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Case No: 72261

Event No: 658239

ORIGINAL

EFTA SURVEILLANCE
AUTHORITY

ORIGINAL

IN THE EFTA COURT

DEFENCE

submitted pursuant to Article 35 of the Rules of Procedure of the EFTA Court by

THE EFTA SURVEILLANCE AUTHORITY

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

IN CASE E-8/12

Schenker North AB, Schenker Privpak AB and Schenker Privpak AS

v

EFTA Surveillance Authority

regarding an application for annulment of decisions allegedly
adopted by the EFTA Surveillance Authority ("the Authority")
in letters of 9 May 2012, 22 May 2012 and 2 July 2012 concerning
requests for public access to, *inter alia*, documents on its
administrative case files no. 34250 and no. 68736.

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1 INTRODUCTION

1.1 The three actions brought by Deutsche Bahn

1. The three Scandinavian Applicants in this case ("the Applicants" or "DB") are indirect but wholly-owned logistics subsidiaries of Deutsche Bahn AG, Berlin, which in turn is wholly owned by the German state.
2. Between October 2011 and July 2012, DB brought three cases in the EFTA Court concerning correspondence by the Authority with their Norwegian counsel regarding requests for public access to documents held on the Authority's records.¹ DB's underlying requests essentially concerned two files. First, case no. 34250 (*Norway Post/Privpak*) relating to an abuse of dominance investigation by the Authority against the Norwegian postal services incumbent, *Posten Norge AS* ("Norway Post"). That investigation concerned exclusionary practices in parcel delivery services in Norway. The second administrative case file is no. 68736 and relates to DB's own public access request to all documents of the main case file no. 34250.
3. DB had acted as complainants in the Norway Post investigation. Further, DB state to have initiated an action for damages against that undertaking in the *Oslo tingrett* (Oslo district court, Norway) following the Authority's Decision in case no. 34250 of 14 July 2010. Therein, the Authority found that Norway Post had indeed infringed Article 54 of the EEA Agreement ("EEA") by abusing its dominant position in the B-to-C parcel market in Norway between 2000 and 2006. Following an action for annulment of that decision brought by Norway Post, the Court upheld the decision as regards the breach of Article 54 EEA, but reduced the fine imposed on the undertaking by 20% because of the overly long duration of the investigation.²
4. While DB explicitly argue to pursue their requests for access, *inter alia*, to obtain information that may be used in their private action allegedly brought

¹ Case E-14/11, lodged on 19 October 2011; Case E-7/12, lodged on 9 July 2012; and Case E-8/12, lodged on 15 July 2012.

² Case E-15/10 *Posten Norge v EFTA Surveillance Authority*, judgment of 18 April 2012, not yet reported.

against Norway Post, DB made these requests not in their capacity as claimants for damages in a follow-on action. Rather, DB acted as members of the general public under the Authority's 2008 rules for public access to documents ("RAD 2008").³

5. In particular, DB have not availed themselves of their EEA right to request the Norwegian court to be provided, under the rules on sincere cooperation between national courts and the Authority, with case specific pieces of evidence from the Authority's case file. This EEA right is commonly referred to as the *Zwartveld* procedure and grants privileged access to such information, and under certain circumstances even to business secrets.⁴ The right exists in the EFTA pillar of the EEA Agreement pursuant to Article 6 EEA.⁵
6. Rather, in their first Case **E-14/11**, DB sought the annulment of a letter of 16 August 2011 in so far as it refused the general public access to certain documents copied by the Authority in the course of an unannounced competition inspection carried out at the Oslo premises of Norway Post under Protocol 4 to the SCA (the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice).⁶ By judgment of 21 December 2012, this Court largely allowed the appeal,

³ Authority Decision No 407/08/COL of 27 June 2008 to adopt new Rules on Public Access to documents. This decision has since been repealed by Authority Decision No 300/12/COL of 5 September 2012 to adopt revised Rules on public access to documents, and repealing Decision 407/08/COL; see also para. 17 below.

⁴ Order of the Court of Justice of 13 July 1990 in Case C-2/88-IMM *Zwartveld a.o.* [1990] ECR I-3365 and the Authority's Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement, OJ 2006 C 305, p. 19 and EEA Supplement to the OJ 2006 No 62, p. 21 points 15 and 21-26. The corresponding EU document is the Commission's Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101, p. 54, points 15 and 21-26.

⁵ Article 6 of the EEA Agreement reads: "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."

⁶ Protocol 4 to the SCA corresponds to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the [EC] Treaty (OJ 2003 L 1, p. 1).

annulling the according parts of the Authority's letter, while dismissing DB's application for the remainder.⁷

7. In their second Case E-7/12, DB seek (i) a declaration by this Court that the Authority failed to act on its request of 3 August 2010 for public access to documents held on Authority case file no. 34250; and (ii) to be awarded as damages certain legal fees allegedly incurred by DB in that context. This case is pending, currently awaiting the oral hearing.
8. Finally, in the present Case E-8/12 DB seek, on top of their action for failure to act registered as Case E-7/12, the partial annulment of three letters sent by the Authority to counsel for the Applicants in the context of their various requests for public access to documents. Indeed, the first two pieces of contested correspondence, of 9 and 22 May 2012, are cover letters to shipments of documents to the Applicants. The third letter of 2 July 2012 is a reply to a letter received from counsel for the Applicants of 14 June 2012 headed "*pre-litigation notice* [etc.]"⁸
9. In the Authority's submission, the present action for annulment is inadmissible for a number of reasons. The Authority, therefore, lodged a formal plea of inadmissibility in the present case on 2 October 2012.⁹ The Applicants responded to that plea of inadmissibility on 7 November 2012.
10. By letter of 17 December 2012, the Court Registry informed the parties that the Court has reserved its decision on the admissibility of the action for the final judgment; and invited the Authority to submit the present defence.

⁷ Case E-14/11 *Schenker North AB a.o. v EFTA Surveillance Authority*, judgment of 21 December 2012 ("*DB Schenker*"), not yet reported. Although pleaded by the Authority (see the Court's Report for the Hearing in Case E-14/11 at para. 122, available free of charge at www.eftacourt.int), that judgment did not deal with the *Zwartveld* case law.

⁸ The Authority's letters have been produced by the Applicants as **Annexes 1 to 3 to the application**; the Applicants' letter of 14 June 2012 as **Annex 53 to the application**.

⁹ For references to points of its plea of inadmissibility, the Authority will use the following abbreviation: "P" followed by the number of the relevant paragraph, for instance "P9" for the ninth point of the plea of inadmissibility.

1.2 Inadmissibility of the present application

11. As set out in its plea of inadmissibility (see, in particular, P13-P28), the Authority submits that none of the contested correspondence actually concerns Authority decisions within the meaning of Article 36 SCA.
12. Subsequently to the Authority's plea of inadmissibility, the Court confirmed that decisions taken by the Authority under its RAD 2008 are in principle justiciable under Article 36 SCA in accordance with the principle of effective judicial protection. However, the Court went on to clarify that only measures the legal effects of which are binding on, and which are capable of affecting the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under that Article.¹⁰
13. The Authority maintains that such is not the case as regards either of the contested correspondence in the present case. As is apparent from their respective substance, in neither of the letters at issue did the Authority determine any position that amounted to a definitive refusal of public disclosure of documents in the context of its, at that time, still ongoing administrative public access procedure case 68736. Rather, the alleged omissions by the Authority that the Applicant take exception to in the present proceedings, that is to produce certain documents, or documents featuring specific information, are typical of situations in which effective judicial protection is available under Article 37(3) SCA, the EEA EFTA provision corresponding to Article 265(3) TFEU (on failure to act).¹¹

¹⁰ Case E-14/11 *DB Schenker*, cited above, paras. 123 and 79-80.

¹¹ For the sake of completeness, the Authority notes that, subsequent to its plea of inadmissibility in the present case, the General Court held admissible an action for annulment alleging a breach of Regulation (EC) No 1049/2001 in a situation where the Commission had indicated that a certain document (listing certain other documents) did not exist, see Case T-392/07 *Strack v Commission*, judgment of 15 January 2013 (in French and German only), not yet reported, paras. 79-82. The Authority submits that this solution needs to be seen in light of the applicable EU procedure under Article 8(3) of Regulation (EC) No 1049/2001 where silence on the part of an EU institution is deemed to be a negative decision. However, no such procedural rule was contained in the RAD 2008, so that Article 37 SCA, which corresponds to Article 265 TFEU (on failure to act), remains the preferable SCA procedure as regards alleged omissions to produce certain documents under the RAD 2008. Otherwise, Article 37 SCA would be rendered devoid of purpose.

14. Equally, the Authority maintains that the Applicants lack the legal interest and, thus, standing to challenge alleged refusals to provide documents that had already been disclosed to the Applicants (in particular P49-P56, P78-P82 and P84); and that the Applicants lack the legal interest and, thus, standing to bring an application for annulment in so far as that action concerns matters on which the Applicants have already seized the Court in an earlier and pending application for failure to act in Case E-7/12 (P91-P93).
15. As regards the Applicants' submissions in their response of 7 November 2012 to classify the Authority's plea of inadmissibility into main and alternative pleas, suffice it to recall (P9) that admissibility of any action brought under the SCA is a matter of public order that the Court must examine on its own motion.¹²

1.3 In the alternative: application not well founded

16. As reiterated above, the Authority pleads that no challengeable act has been adopted by either of its correspondence of 9 May 2011, of 22 May 2012 or of 2 July 2012. The following submissions are therefore provided as alternative grounds of defence only; *i.e.* in case the Court should find that contrary to the Authority's submissions, its relevant letters did constitute acts challengeable under Article 36 SCA.

2 RELEVANT LAW

17. Authority Decision No 407/08/COL of 27 June 2008 *to adopt new Rules on Public Access to documents*¹³ has been repealed as of 6 September 2012 by Article 13, second sentence, of Authority Decision No 300/12/COL of 5 September 2012 *to adopt revised Rules on public access to documents, and repealing Decision 407/08/COL*.¹⁴ Decision No 300/12/COL of 5 September 2012

¹² Case C-208/11 P *Internationaler Hilfsfonds v Commission*, Order of 15 February 2012 (in French and German only), paras. 33-34 and the case law referred to.

¹³ Event no 454884 ("RAD 2008") = Annex D7 to this defence.

¹⁴ Event no 639973 ("RAD 2012") = Annex D8 to this defence.

has not been the object of an action for annulment in this Court under Article 36 SCA.¹⁵

18. However, as Article 36 SCA is essentially identical in substance to Article 263 TFEU (on actions for annulment), the present dispute must be assessed under the legislation, or in this case, the rules applicable at the time or times to which contested letters relate.¹⁶
19. The rules applicable to the correspondence at issue were the Authority's RAD of 27 June 2008. The three letters challenged by DB date of May and July 2012, respectively, that is after the entry into force, but prior to the repeal of the RAD 2008.
20. Indeed, this Court recently found that the Authority's revised rules on public access to documents of 5 September 2012 lay outside the scope of the first case brought by DB (Case E-14/11, see para. 6 above) concerning an Authority letter that also had been issued under the RAD 2008 prior to their repeal by 6 September 2012.¹⁷
21. As regards DB's introductory submissions at A129-A145 on the legal nature of the RAD 2008, suffice it to note, for the purposes of the present case, that this Court has subsequently concluded¹⁸ that it is indispensable that its interpretation of Authority Decision No 407/08/COL of 27 June 2008 *to adopt new Rules on Public Access to documents* is homogeneous to that of Regulation (EC) No 1049/2001 *of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*¹⁹ by the Court of Justice of the European Union.

¹⁵ As does Article 263(3) TFEU, Article 36(3) SCA requires that proceedings be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

¹⁶ See, to that effect, Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, para. 80 and the case law referred to.

¹⁷ Case E-14/11 *DB Schenker*, cited above, para. 99.

¹⁸ Case E-14/11 *DB Schenker*, cited above, para. 121.

¹⁹ OJ 2001 L 145, p. 43. The EU legislator considered that this Regulation is without EEA relevance. The EEA Joint Committee has not incorporated it into the EEA Agreement.

3 THE LETTER OF 9 MAY 2012

22. This letter by the Authority, and DB's according request for annulment, concerns public access to Authority case file no 34250 on the investigation against Norway Post. As summarised at A113, DB challenge:

- an allegedly implied refusal decision "*to disclose a complete statement of content of ESA Case No 34250 (Norway Post / Privpak)*";
- an allegedly implied refusal decision "*to disclose a letter from Norway Post dated or received on*" 13 July 2010 and
- an allegedly implied refusal decision "*to disclose any minutes from its meetings with the Norwegian government and/or Norway Post to discuss the case*".

3.1 Any decision implied in the letter of 9 May 2012 subsequently superseded

23. Although specifically dealing with DB's pleas below, the Authority submits that in light of its subsequent letter of 5 September 2012, this part of the present action for annulment can no longer succeed.

24. Article 36 SCA is identical in substance to Article 263 TFEU. Thus, an action for annulment brought under Article 36(2) SCA by a natural or legal person can only succeed in so far as that person has an interest in the annulment of the contested measure. Yet, such an interest presupposes that the annulment of that measure must of itself be capable of having legal consequences; or, to apply another formulation, that the action must be liable, if successful, to procure an advantage for the party who has brought it and that that person has a vested and present interest in the annulment of that measure.²⁰

25. The Authority submits that any interest that DB may have had at the time they lodged the present case to seek the annulment of the contested letter of

²⁰ This is settled case law; see Case T-19/06 *Mindo v Commission* [2011] ECR II-0000, para. 77. Compare also Case E-14/11, *DB Schenker*, cited above, paras. 79-80.

9 May 2012 has in any event come to an end when the Authority concluded its relevant administrative procedure on 5 September 2012, addressing a comprehensive and conclusive position to the Applicants in writing.

26. To the extent that the general public was entitled to access Authority competition file 34250, the Authority granted DB's request. To the extent that the Authority had to fully or partially refuse the general public access, it did. Consequently, there no longer is any need to adjudicate on this part of the present case.²¹
27. In particular, it is no longer decisive for the present action under Article 36(2) SCA whether or to what extent the Authority may have partially refused the Applicants' public access request at the time when the present case was lodged.
28. Any partial refusal decision as regards DB's 2010 public access request allegedly implied in the contested letter of 9 May 2012 (the Authority maintains that it has taken no such decision) has in any event afterwards been superseded by its subsequent and comprehensive decision of 5 September 2012 taken on that very request.²² While the Authority, on that day, so concluded its, by then still ongoing, public access procedure, nothing in the contested passages of its earlier letter of 9 May 2012 suggest that Authority had already at that time intended to, or otherwise definitively determined its position under its RAD 2008, wholly or partially, on the administrative procedure as regards the 2010 request for access to the entire case file 34250.²³ Such a reading of the letter of 9 May 2012 would clearly go beyond the very wording (reproduced at para. 35 below) of that cover letter to a shipment of documents in light of the applicable procedure under the RAD 2008.

²¹ Case C-44/00 P *Sodima v Commission*, cited above, para. 83; Joined Cases T-297/01 and T-298/01 *SIC v Commission* [2004] ECR II-743, para. 31; Case T-423/07 *Ryanair v Commission*, cited above, para. 26.

²² Compare Joined Cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk v Commission* [2006] ECR II-02023, para. 46.

²³ Compare Case E-14/11, *DB Schenker*, cited above, para. 82 and the case law referred to.

29. Nor has DB claimed that the Authority actually had concluded its relevant administrative procedure on 9 May 2012 by means of the contested letter of that day. To the contrary, the Applicants have faulted the Authority on 9 July 2012, *i.e.* well subsequent to that date, with an alleged failure to act on their request for public access to case no. 34250 in this Court.²⁴

30. Two things follow.

31. First, in so far as the Applicants should be of the opinion that the full or partial refusals set out in the letter of 5 September 2012 concluding the Authority's according administrative procedure were unlawful, DB could have challenged those refusals by means of an action for annulment under Article 36 SCA. DB chose not to do so within the statutory lime-limit of two months. Hence, the letter of 5 September 2012 has become binding on the Applicants as regards their request for public access to case file 34250.²⁵

32. Second, in so far as the Applicants might take the view that the position adopted by the Authority on 5 September 2012 was incomplete – that is, beyond the refusal set out therein²⁶ – the Applicants could start a procedure under Article 37 SCA. To date, the Authority has not received any relevant indication to that extent.

33. As a consequence, the Applicants can no longer claim to have a vested and present interest in the annulment of the previous letter of 9 May 2012.²⁷ On that ground alone, the Authority requests the Court, in the alternative to its plea of inadmissibility, to declare that there no longer is any need to adjudicate on the application as regards decisions allegedly implied in the Authority's

²⁴ Case E-7/12, see OJ C 314 of 18 October 2012, p. 8 and para. 7 above.

²⁵ In particular, the Applicants have not argued - and cannot argue - that the comprehensive act of 5 September 2012 concluding the administrative procedure as regards DB's 2010 public access request was a mere confirmation of the Authority's letter of 9 May 2012. According to settled case law, a measure can be regarded as a mere confirmation of an earlier decision only where it contains no new factors as compared with that decision, see the order of the General Court in Case T-62/12 *ClientEarth v Council* [2012] ECR II-0000, para. 22 and the case law referred to.

²⁶ The Authority notes that DB have made submissions to that extent in their statement of reply in parallel case E-7/12.

²⁷ Compare Case T-392/07 *Strack v Commission* [2013] ECR II-0000, paras. 61-66 and the case law referred to.

letter of 9 May 2012 (event 633455) to counsel for the Applicants regarding their request for public access to file no. 34250 (A146-A171).

34. In any event, the contested passages of the cover-letter of 9 May 2012 are not vitiated by any error of law.

3.2 Statement of content of case no. 34250

35. A146-A156 concern the following statement by the Authority in its letter of 9 May 2012 referred to at A147:

"1 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 NP was granted access when the SO was issued in December 2008."

36. In the Applicants' submission, this statement constitutes an implicit refusal decision to disclose a "complete" statement of content of the file in case 34250; and that such refusal infringes both Article 2(1) RAD and Article 16 SCA.

37. Neither contention is well founded.

3.2.1 Article 2(1) RAD

38. At A146-A154, DB claim that the Authority breached Article 2(1) of its RAD 2008. While conceding to have received the relevant documentation listing the documents registered in the Authority's case relevant file, the Applicants nonetheless claim that the Authority has refused them the public disclosure of documentation that not only itemises all those documents, but, in addition, features specific kinds of information per document so listed (A152-A153).

39. In the circumstances of the present case, none of these submissions establishes any breach of the Authority's RAD 2008.

3.2.1.1 No general obligation to create new documents

40. Pursuant to its rules on public access to documents (of 2008 and 2012 alike), the Authority is under no duty to grant access to any document that it does not possess. Nor are the EU institutions under Regulation (EC) No 1049/2001. It is common to all these public access rules that the EEA institutions are not obliged to create new documents if documents that an applicant for access requests, or suspects might be in the possession of an institution, actually do not exist.
41. Here, this is clear from Article 1(1) RAD 2008, defining their purpose as relating to the right of access to *'documents produced or held by the Authority'*; and from Article 2(3), setting out that the RAD 2008 apply only to *'documents held by the Authority, that is to say, documents drawn up or received by it and in its possession'*.
42. Moreover, and in the Applicants' own submission (A179), the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in a wider meaning. In other words: access to documents presupposes the very existence of such documents²⁸.
43. As regards the Authority, lists of documents in case files are not created and stored as any kind of document unless there is a specific need to do so. What does exist at all times is individual metadata for each document (such as event No, event name, event type; *an 'event' being e.g. a letter or an e-mail*). For case-handling purposes the Authority's information management system ('AIM') can *display* these metadata in various combinations, but does not store such combinations as documents. Combining metadata to create lists requires writing and running a computer script in the database underlying the system and exporting the data to a (new) document.

²⁸ Case T-264/04 *WWF v Council* [2007] ECR II-911, para. 76; Case T-380/04 *Terezakis v Commission* [2008] ECR II-11, paras. 152-156; Case T-392/07 *Strack v Commission* [2013] ECR II-0000, para. 75.

44. As follows from the above, the Authority could not, as a general rule, be obliged to create a list with specific information from the documents so listed added.

3.2.1.2 Exception to the rule where general presumptions against public access apply

45. The Authority notes that the Court, subsequent to the application in the present proceedings, found that if the Authority raises a general presumption against public access under its RAD 2008, as it indeed did in its letter of 5 September 2012,²⁹ the applicant for public access must be "*furnished with sufficient and adequate information, for example an appropriately detailed list of documents, in order to have an opportunity to rebut such a presumption.*"³⁰

46. Indeed, this approach conforms to the Authority's settled practice under the RAD 2008 in cases where it invoked a general presumption, such as in state aid cases.³¹

47. That notwithstanding, the Authority submits that *strictu sensu*, the finding at para. 134 of the judgment in Case E-14/11 is not relevant to the present case for two reasons. First, in transmitting the requested documentation, the Authority did not raise a general presumption against public access. To the contrary, it granted the according request for public access to such a list. Second, even if the principle referred to in the preceding paragraph would have applied to the present case at the time the application was lodged, it would be no longer relevant in this case, as DB chose not to challenge the Authority's letter of 5 September 2012 (see para. 31 above).

48. In any event, the Authority submits that the documentation transmitted to the applicants in this case would meet that test (see para. 57 below).

²⁹ This letter is **Annex D1** to the Authority's plea of inadmissibility of 2 October 2012.

³⁰ Case E-14/11, *DB Schenker*, cited above, para. 134.

³¹ See, for instance, pending Joined Cases E-4/12 and E-5/12 *Risdal Touring a.o. v EFTA Surveillance Authority*.

3.2.1.3 Request for public access to documentation listing all documents held on case file 34250 comprehensively granted

49. It is undisputed that in response to DB's request to access the competition file, the Authority, on 30 August 2010, transmitted the Applicants a complete list of all the documents on the file to which Norway Post had been granted access when the Statement of Objections was issued in December 2008.
50. Further, by email of 5 April 2012, the Authority transmitted DB the list of documents in the case from 16 December 2008. No other documents from that period exist that belong to the case but are not on that list.
51. The Authority maintains that a situation where an applicant for public access takes the view that documents disclosed by the Authority are not those, or not all those that should have been released, may constitute a case of potential failure, by the Authority, to provide that applicant with (all) the documents he may have access to under the Authority's rules on public access to documents. Which, if the Authority was under a legal obligation to provide such documents, and all other conditions of Article 37 SCA are fulfilled, may indeed give rise to an action for failure to act in the EFTA Court. Conversely, there is nothing to assume that any omission to transmit specific information by means of a newly created document implies a decision refusing to grant public access to documents. Rather, mere silence on the part of the Authority cannot generally be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of EEA law,³² which it was not under the RAD 2008.
52. In any event, DB can no longer claim to have a vested and present interest in the annulment of this part of the letter of 9 May 2012. The Applicants have been transmitted additional lists by the Authority's letter of 5 September 2012. With all list provided including those attached to the Authority's letter of 5 September 2012, there are no other documents relating to the antitrust proceedings conducted by the Authority in case 34250 that the Applicants

³² Case C-123/03 P *Commission v Greencore* [2004] ECR I-11647, para. 45.

have not been made aware of by means of a list – except for the so-called inspection documents. However, the Authority's refusal of 16 August 2011 to publicly disclose those documents has been the subject matter of the earlier Case E-14/11 (see para. 6 above). At the time when DB initiated the present proceedings on 15 July 2012, and when the Authority issued its letter of 5 September 2012, these court proceedings regarding the Authority's refusal of 16 August 2011 to disclose those documents were still pending.³³

53. In its letter of 5 September 2012, the Authority referred to previous correspondence regarding the Applicants' request for access to the entire case file 34250. The Authority then set out its position regarding the disclosure to the Applicants of the remaining documents saved under or related to case No 34250 (*Norway Post/Privopak*) pursuant to its RAD 2008. Further, the Authority clarified that there are no other documents on the file or otherwise related to the case.

54. Annex 1 to the Authority's letter of 5 September 2012 contained a list of correspondence with third parties in case 34250.³⁴

55. Annex 2 to that letter contained a list of other documents in case 34250, except internal documents.³⁵

56. Annex 3 the Authority's letter of 5 September 2012 contained a list of 198 (in words: one-hundred-and-ninety-eight) internal documents in case 34250.³⁶

57. In turn, the Applicants have not adduced any reason why the specific list of documents provided by the Authority would, as such, have been insufficient, or not have enabled an applicant for public access to further pursue any public access intention.³⁷ DB's submissions in that regard remain but repetitive and

³³ The judgment in Case E-14/11 *DB Schenker*, cited above, was delivered on 21 December 2012.

³⁴ Event no 645583, enclosed as **Annex D2** to the Authority's plea of inadmissibility of 2 October 2012.

³⁵ Event no 645585, enclosed as **Annex D3** to the Authority's plea of inadmissibility of 2 October 2012.

³⁶ Event no 645586, enclosed as **Annex D4** to the Authority's plea of inadmissibility of 2 October 2012.

³⁷ Although made in a different legal context, compare the Court's conclusion on the very contention in Case E-14/11 *DB Schenker*, cited above, para. 93.

general. Moreover, they wrongly pre-suppose that the Authority must extract certain categories of information contained in the documents held on the file and add those categories of information to the list (see paras. 40 to 44 above).

58. Accordingly, the plea alleging a breach of Article 2(1) RAD should be dismissed (A146-A156).

3.2.2 Article 16 SCA

59. At A155, the Applicants contend that the Authority failed to state reasons for an allegedly implied decision not to disclose a “*complete*” statement of content of the relevant case file.

60. Article 16 SCA corresponds to Article 296(2) TFEU and provides that decisions of the Authority shall state the reasons on which they are based.

61. The Authority submits that the Applicants’ plea on an alleged infringement of that duty is inoperative as its letter of 9 May 2012 did not constitute a decision within the meaning of Article 16 SCA.

62. To avoid repetition, the Authority refers to its respective submissions with regard to Article 36 SCA in its plea of inadmissibility of 2 October 2012. While the applicants have failed to demonstrate the existence of a decision, nothing suggests that the notion of ‘*decision*’ within the meaning of Article 16 SCA calls for a different interpretation than that of Article 36 SCA. Accordingly, it is maintained that in the absence of any challengeable act that could be annulled, the appropriate course of action for the applicant would be an action for failure to act.

63. In the alternative, the Authority makes the following submissions.

64. Whether an Authority decision sets out the degree of reasoning required under Article 16 SCA depends on the circumstances of each case, and in particular on the legal rules governing the matter in question.³⁸
65. Yet, an unfounded plea challenging the legality of a given decision cannot succeed in the guise of a plea on procedure. Pursuant to settled case law, the infringement of the duty to state reasons concerns an essential procedural requirement which is different from the question whether the grounds of a given decision are inaccurate as the latter is reviewed by the Court when it examines the validity of that decision.³⁹ Accordingly, it is necessary to distinguish a plea based on an absence of reasons or inadequacy of the reasons stated from a plea based on an error of fact or law. This last aspect falls under the review of the substantive legality of the contested decision and not the review of an alleged violation of infringement of essential procedural requirements within the meaning of Article 16 SCA.⁴⁰
66. In the present case, the Applicants fail to adduce any reasons for their contention that Article 16 SCA was breached. All that DB claims is that the Authority failed to state reasons for an allegedly implied decision not to disclose a “complete” statement of content of the relevant case file.
67. The Authority submits that it is clear from its wording that the according plea relates to the substantive completeness or, in other words, soundness of the contested documentation, and not to any reasoning of an alleged decision. The alleged lack of reasoning invoked by DB in this case is but implicit; and solely rests on DB’s own contention that the Authority was legally obliged to produce a list different from the one publicly disclosed to the Applicants (*quod non*, see paras. 40 to 44 above).

³⁸ See Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others v EFTA Surveillance Authority* [2011] EFTA Ct. Rep. 16, para. 172; Joined Cases E-10/11 and E-11/11 *Hurtigruten a.o. v EFTA Surveillance Authority*, judgment of 8 October 2012 (*‘Hurtigruten’*), not yet reported, para. 254.

³⁹ Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission* [2010] ECR II-5723, para. 97 and the case law referred to.

⁴⁰ Joined Cases E-10/11 and E-11/11 *Hurtigruten*, cited above, para. 261; Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM v Authority*, judgment of 30 March 2012, not yet reported, para. 165.

68. Hence, in light of the legal rules governing the matter in question, here the RAD 2008, the plea alleging a breach of Article 16 SCA should be dismissed.

3.3 An alleged letter by Norway Post of 13 July 2010

69. At A157-A163, but also elsewhere in the application (A5, A6, A113, A150), DB contend that the Authority, in its letter of 9 May 2012, has implicitly decided to refuse them public access to a certain letter drawn up by Norway Post.

70. The according plea for annulment concerns the following statement by the Authority in its letter of 9 May 2012 quoted *verbatim* at A157:

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

71. The Authority submits that this plea cannot succeed.

3.3.1 Article 2(1) RAD 2008

72. The document at issue was registered by the Authority as event no. 524500 in its case no. 34250 and is a letter of 13 July 2009 in which Norway Post commented on the administrative hearing held in June 2009.

73. The Authority had granted DB partial public access to a non-confidential version of that document as early as in November 2010.⁴¹

74. The Authority's reference in its email of 30 August 2010 to "13 July 2010" concerns a mix-up regarding the year from which event no. 524500 dates.⁴² Yet, the correct reference year has since long been easily identifiable for DB as the Authority, in its email of 30 August 2010, had not only referred to that

⁴¹ While not obvious from the main text of the application, this is clear from the documentation already presented to the Court, see the Authority's letter of 5 November 2010 (event no. 576173), produced by the Applicants as **Annex 20 to the application**; there, event no 524500 is listed in Annex II as the fifth last item.

⁴² That is, the date mentioned - 13 July 2010 - should have read 13 July 2009.

date, but also provided its internal reference ("event") number attributed to that document on the Authority's file.⁴³

75. Also the evidential value attributed to that document by the Authority, and referred to in its email of 30 August 2010, is readily discernible from the references made to that document in its Decision of 14 July 2010 in case 34250.⁴⁴

76. Nonetheless, the Applicants have alleged several times throughout the application (A5, A6, A113, A150, and at A157-A163) that the Authority has flatly refused to disclose that document, if not suppressed or lost it.

77. In doing so, DB has presented the Court at A160 with what is alleged to be a direct quote from the Authority's email of 30 August 2010. However, that quotation is incomplete. DB have omitted the event number referred to in the original email.⁴⁵ The omission matters, as the unique event number under which the relevant document has been registered in the Authority's Information Management Tool ("AIM") renders that document identifiable, excluding any ambiguity.

78. Hence, the plea alleging a breach of Article 2(1) RAD 2008 should be dismissed.

3.3.2 Article 16 SCA

79. At A160-A162, DB claim that the Authority failed to state reasons for what it claims to be a decision. The Applicants assert that the letter disappeared and polemicise whether other evidence may have been lost as well (A161). Nor

⁴³ Indeed, non-confidential English and Norwegian language versions of the Authority's Decision of 14 July 2010 in case no. 34250 quoting the document have long been available to DB in, as well as on the Authority's internet website www.eftasurv.int.

⁴⁴ No less than four such references exist: at D442 (referenced at FN400), D444 (referenced at FN401), D620 (referenced at FN461) and at D724 (referenced at FN495).

⁴⁵ The omission is obvious when the text produced at A160 is compared to the passage of the relevant email as produced by the Applicants as **Annex 10 to the application**. The complete sentence reads: "*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 (524500)*".

could DB or the Court verify whether the letter was lost, or whether the Authority did not want to disclose it (A162).

80. Again, neither submission is liable to demonstrate a breach of Article 16 SCA. The plea alleging a failure to state reason is inoperative as it wrongly presupposes that the contested cover letter constitutes an Authority decision within the meaning of Article 16 SCA. In the alternative, the plea is not well founded.

81. To avoid repetition, the Authority refers to paras. 60 to 68 above, which apply *mutatis mutandis* to the claims and speculations put forward by the Applicants at A160-A162.

3.3.3 Conclusion on the alleged letter of 13 July 2010

82. It follows that the plea alleging an unlawful decision to refuse public access to an alleged letter from Norway Post dated 13 July 2010 (A157-A163) should be dismissed.

3.4 Certain minutes of meetings

83. At A164-A171, DB challenges an alleged implied refusal decision by the Authority in its letter of 9 May 2012 to publicly disclose minutes of meetings that in DB's contention must exist. DB assert that such implied decision is vitiated by a failure to state reasons (Article 16 SCA).

84. This plea concerns the following statement by the Authority in that letter quoted *verbatim* at A165:

"There are not any minutes on the file from meetings between ESA and the Norwegian government. Nor are there any minutes on the file from meetings between the president of ESA and Norway Post or the Norwegian government."

85. This plea should be rejected.

86. The plea alleging a failure to state reason is inoperative. It wrongly presupposes that the contested cover letter constitutes an Authority decision

within the meaning of Article 16 SCA. In the alternative, the plea is not well founded.

87. In the alternative, the plea is not well founded. First, the Authority notes that it overlaps with submissions made by DB with regard to the very passage of the contested letter of 9 May 2012 at paragraph or their application in Case E-7/12. There, the Applicants questioned the reliability of the list of documents in case 34250 from 16 December 2008 transmitted to counsel for DB by Authority email of 5 April 2012 in that it fails to list any minutes from meetings between the Authority and the Norwegian Government and/or Norway Post to discuss the case.
88. Yet, neither an argument nor a plea in law becomes more convincing because of mere repetition. The fact remains that the Applicants, in both court proceedings, merely infer from the Authority's indication that no such documents exist, that the Authority "failed" to list such documents in the list provided by email of 5 April 2012; presupposing that, despite the Authority's explicit indication to the contrary, such documents do exist on the file.
89. In this regard, the Authority cannot but confirm its explicit statement made in the pre-litigation procedure. Despite DB's assumptions and speculations to the contrary, case 34250 does not contain any minutes of meetings between the Authority and the Norwegian Government and/or Norway Post to discuss the case.⁴⁶
90. Irrespective of which communication strategies the Norwegian Government may or may not have pursued with regard to the Authority (A166), no such meetings took place as regards case 34250. Conversely, the meetings between the Authority and Norway Post referred to at recitals 20 and 22 to the Authority's Decision No 322/10/COL (*Norway Post/Privpak*) of 14 July 2010 of course did take place; however, at the time, no specific records of these meetings were taken other than registering any documentation presented during these meetings. Nor was case 34250 discussed with the Norwegian

⁴⁶ See the Authority's letter of 9 May 2012 = Annex 41 to the application, p. 3, first paragraph.

Government during the so-called package meetings which the Authority regularly holds with the EFTA States' Governments on internal market or state aid issues.

3.5 Conclusion on the letter of 9 May 2012

91. Accordingly, the Authority, in the alternative to its maintained plea of inadmissibility, requests the Court to declare that there is no longer any need to adjudicate on the application as regards alleged decisions implied in the Authority's letter of 9 May 2012 to counsel for the Applicants.
92. In the second alternative, the according pleas seeking an annulment of the contested letter of 9 May 2012 should be dismissed as not well founded.

4 THE LETTER OF 22 MAY 2012

4.1 Introduction

93. This letter concerns an Authority cover letter of 22 May 2012 granting a request made by DB for public access to documentation listing the documents held on case file no. 68736 on DB's public access request to the Norway Post investigation file no. 34250 (*Norway Post/Privpak*).
94. DB seek the annulment of this cover letter (A172-A178). Its full text reads:

"Dear Mr Midthjell,

RE: DB Schenker - Access to documents in Case 68736

Your letter of 23 March 2012

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.

Please accept my apologies for this.

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

Yours sincerely,

Xavier Lewis

Director, Legal and Executive Affairs

Enclosure:

Annex 1 : List of Documents on file in Case 68736"

95. DB contend that this letter is an implicit refusal decision to disclose a "*complete statement of content*" of that case file (A172).
96. In support of their request that the Court annul this cover letter, DB plead that the Authority abused of its power, and that it infringed Articles 2(1) RAD 2008 as well as 16 SCA.
97. The Authority submits that none of these pleas is well founded.

4.2 Article 2(1) RAD 2008

98. The present plea raised at A172-A174 is essentially based on DB's earlier contention that a document listing the documents the Authority holds on a given case file is only complete if it has the following features: showing the origin/author of each document/event registered; whether each document is incoming, outgoing or internal; the date of each document/event and the date when it was registered in the statement of content of the file.⁴⁷
99. This plea should be rejected.
100. The Authority submits that in the case at hand, the information transmitted to DB sufficient listed the documents held on case file no. 68736 and so granted DB's according public access request.
101. Moreover, as the access request at hand concerned DB's own application for public access, the vast majority of documents so listed were correspondence between DB and the Authority; and thus already in DB's possession. This, the Authority submits, cannot be without consequences as

⁴⁷ DB raised this argument also in proceedings before this Court in Case E-14/11 *DB Schenker*, see the judgment in that case, cited above, para. 87.

regards the procedural obligation that DB must show a vested and present interest in the annulment of the contested letter (see para. 24 above).

102. Nor did the documentation so provided infringe the general public's derived right under the RAD 2008 to be transmitted a list of documents held on that file.

103. Indeed, the Applicants have not adduced any reason why the specific list of documents provided would, as such, have been insufficient, or not have enabled an applicant for public access to further pursue any public access intention.⁴⁸ Rather, DB's submissions remain repetitive and general. Moreover, they once more pre-suppose that the Authority must extract certain categories of information contained in the documents held on the file and add those categories of information to the list (*quod non*).

104. Accordingly, the plea alleging a breach of Article 2(1) RAD should be dismissed.

4.3 Article 16 SCA

105. At A175, the Applicants claim that the Authority failed to state reasons for what it claims to be a decision as (i) DB have specifically requested certain information to be added to the list received (compare A172-A174), while DB claim that (ii) that list was provided sixty-nine calendar days after their according request.

106. Neither submission is liable to demonstrate a breach of Article 16 SCA.

107. The plea alleging a failure to state reason is inoperative. It wrongly presupposes that the contested cover letter constitutes an Authority decision within the meaning of Article 16 SCA. In the alternative, the plea is not well founded.

⁴⁸ Although made in a different legal context, compare the Court's conclusion on the very contention in Case E-14/11 *DB Schenker*, cited above, para. 93.

108. To avoid repetition, the Authority refers to paras. 60 to 68 above, which apply *mutatis mutandis* both to the argument made with regard to the lapse of time between the lodging of the request and it being granted by the Authority, and on the material scope of documentation listing documents on a given case file.
109. Further, the Authority considers that it matters that DB's access request at hand concerned their own application for public access; and that, accordingly, the vast majority of documents so listed were correspondence between DB and the Authority; and thus already in DB's possession.⁴⁹
110. Consequently, the plea alleging a failure to state reasons is inoperative, but in any event unfounded.

4.4 Abuse of power

111. At A176-A178, DB claims that the Authority abused its powers. Essentially, the Applicants contend that the Authority wilfully violated DB's right of access by "*suppressing*" a column with dates from the print-out of the list at issue in order to so withhold evidence from them (A177).
112. Alleging an abuse of powers is a serious accusation.⁵⁰ The Authority submits that pursuant to Article 6 EEA, the Court should assess it in light of the settled case law on the corresponding EU law concept of misuse of powers (*ditto* A176).
113. Such misuse requires that an institution, here, the Authority, has used its powers for a purpose other than that for which they were conferred on it. Moreover, a measure is only vitiated by misuse of powers if it appears, on the

⁴⁹ The requirements to be satisfied by the statement of reasons depends on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations, Case C-501/00 *Spain v Commission* [2004] ECR I-6717, para. 73.

⁵⁰ As far as the Authority is aware, it has not been raised before in the EFTA Court by any aggrieved party. DB, however, polemicised to that extent in Case E-14/11 *DB Schenker* but did so outside their pleas in law raised in that case (see para. 40 of DB's rejoinder in that case; not referred to in the Court's Report for the Hearing in Case E-14/11).

basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated; or evading a procedure specifically prescribed by the relevant rules for dealing with the circumstances of the given case.⁵¹ Also, where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim.⁵²

114. In that light, it is clear that the plea alleging an abuse of power cannot succeed. DB's mere assertion to that extent fails to show that the Authority, in granting their access request, has acted with the exclusive or main purpose of achieving an end other than publicly disclosing the requested list, or else evading its RAD 2008.

115. On the contrary, the contested letter concerns correspondence under the Authority's RAD 2008 by which the Authority granted DB's request for public access to a list of the documents held on case no. 68736. In fact, the respective list enclosed to the contested letter was drawn up anew and specifically for this purpose.

116. Conversely, the degree of detail required under the RAD 2008 for such a newly created record is an issue relating to the scope of the general public's respective rights under that Authority decision. The Authority submits that the list transmitted to DB by the contested letter of 22 May 2012 was sufficient under Article 2(1) RAD, see paras. 100 to 101 above.

117. Accordingly, the application should be dismissed in so far as it accuses the Authority to have misused its powers.

⁵¹ Case T-417/05 *Endesa v Commission* [2006] ECR II- 2533, para. 258 and the case law referred to.

⁵² Case 2/54 *Italy v High Authority* [1954] ECR 37, 54.

4.5 Conclusion on the letter of 22 May 2012

118. On those grounds, the Authority, in the alternative to its maintained plea of inadmissibility, requests the Court to dismiss DB's pleas seeking an annulment of the contested letter of 22 May 2012 as unfounded.

5 THE LETTER OF 2 JULY 2012

119. This letter concerns public access to Authority documents other than those held on its two administrative case files no. 34250 (*Norway Post/Privpak*) and no. 68736 (on DB's own access request to all documents of that antitrust investigation).

120. As summarised at A121, the Applicants' challenge:

- an alleged implied refusal decision *"to disclose the procedures for administering case files"*;
- an alleged implied refusal decision *"to disclose the procedures for handling public access requests"* and
- an alleged implied refusal decision *"to disclose the ESA College decisions empowering the directors of the competition and state aid department, the legal and executive department, and the administrative department"*.

121. The Authority submits that neither plea is well founded.

5.1 Procedures for administering case files

122. At A179-A184, the Applicants contend that a statement by the Authority in its letter of 2 July 2012 referred to at A179 implies a refusal decision to disclose documents concerning the Authority's procedures for administering files (A181). They assert that such decision breaches Article 2(1) RAD 2008, and Article 16 SCA.

123. The Authority submits that it is clear from Article 8(2) RAD that neither contention is well founded.

5.1.1 Article 2(1) RAD 2008

124. To support their request for annulment of the corresponding passage of the letter, DB contend (A179) that that letter infringes their rights to public access under Article 2(1) RAD. DB submit that the right of public access relates to documents, not information such as contained in the Authority's submissions of 4 June 2012 in the context of the court proceedings in Case E-14/11. DB claim to not have received the correspondence referred to by the Authority, asserting to be entitled to have documents directly addressed to them by means of a reasoned Authority decision (A181); and because of what DB claims to be an attempt by the Authority to stall their access request (A182).

125. These submissions should be rejected.

126. At A181, the Applicants contend that the Authority has refused

"to disclose the procedures for administering case files, including but not limited to routines for registering incoming/outgoing correspondence and internal documents; who is authorized to open/close case numbers and register documents/events on a case; what kind of information must be registered about each document in the defendant's database".

127. However, the Applicants, in the pre-litigation procedure, did not use the formulation presented to the Court now at A181 to challenge the Authority's letter (see the direct quote above). Their actual request of 14 June 2012 reiterated *verbatim* an earlier request formulated by letter of 11 April 2012 in the following terms:⁵³

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

⁵³ See Annex 42 to the application, page 1.

128. That is why the contested passage in the Authority's reply of 2 July 2012 to the Applicants' letter of 14 June 2012 reads as follows:

*"Your letter [of 14 June 2012 – see **Annex 53 to the application**] is understood to the effect that you reiterate an earlier access request to:*

- (1) "ESA's internal procedures/instructions for administering case files, including its routines for registering incoming/outgoing correspondence and internal documents; who is authorized to open/close case numbers and register documents/events on a case; what kind of information must be registered about each document/event in ESA's database; etc.*
- (2) ESA's internal procedures/instructions for handling public access requests under RAD [the Authority's Rules on Public Access to Documents].*
- (3) ...*

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

..."

129. By these statements, the Authority, *inter alia*, referred correctly to the fact that it had already made available the following documents under its rules on public access to documents to counsel for the Applicants (albeit in his capacity as counsel for another applicant for public access to documents held by the Authority) by letter of 30 April 2012:⁵⁴

"3. Relevant internal procedures governing the registration of documents etc.

Please find attached the parts of the Authority's guidelines on internal procedures which concern the registration of documents (events) and the information to be stored as well as on the handling of public access requests under the Rules on Access to Documents.

The relevant extracts are:

Section 8.4 on requests for access to documents

Section 9.1 dealing with confidentiality in general

⁵⁴ Event no 632494, enclosed as **Annex D5** to the Authority's plea of inadmissibility of 2 October 2012. This letter is the object of an action for annulment brought against the Authority by Risdal Touring AS, initially registered as Case E-4/12, now Joined Cases E-4/12 and E-5/12 *Risdal Touring a.o. v EFTA Surveillance Authority*.

Section 11.2 on Registry and filing of documents.”⁵⁵

130. Indeed, Article 8(2) RAD 2008 provided:

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

131. The Authority submits that both criteria of Article 8(2) RAD 2008 are met.

The documents to which the Applicants had initially requested access in their letter of 11 April 2012, and again in their letter of 14 June 2012, had already been released by the Authority under its RAD 2008 by letter of 30 April 2012 (event no 632494); and even transmitted to counsel for the Applicants. Counsel for the Applicants has not contested this fact but claimed at footnote 91 to the application that he was *“not at liberty to disclose correspondence relating to other clients”*.

132. In the Authority’s submission it does not matter that the information was divulged to the attention of DB’s counsel in the context of a mandate by a different client. The submission to the contrary at footnote 91 to the application is based on a wrong understanding of the very purpose of public access to documents. What counts is the fact that the documents *“had already been released by the Authority”*, and that they were *“easily accessible”* to the Applicants within the meaning of Article 8(2) RAD 2008, here in the possession of counsel for DB. Although that release had occurred in the context of a different mandate of counsel for DB, the documentation contained in the annexes was disclosed to the general public, and not individually to the company that had happened to first request public access to the relevant documents.⁵⁶ It follows that the Authority had satisfied the Applicants’ right to public access to the requested documentation months before the present application has been lodged in July 2012.

⁵⁵ The relevant excerpts to event no 632494 are enclosed as Annex D6 to the Authority’s plea of inadmissibility of 2 October 2012.

⁵⁶ All that counsel for the Applicants would have had to do was to inform the Applicants accordingly. It would appear from footnote 91 that this was not done. Instead, DB chose to bring the matter before the Court as part of their present action for annulment.

5.1.2 Article 16 SCA

133. At A183, the Applicants claim that the contested letter infringes Article 16 SCA in that fails to identify exhaustively the documents on internal procedures etc. and to explain why correspondence with other companies is relevant for DB.
134. Neither submission is liable to demonstrate a breach of Article 16 SCA. To avoid repetition, reference is made to the submissions at paragraphs 60 to 68 above, which apply *mutatis mutandis* to both points raised at A183.
135. Hence, the plea alleging a failure to state reasons is inoperative, but in any event unfounded.
136. Consequently, the application should be dismissed in so far as it seeks the annulment of an alleged refusal regarding documents that the Authority had already publicly disclosed by letter of 30 April 2012 to counsel for the Applicants (event no 632494), as the Authority has discharged its obligation under Article 8(2) RAD.

5.2 Public access procedures

137. At A185, the Applicants challenge an alleged implied refusal decision to disclose the Authority's procedures for handling public access requests. The Authority notes that DB limit this plea to the submission that it is based on the same grounds as the previous plea (A179-A184; regarding the alleged refusal to disclose the documents relevant to the Authority's procedures for administering files).
138. It is for the Court to decide whether this submissions fulfils the requirements of Article 33(1)(c) of its Rules of Procedure. If so, the Authority, in turn, refers to its defence against the previous plea at paras. 125 to 135 above.

5.3 College decisions empowering the Authority's directors

139. At A186-A196, DB contend that the Authority decided to refuse public disclosure of decisions of the Authority's college on current empowerments of its directors.

140. DB's initial public access request under Article 2(1) RAD of 11 April 2012 was framed in the following terms:⁵⁷

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

141. The plea concerns the following statement by the Authority in its reply of 2 July 2012 quoted *verbatim* at A187:⁵⁸

"Your letter [of 14 June 2012 – see Annex 53 to the application] is understood to the effect that you reiterate an earlier access request to:

(1) ...

(2) ...

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

(...)

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

5.3.1 Article 2(1) RAD 2008

142. The Applicants contend that this passage is a refusal decision to publicly disclose Authority decisions by which the Authority's College empowered the directors of its departments (A192), and that it is in breach of Article 2(1) RAD.

⁵⁷ Reference is made to DB's letter of 11 April 2012 = Annex A.42 to the application, page 3.

⁵⁸ The letter is Annex A.3 to the application.

143. The Applicants contend that the Authority's reply (see para. 140 above) must be factually incorrect (A192). DB points to Authority Decision No 142/11/COL of 11 May 2011 *authorising the representation of the EFTA Surveillance Authority in legal proceedings* (A189);⁵⁹ and to the collegiate responsibility with which the (College) Members of the Authority are entrusted under Articles 7 and 15 SCA.

144. In turn, the Authority does not hold on its files specific College decisions containing a "current empowerment" of each director of its four departments; and stated so accordingly in the contested letter.

145. In light of the Applicants' submissions raised now in Court, the Authority, with the benefit of hindsight, cannot rule out to have misunderstood the respective request that counsel for DB initially made on 11 April 2012, and which he repeated *verbatim* by means of a copy-paste section in his letter of 14 June 2012. Nonetheless, the Authority maintains that an alleged Authority omission to produce certain documents, or documents featuring specific information, are typical of situations in which effective judicial protection is available under Article 37(3) SCA, the EEA EFTA provision corresponding to Article 265(3) TFEU (on failure to act).⁶⁰ Accordingly, the present plea seeking an annulment of a specific statement in that context should be dismissed.

5.3.2 Article 16 SCA

146. At A193-A195, the Applicants claim that the contested letter infringes Article 16 SCA. The alleged failure to provide explanations what the contested passages "mean", in DB's view, do not allow to establish the factual basis for the Authority's alleged implicit refusal decision.

147. The Authority disagrees. To avoid repetition, reference is made to the submissions at paragraphs 60 to 68 above, which apply *mutatis mutandis* to the

⁵⁹ Produced by DB as Annex A.55 to the application.

⁶⁰ See para. 13 and footnote 11 above.

points raised at A193-A195. Consequently, the plea alleging a failure to state reasons is inoperative, but in any event unfounded.

148. Accordingly, the application should be dismissed in so far as the Applicants seek the annulment of an alleged refusal to disclose the Authority decisions take by its College that empower the directors of the Authority's departments (A186-A196).

5.4 Conclusion on the letter of 2 July 2012

149. Accordingly, the Authority, in the alternative to its maintained plea of inadmissibility, requests the Court to dismiss DB's pleas seeking an annulment of the contested letter of 2 July 2012 as unfounded.

6 CONCLUSION

150. On those grounds, the Authority maintains its principal request that the Court:

- 1. dismiss the application as inadmissible;**
- 2. order the Applicants to bear the costs.**

151. Or, in the alternative, to

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

152. Or, in further alternative, to

1. **dismiss the application;**
2. **order the Applicants to bear the costs.**



Markus Schneider



Gjermund Mathisen

Agents of the EFTA Surveillance Authority

7 SCHEDULE OF ANNEXES

No	Description	Referred to in this defence at paragraph(s)	Number of pages
D7	Event no 454884; EFTA Surveillance Authority Decision No 407/08/COL of 27 June 2008 <i>to adopt new Rules on Public Access to documents</i> ("RAD 2008")	4; 17-21; footnote 3	6
D8	Event no 639973; EFTA Surveillance Authority Decision No 300/12/COL of 5 September 2012 <i>to adopt revised Rules on public access to documents and repealing Decision 407/08/COL</i> ("RAD 2012")	17-21; footnote 3	7