E-7/01/17

REPORT FOR THE HEARING
in Case E-7/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the *Gulating Lagmannsrett* (Gulating Court of Appeal) Bergen, Norway in a case pending before it between

Hegelstad Eiendomsselskap Arvid B. Hegelstad and others

and

Hydro Texaco AS

concerning the interpretation of Article 53 of the Agreement on the European Economic Area.

I. Introduction

1. By a reference dated 27 September 2001, registered at the Court on 3 October 2001, the Gulating Lagmannsrett made a request for an advisory opinion in a case pending before it between Hegelstad Eiendomsselskap Arvid B. Hegelstad and others (hereinafter the "Appellants") and Hydro Texaco AS (hereinafter the "Respondent").

II. Facts and procedure

2. The case concerns the issue of whether the Respondent is entitled to lease a petrol station owned by Hegelstad Eiendomsselskap (hereinafter "Hegelstad") after the operating company, Ålgård Servicesenter AS (hereinafter "Ålgård"), went bankrupt on 5 December 1994.

3. Hegelstad is a personal company for Arvid B. Hegelstad. Per Roar Hegelstad and Arne Marc Hegelstad are Arvid B. Hegelstad's sons. Hegelstad owns the property with land registration number (gnr) 7, property number (bnr)

663, section 1 in Gjesdal kommune. A petrol station has been operated on the property for several years. As of November 1990, Ålgård operated the petrol station, which is 100% owned by Arvid B. Hegelstad.

4. A cooperation agreement for the delivery of motor fuels and lubricants concluded by Norsk Texaco AS and Hegelstad on 17 November 1992 included the following provisions: (1) exclusive right for the supplier to supply motor fuels and lubricants to the distributor's petrol station during the period of the agreement; (2) a 10-year contract period, calculated from the time of the first delivery of motor fuels, etc., with automatic renewal for five years on unmodified terms, provided the supplier had not given notice of termination of the contract at least three months prior to the expiry of the 10-year period; (3) termination of the supplier's obligation to supply in the event of debt settlement proceedings or bankruptcy on the part of the distributor. A right for the supplier in such cases to assume ownership by subrogation in return for settling registered debts of NOK 4 million, or, as an alternative, claim immediate lease of the station with a fixed rental (return on NOK 4 million), corresponding in time with the duration of the cooperation agreement.

5. Clause 10 of the agreement provided that the distributor was to be Ålgård Servicesenter AS. Ålgård accepted this provision by way of separate signature on the agreement.

6. On 1 January 1995, the Respondent assumed all the rights and obligations of Norsk Texaco, when the company merged with another company and changed its name to Hydro Texaco AS.

7. Ålgård entered into bankruptcy proceedings by order of 7 December 1994 of the probate and bankruptcy court. The bankruptcy estate ran the petrol station from the commencement of bankruptcy proceedings until 7 January 1995. After that date, the Respondent exercised its rights under clause 10 of the cooperation agreement to lease and run the petrol station. The Respondent did not succeed in its claim to take over the station as owner. The Respondent continues to lease the petrol station, and is thus both the tenant of and the supplier of motor fuels and lubricants to the petrol station.

8. By a writ instituting proceedings of 3 April 1998, the Appellants brought an action against the Respondent, demanding vacation of the property, and compensation of up to NOK 10 million. The Respondent requested that the claim be dismissed, and brought a counterclaim against Per Roar Hegelstad, alleging that he was not entitled to use parts of the petrol station.

9. On 23 February 1999, Sandnes herredsrett (Sandnes District Court) handed down a judgment in favour of the Respondent. That judgment was appealed to the Gulating Lagmannsrett.

III. Questions

10. The following questions were referred to the EFTA Court:

> **(1) Does a contract of cooperation between an independent petrol station operator who owns the station and a supplier of motor fuels and lubricants which contains clauses providing**
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> **– for an exclusive right for the supplier to deliver motor fuels and lubricants to the distributor for the duration of the contract,**
>
> **– for a right for the supplier to assume ownership of the petrol station for a price of kroner 4 million, as registered in the cadastre, or alternatively, a lease option at a set rental price corresponding to the contract period, in the event of debt settlement proceedings or bankruptcy on the part of the distributor,**
>
> **– that, for the owner of the station/distributor the contract period is not capable of termination and the terms of the contract may not be changed for a period of 15 years, and that the supplier is able to terminate the contract three months prior to the initial period,**
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> **come within the block exemption in Article 53(3), cf. regulation of 4 December 1992, no. 964, chapter II, section 10?**
>
> **(2) If the block exemption in Article 53(3) does not apply, is the cooperation agreement incompatible with Article 53(1)?**
>
> **(3) What are the legal effects of a possible conflict, and what limitation on time period must be applied, if any?**

IV. Legal background

11. Chapter II, section 10 of the Norwegian Regulation No 964 of 4 December 1992 (hereinafter referred to as "Regulation No 964") incorporates into Norwegian law the Act previously referred to in point 3 of Annex XIV to the EEA Agreement (Commission Regulation (EEC) No 1984/83[1]) on the application of Article 53(3) of the EEA Agreement to categories of exclusive purchasing agreements (hereinafter referred to as "the block exemption on exclusive purchasing agreements" or "the Act").

12. The text of point 3 of Annex XIV to the EEA Agreement was deleted by EEA Joint Committee Decision No 18/2000, which entered into force on 29 January 2000. The Act now referred to in point 2 of Annex XIV to the EEA

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[1] OJ 1983 L 173, p. 5, as corrected by OJ 1983 L 281, p. 24.

Agreement (Commission Regulation (EC) No 2790/1999)[2] on the application of Article 53(3) to categories of vertical agreements and concerted practices (the block exemption on vertical restraints)[3] has replaced the block exemption on exclusive purchasing agreements.[4]

13. According to Article 12 of the block exemption regulation on vertical restraints the block exemption regulation on exclusive purchasing agreements continued to apply until 31 May 2000. For agreements already in force on 31 May 2000, which did not satisfy the conditions for exemption provided for in the new block exemption regulation on vertical restraints, there was a transitional period that ended on 31 December 2001.

14. Since the referral from the national court only deals with the applicability of the block exemption regulation on exclusive purchasing agreements in the past, the relationship to the block exemption regulation on vertical restraints is not an issue before the EFTA Court.

15. Article 53 EEA reads as follows:

> *"1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*
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> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
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> *(b) limit or control production, markets, technical development, or investment;*
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> *(c) share markets or sources of supply;*
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> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make 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.*
>
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

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2 OJ 1999 L 336, p. 21.

3 Cf. Chapter I A of Regulation No 964.

4 Point 2 of Annex XIV to the EEA Agreement was amended by EEA Joint Committee Decision No 18/2000.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– *any agreement or category of agreements between undertakings;*

– *any decision or category of decisions by associations of undertakings;*

– *any concerted practice or category of concerted practices;*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

16. The block exemption regulation on exclusive purchasing agreements contains special rules for service-station agreements. Those rules, which differ from the general provisions applicable to exclusive purchasing agreements, are contained in Articles 10, 11, 12 and 13.

17. Article 10 of the block exemption regulation on exclusive purchasing agreements, which corresponds to section 10 of the Norwegian Regulation No 964, stipulates that Article 53(1) EEA shall not apply to

"agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain petroleum-based motor-vehicle fuels or certain petroleum-based motor-vehicle and other fuels specified in the agreement for resale in a service station designated in the agreement."

18. Article 11 of the block exemption regulation on exclusive purchasing agreements, which corresponds with section 11 of Regulation No 964, provides for only a limited exemption for lubricants, applicable on the conditions that the supplier has made available or financed "a lubrication bay or other motor-vehicle lubrication equipment" and that the lubricants are only for the seller's "use."[5]

19. Article 12(1)(c) of the block exemption regulation on exclusive purchasing agreements, which corresponds to section 12(1)(c) of Regulation No

[5] See Notice concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement (Commission Reg. (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Art. 53(3) of the EEA Agreement to categories of exclusive distribution and purchasing agreements), OJ 1994 L 153, p. 13 and EEA Supplement 1994 15, p. 12.

964, states that "[a]rticle 10 shall not apply where: …the agreement is concluded for an indefinite duration or for a period of more than 10 years…."

V. Written Observations

20. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Hydro Texaco AS, represented by Trym Landa, Advokatfirmaet Schjødt AS;

- the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski and Per Andreas Bjørgan, Officer, Legal and Executive Affairs, acting as Agents;

- the Commission of the European Communities, represented by Anthony Whelan and Wouter Wils, Legal Advisers, Legal Service, acting as Agents.

The Appellants did not present any written observations to the EFTA Court.

The first question

Hydro Texaco AS

21. The Respondent emphasises that subsequent to the lease agreement there has been no agreement on the delivery of motor fuels and/or lubricants between the Respondent and the Appellants. Prior to January 1995 the Respondent delivered motor fuels and/or lubricants to Ålgård, not the Appellants. Moreover, the Respondent has not delivered any motor fuels and/or lubricants to the Appellants outside the cooperation agreement of 17 November 1992.

22. By entering into the lease agreement, the Respondent found itself in a position where it delivered motor fuels and/or lubricants to itself, until the Respondent later appointed a franchisee to operate the petrol station. This implies that the Respondent delivers motor fuels and/or lubricants to the franchisee according to the agreement between the Respondent and franchisee, and not according to the cooperation agreement between the Appellants and the Respondent. In fact, the Respondent has never delivered any motor fuels and/or lubricants to the Appellants. The relationship between the Appellants and the Respondent has never been of a character that is comprised by the rules that the Appellants apply in this case.

23. The relationship between the Appellants and the Respondent is not under any circumstances of a character that is covered by Article 53 (1) of the EEA

Agreement. When considering the relationship between the two parties in light of the parties' turnover, share of relevant market and the lack of effect on trade within the territory covered by the EEA Agreement, this seems to be the case. The agreement between the Appellants and the Respondent has no effect on competition in the relevant market.

24. The questions put before the EFTA Court by the national court seem to presuppose that delivery of motor fuels and lubricants has taken place between the parties. The formulation of the first question seems to indicate that the Appellants were a petrol station operator whilst the cooperation agreement between the parties was in force. In the event that the posed question can be construed in this manner, this is in the Respondent's opinion not a correct understanding of the facts in the case.

25. The EFTA Court should therefore consider whether or not the competition rules in the EEA Agreement apply to the cooperation agreement, as well as the questions issued by Gulating Lagmannsrett.

The EFTA Surveillance Authority

26. The EFTA Surveillance Authority notes that the question of applicability of a block exemption regulation is only relevant in so far as the agreement in question falls under Article 53(1) EEA.

27. Clause 9 of the cooperation agreement states that the contract period should be for 10 years and thereafter be automatically renewed for an additional 5 years unless terminated by the Respondent. Although the latter is in a position to terminate the cooperation agreement after 10 years, the Appellants, on the other hand, are not free to choose another supplier before the 15 year period lapses.

28. From a competition law point of view, it is the tying of a number of distributors to the existing suppliers that may have the effect of sealing-off the market. Furthermore, clause 2.1 of the cooperation agreement establishes the conditions for the granting of a loan to Hegelstad that "shall be written off by the Respondent in equal annual amounts over 15 years." This seems to indicate that both parties, and in particular the Respondent, envisaged from the outset that the contract period should be 15 years.

29. Reference is made to the Court of First Instance of the European Communities' judgments *Langnese* and *Schöller*,[6] in which the view was taken that exclusive purchasing agreements that specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate the

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[6] Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraphs 137 and 138; Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraphs 123 and 124.

contract, are to be considered to have been concluded for an indefinite period. Following the EFTA Surveillance Authority, under the circumstances, this jurisprudence has to be applied *a fortiori* to the present cooperation agreement. The agreement should therefore be deemed to have a duration exceeding the 10 year limit laid down in the block exemption regulation on exclusive purchasing agreements.

30. Concerning a special transitional treatment of the cooperation agreement, as it was already in existence when the EEA Agreement came into force, the EFTA Surveillance Authority refers in general to the case law of the Court of Justice of the European Communities.[7] However, although the cooperation agreement predates the entry into force of the EEA Agreement, it was clearly stated in point 3 of Annex XIV to the EEA Agreement[8] that the transitional regime in Article 15 of the Act should not apply. The EEA Agreement did therefore not provide for a transitional period, as the one in Article 15 of Commission Regulation (EEC) No 1984/83. Instead, Articles 5 et seq. of Protocol 21 to the EEA Agreement provide provisions of general application to deal with agreements which were in existence at the date of the entry into force of the EEA Agreement.[9] Where an agreement fell within the prohibition contained in Article 53(1) EEA and had not been previously notified to the Commission of the European Communities, there was a six-month adaptation period from the date of entry into force of the EEA Agreement. Within that period, undertakings were to modify their agreements so that they were no longer covered by the prohibition of Article 53(1) EEA or to comply with existing block exemption regulations, or to notify them in order to obtain an individual exemption under Article 53(3) EEA.

31. Furthermore, the EFTA Surveillance Authority points out that the Court of Justice of the European Communities has, in the context of beer supply agreements, clarified that the block exemption regulation is not applicable if the entirety of its conditions are not satisfied.[10]

32. The EFTA Surveillance Authority suggests to answer the question as follows:

> *"The cooperation agreement, referred to in the request for an advisory opinion, is not covered by the block exemption on exclusive purchasing agreements."*

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7 Case C-39/92 *Petrogal* [1993] ECR I-5659.

8 Prior to the amendment by EEA Joint Committee Decision No 18/2000.

9 Similar transitional provisions are contained in Chapter XIV of Protocol 4 to the Surveillance and Court Agreement.

10 Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 39.

The Commission of the European Communities

33. The Commission of the European Communities submits that an agreement such as the contract of cooperation between the Respondent and Hegelstad, with the characteristics described in the first question, is not covered by the block exemption contained in Article 10 of Regulation No 964 of 4 December 1992. Article 12(c) of that Regulation excludes the application of the block exemption where the agreement is concluded for an indefinite duration or for a period of more than 10 years. The Commission took the view, in its Notice on the application of the corresponding EC block exemption,[11] that exclusive purchasing agreements that specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are to be considered to have been concluded for an indefinite period.

34. Reference is made to the judgments *Schöller* and *Langnese*.[12] The analysis therein applies *a fortiori* in the present case, due to a specific feature of the contractual terms in the present case: although the Respondent is free to terminate the contract after 10 years, thus preventing its automatic renewal, Hegelstad does not enjoy similar freedom of action. From the point of view of the latter, the contract is of indefinite duration or, in any event, of more than 10 years' duration, as it has no power to induce early termination other than in the event of serious unrectified breach of the contract by the Respondent. In the case of asymmetric contractual freedom, the position of the distributor is especially important, as market foreclosure comes about through the tying of a sufficient number of distributors to existing suppliers. Moreover, the freedom of action of Hegelstad was further reduced by the fact that outstanding loans would become payable, by virtue of clause 2.1 of the contract of cooperation, in the event that the contract was terminated before the lapse of 15 years.

35. The Commission of the European Communities also notes that, in the event that an agreement is not covered by the block exemption regulation by reason of its duration, it is not possible to apply the exemption during the first 10 years of the agreement, as suggested by the Respondent. The block exemption regulation is not applicable in any respect if the entirety of its conditions is not satisfied.[13] Otherwise, undertakings might be enabled to conclude agreements

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11 Paragraph 39, Commission Notice 84/C 101/02 concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements, OJ 1984 C 101, p. 2, as amended by Commission Notice 92/C 121/02, OJ 1992 C 121, p. 2.

12 See Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraphs 137 and 138 and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraphs 123 and 124.

13 See footnote 10, *Delimitis*. Although the contract of cooperation between the Respondent and Hegelstad predates the entry into force of the EEA Agreement, the Norwegian rules do not contain any provision equivalent to Article 15(4) of Regulation No 1984/83, applied in Case C-39/92 *Petrogal* [1993] ECR I-5659. Annex XIV to the EEA Agreement provides for the adoption of Regulation No 1984/83 pursuant to Article 60 EEA but states that Article 15 thereof shall not apply.

whose restrictive effects exceed those permitted by the block exemption regulation, in the knowledge that the agreements could be interpreted in conformity with the conditions of exemption in the event of difficulty in enforcing their original terms.

36. Therefore, the Commission submits that the Court should reply to the first question in the negative.

The second question

The EFTA Surveillance Authority

37. According to the EFTA Surveillance Authority, the fact that the cooperation agreement does not satisfy the conditions for a block exemption regulation does not mean that Article 53(1) EEA "automatically" prohibits the contract. Whether the agreement in question is covered by the prohibition in Article 53(1) EEA depends on whether the conditions laid down in Article 53(1) EEA are fulfilled.

38. In principle, Article 53(1) EEA may apply to exclusive purchasing agreements as the reseller deprives himself of the freedom to obtain goods elsewhere, while at the same time other suppliers are denied an outlet for their products. This will depend on the legal and economic context of the agreement at stake. Even if an exclusive purchasing agreement does not have the objective of restricting competition, it is nevertheless necessary to ascertain whether it has the effect of preventing, restricting or distorting competition.[14]

39. In its judgment *Brasserie De Haecht*, the European Court of Justice held that the effects of such agreements had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition.[15] It also follows from that ruling that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between the Contracting Parties is capable of being affected.

40. In the present case it is necessary to analyse the effects of the cooperation agreement, taken together with other contracts of the same type, on the opportunities of competitors from Contracting Parties to gain access to the market for motor fuels and lubricants consumption or to increase their market share.

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14 See footnote 10, *Delimitis*, paragraph 13.

15 Case 23/67 *Brasserie De Haecht* v *Wilkin* [1967] ECR 407 and footnote 10, *Delimitis*, paragraph 13.

41. In carrying out that analysis, it is necessary first to identify the relevant product and geographical market. Second, the nature and extent of all similar agreements in that market, tying distributors to various suppliers must be examined in order to assess whether it will be difficult for a new competitor to enter the market. Thirdly, the Respondent's position in that market must be examined to determine whether the Respondent's network of agreements significantly contributes to a foreclosure of the market. Finally, the actual agreement's contribution to the cumulative effect of the Respondent's network of agreements should be assessed.[16]

42. The relevant product market is defined on the basis of the nature of the economic activity in question, here the distribution of motor fuels and lubricants for sale in petrol stations. The relevant market is further defined by its geographical scope.[17] Although the Authority would assume that most of the exclusive purchasing agreements concerning motor fuels and lubricants are entered into at a national level, thus indicating that the relevant geographic market is national in scope, the request for an advisory opinion does not contain sufficient information on this point.

43. The cooperation agreement viewed in isolation will probably not have any effect on competition in the relevant market; neither will the agreement have any effect on trade. However, it follows from the above that the effect of an exclusive purchasing agreement must be evaluated in the legal and economic context in which the agreement functions and where it may combine with other agreements to have a cumulative effect on competition. The cumulative effect is also one factor amongst others to consider when determining whether trade between Member States is capable of being affected.[18]

44. In the cases *Bilger* and *Delimitis*, the European Court of Justice explained that it is necessary to examine the nature and extent of all similar contracts in their totality, comprising all similar contracts tying a large number of points of sale to several national producers.[19] However, even if the network of similar contracts has a considerable effect on the opportunities for gaining access to the market, it is not sufficient in itself to support a finding that the relevant market is inaccessible.[20] Other factors should be taken into account, such as the possibilities to acquire a supplier already established in the market, or to open up new petrol stations. Furthermore, the competitive forces in the market, including the number and size of suppliers, the degree of saturation of that market and brand loyalty among the distributors, need to be considered.

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16 See footnote 10, *Delimitis* and Case C-214/99 *Neste Markkinointi* [2000] ECR I-11121.

17 See footnote 10, *Delimitis*, paragraphs 16 to 18.

18 See footnote 10, *Delimitis*, paragraph 14.

19 Case 43/69 *Bilger* v *Jehle* [1970] ECR 127 and footnote 10, *Delimitis*, paragraph 19.

20 See footnote 15, *Brasserie De Haecht* v *Wilkin* and footnote 10, *Delimitis*, paragraph 20.

45. If the examination shows that the totality of agreements does not have the cumulative effect of foreclosing the market and thereby denying access to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to be contrary to Article 53(1) EEA.[21]

46. If the network of agreements deprives a new competitor of real concrete possibilities to gain access to the market, it is necessary to examine the extent to which the agreements entered into by the supplier in question contribute to the cumulative effect produced by the totality of the similar agreements found in that market.[22] Responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. Contracts entered into by suppliers whose contribution to the cumulative effect is insignificant, do not therefore fall under the prohibition laid down in Article 53(1) EEA.[23]

47. In considering whether the agreements have an appreciable effect, the market position of the Respondent must be taken into account. That position is not only determined by the market share held by the supplier and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of motor fuels and lubricants found in the relevant market.[24] Furthermore, the contribution to the cumulative effect also depends on the duration of those agreements. If the duration manifestly exceeds the average duration of contracts generally concluded on the relevant market, the individual contract falls under the prohibition laid down in Article 53(1) EEA. This is because a supplier with a relatively small market share may make as significant a contribution to a foreclosure of the market as a supplier with a strong market position that regularly releases the distributors at shorter intervals.[25]

48. Reference is made to the *Guidelines on Vertical Restraints*,[26] which set out the principles for the assessment of vertical agreements under Article 53 EEA. The guidelines are non-binding and primarily aimed at helping undertakings to make their own assessment of vertical agreements under the EEA competition rules.

49. Agreements which are not capable of appreciably affecting trade between the Contracting Parties or capable of appreciably restricting competition are not caught by Article 53(1) EEA. Section II of the vertical guidelines deals with

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21 See footnote 10, *Delimitis*, paragraph 23.

22 See footnote 10, *Delimitis*, paragraph 24.

23 See footnote 16, *Neste Markkinointi*, paragraph 27.

24 See footnote 10, *Delimitis*, paragraph 25.

25 See footnote 10, *Delimitis*, paragraph 26 and footnote 16, *Neste Markkinointi*, paragraphs 27 to 30.

26 Guidelines on Vertical Restraints of 25.07.2001 (not yet published).

agreements that generally fall outside Article 53(1) EEA and contains a reference to the EFTA Surveillance Authority's *"de minimis"* notice from 1998.[27] This notice replaced the Authority's *"de minimis"* notice from 1994.[28] Both parties to the main dispute refer to the market share thresholds in this notice. However, neither that notice, nor the notice from 1998 applies where competition in the relevant market, as in the present case, is restricted by the cumulative effect of agreements entered into between several suppliers and distributors. However, the Commission's new *"de minimis"* notice[29] deals with the cumulative effect of agreements, and paragraph 8 suggests that a market share threshold of 5 %, i.e. where the supplier's market share is lower than 5 %, will not be deemed to contribute significantly to a cumulative foreclosure effect. The EFTA Surveillance Authority has not yet issued a similar notice.

50. The market share is only one factor when considering whether the Respondent's network has an appreciable effect on the possible foreclosure of the relevant market. Account must also be taken of the number of distributors tied to the Respondent with agreements of the kind at issue, and the duration of these agreements.

51. Finally, even if the supplier's network of agreements in total contributes significantly to the foreclosure of the relevant market, the national court should also consider the relevant agreement's contribution to that effect. If a supplier has entered into various categories of agreements, there might be agreements that must be regarded as making no significant contribution to the cumulative effect of sealing-off the market. Such subdividing of a supplier's network can be necessary in exceptional cases.[30] When considering if such subdividing is necessary the duration of the supply obligation assumed by the retailer is the decisive factor.[31]

52. If the agreement is considered to restrict competition in the relevant market within the meaning of Article 53(1) EEA, it must also be examined whether the agreement affects trade between the Contracting Parties. In order to determine whether an agreement between undertakings may affect trade between Contracting Parties, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade

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27 Notice on agreements of minor importance which do not fall under Article 53(1) of the EEA Agreement, OJ 1998 L 200 and EEA Supplement 1998 28, p. 13.

28 Notice on agreements of minor importance which do not fall under Article 53(1) of the EEA Agreement, OJ 1994 L 153 and EEA Supplement 1994 15, p. 31.

29 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C 368, p. 13.

30 See footnote 16, *Neste Markkinointi*, paragraph 37.

31 See footnote 16, *Neste Markkinointi*, paragraph 32.

between Contracting Parties.[32] The cumulative effect of the existence of a network of exclusive agreements covering the whole territory of an EEA State and a large part of the relevant market, may prevent penetration by competitors from other EEA States.[33]

53. The EFTA Surveillance Authority submits to answer the second question as follows:

> *"The cooperation agreement, referred to in the request for an advisory opinion, is prohibited under Article 53(1) EEA if two cumulative conditions are met. First, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the relevant market. The fact that, in that market, the agreement at issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. Second, the network of similar agreements entered into by the supplier in question must contribute significantly to the sealing-off effect of the market. The extent of the contribution made by the individual supplier depends, inter alia, on the position of the supplier in the relevant market and on the duration of his agreements."*

The Commission of the European Communities

54. The fact that the contract of cooperation is not covered by the block exemption regulation does not necessarily imply that it is prohibited by Article 53(1) EEA. The block exemption regulation merely states that Article 53(1) shall not apply to agreements that meet its criteria. The third recital in the preamble to Regulation (EEC) No 1984/83 states merely that exclusive purchasing agreements may fall within the prohibition in Article 81(1) EC and that this may in particular be the case where an agreement between undertakings established in one Member State is one of a network of similar agreements. This statement reflects the ruling of the Court of Justice of the European Communities in *Brasserie de Haecht*[34] and is echoed by the reasoning of that Court in *Delimitis* and by that of the Court of First Instance of the European Communities in *Langnese* and *Schöller*.

55. Since the information of the national court does not extend beyond the market share of the Respondent in Norway, the Commission of the European Communities recalls broad principles that may assist the national court.

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32 See footnote 6, *Langnese-Iglo* v *Commission*, paragraph 119.

33 See footnote 6, *Langnese-Iglo* v *Commission*, paragraph 120.

34 See footnote 15.

56. It is first necessary to identify the relevant product and geographical markets.[35] General guidance in this regard may be sought in the Commission Notice on the definition of the relevant market for the purposes of Community competition law.[36] More specific guidance regarding the service station sector is furnished by Commission merger decisions concerning the sector, in particular that in Exxon/Mobil.[37] By reason of, in particular, supply-side substitutability in respect of different fuels and their common distribution, it appears that a single product market may be defined for branded and unbranded retail motor fuel sales. In certain circumstances, a separate market for toll motorway fuel retailing may be defined. Although the demand served by any given service station will be predominantly local, the chain-reaction effect of networks of stations, the organisation of advertising, supplies and price campaigns on a national level and the important effect of national taxes on retail prices may, in combination, permit the geographic market for motor fuel retailing to be defined as national in scope.

57. It cannot be inferred with any certainty that a network of exclusive purchasing agreements is automatically liable appreciably to prevent, restrict or distort competition or to affect trade between Contracting Parties merely because the ceilings referred to in the former Commission Notice on agreements of minor importance are exceeded.[38] In order to assess whether the existence of several exclusive purchasing agreements impedes access to the market, it is necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several producers. The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to producers in relation to the number of outlets which are not so tied, the duration of the commitments entered into, the quantities of product to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.[39] The tying-in of up to 30% of the market was considered to be acceptable by the Commission in the circumstances of *Schöller*.[40] The current Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (*de minimis*) states that a cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.[41]

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35 See footnote 10, *Delimitis*, paragraphs 16 to 18.

36 OJ 1997 C 372, p. 5.

37 Case M.1383 *Exxon/Mobil* Commission Decision of 29 September 1999, paragraphs 436 to 442. See also Case M.1628 *TotalFina/Elf Aquitaine* Commission Decision of 9 February 2000, paragraphs 157 to 188 of which analyse in detail the market for service stations on toll motorways.

38 See footnote 6, *Schöller* v *Commission*, paragraph 75.

39 See footnote 10, *Delimitis*, paragraph 19.

40 XV Report on Competition Policy (1985), paragraph 19; see footnote 6, *Schöller* v *Commission*, paragraph 81.

41 OJ 2001 C 368, p. 13, paragraph 8 of the Notice *in fine*.

58. The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised. The other factors to be taken into account are, in the first instance, also those relating to opportunities for access. In that connection it is necessary to examine whether there are concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a producer already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new outlets. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system.[42] The presence of wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own product.[43]

59. Secondly, account must be taken of the conditions under which competitive forces operate in the relevant market. In that connection it is necessary to know not only the number and the size of producers present in the market, but also the degree of saturation of that market and customer fidelity to existing brands; for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names.[44]

60. If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new domestic and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 53(1) EEA. They do not, therefore, fall under the prohibition laid down in that provision. If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the producer in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Responsibility for such an effect of closing off the market must be attributed to the producers that make an appreciable contribution thereto. Supply

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42 See in this regard footnote 6, *Schöller* v *Commission*, paragraph 85.

43 See footnote 10, *Delimitis*, paragraphs 20 and 21.

44 See footnote 10, *Delimitis*, paragraph 22.

agreements entered into by producers whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition of Article 53(1).[45]

61. In order to assess the extent of the contribution of the supply agreements entered into by a producer to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the producer and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale of motor fuel and lubricants found in the relevant market. The contribution of the individual contracts entered into by a producer to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of petrol supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 53(1). A producer with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a producer in a relatively strong market position which regularly releases its sales outlets at shorter intervals.[46] However, in general, individual suppliers or distributors with a market share not exceeding 5% are not considered to contribute significantly to a cumulative foreclosure effect.[47]

62. The assessment of the effects of a network of similar agreements on competition and on trade applies to all the individual agreements making up the network; the effects of the agreements should not normally be examined separately.[48] However, it may be necessary to take a different approach where there are substantial material differences, for example as regards duration, between the different types of agreements concluded by a given producer. In that case, even if the network of agreements as a whole, taken together with other such networks of agreements concluded by other suppliers, has the effect of appreciably restricting competition, certain types of agreements in the network at issue do not make a significant contribution to that overall outcome.[49]

63. The Commission of the European Communities suggests to answer the second question as follows:

> *"The contract of cooperation at issue in the present case is prohibited by Article 53(1) of the EEA Agreement if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the*

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45 See footnote 10, *Delimitis*, paragraphs 23 and 24.

46 See footnote 10, *Delimitis*, paragraphs 25 and 26.

47 De minimis Notice, op. cit., paragraph 8; see also the Commission Guidelines on vertical restraints, OJ 2000 C 291, p. 1, paragraphs 73, 142, 143 and 189.

48 See footnote 6, *Schöller* v *Commission*, paragraphs 95 and 98.

49 See footnote 16, *Neste Markkinointi*, paragraphs 36 to 39.

market or increase their market share to gain access to the relevant market. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."

The third question

The EFTA Surveillance Authority

64. The third question concerns the legal effects of a possible infringement of the EEA competition rules and what limitation period must be applied, if any. The EFTA Surveillance Authority assumes that the national court raises here the issue of the possible consequences of the duration clause being prohibited under Article 53(1) EEA.

65. Should the cooperation agreement be prohibited under Article 53(1) EEA, the consequence would be that the agreement would be automatically void pursuant to Article 53(2) EEA. However, the fact that the cooperation agreement might be in breach of Article 53(1) EEA does not necessarily mean that the whole agreement is void pursuant to Article 53(2) EEA.

66. It is only those aspects of the agreement, which are prohibited by Article 53(1) EEA that are void. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself.[50] It is a matter of national law to determine whether other parts, which are not in themselves restrictive of competition, can be severed from the prohibited clauses and allowed to survive.[51] Thus, if the national court finds that the exclusive purchasing obligation in the cooperation agreement with the given duration falls within Article 53(1) EEA, but that this obligation, according to national law, is severable from the rest of the contract, including the financial and lease

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50 Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and footnote 10, *Delimitis*, paragraph 40.

51 See Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, footnote 10, *Delimitis*, paragraph 40, Case 319/82 *Ciments* v *Kerpen* [1983] ECR 4173, paragraphs 10 to 12 and Case 10/86 *VAG France* v *Magne* [1986] ECR 4071, paragraph 14.

arrangements which do not appear to be anticompetitive, it could hold that only the exclusive purchasing obligation is void by virtue of Article 53(2) EEA.[52]

67. The EFTA Surveillance Authority suggests to answer the third question as follows:

> *"The consequence of the cooperation agreement being prohibited under Article 53(1) EEA is that those aspects of the agreement, which are prohibited by Article 53(1) EEA are void according to Article 53(2) EEA. The agreement as a whole is void only if those parts of the agreement, which are prohibited by Article 53(1) EEA, are not severable from the rest of the agreement. It is a matter of national law to determine whether other parts, which are not in themselves restrictive of competition, can be severed from the prohibited clauses."*

The Commission of the European Communities

68. The time period within which a party to an agreement that is void by virtue of its infringement of Article 53(1) EEA must introduce judicial proceedings in order to avoid the application of that agreement is, in principle, established by national law. This principle is subject to the requirements that such national procedural rules be no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by the EEA Agreement (principle of effectiveness).[53] For the purpose of identifying the nearest equivalent form of domestic action, it is useful to note that breach of Article 81(1) EC is deemed to result in the absolute nullity of the agreement in question,[54] that such nullity has retroactive effect[55] and that enforcement of the

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52 Finally, in the event that the national court should somehow arrive at the conclusion that the part of the cooperation agreement concerning exclusive purchasing of motor fuels and lubricants is prohibited under Article 53(1) EEA and cannot be severed from the part concerning the lease of the petrol station, it should be pointed out that the parties have the possibility to request the EFTA Surveillance Authority to grant an individual exemption (Case 10/86 *VAG France* v *Magne* [1986] ECR 4071). According to Articles 4(2)(2)(a) and 6(2) of Chapter II read in combination with Article 1(2) of Chapter XVI of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Agreement of 11 May 2000 between the EFTA States to amend Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, which entered into force on 27 September 2000), vertical agreements can benefit from an exemption under Article 53(3) EEA from their date of entry into force, even if notification occurs after that date, provided that all four conditions of Article 53(3) EEA are fulfilled. The national court should therefore bear such an option in mind before declaring the cooperation contract void (see paragraphs 22 to 30 of the *Notice on cooperation between national courts and the EFTA Surveillance Authority in applying Article 53 and 54 of the EEA Agreement*, OJ 1995 C 112, p. 7, and paragraphs 63 and 64 of the EFTA Surveillance Authority's *Guidelines on Vertical Restraints)*.

53 See, most recently, in the context of the EC competition rules, Case C-453/99 *Courage* v *Crehan*, [2001] ECR I-6297, paragraph 29.

54 Case 22/71 *Béguelin* [1971] ECR 949, paragraph 29.

prohibition is a matter of public policy.[56] The latter conclusion is founded principally on Article 3(1)(g) EC, to which Article 1(2)(e) EEA substantially corresponds.

69. In the event that the contract of cooperation between Hegelstad and the Respondent is found by the national court to contain terms prohibited by Article 53(1) EEA, at least those terms of the contract are automatically void. The consequences of the nullity of those provisions for all other parts of the agreement or for other obligations flowing from it are not a matter for Community law. The agreement as a whole, including the loan and loan-enforcement provisions, is void only if the prohibited terms are not severable from the agreement itself. It is a matter for national law to determine whether other terms, which are not in themselves restrictive of competition, can be severed from the prohibited terms and allowed to survive.[57] It may be instructive to observe, having regard to the Respondent's interest in recovering its loan, that national courts are not impeded by Community law from taking steps to ensure that the protection of rights conferred by it does not entail the unjust enrichment of those who enjoy them.[58]

70. Even if it were not possible to sever the loan provisions in the agreement from any prohibited terms, it is also possible for the parties to an agreement that does not enjoy the protection of a block exemption regulation, to request the grant of an individual exemption.[59] The question of which authority is competent to grant such an individual exemption is determined by Article 56 EEA.[60] Pursuant to either Article 5(2) of Regulation No 17/62, read with Articles 4(2) and 6(2) of that regulation,[61] or to Article 1 of Chapter XVI of Protocol 4 on the function and powers of the EFTA Surveillance Authority in the field of competition, attached to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice,[62] read with Articles 4(2) and 6(2) of Chapter II of that Protocol, it is possible for the

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55 See footnote 15, *Brasserie De Haecht* v *Wilkin*, paragraphs 25 to 27.

56 Case C-126/97 *Eco Swiss* v *Benetton International* [1999] ECR I-3055, paragraph 36.

57 See footnotes 50 and 51.

58 Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 31 and footnote 53, *Courage* v *Crehan*, paragraph 30.

59 See footnote 51, paragraph 13 and footnote 10, *Delimitis*, paragraph 41.

60 In the case that the notification is addressed to the wrong surveillance authority, the addressee shall forward it to the competent surveillance authority: Article 10(2), Protocol 23 to the EEA Agreement.

61 A s amended by Council Regulation (EC) No 1216/99 of 10 June 1999, OJ 1999 L 148, p. 5. This change has been extended to EEA matters, through an appropriate amendment of Protocol 21 to the EEA Agreement.

62 This provision confers powers on the EFTA Surveillance Authority equivalent to those of the Commission, as foreseen by the EEA Agreement.

competent surveillance authority retroactively to exempt an agreement as from a date before its actual date of notification.

71. The Commission of the European Communities suggests to answer the third question as follows:

> *"The time period within which a party to an agreement which is void by virtue of Article 53(1) of the EEA Agreement must introduce judicial proceedings in order to avoid the application of that agreement is established by national law subject to the requirements that such national procedural rules be no less favourable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by the EEA Agreement."*

Carl Baudenbacher
Judge-Rapporteur