, on 18 April 2012, does not vindicate ESA's starting point for the fine. The Court concluded, at §§ 268-269, that it did not have jurisdiction to review, on its own motion, whether the basic amount of the fine had been set too low. On that basis, the Court was confined to reduce the fine even further because it found that the duration of the administrative procedure and the investigation had been excessive, see the principled reasoning at §§ 276-288.

5 In its annual report 2010, the defendant stated that: "*Amongst others, the Authority has been concerned that Posten Norge's rebate scheme could produce loyalty-inducing foreclosure effects which would make it more difficult for new entrants to compete in the market. During the Authority's investigation, Posten Norge made a number of amendments to its rebate scheme. The Authority carried out a market investigation of possible negative effects of the rebate scheme of Posten Norge, as amended, which indicated that the risks of adverse effects on competition were limited. In addition, the recent emergence of more viable competitors in the market place was observed. In the light of these findings, the Authority decided to close its investigation of the rebate scheme in 2010 without opening formal proceedings*" (see **Annex A.44**). The statements above indicate that the defendant refused to open formal proceedings on whether Norway Post had committed an additional abuse of its dominant position under Article 54 EEA because the company, years after the investigation had been started, was willing to amend its rebate policy. By its own admission, ESA spent more than six years on that case.

6 DB Schenker scheduled a meeting with ESA in Brussels, which was held on 20 November 2009, to provide a briefing about the circumstances and the facts the company had been able to uncover at that point.

Ministry of Transport and Communications, which controls and exercises the state ownership; and ESA, during the long period:

- At the heart of the matter lies an attempt by DB Schenker to challenge Norway Post in the midst of a major structural reform by which Norway Post sought to close down more than 50 percent of its post offices and outsource the services through a privately run Post-in-Shop network, to become more cost efficient;

- Norway Post's downsizing of its labour force, by more than 2500-3000 employees, at that time, and wide scale outsourcing to the private sector, required political approval from the government, and also the parliament.[7] The Ministry of Transport and Communications was charged with the responsibility of drafting the proposal, in consultation with Norway Post, for approval of the reform in the parliament;

- DB Schenker's successful prior entry on the Swedish market against the Swedish Post, and the company's stated intention to extend its network to the Norwegian market, is likely to have been seen as a disruption that could cause political liability[8]. It is plausible that the Ministry of Transport and Communications therefore had an interest in opposing a fast moving investigation that could pave

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7 The initial proposal was presented to the parliament on 26 May 2000 concerning the closure of 450 out of 900 post offices. The Ministry of Transport and Communications later submitted additional proposals for a continued closure of most of the remaining post offices.

8 In its judgement in Case E-15/10 *Norway Post v ESA*, on 18 April 2012, the Court found, at §§ 271-272: [...] *As a de facto monopolist, Norway Post could not have been unaware of its dominant position in the market. Norway Post was also aware of [DB Schenker's] business concept in Sweden. It considered itself that the possibility to combine the collection of parcels with daily errands may matter a lot for the selection of outlets. It must also have been aware that the leading grocery store, kiosk or petrol station chains were particularly well suited to roll out an over-the-counter parcel delivery network. Thus, it could not have been unaware of the importance of access to one or more of the leading grocery store, kiosk or petrol station chains.* [...] *Norway Post must also have been aware that the exclusivity obligations imposed on its partners foreclosed access to a substantial number of outlets belonging to this category; and, as a dominant undertaking, it could not have been unaware that its conduct entailed further disincentives for its partners to deal with its competitors. Furthermore, in particular as its negotiations with the other retail chains had been unsuccessful, it could not have been unaware that the remaining chains were not easily available to potential new entrants".*

the way for DB Schenker to challenge Norway Post at an early stage in the transformation and outsourcing of its own network;

- The applicants are not yet in a position to gauge the full extent of the nexus, and whether it has caused the defendant to handle its investigations of Norway Post differently. It is, however, a plain fact that the nexus involved the defendant, through its regular contacts and meetings with the government, including the Ministry of Transport and Communications. Moreover, in a letter, dated 29 May 2009, the then president of ESA, who sat in office from 20 August 2007 to 30 June 2011, informed DB Schenker that he for 12 years, between 1993-2005, had been the Director General, and later Secretary General, in the Ministry of Transport and Communications.[9]

(5) DB Schenker has, at present, waited more than 704 days for ESA to process the access request that the company submitted on 3 August 2010. The statutory time limit in Article 7(2) RAD, for large case files, is 25 working days.

(6) In addition to the excessive use of time, DB Schenker has experienced a number of other procedural infringements, administrative irregularities, and even instances of subterfuge:

- The defendant repeatedly gave the applicants the impression, at the start of the process, that the matter would be dealt with "*soon*" and "*shortly*", without objecting when the applicants stated that they assumed that any consultation process with Norway Post and third parties, concerning confidentiality issues, would run quickly because all the parties had been required to provide non-confidential versions of their submissions during the investigation.

- During the initial phase, the defendant must have realized that it would not be able to meet the expectations of the applicants or even the extended time limit in Article 7(2) RAD for handling large case files. However, the defendant did not provide a proper advance notice, with detailed reasons, to avail itself of the extended time limit, as required under Article 7(2) RAD. The defendant did not

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9 See **Annex A.45**. The letter ended with the following statement: "*Against, this background there is no reason to doubt that I am qualified to act in this case. Should you wish to obtain further information on the matters addressed above, please contact the Authority by 23 June 2009*".

even inform DB Schenker, at the time the extended time limit expired, to acknowledge the delay.

- When the applicants subsequently complained that the defendant had overrun its time limit, the defendant waited until a second complaint was made, and then responded by censuring the applicants for not being willing to restrict their access request to a list of documents that the defendant had provided, without informing that the list omitted significant parts of the case file, such as key evidence seized from Norway Post in 2004, and working documents, including minutes from meetings during the investigation.

- By imposing very short time limits on DB Schenker to submit confidentiality claims (within two to four working days), when Norway Post counter filed an access request, at the start of the process, the defendant created the impression that all parties would be required to respond quickly to the company's own access request. Instead, the defendant waited three months before contacting the third parties about any confidentiality claims, in relation to the non-confidential versions that they had already submitted during the investigation, three to seven years earlier. When ESA finally contacted the third parties, it did so by identically framed letters.

- The defendant has subsequently refused to disclose the dates for its correspondence with the third parties, and to clarify to what extent it needed more than one round of correspondence, before clearing most of the third party documents for access.

- The defendant claims that the third party consultation is still going on, almost two years after the access request was submitted, whereas the evidence points towards a "*parceling out*" of third party documents, long after they have been cleared for access by the third parties. A majority of the third parties appear not even to have raised confidentiality claims, at least not of any significance.

- The defendant also waited two months before starting consultations with Norway Post, and then only with regard to parts of the case file. The record shows that the defendant waited as much as six months before contacting Norway Post about the inspection documents that had been seized during the dawn raid in 2004.

DB Schenker has subsequently discovered that the documents were never individually registered on the case file, at that time, or later.

- The defendant allowed Norway Post to submit a global confidentiality claim for the entire body of inspection documents and then waited an additional six months before informing DB Schenker of a global decision to refuse access to that part of the file, more than one year after the access request was submitted.

- The defendant has repeatedly ignored invitations from DB Schenker to discuss a reasonable extension of its statutory time limit, presumably because that would have required the defendant to be transparent about the state of the case file and how it was organizing the process.

(7) DB Schenker has tried to complain directly to the president of ESA, on four different occasions, in 2010, in 2011 and in 2012, to no avail.[10] The defendant is still refusing to state when it plans to complete its work. The applicants therefore see no other option to put an end to the violation of its right of access than by the legal action taken today.

(8) For reasons of procedural economy, DB Schenker is submitting an application for:

(i) a declaration under Article 37 SCA that ESA has failed to act on its access request; and

(ii) an award for damages under Article 46(2) SCA, in an interlocutory judgment, for the losses that the failure to handle the request timely and in an otherwise lawful manner, has caused and is still causing.

(9) In the interest of completeness, the applicants note that they are also submitting a parallel action under Article 36(2) SCA against the defendant. In that action, DB Schenker seeks to annul several recent decisions, denying public access to documents such as:

- A letter sent by Norway Post to the president of ESA, dated 13 July 2010. On 30 August 2010, the defendant confirmed that it had received a letter from Norway Post with that date, and explained at that time that: "*The only document of*

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10 To, then, president Per Sanderud, on 9 November 2010 (**Annex A.14**); on 6 January 2011 **(Annex A.18)**; and on 17 February 2011 **(Annex A.20)**; and to, now, president Oda Sletnes, on 8 March 2012 **(Annex A.26)**.

evidential value that was submitted after the oral hearing in June 2009 is a letter from Norway Post dated 13 July 2010. There is no non-confidential version of this document on the Authority's file at this stage" (emphasis added). The defendant is now claiming that it is unable to "*identify*" the letter.[11]

- The minutes from the meetings between ESA/or its president and the Norwegian government about the case. The defendant claims that no such minutes exist.[12]

- The minutes from the meetings between ESA/or its president and Norway Post about the case. The defendant claims that no such minutes exist either.[13]

- A complete statement of content of the file in ESA Case No. 34250. Without stating reasons, the defendant is refusing to list its internal documents such as i.a. minutes and an unknown quantity of additional documents belonging to the case file; refusing to disclose the dates for incoming and outgoing correspondence and documents that have been listed on the file so far; and is also refusing to identify who the senders and receivers are in all instances.[14]

- A complete statement of content of the file in ESA Case No. 68736 which lists the correspondence concerning ESA's progress in handling DB Schenker's access request, from 3 August 2010 and onwards. Without stating reasons, the defendant is refusing to disclose the dates for its incoming and outgoing correspondence; and is also refusing to identify who the senders and receivers are in all instances. [15]

(10) In light of the excessive time, and the additional irregularities that have attached to the defendant's handling of the access request, including the refusals dealt with in the parallel annulment action, the applicants are left with the impression that the defendant is stalling the process in an effort to dissuade the company from pursuing the file. The facts that have been uncovered so far indicates, in the eyes of the applicants, that the intransigence results from a fundamental lack of leadership, over a long period, to establish a sound

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[11] See **Annex A.41**.

[12] See **Annex A.41**.

[13] See **Annex A.41**.

[14] See **Annex A.41**.

[15] See **Annex A.43**.

administrative culture in its legal department and competition department; and an irresponsible willingness to resort to unacceptable, even unlawful, measures to prevent further evidence of that failure to come to light, through the files that document the defendant's handling of its investigations of Norway Post, which stretches 10 years back in time.

2. THE FACTS AND THE PRE-LITIGATION NOTICE

2.1 The administrative process leading up to the pre-litigation notice

(11) This section sets out the correspondence between the parties, from 3 August 2010, when the access request was submitted, until 8 March 2012, more than 583 days later, when the company served a formal pre-litigation notice on the defendant under Article 37(2) SCA, against its failure to act.

(12) **On 3 August 2010**, DB Schenker requested public access to the complete file in ESA Case No 34250 (Norway Post/Privpak), by email.[16] The company explained that it assumed that Norway Post had been asked to submit non-confidential versions of its submissions to ESA during the investigation, just as ESA had requested from DB Schenker, and that most parts of the file therefore could be disclosed quickly.

(13) **On 4 August 2010** (1 day after the access request), ESA confirmed, by email, that it had received the request, and asked DB Schenker to clarify whether the request covered the complete file, and stated that, in any event, "*it would be appreciated if you could specify in more detail the documents to which you seek access*".[17] However, ESA did not provide the statement of content of the file, listing all the documents registered on the case, and failed to offer DB Schenker any other means to restrict its access request in an informed and meaningful manner. Nor did ESA invoke the extended time limit in Article 7(2) RAD, or advice the company that its assumption, that most parts of the file could be disclosed quickly, was fundamentally wrong.[18]

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16 See **Annex A.1**.

17 See **Annex A.2**.

18 Article 7(2) RAD allows ESA, in "*exceptional circumstances*", to extend its normal five working day time limit, with an additional 20 working days, "*provided that the applicant is notified in advance and that detailed reasons are given*".

(14) Later the same day, DB Schenker confirmed, by email, that the access requested concerned the complete file.[19]

(15) **On 10 August 2010** (7 days after the access request), ESA confirmed, by email, that it had understood that the access request concerned the complete file.[20] The defendant did not provide DB Schenker with a statement of content of the file, or, in any other way, invite the company to limit its access request. Nor did the defendant object that the request for the complete file would lead to administrative hardship. Nor did the defendant invoke the extended time limit in Article 7(2) RAD, or advice the company that its assumption, that most parts of the file could be disclosed quickly, was fundamentally wrong.

(16) ESA only stated that "*the file is quite voluminous*" and that processing it would take "*some time*". However, the defendant assured the company that:

> "*We will send you the documents as soon as they are available*" (emphasis added).

(17) **On 11 August 2010** (8 days after the access request), DB Schenker informed ESA, on its own initiative, that the company only needed an electronic copy of the documents, i.e. CD-rom, and not hard copies.[21] The company submitted the clarification to ensure that the defendant did not have to spend time and resources on manual printing and copying of the file.

(18) **On 18 August 2010** (15 days after the access request), ESA informed DB Schenker that:

> "*We will soon revert to you regarding your request for access to documents* [...]" (emphasis added).[22]

(19) The defendant did still not provide a statement of content of the file or, in any other way, invite the company to limit its access request. Nor did the defendant object that the request for the complete file would lead to administrative hardship. Nor did the defendant invoke the extended time limit in Article 7(2) RAD, or advice the company that its assumption, that most parts of the file could be disclosed quickly, was fundamentally wrong.

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19 See **Annex A.3**.

20 See **Annex A.4**.

21 See **Annex A.5**.

22 See **Annex A.6**.

(20) In the same email, ESA informed that Norway Post had submitted a counter-request for public access to all correspondence between DB Schenker and ESA, from mid-2009 until present. ESA asked DB Schenker to clarify whether that correspondence contained business secrets or other confidential information and to "*identify any such information and substantiate any claim for confidential treatment*". DB Schenker was given four working days to respond to Norway Post's access request.

(21) **On 30 August 2010** (27 days after the access request), ESA granted DB Schenker access to a limited number of documents: Norway Post's reply to the Statement of Objections (SO) and the SO itself, which DB Schenker had already received in 2009.[23] The email stated that:

> "*The only document of evidential value that was submitted after the oral hearing in June 2009 is a letter from Norway Post dated 13 July 2010. There is no non-confidential version of this document on the Authority's file at this stage.*" (emphasis added).[24]

(22) The email did not explain why ESA found it relevant to distinguish between documents registered on file before and after the administrative hearing in 2009, given that DB Schenker had requested access to the complete file. Nor did ESA explain how it had come to the conclusion that there was only one document of "*evidential value*" on file after that hearing.

(23) The email then, arbitrarily, addressed three documents that Norway Post had distributed during the hearing in 2009, and stated that:

> "*The Authority assumes that Schenker Privpak is in possession of the documents that were handed out at the oral hearing in case 34250, that is Norway Post's presentation and speaking notes as well as a binder with relevant legal texts provided by Norway Post* [...]".

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23 See **Annex A.7**.

24 In a subsequent decision, on 9 May 2012 (640 days after the access request), ESA denied access to that letter with the following reason: "*We have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010*", see **Annex A.41** at page 2.

(24) However, ESA did not clarify whether that meant that it considered those few documents cleared for public access, or whether they were still subject to confidentiality obligations and restricted use, since they had been provided by Norway Post during the administrative procedure.

(25) ESA did still not invoke the extended time limit in Article 7(2) RAD. Nor did the defendant object that the access request to the complete file would lead to administrative hardship, or advice the company that its assumption, that most parts of the file could be disclosed quickly, was fundamentally wrong. Without making any reference to the consultation procedure in Article 6(3) RAD, the email only stated that:

> "*The administrative file in case 34250 contains a very large number of documents and many very long documents. We would assume that many of these documents would be of limited interest to Schenker Privpak, in particular those which are of a procedural nature without any evidential value. Further, the volume of work required to process a request for access to all documents in the administrative file is very substantial. In order to find a fair solution we would therefore propose that Schenker Privpak reviews the material submitted by this e-mail with a view to identify in more concrete terms the documents to which it would be in Schenker Privpak's interest to have access* [...]" (emphasis added).

(26) No explanation was given for how ESA had come to the conclusion that significant parts of the file, including documents of a "*procedural nature*", would not have any evidential value, i.a. for DB Schenker to consider the reasons for why the investigation had lasted eight years; why evidence had only been seized from Norway Post two years into the investigation and only after the company had been made aware of the case; etc.

(27) DB Schenker was, in effect, requested to limit its access request to a separate list of documents attached to the email. However, ESA's list did not constitute the statement of content of the file. Instead, the defendant had compiled "*a list of the documents on the file to which Norway Post was granted access when the Statement of Objection was issued*". No explanation was given for why DB Schenker could not be given an opportunity to review the complete statement of content of the file, or why ESA found it relevant to select out only the restricted number of documents that Norway Post had been granted access to while the investigation had still been ongoing. Nor did the defendant explain what type of documents ESA had excluded from its selective list.

(28) What the defendant labelled as a "*fair solution*" was, in essence, that DB Schenker should only select documents from a list that excluded core evidence:

- None of the 2800 pages of documents seized from Norway Post during a four-day dawn raid, in 2004, was included on the list, and the defendant made no effort to inform DB Schenker of that significant omission.[25]

- None of the defendant's internal documents and minutes from meetings, showing how ESA had handled the investigation during the eight year period from 2002-2010 was included on the list.

- None of the other correspondence and documents from December 2008 to July 2010 was included on the list.

(29) In the same email, ESA requested that DB Schenker review a 161 pages version of the decision against Norway Post, dated 14 July 2010, and clarify whether it contained business secrets or other confidential information, and, if so, to "*identify any such information and substantiate any claim for confidential treatment*". DB Schenker was given two working days to respond. In the event that DB Schenker should fail to comply with the time limit, ESA warned that it would assume that the 161 pages decision did not contain any confidential information:

> "*You are reminded that in case Schenker Privpak would fail to respond to this request within the set time-limit the Authority may pursuant to Article 16(4) of Chapter III of Protocol 4 to the Surveillance and Court Agreement assume that the draft non-confidential version of the decision does not contain confidential information*".

(30) In a response email the same day, on 30 August 2010, DB Schenker reminded ESA that the company had already confirmed, on 4 August 2010, that it requested access to the complete file, and that ESA, in its emails, on 10 August and 18 August 2010, had

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25 DB Schenker subsequently discovered in the course of Case E-14/11 (pending) that the defendant never registered the seized documents individually on its case file. This means that the defendant is unable to produce a record showing proper custody of evidence, i.e. that no evidence has been lost. The Court ordered ESA to surrender a copy of the documents on 30 March 2012.

confirmed that it was in the process of preparing the documents on that basis.[26] DB Schenker rejected that ESA could ask the company to limit its access request to the selective list it had prepared:

> "*It should therefore be clear that the request for access is entirely legitimate. It is in any case not for the Authority to assume whether parts of a file could be of interest to DB Schenker or to require that the company justify its interest in each document referred to in the excel file that was sent through today, before releasing those documents*".

(31) DB Schenker reiterated that the company was under the assumption that Norway Post, and other third parties, had been asked to submit non-confidential versions of all submissions to ESA during the investigation, just as DB Schenker had done:

> "*As to the issue of whether certain documents contain protected information, we assume that the Authority has continuously requested Norway Post to provide non-confidential versions of the documents in question, as the Authority continuously asked of DB Schenker during the eight year investigation, which we also stated in our email on 3 August 2010 without hearing differently from the Authority. DB Schenker has a right to access those parts of the documents that do not contain protected information and we assume that the Authority has made use of the last 18 working days since the request was filed, to ask Norway Post or other third parties for a release of any remaining documents, in accordance with its Rules of Procedure*"

(32) DB Schenker, nevertheless, invited ESA to discuss a reasonable extension of its statutory time limit if it had met unforeseen difficulties in processing the file on time:

> "*We are also ready to discuss a reasonable extension if the Authority has met unforeseen difficulties in preparing the file. At the moment, it is difficult to appreciate what those difficulties could be in light of the long investigation time which the Authority has had to prepare for requests on access to the file and the fact that we are only requesting an electronic copy of the file*".

(33) **On 1 September 2010** (29 days after the access request), ESA confirmed, by email, that:

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26 See **Annex A.8**.

"*We will get back to you shortly regarding your request for access to documents in case 34250*" (emphasis added).[27]

(34) The defendant did still not provide a statement of content of the complete file. Nor did the defendant invoke the extended time limit in Article 7(2) RAD, or take issue with DB Schenker's assumption that it had already contacted Norway Post and the third parties for any confidentiality claims. Neither did the defendant inform that it would not be able to comply with even the extended time limit in Article 7(2) RAD, or argue that the request would result in administrative hardship, or accept DB Schenker's invitation to discuss a reasonable extension of even the extended time limit.

(35) **On 6 September 2010** (34 days after the access request), DB Schenker reminded ESA, by email, that the statutory time limit for the request would expire the next day.[28] The company stated that it assumed that ESA had already sent a CD-rom with the documents, in the absence of any response to its invitation to discuss a reasonable extension.

(36) **On 7 September 2010** (35 days after the access request), ESA's extended time limit under Article 7(2) RAD, expired. However, the defendant did not acknowledge that it had overrun its time, or provide any other kind of response.

(37) **On 14 September 2010** (42 days after the access request), DB Schenker contacted ESA, by email, to complain that the defendant had overrun its extended time limit, that more than six weeks had passed since the access request had been submitted, and that the delay now was threatening to undermine the company's right to prepare an effective intervention in Case E-15/10 *Norway Post v ESA*, where Norway Post, on the same day, had announced that it had commenced legal action to overturn the infringement decision: [29]

"*Norway Post confirmed today that an appeal has been lodged with the EFTA Court. As you know, DB Schenker has a right to intervene in the case but will need access to the file in order to exercise that right effectively and protect its right to seek damages from Norway Post. However, the Authority has still not handed over*

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27 See **Annex A.9**.

28 See **Annex A.10**.

29 See **Annex A.11**.

a copy of the file, even though the request was filed more than six weeks ago on 3 August 2010. The Authority has also failed to offer any reasons which could justify the delay, in contravention of its own Rules of Procedure. DB Schenker invited the Authority to discuss a reasonable extension of the deadline which expired on 7 September 2010, if the Authority had encountered unforeseen reasons of delay. The Authority never replied to the invitation" (emphasis added).

(38) The company informed that it could not accept that the defendant continued to violate its rights and requested that the file be released by 16 September 2010.

(39) **On 17 September 2010** (45 days after the access request), ESA responded in an email.[30] The defendant did not dispute that it had overrun the extended time limit but refused to enter into any discussion with the applicants about a reasonable extension. Instead ESA stated that:

> "*I had hoped that my previous emails to you had made clear that the file contains a very large number of documents and many of those may contain business secrets or otherwise commercially sensitive information with the consequence that it would not be possible to give you the access you request within the deadlines that normally apply.*
>
> [...] *the Authority is in the process of examining the documents and of consulting the authors of the third-party documents in accordance with Article 4 (5) of the rules. Again, there are many such authors, the documents are numerous and thus time is needed. Rest assured that we will disclose documents (or edited versions) as soon as practically possible in accordance with our rules* [...]" (emphasis added).[31]

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30 See **Annex A.12**.

31 DB Schenker subsequently discovered, in the course of Case E-14/11 (pending) that, contrary to what the defendant stated in its email on 17 September 2010, ESA had not contacted any of the third parties, at that time. ESA waited until 20 and 21 October 2010, before contacting any of the third parties, and then by identically framed letters. This means that ESA waited almost three months before consulting any of the third parties about the access request, see § 84 below.

(40) The email did not contain any explanation for why ESA had not formally invoked Article 7(2) RAD, as required. Nor did the email contain any explanation for why the defendant had not accepted the invitation to discuss a reasonable extension of the time limit, or taken issue, during the previous 45 days, with the company's stated expectation that ESA would be able to provide timely access to the file. Nor did the email explain why the defendant had given the impression that it "*soon*" or "*shortly*" would respond to the access request.

(41) Remarkably, ESA censured DB Schenker for not being willing to limit its access request to the selective list that it had drawn up on 30 August 2010:

> "*As to the remainder of the documents in the file of which you seek disclosure, because of their very large number, you have been asked to provide us with guidance as to which documents in particular you seek disclosure in accordance with Article 6 (2) and (3) of our Rules on access. Unfortunately, your response was not conducive to reaching a fair solution as you insist on receiving all documents including those to which you already have had access*".[32]

(42) The defendant continued by requesting, in effect, that it be allowed to exclude documents from the scope of the access request, at its own discretion, without offering DB Schenker any opportunity to review a complete statement of the content of the file, which was labelled a "*fair solution*" by ESA:

> *In order to expedite matters and in another endeavour to reach a fair solution, I would be grateful if you could confirm that you do not seek access to documents that are purely administrative in nature and are devoid of substantive content, such as exchanges by letter or email requesting, refusing or granting extensions to deadlines and such like*".

(43) The defendant failed to offer any indication of the time needed to complete the process.

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32 The defendant overlooked that, according to its own procedural rules, documents to which DB Schenker had been granted access during the course of the investigation could not be used for any other purpose, i.e. to claim damages from Norway Post; and that DB Schenker therefore had to make a separate access request under RAD to be able to use those documents freely, as evidence.

(44) Later the same day, on 17 September 2010, DB Schenker responded, by email, and asked the defendant to answer when it planned to complete its work, given that ESA had already overrun even its extended time limit.[33]

(45) The company explained that it was difficult to understand the cause of the delay, since all parties presumably had been requested to submit non-confidential versions of their submissions already during the, now terminated, investigation of Norway Post.

(46) The applicants rejected that there was any basis for reproaching them for seeking access to the complete case file:

> "*As for your regrets that DB Schenker has requested access to the entire file, including procedural documents which allegedly take up much of your time, we note that such documents rarely contain business secrets and should be fairly easy to process. Unfortunately, we cannot rely on the Authority to identify documents that are of interest to DB Schenker. If a serious mistake should be committed, who would then be left with the professional responsibility?*
>
> *You also mention that the company is burdening the Authority by including requests for documents that it has already received a copy of. Please note that this concerns at most a handful of documents, that for most part were released prior to the Rules of Procedure and which we cannot present in a court of law without your authorisation. The company must also ensure that the documents that it considers using as evidence are identical and complete to the ones NPO submitted to the Authority. These documents cannot possibly be used as an explanation for your significant delay.*
>
> *We have no interest in burdening the work of the Authority but, as you can appreciate, the company cannot accept that poor administration of the file during a period of eight years be allowed to undermine [DB Schenker's] rights in this matter*" (emphasis added).

(47) DB Schenker invited the defendant to forward, at least, the documents that it had been able to process in the six weeks that had passed, at that time.

(48) **ESA did not respond.**

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[33] See **Annex A.13**.

(49) **On 9 November 2010** (98 days after the access request), DB Schenker decided to send its first complaint to the president of ESA. The company had, at that time, waited more than seven additional weeks for an answer on when the defendant planned to complete its work.[34] The delivery receipt shows that the email was received by ESA's email server the same day at 12h23. The president subsequently sent a read receipt at 12h39.[35]

(50) **On 10 November 2010** (99 days after the access request), ESA sent a letter to DB Schenker in response to the complaint to the president.[36] The defendant informed that it had sent "*a number of documents*" in a letter that was stated to have been sent on 5 November 2010, and assured the company that:

> "*You may rest assured that all of the documents sent to you have been transmitted to you as soon as non-confidential versions were available*" (emphasis added).

(51) The defendant explained that it was in the process of examining all the remaining documents on the case file.

(52) The letter sought to create the impression that the ongoing third party consultation was leading to extensive confidentiality claims assessments for a large number of third parties, even though all the parties had submitted non confidential versions during the investigation, as much as three to seven years earlier.

(53) The next day, on 11 November 2010, DB Schenker received the letter from ESA, dated 5 November 2010, which included a CD-Rom, that only contained a limited part of the correspondence between the defendant and Norway Post:[37]

- The shipment included 70 documents that Norway Post had apparently not even requested confidential treatment for.

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34 See **Annex A.14**.

35 See **Annex A.15**.

36 See **Annex A.16**.

37 See **Annex A.17**. The applicants have subsequently discovered that ESA, after having received the access request on 3 August 2010, waited more than two months before consulting Norway Post, on 7 October 2010, about these documents, see § 84 below.

- The shipment also included 31 additional documents where Norway Post was stated to have submitted confidentiality claims. 13 of these documents were granted in full and 2 denied in full, which suggests that the work had centred around 12 documents, where partial access was granted.

(54) **On 6 January 2011** (156 days after the access request), DB Schenker decided to send a second complaint to the president of ESA, after the defendant still had not provided any answer on when it planned to complete the process.[38] The company had, at that time, also submitted an application for leave to intervene in Case E-15/10 *Norway Post v ESA*, in which Norway Post sought to overturn the infringement decision. ESA was therefore informed that the significant delay was causing the applicants concern that they would not be able to prepare their intervention.

(55) In its complaint, DB Schenker recalled that the defendant had only been able to release a minor part of the file, even when held up against the limited list of documents that the defendant had drawn up on 30 August 2010. The company questioned, again, the reasons what were holding back the third party consultation process, given that all those parties had already submitted non-confidential versions during the investigation, and given the age of those documents now.

(56) The delivery receipt shows that the email was received by ESA's email server the same day at 19h03. The president subsequently sent a read receipt at 21h00, and ESA's registry sent a read receipt the next day, on 7 January 2011, at 08h47.[39]

(57) **ESA did not respond to the letter.**

(58) **On 17 February 2011** (198 days after the access request), DB Schenker decided to send a third complaint to the president of ESA, after the defendant had still not provided any answer on when it planned to complete the process.[40] At that time, the company was coming under significant time pressure in preparing its statement in intervention in Case E-15/10, which ESA was reminded about, again.

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38 See **Annex A.18**.

39 See **Annex A.19**.

40 See **Annex A.20**.

(59) The delivery receipt shows that the email was received by ESA's email server the same day at 20h25. The president subsequently sent a read receipt, on 18 February 2011, at 00h18.[41]

(60) **On 18 February 2011** (199 days after the access request), ESA sent a response letter to the second and third complaints, by email.[42] The defendant sidestepped the question of when it planned to complete the process, which was the substantive issue in the complaints. Instead, ESA censured DB Schenker for having made the complaints.

(61) The defendant informed that it had sent a letter on 16 February 2011 in response to the second complaint DB Schenker had sent, on 6 January 2011, six weeks earlier.

(62) In a follow-up email exchange between the parties, on 18 February 2011, DB Schenker asked ESA to send a copy of that letter, by email.[43] The defendant did not reply. The letter was subsequently received on 22 February 2011. DB Schenker also asked the defendant, again, to respond on when it planned to complete the process. The defendant did not reply.

(63) **On 22 February 2011** (203 days after the access request), DB Schenker received the letter from ESA, dated 16 February 2011, containing a decision that granted full or partial access to some third party correspondence.[44] The pool of documents only consisted of 122 documents, of which as many as 108 were cleared for full access.

(64) The letter, nevertheless, sought to create the impression that the ongoing third party consultation was leading to extensive confidentiality claims assessments for a large number of third parties, even though all the parties had submitted non confidential versions of their submissions during the investigation, as much as three to seven years earlier. The defendant went as far as giving the impression that the third party consultation was the main reason for the delay.

(65) Although the letter was phrased as a response to the second complaint that DB Schenker had sent to the president of ESA, on 6 January 2011, the defendant did not provide any indication on when it planned to complete the process, which was the substantive issue in

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41 See **Annex A.21**.

42 See **Annex A.22**.

43 See **Annex A.23**.

44 See **Annex A.24**.

that complaint. Instead, ESA censured DB Schenker, again, for requesting access to the complete case file:

> "*I would also like to recall that the general rules on access to documents provide that in the event of an application relating to a very large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution. I regret that the Authority has not observed any interest on your part to find such a solution. As a result, and given the large size of the file in Case 34250, the processing of your application for access to all documents in that file will require a substantial amount of resources and will inevitably be time consuming. That is particularly true with respect to documents which have been obtained from third-party respondents*".

(66) The defendant did, however, still not provide the applicants with a complete statement of content of the file, from which they could properly restrict their access request in an informed and meaningful manner. Neither did the defendant openly inform that the selective list that it had drawn up on 30 August 2010 failed to include key parts of the case file. Nor did the defendant comment on why it had not accepted any of DB Schenker's invitations to discuss a reasonable extension of the statutory time-limit.[45]

(67) **On 16 August 2011** (378 days after the access request), ESA sent a letter to DB Schenker to inform that it had taken a decision on certain additional documents.[46] The letter was sent by regular mail service and was received on 23 August 2011.

(68) The first part of the decision denied access to the documents that ESA had seized from Norway Post during its dawn raid on 21-24 June 2004 (the inspection documents). This part of the decision was subsequently challenged by DB Schenker in an annulment action, on 19 October 2010, in Case E-14/11 (pending).

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45 DB Schenker has subsequently discovered that all third parties were consulted on the same date in identically framed letters, on 20 and 21 October 2010, almost three months after the access request was submitted, see § 84 below. By contrast, the pool of documents that was released in the letter dated 16 February 2011 only dealt with one particular group of third parties, the supermarket/kiosk/gas station chains, which supports that the defendant has been "*parceling out*" documents.

46 See **Annex A.25**.

(69) The second part of the decision granted full or partial access to a second pool of third party documents. The pool only consisted of 138 documents of which as many as 112 were cleared for full access.

(70) The defendant stated that it was still working on an unidentified amount of third party documents relating to 24 additional third parties, and that third party consultation was still ongoing, more than one year after the access request had been submitted:

> "*The remaining third party documents are still subject to assessment and third party consultation. There are 24 such third parties.*
>
> *The Authority will continue its assessment of DB Schenker's request for access to documents and will revert to you with further information in this regard as soon as practically possible*" (emphasis added).[47]

(71) The defendant's willingness to extend time in the consultation process, to the third parties, should be contrasted with the time limits it imposed on DB Schenker on 18 August 2010 and 30 August 2010, for two and four working days respectively, at the pain of seeing ESA disclose any confidential information if the company should fail to submit "*substantiated claims*" on time.

(72) ESA did not revert with any further response the next seven months. DB Schenker, therefore, decided to prepare for legal action, on 8 March 2012.

2.2 The pre-litigation notice against the failure to act

(73) On 8 March 2012, DB Schenker served a pre-litigation notice on the defendant pursuant to Article 37(2) SCA.[48] The company had then been waiting 583 days for the defendant to take a final decision on its access request.

(74) The pre-litigation notice, was addressed to the president of ESA, and made it clear that the defendant would take legal action under Article 37 SCA against the failure to act, if ESA should fail to adopt a position on the remaining documents belonging to ESA Case No

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47 The defendant has still not taken a decision on these third party documents (as per 8 July 2012), almost two years after the access request was submitted, see § 79 below.

48 See **Annex A.26**.

34250 within the statutory two month pre-litigation period. The notice is set out in full text below:

> *"Dear Ms President,*
>
> ***CASE NO. 68736 – FORMAL PRE-LITIGATION NOTICE – FAILURE TO ACT ON A REQUEST FOR PUBLIC ACCESS TO DOCUMENTS***
>
> *Reference is made to the request for public access to the documents in Case No 34250 (Norway Post/Privpak) that DB Schenker submitted on 3 August 2010 under Article 2(1) of the Rules on Access to Documents (RAD).*
>
> *Article 1 RAD holds that the purpose of the rules is to ensure the "widest possible" access to documents, to establish rules ensuring the "easiest possible" exercise of the right of access and to promote good administrative practice in that regard.*
>
> *DB Schenker has waited more than 20 months for a final answer on its access request so far, and ESA has only processed part of the file in its decisions on 30 August 2010; 5 November 2010; 16 February 2011; and 16 August 2011. Pursuant to Article 7(2) RAD, ESA had a legal obligation to answer the request within 25 working days, at the latest. According to Article 7(1) RAD, the normal time limit is five working days. An extension for an additional 20 working days requires that "the applicant is notified in advance and that detailed reasons are given". No such notice has been provided by ESA.*
>
> *It is the responsibility of ESA to organize its work, files and internal procedures to ensure that it can respond timely to requests for public access to its documents. DB Schenker has, nevertheless, made several invitations to discuss a reasonable extension of the extended time limit in Article 7(2) RAD, if ESA should have encountered unforeseen difficulties, even though the size of the file does not stand out as exceptionally large. Reference is made to our emails on 30 August 2010; 6 September 2010; 14 September 2010; and our letter on 9 November 2010.*
>
> *ESA did not respond to the invitations and has refused to indicate when it plans to finalize its work. This means that DB Schenker has no information on when ESA intends to take a decision on the remaining documents, or even how many*

documents ESA is still reviewing, although the company has waited more than 20 months.

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

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

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

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

- *According to ESA, the initial six months, from 3 August 2010 to 16 February 2011, were mainly used to process correspondence with third*

parties (the "first round") and Norway Post. However, as noted above, all the parties had already submitted non-confidential versions of these documents during the investigation. Although the parties had the right to be consulted again under Article 4(5) RAD in the context of the present access request, it is equally difficult to see how the work in this round could take six months. This is also borne out by the low number of documents granted full or partial non-disclosure (32 documents) during that time, which translates into 4.9 documents per month that might have required more than a routine round of correspondence.

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

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

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

facto monopoly for at least six years; whether the risk of damages claims against Norway Post has been taken into account in ESA's decision making process; etc.

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

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

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

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

- *the index over the documents attached to the file;*
- *ESA's working documents;*
- *any remaining correspondence, including, but not limited to, Norway Post; third parties; and the Norwegian government;*
- *any minutes from meetings between ESA and the Norwegian government to discuss the case to the extent that these are not considered working documents;*

- *any minutes from meetings between the president of ESA and Norway Post or the Norwegian government to discuss the case to the extent that these are not considered working documents;*

- *all documents from DB Schenker in the redacted form they were sent to Norway Post to protect business secrets and confidential information;*

- *a letter from Norway Post to ESA on 13 July 2010;*

- *any other documents not listed in the index of the file but belonging to the case*

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

(75) The pre-litigation notice was sent by express courier service and by email. The email was sent to the president of ESA; the registry of ESA and the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same day at 13h33. Both the director and the registry subsequently sent read receipts at 14h58, and on 9 March 2012, at10h30, respectively.[49] The president of ESA did not send a read receipt.

(76) ESA subsequently failed to send a formal acknowledgement of receipt to DB Schenker, contrary to the standards of sound administration.

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49 See **Annex A.27**.

3. THE ADMINISTRATIVE PROCESS AND STATUS QUO AFTER THE PRE-LITIGATION PERIOD EXPIRED

3.1 The defendant has failed to decide on the access request even after the pre-litigation period expired

(77) ESA responded to the formal pre-litigation notice in a letter dated 9 May 2012, which was sent by regular post service, and only received on 18 May 2012. At page 2 of its letter, the defendant stated that:

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

(78) However, that statement is clearly contradicted by the content of the letter, and in particular by the subsequent statement, set out on page 3, where the defendant admitted that it had still not defined its position on the access request that DB Schenker submitted on 3 August 2010:

> "*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*" (emphasis added).

(79) The letter appears drafted to create confusion about the defendant's progress with that work:

- In its previous letter, on 16 August 2011, the defendant had stated that it was in the process of running a third pool of third party consultations, concerning 23parties. In its letter, on 9 May 2012, almost nine months later, ESA failed to make any reference to the progress with that allegedly ongoing consultation process.

- The letter, on 9 May 2012, granted access to only 50 documents but without clarifying where those documents originated from. In section 2 of its letter, at page 2, with the subtitle "*Further documents to which access is granted*", ESA merely stated:

> *"I am pleased to grant you access to 50 further documents. A list of those documents is attached to as annex 1 to this letter. The documents themselves are all contained on the CD Rom enclosed with this letter".*
>
> The list that the letter refers to, in Annex 1, was set out in an entirely different format than the previous lists that the defendant provided when it granted access to documents in its letters dated 5 November 2010 and 16 February 2011. This time, all the dates had been stripped away, and the list did not state who the documents originated from. Furthermore, ESA had stripped away the column where it had previously stated whether full or partial access was granted, and the reasons for only granting partial access.
>
> - The pool of documents contained on the CD Rom consisted of a mix of internal documents, documents from the Norwegian authorities, and correspondence with Norway Post, and third parties.

(80) This means that ESA had only been able to process 50 documents over the nine months that had passed since its previous letter on 16 August 2011, that the defendant still refused to clarify which parts of the file remained unprocessed and whether the alleged third party consultation was still ongoing, and that the defendant still refused to offer any indication of when the process would be completed, almost two years after the access request was submitted.

3.2 The defendant has refused to disclose the dates for correspondence showing the progress and work on its allegedly still ongoing consultation process

(81) After having served the formal pre-litigation notice, on 8 March 2012, DB Schenker decided to request access to the statement of content of ESA Case No 68736, which is the case number where all correspondence concerning the handling of DB Schenker's access request, on 3 August 2010, to ESA Case No. 34250, should be registered.

(82) The company wanted to review how ESA had handled the access request, including reviewing the dates for its correspondence with the third parties and Norway Post, how many rounds of consultations each party had required, when the consultations had ended, etc.

(83) This section describes how the defendant first denied that such a statement of content even existed, then stalled the request for access to that list for 10 weeks, and then only provided

a print-out where all the dates for its correspondence and actions had been removed. ESA's refusal to provide a regular statement of content is being challenged in a separate annulment action today.

(84) DB Schenker has, however, discovered, in the course of Case E-14/11 (pending) that:

- ESA had waited until 20 and 21 October 2010 before contacting any of the third parties, and then did so by identically framed letters. This means that ESA waited almost three months after it had received DB Schenker's access request, on 3 August 2010, before consulting any of the third parties.

- ESA had also waited more than two months before consulting Norway Post, on 7 October 2010, and then only about specific third party documents in the file.

- ESA had only contacted Norway Post about the inspection documents that had been seized during the dawn raid in 2004, as late as on 2 February 2011. This means that ESA waited more than six months, before asking Norway Post to respond to this part of DB Schenker's request.

- After having allowed Norway Post to submit a global confidentiality claim, on 18 February 2011, covering all the inspection documents, the defendant waited an additional six months before informing DB Schenker, in its letter dated 16 August 2011, of its global decision to deny access to the inspection documents.

(85) These dates were only brought to light after DB Schenker submitted a motion to compel the defendant to surrender a copy of its initial consultation letters to the third parties and Norway Post, which the Court granted on 9 May 2012.

(86) **On 12 March 2012**, DB Schenker submitted its access request, by letter and email, with the title "*Case No 68736 – Request for public access to the statement of content of the file (index)*".[50]

(87) The letter made it clear that the request was part of the company's preparations for litigation against the defendant's failure to process its original access request:

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50 See **Annex A.28**.

> "*Reference is made to the pre-litigation notice that DB Schenker submitted in this matter on 8 March 2012 pursuant to Article 37 SCA. The company has decided to request public access to the index of the file in Case No 68736 (DB Schenker's request for public access to the documents in Case No 34250 – Norway Post/Privpak) under Article 2(1) of the Rules on Access to Documents (RAD) as a preparatory step if the matter should proceed to court*".

(88) The email was sent to the registry of ESA and to the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same day at 11h18. Both the director and the registry subsequently sent read receipts at 13h34 and 18h15, respectively.[51]

(89) **On 15 March 2012**, ESA denied that the document existed:

> "*Thank you for your letter of 12 March 2012 asking for access to the index of the file in Case no. 68736.*
>
> *I have made enquiries about the existence of such a document. I have found no document extant which is an "index" of the file in that case.*
>
> *As no index exists, I cannot grant access to it*".[52]

(90) **On 19 March 2012**, DB Schenker refused to accept that the statement of content did not exist and reiterated its request.[53] The company reminded, in a letter also sent by email, that under Article 6(2) RAD ESA had a legal obligation to cooperate if an access request should not be sufficiently precise, i.a. "*where the documents for which a listing is sought have been registered under a different case number or the statement of content (index) is referred to internally by a different name*" (emphasis added).

(91) The email was sent to the registry of ESA and to the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same

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51 See **Annex A.29**.

52 See **Annex A.30**.

53 See **Annex A.31**.

day at 18h25. Both the director and the registry subsequently sent read receipts at 19h09, and on 20 March 2012, at 10h06, respectively.[54]

(92) **ESA did not respond.**

(93) **On 27 March 2012**, DB Schenker reiterated its request for access to the statement of content again and warned, in a letter that was also sent by email, that the lack of any such document would be considered relevant as evidence even in the ongoing Case E-14/11.[55]

(94) The email was sent to the registry of ESA and to the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same day at 13h08. Both the director and the registry subsequently sent read receipts at 15h03 and 15h18, respectively.[56]

(95) **On 30 March 2012**, ESA reversed its position and stated that the document existed after all.[57] The explanation for why the defendant first had denied that the document existed can only be described as non-credible:

> *"Your request for public access to an index of documents has caused me some confusion.*
>
> *An index is a list in alphabetical order of the names, places and subjects (also sometimes, the terms but those are usually listed in a separate document called a glossary) mentioned in the documents in a file (or in a work such as a book) with references to each page containing a mention of the item concerned.*
>
> *As I stated to you previously, no such alphabetical listing was ever generated. The documents in the file were analysed manually, not through some index or similar tool.*
>
> *However, your letter of 27 March 2012 now indicates that you wish to have access to "the statement of content of the file (index)".*

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54 See **Annex A.32**.

55 See **Annex A.33**.

56 See **Annex A.34**.

57 See **Annex A.35**.

May I take it that you mean by a "statement of content" a list of the documents contained in the file rather than a document containing an alphabetical analysis of the contents of the documents? "

(96) Remarkably, ESA did still not provide a copy of the statement of content of the file. Instead, the defendant concluded its email in the following fashion:

"*If it is indeed a list of the documents to which you seek access, I can arrange for such a list to be sent to you. I look forward to your clarification at your earliest convenience*".

(97) The email was sent from ESA at 17h23.

(98) Later, the same day, in an email at 18h59, DB Schenker requested, again, that the document be sent by email as soon as possible to avoid further delay.[58] The email was sent to the registry of ESA and to the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same day at 18h59. Both the director and the registry subsequently sent read receipts at 19h52 and, on 2 April 2012, at 11h34, respectively.[59]

(99) **On 5 April 2012**, almost a week later and just before Easter, ESA sent a statement of content of the file but in another case.[60] The defendant did not provide the statement of content in Case No 68736 that the company had been requesting all along.

(100) **On 11 April 2012**, after Easter, DB Schenker requested, yet again, in a letter also sent by email, that ESA provide the correct statement of content, and noted that:

"[...] *the statement of content in Case No 68736 is evidence of how ESA has handled that case* [...]" (original emphasis).[61]

(101) The email was sent to the registry of ESA and to the director of ESA's legal department. The delivery receipt shows that the email was received by ESA's email server the same

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58 See **Annex A.36**.

59 See **Annex A.37**.

60 See **Annex A.38**.

61 See **Annex A.39**. The access request was sent to ESA on 12 March 2012 and not on 23 March 2012, as erroneously stated by ESA in its letter.

day at 13h40. Both the director and the registry subsequently sent read receipts at 14h08 and14h43, respectively.[62]

(102) **ESA did not respond.**

(103) **On 9 May 2012,** the Court ordered, in the course of Case E-14/11 *DB Schenker v ESA* (pending), that the defendant surrender a copy of its initial consultation letters to Norway Post and all the third parties.

(104) **On 23 May 2012**, DB Schenker subsequently received, by email, a letter from ESA with what was presented to be the statement of content in ESA Case No. 68736, which the company had been requesting since 12 March 2012. The letter stated that:

> "*Please find attached a list of the documents on the file in Case 68736 concerning your request for access to the file in Case 34250 Norway Post / Privpak.*
>
> *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* [...]" (emphasis added).[63]

(105) The defendant's attempt to portray the matter as an innocent clerical mistake is beyond belief. At the time, ESA had received no less than four follow up letters and emails, demanding an answer: on 19 March 2012; on 27 March 2012; on 30 March 2012; and on 11 April 2012; in addition to the motion to compel disclosure that was served on 24 April 2012.

(106) Even more remarkable is the fact that the defendant, even at that late stage, and without offering any reasons, had stripped the statement of content for all the dates of its incoming and outgoing correspondence, thus making it impossible for DB Schenker to see the progress of its allegedly ongoing consultation rounds.

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62 See **Annex A.40**.

63 See **Annex A.43**.

3.3 The defendant has failed to disclose the complete statement of content of the file and refuses to clarify which documents or types of documents it has not yet processed

(107) As the record above demonstrates, the defendant has not taken any meaningful initiative to clarify which documents or types of documents it has not yet processed.

(108) The defendant has instead, throughout the entire process, resisted disclosing a proper and complete statement of content, listing all documents that belong to ESA Case No 34250, including dates and authors/addressees and the dates when the documents were registered.

(109) A proper and complete statement of content would have allowed DB Schenker to monitor the defendant's progress, verify that the defendant did not exclude certain documents, be able to consider in an informed and meaningful manner whether to restrict its request, and ask the defendant to give priority to specific documents.

(110) In its letter, on 9 May 2012, the defendant has sought to create the impression that it has disclosed a statement of content of the entire case file, see page 2, in Section 1 with the subtitle "*Index over the documents attached to the file*":

> "*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 [you] received a complete list of all the documents on the file to which [Norway Post] was granted access when the [Statement of Objections] was issued in December 2008*".

(111) The two lists that the defendant has referred to do, however, not constitute a proper and complete statement of content of the case file:

- The first list, sent on 5 April 2012, was the list that the defendant sent <u>in error</u> when DB Schenker was pressing ESA for the statement of content in the access case, to review its progress (see § 99 above). That email did not even pretend to contain a statement of content, and only informed that:

  "*Please find attached a list of the documents in the file from the date of the Statement of Objections. You have already received a list of the documents which pre date the SO*".

The list does not even list the authors/addressees and excludes a complete listing of the working documents such as i.a. minutes. The reliability of the documents is clearly questionable since a prominent letter from Norway Post, dated 13 July 2010, that the defendant, on 30 August 2010, labeled as "*the only document of evidential value that was submitted after the oral hearing in June 2009*" (emphasis added), is not even on the list.

- The second list, sent on 30 August 2010, is the list covering the period from DB Schenker submitted its antitrust complaint in 2002 and until the defendant issued its Statement of Objections, on 18 December 2008, a period of more than six years. However, rather than list all the documents that belong to the case, the second list only contains the restricted documents that Norway Post was granted access to, in the course of the investigation. The list also excludes key evidence, such as all the inspection documents and all working documents, including i.a. minutes from meetings between ESA and Norway Post and the Ministry of Transport and Communication, etc.

(112) DB Schenker is therefore pursuing a parallel action under Article 36(2) SCA to annul the defendant's decision, on 9 May 2012, to refuse access to a proper and complete statement of content of the case file.

3.4 The defendant has failed to register all documents belonging to the case

(113) The defendant's refusal to provide a proper and complete statement of content of the case file appears, at least in part, to be connected with a failure to register all documents properly during the course of the investigation.

(114) During the course of Case E-14/11 (pending), the defendant has already been compelled to admit that the inspection documents, or 2800 pages of core evidence that was seized from Norway Post in the dawn raid in 2004, were never individually registered in the case file. The defendant is simply unable to show a proper record of custody for that evidence, from 2004 and until present day.

(115) The defendant's failure to handle the access request and its refusal even to provide a proper and complete statement of content of the case file appears to flow from a larger and long lasting failure to administer its case files in antitrust cases, in accordance with the standards of sound administration.

3.5 The defendant has refused to state when it plans to complete the process even 704 days after the access request was submitted

(116) DB Schenker has, at present, waited more than 704 days for the defendant to process its access request. Throughout the entire period, the defendant has repeatedly ignored all calls for it to state when it plans to complete work.

(117) Although the applicants have raised the issue in no less than four complaints, addressed to the president of ESA, the defendant has consistently been unwilling to provide any meaningful transparency.

(118) When DB Schenker invited the defendant to discuss a reasonable extension of even the extended statutory time limit in Article 7(2) RAD, if it had met unforeseen difficulties, the defendant simply ignored the invitation.

4. ADMISSIBILITY

4.1 The application against the failure to act is admissible

(119) Pursuant to Article 37(3) SCA, any natural or legal person may complain to the Court "*that the EFTA Surveillance Authority has failed to address to that person any decision*". Union case law has held that standing must be granted to applicants who would have been the addressees of such a decision or directly and individually concerned by it had it been adopted.[64]

(120) The present action concerns the defendant's failure to define its position on the access request that the applicants submitted on 3 August 2010. It follows that the subject matter

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64 See Case 68/95 *T. Port v Commission* [1996] ECR I-6065, at §§ 58-59. See also Case T-395/04 *Air One v Commission* [2006] ECR II-1343, at § 25: "*With regard to the admissibility of a claim for a declaration that there has been a failure to act on the part of the Commission, it should be made clear that Articles 230 EC and 232 EC merely prescribe one and the same remedy. It follows that, just as the fourth paragraph of Article 230 EC allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 232 EC must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way* [...]" (emphasis added). See similarly Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, at § 27.

of the case concerns the absence of a decision that would have been addressed to the applicants, and that they therefore have standing to pursue the present action.[65]

(121) Pursuant to Article 37(2) SCA, an action for failure to act requires that the defendant "*has first been called upon to act*". Article 37(2) SCA does not lay down specific requirements for the format of such a notice, but case law has held that the pre-litigation notice "*must indicate that it constitutes a preliminary to legal proceedings and it must enable ESA to determine what measures it is actually being asked to take*".[66]

(122) The formal pre-litigation notice on 8 March 2012 clearly satisfied those requirements, see in particular at page 4:[67]

> "*The company calls on ESA to take a decision on all remaining documents that have not yet been processed under the request that was submitted on 3 August 2010, within two months of this notice, or face legal action under Article 37 SCA if it should fail to adopt a position on any of those documents by the expiry of the statutory time limit.*
>
> *For obvious reasons, DB Schenker cannot identify all the remaining documents, but expects a decision on the following documents or type of documents:*[...]
>
> *ESA is put on notice that DB Schenker could consider the merits for bringing a damages claim under Articles 46(2) and 39 SCA for losses caused, or augmented by, a failure to provide timely access* [...]" (emphasis added).

(123) It should be noted that the defendant failed to send a formal acknowledgement of receipt. The formal pre-litigation notice was, however, received by ESA's email server on 8

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65 For the sake of completeness, DB Schenker recalls that its standing was not contested in the Case E-14/11 (pending), which concerns an annulment action under Article 36(2) SCA against the defendant's decision on part of the same access request, denying the company access to the inspection documents seized from Norway Post in 2004. By the same token, the applicants have standing to pursue an action against the defendant for its failure to take a final decision on the remaining part of the same access request.

66 See the order of the Court in Case E-5/08 *Bergling v ESA* [2008] EFTA Ct. Rep. 316, at § 4. See similarly the order of the Court in Case E-7/96 *Hansen v ESA* [1997] EFTA Ct. Rep. 101, at § 15.

67 See **Annex A.26**.

March 2012, at 13h33, and read by its legal director the same day, at 14h58.[68] This means that the defendant was required to define its position "*within two months*", i.e. by 8 May 2012.

(124) The defendant failed to respond within the statutory time limit. Instead, ESA sent a letter, dated 9 May 2012, by regular post service, which was only received on 18 May 2012.[69] This means that the response was received outside the statutory two month time limit.[70]

(125) At page 2 of its letter, the defendant stated that:

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

(126) However, that statement is clearly contradicted by the content of the letter itself, and in particular by the subsequent statement made at page 3, where the defendant admitted that it had still not defined its position on the applicant's access request that was received on 3 August 2010:

> "*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*" (emphasis added).

(127) This means, under established case law, that the defendant has failed to define its position on DB Schenker's access request.[71] Consequently, it is the defendant's failure to define a

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68 See **Annex A.27**.

69 See **Annex A.42** for a copy of an email from DB Schenker to ESA on 18 May 2012, confirming the receipt of the letter.

70 Under Union case law, it is the time of the receipt that decides whether the defendant has met its statutory two month time limit, see Joined Cases T-194/97 and T-83/98 *Branco v Commission* [2000] ECR II-69, at § 55.

71 See i.a. Joined cases T-344/00 and T-345/00 *CEVA v Commission* [2003] ECR II-229, at § 80: "*A letter emanating from an institution, stating that examination of the questions raised is in progress, does not, however, constitute the definition of a position which brings to an end a failure to act* [...]" (emphasis added). See similarly Case T-212/99 *Intervet v Commission* [2002] ECR II-1445, at § 61. See also Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, at § 88: "*A letter from an institution called*

position on the remaining documents belonging to ESA Case No 34250 that is the subject matter of the action for failure to act.

(128) Pursuant to Article 37(2) SCA, an action for failure to act may be brought within four months after the pre-litigation notice was served on the defendant, on 8 March 2012. The present action has therefore been brought within the statutory time limit, i.e. by Monday 9 July 2012 on account of Article 76(2) RoP.

(129) The action against the failure to act is therefore admissible.

4.2 The application for damages is admissible

(130) Pursuant to Article 46(2) SCA, "*the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties*". It follows that standing must be granted to those who contend to have been injured by the defendant, as long as the claim has not been assigned.[72]

(131) In the present case, it is the damage caused by the defendant's failure to handle DB Schenker's access request in accordance with its legal obligations, including but not limited to its failure to act above, that is the subject matter of the damages action.

(132) The application for damages is therefore admissible.

5. PLEAS IN LAW

5.1 The defendant has infringed Article 37 SCA by failing to meet its legal obligation to decide on the access request that the applicants submitted on 3 august 2010

(133) Article 37(1) SCA states that:

> "*Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established*".

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upon to act under Article 175 of the Treaty stating that the questions raised are being examined does not in fact amount to the defining of a position such as to release it from its duty to act [...]" (emphasis added). See similarly Case 13/83 *Parliament v Council* [1985] ECR 1513, at § 25.

72 See i.a. Case 118/83 *CMC v Commission* [1985] ECR 2325, at § 31.

(134) Article 37(3) SCA extends a similar right to take action, to the applicants.

(135) DB Schenker submits that the defendant, at the time of the formal pre-litigation notice, on 8 March 2012, had been infringing its legal obligation to decide on the access request, for a significant period already. When the pre-litigation notice was served, the defendant had spent 583 days on the access request.

(136) At the time of the present action, the defendant has spent more than 704 days on the request, and still finds itself unable to state when it plans to complete the process.

(137) The defendant has therefore committed a clear infringement of Article 37 SCA when it failed to take a decision, after having been duly called upon to act, on 8 March 2012, on the remaining parts of the access request even after the pre-litigation period expired on 8 May 2012.

5.1.1 The right of access has been established under the EEA and SCA Agreements and is a fundamental right in EEA law

(138) The failure to act in this case concerns the right of access to documents that flows from Article 2(1) RAD:

> "*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*" (emphasis added).

(139) Article 1 RAD states that the purpose of the rules is to:

> "*(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to 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*" (emphasis added)

(140) According to Article 2(3) RAD, the right of access extends 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*" (emphasis added).

(141) Article 3 RAD defines "*document*" as:

> "*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*" (emphasis added).

(142) This includes databases in which data about ESA's correspondence and other documents are registered with i.a. the dates of correspondence when it was received, the dates of internal documents and later amendments, who the author/receiver of correspondence and internal documents are, etc. See to that effect the Commission's 2008 proposal for a recasting of Regulation 1049/2001, proposing to add the following clarification to the corresponding definition of "*document*":

> "*data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system*"(emphasis added).[73]

(143) RAD took effect on 30 June 2008, and according to Article 13 RAD, ESA was obligated to "*publish these Rules in the EEA Supplement to the Official Journal of the European Union*". More than four years later, ESA has still not published the rules in accordance with its obligation.

(144) By contrast, a similar right of access under EU law has existed, and been properly published, for almost 20 years, see Article 2(1) of Regulation 1049/2001:

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[73] See COM(2008) 229 final, at page 17. See also page 5, which confirms that the proposal only was intended to clarify the definition, within the existing scope of the definition in Article 3 of Regulation 1049/2001. See by also Case T-436/09 *Dufour v ECB*, on 26 October 2011, at § 160.

"*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation*" (emphasis added).[74]

(145) The right of access is also enshrined in Article 15(3) TFEU:

"*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph*" [...]

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph" (emphasis added).

(146) Pursuant to Article 6(1) TEU, the right of access must also be considered a fundamental right, by virtue of Article 42 CFREU:

"*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium*" (emphasis added).

(147) The right of access has therefore long been a central piece of Union law.

(148) The EFTA Member States were legally obliged to establish a similar right of access in relation to ESA, under Article 108(1) EEA, which requires that:

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74 See Regulation No 1049/2001 *of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents* (OJ 2001 L 145, p. 43). The right of access was originally established by Council Decision 93/731 of 20 December 1993 *on public access to Council documents* (OJ 1993 L 340, p. 43) and Commission Decision 94/90 of 8 February 1994 *on public access to Commission documents* (OJ 1994 L 46, p. 58).

> "*The EFTA States shall establish* [...] *procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement* [...]" (emphasis added).

(149) Article 13 SCA empowers ESA to adopt its own rules of procedure, including laying down the right of access in Article 2(1) RAD to its documents, under the conditions set out in RAD.

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

> "*Whereas openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, based on democracy and human rights, as referred to in recital 1 of the preamble of the EEA Agreement,*
>
> *Whereas the Authority wishes, to adopt rules on access to documents substantively similar to Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents,*
>
> *Whereas the Authority will in the application of the rules strive to achieve a homogeneous interpretation with that of the Community Courts and the European Ombudsman when interpreting a provision of these which is identical to a provision in Regulation 1049/2001 so as to ensure at least the same degree of openness as provided for by the Regulation* [...] (emphasis added).

(151) It follows that the three EFTA Member States met their obligation in Article 108(1) EEA to provide a right of access to the defendant's documents, on 30 June 2008, when RAD was established by the defendant under Article 13 SCA. After Article 42 CFREU was made binding in Union law, through Article 6(1) TEU, the right of access must now also be recognized as a fundamental right in EEA law. The right of access is therefore a right based on the SCA and EEA Agreements, and also a fundamental right in EEA law.

5.1.2 The defendant has failed to meet its legal obligation to take a decision within the extended time limit in Article 7(2) RAD

(152) The right of access results in a corresponding duty of the defendant to decide on individual requests from citizens who choose to exercise that right. This duty does not only flow from the content of the right itself but has also been pronounced in Article 7 RAD, which carries the title "*Processing of applications*".

(153) According to Article 7(1) RAD:

> *"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*" (emphasis added).

(154) Under Article 7(2) RAD, the time limit in Article 7(1) RAD can be extended by 20 working days but only in "*exceptional cases*", and then only if the applicant is notified in advance and detailed reasons are given:

> *"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*".

(155) The duty to take a decision on individual access requests within the time limits set out in Article 7 RAD is complemented by a specific duty to examine the requests, in Article 6(1) RAD, and a specific duty to assist the applicant if a request is not found sufficiently precise, in Article 6(2) RAD.

(156) Article 6(1) RAD states that:

> "*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 [SCA] 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 (emphasis added).

(157) Article 6(2) RAD states that:

"*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*" (emphasis added).

(158) According to Article 8(1) RAD, the defendant has a duty to provide the documents to which public access is granted in the format of the applicant's choice:

"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 [...]".

(159) The duty of the defendant to decide on individual requests therefore flows from the content of the right of access in addition to the direct expression of that duty in Article 7 RAD and the complementing duties, set out in particular in Articles 6(1) and (2) and 8(1) RAD, as interpreted in light of the fundamental right to, as well as general principle of, sound administration, and the overall purpose of the right of access, as pronounced in Article 1 RAD, to ensure *"the easiest possible exercise of this right"*, and its preamble, "*to ensure at least the same degree of openness"* as under Union law.

(160) On the same basis, the specific time limits set out in Article 7 RAD marks that the duty to take a decision on an individual request matures, as a main rule, within five working days of the registration of the request, or sooner, if possible ("*as quickly as possible).* The time limit is reinforced by the duty in Article 7(1) RAD to provide the applicant with an "*acknowledgement of receipt*", the purpose of which is, at least in part, to establish when the access request has been duly registered, and thereby when time begins to run for the defendant to comply with its duty to take a decision.

(161) According to Article 7(2) RAD, the time limits in Article 7(1) RAD can only be extended in exceptional circumstances, and then only by 20 working days. As examples of exceptional circumstances, Article 7(2) RAD mentions "*a very large number of documents*". It follows that it is the responsibility of the defendant to organize its files and internal processes, including in cases concerning large files, in such a manner that it can

comply at least with the extended time limit, i.a. by properly registering documents during an investigation, requesting non-confidential versions to be put on file continuously, starting third party consultation immediately after an access request has been submitted, etc.

(162) The time limits in Regulation 1049/2001 have been considered mandatory in Union case law.[75] The system is different from RAD in the sense that Articles 7 and 8 there establish a two-step procedure for handling requests. A citizen must first submit an initial application that must be decided within 15 working days. If no decision or a negative decision is taken, the applicant can submit a confirmatory application, which then must be decided within 15 working days. The time limits in the first and second phase may be extended by 15 working days each in "*exceptional cases*". If no decision is taken, even after the time limit for the confirmatory application expires, Article 8(3) in Regulation 1049/2001 entitles the applicant to consider that a negative decision has been taken and challenge that decision in the Union Courts and/or before the European Ombudsman.

(163) The purpose of the mechanism in Article 8(3) in Regulation 1049/2001 is:

> "[...] *to counter the risk that the administration would choose not to reply to an application for access to documents and escape review by the courts* [...] (emphasis added).[76]

(164) By contrast, Article 7 RAD only establishes a one-step procedure, sets different time limits, and lacks a mechanism similar to Article 8(3) in Regulation 1049/2001. However, the purpose of these differences was clearly not to subject the defendant to less stringent requirements, resulting in a less efficient right of access under RAD than under Union law. The choice of adopting a one-step procedure and different time limits in RAD

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75 See i.a. Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1, at § 55-56: "*The Commission is required, during the administrative procedure before it, to observe the procedural guarantees provided for by Community law (Case T-348/94 Enso Española v Commission [1998] ECR II-1875, paragraph 56, and Case T-410/03 Hoechst v Commission [2008] ECR II-881, paragraph 128).* [...] *The period of 15 working days – which may be extended – within which the institution must reply to the confirmatory application, as laid down in Article 8(1) and (2) of Regulation No 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision*" (emphasis added).

76 See Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* [2010] ECR II-1, at § 59.

reflects, if anything, the simple reality that the functioning and area of responsibility of the defendant, in relation to the three EFTA Member States, remains modest, compared to that of the Council, the European Parliament and the Commission, all subject to Regulation 1049/2001, in relation to their 27 EU Member States.[77] This is also borne out of the preamble to RAD that specifically states that its aim is: "*to ensure at least the same degree of openness*" as under Union law (emphasis added).

(165) However, according to established case law, the absence of a mechanism similar to Article 8(3) in Regulation 1049/2001 means that the expiry of the time limit in Article 7 RAD does not by itself constitute a negative decision that can be challenged in the Court.[78] The inactivity of the defendant must therefore be challenged under Article 37 SCA, which by itself requires that the defendant is allowed an additional two month pre-litigation period before legal action can be brought to challenge its inactivity.

(166) On that basis, the time limit in Article 7 RAD must be interpreted as equally mandatory for the defendant to ensure that citizens will not be left without an effective remedy to protect their right of access, on par with Union law. This means that, since the access request concerned the complete file, and the defendant has failed to take a decision on all the documents that belong to the file by the end of its extended time limit in Article 7(2) RAD, on 7 September 2010, the defendant has infringed its legal obligation to decide on the access request.

(167) The applicants therefore respectfully request that the Court declare, under Article 37 SCA, that the defendant has failed to act, as set out in the form of order below.

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77 Article 15(3) TFEU extends the right of access to all Union institutions, bodies, offices and agencies.

78 By contrast, under established case law, a negative decision can be inferred from correspondence with the defendant and the accompanying circumstances where this shows that the defendant has laid down a definitive position, see Case C-521/06 P *Athinaïki Techniki v Commission* [2008] ECR I-5829, at §§ 44-45. The expiry of the time limit in Article 7 RAD will, obviously, be a relevant factor in that context. For recent examples of such instances regarding the defendant, see Cases E-4/12 and E-5/12 (pending).

5.1.3 The defendant has failed to meet its legal obligation to take a decision within reasonable time under the general principle and right to sound administration

(168) Even if the time limit in Article 7(2) RAD should not be held mandatory, the defendant would in any case have a legal obligation to take a decision within a reasonable time, under the general principle and right to sound administration.

(169) The principle of sound administration is a general principle of EEA law and the Court has specifically held that rendering decisions within reasonable time is part of that principle, which is consistent with Union case law.[79][80] This part of the principle has also been made a fundamental right in Article 41(1) CFREU, which is binding in Union law by virtue of Article 6(1) TEU.

(170) Article 41(1) CFREU states that

> "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*".

(171) On the basis of the principle of homogeneity, that right must also be regarded as a fundamental right in EEA law since the Court has already recognized that the principle of sound administration form part of EEA law.

(172) In this context, the standard of reasonable time must be interpreted with due regard to the principle of homogeneity and the objective set out in the preamble to RAD to ensure *"at*

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79 See Case E-2/05 *ESA v Iceland*, [2005] EFTA Ct. Rep. 205, at § 22: "[...] *the Court holds that rendering decisions within a reasonable time is part of sound administration under EEA law*".

80 See i.a. Joined Cases T-400/04, T-402/04 to T-404/04 *Arch Chemicals and Arch Timber v Commission*, on 20 September 2011, at § 65: "*It must be borne in mind that the European Union Courts take the principle of sound administration into consideration to ascertain whether the failure to act by the institution is unlawful because it constitutes a breach of that principle (Case 64/82 Tradax Graanhandel v Commission [1984] ECR 1359, paragraph 22, and Joined Cases T-79/96, T-260/97 and T-117/98 Camar and Tico v Commission and Council [2000] ECR II-2193, paragraph 151). Moreover, the case-law applies the notion of sound administration, in the context of actions for a declaration of failure to act, to ascertain whether the examination which the institution is required to carry out following a request to act, submitted under precise provisions, is conducted diligently and impartially and within a reasonable time (Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 62; Gestevisión Telecinco v Commission, paragraph 57 above, paragraphs 72 to 75; and Case T-395/04 Air One v Commission [2006] ECR II-1343, paragraph 61)*" (emphasis added).

least the same degree of openness" as under Regulation 1049/2001. Timely access to the defendant's documents is, obviously, an inherent part of the right of access. If the defendant could delay access requests significantly longer than Union institutions are allowed, the defendant would circumvent the very purpose behind RAD.

(173) It is therefore relevant to take into account that the maximum period afforded in Article 7 and 8 of Regulation 1049/2001, is 60 working days, and that, by virtue of the mechanism in Article 8(3), applicants are granted an effective remedy to challenge any failure to act immediately after the expiry of that time limit, as a negative decision, in the Union courts or before the European Ombudsman, as set out above at § 162. By way of example, the Commission would have been required to take a decision, in a similar case, by 26 October 2010. It follows, on that basis alone, that the defendant has failed to take a decision on DB Schenker's access request that was submitted on 3 August 2010, within reasonable time.

(174) Even if the standard of reasonable time, in this context, should be extended beyond the maximum time afforded to Union institutions, it would at the very least have to be based on objectively justifiable reasons. In this case, the facts demonstrate the opposite: the defendant has completely failed to conduct the process diligently. The presentation of the evidence in Section 2 above, shows that:

- The defendant repeatedly gave the applicants the impression, at the start of the process, that the matter would be dealt with *"soon"* and *"shortly"*, without objecting when the applicants stated that they assumed that any consultation process with Norway Post and third parties, concerning confidentiality issues, would run quickly because all the parties had been required to provide non-confidential versions of their submissions during the investigation.

- During the initial phase, the defendant must have realized that it would not be able to meet the expectations of the applicants, or even the extended time limit in Article 7(2) RAD for handling large case files. However, the defendant did not provide a proper advance notice, with detailed reasons, to avail itself of the extended time limit, as required under Article 7(2) RAD. The defendant did not even inform DB Schenker, at the time the extended time limit expired, to acknowledge the delay.

- When the applicants subsequently complained that the defendant had overrun its time limit, the defendant waited until a second complaint was made, and then

responded by censuring the applicants for not being willing to restrict their access request to a list of documents that the defendant had provided; without informing that the list omitted significant parts of the case file, such as key evidence seized from Norway Post in 2004, and working documents, including minutes from meetings during the investigation.

- By imposing very short time limits on DB Schenker to submit confidentiality claims (within two to four working days) when Norway Post counter filed an access request at the start of the process, the defendant created the impression that all parties would be required to respond quickly to the company's own access request. Instead, the defendant waited three months before contacting the third parties about any confidentiality claims, in relation to the non-confidential versions that they had already submitted during the investigation, three to seven years earlier. When ESA finally contacted the third parties, it did so by identically framed letters.

- The defendant has subsequently refused to disclose the dates for its correspondence with the third parties and to clarify to what extent it needed more than one round of correspondence before clearing most of the third party documents for access. The manner, in which the defendant tried, for months, to avoid disclosing the statement of content of the access case, i.e. listing the correspondence concerning the allegedly ongoing third party consultation process, demonstrates a disturbing lack of care, at a high level in the organization.

- The defendant claims that the third party consultation is still going on, almost two years after the access request was submitted, whereas the evidence point towards a "*parceling out*" of third party documents long after they have been cleared for access. A majority of the third parties appear not even to have raised confidentiality claims.

- The defendant also waited two months before starting consultations with Norway Post, and then only with regard to parts of the case file. The record shows that the defendant waited as much as six months before contacting Norway Post about the inspection documents that had been seized during the dawn raid in 2004. DB Schenker has subsequently discovered that the documents were never individually registered on the case file, at that time, or later.

- The defendant allowed Norway Post to submit a global confidentiality claim for the entire body of inspection documents and then waited an additional six months before informing DB Schenker of a global decision to refuse access to that part of the file, more than one year after the access request was submitted.

- The defendant has repeatedly ignored invitations from DB Schenker to discuss a reasonable extension of its statutory time limit, presumably because that would have required the defendant to be transparent about how it was organizing the process and the state of the case file.

- DB Schenker has, to no avail, complained directly to the president of ESA on four different occasions in 2010, 2011 and 2012. Still, the defendant refuses to state when it plans to complete its work and clarify what documents, or type of documents, remain unprocessed. The process is run in a black box.

(175) The defendant has clearly failed to meet its legal obligation to take a decision on the applicants' access request within a reasonable time. The excessive use of time is not only the result of the defendant's own failure to organize its files and internal processes properly. The evidence points, if anything, towards a lack of adequate leadership in its organization.

(176) The applicants therefore respectfully request that the Court declare, under Article 37 SCA, that the defendant has failed to act, as set out in the form of order below.

5.2 The defendant has infringed Article 46(2) SCA by failing to meet its legal obligation to take a timely decision on the access request that the applicants submitted on 3 august 2010 and handle the request in an otherwise lawful manner

(177) Article 46(2) SCA establishes a right to claim non-contractual damages from the defendant:

> "*In the case of non-contractual liability, the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties*".

(178) In relation to the corresponding Article 340(2) TFEU, the Union courts have aligned the conditions that must be met, in relation to Union institutions, with the conditions governing state liability:[81]

- the rule of law infringed must be intended to confer rights on individuals (the first condition);
- the breach must be sufficiently serious (the second condition); and
- there must be a direct causal link between the breach and the damage sustained (the third condition)

(179) This Court has established that the same conditions apply to state liability for the three EFTA Member States.[82] The same conditions that apply in Union case law must therefore also apply under Article 46(2) SCA in relation to the defendant.

(180) DB Schenker submits that the defendant's failure to handle their access request timely and in an otherwise lawful manner has led to losses for which the defendant is liable under these conditions. This also includes the losses caused by the infringements that the applicants have put forward in Case E-14/11 concerning to defendant's global refusal to grant access to the inspection documents, and the losses caused by the infringements that the applicants have put forward in the parallel annulment action that the applicants have

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81 See Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, at §§ 41-42: "*The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (Brasserie du Pêcheur and Factortame, paragraph 42). [...] As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (Brasserie du Pêcheur and Factortame, paragraph 51)*" (emphasis added). See similarly Case C-440/07 P *Schneider Electric v Commission* (Grand Chamber) [2009] ECR I-6413, at § 160.

82 See Case E-7/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, at § 66, and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, at §§ 37-38 and 47.

brought, in relation to the documents specified at § 9 above, until a lawful decision has been taken in all instances.

The first condition

(181) As established in Section 5.1 above, the applicants had a right of access, and the defendant had a corresponding duty, that it has infringed, to take a decision on the access request that was submitted on 3 August 2010, by the end of its extended statutory time limit under Article 7(2) RAD or, in any event, within reasonable time under the fundamental right and general principle of sound administration in EEA law.

(182) On the same basis, the defendant has also infringed the applicants' legitimate expectation of a timely decision, as held out by the existence and specific provisions set out in RAD, and the defendant's specific and repeated assurances during the entire process, that it was providing access as "*soon as practically possible*", see § 16, § 18, § 33, § 39, § 50, § 70 and § 78 above.

(183) The right to timely access to the defendant's documents is by its nature intended to confer rights on individuals, i.e. to provide each individual applicant with a protected right to choose which documents to request access to. The protection of that individual right is such that an applicant does not have to state reasons for his request under Article 6(1) RAD, and the supporting duties placed on the defendant to assist each applicant, as set out above at §§ 157-159, have been provided to make that right as effective as possible for each applicant. The wording in Article 7(1) RAD bears out the individual nature of the right of access, by referring specifically to "*an application* [...] *shall be handled as quickly as possible*" and "*the Authority shall either grant access to the document requested* [...]".

(184) Furthermore, the general principle of protection of legitimate expectations in EEA law is also an individual right for which the defendant can be held liable, if breached.[83]

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[83] See i.a. Case T-43/98 *Emesa Sugar v Council* [2001] ECR II-3519, at § 64: "*By contrast, the principle of proportionality referred to in the second plea (Unifruit Hellas, cited at paragraph 63 above, paragraph 42), and the principle of protection of legitimate expectations referred to in the fourth plea (Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraph 15), do constitute rules of law conferring rights on individuals*" (emphasis added). In Joined Cases E-5/04, E/6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, see §§ 170-173, the Court has acknowledged the protection of legitimate expectations as a general principle of EEA law.

(185) The first condition for establishing liability against the defendant is therefore satisfied.

The second condition

(186) The standards for demonstrating a sufficiently serious breach depends under current Union case law on whether an institution had discretion, or no or considerably reduced discretion.[84] In the first case, the standard is whether the institution "*manifestly and gravely disregarded the limits on its discretion*", whereas in the latter case, the standard is significantly lower, and can result from the "*mere infringement*" of the law.[85]

(187) DB Schenker submits that the correct standard in this case is the lower standard because the right of access and the duty of the defendant to take a timely decision on access requests is a law bound process in which the defendant has no discretion. The outcome in this case does, however, not depend on the choice of standard because the facts set out above, in Section 2.1 and 3, through the defendant's own correspondence and admissions,

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84 See Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, at §§ 43-44: "*As to the second condition, as regards both Community liability under Article 215 of the Treaty and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion (Brasserie du Pêcheur and Factortame, paragraph 55; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others v Germany [1996] ECR I-4845, paragraph 25). Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, to that effect, Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 28)*" (emphasis added).

85 The range of the lower standard has been developed in case law, see i.a Joined cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica v Commission* [2001] ECR II-1975, at § 134: "*Where the institution in question has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see judgment of the Court in Case C-352/98 P Bergaderm and Goupil v Commission ECR [2000] I-5291, paragraphs 41 to 44). In particular, a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed, will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 215 of the Treaty*" (emphasis added). See similarly Case T-285/03 Agraz v Commission [2005] ECR II-1063, at § 40.

shows a staggering lack of diligence and care, over a long period, and at high level within the organization of the defendant, towards the applicants.

(188) The defendant has acted with manifest and grave disregard of its legal obligations to take a timely decision, and handle the access request in an otherwise lawful manner. The second condition for establishing liability against the defendant is therefore satisfied.

The third condition

(189) The applicants submit that there is a direct causal link between the breach and the damage that they have sustained. The damage for which they seek redress is twofold:

- DB Schenker has incurred legal expenses with its efforts to establish the true state of affairs regarding the defendant's handling of its access request and bring the defendant into compliance. These expenses fall in two categories, of which the applicants only claim compensation under the present plea for the last category. The first category consists of legal expenses for which DB Schenker is entitled to recover in the form of a cost order in Case E- 14/11, the present action and the parallel annulment action, i.e. costs covered by Article 69 RoP ("*expenses necessarily incurred* [...] *for the purpose of the proceedings*"). The second category consists of legal expenses that DB Schenker has incurred, which fall outside the scope of Article 69 RoP, and results from significant parts of the correspondence, detailed in Sections 2 and 3 above, with the defendant during the process and the efforts to bring the defendant into compliance with its legal obligations. These costs have been calculated to represent approximately EUR 22 500 at present.

- DB Schenker has also incurred legal expenses in its efforts to stay the follow-on action in the Oslo City Court against Norway Post until the access request has been lawfully decided by the defendant. Norway Post is opposing a stay of the proceedings since this will only lead more evidence to fall into the hands of the applicants. The proceedings were originally stayed until the Court rendered its judgment on 18 April 2012. Norway Post subsequently filed a motion to commence the proceedings on 9 May 2012, which DB Schenker opposed in a motion filed on 11 May 2012. Norway Post has submitted a second motion on 8 June 2012 which DB Schenker opposed on 25 June 2012. The City Court will continue to hear arguments from both sides after the summer recess, and additional

costs will therefore be incurred by DB Schenker. The legal expenses have not been invoiced yet but are calculated, at present, to represent approximately EUR 26 000 EUR.

(190) The direct causal link between the losses set out above and the infringements that the defendant has committed follows from a comparison of the current situation, with what the situation would have been if the defendant had taken a timely and otherwise lawful decision on the applicants' access request.[86] Absent the defendant's infringements of the law, DB Schenker would not have incurred the losses above.[87] The third condition for establishing liability against the defendant is therefore satisfied.

(191) The applicants therefore submit that the defendant must be held liable under Article 46(2) SCA for the losses, as set out above.

(192) The applicants request that the Court decide on the action for damages by way of an interlocutory judgement, to have the liability of the defendant decided separately from the calculation of the final loss. The reasons for that are twofold.

- First, the losses that have already materialized are likely to rise in the near future and the company has a right to be made whole under Article 46(2) SCA. The total loss can therefore only be established after the defendant has been brought into compliance with its legal obligations, and taken a lawful decision on the access request.

- Second, for reasons of procedural economy, it would, in the light of the relatively modest claim, be better for all involved if the Court first decide on Case E-14/11, the parallel annulment action, the action against the failure to act, and the liability issue. This would make it far easier for the parties, on their own, to first

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86 See i.a. Case T-351/03 Schneider Electric v Commission [2007] ECR II-2237, at § 264: "*In other words, the analysis of the causal link cannot start from the incorrect premise that, in the absence of an unlawful measure, the institution would have refrained from acting or would have adopted a contrary measure, which could also amount to unlawful conduct on its part, but must be based on a comparison between the situation arising, for the third party concerned, from the wrongful measure and the situation which would have arisen for that third party if the institution's conduct had been in conformity with the law*".

87 For the sake of clarity, the applicants' losses, in this context, are independent of which documents the defendant must grant full or partial access to.

try to come to an agreement as to what remaining legal expenses that the defendant can be held liable for, rather than having the Court canvass the multiple interactions between the parties over the past two years.

(193) The applicants also note that the defendant has been given a precise presentation of the nature and type of the losses, the factual basis for the losses, and the present calculation of the claim, in order to be able to prepare its defence adequately.

(194) DB Schenker is also requesting default interest against the defendant from the time of the interlocutory judgement, in the event that the Court agrees with their plea.

6. FORM OF ORDER SOUGHT

(195) In relation to the application against the failure to act, the applicants respectfully request that the Court:

1. **Declare that the defendant has infringed Article 37(1) SCA by failing to act on its duty, under the Rules on Access to Documents, the Surveillance and Court Agreement and the EEA Agreement, to define its position on the request that the applicants submitted on 3 August 2010 for access to the complete file in ESA Case No 34520 (Norway Post/Privpak).**

2. **Order the defendant to bear the costs.**

(196) In relation to the application for damages, the applicants respectfully request that the Court, in view of the fact that it is not yet possible to fix the amount of damages, give an interlocutory ruling on the liability of the defendant and defer to a subsequent stage of the proceedings the question of assessing the damages attributable to the defendant:

1. **Find that the inaction of the defendant between 7 September 2010 or any later date, and until the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, is such as to render the defendant liable, including for default interest, under Article 46(2) SCA.**

2. **Within six months after the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, the applicants shall inform the Court of**

the amount of damages that they claim and whether the parties agree on that amount.

3. **In the event of a failure to agree on the amount of damages, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the defendant's failure to lawfully define its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010.**

4. **Order the defendant to bear the costs.**

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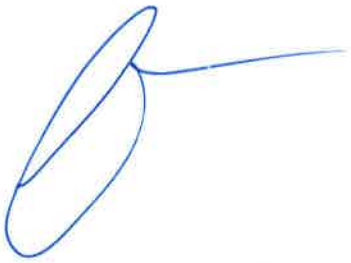
For DB Schenker



Jon Midthjell

Oslo, 8 July 2012

7. SCHEDULE OF ANNEXES

Number	Description	No. pages	References	Language
Annex A.1	A copy of an email from DB Schenker to ESA, dated 3 August 2010	1	Fn 16	EN
Annex A.2	A copy of an email from ESA to DB Schenker, dated 4 August 2010	1	Fn 17	EN
Annex A.3	A copy of an email from DB Schenker to ESA, dated 4 August 2010	1	Fn 19	EN
Annex A.4	A copy of an email from ESA to DB Schenker, dated 10 August 2010	1	Fn 20	EN
Annex A.5	A copy of an email from DB Schenker to ESA, dated 11 August 2010	1	Fn 21	EN
Annex A.6	A copy of an email from ESA to DB Schenker, dated 18 August 2010	1	Fn 22	EN
Annex A.7	A copy of an email from ESA to DB Schenker, dated 30 August 2010, including a list of documents	34	Fn 23	EN
Annex A.8	A copy of an email from DB Schenker to ESA, dated 30 August 2010	1	Fn 26	EN
Annex A.9	A copy of an email from ESA to DB Schenker, dated 1 September 2010	1	Fn 27	EN
Annex A.10	A copy of an email from DB Schenker to ESA, dated 6 September 2010	1	Fn 28	EN
Annex A.11	A copy of an email from DB Schenker to ESA, dated 14 September 2010	1	Fn 29	EN
Annex A.12	A copy of an email from ESA to DB Schenker, dated 17 September 2010	1	Fn 30	EN

Annex A.13	A copy of an email from DB Schenker to ESA, dated 17 September 2010	1	Fn 33	EN
Annex A.14	A copy of a letter from DB Schenker to the president of ESA, dated 9 November 2010	3	Fn 10; Fn 34	EN
Annex A.15	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 9 November 2010	2	Fn 35	EN
Annex A.16	A copy of a letter from ESA to DB Schenker, dated 10 November 2010	6	Fn 36	EN
Annex A.17	A copy of a letter from ESA to DB Schenker, dated 5 November 2010 and received 11 November 2010	1	Fn 37	EN
Annex A.18	A copy of a letter from DB Schenker to the president of ESA, with an attachment, dated 6 January 2011	37	Fn 10; Fn 38	EN
Annex A.19	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 6 and 7 January 2011	2	Fn 39	EN
Annex A.20	A copy of a letter from DB Schenker to the president of ESA, dated 17 February 2011	3	Fn 10; Fn 40	EN
Annex A.21	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 17 and 18 February 2011	3	Fn 41	EN
Annex A.22	A copy of a letter from ESA to DB Schenker, dated 18 February 2011	3	Fn 42	EN
Annex A.23	A copy of an email exchange between DB Schenker and ESA, dated 18 February 2011	1	Fn 43	EN
Annex A.24	A copy of a letter from ESA to DB Schenker, dated 16 February 2011 and received 22 February 2011	1	Fn 44	EN
Annex A.25	A copy of a letter from ESA to DB Schenker, dated 16 August 2011 and received 23 August 2011	19	Fn 46	EN

Annex A.26	A copy of a formal pre-litigation notice under Article 37(2) SCA from DB Schenker to ESA, dated 8 March 2012	5	Fn 10; Fn 48; Fn 67	EN
Annex A.27	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 8 and 9 March 2012	3	Fn 49; Fn 68	EN
Annex A.28	A copy of letter (access request) from DB Schenker to ESA, dated 12 March 2012	2	Fn 50	EN
Annex A.29	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 12 March 2012	3	Fn 51	EN
Annex A.30	A copy of an email from ESA to DB Schenker, dated 15 March 2012	1	Fn 52	EN
Annex A.31	A copy of a letter from DB Schenker to ESA, dated 19 March 2012	3	Fn 53	EN
Annex A.32	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 19 and 20 March 2012	3	Fn 54	EN
Annex A.33	A copy of a letter from DB Schenker to ESA, dated 27 March 2012	3	Fn 55	EN
Annex A.34	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 27 March 2012	3	Fn 56	EN
Annex A.35	A copy of an email from ESA to DB Schenker, dated 30 March 2012	1	Fn 57	EN
Annex A.36	A copy of an email from DB Schenker to ESA, dated 30 March 2012	1	Fn 58	EN
Annex A.37	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 30 March and 2 April 2012	3	Fn 59	EN
Annex A.38	A copy of an email from ESA to DB Schenker, dated 5 April 2012	6	Fn 60	EN

Annex A.39	A copy of an email from DB Schenker to ESA, dated 11 April 2012	4	Fn 61	EN
Annex A.40	A copy of electronic delivery and read receipts from ESA to DB Schenker, dated 11 April 2012	3	Fn 62	EN
Annex A.41	A copy of a letter from ESA to DB Schenker, dated 9 May 2012 and received on 18 May 2012, including two .txt files included on the CD Rom.	15	Fn 11; Fn 12; Fn 13; Fn 14; Fn 24	EN
Annex A.42	A copy of an email from DB Schenker to ESA, dated 18 May 2012	1	Fn 69	EN
Annex A.43	A copy of a letter from ESA to DB Schenker, dated 22 May 2012 and received by email on 23 May 2012	7	Fn 15; Fn 63	EN
Annex A.44	An excerpt of pages 1 and 45 in ESA's annual report 2010	2	Fn 5	EN
Annex A.45	A copy of a letter from the president of ESA to DB Schenker, dated 29 May 2009	2	Fn 9	EN