JUDGMENT OF THE COURT

18 April 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – Competition – Abuse of a dominant position – Market for business-to-consumer over-the-counter parcel delivery – Distribution network – Exclusivity agreements – Conduct liable to eliminate competition on the market – Justification – Duration of infringement – Fine)

In Case E-15/10,

Posten Norge AS, established in Oslo (Norway), represented by Siri Teigum and Frode Elgesem, advocates,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

supported by

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

interveners,

APPLICATION for annulment of 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) or, in the alternative, annulment or reduction of the fine imposed on the applicant in that decision,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Skúli Magnússon,

having regard to the written pleadings of the applicant, the defendant and the interveners, and the written observations of

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

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Siri Teigum and Frode Elgesem; the defendant, represented by Xavier Lewis and Markus Schneider; the interveners, represented by Jon Midthjell; the Norwegian Government, represented by Pål Wennerås and Beate Gabrielsen; and the Commission, represented by Leo Parpala, Felix Ronkes Agerbeek and Luigi Malferrari, at the hearing on 5 October 2011,

gives the following

Judgment

I Introduction

1 The applicant Posten Norge AS (hereinafter "the applicant" or "Norway Post") operates the national postal service in Norway which covers letters, parcels and financial services. Its sole owner is the Norwegian State. The majority of Norway Post's services (approximately 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. ESA ordered Norway Post, insofar as it had not already done so, to bring the infringement to an end and to refrain from further abusive conduct and imposed a fine of EUR 12.89 million on Norway Post.

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 to negotiate and conclude agreements with Norway Post's competitors.

II Legal background

EEA law

4 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.*

5 Article 2 of Chapter II 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

6 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.

…

7 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.

8 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 Background to the dispute

Norway Post and DB Schenker/Privpak

9 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, Norway Post 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"). Norway Post is also obliged to provide certain universal postal services outside the scope of the reserved area. 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.

10 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 may increase their turnover by selling products to consumers who enter the shop to pick up parcels.

B-to-C parcel services

11 B-to-C parcel services cover the collection of parcels from distance selling companies' warehouses, sorting, transportation and delivery of the parcels to private consumers. 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.

12 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

13 Post-in-Shop ("PiS") is a concept developed 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 is required to provide pursuant to 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 outlet and must have the same opening hours as the outlet itself. The PiS has a uniform profile and is branded in accordance with Norway Post'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.

14 Norway Post remunerates individual outlets for each postal and financial transaction and pays a commission for the sale of postal products. In addition,

Norway Post pays the local outlet a fixed monthly fee to cover costs for 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

15 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 (a simple version of the subsequent PiS concept) 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.

16 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") with some 2 850 outlets in 2001 (2004: 2 745 outlets), ICA Norge AS ("ICA") with 1 100 outlets in 2001 (2004: 978), COOP NKL BA ("COOP") with 978 outlets in 2001 (2004: 902), Statoil Detaljhandel AS ("Statoil") with around 395 manned petrol stations in 2001 and 2004, A/S Norske Shell ("Shell") with 554 manned petrol stations in 2001 (2004: 503), Esso Norge AS ("Esso") with 358 manned petrol stations in 2001 (2004: 329), Hydro Texaco AS ("Hydro Texaco") with 340 manned petrol stations in 2001 (2004: 300), and Reitangruppen with 827 outlets in 2001 (2004: approximately 900) organised in three chains: Rema 1000, Narvesen and 7-eleven. NorgesGruppen, through its chain MIX Butikkene AS ("MIX"), is also the largest kiosk retailer in Norway.

17 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 Norway Post's preferred partner. The negotiations with the chains belonging to Reitangruppen did not lead to any result as the strategic match between the parties was considered to be rather poor.

18 The Business Agreement with NorgesGruppen/Shell concluded on 20 September 2000 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 shop in question. A 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".

19 A Framework Agreement and a 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 NorgesGruppen or Shell outlets matching the PiS selection criteria, Norway Post was 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.

20 A 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.

21 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 concerning preferred partner status, exclusivity, non-compete obligations or the duration of the agreements.

22 At the end of 2003, Norway Post wrote 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, on 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.

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

24 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.

25 According to 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.

26 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-Shop			
	Post-in-Shop*	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 and Branch Post Offices ("BPO") from 1997 to 2001*			

27 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% during the relevant period, i.e. 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

28 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%.

29 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. 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

30 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

31 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 EEA 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.

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

33 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.

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

35 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.

36 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.

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

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

39 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.

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

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

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

43 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.

44 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 Norway Post, an oral hearing was held by ESA on 16 June 2009.

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

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

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

V The contested decision

48 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 competitor on the relevant market.

49 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

50 ESA considered that when establishing its PiS network, Norway Post's strategy was to target leading grocery store, kiosk and petrol station 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 these chains and outlets belonging to them.

51 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 Norway Post's agreements were only made in the absence of better alternatives.

52 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.

53 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 are well-known brands. In contrast, independent outlets are considered to have significantly higher credit losses – which are usually also seen 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.

54 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 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 offering competing products.

55 These findings are seen to be supported overall 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

56 Assessing Norway Post'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 to Norway Post 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 Norway Post – some 3 672 outlets in 2004.

57 In addition, ESA considered that Norway Post's conduct created disincentive effects for COOP and ICA to supply competitors of Norway Post, having regard to Norway Post'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 Norway Post 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 to cooperate with Norway Post's competitors.

58 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 Norway Post's competitors, as those chains were not interested in rolling out delivery concepts of B-to-C parcel services. ESA concluded that

Norway Post'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

59 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 Norway Post's strong position on that 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 Norway Post, 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

60 ESA, while noting that this was not a prerequisite to establishing the abusive nature of Norway Post's conduct, 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

61 ESA considered that there was no objective justification for Norway Post's conduct. As regards group exclusivity, ESA rejected Norway Post'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 Norway Post's arguments that it was necessary to protect Norway Post'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 Norway Post's concept. As to Norway Post'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.

62 Additionally, ESA considered that alleged efficiency gains from Norway Post'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 absence of competition, ESA considered that Norway Post, as dominant undertaking, lacked incentives to pass on efficiency gains to consumers 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

63 ESA considered that the conduct constituted a single and continuous infringement of Article 54 EEA 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.

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

65 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, Norway Post's very high share of 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 by a factor of 5.5 for the duration of the infringement, ESA fixed the basic amount of the fine at EUR 13.89 million.

66 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.

67 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 Procedure

68 By application lodged at the Court on 14 September 2010, Norway Post brought the present action.

69 By order of 15 February 2011, the President of the Court granted Schenker North AB, Schenker Privpak AB and Schenker Privpak AS leave to intervene in the proceedings in support of the form of order sought by ESA.

70 By letter of 15 April 2011, the defendant requested that certain parts of the applicant's reply be submitted to the Governments of the EFTA States, the European Union and the European Commission and to set a new deadline for written observations on these parts. This request was rejected by the Court on 28 April 2011.

71 By letter of 15 June 2011, the interveners requested that certain parts of the applicant's reply be submitted to the Governments of the EFTA States, the European Union and the European Commission and to set a new deadline for written observations on these parts. This request was rejected by the Court on 30 June 2011.

72 By decision of 2 September 2011, the Court requested ESA to produce certain documents from the case file. ESA complied with that request.

73 The parties presented oral argument and their answers to questions put by the Court at the hearing on 5 October 2011.

VII Forms of order sought

74 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;

(iv) order Schenker North AB, Schenker Privpak AB and Schenker Privpak AS to pay the costs relating to their intervention.

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

(i) dismiss the application;

(ii) order the applicant to bear the costs.

76 Schenker North AB, Schenker Privpak AB and Schenker Privpak AS request the Court to:

(i) dismiss the application;

(ii) order the applicant to bear the costs.

77 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

VIII Law

78 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.

General issues

79 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 itself which ESA found to constitute an abuse of its dominant position. What is in dispute are the circumstances, and the assessment thereof, that led ESA to conclude that Norway Post's conduct constituted an abuse of that kind.

80 It is appropriate first to address some preliminary issues that are disputed between the parties, namely questions related to the burden of proof and the standard of review and questions relating to the admissibility of certain documents submitted by the applicant.

1. Burden of proof and standard of review

Arguments of the parties

81 The applicant contends that ESA bears the burden of proving that an infringement of the competition rules has taken place. It is submitted that the existence of the circumstances that constitute the infringement must be proven

beyond reasonable doubt. The applicant argues that this high standard of proof is necessary as the imposition of a substantial fine is tantamount to a criminal charge for the purposes of Article 6 ECHR. Accordingly, the principle of *in dubio pro reo* must be respected.

82 Furthermore, Norway Post submits that, for the guarantees of the ECHR to be respected, the Court must have full jurisdiction, including the power to quash in every respect, on questions of fact and law, the challenged decision. Referring to Article 2 of Protocol 7 to the ECHR, the applicant contends that this must apply *a fortiori* in the absence of a possibility to appeal to a second instance, as is the case in the EFTA pillar of the EEA. In any event, the applicant submits that the case at hand does not involve complex economic appraisals and that, accordingly, the Court must not defer to any significant degree to ESA's assessment of the facts.

83 ESA acknowledges that the procedure in competition law cases falls within the criminal sphere for the purpose of the application of the ECHR. However, in its view, the guarantees under Article 6 ECHR do not necessarily apply with their full stringency. It is submitted that the established case-law of the European Union courts on judicial review of competition decisions is compatible with the guarantees laid down by Article 6(1) ECHR. According to this case-law, the review by the Court is limited as regards complex technical or economic appraisals by ESA. In such cases, it is sufficient for the Court to 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. ESA submits that its analysis of the competitive situation constitutes a complex economic appraisal and that, accordingly, the decision must be upheld unless the Court finds that it manifestly erred in the appraisal of the applicant's conduct.

Findings of the Court

84 In essence, the parties disagree on the extent to which the guarantees provided for under Article 6 ECHR apply to the present proceedings and the effect, if any, this must have, in accordance with existing case-law, on the burden of proof and on the extent of the review of ESA's decision exercised by the Court.

85 According to the Court's established case-law, the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23, and most recently, Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49).

86 The principle of effective judicial protection including the right to a fair trial, which is *inter alia* enshrined in Article 6 ECHR, is a general principle of EEA law. It may be noted that expression to the principle of effective judicial protection is now also given by Article 47 of the Charter of Fundamental Rights

of the European Union (see on the latter point Case C-389/10 P *KME* v *Commission*, judgment of 8 December 2011, not yet reported, paragraph 119; and concerning the right of access to justice, Case E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36 and Case E-3/11 *Sigmarsson*, [2011] EFTA Ct. Rep. 430, paragraph 29).

87 The primary form of judicial protection against decisions of ESA is provided for by Article 36 SCA. Under that provision, the Court has jurisdiction to declare decisions adopted by ESA void. This is an administrative review procedure. Nonetheless, the Court notes that proceedings under Article 54 EEA may entail substantial fines. In the present case, a fine of EUR 12.89 million was imposed on Norway Post by ESA. The parties agree that the procedure in the present case falls, as a matter of principle, within the criminal sphere for the purposes of the application of the ECHR.

88 Indeed, penalties such as the one at issue pursue aims of both repressive and preventive character. They are intended to act, in the interest of society in general and the good functioning of the EEA single market in particular, as a deterrent against future breaches of the competition rules both for the perpetrator and for all other undertakings that enjoy a dominant position on the market. Accordingly, having regard to the nature of the infringements in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall, as a matter of principle, within the criminal sphere for the purposes of Article 6 ECHR (compare the European Court of Human Rights *A. Menarini Diagnostics S.R.L.* v. *Italy*, no 43509/08, §§ 38 to 44, 27 September 2011; see furthermore the Opinion of Advocate General Sharpston in Case C-272/09 P *KME Germany and Others* v *Commission*, judgment of 8 December 2011, not yet reported, point 64).

89 As has been pointed out by ESA, Article 6 ECHR does not in all cases apply with its full stringency. The criminal head guarantees of Article 6 are applied in a differentiated manner, depending on the nature of the issue and the degree of stigma carried by certain criminal cases on the one hand and, on the necessity of the guarantee in question for the requirements of a fair trial on the other. Thus, to what degree these guarantees apply in a given case, must be determined with regard to the weight of the criminal charge at issue (see European Court of Human Rights *Jussila* v. *Finland* [GC], no 73053/01, § 43, Reports of Judgments and Decisions 2006–XIV; and *Kammerer* v. *Austria*, no 32435/06, 12 May 2010).

90 Having regard to the nature and the severity of the charge at hand, the present case cannot be considered to concern a criminal charge of minor weight. The amount of the charge in this case is substantial and, moreover, the stigma attached to being held accountable for an abuse of a dominant position is not negligible. Thus, while the form of administrative review provided under Article 36 SCA may influence, with regard to several aspects, the way in which the guarantees provided by the criminal head of Article 6 ECHR are applied, this cannot detract from the necessity to respect these guarantees in substance (compare *A. Menarini Diagnostics S.R.L.* v. *Italy*, cited above, § 62).

91 Accordingly, in order to be compatible with Article 6(1) ECHR and Article 2 of Protocol 7 ECHR, "criminal penalties" of the kind at issue must not, in the first instance, necessarily be imposed by an "independent and impartial tribunal established by law". Such sanctions may be imposed by an administrative body which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does in fact comply with those requirements (see, referring only to Article 6(1) ECHR, the Opinion of Advocate General Sharpston in *KME Germany and Others* v *Commission*, cited above, point 67; compare *A. Menarini Diagnostics S.R.L.* v. *Italy*, cited above, § 59). If this is the case, the competition law procedure as a whole is compatible with the applicable guarantees of the ECHR.

92 With regard to Article 2(1) of Protocol 7 ECHR in particular, the applicant has alleged that the absence of a possibility of appeal against the judgments of the Court could pose a problem. However, Article 2(2) of that Protocol excepts from the right to appeal a case in which the person concerned was tried in the first instance by the highest tribunal. Under the relevant treaties of the European Economic Area, the Court is, within its jurisdiction, the highest tribunal.

93 On the burden of proof, the Court recalls that the onus of demonstrating the existence of the circumstances that constitute an infringement of Article 54 EEA is borne by ESA. It is therefore incumbent on ESA to adduce evidence capable of proving the existence of such circumstances (compare C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 29). Moreover, and keeping in mind the guarantees provided by Article 6(2) ECHR, it follows from the principle of the presumption of innocence that the undertaking to which the decision finding an infringement was addressed must be given the benefit of the doubt (compare Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp.* v *Commission* [2007] ECR I-729, paragraph 52; and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149–150).

94 Thus, ESA must submit precise and consistent evidence in order to establish the existence of the infringement. However, it is not necessary for ESA to adduce such proof in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the surveillance authority, viewed as a whole, and whose various elements are able to reinforce each other, proves the existence of the circumstances that constitute the infringement in question (compare, to that effect, Case T-321/05 *AstraZeneca* v *Commission*, judgment of 1 July 2010, not yet reported, paragraph 477).

95 As regards ESA's claim that its assessment of the competitive situation is by its nature a complex economic assessment whose review by the Court must necessarily be limited, the Court notes that the courts of the European Union have repeatedly held that review of complex economic assessment made by the European Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any

manifest error of assessment or misuse of powers (see, for example, 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 279).

96 This case-law must be seen against the background of the limitation of the Court's powers of review which is inherent in the concept of review of legality, as provided for, in the case of the Court, by the SCA. The object of an action for annulment is only to review the legality of acts adopted by ESA. The analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. This is the reason for which the Court, when conducting its review of ESA's decision, must not substitute its own assessment of complex economic circumstances for that of ESA (compare Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraph 67; Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57; and Case C-399/08 P *Commission* v *Deutsche Post*, judgment of 2 September 2010, not yet reported, paragraphs 84 and 87).

97 In that regard, it must be noted that it is inherent in the assessment of complex economic situations, in particular where a prospective analysis of future market developments, i.e. a prognosis, is required, that it is necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely or relevant (compare Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 43; and the Opinion of Advocate General Kokott in *Commission* v *Alrosa*, cited above, points 70–72).

98 Also as far as past events involving complex economic features are concerned, a situation may arise in which the Court, while still considering ESA's reasoning to be capable of substantiating the conclusions drawn from the economic evidence, may come to a different assessment of a complex economic situation. However, the fact that the Court is restricted to a review of legality precludes it from annulling the contested decision if there can be no legal objection to the assessment of ESA, even if it is not the one which the Court would consider to be preferable (compare *Commission* v *Alrosa*, cited above, paragraphs 65–67; and the Opinion of Advocate General Kokott in that case, points 81–84).

99 This does not, however, mean that the Court must refrain from reviewing ESA's interpretation of information of an economic nature. Not only must the Court establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (compare *Spain* v *Lenzing*, cited above, paragraphs 56 and 57; and, most recently, *KME* v *Commission*, cited above, paragraph 121).

100 Moreover, it must be recalled that Article 6(1) ECHR requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged

decision (see, for comparison, European Court of Human Rights *Janosevic* v. *Sweden*, no 34619/97, § 81, Reports of Judgments and Decisions 2002-VII, and *A. Menarini Diagnostics S.R.L.* v. *Italy*, cited above, § 59). Therefore, when imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.

101 Furthermore, as held above at paragraphs 93 to 94, in a case which is covered by the guarantees of the criminal head of Article 6 ECHR, the question whether the evidence is capable of substantiating the conclusions drawn from it by the competition authority must be answered having regard to the presumption of innocence. Thus, although the Court may not replace ESA's assessment by its own and, accordingly, it does not affect the legality of ESA's assessment if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, the Court must nonetheless be convinced that the conclusions drawn by ESA are supported by the facts.

102 Accordingly, the submission that the Court may intervene only if it considers a complex economic assessment of ESA to be manifestly wrong must be rejected.

2. Admissibility of certain documents

Arguments of the parties

103 The defendant considers that a number of annexes to the application and the reply are inadmissible, 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 to the application, and Appendices 9 to 12 and 18 to the reply. 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. 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.

104 The defendant further claims that the applicant has, contrary to Article 37(2) of the Rules of Procedure, introduced new evidence in the reply without giving any reasons for its delay.

105 The interveners support the defendant's plea of inadmissibility with regard to the economic studies on which Norway Post relies. In any event, the interveners reject the studies as unreliable, pointing out that none of them meets the Commission's best practice criteria for the submission of economic evidence.

106 The applicant submits that there is an extensive right to further develop and supplement the application in the reply, including the right to expand on arguments originally developed in the appendices to the application.

107 With regard to the interveners' objections to the introduction of 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, whereas the reports in question contain, in essence, common economic reasoning which ESA and the Court can easily assess as regards their relevance and reliability.

Findings of the Court

108 Under Article 19 of the Court's Statute and Article 33(1)(c) of the Rules of Procedure, each application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. These provisions are identical in substance to Article 21 of the Statute of the Court of Justice of the European Union and, respectively, Article 38(1)(c) of the Rules of Procedure of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court.

109 The Court has held repeatedly, for the sake of procedural homogeneity, that although it is not required by Article 3(1) SCA to follow the reasoning of the European Union courts when interpreting the main part of that Agreement, the reasoning which led those courts to their interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (Case E-18/10 *ESA* v *Norway* [2011] EFTA Ct. Rep. 202, paragraph 26; and *Bellona,* cited above, paragraph 39. On the right to intervene, see Case E-15/10 *Posten Norge* v *ESA*, order of the President of 15 February 2011, paragraph 8).

110 The need to apply the principle of procedural homogeneity, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent with regard to rules concerning the modalities of the procedure, when they relate mainly to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, the Court considers it also in such cases appropriate as a rule to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure which are identical in substance to expressions in the equivalent provisions of Union law. Moreover, the Court notes that, in any event, the application of its procedural rules must respect fundamental rights.

111 As regards the question whether 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 to the application were properly introduced into the present proceedings, and the applicant‘s submission that there is an extensive right to further develop and supplement the application in the reply to the defence, the Court recalls that under Article 33(1)(c) of the Rules of

Procedure, all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if appropriate, without recourse to other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible, the essential facts and the law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible.

112 Although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential information in the application itself, even if those documents are attached to the application. It is not for the Court to seek and identify in the annexes the pleas and arguments on which the action is based, since the annexes have a purely evidential and instrumental purpose (compare Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 39, point not set aside by the Court of Justice of the European Union, on appeal, in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375; and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94).

113 The application contained only global references to the studies annexed as 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. However, most of the studies commissioned by the applicant neither aim to prove any specific matters of fact nor can they be considered to put forward economic evidence based on sound scientific standards. Instead, they contain, as the applicant puts it itself, “common economic reasoning” aimed at challenging various parts of the economic assessment made by ESA. Thus, as general arguments in support of the application, their essential elements must be included in the application or in the reply itself, which must refer to the extracts of those annexes in order to substantiate or to complement the content of those arguments and not merely make a general reference to those annexes (compare Case T-151/01 *Der Grüne Punkt – Duales System Deutschland* v *Commission* [2007] ECR II-1607, paragraph 76).

114 Provided that the other requirements of admissibility, such as the prohibition on introducing new pleas in law in the reply, are met, it follows that it suffices if the applicant referred to those annexes to the requisite degree of specificity in the reply. Accordingly, Appendices A 35, A 39, A 40, A 41, A 44, A 45 and A 87 to the application are admissible.

115 With regard to Appendices A 27, A 180 and A 182 to A 184, it must be recalled that, pursuant to Article 25(3) of the Rules of Procedure, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. The “Econ report”

contained in Appendix A 27 as well as the two reports from A. C. Nielsen and the two consumer surveys submitted as Appendices A 180 and A 182 to A 184 to the application have been submitted only in Norwegian. These documents are therefore inadmissible.

116 Next, it is necessary to examine whether the evidence contained in Appendices 9 to 12 and 18 to the reply (the explanatory remarks of Komplett, Select, Forlagssentralen, De norske Bokklubbene and COOP) has been introduced in breach of Article 37(1) of the Rules of Procedure. As that evidence was only submitted in the reply, the applicant must give reasons for the delay in offering it.

117 The applicant argues that the information from the distance selling companies and some chains did not exist at the time when the application was lodged and, moreover, that submission of the new evidence is a way of securing its right to examine witnesses which have provided evidence against it.

118 With regard to those arguments, the Court observes that the documents in question have been drafted by the undertakings in question, on the initiative of or even during meetings with Norway Post, in December 2010 and January 2011. All the documents contain clarifications of earlier statements by those undertakings that were relied on by ESA in the contested decision. The Court does not deny that Norway Post has a right to examine witnesses which in earlier stages of the administrative proceedings have produced evidence against it. That does not, however, exonerate the applicant from the duty to comply with the rules on the submission of evidence. These rules aim at securing the proper functioning of the proceedings of the Court.

119 In that regard, the Court observes that it would seem likely that an undertaking of the size of Norway Post, which is routinely engaged in international business relationships, is able to understand the content and the nature of the allegations levelled against it on the basis of a Statement of Objections which has been communicated to it in English. At the very latest, Norway Post must have been aware of the allegations against it, including the evidence on which these allegations were based, when it received the Norwegian version of the Statement of Objections on 6 February 2009. The applicant therefore had ample time to secure those statements of clarification before it lodged its application at the Court's Registry on 14 September 2010. It has provided no argument why it took it almost two years to collect that evidence after it had received the Statement of Objections in Norwegian. Under these circumstances, the evidence submitted in Appendices 9 to 12 and 18 to the reply must be dismissed as inadmissible.

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

120 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 (1) 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 (2) that ESA has not proven that the conclusion of an agreement or the 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, (3) that ESA has not proven that its conduct limited competitor's access to those chains in a manner that constituted abuse, and (4) that ESA has not proven that Norway Post's conduct resulted in actual anti-competitive effects.

1. The applicable legal test/concept of abuse

Arguments of the parties

121 The applicant acknowledges that, according to case-law, it is sufficient for ESA 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 factual context. 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 demonstrate 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.

122 The applicant further submits that ESA 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. Even if exact quantification may not be required, it was for ESA to prove that the degree of foreclosure was substantial, i.e. significant, and not merely theoretical. In that regard, it is 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.

123 Norway Post maintains that the required threshold of foreclosure, both with regard to likelihood and materiality, may vary depending on the kind of abuse concerned. 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"), a high threshold applies where the practice is not as such abusive in character. In that regard, the applicant points out that its conduct was intended to secure a fast and efficient roll-out of a new distribution model (the PiS concept), had the objective of ensuring the effective implementation of Norway Post's public service obligations and protected a significant investment in a new delivery network. 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. As the conduct did not tie end-users to Norway Post, 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.

124 ESA and the Commission reject these arguments and maintain that ESA correctly applied the concept of abuse of a dominant position as follows from established case-law.

Findings of the Court

125 By its first line of argument, the applicant claims that ESA should have demonstrated anti-competitive effects with regard to effective market access and actual damage to consumer welfare.

126 The notion of abuse of a dominant position under Article 54 EEA is a legal notion that must be examined in the light of economic considerations (Case E-4/05 *HOB-vín* v *The Icelandic State and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland)* [2006] EFTA Ct. Rep. 4, paragraph 51).

127 The Court recalls that Article 54 EEA must be interpreted as referring not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition. Article 54 EEA does not prohibit an undertaking from acquiring, on its own merits, a dominant position in a market. *A fortiori*, a finding that an undertaking holds a dominant position is not in itself a ground for sanction. The fact remains that, according to settled case-law, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (compare Case C-52/09 *TeliaSonera Sverige*, judgment of 17 February 2011, not yet reported, paragraph 24 and case-law cited).

128 In determining whether Norway Post's conduct was abusive, it is necessary to consider all the circumstances, and to investigate whether the overall behaviour of Norway Post during the relevant period tended to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (see, for comparison, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 90, and Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 67).

129 Thus, in order to determine whether exclusivity agreements are compatible with Article 54 EEA, it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so (compare Case T-155/06 *Tomra*

Systems ASA and Others v *Commission*, judgment of 9 September 2010, not yet reported, paragraph 215).

130 The concept of abuse of a dominant position prohibited by Article 54 EEA is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing 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 (compare *TeliaSonera Sverige*, cited above, paragraph 27).

131 Accordingly, the argument of the applicant that ESA was required to demonstrate actual anti-competitive effects must be rejected. It was sufficient for ESA to show that the conduct in question was liable to distort competition by raising barriers to entry and, therefore, to the maintenance or growth of the competition still existing in the market.

132 For the same reason, it is immaterial whether an "as efficient competitor" could have competed effectively with Norway Post. As ESA has correctly pointed out, it is for the competitive process to decide, without being distorted, which firms stay in the market.

133 By its second line of argument, the applicant submits that ESA erred in law when stating that due to the extremely weak competition in the market, even a rather limited degree of foreclosure was liable to restrict competition. According to the applicant, ESA should have considered whether the degree of foreclosure was substantial. Moreover, account should have been taken of the fact that Norway Post's conduct was not as such abusive.

134 The last of those arguments must be rejected directly. It follows from the objective nature of the concept of abuse (see above, paragraph 130) that the aims which Norway Post pursued by its conduct are irrelevant for the question whether the conduct was liable to restrict competition. Such considerations may nonetheless be relevant for the question whether the conduct was objectively justified.

135 However, as the applicant asserts, a distinction must be made between foreclosure of the distribution channel – in this case, access to leading grocery stores, kiosk and petrol station chains – and foreclosure of the actual market where competition is already limited. With regard to the former, it is clear that not any degree of foreclosure is sufficient. If the remaining share of the outlets in question still allows competitors effectively unfettered access to the entire market, or at most forecloses only an insignificant part of the market, the conduct does not raise barriers to entry that can be considered sufficiently relevant. In contrast, where the degree of foreclosure with regard to important distribution outlets is substantial, the conduct is capable of distorting competition on the

entire market in question (compare Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 160).

136 ESA did not specifically explain which level of foreclosure with regard to the outlets in question it considered necessary for its finding of an abuse. But it is apparent from the decision that ESA, as a matter of fact, undertook to establish that the degree of foreclosure with regard to the relevant distribution outlets was substantial. It was only after ESA had shown that access to the leading grocery stores, kiosk and petrol station chains was important for providers of B-to-C parcel services and that Norway Post's conduct had significantly limited its rivals' possibilities of being able to roll out their delivery concepts in these chains that it considered what degree of foreclosure on the relevant market would be sufficient. Only in that respect, and without committing an error in law, did ESA consider that having regard to the very weak degree of competition in the market for B-to-C parcel services with over-the-counter delivery, even a limited degree of foreclosure was liable to restrict or distort the competition which still existed in the market.

137 It must therefore be held, contrary to what the applicant asserts, that ESA applied the correct legal test in establishing whether Norway Post's conduct constituted an abuse of its dominant position.

2. Major importance of an agreement or cooperation with one or more leading grocery store, kiosk or petrol station chains to new entrants

Arguments of the parties

138 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.

139 First, the applicant 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 Norway Post) 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.

140 Second, the applicant disputes ESA's finding that Norway Post's competitors have shown a "clear and consistent preference" for outlets belonging to these chains. Privpak's statements in this respect are regarded as contradictory and not credible in view of Privpak's action for damages against Norway Post which is pending before the Oslo District Court. Norway Post 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, and that neither in Sweden nor in Norway was it Privpak's aim to cooperate at chain level. 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. Norway Post contends that Privpak considered the NorgesGruppen/MIX outlets preferable mainly because of the possibility of free-riding on Norway Post's investments.

141 Third, the applicant argues 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, in particular with regard to opening hours, customer handling and service quality. 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, these replies do not support the defendant's assessment and the defendant misinterpreted them.

142 The applicant also submits that the defendant failed to take account of the results of the consumer surveys submitted by Norway Post 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.

143 Fourth, in the reply, the applicant argues that even if the delivery network of a competitor consisted of outlets other than those used by Norway Post, the number of parcels from distance selling companies interested in such alternative distribution networks was more than sufficient for a competitor to be profitable. 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" (i.e. available for distribution by competitors) was approximately 4.78 million (or 60% of the market) for the purposes of the fourth question, approximately 4.77 million (or 60% of the market) for the purposes of the fifth question, and approximately 6.89 million (or 87% of the market) for the purposes of the sixth question.

144 The defendant disagrees with 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, whereas 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.

Findings of the Court

145 ESA based its finding concerning the importance of an agreement or cooperation with one or more of the leading grocery store, kiosk or petrol station chains on the reasons summarised in paragraphs 50 to 55 above.

146 First, as to Norway Post's own preferences, it is true that the requirements which Norway Post has established for its PiS, in particular with regard to space, are not entirely comparable with those of its competitors on the relevant market. It is also correct that, on a more abstract level, outlets must comply with certain qualitative selection criteria such as accessibility and service level which, as such, are independent from the type of outlet. However, these selection criteria must be made operational in practice in order to establish a delivery network with sufficient geographical coverage. The applicant has not disputed that it showed a strong preference for the chains in question to make these selection criteria operational. That Norway Post's needs were to some extent different from those of its competitors does not make that preference irrelevant, as the applicant has failed to convincingly explain why the needs that were peculiar to it, and thus distinguished it from its competitors, may be satisfied only by the type of outlets in question. A fast and efficient roll-out of the delivery network, the need for which the applicant has particularly stressed, could certainly also be of interest to Norway Post's competitors and was therefore not peculiar to Norway Post. Accordingly, and although Norway Post's preference did not constitute conclusive evidence on its own, ESA was right to take that preference into account as one element of its overall appraisal of the evidence.

147 Second, with regard to Norway Post's claim relating to the preferences of its competitors, Privpak and Tollpost, the Court holds that ESA was correct to state that they showed a strong preference for the leading grocery store, kiosk or petrol station chains.

148 As regards Tollpost, it has not been disputed that this company first (in autumn 2005) contacted NorgesGruppen, COOP, Reitangruppen, ICA, Statoil, Shell, Hydro Texaco and Esso at central level. It was only after those companies showed no interest in its business concept that it turned to florist chains, which it considered a less viable alternative, and secured approximately 280 florists as outlets. Less than a year after the removal of the exclusivity obligations for Norway Post's partners, Tollpost entered into a cooperation agreement with ICA. In 2008, according to Norway Post's own submissions, Tollpost had agreements with 124 florists and 325 ICA outlets. It is evident from these facts that Tollpost had a clear and consistent preference for the leading grocery store, kiosk or petrol station chains.

149 Contrary to what the applicant claims, Privpak's statements concerning its preferences are not contradictory. Nor is there any serious indication in the available evidence that Privpak intended to "free-ride" on Norway Post's investments. While it is true that Privpak was, according to its own statements, not particularly interested in cooperation at chain level, that is, with the central

management of a chain, it has nevertheless consistently explained why it considered access to individual outlets belonging to branded chains important. These stated preferences are corroborated by Privpak's market conduct. Similarly, Norway Post's claim that Privpak's business concept is generally not attractive to the outlets in question – which basically challenges the viability of Privpak's business concept – is not supported by the available evidence, but would, in any event, seem to be speculative and, for the purpose of establishing Privpak's actual preferences, also not to the point.

150 It is undisputed that, in 2000, the first potential partners which Privpak approached in Norway were kiosk or petrol station chains, namely Narvesen, Shell, Statoil, Hydro Texaco, ESSO and MIX. In June 2003, that is, while Norway Post's conduct was ongoing and after Privpak had failed to conclude an agreement with MIX (which is part of NorgesGruppen), 79 out of Privpak's 130 outlets (60%) were petrol stations, kiosks or grocery stores. The single most common type of outlet in Privpak's network at that time was a petrol station belonging to a chain. After Norway Post's conduct had ended, Privpak successfully engaged in negotiations with NorgesGruppen and, in November 2008, of Privpak's 295 outlets in Norway 206 belonged to NorgesGruppen. This demonstrates a consistent preference for outlets belonging to the leading grocery store, kiosk or petrol station chains.

151 This finding is not contradicted by Privpak's market conduct in Sweden, to which the applicant legitimately refers as a potential element of proof regarding Privpak's business concept in general. ESA and the interveners have described Privpak's concept in Sweden as being based on the idea of organising a delivery network through grocery chains, kiosk and petrol stations. The applicant bases its claim to the contrary on a list of outlets which is, as has been criticised by ESA, undated, without any indication as to its source and which does not explain the methodology by which the outlets have been categorised. Yet, even if Norway Post's claims that the document lists all Privpak outlets in Sweden in 2006 could be taken at face value, a scrutiny of the names of the 656 outlets categorised as "other" by the applicant reveals that, in addition to the 675 outlets which the applicant counted as "corner stores, grocery stores, kiosks and petrol stations", at least 200 of the "other" outlets appear to be grocery/convenience stores, kiosks and petrol stations as well, even though most of them do not appear to belong to chains. The information submitted by the applicant thus supports ESA's finding that Privpak also in Sweden had a strong preference for grocery stores, kiosks or petrol stations, preferably belonging to chains, when choosing its outlets.

152 Third, with regard to the 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, the Court notes that the applicant has not challenged ESA's findings that independent outlets have significantly higher credit losses than chain outlets, that a delivery network spread over many individual shop owners is more costly to operate, and that it is of great value for a B-to-C supplier to be associated with a

well-known brand such as the brands of the leading grocery store, kiosk or petrol station chains. These considerations seem, in any event, perfectly reasonable.

153 The parties disagree, however, whether grocery stores, kiosks and petrol stations belonging to chains are particularly well suited to match the general selection criteria concerning accessibility and quality and on the relevance of the possibility to combine the collection of parcels with daily errands. They also disagree whether the replies of the distance selling companies support ESA's findings, and whether ESA was wrong not to take account of the consumer surveys produced by the applicant.

154 The Court considers that ESA was right to assume – and this has not been contested by the applicant – that grocery stores, kiosks and petrol stations belonging to chains will generally have good accessibility, attractive opening hours and well-trained staff. Accordingly, having a network consisting mainly of such outlets will be an efficient means for a B-to-C supplier to make the selection criteria operational in practice, and to convince its potential clients that its network satisfies their qualitative requirements. Although it is reasonable to assume, as pointed out by the applicant, that many other outlets will also meet these criteria, ESA was nonetheless right in stating that opening hours in specialised trade outlets tend to be shorter and that the potential for combining the collection of parcels with other business is more limited. These are generally known facts and it is therefore not possible for the applicant merely to dismiss ESA's findings in this regard as speculative. Moreover, ESA pointed out – and this has again not been disputed by the applicant – that grocery stores, kiosks and petrol stations offer the most neutral assortment and are thus least likely to cause conflicts of interest between distance selling companies and outlets selling competing products.

155 As to the relevance of the possibility to combine the collection of parcels with daily errands, which the applicant claims to constitute an unsubstantiated common sense assumption by ESA, the Court notes that on this point the decision refers to Norway Post's own agreement with NorgesGruppen/Shell where it is stated that "this may matter a lot both for the customers of Norway Post and NG/Shell". Moreover, it follows from the description of Privpak's business concept in the decision that the possibility for outlets to increase their turnover by selling products to customers who enter the shop to pick up parcels is a cornerstone of Privpak's business concept. Norway Post's argument that the possibility for additional sales would be the same in specialised trade outlets must be rejected, as the likelihood for such additional sales is higher in shops where consumers run routine errands, i.e. grocery stores, kiosks and petrol stations. It must therefore be held that the possibility to combine the collection of parcels with daily errands was clearly considered to be highly relevant by the market participants.

156 As regards the replies of the distance selling companies, the Court notes that these documents have been submitted only in Norwegian. Under the first subparagraph of Article 25(3) of the Rules of Procedure, all supporting

documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. Having regard to the specific circumstances of the case at hand and the nature of the documents, the Court has decided to accept them pursuant to its discretion under the first subparagraph of Article 25(3) of the Rules of Procedure, and to have them translated by the Court.

157 Having done so, the Court finds that ESA's assessment is further supported by the replies of the distance selling companies. The answers of seven distance selling companies (Cappelen, Sparkjøp, Trumf, Clas Ohlson, Ellos, Homebox and Samlerhuset) must be understood as effectively ruling out, for their purposes, the choice of a distribution partner disposing of a delivery network consisting mainly of other types of outlet. The answers of Select, Komplett, H&M, De Norske Bokklubbene and Readers Digest are somewhat ambiguous, while only three distance selling companies (Skandinavisk Press, LR International and Forlagssentralen) clearly state that the type of outlet used is of no importance to them. The defendant is also right to point out that the last two questions asked to the distance selling companies presupposed that a competing nationwide delivery network had been established, which cannot be taken for granted without access to any of the leading grocery, kiosk and petrol station chains.

158 As regards the applicant's claim that ESA should have taken account of the consumer surveys that it submitted, the Court notes that they have not been properly introduced in the proceedings. The Court is therefore not in a position to assess them. In any event, the Court concurs with ESA that the relevant demand side of the market consists of the distance selling companies which are the commercial clients of B-to-C parcel delivery companies. ESA was thus not required to take the views of consumers into account.

159 Fourth, the applicant submits that even if the delivery network of a competitor consisted only of outlets other than those used by Norway Post, the number of parcels "in competition" would be sufficient for its competitors to be profitable. The applicant essentially argues that its conduct could not constitute an abuse because it foreclosed only 40% of the market.

160 At the outset, the Court observes, based on what was held above at paragraph 157 and applying the turnover figures submitted by Norway Post, that the level of foreclosure would instead amount to 50%, if not more, of the relevant demand. Moreover, this scenario is based on the assumption that a competitor would actually have been successful in establishing a delivery network with sufficient coverage without having access to any of the leading grocery, kiosk and petrol station chains. In any event, such levels of foreclosure must be considered as substantial.

161 In that regard, it must be recalled that foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have

the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not for the dominant undertaking to decide how many viable competitors will be allowed to compete for the remaining contestable portion of demand (compare *Tomra Systems ASA and Others* v *Commission*, cited above, paragraph 241).

162 In conclusion, the Court has no doubt that ESA was correct to state that an agreement or cooperation with one or more of the leading grocery store, kiosk or 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.

3. Abusive limitation of the access to leading grocery store, kiosk and petrol station chains

Arguments of the parties

163 The applicant submits that ESA has neither proven that the conduct was liable to create the disincentives it envisaged nor that other leading chains were unavailable to rivals. Norway Post 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. On the other hand, many outlets were available to competitors in COOP, ICA and other chains and there were, moreover, outlets which did not have agreements with Norway Post.

164 The applicant claims that ESA's assessment of disincentives is, in general, speculative. In 2004, both COOP and ICA explicitly answered questions from the defendant to the effect that both the chain management and the outlets without PiS were open to agreements with other suppliers, but that the chains had not received any (serious) enquiries from Norway Post's competitors. As to the assessment of incentives, it is submitted that ESA failed to take account of the fact that no outlet was obliged to accept Norway Post as a partner, that COOP and ICA were free to conclude agreements with Norway Post'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. Once the main roll-out was completed, neither COOP nor ICA had any significant disincentives to conclude agreements with Norway Post's competitors. As Norway Post 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 distributors. 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.

165 The applicant denies that it pursued a renegotiation strategy as suggested in the decision and maintains that it did not link the issues of preference and exclusivity. 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. The applicant further submits that COOP merely did not want to end up with a lower priority status, and that ICA wanted Norway Post to abolish the preference system altogether. 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 Norway Post. Furthermore, Norway Post considers that both ICA's cancellation of its agreement with Norway Post on 5 October 2005 and its answers to the defendant prove that ICA felt free to conclude agreements with Norway Post's rivals. Norway Post observes that the defendant did not ask COOP such follow-up questions. Under these circumstances, the applicant maintains that ESA's finding of the existence of disincentives is based on pure speculation.

166 The applicant goes on to submit that the defendant also failed to prove that other outlets or chains were not available to its competitors. In its view, the starting point must not be the number of outlets tied to Norway Post (some 3 672 shops in 2004), but the number of untied shops, which Norway Post estimates at 28 000 in Norway, out of which more than 5 000 were grocery stores, kiosks and petrol stations. Taking the view that a delivery network of approximately 365 to 485 outlets would be sufficient to reach most of Norway's population, Norway Post 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 Norway Post's infrastructure. In any event, some analysis of the required access to outlets would have been necessary to support ESA's assessment that Norway Post's conduct led to possible foreclosure effects.

167 The defendant disagrees with all these arguments. It submits that it examined the overall behaviour of Norway Post during the relevant period in its pertinent legal and economic context, and that parts of the conduct cannot be examined on their own and in isolation from Norway Post'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 Norway Post only needed access to some 22% of them. In addition, 422 outlets in COOP and ICA were removed from the market by outlet exclusivity.

168 With regard to the finding that the applicant had created additional disincentives for COOP and ICA, the defendant argues that also practices other than formal undertakings may constitute an abuse under Article 54 EEA. By objective standards, Norway Post 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 Norway Post 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 Norway Post would establish a PiS 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 Norway Post's competitors existed during this period.

169 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. ESA contends that the answers it received from COOP and ICA in 2004 and from ICA in 2007 do not support Norway Post's claim that COOP and ICA at chain level did not feel that there were disincentives to deal with new entrants.

Findings of the Court

170 In order to uphold ESA's findings regarding abusive limitation of the access to leading grocery store, kiosk and petrol station chains, ESA must have demonstrated in its decision that the conduct of Norway Post was intended to restrict or foreclose competition or was capable of doing so in relation to access to a substantial share of the relevant outlets (see paragraph 135 above). In that regard, it must be kept in mind that for a successful market entry, competitors needed to acquire access to a number of outlets sufficient to establish a delivery network capable of serving most of Norway's population. Even according to the applicant, 365 to 485 outlets would be required to achieve this goal; a number which is, as the Court notes, considered as too low by both ESA and the interveners.

171 It is undisputed that Norway Post's conduct foreclosed access to all of NorgesGruppen/Shell outlets, i.e. some 3 250 outlets in 2004. Moreover, the applicant's claim that the COOP and ICA outlets where a PiS was established would not normally have concluded agreements with other parcel distributors, apart from not being supported by evidence, must be rejected already on the ground that a dominant undertaking cannot justify the limitation of its business partners' contractual freedom to the detriment of its competitors for reasons that pertain to the alleged interests of those partners. Accordingly, ESA was correct to find that Norway Post foreclosed access to some 3 672 outlets in 2004 through its exclusivity agreements alone.

172 The Court observes that these 3 672 outlets amount to almost 50% of the outlets identified as relevant by the decision, i.e. the outlets belonging to the leading grocery store, kiosk and petrol station chains.

173 With regard to the disincentives contended by ESA in connection with the roll-out of Norway Post's PiS concept, i.e. from 2001 to autumn 2002, ESA rightly stated that Norway Post was objectively a more attractive business partner than new entrants and that both COOP and ICA had an interest in being awarded as many PiS as possible as soon as they had entered into the agreements with Norway Post 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 Norway Post would establish a PiS 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 was correct to find that Norway Post's

conduct created disincentives to deal with Norway Post's competitors during this period.

174 Norway Post cannot challenge that conclusion by claiming that Privpak would not have been able to make a sufficiently attractive offer to the companies at that time. A dominant undertaking cannot argue that entry would be too difficult for new entrants in order to justify conduct by which it raises market barriers even higher, unless entry would be *a priori* hypothetical. Moreover, the argument that, as Norway Post had to offer comparatively high payments per transaction, the same would necessarily have applied also to its competitors is speculative. As ESA rightly points out, the business concepts of Norway Post's competitors required considerably less space and investment from the outlets. In any event, the failure of one undertaking to fully explain the advantages of a new business concept does not entail that others could not have succeeded in doing so, in particular if other undertakings, such as Privpak, could refer to the successful implementation of that business concept in the market of a neighbouring country. Free and fair competition in the market would have tested assumptions of that kind.

175 For the subsequent period until the end of 2003, the decision considered that the disincentives were, due to the more limited number of new PiS being established, less relevant. As a consequence, the decision did not consider disincentives for this period to be a central part of the abuse. As the decision is not based on the existence of disincentives for this period, the arguments of the applicant concerning this period are unable to affect its legality.

176 As regards the additional disincentives identified by ESA in the context of the renegotiations, the Court agrees that in a situation where a dominant undertaking has concluded agreements providing for group exclusivity for its preferred distribution partner and outlet exclusivity for its other distribution partners, a negotiation strategy such as the one used by Norway Post may be liable to distort competition by limiting the willingness of the dominant undertaking's partners to conclude agreements with its competitors.

177 This applies even if the dominant undertaking has not, as is undisputed in the present case, actively linked the negotiations on the future of preferred partner status to the issue of exclusivity. As ESA correctly observes, a dominant undertaking has a special responsibility to ensure that its conduct does not distort competition (see above, paragraph 127). While negotiations with actual or potential partners about preferred partner status are, as such, part of the normal process of competition in products or services which also a dominant undertaking is free to pursue, the fact that the dominant undertaking at the time of the negotiations imposes exclusivity obligations on its partners is nevertheless, in circumstances such as those of the present case, liable to create incentives for the undertakings participating in the negotiations not to cooperate with the competitors of the dominant undertaking while these negotiations are on-going.

178 It must be kept in mind that Norway Post was objectively a more attractive business partner for COOP and ICA than potential market entrants. Changes in the preference status were, at least in the long run, likely to lead to renewed competition for a considerable number of both new and existing PiS after the existing agreements had been replaced. The renegotiations conducted by Norway Post went on for a significant period of time, and Norway Post failed to announce unequivocally its intention not to maintain exclusivity clauses in future cooperation agreements. The fact that ICA showed no interest in Tollpost's business concept during the renegotiation period, but concluded an agreement with Tollpost shortly after the contractual relationship with Norway Post had been clarified, lends further support to the assumption that the disincentives identified by ESA were actually present. In the absence of any proof to the contrary, ESA was therefore entitled to conclude that the renegotiation strategy pursued by Norway Post did create significant disincentives for COOP and ICA, which made these retail groups less available to new entrants from 2004 until the negotiations were settled in 2006.

179 Finally, the applicant cannot successfully challenge ESA's statement in the decision that the other leading grocery store, kiosk and petrol station chains were far from readily available to Norway Post's competitors by claiming that ESA failed to prove that other outlets or chains were not available to its competitors. It is evident that ESA, when assessing whether the other chains were readily available, required more than just possible availability as is argued by the applicant. Nor is ESA, in a situation where it has already demonstrated that a substantial share of the relevant outlets has been foreclosed by the conduct of the dominant undertaking, obliged to show that the other relevant outlets were unavailable. Thus, even if the remaining outlets were, as the applicant claims, in principle available, that does not entail that they were also readily available. For this to be the case, the remaining outlets and chains would effectively have needed to have a level of availability sufficient to offset the foreclosure effects caused by the dominant undertaking. The available evidence does not suggest that this was the case.

180 Having regard to all of the foregoing, the Court has no doubt that Norway Post's conduct abusively limited access to the leading grocery store, kiosk and petrol station chains. It must therefore be held that ESA was correct to find that Norway Post's conduct limited access to the leading grocery store, kiosk and petrol station chains and that the conduct was liable to restrict competition in the relevant market.

4. Absence of actual anti-competitive effects

Arguments of the parties

181 Although the applicant acknowledges that it is not necessary under Article 54 EEA for ESA to prove actual effects on competition, it goes on to argue that the absence of actual effects is a relevant indication that the conduct was in fact not liable to restrict competition, in particular where such conduct continued for a

longer period. The applicant contends that, although the alleged infringement continued for 5.5 years, no evidence exists that the market development after 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.

182 Privpak's lack of success in establishing a delivery network in Norway is, according to the applicant, a consequence of its special business requirements. These requirements, such as its reliance on kiosk counters, and its unwillingness to offer sufficient compensation to potential outlets, are considered ill-suited for the Norwegian market. Norway Post 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 said to be unrelated to Norway Post's conduct and in no way indicative of market foreclosure. As regards the fact that Privpak was hindered in accessing MIX, Norway Post argues that the legality of its conduct cannot depend on the preferences of actual or potential competitors which 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 Norway Post's conduct was actually capable of having any foreclosure effect.

183 The applicant further claims that the effect of its conduct on competition was actually a positive one, 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 observes 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.

184 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, without this being necessary under the case-law. In any event, ESA disagrees with the applicant's arguments.

185 The interveners reject any arguments by which Norway Post claims that their lack of success was due to an inferior business model, or that Privpak wanted to copy or "free-ride" on Norway Post'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. Further, they 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 Norway Post 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.

Findings of the Court

186 If some grounds of a decision on their own provide sufficient legal basis for the decision, errors in other grounds of the decision have, in any event, no effect on its enacting terms (compare *Tomra Systems ASA and Others* v *Commission*, cited above, paragraph 286).

187 The contested decision states, at recital 641, that although, according to case-law, it is sufficient, for the purpose of establishing an infringement of Article 54 EEA, to show that the applicants' practices tended to restrict competition or that their conduct was capable of having that effect, ESA supplemented its analysis in the present case by considering the likelihood of actual anti-competitive effects of the applicant's practices.

188 It is thus clear that ESA did not attempt to base its finding of an infringement of Article 54 EEA on the consideration of the actual effects of the applicant's practices on each of the national markets examined. Rather, ESA merely complemented its finding of infringement with a brief examination of the likely effects of those practices.

189 It must also be stated that, for the purposes of establishing an infringement of Article 54 EEA, it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (compare *Tomra Systems ASA and Others* v *Commission*, cited above, paragraph 289; and above, paragraph 131).

190 Accordingly, and in light of the findings on the previous parts of the first plea, the pleas of the applicant to the effect that ESA failed to properly assess the effects of Norway Post's conduct on competition are ineffective to challenge the legality of the decision.

191 Furthermore, the pleas of the applicant contending an absence of actual effects entailing, in turn, that the conduct was not liable to have any negative effects on competition must be rejected.

192 While the Court agrees with the applicant that, in some cases, the persistent lack of actual negative effects on competition may cast doubt on a finding by ESA that a certain conduct is liable to restrict competition, the Court considers that the claims of the applicant in this particular case are not convincing.

193 The Court recalls that ESA had reason to find that Norway Post's conduct was liable to restrict competition by erecting additional barriers to entry in a situation

where competition existing on the relevant market was very weak. Where an undertaking is already capable, as a result of its dominant position, to set the price for its products and services independently of those of its competitors, the erection of such additional barriers does not necessarily lead to an increase in prices. In the same way, contrary to what the applicant claims, the removal of such additional barriers to entry does not necessarily lead to a decrease in prices. In the present case, there is no doubt that the applicant's conduct made entry for its competitors more difficult, even if, as the applicant claims, it may have had no impact on the prices charged to its customers.

194 With regard to Norway Post's claim that the establishment of the PiS network "paved the way" for new entrants by convincing market participants of the viability of over-the-counter parcel delivery through retail outlets, the Court considers that, even if this were the case, the conduct cannot be considered necessary for the establishment of the PiS network (see below, paragraphs 216 to 219, 231 and 236). In any event, any such effects would have been outweighed during the relevant period by the difficulties the applicant created for its competitors to actually establish such a network.

195 It is evident from the facts submitted to the Court that both Privpak and Tollpost, Norway Post's only competitors during the relevant period, were unsuccessful in securing cooperation with Norway Post's partners while the exclusivity agreements were in force, but succeeded in achieving such cooperation after the conduct had ended. Entry into a cooperation agreement with those chains at an early stage would have been an important breakthrough for the competitors of Norway Post. In the case of Privpak, ESA correctly found, on the basis of the available evidence, that it was likely that the failure to secure an agreement with MIX could be attributed to the effects of Norway Post's conduct. ESA was therefore entitled to conclude that it was likely that the additional barriers to entry caused by Norway Post's conduct had in fact adversely affected Privpak's efforts to enter the market.

196 In that regard, it is irrelevant whether Privpak was an inefficient competitor, as the applicant claims, and whether its endeavours on the Norwegian market were successful after the cessation of the incriminated conduct. The Court recalls that it does not matter whether the conduct had actual negative effects on competition, but only whether it was objectively liable to have such effects (see above, paragraphs 130 to 131). *A fortiori*, in a situation where the conduct in question raised additional barriers to entry, its legality cannot depend on the efficiency of the undertakings affected (see above, paragraph 132). On the contrary, the observation that an undertaking, even one alleged to be inefficient, appears to have been negatively affected in a significant way by the *prima facie* abusive conduct is capable of lending additional support to a finding that the conduct in question was indeed liable to restrict competition.

197 Accordingly, Norway Post's arguments with regard to the fourth part of the first plea must be rejected in their entirety.

The second plea – Objective justification

198 By its second plea, the applicant submits that its conduct was, in any event, objectively justified. It argues (1) that ESA overstated the foreclosure effects and applied too strict a test when assessing objective justifications and efficiencies, in particular having regard to the fact that it provides a service of general economic interest; and that its conduct was objectively justified because it had a legitimate interest in pursuing (2) chain exclusivity, (3) outlet exclusivity and (4) its renegotiation strategy, and (5) that ESA failed to carry out an assessment comparing the efficiency gains achieved with any likely anti-competitive effects.

1. The applicable test

Arguments of the parties

199 The applicant submits that the threshold applicable to objective justifications and efficiencies depends upon the extent of the foreclosure effects. ESA overstated the foreclosure effects and consequently erred in its assessment of objective justifications and efficiencies. The applicant asserts that the reasoning underlying the judgment of the Court of Justice of the European Union in Case C-7/97 *Bronner* [1998] ECR I-7791 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.

200 The defendant disagrees with those arguments, maintaining that any justification put forward had to be applicable to parcel distribution services.

201 In its reply, the applicant makes a number of submissions to the effect that it provides services of general economic interest. This, in the applicant’s view, is a reason of objective justification in itself or should, at least, have led to the application of a more lenient test under which the conduct could be considered illegal only if it were manifestly inappropriate in order to safely establish and maintain its PiS network, which Norway Post considers essential in order to fulfil its obligations under its universal postal service licence.

202 The defendant contests the admissibility of these arguments, arguing 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. In any event, the defendant submits that the essential facts and the law on which an action is based must be apparent from the text of the application itself. Moreover, it rejects these arguments as unfounded.

203 The applicant considers that, if in a criminal case it were precluded from submitting arguments and evidence to defend itself against a materially incorrect conviction 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, this would be incompatible with the ECHR and the Court's duty to undertake an unlimited review of the contested decision.

Findings of the Court

204 It follows from what was held above that ESA was correct in its assessment that the applicant's conduct was liable to distort competition and must, accordingly, be considered abusive unless it can be objectively justified.

205 As regards the question of whether the *Bronner* judgment of the Court of Justice of the European Union is relevant, as contended by the applicant, it suffices to state that the case at hand must be distinguished on the facts. Unlike the dominant firm in *Bronner*, the applicant neither owns nor operates the infrastructure to which it impeded the access of competitors, namely the outlets of NorgesGruppen/Shell, COOP and ICA.

206 Instead, ESA was correct to consider that it is for the applicant to demonstrate that its conduct is objectively necessary or produces efficiencies which outweigh the negative effects on competition, and that, if the exclusionary conduct bears no relation to the benefits for the market and the consumers, or if it goes beyond what is necessary in order to attain these benefits, that conduct must be regarded as an abuse.

207 As regards the admissibility of the arguments put forward in the reply, the Court notes that the applicant submits thereby, first, a new plea of objective justification and, second, a new plea arguing that ESA erred in law by requiring Norway Post's conduct to be necessary for attaining its goals. These submissions constitute new pleas in law contrary to Article 37(2) of the Rules of Procedure, and must therefore be dismissed as inadmissible. It is therefore unnecessary to adjudicate whether the applicant was required to submit the new plea of objective justification before the end of the administrative procedure.

208 In any event, inasmuch as these arguments are also raised on a more general level with regard to the subsequent parts of this plea, it should be noted that ESA never questioned the legitimacy of the applicant's goal to ensure a fast and efficient establishment of its PiS network and, thus, its ability to satisfy the requirements of its universal service licence. ESA merely required, in accordance with established case-law, that Norway Post's conduct, i.e. concluding and maintaining group and outlet exclusivity with regard to parcel delivery services in its cooperation agreements and the related renegotiation strategy, be necessary to attain that goal.

209 For the sake of clarity, the Court emphasises that Article 54 EEA applies to all economic activity engaged in by undertakings at their own initiative. It is only if national legislation requires anti-competitive conduct from undertakings, or if national legislation creates a legal framework which itself eliminates any possibility of competitive activity, that Articles 53 and 54 EEA cease to apply. However, in the present case, it is undisputed that Norway Post devised and

adopted its commercial strategy at its own initiative. Whether the consent of its owner was required is irrelevant. The fact that the Norwegian State as owner urged Norway Post to reduce its costs does not differentiate it from any other undertaking which is under pressure from its shareholders to become more efficient. In the same way, the fact that the applicant provides a service of general economic interest does not exonerate it from the obligation to fully comply with the requirements of Articles 53 and 54 EEA.

210 It follows from the above that the first part of the second plea must be rejected.

2. Necessity of chain exclusivity

Arguments of the parties

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

212 Norway Post 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 PiS concept during the start-up phase. Norway Post 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. Furthermore, Norway Post'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.

213 Norway Post adds that the risk of hold-up existed also in the period after the main roll-out. Furthermore, Norway Post 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 Norway Post were not strong and Norway Post risked higher costs if access to new outlets within NorgesGruppen became subject to competition.

214 Thus, while Norway Post accepts that chain exclusivity with NorgesGruppen may have had different effects on competition before and after 2003, it submits that this exclusivity 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.

215 The defendant disagrees with the arguments raised by Norway Post. It contends that Norway Post 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. ESA submits that Norway Post 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 Norway Post has not demonstrated that any efficiency gains were linked to group exclusivity. Furthermore, Norway Post 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 Norway Post, there was little risk of opportunistic hold-up.

Findings of the Court

216 As to the risk alleged by Norway Post that NorgesGruppen/Shell would not contribute sufficiently to the roll-out in the absence of group exclusivity, ESA considered in the contested decision that clear targets concerning the roll-out for NorgesGruppen/Shell had been laid down in the agreement, that NorgesGruppen/Shell had committed itself to be heavily involved in the roll-out of the PiS concept early on and that it had reason to expect economic benefits from its involvement. On the latter point, ESA also took notice of the fact that the PiS concept represented a greater commercial potential than a competing parcel delivery concept in a start-up phase. ESA concluded that these circumstances sufficiently ensured NorgesGruppen/Shell's commitment.

217 The Court concurs with the above considerations. As regards the applicant's argument that a number of individual outlets may initially not have been interested in the PiS concept, the Court fails to see how group exclusivity might contribute to make an outlet more willing to host a PiS if it was not interested in the concept in general. With regard to the alleged risk of hold-up as soon as the advantages of the concept were realised, the Court finds that Norway Post was, by objective standards, a more attractive partner for outlets than possible competitors. As ESA noted correctly in the contested decision, the fact that Norway Post had access to the outlets of NorgesGruppen/Shell, COOP and ICA significantly reduced any likelihood of a lack of outlets in the absence of exclusivity provisions also in municipalities in which Norway Post was required to establish a PiS.

218 Thus, in light of the commitments it had made, NorgesGruppen/Shell's own economic interest in the economic benefits related to the roll-out, the large choice of outlets available to Norway Post inside and outside of NorgesGruppen/Shell, its attractiveness as a partner as compared to possible competitors and more generally the almost entire absence of competition on the relevant market at the time of the roll-out – the applicant itself contends that its only competitor at the time, Privpak, was "hardly visible in the Norwegian market" –, the applicant

cannot credibly argue that group exclusivity was objectively necessary to ensure a fast and secure roll-out of its PiS concept.

219 Moreover, as for the period after the main roll-out, the contested decision is correct in stating that to reserve a considerable number of outlets, including many of which Norway Post knew in advance it would not need access to, exclusively for itself merely because it might need to establish a limited number of new PiS in some of them was in any event excessive and went beyond what was reasonable for Norway Post.

220 Consequently, the second part of the second plea arguing that the group exclusivity was objectively justified must be dismissed.

3. Necessity of outlet exclusivity

Arguments of the parties

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

222 According to the applicant, the fact that Norway Post 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 Tollpost and Privpak operate most of their parcel delivery through outlets other than Norway Post 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.

223 In its reply, Norway Post submits a number of arguments relating to an alleged risk of free-riding by its competitors and a risk of goodwill loss and details the marketing-related and training costs and measures for the PiS concept which it considers were exposed to free-riding.

224 The defendant disagrees with those 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 Norway Post 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.

Findings of the Court

225 With regard to the admissibility of the extensive arguments relating to the existence of circumstances capable of objectively justifying the outlet exclusivity, which were submitted for the first time in the reply, the Court recalls that under Article 33(1)(c) of the Rules of Procedure, an application shall state the subject-matter of the proceedings and include a brief statement of the grounds relied on. Although an applicant may expand on existing pleas in law in the reply or submit additional arguments in support of such pleas, the essential facts and the law on which the pleas are based must be apparent from the text of the application itself, in a coherent and comprehensible way, even if only stated briefly (compare paragraph 111 above).

226 Furthermore, it is for the applicant to demonstrate that its conduct is objectively necessary or produces efficiencies which outweigh the negative effect on competition (see paragraph 206 above).

227 As to the presence of circumstances capable of objectively justifying outlet exclusivity, Norway Post essentially limits itself in the application to contend that it had presented, during the administrative procedure, sufficient documentation pertaining to the need to protect its intellectual property rights, to safeguard the identity and reputation of the PiS concept and to prevent confusion about postal and other services. It then goes on to refer globally to two annexes to the application, the first a document prepared by Norway Post and the second a report by Copenhagen Economics, which, according to the applicant, contain documentation showing that its conduct was justified. Incidentally, it may be noted that neither of these documents was presented to ESA during the administrative procedure.

228 These statements are not capable of discharging the applicant’s burden of proof, and they do not enable the Court to render a ruling on the basis of the application alone. It follows that the arguments brought forward for the first time in the reply cannot be regarded as an expansion of an existing plea in law, but must be considered to constitute new pleas in law. Pursuant to Article 37(2) of the Rules of Procedure, they must be dismissed as inadmissible. Under these circumstances, it is unnecessary to adjudicate whether the applicant was required to submit those arguments and facts already before the end of the administrative procedure.

229 With regard to the remaining arguments submitted, the Court notes that, contrary to what Norway Post asserts, ESA did not consider the fact that Norway Post was forced to abandon the exclusivity clauses after ICA cancelled its agreement as proof that exclusivity was never needed in the first place. ESA merely observed that the solution provided for in the new agreement with ICA appeared to be sufficient to protect Norway Post’s intellectual property rights. Accordingly,

Norway Post's submissions in this regard are ineffective to challenge the legality of the contested decision.

230 Next, the applicant submits that outlet exclusivity was needed, beyond the need to prevent confusion of its services with those of its competitors, to ensure that individual outlets focused on Norway Post's concept and needs. It alleges that mere equipment exclusivity would not have been sufficient in this regard.

231 The Court notes, as pointed out by ESA in the contested decision, that Norway Post fails to give any explanation why the introduction of competing parcel delivery services, if properly separated from the PiS unit, would be likely to negatively affect the quality of the services provided by the staff of the outlet on behalf of Norway Post or, in other words, why outlets could be expected to have incentives not to focus sufficiently on the PiS established at their premises. Even if many outlets may, as the applicant claims, prefer, for their own reasons, to cooperate only with one parcel delivery operator, this cannot justify conduct by a dominant undertaking to restrict the decision-making of its partners in that regard.

232 It must therefore be held that the arguments of the applicant are general assertions incapable of challenging the findings in the contested decision regarding the lack of necessity for outlet exclusivity. Accordingly, the third part of the second plea must be rejected.

4. Norway Post's renegotiation strategy

Arguments of the parties

233 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. Norway Post contends that it did not link group exclusivity and preferred partner status in the negotiations. Moreover, unless group exclusivity itself was contrary to Article 54 EEA, which Norway Post denies, it was under no obligation to release NorgesGruppen from that contractual commitment.

234 The defendant disagrees with those arguments.

Findings of the Court

235 The Court recalls that, as a matter of principle, also a dominant undertaking such as Norway Post is free to negotiate preferred partner status with its commercial partners. In the present case, the conduct was nonetheless liable to contribute to a distortion of competition. It created additional foreclosure effects in combination with the exclusivity provisions contained in Norway Post's existing agreements, which its partners could expect to be maintained in any future agreements, even if those issues were not actively linked to the negotiations.

236 ESA was therefore correct to state in the contested decision that Norway Post could have taken initiatives to release NorgesGruppen from the group exclusivity which was applicable throughout the renegotiation period. At the very least, Norway Post could have made clear that it would not include such exclusivity obligations in future agreements. As ESA correctly pointed out in the contested decision, Norway Post was, as a dominant undertaking, obliged to ensure that its conduct did not distort competition. Other than contending that it was entitled to require group exclusivity from its preferred partner, the applicant has advanced no argument as to why it failed to announce in the renegotiations a waiver of the group exclusivity for the future. Even Norway Post appears to have been of the opinion that preferred partner status and group exclusivity were not necessary for future agreements. Accordingly, the Court has not been presented with objective grounds to justify the applicant's renegotiation strategy.

237 Consequently, the fourth part of the second plea must be rejected.

5. Efficiencies

Arguments of the parties

238 The applicant submits that the defendant failed to carry out an assessment comparing the efficiency gains achieved with the likely anti-competitive effects. It 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 considerable efficiency gains. At the oral hearing, the applicant added, in response to a question from the bench, that the significant savings in public spending in themselves would constitute efficiencies capable of justifying Norway Post's conduct.

239 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. 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.

240 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 Norway Post 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 to consumers.

Findings of the Court

241 The Court observes that, as the conduct was not objectively necessary to ensure the fast and secure establishment of Norway Post's PiS network, efficiency gains related to the conduct are unlikely or at least limited. In any case, the applicant has not shown that efficiency gains were passed on to consumers. The fact that the State, and thus possibly taxpayers, may have avoided expenditure is irrelevant in the context of the application of the competition rules. Moreover, ESA is also correct to point out 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.

242 It follows that also the fifth part of the second plea, and therewith the second plea in its entirety, must be rejected.

The third plea – The fine is too high and should be reduced

243 By its third plea, the applicant submits that, in any event, ESA erred in its assessment of the duration of the infringement and that the remedies imposed by the decision are inappropriate. It argues (1) that ESA erred in its assessment of the duration of the infringement, (2) that there was no reason to require it to bring the infringement to an end, and (3) that the fine is too high and should be reduced.

1. Duration of the infringement

Arguments of the parties

244 Norway Post 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 from 1 January 2006.

245 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: The main roll-out from 20 September 2000 until September 2002, the intermediate period until the renegotiations commenced in September 2003, and the final period ending in March 2006. It argues that both its conduct and the alleged foreclosure effects thereof were very different in each of these periods. Norway Post 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.

246 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. 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 taken in isolation, an infringement of Article 54 EEA. ESA contends that in particular the group exclusivity was in place throughout the entire period.

Findings of the Court

247 In the contested decision, ESA referred to "Norway Post's conduct" as shorthand to denote Norway Post's strategy and behaviour in relation to the establishment and maintenance of its PiS network (see recital 484 of the contested decision). At recital 800 of the contested decision, ESA found that the conduct, consisting of Norway Post's use of group exclusivity in its agreements with NorgesGruppen/Shell, its use of outlet exclusivity in its agreements with COOP and ICA and the strategy pursued when renegotiating its agreements with NorgesGruppen, COOP and ICA from 2004 onwards, was in its nature a single and continuous infringement.

248 An infringement of Article 54 EEA may result not only from an isolated act but also from a series of acts or from continuous conduct. The courts of the European Union held in that regard that such an interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision when the different actions form part of an "overall plan", because their identical object distorts competition within the common market (compare *Aalborg Portland and Others* v *Commission*, cited above, paragraph 258).

249 In the contested decision, ESA did not contend, let alone prove, the existence of an "overall plan" of which the different elements of the conduct formed part. Indeed, ESA did not conclude that Norway Post acted intentionally, but simply found, at recital 815 of the contested decision, that Norway Post could not have been unaware that the conduct in question had as its object or effect the restriction of competition. Nor did ESA establish whether one or several of the elements of Norway Post's conduct constituted, in isolation, an infringement of Article 54 EEA. The contested decision nonetheless found that the conduct was "by its nature" a single and continuous infringement of Article 54 EEA.

250 The Court takes the view that, in the circumstances of the present case, it does not matter whether the applicant's conduct formed part of an "overall plan" within the meaning of the case-law referred to above. That case-law has been deemed relevant when, in a series of infringements, some of those infringements

taken in isolation were time-barred, or with regard to the personal nature of the liability for infringement of the competition rules in cases where different undertakings played different roles in the pursuit of a common objective. Indeed, for liability to be imputed on the basis of participation in the infringement considered as a whole, in the case of series of acts, i.e. intermitting conduct, or in the case of series of acts or continuous conduct committed by different undertakings, an overarching element is necessary in order to link elements of conduct together that are otherwise separate (compare Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraphs 158 and 160 to 161).

251 However, in the present case, the conduct in question was not intermitting nor did it involve several undertakings. Instead, the conduct was on-going for several years, committed by the one and the same undertaking and linked in its entirety to a strategy of incorporating exclusivity provisions in the agreements with Norway Post's partners in the specific business context of PiS.

252 Norway Post argues that the decision itself did not consider disincentives to have been present throughout the entire duration of the alleged abuse. The Court agrees with the applicant that the finding of a single and continuous infringement in the absence of an "overall plan" necessarily requires that the conduct was liable to distort competition on a continuous basis and, thus, also during the time for which ESA had found no significant disincentive effects to be present. However, having regard to the substantial share of outlets to which access was continuously foreclosed by the group and outlet exclusivity alone (see above, paragraph 172), the Court concludes that ESA was correct to find that Norway Post's conduct was, by its nature, a single and continuous infringement of Article 54 EEA.

253 As regards the start date of that single and continuous infringement, the Court considers that ESA was entitled to find in the contested decision that the abuse commenced no later than 20 September 2000, when the Business Agreement with NorgesGruppen/Shell was concluded. Contrary to what the applicant alleges, COOP and ICA were not available to its competitors between 20 September 2000 and 25 January 2001, as both chains were bound by their undertakings of intent not to enter into discussions with competitors of Norway Post during the negotiations of the agreements which were eventually concluded on 21 and 25 January 2001.

254 With regard to the end date of the infringement, the Court considers, having regard to the substantial share of outlets to which access was foreclosed even with ICA released from all exclusivity and non-compete obligations on 12 January 2006, that ESA was entitled to find that the conduct persisted for at least as long as NorgesGruppen was bound by group exclusivity. Moreover, and contrary to what Norway Post asserts, ESA was right to consider that date to be 31 March 2006. The fact that the protocol of 30 March 2006 entered into force retroactively on 1 January 2006 does not mean that, as a matter of fact, NorgesGruppen was released from its exclusivity and non-compete obligations

on 1 January 2006. Such an assumption lacks any plausibility. The retroactive application of that protocol applied only to the other issues it concerned, such as the remuneration for the services provided in the PiS, whereas ESA correctly found that NorgesGruppen's preferred partner status, and with it its exclusivity obligations, was abrogated from 31 March 2006.

255 It follows from the above that the first part of the third plea must be rejected.

2. Necessity of the order to bring the infringement to an end

Arguments of the parties

256 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.

257 The defendant disagrees with those arguments.

Findings of the Court

258 By requiring the applicant to bring the infringement to an end and to refrain from any conduct which may have the same or equivalent object or effect as long as it holds a dominant position in the relevant market, ESA merely indicated the consequences, regarding Norway Post's future conduct, of the finding of illegality in Article 1 of the contested decision.

259 The plea that Article 3 of the contested decision is illegal therefore cannot be upheld.

3. The fine is too high and should be reduced

Arguments of the parties

260 The applicant submits that the fine imposed on it by ESA should be annulled or at least substantially reduced. First, Norway Post submits that no infringement was demonstrated or, at any rate, that the infringement, if any, had a less extensive scope than alleged. Second, it 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.

261 The applicant further 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%. It notes that the total length of the proceedings, including the proceedings before the Court, will be between nine and ten years. In the reply, Norway Post 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 market players to verify information gathered at earlier stages. The applicant also maintains that the case did not contain elements of particular difficulty, and that Norway Post did not engage in any dilatory conduct.

262 In the reply, the applicant submits, 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, that its conduct cannot be characterised as serious.

263 As regards the imposition of the fine, the defendant maintains that it was correct 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 complete monopoly. It states that it fixed the amount of the fine by applying the method set out in its 2006 Fining Guidelines.

264 While the defendant agrees that an excessive length of procedure may render a decision unlawful, it submits that the duration of the proceedings before it was justified in the circumstances of the case.

265 The interveners invite the Court to make use of its unlimited jurisdiction to review the fine, including the possibility to increase it. Referring to the principle of homogeneity that underlies the EEA Agreement, the interveners submit that fines imposed by ESA for antitrust infringements may 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. Having regard to the de facto monopoly Norway Post enjoyed during the relevant period, the interveners consider it highly likely that Norway Post was able to earn a significantly higher profit than 3% of sales value.

266 The applicant, in its comments on the Statement in Intervention, disagrees with the submissions of the interveners. Norway Post contends that the principle of *reformatio in peius* generally opposes any increase of the fine by the Court. It rejects the interveners' suggestion that all of its sales value results from 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.

Findings of the Court

267 As a preliminary point, the Court remarks that the review of legality of the decisions of ESA is supplemented by the unlimited jurisdiction which it is afforded by Article 35 SCA. Under that jurisdiction, the Court, in addition to carrying out a full review of the lawfulness of the penalty, is empowered to substitute its own appraisal for ESA's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

268 However, the exercise of unlimited jurisdiction is not equivalent to a review on the Court's own motion. Proceedings before the Court are *inter partes*. With the exception of pleas concerning public policy matters which the Court must raise on its own motion, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (compare *KME* v *Commission*, cited above, paragraphs 130 to 131).

269 The interveners have argued that the fine should be increased. However, it follows from Article 36(3) of the Statute of the Court that an application to intervene shall be limited to supporting the form of order sought by the party in support of whom the intervention is made. According to Article 89(4) of the Rules of Procedure, an intervener must accept the case as he finds it at the time of his intervention. Consequently, the interveners' submissions in this regard must be dismissed as inadmissible.

270 As regards the applicant's first submission, the Court holds that since all the pleas of the applicant concerning the legality of the contested decision have been unsuccessful, its submissions concerning the alleged less extensive scope of the infringement must be equally rejected.

271 With regard to Norway Post's second claim, that it was not and could not have been aware of the alleged anti-competitive effects of its conduct, the Court recalls that, pursuant to Article 23(2)(a) of Chapter II of Protocol 4 SCA, infringements of Articles 53 and 54 EEA may be committed both intentionally and negligently. ESA has correctly concluded in the contested decision that Norway Post could not have been unaware that its conduct had as its object or effect the restriction of competition. As a *de facto* monopolist, Norway Post could not have been unaware of its dominant position in the market. Norway Post was also aware of Privpak's business concept in Sweden. It considered itself that the possibility to combine the collection of parcels with daily errands may matter a lot for the selection of outlets. It must also have been aware that the leading grocery store, kiosk or petrol station chains were particularly well suited to roll out an over-the-counter parcel delivery network. Thus, it could not have been unaware of the importance of access to one or more of the leading grocery store, kiosk or petrol station chains.

272 Norway Post must also have been aware that the exclusivity obligations imposed on its partners foreclosed access to a substantial number of outlets belonging to this category; and, as a dominant undertaking, it could not have been unaware that its conduct entailed further disincentives for its partners to deal with its competitors. Furthermore, in particular as its negotiations with the other retail chains had been unsuccessful, it could not have been unaware that the remaining chains were not easily available to potential new entrants.

273 Under those circumstances, Norway Post could not have been unaware that its conduct raised barriers to entry and was therefore liable to distort competition on the relevant market. Moreover, and even on the assumption that the parts of the contested decision concerning the renegotiation strategy contained novel legal

reasoning, the applicant cannot reasonably claim that a finding that its conduct as a whole was liable to produce anti-competitive effects is ground-breaking legal thinking, when that conduct included the widespread use of exclusivity obligations by a dominant undertaking.

274 Consequently, the applicant's plea that any breach of Article 54 EEA was neither intentional nor negligent cannot be upheld.

275 By its third claim, the applicant submits that the fine must be substantially reduced on account of the unreasonable duration of the administrative procedure.

276 In competition law matters, the principle that action must be taken within a reasonable period must be observed in administrative proceedings which may lead to penalties. Where the duration of a period is *prima facie* too long, the reasonableness of the duration is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities. An examination is required as to whether there have been any actual delays which cannot be justified by the circumstances of the case (compare Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV and Others* v *Commission*, cited above, paragraphs 188 and 193).

277 A proper examination of the length of the proceedings requires assessing each individual stage of the proceedings separately. If any stage of the proceedings was excessively long, this fact alone justifies the finding that there has been an infringement of the right to have a matter adjudicated upon within a reasonable time. Nonetheless, also the overall duration of the administrative and judicial proceedings must satisfy the requirement that proceedings are dealt with within reasonable time (compare the Opinion of Advocate General Kokott in Case C-110/10 P *Solvay* v *Commission*, judgment of 25 October 2011, not yet reported, points 81 to 83).

278 In the case at hand, ESA itself acknowledged in the contested decision, at recital 851, that the duration of the administrative procedure was considerable. While it did not consider itself legally bound to do so, ESA found it appropriate, in the exercise of its discretion in fixing the fines, to reduce the amount of the fine by EUR 1 million.

279 Indeed, between the date when Norway Post was first affected by the present proceedings and the date of the adoption of the contested decision, that is, between 2 May 2003, when the first request for information was sent to Norway Post, and 14 July 2010, when the contested decision was adopted, more than seven years and two months, or 86 months, elapsed. That duration appears already *prima facie* to be too long.

280 As regards the importance of the proceedings to the appellant, it must be emphasised, having regard to its economic strength, that its economic survival was clearly not endangered by the proceedings. The fact nevertheless remains that, in the case of proceedings concerning infringement of competition rules, the fundamental requirement of legal certainty on which economic operators must be able to rely and the aim of ensuring that competition is not distorted in the internal market are of considerable importance not only for an applicant himself and his competitors but also for third parties in view of the large number of persons concerned and the financial interests involved (compare also *Baustahlgewebe* v *Commission*, cited above, paragraph 30).

281 Having regard more specifically to the investigation period, which was concluded when ESA notified the Statement of Objections to Norway Post on 17 December 2008, the Court notes that it amounted to more than five years and eight months, or 68 months, which must be considered *prima facie* as too long. Contrary to what ESA asserts, the Court cannot see that this duration was justified by any particular difficulties of the case which go beyond what is normal for competition law cases. On the contrary, it would seem that both the definition of the relevant market and the question whether Norway Post entertained a dominant position on that market were rather straightforward. Norway Post did not dispute the existence or content of the agreements with its partners. Under those circumstances, it is unjustifiable, for example, that the questionnaires to the distance selling companies were sent only in October and November 2007. Indeed, between the end of 2005 and October 2007, it appears that ESA pursued no serious activity in investigating the infringement.

282 Under these circumstances, it must be held that the duration of ESA's investigation was excessive.

283 In addition, the Court notes that it took ESA 17 months to adopt the contested decision after it had sent Norway Post, at its request, a Norwegian translation of the Statement of Objections on 6 February 2009. Also the duration of this period appears *prima facie* too long. In particular, the Court notes that, although it had already drawn up its Statement of Objections, it took ESA one year to draft the final decision after Norway Post made its last submissions on 13 July 2009. Also the duration of this period must thus be considered excessive.

284 ESA reduced the basic amount of the fine by EUR 1 million, which corresponds to a discount of circa 7.2%. Having regard to the important delays encountered in the pursuit of the proceedings, the Court agrees with the applicant's plea that the fine must be further reduced.

285 Under Article 13 ECHR, the infringement of a fundamental right through failure to adjudicate in reasonable time requires an effective remedy. A reduction of a sentence may be an appropriate redress of such a violation, if it is done in an express and measurable manner (compare, for example, European Court of Human Rights *Scordino* v. *Italy (no. 1)* [GC], no 36813/97, § 186, Reports of Judgments and Decisions 2006-V). When reducing the sentence, in the case at

hand the fine, regard must be had to all the circumstances; in particular, on the one hand, the seriousness of the infringement committed by Norway Post and, on the other hand, the seriousness of the infringement of the applicant's right under Article 6 ECHR to have the proceedings against it concluded within reasonable time (compare also the Opinion of Advocate General Kokott in *Solvay* v *Commission*, cited above, point 196).

286 In exercising its unlimited jurisdiction in reviewing the fine, having regard to all the circumstances of the case, the Court considers it appropriate to reduce the basic amount of the fine by 20%. An effective remedy requires a substantial reduction of the fine and well beyond ESA's assumption.

287 As regards, finally, the alleged less serious nature of the infringement, the Court notes that the applicant has raised this plea only in the reply. Accordingly, it must be dismissed as inadmissible pursuant to Article 37(2) of the Rules of Procedure.

288 It follows from all of the foregoing that the amount of the fine imposed on the applicant must be amended by reducing the fine from EUR 12.89 million to EUR 11.112 million.

IX Costs

289 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 66(3) of those rules provides that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

290 The applicant has been unsuccessful in its claim that the contested decision should be annulled in its entirety. ESA and the interveners have been unsuccessful in their claim that the entirety of the application should be dismissed. The Court notes, however, that, in substance, Privpak's intervention was not related to the applicant's only successful plea, that is, that the duration of the administrative proceedings was excessive. In those circumstances, it is appropriate to order the applicant to bear its own costs, the costs of the interveners in relation to the present proceedings and 75% of ESA's costs. ESA shall bear the remainder of its own costs.

291 The costs incurred by the Norwegian Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Sets the fine imposed by Article 2 of 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) on Posten Norge AS at EUR 11 112 000;**

2. **Dismisses the remainder of the application;**

3. **Orders Posten Norge AS to bear its own costs and to pay 75% of ESA's costs and the costs of Schenker North AB, Schenker Privpak AB and Schenker Privpak AS;**

4. **Orders ESA to bear the remainder of its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 18 April 2012.

Skúli Magnússon
Registrar

Carl Baudenbacher
President