E-15/10-65

REPORT FOR THE HEARING
in Case E-15/10

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

Posten Norge AS, established in Oslo, Norway,

and

EFTA Surveillance Authority,

supported by

Schenker North AB, established in Gothenburg, Sweden,

Schenker Privpak AB, established in Borås, Sweden, and

Schenker Privpak AS, established in Oslo, Norway,

seeking the annulment of the EFTA Surveillance Authority's Decision No 322/10/COL of 14 July 2010 relating to a proceeding under Article 54 of the EEA Agreement (Case No 34250 Norway Post / Privpak).

I Introduction

1. Posten Norge AS (hereinafter "the applicant", "Norway Post" or "NP") operates the national postal service in Norway which covers letters, parcels and financial services. Its sole owner continues to be the Norwegian State. The majority of Norway Post's services (90%) are exposed to competition.

2. The case concerns the decision taken by the EFTA Surveillance Authority (hereinafter "the defendant" or "ESA") on 14 July 2010 stating that Norway Post committed an infringement of Article 54 of the EEA Agreement (hereinafter "EEA") by abusing its dominant position in the business-to-consumer ("B-to-C") parcel market in

Norway between 2000 and 2006, imposing a fine of EUR 12.89 million on Norway Post and requiring Norway Post, insofar as it has not already done so, to bring the infringement to an end and to refrain from further abusive conduct.

3. The abuse identified in the decision concerned, in essence, the conclusion and maintenance of agreements providing for group and outlet exclusivity with major retail and petrol station chains in Norway, as well as the pursuit of a renegotiation strategy likely to limit the willingness of chains from negotiating and concluding agreements with NP's competitors.

4. The application is based on three pleas, namely, that Norway Post's behaviour did not constitute an abuse of a dominant position under Article 54 EEA; that, in any event, Norway Post's behaviour was justified; and, in the alternative, that the fine imposed was too high and should be reduced.

II Legal Background

EEA law

5. Article 54 EEA reads as follows:

> *Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.*
>
> *Such abuse may, in particular, consist in:*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

6. Article 2 of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "Protocol 4 SCA") reads as follows:

Burden of proof

In any national or EFTA proceedings for the application of Articles 53 and 54 of the EEA Agreement, the burden of proving an infringement of Article 53(1) or of Article 54 of the EEA Agreement shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 53(3) of the EEA Agreement shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The European Convention on Human Rights

7. Article 6 of the European Convention on Human Rights (hereinafter "ECHR") reads as follows:

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

…

8. Article 13 ECHR reads as follows:

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

9. Article 2 of Protocol 7 to the European Convention on Human Rights (hereinafter "Protocol 7 ECHR") reads as follows:

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

III Facts

Norway Post and DB Schenker/Privpak

10. Norway Post operates under a licence from the Ministry of Transport and Communication and is obliged to have at least one permanent postal service facility in each municipality in Norway. Under the Postal Services Act,[1] NP has the exclusive right to convey letters weighing less than 50g and costing less than two and a half times the basic tariff ("the reserved area"). NP is also obliged to provide certain universal postal services outside the scope of the reserved area.[2] However, the majority of its services (90%) are exposed to competition. Norway Post had a worldwide group turnover of NOK 23 668 million in 2006 compared to NOK 13 659 million in 2000.

11. The interveners (jointly referred to as "Privpak") are part of the DB Schenker group ("DB Schenker"). DB Schenker combines all transport and logistics activities of Deutsche Bahn AG and is a major European freight forwarding and logistics company. Schenker North AB owns and controls the group's businesses in Norway, Sweden and Denmark. Schenker Privpak AS, a limited liability company incorporated under Norwegian law, handles DB Schenker's domestic B-to-C parcel service in Norway. Schenker Privpak AB is a company incorporated in Sweden. Both Schenker Privpak AB and Schenker Privpak AS handle international customers seeking B-to-C distribution in Norway. Privpak's business concept is to deliver parcels from distance-selling companies to consumers in Norway, Sweden and Finland by offering distribution and delivery of parcels through retail outlets. In order to develop a network of delivery outlets at affordable costs, a cornerstone of Privpak's concept has been to find retail outlets which can perform the over-the-counter delivery with marginal resources and which, at the same time, can increase their turnover by selling products to consumers who enter the shop to pick up parcels.

B-to-C parcel services

12. B-to-C parcel services cover the collection of parcels at distance selling companies' premises/places of storage, sorting, transportation and delivery of the parcels to private consumers. Parcel recipients can either pick up their parcel over-the-counter in a post office or retail outlet ("over-the-counter delivery") or receive the parcel at their place of residence ("home delivery"). Delivery of B-to-C parcels at work has also been introduced in recent years ("delivery at work"). In Norway, over-the-counter delivery has by far been the predominant form of delivery.

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1 Act No 73 of 29 November 1996.

2 During the relevant period Norway Post was, for example, obliged to provide consumer-to-consumer (C-to-C) parcel services for parcels up to 20 kg.

13. In order for an undertaking to provide B-to-C parcel services with over-the-counter delivery, a platform for parcel distribution must be established. This platform requires the necessary infrastructure, including a fleet of vehicles for the collection of parcels at the distance selling company premises; sorting facilities (terminals) both central and regional; and a means of transporting parcels from the sorting facilities to regional facilities and hence to outlets from which delivery can take place. These infrastructure investments represent, to a large extent, fixed costs.

The Post-in-Shop concept

14. Post-in-Shop ("PiS") is a concept developed and owned by Norway Post for the provision of a range of postal and financial services in retail outlets such as supermarkets, grocery stores, kiosks and petrol stations. Each PiS must offer at least the minimum basic postal and banking services which Norway Post must provide in order to fulfil its universal postal service licence obligations. Additional products and services can be incorporated depending on the customer base of the individual PiS. Norway Post bears the main responsibility for the day-to-day monitoring of the PiS and has the right to control all aspects of the operation of the concept, including testing the competence of personnel. The PiS has to be integrated in the outlets and must have the same opening hours as the outlet itself. The PiS has a uniform profile and is branded in accordance with NP's general strategy. It must be centrally located inside the premises with its own adapted facilities. Norway Post has also set standard requirements for the interior of the outlet in which a PiS is established. Norway Post provides and operates the IT solutions which are required if these are not to be dealt with via the tills of the store. PiS vary in size, but the normal size for a PiS is around 7 to 20 square metres with an average of 15 square metres per shop.

15. Norway Post pays individual outlets for each postal and financial transaction as well as a commission for the sale of postal products. In addition, Norway Post pays the local outlet a fixed monthly fee to cover training, insurance and accounting. The local outlets are guaranteed a minimum income when the transaction fees and fixed fees are lower than planned for a given year. The outlets/retail chains are responsible for the costs related to the establishment of a PiS with the exception of equipment for which Norway Post is responsible.

The establishment and maintenance of the Post-in-Shop network

16. Originally, Norway Post had used its own network of post offices, established and developed partly through state resources, to provide B-to-C services. This network has been subject to two major reorganisations since the 1990s. From 1996 to 1998, Norway Post reduced the number of post offices from 2 228 to 910 while increasing the number of branch post offices from 128 to 370. In 1999 it concluded that its existing network was still too costly to operate and did not meet the market demands for accessibility and

service. It decided to reduce the number of post offices to 300-450 and to establish at least 1 100 PiS.

17. To that end, Norway Post presented its PiS concept in 1999-2000 to all major grocery store, kiosk and petrol chains in Norway: NorgesGruppen ASA ("NorgesGruppen") to which more than 2 850 outlets belonged in 2001, ICA Norge AS ("ICA") with 1 100 outlets in 2001, COOP NKL BA ("COOP") with 978 outlets in 2001, Statoil Detaljhandel AS ("Statoil") with around 395 manned petrol stations in 2001, A/S Norske Shell ("Shell") with 554 manned petrol stations in 2004, Esso Norge AS ("Esso") with 358 manned petrol stations in 2001, Hydro Texaco AS ("Hydro Texaco") with 340 manned petrol stations in 2001, and Reitangruppen with 827 outlets in 2001 organised in three chains: Rema 1000, Narvesen and 7-eleven. NorgesGruppen, through the chain MIX Butikkene AS ("MIX"), is also the largest kiosk retailer in Norway.

18. Eventually, Norway Post entered into agreements with NorgesGruppen/Shell, COOP and ICA. Esso and Hydro Texaco were not interested in the concept. Statoil initially negotiated together with ICA, but withdrew from the negotiations when ICA/Statoil were unable to offer a sufficient number of potential outlets to become NP's preferred partner. The negotiations with the chains belonging to Reitangruppen did not lead to any results as the strategic match between the parties was considered to be rather poor.

19. The Business Agreement with NorgesGruppen/Shell was concluded on 20 September 2000 and provided that NorgesGruppen/Shell would be Norway Post's preferred partner. In return for preferred partner status, NorgesGruppen/Shell gave Norway Post exclusive access to all outlets in their retail networks, regardless of whether there was a PiS in the actual shop. The non-compete obligation for NorgesGruppen/Shell included explicitly "delivery of parcels from legal entities which have freight as a business or part of their business".

20. The Framework Agreement and the Standard Operating Agreement between Norway Post and COOP were concluded on 22 January 2001. COOP was given second priority status, which meant that in locations without any NorgesGruppen or Shell outlets matching the PiS selection criteria, Norway Post were to give priority to outlets within the COOP group. Exclusivity was imposed on all outlets in which a PiS was established. Delivery of parcels was explicitly mentioned as competing activity in the non-compete clause.

21. The protocol entered into by Norway Post and ICA on 25 January 2001 referred to a Standard Operating Agreement that was similar to the Standard Operating Agreement for COOP. Exclusivity was imposed on all outlets in which a PiS was established. Delivery of parcels was explicitly mentioned as competing activity in the non-compete clause.

22. The three agreements could be terminated at the earliest towards the end of 2005. However, they were replaced by new agreements at the beginning of 2003. As far as postal services were concerned, no changes were made to the provisions on preferred partner status, exclusivity, non-compete obligations and the duration of the agreements.

23. At the end of 2003, Norway Post sent letters to NorgesGruppen/Shell, COOP and ICA, inviting them to talks regarding the conditions for operating PiS and possible amendments to the PiS agreements. From the beginning of 2004, Norway Post conducted, at its own initiative, parallel negotiations with NorgesGruppen, COOP and ICA with a view to concluding new framework agreements for PiS to replace the existing agreements from 1 January 2006. During these negotiations, Norway Post kept open the question to whom it would grant preferred partner status.

24. In the meantime, ESA opened its investigation concerning the PiS agreements.

25. ICA expressed its opposition to the preference and exclusivity arrangements and refused to accept such clauses in future agreements. On 5 October 2005, ICA informed Norway Post of its termination of the cooperation with Norway Post with effect from 31 December 2005. Norway Post disputed ICA's right to terminate the agreement and reminded it to retain the exclusivity for postal services in PiS outlets. Eventually, Norway Post agreed to remove both the preference clauses and the exclusivity provisions from its agreements. On 12 January 2006, a protocol was signed releasing ICA from all exclusivity and non-compete obligations in the existing agreements between the parties.

26. According the contested decision, Norway Post abolished the exclusivity and preference clauses with NorgesGruppen by way of a protocol signed on 30 March 2006. On 4 September 2006, Norway Post waived the exclusivity obligations in its agreements with COOP and COOP outlets with immediate effect. On 31 December 2004, Shell terminated the Framework Agreement with effect from 31 December 2006 and its outlets were, as from that day, no longer covered by any exclusivity obligations.

27. Norway Post rolled out its PiS concept from 2000 to 2002. At the end of 2002, it operated 328 post offices and 1 146 PiS (see table).

Number of post offices and Post-in-Shops			
	Post-in-Shops*	Post offices	Total
1997	265	1269	1534
1998	370	910	1280
1999	376	881	1257
2000	378	875	1253
2001	897 (incl. 378 BPO)	431	1328
2002	1146	328	1474
2003	1175	328	1503

2004	1201	328	1529
2005	1196	327	1523
2006	1184	327	1511
** including Contract Post Offices ("BPO") and Branch Post Offices from 1997 to 2004*			

28. Norway Post is the only supplier of B-to-C parcel services with a network covering the whole of Norway. Its market share remained close to or above 98% from the beginning of 2000, when it started negotiating with retail groups with a view to establish its network of PiS, until the time it had removed all exclusivity and preferences clauses in its agreements with NorgesGruppen/Shell, COOP and ICA during the course of 2006 ("the relevant period").

Privpak's market entry

29. Privpak originally started its operations in Sweden in 1992, introducing the concept of B-to-C over-the-counter delivery through retail outlets to the Swedish market. Privpak became profitable in Sweden only in 1999, with a network of 850 delivery outlets at the time. The number of outlets in Sweden was subsequently raised to 1 020 in 2003, 1 200 in 2006 and 1 400 in 2007. The Swedish regulator estimated that in 2003 Privpak had a market share in Sweden of 20 to 25%.

30. Privpak started planning for entry to the Norwegian market in 1997/1998 and started operations in 2001, relying on the same concept as in Sweden. According to its own submissions to ESA, it estimates that it needs at least 325 to 400 outlets to establish a credible presence in the medium term, and around 1 000 outlets to establish such a presence in the long term. In 2005, Privpak had managed to establish 142 outlets. Moreover, from June 2003 to June 2005, the agreements with 46 of the outlets were terminated either by Privpak itself or the outlet owner.

Number of Privpak delivery outlets	
2001	40
2002	114
2003	146
2004	146
2005	142

31. On 12 December 2006, Privpak and NorgesGruppen agreed on a pilot project in which Privpak's concept was tested in ten of NorgesGruppen outlets. On 22 October 2007, NorgesGruppen and Privpak entered into a cooperation agreement. According to information provided by Privpak to ESA, as of 30 November 2008, it had 295 delivery outlets in Norway out of which 206 belonged to NorgesGruppen.

IV Pre-litigation procedure

32. On 24 June 2002, ESA received a complaint from Privpak concerning the agreements between Norway Post and NorgesGruppen, ICA, COOP and Shell for the establishment of PiS in retail outlets belonging to those groups. Privpak alleged that Norway Post had engaged in anti-competitive practices in violation of Article 54 of the EEA Agreement and submitted that, as a result of these agreements, it was prevented from developing a rival network in Norway and thereby from competing with Norway Post for the provision of B-to-C parcel services in Norway.

33. Privpak submitted additional information by letters of 9 December 2002 and 14 January 2003.

34. A request for information was sent to Norway Post on 2 May 2003 which was replied to by letters of 16 and 23 June 2003.

35. Further information was sought by ESA from Privpak on 17 June 2003. The requested information was provided by letter on 15 August 2003.

36. In July 2003, requests for information were sent to twenty-two of Norway Post's customers leading to twenty-one responses being received by ESA.

37. On 2 February 2004, ESA sent a request for information to Privpak and received a reply by letter of 5 March 2004. In March 2004, ESA sent requests for information to ICA, NorgesGruppen, COOP, Shell and Reitangruppen. The replies were received during March and April 2004.

38. A request for information was sent to Privpak on 23 April 2004. Privpak replied by letter of 12 May 2004.

39. From 21 to 24 June 2004, ESA conducted an inspection at the premises of Norway Post in Oslo.

40. ESA continued to gather information from the complainant, Norway Post and other market participants during 2004 and 2005. Questionnaires were sent to distance selling companies in October and November 2007. Replies were received from 16 respondents.

41. Requests for information were sent to ICA and COOP on 1 April 2008. The answers were received on 3 April and 4 April 2008 respectively.

42. Finally, a request for information was sent to Privpak on 27 November 2008 to which Privpak responded on 2 December 2008.

43. ESA additionally held numerous meetings with the complainant, Norway Post and other undertakings during its investigation from 2002 to 2008.

44. On 17 December 2008, ESA notified a Statement of Objections to Norway Post. It took the preliminary view that Norway Post held a dominant position and had abused it by pursuing an exclusivity strategy with preferential treatment when establishing and maintaining its PiS network and by entering into agreements with certain retail groups and retail outlets in Norway.

45. On 23 December 2008, Norway Post requested a translation of the Statement of Objections into Norwegian and asked to be addressed in Norwegian in the future. A Norwegian translation of the Statement of Objections was transmitted to Norway Post on 6 February 2009. Norway Post submitted its reply to the Statement of Objections on 3 April 2009. At the request of NP, an oral hearing was held on 16 June 2009.

46. Privpak made its views known in writing on 20 April 2009 and participated at the oral hearing.

47. Norway Post made an additional submission on 13 July 2009 addressing, *inter alia*, questions raised by ESA at the oral hearing.

48. On 14 July 2010, ESA issued the contested decision.

49. By application lodged at the Court on 14 September 2010, Norway Post requested the Court to annul the contested decision.

V The contested decision

50. ESA found that the relevant market was the market for provision of B-to-C parcel services with over-the-counter delivery in Norway ("the relevant market"). ESA further found that Norway Post occupied a dominant position on that market, having regard to the very high market shares Norway Post held within the relevant period, the numerous barriers to entry it identified, and the fact that until 2005, when Tollpost Globe ("Tollpost") entered the Norwegian B-to-C parcel market, Privpak was Norway Post's only challenger on the relevant market.

51. ESA took the view that by entering into the agreements with NorgesGruppen/Shell, COOP and ICA, and by the subsequent renegotiation of those agreements ("the conduct"), Norway Post had abused its dominant position. In doing so, ESA relied on the following three considerations: (1) an agreement or cooperation with one or more of the leading grocery store, kiosk and petrol station chains was of significant importance to new entrants in order to enable them to establish a delivery network capable of competing effectively with that of Norway Post; (2) Norway Post's

conduct limited its competitors' access to those chains; and (3) the conduct was capable of restricting competition in the market for B-to-C parcels with over-the-counter delivery. In addition, ESA considered that (4) Norway Post's conduct likely resulted in actual anti-competitive effects to the detriment of consumers.

Importance of an agreement or cooperation with leading grocery store, kiosk or petrol station chains

52. ESA considered that when establishing its PiS network, Norway Post's strategy was to target these chains. Of the 1 175 PiS in 2003, only 35 had been established in (mainly independent) grocery stores, kiosks or petrol stations outside the NorgesGruppen/Shell, COOP and ICA groups. Only 42 outlets (around 3.6% of its network) were not grocery stores, kiosks or petrol stations. ESA considered this to demonstrate Norway Post's strong preference for the leading grocery store, kiosk and petrol station chains, and outlets belonging to these chains.

53. Similarly, Norway Post's only competitors, Privpak and Tollpost, were found to have a strong preference for such outlets. Their choices of outlets prior to the removal of the exclusivity clauses in NP's agreements were only made in the absence of better alternatives.

54. ESA considered that this preference can be explained, first, by the fact that cooperation with one or more of the leading grocery store, kiosk and petrol station chains is a highly efficient way of establishing and operating a delivery network for B-to-C parcels and, second, by the fact that a delivery network composed of grocery stores, kiosks and petrol stations belonging to chains is likely to be more competitive than a delivery network composed of other types of outlets.

55. ESA noted that retail groups will normally take on an obligation to promote the concept within their chain, thus facilitating the roll-out of the concept in the market, as opposed to contacting and convincing each and every potential delivery outlet. Furthermore, large chains have well-trained staff and an efficient management. The leading grocery store, kiosk and petrol station chains are among the largest retail chains in Norway and have well-known brands. In contrast, independent outlets are considered to have significantly higher credit losses – which are seen usually also as evidence of an overall poor service performance in the outlets concerned – and more rapid ownership changes. A delivery network consisting of such outlets was less stable and therefore more costly to operate.

56. With regard to the competitiveness of different types of outlets, ESA found that grocery store, kiosk and petrol station outlets are easily accessible due to long opening hours, their usually central location and good parking facilities. Furthermore, they are regularly frequented by consumers who, therefore, can conveniently combine their daily tasks with the pick-up of parcels. Customer handling in these stores is generally fast and

of generally high quality, while sales staff in specialised trade outlets may often be busy serving other clients. Furthermore, specialised trade outlets may have conflicts of interest with distance selling companies selling competing products.

57. These findings are seen to be overall supported by the answers of the distance selling companies obtained during the investigation. Five of these companies stated that they would not consider switching to a supplier of B-to-C parcel services whose network of delivery outlets did not comprise any or only a limited number of grocery stores, kiosks or petrol stations, and nine qualified their theoretically positive answers in important respects.

Conduct limiting access to the leading grocery store, kiosk and petrol station chains

58. Assessing NP's conduct, ESA found that the group exclusivity prevented the competitors of Norway Post from having access to the whole of NorgesGruppen/Shell, which included the largest daily consumer goods retail group, the largest kiosk chain and a leading petrol station chain in Norway, covering some 3 400 outlets in 2001 and close to 3 250 outlets in 2004. In 2004, Norway Post used only 706 of these outlets. Further, 242 COOP outlets and 180 ICA outlets were tied because of outlet exclusivity. Thus, the group and outlet exclusivity tied a large number of outlets in the leading grocery store, kiosk and petrol station chains in Norway to NP – some 3 672 outlets in 2004.

59. In addition, ESA considered that NP's conduct created disincentive effects for COOP and ICA to supply competitors of NP, having regard to NP's dominant position and its attractiveness as a business partner relative to new entrants. During the main roll-out from 2001 to 2003, the outlet exclusivity led to a situation where the establishment of outlets belonging to competitors of NP would have significantly reduced the likelihood of being awarded new PiS. During the renegotiations from 2004 to 2006, Norway Post expressly kept open the question of preferential partner and thereby gave COOP and ICA the impression that they could be awarded such a status from 2006 onwards. ESA concluded that, in order not to disqualify themselves as candidates for preferred partner status, COOP and ICA had disincentives, therefore, to cooperate with NP's competitors.

60. ESA also found that the other leading grocery store, kiosk and petrol station chains – Esso, Hydro Texaco, Statoil and Reitangruppen – were far from readily available to NP's competitors, as those chains were not interested in rolling out delivery concepts of B-to-C parcel services. ESA concluded that NP's conduct made it considerably more difficult for new entrants to obtain access to the most sought after distribution channels in Norway, thereby creating strategic barriers to entry on the relevant market.

Conduct capable of restricting competition

61. Considering the quality and attractiveness of the delivery network as one of the major competitive parameters in the relevant market, and against the background of NP's

strong position on the market, ESA reasoned that, without having access to any of the leading grocery store, kiosk or petrol station chains, it would be difficult to establish a viable and efficient B-to-C distribution business. Even if a network consisting of alternative outlets could be established on a large scale, new entrants would be at a competitive disadvantage compared to NP, as such an alternative network would be less attractive both from the perspective of distance selling companies and consumers.

Likelihood that the limitation of access to the leading grocery stores, kiosk and petrol chains resulted in actual anti-competitive effects

62. Moreover, and noting that this was not a prerequisite to establishing the abusive nature of NP's conduct, ESA also found it likely that the agreements actually had a negative impact on Privpak's entry into the Norwegian market, as the latter was prevented from concluding an agreement with MIX.

No objective justification

63. ESA considered that there was no objective justification for NP's conduct. As regards group exclusivity, ESA rejected NP's arguments that this was necessary to achieve efficiency gains or to prevent free-riding on its investments; in any event, it considered that the scope and duration of the group exclusivity was excessive. As regards outlet exclusivity, ESA rejected NP's arguments that it was necessary to protect NP's promotional efforts and investments in training, its intellectual property rights and the identity and reputation of the PiS concept, investments in counters and physical equipment, and to ensure that every PiS outlet focused on NP's concept. As to NP's renegotiation strategy, ESA also found that Norway Post had not demonstrated that it brought about efficiency gains, or was necessary and proportionate to achieve such gains.

64. Additionally, ESA considered that alleged efficiency gains from NP's conduct were, in any event, so limited that they did not outweigh the negative effects on competition and consumer welfare resulting from the conduct. Moreover, given the lack of competition, ESA considered that NP, as dominant undertaking, lacked incentives to pass on efficiency gains even if it had demonstrated that it had achieved such. Therefore, they could not be regarded as sufficient justification.

Duration of the infringement and fine

65. ESA considered that the conduct constituted a single and continuous infringement that lasted at least as long as NorgesGruppen was bound by the group exclusivity. Thus, ESA found that Norway Post's abuse of its dominant position commenced no later than 20 September 2000 with the conclusion of the first Business Agreement with group exclusivity and lasted until 31 March 2006.

66. ESA found that NP could not have been unaware that the conduct in question had as its object or effect the restriction of competition. Thus, ESA concluded that NP's conduct justified the imposition of a fine.

67. Norway Post's turnover in 2005 from the distribution of B-to-C parcels with over-the-counter delivery amounted to NOK 674.16 million, equivalent to EUR 84.17 million. Taking into account the nature of the infringement, NP's very high market share in the relevant market and the fact that the abuse covered the whole territory of Norway, ESA decided to set the proportion of the value of those sales to be used for the purposes of establishing the basic amount of the fine at 3%. Multiplying this amount with the number of years of the infringement, i.e. five years and six months, ESA fixed the basic amount of the fine at EUR 13.89 million.

68. ESA considered that neither mitigating nor aggravating circumstances were present. However, taking into account the considerable duration of the administrative procedure, ESA decided to exercise its discretion in fixing fines by reducing the basic level of the fine by EUR 1 million. The final amount of the fine was therefore EUR 12.89 million.

69. Articles 1 to 3 of the operative part of the decision read:

Article 1

Posten Norge AS has committed a single and continuous infringement of Article 54 of the EEA Agreement from 20 September 2000 until 31 March 2006 in the marked [sic] *for B-to-C parcel services with over-the-counter delivery in Norway by pursuing an exclusivity strategy with preferential treatment when establishing and maintaining its Post-in-Shop network which consisted of the following elements:*

- *Concluding and maintaining agreements with NorgesGruppen/Shell and agreements with individual outlets within this group providing group and outlet exclusivity in favour of Norway Post;*
- *Concluding and maintaining agreements with COOP and with individual outlets within COOP providing outlet exclusivity in favour of Norway Post;*
- *Concluding and maintaining agreements with ICA and with individual outlets within ICA providing outlet exclusivity in favour of Norway Post; and*
- *Pursuing a renegotiation strategy which was likely to limit the willingness of COOP and ICA to negotiate and conclude agreements with competitors of Norway Post for the provision of over-the-counter delivery of B-to-C parcels.*

Article 2

For the infringement referred to in Article 1, a fine of EUR 12.89 million is imposed on Posten Norge AS.

…

Article 3

Insofar as it has not already done so, Posten Norge AS is required to bring the infringement to an end and to refrain from any conduct which might have the same or equivalent object or effect as long as it holds a dominant position in the relevant market.

VI Forms of order sought by the parties

70. The applicant, Norway Post, claims that the Court should:

(i) annul the contested decision;

(ii) annul or substantially reduce the fine;

(iii) order the EFTA Surveillance Authority to pay the costs.

71. The defendant, the EFTA Surveillance Authority, submits that the Court should:

(i) dismiss the application;

(ii) order the applicant to bear the costs.

72. By Order of the President of the Court of 15 February 2011, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS have been granted leave to intervene in support of the defendant.

VII Written procedure

73. Pleadings have been received from:

- the applicant, represented by Siri Teigum and Frode Elgesem, advokats;
- the defendant, represented by Xavier Lewis, Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as agents;
- the interveners, represented by Jon Midthjell, advokat.

74. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the European Commission (hereinafter "the Commission"), represented by Leo Parpala, Felix Ronkes Agerbeek and Luigi Malferrari, Members of its Legal Service, acting as agents.

General issues

75. The applicant does not challenge ESA's definition of the market, the finding that it was in a dominant position on that market and the conduct which ESA assessed to be an abuse of its dominant position. What are in dispute are the circumstances, and the assessment thereof, that led ESA to conclude that NP's conduct constituted such an abuse.

Admissibility of certain pleas and treatment of certain documents

76. The defendant considers that a number of annexes to the application and reply are inadmissible and that the applicant has introduced several new pleas in law in the reply.

77. According to the defendant, although the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of essential arguments in law which, in accordance with the Rules of Procedure, must appear in the application.[3] Since the annexes have a purely evidential and instrumental function, it is neither for the defendant nor for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based.[4]

78. The defendant considers that a number of economic studies commissioned by the applicant, namely Appendices A 27, A 35, A 39, A 40, A 41, A 44, A 45, A 87, A 180, A 182, A 183 and A 184, are referred to in the application on numerous occasions only in a global way and permit neither ESA nor the Court to identify precisely the arguments that might be regarded as supplementing the pleas in law developed in the application. To the extent that the applicant has not referred to any specific points therein, the defendant considers these annexes to be inadmissible. Furthermore, the defendant contends that it is for the dominant undertaking concerned to support any plea of objective justification with arguments and evidence before the end of the administrative procedure.[5] In any event, it

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3 Reference is made to Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17; Case T-154/98 *Asia Motor France* v *Commission* [1999] ECR II-1703, paragraph 49; and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94.

4 Reference is made to Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34; Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 154; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 94 and 96–97; and Case T-87/05 *Energias de Portugal* v *Commission* [2005] ECR II-3745, paragraphs 153–156.

5 Reference is made to Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 688.

submits that the essential facts and law on which an action is based must be apparent from the text of the application itself.[6]

79. The defendant further claims that the applicant has, contrary to Article 37(2) of the Rules of Procedure, belatedly introduced a number of new pleas in law and new evidence in the reply. Invoking the principle of procedural homogeneity,[7] the defendant requests the Court to dismiss any new pleas and arguments as inadmissible. Similarly, the defendant submits that a number of annexes, namely Appendices 9 to 12 and 18 to the reply, should be considered as new evidence and declared inadmissible in their entirety. The defendant notes that the applicant has not given any reasons for its delay in offering those documents. ESA considers that, in any event, its assessments must be examined solely on the basis of the information available to it when they were made.[8]

80. The interveners support the defendant's plea of inadmissibility with regard to the economic studies on which NP relies. In any event, the interveners reject the studies as unreliable.[9] They submit that none of them meets the Commission's best practice criteria for the submission of economic evidence.[10] The interveners subsequently address in detail what they consider to be flaws in each study.

81. The applicant submits that no new pleas in law were introduced in the reply. It acknowledges that while it may not submit completely new pleas, in its view, there is an extensive right to further develop and supplement the application in the reply. This allows

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6 Reference is made to Case C-400/08 *Commission* v *Spain*, judgment of 24 March 2011, not yet reported, paragraphs 36 and 45; and Case T-87/05 *Energias de Portugal* v *Commission* [2005] ECR II-3745, paragraph 155.

7 Reference is made to Case E-2/02 *Bellona* v *EFTA Surveillance Authority* [2003] EFTA Ct. Rep. 52, paragraph 39; order of the Court of 31 January 2011 in Case E-13/10 *Aleris Ungplan* v *EFTA Surveillance Authority*, not yet reported, paragraph 39; and order of the President of the Court of 15 February 2011 in the present case, not yet reported, paragraph 8.

8 Reference is made to Case T-141/08 *E.ON Energie* v *Commission*, judgment of 15 December 2010, not yet reported, paragraph 48; Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33; Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81; Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 88; Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 47; Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 48; and Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and ZEMAG* v *Commission* [2005] ECR II-1579, paragraph 67.

9 Reference is made to Case T-110/07 *Siemens* v *Commission*, judgment of 3 March 2011, not yet reported, paragraph 54.

10 See the Commission's 2010 publication: "Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases", submitted as Annex I 7.

it also, in the reply, to expand on arguments originally developed in the appendices.[11] In any event, the applicant considers that it would be incompatible with the ECHR and the Court's duty to undertake an unlimited review of the contested decision if, simply on account of purely formal considerations such as the fact that arguments or evidence were not invoked before the end of the administrative procedure, it were precluded in a criminal case from submitting arguments and evidence to defend itself against a materially incorrect conviction.

82. With regard to the interveners' objections to the economic studies, the applicant submits that the Commission's best practice guidelines are directed towards different types of economic studies, such as quantitative data and econometric models, while the reports in question contain, in essence, common economic reasoning which ESA and the Court can easily assess as regards their relevance and reliability.

83. Regarding the new evidence submitted in the reply, the applicant argues that this information from the distance selling companies and some chains did not exist at the time the application was lodged and, moreover, submission of the new evidence is a way of securing for NP the right to examine witnesses which have provided evidence against it.

Standard of review and burden of proof

84. The applicant contends that ESA bears the burden of proving that an infringement of the competition rules has taken place.[12] It submits that the standard of proof is high and not satisfied if a plausible explanation can be given which rules out an infringement.[13] The existence of the circumstances that constitute the infringement, including the required intent, must be proven beyond reasonable doubt.[14] In other words, ESA must present to the Court precise and consistent evidence in order to establish the existence of the infringement.[15] The applicant submits that the case at hand does not

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11 Reference is made to Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 99; and Case T-151/01 *Der Grüne Punkt – Duales System Deutschland* v *Commission* [2007] ECR II-1607, paragraph 76.

12 Reference is made to Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 45; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 66 [sic]; D. Wood, "Proving it – The standard and burden of proof in Article 82 cases", *Competition Law Insight*, 11 March 2008, pp. 5 and 6; and M. M. Collins, "The burden and standard of proof in competition litigation and problems of judicial evaluation", *ERA-Forum, Humanities, Social Sciences and Law*, Volume 5, Number 1, pp. 66–83.

13 Reference is made to C. Kerse and N. Kahn, *EC Antitrust Procedure*, fifth edition, London 2005, p. 478.

14 Reference is made to Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraphs 474 to 475; and to the judgment of the European Court of Human Rights (ECtHR) in *Barberà, Messegué and Jabardo* v *Spain*, No 10588/83, 10589/83, 10590/83, 6 December 1988, Series A No 146, paragraph 77.

15 Reference is made to Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 477.

involve complex economic appraisals and that, accordingly, the Court must not defer to any significant degree to ESA's assessment of the facts.[16]

85. The applicant argues that this high standard of proof is necessary in particular as the imposition of a substantial fine is tantamount to a criminal charge for the purposes of Article 6 ECHR.[17] Accordingly, the safeguards of the ECHR must be observed including, in particular, the principle of *in dubio pro reo*. In that regard, according to the applicant, the Court must have full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.[18] In the reply the applicant argues that the absence of a possibility to appeal to a second instance, something which it considers to be a manifest defect of the judicial system of the EFTA pillar in the light of Article 2 of Protocol 7 to the ECHR, requires the Court to undertake a particularly strict review of the evidence produced by ESA.

86. The defendant submits that the Court must establish whether the evidence put forward is factually accurate, reliable and consistent, contains all the relevant data that must be taken into consideration in appraising a complex situation, and is capable of substantiating the conclusions drawn from it. However, in its view, review by the Court is limited as regards complex technical or economical appraisals by ESA.[19] ESA maintains that its analysis of the competitive situation constitutes such a complex economical appraisal and that, accordingly, the decision must be upheld unless the Court finds that ESA manifestly erred in its appraisal of the applicant's conduct.[20] Furthermore, it asserts that it is for the applicant to support any pleas of objective justification with arguments and evidence before the end of the administrative procedure,[21] and that it is for that party to demonstrate before the Court that ESA made a manifest error of assessment in its

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16 Reference is made to Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 89.

17 Reference is made to Case C-185/95 P *Baustahlgewebe GmBH* v *Commission* [1998] ECR I-8417, to judgments of the ECtHR in *Société Stenuit* v *France*, No 11598/85, 27 February 1992, and *Jussila* v *Finland*, No 73053/01, 23 November 2006, paragraph 46; and to L.O. Blanco (ed.), *EC Competition Procedure*, second edition, Oxford University Press, New York 2006, p. 175; M. Ameye, "The interplay between human rights and competition law", [2004] *European Competition Law Review*, pp. 332–341. On the applicability of Article 6 ECHR to legal persons, reference is made to the judgment of the ECtHR in *Fortum Oil and Gas OY* v *Finland*, No 32559/96, 12 November 2002 (decision on admissibility), p. 11.

18 Reference is made to judgments of the ECtHR in *Öztürk* v *Germany*, No 8544/79, 21 February 1984, paragraph 56, and *Janosevic* v *Sweden*, No 34619/97, paragraph 81.

19 Reference is made to Case C-241/00 P *Kish Glass* v *Commission* [2001] ECR I-7759 and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 87–89.

20 Reference is made to Case E-4/97 *Norwegian Banker's Association* v *EFTA Surveillance Authority* ("*Husbanken II*") [1999] EFTA Ct. Rep. 1, paragraph 40.

21 Reference is made to Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 688.

evaluation of any such arguments advanced by the applicant during the administrative procedure.[22]

87. The defendant rejects the applicant's submissions to the extent that these would require a departure from established case law. In its view, the allegation that the absence of a possibility to appeal to a second instance is incompatible with the ECHR constitutes a new plea in law which is inadmissible and, in any event, unfounded.[23] Whilst ESA acknowledges that the procedure in competition cases such as the present falls within the criminal sphere for the purpose of the application of the ECHR,[24] in its view, in such cases the guarantees under Article 6 ECHR do not necessarily apply with their full stringency.[25] It submits that the judicial review of competition decisions by the Court is sufficient to fulfil the guarantees laid down by Article 6(1) ECHR.

First plea: Norway Post's behaviour did not constitute an abuse of a dominant position under Article 54 EEA

88. By its first plea, the applicant submits that its behaviour did not constitute an abuse of a dominant position within the meaning of Article 54 EEA. It argues that ESA's application of the legal test is too strict and that the evidence produced by ESA is insufficient to prove its allegations. In particular, the applicant submits (1) that ESA has not proven that the conclusion of an agreement or cooperation with one or more leading grocery stores, kiosk or petrol station chains is of major importance to new entrants in establishing a delivery network capable of competing effectively with Norway Post, (2) that ESA has not proven that its conduct limited competitor's access to those chains in a manner that constituted abuse, and (3) that ESA has not proven that NP's conduct resulted in actual anti-competitive effects.

First part: The applicable legal test/concept of abuse

89. The applicant acknowledges that, according to case law, it is sufficient to demonstrate that the conduct in question is liable to restrict competition. In its view, however, there is a movement towards a more effects-based approach and, in the assessment of exclusive dealing arrangements, more emphasis should be placed on the appraisal of likely effects and the possible impact of these effects within the relevant

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22 Reference is made to Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 224.

23 Reference is made to the judgment of the ECtHR in *Belilos* v *Switzerland*, No 10328/83, 29 April 1988, paragraph 68.

24 Reference is made to the judgment of the ECtHR in *Engel* v *the Netherlands*, No 5100/71, 8 June 1976, paragraph 82, and to the Opinion of Advocate General Sharpston of 10 February 2011 in Case C-272/09 P *KME Germany and Others* v *Commission*, not yet reported, point 64.

25 Reference is made to *Jussila* v *Finland*, cited above, paragraph 46.

factual context.[26] The applicant submits that, in order to establish anti-competitive foreclosure, it is not sufficient to show that one single method of access was hampered or eliminated. Rather, ESA must show that effective access to the market was hampered or eliminated, and that the conduct makes it possible for the dominant undertaking to increase prices, or reduce quality or choice to the detriment of consumers.[27]

90. The applicant submits that the defendant committed an error in law by failing to quantify the degree of possible foreclosure, either in absolute terms or as a percentage of the market, resulting from the conduct.[28] Even if exact quantification may not be not required, it was for ESA to prove that the degree of foreclosure was substantial, i.e. significant and not merely theoretical.[29] In that regard, it was irrelevant whether or not NorgesGruppen/MIX was particularly well suited for Privpak's concept. According to the applicant, instead, ESA should have considered if the available alternatives would have allowed an "as efficient competitor" to compete effectively with Norway Post.[30]

91. NP maintains that the required threshold of foreclosure, both with regard to likelihood and materiality, may vary depending on the kind of abuse concerned.[31] While it may be particularly low in cases where the conduct is *prima facie* likely to lead to an unjustified distortion of competition ("abuse by object"),[32] a high threshold applies where

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26 Reference is made to Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, in particular paragraph 160; R. O'Donoghue and A. J. Padilla, *The Law and Economics of Article 82 EC*, pp. 357–368; DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses; and Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45, p. 7, paragraph 20.

27 Reference is made to the Guidance on the Commission's enforcement priorities, cited above, paragraph 19.

28 Reference is made to Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 80 and 160.

29 Reference is made to Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 68; Case C-280/08 P *Deutsche Telekom* v *Commission*, judgment of 14 October 2010, not yet reported; Opinion of Advocate General Mazák of 2 September 2010 in Case C-52/09 *Konkurrensverket* v *TeliaSonera Sverige*, not yet reported, point 40; Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 477; Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraphs 238–246; and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 149 and 160. In addition, reference is made to Case 6/72 *Continental Can* v *Commission* [1973] ECR 215, paragraph 29; and Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 73.

30 Reference is made to the US Court of Appeals judgment in *Omega Environmental Inc* v *Gilbarco Inc*, 127 F.3d. 1157 (9th Cir. 1997); Commission Decision in Case COMP/C-3/37.792 *Microsoft*, paragraph 838; Commission Decision of 11 October 2007 in Case COMP/B-1/37.966 *Distrigas*; and to L. Kjølbye, "Rebates under Article 82 EC: navigating uncertain waters", [2010] *European Competition Law Review*, pp. 66–80, at p. 70.

31 Reference is made to E. Østerud, *Identifying Exclusionary Abuses under article 82 EC – The spectrum of tests*, University of Oslo 2010, in particular p. 179.

32 As examples for such cases, reference is made to Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 90; Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 61;

the practice is not as such abusive in character.[33] In that regard, the applicant points out that its conduct was intended to secure a fast and efficient roll-out of a new form of distribution model (the PiS-concept),[34] had the objective of ensuring the effective implementation of NP's public service obligations and protected a significant investment in a new delivery network.[35] Furthermore, the conduct concerned exclusive dealing arrangements imposed on distributors rather than end-users. The applicant considers that kind of conduct to give less cause for concern, unless the distributors are especially important to effective competition, as competitors are still able to compete for the entire market.[36] As the conduct did not tie end-users to NP, the applicant submits that ESA erred in law when it considered that, due to the "extremely weak" degree of competition in the market, even a rather limited degree of foreclosure was liable to distort competition.

92. The defendant maintains that it correctly applied the concept of abuse of a dominant position as follows from consistent case law, i.e. that it is sufficient to show that the conduct tends to restrict competition or, in other words, that the conduct is capable of having that effect.[37] ESA considers that it demonstrated in the decision that the applicant's conduct was capable of restricting competition, in particular as the competition in the market was extremely weak. In its view, NP's intentions are irrelevant as the notion of abuse is objective in nature,[38] and exclusive dealing practices that are acceptable for the purposes of Article 53(1) EEA may nonetheless be prohibited under Article 54 EEA.[39] The "as efficient competitor" test is only relevant in certain price abuse

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Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported; and Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraphs 209 and 210.

33 Reference is made to Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935.

34 Reference is made to the former Guidelines on vertical restraints [sic], paragraph 119.

35 With regard to the latter aspect, parallels are drawn with Case C-7/97 *Oscar Bronner* v *Mediaprint* [1998] ECR I-7791.

36 Reference is made to Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraphs 222 and 245; *Omega Environmental Inc* v *Gilbarco Inc*, 127 F.3d. 1157 (9th Cir. 1997); *United States of America* v *Dentsply International Inc*, 399 F.3d 181 (3rd Cir. 2005); *CDC Technologies Inc* v *IDEXX Laboratories Inc*, 186 F.3d 74 (2nd Cir. 1999); R. M. Steuer, "Exclusive Dealing in Distribution", 69 *Cornell Law Review* (1983), p. 101, at p. 105; and J. M. Jacobson, "Exclusive Dealing, 'Foreclosure' & Consumer Harm", 70 *Antitrust Law Journal* (2002), p. 311.

37 Reference is made to Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 30; Case T-203/01 *Michelin* v *Commission* ("*Michelin II*") [2003] ECR II-4071, paragraph 239; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 867; Case T-301/04 *Clearstream* v *Commission* [2009] ECR II-3155, paragraphs 144–145; Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 376; Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 289.

38 Reference is made to Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 356.

39 Reference is made to the Opinion of Advocate General Kokott in Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, point 23, and the case law cited.

cases such as margin squeeze because of the problems of legal certainty involved,[40] but not applicable to cases involving exclusivity agreements. In the latter category of cases, it is for the competitive process to decide, without being unduly hindered by the conduct of the dominant firm, which firms stay in the market.

93. The Commission submits that the defendant applied the correct legal test according to which, provided that the other conditions of Article 54 EEA are met, for abusive conduct to be regarded as illegal it suffices to show that it is capable or likely to restrict competition. In particular, it is not necessary to demonstrate concrete effects.[41] The Commission contends that the existence of a dominant position means that, irrespective of the reasons that led to that position, the dominant undertaking or undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the internal market.[42] Accordingly, it is no excuse that customers of a dominant undertaking are willing, or even request, to enter into exclusive agreements.[43] In the Commission's view, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[44]

94. The Commission rejects the applicant's interpretation of the *Van den Bergh Foods* judgment of the ECJ. Instead, it considers that this judgment confirms the previous case law and builds upon it by holding that Article 54 EEA also applies to *de facto* retailer

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40 Reference is made to Case C-280/08 P *Deutsche Telekom* v *Commission*, judgment of 14 October 2010, not yet reported, paragraph 188.

41 Reference is made to Case C-280/08 P *Deutsche Telekom* v *Commission*, judgment of 14 October 2010, not yet reported, paragraphs 175 and 177; Case T-203/01 *Michelin* v *Commission* ("*Michelin II*") [2003] ECR II-4071, paragraph 239; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 867; Case T-301/04 *Clearstream* v *Commission* [2009] ECR II-3155, paragraphs 144–145; Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 30; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917; Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 376; and Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraphs 289–290.

42 Reference is made to Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 57; Joined Cases C-395/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 85; and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 114.

43 Reference is made to Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461; and Case C-393/92 *Municipality of Almelo and Others* v *NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

44 Reference is made to Case 6/72 *Continental Can* v *Commission* [1973] ECR 215, paragraph 26; Joined Cases 6/73 and 7/73 *Istituto Chemicoterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 32; and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 91.

exclusivity.[45] As to the *Delimits* judgment of the ECJ, the Commission submits that the case is only relevant in relation to the application of Article 53 EEA and that the question of effects was only raised in that case with regard to whether there was an effect on trade between Member States.[46] The Commission also disagrees with NP's reading of the Commission's guidance on enforcement priorities[47] and its 2005 discussion paper.[48] In any event, it asserts that there are no good reasons to depart from the existing legal standard.

Second part: Major importance of an agreement or cooperation with one or more leading grocery stores, kiosk or petrol station chains to new entrants

95. The applicant submits that ESA's finding that an agreement or cooperation with one or more of the leading grocery store, kiosk or petrol station chains was of major importance to new entrants is not supported by the available evidence.

96. First, NP argues that its own preferences were of little value to support ESA's finding having regard to the important differences, in particular with regard to space requirements, between the PiS-concept (of NP) and other over-the-counter delivery concepts. It claims that only selection criteria which are not specific to PiS are relevant, in particular "proximity to consumers" and "opening hours", and that those criteria are equally fulfilled by other types of outlets.

97. Second, the applicant disputes ESA's finding that NP's competitors have shown a "clear and consistent preference" for outlets belonging to these chains. Privpak's statements in this regard are regarded as contradictory[49] and not credible considering Privpak's action for damages against Norway Post pending before Oslo City Court. NP submits that Privpak's business concept, to operate an over-the-counter delivery service with marginal resources, is not attractive to these outlets as they have generally the highest earnings requirements per square metre,[50] and that neither in Sweden nor in

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45 Reference is made to Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, in particular, paragraphs 80–119 and 157–160; Case C-552/03 P *Unilever Bestfoods (Ireland)* v *Commission* [2006] ECR I-9091, paragraph 129; and opinion of Advocate General Cosmas in Case C-344/98 *Masterfoods Ltd* v *HB Ice Cream Ltd* [2000] ECR I-11369, point 94.

46 Reference is made to Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, paragraphs 7, 9, 14–15 and 32.

47 Guidance on the Commission's enforcement priorities, cited above, in particular, paragraphs 1, 3 and 19–20.

48 DG Competition paper on the application of Article 82 EC to exclusionary abuses, December 2005. Reference is made in particular to points 1 and 60.

49 Reference is made to Appendix A 43 (Reply from Privpak, 10 June 2005, second part); Appendix A 47 (Reply from Privpak, 23 April 2004, question 2.4); Appendix A 178 (Reply from Privpak, 15 August 2003, question 1.2); and Appendix R 1 (Presseklipp, Bring 03.02.11, p. 6/7).

50 Reference is made to Appendix A 40 (Copenhagen Economics of 14 September 2010, slide 10).

Norway was it Privpak's aim to cooperate at chain level.[51] It claims that, in 2006, approximately 50% of Privpak's outlets in Sweden and 30% of Tollpost's outlets in Norway did not belong to the category of outlets in question.[52] NP contends that Privpak considered the NorgesGruppen/MIX outlets preferable mainly because of the possibility to free ride on NP's investments.[53] The significant increase in the number of outlets used by Tollpost following the expiry of NP's agreements is explained by the fact that the market had become accustomed to these outlets due to NP's presence over time. In the applicant's view, the market situation that prevailed from mid-2006 onwards is unsuited to prove preferences during the period of the alleged abuse.

98. Third, the applicant submits that ESA's finding that a delivery network composed of outlets belonging to the leading grocery store, kiosk or petrol station chains is likely to be more competitive than a delivery network composed of other outlets is not supported by the evidence, but rests on unsubstantiated, speculative "common sense" assumptions. The only evidence gathered by ESA which the applicant considers to have some value are the replies submitted by the distance selling companies in response to ESA's questionnaire. However, in the applicant's view, the defendant misinterpreted these replies and they do not support its assessment.[54]

99. The applicant claims that it follows from the answers submitted in response to the first question in ESA's questionnaire that the most important criteria for the distance selling companies are price, service quality, delivery time, national presence/coverage and accessibility to consumers, but not the type of delivery outlet or chain affiliation. NP argues that the defendant erred in disregarding price as being among the most important parameters for competition in the relevant market. Even in the answers given to questions 2 and 4 on the importance of the type of delivery outlet (questions which the applicant considers to be leading), eleven out of fifteen distance selling companies did not state a preference for grocery stores, kiosks or petrol stations, with five respondents explicitly stating that the type of outlet is of no or only minor importance. Further, only five out of fifteen distance selling companies answered that they would not consider switching part or all of their demand to a network of delivery outlets which did not comprise any, or only a limited number of, grocery stores, kiosks and petrol stations, and only two answered that question in the negative for a delivery network composed of independent outlets (questions 5 and 6). According to the applicant, moreover, the distance selling

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51 Reference is made to Appendix A 178 (Reply from Privpak, 15 August 2003, question 2.2).

52 Reference is made to Appendix A 97.

53 Reference is made to Appendix A 47 (Reply from Privpak, 23 April 2004, question 2.4); and Appendix A 123 (Reply from Privpak, 1 October 2007, question 10, lit. l and m).

54 In the assessment of the replies by the distance selling companies, further reference is made to Appendix R 9 (Explanatory remarks from Komplett, 6 December 2010); Appendix R 10 (Explanatory remarks from Select, 21 January 2011); Appendix R 11 (Explanatory remarks from Forlagssentralen, 26 January 2011); and Appendix R 12 (Explanatory remarks from De norske Bokklubbene, 20 December 2010).

companies answering in the negative qualified their answers in important respects. It notes that although Tollpost's delivery network consisted mainly of florists in June 2006, many distance selling companies, among them two who had answered question five in the negative, were interested in distributing parcels through Tollpost's network.[55] Privpak, too, had agreements with two distance selling companies which the defendant considered to be negatively disposed to switching.[56] None of the distance selling companies mentioned lack of chain affiliation or the outlets used by distributors when asked by the defendant, in 2003 and 2007, to explain why they did not use other distributors than NP. Finally, in the answers to the third question on selection criteria, none of the distance selling companies mentioned consumer frequency, and only one mentioned "combining errands" as an advantage.

100. The applicant submits that the defendant failed to take into account the results of the consumer surveys submitted by NP during the administrative procedure. It contends that the important features for consumers were price, delivery time, security of delivery and proximity of the outlet, but not the type of delivery outlet, or chain affiliation, or the possibility to combine errands.[57] NP argues that the decision is speculative when holding that specialised trade shops have shorter opening hours, slower customer handling and do not always provide the same service quality. On the question of opening hours, the applicant points out that most PiS had to be established in large outlets which were normally not exempted from the law on opening hours and that in any event, only 2% of the customers use PiS between 7 pm and 9 pm.[58]

101. The applicant concludes that ESA's appraisal of the criteria relevant to the selection of an outlet is incorrect on a number of points and that it has not been demonstrated that grocery stores, kiosks and petrol stations belonging to chains are more suitable than other types of outlets for the provision of over-the-counter parcel services.

102. Fourth, in the reply, the applicant argues that even if the delivery network of a competitor consisted of outlets other than those used by NP, the number of parcels from distance selling companies interested in such alternative distribution networks was more than sufficient for a competitor to be profitable.[59] Based on its analysis of the B-to-C market and the replies by the distance selling companies, the applicant estimates that during the relevant period, the annual number of parcels "in competition" (available for

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55 Samlerhuset and H&M. Reference is made to Annex D II (Presentation submitted by Tollpost to ESA, 26 June 2006, p. 20).

56 H&M and Sparkjøp. Reference is made to Appendix R 13 (Reply from Privpak, 22 November 2004, p. 4).

57 Reference is made to Appendix A 183 (Consumer survey by Synovate, September 2007); Appendix A 184 (Consumer survey by Synovate, 2005); and Appendix A 182 (AC Nielsen, 2005).

58 Reference is made to Appendix A 118 (AC Nielsen, 2008, last slide).

59 According to the applicant, the number of parcels required is approximately one million. In this regard, reference is made to Appendix A 177 (Reply from Tollpost, 8 August 2006).

distribution by competitors) was approximately 4.78 million (or 60% of the market) for the purposes of the fourth question, approximately 4.77 million for the purposes of the fifth question and approximately 6.89 million (or 87% of the market) for the purposes of the sixth question.[60]

103. The defendant rejects the applicant's submissions and maintains that a new entrant would have been placed at a competitive disadvantage if it had been unable to conclude an agreement for parcel delivery with one or more of the leading grocery store, kiosk or petrol station chains. New entrants needed to build a platform for parcel delivery and needed to acquire a sufficient volume of business to make the platform economically viable, all the while the applicant controlled the relevant market as a quasi-monopolist. In the defendant's view, the application is based on a selective reading of the decision and the challenges to the individual points are made out of context. ESA submits that its assessment is based on an objective overall appraisal of the available evidence.

104. ESA maintains that NP's preferences provide useful and relevant information notwithstanding the differences between PiS and mere parcel delivery. The defendant rejects the claims that Privpak's statements are contradictory,[61] that grocery stores, kiosks or petrol stations have higher earning per square metre requirements than other outlets in comparable locations and that Privpak wanted to free ride on NP's investments in NorgesGruppen/MIX. On the latter point, in any event, it was the retail chains that paid for the reconstruction of outlets and other modifications of fixed installations. With regard to Privpak's alleged lack of preference for chain affiliation, ESA states that, at the time, Privpak had a very limited business volume which reduced its attractiveness vis-à-vis the central management of retail chains, but that, in any event, access to branded chains was regarded important.[62] ESA argues that during the relevant period Privpak tried and, subsequent to the abolition of the exclusivity practices, succeeded in concluding an agreement with NorgesGruppen/MIX. As regards Privpak's and Tollpost's current operations, the defendant considers, first, the list presented by NP to be incomprehensible, second, Privpak's choice of outlets in Sweden to be irrelevant due to differing market conditions, and, third, the large increase of Tollpost outlets within ICA to clearly illustrate Tollpost's preferences.

105. The defendant submits that the views of the distance selling companies were but one element in its finding that access to the chains in question was important for new entrants, the most important of which was that outlets had to fulfil certain qualitative criteria such as accessibility. These criteria can be achieved through use of the type of

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60 Reference is made to Appendix R 16 (Analysis of the number of B-to-C parcels "in competition" for competitors of NP).

61 Reference is made to Appendix A 43 (Reply from Privpak, 10 June 2005, pp. 3–4); and Appendix A 47, pp. 1290–1291 (Reply from Privpak, 23 April 2004). With regard to Appendix R 1 (Presseklipp, Bring 03.02.11, pp. 6-7), reference is made to Annex I to the Rejoinder.

62 Reference is made to Appendix A 178, p. 2437 (Reply from Privpak, 15 August 2003).

outlets in question. It is common ground that these outlets had a good accessibility with usually a central location, good parking facilities and long opening hours.[63] As regards the importance of using outlets that consumers often visit and where they can combine errands, the defendant refers to statements by NP and NorgesGruppen.[64]

106. Furthermore, the defendant considers that the replies of the distance selling companies to the fifth and sixth question of its questionnaire, due to the important reservations made by most respondents, support its thesis that new entrants would be placed at a competitive disadvantage if they could not secure an agreement to use chains of grocery stores, kiosks and petrol stations. Both questions presupposed that a competing nationwide delivery network had been established, which was not the case during most of the relevant period.

107. As regards its alleged failure to take account of consumer preferences, the defendant argues that the survey carried out for the applicant was of limited reliability as it involved many hypothetical issues, its findings do not contradict ESA's assessment and, in any case, that the relevant demand side of the market consists of the distance selling companies who are the industrial clients of B-to-C parcel delivery companies.

Third part: Conduct did not abusively limit the access of NP's competitors to leading grocery store, kiosk and petrol station chains

108. The applicant maintains that the defendant has neither proven that the conduct was liable to create the disincentives envisaged by ESA nor that other leading chains were unavailable to rivals. NP also claims that, even in the absence of the outlet exclusivity provisions, COOP and ICA outlets with a PiS would normally not have concluded agreements with other parcel distributors in order to avoid confusion by employees and customers.[65] In its view, it is unclear from the decision whether the group exclusivity with NorgesGruppen in itself already amounted to a restriction of competition, or if this restriction resulted only from the additional outlet exclusivity agreed with outlets in ICA and COOP. The applicant submits that many outlets were available to competitors in COOP, in ICA and in other chains and outlets not having agreements with Norway Post.

109. The applicant claims that ESA's assessment of disincentives in general is speculative and not based on facts and sound economic theory. In 2004, both COOP and ICA explicitly answered questions from the defendant to the effect that both the chain

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63 Reference is made to Annex D II (Presentation submitted by Tollpost to ESA, 26 June 2006).

64 Reference is made to paragraph 84 of the contested decision and Norway Post's Annual Report 2000, p. 8.

65 Reference is made to Appendix A 74 (Request for information from COOP, 19 February 2004) and Appendix A 81 (Reply from COOP, 31 March 2004, question 4a); Appendix A 79 (Reply from ICA, 17 March 2004, question 4a); Appendix A 25 (Reply from ICA, 29 October 2007, question 5b); and Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 1c).

management and the outlets without PiS were open to agreements with other suppliers,[66] but that the chains had not received any (serious) enquiries from NP's competitors.[67] NP asserts that the burden of showing that this attitude changed at a later stage rests with the defendant. As to the proper assessment of incentives, NP submits that ESA failed to take account of the fact that no outlet was obliged to accept NP as a partner, that COOP and ICA were free to conclude agreements with NP's competitors, and that COOP and ICA outlets knew that if a PiS was established in a nearby NorgesGruppen outlet, they could not expect to take over that PiS.[68] In the applicant's view, at any rate once the main roll-out was completed, neither COOP nor ICA had any significant disincentives to conclude agreements with NP's competitors. As NP was not in a position to conclude agreements with a significant number of new outlets, the chains and their outlets had increasingly stronger incentives to accept agreements with other parcel operators. ICA, operating both in Sweden and Norway, had incentives to find a partner for outlets in both countries and eventually found that partner in Tollpost, i.e. Sweden Post.

110. NP does not share the defendant's view that it was common knowledge that NP planned to further reduce the number of post offices and replace them with PiS. On the contrary, it was common knowledge that this was a politically extremely sensitive subject, and, during the relevant period, nobody had reason to believe that a significant number of post offices would be replaced by PiS in the future. In any event, information circulating in February 2006 regarding future plans for post offices, plans which were decided upon only in 2008, was incapable of creating any disincentives in relation to the preceding period.

111. Although COOP was informed in 2003 of plans to establish 75 new PiS in 2004, according to the applicant, it was clear that most of them would be established at NorgesGruppen outlets. Further, it asserts that, even though some of the existing PiS were replaced, NP was not free to cancel agreements at its own discretion and, again, was bound by its preference commitments to NorgesGruppen and COOP. Accordingly, neither COOP nor ICA had reason to expect competition for a high number of PiS contracts in the relevant period. The fact that the relocation of existing PiS was "not unthinkable" could not have created particularly strong disincentives for COOP and ICA. Moreover, any outlet wishing to take over an existing PiS would have been required to cover the installation costs of approximately NOK 200 000. Under these circumstances, the alternative for an outlet wanting to provide parcel delivery, that is to conclude

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66 Reference is made to Appendix A 73 (Request for information to ICA Norge, 19 February 2004) and Appendix A 117 (Reply from ICA, 17 March 2004, questions 4a and 4b); and Appendix A 74 (Request for information to COOP, 19 February 2004) and Appendix A 81 (Reply from COOP, 31 March 2004, questions 4a and 4b).

67 Reference is made to Appendix A 79 (Reply from ICA, 17 March 2004, question 5a); and Appendix A 80 (Reply from COOP, 31 March 2004, question 5a).

68 Reference is made to Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 3).

agreements with other parcel distributors, would have been far less costly and would have required less space and training than the establishment of a PiS.

112. The applicant disputes that it pursued the renegotiation strategy suggested in the decision and maintains that it did not link the issues of preference and exclusivity.[69] It had informed all negotiating partners that with the completion of the main PiS roll-out, the need for a close partner was less prominent.[70] The applicant submits further that ESA is not entirely correct to state that COOP and ICA were interested in obtaining a better preference status. Instead, COOP did not want to end up with a lower priority status,[71] and ICA wanted NP to abolish the preference system altogether.[72] The applicant claims that at no stage of the negotiations was ICA given any reason to expect that it would become the preferred partner of NP.[73] Moreover, it rejects the idea that mere disagreement between NP and ICA regarding exclusivity and preference clauses would be sufficient to create any disincentives, in particular as those issues were not linked in the negotiations. Furthermore, NP considers that both ICA's cancellation of its agreement with NP on 5 October 2005 and its answers to the defendant prove that ICA felt free to conclude agreements with NP's rivals.[74] NP notes that the defendant did not ask COOP such follow-up questions.[75] Under these circumstances, the applicant maintains that ESA's finding of disincentives is based on pure speculation.

113. Instead, NP submits that, during the initial phase from 2001 to 2002, ICA and other chains were not very interested in the PiS concept in general,[76] and that the decisive issue for the chains was not the extra business that could be attracted but the direct payment for the services. NP points out that its offer per transaction was twice as high as Privpak's.[77] Consequently, it concludes that even in the absence of NP's conduct Privpak's offer would not have been considered attractive. NP further submits that direct

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69 Reference is made to Appendix R 21 (Minutes of meeting NorgesGruppen/NP, 16 and 23 September 2004); and Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 3).

70 Reference is made to Appendix R 20 (Email from Oddvar Aakvik to Erik Johannesen, 30 March 2004); and Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 3).

71 Reference is made to Appendices A 29, A 30 and A 31.

72 Reference is made to Appendix A 111 (ICA draft agreement, 25 January 2005); and Appendices A 23, A 24, A 25 and A 110.

73 Reference is made to Appendices A 111 and A 124.

74 Reference is made to Appendix A 86 (Request for information to ICA, 16 October 2007) and Appendix A 25 (Reply from ICA, 6 November 2007).

75 However, the applicant considers its viewpoint confirmed by its own interview with COOP, reference is made to Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 2).

76 Reference is made to Appendix A 86 (Request for information to ICA, 16 October 2007) and Appendix A 25 (Reply from ICA, 6 November 2007, question 3).

77 Reference is made, *inter alia*, to Appendix A 121 (payment for ICA in 2005); Appendix A 84 (Reply from Hydro Texaco, 1 June 2005, Annex 1); and Appendix A 85 (Reply from Tollpost, 5 June 2007, Tollpost's prices).

payment was the decisive factor also for the subsequent period and the renegotiations, and that COOP and ICA were open to viable offers but did not receive any.[78] The applicant concludes that the defendant failed to understand the basic interests of the outlets. Moreover, it asserts that the defendant's finding that COOP and ICA were far from readily available to new entrants is unsupported by the evidence.

114. The applicant submits that the defendant also failed to prove that other outlets or chains, in particular Esso, Hydro Texaco, Statoil and Reitangruppen, were not available to its competitors. In its view, the starting point must not be the number of outlets tied to NP (some 3 672 shops in 2004) but the number of untied shops, which NP estimates at 28 000 in Norway, out of which more than 5 000 were grocery stores, kiosks and petrol stations.[79] Taking the view that a delivery network of approximately 365 to 485 outlets would be sufficient to reach most of Norway's population,[80] NP submits that its competitors had more than enough outlets from which to choose. Moreover, to ensure national coverage including rural areas with low population, new entrants could also have used NP's infrastructure. In any event, some analysis of the required access to outlets would have been necessary to support ESA's assessment that NP's conduct led to possible foreclosure effects. Moreover, NP considers that also the failure to assess the availability of outlets other than amongst the leading grocery stores, kiosks and petrol station chains constitutes a manifest error of assessment.

115. Privpak's lack of success in establishing a delivery network in Norway is claimed to be due to Privpak's special business requirements which are considered ill-suited for the Norwegian market, such as its reliance on kiosk counters, and its unwillingness to offer sufficient compensation to potential outlets.[81] NP claims that Privpak's attempts to establish contacts with distance selling companies were also inadequate. Accordingly, the lack of success of Privpak's market entry is unrelated to NP's conduct and in no way indicative of market foreclosure. As regards the fact that Privpak was prevented access to MIX, NP argues that the legality of its conduct cannot depend on the preferences of actual or potential competitors who are inefficient. Only the foreclosure of efficient competitors can constitute an abuse. The applicant submits that the lack of analysis in determining whether Privpak was an efficient competitor constitutes a manifest error in the assessment of whether NP's conduct was actually capable of having any foreclosure effect.

116. The defendant rejects all the arguments of the applicant. It submits that it examined the overall behaviour of NP during the relevant period in its pertinent legal and

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78 Reference is made to Appendix R 18 (Explanatory remarks from COOP, 17 December 2010, question 1). Tollpost's lack of success in 2005 is regarded as indication that its offer was not attractive.

79 Reference is made to Appendix A 27 (Oslo Economics, 6 September 2010, pp. 7–8).

80 Reference is made to Appendix A 27 (Oslo Economics, 6 September 2010).

81 Reference is made to Appendix 43 (Reply from Privpak, 10 June 2005, Annex 3).

economic context, and that parts of the conduct cannot be examined on their own and in isolation from NP's overall practices. The group exclusivity with NorgesGruppen/Shell made all the outlets in that network unavailable for five-and-a-half years despite the fact that NP only needed access to some 22% of them. In addition, 422 outlets in COOP and ICA were removed from the market by outlet exclusivity. The applicant's contention that outlets with PiS did not have any interest to cooperate with competing parcel distributors is rejected, as it was neither for the defendant to prove that such interest existed, nor for the applicant to limit those outlets in their ability to decide for themselves whether or not to deliver parcels for NP's competitors.

117. As regards the assessment of the additional disincentives created by the applicant, the defendant argues that also practices other than formal undertakings may constitute an abuse under Article 54 EEA.[82] By objective standards, NP was a more attractive business partner than new entrants and both COOP and ICA had an interest in being awarded as many PiS as possible as soon as they had concluded the agreements with NP in January 2001. Even if COOP and ICA had gradually become aware which of their outlets were located close to a PiS established in a NorgesGruppen/Shell outlet, there was still considerable uncertainty as to where NP would establish Post-in-Shops during the main roll-out period. As the outlet exclusivity effectively excluded from the PiS concept all outlets to which a competitor had been granted access, ESA considers it evident that disincentives to deal with NP's competitors existed during this period.

118. For the period between the main roll-out and the renegotiations, that is, from autumn 2002 to the end of 2003, ESA contends that, for the purposes of the decision, disincentives were not regarded as a central element of the abuse. Nonetheless, it maintains that NP established 50 PiS in 2003 and a further 50 in 2004, and that the corresponding plans to expand its PiS network were communicated to the public.[83] ESA further claims that NP's partners knew that NP wanted to further reduce the number of its post offices,[84] and that in 2006 an application to close 150 post offices was made.[85] Additionally, ESA maintains that it is undisputed that NP closed some PiS and replaced them with new ones, and that it was not unthinkable that NP would move a large number of PiS after its agreements were replaced in 2006. To illustrate that possibility, ESA submits that, in 2011, some 120 existing PiS were moved to new outlets.[86]

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82 Reference is made to Case Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 59.

83 Reference is made to NP's annual reports 2002 (p. 56), 2003 (pp. 6 and 28) and 2004 (pp. 11 and 62); and Appendix A 103 (Newspaper article, 21 January 2004).

84 Reference is made to Appendix A 14, p. 658 (Minutes from meeting COOP/NP, 14 November 2003).

85 Reference is made to Appendix A 34, p. 1078N.

86 Reference is made to Annex II to the rejoinder (NP Press Release, 29 October 2010).

119. As regards the renegotiations, the defendant submits that the special responsibility as a dominant firm should have led the applicant to abstain from such a strategy. Both COOP and ICA wanted preferred partner status and for ICA, even equal treatment would have been an improvement.[87] The fact that ICA cancelled its agreement with NP is considered to have been but a step in the negotiation process. While the decision is not based on any link between preferred partner status and exclusivity, ESA maintains that it has shown that COOP was concerned about its priority status. A commitment to roll out a competitor's concept during the renegotiations would have been likely to damage COOP's bargaining position vis-à-vis NP as long as the question of preference remained open. ESA contends that the answers it received from COOP and ICA in 2004 and from ICA in 2007 do not support NP's claim that COOP and ICA at chain level did not feel disincentives to deal with new entrants. ESA asserts further that the statements made by COOP vis-à-vis NP on 17 December 2010[88] are inadmissible, and, in any event, do not constitute credible evidence.[89]

120. According to ESA, the fact that NP's competitors did not enter into detailed negotiations with COOP and ICA is ineffective to challenge ESA's finding that NP's conduct created disincentives. In relation to the argument that the payment offered by the new entrants was too low, ESA contends that new entrants needed also to get the distance selling companies on board, which meant that there was a limit to the payment they could offer to outlets. Moreover, although new entrants were not able to offer to outlets payments similar to those paid by NP, which as the incumbent provider served virtually all existing customers in the relevant market, their business concepts also did not entail such high costs for retail groups and outlets. As outlets would also create extra revenue from the additional customer flow generated by parcel delivery, ESA considers that Privpak's entry strategy was coherent and deserved a chance without being hampered by NP's conduct. ESA submits that, although there may have been some uncertainty about the scope of the potential for increased sales due to customers collecting parcels, that potential was nevertheless recognised. The mere fact ICA was reluctant towards over-the-counter-delivery concepts does not demonstrate that it would have been impossible for new entrants to conclude an agreement with ICA in the absence of NP's conduct.

121. The defendant maintains that the other chains were not readily available to new entrants. It also rejects the applicant's submission that the analysis ought to start with the number of untied outlets. It is argued that foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of

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87 Reference is made to Appendix A 2 (NP's reply to the Statement of Objections, p. 64).

88 Appendix R 18.

89 The defendant points out that only one of the two COOP employees attending the meeting signed the statement and that COOP had and continues to have close business relations with the applicant. Reference is made to Annex II to the rejoinder (NP Press Release, 29 October 2010); and Annex III to the rejoinder (COOP Press Release, 29 October 2010).

the market is still sufficient to accommodate a limited number of competitors.[90] Moreover, the applicant fails to acknowledge the importance for a new entrant to conclude an agreement or enter cooperation with one or more of the leading grocery store, kiosk or petrol station chains. As regards the possibility for a new entrant to rely on NP's outlets in sparsely populated areas, the defendant asserts that a dominant undertaking cannot escape liability for a barrier to entry it has created by proposing that new entrants should become its customers.

122. Finally, the defendant submits that Privpak's particular focus on stores with kiosk counters did not mean that its entry strategy made no sense, or that access to MIX would not have been an advantage. It should be for the selection process of the market and not for artificial barriers created by a dominant undertaking – or for a competition authority – to decide whether a new entrant's strategy is efficient or not. In any event, the question of which entry strategy one particular market player pursued cannot be decisive in determining whether NP's conduct was liable to restrict competition.

123. The interveners reject any arguments by which NP claims that their lack of success was due to an inferior business model, or that Privpak wanted to copy or "free-ride" on NP's network. They point out that DB Schenker is one of the leading providers of globally integrated logistics services with a turnover in excess of EUR 15 billion and contend that it was Privpak who successfully pioneered the business model of over-the-counter B-to-C parcel delivery through leading grocery chains, kiosks and petrol stations in Sweden, long before NP adopted its PiS concept in Norway. DB Schenker already operated a nationwide business-to-business (B-to-B) network in Norway and Privpak's B-to-C outlets constituted only "the last mile" of an otherwise already existing network. The successful roll-out of its delivery network in Sweden, where no exclusivity agreements were maintained by the former state monopolist due to interventions by the Swedish Competition Authority, is contrasted with the low number of Privpak outlets in Norway.

124. Moreover, the interveners contend that NP regarded Privpak as a direct threat to its B-to-C business. They submit that NP offered to buy Privpak's business in Sweden and Norway in 2004 and 2005.[91] It is claimed that, two weeks after DB Schenker and NorgesGruppen announced a breakthrough agreement in 2007,[92] NP approached DB Schenker with a proposal for a market-sharing agreement under which DB Schenker

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90 Reference is made to Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 241.

91 Reference is made to Annex I 3 (Indicative offer from NP, 23 September 2005).

92 Reference is made to Annex I 5 (NorgesGruppen/Privpak Press release, 23 October 2007).

would abandon its network in Norway and NP, in return, would use Privpak in Sweden rather than establishing its own network there.[93]

125. In its comments on the intervention, NP rejects the allegation that it approached DB Schenker with a proposal for a market-sharing agreement. Rather, the interveners are distorting and misrepresenting the evidence. NP contends that it was interested in acquiring Privpak's operations in Sweden, Denmark and Finland in order to expand into these markets. The offer with regard to Privpak's Norwegian business was only made because NP did not expect DB Schenker to be interested in keeping Privpak's operations in Norway without the business in Sweden.

Fourth part: NP's conduct did not result in actual anti-competitive effects

126. Although the applicant acknowledges that it is not necessary under Article 54 EEA for ESA to prove actual effects on competition, it maintains that valid proof of such effects strengthens the presumption of conduct being liable to have negative effects and, vice versa, that the absence of actual effects is a relevant indication that the conduct was in fact not liable to restrict competition,[94] in particular where such conduct has continued for a longer period.[95] NP contends that, although the alleged infringement continued for 5.5 years, no evidence exists that the market development subsequent to 2006 has been influenced by the removal of the exclusivity provisions. Actual anti-competitive effects should have implied price decreases; however, the defendant failed to even investigate price developments.

127. The applicant claims that the effect of its conduct on competition was actually positive, as it was indispensable to the establishment of the PiS network which, in turn, familiarised the market with the over-the-counter delivery concept and thereby paved the way for new entrants. As regards the development of its competitors after the relevant period, the applicant notes that Tollpost succeeded in establishing itself without access to outlets previously covered by the group exclusivity, while Privpak remains a marginal supplier even today, long after the exclusivity provisions ceased to have any effects.

128. The defendant submits that this part of the first plea should be rejected, as it is ineffective to challenge the legality of the decision. The defendant merely complemented its finding of infringement with an examination of the likely effects of those practices,

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93 Reference is made to Annex I 6 (Email from NP to Privpak, 14 November 2007, and presentation, 7 November 2007).

94 Reference is made to Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 92–95; Case COM 12114 *Viasat/TV2/Canal Digital Norge*, ESA decision of 11 July 2007, paragraph 397; and Commission Decision in Case COMP/C-3/37.792 *Microsoft*, paragraphs 905–926 and 944.

95 Reference is made to the DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, cited above, paragraph 55.

without this being necessary under the case law. In any event, ESA rejects the arguments made by the applicant.

Second plea: In any event, Norway Post's conduct was justified

First part: Threshold applicable to objective justifications

129. The applicant submits that the threshold applicable to objective justifications and efficiencies depends upon the extent of the foreclosure effects.[96] NP contends that ESA overstated the foreclosure effects and consequently erred in its assessment of objective justifications and efficiencies. NP asserts that the reasoning underlying the ECJ's judgment in *Bronner* applies to the present facts and that a prohibition on exclusivity from the outset would have significantly increased the risks and reduced the incentives to make the necessary investments in creating the PiS network.

130. The defendant rejects these arguments, arguing that any justification put forward had to be applicable to parcel distribution services.

131. In its reply, NP argues that the exclusivity clauses were intended to cover the establishing of full post office functions which relate to many product markets and that to require direct links to the B-to-C parcel delivery market is too narrow an approach.

132. NP submits that there is no room for applying the proportionality principle *stricto sensu* in this case, and argues that, in any event, the Court should exercise a great deal of restraint in the scope of its judicial review.[97] NP asserts that in connection with actions that are carried out to provide services of general economic interest there are compelling reasons to act with such restraint. Member States have a broad margin of discretion when determining what is to be defined a service of general economic interest[98] and, therefore, also when determining internal levels of protection.

133. The applicant claims that public interest considerations and more specifically the performance of services of general economic interest are aims which can constitute an objective justification for the purposes of Articles 53 and 54 EEA.[99] NP asserts that its

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96 Reference is made to the Opinion of Advocate General Jacobs in Case C-53/03 *Syfait* v *Glaxosmithkline* [2005] ECR I-4609, point 72.

97 Reference is made to J. H. Jans, 'Proportionality Revisited', [2000] *Legal Issues of Economic Integration*, pp. 239-265, at p. 248.

98 Reference is made to Case T-17/02 *Fred Olsen* v *Commission* [2005] ECR II-2031, paragraph 216.

99 With regard to Article 54 EEA, reference is made to Case 6/72 *Continental Can* v *Commission* [1973] ECR 215, paragraphs 25–26; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755; Commission Decision 2000/521/EC, *Spanish Airports*, OJ 2000 L 208, p. 36, paragraph 52; Commission Decision 97/745/EC, *Port of Genova*, OJ 1997 L 301, p. 27, paragraph 21; Guidance on the Commission's enforcement priorities in applying Article 82 EC, cited above, paragraph 29; E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law*, Hart Publishing, 2010, pp. 266–

public service obligations constitute services of general economic interest.[100] Although mainly protected by Article 59(2) EEA, according to the applicant, services of general economic interest remain of relevance when making an assessment under Article 54 EEA.[101] Furthermore, while there is no provision in the EEA Agreement equivalent to Article 14 TFEU,[102] NP submits that Article 54 EEA should be applied nonetheless in the same manner by the Court in accordance with the principle of uniform application.

134. NP claims that the implementation of the PiS concept through group and/or shop exclusivity agreements is intended to ensure services of general economic interest. On its reading of the case law, in the sphere of services of general economic interest, the test as to whether measures are necessary evolved from requiring that they are "indispensable" for the performance of the task of general interest[103] towards a more lenient test where the measures adopted are required merely to be "necessary" to attain the benefits of the legitimate aim.[104]

135. NP continues that, under Article 106(2) TFEU, in cases where no exhaustive EU norm pre-empts the discretion of the Member State in question, the measures adopted to achieve the public interest should be considered illegal only if they are manifestly inappropriate.[105] NP argues that to the extent Member States are granted a margin of appreciation, such margin of appreciation should apply similarly to an undertaking empowered by that Member State.[106] Consequently, NP asserts that ESA has made a

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268; and O. Kolstad, *Abuse of a Dominant Position*, 2007, pp. 203–210. With regard to Article 53 EEA, reference is made to Case C-309/99 *Wouters and Others* [2002] ECR I-1577; O. Kolstad, *Abuse of a Dominant Position*, 2007, p. 206; and J. Faull and A. Nikpay (eds), *The EC Law of Competition*, second edition, OUP, 2007, p. 407.

100 Reference is made to Case C-320/91 *Corbeau* [1993] ECR I-2533.

101 Reference is made to Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole Télévision SA* v *Commission* [1996] ECR II-649; J. L. Buendia Sierra, *Exclusive rights and state monopolies*, OUP, 1999, p. 359; the same author in Faull and Nikpay (eds), *The EC Law of Competition*, second edition 2007, pp. 644 and 1386; and Richard Whish, *Competition Law*, sixth edition, OUP, 2009, p. 154. Additional reference is made to Article 36 of the Charter of Fundamental Rights of the European Union.

102 Reference is made to Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 39.

103 Reference is made to Case 66/86 *Ahmed Saeed* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 58.

104 Reference is made to Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14–16; Case C-393/92 *Almelo* [1994] ECR I-1477, paragraphs 46 and 49; Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraphs 16, 17, 43 and 64; and W. Sauter, 'Services of General Economic Interest and Universal Service in EU Law', 33 *European Law Review* (2008), pp. 167–193, at p. 187.

105 Reference is made to Case T-289/03 *BUPA* v *Commission* [2008] ECR II-81; Joined Cases T-125/96 and T-152/96 *Boehringer* v *Council and Commission* [1999] ECR II-3427, paragraphs 73 and 74; Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraphs 138–140; Buendia Sierra in Faull and Nikpay (eds), *The EC Law of Competition*, second edition 2007, p. 642; and W. Sauter, *Services of General Economic Interest and Universal Service in EU Law*, [2008] E.L.R., p. 167–193, at pp. 186–188.

106 Reference is made to Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 139; and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118.

manifest error in law in applying, in this case, instead, the requirement that recourse be had to the least restrictive alternative.

136. Further, NP asserts that while it is, in principle, for the dominant undertaking invoking the doctrine of objective justification to prove that the relevant conditions are met, in the area of services of general economic interest, the burden of proof must to a certain extent be shared between the undertaking and ESA.[107] NP submits that no stricter burden of proof applies to NP than to Member States. However, NP submits that the burden of proof adopted by ESA effectively requires NP to prove, positively, that no other conceivable measure could enable the tasks in question to be performed under the same conditions.

137. Apart from considering these submissions to be inadmissible, ESA asserts that abusive behaviour cannot be ignored on the grounds that it affects even more markets than the relevant one and, in addition, rejects the applicant's claims on the proportionality principle. It contends that the applicant could have taken less restrictive action than its actual conduct and asserts that the purpose of Article 54 EEA is to protect competition not the dominant undertaking.[108]

Second part: Necessity of chain exclusivity

138. The applicant submits that ESA erred in its assessment of the necessity of chain exclusivity for the roll-out of the PiS concept by excluding the legitimate need for NP to reduce the substantial financial risks related to the project, to secure the safety of its investments and to prevent free-riding.

139. NP submits that ESA disregarded the impact of the exceptional size and character of the PiS roll-out and underestimated, therefore, the need for chain exclusivity. It states that this roll-out was the largest ever roll-out of a retail network in Norway, and it was combined with the establishment of an entirely new business concept. NP asserts that it was under pressure from its owner, the Norwegian State, to save costs while, at the same time, bound by the conditions of its universal service licence and needing Parliamentary approval for its restructuring plans. Consequently, it was of utmost importance to NP to ensure the commitment of NorgesGruppen to the project through the granting of preferred partner status combined with an exclusivity obligation.

140. NP argues that ESA disregarded the reluctance both chains and individual outlets showed in relation to the PiS concept prior to the conclusion of the chain agreements in 2001. There was a risk that a number of individual outlets would not be interested in the

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107 Reference is made to Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 56; and Case C-67/96 *Albany* [1999] ECR I-5751.

108 Reference is made to Case C-52/09 *Konkurrensverket* v *TeliaSonera Sverige*, judgment of 17 February 2011, not yet reported, paragraph 22.

PiS concept during the start-up phase.[109] NP submits that *ex ante* chain exclusivity has a strong effect on commitment, making individual outlets more willing to host a PiS, and even more so when combined with the grant of preferred status to the chain to which they belong.

141. According to NP, the roll-out required large non-outlet specific investments in the concept, including in marketing and training materials. A fast and secure roll-out was required in order to achieve positive economic effects. Furthermore, NP's contingency planning had to take into account that, once the success of PiS was recognised, shops could be captured by competitors and/or Norway Post could face high payment demands (hold-ups), and thus increased costs.

142. The applicant asserts that chain exclusivity was motivated by NP's need for a committed partner covering all the geographic areas needed within the period required. It cannot be held against NP that no written documentation to support this submission exists, if NP has proven that it considered delays in the roll-out as the major risk related to the project, that there was reluctance on the part of NorgesGruppen and its outlets, and that exclusive agreements are a recognised means of ensuring commitment to a project. ESA's allegations that NP's conduct had the objective aim of creating barriers to entry are rejected as unfounded and not substantiated by any credible evidence.

143. NP adds that the risk of hold-up existed also in the period after the main roll-out. Furthermore, NP needed to protect its investment in NorgesGruppen as a preferred partner and still needed to ensure access to appropriate outlets for its remaining, although limited, roll-out of new PiS. With regard to the latter point, the fact that NorgesGruppen wanted to abolish the group exclusivity in 2003 demonstrates that the incentives of NorgesGruppen and its individual outlets to give priority to NP were not strong and NP risked higher costs if access to new outlets within NorgesGruppen became subject to competition.[110]

144. Thus, while NP accepts that chain exclusivity with NorgesGruppen may have had different effects on competition before and after 2003, it submits that it was nonetheless justified during both periods, in particular as any foreclosure effects resulting from the outlet exclusivity applicable in relation to the other chains were insignificant subsequent to the main roll-out. In order to demonstrate the significant efficiencies achieved, the applicant refers to a study by Copenhagen Economics. In the reply, NP details this further by explaining that it invested close to NOK 2 billion in the establishment of the PiS concept, creating anticipated efficiency gains of about NOK 1 billion per year once the

[109] Reference is made to Appendix A 123.

[110] Reference is made to Appendix A 44 (Copenhagen Economics: Chain Exclusivity was necessary to secure roll-out, p. 13).

roll-out was completed.[111] A delayed roll-out would have increased the risk of a political backlash against the PiS concept. It is submitted that a delayed roll-out would have led to unrealised efficiency gains of between NOK 86 million and 200 million.[112]

145. In its reply, the applicant contests ESA's finding that it could have used less restrictive means than group exclusivity, by agreeing upfront which outlets it needed to remain available to it, to ensure access to the outlets required. NP asserts that this would have not been feasible and contends that ESA's findings in this regard are not backed up by any evidence.

146. The defendant rejects the arguments raised by NP. It contends that NP does not contest its findings in any detailed manner but globally dismisses them on general grounds, namely, the alleged importance of ensuring commitment by NorgesGruppen to the PiS project. The fact that NP needed to obtain its owner's permission to replace post offices with PiS is considered irrelevant. The defendant submits that abusive conduct cannot be justified by a dominant undertaking on internal corporate governance grounds.

147. ESA contends that NP failed to demonstrate any direct link between the group exclusivity agreements and the economic risk perceived in a delayed implementation of the PiS concept. Correspondingly, ESA argues that NP has not demonstrated that any efficiency gains were linked to group exclusivity. Furthermore, NP failed to demonstrate that, at the time when the agreements with NorgesGruppen/Shell were concluded, it perceived a risk that the rollout of its PiS network could be delayed without group exclusivity. It asserts that, given the strong incentive for NorgesGruppen to cooperate with NP, there was little risk of opportunistic hold-up. Moreover, alternative, less restrictive means than group exclusivity could have been used to secure access to outlets.

148. ESA submits that distinguishing NP's single and continuous course of conduct in two separate periods where it had different functions is artificial and, in any event, not substantiated in the light of the long-term duration of the exclusivity clauses. Instead, ESA considers that the implementation of NP's exclusivity strategy had the ongoing objective aim to create strategic barriers to entry in a market where it was exposed to minimal competition.

Third part: Necessity of outlet exclusivity

149. The applicant submits that ESA has applied too high a standard of proof in relation to NP's need to protect, by means of outlet exclusivity, its investments in individual outlets and their staffing against spillover effects. It contends that it has provided the necessary documentation to demonstrate how parcel delivery on behalf of a competitor of

111 Reference is made to Appendix A 87 (Copenhagen Economics: Risk and efficiency losses from delayed or limited implementation of PiS, 14 September 2010, p. 3).

112 Ibid., pp. 5–10 and 12.

Norway Post in outlets with a PiS unit posed a risk to its intellectual property rights, its need to safeguard the identity and reputation of the PiS concept and to prevent confusion about postal services and other services. NP refers to new documentation concerning marketing and training and a new economic study on the economic justification for outlet exclusivity.[113]

150. NP asserts that the fact that it was forced to abandon the exclusivity clauses after ICA cancelled its agreement cannot be considered proof that exclusivity was never needed in the first place. Furthermore, the fact that ICA itself preferred to keep PiS and competing parcel distribution services separate, and that, even today, Tollpost and Privpak operate most of their parcel delivery through outlets other than NP confirms that the separation of competing parcel services is considered necessary by all parties concerned. For the purposes of ensuring protection against the promotion of a competitor's services and not simply the prevention of confusion, mere equipment exclusivity is regarded as insufficient.

151. In its reply, NP contends that free-riding may arise if competitors were to have a parcel delivery service in the same outlet as a PiS as they would have less need for their own marketing, could use the counter, scales and other equipment installed by NP, and/or use staff who have been already trained in parcel delivery. Furthermore, NP's high quality services could be tarnished if confused with lower quality rival services, whether as a matter of consumer perception or as a result of errors made by confused staff, necessitating the potential incurrence of additional costs in order to restore brand perception. NP asserts that the risk of goodwill loss was significant and real, particularly as consumers have difficulties in distinguishing between rival B-to-C services.[114]

152. NP asserts that equipment exclusivity would be insufficient to counteract the potential loss of goodwill and free-riding on training (which in part constitute commercial know-how and business secrets). Equipment exclusivity would require individual on-site inspections in order to be enforced. Further, NP argues that, as regards the effect on competition, the differences between outlet and equipment exclusivity are minimal, as, in any event, most outlets would not find it in their interest to have two competing deliverers on the same premises due to problems such as needless queuing and confusion among customers.

153. Also in the reply, NP details the marketing-related costs and measures for the PiS concept which it considers were exposed to free-riding, in particular for the restructuring of the network, the development of the interior design and the marketing campaign for

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113 Reference is made to Appendix A 185 (Norway Post: Marketing costs related to Post in shop, Training, 13 September 2010); and Appendix A 45 (Copenhagen Economics: Shop exclusivity was justified ex ante and had little effect ex post, 14 September 2010).

114 Reference is made to Appendix A 45 (Copenhagen Economics: Shop exclusivity was justified ex ante and had little effect ex post, 14 September 2010, pp. 10–12, 14–15 and 17–18).

the introduction of PiS including marketing directed at distance selling companies.[115] NP argues that outlet exclusivity protected not only B-to-C parcel services but all services provided by NP at the individual outlet.

154. With regard to training, NP submits that it invested both in general and parcel delivery specific training. It contends that the addition of extra tasks and routines established by NP's competitors would increase the risk of confusion and mistakes by the employees operating the PiS and thus could affect the quality of all PiS services. In answer to ESA's argument that NP never explained in any detail what kind of training it has provided to the employees of the outlets, NP submits an overview of the training provided.

155. The defendant rejects these arguments. Not only does it consider the references to the Appendices and the arguments put forward in the reply as inadmissible, ESA contends, in addition, that both during the administrative procedure and in the application NP has continuously relied on general assertions to challenge the validity of ESA's findings on the need to protect intellectual property rights and to safeguard the identity and reputation of the PiS concept. NP's allegation that ESA relied on NP's later agreements as proof that outlet exclusivity was not necessary is based on a misreading of the contested decision.

156. With regard to the argument that separation of providers is considered necessary by all parties concerned, ESA maintains that clear separation in the individual outlets is sufficient to avoid any danger of confusion. The defendant fails to see any arguments why, beyond that, the promotion of its different services justifies NP's abusive conduct.

Fourth part: Norway Post's renegotiation strategy

157. The applicant submits that its renegotiation strategy was objectively justified, as it would have been impossible to choose a preferred partner before the question of direct payment for services was determined. It considers that ESA has not fulfilled its obligation to state reasons for its assessment. NP contends that it did not link group exclusivity and preferred partner status in the negotiations. Moreover, unless the group exclusivity itself was contrary to Article 54 EEA, which NP denies, it was under no obligation to release NorgesGruppen from that contractual commitment.

158. The defendant rejects these arguments. Observing that the plea does not concern whether the conduct as such is abusive but the existence of objective justification, it asserts that NP did not show that its renegotiation strategy brought about any efficiency

[115] Reference is made to Appendix R 33 (Appendices to Appendix 185 to the Application, p. 8 and Appendices 1–3, p. 8 of Appendix 4, Appendices 5–6 and Appendices 15–17).

gains capable of justifying its abusive conduct. Furthermore, ESA submits that it complied with its duty to state reasons.[116]

Fifth part: The balancing of efficiency gains with anti-competitive effects

159. The applicant submits that the defendant failed to carry out an assessment comparing the efficiency gains achieved with likely anti-competitive effects. NP contends that even a small delay in roll-out would have resulted in significant losses in efficiency gains. In light of the fact that price development both during the relevant period and afterwards indicates a steady and moderate price increase, the applicant asserts that the only actual effect of the alleged abuse identified by the defendant is the supposed delay in Privpak's development. Accordingly, the applicant finds it hard to see how any foreclosure effects could outweigh the efficiency gains.

160. The defendant submits that exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly cannot normally be justified on the grounds that it also creates efficiency gains.[117] ESA states that NP had a quasi-monopoly for B-to-C parcel services with over-the-counter delivery with a market share of between 99.9% and 97.4% during the relevant period. Any efficiency gains linked to the abusive exclusivity agreements, and not the PiS concept as such, would have been so limited that they could not have outweighed the negative effect on competition and consumer welfare caused by the market foreclosure.

161. ESA argues further that the abuse raised barriers to effective entry, thereby foreclosing both actual and potential competition which was not limited to the prospects of Privpak. Moreover, ESA notes that NP does not challenge its reasoning that, in the absence of rivalry between undertakings, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.[118]

Third plea: The fine is too high and should be reduced

162. The applicant submits that the defendant erred in its assessment of the duration of any infringement of Article 54 EEA and that the remedies imposed by the decision are inappropriate.

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116 Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* v *EFTA Surveillance Authority* [2005] EFTA Ct. Rep. 117, paragraphs 96–97; Case E-2/94 *Scottish Salmon Growers* v *EFTA Surveillance Authority* [1994–1995] EFTA Ct. Rep. 59, paragraph 25; Case T-155/06 *Tomra* v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 227; and Case C-413/06 P *Bertelsmann AG and Sony Corporation of America* v *Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, paragraph 181.

117 Reference is made to ESA's Guidelines on Vertical Restraints, point 135; and the Commission's Guidelines on Vertical Restraints, OJ 2010 C 130, p. 1, point 30.

118 Reference is made to the Commission's Guidance Paper on Article 102 TFEU, paragraph 30, final indent.

Duration

163. NP argues that ESA placed an inappropriate focus on access to NorgesGruppen although ESA itself had considered that access to COOP and ICA outlets was also necessary for competitors. Any possible infringement cannot have started before 25 January 2001, when the last of the three agreements was concluded, and must have ended on 15 October 2004, since from that date onwards ICA maintained that an exclusivity obligation could not be upheld between the parties for legal reasons. Moreover, it claims that the exclusivity clause in the agreement with NorgesGruppen was no longer in effect as of 1 January 2006.[119]

164. Further, the applicant disputes that the alleged infringement was of a single and continuous nature, or that its conduct was guided by an "overall plan" with the objective of distorting competition. It maintains that the assessment of its conduct must be divided into three distinct periods: First, the initial period (the main roll-out) from 20 September 2000 until September 2002, second, the intermediate period until the renegotiations commenced in September 2003, and third, the final period ending in March 2006. It argues that both its conduct and the alleged foreclosure effects thereof were very different in these periods. NP submits that it was at any rate entitled to request group and outlet exclusivity in the initial period to secure the roll-out; that the decision itself did not consider disincentives to have been present throughout the second period; and that ESA has failed to demonstrate the existence of disincentives in the final period. Thus, it concludes that its conduct was justified during the first period and did not prevent new entrants from competing effectively during the second and third periods.

165. The defendant maintains that it was right to rely on the concept of a single and continuous infringement, which relates to a series of actions which form part of an "overall plan" because their identical object distorts competition within the common market.[120] ESA considers the overall plan in this case to be the implementation of the applicant's exclusivity strategy as set out in Article 1 of the contested decision. It claims that this interpretation cannot be challenged on the ground that one or several elements of that continuous conduct could also constitute, in themselves and in isolation, an infringement of Article 54 EEA.[121] ESA contends that in particular the group exclusivity was in place throughout the entire period.

Remedies and fines

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119 Reference is made to Appendix A 34 (Minutes of meeting 30 March 2006 between Norway Post and NorgesGrupen ASA, Annex 1).

120 Reference is made to Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 258; and Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 892 et seq.

121 Reference is made to Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 81.

166. The applicant submits that there is no reason to require it to bring the infringement to an end, as the decision acknowledges that there are no grounds for believing that its agreements with retail groups still contain exclusivity obligations. It contends that this part of Article 3 of the decision is therefore irrational, unnecessary and has only the effect of casting doubt on Norway Post's reputation.

167. Concerning the imposition of the fine, the applicant submits that it should be annulled or at least substantially reduced. First, it submits that no infringement was demonstrated or, at any rate, that the infringement, if any, had a less extensive scope than alleged. Second, NP claims that it was not and could not have been aware of the alleged anti-competitive effects of its conduct. This applies to all elements of its conduct, but in particular to its alleged negotiation strategy. The applicant considers this allegation to be groundbreaking legal thinking.

168. Third, the applicant contends that the unreasonable duration of the administrative proceedings constitutes a violation of Articles 6 and 13 ECHR and requires a substantial reduction of the fine by at least 50%.[122] NP notes that the total length of the proceedings, including the proceedings before the Court, will be between nine and ten years. In the reply, NP refers to what it considers specific delays and inefficiencies in ESA's case handling, and claims that these caused additional delays later on, *inter alia*, because it became difficult for the market players to verify information gathered at earlier stages. The applicant also maintains that there was little doubt on what constituted the relevant market, that NP had a dominant position on that market, that the case did not contain elements of particular difficulty, and that NP did not engage in any dilatory conduct.

169. In the reply, the applicant submits that, taking into account all the circumstances and, in particular, the fact that it had to live up to certain state obligations regarding its service infrastructure, its conduct cannot be characterised as serious.

170. The defendant rejects these arguments. With regard to the order to bring the infringement to an end, the defendant doubts that the applicant has sufficient legal interest to advance a plea of illegality. In any event, the defendant considers that it merely indicated the consequences of its finding in Article 1 of the decision that the applicant's conduct was illegal and that, if the applicant had already brought the infringement to an end, it was not concerned by the cease order.[123]

171. Concerning the imposition of the fine, the defendant maintains that it was right to conclude that the applicant could not have been unaware of the elements constituting the abuse, as well as the fact that its exclusive dealing practices entailed a raising of barriers to entry to actual as well as potential competitors in a market in which it held an almost

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122 Reference is made to a judgment of the Norwegian Supreme Court, Rt. 2000, p. 996.

123 Reference is made to Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraphs 191–194.

complete monopoly. It states that it fixed the amount of the fine by applying the method set out in its 2006 Fining Guidelines.

172. While the defendant agrees that an excessive length of procedure may render a decision unlawful,[124] it submits that the length of the proceedings before it was justified in the circumstances of the case. Its assessment required a comprehensive approach taking into account all the relevant circumstances on the market and included difficult and complex questions.[125] The defendant contends that, during the administrative proceedings, the applicant never agreed to the definition of the relevant market or to the fact that it entertained a position of dominance.[126] Further, ESA argues that NP's renegotiation strategy was implemented after the inspection at the premises of NP and that it was only able to obtain the necessary evidence in April 2008. In any event, ESA rejects the notion that its investigation was flawed by specific delays and inefficiencies, or that those delays were the cause of further delays.

173. The interveners argue that the Court enjoys, pursuant to Article 35 SCA, unlimited jurisdiction to review the fine, including the possibility to increase it. They submit that the basic amount of the fine was set as low as 3% of the value of the sales NP had in the relevant market while it could have been set as high as 30%. Referring to the principle of homogeneity, the interveners submit that fines imposed by ESA for antitrust infringements must not have significantly less deterrent effect than fines issued by the Commission for similar infringements. In order to have sufficient deterrent effect, a fine should at the very least cover what the perpetrator gained from the infringement.[127] The interveners point out that the decision gave explicit consideration neither to the amount of improper gains nor to the need to ensure sufficient deterrent effect. Having regard to the *de facto* monopoly NP enjoyed during the relevant period, the interveners consider it highly likely that NP was able to earn a significantly higher profit than 3% of sales value. The interveners contend that the Rules of Procedure provide the Court with the means to establish the likely profit NP extracted from its abuse. The interveners accordingly suggest that the Court should consider how the principle of homogeneity should be applied to ensure an appropriate deterrent effect.

174. The applicant, in its comments on the Statement in Intervention, rejects the submissions of the interveners. NP contends that the principle of *reformatio in peius*

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124 Reference is made to Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185; and Case E-2/05 *EFTA Surveillance Authority* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22.

125 Reference is made to Case E-4/05 *HOB vín* v *the State Alcohol and Tobacco Company of Iceland* [2006] EFTA Ct. Rep. 3, paragraph 51; Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraphs 181–182; and opinion of Advocate General Bot in the same case, point 289.

126 Reference is made to Appendix A 2 (Reply to the Statement of Objections, pp. 90–92).

127 Reference is made to the 2006 Fining Guidelines of the Commission, paragraphs 30–31; and the corresponding guidelines of the Authority, paragraphs 22–23.

generally opposes any increase of the fine by the Court. It disagrees with the interveners' suggestion that all of its sales value is the result of the alleged infringement. Claiming that the conduct had very little impact, if any, on its total sales value, it considers that a fine amounting to 3% of the sales value is very high.

Carl Baudenbacher

Judge-Rapporteur