Case

E-6/17

Fjarskipti hf.

=V=

Síminn hf.

(Article 54 EEA – Abuse of a dominant position – Margin squeeze – Right to claim damages – Applicability of provisions of the EEA Agreement in domestic proceedings – Significance of a final ruling of a competition authority)

Table of Contents

Summary of the Judgment

1 The main part of the EEA Agreement is part of the internal legal order of all EEA States. It is therefore possible for an individual, in an action before a national court, to rely upon a provision of the main part of the EEA Agreement, as it is, or has been made, part of domestic law.

2 The national courts, whose task it is to apply provisions of EEA law in areas within their jurisdiction, must ensure that those provisions take full effect and that the rights conferred on individuals are protected. The full effectiveness of Article 54 EEA would be put at risk if it were not open to an individual to claim damages for loss caused by conduct liable to restrict or distort competition.

3 EEA law does not set out the procedural rules concerning the right to claim damages. In the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions to safeguard rights that individuals derive from EEA law. Such rules must respect the principles of equivalence and effectiveness.

4 Since it must be possible for an individual to claim damages for loss caused by conduct infringing EEA competition rules, that right cannot be restricted by requiring a claimant to await the final result of a national competition authority's investigation.

5 There is no requirement under EEA law for a final ruling of a national competition authority to be binding on a national court, when such a court assesses a damages claim. In contrast, domestic rules denying such a final ruling any significance at all may be in breach of EEA law, in particular the principles of equivalence and effectiveness.

6 Article 54 EEA prohibits any abuse of a dominant position and provides a list of examples of what constitutes such conduct. The examples are not exhaustive and it follows from case law that a margin squeeze may constitute abuse under Article 54 EEA.

7 A margin squeeze may occur, for example, where a dominant undertaking in a wholesale market offers services to undertakings with which the dominant undertaking competes on a retail market where the service offered is an input. A margin squeeze exists if, inter alia, the spread between the wholesale price charged to competitors and the retail price charged to the dominant undertaking's own customers is negative or insufficient to cover the costs the dominant undertaking has to incur in order to supply the retail service. When this is the case, competitors as efficient as the dominant undertaking can compete on the retail market only at a loss or at artificially reduced levels of profitability.

8 A margin squeeze constitutes abuse within the meaning of Article 54 EEA where, given its effect of excluding competitors who are at least as efficient as the dominant undertaking by squeezing their margins, it is capable of making it more difficult, or impossible, for those competitors to enter the market concerned. The anti-competitive

effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anti-competitive effect that may potentially exclude competitors that are at least as efficient as the dominant undertaking.

9 In order to assess the lawfulness of a pricing practice, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors.

10 The question of whether a pricing practice introduced by a dominant undertaking in the wholesale market and resulting in margin squeeze of the undertaking's competitors in an associated retail market is abusive does not depend on whether that undertaking is dominant in that retail market. However, the undertaking's position in and ability to affect the retail market is of relevance to the assessment of whether the conduct produces anti-competitive effects.

Judgment of the Court

30 May 2018[1]

(Article 54 EEA – Abuse of a dominant position – Margin squeeze – Right to claim damages – Applicability of provisions of the EEA Agreement in domestic proceedings – Significance of a final ruling of a competition authority)

In Case E-6/17,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the District Court of Reykjavík (*Héraðsdómur Reykjavíkur*), in a case pending before it between

Fjarskipti hf.

and

Síminn hf.

concerning the interpretation of Article 54 of the Agreement on the European Economic Area,

The Court

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur), and Martin Ospelt (ad hoc), Judges,

1 Language of the request: Icelandic.

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Fjarskipti hf. ("Fjarskipti"), represented by Dóra Sif Tynes, District Court Attorney, acting as Counsel;

– Síminn hf. ("Síminn"), represented by Halldór Brynjar Halldórsson, Supreme Court Attorney, acting as Lead Counsel, on behalf of Helga Melkorka Óttarsdóttir, Supreme Court Attorney;

– the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent, Heimir Skarphéðinsson, Legal Officer, Ministry of Industries and Innovation, and Guðmundur Haukur Guðmundsson, Legal Officer, Icelandic Competition Authority, acting as Co-Agents, and Gizur Bergsteinsson, Attorney at Law, acting as Counsel;

– the Norwegian Government, represented by Ketil Bøe Moen and Henrik Kolderup, Advocates, Office of the Attorney General (Civil Affairs), and Carsten Anker, Senior Adviser, Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Ingibjörg Ólöf Vilhjálmsdóttir, and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Giuseppe Conte, Gero Meeßen, and Martin Farley, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Fjarskipti, represented by Dóra Sif Tynes; Síminn, represented by Halldór Brynjar Halldórsson; the Icelandic Government, represented by Gizur Bergsteinsson; the Norwegian Government, represented by Ketil Bøe Moen and Henrik Kolderup; ESA,

represented by Claire Simpson; and the Commission, represented by Giuseppe Conte, Gero Meeßen, Martin Farley, and Viktor Bottka, at the hearing on 31 January 2018,

gives the following

Judgment

I LEGAL BACKGROUND

EEA LAW

1 Article 54 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

NATIONAL LAW

2 The main part of the EEA Agreement is incorporated into the Icelandic legal order by the Act on the EEA Agreement No 2/1993 (*lög nr. 2/1993 um Evrópska efnahagssvæðið*) ("the EEA Act"). *In addition,* Article 54 EEA has been implemented in Article 11 of the Icelandic Competition Act (*Samkeppnislög nr. 44/2005*), which substantively mirrors Article 54 EEA.

II FACTS AND PROCEDURE

3 The parties to the dispute provide general telecom services in Iceland, including mobile phone services. Síminn commenced its telecom operation in 1994. Its predecessors were publicly owned and had a monopoly owning and operating general telecommunications networks in Iceland. This State monopoly was abolished by law on 1 January 1998. Fjarskipti's activity can be traced back to 1998, when its predecessor commenced operation. In 2005, Fjarskipti was established as a special subsidiary responsible for all telecom operations and acquired all assets, rights and obligations of its predecessor pertaining to those operations.

4 Over time, several complaints against Síminn were filed with the Icelandic Competition Authority (*Samkeppniseftirlitið*) ("the Competition Authority"). One of the complaints concerned an alleged abuse of a dominant position in the form of a margin squeeze. By Decision No. 7/2012 of 3 April 2012, the Competition Authority found that Síminn had violated, inter alia, Article 11 of the

Competition Act and Article 54 EEA by having applied, from the middle of 2001 to 2007, an unlawful margin squeeze against its competitors, including Fjarskipti, in the setting of its termination rates. A termination rate is the price paid for terminating a call that originates in one mobile network and ends in another.

5 Following the Competition Authority's decision, Síminn lodged an appeal with the Competition Appeals Committee (*Áfrýjunarnefnd samkeppnismála*). By a ruling of 22 August 2012, the Competition Appeals Committee upheld the Competition Authority's decision. On 26 March 2013, the Competition Authority and Síminn entered into a general settlement. That settlement included the point that the Competition Appeals Committee's ruling had become final and could no longer be referred to a court of law.

6 Fjarskipti considered it had paid excessively high termination rates to Síminn in the period 2001 to 2007 and had thereby suffered substantial losses. On 13 September 2013, it sent Síminn a claim demanding compensation. By letter of 21 October 2013, Síminn rejected the claim, stating that there was no basis for compensatory liability and that the alleged losses had not been proven.

7 Fjarskipti brought the matter before the referring court. Síminn instituted a counter-action against Fjarskipti, arguing that Síminn had paid Fjarskipti excessive termination rates amounting to even more than Fjarskipti's claim against it. Síminn argued that Fjarskipti had fixed its pricing in such a way that phone calls between its own customers within its system, so-called on-net calls, were priced far below the termination rates demanded of Síminn in cases where Síminn's customers made calls to Fjarskipti's customers.

8 Termination rates had been determined through agreements between the companies in accordance with an obligation under the Icelandic Telecommunications Act. In April 2003, the Post and Telecom Administration (*Póst- og fjarskiptastofnun*) ordered Síminn to reduce the termination rates for phone calls ending in its mobile phone network. Síminn subsequently lowered its rates. The termination rates of its competitors, however, rose from April 2003 until almost the end of 2006.

9 Fjarskipti bases its action on the view that all those who incur loss or damage as a result of a violation of Article 54 EEA must be guaranteed compensation for such loss or damage.

10 According to the referring court, the interpretation of Article 54 EEA could be of substantial significance for the resolution of the case. On that basis, it decided to stay the proceedings and make a request to the Court for an advisory opinion. The request was sent by letter of 30 June 2017, and registered at the Court on 19 July 2017.

11 The District Court of Reykjavík has asked the following questions:

1. *Does it constitute part of the effective implementation of the EEA Agreement that a natural or a legal person in an EFTA State should be able to invoke Article 54 of the Agreement before a domestic court in order to claim compensation for a violation of the prohibitions of that provision?*

2. *When assessing whether the conditions are fulfilled for a compensation claim in view of a violation of competition rules, is it of significance whether the competent authorities have delivered a final ruling on a violation of Article 54 EEA?*

3. *Is it regarded as an unlawful margin squeeze, violating Article 54 EEA, when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than that at which it sells termination to its competitors?*

4. *Is the fact that an undertaking is in a dominant position on the relevant wholesale market sufficient for it to be guilty of applying an unlawful margin squeeze, violating Article 54 EEA, or must the undertaking also be in a dominant position on the relevant retail market?*

12 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWERS OF THE COURT

THE FIRST QUESTION

13 By its first question, the referring court asks whether it constitutes part of the effective implementation of the EEA Agreement that a natural or legal person should be able to invoke Article 54 EEA before a domestic court in order to claim compensation for a violation of the prohibitions laid down in that provision.

OBSERVATIONS SUBMITTED TO THE COURT

14 All those who have submitted observations agree that this question should be answered in the affirmative.

15 Fjarskipti and the Norwegian Government emphasise that Article 3 EEA obliges the Contracting Parties to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

16 The Icelandic Government, the Norwegian Government, and the Commission note that Article 54 EEA and the corresponding Article 102 of the Treaty on the Functioning of the European Union ("TFEU") are sufficiently precise and unconditional as not only to impose obligations on those undertakings to which they are addressed, but also to establish rights for private parties. The Norwegian Government emphasises that this is not a question of direct effect in the sense that applies to non-incorporated directives under EU law, for which there is no equivalent under EEA law. The question is whether Article 54 EEA is sufficiently precise and unconditional to be directly applicable in the sense that it may be invoked by private parties in domestic legal proceedings.

17 Furthermore, the Icelandic Government, the Norwegian Government, ESA, and the Commission point to the fact that Article 54 EEA is implemented in Icelandic law.

18 Fjarskipti, the Icelandic Government, the Norwegian Government, and ESA state that the Court has held that private enforcement of Articles 53 and 54 EEA ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA (reference is made to Cases E-14/11 *Schenker North and Others* v *ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 132, and E-5/13 *Schenker North and Others* v *ESA* ("*DB Schenker V*") [2014] EFTA Ct. Rep. 304, paragraph 134).

19 Fjarskipti, the Icelandic Government, the Norwegian Government, ESA, and the Commission argue that the Court of Justice of the European Union has consistently held that anyone can claim compensation before national courts for harm caused by an infringement of Article 101 TFEU. The full effectiveness of that provision would otherwise be put at risk (reference is made to the judgments in *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 24 and 26, and *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 59 and 60). The Icelandic Government, the Norwegian Government, ESA, and the Commission argue that the same should apply to Article 102 TFEU and Article 54 EEA.

20 The Icelandic Government, the Norwegian Government, ESA, and the Commission state that the existence of the right to claim damages strengthens the working of the competition rules and that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition (reference is made to Courage and Crehan, cited above, paragraph 27, and *Manfredi and Others*, cited above, paragraph 91).

21 Finally, Fjarskipti, the Norwegian Government, ESA, and the Commission emphasise that in the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EEA law. Such rules are subject to the principles of equivalence and effectiveness (reference is made to *Courage and Crehan*, cited above, paragraph 29, and *Manfredi and Others*, cited above, paragraphs 62 and 64).

FINDINGS OF THE COURT

22 By its first question, the referring court asks, in essence, whether a natural or a legal person in an EFTA State may rely on Article 54 EEA as a basis for a damages action before a domestic court.

23 Article 3 EEA obliges the Contracting Parties to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement. However, this does not entail that EEA law is directly applicable in domestic proceedings.

24 Furthermore, it is well established that there is no recognition of direct effect under the EEA Agreement. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 28 and 29). In order for individuals to be able to invoke an EEA provision in domestic proceedings, that provision must be, or have been made, part of domestic law in the EEA States in accordance with their constitutional and legal traditions.

25 In Liechtenstein and the EU Member States, the EEA Agreement is considered an integral part of domestic law without further action (see, respectively, Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 35, and the judgment in *Opel Austria*, T-115/94, EU:T:1997:3, paragraph 102). However, in Iceland and Norway, specific implementing measures are required. Both States have incorporated the main part of the EEA Agreement, in authentic language versions, into Icelandic and Norwegian law.

26 Consequently, the main part of the EEA Agreement is part of the internal legal order of all EEA States. It is therefore possible for an individual, in an action before a national court, to rely upon a provision of the main part of the EEA Agreement, as it is, or has been made, part of domestic law.

27 However, not all provisions in the main part of the EEA Agreement are framed in a manner capable of creating rights that individuals and economic operators can invoke before national courts. It has been established that for the provisions of the EEA Agreement to have such effect, they must be unconditional and sufficiently precise (see, inter alia, Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 122 and *Opel Austria*, cited above, paragraphs 101 and 102). These requirements are necessary to ensure that a provision is sufficiently operational for a court to give effect to it.

28 Article 102 TFEU has been held to produce direct effect between individuals and create rights for the individuals concerned that must be safeguarded by the national courts (see *Courage and Crehan*, cited above, paragraph 23). It follows from the case law of the Court of Justice of the European Union that such effect will apply where an EU treaty provision is sufficiently clear, precise and unconditional. Article 102 TFEU is thus considered to fulfil these requirements. Article 54 EEA is identical in substance to Article 102 TFEU. In order to ensure equal treatment of individuals throughout the EEA and in view of the principle of homogeneity, Article 54 EEA must also be held to be sufficiently clear, precise and unconditional.

29 As regards specifically the possibility of relying on Article 54 EEA in damages actions, it should be remembered that the national courts, whose task it is to apply provisions of EEA law in areas within their jurisdiction, must ensure that those provisions take full effect and that the rights conferred on individuals are protected. The full effectiveness of Article 54 EEA would be put at risk if it were not

open to an individual to claim damages for loss caused by conduct liable to restrict or distort competition (compare *Courage and Crehan*, cited above, paragraphs 24 to 26).

30 The existence of a right to claim damages strengthens, in particular, the working of the EEA competition rules and discourages agreements or practices that are liable to restrict or distort competition. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition (compare *Courage and Crehan*, cited above, paragraph 27). The Court has therefore held that private enforcement of Articles 53 and 54 EEA ought to be encouraged. While pursuing a private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest, thereby benefitting consumers (see *DB Schenker I*, cited above, paragraph 132, and *DB Schenker V*, cited above, paragraph 134).

31 Nevertheless, EEA law does not set out the procedural rules concerning the right to claim damages. In the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions to safeguard rights that individuals derive from EEA law. Such rules must respect the principles of equivalence and effectiveness. This means that those rules must not be less favourable than those governing similar domestic actions and they must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (compare *Courage and Crehan*, cited above, paragraph 29). It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness.

32 The answer to the first question must therefore be that a natural or legal person must be able to rely on Article 54 EEA, as it is, or has been made, part of domestic law, in order to claim compensation before a national court for a violation of the prohibitions laid down in that provision.

THE SECOND QUESTION

33 By its second question, the referring court asks, in essence, whether it is of significance, when assessing a claim for compensation for a violation of competition rules, whether a competition authority has delivered a final ruling finding a violation of Article 54 EEA.

OBSERVATIONS SUBMITTED TO THE COURT

34 All participants point to the fact that Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) ("the Damages Directive") has not been incorporated into the EEA Agreement. Article 9 of the Damages Directive contains rules on the effects of final rulings of national competition authorities in proceedings before national courts in the EU. There appears to be an agreement that the provisions of the Damages Directive, including Article 9, are not applicable in the EEA and that it falls under the procedural autonomy of each EEA State to lay down the detailed procedural rules for damages claims for breaches of competition law, subject to the principles of equivalence and effectiveness (reference is made to, inter alia, *Courage and Crehan*, cited above, paragraph 29).

35 Fjarskipti, however, notes that the Damages Directive codifies certain conditions for damages actions. Fjarskipti invites the Court to consider that the Damages Directive, albeit not incorporated, may serve as a point of reference also in the EFTA pillar, as codification of relevant case law. In Fjarskipti's view, it follows from the principles of homogeneity and loyalty combined that it is for the courts to balance the need for recognition of equal rights for individuals throughout the EEA against the possible effects of delayed incorporation. It calls for a careful consideration of whether EEA law can produce the same results as in the EU. The Norwegian Government submits that Article 9 of the Damages Directive was not intended to have a codifying nature and should therefore not be relied upon in the EEA. The Commission argues in a similar way and adds that, as the principles laid down in Article 9 do not derive from EU primary law, but only from secondary legislation not incorporated into the EEA Agreement, there are no grounds for establishing equivalent rules in the EEA.

36 All participants agree, furthermore, that a final ruling of a national competition authority finding a violation of EEA competition rules is not a precondition for domestic proceedings on a claim for damages. It is generally accepted that a private party may claim damages through stand-alone actions. Such actions play a vital part in the private enforcement of EEA competition law, which the Court has held ought to be encouraged (reference is made to *DB Schenker I*, cited above, paragraph 132).

37 As for the situation where a final ruling has been made, there appears to be an agreement that a ruling should be of some significance and that national rules governing the degree of significance of that ruling granted in domestic proceedings must respect the principles of equivalence and effectiveness.

38 The Icelandic Government, the Norwegian Government, ESA, and the Commission state that, in practice and due to the complexity of competition cases, private parties have a tendency to await a national competition authority's decision before bringing actions for damages. National competition authorities are, given their wide-ranging investigative powers, generally better equipped than private parties to investigate and prove the existence of infringements. Follow-on actions are therefore common, since such actions make it easier in general for a claimant to bring a damages action for a violation of competition rules.

39 ESA argues that it would undermine the principle of effectiveness if national courts failed to take any account of a final ruling, given the time and resources the national competition authority has devoted to the investigation. The Norwegian Government argues that the ability of a private party to prove infringement of Article 54 EEA would be substantially reduced if it were not possible to rely on the analyses in a preceding ruling from a national competition authority. Fjarskipti submits that it would be tantamount to a breach of the principle of effectiveness if a natural or legal person were required to prove anew a violation of Article 54 EEA when such breach had already been firmly established by a national competition authority.

40 Síminn argues that a final ruling of a national competition authority may be submitted as evidence. However, the significance of such a ruling, when assessing whether the conditions for a compensation claim are fulfilled, varies and depends on national law on evidence and tort, neither of which have been harmonised in the EEA. The significance of such rulings should be limited, in the sense that stand-alone actions must be encouraged. The significance can never be such as to discourage stand-alone actions, which form a vital part of the effective enforcement of Articles 53 and 54 EEA.

FINDINGS OF THE COURT

41 By its second question, the referring court seeks clarification of whether it is of significance, when considering compensation claims for a breach of competition rules, that a national competition authority has delivered a final ruling finding a violation of Article 54 EEA.

42 Since it must be possible for an individual to claim damages for loss caused by conduct infringing EEA competition rules, that right cannot be restricted by requiring a claimant to await the final result of a national competition authority's investigation. Moreover, such an investigation may not take place in every case. Consequently, a final ruling by a national competition authority is not a requirement for an individual's right to claim compensation for violations of the EEA competition rules.

43 However, the question referred must be understood to include the issue of whether such a final ruling must be taken into account when a national court assesses a claim for damages for a breach of competition law and, if so, what weight should be given to such a final ruling in national proceedings.

44 In the EU, this issue has been settled by the Damages Directive, in particular Article 9. However, that directive has not been incorporated into the EEA Agreement. Hence, the rules on procedure and remedies for violations of competition law, including the significance of a final ruling by a national competition authority, are not subject to harmonised rules in the EEA. Insofar as Fjarskipti has argued that the Damages Directive is a codification of principles laid down in case law, it should be observed that this does not apply in relation to Article 9. There is no requirement under EEA law for a final ruling of a national competition authority to be binding on a national court, when such a court assesses a damages claim.

45 In contrast, domestic rules denying such a final ruling any significance at all may be in breach of EEA law, in particular the principles of equivalence and effectiveness.

46 If Icelandic law permits, for example, a claimant to rely on a final ruling of a national competition authority in actions for damages based on national competition law, the principle of equivalence requires that a claimant benefits from the same procedural right in relation to actions for damages based on EEA competition law. It is for the referring court to determine the content of national rules and to draw the necessary conclusions under the principle of equivalence.

47 As regards the principle of effectiveness, it should be noted that national competition authorities have specialised competence and will generally invest significant resources into investigations of infringements of Articles 53 and 54 EEA. For this reason, claimants seem to prefer follow-on actions over stand-alone actions. Accordingly, if no significance at all were to be given to a final ruling of a national competition authority finding a violation, it could make it practically impossible or excessively difficult for a claimant in a follow-on action to prove that violation independently from the final ruling. Therefore, it would be incompatible with the principle of effectiveness if no significance at all is given to a final ruling in such actions. Moreover, the effective enforcement of competition rules and the efficient use of resources in this field could suffer.

48 In light of the above, the Court holds that the answer to the second question must be that it is not a prerequisite for a court's assessment of a damages claim for violation of competition rules that a national competition authority has handed down a final ruling finding a violation of Article 54 EEA. Where a national competition authority has given such a final ruling, EEA law does not require that the ruling is binding on the national courts in a follow-on action. In the absence of EEA law governing the procedure and remedies for violations of competition law, it falls under the procedural autonomy of each EEA State to lay down the detailed rules on the degree of significance to be attached to a final ruling, subject to the principles of equivalence and effectiveness.

THE THIRD QUESTION

49 The third question concerns the situation where a dominant undertaking in a wholesale market charges termination rates to its competitors such that the dominant undertaking's own retail division would be unable to make a profit if it had to bear the cost of selling telephone calls under the same circumstances. The referring court asks whether, in such circumstances, it is of relevance to the finding of an unlawful margin squeeze that the dominant undertaking is itself obliged to pay a termination rate to its competitors that is higher than the rate it charges them.

OBSERVATIONS SUBMITTED TO THE COURT

50 The Icelandic Government, the Norwegian Government, and the Commission submit that dominant undertakings have a special responsibility not to allow their conduct to impair competition (reference is made to, inter alia, Case E-15/10, *Posten Norge*, [2012] EFTA Ct. Rep. 246, paragraph 177, and the judgments in Michelin, 322/81, EU:C:1983:313, paragraph 57, and *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23).

51 The Norwegian Government and the Commission state that the concept of abuse of a dominant position is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods 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 (reference is made to, inter alia, *Posten Norge*, cited above, paragraph 130, and *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 27).

52 All participants agree that a margin squeeze may constitute an abuse under Article 54 EEA (reference is made to, inter alia, Case E-29/15 *Sorpa* [2016] EFTA Ct. Rep. 827, paragraph 116, and *TeliaSonera Sverige*, cited above, paragraph 31).

53 Fjarskipti, the Icelandic Government, the Norwegian Government, ESA, and the Commission argue that for a margin squeeze to be abusive, it must have anti-competitive effects. These effects need not be concrete, it is sufficient that they have the potential to exclude competitors who are at least as efficient as the dominant undertaking (reference is made to *TeliaSonera Sverige*, cited above, paragraph 64). In the assessment of whether such anti-competitive effects exist, all the specific circumstances of a case must be taken into consideration (reference is made to *TeliaSonera Sverige*, cited above, paragraph 68).

54 Síminn submits that the question of whether a practice amounts to an unlawful margin squeeze depends on whether the practice excludes efficient competitors, as they would be forced to price their products on the relevant retail market at a loss or artificially reduced levels of profitability in order to compete with the dominant undertaking (reference is made to, inter alia, *TeliaSonera Sverige*, cited above, paragraph 33). In Síminn's view, a margin squeeze can thus not occur unless the practice excludes from the market those competitors that are as efficient as the dominant undertaking (reference is made to the judgment in *Intel*, C-413/14 P, EU:C:2017:632, paragraph 141). Síminn argues that the facts of the case show that no such exclusion occurred, as existing competitors competed profitably and a new competitor entered the market.

55 Fjarskipti, the Icelandic Government, ESA, and the Commission state that when assessing whether a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the dominant undertaking itself. Only where it is not possible, in particular circumstances, to refer to the prices and costs of the dominant undertaking should those of competitors on the same market be examined (reference is made to *TeliaSonera Sverige*, cited above, paragraph 46).

FINDINGS OF THE COURT

56 The third question relates to the criteria that need to be taken into account when assessing whether a pricing practice resulting in a margin squeeze constitutes an abuse of a dominant position in violation of Article 54 EEA. In essence, the referring court asks whether it is of relevance to that assessment that the competitors of the dominant undertaking in question charge higher rates than the corresponding rates charged by the dominant undertaking.

57 Article 54 EEA applies to dominant undertakings. The Court will address the requirement of dominance under the fourth question. In the context of the current question, the Court's assessment rests on the premise set by the referring court that an undertaking's dominance on the wholesale market is established.

58 An undertaking that holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (see *Posten Norge*, cited above, paragraph 127, and compare *Intel*, cited above, paragraph 135 and case law cited). Article 54 EEA prohibits any abuse of a dominant position and provides a list of examples of what constitutes such conduct. The examples found in Article 54 EEA are not exhaustive

and it follows from case law that a margin squeeze may constitute abuse under Article 54 EEA (see *Sorpa*, cited above, paragraph 116, and compare *TeliaSonera Sverige*, cited above, paragraph 31).

59 A margin squeeze may occur, for example, where a dominant undertaking in a wholesale market offers services to undertakings with which the dominant undertaking competes on a retail market where the service offered is an input. A margin squeeze exists if, inter alia, the spread between the wholesale price charged to competitors and the retail price charged to the dominant undertaking's own customers is negative or insufficient to cover the costs the dominant undertaking has to incur in order to supply the retail service. When this is the case, competitors as efficient as the dominant undertaking can compete on the retail market only at a loss or at artificially reduced levels of profitability (compare *TeliaSonera Sverige*, cited above, paragraphs 32 and 33).

60 The premise of the referring court's question is that a dominant undertaking's termination rate is set in such a way that the undertaking's own retail division would be unable to make a profit from the sale of telephone calls within its system if it had to bear the same costs it imposes on its competitors. In other words, the spread is negative or insufficient to cover the costs of supplying that service, thus constituting a margin squeeze.

61 However, the very existence of a margin squeeze is not sufficient for a finding of abuse. For a pricing practice to be abusive, it must have an anti-competitive effect on the market (compare *TeliaSonera Sverige*, cited above, paragraph 61).

62 A margin squeeze constitutes abuse within the meaning of Article 54 EEA where, given its effect of excluding competitors who are at least as efficient as the dominant undertaking by squeezing their margins, it is capable of making it more difficult, or impossible, for those competitors to enter the market concerned. The anti-competitive effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anti-competitive effect that may potentially exclude competitors that are at least as efficient as the dominant undertaking. Conversely, in the absence of any effect on the competitive situation of competitors, a pricing practice cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice (compare *TeliaSonera Sverige*, cited above, paragraphs 63, 64 and 66).

63 In order to assess the lawfulness of a pricing practice, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy. This approach conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (compare *TeliaSonera Sverige*, cited above, paragraphs 41 and 44). As the Commission has argued, it is also in line with the objective nature of the margin squeeze assessment, which looks more generally at the potential exclusionary effect on hypothetical as-efficient competitors rather than assess whether actual, individual competitors have in fact been excluded.

64 It cannot be ruled out that the costs and prices of competitors may be relevant to the examination of a pricing practice. However, those prices and costs should be examined only in particular circumstances, where it is not possible to refer to those of the dominant undertaking. When assessing whether a margin squeeze is abusive, account should thus as a general rule be taken primarily of the prices and costs of the dominant undertaking (compare *TeliaSonera Sverige*, cited above, paragraphs 45 and 46).

65 Therefore, the fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own does not preclude a finding that the dominant undertaking's pricing practice constitutes an abuse of a dominant position within the meaning of Article 54 EEA. The decisive factor in the assessment is whether the pricing practice causing a margin squeeze produces an effect on the retail market that is at least potentially anti-competitive.

66 In the assessment of the effects of a margin squeeze, it is necessary, inter alia, to consider whether the wholesale product is indispensable for the sale of the retail product and to determine the level of the margin squeeze. Where the supply of the wholesale product is indispensable, an at least potentially anti-competitive effect is probable. The same applies if the margin is negative, taking into account the fact that, in such a situation, competitors who are at least as efficient would be compelled to sell at a loss (compare *TeliaSonera Sverige*, cited above, paragraphs 69 to 73, and *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 143).

67 Furthermore, in the assessment of whether there are anti-competitive effects, all the specific circumstances of a case must be taken into consideration (compare *TeliaSonera Sverige*, cited above, paragraph 68). In the present case, the special characteristics of the telecommunications sector may lead to the effects on the market varying according to how services are provided at the retail level.

The impact of termination rates would, inter alia, depend on what proportion they represent of the retail costs. Where the retail service entails payment for individual mobile phone calls, the termination rate may constitute a significant proportion of the retail cost and therefore have a higher potential impact on competition. However, where telephone calls are provided as one of several mobile telephony services in a fixed-price bundle package, the termination rate, and the connected margin squeeze, may represent a smaller proportion of costs and possibly have less impact on competition.

68 It is for the referring court to assess, on the basis of all the circumstances of the case before it, whether anti-competitive effects are present.

69 It must be added that an undertaking remains at liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is economically justified. The assessment of whether such justification exists must be made on the basis of all the circumstances of the case (compare *TeliaSonera Sverige*, cited above, paragraphs 75 to 77).

70 The answer to the third question referred is that the fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own, does not preclude a finding that the dominant undertaking's own pricing practice in the form of a margin squeeze constitutes an abuse of a dominant position within the meaning of Article 54 EEA.

THE FOURTH QUESTION

71 By its fourth question, the referring court asks, in essence, whether it is required for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is dominant on both the relevant wholesale market and on the relevant retail market.

OBSERVATIONS SUBMITTED TO THE COURT

72 All participants seem to agree that it is not required that an undertaking must be dominant on the relevant wholesale market as well as on the relevant retail market, for the finding of an unlawful margin squeeze in violation of Article 54 EEA.

73 All participants state that it follows from consistent case law that, in order to establish that an undertaking has applied an unlawful margin squeeze, it is sufficient for that undertaking to be dominant on the wholesale market; it does not depend on that undertaking being dominant also on the relevant retail market (reference is made, in particular, to *TeliaSonera Sverige*, cited above, and *Telefónica,* T-336/07, EU:T:2012:172, upheld on appeal in *Telefónica*, C-295/12 P, EU:C:2014:2062).

74 ESA emphasises that, in addition to a finding of dominance at the wholesale level, the other conditions for finding a margin squeeze must also be met. Dominance in itself is not prohibited (reference is made to *Michelin*, cited above, paragraph 57). Fjarskipti argues that the possibility for a dominant undertaking to affect the market and thus abuse its position is instrumental to any finding of an infringement of the competition rules.

FINDINGS OF THE COURT

75 Article 54 EEA applies to dominant undertakings. In the question referred, the contested pricing practice concerns a wholesale market for termination rates. It has been pointed out, inter alia by ESA, that the nature of termination services leads to each operator having full control of the market for such services with regard to its own network. However, this does not necessarily mean that each operator must also be considered to be a dominant undertaking. To be considered a dominant undertaking, in the context of EEA competition law, an operator must have sufficient economic strength and market power to behave to an appreciable extent independently of its competitors and its consumers (compare *Deutsche Telekom* v *Commission*, cited above, paragraph 170).

76 Whether an operator can behave independently of other operators when setting its termination rates must be considered in light of the specific circumstances of the case. To have a complete and fully functional market in telecommunications services, each operator needs access to all other operators' networks. Accordingly, there is an interdependence between the operators. As the Icelandic Government has pointed out, a legal obligation on all the operators to agree termination rates among themselves and to provide access to each other's networks may affect the assessment of the operators' ability to behave independently of each other. It is for the referring court to assess, in the context of both the principal action and the counter-action, whether Síminn and Fjarskipti have the required independence at the wholesale level to be considered dominant. In the following, the Court's assessment rests on the premise that the requirement of dominance in Article 54 EEA is fulfilled as regards the wholesale market.

77 Article 54 EEA gives no explicit guidance on the issue of whether, in cases concerning margin squeeze, the requirement of dominance applies to both the wholesale market and the retail market. Accordingly, the actual scope of the special responsibility imposed on a dominant undertaking must be considered in light of the specific circumstances of each case which show that competition has been weakened (compare *TeliaSonera Sverige*, cited above, paragraph 84).

78 The application of Article 54 EEA presupposes a link between the dominant position and the alleged abusive conduct. In the present case, the pricing practice in question takes place in the wholesale market, but the alleged abusive conduct and its effects on competition are related to the retail market. The presupposed link between dominant position and abusive conduct is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. However, in the case of distinct, but associated, markets, as in the case at hand, special circumstances may justify the application of Article 54 EEA to conduct found on the associated, non-dominated market and having effects on that market (compare *TeliaSonera Sverige*, cited above, paragraph 86).

79 Such circumstances may arise where the conduct of a dominant undertaking on a wholesale market consists in attempting to drive out at least equally efficient competitors in an associated retail market, in particular by applying a margin squeeze to them. Such conduct is likely to have the effect of weakening competition in the retail market, not least because of the close links between the markets concerned (compare *TeliaSonera Sverige*, cited above, paragraph 87).

80 Furthermore, in such a situation and in the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the retail market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits (compare *TeliaSonera Sverige*, cited above, paragraph 88).

81 Consequently, the question of whether a pricing practice introduced by a dominant undertaking in the wholesale market and resulting in margin squeeze of the undertaking's competitors in an associated retail market is abusive does not depend on whether that undertaking is dominant in that retail market (compare *TeliaSonera Sverige*, cited above, paragraph 89).

82 The Court notes that, although there is no requirement of dominance on the retail market, the undertaking's presence on that market cannot be considered irrelevant to the assessment of whether that undertaking's conduct constitutes unlawful abuse of a dominant position. The undertaking's position in and ability to affect the retail market is of relevance to the assessment of whether the conduct produces anti-competitive effects (compare *TeliaSonera Sverige*, cited above, paragraph 81).

83 In principle, such effects are to a large extent taken as given where the undertaking has a dominant position in the retail market, and they are also likely to occur where the undertaking has a prominent, albeit not dominant, presence. However, where an undertaking holds an insignificant position on the retail market, it is more difficult to demonstrate that the undertaking's pricing practice results in a margin squeeze that could affect the market in such a way as to produce the anti-competitive effects required for the finding of a violation of Article 54 EEA.

84 The answer to the fourth question referred is therefore that it is sufficient for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is in a dominant position on the relevant wholesale market. It is not required that the undertaking holds a dominant position also on the relevant retail market.

IV COSTS

85 The costs incurred by the Icelandic and Norwegian Governments, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

The Court

in answer to the questions referred to it by the *District Court of Reykjavík* hereby gives the following Advisory Opinion:

1. **A natural or legal person must be able to rely on Article 54 EEA, as it is, or has been made, part of domestic law, in order to claim compensation before a national court for a violation of the prohibitions laid down in that provision.**

2. **It is not a prerequisite for a court's assessment of a damages claim for violation of competition rules that a national competition authority has handed down a final ruling finding a violation of Article 54 EEA. Where a national competition authority has given such a ruling, EEA law does not require that the ruling is binding on the national courts in a follow-on**

action. In the absence of EEA law governing the procedure and remedies for violations of competition law, it falls under the procedural autonomy of each EEA State to lay down the detailed rules on the degree of significance to be attached to a final ruling, subject to the principles of equivalence and effectiveness.

3. **The fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own, does not preclude a finding that the dominant undertaking's own pricing practice in the form of a margin squeeze constitutes an abuse of a dominant position within the meaning of Article 54 EEA.**

4. **It is sufficient for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is in a dominant position on the relevant wholesale market. It is not required that the undertaking holds a dominant position also on the relevant retail market.**

Páll Hreinsson **Per Christiansen** **Martin Ospelt**

Delivered in open court in Luxembourg on
***30 May 2018**.*

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President

Report for the Hearing

in Case E-6/17

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the District Court of Reykjavík (*Héraðsdómur Reykjavíkur*), in a case pending before it between

Fjarskipti hf.

and

Síminn hf.

concerning the interpretation of Article 54 of the Agreement on the European Economic Area.

I INTRODUCTION

1 By a letter of 30 June 2017, registered at the Court on 19 July 2017, Reykjavík District Court (*Héraðsdómur Reykjavíkur*) made a request for an advisory opinion in a case between two telecommunications companies, Fjarskipti hf. ("Fjarskipti") and Síminn hf. ("Síminn").

2 The case before the referring court concerns an action brought by Fjarskipti against Síminn claiming compensation of losses incurred due to Síminn having set excessively high termination rates in the period medio 2001 to 2007. Síminn has brought a counter-action before the same court, claiming compensation for losses incurred due to Fjarskipti's excessive termination rates.

3 The District Court has asked four questions. The first two questions concern the significance of Article 54 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") in national court proceedings involving claims for compensation for violations of EEA competition rules. The other two questions concern the issue of what is to be regarded as an unlawful margin squeeze in violation of that provision.

II LEGAL BACKGROUND

EEA LAW

4 Article 54 EEA reads:

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

5 Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") sets out the functions and powers of the EFTA Surveillance Authority in the field of competition. The second sentence of Article 3(1) in Part II Chapter II of that protocol reads:

Where the competition authorities of the EFTA States or national courts apply national competition law to any abuse prohibited by Article 54 of the EEA Agreement, they shall also apply Article 54 of the EEA Agreement.

NATIONAL LAW

6 The EEA Agreement was ratified and incorporated into the Icelandic legal order by Articles 1 and 2 of the Act on the EEA Agreement No 2/1993.[1] Article 54 EEA has been implemented in Article 11 of the Icelandic Competition Act.[2] That provision substantively mirrors Article 54 EEA.

III FACTS AND PROCEDURE

7 According to the referring court, the parties to the dispute provide general telecom services in Iceland, including mobile phone services.

8 Síminn commenced its telecom operation in 1994. Its predecessors, which were owned by the Icelandic state, had a monopoly in owning and operating general telecommunications networks in Iceland. This state monopoly was abolished by law on 1 January 1998.

1 *Lög nr. 2/1993 um Evrópska efnahagssvæðið.*
2 *Samkeppnislög nr. 44/2005.*

9 Fjarskipti's activity can be traced back to 1998, when its predecessor commenced operation. In 2005, Fjarskipti was established as a special subsidiary responsible for all telecom operations and taking over all assets, rights and obligations pertaining to those operations.

10 Over time, several complaints against Síminn were filed with the Icelandic Competition Authority ("the Competition Authority"). One of the complaints concerned an alleged abuse of a dominant position in the form of a margin squeeze. By Decision No. 7/2012, the Competition Authority found that Síminn had violated, inter alia, Article 11 of the Competition Act and Article 54 EEA by having applied, from the middle of 2001 to 2007, an unlawful margin squeeze against its competitors, including Fjarskipti, in the setting of its termination rates. Síminn lodged an appeal with the Competition Appeals Committee, which upheld the Competition Authority's decision.

11 On 26 March 2013, the Competition Authority and Síminn entered into a general settlement on the closure of certain matters that the authority had received for examination. The settlement provided, inter alia, that the Competition Appeals Committee's ruling became final and could not be referred to a court of law.

12 Fjarskipti considered it had paid excessively high termination rates to Síminn in the period 2001 to 2007 and had thereby suffered substantial losses. On 13 September 2013, it sent Síminn a claim demanding compensation. By letter of 21 October 2013, Síminn rejected the claim, stating that there was no basis for compensatory liability and that the alleged losses had not been proven.

13 Fjarskipti brought the matter before the referring court. Síminn instituted a counter-action against Fjarskipti, arguing that Síminn had paid Fjarskipti excessive termination rates amounting to even more than the claim presented against it by Fjarskipti. Síminn argued that both Fjarskipti and its predecessor had fixed their pricing in such a way that phone calls between their own customers within their system were priced far below the termination rates demanded of Síminn in cases where Síminn's customers made calls to their customers.

14 Termination rates had been determined based on agreements between the companies, in accordance with an obligation under the Icelandic Telecommunications Act to agree such rates between themselves. In April 2003, the Post and Telecom Administration ordered Síminn to reduce its termination rates for phone calls ending in the GSM mobile phone network. Síminn subsequently lowered its rates. The termination rates of its competitors, however, rose during the period until near the end of 2006.

15 Fjarskipti bases its action on the view that all those who incur loss or damage as a result of a violation of Article 54 EEA must be guaranteed compensation for such loss or damage. According to the request, a disputed point in the case is if, when assessing whether the conditions for compensation are fulfilled, it is necessary that the competent authorities have reached a final conclusion concerning a violation of Article 54 EEA. Another disputed point is whether such a final conclusion is necessary for the interpretation of what constitutes an unlawful margin squeeze violating Article 54 EEA.

16 According to the request, the interpretation of Article 54 EEA could be of substantial significance for the resolution of the case. On that basis, Reykjavik District Court decided to stay the proceedings and ask the Court the following questions:

1. **Does it constitute part of the effective implementation of the EEA Agreement that a natural or a legal person in an EFTA State should be able to invoke Article 54 of the Agreement before a domestic court in order to claim compensation for a violation of the prohibitions of that provision?**

2. **When assessing whether the conditions are fulfilled for a compensation claim in view of a violation of competition rules, is it of significance whether the competent authorities have delivered a final ruling on a violation of Article 54 EEA?**

3. **Is it regarded as an unlawful margin squeeze, violating Article 54 EEA, when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than that at which it sells termination to its competitors?**

4. **Is the fact that an undertaking is in a dominant position on the relevant wholesale market sufficient for it to be guilty of applying an unlawful margin squeeze, violating Article 54 EEA, or must the undertaking also be in a dominant position on the relevant retail market?**

IV WRITTEN OBSERVATIONS

17 In accordance with Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Fjarskipti, represented by Dóra Sif Tynes, District Court Attorney, acting as Counsel;
- Síminn, represented by Halldór Brynjar Halldórsson, District Court Attorney, acting as Lead Counsel, on behalf of Helga Melkorka Óttarsdóttir, Supreme Court Attorney;
- the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry of Foreign Affairs, acting as Agent, Heimir Skarphéðinsson, Legal Officer, Ministry of Industries and Innovation, and Guðmundur Haukur Guðmundsson, Legal Officer, Icelandic Competition Authority, acting as Co-Agents, and Gizur Bergsteinsson, Attorney at Law, acting as Counsel;
- the Norwegian Government, represented by Ketil Bøe Moen and Henrik Kolderup, Advocates, Office of the Attorney General (Civil Affairs), and Carsten Anker, Senior Adviser, Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Ingibjörg-Ólöf Vilhjálmsdóttir and Carsten Zatschler, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Giuseppe Conte, Gero Meeßen and Martin Farley, members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

FJARSKIPTI

18 As a preliminary remark, Fjarskipti notes that the EFTA States have sought to align the decentralisation of the application of the EEA competition rules to the competition law regime in the EU by amending Protocol 4 to the SCA. However, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) ("the Damages Directive") has not been incorporated into the EEA Agreement. As that directive is not a part of EEA law, Fjarskipti submits that the relevant sources of law in this case is instead the practice and case law of the Court of Justice of the European Union ("ECJ") leading to the codifications included in the Damages Directive.

19 Under the first question, Fjarskipti submits that the ECJ has consistently held that individuals or economic operators can rely on the competition provisions of the Treaty on the Functioning of the European Union ("TFEU") before a national court. The full effectiveness of those provisions and in particular the effect of the prohibition laid down therein, would be put at risk if it were not open to any individual to claim damages for loss suffered by a conduct liable to restrict or distort competition.[3] The importance of private enforcement has also been stressed by the Court, stating that this ought to be encouraged, as private enforcement could contribute significantly to the maintenance of effective competition in the EEA.

3 Reference is made to the judgment in *Courage and Crehan,* C-453/99, EU:C:2001:465, paragraph 26.

The right to seek damages in the EEA should be in parallel to similar rules under EU law.[4]

20 In light of this, Fjarskipti argues that the EEA Agreement contains an individual right for any natural or legal person to claim damages for breach of competition law, such as a violation against Article 54 EEA. It follows from the principle of loyalty that a national court must uphold the right for individuals to seek damages for a violation of that provision. Fjarskipti also underlines that the decentralised application of EEA competition law is mandated by Protocol 4 SCA, which has been implemented in national law. Consequently, it is beyond doubt that it is for the national court to apply Article 54 EEA.

21 With regard to the second question, Fjarskipti notes that the EU has codified certain conditions for damages actions in the Damages Directive in order to facilitate private enforcement. In Fjarskipti's view, the principle of homogeneity calls for corresponding rights in the EEA and, regardless of the delayed incorporation of the Damages Directive, existing EEA law should be applied in such a way as to give effect to the right to claim damages and ensure homogeneous protection.

22 Fjarskipti argues that it would be tantamount to a breach of the principle of effectiveness if a natural or legal person would be required to prove anew a violation of Article 54 EEA where this has already been firmly established by national competition authorities. Where there is a final decision in place, as in this case, it would be contradictory to the obligations under the EEA Agreement if that

4 Reference is made to Cases E-14/11 *DB Schenker* v *ESA (DB Schenker I)* [2012] EFTA Ct. Rep. 1178, paragraph 132, and E-7/12 *DB Schenker* v *ESA (DB Schenker II)* [2013] EFTA Ct. Rep. 310, paragraph 139.

decision could not be relied upon before a national court in an action for damages.

23 Fjarskipti invites the Court to consider that the Damages Directive entails codification of case law that may serve as a point of reference also in the EFTA pillar. In Fjarskipti's view, it follows from the principles of homogeneity and loyalty combined that it is for the courts to balance the need for recognition of equal rights throughout the EEA against the possible effects of delayed incorporation. It calls for a careful consideration of whether EEA law can produce the same results as in the EU. In this context, Fjarskipti emphasises the importance of taking into account the principles of equivalence and effectiveness.

24 As for the third question, Fjarskipti submits that a margin squeeze is defined in legal literature as a pricing practice whereby a dominant undertaking adopts a pricing strategy that leaves its competitors in a downstream market that rely on an input from the dominant undertaking in an upstream market unable to compete effectively, as the difference between the dominant undertaking's input and retail price is too small for the competitors to compete effectively. A margin squeeze can only occur where there is a vertically integrated dominant undertaking in an upstream market supplying competitors in the downstream market.

25 Fjarskipti argues that for the finding of abuse it must be established that a practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anti-competitive effect that may

potentially exclude competitors who are at least as efficient as the dominant undertaking.[5]

26 Furthermore, Fjarskipti submits that all circumstances of a case must be taken into consideration as a whole. In particular, account must be had of the prices and costs of the dominant undertaking. The prices and costs of competitors should only be examined in particular circumstances, where it is not possible to refer to those of the dominant undertaking. It must also be demonstrated that the alleged unlawful practice is not in any way economically justified.[6] Finally, Fjarskipti submits that it is not relevant whether the dominant undertaking is obliged to purchase services from competitors at a rate higher than its own.

27 With respect to the fourth question, Fjarskipti submits that dominance on the downstream market is not needed for there to be an infringement on the upstream market. The possibility of a dominant undertaking to affect the market and thereby abuse its position is instrumental to finding an infringement of Article 54 EEA. It is of no relevance that competitors of a dominant undertaking are considered dominant in their own networks.

SÍMINN

28 With regard to the first question, Síminn notes that both parties to the case are invoking Article 54 EEA in support of their claims in the principal action and the counter-action, respectively. The parties therefore seem to agree that the first question should be answered in the affirmative. Síminn states that it constitutes part of the effective

5 Reference is made to the judgments in *Deutsche Telekom,* T-271/03, EU:T:2008:101; *Deutsche Telekom*, C-280/08 P, EU:C:2010:603; and *TeliaSonera Sverige*, C-52/09, EU:C:2011:83.

6 Reference is made to *TeliaSonera Sverige*, cited above.

implementation of the EEA Agreement that a natural or a legal person in an EFTA State is able to invoke Article 54 EEA before a domestic court in order to claim compensation for a violation of the prohibition in that provision.

29 As for the second question, Síminn submits that since the Damages Directive can have no bearing in the present case, this question should be answered based on EEA law as it stood before the enactment of that directive.

30 Síminn contends that stand-alone actions, that is damages claims where the competent authorities have not taken any decision, play a vital part in private enforcement of EU and EEA competition law. The significance of a final ruling from the competent authorities is thus limited, in the sense that stand-alone actions where no such ruling is present must be encouraged. Individuals and undertakings must be able to enforce their claim for damages on a stand-alone basis in cases not pursued by the competent authorities. Otherwise the effectiveness of the competition rules would be jeopardized.

31 Síminn further argues that stand-alone actions close the "enforcement-gap" created by the competent authorities' lack of resources to pursue all infringements. Such actions both increase the deterrence effect of the competition rules and the likelihood of such infringements being detected. It is not necessary to always refer to a decision by the Commission or competent authority having

established an infringement.[7] The right and the effectiveness of Article 54 EEA itself must be protected by allowing actions for damages before the national courts.

32 Síminn contends that the second question must be answered in a way that entails that the significance of a competent authority's final ruling, when assessing whether the conditions for a compensation claim is fulfilled, varies and depends on national law on evidence and tort, neither of which have been harmonized among the Contracting Parties. The significance of such rulings can never be such as to discourage stand-alone actions, which form a vital part of the effective enforcement of Articles 53 and 54 EEA.

33 With regard to the third question, Síminn submits that the question of whether a practice amounts to an unlawful margin squeeze depends on whether the practice excludes efficient competitors, as they would be forced to price their products at the relevant retail market at a loss or artificially reduced levels of profitability in order to compete with the dominant undertaking.[8] A margin squeeze can thus not occur unless the practice excludes from the market those competitors that are as efficient as the dominant undertaking.[9]

34 Síminn submits that the facts in the present case show that Fjarskipti both could compete profitably, as it did over a long period of time, and at the same time increase its market share. These facts

7 Reference is made to the judgments in *Courage and Crehan,* cited above, and *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461.

8 Reference is made to *Deutsche Telekom* T-271/03, cited above, paragraph 38; *Deutsche Telekom*, cited above, paragraph 143; and *TeliaSonera Sverige*, cited above, paragraph 33.

9 Reference is made to the judgment in *Intel*, C-413/14 P, EU:C:2017:632, paragraph 141.

are incompatible with the definition and essence of a margin squeeze. Furthermore, the successful entry of a new competitor into the market, and the capping of the termination fees at a level significantly higher than Síminn's cap, demonstrate that Síminn's pricing practice was not capable of creating any barriers to entry. Síminn further submits that it was just as dependant on access to its competitors' networks, as the competitors were to Síminn's network, and that it had to pay higher prices for that access than their competitors had to pay for access to Síminn's network.

35 In light of this, Síminn submits that the third question must be answered in the negative, provided that the dominant undertaking's termination fees are capped by the regulator at a significant lower level than the termination rates applying to new entrants. In such cases, it cannot be regarded as an unlawful margin squeeze when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than at which it sells termination to its competitors.

36 As for the fourth question, Síminn submits that it is clear from legal theory and from case law that in order to establish an abuse of dominant position in the form of a margin squeeze, it is sufficient for the undertaking in question to hold a dominant position on the relevant wholesale market. Its position on the relevant retail market is irrelevant for such a finding.[10]

10 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 83 to 89.

THE ICELANDIC GOVERNMENT

37 With regard to the first question, the Icelandic Government notes that there are two pillars on which the enforcement of EEA competition rules rests: the duty of public enforcement by punitive means (which lies with competition authorities) and private enforcement (initiated by individuals recurring to civil law means).[11] These two pillars, albeit different, complement each other. The first is aimed at deterrence, while the latter is designed to compensate by way of damages those who have been harmed.

38 The Iceland Government submits that private enforcement should be encouraged, as it helps maintaining effective competition in the EEA.[12] The full effect of the competition rules applicable in the EEA would be put at risk if it were not open to any person to claim damages for loss caused to them by a contract or by conduct liable to restrict or distort competition.[13] National courts have an essential part to play in the application of EEA competition, as they protect the subjective rights under EEA law by awarding damages to the victims of infringement.[14] The Icelandic Government thus proposes that the Court should answer the first question referred in the affirmative.

11 Reference is made to the Opinion of Advocate-General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, paragraph 59.

12 Reference is made to *DB Schenker I*, cited above, paragraph 132.

13 Reference is made to the judgments in *Courage and Crehan*, cited above, paragraph 26; *Manfredi and Others*, cited above, paragraphs 60 and 90; and *Donau Chemie*, C-536/11, EU:C:2013:366, paragraph 27; and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 41.

14 Reference is made to the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L 1, p. 1), which is relevant for the interpretation of Protocol 4 SCA.

39 As for the second question, the Icelandic Government notes that, in the absence of EEA law governing procedural rights and remedies, it is for the EEA States to lay down the procedural rules governing actions for safeguarding rights that individuals derive from EEA law. This includes the right to claim damages for harm suffered as a result of infringements of EEA competition rules, provided that the principles of equivalence and effectiveness are observed.[15] In this respect, national competition authorities are better placed than private individuals to detect infringements and to produce evidence of such infringements, because competition investigations require complex factual and economic analysis.

40 In the absence of a final ruling of the competent competition authority, private parties have no assurance of the existence of an infringement of the EEA competition rules. In the Icelandic Government's view, the uncertainty of the outcome works as a disincentive to bring stand-alone actions. Thus, private parties generally wait until the competent competition authority has reached a final decision before relying on that decision in support of its claim before the national court in a follow-on action. The Icelandic Government suggests that no distinction should be made between stand-alone and follow-on actions, as such a distinction would discourage private enforcement of violations of competition rules. As for Icelandic law, a decision of the Icelandic competition authority becomes final when it cannot longer be reviewed (meaning the decision has not been appealed within the applicable time limits, or it has been confirmed by the Appeals Committee and courts).

15 Reference is made to the judgments in *Courage and Crehan*, cited above, paragraph 29; *Manfredi and Others*, cited above, paragraphs 62, 64 and 81; *Donau Chemie*, cited above, paragraph 27; and *Kone and Others*, C-557/12, EU:C:2014:1317, paragraphs 24 to 26, 32 and 33.

41 In view of this, and in answer to the second question referred, the Icelandic Government submits that a final ruling by the competent authorities on a violation of Article 54 EEA, albeit beneficial for the claimant, is not a requisite to support a claim for damages before a national court.

42 With regard to the third question, the Icelandic Government points out that dominant undertakings have a special responsibility not to allow their conduct impair genuine undistorted competition in the internal market.[16] Article 54 EEA prohibits dominant undertakings from adopting pricing practices with an exclusionary effect on competitors and strengthening its dominant position by using methods of unfair competition.[17] This provision does not, moreover, contain an exhaustive list of all the practices that can amount to abuse of a dominant position.[18] In fact, it stems from case law that certain pricing practices of dominant firms can be abusive in nature. The Court has established that a margin squeeze constitutes an independent abuse under Article 54 EEA.[19]

43 However, Article 54 EEA only applies to dominant undertakings; as such, it is necessary to examine the position of both plaintiff and defendant in the relevant markets.[20] The Icelandic Government

16 Reference is made to Case E-15/10, *Posten Norge*, [2012] EFTA Ct. Rep. 246, paragraph 177, and the judgments in *Michelin*, C-322/81, EU:C:1983:313, paragraph 57; *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23; and *Intel*, cited above, paragraph 135 and case law cited.

17 Reference is made to *Intel*, cited above, paragraph l36; *Deutsche Telekom*, cited above, paragraph 177 and case law cited; and *TeliaSonera Sverige*, cited above, paragraph 39.

18 Reference is made to the judgment in *British Airways*, C-95/04, EU:C:2007:166, paragraph 57 and case law cited.

19 Reference is made to Case E-29/15, *Sorpa* [2016] EFTA Ct. Rep. 827; and *Deutsche Telekom*, cited above, paragraph 183.

20 Reference is made to *Deutsche Telekom*, cited above, paragraph 170.

submits that when assessing if a network operator has applied an unlawful margin squeeze, it is moreover necessary to analyse the surrounding factors of the case and take into account all the relevant circumstances. In this respect, it notes that some network operators, such as Síminn, are in a particularly strong position largely as a result of the monopoly it enjoyed before the liberalisation of the telecommunications sector.

44 The Icelandic Government also notes that under Icelandic law, network operators are faced with an interconnection obligation to ensure end-to-end connectivity between their networks. They must agree on termination rates between themselves and provide access to each other's networks, which in turn limits the opportunity to exercise buyer power. Accordingly, several factors can affect the finding of dominance on the wholesale level. In addition, when determining whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition.[21]

45 In order to assess the existence of a margin squeeze, it is necessary to look at the costs and the strategy of the dominant undertaking, assessing the difference between wholesale and retail prices. However, there is no need to demonstrate that such prices are in themselves abusive.[22] In this regard, the Icelandic Government notes that the approval by a national regulator of the prices set by a

21 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 28, and *Deutsche Telekom*, cited above, paragraph 175 and case law cited.

22 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 41 to 44, and *Deutsche Telekom*, cited above, paragraphs 169, 183 and 198 to 203.

dominant operator does not preclude their qualification as abusive under Article 54 EEA if the dominant operator is allowed to adjust them.[23] Moreover, for a margin squeeze to be abusive, such a practice must have anti-competitive effects on the market, and such effects do not need to be concrete, but rather have the potential of excluding competitors who are at least as efficient.[24]

46 In light of this, the Icelandic Government argues that it is an indication of an unlawful margin squeeze if the retail division of a dominant operator is unable to profit from the sale of telephone calls (that is without incurring losses) if it had to bear the cost of termination within its network.[25] The fact that the dominant operator is also obliged to purchase termination services from its competitors at a higher price than the price it offers its competitors cannot affect this finding. The high termination rates discourage consumers from changing their provider; the large subscriber base means that competitors' customers have relatively more off-net calls than its own customers. The high termination rates therefore affect competition on both the wholesale and retail level. This in turn hinders competition to the detriment of consumers.[26]

47 In the view of the Icelandic Government, the third question should be answered in the affirmative.

48 With regard to the fourth question, the Icelandic Government merely notes that it is settled case law that it is not necessary for an undertaking dominant on the upstream market to be dominant also on the downstream market in order to establish that it has applied an

23 Reference is made to *Deutsche Telekom*, cited above, paragraphs 80 to 90.
24 Reference is made to the judgments in *TeliaSonera Sverige*, cited above, paragraph 64, and *Telefónica*, C-295/12 P, EU:C:2014:2062, paragraph 124.
25 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 75 to 77.
26 Reference is made to the judgment in *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraph 186 and case law cited.

abusive margin squeeze. Indeed, the fact that a dominant undertaking's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of the prohibition in Article 102 TFEU and, equivalently, Article 54 EEA.[27]

49 Consequently, the Icelandic Government submits that the question of whether a pricing practice introduced by a vertically integrated dominant undertaking on the relevant wholesale market is abusive does not depend on whether that undertaking is also dominant on the retail market.

THE NORWEGIAN GOVERNMENT

50 The Norwegian Government points to the absence of incorporation of the Damages Directive into the EEA Agreement. Due to this fact, the questions must be assessed based on established case law of the Court and the ECJ. In the Norwegian Government's view, the starting point is the procedural autonomy of the EEA States, subject to the principles of equivalence and effectiveness, which derive from the obligation of loyalty in Article 3 EEA.

51 With regard to the first question, the Norwegian Government recalls that Article 3 EEA obliges the Contracting Parties to take all appropriate measures to ensure the fulfilment of obligations arising from the EEA Agreement. As Article 54 EEA and Article 102 TFEU are sufficiently precise and unconditional, they may not only impose obligations on the undertakings to which they are addressed, but

27 Reference is made to the judgments in *TeliaSonera Sverige*, cited above, paragraphs 83-89 and case law cited, *Tetra Pak*, C-333/94 P, EU:C:1996:436, paragraphs 25 to 31.

also establish rights on private parties to protect their interests in case of breach. In this regard, the Norwegian Government emphasises that this is not a question of direct effect in the sense that applies to non-incorporated directives under EU law, to which there is no comparison under EEA law, cf. Article 7 EEA. Rather the issue is whether Article 54 EEA, having been implemented in Icelandic law, is sufficiently precise and unconditional to not only impose obligations on undertakings, but also to establish rights for private parties to protect their interests.

52 Similarly to the Icelandic Government, the Norwegian Government notes that both the Court and the ECJ have held that private enforcement under Article 54 EEA and Article 102 TFEU should be encouraged.[28] This right is, however, not without limitations – it is for the domestic legal system to set out the conditions for its exercise, subject to the principles of equivalence and effectiveness.[29]

53 The Norwegian Government thus supports the right of individuals to claim damages for losses caused by conduct which is liable to restrict or distort competition contrary to Articles 53 and 54 EEA. The right to claim damages makes those rules more effective. These considerations are irrespective of the fact that the Damages Directive has not yet been incorporated into the EEA Agreement: despite existing legal differences, the underlying approach to the beneficial nature of private enforcement is shared by the EEA and the EU alike.

28 Reference is made to *DB Schenker I*, cited above, paragraph 132; Case E-5/13 *DB Schenker V* [2014] EFTA Ct. Rep. 304, paragraph 134; *Courage and Crehan*, cited above, paragraph 29; and *Manfredi and Others*, cited above, paragraphs 62 and 64.

29 Reference is made to *Manfredi and Others,* cited above, and to recital 11 in the preamble to the Damages Directive.

54 The Norwegian Government thus proposes that the Court should answer the first question in the affirmative.

55 As for the second question, the Norwegian Government notes that it addresses a follow-on action of Fjarskipti to the decision taken by the Icelandic Competition Authority, and which raises the issue of the application of the principle of effectiveness. It follows from Article 3 EEA that private parties must be given the possibility to enforce Article 54 EEA by claiming damages. In the absence of EEA rules governing the matter, it falls under the procedural autonomy of the EEA States to lay down detailed procedural rules, including substantial civil rules of damages, provided that they respect the principles of equivalence and effectiveness.[30]

56 In this regard, the Norwegian Government notes that Article 9 of the Damages Directive on the significance of preceding competition authority decisions was framed to enhance legal certainty. Beyond the ambit of the harmonising provision of that directive, the principles of equivalence and effectiveness shall apply. It is argued that in the case at hand, the interrelation between procedural autonomy and said principles should be the same under the EEA Agreement and EU law prior to the Damages Directive. As such, the national court must assess whether the procedural requirements at stake make it excessively difficult or practically impossible for Fjarskipti to exercise its rights under EEA law.

57 With regard to the decision of the national competition authority, the Norwegian Government submits that these bodies are, given their wide-ranging investigative powers, generally better equipped than private parties to investigate and prove the existence of

30 Reference is made to *Courage and Crehan*, cited above, paragraph 29, and *Manfredi and Others*, cited above, paragraphs 62 to 64, 71, 72, 77, 81, 82, and 92.

infringements. The ability of a private party to prove infringement of Article 54 EEA would be substantially reduced without the possibility of relying on the analyses in a preceding decision from the competent authority. Under Norwegian procedural law, a decision finding an infringement of Article 54 EEA would have no binding effect on the presiding court, irrespective of whether it has been subject to legal review. However, to the extent a plaintiff presents a final administrative decision relating to the same facts and based on the same legal norm, and which has been subject to a thorough contradictory administrative process (perhaps also judicial proceedings), one may expect that it will be up to the defendant to set forth compelling legal and factual arguments, supported with necessary evidence, in order to rebut the evidentiary and legal significance of the decision. The Norwegian Government assumes that, in a similar way, a preceding final decision by the competition authorities should be significant also in Iceland.

58 On this basis, the Norwegian Government argues that the second question should be answered in the affirmative. It is in accordance with the principles of equivalence and effectiveness that it be rendered significant that the competent authorities have delivered a final decision on a violation of Article 54 EEA. However, bearing in mind the principle of national procedural autonomy, the assessment of the significance ultimately lies with the referring court.

59 With regard to the third question, the Norwegian Government recalls that due to the nature of the termination service and the existence of absolute entry barriers in the relevant markets, each network owner is normally deemed to hold a dominant position in

the market for termination of calls in its own network.[31] Potential competition concerns arise when operators set prices at the wholesale level while being vertically integrated into retail calls markets where they compete with their wholesale customers. One such potential competition concern is unfair pricing, referring to the incentives that terminating operators have to raise rivals' costs by setting termination prices at levels that impede their rivals' ability to compete in downstream retail markets.

60 The Norwegian Government states that the concept of abuse of a dominant position is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods 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.[32] Article 54 EEA must be interpreted as referring not only to practices that may cause damage to consumers directly, but also to practices detrimental to them by way of their impact on competition. Article 54 EEA does not prohibit an undertaking from acquiring, on its own merits, a dominant position. However, such undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market.[33]

31 Reference is made to the seventh recital in the preamble of the EFTA Surveillance Authority Recommendation of 13 April 2011 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EFTA States (ESA Recommendation 2011).

32 Reference is made to *Posten Norge*, cited above, paragraph 130.

33 Reference is made to *Posten Norge*, cited above, paragraph 127.

61 The Norwegian Government argues that in order to determine whether a dominant undertaking has abused its position by its pricing practices, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition.[34]

62 Furthermore, the Norwegian Government submits that, in order to establish whether a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an effect that may potentially exclude competitors who are at least as efficient as the dominant undertaking.[35]

63 With respect to the assessment of the reciprocal situation raised by the referring court, the Norwegian Government argues on a general basis that it cannot be ruled out that an identified margin squeeze inferred from the termination pricing of the dominant undertaking may produce potential anti-competitive effects, even where that undertaking must purchase termination services from competitors at a higher rate than its own.

64 The assessment of potential anti-competitive effects in the market should be distinguished from the assessment, in an action for damages, of the extent to which an abusive margin squeeze has inflicted harm on an individual plaintiff. The question of a potential anti-competitive effect concerns the extent to which a margin squeeze is capable of making entry to, or growth in, the relevant

34 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 28; *Deutsche Telekom*, cited above, paragraph 175.

35 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 64; and *Telefónica*, cited above, paragraph 124.

retail market more difficult or impossible for competitors who are as efficient as the dominant undertaking.

65 It is therefore the view of the Norwegian Government that the answer to the third question should be that the matter of reciprocity in termination pricing does not rule out that an identified margin squeeze is unlawful. However, it is for the referring court, in the light of the circumstances of the case before it, to examine whether the pricing practices at issue in fact constitute an unlawful margin squeeze in violation of Article 54 EEA.

66 As for the fourth question, the Norwegian Government submits that the question whether a pricing practice introduced by a vertically integrated dominant undertaking in a wholesale market and resulting in the margin squeeze of competitors of that undertaking in the retail market is abusive, does not depend on whether that undertaking is dominant in that retail market. In such cases, therefore, the question whether the vertically integrated dominant firm holds a dominant position on the relevant retail market in question need not be examined.[36]

ESA

67 With regard to the first question, ESA notes that the full effect of EEA competition rules would be put at risk if there were no possibility of claiming damages before a domestic court for a loss caused by a breach of Article 54 EEA.[37] Similarly to the Icelandic and Norwegian Governments, ESA points to the vital role of national

36 Reference is made to the judgments in *TeliaSonera Sverige*, cited above, paragraph 89; and *Telefónica*, T-336/07, EU:T:2012:172, paragraph 146, upheld on appeal in *Telefónica*, cited above.

37 Reference is made to *Courage and Crehan*, cited above, paragraphs 24 and 26; and *Manfredi and Others*, cited above, paragraphs 59 and 61, to be read in light of the principle of homogeneity.

courts in applying EEA competition rules and ensuring their enforcement through actions by private parties.[38] Moreover, by way of legal background, ESA refers to the Damages Directive, which reiterates the right to claim full compensation for anyone who suffers harm caused by an infringement of EU competition law.

68 In ESA's view, it is clear that market actors may rely on Article 54 EEA before courts of the EFTA States in actions for damages for a breach of that provision. However, in the absence of harmonised EEA law governing procedural rights and remedies, it is for the EFTA States to lay down the procedural rules governing actions for rights that individuals and economic operators derive from EEA law.[39] Such rules and their application must respect the principles of equivalence and effectiveness.

69 ESA submits that under the principle of equivalence, national procedural rules governing actions for safeguarding rights derived from EEA law must not be less favourable than those governing similar domestic actions. Under the principle of effectiveness, national rules on the right to seek damages before national courts for harm suffered due to a breach of EEA competition law must not make it practically impossible or excessively difficult to exercise that right.[40]

70 ESA notes that it is for the national court to establish whether the relevant procedural rules in national law respect such principles. As for the principle of effectiveness, the court should review, inter alia, the national rules on lapse of claims and limitation periods (including their length and the extent to which they are suspended

38 Reference is made to the preamble to Regulation No 1/2003.

39 Reference is made to Case E-11/12 *Beatrix Koch* [2013] EFTA Ct Rep. 272, paragraphs 115 and 121 and following; *Courage and Crehan*, cited above, paragraph 29; *Manfredi and Others*, cited above, paragraphs 62 and 81, *Donau Chemie*, cited above, paragraph 27; *Kone and Others*, cited above, paragraphs 21 to 26, 32 and 33.

40 Reference is made to *Beatrix Koch*, cited above, paragraphs 121 and following.

during any investigation of the national competition authorities), as well as how difficult it is for litigants to bring follow-on or stand-alone damages claims for breaches of Article 54 EEA (for example, the rules on discovery or disclosure, and on burden of proof). In this regard, ESA suggests that the national court takes into account the approach of the Damages Directive which, albeit not incorporated into the EEA Agreement, can be seen as an example of a framework in which effective remedies for breaches of competition rules take place.[41] The national court must ensure that where national limitation periods are not suspended during the investigation of a competition authority, the limitation period is long enough to ensure an effective remedy for a breach of Article 54 EEA.[42]

71 In light of the above, ESA takes the view that the Court should answer the first question in the affirmative.

72 As for the second question, ESA makes two preliminary remarks. First, it notes that it understands the term "competent authorities" used in that question to mean the Icelandic Competition Authority and the Competition Appeals Committee, which were competent and required to rule on whether there was a breach of Article 54 EEA in the present case. They acted under Article 3(1) and Article 5 of Chapter II of Protocol 4 SCA, which provide for the decentralised enforcement of the EEA competition rules by the competition

41 Reference is made to Article 10 of the Damages Directive.
42 Reference is made to *Manfredi and Others*, cited above, paragraphs 78 to 82.

authorities of the EFTA States. Protocol 4 SCA was amended to include the necessary provisions analogous to those of Regulation 1/2003 and thereby decentralise enforcement of Articles 53 and 54 EEA within the EFTA pillar. Second, ESA states that it considers a "final ruling" to be one which cannot be, or can no longer be, appealed by normal means. This encompasses the ruling in the case before the referring court.

73 ESA submits that while there is nothing in EEA law requiring a final ruling from the competent authorities as a precondition for bringing a damages claim, it is usually easier for a claimant to wait until the competent authorities have ruled that there has been an infringement. The reason is that, in general, the competent authorities are better placed than victims of anti-competitive conduct to uncover infringements of EEA competition rules. This is in particular due to the authorities' wide-ranging investigative powers, including significant means with which to uncover evidence. Where a competent authority has initiated an investigation, victims of the practise under scrutiny will generally wait until the authority has reached a final decision before deciding whether to bring a follow-on claim before the national courts.

74 ESA notes that in the EU, a final infringement decision will constitute full proof before civil courts in the same Member State and at least *prima facie* evidence of an infringement before courts of other Member States. It will also be of procedural significance in the EU.[43] The harmonising rules of the Damages Directive are not yet incorporated into the EEA Agreement. The general principles of

43 Reference is made to Articles 9 and 10 of the Damages Directive.

equivalence and effectiveness nevertheless apply. A national court must bear these principles in mind when considering whether to take into account a final ruling, and if so, to what extent it should be taken into account.

75 ESA submits that it would undermine the principle of effectiveness if national courts failed to take any account of a final ruling of their national competition authorities, given the time and resources involved in the investigation. In ESA's view, it would make a claim for damages excessively difficult if the claimant would be required to bring a stand-alone damages action before the national court notwithstanding a competition authority decision establishing an infringement. Furthermore, ESA submits that national courts should take into account relevant rules on limitation periods and lapse of right and interpret and apply those rules in such a way as to ensure that claimants are granted an effective remedy.

76 ESA argues that, when considering how much weight to attach to a final ruling, the national court should be free to consider all the relevant facts and circumstances of the case, including the amount and quality of evidence in the relevant ruling. ESA considers that in all but the most exceptional cases, a final ruling should be considered at least prima facie evidence that an infringement of Article 54 EEA took place. It should be within the national court's discretion to decide that a final ruling constitutes irrefutable proof of the infringement, for the purposes of bringing a follow-on damages claim.

77 In light of the above, ESA submits that the answer to the second question should be that a final ruling is not a precondition for bringing a damages claim. Such a claim can take the form of a follow-on action or a stand-alone action. In the absence of harmonisation, the effect of a final ruling is governed by national

rules and procedures of the EFTA States, subject to the general principles of effectiveness and equivalence.

78 As for the third question, ESA states that a margin squeeze may occur where a vertically-integrated firm sells a product or service to undertakings on an upstream (wholesale) market where it is dominant and also competes with those undertakings on a downstream (retail) market for which the product or service is an input. A margin squeeze is capable of constituting abuse of a dominant position under Article 54 EEA where the margin calculation results in a particular spread and the resulting "squeeze" is capable of having a negative effect on competition and an effect on trade in the EEA.

79 ESA submits that the spread between the wholesale price charges upstream for the input concerned, and the retail price charged to the dominant undertaking's own customers downstream, must be insufficient for competitors as efficient as the dominant undertaking to either cover the product-specific costs of supplying the retail product or service or to make a reasonable profit.[44] In such cases, the potential anti-competitive effect of a margin squeeze usually results from increased entry costs of competitors or their delayed prospects of becoming profitable.

80 ESA argues that for a margin squeeze to be considered abusive, the practice must have an anti-competitive effect on the market, but this need not be concrete. It is sufficient to demonstrate that the margin squeeze is capable of having an effect that may potentially exclude competitors that are at least as efficient. Whether the exclusion takes place or not, is not decisive. A negative margin (wholesale price is higher than the relevant retail price) is at least potentially

44 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 32.

exclusionary, given that competitors would be compelled to sell at a loss.[45] As for a positive margin, it must be demonstrated that the application of that pricing practice was likely to make it at least more difficult for the operators concerned to trade on the relevant market, for example by reason of reduced profitability.[46]

81 Concerning the existence of so-called asymmetric termination rates, as in the case at hand, ESA takes the view that such a situation does not in itself preclude the finding of an unlawful margin squeeze in breach of Article 54 EEA. In order to establish whether a margin squeeze is abusive, each case must be assessed in its own specific context and circumstances.[47]

82 In the assessment of dominance, ESA states that the market definition for mobile call termination on each individual network means that each operator has a 100 % market share, providing a strong presumption of dominance. ESA notes that Síminn was found to be dominant on the relevant wholesale market for mobile call termination on its own mobile network.

83 As for the assessment of abuse, ESA submits that the margin calculation contains two main points of reference, which are typically the dominant undertaking's input price in the relevant wholesale market, and the same undertaking's retail price charged to its own downstream customers. Input prices charged by others in separate wholesale markets are irrelevant. The relevant retail price depends on the facts of each case. In the case at hand, the relevant prices are Síminn's input price and the retail price for calls within Síminn's own network.

45 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 73.
46 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 74.
47 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 28; *Deutsche Telekom*, cited above, paragraph 175; and *Posten Norge*, cited above, paragraphs 128 and 129.

84 ESA argues that an identified insufficient margin must also be capable of having an anti-competitive effect in the relevant retail market. When assessing an alleged margin squeeze, the potential anti-competitive effect must relate to the possible barriers that such a pricing practice may create to the growth on the retail market of the services offered to end users and, therefore, on the degree of competition in that market.[48] ESA finds that the existence of asymmetric termination rates does not preclude a potential anti-competitive effect. The assessment of potential effects entails a specific analysis of the insufficient margin applied by the dominant undertaking under investigation and depends on a number of factors, including the relative size of downstream competitors and the role of the dominant undertaking's input in influencing entry or growth on the downstream market.

85 ESA submits that the answer to the third question should be that the fact that a dominant undertaking in one wholesale market is obliged to purchase services from other operators in separate relevant wholesale markets at higher rates than its own, does not in itself preclude the existence of an abusive margin squeeze.

86 With respect to the fourth question, ESA notes that the ECJ has ruled that so-called double dominance is not necessary for the finding of an abusive margin squeeze in breach of Article 54 EEA.[49] It is only required that the vertically-integrated undertaking concerned has a dominant position on the relevant wholesale market, and not that it

48 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 62.
49 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 83 to 89.

also holds a dominant position on the relevant retail market.[50] ESA emphasises that, in addition to finding a dominance at the wholesale level, the other conditions for finding a margin squeeze must be met; dominance itself is not prohibited.[51]

87 In ESA's view, the answer to the fourth question must be that the dominance part of the test for finding an unlawful margin squeeze within the meaning of Article 54 EEA is met where the undertaking is dominant on the relevant wholesale market. Dominance is not required on the relevant retail market.

THE COMMISSION

88 The Commission notes that Article 102 TFEU and Article 54 EEA are identical in substance. According to Article 6 EEA, provisions of the EEA Agreement that are identical in substance to corresponding EU treaty provisions shall be interpreted in conformity with relevant rulings of the ECJ given prior to the date of signature of the EEA Agreement.

89 As for Article 102 TFEU, the ECJ has held that it produces direct effects in private relationships, as well as creating rights for individuals that must be safeguarded.[52] Moreover, it is also established that national courts must ensure the full effect of such

50 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 89.
51 Reference is made to *Michelin*, cited above, paragraph 57.
52 Reference is made to the judgments in *BRT and SABAM*, Case 127/73, EU:C:1974:25, paragraph 16; and *Guérin automobiles* v *Commission,* C-282/95 P, EU:C:1997:159, paragraph 39.

provisions.[53] In the Commission's view, the same finding should apply to Article 54 EEA. Both Article 102 TFEU and Article 54 EEA establish the same obligation as regards the prohibition of abuse of a dominant position. Likewise, the obligation to provide for an effective remedy in damages for a breach of competition rules, must – in view of the principle of homogeneity and the aim of ensuring equal treatment of individuals throughout the EEA[54] – be interpreted as being sufficiently precise and unconditional to have direct legal effect. Article 54 EEA is in any event implemented in Article 11 of the Icelandic Competition Act. That provision is identical in substance to Article 102 TFEU and Article 54 EEA. It must therefore be interpreted accordingly as regards the obligation to provide for an effective remedy in damages for a breach of that prohibition.

90 The Commission argues that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EEA. However, in the absence of EEA rules governing the matter, it is for the domestic legal system of each Contracting Party to prescribe the detailed rules governing the exercise of that right, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or

53 Reference is made to the judgments in, inter alia, *Simmenthal*, Case 106/77, EU:C:1978:49, paragraph 16, *Factortame*, C-213/89, EU:C:1990:257, paragraph 19; and *Courage and Crehan*, cited above, paragraph 25 and following.

54 Reference is made to Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraphs 32, 75 and 80.

excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[55]

91 On those grounds, the Commission submits that the first question should be answered in the affirmative, meaning that a natural or a legal person should be able to invoke Article 54 EEA before a national court in order to claim damages for loss caused to it by a violation of that provision.

92 As for the second question, the Commission notes that it concerns two separate aspects. First, whether it is *necessary* that a national competent authority has reached a final conclusion concerning a violation of Article 54 EEA, and second, whether a national court assessing a damages claim concerning an alleged violation is *bound* by a finding by a national competent authority of a violation of Article 54 EEA. The question does not raise the issue of whether a national court in the EEA would be bound by a decision by ESA or the Commission.

93 Under the first aspect, the Commission reiterates its view that Article 54 EEA creates rights for individuals directly applicable in relations with other individuals and that national courts are obliged to ensure that those rules are given full effect and that the rights are protected. The practical effect of the prohibition in Article 54 EEA would be put at risk if it were not open to any individual to claim damages for loss caused to that individual by conduct infringing that provision. For such a claim to arise, it is not necessary that the competent authorities have reached a final conclusion concerning a violation. Under EU law, it is generally accepted that damages claims for breach of competition rules can be brought either following a decision of a competition authority ("follow-on action") or without a

55 Reference is made to *Manfredi and Others*, cited above, paragraph 64; *Courage and Crehan*, cited above, paragraph 29; and *Palmisani v INPS*, C-261/95, EU:C:1997:351, paragraph 27.

preceding decision ("stand-alone action"). In the Commission's view, the same applies to the civil law consequences of a violation of Article 54 EEA.

94 Under the second aspect, the Commission notes that Article 9 of the Damages Directive establishes binding effect of decisions of national competition authorities in the EU. This binding effect does not derive from EU primary law, but from a directive that is not incorporated into the EEA Agreement. Therefore, the Commission considers that there is no obligation under EEA law that an infringement of competition law found by a final decision of a national competition authority, or by a review court, should be deemed to be irrefutably established for the purposes of an action for damages brought before their national courts for a violation of Article 54 of the EEA Agreement.

95 With regard to the third question, the Commission submits that the fact that a dominant undertaking in an upstream wholesale market is obliged to purchase similar services from competitors on the downstream retail market at a higher price than its own, does not in itself exclude the possibility of finding an unlawful margin squeeze by the dominant undertaking.

96 The Commission states that the abuse of a dominant position is an objective concept relating to the conduct of a dominant undertaking which has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Whether a dominant undertaking's conduct is abusive turns on the risk that such conduct poses to competition on the market generally, and is not limited to, or conditioned on, whether a particular actor is able to limit the potential impact of the dominant undertaking's conduct on its position.

97 The Commission submits that the abusiveness of a margin squeeze practice must be assessed not only with regard to the possibility that that practice may drive equally efficient operators who are already active in the relevant downstream market from that market, but also by taking into account any barriers the practice is capable of creating for operators who are potentially equally efficient and who are not yet present on that market.[56]

98 Furthermore, the Commission argues that for a margin squeeze to be abusive it must be demonstrated that the dominant undertaking's conduct is capable of making it more difficult or impossible for competitors to enter the market concerned. As such, it is not necessary to demonstrate that the margin squeeze has a concrete or actual effect on any individual competitor or competition generally. Rather, the relevant effects analysis relates to the potential effects that the margin squeeze practice could have through the possible barriers that the dominant undertaking's practice may have erected in respect of the degree of competition on the downstream market.[57]

99 The Commission submits that an assessment of a margin squeeze is generally carried out on the basis of the dominant undertaking's own prices and cost structure. It is only in exceptional circumstances, where it is not possible to refer to the dominant undertaking's prices and costs, that those of its competitors should be examined.[58]

100 The Commission notes that it is open to a dominant undertaking to demonstrate that its conduct was objectively justified; meaning that its conduct is either objectively necessary, or that the exclusionary

56 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 94; and *Deutsche Telekom*, cited above, paragraph 178.

57 Reference is made to *Deutsche Telekom,* cited above, paragraphs 250 to 253; *TeliaSonera Sverige*, cited above, paragraphs 61 to 63; and *Telefónica*, cited above, paragraph 275.

58 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 45 and 46.

effect produced may be counterbalanced by advantages in terms of efficiency that also benefit consumers.[59] The Commission further notes that, although it is not relevant for the assessment of Síminn's conduct, a finding by the referring court that Fjarskipti had also engaged in an unlawful margin squeeze could potentially have an impact on Fjarskipti's ability to claim compensation or the attainable amount for compensation. The same would apply with respect to Síminn's claim in the counter-action. These, however, are matters to be determined by the referring court on the basis of the national rules governing the damages action.

101 As for the fourth question, the Commission submits that it follows from consistent case law of the EU Courts that the question of whether a pricing practice introduced by a vertically integrated dominant undertaking in a wholesale market that results in a margin squeeze of competitors of that undertaking in the relevant retail market is abusive, does not depend on whether that undertaking is dominant in that retail market.[60]

102 Consequently, the Commission is of the view that the fact that a vertically integrated undertaking only holds a dominant position on the upstream wholesale market, but not on the relevant downstream retail market, does not, as such, exclude a finding that the undertaking's pricing practices constitute an unlawful margin squeeze.

Per Christiansen
Judge-Rapporteur

59 Reference is made to the judgments in *United Brands*, Case 27/76, EU:C:1978:22, paragraph 184; *RTE and ITP* v *Commission*, C-241/91 P and C-242/91 P, EU:C:l995:98, paragraphs 54 and 551; *TeliaSonera Sverige*, cited above, paragraphs 31 and 75; and *Post Danmark*, cited above, paragraphs 41 and 42.

60 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 89 and 114; and *Telefónica*, T-336/07, cited above, paragraph 146.