

Case No: 34250
Event No: 554794
Dec. No: 322/10/COL

The logo of the EFTA Surveillance Authority, featuring the text "EFTA SURVEILLANCE AUTHORITY" in white on a dark blue background.

EFTA SURVEILLANCE
AUTHORITY

**NON-CONFIDENTIAL
VERSION**

EFTA SURVEILLANCE AUTHORITY DECISION

of 14 July 2010

**Relating to a proceeding under Article 54 of the EEA Agreement
(Case No. 34250 Norway Post / Privpak)**

THE EFTA SURVEILLANCE AUTHORITY,

Having regard to the Agreement on the European Economic Area,

Having regard to Chapter II of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the general procedural rules implementing articles 53 and 54 of the EEA Agreement, and in particular Article 7 and Article 23(2) thereof,

Having regard to the complaint lodged by Schenker Privpak AB on 24 June 2002 alleging an infringement of Article 54 of the EEA Agreement and requesting the Authority to put an end to that infringement,

Having regard to the Authority's decision of 17 December 2008 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Authority pursuant to Article 27(1) of Chapter II and Article 12 of Chapter III of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

WHEREAS:

I. THE FACTS

1 Parties to the proceedings

1.1 Norway Post AS

1. Norway Post AS operates the national postal service in Norway which covers letter and parcel services at national and international level. Between 1996 and 2002 Norway Post was organised as a state-owned limited liability company (Norway Post BA).¹ On 1 July 2002, Norway Post BA was converted into the private limited liability company Norway Post AS.² The assets, rights and obligations of Norway Post BA were transferred as a whole to Norway Post AS. The Norwegian State continues to be the sole owner of Norway Post. Hereafter “Norway Post” will be used to designate either Norway Post BA or Norway Post AS, as the context requires.
2. Under the Postal Services Act,³ Norway Post had at the time of the complaint an exclusive right to convey letters weighing less than 100g and costing less than 3 times the basic tariff (“the reserved area”).⁴ Norway Post operates under a licence granted by the Ministry of Transport and Communication. The current licence runs from 1 January 2007 until 31 December 2010.⁵ Norway Post is obliged to have at least one permanent postal service facility in each municipality in Norway. Norway Post is also obliged to provide certain universal postal services outside the scope of the reserved area.⁶
3. In addition to the reserved area, Norway Post provides a wide range of services which are open to competition (“the competitive area”). This includes, *inter alia*, express delivery services, commercial parcel services, logistics and freight forwarding. Only a small part of the services provided by Norway Post in the competitive area are subject to universal service obligations.
4. Norway Post had a worldwide group turnover of 23 668 million Norwegian Kroner (“MNOK”) in 2006 compared to 13 659 MNOK in 2000. Turnover outside Norway represented around 17.5% of the total group turnover in 2006 compared to less than 10% of turnover in previous years.

¹ Act no. 65 of 22 November 1996 relating to the organisation of Norway Post, according to which the rules on the organisation of the company correspond generally to that of a private limited liability company, although the special designation ‘BA’ is used to identify the legal form of the company.

² Act no. 43 of 21 June 2002 relating to the conversion of the state railway company (NSB BA) and the state post company (Posten Norge BA) to private limited liability companies.

³ Act no. 73 of 29 November 1996.

⁴ From 1 January 2006, Norway Post’s reserved area was reduced from 100g to 50g and from 3 to 2½ times the basic tariff.

⁵ http://www.regjeringen.no/upload/kilde/sd/kon/2006/0001/ddd/pdfv/302146-postens_konsesjon.pdf.

⁶ During the relevant period Norway Post was e.g. obliged to provide consumer-to-consumer (C-to-C) parcel services for parcels up to 20 kg. Norway Post’s product “Norgespakke” fulfilled the requirements of that obligation. In internal documents Norway Post refers to this product as “the licence product” (“*konsesjonsproduktet*”) and that other products provided by its logistics department are not covered by the licence (i.e. the universal service obligation), see for instance event #289736 (pages 27, 197, 235 and 236), KBJ 55 6/35, KBJ 65 3/19 and KBJ 72 5/9-6/9.

1.2 The complainant: Schenker Privpak AB

5. The complainant is Schenker Privpak AB (“Privpak”), a company incorporated in Sweden in 1992. Schenker Privpak AB is part of the DB Schenker group of companies.⁷ DB Schenker combines all transport and logistic activities of Deutsche Bahn and is a major European freight forwarding and logistics company. Ultimately, Deutsche Bahn AG is 100% owned by the German state. In Norway, Privpak operates via Schenker Privpak AS a limited liability company incorporated under Norwegian law.
6. Privpak delivers parcels from distance selling companies⁸ to consumers in Norway, Sweden and Finland. This service can also be described as business to consumer (“B-to-C”) parcel services. Privpak’s business concept is to offer distribution and delivery of B-to-C parcels to consumers through retail outlets such as grocery stores, kiosks and petrol stations.

2 Procedure

7. On 24 June 2002, the EFTA Surveillance Authority (“the Authority”) received a complaint from Schenker Privpak AB (Privpak)⁹ in accordance with Article 3 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 (“the Surveillance and Court Agreement”).¹⁰ The complaint alleges that Posten Norge BA (“Norway Post”) has engaged in anti-competitive practices in Norway in violation of Article 54 of the EEA Agreement.
8. Privpak submitted additional information by letters dated 9 December 2002¹¹ and 14 January 2003.¹²
9. A request for information was sent on 2 May 2003 to Norway Post. Norway Post replied by two letters dated 16 and 23 June 2003.¹³
10. On 17 June 2003, the Authority asked the complainant further questions concerning its complaint. The information requested was provided by Privpak in a letter dated 15 August 2003.¹⁴
11. In July 2003, requests for information were also sent to 22 customers of Norway Post. The Authority received 21 replies.¹⁵

⁷ See <http://www.dbschenker.com/site/logistics/dbschenker/com/en/start.html>.

⁸ Distance selling companies are businesses selling goods or services over the internet, by phone or by mail order etc.

⁹ See event # 207276, complaint from Privpak dated 24 June 2002.

¹⁰ As applicable before the entry into force of the Agreement amending Protocol 4 of 24 September 2004 (e.i.f. 20.5.2005).

¹¹ See event # 100990.

¹² See event # 99734.

¹³ See events # 96421 and 95585.

¹⁴ See event # 94632.

¹⁵ See event # 213531, event # 301804, event # 94130, event # 94252, event # 93916, event # 94071, event # 93670, event # 303397, event # 93720, event # 93652, event # 304513, event # 93344, event # 92917, event

12. On 2 February 2004, the Authority sent a request for information to Privpak and received a reply by letter dated 5 March 2004.¹⁶
13. In March 2004, the Authority sent requests for information to four Norwegian retail groups and to A/S Norske Shell. The replies from ICA Norge AS, NorgesGruppen ASA, COOP NKL BA, A/S Norske Shell and Reitangruppen were received by the Authority in the course of March and April 2004.¹⁷
14. A request for information was sent to Privpak on 23 April 2004. Privpak replied by letter dated 12 May 2004.¹⁸
15. On 14 June 2004, the Authority decided that, in order to verify whether Norway Post's agreements or practices infringed Articles 53 and 54 EEA, it was necessary to undertake an inspection at the premises of Norway Post.¹⁹ The inspection took place from 21 to 24 June 2004 at the premises of Norway Post in Oslo.
16. After the on-the-spot investigation at Norway Post's premises, the Authority gathered further information from the complainant, Norway Post and other market players during 2004 and 2005.²⁰
17. Furthermore, questionnaires were sent to distance selling companies in October and November 2007. Replies were received from 16 respondents.²¹
18. Requests for information were sent to ICA Norge AS and COOP NKL BA on 1 April 2008. The information requested from ICA Norge AS was received on 3 April 2008.²² The information requested from COOP NKL BA was received on 4 April 2008.²³

93893, event # 93766, event # 92392, event # 302919, event # 92545, event # 92581, event # 93062 and event # 189477.

¹⁶ See event # 258808.

¹⁷ See event # 259827, event #260579, event # 261379, event # 315641 and event # 279922.

¹⁸ See event # 281231.

¹⁹ Decision No 128/04/COL of 14 June 2004 (Event # 281844).

²⁰ See event # 300380, event # 301874, event # 301014, event # 302179, event # 301804, event # 302287, event # 302322, event # 302374, event # 303191, event # 302805, event # 303190, event # 302919, event # 302952, event # 303397, event # 303308, event # 303329, event # 303395, event # 312267, event # 304377, event # 304513, event # 304805, event # 305844, event # 305958, event # 305826, event #313324, event # 313884, event # 321420, events # 321960, 322407 (with annexes in events # 357052, 357049 and 357048) and 323208, event # 322174, event # 323285, event # 354014, event # 356063, event # 378457, event # 379457, # 383637 (with annexes in events # 383638, 383639, 383640, 383636, 384027, 383641 and 383642), event # 390809, event # 415750, events # 423549 (with annex in 423550), event # 424176 and 424178 (with annexes in events # 424179,447267, 424180, 424181 and 424182), event # 435408, event # 437351 (with annexes in events # 437352, 437354 and 437360), event # 438275, events # 440187 (with annex in 440185), event # 440587 (with annexes in events # 440592-440608 and 440611), events # 444850 (with annexes in events # 444851, 444852, 444854, 444855 and 445104), event # 447286, event # 450690, event # 449682 (with annex in 449681), events # 453394 (with annex in 453395) and event # 458076.

²¹ See event # 452002, event # 452046, event # 452209, event # 452148, event # 452477, event # 452467, event # 452781, event # 452553, events # 453431 and 453433, event # 454018, events # 454576 and 454575, event # 455798, events # 458107 and 458108, event # 459042, events # 461146, 461147 and 461156, and event # 461359.

²² See events # 472859, 472860, 472861 and 472862.

²³ See events # 472751 and 472752.

19. Finally, a request for information was sent to Privpak on 27 November 2008 to which Privpak responded on 2 December 2008.²⁴
20. The Authority has held a number of meetings with the complainant, Norway Post and other undertakings in the course of the investigation.
21. The Authority met with representatives of Privpak on 17 December 2002, on 27 May 2003, on 16 April 2004, 14 May 2004, 28 April 2005, 22 June 2006, 16 February 2007, 27 June 2007 and 4 September 2008.
22. The Authority met with representatives of Norway Post on 16 June 2006 and 28 June 2007, with representatives of Tollpost Globe AS on 27 June 2006, with representatives of ICA Norge on 3 April 2008 and, finally, with representatives of COOP NKL on 4 April 2008.
23. On 17 December 2008, the Authority notified a statement of objections to Norway Post. The Authority took the preliminary view that Norway Post held a dominant position and had abused its dominant position by pursuing an exclusivity strategy with preferential treatment when establishing and maintaining its Post-in-Shop network and by entering into agreements with certain retail groups and retail outlets in Norway.
24. 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. It asked for an oral hearing to be held. The oral hearing was held on 16 June 2009.
25. In application of Article 6(1) of Chapter III of Protocol 4 to the Surveillance and Court Agreement, the Authority provided Privpak with a copy of the non-confidential version of the Statement of Objections. Privpak made its views known in writing on 20 April 2009. It also participated at the oral hearing.
26. Norway Post made an additional submission on 13 July 2009, *inter alia* addressing questions that were raised at the oral hearing by the Authority.

3 The complaint

27. The complaint concerns agreements which Norway Post entered into with NorgesGruppen ASA (“NorgesGruppen”), ICA Norge AS²⁵ (“ICA”), COOP NKL BA²⁶ (“COOP”) and A/S Norske Shell (“Shell”) for the period 2000-2006. NorgesGruppen, ICA and COOP are the three largest food retail groups in Norway. NorgesGruppen, through the chain Mix Butikkene AS (“Mix”), is also the largest kiosk²⁷ retailer in Norway. Shell is one of the leading motor fuel retailers in Norway.

²⁴ See event # 500443.

²⁵ ICA Norge AS was previously called Hakongruppen AS. The company changed name on 1 October 2003. The original agreements with Norway Post were entered into by Hakongruppen.

²⁶ Coop NKL BA was previously called Forbrukersamvirket NKL. The company changed name on 15 August 2001.

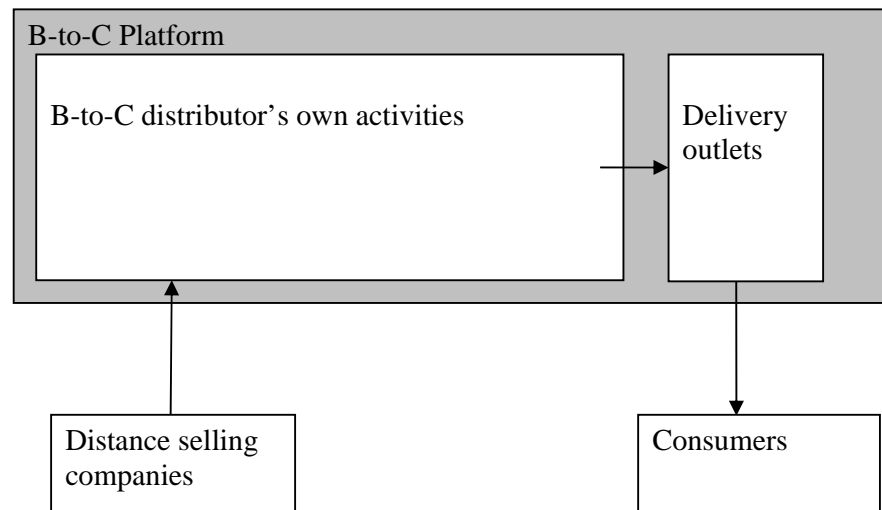
²⁷ “Kiosks” in Norway normally refer to sales outlets that sell products such as tobacco, tobacco supplies, newspapers, magazines, writing materials, sanitation products, sugar and chocolate products, bakery and

28. The contested agreements concerned the establishment of units for the provision of postal and financial services in retail outlets belonging to the above-mentioned retail groups (so-called Post-in-Shops).
29. According to the complainant, the agreements in question contained exclusivity provisions preventing retail outlets within the retail groups from contracting freely with competing suppliers of postal services including suppliers of B-to-C parcel services. Privpak submits that as a result of these agreements it was prevented from developing a rival network of retail outlets for the delivery of B-to-C parcels in Norway and thereby from competing with Norway Post for the provision of B-to-C parcel services in Norway.
30. Privpak has alleged that Norway Post holds a dominant position on the relevant market and that it has engaged in abusive behaviour which infringes Article 54 EEA.

4 Business to Consumer parcel services

31. B-to-C parcel services cover collection of parcels at distance selling companies' premises/place of storage, sorting, transportation and delivery of the parcels to private consumers. Parcel recipients can either pick up their parcel over-the-counter in a post office or retail outlet ("*over-the-counter delivery*") or receive the parcel at their place of residence ("*home delivery*"). Delivery of B-to-C parcels at work has also been introduced in recent years ("*delivery at work*"). In Norway, over-the-counter delivery has by far been the pre-dominant form of delivery (see table 2 below).
32. In order for an undertaking to provide B-to-C parcel services with over-the-counter delivery, a platform for distribution of B-to-C parcels must be established. This platform includes the necessary infrastructure such as a fleet of vehicles for the collection of parcels at the distance selling companies premises, sorting facilities (terminals), both centrally and regionally, and means for transporting parcels from the sorting facilities to regional facilities and from these facilities to outlets from which delivery can take place. These infrastructure investments represent, to a large extent, fixed cost.
33. There are four parties involved in the provision of B-to-C parcel services with over-the-counter delivery as illustrated in **Figure 1**.

Figure 1: Platform for B-to-C parcel distribution



34. Consumers order products from catalogues or websites of distance selling companies. In order to deliver the products ordered by consumers distance selling companies need to buy parcel distribution services. B-to-C parcel distributors provide such services and are responsible for bringing parcels from the distance selling companies' warehouses to consumers. Over-the-counter delivery requires a network of delivery outlets which hand out parcels to consumers on behalf of B-to-C parcel distributors.
35. It follows that a B-to-C distributor in addition to having its own infrastructure must attract three parties to its platform in order to set up a successful business: distance selling companies, delivery outlets and consumers.
36. During the period at issue consumers were generally given the possibility to choose from which outlet their parcels could be picked up when ordering products from distance selling companies. Where distance selling companies used an additional supplier to Norway Post, consumers were often able to choose between the delivery outlets of the two suppliers.²⁸
37. Distance selling companies have customers in the whole of Norway and therefore require their parcels to be distributed throughout the country. The volume which a B-to-C parcel supplier is able to distribute depends on the size and geographical coverage²⁹ of its delivery network: as the number and geographic spread of delivery outlets increase parcels can be delivered to a larger part of the population and the supplier can compete for a larger part of the distance selling companies' requirements. A supplier must therefore establish a delivery network with a sufficient number of attractive outlets that consumers are willing to use and with a sufficient geographical spread in order to be competitive. A network of delivery outlets with limited coverage will only have the possibility to distribute part of a distance selling company's requirements. A supplier with such a network can thus

²⁸ For instance, two of the largest customers of Norway Post during the relevant period, Ellos and H&M Rowells, have allowed customers to choose between Norway Post and Privpak delivery outlets, at least when ordering from the internet.

²⁹ The term geographical coverage can be defined in different ways but refers in principle to the number of households an over-the-counter delivery network is able to reach.

only be used as an *additional supplier*, not as a genuine alternative to an incumbent supplier with a nation-wide delivery network.

38. The only cost-efficient way of establishing an over-the-counter delivery network is to use already existing retail outlets. For a new entrant creating and operating dedicated delivery outlets only for the purpose of delivering B-to-C parcels is clearly uneconomical. In practice, a supplier of B-to-C parcel services will therefore have to conclude agreements with retail groups and retail outlets which take on the task of delivering B-to-C parcels to consumers in their shops on behalf of the supplier.

5 Norway Post's provision of B-to-C parcel services

5.1 The B-to-C parcel services of Norway Post

39. During the period at issue Norway Post provided B-to-C parcel services with over-the-counter delivery and home delivery. It also offered B-to-C parcel services for delivery abroad.

5.1.1 Norway Post's B-to-C service with over-the-counter delivery

40. Norway Post's main product for B-to-C parcel delivery is called "Service Parcel" ("*Servicepakke*"). This service was launched in 1997 and is available for parcels weighing up to 35 kg.
41. B-to-C parcels can either be brought to a terminal of Norway Post or be collected by Norway Post at the premises of the distance selling company. Norway Post has provided the collection of parcels at the customers' premises as an additional pick up service.³⁰ It appears that most distance selling companies have subscribed to the pick-up service.
42. Norway Post brings the parcels of distance selling companies to a post office or to a retail outlet/Post-in-Shop in the area where the recipient resides within 1-to-5 days (depending on distance between the distance selling company and the final consumer).
43. Norway Post also offers additional value added services such as for instance the return of the parcel to the sender (i.e. return service), the possibility to pay for the parcel at the time of delivery (i.e. cash-on-delivery), which ensures that the goods are not handed out to the recipient without prior payment, and the sending of reminders for parcels not collected by recipients.
44. Norway Post's pricing system for the B-to-C service with over-the-counter delivery has consisted of two elements since 1 January 2003: the "freight calculation weight" and the price zone.³¹ The freight calculation weight is the highest value of the "volume weight"³² and the real weight. There are five price zones depending on the

³⁰ Norway Post has charged its customers an additional fixed monthly fee for the pick up service which also has covered the picking up of letters.

³¹ Prior to 1 January 2003, Norway Post's pricing system consisted of weight, i.e. the parcel's real weight and price zone.

³² Volume weight is calculated by multiplying the parcels length, width and height. If the measures are in cm, the figure is divided by 1000 to get dm³. Thereafter, the figure is divided by a fixed conversion factor to arrive at the calculated volume weight.

distance between the distance selling company and the recipient. Price zone 1 covers local transport costs in cities and surrounding areas while price zone 5 applies to shipments between the south and north of Norway.³³

45. Most of the B-to-C parcels weigh less than 5 kg.³⁴ Norway Post's price lists for 2005 and 2006 for the distribution of B-to-C parcels with over-the-counter delivery up to 5 kg have been reproduced in the Annex to this Decision.
46. Norway Post has granted rebates on its list prices to larger customers depending on the volume purchased by these customers and other criteria.³⁵

5.1.2 Norway Post's B-to-C service with home delivery

47. Norway Post has also provided a home delivery service. This service has been marketed as a separate service called "at the door" (*På døren*).
48. With respect to this service, an internal Norway Post document states:

*"There is competition for home delivery and the need of recipients is divided. 40% of Norway's population states that they do not want the service. On the other hand, there is a segment which has a high willingness to pay for this. Therefore Norway Post Logistics wants to attack the market by offering the service as a relatively "expensive" value added service for parts of the market and then potentially adjust the unit price when the entire market is mature. It was considered to make home delivery a standard part of the Service Parcel, but this was abandoned due to the above-mentioned low maturity of the market."*³⁶

49. Norway Post's price lists for 2005 and 2006 for the home delivery of B-to-C parcels up to 5 kg have been reproduced in the Annex to this decision.

5.1.3 Norway Post B-to-C service with delivery abroad

50. Norway Post has also offered distance selling companies the services "CarryOn HomeShopping" for B-to-C parcels with delivery outside Norway. These parcels have been delivered at home or over-the-counter depending on the services available in the recipients' country.³⁷ For deliveries abroad, Norway Post has used the carrier Pan Nordic Logistics AS (PNL). PNL is now controlled by Norway Post and operates under the brand name Bring but was a joint venture between Norway Post and Post Danmark A/S until August 2008.

³³ See event # 296229, letter from Norway Post dated 4 July 2002.

³⁴ See event # 289736, **KBJ 61 (4/6)** according to which 70% of service parcels are in the weight band 1 to 3 kg and 83.7% of service parcels are in weight band 1 to 5 kg.

³⁵ The discount system of Norway Post has been subject to a separate but parallel investigation (Case No. 13115, Norway Post discount system ex officio).

³⁶ See event # 289736 **KBJ 64 (5/19)**: "Priser for 2003: Hjemkjøring er det konkurranse på og behovet er delt hos mottakerne. 40% av Norges befolkning uttrykker at de ikke ønsker tjenesten. Derimot er det et segment som har høy betalingsvillighet for det. Derfor ønsker Posten Logistikk å angripe markedet med tjenesten som en relativt "dyr" VØT for deler av markedet for så evt. å justere enhetsprisen når hele markedet blir modent. Å gjøre Servicepakken om til standard hjemkjøring ble vurdert, men skrinlagt av ovennevnte lav modenhet i markedet."

The document is not dated, but appears to be from late 2002.

³⁷ See www.posten.no and www.pannordic.com.

5.1.4 Norway Post B-to-C service with delivery at work

51. Norway Post maintains in its Reply to the SO that during the whole period at issue it has offered delivery at work through the service called “Business parcel”. It does admit, however, that this service was not marketed actively and the volume of this service is uncertain as it did not register whether parcels were received by a private person or in relation to a business.³⁸
52. The Authority notes that Norway Post has never made this argument prior to the Reply to the SO and has not submitted any factual information which would support this argument. Further, the Authority is not aware of any distance selling company which has offered their customers delivery at work by way of Norway Post’s business parcel service. The Authority therefore takes the view that the number of B-to-C parcels that have been delivered by means of Norway Post’s B-to-B services during the period at issue must have been so limited that it safely can be disregarded.

5.1.5 Norway Post B-to-C service with delivery by way of postal automats

53. It follows from its Reply to the SO that Norway Post has not offered B-to-C services with delivery by way of postal automats during the period at issue.³⁹

5.2 Norway Post’s over-the-counter delivery network

54. Norway Post’s network for the delivery of B-to-C parcel services consists of its post offices and Post-in-Shop outlets. This network can be supplemented by postmen in the most rural areas if need be.
55. Through its network of post offices/Post-in-Shops (and postmen) Norway Post is the only supplier of B-to-C parcel services with a network covering the whole of Norway. This is confirmed by internal documents found at the premises of Norway Post during the inspection:

“Norway Post has an extensive network of post offices and postmen which makes our accessibility unique. We reach everybody (as opposed to our competitors).”⁴⁰

56. Prior to the establishment of the Post-in-Shop concept, Norway Post had entered into agreements with individual retailers concerning Contract Post Offices and later Branch Post Offices.⁴¹ At the end of 2000, 378 such Branch Post Offices had been

³⁸ Reply to SO, page 48.

³⁹ Reply to SO, page 49.

⁴⁰ See event # 289736 (pages 30 and 138), **KBJ 55 9/35** “PRODUKTGJENNOMGANG - MARKED B2C C2C NETTLØSNINGER”, version 15 September 2003: “Posten har et meget utstrakt nettverk av postkontorer samt landpostbud som gjør tilgjengeligheten vår unik. Vi når alle (i motsetning til våre konkurrenter)”; see also **KBJ 61 3/6** where it is stated that Norway Post has no large competitors with full coverage in mainland Norway (“Vi har ingen store konkurrenter med full dekning av fastlandsnorge”).

⁴¹ Previously, Norway Post operated a simpler version of the Post-in-Shop concept originally called Contract Post Office (“Kontraktspostkontor”) and then from 1997 Branch Post Office (Postfilial). According to Norway Post, the Branch Post Office Agreement was a standard agreement entered into by Norway Post and individual retailers, whereby the individual retailers agreed to manage branch post offices through their retail outlets. According to Norway Post, it is probably correct to say that the objectives of the Branch Post Office Agreement were the same as the objectives under the sets of agreements regulating the Post-in-Shop concept. In Norway Post’s view the Branch Post Office concept was, however, a simpler concept than the

established across Norway in addition to the 875 post offices owned and operated by Norway Post.⁴²

57. Norway Post’s network for the provision of postal and financial services, including B-to-C parcel services has been composed as follows:

Table 1: Number of post offices and Post-in-Shops (including Contract Post Offices and Branch Post Offices, hereinafter “CPO” and “BPO”) 1997-2004

	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 [304]	1474 [1450]
2003	1175	328 [303]	1503 [1478]
2004	1201	328 [303]	1529 [1504]
2005	1196	327	1523
2006	1184	327	1511

Source: **1997-2001:** Event # 313172, letter of 27 June 2002 from the Norwegian Post and Telecommunications Authority to the Ministry of Transport and Communication “*Rapport over utviklingen i servicenivå for Postens leveringspliktige tjenester for 2001*”; **2002-2006:** Norway Post’s Annual Reports. The figures between brackets are the figures submitted by Norway Post in its reply of 18 March 2005 (event # 313884). These figures appear not to include so-called “company centres” (“*bedriftssentre*”).

58. In February 2006 Norway Post announced to the press that it wanted to close down 150 post offices and replace them with Post-in-Shops.⁴³ In February 2008 the Norwegian Government approved the replacement of 124 post offices with Post-in-Shops.⁴⁴

5.3 Size of Norway Post’s B-to-C parcel services according to its own calculations

59. Tables 2 and 3 below show the total distribution of Norway Post’s B-to-C parcels and a breakdown on home delivery and over-the-counter delivery:

Table 2: Turnover of Norway Post’s B-to-C parcels distribution business from 2000 to 2006⁴⁵

Post-in-Shop concept. This was reflected in the scope of the Branch Post Office Agreement, which regulated the rights and obligations between Norway Post and the individual retailers, although it can be held that these rights and obligations were more limited than the rights and obligations under the Post-in-Shop concept (see Event # 96421, Memo from Norway Post dated 16 June 2003, at pages 2 and 7).

⁴² See event # 313172, letter dated 27 June 2002 from the Norwegian Post and Telecommunications Authority to the Ministry of Transport and Communication, “*Rapport over utviklingen i servicenivå for Postens leveringsdyktige tjenester for 2001*”.

⁴³ See e.g. <http://www.vg.no/nyheter/okonomi/artikkel.php?artid=137210> and <http://www.dagbladet.no/nyheter/2006/02/21/458507.html>.

⁴⁴ See St.meld. No. 12 (2007-2008) “*Om verksemda til Posten Norge AS*”.

⁴⁵ Norway Post has clarified that the increase from 2000 to 2001 are due to changes in Norway Post’s internal product definitions and not changes in demand, see reply from Norway Post dated 23 June 2003, page 7 (event # 95585).

Turnover MNOK		2000	2001	2002	2003	2004	2005	2006
(1) Home delivery	MNOK	3.8	9.7	17.6	31.8	32.0	23.6	23.2
	% of total	1.1%	2.3%	3.4%	5.5%	4.7%	3.4%	3.0%
(2) Over-the-counter delivery	MNOK	362.0	419.7	507.2	550.6	641.9	674.1	739.2
	% of total	98.9%	97.7%	96.6%	94.5%	95.3%	96.6%	97.0%
Total		365.9	429.4	524.8	582.4	673.9	697.7	762.4

Source: Norway Post's replies dated 23 June 2003, 9 December 2005 and 29 August 2007⁴⁶

Table 3: Number of B-to-C parcels distributed by Norway Post from 2000 to 2006

Volume		2000	2001	2002	2003	2004	2005	2006
Home delivery	Parcels	0 ⁴⁷	127464	240689	273809	294450	327000	200532
	% of total	0.0%	1.6%	3.0%	3.3%	3.2%	3.4%	2.1%
Over-the-counter delivery	Parcels	6645603	7914202	7916540	8107382	8958322	9269000	9264621
	% of total	100.0%	98.4%	97.0%	96.7%	96.8%	96.6%	97.9%
Total		6645603	8041666	8157229	8381191	9252772	9596000	9465153

Source: Norway Post's replies dated 23 June 2003, 9 December 2005 and 29 August 2007⁴⁸

60. Thus, during the period 2001 to 2006, home delivery of B-to-C parcels has only constituted between 1.1% and 5.5% of Norway Post's total turnover of B-to-C parcels and between 1.6% and 3.4% of Norway Post's total volume of B-to-C parcels.
61. In response to the Authority's information requests, Norway Post has estimated its market share in terms of volume in the overall market for B-to-C parcel services (including both home delivery and over-the-counter delivery). This is shown in table 4 below:

Table 4: Norway Post's market share based on number of B-to-C parcels

	2000	2001	2002	2003	2004	2005*
Market share	92%	92%	94%	90%	90%	90%

Source: Norway Post's replies dated 23 June 2003 and 9 December 2005⁴⁹

* From 1.1 to 30.11

62. According to Norway Post's internal documents collected during the inspection at Norway Post's premises, Norway Post has considered at different times during the relevant period that its market share for the provision of B-to-C parcel services has been between 91% and 95%.⁵⁰

⁴⁶ See events # 95585, 354014 and 437351.

⁴⁷ Norway Post has reported that the turnover of the home delivery service was 3.8 million NOK in 2000 but that the number of parcels was 0 (event # 95585, page 7).

⁴⁸ See events # 95585, 354014 and 437351.

⁴⁹ See events # 95585 and 354014.

⁵⁰ See event # 289736 (pages 28, 115, 138, 146, 180 and 241), **KBJ 55** (95 %), **KBJ 58 6/10** (91 %), **KBJ 61 3/6** (95%), **KBJ 62 5/8** (95%), **KBJ 64 5/19** (95%), **KBJ 73 2/3** (95%); Event # 289492 (page 145), **TJO 56 6/7** (95 %); Event # 289510 (page 48), **PAB 7 3/9** (95 %).

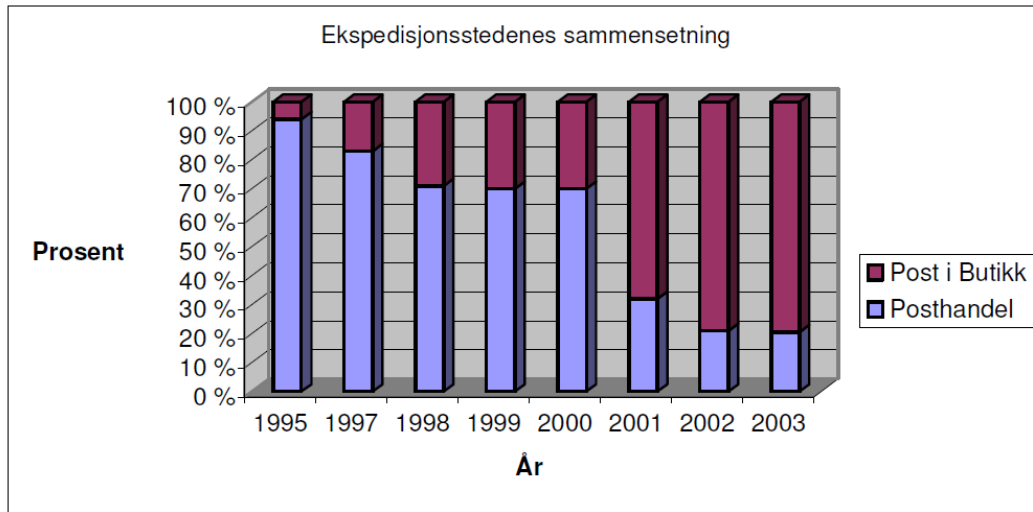
6 The establishment and maintenance of Norway Post's Post-in-Shop network

63. Norway Post originally used its own network of post offices, established and developed partly through state resources, to provide B-to-C parcel services. This network has been subject to two major reorganisations since the 1990s.
64. From 1996 to 1998, Norway Post reduced the number of post offices from 2 228 to 910 and increased the number of branch post offices from 128 to 370.⁵¹
65. In 1999, Norway Post concluded that its existing network did not sufficiently meet the market demands for accessibility and service. Further, the income from the network had been significantly reduced in recent years and its network was too costly to operate. Norway Post, thus, decided to reorganise its delivery network once again and to reduce the number of post offices to 300-450 and to establish at least 1 100 Post-in-Shops. It would thereby increase the accessibility of postal and financial services by increasing the total number of delivery outlets by at least 200 and improve its profitability by reducing its operating costs.⁵²
66. The increase in the number of postal units in retail outlets resulting from these reorganisations is illustrated in Figure 2 below.

⁵¹ See St.meld. nr. 16, (1998-99) "*Om virksomheten til Posten Norge BA*", 27.11.1998, <http://www.regjeringen.no/nb/dep/sd/dok/regpubl/stmeld/19981999/Stmeld-nr-16-1998-99-.html?id=192081>; and event # 313173, report from the Norwegian Post and Telecommunications Authority dated 30 June 2003, "*Rapport over utviklingen i servicenivå for Postens leveringsdyktige tjenester for 2001*".

⁵² See St.meld. nr. 37 (1999-2000) "*Om omlegging av Postens ekspedisjonsnett*", 26.05.2000. Norway Post estimated that the investments related to Post-in-Shop would be around 100 million NOK and that the total investments in the restructuring of its network would amount to 800 million NOK. The costs related to Post in Shop are to a large extent transaction based. The closing down of post offices reduces Norway Post's fixed costs. The restructuring of Norway Post's distribution network took mainly place in 2001 and 2002. The general restructuring of Norway Post, of which the restructuring of the distribution network formed part, was expected to lead to a reduction of costs of 2 billion NOK from 2000 to 2002. According to Norway Post, it invested 1915.6 MNOK in restructuring the postal network from 2000-2006. In the same period, this restructuring lead to cost savings of 2395.2 MNOK, event # 438275, reply from Norway Post dated 31 August 2007.

Figure 2: The development of Norway Post’s network from 1995 to 2003.⁵³



67. The next section describes the Post-in-Shop concept in more detail. Norway Post’s strategy and behaviour in relation to the establishment of the Post-in-Shop network that the Authority has found reason to investigate is described in Section 6.2. The agreements concluded by Norway Post with NorgesGruppen, COOP and ICA are described in Section 6.3 and the re-negotiation of these agreements is looked at in Section 6.4. In Section 6.5 the abolition of exclusivity obligations and preference clauses is dealt with. Section 6.6, finally, looks at Norway Post’s agreements with retail outlets not belonging to NorgesGruppen/Shell, COOP or ICA.
68. Norway Post maintains in its Reply to the SO that it seems that the Authority considers that Norway Post mainly focused on exclusivity clauses for postal and financial services when it negotiated the agreements with NorgesGruppen/Shell, COOP and ICA and later renegotiated those agreements.⁵⁴ This has, however, never been the position of the Authority.
69. In Section 2 of its Reply to the SO Norway Post has described in detail what is has called the background and reasons for the establishment of Post-in-Shop. The Authority has never denied that Norway Post’s use of exclusivity obligations and preference clauses as such was part of a wider context. However, the purpose of the factual description of Norway Post’s conduct in this section is limited to the factual elements that are relevant for the application of Article 54 EEA, and in particular to the assessment of whether Norway Post conduct has been abusive.

6.1 The Post-in-Shop concept

70. Post-in-Shop is a concept developed and owned by Norway Post for the provision of a range of postal and financial services in retail outlets such as supermarkets, grocery stores,⁵⁵ kiosks and petrol stations.

⁵³ See event # 313174, report from the Norwegian Post and Telecommunications Authority dated 1 July 2004, “Rapport over utviklingen i servicenivå for Postens leveringsdyktige tjenester for 2003”.

⁵⁴ Reply to SO, page 56.

⁵⁵ The Authority will use the word “grocery store” to designate groceries, supermarkets and hypermarkets regardless of size. The words supermarkets and hypermarkets are used when only referring to large or very large stores selling daily consumers goods.

71. According to Norway Post, the objectives of the Post-in-Shop concept are fourfold: (i) to increase the availability and service level for customers by increasing the accessibility of postal and financial services; (ii) to reduce the operating costs for Norway Post compared to continued operation of a large number of post offices; (iii) to increase the turnover of the retail groups by increasing the number of visitors to the outlets in which Post-in-Shop is established;⁵⁶ and (iv) to increase profitability for both parties.
72. Each Post-in-Shop must offer at least the minimum basic postal and banking services which Norway Post must provide in order to fulfil the requirements of the licence under which it operates. Additional products and services can be incorporated depending on the customer base of the individual Post-in-Shop.
73. Norway Post bears the main responsibility for the day-to-day monitoring of the Post-in-Shop, and has the right to control all aspects of the operation of the concept, including testing the competence of personnel.
74. The Post-in-Shop is to be integrated in the outlets and must have the same opening hours as the outlet itself. Customers “*are to be served as an integrated part of the store*”.⁵⁷
75. The Post-in-Shop has a uniform profile and is branded in accordance with Norway Post’s general strategy. Norway Post provides the necessary material for profiling and marketing the Post-in-Shop, including signs, posters and other advertising material. Norway Post has also set standard requirements for the interior of the outlet in which a Post-in-Shop is established. The Post-in-Shop must be centrally located inside the premises with its own adapted facilities.
76. Norway Post provides and operates the IT solutions which support the services and products included in the Post-in-Shop concept where these are not to be dealt with via the tills of the store.
77. The space requirements for each Post-in-Shop depends on the type of outlet, the size of the outlet, the customer base of the Post-in-Shop and the range of postal services to be provided in the individual Post-in-Shop. The normal size for a Post-in-Shop is around 7-20 square meters with an average of 15 square meters per shop.
78. With regard to remuneration, Norway Post pays individual outlets for each postal and financial transaction as well as a commission for the sale of postal products. In addition, Norway Post pays the local outlet a fixed monthly fee to cover training, insurance and accounting. The local outlets are guaranteed a minimum income when the transaction fees and fixed fees are lower than what had been planned for a given year.

⁵⁶ Studies have shown that the turnover of retail outlets where a Post-in-Shop has been established has increased compared to retail outlets without a Post-in-Shop. See reference to an AC Nielsen survey in Norway Post Annual Report 2003, p. 28, and Norway Post Annual Report 2002, p. 58.

⁵⁷ See event # 96421(pages 57, 305 and 352), reply from Norway Post dated 16 June 2003, Annex 4, “*Forretningsavtale mellom Posten Norge BA og AS Norske Shell/NorgesGruppen ASA vedrørende post i butikk av 20 september 2000*”, Clause 4; Annex 9, “*Driftsavtale mellom Posten Norge BA og ... samvirkelag vedrørende post i butikk av 01.01.2003*”, Clause 4; and Annex 12, “*Driftsavtale mellom Posten Norge BA og [lokal enhet] vedrørende post i butikk av 11.01.2001*”, Clause 4.

79. The outlets/retail chains are responsible for the costs related to the establishment of Post-in-Shop with the exception of equipment for which Norway Post is responsible.

6.2 Norway Post's strategy and behaviour in relation to the establishment of the Post-in-Shop network

80. In 1999-2000 when the Post-in-Shop concept was established, Norway Post's intention was to conclude strategic alliances with the leading grocery store, kiosk and petrol station chains/groups for the provision of postal services in shops.⁵⁸ The Post-in-Shop concept was thus presented to the following chains/groups:

- **NorgesGruppen**, the largest retail group in Norway. In 2001 around 1 850 grocery stores and more than 1 000 kiosks/convenience stores were part of NorgesGruppen.⁵⁹ In 2004 NorgesGruppen comprised the following chain concepts: Ultra (hypermarket chain with 11 outlets in 2004), Meny (chain of large supermarkets with 123 outlets in 2004), Spar (supermarket chain with 335 outlets in 2004), Kiwi (discount grocery chain with 340 stores in 2004), Joker (corner shop grocery chain with 366 outlets in 2004), Nærmat/Nærkjøpmenn (chain of small grocery shops with 225 outlets in 2004) and Mix (kiosk chain with 896 kiosks in 2004). A number of regional chains (such as the grocery chains Bunnpris) and independent/local chains were also affiliated to NorgesGruppen (in total 476 outlets in 2004). Thus in total 2 745 outlets belonged to NorgesGruppen in 2004.⁶⁰
- **Hakongruppen** (now **ICA Norge AS** and referred to as ICA below), another major retail group. ICA had 1 100 grocery store outlets in 2001⁶¹ and 978 grocery store outlets in total in 2004.⁶² ICA Norge AS is a wholly owned subsidiary of ICA AB, a Swedish company. ICA Norge AS has operated four chain concepts in Norway: MAXI (hypermarket chain with 16 outlets in 2004), ICA Supermarked (supermarket chain with 70 outlets in 2004), RIMI (discount grocery chain with 374 outlets in 2004) and ICA SparMat/Nær (grocery chain with 357 outlets in 2004). In addition, ICA collaborates with associated outlets (around 161 outlets belonging to the grocery chains Livi and Servicemat in 2004).⁶³
- **COOP**, a co-operative organisation and one of the four major grocery store retail groups in Norway. In 2001 there were around 978 grocery stores within COOP.⁶⁴ There were 212 co-operatives in 2004 which owned and ran all shops in the COOP-system, in total 902 outlets. There were four chain concepts: Coop Marked (local grocery shop chain with 393 outlets in 2004), Coop Prix (discount grocery chain with 329 outlets in 2004), COOP Mega (supermarket chain with 159 outlets in 2004) and COOP Obs (hypermarket chain with 21 outlets in 2004).⁶⁵ COOP also operated 15 kiosks in 2004.⁶⁶

⁵⁸ See event # 289584, **LKP 8**. See also St.meld. nr. 37 (1999-2000), at section 3.3.

⁵⁹ See event # 356851, NorgesGruppen Annual Report 2001, pages 28 and 34; event # 353662 Dagligvarefasiten for 2001.

⁶⁰ See event # 303995, reply from NorgesGruppen dated 21 December 2004.

⁶¹ See event # 356868, Hakongruppen Annual Report 2001, page 19.

⁶² See event # 356898, ICA Annual Report 2004, page 34.

⁶³ See event # 356898, ICA Annual Report 2004, page 36.

⁶⁴ See event # 353662, Dagligvarefasiten for 2001.

⁶⁵ See event # 261379, reply from COOP dated 30 March 2004.

⁶⁶ See event # 305958, reply from COOP dated 17 January 2005.

- **Rema 1000**, belonging to Reitangruppen, a franchise based retail company and the fourth major retail group in Norway. In 2001 there were 340 grocery store outlets⁶⁷ and 487 kiosks/convenience stores within Reitangruppen.⁶⁸ In 2004 there were in total around 900 outlets in Reitangruppen organised in three chains: REMA 1000 (grocery chain with 380 outlets in 2004), Narvesen (chain of kiosks with 440 outlets in 2004) and 7-eleven (chain of kiosks with 78 outlets in 2004).⁶⁹
- **Statoil** Detaljhandel AS (“Statoil”), one of four large petrol station chains in Norway, with around 395 manned petrol stations both in 2001 and 2004.⁷⁰
- AS Norske **Shell** (“Shell”), another major petrol station chain in Norway, with 554 manned petrol stations in 2001 and 503 in 2004.⁷¹
- **Esso** Norge AS (“Esso”), the third of the major petrol station chains in Norway, with 358 manned petrol stations in 2001 and 329 in 2004.⁷²
- **Hydro Texaco** AS (“Hydro Texaco”) the fourth large petrol station chain in Norway, with a total of 340 manned petrol stations in Norway in 2001 and 300 in 2004.⁷³
- **Narvesen**, the largest kiosk chain of Norway which became part of Reitangruppen in 2001. Norway Post initiated talks with Narvesen before it became part of Reitangruppen.⁷⁴

81. These players constituted all the major grocery store, kiosk and petrol station chains in Norway.
82. At the beginning of 2000, Norway Post negotiated agreements of intent with NorgesGruppen/Shell,⁷⁵ Coop, ICA, Rema 1000 and Narvesen.⁷⁶
83. Norway Post signed an agreement of intent with **NorgesGruppen/Shell** on 30 May 2000.⁷⁷ The letter of intent indicated that NorgesGruppen/Shell would become Norway Post’s *preferred partner* and that Norway Post would be granted *exclusive rights* to provide postal services. In an annex to the agreement it was pointed out that

⁶⁷ See event # 353662 Dagligvarefasiten for 2001.

⁶⁸ See event # 304805, reply from Reitangruppen dated 10 January 2005.

⁶⁹ See event #279922, reply from Reitangruppen dated 3 May 2004.

⁷⁰ See event # 323285, reply from Statoil dated 17 June 2005.

⁷¹ See event # 305826, reply from Shell dated 20 January 2005.

⁷² See event # 322174, reply from Esso dated 9 June 2005.

⁷³ See event # 321420, reply from Hydro Texaco dated 1 June 2005. Hydro Texaco was acquired by Reitangruppen in 2006.

⁷⁴ See additional information given on Rema1000/Reitangruppen above.

⁷⁵ NorgesGruppen and Shell negotiated jointly with Norway Post.

⁷⁶ See event # 289584, **LKP 8**, “*Post i Butikk, Evaluering av intensjonsavtaler, Anbefaling om videre prosess*”; **LKP 5**, “*Intensjonsavtale mellom AS Norske Shell, Norgesgruppen AS og Posten Norge BA*” (dated 27 March 2000); **LKP 6**, “*Intensjonsavtale mellom Forbrukersamvirket NKL og Posten Norge BA*” (dated 20 March 2000) and annexes thereto; **LKP 7**, “*Intensjonsavtale mellom Hakon Gruppen AS, Statoil Detaljhandel AS og Posten Norge BA*” (dated 29 March 2000) and annexes thereto; Event # 288297, **LKP 4**, “*Intensjonsavtale mellom Rema 1000 Norge AS og Posten Norge BA*” (dated 17 March 2000) and annexes thereto; Event # 289584, **LKP 12**, “*Intensjonsavtale mellom Narvesen ASA og Posten Norge BA*” (dated 9 June 2000) and annexes thereto.

⁷⁷ See event # 438275, reply from Norway Post, dated 31 August 2007, annex 1.

NorgesGruppen accepted that Norway Post would be granted exclusive rights to provide postal services within NorgesGruppen.⁷⁸

84. In the annex to the agreement of intent, under the heading “NG’s/Shell’s objectives with the co-operation” it was pointed out that:

*“Consumers are increasingly busy and they wish to combine their daily activities with the purchasing of consumer goods. Consumers can save a significant amount of time if they can find everything at the same place. Consequently, the development of Post-in-Shop may matter a lot both for the customers of Norway Post and NG/Shell”*⁷⁹

85. In the agreement of intent, NorgesGruppen/Shell undertook not to enter into discussions with other financial and postal suppliers until 1 July 2000. It also stated that it would place all its shops at Norway Post’s disposal.

86. In a letter dated 22 June 2000, **COOP** gave its comments to a draft main agreement with Norway Post and submitted a revised offer to Norway Post which presupposed that COOP would become *preferred partner* in relation to Norway Post in so far as COOP had or would be able to provide an outlet which fulfilled the criteria for establishing a Post-in-Shop.⁸⁰

87. Norway Post signed an agreement of intent with COOP on 28 June 2000.⁸¹ Exclusivity is mentioned as one of the issues that would be given special consideration by Norway Post. Like NorgesGruppen/Shell, COOP also accepted Norway Post’s exclusivity for postal services.

88. In the agreement of intent, COOP undertook not to enter into discussions with other financial and postal suppliers until 1 July 2000, or for the duration of the negotiations with Norway Post.

89. In an annex to the agreement COOP acknowledged that its coverage did not justify *full exclusivity*.⁸² It was also stated in the annex that COOP would involve the chain administrations, members and markets in the co-operation in order to integrate Post-in-Shop as part of the standard chain concepts for COOP shops.⁸³ Furthermore, it was stated that COOP would place all its shops at Norway Post’s disposal,⁸⁴ and that Norway Post should have exclusivity for all postal products and services.⁸⁵

⁷⁸ “NorgesGruppen aksepterer at Posten skal ha eksklusivitet for alle post- og banktjenester innen NorgesGruppen”.

⁷⁹ “Forbrukeren får en stadig travlere hverdag, hvor det er ønskelig med en enklere håndtering av de daglige gjøremål i kombinasjon med innkjøp av forbruksvarer. For forbruker er det svært tidsbesparende å finne alt på et sted. Således vil en utvikling av Post i Butikk kunne bety mye for kundene til både Posten og NG/Shell”.

⁸⁰ See event #389584 (page 87), **LKP 9 1/6**.

⁸¹ See event # 438275 (page 31), reply from Norway Post dated 31 August 2007, annex 2; See also event # 289584, **LKP 6**, “Intensjonsavtale mellom Forbrukersamvirket NKL og Posten Norge BA” (dated 20 March 2000, but not signed) and annexes thereto.

⁸² “[COOP] erkjenner at de ikke har en dekning som kan berettige full eksklusivitet.”

⁸³ “[COOP] vil forankre samarbeidet hos kjedeadministrasjonen/medlem&marked for a integrere Post i Butikk som en del av standardkonseptet for butikkene”.

⁸⁴ “[COOP] stiller alle sine butikker til disposisjon for Post i Butikk”.

⁸⁵ “Posten skal ha eksklusivitet for alle postale ... produkter og tjenester...”.

90. Norway Post also signed an agreement of intent with **ICA**.⁸⁶ ICA accepted that Norway Post would get exclusivity for postal services.⁸⁷ It also accepted not to enter into discussions with other financial and postal suppliers until 1 July 2000, or for the duration of the negotiations with Norway Post.⁸⁸
91. In the annex to a draft agreement of intent with ICA/Statoil, which summarises the discussion between Norway Post and ICA, it was stated that:
- “At places where ICA has shops today the group shall be given preference/be the first choice if both parties find that it is commercially profitable to establish Post-in-Shop”.*⁸⁹
92. It was also stated that:
- “Norway Post shall have exclusivity for all postal products and services in the group”.*⁹⁰
93. Norway Post also negotiated agreements of intent with **Rema 1000**⁹¹ and **Narvesen**.⁹² These agreements of intent, it appears, were never formally signed. The draft agreements were similar to the agreements described above. They contained clauses obliging the retail chains not to enter into parallel discussions with other postal suppliers.
94. In the annex to the draft agreement of intent with Rema 1000 it was acknowledged that exclusivity for Rema 1000 in Norway would be difficult to obtain because the geographical coverage of Rema 1000 was too limited. However, Rema 1000 could be granted exclusivity at the local level.⁹³

⁸⁶ See event # 438275, reply from Norway Post dated 31 August 2007, page 2, where Norway Post accepts that a letter of intent was signed with ICA, but is unable to provide a signed copy of the letter of intent. A draft letter of intent can be found in event # 289584 (page 20), **LKP 7**, “Intensjonsavtale mellom Hakon Gruppen AS, Statoil Detaljhandel AS og Posten Norge BA” (dated 29 March 2000) and annexes thereto.

⁸⁷ See event # 289584 (pages 44 and 52), **LKP 8 8/50 and 16/50**, regarding Post-in-Shop, evaluation of agreements of intent and recommended further process (“Post i Butikk, Evaluering av intensjonsavtaler, Anbefaling om videre prosess”) where it is stated that Norway Post is granted exclusivity for postal products by Hakon/Statoil.

⁸⁸ See event # 289584 (page 22), **LKP 7 3/17**, Agreement of intent between Hakon Gruppen AS, Statoil Detaljhandel and Norway Post (“Intensjonsavtale mellom Hakon Gruppen AS, Statoil Detaljhandel AS og Posten Norge BA”) dated 29 March 2000;

⁸⁹ See event # 289584 (page 26), **LKP 7 7/17**, “På de steder der [ICA] har butikker per i dag, skal gruppen gis fortrinnsrett/førstevalg dersom begge parter finner det forretningsmessig lønnsomt å opprette Post i Butikk”.

⁹⁰ See event # 289584 (page 27) **LKP 7 8/17**, “Posten skal ha eksklusivitet for alle postale produkter og -tjenester i Hakon Gruppen”.

⁹¹ See event # 288297 (page 28), **LKP 4**, “Intensjonsavtale mellom Rema 1000 Norge AS og Posten Norge BA” (dated 17 March 2000, but not signed) and annexes thereto.

⁹² See event # 289584 (pages 41, 55 and 122), **LKP 8 5/50 and 19/50**, “Post-in-Shop, evaluation of agreements of intent, Recommended further process” (“Post i Butikk, Evaluering av intensjonsavtaler, Anbefaling om videre prosess”); **LKP 12**, “Intensjonsavtale mellom Narvesen ASA og Posten Norge BA” (draft dated 9 June 2000, but not signed) and annexes thereto. See also event # 288297 (page 24), **LKP 3**, “Intensjonsavtale mellom Narvesen ASA og Posten Norge BA” (draft dated 27 April 2000, but not signed) and annexes thereto.

⁹³ See event # 288297 (page 34), **LKP 4 7/15**, “Rema er innforstått med at eksklusivitet i Norge kan være vanskelig grunnet gruppens geografiske dekning. Rema er derfor åpen for at konkurrerende kjeder også får tilgang til Post i Butikk, og har ikke problemer med å samarbeide med noen av de andre kjedekonstellasjonene i Norge. Ved et slikt samarbeid ønsker Rema lokal eksklusivitet.”.

95. Discussions between Norway Post and Narvesen appear to have continued until at least June 2000. These discussions focused on a possible Post Kiosk concept but were unsuccessful.
96. Following the negotiations/conclusion of agreements of intent with these 9 groups of grocery store, kiosk and petrol station chains Norway Post conducted further negotiations with three groups: NorgesGruppen/Shell, ICA/Statoil and COOP. These negotiations were also conducted in parallel.
97. In these negotiations Norway Post's project group aimed at achieving agreements which would give Norway Post flexibility, *ensure that Norway Post, through the agreements, would become more competitive than its competitors could become*, and give Norway Post a good position in relation to the segments/areas which would be exposed to competition.⁹⁴
98. Information in the Authority's file shows that when assessing the different alternatives and in selecting the best partners for its Post-in-Shop concept, Norway Post granted importance to the "*strategic match*" of its partners in terms of outlet coverage.⁹⁵ Furthermore, one of the features of the negotiations with the retail groups was that Norway Post required an *exclusive right* to provide postal and financial services.⁹⁶
99. In its Reply to the SO, Norway Post points out that exclusivity was a subordinate criterion.⁹⁷ In this regard the Authority notes that as a matter of fact, there were five main criteria: Concept, Accessibility, Economy, Strategic Match and Risk. Under the criterion "concept" exclusivity for postal/financial products and services was one of four subcriteria. According to Norway Post all retail groups accepted exclusivity for postal services in their first offers to Norway Post. Exclusivity with respect to postal services was therefore not discussed to any significant extent.⁹⁸ Hence, Norway Post does not dispute that strategic match and exclusivity were criteria that were given weight from the very beginning.
100. Norway Post ranked **ICA/Statoil** before the two other groups at one stage during these negotiations.⁹⁹ Nevertheless, Norway Post considered that COOP had the best

⁹⁴ See event # 289584 (page 79), **LKP 8 43/50** "*Evaluering av intensjonsavtaler – Anbefaling om videre prosess*":

"Da prosjektgruppen per dags dato ikke opplever at det foreligger sterke strategiske føringer fra konsernet for valg av samarbeidspartner, har man for Post i Butikk valgt å vektlegge å få til avtaler som:

- åpner muligheter og dermed gir Posten fleksibilitet

- sørger for at Posten gjennom avtalen blir mer konkurransedyktig enn konkurrentene kan bli

- gir Posten en god posisjon i forhold til de segmenter/områder som vil bli utsatt for konkurranse"

⁹⁵ See event # 289584 (pages 5, 21, 45, 47, 48, 58 and 59), **LKP 6 3/17, LKP 7 2/17, LKP 8 9/50, LKP 8 11/50, LKP 8 12/50, LKP 8 22/50 to LKP 8 30/50**. In **LKP 8 23/50** it is stated that one of the criteria for evaluating the groups Norway Post negotiated with was the group's position on the Norwegian and Nordic market as well as in segments where it would be of importance to have good coverage in order to provide the best possible offer in a potential competitive situation. ("*Vurdering av gruppens posisjon i det norske og nordiske markedet, samt i segmenter der det vil være av betydning for Posten å ha god dekning for å gi et best mulig tilbud i en eventuell konkurransesituasjon.*")

⁹⁶ See for instance event # 288296 (page 2) **LKP 1**, presentation to regional directors, where exclusivity is listed as one of the main points in the agreements.

⁹⁷ Reply to SO, page 56-57

⁹⁸ Reply to SO, page 57.

⁹⁹ See event # 289647 (page 97), **KBJ 46 2/10**. Statoil was contacted by ICA in August 2000 regarding a possible joint participation in the Post-in-Shop concept.

position in local areas and smaller places and that this could be important in order to fulfil the requirements of the licence under which Norway Post operated.¹⁰⁰

101. In the final negotiations ICA/Statoil was unable to provide a sufficient number of shops that could be used by Norway Post to replace post offices with Post-in-Shop. At this stage Statoil withdrew from the negotiations.¹⁰¹
102. Norway Post then chose **NorgesGruppen/Shell** as its *preferred partner* because it had by far the best nationwide coverage of shops and was able to guarantee Norway Post coverage in the areas where NorgesGruppen or Shell was already present.¹⁰² In return for its preferred partner status, NorgesGruppen/Shell gave Norway Post exclusive access to all outlets in their retail networks regardless of whether there was a Post-in-Shop in the actual shop.
103. **COOP** was given *second priority status*, which meant that in locations without any NorgesGruppen or Shell outlets, or in locations where NorgesGruppen/Shell outlets did not fulfil the criteria to operate a Post-in-Shop, Norway Post were to give priority to outlets within the COOP group. Exclusivity was imposed on all outlets in which a Post-in-Shop was established.
104. Finally, Norway Post concluded a protocol with **ICA**. ICA was not a preferred partner. Nevertheless, exclusivity was imposed on all outlets in which a Post-in-Shop was established.
105. Neither **Rema 1000** nor Narvesen concluded any agreements with Norway Post. The owner, Reitangruppen, has informed the Authority that Rema 1000 did have discussions with Norway Post but did not proceed with these discussions for strategic reasons as:

*“Rema 1000 has always had a strategy of concentrating on being the best and cheapest soft discounter and avoids any projects that may add costs and/or draw focus away from this main strategy”.*¹⁰³

106. Further, with regard to the kiosk chains Narvesen and 7-Eleven, Reitangruppen has stated that:

*“while the Norwegian Post was basically searching for distributors outside the most central locations, most Narvesen and 7-Eleven locations were near (central) places where the Post wished to continue its own operations. A “Post-i-Butikk” would add very little to the current customer flow of these central locations. A miniature concept was discussed but dropped since it could not yield the contribution per meter that Narvesen and 7-Eleven required”.*¹⁰⁴

107. In its Reply to the SO, Norway Post maintains that it was Norway Post which did not find Rema 1000 interesting for the Post-in-Shop concept after having assessed the location of the Rema shops. According to Norway Post, Rema shops were

¹⁰⁰ See event # 288610 (pages 54 and 70); **MH 13 18/20** and **MH 15 4/39**.

¹⁰¹ See event # 289647 (page 97), **KBJ 46 2/10**.

¹⁰² See event # 289647 (page 97), **KBJ 46 2/10**, “[NG/Shell] hadde suverent beste dekning av butikker på landsbasis og garanterte dekning der de var til stede med butikk”.

¹⁰³ See event # 279922, reply by Reitangruppen dated 3 May 2004, page 2.

¹⁰⁴ See event # 279922, reply by Reitangruppen dated 3 May 2004, page 2.

mainly located in more densely populated areas where Norway Post would for the most part keep its post offices.¹⁰⁵

108. However, the Authority has no reason to believe that the statements made by Reitangruppen in response to the Authority's request for information are incorrect. It may well be the case that the strategic match between Norway Post and Rema 1000/Reitangruppen was perceived as rather poor from both parties' point of view.
109. Esso and Hydro Texaco dropped out of the negotiations at an early stage due to lack of interest or a "missing match".¹⁰⁶ They did not negotiate any agreement of intent with Norway Post.
110. The management of **Esso** has informed the Authority that it was approached by Norway Post regarding the Post-in-Shop concept. However, Esso soon established that the concept was not interesting to it. The reason was that the Post-in-Shop would occupy too much space in the shops of Esso, which are normally smaller than 150 square metres. Moreover, according to Esso "*there was no economy in the concept*". Thus, no extensive negotiations between Esso and Norway Post took place.¹⁰⁷
111. **Hydro Texaco** has informed the Authority that it did receive an inquiry from Norway Post regarding the possible establishment of Post-in-Shop in Hydro Texaco petrol stations. According to Hydro Texaco, the main reason why negotiations between Hydro Texaco and Norway Post did not continue was the lack of space at the business premises of Hydro Texaco's petrol stations, which are generally relatively small.¹⁰⁸
112. Also with regard to Esso and Hydro Texaco, Norway Post maintains in its Reply to the SO that it was Norway Post which did not want to continue the negotiations.¹⁰⁹ Even if it is true that Norway Post did not want to continue the negotiations, this does not contradict the statements made by Esso and Hydro Texaco in their replies to the Authority's requests for information. Moreover, the Authority has no reason to believe that those statements are incorrect.
113. Although **Statoil** did participate in the negotiations with Norway Post together with ICA for some time,¹¹⁰ it appears that Statoil lost interest in the negotiations at an early stage. Statoil has stated to the Authority that it:

"regards the distributing of postal parcels in principle not to be a part of our station concept. Statoil [...] currently does not consider distributing postal parcels from petrol stations to be an interesting business opportunity".¹¹¹

114. In relation to Statoil, Norway Post maintains in the Reply to the SO that Statoil after having terminated its co-operation with ICA no longer was of interest to Norway

¹⁰⁵ Reply to SO, page 58.

¹⁰⁶ See event # 289584 (page 41) **LKP 8 5/50**: "*På grunn av liten interesse eller manglende match er det ikke gjennomført forhandlinger med Esso og Hydro Texaco*".

¹⁰⁷ See event # 322174, reply by Esso dated 9 June 2005.

¹⁰⁸ See event # 321420, reply by Hydro Texaco dated 1 June 2005.

¹⁰⁹ Reply to SO, page 58-59.

¹¹⁰ See footnote 99 above.

¹¹¹ See event # 323285, reply from Statoil dated 17 June 2005, page 4.

Post.¹¹² However, again there is no contradiction of a factual nature between the statement made by Statoil to the Authority's request for information and Norway Post's own understanding of the facts.

115. As follows from the description above, during autumn 2000/beginning of 2001, Norway Post had concluded the following agreements:

- Business agreement between Norway Post and NorgesGruppen/Shell signed on 20 September 2000;¹¹³
- Framework agreement between Norway Post and COOP entered into on 22 January 2001¹¹⁴ and;
- Protocol between Norway Post and ICA entered into on 25 January 2001.¹¹⁵

116. In addition to these agreements, which were concluded at group level, standard operating agreements to be entered into with each of the individual outlets in which a Post-in-Shop would be established were negotiated between Norway Post and each group.¹¹⁶

6.3 The agreements entered into by Norway Post between September 2000 and 2003 with NorgesGruppen/Shell, COOP and ICA

6.3.1 The agreements with NorgesGruppen and Norske Shell

117. The Business Agreement concluded on 20 September 2000 between Norway Post and NorgesGruppen/Shell included the following provisions which are relevant to the present case:

118. Clause 2.2, second paragraph, of the Business Agreement provided that NorgesGruppen/Shell was Norway Post's *preferred partner*.

119. This entailed that outlets within NorgesGruppen and Shell should be considered before any other retail chain when Norway Post decided to establish a Post-in-Shop at a given location. Only if there were no outlets belonging to NorgesGruppen and Shell at the location in question or these outlets did not fulfil Norway Post's selection criteria for Post-in-Shop, could Norway Post consider other outlets.

120. The criteria for selecting outlets were set out in Annex 3 to the Business Agreement. There were five main criteria:¹¹⁷

- shop accessibility;

¹¹² Reply to SO, page 59.

¹¹³ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 4: "*Forretningsavtale mellom Posten Norge BA og AS Norske Shell/NorgesGruppen ASA vedrørende post i butikk av 20 september 2000*".

¹¹⁴ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 8: "*Rammeavtale mellom Posten Norge BA og Norges Kooperative Landsforening vedrørende post i butikk av 22 januar 2001*".

¹¹⁵ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 11: "*Protokoll om samarbeidet om å opprette post i butikk mellom Hakon gruppen AS og Posten Norge BA av 25.01.2001*".

¹¹⁶ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 5: "*Driftsavtale for post i butikk mellom NorgesGruppen ASA og [kjedemedlem]...*", Annex 9: "*Driftsavtale mellom Posten Norge BA og ... samvirkeleg vedrørende post i butikk av 22.01.2001*" and Annex 12: "*Driftsavtale mellom Posten Norge BA og ... vedrørende post i butikk av 11.01.2001*".

¹¹⁷ See event # 96421 (page 102), reply from Norway Post dated 16 June 2003 annex 3, "*Forretningsavtale mellom Posten Norge BA og AS Norske Shell/NorgesGruppen ASA vedrørende post i butikk av 20.09.2000*", Attachment 3.

- the conditions inside the shop
 - quality and level of service in the store;
 - accounting/financial solidity; and
 - establishment of Post-in-Shop in places where other postal outlets were established.
121. As regards *shop accessibility* it was emphasized that the shop should be as centrally located as possible in relation to where customers have other regular errands. Satisfactory *parking facilities* were required and *opening hours* had to be adapted to the needs of the customers. In cases where a choice had to be made between two or more shops the ones which were located most centrally in relation to customer flows would be chosen.¹¹⁸
122. The second criterion considered the *conditions inside the shop* such as the space required for customer handling, promotion material, profiling and logistics solutions. A satisfactory IT-system was also a requirement.¹¹⁹
123. The third criterion required confidence that services could be provided in accordance with established *quality and service targets*. The first impression of the shop, the premises, good management, manpower policy and the degree to which personnel was motivated and service minded were all factors which were taken into account.¹²⁰
124. The fourth criterion required a basic confidence in that *accounting and settlements* would be taken care of in a reassuring manner. Sound economy and good and orderly liability and insurance conditions were required as well.¹²¹
125. The last criterion stipulated that an overall evaluation of the *client base and accessibility* should be made when deciding whether to establish a Post-in-Shop at a location where other postal outlets were already established.
126. Exclusivity was provided for in Clause 2.2, seventh paragraph, of the Business Agreement which provided that:

*“Norway Post has the sole right to provide and market postal services to end users in the Groups’ network”.*¹²²

¹¹⁸ “Plasseringen skal være så sentral som mulig i forhold til hvor kunden har andre regelmessige ærend. Med dette menes nærhet til samlingspunkter som trafikknutepunkter, kjøpesenter, arbeidsplasser, og kommuneadministrasjon o.l. Det legges vekt på tilfredsstillende parkeringsmuligheter. Åpningstiden må være tilpasset kundenes behov. På steder der det må velges mellom 2 eller flere butikker, velges den eller de butikken(e) som ligger mest sentralt i forhold til kundestrømmene”.

¹¹⁹ “Det skal være gode forhold for å etablere konseptet Post i Butikk i butikken. Dette innebærer f.eks tilstrekkelig areal for kundebehandling, presentasjon av salgsartikler, profilering og logistikk-løsninger samt tilfredsstillende IT-system. Det skal være mulig å etablere tilstrekkelig sikkerhet for oppbevaring av verdier, utstyr og postsendinger.”

¹²⁰ “Det skal være tillit til at tjenestene blir utført i henhold til fastsatte kvalitets- og servicemål. Forhold som vil veklegges i vurderingen er bla: førsteintrykk av butikken, lokalene, god ledelse, personalpolitikken samt motivert og serviceinnstilt personale”.

¹²¹ “Det skal være grunnleggende tillit til at regnskap og oppgjør vil bli ivaretatt på en betryggende måte. Virksomheten skal ha god økonomi og et godt og ryddig ansvars- og forsikringsforhold. Gruppen er, før etablering, pliktig til å innhente vandelsattester fra lokale politimyndigheter. I tilfelle hvor person i lokal enhet er straffedømt eller gitt forelegg (ikke forenklet), skal Posten kunne motsette seg etablering”.

¹²² “POSTEN har enerett til å formidle og markedsføre postale og finansielle produkter og tjenester til sluttbruker i GRUPPENs nett”.

127. According to Clause 1.2.4 of the Business Agreement, the “Group’s network” comprised all the outlets which were “*owned or linked to/associated with*” NorgesGruppen or Shell by an agreement other than the Post-in-Shop operational agreement.¹²³
128. Under Clause 2.3, fourth paragraph, NorgesGruppen/Shell should be offered post office premises which became vacant after being replaced by a Post-in-Shop.¹²⁴
129. Clause 9.3, first paragraph, of the Business Agreement prevented NorgesGruppen and Shell from starting operations competing with Norway Post.¹²⁵
130. Clause 9.3, third paragraph, specified that this non-compete obligation in particular applied to the delivery of parcels:
- “Any performance of a postal service, such as, for example, **delivery of parcels from legal entities which have freight as a business or part of their business, is considered to be competing operations**”.*¹²⁶ (Emphasis added)
131. According to Clause 9.3, eighth paragraph, NorgesGruppen and Shell were, moreover, obliged not to compete with the Post-in-Shop concept for a period of one year after termination of the agreement if this could harm the identity and/or the reputation of the Post-in-Shop.
132. Under the Business Agreement NorgesGruppen/Shell was responsible for the relations with the individual outlets. It was required to support and motivate local units and monitor the service level and quality.¹²⁷
133. The Business Agreement could not be terminated before 31 December 2003. After that date the agreement could be terminated subject to a two years’ notice period. It was specified in Clause 17 that the Business Agreement could be brought to an end at the earliest after five years.
134. Under Clause 9.5 of the Business Agreement, it was specified that at least 1 100 Post-in-Shops would be established. NorgesGruppen/Shell was obliged to open at least 700 Post-in-Shops with a satisfactory geographical spread between 1 March 2001 and 1 March 2002.
135. For each Post-in-Shop that was established in the network of NorgesGruppen an operating agreement was concluded between the outlet and NorgesGruppen. Norway Post was not party to this agreement. However, a standard operating agreement had been agreed between Norway Post and NorgesGruppen and was the basis for the conclusion of operating agreements with each outlet. To a large extent this

¹²³ “GRUPPENs nett er alle utsalgssteder som er eiet av eller tilknyttet/assosiert GRUPPEN ved avtale utover den driftsavtale som er en del av nærværende avtale”.

¹²⁴ “GRUPPEN har førsterett til å overta lokaler som blir ledig etter postkontor som blir erstattet med Post i Butikk”.

¹²⁵ “GRUPPEN får ikke i avtaletiden, det være seg direkte eller indirekte, sette i gang konkurrerende virksomhet med POSTEN eller det nett som er etablert i medhold av denne avtale”.

¹²⁶ “Enhver utførelse av postal tjeneste, som for eksempel utlevering av pakker fra rettssubjekter som har frakt som næring eller del av næring, anses som konkurrerende virksomhet”.

¹²⁷ “Gruppen er ansvarlig for oppfølging og administrasjon mot butikkene [...] Driftsorganisasjonen skal primært støtte og motivere, samt føre tilsyn med servicenivå og kvalitet”.

- agreement referred to the clauses in the chain membership agreement that had been concluded previously between the outlet and NorgesGruppen.¹²⁸
136. In April 2003, the Business Agreement¹²⁹ between Norway Post and NorgesGruppen/Shell and the Standard Operating Agreement¹³⁰ were replaced by new agreements.
 137. The new Business Agreement was to a large extent a blueprint of the agreement signed in 2000. The clauses in the Business Agreement from 2000 regarding preference, exclusivity and non-compete obligations remained unchanged insofar as postal services were concerned. The selection criteria in annex 3 to the Business Agreement were also the same.
 138. The new agreement contained the same termination conditions as the original Business Agreement. Thus, NorgesGruppen/Shell continued to be bound by Norway Post's group exclusivity at least until the end of 2005.
 139. While the first operating agreement for NorgesGruppen outlets to a large extent referred to the clauses in the chain membership agreement, the new Standard Operating Agreement was very similar to the standard operating agreements for COOP and ICA that Norway Post had used since the beginning of 2001 (these standard operating agreements are described in more detail below). NorgesGruppen/Shell, Norway Post and the outlet were parties to the individual agreements that were concluded on the basis of the new Standard Operating Agreement.
 140. Clause 10 of the new Standard Operating Agreement for NorgesGruppen outlets prohibited the local outlet from starting operations competing with Norway Post. The second paragraph of this clause specified, like Clause 9 of the Business Agreement, that the non-compete obligation in particular applied to the delivery of parcels.
 141. Clause 9 gave Norway Post a right to terminate the operating agreement if the Business Agreement between Norway Post and NorgesGruppen/Shell was terminated and to phase out the concept during the last 12 months of the notice period applicable under the Business Agreement. Under the Standard Operating Agreement Norway Post was obliged to send the local outlet a notice of closure at least 8 weeks before closure would take place.

6.3.2 The agreements with COOP

142. The Framework Agreement between Norway Post and COOP of 22 January 2001 was based on the same template as the Business Agreement with NorgesGruppen.
143. Clause 2.2, second and third paragraph, of the Framework Agreement provided that COOP was not Norway Post's *preferred partner*, but that COOP should be

¹²⁸ See event # 96421, reply from Norway Post dated 16 June 2003 Annex 5: "Driftsavtale for post i butikk mellom NorgesGruppen ASA og [kjedemedlem]...". The operating agreement for NorgesGruppen outlets has only been submitted in draft form by Norway Post.

¹²⁹ See event # 96421, reply from Norway Post from 16 June 2003, Annex 6.

¹³⁰ See event # 96421, reply from Norway Post from 16 June 2003, Annex 7.

- prioritised before others when establishing Post-in-Shop (“*second priority status*”).¹³¹
144. It is the understanding of the Authority that the criteria for selecting outlets were the same as in the agreement with NorgesGruppen and Shell.
145. Clause 2.2, seventh paragraph, of the Framework Agreement stated that:
- “Norway Post has the sole right to provide and market postal and financial products and services ... to customers in the local units in Coop’s network which have entered into the Operating Agreement with Norway Post concerning Post in Shop”.*¹³²
146. “*COOP’s network*” was defined as all co-operatives and possibly other undertakings which were linked to/associated with COOP Norway by agreement or ownership.¹³³
147. “*Local unit*” was defined as the co-operative or other legal person linked to COOP Norway which operated the Post-in-Shop concept locally in combination with its own business.¹³⁴
148. Norway Post’s exclusive rights did not cover financial products and services forming part of the co-operatives own membership concept or COOP’s e-commerce activities based on delivery of parcels in local units distributed through COOP’s distribution network.
149. Under Clause 2.3, third paragraph, of the Framework Agreement COOP would be offered post office premises which become vacant after being replaced by a Post-in-Shop and which the preferred partner of Norway Post was not interested in.
150. COOP was also under an obligation to arrange for, motivate and recommend to local units within COOP’s network entry into operating agreements with Norway Post.
151. Under Clause 9.2, second paragraph, of the Framework Agreement COOP was obliged not to compete with the Post-in-Shop concept for a period of one year after termination of the agreement if this could harm the identity and/or the reputation of the Post-in-Shop concept and to the extent this was necessary to protect the know-how transferred from Norway Post to COOP or the local unit.¹³⁵

¹³¹ “*Coop Norge er ikke preferert partner i forhold til Post i Butikk konseptet. Med preferert partner menes den GRUPPE som, etter avtale med POSTEN, først skal vurderes ved lokalisering av lokale enheter, og som har fortrinn ved etablering av strategisk samarbeid på andre områder.*

Coop Norge med tilsluttede samvirkelag skal prioriteres foran andre enn preferert partner ved oppretting av lokale enheter og inngåelse av andre samarbeidsavtaler.”

¹³² “*POSTEN har enerett til å formidle og markedsføre postale og finansielle produkter og tjenester ... til kunder i de lokale enhetene i Coop Norges nett som har inngått driftsavtale med POSTEN om Post i Butikk.”*

¹³³ See Clauses 1.2.4 of the agreement: “*Coop Norges nett er alle S-lag og eventuelt andre virksomheter som er tilknyttet/assosiert Coop Norge ved avtale eller eierskap”.*

¹³⁴ See Clauses 1.2.5 of the agreement: “*Lokal enhet er det samvirkelag eller annen juridisk person tilknyttet Coop Norge som lokalt driver konseptet Post i Butikk i kombinasjon med egen virksomhet”.*

¹³⁵ “*Etter avtalens opphør er Coop Norge forpliktet til i 1 år ikke - verken direkte eller indirekte - å starte opp eller delta i konsept i konkurranse med Post i Butikk konseptet dersom dette ville svekke Post i Butikk konseptets identitet og/eller omdømme, begrenset til det sted hvor fra virksomheten ble drevet etter denne avtale og bare i den utstrekning det er nødvendig for å beskytte know-how som er overført til Coop Norge/lokal enhet”.*

152. Clause 17 on termination of the Framework Agreement was identical to the provision on termination in the NorgesGruppen/Shell agreement and specified that the agreement could be brought to an end at the earliest after five years.
153. The Standard Operating Agreement of 22 January 2001 for COOP contained clauses on preference, exclusivity and non-compete obligations.
154. The preference provision in Clause 2.2, second paragraph, and the exclusivity provision in Clause 2.2, seventh paragraph, of the Framework Agreement were reproduced in the Standard Operating Agreement.
155. Clause 9.3 of the Standard Operating Agreement contained a non-compete clause prohibiting the local unit from starting operations competing with Norway Post and the network established in accordance with the Operating Agreement.¹³⁶ Delivery of parcels was explicitly mentioned as competing activity.
156. Clause 1.2.4 of the Standard Operating Agreement defined “*local unit*” as the co-operative or other legal person linked to COOP Norway which according to the Framework Agreement between Norway Post and COOP derived rights to the Post-in-Shop concept. It was further stated that the local unit constituted the outlet or outlets which operated the concept in combination with and as an integrated part of their own business. It was also specified that a local unit could be responsible for more outlets.¹³⁷
157. The Operating Agreement could be terminated on the same conditions as the Framework Agreement. It was also specified in Clause 16 that the duration of the Operating Agreement would not be longer than the duration of the Framework Agreement unless Norway Post decided otherwise.
158. COOP, Norway Post and the outlet were parties to the individual agreements that were concluded on the basis of the Standard Operating Agreement.
159. A new Standard Operating Agreement for COOP was used from 1 January 2003.¹³⁸ However, no changes were made to the clauses on preference, exclusivity, non-compete obligations or the duration of the agreement.

6.3.3 The agreements with ICA

160. The Protocol of 25 January 2001 entered into by Norway Post and ICA was less detailed than the Business Agreement Norway Post concluded with NorgesGruppen/Shell and the Framework Agreement it concluded with COOP.
161. The Protocol referred to a standard operating agreement which had been drawn up by the parties and other documentation from the negotiations between the parties.

¹³⁶ “*LOKAL ENHET får ikke i avtaletiden, det være seg direkte eller indirekte, sette i gang virksomhet som konkurrerer med POSTEN eller det nett som er etablert i medhold av denne avtale*”.

¹³⁷ “*LOKAL ENHET er det samvirke-lag eller annen juridisk person tilknyttet Coop Norge som etter rammeavtale mellom POSTEN og Coop Norge utleder rettigheter til Post i Butikk konseptet. LOKAL ENHET er det utsalgst-ed(er) som drifter konseptet i kombinasjon med og som integrert del av egen virksomhet. LOKAL ENHET kan ha ansvar for flere utsalgst-eder*”.

¹³⁸ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 10.

162. ICA was to market the Post-in-Shop concept in its network and to contribute to ensuring that relevant outlets entered into negotiations with Norway Post for the setting up of Post-in-Shop with a positive attitude to the concept.¹³⁹
163. ICA could introduce financial products and services from ICA Finance/Bank in parallel to Norway Post financial services in outlets where a Post-in-Shop was established on the condition that these products were not promoted or sold via the post module and were kept separate from financial products and services in the Post-in-Shop concept.
164. It was also agreed that any staff in the outlet who would work with financial products and services in the Post-in-Shop had a confidentiality obligation in relation to owners of competing products.¹⁴⁰
165. The Standard Operating Agreement was similar to the Standard Operating Agreement for COOP.
166. Clause 2, second and third paragraph, specified that the local unit was not the preferred partner of Norway Post and that the establishment of a Post-in-Shop by Norway Post's preferred partner could exclude the establishment of a Post-in-Shop by the non-preferred partner.¹⁴¹
167. "Local unit" was defined as the legal person who derived rights to the Post-in-Shop concept from Norway Post and constituted the outlet which operated the concept in combination with and as an integrated part of its own business.¹⁴²
168. Under Clause 2.2, fifth paragraph, Norway Post was granted the sole right to provide and market postal services to the customers of the local unit.
169. According to Clause 2.2, sixth paragraph, Norway Post was to be the local outlet's exclusive supplier of financial products and service to private customers. However, it was specified as in the Protocol that the local unit could offer financial products and services from ICA Finance/Bank or other ICA companies, but not through the Post-in-Shop module.
170. Clause 9.3 contained a non-compete clause prohibiting the local unit from starting operations competing with Norway Post and the network established in accordance with the Operating Agreement.¹⁴³ Delivery of parcels was explicitly mentioned as competing activity.

¹³⁹ "På dette grunnlaget vil Hakon Gruppen AS [ICA] markedsføre Post i Butikk-konseptet i sitt nett og medvirke til at aktuelle utsalgssteder går i forhandlinger med Posten med positive holdninger til konseptet".

¹⁴⁰ "Personalet i lokal enhet som arbeider med finansielle produkter og tjenester i Post i Butikk konseptet, har taushetsplikt overfor konkurrerende produkteiere om Postbankproduktenes egenskaper/kvaliteter og priser".

¹⁴¹ "POSTEN kan utelukke Post i Butikk-etablering for ikke preferert partner på det sted preferert partner foretar etablering".

¹⁴² "LOKAL ENHET er det rettssubjekt som utleder rettigheter til Post i Butikk konseptet fra POSTEN. LOKAL ENHET er det utsalgssted som drifter konseptet i kombinasjon med og som integrert del av egen virksomhet."

¹⁴³ "LOKAL ENHET får ikke i avtaletiden, det være seg direkte eller indirekte, sette i gang virksomhet som konkurrerer med POSTEN eller det nett som er etablert i medhold av denne avtale".

171. Clause 16 provided that the Agreement could not be terminated before 31 December 2003 and after that date subject to a two years' notice period so that the agreement could only be brought to an end on 31 December 2005 at the earliest.
172. A new Standard Operating Agreement for ICA was used from 1 January 2003.¹⁴⁴ However, no changes were made to the clauses on preference, exclusivity, non-compete obligations or the duration of the agreement.

6.4 The re-negotiations with COOP, ICA and NorgesGruppen

173. It appears that Norway Post was not always satisfied with NorgesGruppen/Shell's performance as preferred partner and that it considered terminating the agreement at the end of 2003/beginning of 2004.¹⁴⁵
174. It was thus proposed internally in Norway Post to inform all groups that Norway Post wanted to conclude new framework agreements regarding Post-in-Shop and to inform them that it wanted to adjust the provisions regarding preference without informing the retail groups if and in case to whom priority would be given before at the end of the negotiations.¹⁴⁶
175. In an e-mail from Mr. [A], who was responsible for the Post-in-Shop concept, to Mr. [B], the group managing director of Norway Post, dated 30 March 2004 the following was stated:

"In the attached summary from December 2003 I concluded by recommending that we cancel the agreement with NG/Shell from 1.1.04, and that we invited all groups to new negotiations regarding a new business agreement or framework agreement.

*The conclusion was that we sent letters to all groups inviting them to talks."*¹⁴⁷

176. While Norway Post did not terminate the existing agreement with NorgesGruppen/Shell,¹⁴⁸ it did send letters to NorgesGruppen/Shell, COOP and ICA

¹⁴⁴ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 10.

¹⁴⁵ See event # 289647 (page 98), **KBJ 47 3/10**, where it is stated that the roll-out period between 1.3.2001 and 30.6.2001 was characterised by many fights and difficult communication, that NorgesGruppen/Shell maintained with force its rights as preferred partner but was not equally willing to fulfil their obligations but that NorgesGruppen should nevertheless be accredited goodwill for participating in rolling out a concept that was not fully developed. It is also stated that NorgesGruppen treats Norway Post as any supplier that can be pressed on conditions ("*Utrullingsperioden 1.3.2001 - 30.6.2002 var preget av mange stridigheter og vanskelig kommunikasjon - NG/Shell hevdet med kraft sine rettigheter som preferert partner, men var ikke like villig til å oppfylle sine plikter. NG må likevel godskrives goodwill for at de var med på å rulle ut et konsept som ikke var ferdig utviklet*"[...] *NG behandler Posten som hvilken som helst leverandør som kan presses på betingelser.*").

¹⁴⁶ See event # 288296, **LKP 1 2/3**, (meeting with the regional directors on 12 January 2004) where it is stated:

"Forslag til strategi: [...]Varsler NG/Shell om oppsigelse av avtalen og alle grupperinger om at vi vil: - inngå rammeavtaler om PiB-drift med gruppene, - justere på bestemmelsene om preferanse (uten å spille ut om og i tilfelle hvem vi vil prioritere før i slutten av forhandlingene)".

¹⁴⁷ See event # 288300, **MH7 4/6**, e-mail dated 30 March 2004 entitled "*Forretningsavtalen med NG/Shell*": "*I vedlagte oppsummering fra desember 2003 konkluderte jeg med å anbefale at vi sa opp avtalen med NG/Shell fra 1.1.04, og at vi inviterte samtlige grupperinger til nye forhandlinger om ny forretningsavtale eller rammeavtale. Konklusjonen ble at vi sendte brev til alle grupperinger med invitasjon til samtaler*".

- at the end of 2003 inviting them to talks regarding the conditions for operating Post-in-Shop and possible amendments to the Post-in-Shop agreements.¹⁴⁹
177. 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 Post-in-Shop.¹⁵⁰ These agreements aimed at replacing the existing agreements from 1 January 2006.
178. As will be explained in more detail below, information on the Authority's file shows that Norway Post followed the proposed strategy and kept the question of to whom it would grant *preferred partner status* open during the negotiations. In its Reply to the SO, Norway Post does not deny that this was the case.
179. In its Reply to the SO, Norway Post points out that with regard to the negotiations that took place from the beginning of 2004 onwards the retail groups now had experience with Post-in-Shop and it was clear to them that it was a significant advantage to have a Post-in-Shop in their outlets. Further, according to Norway Post, the retail groups encouraged Norway Post to keep the system with preferred partner status and each of them wished that their group would be granted such status from 2006. These views were, according to Norway Post, explicitly expressed to Norway Post and it did not regard it with surprise that the chains had this position as their starting point for the negotiations.¹⁵¹
180. Documents on the Authority's file shows that it was stated by the representative of Norway Post at a meeting with COOP on 23 April 2004 that all partners had been told that Norway Post would look at the preferred partner status again and that "*all cards are still open in this case*".¹⁵² In the Reply to the SO, Norway Post confirms that what would happen with the clause regarding preferred partner status was kept open and maintains that the choice of preferred partner was a strong "card" in the negotiations with the retail groups.¹⁵³ Norway Post also states in its Reply to the SO that this was its best card in the negotiations and that it did not have any incentive to throw away this card before it had negotiated the best possible deal.¹⁵⁴
181. However, it is also stated in the Reply to the SO that at the time of the renegotiations Norway Post considered that it was not in its interest to allocate preferred partner status to one retail group from 2006 and that it would have more freedom to establish Post-in-Shops at the most suitable locations in absence of such a partner.¹⁵⁵

¹⁴⁸ Norway Post maintains that both Norway Post and its contractual partners considered that the agreements were of five years' duration even if the wording of the agreements strictly speaking would indicate a longer duration (running as long as they had not been terminated by one of the parties). Hence, according to Norway Post both Norway Post itself and the retail groups with which it negotiated were of the understanding that new agreements were to be concluded from 2006 (Reply to SO, page 59 and 64)

¹⁴⁹ See event # 472752, page 99 for a copy of the letter to COOP dated 23 December 2003.

¹⁵⁰ See event # 472752, page 126: "*Det er Posten som selv har bedt om reforhandlinger med samtlige samarbeidspartnere og de kjører disse forhandlingene parallelt.*"

¹⁵¹ Reply to SO, page 64.

¹⁵² See event # 472752, page 73: "[A] kunne fortelle at alle samarbeidspartnerne nå hadde fått melding om at Posten Norge vil se på Preferert partner på nytt grunnlag, det vil si alle kort er fortsatt åpne i denne saken."

¹⁵³ Reply to SO, pages 65-66. Norway Post also states at page 66 that in negotiations between business partners it is rare that one of the parties long before the agreements are to be concluded gives up its best cards in the negotiations.

¹⁵⁴ Reply to the SO, page 114.

¹⁵⁵ Reply to SO, page 64.

Nevertheless, Norway Post maintains in its Reply to the SO that it was truthful in its negotiations and informed its counterparts that it had not yet been decided whether Norway Post at all would have a preferred partner from 2006.¹⁵⁶

182. Evidence obtained at the premises of Norway Post during the inspection shows that COOP and ICA wanted to improve their preference status during the negotiations with Norway Post. The e-mail from 30 March 2004 cited in paragraph 175 above continued:

“The talks with COOP and ICA got started well. The talks are conducted on a very friendly basis, even if both groups [Coop and ICA] are very concerned with accomplishing a changed status with regard to preference.

*Indeed, for a certain period of time ICA went so far that they did not want to take part in the process if they were not given a clear answer regarding preference. That is now behind us and the talks are continuing on the same friendly basis.”*¹⁵⁷

183. Further evidence shows that COOP was interested in replacing NorgesGruppen/Shell as preferred partner.¹⁵⁸
184. In minutes from meetings between Norway Post and COOP it is mentioned several times that Norway Post had not yet clarified with NorgesGruppen whether the preferred status of NorgesGruppen would be upheld but that it was in the process of doing so.¹⁵⁹
185. It also appears from information in the file that NorgesGruppen, COOP and ICA were informed by Norway Post at different stages of the negotiations about its plans to establish new Post-in-Shop in the future.¹⁶⁰
186. The available evidence shows that the question of preference was regarded as one of the most important points by COOP during the negotiations with Norway Post. The objective of COOP during the negotiations with Norway Post was at least to maintain its position as second priority partner.¹⁶¹ COOP found itself in a dilemma as it could lose its second priority status to ICA if its demands for higher remuneration were pushed too hard during the negotiations with Norway Post.¹⁶²

¹⁵⁶ Reply to the SO, page 66.

¹⁵⁷ See event # 288300, **MH7 4/6**, “Vi kom godt i gang med samtalene med Coop og ICA. Samtalene går i en meget god tone, selv om begge grupperingene er svært opptatt av å få endret status i forhold til preferanse. ICA gikk riktig nok i en periode så langt at de ikke ville være med lenger i prosessen dersom de ikke fikk et klart svar om preferanse. Det er vi nå forbi og samtalene fortsetter i samme gode tone.”

¹⁵⁸ See event # 289647, **KBJ 46 9/10**, (presentation dated 12 December 2003) where it is stated that centrally COOP wants to initiate strengthened and expanded co-operation and wants to be preferred partner from 2006 (“sentralt er COOP pådriver for forsterket og utvidet samarbeid og ønsker å bli preferert partner fra 2006”); **KBJ 47 1/4**, (handwritten notes from meeting with COOP on 8 March 2004) where it is stated that it is unclear whether Norway Post is going to choose a preferred partner, who it will possibly choose and that COOP is interested in negotiating about that role (“Usikkert om posten skal ha pref. partner. I tilfelle hvem. COOP interessert i samtaler om den rollen”); Event # 288296, **LKP 1 2/3**, (Meeting with the regional directors on 15 January 2004) reiterates that centrally COOP wants to initiate strengthened and expanded co-operation and wants to be preferred partner from 2006 (“Møte med regionsdirektørene 15/1/2004: sentralt er COOP pådriver for forsterket og utvidet samarbeid og ønsker å bli preferert partner fra 2006”).

¹⁵⁹ See event # 472752, pages 19, 22, 47, 52, 60, 63, **73**, 75, **79**, 86 and 97.

¹⁶⁰ See event # 472752, pages 25, 28, 59, 62-63, 80, 128, 129, 132 and 137.

¹⁶¹ See event # 472752, page 65 and 126.

¹⁶² See e.g. Event # 472752, page 65 where it is stated that COOP’s negotiating committee had a mandate consisting of two items: Firstly, it was important for COOP not to be pushed further down the list but at least

The main priority for COOP was not to back out from the co-operation and leave Post-in-Shop to the other chains.¹⁶³

187. In order to prepare for the negotiations with Norway Post, COOP carried out an internal evaluation of Post-in-Shop among its co-operatives,¹⁶⁴ a negotiating committee was established and a number of internal meetings were held in which the negotiating strategy was discussed.
188. Information in the Authority's file shows that COOP had a number of meetings with Norway Post from autumn 2003 onwards. At least on the following dates meetings were held between Norway Post and COOP regarding Post-in-Shop: 14 November 2003,¹⁶⁵ 6 February 2004,¹⁶⁶ 5 March 2004,¹⁶⁷ 26 March 2004,¹⁶⁸ 23 April 2004,¹⁶⁹ 25 May 2004,¹⁷⁰ 5 October 2004,¹⁷¹ 25 October 2004,¹⁷² and 20 April 2005.¹⁷³
189. To the Authority ICA has explained that it had a "wait-and-see" attitude towards Post-in-Shop and similar concepts when Post-in-Shop was launched and that it had this attitude for a long time. Administration and practical problems related to this type of activity are in ICA's view rarely proportionate to the revenue generated from such activities.¹⁷⁴
190. In internal documents of Norway Post it is nevertheless reported that outlets within the Rimi chain (one of the chains of ICA) showed considerable interest in becoming Post-in-Shop outlets.¹⁷⁵ Internal documents of ICA show that in 2005 many Rimi and ICA outlets were positive to the existing Post-in-Shop and wanted them to be maintained.¹⁷⁶

maintain its second priority status when new Post-in-Shops were going to be established. In respect it was recalled that NorgesGruppen was Norway Post's preferred partner, that COOP was second and ICA third. It was also pointed out that ICA had almost as many Post-in-Shops as COOP. Secondly, COOP wished to increase the remuneration it received from Norway Post. COOP regarded it as a dilemma that if it required higher remuneration than e.g. ICA, it might quickly be put in third position when new Post-in-Shops were going to be established. It was considered that COOP could not return to the co-operatives after the negotiations with such a result. For COOP therefore the negotiations with Norway Post was a balancing act that need to be taken into account at all times during the negotiations ("*Vår forhandlingsgruppe har et mandate i to punkter: For det første må vi ikke komme lenger ned på listen enn minimum være nummer to når nye PiBer skal etableres. Norgesgruppen har som kjent første plassen i dag, vi er på andre plass og Ica gruppen på tredje. Ica gruppen har nesten like mange PiBer [som] oss. For det andre ønsker vi å høyne kompensasjonene. Det er altså vårt dilemma at hvis vi kommer med høyere krav enn eksempelvis ICA gruppen, kan vi fort komme på tredje plass i forhold til når PiBer skal etableres og det kan vi ikke komme tilbake til samvirkelagene med etter forhandlingene. Vi må hele tiden forholde oss til denne balansegangen i forhandlingene.*").

¹⁶³ See event # 472752, page 86.

¹⁶⁴ See event # 472752, pages 11 and 45.

¹⁶⁵ See event # 472752, page 59.

¹⁶⁶ See event # 472752, page 43.

¹⁶⁷ See event # 472752, page 36.

¹⁶⁸ See event # 472752, page 75.

¹⁶⁹ See event # 472752, page 32 and 72.

¹⁷⁰ See event # 472752, page 31.

¹⁷¹ See event # 472752, page 22.

¹⁷² See event # 472752, page 49.

¹⁷³ See event # 472752, page 46.

¹⁷⁴ See event # 450690, reply from ICA dated 29 October 2007, questions 2a) and 3.

¹⁷⁵ See event # 289647 **KBJ46 9/10** (presentation dated 03.12.2002): "*det er stadig henvendelser fra Rimibutikker om å få avtale om PiB*"; see also event # 288296 **LKPI 2/3**.

¹⁷⁶ See event # 472860, page 148.

191. Norway Post conducted negotiations with ICA in parallel with its negotiations with NorgesGruppen and COOP from early 2004.¹⁷⁷ The negotiations with ICA continued into 2005 and 2006.¹⁷⁸
192. At least on the following dates meetings were held between Norway Post and ICA regarding Post-in-Shop: 25 April 2005, 18 May 2005,¹⁷⁹ 10 October 2005, 7 November 2005,¹⁸⁰ 16 November 2005,¹⁸¹ 28 and 29 November 2005,¹⁸² 12 January 2006 and 14 June 2006.
193. There were major disagreements between Norway Post and ICA during these negotiations. As mentioned in paragraph 182 above, early on in the negotiations ICA requested a clear statement from Norway Post on preference and threatened otherwise to withdraw from the negotiations.
194. From ICA's reply to the Authority's request for information it appears that there was little progress in the discussions between Norway Post and ICA before November 2004. In November 2004 ICA was positive to concluding a complete framework agreement for Post-in-Shop and to finding a solution to unclear points. However, ICA was not willing to accept clauses on preference and exclusivity and one of ICA's objectives during the negotiations was to remove these clauses. Norway Post was in disagreement with ICA on these issues and the questions regarding preference and exclusivity remained unresolved for a long time.¹⁸³
195. Norway Post denies that there was disagreement between Norway Post and ICA regarding exclusivity for postal services and that such disagreements have not been demonstrated.¹⁸⁴ However, it follows from documentary evidence on the file that Norway Post in an email of 9 February 2005 informed ICA that the question on preference had not yet been clarified with NorgesGruppen.¹⁸⁵
196. Further, in draft minutes from a meeting on 25 April 2005 prepared by a representative of Norway Post the following was stated:

“Points 1.2 and 4: The parties agree to postpone these points until late autumn 2005. Norway Post clarifies in its cover letter/letter of intent that Norway Post will allow for a new revision autumn 2005 in order to discuss [...] the term preference, and the clauses on exclusivity, competition and non-compete as well as the notice period [...] Sven [the name of ICA's lawyer misspelled] made a reservation regarding the approval of ICA's management in Stockholm and indicated that principle attitudes regarding exclusivity and competition clauses in ICA could make it difficult to have an agreement approved by ICA without amendments on these points.”¹⁸⁶

¹⁷⁷ See event # 288300, **MH7 4/6**.

¹⁷⁸ See event # 450690, reply from ICA dated 29 October 2007.

¹⁷⁹ See event # 472861, page 4.

¹⁸⁰ See event # 472859, page 6.

¹⁸¹ See event # 472859, page 5.

¹⁸² See event # 472860, page 20.

¹⁸³ See event # 450690, reply from ICA dated 29 October 2007.

¹⁸⁴ See Reply to SO, page 66.

¹⁸⁵ See event # 472859, page 33.

¹⁸⁶ See event # 472859, page 22: “Pkt 1,2 og 4: Partene er enige om å utsette disse punktene til senhøstes 2005. Posten presiserer i oversendelsesbrev/Letter of understanding at Posten vil åpne for ny revisjon høsten 2005 for å drøfte [...] preferansebegrepet, eneretts-, konkurranse og karantenebestemmelsene, samt oppsigelsestid[...] Sven tok forbehold om godkjenning hos ICAs ledelse i Stockholm og antydnet at

197. ICA's lawyer was however not satisfied with these formulations, made corrections to them and sent them back to Norway Post by e-mail on 28 April 2005.¹⁸⁷ In this e-mail ICA's lawyer stated:

*“Thank you for the draft minutes. I thought that I expressed myself clearly with regard to point 1, 2 and 4 in earlier meetings, in my e-mails and during our meeting at your place. But these points are in any case a problem that must be resolved. I have therefore made some changes to the minutes so that this is clearly stated [...] it would be a misunderstanding to believe that this is something that would go away over time. I would therefore as soon as possible recommend that Norway Post realise the problem.”*¹⁸⁸

198. ICA's lawyer changed the text quoted in paragraph 196 above as follows:

*“Points 1.2 and 4: The parties agree to postpone these points until late autumn 2005. Sten [ICA's lawyer] took note of this. Norway Post will clarify in its cover letter/letter of intent that Norway Post will allow for a new revision autumn 2005 in order to discuss [...] the term preference, and the clauses on exclusivity-, competition and non-compete as well as the notice period [...] Sten made a reservation regarding the approval of ICA's management in Stockholm. He said that principle attitudes regarding exclusivity and competition clauses in ICA could make it difficult to have an agreement approved by ICA without amendments on these points. Should Norway Post not accept this, there is therefore a risk that the co-operation with Norway Post will be terminated rather than renewed.”*¹⁸⁹

199. In a protocol dated 31 May 2005, the parties stated that they had not agreed on an agreement that could replace the protocol from 25 May 2001, but that they nevertheless had agreed to put into effect a revision of the economic conditions for the ICA Post-in-Shops retroactively from 1 January 2005. At the same time, it was agreed that the negotiation of a framework agreement should be finalised before the end of 2005.¹⁹⁰

200. In autumn 2005, ICA strengthened the committee which was negotiating with Norway Post with representatives from its Swedish parent company, and the parties entered into a critical phase of the negotiations regarding a framework agreement.¹⁹¹

prinsipielle holdninger til enerett og konkurranseklausuler i konsernet, kan gjøre det vanskelig å få avtalen godkjent i ICA uten endringer på disse punkten.”

¹⁸⁷ See event # 472860, page 62.

¹⁸⁸ See event # 472860, page 62: *“Takk for utkast til referat. Jeg syntes selv at jeg uttrykte meg tydelig når det gjelder holdningen til pkt 1,2 og 4 under tidligere møter, i mine mail og undervårt møte hos deg. Men disse punktene utgjør i alle fall et problem som må løses. Jeg har derfor rettet litt i referatet slik at det kommer tydeligere frem [...] at det vil være en misforståelse å tro at dette er noe som med tiden vil gå over. Jeg vil derfor raskest mulig anbefale at Posten innser problemet.”*

¹⁸⁹ See event # 472860, page 64 *“Posten ønsker å utsette behandlingen av disse punktene til senhøstes 2005. Sten noterte dette. Posten vil presisere i oversendelsesbrev/Letter of understanding at Posten vil åpne for ny revisjon høsten 2005 for å drøfte [...] preferansebegrepet, eneretts-, konkurranse og karantenebestemmelsene, samt oppsigelsestid [...] Sten tok forbehold om godkjenning hos ICAs ledelse i Stockholm. Han sa at prinsipielle holdninger til enerett og konkurranseklausuler i konsernet, kan gjøre det vanskelig å anbefale avtalen godkjent i ICA uten endringer på disse punktene Dersom ikke Posten etterkommer dette, er det derfor fare for at samarbeidet med Posten kan bli avvirket i stedet for fornyet.”*

¹⁹⁰ See event # 472859, page 17.

¹⁹¹ See event # 450690, reply from ICA dated 29 October 2007.

201. Following internal discussions, ICA notified Norway Post on 5 October 2005 that it terminated its co-operation with Norway Post with effect from 31 December 2005. In the letter it was stated that one of the reasons for terminating the agreement was that the existing agreement contained clauses that ICA could not accept in the future.¹⁹²
202. Norway Post disputed that ICA had the right to terminate the agreement and this question was subject to further discussions between the parties. Thus, in minutes from 7 November 2005 it is for instance stated that “ICA maintains its earlier termination of the agreement”, “Norway Post does not say clearly that the restriction of competition in the agreement must be removed” and “Norway Post disputes that it has received a formal notice of termination and that ICA has the right to terminate the agreement collectively on three months’ notice”.¹⁹³
203. At a meeting on 10 October 2005 Norway Post informed ICA that the question of removing the existing provisions on preference in its agreements with the three “large” partners in Norway would be part of the further negotiations. Nevertheless, Norway Post was minded to keep the exclusivity for postal services in Post-in-Shop outlets.¹⁹⁴ Eventually, Norway Post agreed to remove both preference clauses and exclusivity provisions from its agreements (see Section 6.5 below)
204. Against this background, the Authority has to maintain that there were disagreements between Norway Post and ICA regarding preference and exclusivity for postal services during the renegotiations that took place from 2004 onwards and that these disagreements have been amply demonstrated by documentary evidence.

6.5 The removal of exclusivity and preference clauses in the agreements with NorgesGruppen/Shell, COOP and ICA

205. On 30 March 2006 Norway Post and **NorgesGruppen** signed a protocol amending the existing agreements concerning Post-in-Shop. According to this protocol the exclusivity and non-compete clauses in the existing agreements between the parties should no longer have any effect.
206. This protocol also stated that NorgesGruppen had been Norway Post’s preferred partner until 31 March 2006 as regards Post-in-Shop but that from 1 April 2006 the partners of Norway Post would be equal partners. However, it was also stated that should Norway Post wish to alter the principle of equal treatment NorgesGruppen should be notified hereof six months in advance.¹⁹⁵

¹⁹² See event # 472860, page 139-140. (“Nåværende avtale inneholder klausuler som ICA ikke kan akseptere for fremtiden”).

¹⁹³ See event # 476028, page 35. (“ICA står på sin tidligere oppsigelse av avtalen”, “Posten er ikke klar på at konkurranserestriksjonene i avtalen må bort” and “Posten bestrider at de har mottatt formell oppsigelse, og at ICA har rett til å si opp avtalen kollektivt med 3 måneders varsel”).

¹⁹⁴ See event #472860 page 54, “Spørsmålet om bort fall av dagens preferansebestemmelser i avtaleverket mellom de 3 “store” samarbeidspartnerne i Norge vil være med i det videre løpet. Posten er innstilt på å fortsatt eksklusivitet [for] posttjenester i PiB-butikkene.”.

¹⁹⁵ “NorgesGruppen har vært preferert partner i forhold til Post i Butikk konseptet frem til 31.03.2006. Fra 01.04.2006 er Postens samarbeidspartnere likestilte partnere. Skulle Posten ønske å endre på likestillingsprinsippet, skal NorgesGruppen varsles med en 6 mnd frist.”.

207. The protocol also made a number of amendments to the economic regulation between the parties.
208. During 2006 Norway Post negotiated and concluded new agreements for Post-in-Shop with NorgesGruppen
209. On 31 December 2004 **Norske Shell** terminated the Framework Agreement with Norway Post with effect from 31 December 2006.¹⁹⁶ The Operating Agreements with the individual outlets were discontinued as from 31 December 2006. The discontinuation of the agreements had limited consequences for the number of Post-in-Shop as Norway Post intended to enter into new operating agreements with each of the outlets in which a Post-in-Shop had been established. However, as from 31 December 2006, the Shell outlets where no Post-in-Shop had been established were no longer covered by any exclusivity obligations.
210. In June 2006 Norway Post presented a draft agreement to **COOP** without any exclusivity clauses concerning the distribution of B-to-C parcels. At a meeting with **COOP** on 4 September 2006 Norway Post finally waived with immediate effect the exclusivity obligations in its agreements with COOP and COOP outlets.¹⁹⁷
211. According to Norway Post it was stated at the meeting in September 2006 that in order to ensure equal treatment of all its partners it had been decided by Norway Post that where the agreements contained exclusivity clauses granting rights to Norway Post such clauses would no longer have any legal effect.¹⁹⁸
212. A new agreement with COOP was concluded on 21 November 2006. This agreement specified in Clause 2.6 that no exclusivity applied and that COOP could provide competing products and services in its network if these were provided clearly separated from and without any risk of confusion with the Post-in-Shop-concept. Moreover, equal treatment of Norway Post's services and competing services on the basis of commercial competitiveness was required.¹⁹⁹
213. At a meeting on 16 November 2005 Norway Post informed **ICA** that it was prepared to remove the exclusivity provisions from the existing agreements with the exception of the exclusive right to provide postal services in outlets which had concluded an operating agreement with Norway Post. Moreover, Norway Post was prepared to remove the provisions on preference in the agreements with NorgesGruppen, COOP and ICA.²⁰⁰

¹⁹⁶ See event # 313884, reply from Norway Post dated 17 March 2005.

¹⁹⁷ See event # 390809, letter from Norway Post dated 4 October 2006.

¹⁹⁸ See event # 390809, letter from Norway Post dated 4 October 2006, pages 9-10.

¹⁹⁹ See event # 472751 page 10: "*Kjeden har ikke eksklusiv rett til 5 inngå avtale med Posten om tilgang til Post i Butikk-konseptet.*

Tilsvarende har Posten ingen eksklusiv rett til i levere Postale produkter og tjenester, finansielle grunntjenester eller finansielle tilleggstjenester gjennom kjedens nett.

Kjeden kan innføre konkurrerende produkter og/eller tjenester dersom slike tilbys klart separert fra og uten forvekslingsfare for, Post i Butikk-konseptet. Dette gjelder også handelsprodukter.

For det tilfellet at Kjeden benytter seg av anledningen til å formidle eller selge produkter eller tjenester som konkurrerer med produkter eller tjenester formidlet i henhold til denne avtalen, skal Kjedespissen påse at det i hele Kjeden skjer en likebehandling av slike produkter og tjenester basert på forretningsmessig konkunansedyktighet."

²⁰⁰ See event # 472862, page 5.

214. Following further discussions with ICA Norway Post agreed to also remove the exclusivity for postal services in the established Post-in-Shop outlets and a new protocol was signed between Norway Post and ICA on 12 January 2006.²⁰¹ Under this protocol Norway Post released ICA from all exclusivity and non-compete obligations in the existing agreements between the parties.²⁰²
215. Furthermore, 1 July 2006 was set as a time limit for the conclusion of a new co-operation agreement. If an agreement was not reached within this deadline, the protocol of 12 January 2006 stipulated that the co-operation between Norway Post and ICA would come to an end and the existing Post-in-Shop in ICA outlets closed within 12 months.
216. A new Framework Agreement and an Operating Agreement were signed by the parties on 14 June 2006. The Framework Agreement specified in Clause 2.6 that no exclusivity applied and that ICA could provide competing products and services in its network if these were provided clearly separated from and without any risk of confusion with the Post-in-Shop-concept. Moreover, equal treatment of Norway Post's services and competing services on the basis of commercial competitiveness was required.
217. In May 2006 Norway Post also concluded a framework agreement with Rema 1000.²⁰³ This agreement was based on the same principle of equal treatment of all partners as in the other agreements described in this sub-section.

6.6 Agreements with retail outlets not belonging to NorgesGruppen/Shell, Coop and ICA

218. Norway Post also entered into agreements with some retail outlets not belonging to any of the above-mentioned groups (NorgesGruppen/Shell, Coop and ICA).
219. Norway Post's agreements with these outlets were based on a Standard Operating Agreement for Post-in-Shop.²⁰⁴ From 2001 to 2004 the number of Post-in-Shops established in other retail outlets were as shown in table 5:

Table 5: Number of Post-in-Shop in other outlets

2001	2002	2003	2004
38	73	77	73

Source: Event # 313884, reply from Norway Post dated 17 March 2005, attachment 1, page 3. Note that for the year 2001, Norway Post has only submitted figures corresponding to the objective for that year.

220. The Standard Operating Agreement with the retail outlets not belonging to NorgesGruppen/Shell, COOP and ICA contained exclusivity and non-compete provisions similar to the provisions in the operating agreements for COOP and ICA.
221. From a list submitted by Norway Post in June 2003,²⁰⁵ it appears that Norway Post at that time had established delivery outlets in 77 outlets outside

²⁰¹ See event # 390809, letter from Norway Post dated 4 October 2006, page 17.

²⁰² See event # 450690, reply from ICA dated 29 October 2007; and event # 390809, page 17.

²⁰³ See event # 390809, letter from Norway Post dated 4 October 2006.

²⁰⁴ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 15, "Driftsavtale mellom Posten Norge BA og [lokal enhet] vedrørende post i butikk av 01.01.2003".

NorgesGruppen/Shell, COOP and ICA. Among these outlets there were 17 grocery stores, 6 kiosks and 12 petrol stations.²⁰⁶

222. The remaining 42 Post-in-Shops were established in other types of stores, including *inter alia*, 5 flower shops, 2 hotels, 2 public offices, a hairdresser, a library and a coffee shop.
223. During September and October 2006, Norway Post sent letters to all Post-in-Shop outlets outside NorgesGruppen, COOP and ICA informing them that it waived the exclusivity clauses in their agreements with immediate effect.²⁰⁷

7 Privpak's provision of B-to-C parcel services

7.1 Privpak's concept

224. Unlike Norway Post which, as the incumbent postal operator, provided a whole range of postal and financial services from its post offices and Post-in-Shops, during the period at issue Privpak has only provided B-to-C parcel services with over-the-counter delivery. It has not provided a home delivery service.
225. In order to develop a network of delivery outlets at an affordable cost, a cornerstone of Privpak's concept has been to find retail outlets which can perform the over-the-counter delivery service with marginal resources and which, at the same time, can increase their turnover by selling products to consumers who enter the shop to pick up parcels. Privpak's concept therefore targets the types of outlets which are most likely to increase their turnover through the distribution of B-to-C parcels. These are grocery stores, kiosks and petrol stations.
226. Privpak's B-to-C parcel services cover the collection, transport and delivery of parcels. Privpak also offers the following value added services:
- cash-on-delivery ;
 - handling of returns (the consumer can deliver return at the outlet, either paid by the consumer or prepaid by the sender),
 - notification of arrival with the sender's message and logo, notification of arrival by SMS or e-mail,
 - sending of reminders if parcel has not been collected within 15 days; and
 - return of goods not collected to the sender after 30 days.
227. Privpak has negotiated prices individually with distance selling companies. According to distance selling companies, Privpak's prices have been competitive compared to Norway Post. However, the coverage of its delivery network has been regarded as limited.²⁰⁸

²⁰⁵ See event # 96421, reply from Norway Post dated 16 June 2003, Annex 14; and event # 313884 reply from Norway Post dated 17 March 2005 annex 1 to attachment 1 (revised list).

²⁰⁶ Four of the companies listed as car repair shops are also petrol stations according to www.finnalle.no.

²⁰⁷ See event # 390809, letter from Norway Post dated 4 October 2006.

²⁰⁸ See event # 92545, reply from Trumf dated 6 November 2003; event # 93871, reply from H&M dated 23 September 2003; event # 93766, reply from Ellos dated 30 October 2003; and event # 94096, reply from Homebox dated 3 September 2003.

7.2 Privpak’s over-the-counter delivery network

228. The number of delivery outlets established by Privpak from 2001 to 2005 is shown in Table 9 below.

Table 6: Number of Privpak delivery outlets in Norway

2001	40
2002	114
2003	146
2004	146
2005	142

Source: Privpak’s reply dated 18 November 2004 and Annex I to Privpak’s letter dated 6 June 2005.²⁰⁹

229. The table shows the highest number of delivery outlets used by Privpak each year. As of June 2003 Privpak had 130 delivery outlets. In June 2005 only 84 of these outlets were still used by Privpak. The agreements with the remaining 46 outlets or around 35% of the total network had been terminated either by Privpak itself or the outlet owner.
230. On 15 February 2006, Privpak concluded a co-operation agreement with the Norwegian kiosk chain Gyda. As a result Privpak opened 8 delivery outlets in Gyda kiosks.
231. Privpak contends that its network coverage has been 36% without clearly specifying how it defines coverage.²¹⁰ According to information found at the premises of Norway Post during the inspection, Spar Kjøp, one of the largest distance selling companies in Norway, found after comparing Privpak’s delivery network with its own customer lists that the coverage of Privpak’s delivery network was 36%.²¹¹
232. Thus, it appears that in theory Privpak could deliver parcels to 36% of Spar Kjøp’s customers if Spar Kjøp did not give the customers in question the possibility of using delivery outlets of Norway Post.
233. Privpak started delivering parcels for Spar Kjøp in 2005 but did not deliver either that year or the following year, more than 12% of Spar Kjøp’s total number of parcels.²¹²
234. Privpak has stated that 80-90% coverage is needed in order to be competitive. According to Privpak 325 to 400 delivery outlets is *the minimum number* of delivery outlets needed to establish a credible competitive presence for large distance selling companies.²¹³
235. The number of delivery outlets needed to mount a long term competitive presence in the market and to attract also small and medium sized distance selling companies

²⁰⁹ See event # 300380 and event # 321960.

²¹⁰ See footnote 29 regarding the term geographical coverage.

²¹¹ See **KBJ 48 (1/4)**: “Fått tilbud fra Privpak. Etter å ha vasket kundens adresseregister mot egne utleveringssteder gir de 36% treff/dekning.”

²¹² See event # 452553, reply from Sparkjøp received 22 November 2007, page 3.

²¹³ See event # 94632, reply from Privpak dated 15 August 2003, pages 4/10 and 5/10; and event # 323208, reply from Privpak dated 17 June 2005.

would, according to Privpak, be close to that of Norway Post.²¹⁴ Privpak has contended that to develop a network which covers 100% of the Norwegian market Privpak would need around 1 000 outlets.²¹⁵ Privpak subsequently specified that in order to cover 89% of the market, it would need 1 067 outlets.²¹⁶

7.3 Privpak’s estimated market share

236. Privpak has estimated that its position on the market for the provision of B-to-C parcel services has been as follows:

Table 7: Privpak’s market position in turnover

	2001	2002	2003	2004	2005	2006
Turnover (MNOK)	0.4	2.65	7. 199	9.385	11.526	14.723
Market share	0.09%	0.5%	1.3%	1.5%	1.6%	1.8%

Source: Privpak’s replies dated 18 November 2004²¹⁷ and 1 October 2007²¹⁸

Table 8: Privpak’s market position on the basis of volumes of parcels

	2001	2002	2003	2004	2005	2006
Number of parcels	9 700	53 000	141 900	176 183	199 482	251 436
Market share	0.1%	0.6%	1.6%	2%	2.1%	2.4%

Source: Privpak’s replies dated 18 November 2004²¹⁹ and 1 October 2007²²⁰

8 Privpak’s attempts to enter the market for B-to-C parcel services

8.1 Privpak’s entry on the Swedish market

237. When Privpak’s concept was introduced in Sweden in 1992, the Swedish Post was still using the post office network to deliver B-to-C parcels. Privpak business idea was to make parcel delivery more accessible to private consumers by making it possible to pick up parcels in grocery stores, kiosks and petrol stations which were open seven days a week and in the evenings. The accessibility of Privpak’s delivery outlets to consumers compared to post offices was a major selling argument towards the distance selling companies.

238. Privpak entered the Swedish market by targeting large mail-order customers which could use Privpak as an additional supplier to the Swedish Post. Privpak could attract customers even if its network of delivery outlets did not initially have the same coverage as the Swedish Post’s network.

²¹⁴ See event # 94632, reply from Privpak dated 15 August 2003.

²¹⁵ See event # 323208, reply from Privpak dated 17 June 2005.

²¹⁶ See event # 444850, reply from Privpak dated 1 October 2007.

²¹⁷ See event # 300380.

²¹⁸ See event # 444852.

²¹⁹ See event # 300380.

²²⁰ See events #444852.

239. However, as a new entrant on the market Privpak had to raise customer awareness in order to gain customers and increase its volume of parcels to a level which could allow it to cover its costs. Privpak became profitable in Sweden only in 1999 with a volume of parcels of 1.6 million.²²¹ This volume was reached with a delivery network consisting of around 850 delivery outlets.²²²
240. In 2001-2002, the Swedish Post also started to use retail outlets for the provision of postal services, including the delivery of B-to-C parcels. Privpak therefore no longer had a “*unique*” concept with which to attract customers. According to Privpak, it thus became important to develop a network with “*almost full*” coverage of the country so as to be able to meet the entire parcel requirements of the distance selling companies and to also become an option for the smaller distance selling companies which, for economic reasons, would not deal with two suppliers.²²³
241. In Sweden, as many as 32.5% of the outlets used by Privpak are joint outlets where parcels both from Privpak and the Swedish Post are distributed.²²⁴ As far as the Authority understands, this is the result of the Swedish Competition Authority’s objection to exclusivity clauses and non-compete obligations in agreements notified to it by the Swedish Post and its partners ICA Handlarnas AB and Q8.²²⁵
242. According to the Swedish regulator, Privpak’s delivery network covered 67% of all Swedish households in 2002. In 2003, Privpak had 1020 delivery outlets covering 82% of all postal codes. The remaining 18% corresponded roughly to the households served by the rural postmen of the Swedish Post. According to the Swedish regulator, Privpak’s ambition was not to cover absolutely all households in Sweden but to represent a sufficiently good alternative for its business customers.²²⁶
243. At the beginning of 2006 Privpak’s Swedish delivery network had increased to 1 200 outlets.²²⁷ Privpak has continued expanding its network and had close to 1 400 delivery outlets in Sweden in 2007.²²⁸
244. By comparison, the Swedish Post had 1 452 outlets in 2001, 2 087 outlets in 2003, 2 039 outlets in 2004 and 2 012 in 2005.²²⁹
245. According to the Swedish regulator, the estimated market share of the Swedish Post on the market for B-to-C parcel services with over-the-counter delivery was 75-80% and the estimated market share of Privpak 20-25% in 2003.²³⁰ On its website Privpak indicates that its market share in Sweden has been around 15-20%.²³¹

²²¹ Event # 281231, reply from Privpak dated 12 May 2004, question 3.2.

²²² Event # 444850, reply from Privpak dated 1 October 2007.

²²³ See also paragraph 37 above.

²²⁴ Event # 444850.

²²⁵ Decisions dated 2 February 2003 (Doc No 163/2002) and 12 December 2002 (Doc No 835/2001) by the Swedish Competition Authority available at: <http://www.kkv.se/beslut/01-0835.htm> and <http://www.kkv.se/beslut/02-0163.htm>.

²²⁶ See event # 313210, Report from Post & Telestyrelsen, “*Den Svenska Postmarknaden – en beskrivning och övergripande analys*”, page 61 (13 May 2004).

²²⁷ See event # 370680, excerpts from Privpak’s webpages (dated 17 January 2006).

²²⁸ See event # 473756, excerpts from Privpak’s webpages (dated 21 June 2007).

²²⁹ See event # 370710, Report from Post & Telestyrelsen, “*Service och konkurrens 2006*”, page 24 (27 March 2006).

²³⁰ See event # 313210, Report from Post & Telestyrelsen, “*Den Svenska Postmarknaden – en beskrivning och övergripande analys*”, page 61 (13 May 2004).

²³¹ See event # 473756, excerpts from Privpak’s webpages (dated 21 June 2007).

8.2 Privpak's attempt to enter the Norwegian market

246. Privpak started planning for entry on the Norwegian market in 1997/1998, and started operations in 2001. According to Privpak, it entered the Norwegian market after requests from its Swedish customers which also operated in the other Nordic countries.
247. As in Sweden, Privpak was able to use the pre-existing transport infrastructure within the group of companies to which it belonged. Although it had to pay for the use of this infrastructure, it did not have to build up a transport infrastructure on its own. Thereby, Privpak avoided carrying all the fixed costs that are related to the establishment of a transport infrastructure of this kind. It was also able to rely on the market know-how and the confidence of distance selling companies that it had acquired after nine years of experience on the Swedish market.
248. In Norway, Privpak used the same concept as it used in Sweden. However, in Norway, Privpak did not have a "unique" concept since Norway Post had already started to establish Post-in-Shops in retail outlets when Privpak entered the market.
249. In order to operate profitably on the Norwegian market, Privpak has estimated that it needs to distribute 1 050 000 parcels. The estimate is based on its experience on the Swedish market in which break even was reached in 1999 with 1 600 000 parcels distributed by Privpak and around 850 outlets. As seen above in section 7.3, in Norway Privpak only distributed 199 482 parcels in 2005, when its estimated market share (based on number of parcels distributed) rose to 2.4%. After the initial build-up period in 2001-2002, Privpak's network has consisted of around 140 outlets during 2003-2005.
250. The first years after it started its operations in Norway, Privpak operated at a loss.²³²
251. Privpak informed the Authority at the beginning of 2003 that it had been instructed by its owner to withdraw from the Norwegian market unless it either reached break even or could show that the market situation improved substantially before 1 July 2003.²³³ While Privpak experienced some increase in its business volume and decided to stay in the market, Privpak's business remained very small compared to Norway Post's.

8.3 Privpak's attempts to establish a network of delivery outlets in Norway

8.3.1 Privpak's contact with retail chains

252. Privpak has contacted a number of grocery, kiosk and petrol station chains, at central and regional level, and a large number of retail outlets with a view to establishing a network of delivery outlets in Norway. These contacts were made from mid-2000 onwards and continued throughout the relevant period. Privpak has submitted

²³² See event # 94632, reply from Privpak dated 15 August 2003, Question 4.1 and Annex 3. According to this information at the end of July 2003 Privpak had sustained a loss of NOK 1.199 million that year, by mid 2003 the direct aggregated investments in Privpak AS amounted to NOK 10.365 million and its aggregate losses between 2000 and 2002 was NOK 5.782 million.

²³³ See event # 99374, letter from Privpak dated 14 January 2003.

information to the Authority documenting these contacts. In addition, the Authority has obtained information directly from several retail chains. This is described below.

8.3.1.1 Mix and NorgesGruppen

253. Mix (belonging to NorgesGruppen) was one of the chains Privpak contacted during summer 2000, which at that point showed an interest in Privpak's concept.²³⁴ On 12 September 2000, Privpak again met the central management of the kiosk chain Mix. According to Privpak:

*“Mix was interested in cooperating with Privpak and was prepared to present a proposal for an agreement for its Board of Directors, but advised that Privpak first met with NorgesGruppen to ensure that any distribution agreement with Mix did not interfere with a co-operation agreement between NorgesGruppen and Posten”.*²³⁵

254. A meeting with NorgesGruppen was held on 24 January 2001. NorgesGruppen stated that it had an exclusive agreement with Norway Post, but that the company would investigate whether this agreement prevented NorgesGruppen from cooperating with Privpak. On 14 February 2001, NorgesGruppen reported that its exclusive agreement with Norway Post:

*“...did not leave any room for other companies than Norway Post”.*²³⁶

255. There was a dialogue between Privpak and NorgesGruppen from 2004 onwards. NorgesGruppen then stated to Privpak that it had a commercial interest in providing delivery services on behalf of Privpak. It also indicated to Privpak that it was interested in co-operating with other parcel suppliers, but that it had been prevented from doing so due to its exclusive agreement with Norway Post. When Privpak attempted to contact outlets locally, NorgesGruppen reacted negatively and asked Privpak to refrain from undermining NorgesGruppen's agreements with Norway Post.²³⁷

256. On 9 February 2006, NorgesGruppen confirmed its interest in co-operating with Privpak although only in outlets where Norway Post had not established a Post-in-Shop already.²³⁸

257. At a meeting on 15 June 2006 Privpak was informed by NorgesGruppen that the exclusivity and non-compete provisions in NorgesGruppen's agreements with Norway Post were lifted. NorgesGruppen also asked Privpak to prepare a draft co-operation agreement and to launch a pilot project in the course of 2006. Since then negotiations between Privpak and NorgesGruppen took place with a view to use NorgesGruppen's outlets for delivery of B-to-C parcels.²³⁹

²³⁴ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, p. 34-35 (internal Privpak memo dated 31 August 2000).

²³⁵ See event # 207276, complaint from Privpak dated 24 June 2002.

²³⁶ See event # 207276, complaint from Privpak dated 24 June 2002.

²³⁷ See event # 444850, reply from Privpak dated 1 October 2007, page 1; See also event # 300380, reply from Privpak dated 18 November 2004, pages 4-5.

²³⁸ See event # 444850, reply from Privpak dated 1 October 2007, page 1.

²³⁹ See event # 444850, reply from Privpak dated 1 October 2007, page 1.

258. However, NorgesGruppen's relationship to Norway Post continued to complicate the negotiations. NorgesGruppen took initiatives to explore whether a co-distribution of the parcels of Norway Post and Privpak in existing Post-in-Shop outlets within NorgesGruppen would be possible. NorgesGruppen warned Privpak that if Privpak were to reject such an offer, NorgesGruppen would need more time to consider whether Privpak could get access to the other 2 200 outlets within NorgesGruppen where Norway Post was not present.²⁴⁰
259. On NorgesGruppen's initiative a meeting was held between NorgesGruppen, Norway Post and Privpak on 9 November 2006 at which a possible co-distribution of parcels was discussed. However, Norway Post declined NorgesGruppen's proposal for a co-operation.
260. On 12 December 2006, Privpak and NorgesGruppen agreed to proceed with a pilot project in which Privpak's concept was tested in ten of NorgesGruppen's outlets. The pilot project was launched in February 2007 and proved successful. Of the ten participating outlets, nine outlets decided to remain distributors after the expiry of the testing period.²⁴¹
261. Nevertheless, according to Privpak, NorgesGruppen's sensitivity towards Norway Post continued throughout the negotiations and was a topic of discussion as late as in a meeting on 2 May 2007 – almost a year after the exclusivity agreement was formally lifted.²⁴²
262. At a meeting with the Authority on 27 June 2007, Privpak maintained that Norway Post had stated that Privpak could not use outlets of NorgesGruppen where a Post-in-Shop had been established and that NorgesGruppen did not want to provoke Norway Post by allowing Privpak to use such outlets.²⁴³
263. On 22 October 2007, NorgesGruppen and Privpak entered into a formal co-operation agreement. Under this agreement NorgesGruppen undertook to inform outlets in the retail group about Privpak's concept and assist Privpak in planning and selecting delivery outlets. After the conclusion of this agreement, Privpak's goal was to establish a delivery network with 700 delivery outlets in Norway.²⁴⁴
264. As of December 2007 NorgesGruppen had not yet wanted to let Privpak use outlets in which a Post-in-Shop had been established, although it indicated that there might be some joint outlets in the future.²⁴⁵
265. Privpak has informed the Authority that as of 30 November 2008 it had 295 delivery outlets in Norway and that 206 of these outlets belonged to NorgesGruppen. As part of a test project it was using two outlets of NorgesGruppen which were also used by Norway Post.²⁴⁶

²⁴⁰ See event # 444850, reply from Privpak dated 1 October 2007, page 1.

²⁴¹ See event # 444850, reply from Privpak dated 1 October 2007.

²⁴² See event # 444850, reply from Privpak dated 1 October 2007.

²⁴³ See event # 372432, request for information to Privpak dated 20 July 2007, question 2-d(ii); and event # 444850, reply from Privpak dated 1 October 2007, page 3.

²⁴⁴ See event # 444850, reply from Privpak dated 1 October 2007, page 4.

²⁴⁵ See event # 458076, reply from NorgesGruppen dated 17 December 2007.

²⁴⁶ See event # 500443, reply from Privpak dated 27 November 2008.

8.3.1.2 Shell

266. Privpak contacted Shell during summer 2000. However, the response of Shell was negative according to an internal Privpak document dated 31 August 2000. The reason given by Shell was that the remuneration was too low.²⁴⁷ As explained above in Section 6.2, Shell and NorgesGruppen at this time were in negotiations with Norway Post concerning the Post-in-Shop agreements. The agreement of intent had been signed on 30 May 2000, NorgesGruppen/Shell had undertaken not to negotiate with other suppliers of postal services until July 2000 and the negotiations with Norway Post continued until late September.
267. In its reply to a request for information in April 2004, Shell stated that to the knowledge of the retail management there had been no request from companies other than Norway Post with a view to distribute parcels in Shell petrol stations and that the probable reason was that Norway Post was the sole provider of the full range of postal services.²⁴⁸
268. Although the statement from Shell in 2004 at first sight may seem to contradict the documentary evidence submitted by Privpak, the Authority has no reason to believe that the documentary evidence submitted by Privpak is not genuine. The contacts between Privpak and Shell summer 2000 must however have been of a brief nature and cannot have led to any detailed negotiations.

8.3.1.3 Esso

269. Esso was visited by Privpak already in summer 2000. These contacts were followed up at the beginning of 2001 with another meeting. Esso was provided with further information about Privpak's concept.²⁴⁹
270. However, as was the case with the Post-in-Shop concept of Norway Post's, Esso did not find Privpak's concept commercially interesting as it considered that its petrol stations had insufficient space to provide the over-the-counter delivery service and that *"there was no economy in the concept"*.²⁵⁰
271. Despite the negative reaction from Esso centrally, Privpak did approach petrol stations within the Esso network at outlet level with a view to establishing delivery points in such outlets. This resulted in some delivery outlets being set up. It is not clear to the Authority to what extent the central management of Esso was aware of these contacts.
272. At a later stage, Privpak informed the Authority that Esso centrally had been taking over some of its larger franchisee petrol stations which led to Privpak *"being thrown out"* of these stations.²⁵¹ An overview of Privpak's delivery outlets also shows that Privpak has lost more than ten Esso delivery outlets since 1 January 2005.²⁵²

²⁴⁷ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, page 34.

²⁴⁸ See event # 315641, Reply form Shell dated 2 April 2004, page 6.

²⁴⁹ See event # 357052, Annex 1 to Reply from Privpak dated 10 June 2005, pages 10 to 12.

²⁵⁰ See event # 322174, reply from Esso dated 9 June 2005.

²⁵¹ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, page 33.

²⁵² See event # 501898, email from Privpak dated 15 December 2008.

8.3.1.4 Hydro Texaco

273. Privpak had several contacts with Hydro Texaco from summer 2000 onwards. However, in autumn 2002 Hydro Texaco communicated to Privpak that it had assessed the “*parcel in shop*” business area and decided that Hydro Texaco centrally would not give priority to this area at the present time.²⁵³ Hydro Texaco also informed Privpak that Hydro Texaco centrally did not want Privpak to approach individual petrol stations within its network.²⁵⁴
274. Hydro Texaco has explained to the Authority that the business premises of its petrol stations are unsuitable for:

*“this kind of space-demanding business”.*²⁵⁵

8.3.1.5 Statoil Detaljhandel AS

275. From information submitted by Privpak, it appears that Statoil was contacted by Privpak at central level both in 2000 and 2001.²⁵⁶ In 2000, Statoil was reorganising its market structure and wanted to await further developments. The marketing director of Statoil Detaljhandel AS was contacted again in February 2001 and later in 2002. However, Statoil communicated to Privpak that it was negative to Privpak’s concept during autumn 2002.²⁵⁷
276. In 2005, Statoil informed the Authority that its central management had not been approached by any other company than Norway Post with a view to distribute postal services in petrol stations. However, other employees such as area managers had been approached by franchisees wishing to distribute postal parcels from petrol stations. Statoil had not been supportive of this.²⁵⁸

8.3.1.6 Narvesen/Rema 1000 (Reitangruppen)

277. Narvesen was contacted by Privpak with a view to use Narvesen’s outlets for the distribution of parcels in 2000/2001.²⁵⁹ However, Narvesen turned down the offer made by Privpak for the same reasons as it turned down the Post-in-Shop concept of Norway Post. It considered that the earnings per square metre would have been too low. Thus the space that would be occupied by the postal business could be better occupied by more revenue-making products.²⁶⁰ As mentioned above, Narvesen became part of Reitangruppen in 2001.
278. Information submitted by Privpak indicates that Rema 1000, belonging to Reitangruppen, was contacted at central level in 2000 without any agreements being

²⁵³ See event # 357052, reply from Privpak dated 10 June 2005, Annex 1, pages 14 to 21.

²⁵⁴ See event # 357052, reply from Privpak dated 10 June 2005, Annex 1, page 13 (Privpak minutes from phone conversation with Hertenberg in Hydro Texaco dated 14 June 2002).

²⁵⁵ See event # 321420, reply from Hydro Texaco dated 1 June 2005.

²⁵⁶ See event #357052, reply from Privpak dated 10 June 2005, Annex 1, pages 22 and 24; and event # 357048, reply from Privpak dated 10 June 2005, Annex 3, page 34.

²⁵⁷ See event # 357048, reply from Privpak dated 10 June 2005, Annex 2, page 33.

²⁵⁸ See event # 323285, reply from Statoil dated 17 June 2005.

²⁵⁹ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, page 34-35, internal Privpak memo dated 31 August 2000.

²⁶⁰ See event # 279922, reply from Reitangruppen dated 3 May 2004.

concluded.²⁶¹ In 2004, the management of Rema 1000 did not remember any such contacts.²⁶²

8.3.1.7 COOP

279. Privpak was also in contact with regional managers in COOP in 2001 and had some contact with COOP centrally in 2002.²⁶³ These contacts did not result in any agreements being concluded at regional or central level. While the Authority has no reason to doubt that there were contacts between Privpak and COOP centrally in 2002, these contacts must have been rather brief and no serious negotiations about possible parcel delivery in COOP outlets can have taken place.²⁶⁴

280. When it was in the process of entering the Norwegian market it was unclear to Privpak whether COOP outlets were covered by the same type of exclusivity as the outlets of NorgesGruppen (see section 8.3.3 below). However, Privpak also considered the kiosk outlets of MIX as better suited for its concept than most grocery store outlets of COOP as only a few of the latter outlets had a kiosk counter (“förbutik”).²⁶⁵

8.3.1.8 ICA

281. According to Privpak, ICA was not contacted at central level as ICA in general had few shops with a kiosk counter.²⁶⁶

282. As was the case with COOP outlets, when it was in the process of entering the Norwegian market it was unclear to Privpak whether ICA outlets were subject to the same type of exclusivity as NorgesGruppen.

8.3.1.9 Gyda, Video Nova and Showtime

283. Privpak was also in contact with some smaller chains such as Gyda (kiosks)²⁶⁷, Video Nova (video rental)²⁶⁸ and Showtime (video rental)²⁶⁹ in 2001.²⁷⁰

²⁶¹ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, page 33.

²⁶² See event # 279922, reply from Reitangruppen dated 3 May 2004.

²⁶³ See event # 357052, reply from Privpak dated 10 June 2005, Annex 1, page 2 which shows that a Privpak employee were in contact with and sent information to Egil Sætveit in COOP. Mr. Sætveit was according to Privpak’s knowledge involved in the agreement with Norway Post and would together with Mr. Odmund Berg be the one who decided whether Privpak could get access to COOP. Privpak has not submitted any further evidence regarding how these contacts were followed up.

²⁶⁴ See event 261379, reply from COOP, question 5a, where it is stated that COOP does not know of any serious requests from operators who compete with Norway Post with a view to distribute parcels from retail outlets.

²⁶⁵ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, p. 33.

²⁶⁶ See event # 357048, reply from Privpak dated 10 June 2005, Annex 3, p. 33.

²⁶⁷ GYDA Godtespesialisten BA (Gyda) is a kiosk chain with 180 associated outlets across Norway out of which only 30 are branded (<http://www.gyda.no/omgyda.asp>). According to Dagligvarekartet (see event # 357097) there have been 250 outlets in Gyda during the relevant period. However, only around 40 have been branded.

²⁶⁸ Video Nova is a video rental chain with 15 outlets mainly located in Oslo and Romerike. See <http://www.videonova.no/index.cgi?yp=42>.

²⁶⁹ Showtime is the largest video rental chain in Norway. During the relevant period it had 25 video rental outlets most of which were located in southeast Norway. See <http://www.showtime.no/>.

²⁷⁰ See event # 357049, Annex 2 to reply from Privpak dated 10 June 2005, p. 15 and 34.

284. No agreement was concluded between Privpak and Gyda following the contacts in 2001. According to Privpak, at this time it focused on gaining access to the major chains in Norway and assigned lower priority to Gyda.²⁷¹
285. In 2006, Privpak concluded an agreement with Gyda. However, the agreement only concerned the branded outlets of the chain.²⁷² Privpak maintains that at this stage it needed to show its customers that it took all possible measures to enter the Norwegian market and that it was the continued support from its major customers that made Privpak decide not to exit the market. At the end of 2006, this agreement had resulted in 8 new Privpak delivery outlets in Gyda kiosks.²⁷³
286. Video Nova was not willing to handle cash flows for Privpak which meant that a cash-on delivery service could not be provided. It could only provide the mere handing out of parcels.²⁷⁴ Since cash-on-delivery is an important element of the services B-to-C parcel distributors offer to distance selling companies, it follows that Video Nova could not be used by Privpak for distribution of B-to-C parcels.
287. With regard to Showtime, no formal agreement was entered into. However, Privpak discussed both the concept and agreements with the central management.²⁷⁵ Following these discussions, it appears that Showtime centrally endorsed Privpak's concept which in total resulted in agreements with 16 local outlets.²⁷⁶

8.3.2 Privpak's contacts with individual retail outlets

288. In addition to contacts with retail chains at central and regional level, Privpak has made contact with a large number of individual retail outlets. These contacts were made by employees of Privpak who travelled throughout Norway.
289. According to a list submitted to the Authority in June 2005,²⁷⁷ 59 of the outlets in Privpak's delivery network belonged to one of the major chains of grocery stores, petrol stations and kiosks (see table 11 below). These agreements were concluded individually with the retail outlets at local level.

Table 9: Outlets in Privpak's delivery network belonging to the major chains of grocery stores, petrol stations and kiosks in 2005

Esso	31
Mix	19
Shell	5
Hydro Texaco	2
Coop	1
ICA	1

290. It is unclear to the Authority whether the central management of NorgesGruppen/Shell have been aware of the use by Privpak of outlets in their

²⁷¹ See event 444580, reply from Privpak of 1 October 2007, Question 9 c, page 5.

²⁷² See event # 444850, reply from Privpak dated 1 October 2007, page 5.

²⁷³ See event # 501898, email from Privpak dated 15 December 2008.

²⁷⁴ See reply from Privpak dated 10 June 2005, event # 357049, Annex 2, p. 15-16.

²⁷⁵ See event # 357049, reply from Privpak dated 10 June 2005, Annex 2, pages 15 and 34-35.

²⁷⁶ See event # 321960, list of Privpak's outlets in reply from Privpak dated 6 June 2005, pages 5 and 6.

²⁷⁷ See event # 321960, list of Privpak's outlets in reply from Privpak dated 6 June 2005, pages 5 and 6.

networks. This use has in any event remained limited. Most of the retail outlets used by Privpak have been independent kiosks and small grocery stores.

8.3.3 Contact between Privpak and Norway Post

291. In 2001, Privpak learned that Norway Post had concluded exclusive agreements with NorgesGruppen, ICA and COOP.²⁷⁸ As mentioned above, it was unclear to Privpak whether COOP and ICA outlets were covered by the same type of exclusivity as the outlets of NorgesGruppen.
292. In May 2001, Privpak contacted Norway Post regarding the use by Norway Post of retail outlets for the distribution of postal services. Norway Post confirmed to Privpak that it had entered into exclusive agreements with NorgesGruppen and Shell.²⁷⁹
293. In December 2001, Privpak wrote to Norway Post to ask for a clarification regarding the limitations that Norway Post had imposed on the retail chains in Norway as regards these chains' possibilities of concluding agreements with competitors of Norway Post. Privpak explained to Norway Post that outlets within the major grocery chains on several occasions had stated that they could not enter into agreement with Privpak as Norway Post had entered into exclusive agreements with the chains concerning Post-in-Shop.²⁸⁰
294. In response Norway Post stated that the agreements with the grocery, kiosk and petrol station chains were confidential for commercial reasons and refused to give any clarification.²⁸¹ Privpak again contacted Norway Post via its legal counsel and proposed a meeting to discuss the matter. This was declined by Norway Post which could not see any reason to participate in a meeting.²⁸²
295. Norway Post has referred to that in relation to COOP a Privpak employee already in 2001 found out that COOP was not subject to any group exclusivity.²⁸³ However, Privpak only concluded that this had to be the case after a meeting with the manager of COOP Bærum who was positive to Privpak's concept and promised that Privpak could get access to five COOP outlets.²⁸⁴ Privpak's knowledge about the extent to which COOP outlets were subject to exclusivity therefore appeared far from certain at that stage.

9 Provision of B-to-C parcels services by other players

296. According to Norway Post, the main competitors providing B-to-C parcel services, in addition to Privpak, have been Linjegods, Tollpost Globe and NorCargo.²⁸⁵
297. Privpak maintains that it is the only company which has challenged Norway Post in its consumer market (i.e. the provision of B-to-C parcel services).²⁸⁶

²⁷⁸ See e.g. event # 357049, minutes from internal Privpak meeting in June 2001, page 12.

²⁷⁹ See event # 207276, complaint from Privpak dated 24 June 2002.

²⁸⁰ See event # 207276, complaint from Privpak dated 24 June 2002, annex 3.

²⁸¹ See event # 207276, complaint from Privpak dated 24 June 2002, annex 4.

²⁸² See event # 207276, complaint from Privpak dated 24 June 2002, annex 5 and 6.

²⁸³ See Reply to SO, page 79.

²⁸⁴ See event # 357052, reply from Privpak dated 10 June 2005, Annex 1, page 3.

²⁸⁵ See event # 95585, reply from Norway Post dated 23 June 2003.

298. NorCargo and Linjegods seem to have focused on B-to-B parcel services and have only to some extent provided B-to-C parcel services with home delivery during the period under review. They have not provided B-to-C parcel services with over-the-counter delivery. NorCargo was acquired by Norway Post in June 2004.
299. Tollpost Globe (“Tollpost”) has mainly been active in the B-to-B parcel services market. In 2005, Tollpost decided to enter the B-to-C market.
300. The reason for this decision was that Tollpost saw a need for suppliers of overall logistics services and that more and more of the volume of parcels in the B-to-B market was transferred to the B-to-C market due to increased internet and mail-order shopping. Finally, the Swedish Post, which owned 50% of Tollpost at the time, wanted to establish a Nordic network for B-to-C parcels.²⁸⁷ As of 11 March 2008, the Swedish Post has been the sole owner of Tollpost.
301. During autumn 2005, Tollpost considered the following retail chains with a view to establishing a network of delivery outlets: NorgesGruppen, Coop, REMA (Reitangruppen), ICA, Statoil, Shell, Hydro Texaco and Esso. It contacted the head/central organisation of these chains. According to Tollpost, the companies showed no interest in its business concept.²⁸⁸
302. Tollpost later contacted florist chains and independent florist outlets, and managed to get a co-operation agreement with three Norwegian florist chains, which had in total 830 flower shops. Through this co-operation, Tollpost managed to recruit around 280 delivery outlets.²⁸⁹
303. Tollpost did not consider flower shops as an equal alternative to grocery stores, kiosks and petrol stations for over-the-counter delivery of parcels. It chose flower shops because it was not possible to conclude any agreements with other chains or come in a negotiating position with such chains.²⁹⁰
304. Tollpost has stated that there are several drawbacks with flower shops as compared to grocery stores, kiosks and petrol stations. Flower shops have shorter opening hours, are less frequently visited by consumers and have lower turnover from impulse purchases/necessity purchases because of the limited assortment. Finally, the bankruptcy rate for flower shops is higher than for grocery stores.²⁹¹
305. Several flower shops have terminated their agreements with Tollpost and in August 2007, the number of flower shops that Tollpost used for distribution of B-to-C parcels had fallen to around 190.²⁹²
306. In 2006, the Swedish Post decided to establish a delivery network for parcels in Norway under the brand name MyPack. To that end, the Swedish Post, following

²⁸⁶ See event # 99374, letter from Privpak dated 14 January 2003.

²⁸⁷ See event # 379573, presentation from Tollpost Globe in meeting 27 June 2006, page 7.

²⁸⁸ See event # 383637, reply from Tollpost Globe dated 8 August 2006 and event # 383638, annex 3 thereto.

²⁸⁹ See event # 383637, reply from Tollpost Globe dated 8 August 2006.

²⁹⁰ See event # 383637, reply from Tollpost Globe dated 8 August 2006 (question 4).

²⁹¹ See event #424177, reply from Tollpost Globe dated 6 June 2007 (question 4).

²⁹² See event #424177, reply from Tollpost Globe dated 6 June 2007 (question 5 b); and event # 440185, reply from Tollpost Globe dated 5 September 2007.

several months of negotiations, entered into an agreement with ICA Norway on 10 January 2007 which allowed the Swedish Post, HIT Norge AS²⁹³ and Tollpost to use ICA outlets for delivery of parcels. ICA was chosen by the Swedish Post since it has been in longstanding co-operation with ICA in Sweden.²⁹⁴

307. According to the agreement with the Swedish Post, ICA shall be actively involved in the process of selecting outlets with a view to ensuring that the delivery network achieves the purported coverage.²⁹⁵
308. Tollpost's best estimate in 2006 was that it would probably need around 1 million parcels per year and 400-500 outlets in order to become profitable, and expected to reach that goal in 2008.²⁹⁶ Tollpost stated publicly in 2008 that it had a network of 800 delivery outlets covering 98% of the Norwegian population.²⁹⁷ According to its website, MyPack has more than 700 delivery outlets in grocery stores all over Norway.²⁹⁸
309. Norway Post has also referred to the company Mail Boxes as a competitor.²⁹⁹ Mail Boxes, is owned by UPS and offers services to businesses and consumers through a network of franchised Mail Boxes outlets. In particular, Mail Boxes rents out post boxes, provides packaging services and ships letters and parcels using the UPS infrastructure as well as other carriers.³⁰⁰ The activities of Mail Boxes in Norway started in 2001 through the establishment of the first Mail Boxes location in Oslo. It appears that the activities of Mail Boxes Norway have remained very limited.³⁰¹
310. Pan Nordic Logistics AB ("PNL") was originally a joint venture company owned by Norway Post and Post Danmark A/S offering cross-border parcel services. PNL does not have its own delivery network in Norway, but relies on other carriers including Norway Post for delivery of parcels in Norway. Recently Norway Post acquired sole control over PNL Logistics.

10 The views of distance selling companies

311. In autumn 2004, the Authority gathered information from 16 of the largest distance selling companies in Norway relating to their use of delivery networks for the distribution of B-to-C parcels.³⁰² The replies of these distance selling companies are summarised in this section.³⁰³

²⁹³ A fully-owned subsidiary of Swedish Post created to operate the delivery network.

²⁹⁴ A letter of intent was entered into between Swedish Post and ICA Norway already in September 2006.

²⁹⁵ See events # 498248 and #497678.

²⁹⁶ See event # 383637, reply from Tollpost dated 8 August 2006.

²⁹⁷ See event # 475125, excerpts from Tollpost's webpages (<http://www.tollpost.no/6212#>).

²⁹⁸ www.mypack.no

²⁹⁹ See event # 296229, letter from Norway Post dated 4 July 2002, page 4.

³⁰⁰ Norway Post, DHL, UPS, JETPAK, and Box Delivery (an express logistics company).

³⁰¹ See www.mbe.no.

³⁰² See event # 300542, request for information to H&M dated 24 November 2004, for an example of the questionnaire that was used to gather this information.

³⁰³ The respondents were: **Clas Ohlson** (event # 303191); **De Norske Bokklubbene** (event # 303397); **Ellos** (event # 302287); **Forlagssentralen ANS** (event # 93893); **Homebox** (event # 301804); **H&M Rowells** (event # 304513); **J. W. Cappelens Forlag** (event # 301874); **Komplett** (event # 302952); **LR International** (event # 94071) **Reader's Digest** (event # 92917); **Samlerhuset** (event # 303190); **Select** (event # 302805); **Skandinavisk Presse AB** (event # 302919); **Sparkjøp** (event # 94252); **Trumf** (event # 302179).

312. Regarding the criteria which retail outlets must fulfil in order to be used to deliver B-to-C parcels (i.e. the selection criteria), a large majority of the distance selling companies considered that long opening hours and accessibility, e.g. location close to where customers live or the existence of parking facilities were important.³⁰⁴ Other important criteria were the financial stability of the retail outlet and the need to have a stable network.³⁰⁵ Criteria linked to the quality of the service were also mentioned such as the staff's knowledge of the product, payment possibilities and storage capacity/conditions.³⁰⁶ Further, it was mentioned that the outlet should be regularly visited by consumers³⁰⁷ or that the consumer should have an incentive to buy from the shop.³⁰⁸ Other companies emphasised that the outlet should be

³⁰⁴ [X] (Q3: extended opening hours (to 20.00), easy access and free parking possibilities); [X] (Q3: opening hours are like Norway Post's (minimum)); [X] (Q1: accessibility; Q2: opening hours; accessibility (more locally); Q3: opening hours); [X] (Q3: all criteria in question 3 regarding delivery outlets, i.e. parking facilities, opening hours [...] are important; Q4: easily accessible); [X] (Q1: opening hours; Q3: accessibility with a view to parking; opening hours), [X] (Q2: it is important that the delivery outlet: is located close to the buying customer's residence; [...] has good accessibility in terms of opening hours; has good parking facilities); [X] (Q3: opening hours and accessibility [...] for cars); [X] (Q2: accessibility, closeness to the consumer; Q3: a delivery outlet should have parking possibilities, long opening hours; Q4: delivery outlets must have long opening hours, Q5: accessibility); [X] (Q2: easy consumer access; Q3: flexible opening hours; close proximity to consumer's homes); [X] (Q3: a delivery outlet [...] should be centrally located with good parking and access possibilities; it should also have good opening hours); [X] (Q2: how close the outlets are to our customers, Q3: accessibility is important; parking is only important in big cities, therefore not a big issue; Q4: accessible networks [of delivery outlets]; Q6: accessibility); [X] (Q3: opening hours and parking facilities); [X] (Q3: accessibility – easy to find – reasonably close to users in geographic terms; parking possibilities throughout the opening hours); [X] (Q3: centrally located in relation to the customers; easily accessible; parking possibilities; opening hours; Q4: extended opening hours; Q5: central location and long opening hours is essential).

³⁰⁵ [X] (Q3; economic stability is very important); [X] (Q2: it is important that the supplier has delivery points that are [...] financially secure; Q3: all criteria in question 3 regarding delivery outlets, i.e.[...] financial stability, are important); [X] (Q2: it is important that the delivery outlet [...] has economic stability which secure long-term operations); [X] (Q3: a delivery outlet should have [...] a stable location; Q4: delivery outlets must have [...] a stable location); [X] (Q3: a delivery outlet [...] should also [...] be economically stable to prevent that we have to change delivery outlet frequently due to bankruptcies etc.); [X] (Q3: Financial stability is [...] very important); [X] (Q3: must have solidity to take economic responsibility for damages, loss etc.; long-term operations; Q6: continuity – avoid frequent replacement of delivery outlets; economic solidity over time); [X] (Q1: the service supplier must have a solid economy; Q3: the agent must be economically solid and be well established in order to prevent frequent change of delivery outlet).

³⁰⁶ [X] (Q1: the service supplier must also have a payment solution equivalent to cash-on-delivery [which involves the delivery outlets]); [X] (Q3: the delivery outlet should provide the individual customer with a good service; sufficient knowledge about the logistic products; give sufficient priority to the service; Q5: the quality and capability to deliver); [X] (Q5: services of the alternative); [X] (Q1: high quality in the delivery network with staff with high quality and knowledge), [X] (Q2: it will be very important that the delivery outlets are of the same quality as the [ones] Norwegian Post is using today, Q4: we do not want places where the staff does not give good service); [X] (Q1: good commission agents; Q2: it is very important to choose the right agents and locations in order to get our customers to use another supplier than Norway Post; Q3: the premises must be appealing to our customers); [X] (Q4: important that the chain in question has a good reputation – stands for reliability; Q6: competence of staff; reliability and quality); [X] (Q3: the general impression one has of an operator (delivery outlet)).

³⁰⁷ [X] (Q4: retail types of outlets that we as consumers have a frequent and trustful relationship with; Q5: weekly); [X] (Q4: type of shops that are frequently visited by our customer); [X] (Q4: for us it is important that there are delivery outlets where one shops relatively frequently); [X] (Q4: in order to be suitable a delivery outlet must be a place that we visit often not only for the picking up of a parcel); [X] (Q2: located at a place the customer in any case visits regularly).

³⁰⁸ [X] (Q3: it is a great plus if this outlet in addition can provide a kind of service that gives the customer an advantage from visiting the outlet (e.g. buying food and picking up a parcel etc.).

sufficiently trustworthy or serious³⁰⁹ and have a good relationship to the parcel recipient.³¹⁰

313. Seven of the distance selling companies contacted by the Authority expressed a preference for grocery stores, kiosks and petrol stations or that other types of outlets would be less suitable.³¹¹ In addition to these seven respondents, [X] found it difficult to give a good answer but was in principle sceptical to the use of a kind of outlet that its customers were not familiar with.³¹²
314. Six companies stated that other types of outlets could be used.³¹³ [X] stated that the type of delivery outlet was of limited importance as long as certain qualitative selection criteria were fulfilled. It found that the following types of outlets could be used to deliver B-to-C parcels: sport shops, banks, railway stations, plumbers, hairdressers and flower shops. However, it also noted that it would be an advantage for the distributor to use delivery outlets organised in chains.³¹⁴ Banks and sport shops were mentioned by [X]. However, [X] found it important that a chain be

³⁰⁹ [X] (Q4: trusted as a temporary storing place for parcels; Q5: an outlet that can be trusted); [X] (emphasises in its reply to Q2, Q3 and Q6 that delivery outlets must be serious operators); [X] (Q2: we will prefer delivery outlets that appear serious and well known; Q3: the delivery outlet should have a well-known and serious profile); [X] (Q2: the more serious the delivery outlet, the better).

³¹⁰ [X] (Q3: the outlet [...] has or can have a natural/good relation to the receiver of the consignment); [X] (Q2: it is important that the supplier has delivery points that are customer friendly; Q4: customer friendly).

³¹¹ [X] (Q2: Preferably we would like delivery outlets to represent trust and to have a “recognition effect” for our customer; type petrol station and e.g. supermarket chains or kiosks in chains. Smaller local delivery outlets that are not part of a nation-wide chain with a well-known brand name would not be very relevant; Q4: there are very few types of delivery outlets other than kiosks, petrol stations etc. that can be relevant); [X] (Q3: chain affiliation – we are owned by Shell and NorgesGruppen, so for our owners it would have been problematic if delivery outlets e.g. should be COOP and Hydro Texaco; Q4: For us it is important that there are delivery outlets where one shops relatively frequently and which have a good geographic spread. In addition there should not be any conflict with our owners’ interests, cf. the preceding question. On this basis, we see few delivery outlets which are as well/better suited than kiosks, petrol stations and grocery stores. The only alternative is perhaps a clothes chain like H&M?); [X] (Q4: it is considered that the delivery outlets which currently are used (grocery stores, kiosks and petrol stations) are those which are most suitable); [X] (Q4: we are of the view that one should keep to grocery stores, convenience stores and petrol stations); [X] (Q4: we do not consider it very suitable to use specialised trade outlets as delivery outlets for B-to-C parcels; these [outlets] are often not located sufficiently close to potential customers to the same extent as shops, petrol stations and kiosks/convenience stores; in addition we do not consider specialised trade outlets as equally good at handling a large number of customers within a short time-span; we would therefore not have the necessary confidence in that our customers would receive a fast and efficient service); [X] (Q2: the type of delivery outlet will be of little importance; accessibility, closeness to the consumer and service will be decisive; Q4: delivery outlets must have long opening hours and a stable location; this makes other types of shops [than grocery stores, kiosks and petrol stations] less suitable); [X] (Q2: the type of delivery outlets as such plays no major role; Q4: we find it rather unlikely that more specialised shops could be effectively used for delivery of B-to-C parcels; this opinion is based on the belief that their location, frequency of consumer visits and other similar factors make them less attractive for this).

³¹² [X] (Q4: it is difficult to give a good answer; we do not have any experience in using other than the Post; we are in principle sceptical to use [a] kind of outlet that our customers are not familiar with.).

³¹³ [X], [X], [X], [X], [X] and [X].

³¹⁴ [X] (Q4: according to our knowledge Norway Post’s network consists of a very large number of different types of delivery outlets [...]; this indicates in itself that the type of delivery outlet is not very important; if the delivery outlet fulfils the requirements we refer to under questions 2 and 3, it will not in our view be decisive what type of delivery outlet that is chosen; probably there will be a very large number of delivery outlets that can be relevant; it is nevertheless reason to point out that the distribution probably will be simplified for the distributor if it takes place in delivery outlets organised in chains [...]; against this background we consider that e.g. clothes chains, chains of bookshops, chains of sport shops, chains of pharmacies, and all other retail chains could be used as delivery outlets for parcels);

involved that has a good reputation.³¹⁵ According to [X] any outlet could be used, but that did not seem realistic as a provider of parcel distribution services would need a vast and accessible network from few providers in order to be efficient. The bigger the chain, the more realistic the alternative would be.³¹⁶ [X] found that other delivery outlets could be used but nevertheless referred to certain qualitative criteria that outlets should fulfil (trusted as a temporary storing place for parcels, retail types of outlets that we as consumers have a frequent and trustful relationship to) and that grocery stores and petrol stations often would fulfil those criteria.³¹⁷ Provided that parcel delivery in the outlet could be made uniform as a recognisable area inside the shop, [X] considered that other types of shops could very clearly be an alternative. However, it qualified this statement in several ways. Firstly, it recognises that use of other types of outlets would require more focus on location and the chain's internal control. Secondly, under question two it believed that large grocery store, petrol station and kiosk chains were important. Thirdly, it questioned whether a clothes shop would wish to deliver parcels for a distance selling company selling clothes and whether the distance selling company would have confidence in the neutrality of the outlet's staff.³¹⁸ Finally, [X] found that all types of outlets which fulfilled a range of qualitative criteria could be used but emphasised that it was very important to choose the right agents and locations in order to get its customers to use another supplier than Norway Post.³¹⁹

315. When asked in question five whether they would consider switching part or all of their requirements for B-to-C services to a nationwide provider of B-to-C parcel services (if there was one) whose network of delivery outlets did not comprise any, or only a limited number of, grocery stores, kiosks and petrol stations, five distance selling companies answered that they would not consider switching.³²⁰

³¹⁵ [X] (Q2: [the types of delivery outlets are] not decisive as long as the following is arranged: secure storage and handling with a view to prevent physical damage, theft etc.; electronic receipt; COD [cash-on-delivery]; Q4: it is not decisive which other products and services a delivery outlet sells [...]; important that the chain in question has a good reputation – stands for reliability and quality – both from the view of sender and receiver).

³¹⁶ [X] (Q4: any retail outlet could do the job, but it doesn't seem realistic; to be efficient you need a vast and accessible networks from few providers; to have different contracts and IT-systems for each single outlet (when not a part of a chain) is not realistic; the bigger the chain, the more realistic; for me as a customer, it doesn't matter, as long as the parcel arrives at the right place at the right time, and that the accessibility is not altered much).

³¹⁷ [X] (Q4: other delivery outlets can be used, but the outlet must have a relation or it must be obvious that it can be trusted as a temporary storing place for parcels (trusted 3rd party); restaurants and similar [outlets] could hardly be such an outlet; there should be retail types of outlets that we as consumers have a frequent and trustful relationship to; grocery stores and petrol stations are often such outlets);

³¹⁸ [X] (Q2: the type of delivery outlet is important in the sense that this is often the only place the customer "is in contact with us"; here we believe that large grocery store, petrol station and kiosk chains are important; Q4: if parcel delivery in the outlet can be made uniform as a recognisable area inside the shop, other types of shops could of course very clearly be an alternative; we believe, however, that this to an even larger extent will require focus on the outlets location and the chain's internal control;

³¹⁹ [X] (Q2: the type of delivery outlet is not of great importance, with the exception of premises in which food smell is disturbing; in order to be chosen, the delivery outlet should fulfil the requirements [listed] under question 3; Q4: all type of delivery outlets which fulfil the criteria in question 3).

³²⁰ [X] (Q5: would not have switched to a supplier that did not have a network of this type); [X] (Q5: no we would not switch part of or our whole distribution to a supplier that did not comprise any supermarkets, kiosks or petrol stations); [X] (Q5: no; the reasoning is as under question 4 above); [X] (Q5: we would probably not choose a nationwide supplier if the delivery outlets consisted of other alternatives than those mentioned; we can hardly see that specialised trade outlets or other "special" agents would be relevant to try out); [X] (we would not consider switching on the basis of the criteria mentioned).

316. Nine companies indicated in affirmative terms that they would consider switching to such a provider of B-to-C parcel services whose network of delivery outlets did not comprise any, or only a limited number of, grocery stores, kiosks and petrol station.³²¹ However, all these respondents qualified their answer in important respects. Thus, [X], stated that it would theoretically consider switching, but that it could with difficulty imagine national solutions outside those types of delivery outlets.³²² [X] stated that such a solution did not seem realistic.³²³ [X] stated that they would consider switching if the service and the cost level met certain general requirements.³²⁴ [X] stated that they would always assess any alternative, but expressed that it clearly believed that the alternative supplier would have a harder time.³²⁵ [X] made reservations relating to the qualitative criteria delivery outlets should fulfil.³²⁶ [X] answered Question 5 in the affirmative on the condition that the quality of the outlets would be regarded as being of equal quality to the outlets of Norway Post and that price in that case would be decisive.³²⁷ [X] also answered Question 5 in the affirmative with a qualification.³²⁸ So did [X].³²⁹ [X] also replied to Question 5 in the affirmative on the condition that the alternative supplier could ensure as good or even better conditions with another network. Price and a range of qualitative factors were important to this respondent who also stated that the delivery network was one of the elements that would have an impact on the quality and capability to deliver.³³⁰
317. When asked in question 6 whether they would consider switching part or all of their requirements for B-to-C services to a nationwide provider of B-to-C parcel services whose network of delivery outlets were composed of independent retail outlets (as opposed to retail outlets belonging to a chain), [X] and [X] answered that they were

³²¹ [X] (Q5); [X] (Q5); [X] (Q5); [X] (Q5); [X] (Q5); [X] (Q5); [X] (Q5); [X] (Q5).

³²² [X] (Q5: theoretically it can be imagined that [X] AS would consider switching part or all of its requirements for B-to-C services to a nationwide supplier of B-to-C parcel services, but [X] has difficulties in seeing national solutions outside those delivery outlets that are mentioned in the question).

³²³ [X] (Q5: yes; please see answer 4; Q4: any retail outlet could do the job, but it doesn't seem realistic).

³²⁴ [X] (Q5: yes, under condition that cost and service level meet the general requirements [listed in the reply to question 2 and 3]; Q1: access to up-to-date national lists of postal addresses and a distribution network that covers large enough geographic area and/or economically sufficient volume of parcels to be delivered with reasonable service level (accessibility) for the consumers; Q2: the type of delivery outlets as such plays no major role; the distribution cost and easy consumer access are more important).

³²⁵ [X] (Q5: we will always consider all types of suppliers without any prejudiced opinions, [but] we probably believe that the total picture of price, reputation and the type of delivery outlets the providers are using would have an impact on the decision. We clearly believe from the other arguments in our reply that such a supplier would have a harder time [...])

³²⁶ [X] (Q5: yes – if the requirements mentions under the above questions are met).

³²⁷ [X] (Q5: yes; if quality of outlets will be regarded as of equal quality as to Post's current outlets, then the price will decide).

³²⁸ [X] (Q5: if these [delivery] outlets covered all places where we have customers and our owners would not object to it we would have considered it).

³²⁹ [X] (Q5: yes, we would, but [this is] of course dependent on accessibility, price and services of the alternative).

³³⁰ [X] (Q5: whether we would use another national B-to-C supplier would depend on an overall assessment of price, quality and capability to deliver, cf. question 1 above; the distribution network, including delivery outlets, would be one of the elements that would have an impact on the quality and capability to deliver; if the alternative supplier could ensure as good or even better conditions with another network, we would of course consider switching to this supplier regardless of which type of delivery outlets the supplier in question used).

unlikely to do so.³³¹ [X], [X] and [X] answered yes to the question in unequivocal terms.³³²

318. [X] indicated that being part of a well-known chain was an advantage and expressed doubts that, in practice, it was possible to build up a network with sufficient coverage without using outlets which are part of a well-known chain. The same company also stated that they preferred outlets which appeared “serious and well-known” and that smaller local outlets not being part of a chain were not very relevant.³³³ [X] indicated that switching could potentially be relevant, but that it would be an advantage if one or more well-known chains with a good reputation of national scope were used in addition to local solutions where the chain(s) did not have outlets.³³⁴ [X] referred to its reply to question five.³³⁵ [X] would consider switching provided the outlets in question could be regarded as serious outlets.³³⁶ According to [X] the prerequisite for using other suppliers than Norway Post was that these suppliers fulfilled the criteria it had listed its reply to question 3.³³⁷ Five respondents would consider switching provided that the delivery network fulfilled the qualitative criteria that they deemed important.³³⁸ [X] did not give a meaningful answer to this question.

³³¹ [X] (Q6: probably not because this would be inefficient); and [X] (Q6: we would not be likely to consider this unless the price of the alternative supplier was considerably lower the prices of Norway Post)

³³² [X] (Q6: yes); [X] (Q6: yes; chain or not is not crucial); [X] (Q6: yes).

³³³ [X] (Q6: we would regard it as an advantage if the delivery outlets were part of a well-known chain; we believe no supplier would manage to achieve a sufficiently breadth in its network by only basing it[s network] on local, independent outlets; thus, such a supplier will not be able to satisfy our needs in terms of number of delivery outlets; (Q2: we will prefer delivery outlets that appear serious and well known; [...] smaller local delivery outlets that are not part of a nationwide chain with a well-known brand name will be less relevant).

³³⁴ [X] (Q6: this could potentially be of interest, but [X] AS is of the view that it would help if the network of delivery outlets belonged to a chain or a few well-known chains with a good reputation of national scope, in addition to possible local solutions where the national chain does not have coverage);

³³⁵ See footnote 325 above.

³³⁶ [X] (Q6: Yes, as long as the outlets in question can be regarded as serious outlets).

³³⁷ [X] (Q6: We have used Privpak as an alternative to Norway Post since it entered the Norwegian market. The prerequisite for using others than Norway Post is that they fulfil the criteria listed under question 3 (centrally located in relation to the customers; easily accessible; parking possibilities; opening hours; sufficient space to store parcels; premises must be appealing to our customers; economically solid; well established)).

³³⁸ [X] (Q6: the same conditions as under question 5 apply); [X] (Q6: yes, as long as the outlets in question can be regarded as serious outlets); [X] (Q6: given that the B-to-C supplier and the delivery outlets fulfil the criteria we have described under question 1, 2 and 3, [X] would not have objections against using independent outlets. On the other hand, it is according to our view more costly and resource demanding for a supplier of B-to-C services to have agreements with a large number of independent outlets); [X] (Q6: yes, as already mentioned, as long as the parcel arrives at the right place at the right time, that the accessibility is not altered much, that I have traceability of parcels and no money refund problems); [X] (Q6: on the condition that the service provider ensures that all requirements are met; especially important that the following is ensured; continuity – avoid frequent replacement of delivery outlets; Competence of staff; Economic solidity over time; Reliability and quality).

II. LEGAL ASSESSMENT

11 Introduction

319. According to Article 54 EEA, any abuse by one or more undertakings of a dominant position within the territory covered by the EEA Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of the EEA Agreement in so far as it may affect trade between Contracting Parties.
320. According to Article 56(2) first sentence of the EEA Agreement, individual cases falling under Article 54 EEA shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. As will be explained below, the Authority considers that Norway Post has been dominant in Norway. The EFTA Surveillance Authority is thus competent to decide upon the present case.
321. Article 54 EEA is identical in substance to Article 102 of the Treaty on the Functioning of the European Union (TFEU). According to Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement the case law of the Court of Justice and the General Court of the European Union is therefore relevant for the interpretation of Article 54 EEA.³³⁹
322. It is a fundamental objective of the EEA Agreement to achieve and maintain uniform interpretation and application of those provisions of the EEA Agreement that correspond to provisions of the TFEU, and to arrive at equal treatment of individuals and economic operators as regards conditions of competition in the whole European Economic Area.³⁴⁰
323. In order to assess whether Norway Post has abused a dominant position within the meaning of Article 54 EEA the Authority will first define the relevant product and geographic market involved. Secondly, the Authority will assess whether Norway Post holds a dominant position on this market. Thirdly, it will consider whether Norway Post's behaviour constitutes an abuse within the meaning of Article 54 EEA. Finally, the effect on trade criterion will be assessed.
324. The period under review, which in this decision is also referred to as “the relevant period” or “the period at issue”, is the period between the beginning of 2000, when Norway Post started negotiating with retail groups with a view to establish its network of Post-in-Shops, until the time Norway Post had removed all exclusivity and preferences clauses in its agreements with NorgesGruppen/Shell, COOP and ICA during the course of 2006.³⁴¹

12 The relevant market

325. According to the Authority's Notice on the definition of the relevant market, the main purpose of market definition is to identify in a systematic way the competitive

³³⁹ See Case E-3/97 *Jan and Kristian Jøger AS* [1998] EFTA Ct. Rep. 1, at paragraph 19; and Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Ct. Rep. p.114, at paragraph 39.

³⁴⁰ Case E-8/00 *Landsorganisasjonen i Norge*, cited above, at paragraph 39.

³⁴¹ The exact duration of the infringement that the Authority considers that Norway Post has committed is dealt with in Section 16 below.

constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.³⁴²

326. A relevant product market comprises all those products and/or services which the consumer, by reason of the products' characteristics, their prices and their intended use regards as interchangeable or substitutable.³⁴³
327. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.³⁴⁴
328. When defining a relevant market, regard may be had both to demand substitution and supply substitution. However, from an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographic location of suppliers.³⁴⁵
329. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When supply side substitutability entails the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition.³⁴⁶

12.1 The relevant product market

330. The present case concerns the provision of B-to-C parcel services with over-the-counter delivery. These services are the starting point for the definition of the relevant product market.
331. B-to-C parcel services with over-the-counter delivery are provided by postal operators and suppliers of logistics services to distance selling companies. Distance selling companies demand B-to-C parcel services in order to deliver their products to final consumers who are their customers. The preferences of distance selling

³⁴² The EFTA Surveillance Authority's notice on the definition of the relevant market for the purposes of EEA competition law (OJ L 200/48 of 16 July 1998 and EEA Supplement to the OJ No 28, 16.7.1998, p. 3), paragraph 2.

³⁴³ Notice on the definition of the relevant market, cited above, paragraph 7.

³⁴⁴ Notice on the definition of the relevant market, cited above, paragraph 8.

³⁴⁵ Notice on the definition of the relevant market, cited above, paragraph 13.

³⁴⁶ Notice on the definition of the relevant market, cited above, paragraphs 20 and 23.

companies in relation to the purchasing of B-to-C parcel services are therefore influenced by the preferences of final consumers who are the ultimate recipients of B-to-C parcels.

332. In the following it is assessed whether the relevant product market in the present case should include the provision of B-to-C parcel services with home delivery, the provision of B-to-C parcels services with delivery at work, the provision of B-to-B parcels services or the provision of C-to-C parcel services.

12.1.1 Home delivery of B-to-C parcels

12.1.1.1 Assessment

333. B-to-C parcel services with over-the-counter delivery and B-to-C parcel services with home delivery are both services which are demanded by distance selling companies with a view to distributing their products to final consumers. The two services are, however, distinguished by the mode of delivery. This is an essential element of the service.
334. In the case of over-the-counter delivery a parcel can be picked up from a retail outlet, e.g. a grocery store, at any time during the opening hours of the store. In case of home delivery, the consumer must know when the parcel will be delivered and must make sure to be home when the parcel arrives. It is not possible for the service provider to predict with absolute certainty when a parcel will be delivered at the door of the recipient. The service provider must therefore block a certain amount of the time of the consumer during which the consumer must stay at home. In this respect there is a difference in the characteristics of the two services.
335. It can be inferred from the delivery of B-to-C parcels in Norway Post's Post-in-Shop network that most people do not mind picking up small and light parcels when they buy daily consumer goods at the grocery store. On the contrary, it appears that this is perceived to be an easy and efficient way of receiving parcels. However, it is likely that many people would feel differently about picking up large and heavy products such as TV sets or furniture in the same manner. This is reflected in the fact that the demand for B-to-C parcel services with over-the-counter delivery is concentrated around the lower weight bands,³⁴⁷ while the demand for home delivery is typically concentrated around the higher weight bands. The intended use of the two services is therefore to a large extent different.
336. There are therefore differences in the characteristics and intended use of the two services which are likely to reduce the extent to which they are regarded as substitutable or interchangeable by consumers and distance selling companies. However, a further assessment is needed of the extent to which home delivery services during the period at issue exerted an effective competitive constraint on the provision of over-the-counter delivery services.
337. When Norway Post introduced a new pricing system in 2003 for B-to-C parcels with over-the-counter delivery its strategy was to increase its prices significantly. Norway Post's internal reports show that it increased its prices for the B-to-C service with

³⁴⁷ See footnote 34 above.

- over-the-counter delivery in 2003 by almost 10% and that there would be room for price increases also in 2004.³⁴⁸
338. There is no information available to the Authority which indicates that distance selling companies have regarded home delivery services as substitutes to Norway Post's B-to-C service with over-the-counter delivery, let alone moved volumes from Norway Post's over-the-counter service to home delivery services in response to the price increases of Norway Post.
339. Home delivery of B-to-C parcels requires a transport infrastructure capable of delivering the parcels at each recipient's doorstep. In order to reach each recipient's home, a supplier would require vehicles to travel longer distances than when parcels are transported to delivery outlets for over-the-counter delivery. In the case of home delivery, normally only one parcel can be delivered per delivery vehicle stop ("low stop factor"). In the case of over-the-counter delivery, several parcels can be delivered to a retail outlet per stop ("high stop factor").³⁴⁹ The stop factor is an important cost driver for the service provider.
340. Since recipients are normally private consumers, home delivery must normally take place in the evenings and additional costs are incurred if the recipient is not home when delivery is supposed to take place.³⁵⁰ In the case of over-the-counter delivery, transportation to the delivery outlet can take place during normal working hours and is more predictable for the service provider than home delivery.
341. Thus, the difference in mode of delivery means that transport costs for home delivery are higher than for delivery over-the-counter. This leads to higher prices for home delivery services.
342. The price difference between the over-the-counter service and the home delivery service has been significant. For example, in 2005 and 2006 the price for Norway Post's home delivery service for parcels weighing between 1 and 5 kg was at least 50% higher than the price for over-the-counter delivery of the same parcel.³⁵¹
343. According to Tollpost's price list of December 2005 home delivery was offered as an additional service to its general cargo services ("*Tollpost stykkgoods*"). This home

³⁴⁸ See e.g. event # 289492, **TJO 56 5/7**, "*the effect of the volume calculation has been good with a price effect of 9.14% (incl. Aug)*" ("*effekten av volumberegning har vært bra med en priseffekt på 9,14% (tom aug)*"); **TJO 56 6/7**, "*Generally the marked has experienced a steady price increase in 2003. The price effect has been taken out on all customer groups*" ("*Generelt har markedet opplevd en jevn prisøkning i 2003. Priseffekten er tatt ut på alle kundegrupper*"); and **TJO 57 4/18** and **14/18**; Event # 289735, **TJO 104 1/2**; Event # 288099, **PAB 16 1/2**, regarding the adoption of new prices for 2004 where it is stated that: "*In the mail order market competition is beginning to increase somewhat, in particular from Privpak, but also from other large international operators which look at the possibilities in relation to internet shopping. It should anyhow be room for price increases above the inflation rate without loss of competitiveness*" ("*I postordremarkedet begynner konkurransen å tilta noe, spesielt fra Privpak, men også fra andre store internasjonale aktører som ser på mulighetene ift. netthandel. Det bør likevel være rom for å øke prisene utover inflasjon uten å tape konkurransekraft.*"); Event # 288129, **PAB 35 3/7**; Event # 289513, **COD 13 3/7**.

³⁴⁹ See Commission Decision in case COMP/35.141 DPAG, OJ 2001, L125/27, paragraph 29.

³⁵⁰ See event # 289736, **KBJ 55 11/35**.

³⁵¹ See the Annex to this Decision below.

delivery service was substantially more expensive than Norway Post's over-the-counter delivery service.³⁵²

344. Over-the-counter delivery has been the pre-dominant mode of delivery for B-to-C parcels in Norway to which consumers have been accustomed. Norway Post has been the leading provider of the B-to-C parcel delivery services but home delivery has only been a small fraction of its total volume of B-to-C parcels.³⁵³ Due to the significant difference in price between the two services, distance selling companies normally charge their customers, the final consumers, a higher price for home delivery.
345. Under these circumstances, it would have been commercially difficult, if not impossible, for individual distance selling companies to remove the cheapest mode of delivery and only offer the more expensive home delivery option, or to increase the fees that consumers were charged for over-the-counter delivery sufficiently to induce them to switch to home delivery. A distance selling company that would embark on such a strategy would make its products less competitive as compared to other distance selling companies who would not do the same. Distance selling companies were therefore not in a position where they could easily have replaced over-the-counter delivery services with home delivery services.
346. Moreover, Norway Post admits in the Reply to the SO that the network for home delivery at the time was not particularly well developed.³⁵⁴ That clearly reduced further the extent to which such delivery constituted an effective and immediate disciplinary force on Norway Post's provision of over-the-counter delivery services.
347. In any event, home delivery services and over-the-counter delivery services could only have been regarded substitutable or interchangeable if it had been possible to switch a considerable amount of parcels from over-the-counter delivery to home delivery in the short term. The available evidence shows that this was not a realistic scenario during the relevant period.
348. Thus, from a demand-side point of view, the two services were not interchangeable or substitutable during the period at issue to such a degree that home delivery services acted as an effective competitive constraint on B-to-C parcel services with over-the-counter delivery.

³⁵² See event # 498021 (Tollpost's price list December 2005) and event # 437352 (Norway Post's price lists for over-the counter delivery). A comparison of pages 4 to 6 and 20 of Tollpost's price list with the 2005 price list of Norway Post shows that Tollpost's home delivery service has been substantially higher priced than Norway Post's over-the-counter delivery service. Thus, Tollpost's additional fee for home delivery which was paid on top of the price for the general cargo service was 107 NOK. The lowest price for its general cargo service was 178 NOK (1 to 19 kg, local zone 100). In case the recipient would not be present at the time of delivery an additional fee of 238 NOK applied. This is to be compared to Norway Post price in 2005 for over-the-counter delivery in zone one for parcels weighing from 1 to 19 kg. This price was in the range between 55 NOK to 122 NOK.

³⁵³ See Section 5.3 above.

³⁵⁴ See Reply to the SO, page 88, referring to that one reason why distance selling companies did not move volumes from Norway Post's over-the-counter service to home delivery might be that there was no particularly well developed network for home delivery at the time. See also paragraph 48 above (internal Norway Post document obtained during the inspection referring to the low maturity of the home delivery market).

349. On the supply-side, the provision of B-to-C parcel services with over-the-counter delivery in outlets requires the use of a network different from that needed to deliver B-to-C parcels at the recipient's home.
350. Suppliers of B-to-C parcels with home delivery would need time and incur additional costs and risks in order to establish an over-the-counter delivery network. The difference in the infrastructure needed to provide the two services therefore means that suppliers of B-to-C parcels with home delivery were not in a position to provide over-the-counter delivery services in retail outlets with the required effectiveness and immediacy in the event of a small but permanent increase in the price of B-to-C parcels services with over-the-counter delivery (see paragraph 329 above).
351. Consequently, B-to-C parcel services with home delivery cannot therefore be included in the relevant product market based on considerations relating to supply-side substitutability.
352. It may finally be noted that Norway Post has viewed the home delivery service as a relatively expensive value added service targeted at a segment with a high willingness to pay.³⁵⁵ It also appears that Norway Post has not wished to make home delivery the standard part of its B-to-C parcel services due to the immaturity of the home delivery market.³⁵⁶ Thus, Norway Post has not regarded the two services as close substitutes. This is a further indication that the two services did not form part of the same relevant product market during the period at issue.

12.1.1.2 The arguments of Norway Post in the Reply to the SO

353. In the Reply to the SO, Norway Post maintains that the price increases referred to in paragraph 337 above were a result of a new pricing model based on volume and weight of the parcels, which is a standard pricing model in the business. Further, it maintains that its prices had to be adjusted in order to cover all relevant costs and a satisfactory margin and points out that it has not enjoyed supracompetitive margins on this service.³⁵⁷
354. Norway Post also contests the Authority's statement in the SO that there were no indications that distance selling companies moved volumes from Norway Post's over-the-counter service to home delivery as a reaction to the price increases (see paragraph 338 above). Even if that were the case, Norway Post continues, the reason could have been that the network for home delivery at the time was not particularly well developed. According to Norway Post, that does not mean that the services are not substitutable as it is possible that customers would have switched to such services if someone had established such a network.
355. As regards Norway Post's comments in relation to its price increases in 2003 and 2004, it must be noted that already the fact that Norway Post believed its prices for

³⁵⁵ See Section 5.1.2 above. Yet Norway Post's prices for the home delivery service have not always covered its costs. See event # 289492, **TJO 56 6/7**, where it is stated that the price of the home delivery service has been low as compared to the costs incurred and that Norway Post as a consequence lose money on this product ("*Prismessig er produktet priset lavt, i forhold til de kostnader vi har med produktet. Dette gjør at vi i dag taper penger på produktet*").

³⁵⁶ See Section 5.1.2 above.

³⁵⁷ Reply to the SO, page 88.

B-to-C parcel services with over-the-counter delivery could be increased indicates that it believed that there were no close substitutes to which its customers could switch. Therefore, Norway Post must have believed that distance selling companies would not be able to switch their demand to alternative services, at least not in the short term, to such an extent that the price increases would have been unprofitable. The fact that prices were increased in two consecutive years represents further evidence of the lack of substitutable services. These considerations and the fact that home delivery is a more costly service to produce, as explained above, the large volumes of parcels Norway Post distributed over-the-counter and the rather underdeveloped home delivery services at the time, show that home delivery did not constitute a sufficiently close substitute to over-the-counter delivery.

356. The reasons as to why Norway Post increased its prices, do not in the Authority's view, have any impact on the extent to which its over-the-counter delivery services were interchangeable with home delivery services, and Norway Post has not provided any explanation to the contrary. With regard to Norway Post's argument that it has not enjoyed supracompetitive margins, it is sufficient to note that the purpose of market definition is to identify those products that are effective substitutes at competitive prices. In a competitive market with suitable alternatives, it would normally be difficult to impose an adjustment of prices which led to price increases for all customer groups (see footnote 348 above). The Authority is not either aware of any internal Norway Post documents expressing any concern of a loss of customers to home delivery services in response to its price increases.
357. As regards the Authority's statement in paragraph 338 above (paragraph 320 of the SO) that there are no indications that distance selling companies moved volumes from Norway Post's over-the-counter delivery services to home delivery services as a reaction to the price increases, Norway Post has not submitted any evidence that would call into question the correctness of that statement. As the incumbent provider of these services, it must have had very good knowledge of the demand of these services and should have been the first to notice if its price increases led to a significant loss of sales. From the documentary evidence cited in footnote 348 above, it would appear that Norway Post had not experienced any switching from its over-the-counter services to competing home delivery services in 2003 and did not expect such switching to take place in 2004. Indeed, in its round of questionnaires in the autumn of 2007 the Authority asked distance selling companies whether they had received offers or concluded agreements with other distributors of B-to-C parcels than Norway Post since autumn 2003. There were no indications in the replies of distance selling companies that they had switched from Norway Post's over-the-counter services to providers of home delivery services.
358. Finally, the fact that home delivery services were not particularly well developed means that from a demand-side point of view home delivery services did not exert an effective competitive constraint on over-the-counter delivery services. Even if there was a potential for competitors of Norway Post to develop home delivery services further, such services would likely have remained more costly to provide with limited possibilities for distance selling companies to switch to such services (see the reasoning above). In any case, it would have taken time and substantial resources to develop such services. In this regard, it must be recalled that potential competition is not taken into account when defining relevant markets.³⁵⁸

³⁵⁸ Notice on the definition of the relevant market, cited above, paragraph 24.

12.1.1.3 Conclusion with regard to home delivery services

359. In the light of all the above, the Authority takes the view that during the relevant period the provision of home delivery services was not capable of constraining the market behaviour of suppliers of over-the-counter delivery services to any significant extent. The Authority therefore concludes that for the purpose of the present case the market for the provision of B-to-C parcel services with over-the-counter delivery is distinct from the market for the provision of B-to-C parcel services with home delivery.

12.1.2 B-to-B parcel delivery services

360. B-to-B parcel delivery services are used by business customers that require door-to-door delivery to other businesses within working hours. Such business customers are time sensitive³⁵⁹ and are prepared to pay a significantly higher price for such services.³⁶⁰ B-to-C parcel services with over-the-counter delivery, on the other hand, are used by distance selling companies which send large volumes of parcels to private individuals at lower prices. The two services therefore have different characteristics, prices and intended uses.

361. Due to the difference in price between the two services, which is likely to reflect the difference in the cost of providing these services, it would not be economical for distance selling companies to replace the B-to-C parcel services with over-the-counter delivery with B-to-B parcel services. The latter services were therefore not a competitive constraint on the provision of B-to-C parcel services.

362. Furthermore, it is unlikely that it was practically feasible for distance selling companies to switch to B-to-B parcel services. The providers of the latter services normally required that the recipient of the parcel be a business entity and not a private person. In other words, providers of B-to-B parcel services did not offer their services to distance selling companies with the view to distribute parcels that were destined to consumers. It follows that distance selling companies could not have switched to B-to-B parcel services in response to a price increase of B-to-C parcel services. No distance selling companies has indicated to the Authority that such switching was possible.

363. Thus, there are no indications that the two services were interchangeable or substitutable from the viewpoint of demand during the period at issue.

364. On the supply-side, suppliers of B-to-B parcel delivery services could not easily have supplied B-to-C services with over-the-counter delivery in response to a small but permanent increase in the price of the latter since B-to-B suppliers did not have the required network of delivery outlets (see also paragraph 350 above).

³⁵⁹ Norway Post's standard B-to-B parcel service, Business Parcel door-to-door, is delivered within 1-3 days (depending on distance) before 4 p.m. The express service, Business Parcel Express, is delivered before 9 a.m. the day following the sending or before 4 p.m. for more remote locations. The delivery time for Service Parcel is 1-5 days depending on distance.

³⁶⁰ For instance, in 2005 Norway Post's prices for the B-to-B door-to-door service for a parcel of one kg sent to zone 1 was 62 NOK according to Norway Post's pricing schedule compared to 55 NOK for a B-to-C parcel of the same weight sent to the same zone. For a parcel of 5 kg sent to zone 5 the price was 101 NOK compared to 78 NOK for a corresponding B-to-C parcel (Figures taken from the price lists published on Norway Post's web page). The B-to-B express service was even more expensive.

365. The Authority therefore concludes that the provision of B-to-B parcel services must be excluded from the relevant product market.

12.1.3 Delivery of B-to-C parcels at work

12.1.3.1 Assessment

366. When Tollpost started providing B-to-C parcel services with over-the-counter delivery in 2006 it also introduced delivery of B-to-C parcels at work as an additional option for consumers. Schenker AS, which is part of the same group of companies as Privpak, has also introduced such a service in Norway. It appears that Norway Post has chosen not to do so.

367. The Authority is not aware of any supplier that offered delivery of B-to-C parcels to consumers at work to any significant extent during the period under review. This is consistent with the information the Authority obtained from distance selling companies in its round of questionnaires in the autumn of 2007. Large distance selling companies such as Ellos and H&M still do not offer this as a mode of delivery on their websites.³⁶¹ Delivery at work was therefore not an actual competitive constraint on the provision of over-the-counter delivery services during the relevant period since distance selling companies could not switch to such services.

368. Moreover, delivery at work has a lower stop factor than over-the-counter delivery, i.e. there would be more stops and fewer parcels delivered per stop (see paragraph 339 above). This would translate into higher average costs per unit and therefore limit the capability of such a service to compete with the over-the-counter delivery service. As a result, even if delivery at work had been an available service during the relevant period, distance selling companies would likely have faced similar limitations on switching possibilities that were discussed with regard to home delivery (see in particular paragraph 345 above).

369. Further, delivery of B-to-C parcels at work can normally only be done with the employer's prior consent and presupposes a manned reception which can give a receipt for the delivery of the parcel.³⁶² This indicates that delivery of B-to-C parcels at work, in any event, could not have been an alternative to over-the-counter delivery in all circumstances.

12.1.3.2 The arguments of Norway Post in the Reply to the SO

370. In its Reply to the SO, Norway Post argues that delivery of B-to-C parcels at work should be included in the relevant market and that the Authority's arguments in this respect are not sufficiently substantiated or documented. According to Norway Post, the costs of introducing delivery at work are small, as parcels would be part of the B-to-B stream of parcels. Further, Norway Post argues that customers can easily have their parcels delivered at work by choosing their employer's address as the place of delivery when ordering products from distance selling companies and cannot see why customers would need prior permission from their employer.

³⁶¹ See <http://www.ellos.no/> and <http://shop.hm.com/no/?action=viewhome>. Notably, Ellos offers delivery in outlets close to the work place but not delivery at work.

³⁶² See event # 498030, Schenker's product brochure, page 8.

371. In response to these arguments, it must first be noted that Norway Post ignores the fact that it is not the current market situation that must be assessed but the market situation during the period at issue. The question is whether delivery at work constituted an effective and immediate disciplinary force on Norway Post's provision of over-the-counter delivery services during that period.
372. As noted above, to the Authority's knowledge, no supplier of B-to-C parcel delivery services offered delivery at work during the period at issue to any significant extent. Hence, during the relevant period, substitution at the demand side was simply not possible. Norway Post has not submitted any information that contradicts that finding.
373. With regard to the possibility of providing B-to-C parcel distribution with delivery at work as part of the stream of B-to-B parcels, the considerations in paragraph 361 above apply. Since B-to-B services generally were priced higher than B-to-C services, it remains unexplained how this possibility could have exerted any appreciable competitive constraints on the provision of over-the-counter delivery services during the relevant period. It is further recalled that on the supply-side of the market only supply-side substitution and not the mere potential for competition can be taken into account at the stage of market definition.³⁶³
374. For the sake of completeness, the argument that customers can easily have their parcels delivered at work by choosing their employer's address as the place of delivery, presupposes that distance selling companies offer delivery at work as a separate delivery option to consumers. Since that generally was not the case during the relevant period, consumers could not choose this mode of delivery.
375. Further, the need to obtain prior permission from the employer in order to receive parcels at work seems obvious. Tollpost and Schenker, as opposed to Norway Post, do provide this service today. It is apparent that both suppliers are of a different opinion than Norway Post in this regard.³⁶⁴ Moreover, Norway Post does not give any reasons why it considers that a prior permission would not be required.

12.1.3.3 Conclusion with regard to delivery at work

376. Against this background, the Authority concludes that delivery of B-to-C parcels at work cannot be included in the relevant product market in the present case.

12.1.4 C-to-C parcels delivery services

377. Norway Post provides C-to-C parcel delivery services as part of its universal service obligations (see footnote 6 above). This service requires that the customer hands in its parcel over a counter in a post office or post-in-shop. The customer is normally a private person who hands in a very low number of parcels each time. In contrast, B-

³⁶³ See paragraph 329 above.

³⁶⁴ See event # 498030, Schenker's product brochure, page 8 and Tollpost's website (<http://www.tollpost.no/6359#>) where it is stated that: "We recommend that recipients who wish to receive goods at work obtain approval from their employer in advance" ("Vi anbefaler at mottakere som ønsker varer levert på jobben, får godkjenning av arbeidsgiver på forhånd").

to-C parcels are normally transported in large volumes directly from distance selling companies to terminals of suppliers of the B-to-C parcel services.³⁶⁵

378. The C-to-C service is more costly to produce than B-to-C services due to the additional cost incurred for the collection of parcels at post offices or Post-in-Shops and the transport to terminals. The C-to-C service is not intended for distance selling companies and would in any event be a much more expensive alternative to the B-to-C service with over-the-counter delivery.
379. These differences in characteristics, price and intended use mean that for distance selling companies, C-to-C parcel delivery was not a substitute to B-to-C parcel services with over-the-counter delivery during the period at issue. These two services therefore belong in two distinct markets.³⁶⁶

12.1.5 Parcel delivery through automats

380. Norway Post argues that the technology for parcel delivery through automats has existed since 2001, is used in other countries by DHL, Austria Post, Denmark Post and Itella and represents a cost efficient mode of delivery.
381. The mere fact that automats for the delivery of B-to-C parcels have existed since 2001, if correct, does not mean that they have represented a competitive constraint on the provision of over-the-counter delivery services. There is no information in Norway Post's Reply to the SO, or on the Authority's file, which indicates that this has been the case. On the contrary, it follows from the Reply to the SO that Norway Post only decided to acquire automats in 2007 and had 19 automats in Norway and nine in Sweden at the end of 2008.³⁶⁷ No supplier offered this mode of delivery to distance selling companies during the relevant period. While the use of automats potentially could have been part of an entry strategy with all the risks and investments such a strategy would entail, this mode of delivery did not constitute an effective and immediate disciplinary force on the provision of over-the-counter delivery services during the relevant period.
382. Parcel delivery through automats cannot therefore be included in the relevant product market in the present case.

12.1.6 Conclusion on the relevant product market

383. The Authority concludes that during the period at issue the market for B-to-C parcels services with over-the-counter delivery was distinct from B-to-C parcel services with home delivery or delivery at work, B-to-B parcel delivery services and C-to-C parcel delivery services.
384. Consequently, for the purpose of the present case the Authority concludes that the market for the provision of B-to-C parcel services with over-the-counter delivery constitute a separate relevant product market.

³⁶⁵ See paragraph 41 above.

³⁶⁶ See Commission Decision in case COMP/35.141 *DPAG*, cited in footnote 349 above, paragraph 26.

³⁶⁷ See Sections 4.4.3 and 13.3 of Norway Post's the Reply to the SO.

12.2 The relevant geographic market

385. The conditions of competition in the market for the domestic provision of B-to-C parcel services with over-the-counter delivery in outlets in Norway were to a large extent homogenous during the period at issue.³⁶⁸ It is sufficient to note in this respect that Norway Post was the incumbent supplier with a leading position throughout Norway, that delivery networks were built along national lines and that distance selling companies required delivery of their parcels all over Norway.
386. In response to a price increase for the B-to-C parcel services with over-the-counter delivery in Norway, distance selling companies could not switch to service providers elsewhere as their parcels had to be delivered to Norwegian recipients.
387. For providers of B-to-C parcel services in neighbouring EEA countries, it would take time to set up a delivery network in Norway and entry could not take place without incurring significant costs and risks. These providers could not therefore enter the Norwegian market with the required effectiveness and immediacy (see paragraph 329 above).
388. For these reasons, the relevant geographical market does not extend beyond the boundaries of Norway.
389. The Authority therefore concludes that the geographical scope of the market for B-to-C parcels services with over-the-counter delivery is Norway.

12.3 Why it is not necessary to define a secondary market in the present case

390. Norway Post maintains that it is wrong of the Authority not to define explicitly a secondary market (the market for outlets/infrastructure). According to Norway Post, the Authority indirectly limits the secondary market to national chains of grocery stores, kiosks and petrol stations. Norway Post maintains that this is incorrect. It argues that several alternative outlets exist and that the assessment of these alternatives should have been made within the context of the market definition. In Norway Post's view, the secondary market might consist of different local markets, and this might influence the assessment of the effects of the exclusivity clauses.
391. According to established case law the definition of a relevant market is a necessary step in the assessment of dominance.³⁶⁹ The relevant market defined above is the market in which the Authority considers that Norway Post has been in a dominant position.
392. The Authority does not argue that Norway Post has been dominant in any secondary market. Nor is it necessary for the analysis in the present case to assess the extent to which suppliers in any possible secondary market have been in a position in which they could have exercised market power or conversely have faced competitive constraints from other suppliers.

³⁶⁸ Notice on the definition of the relevant market, cited above, paragraph 8.

³⁶⁹ See e.g. Case T-321/05 *AstraZeneca v Commission*, not yet reported, paragraph 30; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 91, confirmed on appeal in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331; Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 10.

393. By way of example, in a well-known case like *Van den Bergh Foods*³⁷⁰ the abusive conduct related to the dominant firm's provision of freezer cabinets to retail outlets and the effect of this conduct in the impulse ice-cream market. While the impulse ice-cream market was defined in that case, no market for the provision of freezer cabinets needed to be defined. The main issue in that case was whether the conduct of the dominant firm made it more difficult for other suppliers of impulse ice-cream to enter the market. In this respects, the situation in the present case is comparable to the situation in *Van den Bergh Foods*.
394. An issue that is relevant to assess in the present case is the alternatives that existed for new entrants with Norway Post's conduct in place as compared to the alternatives that would have existed in absence of that conduct. The relevant question is thus the extent to which Norway Post's conduct acted as an additional barrier to entry in the relevant market in which Norway Post held a dominant position. That issue, which does not relate to how a secondary market should be defined but whether the conduct of Norway Post must be regarded as abusive, is assessed in Section 14 below.
395. On the basis of the above, it is unnecessary to define any secondary market in the present case.
396. In addition, if one were to define a secondary market, it is implausible for reasons set out below that new entrants, if they could have had access to grocery store, kiosk and petrol station chains at competitive prices, would have switched to other distribution channels in the event of a small, but significant non-transitory increase in relative prices.³⁷¹ Moreover, only suppliers that did offer the service or were likely to do so with the necessary effectiveness and immediacy in response to a price increase could have been included in a relevant secondary market. This indicates that a relevant secondary market, in any event, would have had to be defined narrowly and that the assessment of the alternatives that existed for new entrants with Norway Post's conduct in place would have centred on the alternatives which existed outside that market.

13 Dominance

397. Article 54 EEA prohibits any abuse by one or more undertakings of a dominant position.
398. Norway Post is an undertaking within the meaning of Article 54 EEA.
399. A dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.³⁷²

³⁷⁰ Case T-65/98 *Van den Bergh Foods v Commission*, [2003] ECR II-4653, confirmed on appeal in Case C-552/03 P *Unilever Bestfoods v Commission*, [2006] ECR I-9091.

³⁷¹ See in particular Section 14.3 below.

³⁷² Case 27/76 *United Brands v Commission*, cited in footnote 369 above, paragraph 65; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38.

400. Such a position is consistent with some degree of competition, but it enables the undertaking in question at least to have an appreciable influence on the conditions under which that competition will develop.³⁷³
401. Very high market shares are, in themselves, and save in exceptional circumstances, evidence that a firm is dominant.³⁷⁴ That is the situation where there is a market share over 50%.³⁷⁵ The ratio between the market shares held by the undertaking concerned and that of its nearest rivals is a highly significant indicator of dominance.³⁷⁶

13.1 The dominant position of Norway Post in the market for the provision of B-to-C parcel services with over-the-counter delivery

13.1.1 The market shares of Norway Post and its competitors

402. Since the launch of Service Parcel in 1997, Norway Post has been the leading provider of B-to-C parcel services with over-the-counter delivery in Norway and has faced very little competition.
403. Privpak was, until Tollpost's entry on the market, Norway Post's only challenger. No distance selling companies have mentioned any other competitors which provided B-to-C parcel services with over-the-counter delivery prior to autumn 2006.
404. Tollpost decided to enter the market in autumn 2005 but became operative only in autumn 2006 and on a very small scale. The Authority therefore considers that there were only two players on the relevant market for B-to-C parcel services with over-the-counter delivery during the relevant period: Norway Post and Privpak.³⁷⁷
405. According to the data which has been obtained from Norway Post and Privpak,³⁷⁸ market shares based on turnover were as follows:

Table 10: Market shares based on turnover

³⁷³ Case 85/76 *Hoffman-La Roche v Commission*, cited in footnote 372 above, paragraph 39.

³⁷⁴ Case 85/76 *Hoffmann-La-Roche v Commission*, cited in footnote 372 above, where market shares ranged from 75% to approximately 87%; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* [1994] ECR-II 755, paragraph 109.

³⁷⁵ Case 62/86, *AKZO v Commission* [1991] ECR I-3359, paragraph 60.

³⁷⁶ Case T-219/99, *British Airways v Commission*, cited in footnote 369 above, paragraph 210.

³⁷⁷ In the Reply to the SO, Norway Post refers to an ECON report submitted to the Authority by Norway Post on 23 June 2003 (event # 296227). Norway Post asserts that according to this report Norway Post's market share was 64% and the market shares of other players were as follows: Tollpost 1.9%, Linjegods (now Schenker) 1.5%, others 16% and own transport 14.6%. These figures only appear in a footnote of the report and are merely asserted without any further substantiation or explanation. The market definition on the basis of which these market shares are calculated is not discussed but only assumed. The MMI data on which it is alleged that these calculations are based have never been submitted to the Authority. Moreover, these figures are contrary to Norway Post own figures which are said to be based on the same MMI data (90%-92% according to Section 14.1 in the Reply to the SO and 90%-94% in previous submissions including both over-the-counter delivery and home delivery, see paragraph 61 above). The market share figures in the ECON report referred to by Norway Post cannot therefore be given any weight.

³⁷⁸ See Sections 5.3 and 7.3 above.

Turnover MNOK	2001	2002	2003	2004	2005	2006
Norway Post	419.7	507.2	550.6	641.9	674.1	739.2
Privpak	0.4	2.65	7.2	9.4	11.5	14.7
Total turnover	420.0	509.8	577.8	651.3	685.6	759.9
Market shares						
Norway Post	99.9%	99.5%	98.8%	98.6%	98.3%	98.1%
Privpak	0.1%	0.5%	1.2%	1.4%	1.7%	1.9%

406. Market shares based on volume were as follows:³⁷⁹

Table 11: Market shares based on volume

Volume	2001	2002	2003	2004	2005	2006
Norway Post	7914202	7916540	8107382	8958322	9269000	9264621
Privpak	9700	53000	141900	176183	199482	251436
Total volume	7923902	7969540	8249282	9134505	9468482	9516057
Market shares						
Norway Post	99.9%	99.3%	98.3%	98.1%	97.9%	97.4%
Privpak	0.1%	0.7%	1.7%	1.9%	2.1%	2.6%

407. Regardless of whether calculated on the basis of turnover or volume, the market share of Norway Post remained above or close to 98% throughout the relevant period. Based on volume Norway Post's market share in 2006 was down slightly to 97.4%. Privpak's share of the market remained very low: below 2% measured in terms of turnover and below 3% measured in terms of volume.

408. A number of the distance selling companies have confirmed that there were no alternative suppliers to Norway Post capable of distributing their entire volume of B-to-C parcels in Norway.³⁸⁰

409. The absence of any large competitors is also confirmed by documents collected during the inspection at Norway Post's premises. In an internal document from September 2003, it is stated:

*"We do not have any large competitors with complete coverage of mainland Norway, but we see that for instance Privpak is establishing itself in the larger cities. They compete on price in our local regions."*³⁸¹

410. Another internal document states:

³⁷⁹ See Sections 5.3 and 7.3 above.

³⁸⁰ See in particular replies to the Authority's requests for information of July 2003 from J. W. Cappelen (event # 94130), Spar Kjøp (event # 94252), Trumpf (event # 92545), Reader's Digest (event # 92917), Hilt & Hansen (event # 213531), N.W. Dam (event # 93670), LR International (event # 94071), Homebox (event # 94096), H&M (event # 93871) and De Norske Bokklubbene (event # 93838).

³⁸¹ See event # 289736, **KBJ 61 3/6** and **KBJ 62 6/8**, "Vi har ingen store konkurrenter med full dekning av fastlandsnorge, men vi ser at f. eks Privpak etablerer seg i de større byene. De konkurrer på pris i våre lokalområder."

“Little competition. We are the only operator who reaches everybody in the entire Norway. But the customers are constantly searching for other alternatives in order to be able to put pressure on price. There are today some distance selling companies which offer an alternative to Norway Post (H&M, Privpak).”³⁸²

411. The market share of Norway Post thus remained exceptionally high and stable over a long period of time despite Privpak’s entry on the market as early as 2000/2001. This means that Norway Post hardly faced any competition at all from actual competitors during the period under review. Norway Post’s position on the market for the provision of B-to-C parcel services with-over-the counter delivery was close to a *de facto* monopoly.³⁸³
412. Such high market shares in the relevant market are, in themselves, sufficient for a finding of dominance. However, the Authority has also investigated additional elements that support the finding that Norway Post was dominant on the relevant market.

13.1.2 Barriers to entry and expansion

13.1.2.1 Assessment of barriers to entry and expansion

413. Potential suppliers on the market for the provision of B-to-C parcel services with over-the-counter delivery have encountered a number of barriers to entry and expansion which have diminished the attractiveness of entry and retarded or prevented their arrival on the market.
414. A potential supplier on the relevant market must have access to infrastructure in Norway for collecting, sorting and transporting parcels. Establishing such infrastructure requires significant investments entailing high fixed costs which will be difficult to recover in the short term.³⁸⁴
415. In the Authority’s view, a new entrant could not have entered the market profitably by establishing itself the infrastructure required with a view only to provide B-to-C parcel services. The reason for this is the economies of scope achieved by providing B-to-C parcel services on an already existing infrastructure for the provision of B-to-B parcel services and the resulting cost advantage that for example Norway Post has been able to realise.

³⁸² See event # 289736, **KBJ 73 2/3**, “Liten konkurranse. Vi er den eneste operatør som når alle i hele Norge. Men kundene søker hele tiden andre alternativer for å kunne presse på pris. Det finnes per i dag noen postordrefirmaer som tilbyr et alternativ til Posten (H&M, Privpak).”

³⁸³ Norway Post’s market position would not have been much different if B-to-C parcel services with home delivery and B-to-C parcels services with delivery at work had been included in the relevant market. Firstly, these services have played a very limited role during the period under review and Norway Post would have had a market share of at least 90% (see paragraph 61). Secondly, if competitors of Norway Post merely had offered home delivery and delivery at work they would have remained fringe players without the ability to challenge Norway Post’s position in the over-the-counter delivery business, the pre-dominant and most cost effective mode of delivery. Thus, whether or not to include B-to-C parcel services with home delivery and B-to-C parcel services with delivery at work in the relevant market is immaterial for the finding of dominance.

³⁸⁴ See for instance Commission Decision in case COMP/35.141 *DPAG*, cited in footnote 349 above, paragraph 32, second indent.

416. Thus, the undertakings which could potentially have entered the relevant market and competed with Norway Post were undertakings which already provided B-to-B parcel services in Norway or which were able to obtain access to the infrastructure of such service providers. This limited the number of potential new entrants.³⁸⁵
417. The relevant market is also characterised by significant economies of scale, which means that average costs decrease as units of output increase over a certain range of production. Norway Post has realised scale economies in the picking up, sorting and transport of B-to-C parcels. In addition to the scale economies in the transport between terminals, there are scale economies in the transportation of B-to-C parcels from terminals to delivery outlets.³⁸⁶
418. The more powerful scale economies are, the more likely it is that entrants would have to enter on a large scale to have any chance of being competitive. This also generally entails that entry will be less attractive as the cost of entry and the exposure to risk increases. Privpak and Tollpost have both estimated that they would need to distribute approximately 1 million parcels each in order to operate profitably on the Norwegian market.³⁸⁷
419. Furthermore, investments in training and advertising and losses experienced during the start-up phase or losses from operating at inefficiently low initial output levels, can be considered sunk costs for a potential rival, as they are costs that cannot be recovered once they have been incurred. Sunk costs raise the risks associated with entry.
420. As the incumbent postal operator with a statutory monopoly for the provision of letter services, Norway Post has, in addition to economies of scale and scope, enjoyed a number of other advantages over its competitors which has strengthened its market position. The well-developed network of post offices, branch post offices, Post-in-Shops and postmen has represented one of Norway Post's main competitive advantages. It has thus had the largest network of delivery outlets and been able to reach all citizens in Norway.³⁸⁸
421. In order to be in a position to compete effectively with Norway Post, a new entrant therefore needed a competitive delivery network with sufficient coverage. A sufficient geographical coverage and number of delivery outlets are directly linked to achieving the necessary business volume and the exploitation of economies of scale. Also, the greater the coverage, the more attractive a delivery system will be. A supplier of B-to-C parcel services with over-the-counter delivery must be an attractive alternative not only for the distance selling companies, but also for the end-consumers in order to be of interest.

³⁸⁵ One of the reasons why Privpak was able to enter the Norwegian market at all was that it could use part of the infrastructure that Linjegods (later Schenker AS) used for the provision of B-to-B parcel services for the provision of its B-to-C parcel services.

³⁸⁶ The more parcels that can be delivered per stop reduces the cost per unit incurred for transportation from terminal to delivery outlet, see paragraph 339 above.

³⁸⁷ See paragraphs 249 and 308 above.

³⁸⁸ See event # 289736 **KBJ 55 9/35**: “Norway Post has a very extensive network of post offices and postmen which makes our accessibility unique. We reach everybody (contrary to our competitors!)” (“Posten har et meget utstrakt nettverk av postkontorer samt landpostbud som gjør tilgjengeligheten vår unik. Vi når alle (i motsetning til våre konkurrenter)!”).

422. The longer it takes to achieve a profitable volume of business, the less attractive entry will be. To enable a new entrant to compete effectively in the market it is therefore of importance to establish a competitive delivery network in a relatively short time span. The experience of Privpak has shown that without an attractive delivery network with sufficient coverage it is not possible to win significant volumes of business from distance selling companies.
423. Norway Post provides a wide range of postal and logistics services. This allows it to provide a one-stop shop solution for customers preferring to deal with only one supplier of such services. Thus, distance selling companies use Norway Post's letter services, B-to-B parcel services, direct mail services for bulk mailings and so on. In addition, Norway Post's letter services are used by distance selling companies with small parcels such as online bookstores and book-clubs, since this service includes parcels up to 2 kg ("brevpakke" or "dagligbrev").
424. There is a wide range of services which are provided in Post-in-Shops. This enables Norway Post to offer the retail outlets a much higher total remuneration than new entrants. It also generates more additional traffic in retail outlets than the parcel delivery concepts of Norway Post's competitors. This translates into a significantly higher potential for generating extra sales for the shop owner compared to competing parcel distribution concepts. For retailers it was also more attractive to co-operate with the well-known Norway Post with a large volume of business than less known providers of B-to-C parcel services which were in the start-up phase and only had a limited business volume. These factors gave Norway Post competitive advantages over its competitors with regard to the recruiting of retail groups and outlets for the delivery of B-to-C parcels.
425. As the incumbent operator, Norway Post also enjoyed a very strong brand name and a solid reputation which is likely to have enhanced customer loyalty. In order to enter or expand on the market, competitors needed to overcome customer loyalty by offering better prices and provide services of a high quality.

13.1.2.2 Why Norway Post's establishment of the Post-in-Shop network did not facilitate new entry

426. Norway Post argues that it took the risks associated with the establishment of a new form of distribution for B-to-C parcels, and thereby facilitated entry to the market by competitors at substantially lower risk. However, it has not provided any detailed reasoning or evidence to show why this was the case.³⁸⁹ This argument is nevertheless assessed in some detail below for the sake of completeness.

³⁸⁹ Reply to SO, page 90. In submissions prior to the SO Norway Post has made similar arguments. See event # 95585 Reply from Norway Post dated 23 June 2003, page 2 ("It is the opinion of Norway Post that the possibilities to penetrate the market have increased due to the fact that Norway Post's establishment of [Post-in-Shops] in various outlets has altered the consumer's attitude towards how postal products and services may be offered. Thus, an establishment of a postal sales point by a competitor of Norway Post in an (retail) outlet will be seen as more interchangeable today than some years ago and therefore have a much higher chance of success. It is therefore the opinion of Norway Post that the agreements with the large grocery retail groups promote competition") and pages 17-18 ("The fact that Norway Post has developed [Post-in-Shops], has legitimated the idea that parcel services can be rendered through various kinds of outlets (and not only post offices). This has again contributed to a reduction of the entry barriers (as the costs connected to the establishment of such postal services are lower than the establishment of traditional post offices) and thus paved the way for new market entry."); and event # 390809, page 5 ("...the Original Agreements, which covered a limited part of the relevant distribution points, prepared the way for increased

427. The Authority accepts that there were some risks involved when Norway Post established its Post-in-Shop network. These risks, however, related mainly to the transition of its business volume from the old post office network to the new network. Hence, the need for fast, effective and focused implementation of the new network has been emphasised by Norway Post (See the Reply to the SO, pages 20-21 and 32). These risks would have existed irrespective of whether a competing supplier of B-to-C parcel services had already established a distribution network in grocery stores, kiosks or petrol station chains.
428. It is true that successful new entry would depend on the acceptance by retail groups, distance selling companies and consumers of the delivery network of the new entrant (see Section 4 above). When assessing whether the establishment of the Post-in-Shop network facilitated new entry, however, the situation with that network in place must be compared to the counterfactual situation if Norway Post had maintained its old distribution network. In that regard, it must be emphasised that the old network of Norway Post was inefficient and costly to operate. In the counterfactual situation, competing suppliers of Norway Post could have established a distribution network in retail outlets that was more accessible to consumers and less costly to operate than the distribution network of Norway Post. This would have represented an obvious competitive advantage for new entrants all else being equal. In other words, Norway Post became more efficient through the establishment of the Post-in-Shop network. The improvement of the efficiency of an incumbent is likely to deter entry, not to facilitate entry.
429. With regard to the outlets of NorgesGruppen/Shell, which were covered by the group exclusivity, the establishment of the Post-in-Shop network could not facilitate new entry as the exclusivity prevented competitors from accessing all the outlets in the retail networks of NorgesGruppen/Shell. As will be argued in more detail below, the established business relationship between COOP and ICA, on the one hand, and Norway Post, on the other, Norway Post's use of outlet exclusivity in relation to COOP and ICA and its re-negotiation of its Post-in-Shop agreements were likely to make it more difficult for new entrants to conclude distribution agreements with COOP and ICA that would allow a large number of delivery outlets to be established in their chains.
430. The fact that Norway Post had established the Post-in-Shop network gave other retail groups very little relevant information when assessing the viability of the business concept of a competing distributor of B-to-C parcels. In relation to retail groups that did not have any experience with the Post-in-Shop concept, it is therefore unlikely that the establishment of Post-in-Shop network made it any easier for competing suppliers to conclude distribution agreements for B-to-C parcels.
431. Thus, there is no reason to believe that the establishment of the Post-in-Shop network put competing B-to-C parcel delivery concepts in a more positive position from the viewpoint of retail groups than what would otherwise have been the case.

competition concerning postal distribution. The [Post-in-Shops] network has introduced a new kind of distribution of i.a. mail order parcels to the consumers. Consequently the consumers' attitudes with regard to which kinds of postal distribution that are considered to be interchangeable have changed. Whereas the consumers previously have been used to postal offices as the usual delivery and reception point for parcels and other postal products and services, the consumers are now accustomed to deliver or collect parcels in various kinds of outlets").

432. With regard to distance selling companies, the competitive advantages of new entrants in the counterfactual situation would have made it easier to convince distance selling companies to use the services of new entrants than what was the case with the Post-in-Shop network in place. Distance selling companies would have had clear benefits from using a competing distributor with a delivery service more accessible to consumers and, presumably, lower prices as distribution would have been more efficient than distribution through the old post office network of Norway Post.
433. It is not clear either why it would be easier for new entrants to convince consumers to accept their services with the Post-in-Shop network in place. Norway Post has not explained why this would be the case. When ordering a product from a distance selling company the consumer is told where it can pick up the parcel. When the parcel has arrived at the delivery outlet the consumer is informed of the arrival and that the parcel can be picked up within a specified time period. The place of delivery must be communicated to the consumer irrespective of whether the delivery outlet is a post office or a retail outlet. Provided that delivery took place in well-known retail outlets that were easy to find, it would not appear difficult to convince consumers to use a more accessible delivery service than the services of Norway Post which they were using prior to entry.
434. In the light of the above, it is unlikely that the Post-in-Shop network created any advantages for new entrants. Norway Post's argument must therefore be dismissed.

13.1.2.3 The possibility for competitors of using Norway Post's distribution network in areas their own networks did not have coverage

435. Norway Post argues that the Authority has failed to take into consideration that a new entrant could use the infrastructure of Norway Post in parts of Norway and refers to the ECON report in this regard. According to Norway Post, this has a bearing on the possibilities of concluding agreements with distance selling companies and retail groups, is of central importance for the case and a decisive flaw in the Authority's SO.³⁹⁰
436. In the ECON report it is asserted that Norway Post is obliged to distribute parcels for its competitors, that in theory a new competitor could therefore have offered nationwide distribution of B-to-C parcels without a single delivery outlet and with a single truck (because it could have used Norway Post's network) and that a new entrant could therefore offer a nationwide service with relatively limited investments.³⁹¹
437. In the Authority's view, this argument is misconceived already for the simple reason that competitors wished to establish their own distribution networks in competition with Norway Post, not to become Norway Post's customers. Evidently, a dominant firm cannot avoid liability for a barrier to entry that it has created itself by proposing that new entrants could become its customers.

³⁹⁰ See Reply to the SO, pages 91-92.

³⁹¹ ECON Report, page 16.

438. Moreover, the statement by ECON that Norway Post is obliged to distribute parcels for its competitors is based on an erroneous understanding of the law. Firstly, Norway Post's B-to-C parcel distribution services were not part of Norway Post's universal service obligations.³⁹² Secondly, under relevant EU and EEA case law Norway Post would only be obliged to supply its competitors in exceptional circumstances.³⁹³ It would not be obliged to do so in areas where it would be economically feasible for a new entrant to establish its own distribution network.³⁹⁴
439. Moreover, information submitted by Tollpost in August 2006 indicates that it was far from straight-forward for Tollpost to conclude a distribution agreement with Norway Post. Documents submitted by Tollpost show that Norway Post in October 2005 communicated to Tollpost that no agreement could be concluded because Tollpost was a "concrete competitor" of Norway Post,³⁹⁵ that Tollpost contacted the Norwegian Competition Authority about the issue,³⁹⁶ and that it had to correspond with Norway Post via its lawyer before Norway Post reversed its position.³⁹⁷ That happened only in April 2006. Further, Tollpost has explained that under the terms offered in 2006 it was not economically viable to make use of the agreement.³⁹⁸
440. The change in Norway Post's position in April 2006 coincided with the removal of the exclusivity clauses in its agreements with NorgesGruppen/Shell. It is quite possible that this signified a policy change on the part of Norway Post which is to be welcomed. However, the chain of events in 2005 and 2006 in relation to Tollpost described above raises serious doubts as to Norway Post's willingness to conclude a distribution agreement with one of its competitors during the period at issue. In the light of the contacts that took place between Privpak and Norway Post in 2001 (see Section 8.3.3 above), it seems rather unlikely that Privpak would have been allowed to rely on Norway Post's distribution network for the distribution of its customers' parcels to any significant extent.
441. At the time the SO was issued, and in absence of any argument by Norway Post to that effect, a network of delivery outlets with limited coverage combined with reliance on Norway Post's services for the rest of the country did not appear relevant or credible as a business alternative.

³⁹² See footnote 6.

³⁹³ See Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601; and Case T-301/04 *Clearstream v Commission*, not yet reported.

³⁹⁴ See e.g. Whish, *Competition Law*, 6th edition, page 687 *et seq.*, and Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 039 , 06/02/1998), paragraphs 2.8 and 2.9.

³⁹⁵ See event # 383640, page 2 (e-mail from Norway Post's sales representative to Tollpost) according to which "It has now been decided centrally in Norway Post Logistics that Tollpost Globe AS, as a concrete competitor of Norway Post Logistics, will not be offered an EDI-solution or agreement for the distribution of service parcels by Norway Post" ("Det er nå fra sentralt hold i Posten logistikk tatt beslutning om at Tollpost Globe AS, som en konkret konkurrent til Posten Logistikk, ikke vil bli gitt tilbud om en edi-løsning eller avtale for å sende Servicepakker i Posten").

³⁹⁶ See event # 383640, pages 7-8.

³⁹⁷ See event # 383640, page 4 (letter from Norway Post to Tollpost's lawyer); and event # 379573.

³⁹⁸ See event # 383637, reply from Tollpost Globe dated 8 August 2006, page 2, according to which "Tollpost Globe contacted Norway Post for a Serviceparcel agreement, in order to be able to offer our customers the possibility of Tollpost Globe handling their entire volume of over-the-counter deliveries nationwide. For some of our potential customers it is value added to deal with as few carriers as possible. The system needed for handling goods through Norway Post is not finalized. The agreement is based on non-discounted prices and it is not economically viable to make use of the agreement as presented today as these prices are higher than the customers are willing to pay to us. The process to get an agreement with Norway Post has been time-consuming and difficult."

442. Based on the volume that is linked to the customers of Tollpost/the Swedish Post, Norway Post estimated that its competitor distributed between [confidential] parcels in 2009.³⁹⁹ According to its submission after the oral hearing, Norway Post distributed [confidential] parcels under its agreement with Tollpost/the Swedish Post the first six months of 2009.⁴⁰⁰ On the assumption that the total number of parcels distributed by Tollpost/Sweden Post during this period was in line with Norway Post's estimate, i.e. between [confidential], this implies that Norway Post distributed between [confidential] and [confidential] of all the parcels of Tollpost/the Swedish Post. While this seems to confirm that a new entrant can become a nation-wide supplier by relying on Norway Post's delivery network in the most rural parts of Norway, this is not contradictory to the Authority's position in the SO.
443. However, a new entrant that would have relied more heavily on Norway Post's distribution network than the existing case law on refusal to supply provides for (on the unlikely assumption that Norway Post would have allowed it to do so) could seriously have undermined its own position in the relevant market since it would be strategically and economically dependent on Norway Post. Firstly, its profitability could to a significant degree have depended on the conditions that it was offered by Norway Post and the service quality that Norway Post provided. There would also be the risk of Norway Post terminating or altering the business relationship. This scenario would therefore have entailed serious risks for a new entrant.
444. Secondly, it would appear rather unlikely at the outset that Norway Post would grant a new entrant business conditions that would allow the new entrant to become a serious competitive threat to Norway Post without having to establish an extensive delivery network itself. In its submission after the oral hearing Norway Post points out that it grants its competitors, MyPack (Tollpost/the Swedish Post) and Privpak, the same standard conditions that other customers of its B-to-C parcel distribution service are offered.⁴⁰¹ Norway Post does not mention, however, that during the relevant period it granted substantial non-standard rebates to its largest customers.⁴⁰² If such a customer were to move all its parcels from Norway Post to a new entrant and the latter would have to rely on Norway Post's services to deliver a large proportion of those parcels on standardised conditions but without the additional rebates, it is hard to see how the new entrant's business model could be viable.
445. Thirdly, due to the strategic dependence between the entrant and the incumbent it is unlikely that the scenario that Norway Post postulates would lead to effective competition. A new entrant that relied heavily on the services of Norway Post would have reduced incentives to price aggressively because of the risk of retaliation from Norway Post.

³⁹⁹ Reply to SO, page 73.

⁴⁰⁰ See event # 524500, letter from Norway Post dated 13 July 2009, page 6.

⁴⁰¹ See event # 524500, letter from Norway Post dated 13 July 2009, page 6.

⁴⁰² By way of example, amongst others Norway Post reported to the Authority in letters dated 6 July 2004 and 29 June 2006 that it had granted the following non-standard rebates on its list prices to large customers between 1 November 2003 and end 2005: Redcats (Ellos) 32.2%; H&M 23%; Komplet AS 18.0%; Sparkjøp 16.0-17.0%; Netthandel Norge AS 15.3%; De Norske Bokklubbene 10.0-20.0%; PS Web 18.5%; Sportmann 14.0-15.0%; Cappelen 10.0-15.0%; N W Damm & Søn 8.5-12.5%; Clas Ohlson 8.0%; Samlerhuset 8.0-10.0%; Forlagssentralen 10.0% (Events ## 287194 and 379875 in case 13115 Norway Post discount system).

446. Finally, a new entrant that would rely on the entry scenario argued by Norway Post would risk that a second new entrant would enter the market with a larger and more competitive delivery network than itself.
447. In the light of the above, it is not credible that competitors of Norway Post during the relevant period could easily have concluded an agreement with Norway Post regarding distribution of B-to-C parcels. Moreover, it is unlikely that Norway Post would have offered its competitors commercial conditions that would make it a viable strategy to use Norway Post’s distributions services to any significant extent. Any competitor that would have relied heavily on Norway Post would have become strategically dependent on Norway Post, exposed itself to risks and weakened its competitive position vis-à-vis Norway Post and other potential new entrants. In conclusion, Norway Post’s arguments must therefore be dismissed.

13.1.2.4 The number of delivery outlets required by a new entrant

448. Norway Post argues that the Authority has not sufficiently analysed the geographical coverage and the business volume that would be required for entry to be profitable. In that regard, Norway Post refers to Section 3 of the ECON report which deals with barriers to entry.⁴⁰³
449. In Section 3.1.1 of its report, ECON asks how many delivery outlets a rational supplier would establish. ECON bases its assessment on the assumption that the supplier will seek to find delivery outlets which provide the largest coverage at the lowest cost. As a starting point, ECON considers that *a new entrant would minimise the number of delivery outlets for a given coverage*. To assess how many persons who can be reached from an outlet, ECON explains, it must be determined how far a person is willing to walk/drive in order to pick up a parcel and how many people live within the given distance from the outlet. ECON’s analysis focuses on persons who are over 15 years old.
450. ECON uses Rema 1000’s outlet at Sofienberg in Oslo as an example where 38 183 people over 15 years live within a radius of 1 km and 93 885 people within a radius of 2 km. According to ECON, this shows that the outlet reaches more than 38 000 customers if they are willing to travel 1 km to pick up the parcel and more than 93 000 customers if they are willing to travel 2 km.
451. Based on this methodology, ECON has calculated how many persons can be reached by the establishment of a varying number of outlets. In doing so, it has divided Norwegian municipalities in four categories and assessed how many persons over 15 live within certain distances from 24 selected Rema 1000 outlets in 15 municipalities, as indicated in the table below:

Table 12:

Number of inhabitants older than 15 years	Number of municipalities	Number of Rema outlets	Distances from Rema outlets	
			Area I	Area II
> 80 000	5	12	1 km	2 km
25 000 – 80 000	4	6	3 km	5 km

⁴⁰³ Reply to SO, page 92.

8 000 – 25 000	3	3	3 km	5 km
< 8 000	3	3	3 km	5 km
Total	15	24		

452. In its example from Sofienberg in Oslo (page 19 of the ECON report) ECON has drawn two circles around the selected Rema outlet with a radius of 1 and 2 km respectively. There are three more illustrations where the areas around the selected outlet have different shapes. ECON has not explained what criteria it has used to define the areas around each outlet or how it has been able to determine how many people who live inside each area.

453. The findings of ECON can be summarised in the table below:

Table 13:

Category of municipalities (inhabitants older than 15 years)	I. Average number of inhabitants >15 years old within 1 km from outlet	II. Average number of inhabitants >15 years within 2 km from outlet	III. Total number of inhabitants in the category of municipalities	Outlets needed if distance is 1 km (III/I)	Outlets needed if distance is 2 km (III/II)
> 80 000	11 100	29 938	990 939	90	34
	I. Average number of inhabitants >15 years old within 3 km from outlet	II. Average number of inhabitants >15 years old within 5 km from outlet	III. Total number of inhabitants in the category of municipalities	Outlets needed if distance is 3 km (III/I)	Outlets needed if distance is 5 km (III/II)
25 000 – 80 000	14 900	28 349	772 842	52	28
8 000 – 25 000	8467	12154	1 094 687	130	90
< 8 000	3244	4547	967 659	299	213
				571	365

454. ECON concludes that by accepting that recipients are willing to walk/drive a distance of 2 km to the delivery outlet in the largest municipalities and 5 km in all other municipalities, 365 delivery outlets would be sufficient to reach almost the whole Norwegian population. If recipients are only willing to walk/drive a distance of 1 km to the delivery outlet in the largest municipalities, and 3 km in municipalities with between 8000 – 80 000 inhabitants and 5 km in municipalities with less than 8000 inhabitants, 485 delivery outlets would suffice according to ECON.

455. Essentially, ECON maintains that a large part of the population can be reached even if the number of delivery outlets is limited and that the rest of the population can be reached via Norway Post’s network. The latter argument has already been dismissed above. There are a number of reasons why the figures ECON arrives at cannot be regarded as good estimates of the number of delivery outlets a new entrant would find it optimal to establish.

456. Firstly, ECON’s analysis does not reflect reality. Although the Authority has not verified the actual number of delivery outlets in the network of Tollpost/MyPack, it is apparent from the websites of Tollpost and MyPack that they have endeavoured to establish a distribution network which is substantially larger than the network of outlets ECON considers as optimal (see paragraph 308). It is very unlikely that

Tollpost/MyPack is establishing a delivery network with as much as 315 (800 minus 485) more delivery outlets than what is optimal for a rational operator on the relevant market. That proposition is unrealistic.

457. Secondly, a central assumption in ECON's analysis is the acceptable distance from the recipients' home address to the delivery outlet. If these distances decrease, the number of delivery outlets needed increases. ECON has not justified why the distances it has considered as acceptable would be regarded as acceptable by a new entrant. Thus, it is not explained why the number of outlets arrived at would be good estimates for the optimal number of outlets that a rational new entrant would establish.
458. Thirdly, another central assumption in ECON's analysis is that it will be rational for a new entrant to minimise the number of outlets for a given level of coverage in order to minimise costs. A serious problem with this assumption is that a new entrant must offer a competitive service level in terms of accessibility compared to the service level of the incumbent. If not, consumers are likely to be unhappy with the services offered and distance selling companies unwilling to rely on these services. By way of example, when considering how many consumers that can be reached with one delivery outlet at Sofienberg in Oslo it is not sufficient to assess how many people live within a certain distance from the outlet. The alternatives people have must also be assessed. For many who live 1 or 2 km away from the outlet it is likely that more convenient alternatives exist (i.e. Norway Post outlets). Hence, the estimate that 38 183 people who live within a 1 km radius from the outlet at Sofienberg and 93 885 people who live in a 2 km radius can be reached by this outlet need to be adjusted for this effect. This is entirely ignored in ECON's analysis, which is therefore likely to overstate the number of people who can be reached from an outlet. A new entrant would clearly need to take this concern into account.
459. Fourthly, ECON's analysis is at best a crude measure of the number of outlets a new entrant would need. The number of outlets (24) and the number of municipalities (15) assessed is very limited.⁴⁰⁴ The actual situation across the country is likely to vary more than ECON's analysis is able to capture by this methodology. This raises questions about how representative the analysis is for the country as a whole. Further, the analysis only measures distance as the crow flies without having any regard to local conditions. It seems obvious that a new entrant would need to make a more detailed assessment to be able to optimise its network.
460. In conclusion, ECON's analysis is at odds with reality, would represent a poor optimising strategy for a new entrant if not complemented by additional analyses and is likely to overstate the number of people who can be reached by each outlet and, hence, to understate the number of outlets a new entrant would need.
461. Consequently, there are good reasons to consider that the optimal size of a distribution network of a new entrant exceeds the number of outlets that ECON considers that a rational supplier would establish.

⁴⁰⁴ It may be added that at least with regard to Kristiansand there is only 1.6 km between the two Rema outlets used by ECON in its analysis while the "acceptable" distance used by ECON is 3 km and 5 km respectively. This seems to lead to double counting.

462. In the light of the above analysis and the analysis in the previous section, it is not necessary for the purpose of the present case to make any further estimates of the number of outlets needed by a new entrant.

13.1.2.5 Why entry by Tollpost Globe/the Swedish Post was successful

463. Norway Post has referred to the fact that Tollpost Globe was supported by distance selling companies when establishing its B-to-C parcel distribution business in Norway, in particular by Redcats (Reply to the SO, page 93).

464. As pointed out by Norway Post, it was Redcats (Ellos), the largest distance selling company in Norway but based in Sweden, that secured a significant business volume to MyPack's distribution network in Norway.⁴⁰⁵ It was, however, only when its parent company, the Swedish Post, decided to become involved that MyPack/Tollpost was able to secure sufficient business volume in their network. According to the Swedish Post, it was much more experienced in operating a B-to-C parcel distribution business than Tollpost and had a longstanding co-operation with the ICA Group in Sweden. Further, due to its larger established customer base with a greater potential for parcel volumes destined for Norway it had, relative to Tollpost, a larger potential for generating parcel volumes for a new distribution network in Norway.⁴⁰⁶

465. The Swedish Post has explained that a number of distance selling companies had expressed an interest in a new alternative distribution network in Norway due to dissatisfaction with Norway Post and its price levels.⁴⁰⁷ Thus, while distance selling companies were interested in developing an alternative to Norway Post it was not easy for them to do so before a player that could secure access to retail chains arrived on the scene. Likewise, for many retail chains it was not interesting to start distribution B-to-C parcels without the prospects of a significant volume of parcels to distribute.

466. Thus, it was not as easy for Tollpost to generate sufficient parcel volume in its B-to-C distribution network in Norway as Norway Post seems to assert. It was only with help from the Swedish Post that Tollpost got access to ICA outlets in the first place and, moreover, sufficient parcel volume from Redcats that made its B-to-C distribution business take off. Most potential new entrants were in a position similar to Privpak and Tollpost before the Swedish Post got involved.

467. These events only underline the importance for new entrants of securing access both to retail groups and sufficient parcel volumes in order for entry to succeed. The Swedish Post was in an exceptional position as a potential entrant in the Norwegian market and was not representative of potential new entrants generally.

⁴⁰⁵ See event # 494890, reply from Ellos to the Authority's request for information dated 26 October 2007, page 13-14 concerning the agreement Redcats concluded with MyPack/the Swedish Post in 2007 and which led to a re-negotiation of Redcats' existing agreement with Norway Post due to the reduced volume of parcels that would be distributed by Norway Post in the future.

⁴⁰⁶ See event # 423590, reply from Sweden Post, pages 2-3.

⁴⁰⁷ See event # 423590, reply from Sweden Post, page 2.

13.1.2.6 Conclusion on barriers to entry and expansion

468. In conclusion, the Authority takes the view that there were important barriers to entry and expansion in the relevant market during the period at issue. The possibility of new entry during the period did not constrain the market behaviour of Norway Post to any significant extent.

13.1.3 Buyer power

469. Since a large part of demand for B-to-C parcel services has been concentrated in a limited number of large customers, these customers have to a certain extent been able to negotiate rebates for the purchase of B-to-C parcel services. However, countervailing buyer power cannot be considered a sufficiently effective constraint for the dominant undertaking unless there have been credible alternative suppliers to which customers could turn, or unless customers have been able to sponsor new entrants.

470. In absence of alternative suppliers with significant and stable market shares, any threat by even the largest customers to move all or a very large proportion of their requirements away from Norway Post was not credible. Norway Post therefore remained an unavoidable trading partner throughout the relevant period.

471. Sponsoring new entrants was far from easy for distance selling companies, given that new entrants needed a competitive delivery network with sufficient coverage throughout Norway in order to be successful. Distance selling companies had few means of contributing to the establishment of such a network.

13.1.4 Influence on the conditions of competition

472. Finally, the price increases implemented by Norway Post following the introduction of the “*freight calculation weight*” (see paragraph 337 above), its use of exclusivity in contracts with retail groups and the way in which it conducted parallel negotiations with these groups demonstrate that Norway Post had an appreciable influence on the conditions under which competition on the relevant market for B-to-C parcel services with over-the-counter delivery developed.

13.1.5 Conclusion

473. In light of the foregoing, the Authority concludes that Norway Post, during the relevant period, was in a dominant position within the meaning of Article 54 EEA on the relevant market for the provision of B-to-C parcel services with over-the-counter delivery.

474. The relevant geographic market on which Norway Post held that dominant position is Norway. Norway constitutes a “substantial part” of the EEA territory.⁴⁰⁸

⁴⁰⁸ Case 322/81 *Michelin v Commission (Michelin I)* [1983] ECR-3461, paragraph 28; Case C-323/93 *Centre d’Insémination de la Crespelle* [1994] ECR I-5077, paragraph 17.

14 Abuse

14.1 The concept of abuse

475. Article 54 EEA prohibits as incompatible with the functioning of the EEA Agreement any abuse by one or more undertakings of a dominant position within the territory covered by the agreement or in a substantial part of it, insofar as it may affect trade between Contracting Parties.

476. It is settled case law that the concept of an abuse is:

*“an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of 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”.*⁴⁰⁹

477. The effect referred to in the case-law cited in the preceding paragraph does not necessarily relate to the concrete or actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 54 EEA, it is sufficient 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 or liable to having that effect.⁴¹⁰ The ability of the practice in question to restrict competition may be indirect, provided that it is shown to the requisite legal standard that it is actually liable to restrict competition.⁴¹¹

478. A dominant undertaking – whatever the causes of its dominant position – has a special responsibility to ensure that its conduct does not undermine effective and undistorted competition in the EEA.⁴¹² The scope of that special responsibility must be considered in the light of the specific circumstances of each case which show that competition has been weakened.⁴¹³

479. Article 54 EEA does not only aim at preventing practices that may cause damage to customers or to consumers directly, but also those that are detrimental to them through their impact on the competitive structure and thus on competition as such.⁴¹⁴

⁴⁰⁹ Case 85/76 *Hoffmann-La Roche v Commission*, cited in footnote 372 above, paragraph 91; Case 322/81 *Michelin I*, cited in footnote 408 above, paragraph 70; Case C-62/86 *AKZO v Commission*, cited in footnote 375 above, paragraph 69; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 111; Case T-219/99 *British Airways v Commission*, cited in footnote 369 above, paragraph 241; Case T-271/03 *Deutsche Telekom v Commission*, [2008] ECR II-477, paragraph 233.

⁴¹⁰ Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, paragraph 239; Case T-201/04 *Microsoft v Commission*, cited in footnote 393 above, paragraph 867; and Case T-301/04 *Clearstream v Commission*, not yet reported, paragraphs 144-145.

⁴¹¹ Case T-321/05 *AstraZeneca v Commission*, not yet reported, paragraph 376.

⁴¹² Case 322/81 *Michelin I*, cited in footnote 408 above, paragraph 57; Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA v Commission* [2000] ECR I-1365, paragraphs 37 and 85.

⁴¹³ Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA v Commission*, cited in footnote 412 above, paragraph 114; Case T-83/91 *Tetra Pak II*, cited in footnote 374 above, paragraph 115.

⁴¹⁴ Case 6/72 *Continental Can v Commission* [1973] ECR 215, paragraph 26; Case 85/76 *Hoffmann-La Roche v Commission*, cited in footnote 372 above, paragraph 125; Case C-95/04 P *British Airways v Commission*, cited in footnote 369 above, paragraph 106.

14.2 Outline of the abuse assessment

480. When carrying out the abuse assessment, it must be remembered that Norway Post had an exceptionally strong position in the relevant market. As the incumbent postal operator, it enjoyed a number of advantages vis-à-vis its competitors and there were significant barriers to entry and expansion (see Sections 13.1.1 and 13.1.2 above).
481. For a new entrant in the B-to-C parcel distribution market the competitive benchmark during the period at issue was the services provided by Norway Post since Norway Post was an unavoidable trading partner for distance selling companies and because distance selling companies and consumers would compare the services of a new entrant with those of Norway Post.
482. When assessing which outlets that new entrants could use for over-the-counter parcel delivery, the relevant benchmark is therefore the network of Norway Post, which a new entrant had to compete with after entry. The establishment of the Post-in-Shop network increased significantly the efficiency of that network which for the most part of the relevant period network consisted of around 300 post offices and between 1150 and 1200 Post-in-Shops (see paragraph 57).
483. It must also be recalled that the quality and attractiveness of the delivery network is one of the major competitive parameters in the relevant market. In order to be successful, it was of major importance for a new entrant to establish a delivery network capable of competing effectively with that of Norway Post.
484. The strategy pursued by Norway Post and its behaviour in relation to the establishment and maintenance of the Post-in-Shop network, which the Authority has found reason to investigate, have been described in detail in Section 6 above (see in particular Sections 6.2 to 6.4). In the following “*Norway Post’s conduct*” is used as shorthand to denote this strategy and behaviour.
485. The Authority’s objections to Norway Post’s conduct, as set out in the SO, is based on the basic premise that a new entrant would be placed at a competitive disadvantage if it were unable to conclude an agreement for parcel delivery with one or more of the leading grocery store, kiosk or petrol station chains and that the conduct of Norway Post had a negative impact on the ability of new entrants to conclude such agreements. In other words, Norway Post’s conduct created additional (or strategic) barriers to entry on the relevant market.
486. The constituent elements of the abusive conduct are the use of group and outlet exclusivity and the strategy pursued by Norway Post when renegotiating its agreements from 2004 onwards. 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. 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. During the renegotiations, Norway Post kept the question of preferential partner open and thereby gave COOP and ICA the impression that they could be allocated such a status from 2006 onwards. By doing so, Norway Post created through its own market behaviour, and while the group and outlet exclusivity was still in effect, additional barriers to entry that limited the possibilities

of new entrants to conclude distribution agreements with the most sought after distributors.

487. A monopolist or close-to-monopolist that prevents its competitors from access to one or more of the most sought after distribution channels is capable of restricting competition. That is even more so if its competitors are thereby placed at a competitive disadvantage because the alternatives available to them are limited. If the risk or cost of entry increases due to the conduct of the incumbent firm, or such conduct causes a delay in the scale of entry, this represents a restriction of competition which would amount to an abuse unless objectively justified.
488. When carrying out the analysis it is appropriate to have regard to the situation that would have existed if access to the foreclosed distribution channels had not been denied by the conduct of the dominant firm. It is also relevant to take into consideration that the industry in question is a platform industry (multi-sided market) in which a new entrant must attract the different sides of the market to its platform in order to be successful (Section 4 above).
489. The following sections set out why the Authority considers that Norway Post's conduct constitutes an abuse within the meaning of Article 54 EEA. In brief, the Authority considers that an agreement or co-operation 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 (Section 14.3); that Norway Post's conduct limited its competitors' access to the leading grocery store, kiosk and petrol station chains (Section 14.4); and that its conduct was capable of restricting competition in the market for B-to-C parcels with over-the-counter delivery (Section 14.5). In addition, the Authority considers that Norway Post's conduct likely resulted in actual anticompetitive effects to the detriment of consumers (Section 14.6).

14.3 The importance of an agreement or co-operation with leading grocery store, kiosk or petrol station chains

14.3.1 Preferences among providers of B-to-C parcel services with over-the-counter delivery for outlets belonging to leading grocery store, kiosk and petrol station chains

490. As was described in detail above (see Section 6.2), when establishing its Post-in-Shop network Norway Post's strategy was clearly to target the leading grocery store, kiosk and petrol station chains/retail groups: NorgesGruppen, COOP, ICA, Reitangruppen, Narvesen (now part of Reitangruppen which also owns 7-Eleven) and the four incumbent petrol station chains Statoil, Shell, Esso and Hydro Texaco. In fact, out of 1175 Post-in-Shops 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.⁴¹⁵ This demonstrates

⁴¹⁵ See Section 6.6 above.

Norway Post's strong preference for the leading grocery store, kiosk and petrol station chains, and outlets belonging to these chains.⁴¹⁶

491. Privpak has alleged that the type of retail outlets which it can use to develop a competitive network is limited to grocery stores, kiosks and petrol stations belonging to a chain. Privpak has also argued that:

*"...in order for Schenker Privpak to penetrate the market in Norway, where the distributors already have significant confidence in Norway Post as the state owned postal service operator and market leader, the company must offer a distribution network in which distributors already have confidence. Branded chains, which are known to the distributors, are necessary for that purpose".*⁴¹⁷

492. After the abolition of Norway Post's group exclusivity, Privpak has expanded its delivery network in the grocery stores and kiosks of NorgesGruppen, the largest retail group for daily consumer goods in Norway.
493. Prior to the expansion under its agreement with NorgesGruppen, Privpak's network of delivery outlets in Norway remained limited and was composed mainly (90%) of small grocery stores, kiosks/video rental outlets and petrol stations. While several of these outlets did not belong to a retail chain, Privpak has argued that when it used other types of outlets than grocery stores, kiosks or petrol stations or outlets not belonging to a chain, that was in absence of a better alternative.⁴¹⁸
494. Tollpost has also demonstrated a clear preference for outlets in the leading grocery store, kiosk and petrol station chains. Only after failing to secure a distribution arrangement with such chains did it turn to chains of flower shops (see Section 9 above). After the removal of exclusivity and preference clauses in Norway Post's agreements with retail groups, Tollpost, through its owner the Swedish Post, concluded a distribution agreement with ICA. The majority of the delivery outlets in the network used by Tollpost consist of grocery stores which are part of ICA chains.
495. The available evidence therefore demonstrates a strong preference among providers of B-to-C parcel services with over-the-counter delivery for outlets belonging to the leading grocery store, kiosk and petrol station chains.
496. This preference can be explained firstly by the fact that co-operation 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 (Section 14.3.2 below) and, secondly, by the fact that a delivery network composed of grocery stores, kiosks and petrol stations belonging to chains was likely to be more competitive than a delivery network composed of other types of outlets (Section 14.3.3 below).

⁴¹⁶ The space requirements of a regular Post-in-Shop may nevertheless have limited the extent to which Norway Post has used kiosks and petrol stations in its Post-in-Shop network.

⁴¹⁷ See event # 94632, reply from Privpak dated 15 August 2003.

⁴¹⁸ See event # 258808 (page 5), reply from Privpak dated 5 March 2004.

14.3.2 An agreement or co-operation with one or more leading grocery store, kiosk or petrol station chains is a highly efficient way of establishing and operating a delivery network for B-to-C parcels

497. Norway Post has itself stated that in order to ensure an effective implementation of the Post-in-Shop network:

*“it was important to co-operate with a partner who was in a position to persuade the local outlets about the profitability of the concept...”*⁴¹⁹

498. The retail group will normally take on an obligation to promote the concept within its chains. The endorsement and support of the delivery concept by a retail group therefore facilitates the roll-out of the concept in the market as opposed to a situation where the supplier would have to contact and convince each potential delivery outlet on his own.

499. Thus, under the agreements with Norway Post, NorgesGruppen/Shell, COOP and ICA were obliged to support, motivate, arrange for, recommend or contribute to local units entering into an agreement with Norway Post (see Sections 6.3.1, 6.3.2 and 6.3.3 above). Both NorgesGruppen and ICA have undertaken similar obligations under the agreements with Privpak and the Swedish Post (see Sections 8.3.1.1 and 9 above).

500. The larger the chain or retail group, the more delivery outlets would likely result from the co-operation. As stated by Norway Post, rapid implementation also:

*“...made the process more efficient with a high focus on standardized and parallel implementation in many outlets carried out by a specialized organisation for the establishment of the [Post-in-Shop] network. Thus, Norway Post was able to reduce [its] costs.”*⁴²⁰

501. According to Privpak, independent outlets have significantly higher credit losses and more rapid ownership changes than chain outlets, which would also entail significantly higher costs in maintaining a network of mainly independent outlets. Privpak has also pointed out that credit losses are not only an important disadvantage in themselves, but are usually evidence of an overall poor service performance in the outlets concerned.⁴²¹ A delivery network spread over many individual shop owners is also likely to be less stable⁴²² and therefore more costly to operate.⁴²³ Norway Post has not provided any information that could cast doubt about the correctness of these observations.

502. Large chains with strong chain or franchise concepts with well trained staff accustomed to handling cash flows and a management that controls the activities of the chain’s outlets are likely to make the roll-out and maintenance of a parcel delivery concept particularly efficient. It is therefore likely that a delivery network which is composed mainly of outlets belonging to large chains is more efficient to

⁴¹⁹ See event # 438275, reply from Norway Post dated 31 August 2007.

⁴²⁰ See event # 438275, reply from Norway Post dated 31 August 2007, page 8.

⁴²¹ See event # 281231, reply from Privpak dated 12 May 2004, pages 2-3 and the power point presentation on pages 7-22; as well as event # 445104, reply from Privpak dated 1 October 2007, annex 8.

⁴²² Privpak points to more frequent changes of ownership for independent outlets, see event # 281231, reply from Privpak dated 12 May 2004, page 3.

⁴²³ See event # 281231, reply from Privpak dated 12 May 2004, page 3.

establish and operate than a network consisting of individual outlets. As a result, co-operation with one or more large chains is likely to lead to a faster and more efficient roll-out of a delivery network for B-to-C parcels.

503. The leading grocery store, kiosk and petrol station chains are among the largest retail chains/groups in Norway. These retail groups have brands which are among the most well-known in Norway. It is of great value for a B-to-C supplier to be associated with such a brand, in particular if it is a newcomer in the market without a well-known brand itself. Many of the leading grocery store, kiosk and petrol station chains control quite tightly the activities of their chain outlets.⁴²⁴ These retail networks are therefore very well placed to roll-out a parcel delivery concept which will be stable and efficient to operate and maintain.
504. In conclusion, therefore, an agreement or co-operation with one or more of the leading grocery store, kiosk or petrol station chains is a highly efficient way of establishing and operating a delivery network for B-to-C parcels.

14.3.3 A network composed of grocery stores, kiosks or petrol stations belonging to chains is likely to be more competitive than a delivery network composed of other types of outlets

505. Norway Post has argued that there are many different types of outlets, such as sports shops, pharmacies, bookshops, electronics shops, hotel chains, hardware stores and builder's merchants which can be used as alternatives to grocery stores, kiosks and petrol stations.
506. It is clear that Norway Post considered the efficiency and the competitiveness of the network as one of the parameters of importance when it negotiated the Post-in-Shop agreements. Further, it is clear that Norway Post anticipated that its distribution network would face more competition in the future, including in the market for B-to-C parcel distribution, and wanted to position itself to meet this threat when restructuring its distribution network.⁴²⁵ If Norway Post had considered other types of outlets as efficient and competitive as the outlets of the leading grocery store, kiosk or petrol station chains, it is likely that it would at least have invited the former to take part in the negotiations. However, there is no information available to the Authority which indicates that Norway Post seriously considered rolling out its Post-in-Shop concept in other types of retail outlets or considered this as a viable and competitive alternative to the leading grocery store, kiosk and petrol station chains with which it engaged in detailed negotiations.
507. Suppliers of B-to-C parcel distribution services need to provide delivery services which their customers (distance selling companies) regard as satisfactory and which are of a comparable quality to the delivery services that competing distributors offer.

⁴²⁴ See e.g. event # 289584 (page 44), **LKP 8 8/50**, where this is acknowledged as regards NorgesGruppen, ICA (Hakon/Statoil) and Rema.

⁴²⁵ See paragraph 97 above. See also event # 289584 (page 37), **LKP 8**. Exclusivity was one of the strategic parameters (**LKP 8 6/50**). When assessing strategic match the competitive position was one of four factors that were taken into account (**LKP 8 11/50**). This entailed an assessment of "*the groups position in the Norwegian and Nordic market and in segments where there would be of significance for Norway Post to have good coverage in order to provide the best possible offer in a potential competitive situation*" (**LKP 8 23/50**). This should be read in conjunction with the wording of the non-compete clauses in the Post-in-Shop agreements of Norway Post which specifically targeted "*delivery of parcels from legal entities which have freight as a business or part of their business*" (see paragraph 130 above).

Distance selling companies will take into account which delivery options are likely to be well-regarded by consumers when choosing a distributor for the delivery of B-to-C parcels. It is also important for distance selling companies that parcels are stored safely and handled with the required care and that cash-on-delivery is performed correctly and efficiently. The replies from several of the distance selling companies show that it is important that the delivery outlets used by a new entrant satisfy a number of qualitative requirements and are of a quality comparable to the outlets used by Norway Post (see Section 10 above).

508. Distance selling companies which used more than one supplier during the relevant period normally allowed consumers to choose between delivery outlets of each supplier without differentiating the delivery fees they charged consumers.⁴²⁶ In such cases, the quality and convenience of the outlets were the *only* criteria which determined the consumers' choice and, therefore, affected directly the number of parcels which would be delivered through the outlets.
509. Grocery store, kiosk and petrol station outlets are easily accessible to consumers: they have long opening hours, tend to be centrally located and to have good parking facilities. Moreover, they are particularly well suited for allowing increasingly busy consumers to combine the collection of parcels with other routine errands.⁴²⁷
510. This applies in particular to grocery stores which are visited on a weekly or sometimes even daily basis by consumers. No other shops are visited more often by consumers than grocery stores.⁴²⁸ Every household needs to visit grocery stores on a regular basis. This also means that grocery stores generally attract more consumers into their shops than any other type of retail outlets. Therefore, it is particularly convenient for consumers to pick up parcels from a grocery store and the potential for suppliers of B-to-C parcel services to deliver large volumes of B-to-C parcels in such outlets is particularly high.
511. In addition, kiosk and petrol station chains have developed convenience store concepts and convenience shopping has become increasingly popular. This brings many consumers into these outlets. Kiosks and petrol stations often have even longer opening hours than grocery stores.⁴²⁹ Petrol stations are easily accessible by car. Kiosks are typically easily accessible by car or located where many people pass by. Thus, also in these outlets it is particularly convenient for consumers to pick up parcels and the potential for suppliers of B-to-C parcel services to deliver large volumes of parcels in such outlets is very high.
512. Specialised trade outlets, such as for instance clothes shops, electronics shops, builder's merchants, sport shops, book shops and flower shops are less frequently visited by most consumers than grocery stores. They tend to have shorter opening hours than grocery stores, kiosks and petrol stations and the potential for combining the collection of parcels with other business is more limited.

⁴²⁶ See e.g. event # 491495, reply from H&M, page 8; and event # 494890, reply from Ellos, page 6.

⁴²⁷ See paragraph 84 above.

⁴²⁸ Scandinavian consumers visit groceries very frequently compared with other Europeans according to a report from the Nordic competition authorities entitled "Nordic Food – a taste for competition", at page 48. The report is available at:

http://www.konkurransetilsynet.no/iKnowBase/Content/392450/NORDIC_FOOD_MARKETS.PDF.

⁴²⁹ Public regulations of opening hours allows smaller shops like kiosks, convenience stores and petrol stations to be open longer than larger grocery stores.

513. Sales staff in such specialised trade outlets often have to give customers advice on what to buy, present different alternatives to them and generally provide a more time-consuming sales service. This means that the picking up of a parcel, especially during peak hours, could take more time for consumer when staff are busy serving other clients.⁴³⁰ In comparison, customer handling in grocery stores, kiosks or petrol stations is generally fast.
514. For these reasons, it will generally be more convenient for consumers to pick up parcels in grocery stores, kiosks and petrol stations as compared to specialised trade outlets. A new entrant using specialised trade outlets on a large scale for the delivery of B-to-C parcels would therefore be placed at a disadvantage vis-à-vis competitors providing delivery in grocery stores, kiosks or petrol stations.
515. Further, there is a conflict of interest between distance selling companies and delivery outlets if they sell competing products as the consumer might start buying from the delivery outlet in stead of buying from the distance selling company.⁴³¹ Since distance selling companies sell a wide variety of products, suppliers of B-to-C parcel distribution services need to establish a delivery network which is capable of attracting as many potential customers (i.e. distance selling companies) as possible, and avoid outlets which could potentially deter one or more distance selling companies. Ellos, the largest distance selling company in Norway, has in this regard referred to that grocery stores, petrol stations and kiosks offer the most “neutral” assortment.⁴³²
516. In response to the Authority’s requests for information, five distance selling 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 (paragraph 315). While nine companies indicated that they in principle would consider switching, they all qualified their answers in important respects. Essentially, it was indicated that it did not seem realistic to establish such a network, that such a supplier would have a harder time or that switching would only occur if the quality of the network and prices were competitive (See paragraph 316).
517. While chains of flower shops were used by Tollpost initially, they were only a secondary alternative. Tollpost has pointed out a number of drawbacks associated with using flower shops as compared to grocery stores, kiosks and petrol stations (see Section 9 above). Chains of flower shops were not regarded by Tollpost as equivalent to leading grocery store, kiosk and petrol station chains.

⁴³⁰ It is indeed specified in Norway Post’s agreements with retail groups that all customers shall be served within 5 minutes (see e.g. Annex 4 to the business agreement with NorgesGruppen/Shell of September 2000 regarding service levels to customers, event # 96421).

⁴³¹ Moreover, it is unlikely that other types of retail chains would have been prepared to roll out a parcel delivery concept in their chains when the activities of these chains were in competition with the activities of distance selling companies. This would e.g. apply to clothes retailers as many distance selling companies are selling clothes, electronics retailers as the internet has become an important distribution channel for electronics and so on.

⁴³² See event # 302287, reply from Ellos dated 6 December 2004; event # 303191, reply from [X] dated 12 December 2004 (which also mention neutrality issues); and event # 301804, reply from [X] dated 6 December 2004 (which is selling clothes and considers that clothes shops are not suitable for parcel delivery due to the competitive relationship between the distance selling company and the delivery outlet).

518. Tollpost's agreements with chains of flower shops were clearly insufficient to penetrate the market for B-to-C parcel services. It only recruited 280 delivery outlets among flower shops and this number was reduced to 190 by August 2007 (see Section 9 above). It was only when Tollpost got access to ICA that it could roll out its delivery concept and start competing with Norway Post on a more equal footing.
519. In the light of all the above, a delivery network composed of grocery stores, kiosks or petrol stations belonging to chains is likely to be more competitive than a delivery network composed of other types of outlets.

14.3.4 Arguments of Norway Post

14.3.4.1 The need for rapid and efficient roll-out of a delivery concept

520. Norway Post has referred to the need to roll-out its Post-in-Shop network quickly and efficiently in order to save costs and admits in **Section 15.4.2** of its Reply that it considered the Post-in-Shop agreements with grocery store, kiosk and petrol station chains as the most appropriate solution. However, it maintains that this does not mean that other alternatives did not exist. If it had not been able to conclude these agreements, Norway Post argues that it would have found another solution in order to reduce the costs incurred by its post office network and refers to solutions that have been chosen by postal operators in other European countries (see Section 4 of the Reply to the SO).
521. In this regard, it is noted that the Authority has not maintained that grocery store, kiosk and petrol station chains were the only alternatives that existed. Rather, it argues that those other alternatives were inferior and would have placed a new entrant at a competitive disadvantage. Moreover, had Norway Post's contractual partners not been available, the alternative way in which Norway Post had restructured its network of post offices would have changed the market conditions considerably since Norway Post controlled the whole market before entry occurred. The conditions of competition faced by new entrants would therefore have been different from what they actually were when Privpak and Tollpost entered the market. Which other ways Norway Post could have found to restructure its distribution network, is therefore a hypothetical question irrelevant to the assessment.
522. Norway Post further argues in **Section 15.4.3** of its Reply to the SO that its need to roll-out its concept quickly was not only related to the establishment of a new network but also the fact that it was replacing an already existing, loss-making network. Norway Post maintains that a new entrant did not have the same needs as Norway Post to roll out its network quickly and that it is fundamentally wrong by the Authority to focus on the needs of Norway Post in this regard.
523. Even if it is correct that it was important for Norway Post to roll out the Post-in-Shop concept as fast as possible because its existing distribution network was very costly to operate and, hence, inefficient it does not follow that rapid and efficient roll-out was not important for new entrants and for competition. Typically, a new entrant would operate with losses in a first phase after entry until it achieved sufficient business volumes or, if it minimised its investments to avoid such losses, would remain a niche player in the market for a considerable period of time. The larger its distribution network in terms of coverage and the faster the network could

be established, the more business a new entrant could expect to attract, the more competition Norway Post would face and the more consumers would benefit.

524. It is further noted that the level of cost savings that Norway Post could achieve through rapid roll-out of its Post-in-Shop concept is an efficiency argument to be assessed below in the section concerning possible objective justifications of Norway Post's conduct.

14.3.4.2 Norway Post: Agreements with chains do not necessarily guarantee rapid roll-out of the network

525. Norway Post also maintains, in **Section 15.4.4** of its Reply to the SO, that agreements with chains do not necessarily guarantee rapid roll-out of the network. In Norway Post's view, the Authority overstates (in paragraph 413 of the SO) the importance of chains with respect to the efficiency of the roll-out process because a market player which wishes to roll out its concept quickly will in any event have to negotiate with individual outlets. According to Norway Post, there are advantages of having an agreement at chain level but it remains necessary to convince individual outlets that parcel delivery will be profitable for them. Norway Post also argues, in Section 15.4.4 of its Reply, that although it believed that COOP did not tightly control the activities of its outlets, it nevertheless concluded an agreement with COOP and gave it second priority status.
526. For the reasons already described, the Authority considers that retail chains provide a clear advantage as compared to approaching individual outlets without any support from the central management of a chain to which individual outlets belong.
527. There cannot be any doubt that it will be easier for a new entrant to obtain acceptance at outlet level with backing from the central management of a chain and a standard agreement negotiated at central level. Even if agreements with chains or retail groups are not giving automatic access to all outlets, such agreements are likely to constitute a necessary condition for a timely and large scale roll-out in retail chains. In retail groups, such as NorgesGruppen and ICA, which control tightly the activities of their chain outlets, a large scale roll-out of a delivery concept is most likely impossible without such support. Moreover, as set out above, other factors than the mere speed with which a concept could be rolled out supports the finding that an agreement or co-operation with grocery store, kiosks and petrol station chains is a highly efficient way to establish a network for over-the-counter delivery of B-to-C parcels.
528. As regards COOP, the fact that there may be less central control than in other daily consumer goods retail groups does not mean that the backing of the central management of COOP would not have helped to convince individual COOP units to accept becoming a delivery outlet for parcels.
529. In conclusion, therefore, the Authority cannot subscribe to the arguments of Norway Post.

14.3.4.3 Differences between the Norwegian and the Swedish market

530. In **Section 15.4.5** of its Reply to the SO, Norway Post maintains that Privpak's establishment on the Swedish market shows that a chain agreement is not necessary

and that there are no relevant differences between the Norwegian and the Swedish market in this respect.

531. As regards the necessity of concluding an agreement with a retail chain, it should be noted that the Authority is not maintaining that it is absolutely impossible to enter the market without access to grocery store, kiosk and petrol station chains, only that access to such chains is a considerably more efficient means of entry. Had for instance Privpak been able to conclude a distribution agreement in Sweden with a leading grocery store retail chain at an early stage, it is reasonable to expect that Privpak could have increased the volume of its business in Sweden faster than it was able to without such an agreement.
532. Furthermore, contrary to what Norway Post maintains, there are several differences between the Norwegian and the Swedish market which are referred to in the SO. Firstly, Privpak entered the Swedish market for the distribution of B-to-C parcels already in 1992 and became profitable in 1999. Privpak was an additional supplier to the Swedish Post at that time and could offer delivery from a “new” type of outlet. The Swedish Post only started offering postal services from retail outlets in Sweden from 2001-2002.
533. Thus, Privpak was a first mover on the Swedish market as regards the distribution of B-to-C parcels from retail outlets. In Norway, Privpak could not benefit from a first mover advantage given that Norway Post rolled out its Post-in-Shop network at the same time Privpak entered the market.
534. Secondly, at the end of 2002, the Swedish Competition Authority was able to convince the Swedish Post to remove exclusivity clauses from its agreements with retail groups and this paved the way for distribution of Privpak’s parcels from the same outlets that were used by the Swedish Post (see paragraph 241 above). This applied in particular to outlets belonging to ICA, by far the largest retail group in the Swedish daily consumer goods market. ICA is comparable to the largest Norwegian player, NorgesGruppen, from which competitors to Norway Post in the B-to-C market in Norway were completely foreclosed due to Norway Post’s group exclusivity.
535. In conclusion, the competitive situation Privpak faced in Norway was therefore different in two important respects from that in Sweden.

14.3.4.4 The considerations of distance selling companies

536. In **Section 15.4.6** of its Reply to the SO, Norway Post argues that distance selling companies do not consider whether a market player has concluded an agreement with a chain. To support this argument, Norway Post claims that at least 11 of the 16 distance selling companies (in response to question six of the Authority’s questionnaire) were positive to using a new entrant with a network consisting mainly of independent outlets, while only three were negative.⁴³³
537. It is recalled that the respondents to question six of the Authority’s questionnaire were asked whether they would consider switching part or all of their requirements for B-to-C services to a nationwide provider of B-to-C parcel services whose

⁴³³ See also Section 10 of the Reply to the SO.

network of delivery outlets were composed of independent retail outlets (as opposed to retail outlets belonging to a chain). In fact only three respondents answered that question unequivocally in the affirmative while two respondents answered that they were unlikely to consider switching (see paragraphs 317 above).

538. The Authority cannot agree with Norway Post's view that the remaining respondents were positive to switching. While not categorically ruling out a switch, this category of respondents observed that a supplier relying on a network of this type would be placed at a disadvantage, or that they would consider switching provided that the delivery network fulfilled the qualitative criteria that they deemed important (see paragraph 318 above). Clearly, such qualitative criteria would be more easily fulfilled if relying on a network of outlets belonging to retail chains. Outlets wishing to become part of retail chains generally must satisfy similar qualitative criteria regarded important for over-the-counter parcel delivery services. At least part of the selection process that the new entrant would have to carry out itself, if relying on independent outlets, would have been carried out already by the chain.
539. In that light, the Authority considers that the views expressed by the distance selling companies to this question overall supports the view that a new entrant relying on a network mainly consisting of retail outlets belonging to chains would have been better off than a new entrant with a network of delivery outlets predominantly consisting of independent retail outlets. These replies, viewed as a whole, are thus consistent with the views the Authority has taken above.

14.3.4.5 The relevance of differences between the Post-in-Shop concept and the concepts for B-to-C parcel delivery

540. In **Section 15.6.2** of its Reply to the SO, Norway Post maintains it is not relevant which solution would be most efficient for Norway Post because the activities of Norway Post are not comparable to the activities of its competitors in the B-to-C parcel distribution market. Therefore, Norway Post argues, its preferences do not indicate which solution that would be the best for its competitors. Norway Post emphasises in this regard that the space requirements of Post-in-Shop exceeds the space requirements of a B-to-C parcel delivery concept. According to Norway Post, the need for space explains why it concentrated on establishing Post-in-Shop mainly in grocery stores.
541. Even if the space requirements of Post-in-Shops generally exceed the space requirements of a parcel delivery concept, Norway Post's last assertion remain unsubstantiated and unsupported by the facts on the Authority's file. There must have been many other retail outlets other than grocery stores which were large enough to host a Post-in-Shop unit of 15 to 20 m². A more likely explanation for Norway Post's preferences is that grocery store chains, together with kiosk and petrol station chains, generally were regarded by Norway Post as the most efficient and competitive distribution channels for the reasons set out in Sections 14.3.2 and 14.3.3 above. Those reasons apply equally to Norway Post and distributors of B-to-C parcels even if space requirements may have limited the extent to which Norway Post could establish Post-in-Shops in kiosks and petrol stations. However, as will be explained below, kiosk and petrol station chains were not readily available to new entrants either as such chains were often unwilling to engage in the parcel delivery business.

542. The Authority cannot see how other differences between the Post-in-Shop concept and concepts for B-to-C parcel delivery provide an alternative explanation for why Norway Post focused on grocery store, kiosk and petrol station chains as negotiating partners while access to such chains was not of importance to new entrants. While Norway Post needed coverage in the more rural areas of Norway and grocery store chains were apt to provide such coverage, it is apparent that a considerable number of Post-in-Shops have been established in what must be properly characterised as densely populated areas in Norwegian terms which also were of interest to new entrants.⁴³⁴ It also appears that a number of Post-in-Shops have been established close to post offices.⁴³⁵ This signifies that Norway Post, despite the regulatory requirements it had to fulfil, had ample scope to optimise its distribution network in anticipation of a more competitive future environment.
543. Neither the regulatory constraints that applied to Norway Post nor the wider set of products and services distributed by Norway Post, change the fact that the preferences of Norway Post when establishing its Post-in-Shop network provide valuable information when assessing which alternatives would be efficient and competitive from the viewpoint of new entrants to the B-to-C market. As explained above, the properties of grocery store, kiosk and petrol station chains made these chains particularly well-suited for the provision of postal services/parcel delivery services, and Norway Post had defined the competitive benchmark by using this category of outlets for its Post-in-Shop network.
544. The differences between the Post-in-Shop concept and parcel delivery concepts do not therefore invalidate the Authority's reasoning above.

14.3.4.6 Norway Post: The demands of distance selling companies with regard to delivery points are derived from the requirements of consumers

545. In **Section 15.6.3** of its Reply to the SO, Norway Post maintains that the Authority has not taken into account that the demands of distance selling companies with respect to delivery of parcels are derived from the requirements of consumers. Norway Post is of the opinion that the consumers would accept a number of alternative over-the-counter delivery points. Norway Post argues that it has not been substantiated that it is of great importance to consumers that parcels can be delivered in places they normally visit. The most important thing, Norway Post argues, is not

⁴³⁴ This is clear from the post office/post-in-shop locator at Norway Post's website (www.posten.no). Furthermore, Annex 1 (event # 378461) to Norway Post reply dated 27 June 2006 to a request for information contains a list of Norway Post's post offices and Post-in-Shop for the year 2005. That list reveals that more than 500 Post-in-Shops had been established in Norwegian municipalities with more than 20 000 inhabitants over 15 years (these municipalities are listed in Annex 2 to the ECON Report submitted as Annex 1 to the Reply to the SO).

⁴³⁵ See the following examples: **Kristiansand** (Post-in-Shop 31 metre from Post Office); **Arendal** (Post-in-Shops located at 2.1 km, 2.8 km, 3.6 km and 7.1 km respectively from Post Office); **Grimstad** (Post-in-Shop 3.0 km from Post Office) **Kragerø** (Post-in-Shop 2.1 km from Post Office), **Brevik** (Post-in-Shop 2.0 km from Post Office), **Porsgrunn** (Post-in-Shops located at 1.7 km, 1.7 km, 2.2 km and 3.8 km respectively from Post Office); **Skien** (Post-in-Shops located 450 metre, 1.4 km, 1.9 km, 2.5 km, 3.1 km and 3.4 km from Post Office); **Larvik** (Post-in-Shops located 1.0 km and 1.4 km respectively from Post Office) **Sandefjord** (Post-in-Shops located 1.3 km and 1.9 km from Post Office); **Tønsberg** (Post-in-Shops located at 1.1 km and 2.8 km from Post Office and Post-in-Shop located at 1.8 km from Tølvstrød Post Office); **Horten** (Post-in-Shop located 1.8 km from Post Office); **Moss** (Post-in-Shop located 1.9 km from Post Office); **Fredrikstad** (Post-in-Shops located 1.0 km and 1.4 km respectively from Post Office); **Sarpsborg** (Post-in-Shop located 1.7 km from Post Office). (Sources: the post office/post-in-shop locator available at Norway Post's website www.posten.no and Google Maps available at www.google.com).

that parcels can be picked up at the place where consumers make their grocery shopping but that the place is easily accessible. Hence, according to Norway Post, any place consumers often pass by will be adequate. It also criticises the Authority for not having investigated the preferences of consumers and refers to consumer surveys carried out by Synnovate on behalf of Norway Post.

546. As regards the importance of using outlets that consumers often visit, it is recalled that NorgesGruppen when negotiating the Post-in-Shop agreements with Norway Post, emphasised that consumers were increasingly busy and that consumers could save a significant amount of time if they found everything they needed at the same place (see paragraph 84 above).
547. Further, Norway Post's argument that it is accessibility that is of importance to consumers and not the extent to which parcels can be delivered in outlets consumers often visit is inconsistent since it is obvious that delivery from outlets consumers visit regularly is a means of ensuring that the delivery service is accessible. It cannot be denied that outlets that are often visited by consumers are particularly well suited for over-the-counter parcel delivery.
548. The demand of distance selling companies for parcel distribution services is a derived demand in the sense that increases in demand for distance shopping will increase the demand for parcel distribution services. However, that does not mean that preferences of consumers with respect to delivery of parcels are the only factor that determines the demand of distance selling companies for parcel distribution services. In particular, distance selling companies are interested in minimising the costs of delivery and will only be interested in improving delivery services if that would increase their sales. Conversely, distance selling companies will be unwilling to degrade the quality of delivery services if that is expected to hurt the demand for the products they sell. It is reasonable to assume that distance selling companies generally do understand what kind of delivery services they need to offer consumers in order to operate a successful distance selling business.
549. To distance selling companies it must have appeared likely for the reasons set out in Section 14.3.3 above and from the fact that consumers appeared to accept the means of delivery offered by Norway Post in Post-in-Shops, that collection of parcels in grocery stores, kiosks and petrol stations would represent an efficient and cost effective means of delivery. Conversely, there were very few reasons, if any, why distance selling companies would have considered that the use of a delivery network composed of other types of outlets would constitute a more efficient alternative from the viewpoint of consumers or a more cost effective means of delivery.
550. Moreover, Norway Post's argument fails to take into account the perspective of a new entrant: a new entrant must focus on the most efficient and effective way of setting up a delivery network in order to be competitive. For the reasons set out in Section 14.3.3 above, a new entrant had good reasons to believe that a delivery network composed of grocery stores, kiosk or petrol stations would be the most attractive alternative both from the viewpoint of distance selling companies and consumers. The use of such outlets by a new entrant would precisely be a way of making the demands for accessibility and cost efficiency operational and, hence, the delivery network competitive.

551. From the perspective of a new entrant, it would not be of interest to carry out a consumer survey with a view to ascertaining which other means of delivery that consumers could find acceptable and, subsequently, to present the results of such a survey to distance selling companies with a view to convincing them that alternatives to a delivery network composed of grocery stores, kiosk or petrol stations were likely to be successful. Such an approach would have been impractical and increased the risks and uncertainties surrounding the entry strategy and the cost of entry.
552. Further, consumer surveys are used relatively rarely in competition investigations and with great care. In cases concerning the demand of intermediate players which is derived from consumers, it is normally regarded more reliable and sufficient to address questionnaires to the intermediate players directly.⁴³⁶
553. As an additional point, a consumer survey in the present case would have focused on how consumers might have behaved if they were given a choice in the future. That is quite different from surveying how consumers have behaved in the past with respect to services they have actually been offered and with which they have experience. A weakness with the former type of survey is typically that the answers given by respondents might not correspond to how they actually will behave if faced with the contemplated choices in reality. In any event, it would have been very difficult to draw conclusions from such surveys about how new entrants ought to have organised their over-the-counter delivery networks in order to be successful.
554. Finally, the information that Norway Post has submitted in the Reply to the SO about the consumer surveys conducted by Synnovate (Section 4.3 of the Reply to the SO and annex 44 thereto) is rudimentary and does not give the Authority any reason to reverse its assessment of the present case.

14.3.4.7 The qualitative aspects which the Authority focuses on

555. In **Section 15.6.3** of its Reply to the SO, Norway Post maintains with regard to the qualitative aspects which the Authority focuses on, that Norwegian outlets in general provide services of a high quality, have good premises and by and large have similar opening hours, and that grocery stores, kiosks and petrol stations are not different from other outlets in this respect. Norway Post argues that if two outlets are located beside each other and have acceptable opening hours, consumers would be indifferent with regard to in which outlet the delivery took place.
556. In the Authority's view these arguments are beside the point. As demonstrated above, there are good reasons for distinguishing between outlets belonging to grocery store, kiosk and petrol station chains and other type of outlets. It is well-known, and Norway Post has not contested, that grocery stores in Norway generally have long opening hours.⁴³⁷ It is also plain that smaller grocery stores, kiosks and

⁴³⁶ The European Commission has used customer surveys in two recent merger cases: COMP/M.4439 *Ryan Air / Air Lingus* and COMP/M.4919 *StatoilHydro / Conoco Phillips*. Both cases concerned mergers in retail markets. For more details see Competition Policy Newsletter No 2009, pages 71 et seq for more details (available at http://ec.europa.eu/competition/publications/cpn/2009_1_19.pdf).

⁴³⁷ This is easy to verify on the websites of the retail chains. E.g. the websites of the grocery store chains REMA 1000 (<http://www.rema.no/rema/butikker/>), KIWI (<http://kiwi.no/butikker/>), and Rimi (<http://rimi.no/Finn-butikk>) shows that many grocery stores are open from early in the morning (from seven or eight o'clock) until late in the evening (ten or eleven o'clock). In comparison clothes retailers like Cubus (<http://cubus.com/no/Om-Cubus/Butikker/>) and H&M

petrol stations are allowed to be open longer than other outlets, including on Sundays.⁴³⁸ It cannot be denied that grocery stores are visited more often than any other retail outlets. As regards service quality, it is reasonable to assume that grocery stores, kiosks and petrol stations which are part of a chain concept are apt to provide services of a high quality. It is also unlikely that all types of outlets would provide the same quality of service. It suffices in this regard to note that Norway Post itself emphasised a number of quality aspects when selecting outlets for its Post-in-Shop concept (see paragraphs 120 *et seq* above).

557. DHL's recent entry in the Swedish market, to which Norway Post has referred, also appears to be consistent with the view that access to grocery store, kiosks or petrol station chains is the most efficient means of entry. Even if DHL appears to have complemented its network with other outlets, it is safe to assume that its agreement with Reitangruppen was important for its competitiveness (see Norway Post's Reply to the SO, pages 38-39).
558. Norway Post's example of two outlets which are located beside each other is purely hypothetical, focuses on the choice of an individual outlet, not on the advantages of having access to a well-known nationwide chain, and overlooks that the assessment must focus on the alternatives which were operational, efficient and competitive solutions for new entrants. A new entrant that would have to look for outlets located next to the outlets of a grocery store chain rather than having access to that chain would be placed at a competitive disadvantage.

14.3.5 Conclusion

559. Norway Post established its Post-in-Shop network through co-operation with leading grocery store, kiosk and petrol station chains. As shown above, such co-operation was also likely to constitute the most efficient and cost effective way of establishing and operating a delivery network for B-to-C parcels for new entrants. In comparison, recruiting individual grocery stores, kiosks or petrol stations without co-operating with a chain was an inefficient and hardly feasible way of establishing a sustainable nationwide delivery network. Using other types of outlets was a second-best solution which risked being viewed as a less attractive means of delivery by distance selling companies and consumers, if it could have been established at all. An entry strategy which had purported to establish a delivery network in other types of retail outlets or chains at a large scale would have increased considerably the risks associated with new entry. A new entrant that was unable to roll out its delivery concept in one or more of the leading grocery store, kiosk or petrol station chains, was therefore placed at a serious competitive disadvantage compared to Norway Post.

(http://www.hm.com/no/storelocator_storelocatorhtml.nhtml) often open later (nine or ten o'clock) and close earlier (not later than eight o'clock, often earlier).

⁴³⁸ See paragraph 511 above,

14.4 Norway Post's conduct limited access to the leading grocery store, kiosk and petrol station chains

14.4.1 Limitation of the freedom of grocery store, kiosk and petrol station chains to negotiate with potential competitors of Norway Post

560. Norway Post engaged all significant grocery store, kiosk and petrol station chains in parallel negotiations about the Post-in-Shop concept at the beginning of 2000. In particular, it negotiated agreements of intent with NorgesGruppen/Shell, COOP, ICA/Statoil, Rema 1000 and Narvesen. It signed agreements of intent with NorgesGruppen/Shell, COOP, and ICA.
561. By negotiating and concluding agreements of intent Norway Post limited or sought to limit the retail groups' freedom to negotiate with competing providers of B-to-C parcel services by including clauses which obliged the other party not to enter into discussions with competing suppliers of postal services.⁴³⁹
562. Thus, from the signature of the agreement of intent on 30 May 2000 until 1 July 2000, NorgesGruppen/Shell was formally prohibited from entering into discussions with other suppliers of postal services (see section 6.2 above). In the period between 1 July 2000 and the signature of the Framework agreement with Norway Post on 20 September 2000, Shell and NorgesGruppen were negotiating with Norway Post and were well aware that Norway Post would require exclusivity in the networks of NorgesGruppen and Shell in return for a preferred partner status.
563. COOP undertook not to enter into discussions with other postal operators for the duration of the negotiations with Norway Post and it appears that ICA did the same (see paragraphs 88 and 90 in Section 6.2 above).
564. Thus, while Norway Post conducted parallel negotiations with all the major grocery store, kiosk and petrol station chains/groups it was capable of preventing its negotiating partners from engaging in negotiations with potential competitors for the provision of B-to-C parcel services with over-the-counter delivery. Consequently, already at this stage Norway Post conduct limited in principle its rivals' (or potential rivals') access to the leading grocery store, kiosk and petrol station chains.

14.4.2 Preference and exclusivity clauses tying outlets to Norway Post

565. The agreements of intent, or annexes thereto, contained clauses on preference and exclusivity. Thus, Norway Post indicated that NorgesGruppen/Shell would become Norway Post's preferred partner, COOP would become preferred partner insofar as it had or would be able to provide satisfactory outlets, ICA should be given preference/be the first choice if both parties found it commercially profitable to establish Post-in-Shop. In the draft agreement of intent with Rema 1000 local exclusivity was foreseen (see section 6.2 above).
566. According to the Business Agreement concluded with NorgesGruppen/Shell on 20 September 2000, Norway Post granted NorgesGruppen/Shell *preferred partner status* in return for exclusive access to the whole retail network of NorgesGruppen and Shell. The prohibition on offering competing postal services applied to all

⁴³⁹ This was at least the case as regards NorgesGruppen/Shell, COOP, ICA, Narvesen and Rema 1000.

outlets in the retail networks of NorgesGruppen and Shell regardless of whether a Post-in-Shop was established in those outlets. This has been confirmed by Norway Post.⁴⁴⁰ This form of exclusivity, which is referred to hereafter as “group exclusivity”, was maintained in the renewed Business Agreement from 2003.

567. The group exclusivity covered some 3 400 outlets in 2001 and close to 3 250 outlets in 2004 (see section 6.2 above).⁴⁴¹ Thus, all these outlets were made inaccessible to Norway Post’s competitors. In 2004 Norway Post only used 669 NorgesGruppen outlets and 37 Shell outlets, or less than 22% of all the outlets covered by the group exclusivity.⁴⁴² Thus, the remaining outlets were made inaccessible to Norway Post’s competitors although they were not used by Norway Post. This situation is representative of the whole period under discussion.
568. COOP was granted second priority status by Norway Post. While the Framework Agreements with COOP did not require exclusive access to all COOP outlets (group exclusivity), the exclusive right to offer postal or financial services under these agreements applied to all outlets in which a Post-in-Shop was established.⁴⁴³ This form of exclusivity is referred to as “outlet exclusivity” in the following.
569. COOP had around 900 outlets during the relevant period. Norway Post had established 242 Post-in-Shops in COOP outlets in 2004.⁴⁴⁴
570. The Protocol signed by Norway Post with ICA also provided for outlet exclusivity. This applied to some 180 outlets in 2004 in which Norway Post had established a Post-in-Shop.⁴⁴⁵
571. Accordingly, some 3 672 outlets were tied exclusively to Norway Post in 2004. As there were no major changes in the agreements of Norway Post or the structure of the grocery store, kiosk and petrol station chains during the relevant period the situation described gives a representative picture of the extent to which outlets were reserved exclusively for Norway Post by contractual means.

14.4.3 Disincentive effects resulting from Norway Post’s conduct and the accessibility of COOP and ICA to new entrants

14.4.3.1 Disincentives for COOP and ICA to supply competitors of Norway Post in the period 2001-2003

572. Bearing in mind that the interest for the outlets in providing parcel delivery services to a significant extent lies in the extra business which can be attracted into the shop when final consumers pick up their parcels, it is important to recall the wide range of

⁴⁴⁰ See event # 96421, reply from Norway Post dated 16 June 2003, page 12: “Norway Post has an exclusive right to supply and market postal products and services to the consumers within NorgesGruppen / Norske Shell’s network. This implies that a competitor of Norway Post is prevented from supply and market postal products and services to the consumers within the group regardless of whether Norway Post has established a Post-in-Shop in the outlet in question.”

⁴⁴¹ According to Norway Post’s Reply to the SO, page 111, the number of outlets covered by the group exclusivity was even higher: 3882 in 2001 and 4113 in 2004.

⁴⁴² See event # 313884, reply from Norway Post dated 17 March 2005, attached memo, page 3.

⁴⁴³ It can be questions whether the exclusive right also covered other outlets belonging to the co-operative that was party to the operating agreement and which were located in the same area as the Post-in-Shop.

⁴⁴⁴ See event # 313884, reply from Norway Post dated 17 March 2005, attached memo, page 3.

⁴⁴⁵ See event # 313884, reply from Norway Post dated 17 March 2005, attached memo, page 3.

services offered by Norway Post, its existing business and consumer relationships and its established business volume. Moreover, as the incumbent postal provider, it had a nationwide delivery network which it planned to restructure and extend. In this context, Norway Post was, objectively speaking, a more attractive commercial partner than a competing supplier of B-to-C parcel services which was in a start-up phase and still had to build up a volume of business. Norway Post was therefore, from the outset, in an advantageous position vis-à-vis the leading grocery store, kiosk and petrol station chains compared to its rivals.

573. From the conclusion of their agreements with Norway Post in 2001 and well into 2002, when a large number of new Post-in-Shops were established, both COOP and ICA had an interest in getting as many Post-in-Shops as possible. Norway Post admits in its Reply to the SO that its contracting parties were interested in having as many Post-in-Shop units as possible in their outlets.⁴⁴⁶
574. The fact that Norway Post required outlet exclusivity, as specified in the framework agreement concluded with COOP centrally and in the protocol concluded with ICA centrally (see Sections 6.3.2 and 6.3.3 above), ruled out that a Post-in-Shop could be established in any outlet to which a competitor had been granted access. Thus, every single outlet used by a competitor of Norway Post would be excluded from the Post-in-Shop concept.
575. In this situation, agreeing to roll out a competing delivery concept, resulting in the establishment of several hundred “competing” outlets in their retail networks, would significantly have reduced the likelihood for COOP and ICA of being awarded new Post-in-Shop outlets.
576. Thus, during the roll-out of the Post-in-Shop concept in 2001 and 2002 the conduct of Norway Post, in combination with the advantageous position of Norway Post resulting from the factors mentioned above, created clear disincentives for COOP and ICA that were likely to limit their willingness to negotiate and conclude agreements regarding the provision of over-the-counter delivery services with competing suppliers of B-to-C parcel services.
577. While fewer Post-in-Shops were established from autumn 2002 onwards,⁴⁴⁷ these disincentives continued to play a role. Firstly, Norway Post maintained its exclusivity strategy. Secondly, it was common knowledge that it would be in the interest of Norway Post to reduce further the number of post offices and replace these with the more cost efficient Post-in-Shops.⁴⁴⁸ Thirdly, the fact that Norway Post wished to replace more post offices with Post-in-Shops was communicated to the retail groups (see paragraph 185 above).⁴⁴⁹ Finally, Norway Post closed some Post-in-Shops and replaced them with new ones.

⁴⁴⁶ Reply to the SO, page 24.

⁴⁴⁷ According to Section 2.2.7 of Norway Post’s Reply to the SO, the main roll-out of the Post-in-Shop network was completed autumn 2002.

⁴⁴⁸ See e.g. the report of an interdepartmental working group entitled “Competition on the Postal market”, March 2004, (available at: <http://www.regjeringen.no/upload/kilde/sd/rap/2004/0004/ddd/pdfv/209002-post.pdf>.) which states at page 51 that: “It is more likely that Norway Post will wish to reduce the most costly part of its distribution network, i.e. the post offices operated by Norway Post, and replace them with Post-in-Shop.”

⁴⁴⁹ Norway Post announced publicly its intention to close down 150 post offices in February 2006, see paragraph 58 above.

14.4.3.2 Disincentives for COOP and ICA to supply competitors of Norway Post in the period 2004-2006

578. Norway Post initiated a re-negotiation process in relation to NorgesGruppen/Shell, COOP and ICA towards the end of 2003/beginning of 2004 which lasted well into 2006. It conducted parallel negotiations with the three retail groups. Even if it considered that it was not in its interest to allocate preferred partner status to one retail group from 2006, Norway Post expressly kept the question of preferred status open during the negotiations, indicating to each group that the negotiations could result in a change in their status. Thus, throughout the renegotiation period Norway Post's strategy created a high degree of uncertainty among its three contractual partners with respect to question of preference status.
579. This is described in Section 6.4 above. Documentary evidence obtained by the Authority shows that Norway Post told both COOP and ICA that it would look at the preferred partner status again, that "*all cards were still open in this case*" (paragraph 178 above). Norway Post reverted to the issue at several meetings with COOP without giving COOP any clarification (paragraph 184 above). It followed the same line in relation to ICA (see paragraph 195 above).
580. According to Norway Post, the retail groups with which it negotiated encouraged Norway Post to keep the system with preferred partner status and each of them wished that their group would be granted such status from 2006. These views were according to the Reply to the SO explicitly expressed to Norway Post (see paragraph 179 above).
581. The question of preference was one of the main issues of concern to COOP during the negotiations with Norway Post. COOP was not only very interested in replacing NorgesGruppen/Shell as preferred partner (see paragraph 182 in Section 6.4 above),⁴⁵⁰ it was also concerned that it could lose its second priority status to ICA (see paragraph 186 in Section 6.4 above).
582. It goes almost without saying that if COOP in this situation had concluded an agreement with Privpak or another competitor of Norway Post and committed to roll out a parcel delivery concept in a large number of COOP outlets it would have severely increased the risk that it would lose its second priority status and was likely to have disqualified itself as a candidate for preferred partner status.
583. As long as the issue of preference remained open, Norway Post's conduct therefore created strong disincentives, which reduced the likelihood that COOP would be willing to negotiate and conclude agreements to provide over-the-counter delivery services to competing distributors of B-to-C parcels.
584. As long as Norway Post kept the question of preference open, ICA could also easily have disqualified itself from improving its preference status vis-à-vis Norway Post. Generally it would have weakened its negotiation position if it had agreed to roll-out a parcel delivery concept of one of Norway Post's competitors before the contractual relationship with Norway Post was settled. One of the main reasons for the

⁴⁵⁰ COOP wanted to become the preferred partner of Norway Post already when the first Framework agreement was negotiated and concluded. Although its coverage could not justify "*full exclusivity*" COOP wanted to become the preferred partner insofar as it had or would be able to provide relevant outlets (see Section 6.2 above).

disagreements during the negotiations between Norway Post and ICA related to the fact that Norway Post maintained its strategy with regard to preference and exclusivity (see Sections 6.4 and 6.5 above).

585. As mentioned in Section 9 above, Tollpost maintains that it was in contact with ICA in autumn 2005 and that ICA did not show any interest in its business concept. While ICA cannot confirm this contact, ICA points out that its negotiation committee was engaged with the issue of whether ICA should co-operate with Norway Post regarding Post-in-Shop and, if so, in which way.⁴⁵¹
586. According to ICA, there were diverging opinions inside ICA in 2004 about the advantages of Post-in-Shop and it was not clear that competitors of Norway Post would offer considerably better conditions. The interest of ICA in competing concepts at this time could therefore in ICA's view be regarded as moderate.⁴⁵² At this time, therefore, it cannot have been easy for a new entrant to conclude an agreement with ICA for the roll-out of a parcel delivery concept. The negotiating strategy of Norway Post made this even more difficult due to the disincentives that this strategy created.
587. Further, ICA had a clear interest in improving its preference status during the renegotiations as it was ranked after both NorgesGruppen and COOP under the existing agreements. One way of achieving this could have been to obtain preferred partner status or second priority status. If that had been coupled with exclusivity, however, this would have ruled out the possibility of ICA concluding agreements with competitors of Norway Post, either in ICA's network as a whole (in case of group exclusivity) or for a large number of outlets (in case of outlet exclusivity). This alternative could therefore have been contrary to ICA's interests. The subsequent agreement that ICA concluded with the Swedish Post (see Section 9 above), illustrates that ICA also had an interest in being free to conclude an agreement with a competitor of Norway Post without being ranked after the two other contractual partners of Norway Post.⁴⁵³ A second way to improve its preference status was to require Norway Post to remove preference clauses and exclusivity provisions from its agreements altogether. In any case, as long as the disagreement between Norway Post and ICA regarding exclusivity and preference clauses existed, it would have been very difficult for a new entrant to conclude a distribution agreement with ICA that would allow the new entrant to roll out its delivery concept on a large scale in ICA outlets.
588. Indeed, it was only after the contractual relationship with Norway Post had been resolved that ICA negotiated an agreement for the delivery of parcels in Norway with the Swedish Post.⁴⁵⁴ Obviously, it was much easier for ICA to conclude this agreement when its contractual relationship with Norway Post had been settled and ICA knew that its preference status would not be affected by the conclusion of the agreement with the Swedish Post.

⁴⁵¹ See event # 450690, reply from ICA dated 29 October 2007, question 4.

⁴⁵² See event # 450690, reply from ICA dated 29 October 2007, question 3.

⁴⁵³ Indeed, even after abolishing preference clauses and exclusivity Norway Post reacted swiftly to the news that ICA would make its network available to Tollpost/the Swedish Post for parcel delivery and expressed concerns that its business relationship with ICA could be damaged by the co-operation (event # 472860, letter from Norway Post to ICA dated 5 February 2007).

⁴⁵⁴ See event # 450690, reply from ICA dated 29 October 2007, point 5.a).

589. Thus, Norway Post's negotiating strategy from end 2003/beginning of 2004 in combination with its importance as an existing business partner created clear disincentives for both COOP and ICA that were likely to limit their willingness to supply alternative providers of B-to-C parcel services. This was the case at least as long as the negotiations continued and the contractual relationships with COOP and ICA were unsettled.

14.4.3.3 The arguments of Norway Post regarding disincentive effects and the accessibility of COOP and ICA for new entrants

590. In **Section 15.10** of its Reply to the SO, Norway Post argues that the alleged negative incentives that the agreements with Norway Post are said to have represented were not a relevant problem in areas where Post-in-Shops were already established and Norway Post therefore no longer needed to establish a distribution outlet. According to Norway Post, a large part of the Post-in-Shop network was established already in 2002 and it was decided quickly in which shops a Post-in-Shop unit would be established (also with regard to the COOP/ICA shops). In all locations where a Post-in-Shop had been established in an outlet belonging to NorgesGruppen or Shell, Norway Post maintains, a competitor could negotiate with COOP or ICA regarding the establishment of delivery points for B-to-C parcels without being influenced by the agreements of Norway Post.

591. In areas where Norway Post still might have needed to establish Post-in-Shops, the preference for NorgesGruppen/Shell would, according to Norway Post, to a large extent have ruled out COOP or ICA as an alternative if NorgesGruppen or Shell were present in the area. In Norway Post's view, COOP and ICA were aware of the preferred status of NorgesGruppen/Shell and would quickly see which of their outlets that would not be relevant for the establishment of Post-in-Shop.

592. In this regard, the Authority notes that the preference status of NorgesGruppen/Shell entailed that NorgesGruppen and Shell should be considered before any other retail chain when Norway Post decided to establish a Post-in-Shop at a given location. However, this did not prevent Norway Post from considering other outlets if the outlets of the preferred partner did not fulfil Norway Post's selection criteria for Post-in-Shop. Further, as Norway Post has maintained itself, shopkeepers could say no to the Post-in-Shop concept.⁴⁵⁵ It is therefore likely that there was a significant degree of uncertainty surrounding which COOP or ICA outlets could potentially become a Post-in-Shop during the main roll-out phase which ended in the second half of 2002.

593. On the other hand, it is likely that the disincentive effect was less strong after the main bulk of Post-in-Shops had been established in September 2002 and until the renegotiation process started in 2003/2004, as a lower number of Post-in-Shops were being established.

594. As regards the disincentives created by the way in which Norway Post renegotiated its contracts, Norway Post argues in **Section 15.11** of its Reply to the SO that parallel negotiations with several parties enhanced competition because it was the most efficient way of negotiating agreements. The time spent on the renegotiations

⁴⁵⁵ This was particularly relevant until Norway Post increased its remuneration to shop owners/operators in September 2001 (See Section 2.2.6 of Norway Post's Reply to the SO). After this adjustment, it was easier to convince local shopkeepers to conclude Post-in-Shop agreements (page 27 of the Reply to the SO).

is explained by the fact that the agreement with NorgesGruppen expired after five years and that Norway Post could not change the agreements before they lapsed. Further, it is argued that there was no exclusionary strategy on the part of Norway Post.

595. However, the Authority has not objected to parallel negotiations as such, only the strategic use of the question regarding preference status during the negotiations. It is noteworthy that Norway Post admits in its Reply to the SO that it was not in Norway Post's interest to allocate preferred partner status to one retail group at the time of the renegotiations (see paragraphs 180 and 181 above). An alternative strategy based on equal treatment and no exclusivity, which was subsequently introduced by Norway Post, would have made the situation appreciably different and more predictable for retail groups, which in turn would have made these groups more available to new entrants.
596. The fact that Norway Post was bound by its original agreements for five years does not in any way exonerate Norway Post from liability under Article 54 EEA. It could have taken the initiative to remove the group exclusivity long before 2006 and it could have pursued an alternative negotiation strategy even if its existing agreements were still running.
597. Even if Norway Post did not intend to prevent new entrants from concluding distribution agreements with its three contracting parties, it is nevertheless well-established in case law that a dominant undertaking has a special responsibility to ensure that its conduct does not distort competition (see paragraph 478 above). In a context where Norway Post applied group and outlet exclusivity in its agreements, that responsibility should have led Norway Post to abstain from pursuing a renegotiation strategy in which the prospects of being allocated preferred partner status and the risk that COOP could lose its second priority status were used strategically with the inevitable result that disincentives were created for both COOP and ICA that were likely to limit their willingness to distribute parcels for alternative distributors.
598. In **Section 15.11.2** of its Reply to the SO, Norway Post maintains that ICA reported to the Authority in 2004 that it would be interested in concluding agreements with competitors of Norway Post if a satisfactory logistical solution was available. Norway Post criticises the Authority for not taking this apparently positive attitude with respect to Norway Post's competitors into account.
599. In 2004, the Authority asked ICA with regard to retail outlets in which a Post-in-Shop had been established, whether such retail outlets operated by ICA would have an interest in also distributing parcels for competing suppliers of Norway Post in absence of the outlet exclusivity. What ICA actually reported to the Authority in March 2004 in response to this question was that:

“The precondition for having a co-operation with another supplier is that the supplier's logistics functioned satisfactorily and that this would be positive to the chains of ICA Detalj AS.”⁴⁵⁶

⁴⁵⁶ “Forutsetningen for at ICA ville hatt samarbeid med en annen leverandør, er at leverandøren har en logistikk som fungerte tilfredsstillende og at dette ville vært positivt for ICA Detalj ASs kjeder.” (event # 259827 Q4a)

600. It does not follow from that statement that ICA at that time was interested in concluding agreements with competitors of Norway Post. Further, Norway Post ignores the latter part of the sentence in its Reply. In effect, ICA had two requirements: satisfactory logistics and a positive effect for the ICA chains. On the basis of the above assessment, the Authority maintains that it was far from easy for new entrants generally to convince ICA that their concept would provide a positive effect to ICA chains. ICA's statement does not either contradict that there was a disincentive effect in the main roll-out phase of the Post-in-Shop concept. Nor does the statement contradict the disincentive effects that resulted from Norway Post's renegotiating strategy, since that strategy was implemented after ICA had submitted its reply to the Authority.

14.4.3.4 Conclusion regarding the disincentive effects and the accessibility of COOP and ICA for new entrants

601. For the reasons set out above, the Authority considers that Norway Post's conduct did create disincentives for COOP and ICA between 2001 and autumn 2002 that were likely to limit their willingness to negotiate and conclude agreements regarding the provision of over-the-counter delivery services for competing suppliers of B-to-C parcel services. Between autumn 2002 and end 2003 these disincentives might have been less important and will not be considered a central part of any abuse. However, the renegotiation strategy pursued by Norway Post with regard to preference clauses and exclusivity created significant disincentives on the part of COOP and ICA which made these retail groups less available to new entrants from 2004 until the negotiations were settled in 2006.

602. Moreover, the Authority considers that the agreements Norway Post had concluded with COOP and ICA, which defined their preference status and the extent to which exclusivity provisions were imposed, together with the way in which Norway Post conducted its renegotiation process, seen in the light of Norway Post's dominant position and its attractiveness as a business partner relative to new entrants, effectively meant that COOP and ICA were far from readily available to new entrants during the relevant period.

14.4.4 The other leading grocery store, kiosk and petrol station chains were far from readily available to Norway Post's competitors

603. The petrol station chains Esso, Hydro Texaco and Statoil were not prepared to roll out delivery concepts of suppliers of B-to-C parcel services in their chains (see paragraphs 110 *et seq* of Section 6.2, Section 8.3.1 and paragraph 301 above). At least Hydro Texaco and Statoil were also negative to the possibility that suppliers of B-to-C parcel services approached individual outlets in their network (see Sections 8.3.1.4 and 8.3.1.5 above). Several of the petrol station chains have considered that they do not have sufficient space in their stations to provide parcel delivery services or that a parcel delivery concept could not provide sufficient business opportunities to them (paragraphs 110 to 112 and Sections 8.3.1.3 to 8.3.1.5 above).

604. Reitangruppen was negative to both the Post-in-Shop concept of Norway Post and the concept of Privpak in 2000 (see paragraphs 105 and 277 above). Moreover, in 2004 Reitangruppen's negative attitude towards projects that might add costs and/or draw focus away from Rema 1000's main strategy was clearly spelled out to the Authority (see paragraph 105 above).

605. Neither the Narvesen nor the 7-Eleven chain, which both form part of Reitangruppen, were readily prepared to roll out delivery concepts of suppliers of B-to-C parcel services in their chains (paragraphs 106 and 277 above).
606. On the basis of these facts, the Authority considers that it is unlikely that new entrants during the relevant period could have rolled out their delivery concepts in the retail chains of Reitangruppen or the petrol station chains of Esso, Hydro Texaco and Statoil. This is so even if these chains as such were considered suitable for this purpose by the providers of B-to-C parcel services. At the very least, these chains were far from readily accessible to new entrants and did not represent any alternative to which new entrants could easily have turned.
607. The only remaining grocery store, kiosk or petrol station chain of some size was Gyda. However, a large proportion of the Gyda kiosks are unbranded, the kiosk concept of Gyda appears to be a niche concept⁴⁵⁷ and the number of Gyda outlets has been much more limited than the leading grocery store, kiosk and petrol station chains.⁴⁵⁸ As explained in section 8.3.1.9 above, Privpak pursued contacts with Gyda in 2001 but focused on gaining access to the major chains at this time. In 2006 Privpak concluded an agreement with Gyda. However, this only resulted in 8 delivery outlets being established. Due to the limited size of the Gyda chain, access to this chain would not in any case have been sufficient to roll out a delivery network in the same manner as in the leading grocery store, kiosk and petrol station chains.

14.4.5 The arguments of Norway Post in Section 15.5 of the Reply to the SO

608. In **Section 15.5.1** of its Reply to the SO, Norway Post argues that a potential entrant had the possibility of co-operating with grocery store, kiosk and petrol station chains during the period at issue.
609. In response to this argument the Authority notes, as demonstrated above, that alternatives among grocery store, kiosk and petrol station chains were far from readily available to new entrants. It is not necessary in order to establish that Norway Post's conduct was abusive to prove that it was impossible for new entrants to get access to the alternative chains. Under the existing case law it is sufficient that access was difficult and that the prospects of successful new entry to the market would have been markedly improved in absence of Norway Post's conduct, or in other words that the conduct of Norway Post was capable of restricting competition.⁴⁵⁹ Hence, Norway Post's conduct created additional barriers to entry in the relevant market.
610. In **Section 15.5.2** of its Reply to the SO, Norway Post argues that there were no legal or factual obstacles which hindered its competitors from concluding agreements with grocery store, kiosk or petrol station chains with the exception of NorgesGruppen/Shell and the outlets of COOP and ICA which had concluded Post-in-Shop agreements.

⁴⁵⁷ See www.gyda.no.

⁴⁵⁸ See footnote 267 at paragraph 283 above.

⁴⁵⁹ See Section 14.1 above.

611. It is correct that COOP and ICA were not formally prevented from concluding distribution agreements with Norway Post's competitors insofar as outlets in which no Post-in-Shops had been established are concerned. Norway Post fails to take into account, however, that COOP and ICA were in a business relationship with Norway Post and that they viewed Norway Post as an attractive commercial partner. This fact implies that those two retail groups would take that relationship into account when considering whether to conclude distribution agreements with competitors of Norway Post. While Norway Post cannot be criticised for this fact at the outset, it is nevertheless a business reality that needs to be kept in mind. As demonstrated above, Norway Post's conduct enhanced this effect (see Section 14.4.3 above) and therefore reduced the availability of COOP and ICA to new entrants.
612. In **Section 15.5.3** of its Reply to the SO, Norway Post maintains that it is likely that several of the chains in question would have concluded an agreement concerning parcel delivery if they had received a competitive offer from a potential entrant.
613. In the Authority's view, by making this argument Norway Post disregards the fact that it was not easy for a new entrant to make a sufficiently good offer to be attractive to the grocery store, kiosk and petrol station chains. Privpak and Tollpost were new entrants without much existing business volume. They would have to convince retail groups that their concepts would develop into large volume distribution businesses in order to entice their interest. The retail groups and chains, thus, had to make a prospective analysis of whether the new concepts were likely to develop into a delivery system that would become commercially interesting to the outlets of the chains. Chains and retail groups may have assessed this differently depending amongst others on how they perceived the match between the delivery concepts of the new entrants and their various retail chains. Hence, those who considered that the concepts were not likely to yield a sufficient contribution per square metre and that an alternative use of the space required for parcel distribution would be more profitably, showed little interest in these concepts.
614. As a matter of fact, new entrants faced a classic chicken and egg problem: on the one hand, they had to figure out how to sign up distance selling companies and achieve volume in their networks without having delivery outlets and, on the other, how to sign up delivery outlets without having a pre-existing volume of parcels to distribute (see Section 4 above). While the Swedish Post was able to resolve this problem eventually, new entrants generally were not in the same position. In contrast, Norway Post had an existing business volume to offer retail groups. New entrants and Norway Post were therefore in very different situations during the relevant period.
615. Norway Post maintains further in **Section 15.5.3** of its Reply to the SO, that Hydro Texaco (event # 321420) and Esso (event # 322174) have stated to the Authority that they did not have any general attitude to parcel delivery from its petrol stations. This shows in Norway Post's view that these companies were open to parcel delivery concepts. Further, Norway Post seems to argue that the fact that these companies did not conclude any agreements about parcel delivery does not in any way prove that it was not possible to conclude such agreements since they did not exclude this possibility. Finally, Norway Post refers to that Statoil engaged in serious negotiations with Norway Post regarding the establishment of parcel delivery in its outlets in 2000.

616. The replies from the petrol station chains have been set out above. The assessment of both Privpak and Tollpost was that these chains were not available to them. The fact that Statoil did negotiate with Norway Post together with ICA in 2000, does not negate the finding that Statoil was not interested in distributing parcels from its petrol stations. In the Authority's view, Norway Post's interpretation of the facts on this point stands out as unbalanced and one-sided. At best, the possibilities for new entrants to roll out their concepts in these chains were remote.
617. Norway Post further argues in **Section 15.5.3** of its Reply to the SO that even if there were decisions made centrally regarding parcel delivery, nearly half of the outlets of Statoil, Hydro Texaco and Esso are independent dealer owned and dealer operated stations (DODO), which did not need approval to provide parcel delivery services.
618. This argument, however, disregards the fact that a new entrant would be considerably better off with the endorsement of the chain centrally as argued above. Focusing on DODO stations would represent a more risky entry strategy as the central level might get involved at a later stage for example if the status of DODO stations were to change.⁴⁶⁰ It also remains unexplained why the DODO stations generally would have a different view from the central level on the need to achieve a sufficient contribution per square metre from their limited space. Finally, it is not obvious that it would have been easy for a new entrant to identify which stations that were DODO and which were not. This argument, therefore, does not in any way remove the concern that Norway Post's conduct inhibited competition in the relevant market.
619. Norway Post also maintains in **Section 15.5.3** of its Reply to the SO that even if Reitangruppen has expressed certain scepticism towards parcel delivery, the group's actions suggest that it nevertheless might have been possible for a competitor to establish a delivery network within the chains of Reitangruppen. According to Norway Post, in Sweden kiosk chains belonging to Reitangruppen co-operate with DHL and Posten AB regarding parcel delivery. Further Norway Post refers to that Reitangruppen was also engaged in negotiations with Norway Post in 2000, that Rema 1000 has now entered into a Post-in-Shop agreement with Norway Post and that Privpak is also rolling out its concept in this chain.
620. While Norway Post did conclude a framework agreement with the grocery store chain Rema 1000 in May 2006, prior to the conclusion of this agreement there were very few Post-in-Shops established in Rema 1000 outlets. For instance in 2005 there were two Rema 1000 outlets with a Post-in-Shop according to a list submitted by Norway Post on 27 June 2006 (event # 378461). As a matter of fact, information submitted by Norway Post after the oral hearing shows that there was no Post-in-Shop in Rema 1000 outlets before April 2005. In July 2009 the number had increased to 18 of which eight were opened in 2009, four in 2008, three in 2007, two in 2006 and one in 2005.⁴⁶¹
621. As regards the co-operation between 7 Eleven of Reitangruppen and the Swedish Post, which dates back to 2002, it is noted that that co-operation is basically limited

⁴⁶⁰ See in that regard Privpak's experience with Esso as described in Section 8.3.1.3 above.

⁴⁶¹ See event # 524500, letter from Norway Post dated 13 July 2009, annex 2.

to the selling of stamps, pre-stamped envelopes and access to mail-boxes. It does not include parcel delivery.⁴⁶²

622. The agreement between Pressbyrån, the Swedish kiosk chain of Reitangruppen, and the Swedish Post dates back to 2002 when the Swedish Post was restructuring its distribution network in a similar manner as Norway Post did in Norway. This agreement did comprise parcel delivery.⁴⁶³ This illustrates that Reitangruppen could have been interested in concluding a similar agreement in Norway. However, a pre-condition for concluding such an agreement would have been that it could yield the contribution per square meter that Narvesen and 7-Eleven required. That requirement was not easy to fulfil for new entrants. In fact, neither a miniature Post-in-Shop concept nor Privpak's concept satisfied this requirement according to Reitangruppen itself (see paragraphs 106 and 277 above).
623. The agreement between Pressbyrån and DHL in Sweden is more recent.⁴⁶⁴ Further, Privpak only concluded a distribution agreement with Rema 1000 in Norway in 2009. At the time these agreements were concluded, the market for B-to-C parcel distribution services had evolved considerably, both in Norway and Sweden, since Privpak's entry to the Norwegian market in 2001. It is for instance common knowledge that there has been a significant increase in internet shopping in recent years and, as a result, growth in the market for B-to-C parcel distribution services. In addition, when Privpak concluded its agreement with Rema 1000 it had already at that stage concluded an agreement with NorgesGruppen in 2007 and started rolling out its concept in the chains of NorgesGruppen. The conclusion of an agreement with Privpak must therefore have appeared more promising to Rema 1000 than it did at the time Privpak entered the market.
624. These developments may, nevertheless, also signify that Reitangruppen's views on parcel distribution have evolved over time and that it has become more receptive towards parcel distribution services than it was in the past. However, these developments do not imply that Reitangruppen was readily prepared to let competitors of Norway Post roll out their parcel delivery concepts in Rema 1000 or in its Norwegian kiosk chains during the relevant period.

14.4.6 Conclusion

625. It follows from the above that many outlets were tied to Norway Post, whether or not a Post-in-Shop had been established in those outlets (group exclusivity). Thus, competitors of Norway Post were completely excluded from the retail networks of NorgesGruppen and Shell even if Norway Post only used a small part of these networks for its Post-in-Shop concept.
626. An additional number of outlets in COOP and ICA were tied to Norway Post by "outlet exclusivity". Moreover, additional disincentives were created by Norway Post through its requirements in relation to COOP and ICA that all Post-in-Shops that were to be established should be subject to outlet exclusivity and through the

⁴⁶² Press release of the Swedish Post dated 8 July 2002 available at: http://cws.huginonline.com/P/134112/PR/200207/887009_2_12.html

⁴⁶³ Press release of the Swedish Post dated 23 April 2002 available at: http://cws.huginonline.com/P/134112/PR/200204/887024_2_12.html

⁴⁶⁴ See DHL's press release of January 2008 at: <http://www.dhl.se/publish/se/sv/press/release/2008/20080114.high.html>.

renegotiating strategy that it pursued from 2004 onwards. Norway Post's use of exclusivity in its agreements with COOP and ICA in particular, and its conduct as a whole, therefore reduced the likelihood that competing suppliers of B-to-C parcels services would be given the opportunity to roll out their parcel delivery concepts in COOP or ICA.

627. Against this background Norway Post's conduct in relation to NorgesGruppen/Shell, COOP and ICA limited severely its rivals' ability to establish and expand a delivery network for the delivery of B-to-C parcels in the leading grocery store, kiosk and petrol station chains which had shown a willingness to engage in this kind of business. The other leading grocery store, kiosk and petrol station chains were to a large extent unavailable to Norway Post's competitors during the relevant period. Hence, Norway Post's conduct made it considerably more difficult for new entrants to obtain access to the most sought after distribution channels in Norway. Norway Post's conduct therefore created strategic barriers to entry on the relevant market for the provision of B-to-C parcel services with over-the-counter delivery.
628. This situation commenced in principle already during the negotiation and conclusion of the agreements of intent early in 2000 but became more definitive with the conclusion of the agreement with NorgesGruppen/Shell in September 2000. It was only in the course of 2006 that Norway Post brought the negotiations with NorgesGruppen, COOP and ICA to an end and gradually lifted or waived the exclusivity in all its agreements concerning Post-in-Shop and concluded new agreements under which all partners were treated equally.⁴⁶⁵

14.5 Norway Post's conduct was capable of restricting competition in the market for B-to-C parcel services with over-the-counter delivery

629. When assessing the extent to which Norway Post's conduct was liable to restrict competition on the market for B-to-C parcel services with over-the-counter delivery, account must be taken of the fact that the degree of competition that existed on the market for B-to-C parcel services with over-the-counter delivery (residual competition) was extremely weak. Consequently, even a rather limited degree of foreclosure on the relevant market would be liable to restrict or distort the competition which still existed in the market.
630. As mentioned above, initially there were no competitors on the relevant market and Norway Post therefore satisfied all demand for B-to-C parcel services with over-the-counter delivery. Norway Post's market share on the market for the provision of B-to-C services with over-the-counter delivery was around 98% during the period at issue and remained stable over time despite the fact that Privpak entered the market as early as in 2001. In addition, Norway Post also enjoyed a number of advantages over its competitors (see Section 13.1.2.1 above). As there were no alternative nationwide delivery networks, Norway Post was, *de facto*, an unavoidable trading partner throughout the relevant period.
631. The quality and attractiveness of the delivery network is one of the major competitive parameters and a key element for success in the market for distribution of B-to-C parcels with over-the-counter delivery.

⁴⁶⁵ See Section 6.5 above and event # 390809, letter from Norway Post dated 4 October 2006.

632. It is evident from the assessment above that Norway Post's conduct limited significantly its rivals' possibilities of being able to roll out their delivery concepts in the leading grocery store, kiosk or petrol station chains. For a new entrant this was by far the most efficient and promising way of entering the market, in particular when the delivery network of the incumbent supplier relied heavily on outlets in this category.
633. Further, it must be regarded as doubtful, for the reasons set out in Section 14.3 above, that a new entrant in competition with Norway Post could successfully have established a viable and efficient B-to-C distribution business without having access to any of the leading grocery store, kiosk or petrol station chains. If a new entrant had taken serious steps to establish such an alternative delivery network on a large scale, the risks associated with entry would have increased considerably. There would have been an increased risk that entry would have failed and it would have been more difficult to attract business from distance selling companies. Such a strategy would likely have made it more difficult and time consuming to achieve a volume of business compared to the volume of business that could have been achieved by rolling out the distribution concept in leading grocery store, kiosks or petrol station chains and, therefore, liable to delay entry and expansion.
634. As long as Norway Post's delivery network consisted mainly of the outlets that were the most sought after by all market players, it would have been difficult for other providers of B-to-C parcel services to conclude agreements with distance selling companies in competition with Norway Post without a delivery network consisting of the same type of outlets. It would therefore have been more difficult to attract a sufficient business volume to the distribution platform. This would have represented a serious competitive disadvantage.
635. Even if agreements with distance selling companies could have been concluded without having access to any of the leading grocery store, kiosk or petrol station chains, to the extent these companies continued to use the services of Norway Post alongside the services of a competitor, the competitors of Norway Post would be placed at a disadvantage because consumers were often given the choice by distance selling companies between picking up a parcel from a delivery outlet of Norway Post (for instance a grocery store) and a delivery outlet of the competitor (for instance another type of outlet which was less convenient to use for the parcel recipient).⁴⁶⁶
636. Thus, if only Norway Post could offer delivery in grocery stores, kiosks or petrol stations while its competitors would have had to rely on an alternative delivery network, there is reason to believe that there would be less demand for the services of Norway Post's competitors compared to a situation where they would have had access to the leading grocery store, kiosk or petrol station chains.
637. Privpak's delivery network remained limited during the relevant period. For this reason Privpak was never able to establish itself as a viable competitor to Norway Post. It is possible that Privpak could have invested more in recruiting alternative delivery outlets and extended its coverage in Norway without having access to grocery store, kiosk or petrol station chains. It appears, indeed, that it was reluctant to do so without having access to Mix/NorgesGruppen which it regarded as a good

⁴⁶⁶ As stated above, the distance selling companies have normally charged its customers a uniform price for over-the-counter delivery regardless of which supplier that was chosen by the consumer.

match for its delivery concept and from whom it received positive signals early on. Privpak's lack of success is therefore not in itself evidence of an abuse of Norway Post's dominant position, but supports nevertheless the Authority's more general assessment of the market conditions and the possibilities of new entry. However, a more expansive strategy on the part of Privpak, or another potential new entrant, would have increased the risks associated with entry and would likely have affected the competitiveness of the new entrant negatively as compared with a scenario without the conduct of Norway Post. If distance selling companies had not been satisfied with the alternative delivery network and consumers would have preferred to pick up their parcels from Norway Post's delivery outlets, this entry strategy could easily have failed.

638. Thus, the strategic importance of having access to grocery store, kiosk or petrol station chains for the competitors of Norway Post was significant. During the relevant period there was a lack of adequate, as efficient, alternatives which would have allowed competitors of Norway Post to compete on a more level playing field (see Section 14.4.4 above).
639. Consequently, the limitation of access to leading grocery store, kiosk and petrol station chains resulting from Norway Post's conduct was liable to reduce the ability and/or incentives of the rivals of Norway Post to compete on the market for the provision of B-to-C parcel services with over-the-counter delivery.
640. For these reasons Norway Post's conduct was liable to restrict competition.

14.6 The likelihood that the limitation of access to the leading grocery store, kiosk and petrol station chains resulted in actual anticompetitive effects

641. In addition to the above considerations, which according to the existing case law are sufficient to establish that Norway Post's conduct constituted an abuse unless its conduct can be objectively justified (see paragraph 477 above), the Authority has also assessed the likelihood that Norway Post's conduct resulted in actual anticompetitive effects to the detriment of consumers.
642. Based on the available evidence it is likely that, in absence of the conduct of Norway Post, its competitors could have had access to leading grocery store and kiosk chains. This would have facilitated their entry and expansion on the relevant market and reduced the likelihood that Norway Post would have been able to maintain its market dominance throughout the period at issue.
643. The initial contacts between Privpak and Mix were promising from Privpak's point of view until it became clear that the agreement between NorgesGruppen and Norway Post prevented any agreement between Privpak and NorgesGruppen/Mix from being concluded. Privpak maintained regular contacts with NorgesGruppen from 2004. During this time NorgesGruppen stated to Privpak that it had a commercial interest in providing delivery services on behalf of Privpak. Furthermore, NorgesGruppen indicated to Privpak that it was interested in co-operating with other parcel suppliers than Norway Post, but that it was prevented from doing so due to its exclusive agreement with Norway Post (see Section 8.3.1.1 above).

644. When Norway Post released the retail groups and outlets from exclusivity obligations laid down in its agreements and treated all groups equally, it became possible for Privpak to negotiate an agreement with NorgesGruppen which was formally concluded in October 2007. By 30 November 2008 the agreement had resulted in 206 delivery outlets within NorgesGruppen and the number of delivery outlets in Privpak's network had increased from around 140 to 295 in total, an increase of more than 110% (see Section 8.3.1.1 above). The expansion of Privpak's delivery network continued thereafter.
645. Thus, the interest shown by Mix in 2000 for Privpak's concept, later contacts between NorgesGruppen and Privpak and the chain of events after Norway Post abandoned the group exclusivity strongly suggest that, in absence of Norway Post's conduct, an agreement or arrangement that would have allowed Privpak to use NorgesGruppen/Mix outlets to deliver parcels to consumers would have been in place several years before October 2007.
646. The Authority considers that this would have meant a significant breakthrough for Privpak on the Norwegian market. The number of "first class" Privpak delivery outlets in this scenario could have been substantially increased in a way that was difficult, if not impossible, to achieve with Norway Post's conduct in place. This would have given Privpak's delivery network a much better coverage in Norway within a relatively short time-frame and made its network more attractive to distance selling companies and consumers alike. This would have represented a significant increase in the competitiveness of Privpak's business in Norway.
647. In essence, if the conduct of Norway Post had not prevented an agreement between Privpak and NorgesGruppen regarding the over-the-counter delivery of parcels from being concluded, Privpak could have exercised a more significant competitive pressure on Norway Post and thereby limited the market power of Norway Post to the benefit of distance selling companies and ultimately consumers.
648. It must therefore be concluded that Norway Post's conduct likely resulted in actual anticompetitive effects to the detriment of consumers.

14.7 Additional arguments made by Norway Post in its Reply to the SO

14.7.1 Norway Post's arguments relating to the Commission's Guidance Paper

649. In **Section 15.2.1** of its Reply to the SO, Norway Post has referred to paragraph 20 of the Commission's Guidance Paper on Article 102 TFEU which states:

"The Commission will normally intervene under Article [102] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anticompetitive foreclosure."

650. Norway Post has also referred to paragraph 55 of DG Competition's Discussion Paper from 2005 where it is stated that Article 102 TFEU prohibits:

"exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way. The longer the conduct has already been going on, the more weight will in general be given to actual effects".

651. Norway Post argues that if the conduct in question has been going on for a longer period of time, it would be possible to observe actual negative effects. The more time that has passed the more likely it will be that such effects will be observable according to Norway Post. The absence of such effects, Norway Post argues, could then be a good indication that the conduct is not “capable of having” anticompetitive effects.
652. In response to these arguments the Authority firstly recalls that according to the EFTA Court, the Commission’s practice as such cannot be a source of law for the interpretation of the EEA Agreement by the Court.⁴⁶⁷
653. Further, according to the existing case law of the European Court of Justice, the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty.⁴⁶⁸ Such exercise, however, by the Commission of its discretion in defining its policy does not create any legal obligation on the Authority to bring a specific case before it to an end, where, as in this case, an in-depth investigation has resulted in the identification of anticompetitive effects as set out in the Statement of Objections and discussed in the subsequent oral hearing. Moreover, while guidance issued by the Commission is intended to set out policy objectives and to clarify the interpretation of specific aspects of European competition law, general policy statements taken from guidance papers cannot, and are not intended to, replace the individual assessment by the responsible surveillance authority of a given case before it.
654. In any case, the Commission’s Guidance Paper states explicitly that the document sets out the enforcement priorities that will guide the Commission’s action in applying Article 102 TFEU to exclusionary conduct by dominant undertakings and that it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct. It is also explicitly stated that the Guidance Paper is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 102 TFEU by the Court of Justice or the General Court of the European Union.⁴⁶⁹ Furthermore, in its recent decision in *Intel* the Commission stated that there is no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement of Article 102 TFEU (paragraph 919 of the decision).⁴⁷⁰
655. In any event, the Authority takes the view that the conditions described by the Commission in paragraph 20 of the Guidance Paper are met in this case, as Norway Post’s conduct in the relevant period was indeed likely to restrict competition in the relevant market for B-to-C parcel services with over-the-counter delivery in Norway (See Section 14.6 above).

⁴⁶⁷ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnjord, PIL and others and Norway v EFTA Surveillance Authority*, EFTA Court Report 2005, p. 117.

⁴⁶⁸ Case T-432/05 *EMC Development AB v Commission*, not yet reported, paragraph 62

⁴⁶⁹ Paragraphs 2 and 3 of the Guidance Paper.

⁴⁷⁰ Commission decision of 13 May 2009 in case *COMP/37.990 Intel*.

656. As regards the DG Competition's staff discussion paper, that paper is a preparatory document. The passage from the staff discussion paper quoted by Norway Post has, as evidenced by the omission of that passage in the Guidance Paper on Article 102 TFEU, not become the policy of the Commission.
657. Moreover, in holding that it would be possible to observe actual negative effects when the conduct in question has been going on for a longer period of time, Norway Post fails to see that when abusive conduct contributes to the maintenance of a dominant position, which is relevant in the present case, the negative effects relate to the maintenance of the status quo. Hence, the abusive conduct does not necessarily lead to any observable or measurable change in the structure of the relevant market. Therefore, the fact that there was no change in the dominant position of Norway Post during the relevant period is consistent with a finding of an abuse and militates, if anything, in favour of actual anticompetitive effects of Norway Post's conduct.
658. For these reasons, Norway Post's arguments must be rejected.

14.7.2 The relevance of alternative means of delivery used in other European countries

659. In **Section 4.2** of its Reply to the SO, Norway Post points out that in most European countries B-to-C parcels are to a large extent delivered at the recipient's door. It has also given an overview of a number of distributors of B-to-C parcels which are active in various European countries such as Belgium, Denmark, Finland, France, Germany, the Netherlands, Portugal, Sweden, Switzerland and the UK. Norway Post maintains that its overview shows that to the extent third party networks are used for the delivery of B-to-C parcels, many other types of outlets are used other than grocery store, kiosk and petrol station chains.
660. The Authority observes that the present case must be assessed in the light of the market conditions and the legal and economic context that prevailed in Norway during the relevant period. The means of delivery employed in other European countries is of limited value unless the market conditions and the legal and economic context in these countries were comparable to the situation in Norway during the period under review.
661. There are, however, many differences between Norway and other European countries that are relevant to take into account in this respect. The most obvious differences between Norway and most of the countries Norway Post has referred to are the number of inhabitants, population density, topography, road infrastructure and historical developments of B-to-C parcel distribution markets. Hence, home delivery is much more feasible in countries like Denmark, the Netherlands, the UK and Germany etc. than in Norway. Sweden is in several respects the country that is most similar to Norway, in particular the population density is rather low and over-the-counter delivery has been an important means of delivery of B-to-C parcels. As noted in Section 14.3.4.3 above, however, there have also been relevant differences between the Norwegian and the Swedish markets.
662. With regard to the types of delivery outlets used, Norway Post overview shows that grocery stores, kiosks and petrol stations are used by many while other types of outlets are also used to some extent (dry cleaners, booksellers, florists, pubs, pharmacies, etc). However, in general, the overview provides very little information

on which delivery outlets dominate in the various delivery networks and no reasons are given that could explain why certain types of outlets are used more than others. The overview only shows that at least some outlets of the various types of outlets identified are used. Moreover, Norway Post's overview does not show how the situation was during the relevant period, only at the time of its Reply. The overview also shows that several suppliers emphasise that their delivery outlets have wide opening hours (also in weekends), easy access, quality service, no queue, secured storage space. These are factors that are emphasised in the present case as well.

663. Overall, the Authority considers that the overview provided by Norway Post does not call into question the findings of the Authority in the present case and that it is not necessary for the purposes of the present case to carry out more detailed assessments of the situation in other European countries.

14.7.3 Privpak's alleged lack of efficiency

664. In **Section 15.3.4** of its Reply, Norway Post argues that the Authority has not taken into account Privpak's lack of efficiency. Norway Post maintains that the Authority seems to be of the view that Norway Post's exclusivity has had a decisive significance for why Privpak has not been as successful as Privpak had hoped for. Norway Post is of the view, however, that there are a number of reasons for this which had a much larger impact than the exclusivity. These reasons, Norway Post argues, the Authority either ignores or do not emphasise.
665. Norway Post claims that Privpak's contact with retail chains and distance selling companies was poor (cf. Sections 8.3 and 8.6 of Norway Post's Reply to the SO), that Privpak's remuneration to outlets was too low (cf. Section 8.4 of Norway Post's Reply), that Privpak's concept for parcel delivery was too inefficient to secure market entry (cf. Section 8.5 of Norway Post's Reply), in particular due to lack of investments and staff, and, finally, that Privpak has shown a lack of understanding of the Norwegian market.
666. In this regard, the Authority notes that what Privpak did while the exclusivity was in place must be distinguished from what new entrants, and Privpak in particular, would have done in absence of the exclusivity. Norway Post's arguments mainly relate to what Privpak did while the exclusivity was in place. Norway Post disregards what Privpak would have done differently if it had been able to conclude a distribution agreement with NorgesGruppen/Mix.
667. Two further issues need to be distinguished. The first issue is the need from a policy point of view to enforce Article 54 EEA in a fashion that protects the competitive process and not inefficient competitors. In this regard, it must be emphasised that Norway Post faced very little competition during the relevant period. The central question is whether new entrants generally, and Privpak in particular, in absence of Norway Post's conduct could have developed into a more forceful competitive constraint vis-à-vis Norway Post. That question has been assessed in Section 14.6 above.
668. The second issue relates to the extent to which there were counterstrategies available for new entrants through which they could have circumvented the exclusivity without being placed at a competitive disadvantage vis-à-vis Norway Post. This assessment cannot, however, be carried out in the abstract but must have regard to

the legal and economic context pertaining to the case at hand. In a case where the incumbent player dominates the market completely it would be wrong to insist that new entrants should pursue alternative strategies that they considered as second-best options before an abuse could be found when the best option had been foreclosed by the dominant firm.

669. As mentioned above, the Authority does not regard Privpak's lack of success in itself as evidence of an abuse of Norway Post's dominant position, but considers that this nevertheless supports the Authority's more general assessment of the market conditions and the possibilities of new entry. It should be noted in that regard that Privpak is part of one of the leading logistics companies in Europe. The logistic solution on which Privpak's concept was based relied on Linjegods, one of the leading logistics companies in Norway.⁴⁷¹ Its concept was similar to the concept which had proved sufficiently efficient to compete with the incumbent provider of B-to-C parcel distribution services in Sweden. The specific features of Privpak's concept, that it should be possible to perform the over-the-counter delivery service with marginal resources and that such delivery should entail a potential for additional sales for the delivery outlet (see Section 7 above), made perfect sense. These features, moreover, implied that, as compared to ICA, COOP and Rema 1000 which did not have many kiosks/manned counters, there was a better match between Privpak's concept and the kiosk chain Mix which was covered by the group exclusivity.
670. It is further likely that Privpak, like Norway Post, would have benefitted from learning effects so that the remuneration paid to delivery outlets and other features of the delivery concept could have been adjusted or improved over time as the volume of parcels distributed in the network increased. The potential for such learning effects would have been higher if Privpak had been able to conclude a distribution agreement with NorgesGruppen/Mix. Such an agreement would also have increased the incentives of Privpak to invest in the setting up of delivery outlets and in the hiring of more staff dedicated to the development of its business in Norway. The Authority, therefore, has no reason to believe that Privpak's concept was inefficient compared to the concept of Norway Post to such an extent that Privpak would not have been able to increase the competitive constraints that Norway Post faced if Privpak's concept could have been rolled out in NorgesGruppen/Mix.
671. Under the existing case law it cannot be required that Privpak should document that it has engaged in detailed negotiations with e.g. COOP, ICA or Rema 1000, or made significant efforts in that regard, before Norway Post's conduct can be held abusive within the meaning of Article 54 EEA.⁴⁷² Further, for the reasons set out in Sections 14.4.3 and 14.4.4 above, the Authority considers that many of the leading grocery store, kiosk or petrol station chains, in any event, were far from readily available to a new entrant like Privpak.
672. The likely reason why Privpak did not approach distance selling companies more aggressively was that its delivery network was not sufficiently developed and that it therefore did not yet have a sufficiently attractive service to offer them. If it had tried to sell its concept to distance selling companies more aggressively, that could

⁴⁷¹ Linjegods' distribution network might very well have been more efficient than the distribution network of Norway Post.

⁴⁷² See Section 14.1

have reduced the likelihood of recruiting distance selling companies as customers at a later stage when its delivery network had been further developed.

673. Tollpost's concept and experience in the Norwegian market before the Swedish Post got involved was similar to the experience of Privpak with the exception that it was willing to try out a second-best solution, i.e. flower shops, and to invest more than Privpak before having access to one of the leading grocery store chains in Norway. However, a significant difference between Tollpost and Privpak was that Tollpost could expect that the Swedish Post would get involved and help it to expand its B-to-C parcel distribution business in Norway while Privpak did not have any such possibility. Hence, the limited investments made by Privpak and its more risk averse approach while the exclusivity was in place, does not mean that Privpak would not have been willing to invest more in absence of the exclusivity.
674. For these reasons, Norway Post's arguments relating to Privpak's alleged lack of efficiency must be rejected.

14.7.4 The relevance of the essential facilities doctrine to the present case

675. Norway Post has emphasised in **Section 15.7** of its Reply to the SO that the present case does not concern exclusive agreements with customers in the primary market, but exclusivity in relation to an input factor to this market. It maintains that the case law as well as the Commission's Guidance Paper on Article 82 EC concern conduct towards customers. In the view of Norway Post, the assessment of exclusivity in relation to an input factor must be assessed differently. According to Norway Post the present case has more in common with the case law concerning essential facilities than the case law on exclusive agreements with customers.

676. It may first be noted that Norway Post's reading of the Commission's Guidance Paper is not accurate. In the part of the Guidance Paper that deals with exclusive dealing the Commission states the following in footnote 23:

“The notion of exclusive dealing also includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti-competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.”

677. Hence, in the Guidance Paper the Commission deals with input foreclosure under the heading exclusive dealing, not under the heading refusal to supply.

678. The reason is that from an economic point of view an exclusive contract with an upstream supplier can restrict competition in a similar manner as an exclusive contract with a downstream distribution channel. Norway Post has itself referred to a case in which A.C. Nielsen acquired scanner data on an exclusive basis from supermarkets upstream and resold the processed data to buyers further downstream.⁴⁷³ Indeed, from an economic point of view one can regard a

⁴⁷³ IRI/Nielsen, XXVIth Report on Competition Policy 1996, referred to in footnote 162 of the Reply to the SO.

distribution channel as an input for a firm which operates at an intermediate level of the value chain just as much as an upstream input can be regarded as such.

679. The Authority's assessment of the present case is consistent with the statement of the Commission just quoted. In addition, as emphasised in Section 4 and paragraph 488 above, in the present case it is relevant to take into consideration that the industry in question is a platform industry (multi-sided market) in which a new entrant must attract the different sides of the market to its platform to be successful (Section 4 above). This is reflected in the assessment the Authority has made above.
680. In contrast, the case law on refusal to supply concerns the situation where the dominant firm is the owner of the upstream or downstream input itself and refuses to supply its competitors. Typically, the input owner refuses to supply the input in order to enhance its competitive position in the market which is dependent on the input and in which the input owner may or may not be in a dominant position.⁴⁷⁴
681. According to the Commission's Guidance Paper, the existence of an obligation to supply – even for a fair remuneration – may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings – or undertakings who anticipate that they may become dominant – not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves if a duty to supply is imposed too readily. The imposition of an obligation to supply therefore requires careful consideration.⁴⁷⁵
682. Oscar Bronner is an example of a case in which the refusal to supply related to a distribution network (i.e. a downstream input).⁴⁷⁶ The situation in the present case is clearly distinguishable from the situation in that case as Norway Post is not the owner of the distribution networks from which its competitors have been foreclosed. It is well-established in case law that exclusive contracts concluded by dominant firms are assessed under a different standard than refusals to supply.⁴⁷⁷ In the case of exclusive agreements, the extent to which exclusivity promotes economic efficiency, for instance by protecting investments from free riding, can be raised by the dominant firm as a justification for its use of exclusive contracts (see Section 14.9 below).
683. In the light of these considerations, it must be concluded that the essential facilities doctrine is not relevant to the present case.

⁴⁷⁴ See e.g. Joined cases 6 and 7/73 *Commercial Solvents Corporation v Commission* [1974] ECR 223 (the supplier of the input planned to start producing the downstream product itself) and Case T-201/04 *Microsoft v Commission*, cited in footnote 393 above (refusal to supply interoperability information by dominant supplier of PC operating systems to stand alone suppliers of work group server operating systems).

⁴⁷⁵ See paragraph 75 of the Commission's Guidance Paper.

⁴⁷⁶ See Case C-7/97 *Oscar Bronner v Mediaprint*, cited in footnote 393 above.

⁴⁷⁷ See e.g. Case C-7/97 *Oscar Bronner v Mediaprint*, cited in footnote 393 above (refusal to supply) and Case T-65/98 *Van den Bergh Foods v Commission*, cited in footnote 370 above, confirmed on appeal in Case C-552/03 P *Unilever Bestfoods v Commission*, cited in footnote 370 above (exclusive contracts and freezer exclusivity).

14.8 Conclusion

684. The Authority concludes that the conduct of Norway Post, as described above, constitutes an abuse within the meaning of Article 54 EEA unless the conduct can be objectively justified.

14.9 Justifications put forward by Norway Post

685. Exclusionary conduct can fall outside the prohibition of Article 54 EEA if the dominant company can demonstrate that its conduct is objectively necessary or produces efficiencies which outweigh the negative effect on competition.⁴⁷⁸

686. The dominant undertaking has the burden of proving such objective necessity or efficiency defence.⁴⁷⁹ Thus, it is for the dominant undertaking concerned, and not for the Authority before the end of the administrative procedure, to raise a plea of objective justification and to support it with arguments and evidence. It then falls to the Authority, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.⁴⁸⁰

687. If the exclusionary effect of Norway Post's conduct bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that conduct must be regarded as an abuse.⁴⁸¹

688. The elements of Norway Post's conduct which have been identified as abusive unless objectively justified are, firstly, its use of group and outlet exclusivity in its agreements with NorgesGruppen/Shell; secondly, its use of outlet exclusivity in its agreements with COOP and ICA; and, thirdly, the strategy Norway Post pursued when renegotiating its agreements with NorgesGruppen, COOP and ICA from 2004 onwards.

689. Vertical restraints generally, and exclusive dealing in particular, may provide substantial scope for efficiencies. Hence, the Vertical Block Exemption declares that Article 53(1) EEA does not apply to non-compete obligations with a duration not exceeding five years provided that the relevant market share is not above 30%.⁴⁸² Similarly, the Authority's Guidelines on Vertical Restraints recognise that vertical restraints may have positive effects.⁴⁸³ For example, free-rider problems can occur where one distributor may benefit from pre-sales services provided by another distributor or where a supplier may benefit from another supplier's investments in sales promotion at the premises of its retailers. A "hold-up" problem may arise when there is a risk that one party may act opportunistically once another party has made client-specific investments in for example equipment or training, or transferred

⁴⁷⁸ Case 27/76, *United Brands v Commission*, cited in footnote 369 above, paragraph 184; Case T-83/91, *Tetra Pak II*, cited in footnote 374 above, paragraph 136; Case C-95/04 P, *British Airways v Commission*, cited in footnote 369 above, paragraphs 69 and 86.

⁴⁷⁹ See Article 2 of Chapter II, Protocol 4 to the Surveillance and Court Agreement.

⁴⁸⁰ Case T-201/04 *Microsoft v Commission*, cited in footnote 393 above, paragraph 688.

⁴⁸¹ Case C-95/04 P *British Airways v Commission*, cited in footnote 369 above, paragraph 86.

⁴⁸² See Articles 2, 3 and 5 of Commission Regulation (EC) No 2790/1999 of 22 December 1999 (OJ L 336, 29.12.1999, p. 21) as incorporated into point 2 of Annex XIV to the EEA Agreement.

⁴⁸³ See Guidelines on Vertical Restraints, Section VI (OJ C 122, 23.5.2002, p. 1 and EEA Supplement to the OJ No 26, 23.5.2002, p. 7.).

substantial know-how to the other party. Free-rider and hold-up problems may be anticipated prior to the conclusion of the agreement and may result in underinvestment if they cannot be resolved by the use of vertical restraints. However, as specified in the Guidelines on Vertical Restraints, a number of conditions must be met before the risk of underinvestment is real or significant.⁴⁸⁴

690. Similar considerations can be relevant in the context of Article 54 EEA, although due account must be taken of the fact that competition on the market is restricted already at the outset through the existence of dominance.
691. While the Post-in-Shop network may have created cost savings for Norway Post and benefits for consumers through improved accessibility of postal services in general and by making the collection of parcels easier for consumers, in order to justify its conduct objectively Norway Post would need to demonstrate with a sufficient degree of probability that the use of the group and outlet exclusivity and its renegotiation strategy brought about such efficiency gains, that its conduct was indispensable to achieving that purpose and that the efficiency gains could not have been achieved by less restrictive means. Norway Post would also have to show that the likely efficiencies brought about by the conduct outweighed any likely negative effects on competition and consumer welfare in the affected markets, and that its conduct did not eliminate effective competition by removing all or most existing sources of actual or potential competition.
692. It should also be made clear at the outset that justifications put forward by Norway Post must be applicable to parcel distribution services, the services at issue in these proceedings. In particular, its agreements with NorgesGruppen/Shell, COOP and ICA contained exclusivity clauses which explicitly prohibited outlets from engaging in parcel distribution on behalf of Norway Post's competitors. Further, the outlet exclusivity in the agreements with COOP and ICA and Norway Post's renegotiation strategy from 2004 onwards created disincentives for COOP and ICA that were likely to limit their willingness to negotiate and conclude agreements with competing parcel distributors regarding the provision of over-the-counter delivery of B-to-C parcels.

14.9.1 The group exclusivity

14.9.1.1 Norway Post: The group exclusivity was necessary to achieve efficiency gains

Rapid implementation of the Post-in-Shop network

693. Norway Post claims that the group exclusivity was necessary in order to secure rapid implementation of the Post-in-Shop concept with satisfactory quality. It is argued that fast implementation of the Post-in-Shop network was necessary for a number of reasons:
- Norway Post needed to reduce the considerable losses in its existing post office network as fast as possible;
 - Rapid implementation was required by its owner (the Ministry of Transport) and by the Norwegian Parliament;

⁴⁸⁴ See Guidelines on Vertical Restraints, paragraph 115 *et seq.*

- The restructuring would result in workforce reductions and speedy implementation was important for the employees that would be affected;
- Customers (private persons and businesses) needed to be convinced of the quality and user friendliness of the new distribution channel;
- Fast implementation was necessary in order to secure a predictable and high-quality service for customers, especially in the countryside, as well as to fulfil Norway Post regulatory obligations;
- Fast implementation ensured an efficient process and focus on standardisation and parallel establishment at several locations by a Post-in-Shop team financed by Norway Post. This reduced implementation costs.

694. However, even if rapid implementation of the Post-in-Shop network created efficiency gains, it falls on Norway Post to demonstrate that the group exclusivity insofar as it applied to parcel distribution services contributed to those gains and that no less restrictive means by which those gains could be achieved were available.

The risk that outlets did not remain available to Norway Post

695. Norway Post claims that it was necessary to make sure that none of the outlets needed for Post-in-Shops were taken by competitors, and that the outlets available when the agreements with NorgesGruppen/Shell, COOP and ICA were concluded remained available when the actual Post-in-Shops were to be established.

696. Neither in the Reply to the SO nor at an earlier stage in the proceedings has Norway Post been able to submit any evidence that would show that this was the actual rationale of the group exclusivity at the time the agreements with NorgesGruppen/Shell were concluded.⁴⁸⁵ Therefore, no evidence has been put forward which would suggest that there was a perceived risk on the part of Norway Post that the roll-out of the Post-in-Shop network could be delayed in absence of group exclusivity.

697. Norway Post emphasises that regulatory requirements obliged it to be present in each municipality in Norway and that it could not itself choose the location of its Post-in-Shops.

698. However, the Authority notes that there were 435 municipalities in Norway in 2000, that Norway Post planned to replace 546 post offices with Post-in-Shops but that the minimum number of Post-in-Shops to be established was 1100. This indicates that Norway Post had considerable scope for optimising the structure of its distribution network. Moreover, the regulatory requirements left it to Norway Post to determine the exact location of each Post-in-Shop. The constraint that the regulatory requirements imposed on Norway Post with respect to the location of each Post-in-Shop should therefore not be overstated.

699. Furthermore, when considering the speed with which Norway Post planned to implement the Post-in-Shop concept, it is worth recalling that Norway Post's agreements with NorgesGruppen/Shell, COOP and ICA had in effect secured it

⁴⁸⁵ In a presentation prepared for Norway Post group management meeting on 21 March 2000, it is stated that the greatest risk in relation to the economy of the Aforma project (i.e. the restructuring of the entire distribution network of Norway Post) was delayed implementation of the Post-in-Shop concept. However, the group exclusivity as an important factor that could reduce that risk is not mentioned anywhere. See Annex 7 to the Reply to the SO, first presentation, page 18.

access to all grocery store retail chains in Norway except Rema 1000,⁴⁸⁶ and one of the networks of petrol stations.⁴⁸⁷ The fact that Norway Post had full access to the outlets of all those retail groups significantly reduces any likelihood of a lack of outlets in absence of exclusivity provisions, also in municipalities in which Norway Post was required to establish a Post-in-Shop.

700. The risk that no outlets of its contractual partners would be available to Norway Post could only have been relevant in the more remote areas where few alternatives existed. However, the likelihood that competing parcel distributors in absence of the group exclusivity would have occupied remote outlets within the relevant time frame is limited because their focus would have been on more densely populated areas during the first period after entry and the main roll-out period of the Post-in-Shop was planned to be short. Indeed, Norway Post argues in the Reply to the SO that competing parcel distributors did not even need to establish delivery points in remote areas.⁴⁸⁸
701. In view of these considerations, it is hard to see how Norway Post could have feared that competing parcel distributors in absence of the group exclusivity would have taken outlets Norway Post needed for Post-in-Shops. At best, that could only have been a concern in the more densely populated areas where a lack of outlets was unlikely to be a concern for Norway Post.

The risk that NorgesGruppen/Shell would not contribute sufficiently to the roll-out of the Post-in-Shop concept in absence of the group exclusivity

702. The main roll-out phase of the Post-in-Shop concept was planned to commence on 1 March 2001 and to be completed in September 2002. The plan was to roll out 631 Post-in-Shops in 2001. This included the replacement of 506 existing post offices with Post-in-Shops. By September 2002, 1100 Post-in-Shops were to be established and 546 post offices to be replaced.⁴⁸⁹
703. The Business Agreement concluded with NorgesGruppen/Shell in September 2000 contained a number of targets and obligations with respect to the roll-out of the Post-in-Shop concept. Thus, it was specified that a minimum of 1100 Post-in-Shops were to be established. A minimum of 700 Post-in-Shop were to be established between 1 March 2001 and 1 March 2002, 500 of which were to be established in the network of NorgesGruppen/Shell with a satisfactory geographical spread. This was the minimum amount that had to be reached.⁴⁹⁰ From 1 November 2000, a schedule were to be set up with quarterly milestones for the roll-out of the concept. By 30 September 2002, NorgesGruppen/Shell was to open a minimum of 750 Post-in-Shops.
704. According to Section 6 of the 2000 Business Agreement, both Norway Post and NorgesGruppen/Shell were to establish central organisational units which would be

⁴⁸⁶ Rema 1000 only had around 340 to 380 outlets which according to Norway Post were located predominately in areas in which Norway Post considered that it did not need to establish Post-in-Shops. See Reply to SO, page 58.

⁴⁸⁷ It is true that Norway Post needed to convince each outlet to become a Post-in-Shop outlet and that it appeared difficult for Norway Post to do that in the beginning. That problem was however resolved when it increased its remuneration to outlets (See Reply to the SO, pages 25-27).

⁴⁸⁸ See Reply to the SO, page 92.

⁴⁸⁹ See Annex 14 to Norway Post's Reply to the SO.

⁴⁹⁰ Section 9.5 of the 2000 Business Agreement.

responsible for the Post-in-Shop concept. The central unit of NorgesGruppen/Shell was to communicate closely with Norway Post and should have a contact point which Norway Post could address. According to Section 9.4 of the Agreement, NorgesGruppen/Shell should contribute to the testing of the Post-in-Shop concept and actively contribute to making the concept efficient. Pursuant to Section 2.3 of the Agreement, NorgesGruppen/Shell made its entire network available to Norway Post. It was specified in Section 1.1 of the Agreement that the Post-in-Shop concept was meant to bring about benefits for NorgesGruppen/Shell in the form of revenue from the services provided in the Post-in-Shops and increased customer flows into the shops.

705. Very clear targets for the roll-out of the Post-in-Shop concept were therefore laid down in the agreement, which implied that the concept would be widely implemented in the group's network. NorgesGruppen/Shell committed itself to be heavily involved in the roll-out of the Post-in-Shop concept from an early stage and had in return reason to expect economic benefits from its involvement.
706. The Post-in-Shop concept, with a broad portfolio of products and services and an existing business volume, represented a greater commercial potential for NorgesGruppen/Shell and individual outlets than a competing parcel delivery concept in a start-up phase. Therefore, it would not have been in the interest of NorgesGruppen/Shell or individual outlets to grant a competing parcel distributor access to their outlets if that was likely to rule out the possibility of a Post-in-Shop being established in the same outlet. It was much more likely that NorgesGruppen/Shell and individual outlets would give priority to Norway Post.
707. Thus, in light of the speed with which Norway Post planned to roll out the Post-in-Shop concept, the close co-operation between Norway Post and NorgesGruppen/Shell envisaged under the 2000 Business Agreement and NorgesGruppen/Shell's commercial interest in the concept, it is unlikely that NorgesGruppen/Shell would not have given sufficient consideration to Norway Post's interests so as to ensure that Norway Post could establish its Post-in-Shops with the required speed.
708. In conclusion, the Authority therefore considers that Norway Post has not convincingly shown why the targets and obligations in its agreement were insufficient to ensure that the Post-in-Shop concept would be implemented with the required speed.

Space requirements

709. According to Norway Post, its Post-in-Shops required a considerable amount of space and if a competing supplier had installed a counter for the delivery of parcels in the meantime there was a considerable risk that the outlet in question no longer fulfilled the minimum requirements for a Post-in-Shop.
710. However, space requirements would only be a concern if NorgesGruppen/Shell would have started rolling out a competing parcel distribution concept on a significant scale without taking Norway Post's interests into account. As demonstrated above, that was unlikely to happen. Moreover, it was specified in the agreements how many Post-in-Shops that were to be established in the outlets of NorgesGruppen/Shell. In any event, space requirement cannot be used as

justification for the fact that a large number of outlets, which Norway Post knew it would not need to use for its Post-in-Shops, were tied to Norway Post during the whole period at issue.

Alternative, less restrictive means could have been used to secure access to outlets

711. Norway Post must from an early stage have known which post offices it wished to replace with Post-in-Shops. It should therefore have been possible for Norway Post to draw up a list of post offices that it wished to replace and communicate this to NorgesGruppen/Shell. In light of the detailed assessment Norway Post made of its three contractual partners, Norway Post must also have had very good knowledge of the locations of the outlets of NorgesGruppen/Shell and, therefore, should have been in a position to indicate which of those outlets could be used for Post-in-Shops. This suggests that Norway Post could have agreed with NorgesGruppen/Shell upfront which outlets that needed to remain available to it for a limited period of time. At the very least, Norway Post has not shown why a better targeted exclusivity of a reduced scope and more limited duration would not have been sufficient in order to achieve the same end. Thus, it is in any event likely that there were alternative, less restrictive means available if there was really a risk that outlets needed by Norway Post for its Post-in-Shop concept being taken by competing parcel distributors before the Post-in-Shop could be rolled out.

Co-operation with NorgesGruppen/Shell more generally

712. Norway Post also argues that close co-operation with a partner with own resources and knowledge was necessary to ensure that the Post-in-Shop network could be jointly developed and established. In this regard, it was important that the parties focused only or mainly on each other for a period of time. This was Norway Post's strategy in order to ensure that resources could be used as efficiently as possible and to ensure to the greatest extent possible that the roll-out of a very large project was successful.

713. However, there is little difference between ensuring that NorgesGruppen/Shell remained focused on the roll-out of the project, on the one hand, and ensuring rapid implementation of the project on the other. The considerations above therefore apply also to this argument.

714. Furthermore, Norway Post has provided limited information on NorgesGruppen/Shell's actual contribution to the Post-in-Shop concept.⁴⁹¹ In absence of more detailed information, it must be presumed that the main efforts of NorgesGruppen/Shell in developing and establishing the concept were provided at the initial stage. Norway Post has not demonstrated that significant aspects of the Post-in-Shop concept were developed after the main roll-out of the network or that NorgesGruppen/Shell contributed significantly to any such developments. In comparison to the investments Norway Post made in the Post-in-Shop network, the available evidence indicates that the contribution of NorgesGruppen/Shell was rather limited.

⁴⁹¹ See the Reply to the SO, pages 27, 29 and 118. According to Norway Post the Post-in-Shop concept was adjusted and developed in parallel with the roll-out of the concept. The Post-in-Shop interior was adjusted in close co-operation with the retail chains. This involved a "Post-in-Shop" team which consisted of staff members from Norway Post and NorgesGruppen/Shell.

715. In the Authority's view, Norway Post has therefore not demonstrated that the benefits which resulted from co-operation with NorgesGruppen/Shell as such could not have been achieved without the group exclusivity.

The situation after 2002

716. As regards the period after the main roll-out phase, Norway Post claims that it continued to develop the Post-in-Shop network in order to improve its coverage from 2003 to 2006 and that the group exclusivity was necessary to enable it to "manoeuvre" during this period. Details on how the manoeuvring was carried out have, however, not been provided.

717. In that regard, the Authority notes that the above considerations also apply to the period after 2002.

718. In addition, it must be emphasised that by 1 July 2002 a total of 1075 Post-in-Shops had been established,⁴⁹² and that in September 2002 the main roll-out phase of the Post-in-Shop network came to an end. Even if Norway Post established Post-in-Shops after this time, it did so at a slower pace than in the preceding period. Further, Norway Post has not shown that it replaced any post offices with Post-in-Shop after the main roll-out phase. In fact, during the period from 2002 to 2006 the number of post offices was reduced by only one (see paragraph 57 above). The need to secure rapid implementation of the Post-in-Shop concept was therefore considerably reduced or even non-existent after 2002. Despite this fact, neither in 2002 nor later during the period at issue did Norway Post take any initiative in order to lift the exclusivity that applied to the large number of outlets that Norway Post did not need to use for Post-in-Shops. This supports the finding that the exclusivity agreements were not necessary or proportionate for any of the reasons submitted.

719. Norway Post's argument that the group exclusivity was necessary to enable it to "manoeuvre" during this period cannot therefore be accepted.

The group exclusivity as counterweight to the advantage granted to NorgesGruppen/Shell

720. Norway Post also points out that when NorgesGruppen/Shell was chosen as the preferred partner in 2000, exclusivity for postal and financial products for the entire NorgesGruppen/Shell network was a natural counterweight to the advantage that the preferred partner status conferred on NorgesGruppen/Shell.⁴⁹³ That, however, is only an expression of Norway Post bargaining position. It does not in any way show that the group exclusivity brought about economic efficiencies. This cannot, therefore, in itself provide objective justification under Article 54 EEA.

Conclusion

721. In the light of the above, the Authority concludes that Norway Post has not shown that the group exclusivity, insofar as it applied to parcel distribution services, was necessary for the fast implementation of the Post-in-Shop concept or for the close co-operation with NorgesGruppen/Shell.

⁴⁹² See Reply to the SO, page 27.

⁴⁹³ See Reply to the SO, page 34.

14.9.1.2 Norway Post: the group exclusivity was necessary to prevent free-riding on investments

722. Norway Post argues that it paid substantial amounts to NorgesGruppen/Shell annually for the costs that the group incurred as a result of its involvement in the Post-in-Shop concept. It claims that it could not have ensured that those amounts were used to its benefit without the group exclusivity, and that the group exclusivity was necessary to prevent competitors from free-riding on this investment.
723. The payments in question were made mainly to cover salaries, travel expenses and costs relating to transport of money incurred by NorgesGruppen/Shell in relation to the Post-in-Shop concept. Norway Post has pointed out that in 2002, these payments amounted to NOK 15.5 million and related to eight man-years (three at the central level and five at the regional level). Later payments were smaller: NOK 9.6 million in 2003 and 2004, NOK 2.5 million in 2005 and NOK 1.25 million in 2006.⁴⁹⁴ The payments were based on a budget submitted by NorgesGruppen/Shell each year. Advance payments were made on a monthly basis. The parties met quarterly to compare actual expenses against the budget plan. Settlement of the actual costs incurred took place each year (Annex 23 to the Reply to the SO).
724. Consequently, and in comparison to the total investments Norway Post made in the Post-in-Shop concept (NOK 959 million),⁴⁹⁵ the payments it made to NorgesGruppen/Shell were rather limited. In addition, a protocol agreed between Norway Post and NorgesGruppen/Shell ensured that Norway Post could control how the money was spent. In particular, given that payments were made on a monthly basis, Norway Post could verify the effort made by NorgesGruppen/Shell before payments were made and hold back payments and request greater effort if required.
725. Norway Post has not demonstrated that it was unable to measure or verify that NorgesGruppen/Shell performed its contractual duties. In any event, it is hard to see how the group exclusivity made it any easier to monitor NorgesGruppen/Shell's performance.
726. A real free-riding problem would only exist if there was a significant risk that competing B-to-C parcel distributors could have benefitted from those investments in absence of the group exclusivity.
727. Norway Post has not shown how the transport of money carried out by NorgesGruppen/Shell on Norway Post's behalf could have benefitted competing B-to-C parcel distributors. As regards the salary and travel expenses of NorgesGruppen/Shell that Norway Post covered, Norway Post has not explained in any detail what the tasks of NorgesGruppen/Shell staff involved in the Post-in-Shop concept actually were. It is therefore impossible to verify, firstly, whether competing parcel distributors could have benefitted from those tasks (spillover) and, secondly, the extent to which Norway Post could have prevented any such spillover from happening in absence of the group exclusivity.
728. Moreover, as already explained, given the rights and obligations under the agreement with Norway Post, NorgesGruppen/Shell had strong incentives to contribute to the development of the Post-in-Shop concept.

⁴⁹⁴ See Reply to the SO, page 30.

⁴⁹⁵ See event # 524500, letter from Norway Post dated 13 July 2009, page 3.

729. In conclusion, no significant risk has been demonstrated that the payments made by Norway Post to NorgesGruppen/Shell would benefit competing distributors of B-to-C parcels and no risk of underinvestment has been shown. Norway Post's arguments therefore cannot be accepted.

14.9.1.3 The scope and duration of the group exclusivity was in any event excessive

730. It follows from the assessment above that the group exclusivity insofar as it applied to competing parcel distributors cannot be regarded as having been necessary in order to secure rapid roll-out of the Post-in-Shop concept or close co-operation with NorgesGruppen/Shell. However, even if it could be accepted that the group exclusivity brought about some efficiency gains in this respect, its scope and duration were in any event excessive and therefore disproportionate.
731. The scope of the group exclusivity was excessive because it applied to all NorgesGruppen/Shell outlets, including a significant number of outlets to which Norway Post knew in advance it would not need access.
732. The duration of the group exclusivity was excessive: the rapid implementation argument could not under any circumstances be accepted for a longer period than the duration of the main roll-out phase (i.e. until the end of September 2002). By that time, the large majority of Post-in-Shop units and, hence, a new distribution network, had been established. The duration of the group exclusivity therefore went far beyond what in any event would have been reasonable and required to ensure rapid roll-out of the Post-in-Shop concept.
733. Moreover, even if there was a need for Norway Post to secure access to the outlets it needed for its Post-in-Shop concept during the main roll-out phase, there were alternative, less restrictive means that likely would have achieved the same goal. For example, it could have agreed with NorgesGruppen/Shell upfront which outlets should remain available to it for a limited period of time. A better targeted exclusivity of a more limited scope and duration could also have been an alternative, less restrictive means of securing access to the required number of outlets for the Post-in-Shop concept.

14.9.1.4 Conclusion regarding the group exclusivity

734. The Authority concludes that Norway Post has not demonstrated that its conduct was objectively justified.

14.9.2 The outlet exclusivity

735. Norway Post has explained that the average investment in each Post-in-Shop amounted to NOK 200 000. That investment included the physical construction of the Post-in-Shop unit, its design, adaptations and IT-solutions as well as training of the outlet's staff and the transfer of knowhow. Norway Post claims that the staff in Post-in-Shops needed training in postal and banking services, customer service and IT-tools. It also maintains that it invested in making customers aware of the Post-in-Shop in question as a place where postal and banking services were provided.

736. Norway Post maintains that it needed to protect the investments it made in the Post-in-Shop network and that this was particularly important in a start-up phase. Without the protection of the investments that were made in the Post-in-Shop network, there was a risk, Norway Post argues, that competitors could free-ride on those investments. Without the outlet exclusivity there was a risk that free-riders could have established competing services with much lower costs than Norway Post because Norway Post would have covered the better part of their costs. This would have resulted in considerable risks for the whole Post-in-Shop project. Norway Post considers that the outlet exclusivity ensured that it could reap all the benefits of its investments in each Post-in-Shop.

14.9.2.1 The need to protect Norway Post’s promotional effort and investments in training

737. It should first be recalled that the justification put forward by Norway Post must be applicable to parcel distribution services (see paragraph 692 above). Thus, it needs to be assessed whether there was a real free-rider issue in relation to competing distributors of B-to-C parcels.
738. As regards promotional efforts, Norway Post has not provided any detailed information as to how it has promoted the Post-in-Shop concept in general as a place where postal and financial services are provided or as to which activities it undertook with a view to promoting individual Post-in-Shop outlets locally to increase consumer awareness of the existence or location of such outlets. Nor has Norway Post shown how such promotional activity could have spilled over to competing distributors of B-to-C parcels in absence of the exclusivity.
739. Since consumers are presented with the delivery options and informed of the location of delivery outlets when ordering products from distance selling companies, it is hard to see how promotional efforts could have benefitted competing parcel distributors. Norway Post has not demonstrated that it has carried out promotional activities specifically directed at distance selling companies to increase their awareness of Post-in-Shops as a place where consumers can pick up parcels. Nor has Norway Post explained what such possible promotional activities have consisted of, or how free-riding on such promotional efforts could have benefitted competing parcel distributors.
740. As regards adaptations that were made to the physical outlets in which Post-in-Shop units were established, Norway Post has explained in the Reply to the SO that it was the retail chains that paid for the reconstruction of outlets and other modification of fixed installations.⁴⁹⁶ With regard to such adaptations, therefore, no free-riding on Norway Post’s investments could take place.
741. As regards Norway Post’s investments in training, relevant free-riding concerns could only arise if those investments could benefit competing distributors of B-to-C parcels. Investments in training to perform services unrelated to the delivery of parcels could not do so and are therefore irrelevant. Norway Post has provided very limited information regarding the training that staff in its Post-in-Shops needed in order to be able to perform the services that were directly related to parcel delivery. As Post-in-Shop staff were to provide a large spectrum of services and delivery of

⁴⁹⁶ Reply to the SO, page 29.

parcels does not appear to be a labour intensive or complex service, there is reason to believe that training relevant to parcel delivery constituted only a small part of Norway Post's total investments in training.

742. According to Norway Post, the IT-tools used by suppliers of postal and parcel distribution services are almost identical and a Post-in-Shop employee could therefore easily have used knowledge acquired from Norway Post to the benefit of a competitor.⁴⁹⁷
743. However, due to the wide spectrum of services provided, Norway Post's IT system is likely to have been much more complex than the systems of competing suppliers of parcel distribution services. A free-rider issue could only have existed for the part of the IT-solution that was specifically relevant to the delivery of parcels. Further, even if the IT functionality relating to parcel distribution services was very similar it remains unlikely, and Norway Post has not demonstrated, that the interfaces of the IT systems were so alike that competing distributors of parcels could have enjoyed significant cost savings by free-riding on Norway Post's IT training.
744. Norway Post has not either demonstrated how the relevant part of the training it provided could have spilled over to competing parcel distributors or to what extent they could have benefitted from such spillover. Competitors had developed their own delivery concepts with their own IT solutions. They would therefore have had to provide training themselves and would have incurred costs in that regard.
745. Norway Post also state that staff in Post-in-Shops needed training in customer service provision and appears to argue that such training could be subject to free riding. However, since Norway Post has not explained in any further detail what kind of training was provided in this regard or the extent of such training, this cannot be established.
746. In conclusion, therefore, Norway Post has not demonstrated that there was a significant risk of free-riding on Norway Post's promotional efforts or investments in training insofar as competing distributors of parcels were concerned.

14.9.2.2 The need to protect the intellectual property rights and to safeguard the identity and reputation of the Post-in-Shop concept

747. Norway Post maintains that there was a need to protect its intellectual property rights as the Post-in-Shop concept was designed as a type of franchise concept. The considerations which apply to franchising, therefore, should also be applied with regard to the Post-in-Shop concept. In this regard, Norway Post refers to paragraph 199 *et seq* of the Guidelines on Vertical Restraints and argues that restraints imposed on a franchisee (the outlet), which are necessary in order to protect intellectual property rights or in order to maintain a common identity and reputation, fall outside Article 53(1) EEA. In Norway Post's view it was therefore normal and necessary to protect its intellectual property rights. There was also a need, Norway Post argues, to prevent confusion of postal services and other services that were provided in the shop in order to protect Norway Post's logo and brand name.⁴⁹⁸

⁴⁹⁷ Reply to the SO, page 121.

⁴⁹⁸ Reply to the SO, page 119.

748. Norway Post points out that the Post-in-Shop agreements concluded at outlet level included Norway Post's licences and intellectual property rights to the Post-in-Shop concept (brand name, logo etc.) as well as training programmes, manuals and the provision of continuous advice and information. Norway Post claims this information and knowledge was necessary in order to operate a Post-in-Shop and was therefore transferred to the Post-in-Shops, although regarded as business secrets by Norway Post.⁴⁹⁹
749. Norway Post claims that the knowhow associated with the Post-in-Shop concept as well as general knowledge about postal and financial services among staff could have been exploited by Norway Post's competitors in absence of the outlet exclusivity.⁵⁰⁰
750. The Authority agrees that Norway Post had a legitimate interest in adequately protecting the intellectual property rights that were transferred to the Post-in-Shop outlets and to safeguard the identity and reputation of the Post-in-Shop concept. However, there were also specific features of the Post-in-Shop concept that distinguished it from many typical franchise concepts.
751. Firstly, Norway Post was the incumbent postal operator and the dominant player in the market for the provision of B-to-C parcel services with over-the-counter delivery in which competition was very weak. Secondly, the Post-in-Shop concept was a shop-in-shop concept. By definition, therefore, Norway Post's postal and financial services were to be provided side-by-side with other products or services in the same outlet. Thirdly, parcel delivery was only one of a range of services which formed part of the concept. Fourthly, as explained above, consumers did not make their purchasing decision in the outlet insofar as parcel delivery services were concerned. Consequently, in connection with the provision of parcel delivery services, the outlet did not purchase any goods or services from Norway Post which were resold to consumers. Finally, it was distance selling companies, not consumers directly, which paid for the parcel delivery services. It is in this context it must be assessed to what extent the outlet exclusivity contributed to the protection of Norway Post's intellectual property rights.
752. A number of contractual provisions in its agreements with outlets protected Norway Post's intellectual property rights. It was specified in the agreements that trademarks and signs which were part of the Post-in-Shop concept remained the property of Norway Post. With the exception of the use that was provided for in the agreements, outlets did not obtain any rights to use the trademarks and signs of Norway Post. The same applied to manuals, instructions and other parts of the concept. Any other use was prohibited. For one year after the termination of the agreement, the outlets were prohibited from engaging in competing activities if such activities could weaken the reputation or identity of the Post-in-Shop concept and it was necessary to protect the knowhow that had been transferred to the outlet.⁵⁰¹ After termination of the agreement and for an unlimited period of time, the outlet was under an obligation not to use or transfer to third parties the knowhow connected to the Post-in-Shop concept and which was not in the public domain. Confidentiality obligations were also imposed. Actions or omissions which could seriously damage the Post-in-

⁴⁹⁹ Reply to the SO, pages 33 and 121.

⁵⁰⁰ Reply to the SO, pages 33 and 121.

⁵⁰¹ It is noted that this conditional no-compete provision, which appears balanced and well-suited to protect Norway Post's intellectual property rights, has not been objected to by the Authority.

Shop concept's identity or reputation or which could be regarded as damaging to the network were regarded as a repudiatory breach of contract. Breach of contract was subject to contractual liability.⁵⁰²

753. The minimum duration of the agreements was five years. This protected Norway Post against the risk that outlets might terminate the agreements before Norway Post had recouped its investments in the Post-in-Shop network and use the knowhow they had acquired to provide competing services.
754. Norway Post has not explained how parcel delivery for a competitor of Norway Post in outlets with a Post-in-Shop unit posed a risk to its intellectual property rights. It has not been demonstrated that substantial knowhow indispensable for the delivery of parcels was transferred to the Post-in-Shop outlets and that competing parcel distributors could have benefitted from this knowhow if they could have had access to the same outlets as Norway Post.
755. Norway Post has argued that the possibility of terminating the contract in case of free-riding would not have given sufficient protection due to the investments that had been made and due to the regulatory requirement that Norway Post must be present in each municipality of Norway.⁵⁰³ That argument presupposes that a real free-rider problem existed with respect to parcel delivery. Norway Post has not demonstrated that that was the case. Moreover, the threats of termination and contractual liability provided the outlets with an incentive to comply with the agreements for their whole duration. Norway Post has not shown why outlets would have had insufficient incentives in this regard or conflicting incentives that would lead them not to comply with their contractual obligations. Nor has Norway Post explained why there were reasons to believe that termination of contracts would occur frequently or that the frequency of terminations would increase in a scenario where competing parcel distributors had been given access to outlets in which a Post-in-Shop had been established. Further, Norway Post's argument relating to the fact that Norway Post was required to be present in each of the 435 municipalities of Norway would only have some merit if termination was likely to occur frequently and if there were many municipalities in which there was only one outlet that Norway Post could have used in order to fulfil its regulatory obligations. This appears unlikely and has not, in any event, been demonstrated by Norway Post.
756. Provided that the protection of Norway Post's physical equipment was adequate (see below), the Authority cannot see any risk of free-riding on the design of the Post-in-Shop units. Competing parcel distributors would not have any need to copy that design as it was made for the provision of a whole range of services which such distributors did not supply; in addition the Post-in-Shop units exceeded the space required for simple parcel delivery. It has not been shown that the design in question in any way would have been at risk if competitors of Norway Post had been allowed to distribute parcels from outlets in which a Post-in-Shop had been established.
757. In the light of the above, the Authority is of the view that no convincing and plausible scenario has been demonstrated in which the provision of parcel delivery services from outlets in which a Post-in-Shop had been established could have

⁵⁰² See for instance event # 96421, page 305 *et seq*, the standard operating agreement for COOP outlets of 2001, Sections 9.3, paragraphs five and six, 9.7, 13, 14, 16, 17.1, 17.2 and 18.4.

⁵⁰³ Reply to the SO, page 122.

resulted in a significant free-rider problem in relation to Norway Post's intellectual property rights.

758. Norway Post has further referred to the need to prevent confusion of postal services and other services that were provided in the shop in order to protect Norway Post's logo and brand name.⁵⁰⁴ However, no convincing explanation has been given for why such confusion would be a risk in relation to competing parcel delivery services, provided that Norway Post's counters and other physical equipment was not used by competitors (see below).
759. The Authority therefore considers that the argument that the outlet exclusivity, insofar as it applied to competing parcel distribution services, contributed significantly to the protection of Norway Post's intellectual property rights and the identity and reputation of its network, cannot be accepted.
760. From the above assessment it follows that Norway Post used alternative, contractual means in order to protect its intellectual property rights and the identity and reputation of its network. According to the current operating agreement for ICA outlets, each individual outlet is obliged to offer any competing products/services clearly separated from the Post-in-Shop concept and to avoid any danger of confusion. Each outlet also has a duty not to disclose any information it obtains concerning the activities of Norway Post.⁵⁰⁵ Similar protective measures could have been put in place to protect Norway Post's intellectual property rights and the identity and reputation of its network. The Authority cannot see any reasonable explanation for why the solution that is now provided for in the ICA agreements would not have been sufficient to protect Norway Post's intellectual property rights prior to 2006.
761. With regard to its new agreements, concluded in the course of 2006, Norway Post has explained that the need to maintain the outlet exclusivity was no longer the same, since its investments in the restructuring of its network had been recouped.⁵⁰⁶ However, even if Norway Post had recouped its investments in the Post-in-Shop network, there is nothing which suggests that the value of its intellectual property rights had decreased when concluding the agreements in 2006. If there were compelling reasons for protecting its intellectual property rights with outlet exclusivity vis-à-vis parcel distributors in 2001, it would be expected that those reasons were also applicable in 2006.
762. For these reasons, the outlet exclusivity, insofar as it applied to competing parcel distributors, cannot be regarded as indispensable for the protection of the intellectual property rights of Norway Post or the common identity and reputation of its Post-in-Shop network.
763. In conclusion, the need to protect the intellectual property rights and to safeguard the identity and reputation of the Post-in-Shop concept cannot serve as an objective justification for Norway Post's use of outlet exclusivity.

⁵⁰⁴ Reply to the SO, page 119.

⁵⁰⁵ See event # 390809, letter from Norway Post dated 4 October 2006, Annex 4, Articles 5 and 16.

⁵⁰⁶ Reply to the SO, pages 34-35.

14.9.2.3 The need to ensure that every Post-in-Shop outlet focused on Norway Post's concept and needs

764. Norway Post maintains that exclusivity ensured that every Post-in-Shop outlet focused on Norway Post's concept and needs, that extensive training was necessary to enable staff to carry out their tasks, and that the risk of mistakes had increased if staff would have had to learn other systems in addition to Post-in-Shop.⁵⁰⁷ In this regard, Norway Post refers to the reply from ICA to the Authority's request for information where ICA submitted that this was a reason for not letting Tollpost use ICA outlets in which a Post-in-Shop had been established.⁵⁰⁸
765. It is conceivable that an outlet in which a Post-in-Shop were to be established would wish to focus specifically on the Post-in-Shop concept in an initial phase during which staff would receive the required training and acquire experience in operating a Post-in-Shop. It is nevertheless questionable to what extent it would have been problematic to introduce competing parcel distribution services in the same outlet during this initial phase if those services could have been provided clearly separated from the Post-in-Shop.
766. Moreover, Norway Post's standard operating agreements contained service targets and specified that Norway Post would monitor outlets to ensure quality targets were met.⁵⁰⁹ To the extent there was really a need initially to focus exclusively on the Post-in-Shop concept, it is not apparent why outlets would not have sufficient incentives to do so without outlet exclusivity. It is therefore not clear why there was a need, on top of the quality obligations laid down in the agreements, to prevent outlets from delivering parcels for a competitor of Norway Post in order to align the incentives of the outlet to those of Norway Post during this initial phase.
767. After the initial phase, there is no reason to believe that the introduction of competing parcel delivery services would in any way have directed the outlet's focus away from the Post-in-Shop concept to such an extent that Norway Post's service targets could not have been met. Indeed, it is an inherent feature of the Post-in-Shop concept that postal and financial services are provided beside the core activities of the shop. It is very unlikely that the introduction of competing parcel delivery services, if properly separated from the Post-in-Shop unit, would have constituted such an additional burden on staff that the quality of the services provided on behalf of Norway Post would have been affected negatively.
768. As regards the statement by ICA that Norway Post has referred to in the Reply to the SO, what ICA actually stated to the Authority was that ICA itself wished to keep the Post-in-Shop concept and the competing parcel distribution concept of MyPack separated during an initial period *inter alia* for pedagogical reasons in relation to employees and customers. Its main concern was to ensure the highest possible speed in the roll-out of MyPack's parcel delivery concept. ICA noted in that regard that the parcel delivery concept of MyPack had been rolled out in around 360 ICA outlets within a short period of time. ICA's wish to separate the two concepts was therefore clearly short term in nature.

⁵⁰⁷ Reply to the SO, page 122

⁵⁰⁸ See event # 450690, Reply from ICA dated 29 October 2007, question 5b).

⁵⁰⁹ See for instance event # 96421, page 305 *et seq*, the standard operating agreement for COOP outlets of 2001, Section 9.5.

769. Moreover, ICA stated that in order to avoid the risk of confusion some reconstruction and functional solutions would be required if competing parcel delivery services were to be provided from an outlet with a pre-existing Post-in-Shop. ICA wished primarily to take this into account in connection with the planned upgrading of such shops.
770. It was therefore ICA's view that insofar as risk of confusion existed, it could be avoided if the delivery of parcels for a competitor of Norway Post was clearly separated from the Post-in-Shop in the same outlet.
771. In conclusion, therefore, the need to impose outlet exclusivity for the purpose of ensuring that the Post-in-Shop outlets focused on Norway Post's concept must be regarded as limited. The benefit brought about by the outlet exclusivity in this regard, if any, was therefore likely to be small.
772. Moreover, Norway Post has not shown that the outlets had incentives not to focus sufficiently on the concept as long as that particular focus was needed. Norway Post has not explained why outlets could be expected to have incentives which it needed to restrain by the imposition of outlet exclusivity. Hence, Norway Post has not shown that it was necessary to impose outlet exclusivity in order to ensure that outlets focused sufficiently on its concept.
773. Further, Norway Post has not convincingly shown that it had reason to believe that the outlets' staff would need to focus so strongly on the Post-in-Shop concept for the whole duration of the agreement that the delivery of parcels for a competitor could lead to deterioration in the quality of its services. Norway Post has itself emphasised the importance of implementing the Post-in-Shop concept quickly and with the necessary service quality. It must therefore have expected that the individual outlet would be operative and able to provide services of satisfactory quality within a short period of time. Hence, the initial phase during which it may have been necessary for outlets to focus only on Post-in-Shop must in any event have been rather short. Under these circumstances, the outlet exclusivity cannot, in any event, be regarded as indispensable for the whole duration of the agreements that Norway Post concluded at outlet level.
774. In conclusion, the need to ensure that every Post-in-Shop outlet focused sufficiently on Norway Post's concept cannot serve as an objective justification for Norway Post's use of outlet exclusivity.

14.9.2.4 The need to protect investments in counters and physical equipment

775. Norway Post has argued that in absence of the outlet exclusivity, it would not have been possible in practice to prevent competing parcel distributors from using the counters of Norway Post or to prevent the use of other equipment financed by Norway Post.⁵¹⁰
776. In that respect, the Authority agrees that Norway Post had a legitimate interest in preventing competing parcel distributors from using the counters, IT equipment and other types of equipment of the Post-in-Shop units which belonged to Norway Post

⁵¹⁰ Reply to SO, page 121.

supplied. It was also legitimate to require that parcel delivery for a competitor of Norway Post should be clearly separated from its Post-in-Shop units.

777. However, Norway Post has not demonstrated that it was necessary to impose exclusivity on the whole outlet for this purpose. In the Authority's view, a more narrow contract clause requiring that the Post-in-Shop unit be exclusively used for the provision of Norway Post's products and services would have sufficed in that regard. Non-compliance with such a requirement would have been observable and subject to contractual liability. Since Norway Post in any event needed to monitor the quality of the products and services that the Post-in-Shop units provided, it must be assumed that it also could have verified that its equipment was not used for the delivery of parcels distributed by a competitor.
778. Consequently, the outlet exclusivity cannot be regarded as necessary for this purpose.

14.9.3 The renegotiation strategy of Norway Post

779. With regard to its renegotiating strategy, Norway Post has claimed that parallel negotiations with several suppliers enhance competition because that is the most efficient way to negotiate new agreements. It also maintains that the duration of the renegotiations related to the fact that the agreement with NorgesGruppen only expired after five years and that Norway Post could not amend that agreement before it expired. Further, Norway Post argues that it did not have any incentives not to use its best card in the negotiations – the preference status – before the best possible agreement had been negotiated. Finally, Norway Post maintains that it did not by any means pursue an exclusionary strategy.⁵¹¹
780. However, Norway Post has not explained in any detail how it benefitted from expressly keeping the question of preferred status open during the negotiations. While Norway Post's renegotiation strategy may to some extent have enhanced its bargaining position, Norway Post has not explained how it was able to realise economic efficiencies by pursuing its renegotiation strategy. In particular, since Norway Post ended up not granting preferred partner status to any of the three contractual partners, it is not obvious that the increased uncertainty that its renegotiation strategy created for its contractual partners during the renegotiation period resulted in any economic efficiencies being realised. Nor has Norway Post demonstrated that its renegotiation strategy was indispensable for realising any alleged efficiencies or that such efficiencies outweighed the negative effects on competition. The fact that Norway Post's agreement with NorgesGruppen could only be terminated after five years does not either justify the renegotiation strategy pursued. Norway Post could in any event have taken initiatives to release NorgesGruppen/Shell from the group exclusivity which was applicable throughout the renegotiation period.
781. Furthermore, even if it were to be accepted that Norway Post did not have the deliberate intention to prevent new entrants from concluding distribution agreements with its three contracting parties, as a dominant undertaking it was nevertheless obliged to ensure that its conduct did not distort competition (see paragraph 478 above).

⁵¹¹ Reply to the SO, page 114.

782. It must therefore be concluded that Norway Post has not demonstrated that its renegotiating strategy brought about efficiency gains, was a necessary and proportionate means to achieve such gains and that those gains outweighed the anti-competitive effects the renegotiation strategy resulted in.

14.9.4 Alleged efficiency gains did not in any event outweigh anti-competitive effects

783. The effect of Norway Post's conduct was to place competing parcel distributors at a competitive disadvantage. In particular, the group exclusivity foreclosed the entire network of NorgesGruppen/Shell for a period of five-and-a-half years and was one of the main reasons why competing B-to-C parcel distributors were placed at a competitive disadvantage.

784. In addition to tying outlets to Norway Post, the outlet exclusivity in the particular context in which it was used produced anti-competitive effects by creating disincentives for COOP and ICA that were likely to limit their willingness to negotiate and conclude agreements regarding the provision of over-the-counter delivery services for competing distributors of B-to-C parcels. Similarly, the renegotiation strategy pursued by Norway Post with regard to preference clauses and exclusivity created disincentive effects on the part of COOP and ICA which made these retail groups significantly less available to new entrants from 2004 until the negotiations were settled in 2006. These effects reinforced the negative effects of the group exclusivity.

785. Even if it were to be accepted that Norway Post's conduct did result in some efficiency gains and that that conduct was indispensable for their achievement, those efficiency gains were, in the Authority's view, so limited that they cannot outweigh the negative effects on competition and consumer welfare resulting from that conduct.

786. The Authority is also of the view that exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.⁵¹² The reason is that in absence of rivalry between undertakings the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.⁵¹³

787. Norway Post hardly faced any competition at all from actual competitors during the period under review and its position on the market for the provision of B-to-C parcel services with over-the-counter delivery was close to a *de facto* monopoly throughout that period.

788. Thus, even if Norway Post had been able to demonstrate that its conduct was a necessary and proportionate means for the creation of some efficiency gains, that could not have been regarded as sufficient justification for its conduct.

⁵¹² See the Authority's Guidelines on Vertical Restraints, paragraph 135, which states that where an undertaking is dominant or becoming dominant as a consequence of a vertical agreement, a vertical restraint that has appreciable anti-competitive effects can in principle not be exempted; and the European Commission's Guidelines on Vertical Restraints (OJ C 130/1, 19.5.2010) which state that a restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

⁵¹³ See the Commission's Guidance Paper on Article 102 TFEU, paragraph 30, last indent.

14.9.5 Conclusion on the justifications put forward by Norway Post

789. In the light of the above, the Authority concludes that Norway Post has not demonstrated that its conduct was objectively justified.

14.10 Conclusion on the abuse assessment

790. The Authority concludes that the conduct of Norway Post, that is its use of group and outlet exclusivity in its agreements with NorgesGruppen/Shell, its use of outlet exclusivity in its agreements with COOP and ICA and the strategy Norway Post pursued when renegotiating its agreements with NorgesGruppen, COOP and ICA from 2004 onwards, constitutes an abuse within the meaning of Article 54 EEA.

15 Effect on trade between Contracting Parties

791. Article 54 EEA prohibits any abuse of a dominant position within the territory covered by the EEA Agreement or in a substantial part of it “*in so far as it may affect trade between Contracting Parties*”. This criterion has three basic elements.
792. Firstly, the concept of “*trade between Contracting Parties*” covers all forms of economic activity including establishment,⁵¹⁴ and implies some cross-border element (i.e. that the situation is not purely internal to one EEA States). According to settled case law the concept of trade also encompasses the competitive structure covering e.g. abusive behaviour aimed at eliminating a competitor operating in several Member States.⁵¹⁵
793. Second, it is sufficient that the abuse “*may affect trade*”, i.e. that it is sufficiently probable that the practices are capable of having an effect⁵¹⁶ on the patterns of trade based on an objective assessment.⁵¹⁷ It is not necessary that trade be reduced;⁵¹⁸ the abusive practices must simply be capable of affecting the pattern of trade.
794. Third, the effect on trade of the abuse must be appreciable. This element requires that the effect on trade between Member States must not be insignificant and is assessed primarily with reference to the position of the undertaking(s) on the market for the products concerned.⁵¹⁹
795. Where an undertaking, which holds a dominant position covering the whole of an EEA State, engages in exclusionary abuses, trade between EEA States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other EEA States to penetrate the market, in which case patterns of trade are capable of being affected.⁵²⁰
796. Norway Post held a dominant position in the whole of Norway during the relevant period. The conduct of Norway Post in relation to the establishment and maintenance of the Post-in-Shop network placed its competitors in a disadvantaged position limiting significantly their possibilities to expand their activities in the field of B-to-C parcel services in Norway. Norway Post’s actual or potential competitors included undertakings which were located in or operated from neighbouring EEA States. The fact that Privpak and the Swedish Post were able to conclude agreements with the large retail groups and thereby to expand their activities in Norway following the lifting by Norway Post of the provisions in its agreements with these

⁵¹⁴ Case 172/80 *Züchner* [1981] ECR 2021, paragraph 18; Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 95; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 49; Joined Cases C-215/96 and 216/96 *Bagnasco* [1999] ECR I-135, paragraph 51.

⁵¹⁵ Case 6/72 *Continental Can v Commission*, cited in footnote 414 above, paragraph 16; Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge SA v Commission*, cited in footnote 412 above, paragraph 203.

⁵¹⁶ Joined Cases C-241/91 P and C-242/91 P *RTE (Magill)* [1995] ECR I-743, paragraph 69.

⁵¹⁷ Case T-228/97 *Irish Sugar v Commission*, cited in footnote 409 above, paragraph 170.

⁵¹⁸ Case T-141/89 *Tréfileurope v Commission* [1995] ECR II-791.

⁵¹⁹ Case 5/69 *Völk* [1969] ECR 295; Case E-4/05 *HOB-vín* [2006] EFTA Ct. Rep 4, paragraph 49.

⁵²⁰ See paragraph 93 of the Authority’s Guidelines on the effect on trade concept contained in Articles 53 and 54 of the EEA Agreement (OJ C 291, 30.11.2006, p. 46 and EEA Supplement to the OJ No 59, 30.11.2006, p. 18).

retail groups regarding exclusivity and preferential treatment, illustrates the capability of Norway Post's conduct to affect trade to an appreciable extent.

797. Norway Post's conduct thus made it more difficult for competing suppliers established in other EEA States to penetrate the Norwegian market, and thus contributed to the partitioning of markets on a national basis contrary to the aim of the EEA Agreement. Under these circumstances, the practices in question were capable of influencing to an appreciable extent the patterns of trade amongst EEA States.
798. Further, it cannot be excluded that the conduct of Norway Post indeed have had the actual effect of preventing competitors like Privpak from viably entering the market. The strategy and behaviour of Norway Post have therefore been liable to appreciably affect the competitive structure of the Norwegian market for B-to-C parcel services.
799. The Authority therefore concludes that the conduct of Norway Post which constitute an abuse within the meaning of Article 54 EEA was capable of affecting trade between Contracting Parties to an appreciable extent.

16 Duration

800. The abusive conduct consisted of Norway Post's use of group and outlet 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 and was in its nature a single and continuous infringement.
801. While already Norway Post negotiation and conclusion of agreements of intent with the retail groups in principle limited its rivals' (or potential rivals') access to the leading grocery store, kiosk and petrol station chains, the agreements of intent with NorgesGruppen/Shell only tied this retail group loosely to Norway Post for a limited period of time (see paragraph 562 above). On 20 September 2000, however, the first Business Agreement between Norway Post and NorgesGruppen/Shell was concluded and the group exclusivity entered into effect. The Authority therefore considers that Norway Post's abuse of its dominant position commenced no later than on 20 September 2000.
802. Norway Post signed a new protocol with ICA on 12 January 2006 releasing ICA from all exclusivity and non-compete obligations. On 30 March 2006, Norway Post and NorgesGruppen signed a protocol amending the existing agreements regarding the Post-in-Shop concept and from 31 March 2006 NorgesGruppen was no longer Norway Post's preferred partner and the exclusivity obligations by which NorgesGruppen was bound were lifted. On 4 September 2006, Norway Post waived with immediate effect the exclusivity obligations in its agreements with COOP. It concluded a new agreement with COOP on 21 November 2006. Shell terminated its agreement with Norway Post with effect from 31 December 2006 (see Section 6.5 above).
803. The Authority considers that the single and continuous infringement existed at least as long as NorgesGruppen was bound by the group exclusivity and was Norway Post's preferred partner, that is until 31 March 2006.

17 Liability for the infringement and the addressee of this decision

804. The subjects of the EEA competition rules are undertakings, a concept which is not identical with that of corporate legal personality for the purposes of national commercial or fiscal law. The term “undertaking” is not defined in Article 54 EEA. It may refer to any entity engaged in commercial activities. The case law has confirmed that Article 54 EEA is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.⁵²¹
805. Liability for illegal behaviour may pass to a successor where the corporate entity which committed the infringement has ceased to exist. If the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus is liable for the activity of the entity that was absorbed.⁵²²
806. During the first part of the abuse Norway Post was organised as a state-owned limited liability company (Posten Norge BA). On 1 July 2002, Posten Norge BA was converted into the private limited liability company Posten Norge AS. The assets, rights and obligations of Posten Norge BA were transferred as a whole to Posten Norge AS.⁵²³
807. The addressee of this Decision is therefore Posten Norge AS which must be held liable for the whole period of the abuse.

18 Conclusion on infringement of Article 54 EEA

808. In the light of the above, the Authority concludes that Norway Post has committed a single and continuous infringement of Article 54 of the EEA Agreement from 20 September 2000 until 31 March 2006 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;

⁵²¹ See Case T-11/89 *Shell International Chemical Company Ltd v Commission* [1992] ECR II-757, paragraph 311, and Case T-352/94 *Mo Och Domsjö AB v Commission* [1998] ECR II-1989, paragraphs 87-96.

⁵²² See Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 78 and 79: “*It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it*”, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Lombard Club* [2006] ECR II-5169, paragraphs 319-336.

⁵²³ See paragraph I above.

- Concluding and maintaining agreements with ICA and agreements 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.

19 Remedies and fines

19.1 Article 7 of Chapter II of Protocol 4 to the Surveillance and Court Agreement

809. Where the EFTA Surveillance Authority finds that there is an infringement of Article 54 EEA it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Chapter II of Protocol 4 to the Surveillance and Court Agreement and to impose any remedy which is proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

810. Even if there are no grounds for believing that Norway Post agreements with retail groups still contain exclusivity obligations, the Authority must ensure with certainty that Norway Post has genuinely and permanently terminated its exclusive dealing policy and that it will also refrain from engaging in similar practices in future as long as it holds a dominant position in the relevant market.

811. To the extent it has not already done so, Norway Post is therefore required to bring the infringements to an end and, henceforth, to refrain from any conduct which might have the same or equivalent object or effect as long as it holds a dominant position on the relevant market.

19.2 Article 23(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement

812. Under Article 15(2) of the previous Chapter II of Protocol 4 to the Surveillance and Court Agreement and under Article 23(2) of Chapter II of Protocol 4 as it now stands,⁵²⁴ the EFTA Surveillance Authority may by decision impose fines on undertakings, which either intentionally or negligently infringe Article 54 EEA. Any fine imposed shall not exceed 10% of the undertaking's total turnover in the preceding business year.

813. In fixing the amount of the fine, the Authority must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in the two versions of Chapter II of Protocol 4. In doing so, the Authority will set the fines at a level sufficient to ensure

⁵²⁴ The previous version of Chapter II of Protocol 4 to the Surveillance and Court Agreement was replaced by a new version through an Agreement of 24 September 2004 between the EFTA States amending Protocol 4 of the Surveillance and Court Agreement following the incorporation of Regulation (EC) No 1/2003 into the EEA Agreement (cf. Article 3(1)(3) of Protocol 21 to the EEA Agreement). The Agreement between the EFTA States entered into force on 20 May 2005.

deterrence. In setting the fines to be imposed, the Authority will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Chapter II of Protocol 4 to the Surveillance and Court Agreement.⁵²⁵

814. As regards the intention of Norway Post, it should be noted that the European Court of Justice has ruled that it is not necessary for an undertaking to have been aware that it was infringing the rules of competition laid down in the TFEU for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition.⁵²⁶ The same applies with regard to the competition rules of the EEA Agreement.
815. The Authority considers that Norway Post has committed a single and continuous infringement of Article 54 EEA. Based on the facts described in this decision, the Authority considers that Norway Post could not have been unaware that the conduct in question had as its object or effect the restriction of competition. Norway Post could not have been unaware of its dominant position and the fact that its B-to-C parcels distribution business faced very limited competition. It could not have been unaware of the fact that its agreements restricted its competitors' access to the whole network of NorgesGruppen/Shell and a number of outlets in COOP and ICA, that the outlet exclusivity during the main roll-out phase of the Post-in-Shop concept and its subsequent renegotiation strategy likely would limit the willingness of COOP and ICA to distribute parcels for alternative distributors, that the leading grocery store, kiosk and petrol station chains represented the most sought after distribution channels for B-to-C parcels and, therefore, that by limiting its competitors' access to a large number of these chains its conduct was liable to restrict competition. Accordingly, for the purposes of applying Article 15(2) of the previous Chapter II and Article 23(2) of the current Chapter II of Protocol 4 to the Surveillance and Court Agreement, the infringement must be regarded as having been committed intentionally, or at the very least negligently.
816. In Section 21 of its Reply to the SO Norway Post argues that the present case does not concern "normal" exclusivity but exclusivity related to a sort of input factor. It is according to Norway Post not uncommon that the Commission in more exceptional cases refrain from imposing fines and only requires that the infringement is brought to an end. Norway Post refers in this regard to *Van den Bergh Foods*,⁵²⁷ *Clearstream*⁵²⁸ and *GVG/FS*⁵²⁹ in which no fines were imposed, as well as to *Deutsche Post II*⁵³⁰ in which a symbolic fine was imposed. Norway Post also points out that it is not uncommon that cases concerning "normal" exclusivity are brought to an end without the imposition of fines.⁵³¹

⁵²⁵ OJ C 314, 21.12.2006, p. 84 and EEA Supplement to the OJ No 63, 14.12.2006, p. 44.

⁵²⁶ Case 246/86 *Belasco and others v Commission* [1989] ECR 2117, paragraph 41; and Case C-279/87 *Tippex v Commission* [1990] ECR I-261, paragraph 165.

⁵²⁷ Commission Decision 98/531/EC of 11 March 1998 in Case Nos. IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited* (OJ 1998 L 246, p. 1).

⁵²⁸ Commission decision of 2 June 2004 in Case COMP/38.096 (OJ 2009 C 165/7).

⁵²⁹ Commission decision 2004/33/EC of 27 August 2003 in Case COMP/37.685 (OJ 2004 L11/17).

⁵³⁰ Commission decision 2001/354/EC of 20 March 2001 in Case COMP/35.141 (OJ 2001 L 125/27).

⁵³¹ Norway Post refers to several cases in this regard: IRE/Nordion (XXVIIIth Report on Competition Policy 1998, p. 169-170); IRI/Nordion (XXVIth Report on Competition Policy 1996, p. 144-148); Distrigaz (Case COMP/B-1/37.966); Swedish Match (IP/97/80); and SWIFT (OJ 1991 C 335/3).

817. It should be recalled that the Authority is not bound by earlier decisions of the Commission and that not even the Commission is bound by its earlier decisions as long as there is equal treatment in a given case between undertakings.
818. Moreover, the agreements of Norway Post, which were of a long-term nature, were concluded with retail groups and outlets which undertook to distribute postal and financial services on an exclusive basis for Norway Post. The agreements must therefore be characterised as distribution agreements. It is well known that the Courts have taken a strict approach to the use of contractual exclusivity by dominant firms.⁵³²
819. While there are factual differences between the present case and *Van den Bergh Foods*, it is nevertheless worth noting that Norway Post's exclusive agreements went much further than the agreements in the latter case by foreclosing access to a large number of outlets Norway Post did not need to use. Furthermore, the reasons for not imposing a fine on *Van den Bergh Foods* related, amongst others, to the fact that the case raised fundamental questions about business practices which were found throughout the Community and which the Commission wished to settle. Notably, those practices did not only concern the imposition of exclusivity clauses on outlets, but also exclusivity with regard to the use of freezer cabinets which led to *de facto* outlet exclusivity.
820. In fact, in its decision in *Van den Bergh Foods*, the Commission made it clear that any inducement by a dominant supplier of a customer to grant it exclusivity, so as to prevent competing suppliers over significant periods from dealing with the customer, is prohibited by Article 102 TFEU and that this had been confirmed in case law in a number of cases.⁵³³ It also pointed out that the conduct at issue made access to the relevant market for other suppliers more difficult.⁵³⁴ The decision was upheld on appeal.⁵³⁵
821. The only element which can be said to be particular to the present case is the fact that the outlets in which parcels are delivered are different from the buyer of the services at issue, the distance selling companies (see Section 4 above). While this calls for an assessment of a particular set of facts, the general approach to, and the assessment of, exclusivity agreements which have been laid down in previous cases, and the obligations of dominant firms in this context, remain the same. In particular, the focus is on the extent to which the exclusivity is liable to place competitors of the dominant firm at a competitive disadvantage in a relevant market in which competition is already weakened because of the existence of the dominant position.
822. In *Microsoft*⁵³⁶ the media player market was a platform industry in which network effects played a significant role as entry barriers to new entrants.⁵³⁷ This was central to the foreclosure analysis of the tying abuse. However, Microsoft's argument that the Commission was applying a new rule of law was not accepted. The Commission therefore found that in absence of the application of any novel concept of

⁵³² See Case 85/76 *Hoffmann-La Roche v Commission*, cited in footnote 372 above; Case C-62/86 *AKZO v Commission*, cited in footnote 375 above; and T-65/89; *BPB and British Gypsum v Commission* [1993] ECR II-389.

⁵³³ Paragraph 264 of the Commission's decision.

⁵³⁴ Paragraph 265 of the Commission's decision.

⁵³⁵ Case T-65/98 *Van den Bergh Foods v Commission*, cited in footnote 370 above.

⁵³⁶ Commission Decision 2004/53/EC of 24 March 2004 in Case COMP/C-3/37.792.

⁵³⁷ See paragraphs 420, 879 *et seq* of the decision.

competition law, and in view of the fact that the software industry was not exempted from the application of competition law, Microsoft should have been aware of the fact that it was infringing the competition rules of both the Treaty and the EEA Agreement. The decision was upheld on appeal.⁵³⁸ The Court found that Microsoft ought to have been aware that its behaviour might infringe the competition rules.⁵³⁹ As in Microsoft, the finding of an abuse in the present case does not result from a new interpretation of the law or a new legal theory.

823. In *Clearstream* the reasons for not imposing fines related to the fact that there was no Community decisional practice or case law relating to the complex area of clearing and settlement services. The Commission's decision analysed for the first time the complex clearing and settlement processes in the context of market definition, as well as other sector-specific issues such as internationalisation, and that analysis had a direct bearing on the legal analysis of the case. At the moment of the infringement, it could therefore reasonably be argued that it was not sufficiently clear to the undertaking concerned that its behaviour constituted an infringement of the EU competition rules.
824. In *GVG/FS* the Commission used its discretion not to impose a fine due to the novelty of the case which related to the provision of cross-border railway transport services. The Commission emphasised the fact that FS submitted commitments following the initiation of the Commission's investigation which ensured that FS would not repeat the abuses in the future and which should contribute significantly to the dismantling of entry barriers for international rail passenger services into Italy.
825. In *Deutsche Post I* Commission did not seek to impose a fine, because the relevant measure of cost that a 'multi-product' or 'multi-service' postal operator benefiting from a reserved area had to meet in competitive activities had not been clarified previously. In addition, a fine was not appropriate in view of the fact that, as soon as it was confronted in the Statement of Objections and in the ensuing proceedings with the economic principles on the relevant measure of cost to be covered, DPAG undertook to provide full transparency on the financial relationship between the reserved area and the parcel services subject to competition.
826. In *Deutsche Post II*,⁵⁴⁰ regarding interception of cross-border mail, the Commission chose to impose only a symbolic fine because Deutsche Post had behaved in a manner which – at least partially – was in accordance with the case law of German courts and because national case law had resulted in an unclear legal situation. Further, no Community case law existed that concerned the specific context of cross-border letter mail services and an undertaking had been submitted by DPAG introducing a detailed procedure for the processing of incoming cross-border letter mailings.
827. Thus, in all these cases, there were specific elements present which are not present in the case at hand. More generally, the extent to which the Commission brings a case to an end with commitments with a view to improving the conditions of competition in the markets concerned for the future or imposes fines for the infringements which have been committed in the past depends on the circumstances

⁵³⁸ Case T-201/04 *Microsoft v Commission*, cited in footnote 393 above.

⁵³⁹ Paragraphs 1338 and 1339 of the judgment.

⁵⁴⁰ Commission Decision 2001/892/EC of 25 July 2001 in Case COMP/C-1/36.915 (OJ 2001 L 331/40).

of each individual case. The way in which the Commission has chosen to use its discretion in that regard in the past does not have any bearing on whether it is appropriate to impose a fine in the present case.

828. The Authority's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 53 or 54 of the EEA Agreement is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the EEA Agreement. The Authority has a duty to investigate and sanction individual infringements, the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the EEA Agreement and to steer the conduct of undertakings in the light of those principles with a view to ensuring that its action has the necessary deterrent effect.
829. In the light of the above considerations and having regard to the circumstances in the present case, in particular the exceptionally strong market position of Norway Post throughout the relevant period and the nature and duration of the infringement, the Authority concludes that Norway Post's abusive conduct justifies the imposition of a fine.

19.3 The basic amount of the fine

19.3.1 Calculation of the value of sales

830. As a general rule, the basic amount of the fine is to be set at a level up to 30% of the value of sales of the products the infringement directly or indirectly relates to in the relevant geographic area within the EEA. The Authority normally takes the sales made by the undertaking during the last full business year of its participation in the infringement.⁵⁴¹
831. According to Norway Post's reply to the Authority's request for information, 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.⁵⁴² That is equivalent to EUR 84.17 million.⁵⁴³

19.3.2 Determination of the basic amount of the fine

832. The basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.⁵⁴⁴

19.3.2.1 Gravity

833. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Authority carries out a case-by-case analysis, taking account of all the relevant circumstances of the case. The Authority has regard to a number of factors, such as the nature of

⁵⁴¹ Guidelines on the method of setting fines.

⁵⁴² See event # 437351, reply from Norway Post dated 29 August 2007, page 2.

⁵⁴³ The average exchange rate for 2005 was 8.0092 according to the European Central Bank's historical Euro foreign exchange reference rates.

⁵⁴⁴ Guidelines on the method of setting fines, paragraph 19.

the infringement, the market share of the undertaking and the geographic scope of the infringement. These factors are analysed below.

19.3.2.1.1 Nature of the infringement

834. In its assessment of the gravity of the infringement, the Authority takes into account that the type of infringement in question related to exclusionary practices which affected the structure of the relevant market, that it related to a large number of exclusive agreements, and that the group exclusivity covered all the outlets of NorgesGruppen/Shell for the whole duration of the agreements irrespective of the fact that Norway Post knew at the outset that it only needed to use a fraction of those outlets for its Post-in-Shop concept. The Authority also takes into account that NorgesGruppen was the leading daily consumer goods retail group which also comprised the largest kiosk chain in Norway and was therefore particularly attractive to new entrants.

19.3.2.1.2 Market share

835. Norway Post had a very high market share in the relevant market for the whole duration of the infringement, it was an unavoidable trading partner for all distance selling companies and it did not face competition from any sizeable competitors.

19.3.2.1.3 Geographic scope

836. The abuse covered the whole territory of Norway and jeopardised, contrary to the objectives of the EEA Agreement, the proper functioning of the internal market by raising barriers to effective entry to the relevant parcel distribution market in Norway, thus impeding the establishment of transnational markets.

19.3.2.1.4 Conclusion on gravity of the infringement

837. In conclusion, taking into account the factors discussed above, in particular, the market share of Norway Post and the nature and geographic scope of the infringement, the Authority considers that the proportion of the value of sales to be used to establish the basic amount should be 3%.

19.3.2.2 Duration

838. Norway Post's abuse of its dominant position commenced on 20 September 2000 and continued up to at least 31 March 2006 (see Section 16 above). In this case, the Authority will take into account the actual duration of the infringement rounding down to the month. The overall duration of Norway Post's infringement taken into account by the Authority for the calculation of the fine starts in September 2000 and amounts to five years and six months. The infringement was therefore of long duration.

19.3.2.3 Conclusion on the basic amount of the fine

839. On the basis of the above, the basic amount of the fine should be EUR 13.89 million.

19.4 Mitigating circumstances

840. According to the Guidelines on the method of setting fines, the basic amount of the fine may be reduced where the Authority finds that mitigating circumstances exist, such as the undertaking providing evidence that it has terminated the infringement as soon as the Authority intervened; the infringement has been committed as a result of negligence; the undertaking has effectively cooperated with the Authority outside the scope of the Leniency Notice and beyond its legal obligations to do so; or where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or legislation.⁵⁴⁵
841. In Section 21 of its Reply to the SO, Norway Post maintains that there are a number of reasons why the size of any fine should be limited. In this regard, Norway Post has referred to the fact that it obtained judicial advice from legal experts when Privpak questioned whether Norway Post's exclusive agreements were in compliance with the rules on competition. The legal experts that Norway Post consulted concluded that the agreements were not contrary to the competition rules.
842. However, the fact that an undertaking has commissioned a legal opinion or relied on advice from a legal expert does not exonerate an undertaking from liability under the EEA competition rules and cannot as such be regarded as a mitigating circumstance. In addition, the legal opinion in question was based on the information provided by Norway Post which appears to have been of a superficial nature. Hence, the legal opinion is very short, contains a very limited substantive assessment and does not address central issues such as the definition of the relevant market, the strength of Norway Post's market position, the existence of dominance and possible legal implications of a finding of dominance. Moreover, the opinion is based on an erroneous understanding of the factual situation and the legal and economic context in which Norway Post's conduct must be assessed and was couched in careful terms.
843. Norway Post has also argues that, in any event, there was only an abuse after the introductory phase, i.e. from 2002-2003 at the earliest as the exclusivity was objectively justified in the preceding period.
844. In the light of the assessment in Section 14 above, that argument cannot be accepted. Moreover, even if it were to be accepted that Norway Post could have concluded exclusive agreements of shorter duration without infringing Article 54 EEA, that does not mean that the long-term abusive agreements which were concluded did not infringe Article 54 EEA during the first period of their duration.
845. In conclusion, the Authority considers that there are no mitigating circumstances in the present case.

19.5 Aggravating circumstances

846. The Authority considers that there are no aggravating circumstances.

⁵⁴⁵ See paragraph 29 of the Authority's Guidelines on the method of setting fines. The Guidelines list other types of possible mitigating circumstances but these apply mainly to cartels.

19.6 Duration of the administrative procedure

847. In view of the time that has lapsed since the complaint was lodged, the Authority has considered what effect if any the duration of the administrative procedure should have on the amount of any fine.
848. The Authority received a complaint from Privpak in June 2002. After an initial investigation, the Authority decided in 2004 that it was necessary to carry out an inspection at the premises of Norway Post in order to verify whether the object or effect of the agreements of Norway Post prevented competing distributors of B-to-C parcels from gaining access to a delivery network in Norway and thereby distort competition. Further, Norway Post's renegotiating strategy was implemented after the inspection and the Authority was only able to obtain the necessary evidence regarding this part of the abuse from COOP and ICA in April 2008. The Authority has gathered a large amount of information from a number of market players and has carried out a detailed investigation of the present case. Following the issuing of the SO in December 2008, Norway Post submitted a detailed reply to the SO which has been carefully assessed by the Authority. Despite the fact that the Authority's inspection decision clearly expressed concerns about Norway Post's exclusive agreements Norway Post did not take any steps with a view to resolving those concerns.
849. The Authority does not believe that the duration of the administrative procedure in this case in any way has affected its outcome, nor that the rights of the defence of Norway Post have been infringed. The imposition of a fine is not either time-barred.⁵⁴⁶
850. While the Authority therefore is not required to abstain from imposing a fine or to reduce the fine because of the length of the procedure, it may, however, in the exercise of its discretion in fixing the fines, make a reduction in the amount of the fine.⁵⁴⁷
851. The Authority acknowledges that the duration of the administrative procedure in the present case has been considerable and considers that in the circumstances of the present case a reduction of the basic amount of the fine by EUR 1 million is justified for that reason.

19.7 Conclusion

852. In view of the considerations above, the final amount of the fine to be imposed on Norway Post is EUR 12.89 million.
853. The fine does not exceed 10% of Norway Post's total turnover in the preceding business year which was in the order of EUR 3105.5 million.⁵⁴⁸

⁵⁴⁶ See Article 25 of Chapter II of Protocol 4 to the Surveillance and Court Agreement.

⁵⁴⁷ See Case T-213/00 *CMA and CGM v Commission* [2003] ECR II-913, at paragraph 325. See also paragraph 37 of the Authority's Guidelines on the method of setting fines.

⁵⁴⁸ NOK 27 104 million according to Norway Post's Annual Report 2009.

HAS ADOPTED THIS DECISION:

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 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 agreements 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.

The fine shall be paid, within three months of the date of notification of this Decision, into bank account:

Account No: 363-0750881-44 of the EFTA Surveillance Authority with:

ING Bank, 1 Rue du Trône, B-1000 Brussels

(Code SWIFT BBRUBEBB – code IBAN BE55 3630 7508 8144)

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted plus 3.5 percentage points.

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,

Article 4

This Decision is addressed to Posten Norge AS, Posthuset Biskop Gunnerusgate 14, N-0001 Oslo, Norway.

Done at Brussels, 14 July 2010

For the Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member

Annex: Price differences between service parcels and home delivery⁵⁴⁹

Home delivery price list 01.01.2005					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	88	90	95	99	105
2	90	93	98	102	109
3	92	96	101	105	112
4	94	98	104	108	115
5	96	100	107	111	118

Service Parcel price list 01.01.2005					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	55	57	59	64	67
2	56	58	60	65	68
3	57	59	62	67	70
4	58	61	66	70	74
5	60	64	69	73	78

Price difference – SP in % of Home delivery					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	60.0%	57.9%	61.0%	54.7%	56.7%
2	60.7%	60.3%	63.3%	56.9%	60.3%
3	61.4%	62.7%	62.9%	56.7%	60.0%
4	62.1%	60.7%	57.6%	54.3%	55.4%
5	60.0%	56.3%	55.1%	52.1%	51.3%

Price difference - Home delivery in % of SP					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	160.00%	157.89%	161.02%	154.69%	156.72%
2	160.71%	160.34%	163.33%	156.92%	160.29%
3	161.40%	162.71%	162.90%	156.72%	160.00%
4	162.07%	160.66%	157.58%	154.29%	155.41%
5	160.00%	156.25%	155.07%	152.05%	151.28%

⁵⁴⁹ Excerpts from Norway Post's web pages. All prices are in NOK exclusive VAT. Norway Post has charged an additional fee for cash-on-delivery.

Home delivery price list 01.01.2006					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	92	95	99	105	112
2	94	97	102	109	116
3	96	99	105	112	119
4	98	102	108	115	122
5	100	105	112	119	126

Service Parcel price list 01.01.2006					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	56	58	61	64	69
2	57	59	62	67	71
3	58	61	64	70	74
4	59	64	68	73	78
5	62	67	72	76	82

Price difference - SP in % of Home delivery					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	64.3%	63.8%	62.3%	64.1%	62.3%
2	64.9%	64.4%	64.5%	62.7%	63.4%
3	65.5%	62.3%	64.1%	60.0%	60.8%
4	66.1%	59.4%	58.8%	57.5%	56.4%
5	61.3%	56.7%	55.6%	56.6%	53.7%

Price difference - Home delivery in % of SP					
Freight calculation weight (kg)	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5
1	164.29%	163.79%	162.30%	164.06%	162.32%
2	164.91%	164.41%	164.52%	162.69%	163.38%
3	165.52%	162.30%	164.06%	160.00%	160.81%
4	166.10%	159.38%	158.82%	157.53%	156.41%
5	161.29%	156.72%	155.56%	156.58%	153.66%

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