SUPREME COURT OF NORWAY

On 22 June 2011, the Supreme Court delivered the following judgement in

HR-2011-01251-A, (case no. 2010/1947), civil appeal against judgment

Tine SA	(counsel Mr Stephan L. Jervell) (junior counsel Mr Magnus Hellesylt)
v.	
The Norwegian State, represented by the Competition Authority	(Counsel Mr Christian Lund, on behalf of the Attorney General)

G R O U N D S F O R T H E J U D G M E N T :

(1) Mrs Justice Indreberg: The case before us concerns judicial review of a decision of the Competition Authority to impose an administrative fine pursuant to section 29 of the Competition Act, and the question whether a supplier's conduct in its dealings with a grocery retail chain constituted a breach of the prohibition against abuse of a dominant position in section 11 of the Competition Act.

(2) The Norwegian grocery retail sector is dominated by four large retail groups, each of which own one or more grocery retail chains, NorgesGruppen ASA, Coop Norge AS, ICA Norge AS and Rema 1000 Norge AS – to which I will refer as Norgesgruppen, Coop, ICA and Rema. Each autumn, grocery suppliers and the retail groups hold annual negotiations on the terms and conditions for supply for the following year. The focal point of the negotiations is the economic support the suppliers give to the retail groups by. As a general rule, the parties negotiate on a total amount, which is then converted into discounts on certain product lines, marketing support, etc

(3) The case before the Supreme Court concerns the conduct of TINE BA – now TINE SA, to which I will refer as Tine – during the annual negotiations between Tine and Rema in the autumn of 2004.

(4) Tine is organized as an agricultural cooperative and until 1997 had a monopoly in the Norwegian market for dairy products. In 2004, Tine's market share for hard yellow cheese was 76.3% and its market share for brown cheese was 90%. The only other Norwegian

supplier of hard yellow cheese and brown cheese was Synnøve Finden Inc. – to which I refer as Synnøve Finden - which had a market share of 7.2% for brown cheese and 19.5% for hard yellow cheese. Competition from foreign suppliers was small, partly because of high tariffs.

(5) In 2004, Rema was the most price-focused grocery retail chain in Norway. It had a retail concept based on a narrow product range and doing everything in the simplest manner. Rema had a 17.5% share of the grocery retail market in 2004.

(6) Before the annual negotiations started in 2004, the German discount chain Lidl had announced that it had decided to establish itself in Norway. Lidl focused largely on selling its own brands and Rema expected to see its prices being challenged. In June 2004, Rema prepared a report on how it intended to meet competition from Lidl. Rema chose a strategy which involved cultivating and enhancing its existing concept, and which included focusing on a concentration of suppliers, offering a narrow product range and being cheapest "for the goods that the boss knows and prefers (brands)". The term "boss" in this context refers to the customer. In order to have the best prices, Rema aimed to achieve the best purchasing conditions, which in turn required increasing the economic support it received from its suppliers.

(7) The negotiations between Rema and Tine started on 3 September 2004. Prior to this, Rema and Tine held a meeting on 6 July 2004, which was particularly occasioned by Lidl's entry into Norway. At the meeting, Rema's negotiators informed Tine that Rema was willing to commit itself to a sole supplier of cheese and milk. When asked what Tine was willing to pay in return for this, Tine's chief negotiator replied that Tine could not or would not buy itself out of competition. After the meeting, Rema's buyer outlined three scenarios for Tine: one that excluded Q-meieriene (*literally: "Q-Dairies"*) and Synnøve Finden from Rema's stores, one with unchanged conditions, and one with "full commitment to Q and Finden". In an e-mail to his superior, Rema's chief negotiator wrote that the first scenario would give Tine better exposure, considerable campaigning pressure and intensive launch campaigns, but that this required a strong investment from Tine.

(8) In an e-mail dated 13 July 2004, Tine's chief negotiator suggested they should analyse the current product range in terms of overall profitability across a full range of products. Against this background, at a meeting on 16 August 2004, the parties established a collaboration to go through Rema's product range and to analyse the profitability. In this connection and at Rema's request, a Tine employee sent a memorandum that had been prepared for Tine in 2002 by the consultancy firm Genius Retail Management AS – to which I refer as the Genius memorandum - about the influence that having a sole supplier of cheese

and milk instead of two suppliers has on profitability. In the transmission, the Tine employee wrote: “The figures speak for themselves”.

(9) At Tine, shortly before the first negotiation meeting Tine’s chief negotiator wrote an internal e-mail stating: “They want to work closer with us.” At Rema, the invitation to the first negotiation meeting stated that “Tine suggests the terms and condition for 2005. Approach: Tine as 'sole supplier' of dairy products, liquids and solids.”

(10) During the first negotiation meeting on 3 September 2004, Rema’s CEO stated that Rema would focus on supplier concentration, and that it was realistic to commit to Tine as Rema’s sole supplier if the economic support Rema received from Tine was increased sufficiently. Rema proceeded in the same manner towards its other major suppliers.

(11) At the meeting, Tine's chief negotiator expressed Tine's desire for growth, that Tine wanted more transparency around both the economic support it gave to Rema and the benefits Tine received in return, that Tine was willing to increase its economic support, and that it was necessary to abide by laws and regulations. He also stated that Tine would not buy itself out of competition. The Court of Appeal found it most likely that he also said that it was not Tine’s goal to eliminate Synnøve Finden and Q from the market.

(12) On the same day, Tine sent Rema an offer of agreement where the total amount of economic support was stated to be NOK 31.321 million. This was an increase of NOK 7.771 million on the economic support that had been agreed for 2004. The offer was on condition that the agreement would be for a term of two years and that it would be adjusted in autumn 2005 according to volume growth.

(13) On 9 September 2004, based on an idea from Rema’s chief negotiator, Rema asked Tine to draw up a “planogram for solids / liquids without Finden and Q ... one traditional and one new and crazy version”. A planogram is a detailed overview of the placement of products in a store shelf or refrigerator, showing what products are displayed and how much space each product will have. Usually, planograms are prepared by each retail chain but in this case Rema had asked leading suppliers within each product group to prepare planograms. On 15 September 2004, Tine responded to this request with a proposed planogram for cheese. All hard cheeses from Synnøve Finden were removed from the shelves in this proposal.

(14) Rema considered the first offer from Tine to be a good offer but internally within Rema the chief negotiator intimated that another NOK 6 to 7 million was needed in order to get a good deal.

(15) On 16 September 2004, Tine sent a new offer to Rema. The amount of economic support stated in the new offer was now increased to NOK 33.5 million, and the offer was

conditional on a number of services in return from Rema. New product launches were to be given priority, the product line " Småfolk barnemat" (*literally: Little People Baby Food*) was to be analysed and increased from five to ten product lines, Tine's fruit juice was to be included in Rema's category A product range, Rema was to undertake a review of all product ranges in all major categories where Tine was represented, the planograms were to be binding, the activity level in the activity plan was to be adhered to, and Tine was to be given main supplier status at all Rema, Narvesen, 7-Eleven and Hydro Texaco stores for cheese, liquid dairy products, chilled fruit juices and sandwich lines. In the same e-mail, Tine also stated that it was working conscientiously to prepare a calculation for production of a private label yellow cheese, which Rema had asked Tine to do. Private label is the same as a retailer's own brand, and this cheese was intended to be a "price fighter" product for Rema. At this time, Synnøve Finden was supplier of "price fighter" products in Rema's product range.

(16) On 20 September 2004, Tine's executive management discussed an internal memorandum prepared by Tine's chief negotiator which stated that Rema was now working aggressively to become the leader in retail of branded goods, and that it also intended to narrow its range. The memorandum stated that Rema was facing "a change of tempo selection wise" and that this "provides opportunities" for Tine, "but will of course cost".

(17) The final negotiation meeting between Tine and Rema was held on the same day. Rema again opened the meeting by expressing that Rema could manage without Synnøve Finden and Q provided that Tine's economic support was sufficiently high. With the exception of Tine's conditions concerning baby food and sandwich lines, Rema accepted the terms of Tine's offer of 16 September 2004. For its part, Tine increased its economic support to Rema in two stages so that the final sum was NOK 36.6 million. Tine's agreement was subject to legal review and executive management approval. Tine confirmed to Rema the following day that they had an agreement. The parties agreed to meet later the same week to go through the text of the agreement.

(18) The formal cooperation agreement and supplier agreement was signed on 15 November 2004. In the appendix to the agreement, the total amount of economic support from Tine to Rema is allocated as follows: NOK 3 million as an innovation payment for the new products to be included in Rema's basis range, NOK 2.3 million as compensation for planograms, NOK 18 million for 13 four-week campaigns, including selective discounts of NOK 5 million, and NOK 13.3 million for savings on large deliveries to individual stores – so-called "drop-size".

(19) Synnøve Finden was summoned to annual negotiations with Rema on 14 October 2004 and delivered its proposal for an agreement with Rema on 2 November 2004. The first negotiation meeting was held on 17 November 2004. Synnøve Finden received positive feedback on its proposal for deliveries and follow-up, but was told that its offer of economic support was not good enough. Rema requested NOK 6.6 million in increased economic support from 2004, which Synnøve Finden explained would result in a loss for the company. On 19 November 2004, Synnøve Finden submitted a new offer which contained an increase in economic support of NOK 1.9 million compared to 2004. Rema responded that the offer was not good enough. By e-mail dated 29 November 2004, Synnøve Finden submitted yet a new offer which further increased the economic support it was prepared to give by NOK 500 000 provided that Synnøve Finden's turnover with Rema in 2005 exceeded NOK100 million. In 2004, turnover had been at 83 million. The final meeting was held on 7 December 2004. The Court of Appeal has held that while the negotiations had been bona fide negotiations up until this point, Rema had already decided to terminate its relationship with Synnøve Finden before the final negotiation meeting was held. At the meeting, the parties agreed to postpone announcing the termination until 14 December 2004 for Synnøve Finden's sake.

(20) Synnøve Finden immediately contacted Norgesgruppen, ICA and Coop in order to increase its sale of cheese. In this connection, Synnøve Finden became aware that, during the annual negotiations with ICA, Tine had sent a memorandum to ICA in which Tine had calculated the value for ICA of Tine becoming exclusive supplier of certain product ranges. In general, the memorandum presumed a scenario where Tine's products would replace Synnøve Finden products, although it also presumed that products from some other manufacturers would be removed, too. On 14 December 2004, Synnøve Finden issued a press release which, among other things, stated that Synnøve Finden assumed that Tine had spent "a substantial seven figure sum to secure total dominance of cheese products at Rema 1000", and that the competition authorities should perhaps look into this. The press release received considerable publicity and the Competition Authority started seeking information and making investigations the following day.

(21) In February 2005, Rema entered into a new supply agreement with Synnøve Finden. The agreement reduced Synnøve Finden's product range with Rema from fifteen to eight lines, and increased the economic support to be paid by Synnøve Finden to Rema by NOK 1.1 million.

(22) On 19 February 2007, the Competition Authority imposed an administrative fine of NOK 45 million on Tine for infringement of sections 10 and 11 of the Competition Act. The decision concluded as follows:

> "TINE BA is hereby fined NOK 45 million for infringement of sections 10 and 11 of the Competition Act. TINE has unfairly abused its dominant position during the annual negotiations in 2004 by entering into an agreement, or coming to a mutual understanding, with Rema that TINE would become Rema's exclusive supplier, or almost exclusive supplier, of hard yellow cheese and brown cheese in 2005 and 2006. TINE obtained exclusive supplier status after considerably increasing its economic support to Rema. TINE has also made an attempt to reach a similar agreement with ICA by offering economic support to ICA for exclusive supply of hard yellow cheese and brown cheese to the Rimi grocery chain."

(23) Tine contested the legality of the decision and on 19 April 2007 took out legal proceedings before the Oslo District Court. On 25 March 2009, the Oslo District Court passed judgment with the following ruling:

> "1. The administrative decision of the Competition Authority dated 19 February 2007 in case no. V2007-2 shall be annulled.
>
> 2. The Norwegian State is ordered to pay the costs of the case in the amount of 13,187,604 – thirteenmilliononehundredandeightyseventhousandsixhundredandfour - kroner plus statutory interest from 14 days after service of the judgment until payment is made."

(24) The District Court held that there was no agreement or understanding between Tine and Rema to exclude Synnøve Finden as a supplier, and that Tine's conduct in its dealings with Rema did not infringe the Competition Act section 11. The court emphasized in particular that the negotiations had to be considered in light of the competition posed by Lidl - which suggested that Rema would be required in the future to concentrate on fewer product lines and suppliers, that the considerable increase in Tine's offer during the negotiation rounds was not evidence of anything extraordinary, and that the amounts that were agreed did not suggest that Tine paid anything extra to Rema compared to the annual agreements entered into between Tine and the other grocery chains. The District Court also found that the memorandum that Tine sent to ICA during the negotiations with ICA did not constitute a binding offer of remuneration, or a proposal for remuneration, in return for becoming ICA's almost exclusive supplier of cheese, and that Tine therefore had not infringed the Competition Act section 11 in its negotiations with ICA.

(25) The Norwegian State, represented by the Competition Authority appealed to the Court of Appeal. The appeal concerned the assessment of evidence and the application of law. The Court of Appeal delivered its judgment on 7 September 2010 with the following ruling:

"1. Tine BA is fined 30 million - thirtymillion - kroner for violation of the Competition Act section 11 during the annual negotiations with Rema 1000 Norway AS for 2005.

2. The parties shall bear their own legal costs for the proceedings before the District Court and the Court of Appeal."

(26) The Court of Appeal found no basis on which to conclude that Tine and Rema had entered into an exclusive supply agreement, or almost exclusive supply agreement, and that Tine therefore had not infringed the Competition Act section 10. However, the Court of Appeal held that Tine had contributed to Rema's decision to terminate its supplier relationship with Synnøve Finden. According to the Court of Appeal, Tine had acted contrary to the strict duty of care that applies to a dominant player with a very high market share in a way that would have distinct negative economic effects on competition and had thus infringed the Competition Act section 11. However, like the District Court, the Court of Appeal did not find that Tine had violated the Competition Act section 11 in its negotiations with ICA.

(27) Tine has appealed to the Supreme Court. The appeal concerns part of the Court of Appeal's application of the law, more particularly its application of the Competition Act section 29 on the jurisdiction of the court, the application of the abuse requirement in section 11, and the application of the requirement that in order to infringe section 11 the conduct must have significant anti-competitive effects. The State lodged an ancillary appeal against the Court of Appeal's application of the law with regard to its assessment of Tine's conduct in its negotiations with ICA. On 1 March 2011, the Supreme Court Appeals Committee granted leave for Tine's appeal to be heard by a chamber of the Supreme Court, but refused leave to appeal for the State's appeal. On 15 April 2011, the State applied for consent pursuant to the Disputes Act section 30-7(1) to amend its prayer for relief to also include violation of the Competition Act section 10. However, the Appeals Committee refused this application in an interlocutory order dated 11 May 2011.

(28) In the proceedings before the Supreme Court, the parties have submitted a statement from Professor Tommy Ståhl Gabrielsen on his earlier analyses of the economic effects on competition in the case, and an analysis by Mr Nils-Henrik M. von der Fehr of the economic effects on competition of Tine's conduct in its annual negotiations with Rema in 2004. Apart from the limitations on the scope of the case referred to above, the case before the Supreme Court is essentially the same as in the proceedings before the Court of Appeal.

(29) In brief, the appellant, Tine SA, has argued as follows:

(30) The Court of Appeal has exceeded its powers by imposing a fine on the basis of Tine's unilateral conduct, while the administrative decision reviewed by the Court of Appeal is based on a finding that Tine and Rema entered into an exclusive supply agreement.

(31) Section 29 (4) of the Competition Act provides that the court may try all aspects of the case, but this does not empower the court to act as a competition authority. The language of the provision was chosen to emphasize that, in addition to the power of ordinary judicial review of the administrative decision, the court has power to determine the level of the administrative fine and to exercise discretion as to whether an administrative fine should be imposed. This is apparent from the Report of the Competition Commission published in NOU 2003:12 at pages 132 and 254 and from the Sanctions Committee's comments to similar wording in its proposal, see NOU 2003:15 at pages 355 and 197. Furthermore, the Ministry expressed the same understanding of the Competition Act in the preparatory works to the Public Procurement Act, see Ot.prp. no. 62 (2005-2006) at page 11. Public policy also supports this understanding. An extended power of judicial review which entitles the court to decide whether an administrative fine should be imposed and the amount of such fine is an advantage for the private party and compensates for the lack of the right to bring an administrative appeal against the Competition Authority's decision. However, the courts lack the necessary expertise in matters of competition law to justify giving them the same powers as an administrative appeal body.

(32) The courts cannot extend their power of judicial review so that matters which in the administrative decision are deemed to be evidentiary facts are deemed by the court to be material facts. The case would no longer be the same case. The case law of the Supreme Court shows that when exercising judicial review over administrative decisions the Court cannot base its decision on a different private juristic act than the one on which the administrative decision is based, see e.g. the judgment reported in Rt-2010-999.

(33) The imposition of a fine based on Tine's unilateral conduct in circumstances where the Competition Authority's decision is based on Tine and Rema having concluded an exclusive supply agreement also violates the European Convention on Human Rights - ECHR - Article 6 (3) (a) and (b). According to the case law of the European Court of Human Rights - ECtHR - Article 6 (3) (a) requires detailed information to be given not only about the factual basis for the accusation, but also about the legal characterization, see e.g. the judgment of the ECtHR dated 25 March 1999 in Pélissier and Sassi v. France (Application no. 25444/94) at paragraph 51. Appeal proceedings can only repair the lack of information if all aspects of the case are fully reviewed.

(34) In any event, Tine's conduct during the negotiations with Rema did not contravene the Competition Act section 11. The type of exploitation of a dominant position we may be talking about here is exclusionary abuse. In EU law - which is a central source of law - the various types of exclusionary abuse have been systematized and catalogued. There are three main types of exclusionary abuse: exclusive dealing, illegal discounts and predation. The Court of Appeal held that Tine and Rema did not enter into an exclusive supply agreement, and the Supreme Court must rely on this finding. In the agreement, the selective discounts were allocated between the specific products to which the marketing activities related. The drop size rebate was divided between various specific lines and the discount rate was fixed. Otherwise, the agreement with Rema regulated remuneration for specific benefits, innovation remuneration, planogram remuneration and marketing campaigns. Tine has therefore not offered loyalty discounts or other contingent discounts. On the other hand, Tine has competed on price - offered flat discounts - which also companies in a dominant position are entitled to do as long as there is no question of predation. Tine's prices for cheese were higher than both the average variable cost and average total cost. There is therefore no predation. Tine did not offer selective price cuts in order to out-compete Synnøve Finden. Therefore, Tine's conduct does not fall within any of the established types of abuse. If the Supreme Court finds that Tine's conduct infringes section 11, it will be creating a new type of abuse. Although the case law of the European Court does not exhaustively define the matters that may conflict with the prohibition against abuse of a dominant position, the Supreme Court should be cautious in creating new law in this area. It is important that the legal situation is clear and predictable. In any event, the Court of Appeal has gone too far. If the judgment of the Court of Appeal is upheld, competition in the market will be reduced.

(35) The prohibition against abuse of a dominant position will only be infringed if Tine's behaviour is or is capable of having a significant anti-competitive effect. Exclusive supply agreements automatically have such an effect. If an agreement leads to de facto exclusivity, the effect must be considered on the basis of the specific facts and circumstances of the case. Administrative and court practice regarding unilateral conduct is inconsistent. In some cases, it would seem that evidence of an anti-competitive intent is sufficient for a finding of infringement. In the present case, however, the foreclosure effect of Tine's conduct must be considered. The position of the case is different to when the Competition Authority made its decision since the Competition Authority's decision is based on a finding that Tine and Rema entered into an exclusive supply agreement. However, the Court of Appeal has not considered the impact of Tine's unilateral conduct, only the effect of Rema's decision to take Synnøve

Finden out of its product range. If the Court of Appeal had considered the effect of Tine's conduct, it would have concluded that this conduct did not have a significant anticompetitive effect.

(36) Even if one assumes that Tine was responsible for Rema's decision, the anticompetitive effect is too small. According to the European Union law, the foreclosure must apply to a significant portion of the market. Rema's market share was 17.5 percent and Synnøve Finden's share of cheese sales in Rema was 14.6 percent. In other words, Synnøve Finden lost 2.55 percent of the market as a result of what happened. The foreclosure must also be of some duration. The agreement between Rema and Tine could be terminated with one month's notice, and Rema was entitled to change its product range at any time. If Tine's conduct could lead to foreclosure, such foreclosure was therefore not long term.

(37) Tine SA has entered the following prayer for relief:

> "1. The judgment of the Oslo District Court is affirmed.
>
> 2. TINE SA shall be awarded legal costs of the proceedings before the Court of Appeal and the Supreme Court. "

(38) In brief, the respondent, the Norwegian State represented by the Competition Authority, has argued as follows:

(39) The Court of Appeal has not exceeded its powers pursuant to the Competition Act section 29. Firstly, the Competition Authority's decision is based not only on a finding that Tine and Rema entered into an exclusive supply agreement, but also that Tine's unilateral conduct infringes the Competition Act section 11. Secondly, the court would in any event be entitled to come to this conclusion. According to the preparatory works to the Competition Act, the court has the same powers as an administrative appeal body. The only limitation on the court's powers in section 29 is that it cannot go beyond the scope of the case. In the present case, the ruling of the Court of Appeal is based on the same facts and the same legal characteristics as those applied by the Competition Authority, and there is no doubt that the court has kept within the scope of the case.

(40) The legal guarantees protected by ECHR Article 6 have not been violated. The reasons given by the Competition Authority for its decision show that it found that Tine's unilateral conduct infringes section 11, and Tine's statement of claim to the Oslo District Court shows that Tine was aware of this. In any event, the question has been dealt with by two court instances. To the extent that the Competition Authority did not provide the necessary information, this has been repaired.

(41) Regarding infringement of the Competition Act section 11, the Court of Appeal has correctly concluded that Tine improperly contributed to Synnøve Finden being excluded from Rema. The conduct of dominant undertakings must be assessed strictly. They cannot obstruct the maintenance of residual competition through other means than by competition on performance. They also have a special responsibility not to harm residual competition. The Competition Act section 11 covers numerous types of abuse and does not contain an exhaustive list. Nor does the case law of the European Union exhaustively define the various types of abuse. Weight must be given to the fact that the Court of Appeal found that the agreement between Tine and Rema bordered on an "almost exclusive supply agreement" pursuant to the Competition Act section 10. Exclusive supply agreements entered into by undertakings in a dominant position are at the very core of section 11 and are to be assessed very strictly.

(42) The totality of Tine's conduct shows that Tine paved the way for Rema's decision to remove Synnøve Finden from its product range. When Tine learned that Rema was considering concentrating its suppliers, Tine sent the Genius memorandum to Rema - a memorandum that focuses on the benefits for Rema of having one instead of two suppliers. Tine also responded to Rema's invitation to become exclusive supplier if the payments were sufficiently good by significantly increasing its payments several times. Further, Tine paved the way for Rema's decision by drafting planograms which assumed that Tine products were the only products in the cheese shelves at Rema, and by confirming that Tine would produce private label cheese for Rema.

(43) This must be judged in light of the fact that Tine had a particularly strong position in the market for cheese. In addition to this, Tine had only one real competitor - Synnøve Finden - who was in a vulnerable financial position.

(44) In considering whether section 11 has been an infringed, one cannot look only at the company's conduct. One must also verify whether the conduct is likely to restrict competition. Since the illegal conduct consists of contributing to Rema's decision to exclude Synnøve Finden, the Court of Appeal has correctly considered the consequences of excluding Synnøve Finden from Rema. The Court of Appeal has held that this would result in higher prices, a reduced product range and reduced need for innovation on Tine's part, which would be harmful to consumers. This is not appealed, and can be relied on by the Supreme Court. In any event, the Court of Appeal's assessment of the effects of Tine's conduct is correct. There is no fixed limit on how high the foreclosing effect must be, and Rema's right to terminate is irrelevant if it is not used in practice. The Court of Appeal has found it unlikely that the

termination clause in the supply agreement between Rema and Tine would be used. This conclusion is based on an assessment of the evidence that is not appealed

(45) The State represented by the Competition Authority has entered the following prayer for relief:

> "1. The appeal shall be dismissed.
>
> 2. The State shall be awarded legal costs of the proceedings before the Supreme Court."

(46) I have concluded that the appeal must be allowed.

(47) As already mentioned, the appeal is limited to certain issues relating to the application of the law.

(48) Since an administrative fine pursuant to the Competition Act section 29 is deemed to constitute punishment pursuant to ECHR Article 6, the Court of Appeal found in its assessment of the evidence that it was not sufficient that the facts were proven on a balance of probabilities but that there must be a pool of "weighty, accurate and concurring evidence". I perceive this as a requirement of preponderance of the evidence. This is in line with the finding of the majority of the Supreme Court in the Grand Chamber ruling in Rt-2008-1409 concerning the standard of proof required in order to impose ordinary surtax, which is also a sanction of a penal nature pursuant to ECHR Article 6. I cannot see that there is reason to impose a higher standard of proof for fines imposed pursuant to the Competition Act section 29. The Supreme Court can therefore, in its decision in the case, rely on the facts which the Court of Appeal has found proved.

(49) I will first deal with the question whether the Court of Appeal had the power to impose an administrative fine on the basis of Tine's unilateral conduct during the negotiations with Rema in 2004.

(50) Section 29 (4) of the Competition Act section 29 provides as follows:

> "Decisions to impose administrative fines cannot be appealed. Administrative fines fall due for payment two months after the decision is made. A decision to impose an administrative fine can be used as the basis for distraint proceedings. If the undertaking brings legal action against the State contesting the decision, the enforceability of the decision shall be suspended. The court may try all aspects of the matter. The Disputes Act applies correspondingly insofar as it is relevant."

(51) In the Proposition to the Odelsting - Ot.prp.no.6 (2003-2004) - at page 241 it is stated that: "The court shall have the same powers as the Ministry has in administrative appeal bodies in traditional administrative cases." This means that the court can review the evidence, the procedure, the application of the law and the exercise of discretion. It can make a new

decision if the Competition Authority's decision is invalid, or if it finds that no fine should be imposed or the amount of the fine should be changed. I cannot see that there is any justification for interpreting the wording of section 29 (4) narrowly on the basis of the other preparatory works to the Act, the report of the Sanctions Committee or the preparatory works to the Public Procurement Act, as counsel for Tine has submitted.

(52) However, even administrative appeal bodies must stay within the scope of the case, see the Public Administration section 34. Counsel for Tine has argued that although the Competition Authority and the Court of Appeal based their decisions on the same evidential facts, there is an essential difference between the administrative decision of the Competition Authority and the Court of Appeal's ruling. In the Competition Authority's view, the evidential facts – the substantially increased economic support to be paid by Tine, Tine's forwarding of the planogram proposal and the Genius memorandum, and Tine's confirmation that it would produce a private label cheese - proved the existence of an exclusive supply agreement. In the Court of Appeal's view, however, these actions viewed together constituted by themselves abuse of Tine's dominant position, because they contributed to Rema's decision to exclude Synnøve Finden.

(53) I do not agree with Tine that the Court of Appeal has gone outside the scope of the case. Like the State, I am of the view that the Competition Authority's decision is based not only on a finding that an exclusive supply agreement was entered into, but also that Tine's unilateral conduct infringes the Competition Act section 11.

(54) The Competition Authority's decision consists of a 97-page letter to Tine covering the case procedure, the applicable law, the facts and the subsumption. The conclusion only refers to "an agreement, or … a mutual understanding, with Rema that TINE would become Rema's exclusive supplier, or almost exclusive supplier, of hard yellow cheese and brown cheese in 2005 and 2006." It does not say here that Tine's unilateral conduct was sufficient to justify an administrative fine. However, it is clear from the preceding text that the Competition Authority found that Tine's unilateral conduct violated section 11. Chapter 6.1 of the letter states:

> "The Competition Authority is of the opinion that in this case there existed an exclusive purchasing agreement. In any event, there was a mutual understanding that TINE would become Rema's exclusive supplier of hard yellow cheese and brown cheese, which is also prohibited by section 11. In the Authority's view, however, Tine's unilateral conduct during the annual negotiations with Rema is already covered by the prohibition in the Competition Act section 11."

(55) Even if one were to interpret the Competition Authority's decision narrowly, I do not find that the Court of Appeal has gone beyond the scope of the case. The Supreme Court considered the question of what comprises one and the same case in the case reported in Rt-1997-343, where the administrative appeal body had upheld a decision by reference to a different legal authority than the one relied on by the inferior administrative body that had made the decision. The Supreme Court held that the appeal body had gone beyond the scope of the case, and explained this as follows:

> "The evidential facts are different. The legal authority for the decision and the legal issues are different, and the same applies to the considerations that must be taken into account in the administrative exercise of discretion. The differences are so striking that I am inclined to find that the County Governor in this case has not acted within the scope of the "case", although the end result – the order to restore the property to a residential property – is the same in his decision as in the Building Council's decision. In my view, the County Governor did not have the power to make the decision."

(56) In the case cited here, the evidential facts were different, and the legal authority and other considerations were also different. That is not so in the present case.

(57) In the case reported in Rt-2010-999, one of the questions before the Supreme Court was whether the courts could hold that the income gained from the workers' sale of shares constituted "income from work" in circumstances where the administrative authority that had issued the administrative decision that was under review had held that it was the purchase of shares at a discount a few months before that constituted the income from work. The first voting justice stated as follows at paragraph 54:

> "However, the administrative decision is not based on the circumstances surrounding the sale of the company but on the circumstances surrounding incorporation of the company. The sale is an evidential factor when determining the value of the shares at the time of incorporation, but it is not the crucial and causative trigger for taxation as it would be if the benefit was deemed to be gained upon realisation of the shares."

(58) The Supreme Court held that the court could not review whether the profit on the sale of the shares constituted income from work. The reason for this was that the purchase and the sale of the shares were different private juristic acts and that under these two alternatives there were two different elements in the sequence of events that would be taxed. In the present case, the situation is different. However one views it, the circumstance that is subject to evaluation in the light of section 11 is Tine's conduct during the negotiations.

(59) Tine has also argued that it would violate ECHR Article 6 (3) (a) and (b) to base the administrative fine on Tine's unilateral conduct. This argument cannot succeed either. The legal safeguards in Article 6 (3) shall ensure that the requirement of a fair trial in Article 6 (1)

is met. The key issue here is that the accused shall be given information about what accusations are being made against him and shall have the opportunity to prepare his defence. As mentioned, Tine was made aware through the reasons given by the Competition Authority for its decision that the Authority was also of the view that Tine's unilateral conduct violated the Competition Act section 11. This was also raised in the State's reply to Tine's statement of claim, and was argued by the State in the proceedings before the District Court. The question has therefore been raised in the Competition Authority's decision and in all court instances, and there can therefore be no doubt that Tine has had sufficient insight into the accusations against it and sufficient time to prepare its defence.

(60) I will now deal with the main issue in the case, namely whether Tine abused its dominant position during the negotiations with Rema in 2004.

(61) The Competition Act section 11 provides as follows:

> "Section 11 – Abuse of dominant position
>
> (1) Any abuse by one or more undertakings of a dominant position is prohibited.
>
> (2) Such abuse may, in particular, consist in:
>
> a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> b) limiting production, markets or technical development to the prejudice of consumers;
> c) applying dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage;
> d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

(62) Subsection 1 contains the main principle. Subsection 2 contains a non-exhaustive list of examples of abuse of a dominant position.

(63) The preparatory works to the Competition Act contain little specific guidance on the interpretation of section 11. However, they do state that the Competition Act sections 10 and 11 are modelled on Articles 53 and 54 of the EEA Agreement, based on a desire to harmonize the competition legislation with the competition rules that apply for undertakings pursuant to the EEA Agreement. In the Proposition to the Odelsting, the Ministry emphasized that the case law established by the EU and EEA organs will be very important sources of law when applying the Norwegian prohibition provisions, but stressed that harmonization does not mean that the practice of the Norwegian competition authorities will be entirely identical to EU and EEA practice. Differences in the purpose and scope of the rules and in the relevant source of law may sometimes lead to different results, see Ot.prp.no.6 (2003-2004) at page 68.

(64) Thus, when applying section 11, one must according to applicable EU and EEA law consider whether the undertaking occupies a dominant position, whether the undertaking has acted in a manner that falls within the scope of the prohibition, and whether this conduct is likely to have a significant anticompetitive effect. The latter requirement is not stated explicitly, but is considered to be implicit in the requirement that there must have been abuse, see e.g. Kolstad et al, *Norsk konkurranserett* (Norwegian Competition Law), Volume I, 2006 at page 368 ff.

(65) The Court of Appeal has defined the relevant market to be the cheese market in Norway, and has found that Tine must be regarded as a dominant player in this market. This is not appealed, and must be correct.

(66) The next question is whether Tine has behaved in a way that is regarded as an abuse of Tine's dominant position. […]

(67) The principle authority in EU law regarding the permissible behavior of dominant undertakings is the judgment of the European Court of Justice (ECJ) dated 13 February 1979 in Hoffmann-La Roche & Co. AG v. Commission (61976J0085). At paragraph 91, the ECJ states:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

(68) In general, dominant undertakings can compete, and also compete hard, as long as such competition is based on quality, price, etc. - often referred to as competition "on the merits" or on the basis of "better performance". On the other hand, a dominant undertaking is not entitled to impair competition by using methods other than those which fall within the normal course of the undertaking's supply of goods or services. Such impairment could occur, for example, through exclusive supply agreements, discounts, creating special incentives for buyers to stick to one supplier, or offering services that create such incentives; see for example the review in Kolstad et al, Norsk konkurranserett (Norwegian Competition Law), Volume I, 2006 at page 532 ff.

(69) According to the case law of the ECJ, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine and "undistorted" competition, as

stated, among others, in the judgment in NV Nederlandsche Banden Industrie Michelin v. Commission dated 9 November 1983 at paragraph 57 (61981J0322). This means that conduct that is acceptable where performed by a smaller player is not necessarily acceptable where performed by a dominant player.

(70) Not all competition by means of price is legitimate. EU law prohibits the use of prices that are below average variable costs, and prices that are below average total cost if the price is determined as part of a plan to eliminate a competitor, see the ruling of the ECJ in AKZO Chemie BV v. Commission dated 3 July 1991 at paragraph 70-72 (61986J0062). These prices may exclude competitors that are just as effective. Selective low prices to undercut competitors are also prohibited, see the ECJ ruling dated 16 March 2000 in Compagnie Maritime Belge Transports SA v. Commission (61996J0395). Compagnie Maritime was a member of a shipping conference that had reduced its freight rates by departing from the tariff in force for those of its vessels that sailed on or around the same dates time as the competitor's ships. In this way, Compagnie Maritime could offer the same or lower freight rates than its competitor. The ECJ stated at paragraph 112 et seq:

> "112 It is settled case-law that the list of abusive practices contained in Article 86 of the Treaty is not an exhaustive enumeration of the abuses of a dominant position prohibited by the Treaty [...]
> 113 It is, moreover, established that, in certain circumstances, abuse may occur if an undertaking in a dominant position strengthens that position in such a way that the degree of dominance reached substantially fetters competition [...]
> 114 Furthermore, the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened [...]
> 115 The maritime transport market is a very specialised sector. [...]
> 116 [...] [T]he authorisation to fix rates was granted to liner conferences because of their stabilising effect and their contribution to providing adequate efficient scheduled maritime transport services. The result may be that, where a single liner conference has a dominant position on a particular market, the user of those services would have little interest in resorting to an independent competitor, unless the competitor were able to offer prices lower than those of the liner conference.
> 117 It follows that, where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, it derives a dual benefit. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services which are not threatened by that competition."

(71) The ECJ found it unnecessary to rule generally on the circumstances in which a shipping conference may legitimately adopt prices below the advertised tariff in order to compete with a competitor. It was here sufficient to recall that the conduct at issue was that of a shipping conference which had a 90 percent market share and only one competitor. Further,

the shipping conference had not disputed that the purpose of its conduct was to eliminate the competitor from the market. This was abuse of a dominant position.

(72) Whether or not an undertaking has breached the Competition Act section 11 must be determined on the basis of the facts and circumstances in each case. As previously mentioned, the list of types of abuse in section 11 is not exhaustive. The same applies to the types of abuse that have been developed through the case law of the ECJ and other EU enforcement bodies.

(73) It should also be recalled that the purpose of the Competition Act is to promote competition in order to contribute to the efficient use of society's resources. Special consideration shall be given to the interests of consumers, see the Competition Act section 1. In its discussion paper of December 2005 on the application of the Treaty of Rome Article 82 to exclusionary abuses, the Commission stated that it is competition, and not competitors "as such", that is to be protected.

(74) On this basis, the question therefore is whether Tine's conduct before and during the negotiations with Rema in autumn 2004 is to be considered legitimate competition or abuse of market power.

(75) Tine has not disputed that it was aware at the start of the negotiations that Rema was considering having only one supplier of hard yellow cheese and brown cheese - and that Rema stated that it was possible that it would focus on Tine as its exclusive supplier if Tine made a good offer during the negotiations. The determining factor for the Court of Appeal was that Tine, through its offer, contributed towards Rema's decision to terminate its supplier relationship with Synnøve Finden. In this way, Tine strengthened its position considerably at the expense of its competitor, and neglected its duty not to impair the residual competition in the relevant market area.

(76) As I understand the sources of EU law, the requirements that are placed on Tine here are too strict. As a dominant player, Tine has a special responsibility not to impair effective competition, but it is not prohibited from competing. What matters is whether Tine has competed on performance, or whether it has used unacceptable methods in the competition.

(77) If one compares Tine's conduct with the typical methods of abuse, Tine comes out quite well. Firstly, the agreement between Tine and Rema did not prohibit Rema from entering into an agreement with Synnøve Finden. The Court of Appeal also held that Rema and Synnøve Finden held bona fide negotiations after Rema and Tine had reached agreement on the terms and conditions of the agreement. Secondly, the agreement between Rema and Tine does not in fact bind Rema. By comparison, the EU organs have disallowed an

arrangement where a dominant manufacturer of ice cream products supplied freezer cabinets to kiosks on the condition that they were used exclusively for the manufacturer's ice creams. Lack of space at the kiosk premises meant that this condition in reality restricted competition in the relevant market, see the ruling of the Court of First Instance dated 23 October 2003 in Van den Bergh Foods Ltd. v. Commission (61998A0065). Nor does the agreement contain a discount arrangement whereby Rema would suffer a disadvantage by not sticking to Tine as supplier. The case law of the European courts contains several examples of such arrangements. I mention in this connection that some of the support offered by Tine consisted of discounts on certain product lines. However, these were not product lines that competed with Synnøve Finden's product lines. In other words, Rema would not lose any of the support from Tine if it continued to have Synnøve Finden products in its range.

(78) The pertinent issue is therefore whether Tine – with the knowledge it had about Rema's wish to concentrate its suppliers – abused its dominant position in the Norwegian cheese market by considerably increasing its economic support to Rema compared to the previous year.

(79) The increased economic support from the dairy was primarily designed to compensate for more extensive marketing campaigns, the benefit of making larger deliveries ("drop-size"), for Rema including more products from Tine in its product range and for Rema committing to use planograms prepared by Tine in all of its stores. However, it cannot be ruled out that Tine's offer was also influenced by a desire to increase its supplies to Rema if Rema made earnest of its strategy to reduce the number of its suppliers. However, a motive to win the competition is not sufficient to infringe section 11 - as I have mentioned, dominant undertakings are also entitled to compete on performance. In order to infringe section 11, the dominant undertaking must have used unacceptable methods of competition.

(80) The suppliers and the four large grocery retail groups usually negotiate their supply agreements every year, with particular focus on the total amount of economic support the suppliers offer to the groups. The final result is probably influenced by many factors, including the bargaining power and the people involved. I mention that in 2004 Rema was represented by a new negotiator. I also mention that the negotiations were marked by expectations of increased competition from Lidl, and perhaps also by the introduction of the new Competition Act which, in section 11 (c), prohibits the use of different terms and conditions with different trading partners. Tine's economic support to Rema had in previous years been significantly lower than the economic support it gave to the other retail groups. In 2004, for instance, Tine's economic support to Norgesgruppen accounted for 3.71% its sales

to the Norgesgruppen supermarket chains, while its economic support to Rema accounted for only 1.44% of sales to Rema. Even after Tine increased its economic support to Rema in the agreement for 2005, the economic support it offered in percentage of sales was lowest in the agreement with Rema - 2.28% compared to 4.8% in its agreement with Norgesgruppen, 2.78% in agreement with Coop and 2.58% in its agreement with ICA. This helps to explain why Tine was in a position to increase the economic support it offered to Rema so much in the negotiations in 2004. Further, it is not unusual that the negotiations start with a considerably lower amount than they end up with - on the contrary. I therefore find it difficult to see that Tine's offer to Rema - which is not about selective price cuts or predatory pricing - can be regarded as an unacceptable competitive method.

(81) The position is that Rema twice invited Tine to submit offers of payment in return for an exclusive supply agreement, but that Tine refused this invitation both times. Rema's decision to use Tine as its sole supplier of cheese provided Tine's offer of economic support was good enough, due to its wish to concentrate its suppliers, was entirely Rema's choice. I cannot see that it was improper of Tine to make an offer that was necessary in order to achieve a good agreement with Rema, even though Tine understood that it almost certainly would mean that Rema would no longer use Synnøve Finden as supplier.

(82) The Court of Appeal emphasised that, in addition to its offer of economic support, Tine contributed to Rema's decision by

- sending the Genius memorandum,
- preparing a draft planogram at Rema's request which excluded Synnøve Finden and Q goods, and
- confirming to Rema that it could produce a private label cheese, which was a cheaper cheese that would be able to compete with Synnøve Finden's "price fighter-cheese".

(83) I cannot see that these facts can be given particular weight, either individually or in the total evaluation. The Genius memorandum is a two-page memo about the benefits of having a sole supplier of milk and cheese instead of two supplier's because of the additional time that is spent in retail outlets that have two suppliers. It is doubtful whether this gave Rema any significant new information. In any event, however, we are talking about information, not undue influence. Tine's preparation of the draft planogram cannot be deemed to be undue influence either. This was a service that Rema had requested. The same applied to Tine's confirmation that it would be able to produce a private label cheese for Rema.

(84) For these reasons, I find that the Competition Authority's decision of 19 February 2007 must be repealed.

(85) Given my conclusion, it is not necessary to consider whether the Court of Appeal's assessment of the consequences of Tine's conduct, as required by the Competition Act section 11, is correct.

(86) Tine has won the case entirely and, in accordance with the general rule in the Dispute Act section 20-2, is entitled to be awarded legal costs for the proceedings before all three court instances. In the judgement of the District Court, Tine was awarded NOK 13,187,604 in legal costs. In the proceedings before the Court of Appeal, Tine claimed legal costs in the amount of NOK 9,225,325 and in the proceedings before the Supreme Court it has claimed NOK 3,320,620 plus the appeal fee of NOK 30 960. The State has alleged that Tine's claim for costs for the proceedings before the Court of Appeal is too high because the parties had considerable expenditure on Tine's argument that it was not a dominant player, which did not succeed. As a general rule, the rule on liability for costs also applies to submissions that are not successful and I see no reason to depart from the general rule here. Tine's claim for counsel's costs is high. However, the case has been time-consuming and the claim for costs must be viewed in light of the considerable importance of the case for Tine's reputation and the amount of the administrative fine. In view of this, I find that Tine's claim for legal costs must be upheld.

(87) I vote in favour of the following judgement:

> 1. The judgement of the District Court shall be affirmed.
>
> 2. The State represented by the Competition Authority shall pay to TINE SA legal costs for the proceedings before the Court of Appeal and the Supreme Court in the amount of 12 576 905 – twelvemillionfivehundredandseventysixthousandninehundred andfive – kroner no later than 2 – two – weeks after service of this judgement.

(88) Mrs Justice Webster: I have – under doubt – come to a different conclusion than the first voting justice as regards the question whether Tine has abused its dominant market position in breach of the Competition Act section 11. I essentially concur with the ruling of the Court of Appeal on this point.

(89) A crucial factor to my conclusion is the special responsibility that a dominant undertaking has not to impair residual competition when competition in the relevant market is as limited as it is in the present case. In my opinion, Tine did not observe this obligation when, in its negotiations with Rema in autumn 2004, it strengthened its market position at the expense of the residual competition.

(90) I agree on the whole with the first voting justice's general explanation, but I wish to emphasize some points that are fundamental to my conclusion - and where I to some extent have a different view.

(91) The judgment in Hoffmann-La Roche & Co. AG v. Commission at paragraph 91 (61976J0085), which is cited by the first voting justice, presumes that a dominant player can compete using normal means. Competition on price is such a normal method and is generally permissible for a dominant player. However, this does not apply without limitation; the judgement in Compagnie Maritime Belge Transports SA v. Commission (61996J0395), to which the first voting justice also refers, is an example of this. In this case, a shipping conference held a dominant position for routes from Zaire and Angola to the North Sea coast. The shipping conference reduced its prices on some routes that were exposed to competition. The ECJ held that this form of price competition was unlawful. I refer to the passages from the judgment that are cited by the first voting justice. The ECJ then continues as follows:

> "131. So the fact that operators subject to effective competition have a practice which is authorised does not mean that adoption of that same practice by an undertaking in a dominant position can never constitute an abuse of that position."

(92) The judgment shows that competition on price, which is usually fully acceptable and desirable pro-competitive behaviour, can in the circumstances be in violation of the Competition Act. The legitimacy of a dominant player's conduct in the market must be assessed in light of the consequences of that conduct on the market structure and on future competition.

(93) Another key reason for my conclusion is that, as a result of the agreement with Rema for 2005 and 2006, Tine became the sole supplier of hard cheeses to Rema stores. According to EU case law, there is a breach of the competition rules if a dominant player enters into an exclusive supplier agreement or virtually exclusive supplier agreement. At paragraph 89 of the Hoffmann-La Roche ruling (61976J0085), the ECJ states:

> "89 An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirement exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.
>
> The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers of unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements – whether the

> quantity of its purchases be large or small – from the undertaking in a dominant position."

(94) It is not essential that the buyer does not have a formal commitment to obtain all of its requirements from the dominant player if this in fact is the effect of the agreement. Furthermore, the decision also shows that not only exclusive supply agreements but also other means that have similar consequences are prohibited. The same follows from judgement of the Court of First Instance in Van den Bergh Foods Ltd. v. Commission, to which the first voting justice has referred.

(95) In the case before us, the Court of Appeal concluded that Tine and Rema did not enter into an exclusive supply agreement, but that during the negotiations with Rema in autumn 2004 Tine gradually increased its economic support to Rema based on the assumption that Tine would be sole supplier or almost sole supplier. The effect of the agreement was that Tine became Rema's sole supplier of hard cheese. As the judgement in Hoffmann-La Roche at paragraph 89, among others, shows, it is not essential that Rema formally was free to purchase from Tine's competitors - and for that matter also conducted negotiations with Synnøve Finden - when the consequence of the agreement was that Tine actually became Rema's sole supplier.

(96) In this situation, it is not essential that in the negotiations with Rema in autumn of 2004 Tine offered what must be considered "normal" discounted rates. I also emphasize that Tine also offered other benefits which in my opinion cannot be deemed to be "competition on the merits". The so-called Genius memorandum which Tine sent to Rema is illustrative. The Court of Appeal described the circumstances surrounding the Genius memorandum as follows:

> "In an e-mail dated 13 July 2004, Mr Rune Jenssen at Tine suggested that 'an analysis should be made of the current product range (at Rema) in relation to overall profitability ... and based on a total category approach'. Against this background, a collaboration was established to review the chain's product range and look into the profitability. This project started up on 16 August 2004. After a meeting on this issue between Tore Høylie at Rema and Jan Anders Brun at Tine on 16 August 2004, Tore Høylie informed his superiors that Tine had made profitability calculations showing the advantage of having one contra two suppliers of milk and cheese. He asked Øyvind Kristiansen at Tine to send these over. The calculations were sent to Rema on 18 August 2004. In the e-mail Øyvind Kristiansen sent to Tore Høylie in this connection, Øyvind Krisiansen wrote 'the figures speak for themselves'."

(97) The Court of Appeal also referred to the Genius memorandum in connection with its discussion about whether Tine and Rema had concluded an exclusive supply agreement in violation of the Competition Act section 10:

> "The Court of Appeal also notes that on 18 August 2004 Øyvind Kristiansen at Tine sent Rema a report that Tine had previously obtained from Genius Retail Management about the benefits of having one contra two suppliers of milk and yellow cheese. After Tine sent the report to Rema, Tore Høylie produced a spreadsheet and calculated the profitability for Rema in having Tine as exclusive supplier within the same product areas. (...)"

(98) It is true, as noted by the first voting justice, that the memorandum probably did not contain any information that was new to Rema. However, the memorandum must be seen in the context of Tine's market position and the Court of Appeal's statement that the supermarket chains could not credibly threaten to switch to another supplier. In my view, Tine's submission of the Genius memorandum does not constitute competition "on the merits". The memorandum makes no offer of improved performance or more favourable terms for Rema, but emphasises the advantage of making Tine the exclusive supplier. This suggests that Tine here has gone beyond what is permitted of a dominant market player.

(99) Furthermore, Tine offered to produce a private label cheese for Rema - a cheese that would be a cheaper alternative, a "price fighter". Synnøve Finden had previously produced Rema's cheapest alternative cheese. The final agreement concerning supply of private label cheese was signed in summer 2005, but Tine had given Rema a price estimate for this cheese even before the agreement between Tine and Rema for 2005 and 2006 was signed. I am therefore of the view that this factor must also be taken into account when assessing Tine's actions in terms of the Competition Act section 11.

(100) The Court of Appeal's judgement states:

> "In his testimony Mr Mads Richter Svendsen at Tine has stated that Rema would never have wanted three different types of yellow cheese, so that when they asked for a quote for a private label cheese, this was a signal that Rema was considering throwing out Synnøve Finden. The Court of Appeal agrees with this. If Rema removed Synnøve Finden from its range, there would be a need for a new 'price fighter'."

(101) Tine's offer to deliver this cheaper cheese contributed to strengthening Tine's position in the market at the expense of the residual competition. This must be taken into account in the overall assessment of Tine's conduct in the negotiations in autumn 2004.

(102) The final factor that has been mentioned is the planograms that Tine compiled and which did not feature space for Synnøve Finden products. The planograms were prepared at Rema's request and could be amended to include other suppliers' products if Rema wanted. I therefore do not attach particular weight to the planograms in isolation, although this factor also assumes that Tine would be Rema's exclusive supplier.

(103) I also mention that although it was Rema's commercial decision to cut out Synnøve Finden, this does not change the assessment of Tine's unilateral conduct, see the judgement in Hoffmann-La Roche at paragraph 89.

(104) In my opinion, the fact that Tine signed a main supplier agreement with Rema which strengthened Tine's position at the expense of Synnøve Finden was not in itself problematic. This would have been legitimate if Tine at the same time had observed its special responsibility as the dominant player not to impair the residual competition in this market segment. The Court of Appeal could not see that "Tine through its conduct did anything to protect the residual competition in the market." In my view, the proceedings before the Supreme Court have not brought to light anything that changes this.

(105) Tine has argued that the effect which the result of the negotiations with Rema in autumn 2004 had on the market was not of such a nature that it infringed the Competition Act section 11. The requirement that the conduct must have put competitors at a competitive disadvantage is an integral part of the assessment of whether there has been abuse, but has traditionally and for pedagogical reasons been discussed separately.

(106) Tine has argued that there is a limit - that competitors must be excluded from somewhere between 20 and 40% of the market before a dominant undertaking's unilateral conduct can be considered to be in breach of competition rules. Tine has referred to EU case law in support of this argument. However, I consider the judgments cited by Tine to be examples that do not stipulate a certain percentage as a minimum requirement. Whether conduct is illegitimate depends on a composite assessment - also when one focuses on the impact of the abuse criterion. This has been stated by the European Commission in Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings at paragraph 20, which states that the size of the market affected by the conduct is only one of several relevant factors. Other relevant factors are - among others – how strong the dominant position of the undertaking is, the position of the dominant undertaking’s competitors, how difficult it is to enter or expand in the relevant market and the dominant undertaking's intent. The same follows from the European Commission Guidelines on Vertical Restraints (2010/ C 130/01) (52010XC0519 (04)) section 1.3.1 paragraph 111 and 140 which, in relation to the provision of the EU Treaty that corresponds to the Competition Act section 10, states:

> “For a dominant company, even a modest tied market share may already lead to significant anticompetitive effects.”

(107) One might ask whether it is necessary to prove that there has been an effect on the market at all when a dominant undertaking is a sole supplier, as in the present case. The State has argued that the threshold for proof of an effect on the market in such cases must be very low. This is obviously correct where there is an exclusive supply agreement or almost exclusive supply agreement, see Eirik Østerud, Identifying Exclusionary Abuse by Dominant Undertakings under EU Competition Law, at page 64. I do not find it necessary to decide whether the same should apply to the type of de facto sole supplier position that Tine obtained, since I have concluded that the impact of Tine's conduct on the market was in any event sufficient to infringe the Competition Act section 11.

(108) In view of Tine's exceptionally strong market position, the fact that competition in the market was weak with only one competitor that was significantly weaker than Tine, and that in reality there were only four sales channels for hard cheeses in Norway – i.e. the retail outlets of the four large grocery groups - I find without doubt that the exclusion of other players from 17.5% of the market - which was Rema's overall share of the grocery market in Norway - had such an effect on the market that Tine's conduct must amount to abuse. I refer in general to the Court of Appeal's comprehensive considerations of the market consequences which exclusion of Synnøve Finden had.

(109) Tine has also argued that the market impact of the sole supplier position that Tine obtained by the agreement is limited because the agreement could be terminated at short notice. I concur with the Court of Appeal's view on this point, too. Paragraph 35 of the Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings states as follows:

> "However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anticompetitive foreclosure."

(110) The same must apply when considering contracts which constitute de facto exclusivity. It was unrealistic that Rema might terminate the agreement with Tine. Tine is an "unavoidable trading partner" for all grocery retail chains in the Norwegian market. The formal right to terminate the agreement does not affect the actual ties that were created by the agreement and, therefore, not the market impact - the binding effect – of the agreement either.

(111) Based on an overall assessment of these factors, I therefore find that Tine's agreement with Rema in autumn 2004 was an abuse of its dominant position in a market where the competition was particularly weak with only one competitor who was relatively newly

established and had a difficult financial position - and in a market with a high threshold for new entrants.

(112) On this basis, I find that the appeal should be dismissed. The case involves fundamental questions of principle that deserved review by the Supreme Court. I therefore find that Tine should not be required to pay the State's legal costs, see the Disputes Act section 20-2 subsection a.

(113) Mr Justice Møse: I agree on the whole with and in the conclusion of the second voting justice, Mrs Justice Webster.

(114) Mrs Justice Stabel: I agree on the whole with and in the conclusion of the first voting justice, Mrs Justice Indreberg.

(115) Mr Justice Skoghøy: Likewise.

(116) After the passing of votes, the Supreme Court pronounced the following

Judgement:

1. The judgement of the District Court shall be affirmed.

2. The State represented by the Competition Authority shall pay to TINE SA legal costs for the proceedings before the Court of Appeal and the Supreme Court in the amount of 12 576 905 – twelvemillionfivehundredandseventysixthousandninehundred andfive – kroner no later than 2 – two – weeks after service of this judgement.