

EFTA COURT

Action brought on 28 August 2020 by Telenor ASA and Telenor Norge AS against the EFTA Surveillance Authority

(Case E-12/20)

An action against the EFTA Surveillance Authority was brought before the EFTA Court on 28 August 2020 by Telenor ASA and Telenor Norge AS, represented by Siri Teigum, advocate, Advokatfirmaet Thommessen AS, Postboks 1484 Vika, 0116 Oslo, Norway.

The Applicants request the EFTA Court:

- **to annul the Decision of 29 June 2020 in Case No 71480 Telenor in whole;**
- **in the alternative, to annul the Decision in part, that is in relation to two or one of the contested individual infringements; and**
- **in the alternative, to annul the Decision in part in relation to SPs, in so far as 2011 and 2012 is concerned;**
- **in the alternative, to annul or reduce the fines imposed on the Applicants in exercise of the Court's unlimited jurisdiction; and**
- **to order ESA to pay the Applicants' costs and expenses in connection with these proceedings.**

Legal and factual background and pleas in law adduced in support:

- Telenor ASA is a global telecommunications operator that offers its services in the Nordics, and in Asia. Telenor Norge AS, which operates in the Norwegian market for telecommunication services, is its subsidiary. The Decision holds Telenor ASA and Telenor Norge AS jointly and severally liable for the fines in question (hereinafter jointly referred to as Telenor or the Applicant).
- The EFTA Surveillance Authority (ESA) adopted a Decision in Case No 71480 (the Decision) on 29 June 2020, which concluded that Telenor had infringed Article 54 EEA by applying unfair tariffs not allowing equally

efficient competitors, relying on wholesale access and origination services on Telenor's public mobile telephone network in Norway, to replicate the stand-alone mobile broadband (MBB) services offered by Telenor Norge AS to residential customers in Norway, without incurring a loss, including wholesale NRO tariffs to Network Norway (NwN) from 1 August 2008 to 31 August 2010, wholesale MVNO tariffs to Ventelo from 1 January 2008 to 30 November 2010 and wholesale Service Provider (SP) tariffs from 1 January 2008 to 31 December 2012.

- ESA imposed three separate fines of EUR 32 562 000 (related to NwN), EUR 27 783 000 (related to Ventelo) and EUR 51 606 000 (related to SPs), respectively, in total EUR 111 951 000, on Telenor, and ordered Telenor to immediately bring such acts to an end insofar as it had not already done so. In addition, ESA ordered Telenor to refrain from repeating such conduct, and any conduct having the same or equivalent object or effect.
- According to the Applicant, the Decision does not justify the finding of an infringement of Article 54 of the EEA Agreement, cf. Article 1.
- The Applicant states that the Decision starts with an unprecedented and unlawful definition of the retail market, unsupported by its analysis. It maintains that ESA proceeds to wrongfully base its margin assessment and effects analysis on this excessively narrow market. As a result it failed to engage with the way competition actually occurred in the market. However, when ESA assessed the fine, it took an expansive approach, counting large sums of wholesale turnover outside that market, and triple-counting Telenor's downstream revenue. The Applicant argues that this led to a fine wholly disproportionate and contrary to ESA's own Guidance.