SUPREME COURT OF NORWAY

J U D G M E N T

given on 21 May 2021 by the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Knut H. Kallerud
Justice Per Erik Bergsjø
Justice Wenche Elizabeth Arntzen

HR-2021-1086-A, (case no. 20-160777SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment of 1 September 2020

I. Cappelen Damm Holding AS Cappelen Damm AS	(Counsel Olav Kolstad)
v.	
The State represented by the Competition Authority	(The Office of the Attorney General represented by Pål Erik Wennerås) (Assisting counsel: Kristin Hallsjø Aarvik)
II. Gyldendal ASA Gyldendal Norsk Forlag AS	(Counsel Siri Teigum)
v.	
The State represented by the Competition Authority	(The Office of the Attorney General represented by Pål Erik Wennerås) (Assisting counsel: Kristin Hallsjø Aarvik)

(1) Justice **Matheson:**

Issues and background

(2) The case concerns an administrative fine issued by the Competition Authority pursuant to section 29 cf. section 10 of the Competition Act. The question is whether an agreement between four book publishers on how to act towards a distributor, had as its object the prevention, restriction or distortion of competition in such a manner that it was covered by section 10 subsection 1 of the Competition Act.

(3) Norway's four largest book publishers, Cappelen Damm AS, Gyldendal Norsk Forlag AS, H. Aschehoug & Co. (W. Nygaard) AS and Schibsted Forlag AS were, together with several magazine publishers, among the owners of Bladcentralen ANS. In the following, I will generally refer to these book publishers and their parent companies as Cappelen Damm, Gyldendal, Aschehoug and Schibsted, respectively. In June 2015, Schibsted was acquired by the publishing house Vigmostad & Bjørke AS.

(4) Bladcentralen distributed its owners' publications to the part of the book market called "the mass market". The mass market includes retail outlets that are not traditional bookstores, such as kiosks, grocery stores, post offices and petrol stations.

(5) The product range in such outlets are considerably narrower than in regular bookstores. It consists mainly of factual prose (book group 3), fiction (book group 4), paperbacks (book group 5) and other literature, including serial literature (book group 9). The mass market is primarily focused on best sellers. Serial literature constitutes 40 percent of this market.

(6) Aschehoug's and Gyldendal's ownership in Bladcentralen was organised through the jointly owned company Bestselgerforlaget AS. This publisher's books were based on licensing of Gyldendal's and Aschehoug's respective author rights. In 2017, each of the participants in Bladcentralen owned one sixth of the company.

(7) The long-standing situation in the Norwegian book market is that many bookstores, including the chains Tanum AS, Ark Bokhandel AS and Norli Libris AS, are wholly or partially owned by the publishers. The publishers also own many book clubs and to some extent also the distributors. Furthermore, competition has been regulated by a book agreement between the Norwegian Booksellers' Association and the Norwegian Publishers Association. This agreement permits the publishers to set fixed prices of new books, see section 3 of Regulation of 19 December 2014 no. 1716 on exemptions from section 10 of the Competition Act for cooperation in the sale of books.

(8) In 2014, the four largest publishers had a market share of 70 percent of the total Norwegian book market.

(9) In 2013/2014, Bladcentralen was one of two distributors to the mass market. The second distributor was Interpress AS, owned by Reitan Convenience AS. Around 20 percent of the turnover in the mass market was generated by outlets owned by Reitan Convenience, such as Narvesen, 7-Eleven and Shell/7-Eleven.

(10) Bladcentralen's operated 80 percent of the book distribution to the mass market in 2014, while Interpress operated the remaining 20 percent.

(11) Bladcentralen was initially a closed distribution channel available to its owners only, while Interpress was an open distribution channel available to all book publishers.

(12) The following is set out in the Court of Appeals presentation of the case:

> "During the period concerned, Interpress and Bladcentralen had slightly different distribution agreements and costs structures. Distribution through Bladcentralen enabled the publishers to maintain ownership of the books. The consideration for the distribution was a high one-time fee – which was the same for all the owners, regardless of actual use – and relatively low variable costs. Interpress, in turn, purchased books from the publishers at an agreed discount. The company was nonetheless fully entitled to return books that were not sold. The system of purchasing books at an agreed discount entailed that the publishers' 'costs' for distribution through Interpress were proportionate to the number of books sold."

(13) The Court of Appeal continues:

> "Agreements on the distribution of books to the mass market have traditionally been based on an unwritten principle of exclusivity. This means that the same book may not be distributed by several distributors, at least not to the same outlet. This structure has been justified by the need of an orderly system for returning unsold books from the outlets to the publishers."

(14) The Court of Appeal has trusted that the publishers – at least until 2014 – decided which distributor to use for their books, alternatively whether different distributors should be used for different books. Such decisions were normally made twice a year, in connection with the launching of the so-called spring and autumn titles.

(15) The Court of Appeal has also trusted that Aschehoug, Gyldendal and Schibsted – at least until 2014 – used both Bladcentralen and Interpress as distributors. However, Cappelen Damm had not had any agreement with Interpress for years. After 2008, it had used Bladcentralen as its sole distributor.

(16) The events giving rise to the case are described as follows by the Court of Appeal:

> "On 10 January 2014, Reitan Convenience announced that the company in the future would use Interpress as its sole distributor to its outlets for book groups 3, 4 and 5. Bladcentralen was notified of the decision, since the consequence would be that Bladcentralen lost access to the relevant outlets. Bladcentralen passed the decision on to its owners, the publishers.
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> Following Reitan Convenience's decision, Interpress was in contact with all four publishers. The contact partially concerned what Interpress generally could offer as a distributor to the mass market, but also specifically whether the publishers wished to use Interpress as distributor to the outlets where it, because of Reitan Convenience's decision, was now exercising exclusive control of book groups 3, 4 and 5.
>
> During the period 7 February to 17 March 2014, all publishers announced that they no longer wished to cooperate with Interpress, except that Aschehoug would allow

> Interpress to distribute Jo Nesbø's 'The Son' to Narvesen and Posten during the first half of 2014."

(17) Interpress found the publishers' responses illogical and suspiciously similar, and presumed that the publishers had agreed on a boycott. Together with Reitan Convenience, Interpress reported the said behavior to the Competition Authority, which initiated inquiries.

(18) The Competition Authority's inquiries revealed that the four publishers, in 2014, had cooperated in a collective boycott of Interpress and in that regard exchanged competition sensitive information. It was concluded that the agreement had as its object the restriction of competition, see section 10 subsection 1 of the Competition Act. The Competition Authority therefore did not analyse whether the agreement was anti-competitive. The Authority also found that the conditions for exemption in section 10 subsection 3 were not met. Finally, the Authority found that the remaining conditions for the imposition of an administrative fine under section 29 of the Competition Act were met.

(19) On 22 March, the Competition Authority made this decision:

> "1. Cappelen Damm AS and Cappelen Damm Holdning AS are jointly and severally liable for a fine of NOK 9 100 000 for infringement of section 10 of the Competition Act.
>
> 2. Gyldendal Forlag AS and Gyldendal ASA are jointly and severally liable for a fine of NOK 7 880 000 for infringement of section 10 of the Competition Act.
>
> 3. H. Aschehoug & Co W. Nygaard AS is liable for a fine of NOK 9 660 000 for infringement of section 10 of the Competition Act.
>
> 4. Vigmostad & Bjørke AS and Schibsted ASA are jointly and severally liable for a fine of NOK 4 560 000 for infringement of section 10 of the Competition Act."

(20) As the decision demonstrates, the fine is imposed on the direct and indirect owners of Bladcentralen *and* their parent companies as jointly and severally liable. This is specified in item 5.4 of the decision. The fining of Vigmostad & Bjørke AS with Schibsted ASA as jointly and severally liable is a consequence of the fact that all shares in Schibsted Forlag AS, at the time of the decision, had been transferred to the Vigmostad company.

(21) In 2017, three of the four publishers that had been fined – Cappelen Damm, Gyldendal and Aschehoug – brought an action in Oslo District Court against the State represented by the Competition Authority demanding the decision lifted. The District Court decided to consolidate the cases in accordance with section 15-6 of the Dispute Act.

(22) On 21 June 2018, Oslo District Court handed down the following ruling:

> "1. The administrative fines in the Competition Authority's decision of 22 March 2017 are reduced as follows:
>
> - Cappelen Damm AS and Cappelen Damm Holding AS are jointly and severally liable for an administrative fine of NOK 5 million.

- Gyldendal Forlag AS and Gyldendal ASA are jointly and severally liable for an administrative fine of NOK 5 million.

- H. Aschehoug & Co W. Nygaard AS is liable for an administrative fine of NOK 3.5 million.

The reduced fines are payable two weeks after the delivery of this judgment.

2. Beyond that, the District Court finds in favour of the State represented by the Competition Authority.

3. Costs are not awarded."

(23) Cappelen Damm and Gyldendal appealed to the Court of Appeal. The State submitted a derivative appeal against the calculation of the administrative fine. On 1 September 2020, Borgarting Court of appeal ruled as follows:

"1. The administrative fines in the Competition Authority's decision of 22 March 2017 are fixed as follows:

- Cappelen Damm AS and Cappelen Damm Holding AS are jointly and severally liable for an administrative fine of NOK 7 276 620.

- Gyldendal Norsk Forlag AS and Gyldendal ASA are jointly and severally liable for an administrative fine of NOK 6 305 340.

Time for performance is two weeks of the service of the judgment.

Beyond that, the Court of Appeal finds in favour of the State represented by the Competition Authority.

2. Cappelen Damm AS and Cappelen Damm Holding AS are – jointly and severally – liable for costs in the Court of Appeal of NOK 852 280 to the State represented by the Competition Authority within two weeks of the service of this judgment.

3. Cappelen Damm AS and Cappelen Damm Holding AS are – jointly and severally – liable for costs in the District Court of NOK 859 650 to the State represented by the Competition Authority within two weeks of the service of this judgment.

4. Gyldendal Norsk Forlag AS and Gyldendal ASA are – jointly and severally – liable for costs in the Court of Appeal of NOK 852 280 to the State represented by the Competition Authority within two weeks of the service of this judgment.

5. Gyldendal Norsk Forlag AS and Gyldendal ASA are – jointly and severally – liable for costs in the District Court of NOK 859 650 to the State represented by the Competition Authority within two weeks of the service of this judgment."

(24) The judgment was delivered with dissenting opinions. A minority of the judges found that the publishers' agreement did not have as its object the restriction of competition and that no infringement of section 10 of the Competition Act had taken place.

(25) Cappelen Damm and Gyldendal have appealed to the Supreme Court. The appeal from Cappelen Damm challenged the application of the law and the findings of fact, while Gyldendal's appeal challenged the application of the law.

(26) On 21 December 2020, the Supreme Court's Appeals Selection Committee made the following decision:

> "The appeals are referred to the Supreme Court as far as they regard the application of the law."

(27) The Supreme Court has conducted a remote hearing in accordance with section 3 of temporary Act of 26 May 2020 no. 47 on adjustments in the procedural set of rules due to the Covid-19 outbreak etc.

The parties' contentions

(28) The appellants – *Cappelen Damm AS and Cappelen Damm Holding AS, Gyldendal Norsk Forlag AS and Gyldendal ASA:*

(29) The Court of Appeal has correctly assumed that the analysis under section 10 of the Competition Act of whether an agreement restricting competition by object has been concluded must be made in two steps. However, the Court of Appeal has interpreted and applied the rule incorrectly in both steps.

(30) In the first step, one must according to case law from the Court of Justice of the European Union (CJEU) objectively analyse the "precise purpose" of the cooperation. No such analysis has been made by either the Competition Authority or the Court of Appeal. The publishers' concerted practice was, objectively speaking, a response to Reitan Convenience's ultimatum that its subsidiary Interpress was to be sole distributor of books to Reitan's outlets. In other words, the purpose was not to replace competition by a concerted practice.

(31) The Court of Appeal's presentation of the facts is not disputed, and it gives the Supreme Court a sound basis for making a new ruling on the claim to which the case relates, see section 30-14 subsection 1 of the Dispute Act. Considering what was demonstrably the "precise purpose", the Supreme Court may deliver a judgment on the merits of the case setting aside the Competition Authority's decision.

(32) The absence of an individual assessment of the "precise purpose" of the cooperation is in any case an error in law, with the result that the Court of Appeal's judgment must be set aside.

(33) The Court of Appeal also errs in its conclusion that the publishers' agreement on a "collective boycott" may have had as its object the restriction competition within the meaning of the Competition Act. Only a boycott affecting a competitor or supporting another anti-competitive agreement, may, by its very nature, restrict competition. This is not the situation in the case at hand, as the boycott was directed at a *customer*.

(34) In any case, the information exchanged between the publishers was not of a type making the cooperation a restriction by object. What might constitute a restriction by object must be strictly understood. Only exchange of information forming a basis for collusive pricing may

constitute an infringement. The cooperation in our case involved neither prices, costs nor production volumes. It only concerned the manner in which the publishers could jointly make Reitan Convenience reconsider making Interpress exclusive distributor to Reitan's outlets. Neither experience nor case law suggests that such an agreement, by its very nature, is sufficiently harmful to competition. Although the book publishers' rejection of the company's ultimatum on exclusivity had the result that no books were delivered to Interpress, this was a short-term *effect* of the agreement, and not its precise purpose.

(35) The second step of the analysis requires a prior assessment of the economic and legal context of the agreement. It must then be considered whether this may have another plausible explanation than a wish to regulate competition, and whether the negative effects on competition meet the requirements of sufficient harm. In the event of doubt, the requirement of restriction of competition by object is not met.

(36) The Court of Appeal has not assessed the economic and legal context of the agreement correctly. A correct assessment of the pro-competitive effects would have shown that there is reasonable doubt as to whether the agreement can be regarded as having as its object the restriction of competition.

(37) When assessing whether the exchange of information was objectively necessary to realise the lawful main activity of Bladcentralen, the Court of Appeal has failed to consider the real issue at stake. Crucial here is whether the agreement was necessary to obtain efficient distribution through Bladcentralen at all, not whether the agreement was necessary in the company's strategic work, as the Court of Appeal has focused on.

(38) The Court of Appeal's incorrect approach on these points also suggests that the judgment must be set aside.

(39) Gyldendal Norsk Forlag AS and Gyldendal ASA contend in particular that the administrative fine imposed on them as jointly and severally liable, is a violation of the statutory rule on which undertaking's turnover forms the basis for calculating the fine.

(40) Cappelen Damm AS and Cappelen Damm Holding AS request the Supreme Court to rule as follows:

> "1. Principally: The Competition Authority's decision of 22 March 2017 is set aside on the part of Cappelen Damm AS and Cappelen Damm Holding AS.
>
> In the alternative: The Court of Appeal's judgment is set aside.
>
> 2. The State represented by the Competition Authority is liable for Cappelen Damm AS and Cappelen Damm Holding AS's costs in the District Court, the Court of Appeal and the Supreme Court."

(41) Gyldendal Norsk Forlag AS and Gyldendal ASA request the Supreme Court to rule as follows:

> "1. Principally: The Competition Authority's decision of 22 March 2017 is set aside on the part of Gyldendal ASA and Gyldendal Norsk Forlag AS.
>
> Alternatively: The Court of Appeal's judgment is set aside.

2. The State is liable for Gyldendal Norsk Forlag AS and Gyldendal ASA's costs in the District Court, the Court of Appeal and the Supreme Court."

(42) The respondent – *the State represented by the Competition Authority*:

(43) The Court of Appeal has applied the law correctly.

(44) The competition rules are based on the basic principle that all market participants act independently. Contact between competitors that may influence the behaviour of an undertaking, is prohibited. Exchange of information that may remove uncertainty as regards competitors' future conduct in the market, is therefore, by its very nature, an anti-competitive activity if considered sufficiently damaging to competition.

(45) The prohibition against exchange of information cannot be interpreted solely to cover information on pricing and volume. Any piece of information exchanged between competitors with the effect that uncertainty as regards competition is replaced by an agreement, is considered to have as its object the restriction of competition.

(46) The publishers in the case at hand exchanged information on possible action towards a joint customer. This constitutes a restriction by object. In any case, they exchanged information indirectly concerning volumes, which the Court of Appeal considered sufficiently damaging to competition.

(47) The subsequent agreement between the publishers to stop supplying books to Interpress, was a collective boycott of a joint customer. The precise purpose of such a boycott is to restrict competition as it limits third parties' market freedom and undermines competition as such. It is not a condition that the boycott affects a competitor. A boycott affecting a customer is also an anti-competitive act within the meaning of the competition rules.

(48) This assessment remains unchanged when the acts are assessed in their economic and legal context. The Court of Appeal has considered, but not found reason to doubt, whether the agreement, in overall, was sufficiently harmful to competition to constitute a restriction by object. It has also correctly established that the agreement was not "objectively necessary" for continuing the lawful activities in Bladcentralen.

(49) The State represented by the Competition Authority requests the Supreme Court to rule as follows:

"1. The appeal is dismissed.

2. The State represented by the Competition Authority is awarded costs in the Supreme Court."

My opinion

The law

(50) The Appeals Selection Committee's leave to appeal is limited to the application of the law. This means that the Court of Appeal's findings of fact are not at issue in the Supreme Court. The question is whether the Court of Appeal applied the law correctly when concluding that the object of the publishers' acts, by their very nature, has been the restriction of competition.

(51) Section 10 subsection 1 of the Competition Act reads:

> "The following shall be prohibited: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:
>
> a) directly or indirectly fix purchase or selling prices or any trading conditions;
>
> b) limit or control production, markets, technical development, or investment;
>
> c) share markets or sources of supply;
>
> d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

(52) The provision mirrors Article 53 (1) of the EEA Agreement and Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). The only distinction between the three sets of rules is that section 10 of the Competition Act does not contain a condition that the agreement must be capable of affecting the trade between the Contracting States, see HR-2017-1229-A paragraph 34 *Ski Taxi.* It is clear that this trade is not affected in the case at hand. The case is thus governed by the Competition Act, and not by the EEA Agreement.

(53) Furthermore, there is legal consensus that section 10 of the Competition Act should be interpreted in the same way as Article 53 of the EEA Agreement, and that EEA and EU case law is of significant importance in the application of the Norwegian prohibition provision, see for instance the Supreme Court ruling HR-2017-1229-A paragraph 35 *Ski Taxi* with further references.

(54) In the mentioned case, the Supreme Court had requested and received an advisory opinion from the EFTA Court regarding the interpretation of Article 53 (1) of the EEA Agreement and the prohibition against agreements etc. whose *object* is to prevent competition, see judgment of 22 December 2016 E-3/16 *Ski Taxi*.

(55) The conclusion of the EFTA Court's judgment is divided into six items. These are quoted in HR-2017-1229-A paragraph 36. The first three items concern the general conditions for establishing that an agreement has as its object the restriction of competition under Article 53 (1). In competition law, this alternative is normally referred to as the prohibition against *restrictions of competition by object*.

(56) Items 1-3 read:

> "1. For an agreement to be regarded as a restriction of competition by object within the meaning of Article 53(1) EEA, it must reveal a sufficient degree of harm to competition. It does not suffice that it is simply capable, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition.
>
> 2. In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Court from taking that factor into account.
>
> 3. An agreement reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object only if its harmful nature is easily identifiable. That assessment cannot go as far as a full examination of its actual or potential effects. Nor can it amount to carrying out an assessment of the pro- and anticompetitive effects and thus to applying a rule of reason."

(57) In items 4, 5 and 6, the EFTA Court applies the three general starting points to the individual facts in *Ski Taxi*. Since the case concerned a tender cooperation, I will not go into these items here.

(58) In HR-2017-1229-A paragraph 38-40 the Supreme Court's summarises the EFTA Court's advisory opinion as follows:

> "(38) The EFTA Court's answers to no. 1 to no. 4 and no. 6 imply, firstly, that the relevant object criterion is an objective term. The cooperating parties' subjective object – their intent – is not decisive, cf. answers no. 2, no. 4 and no. 6.
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> (39) Secondly, it is not sufficient to establish that the parties' cooperation "is capable" of restricting competition. To be covered by the option 'have as its object' in section 10 subsection 1, the cooperation must reveal a sufficient degree of harm to competition, so it is unnecessary to investigate the effects of the cooperation, see answer no. 1. This represents a clarification and specification of the condition as the court of appeal applied it, and as referred to in the Supreme Court judgment in Rt-2012-1556, para 64 and para 65 *Gran & Ekran.*
>
> (40) Thirdly, in the assessment one must "take into consideration" the contents of the provisions of the cooperation agreement, its object and the economic and legal context of which it forms part, see answers no. 2 and no. 4. This implies that the decision whether the condition is met must be made based an individual assessment of the relevant facts. A full investigation of the actual and potential effects of the cooperation, however, should not take place. A restriction by object requires that the "harmful nature is easily identifiable" in light of experience and economic conditions, see answer no. 3."

(59) This status of the law is also the starting point for the assessments in the case at hand.

Findings of the court

(60) First, the Court of Appeal's judgment concerns the publishers' exchange of information on how to respond to Reitan Convenience's decision and Interpress's offer of exclusive distribution. Next, it concerns the agreement later concluded by the publishers on a collective boycott of Interpress.

(61) In my view, the publishers' acts must be regarded as one consecutive act, where the book publishers' initial exchange of strategic information led to an agreement to collectively boycott Interpress. Thus, there is no reason to distinguish between these two facts. From now on, I will only refer to them collectively as *a cooperation*.

(62) The publishers' cooperation is not covered by any of the options in section 10 subsection 1 (a)-(e) of the Competition Act. However, the listing is not exhaustive. Whether there is a restriction by object must consequently be assessed in accordance with the overall norm in the first part of subsection 1.

(63) As set out in the EFTA Court's judgment in *Ski Taxi* and the Supreme Court's subsequent judgment in HR-2017-1229-A, it must be considered whether the agreement according to its content or its nature has as its object the restriction of competition. In addition, it must be assessed whether, in the light of the economic and legal context of the cooperation, it may be reasonably questioned whether it reveals a sufficient degree of harm to competition. The Court of Appeal's approach is in accordance with these starting points, which is also not disputed by the appellants.

(64) The first question I will look into is whether the cooperation constitutes a restriction by object based on its content or nature. Note that my references to the Court of Appeal's judgment are in fact references to the opinion of the Court of Appeal's majority.

(65) The framework for the cooperation was Reitan Convenience's decision to make its wholly owned subsidiary, Interpress, exclusive distributor of books etc. to the undertaking's outlets in the mass market.

(66) The publishers have not disputed Reitan Convenience's right under the Competition Act to make such a decision in favour of its subsidiary. Yet, in my understanding, the appellants' opinion is that the "precise purpose" of the cooperation was to counter the decision on exclusive distribution, and to ensure competition for distribution into the Reitan system. The book publishers argue that the Court of Appeal's failure to consider this issue is an error in law, as it concluded that the cooperation had a restrictive object.

(67) I would like to point out that the "precise purpose" is an objective term. The question is thus whether the cooperation, objectively assessed, constitutes a restriction by object. Of relevance to this assessment is the statement in CJEU judgment 20 November 2008 C-209/07 *Beef Industry Development Society Ltd. and Others* paragraph 21, that "an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives". Against this background, I cannot see how the publishers' perception of the "precise purpose" of the cooperation may change

the analysis of whether the agreement, objectively assessed, had as its object the restriction of competition within the meaning of the Competition Act.

(68) As regards the assessment itself, I have the following remarks:

(69) In the question whether the agreement constitutes a restriction by object, the Court of Appeal's findings of fact are crucial. The Court of Appeal has concluded that the publishers on several occasions exchanged information on how to respond to Reitan Convenience's move, and that this was information "constituting market-sensitive, strategic information with significance for competition behaviour". In this regard, the Court of Appeal states:

> "In other words, it was a question of information that 'reduces or removes the degree of uncertainty as to the operation of the market in question', see CJEU judgment 19 March 2015 in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v. the European Commission* paragraph 121."

(70) Furthermore, the Court of Appeal has concluded that the publishers during a meeting

> "entered into an 'agreement' pursuant to section 10 of the Competition Act, i.e. that they, there, expressed a joint intention to behave on the market in a specific way, see CJEU judgment of in Case C-49-/92 *The European Commission v. Anic Partecipazoni* paragraph 130. More precisely, this joint intention was to stand united in not using Interpress as distributor for bookstore publications to the mass market."

(71) In its assessment, the Court of Appeal comments that agreements capable of removing uncertainty as to future market behaviour presumably have as their object the restriction of competition. Based on this, the Court of Appeal has assumed that agreements not involving pricing and volumes may also constitute a restriction by object. In the Court of Appeal's view, the publishers' cooperation covered in any case matters indirectly relating to volumes.

(72) As I see it, the Court of Appeal has correctly analysed whether the publishers' cooperation has as its object the restriction of competition within the meaning of the Competition Act. I will elaborate on this in the following:

(73) It is clear that certain behaviour is likely to have negative effects "in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that it has actual effects on the market", see the CJEU's judgment of 2 April 2020 in Case C-228/18 *Budapest Bank and Others* paragraph 36, with references to previous case law. The ruling also states that experience shows that such behaviour leads to falls in production and price increases to the detriment, in particular, of consumers.

(74) The doctrine that actions may restrict competition by its very nature is elaborated in several rulings from the CJEU. Particularly relevant to the case at hand is judgment of 4 June 2009 in Case C-8/08 *T-Mobile and Others,* stating in paragraph 35 that

> "the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted."

(75) The CJEU continues in paragraph 36 that it is not possible on the basis of the wording of the former Article 81 (1) of the EU Treaty to conclude that "only concerted practices which have a direct effect on the prices paid by end users are prohibited". Next, it is concluded in paragraph 38 that the Treaty's competition rules are "designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."

(76) In addition, it follows from paragraph 41 of the judgment – which the Court of Appeal also pointed out – that the exchange of information capable of removing uncertainties as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be "regarded as pursuing an anti-competitive object".

(77) Based on the case law I have referenced, I find it clear that the exchange of information between the competing publishers on how to respond to the ultimatum from Reitan Convenience and the offer from Interpress, in fact removed uncertainties between the publishers as regards the market's function in the new situation. As mentioned, according to the judgment in *T-mobile* paragraph 36, it is *not* a requirement that the concerted practice has had a direct effect on the prices. It is sufficient that it may be regarded as having an anti-competitive object. The cooperation entailed that the part of the mass market in which the Reitan system operated, would not have access to the publishers' books. This would undermine competition as such, while the publishers removed any uncertainty between themselves as to how they would deal with this part of the market. This uncertainty was substituted by cooperation, which – as mentioned – in *T-mobile* paragraph 41 must be regarded as pursuing an anti-competitive object, see also judgment 30 January 2020 in Case C-307/18 *Generics and Others* paragraph 83.

(78) I also agree with the Court of Appeal that the cooperation under any circumstance indirectly affected the volumes with which the publishers would supply the mass market. Exchange of information between competitors on volumes lies at the core of cooperation that must be regarded as pursuing an anti-objective object. I do not see how it is relevant to the issue of restriction by object that consequences relating to volumes are only an *indirect* effect of the publishers' cooperation. Here, it is not without interest that section 10 subsection 1 (a) of the Competition Act on selling prices and trading conditions also covers agreements that "indirectly fix" this. Indirect consequences for volumes must in any case be covered when they are as likely and striking as in the case at hand.

(79) Nor do I see, based on my discussion so far, that for a collective boycott to constitute a restriction by object, it must affect a competitor, as the publishers argue. Since it is sufficient for establishing an anti-competitive object that it harms competition as such, a collective boycott affecting a customer must also be covered. Case law from both the EU Commission and the CJEU supports such a view. I confine myself to referring to CJEU judgment 26 November 1975 in Case 73/74 *Papiers Peints and Others* paragraphs 20 and 21 and judgment 7 February 2013 C-68/12 *Slovenská sporitel'ňa* paragraph 19.

(80) The appellants have, with reference to the judgment in *Generics* paragraph 67, asserted that the term "restriction of competition by object" must be "interpreted strictly" and only be applied to "some" concerted practices between undertakings. The book publishers have also invoked the CJEU judgment in *Budapest Bank* paragraph 79, stating that restriction of competition by object requires that "general and consistent experience exists for … the harmfulness of an agreement such as that at issue". In other words, there is no practice or

experience indicating that the cooperation in question may be regarded as a restriction by object.

(81) I cannot see that the mentioned rulings prevent the cooperation in question from being regarded as a restriction by object. A strict interpretation and a requirement of consistent experience cannot entail that the cooperation in question, to have as its object the restriction of competition within the meaning of the Competition Act, must coincide with an already familiar form of cooperation with the same object. That would set an artificial and static standard for the provision's area of application. It also follows from CJEU judgment 25 March 2012 in Case C-591/16 P *H. Lundbeck* paragraph 130 that for there to be a restriction by object, it is not necessary "that the same type of agreement has already been censured by the Commission". What matters is "the specific character of that agreement … from which any particular harmfulness … can be inferred", where necessary from "a detailed analysis of that agreement, its objectives and the economic and legal context of which it forms part", see paragraph 131.

(82) Hence, the wording in the mentioned rulings must be interpreted to mean that it has to be *clear* that the agreement constitutes a restriction by object. In my opinion, this requirement is met in the case at hand.

(83) I will now discuss whether the cooperation, in its economic and legal context, is sufficiently harmful to competition for the establishment of its anti-competitive object to be upheld.

(84) The appellants contend that the Court of Appeal has misunderstood and miscalculated the significance of the positive effects the cooperation may have on competition. In any case, they contend that its pro-competitive effects give reason to doubt whether it is sufficiently harmful to competition. The appellants further argue that the requirements in the Competition Act for an agreement to be regarded as restricting competition are not met.

(85) In its assessment of the economic and legal context of the cooperation, the Court of Appeal appears to have left out the fact that the cooperation was a countermove intended to maintain competition for the distribution into the Reitan system. However, the publishers seem to believe that such an assessment would have demonstrated that the cooperation is motivated by something other than commercial anti-competitive interests, namely the wish to continue the joint distribution through Bladcentralen. The book publishers also contend that the Court of Appeal has made an error in law in its assessment of the agreement's pro-competitive effects when concluding that "the asserted scale advantages are too uncertain to create doubt as to the cooperation's capability to harm competition.

(86) In my view, in its assessment of the economic and legal context of the cooperation, the Court of Appeal did not err in excluding the book publishers' contention that they merely responded to an ultimatum from another market participant of significance for competition in the mass market. Only cooperation covered by so-called ancillary restraints might legitimise such behaviour. I will return to this.

(87) I also note that the Court of Appeal has carried out an extensive assessment of the market's structure and functions, and of the possible pro-competitive effects of the cooperation.

(88) It is clear that the mere existence of pro-competitive effects cannot preclude characterisation as a 'restriction by object', see CJEU judgment in *Generics* paragraph 106. The Court of

Appeal has formulated the contextual assessment as a question of "controlling at a general level whether there are particular circumstances raising doubt as to the agreement's *capability* to restrict competition". As mentioned, it concludes that the "scale advantages are too uncertain to create doubt as to the agreement's capability to harm competition".

(89) In view of this, I cannot see that the Court of Appeal has failed to grasp the key issue according to CJEU case law. In *Generics* paragraph 107, the starting point is that pro-competitive effects "must be sufficiently significant, so that they justify a reasonable doubt" as to whether the relevant agreement "caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object". In my view, the Court of Appeal clearly does not consider the scale advantages – i.e. the *pro-competitive* effects – significant enough to create doubt as to whether the cooperation is sufficiently damaging to competition. As far as I can see, this is the key issue to be considered, which is also confirmed by the Court of Appeal's conclusion that "there are no pro-competitive effects of such a scope that it creates reasonable doubt as to whether the agreement is sufficiently damaging to competition".

(90) Whether or not the individual assessment of possible scale advantages etc. is correct, is an evidentiary question beyond the Supreme Court's jurisdiction. As this is also the case for other issues presented as errors in law, I will leave this question here.

Ancillary restraints

(91) The Court of Appeal has concluded that the agreement was not necessary to carry out the activities in Bladcentralen, and that it is therefore covered by section 10 subsection 1 of the Competition Act.

(92) The publishers argue that the Court of Appeal, on this point, has focused on the wrong issue, as the question is not whether the cooperation was necessary for the company's strategic work. What is crucial, according to the publishers, is whether it was necessary to be able at all to distribute effectively through Bladcentralen.

(93) However, as far as I can see, this has been considered by the Court of Appeal. The court comments the following on what the publishers present as the core issue on this point:

> "It is clear under any circumstance that the activities in Bladcentralen were impossible to carry out without an increased volume supply. The partnership agreement in Bladcentralen was not renegotiated until December 2012, without any demands being made for exclusivity or reporting of future volumes. Furthermore, the competition law guidelines for board work in Bladcentralen, adopted in 2013, suggest that the exchange of information on future volumes was not necessary for Bladcentralen's operation, either. …"
>
> …
>
> Therefore, it was impossible to carry out the activities in Bladcentralen without the anti-competitive cooperation in the case at hand."

(94) This shows to me that the publishers' contention is based on an incorrect perception of what the Court of Appeal has considered. The assessment itself of whether the cooperation in fact

constitutes a necessary ancillary restraint on the distribution agreement that is not covered by section 10, is not at issue in the Supreme Court.

The measurement of fines

(95) Gyldendal has also challenged the measurement of the administrative fine.

(96) Administrative fines are determined by the Competition Authority, see section 29 of the Competition Act. According to section 29 subsection 2, "[i]n determining the amount of a fine, particular attention should be paid to the turnover of the undertaking, the gravity and duration of the infringement".

(97) The Fining Regulation issued in accordance with section 29 subsection 5, set out that the fine may be determined based on the "turnover value of the undertaking's goods and services directly or indirectly related to the infringement", see section 3 subsection 3 first sentence.

(98) The Competition Authority has assumed that the publishers' total turnover from books distributed to the mass market through Interpress and Bladcentralen, is to be regarded as "directly or indirectly" affected by the infringement. Through Bladcentralen, the turnover will be the price paid by the end user, minus commission. Through Interpress, the turnover will be the value of the sale from the book publishers. The Court of Appeal supports this, stating that "the retail price for the end user minus commission is the turnover that best reflects the economic impact of the infringement".

(99) Gyldendal contends that "the turnover of the undertaking" in section 29 subsection 2 of the Competition Act, is Gyldendal's turnover. The Competition Authority is therefore wrong in determining the administrative fine based on Bestselgerforlaget's turnover, and not on Gyldendal's licence income from Bestselgerforlaget's book sale. Bestselgerforlaget is an independent undertaking, more specifically a joint venture mutually controlled by Gyldendal and Aschehoug. Bestselgerforlaget and Gyldendal are thus not the same "undertaking" under section 2 of the Competition Act.

(100) The Court of Appeal comments the following in this regard:

> "As concerns Gyldendal's contention that only the publisher royalty should be taken into account, because Bestselgerforlaget is an independent undertaking, the majority points to the fact that the undertaking is not organised to give an unjustified advantage. If only the publisher royalty were relevant, this would reflect Gyldendal's profit rather than its turnover. The majority therefore finds it clear that Bestselgerforlaget's sale of Gyldendal's books through Bladcentralen, minus a commission, is best suited to reflect the economic impact of the infringement."

(101) The view that an undertaking must not be organised to give an unjustified advantage seems to be taken from CJEU judgment 9 July 2015 in Case C-231/14 P *InnoLux* paragraph 63. The case questioned whether internal sales between a parent company and a subsidiary – where the latter had not participated in the parent company's cartel – should have been included in the calculation of the parent company's turnover. This CJEU found that it should.

(102) The facts in *InnoLux* are not parallel to the facts in the present case. However, the question of the weight to be accorded to organisational matters when calculating the turnover for

vertically integrated undertakings may be transferred to the question of which undertaking's turnover must form the basis for the fine where participants in an anti-competitive cooperation have organised their business activities differently.

(103) In the case at hand, one may therefore ask whether Bestselgerforlaget's sale of titles produced on a licence from Gyldendal may, under section 3 subsection 3 of the Fining Regulation, be regarded as "the undertaking's goods … which the infringement … indirectly comprises", i.e. as Gyldendal's "goods" sold indirectly through Bestselgerforlaget. In my view, the answer to this is yes. Key in this respect must be whether the turnover in Bestselgerforlaget is merely a result of Gyldendal's way of commercialising its author rights. As in *InnoLux,* a different solution would enable the publishing house "to avoid the imposition of a fine proportionate to their importance on the market for those goods and the harm which their conduct does to normal competition", see paragraph 63.

(104) Against this background, Gyldendal's objections to the measurement of the administrative fine cannot succeed.

Conclusions

(105) I have arrived at the conclusion that the Court of Appeal's ruling in the restriction by object issue is based on a correct interpretation and application of the competition rules. I have arrived at the same conclusion regarding the Court of Appeal's measurement of Gyldendal's administrative fine.

(106) Consequently, the appeals must be dismissed.

Costs

(107) The State represented by the Competition Authority has won the case and is, under section 20-2 subsection 1 of the Dispute Act, entitled to costs in all instances. The ruling has not given rise to doubt, and the exemptions rules of the Dispute Act are not applicable.

(108) In the Court of Appeal, the State was awarded costs incurred in the District Court and the Court of Appeal. In the Supreme Court, the State has claimed costs of NOK 375 550. The claim is accepted.

(109) I vote for this

J U D G M E N T :

1. The appeals are dismissed.

2. Cappelen Damm Holding AS, Cappelen Damm AS, Gyldendal ASA and Gyldendal Norsk Forlag AS are, jointly and severally, to pay costs in the Supreme Court of NOK 375 550 to the State represented by the Competition Authority within two weeks of the service of this judgment.

(110) Justice **Kallerud:** I agree with Justice Matheson in all material respects and with his conclusions.

(111) Justice **Arntzen:** Likewise.

(112) Justice **Bergsjø:** Likewise.

(113) Justice **Skoghøy:** Likewise.

(114) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeals are dismissed.

2. Cappelen Damm Holding AS, Cappelen Damm AS, Gyldendal ASA and Gyldendal Norsk Forlag AS are, jointly and severally, to pay costs in the Supreme Court of NOK 375 550 to the State represented by the Competition Authority within two weeks of the service of this judgment.