E-12/20-32

REPORT FOR THE HEARING*

in Case E-12/20

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Telenor ASA, established in Fornebu, Norway,

Telenor Norge AS, established in Fornebu, Norway,

and

EFTA Surveillance Authority,

seeking the annulment of the EFTA Surveillance Authority's Decision No 070/20/COL of 29 June 2020 relating to proceedings under Article 54 of the EEA Agreement (Case No 71480 Telenor).

I Introduction

1. Telenor Norge AS, including, where relevant, its legal predecessor Telenor Mobil AS and its parent company Telenor ASA (together "the applicants" or "Telenor"), is the incumbent fixed and mobile communications operator in Norway and the owner of one of the two nationwide mobile communications networks. Telenor offers mobile communications services both in the wholesale and the retail markets.

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* The parties have been presented with the draft of the Report for the Hearing, and have submitted comments which have all been taken into account and incorporated into the text.

2. The case concerns Decision No 070/20/COL ("the Decision" or "the Contested Decision") taken by the EFTA Surveillance Authority ("the defendant" or "ESA") on 29 June 2020 finding that Telenor committed three separate infringements of Article 54 of the EEA Agreement ("EEA") by abusing its dominant position in the wholesale market for access to and handling of data on mobile networks ("access and origination services") from 1 January 2008 to 31 December 2012 (the "relevant period"). ESA imposed three separate fines. One related to wholesale tariffs charged to Network Norway AS ("Network Norway"), another related to wholesale tariffs charged to Ventelo AS, Ventelo Norge AS and Ventelo Bedrift AS (together "Ventelo") and the third to wholesale tariffs charged to service providers. The fines amounted to EUR 111 951 000 in total.

3. In essence, ESA found in the Decision that Telenor held a dominant position in the wholesale market for access and origination services on mobile networks during the relevant period. Furthermore, the wholesale tariffs charged by Telenor entailed negative gross margins on Telenor's competitors in the retail market for the provision of stand-alone mobile broadband services to residential customers in Norway (margin squeeze).

4. Telenor's application is based on four pleas. Those are that:

(i) ESA erred when defining the relevant downstream market;

(ii) Telenor's conduct did not constitute an abuse;

(iii) ESA's power to impose a fine on the basis of two of the alleged infringements is time-barred; and

(iv) the Decision with regard to the fines should be annulled in whole or in part, or the fines should be reduced.

II Legal background

EEA law

5. Article 54 EEA reads as follows:

> *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.

III Facts

Telenor

6. Telenor Norge AS is the incumbent fixed and mobile communications operator in Norway. It is part of the Telenor Group, which provides electronic communications services in Nordic countries (specifically Norway, Sweden, Denmark and Finland) and Asia. In 2012 (the ultimate year of the relevant period), Telenor ASA's worldwide turnover was EUR 12.56 billion. The turnover of Telenor Norge AS was EUR 3.02 billion.

Mobile communications services

7. Mobile communications services are provided over a mobile network. That is a network consisting of fixed communications towers (masts) distributed on land areas, using electromagnetic radio frequencies to transmit wireless communications signals. Each tower provides network coverage in a limited area. Together these towers create uninterrupted wireless connectivity over a wider geographic area.

8. A mobile network enables end users to make and receive calls, to send and receive SMS/MMS and to obtain mobile data services (mobile broadband or mobile telephony data services) wirelessly and while moving within the coverage of the network.

9. Mobile broadband services allow end users to gain access to the internet through large-screen devices (for example a laptop) via the mobile network, that is, without being confined to a fixed location (using fixed broadband through cabled connection and Wi-Fi at home or publicly available Wi-Fi). The term stand-alone mobile broadband services is used to separate mobile broadband subscriptions from other mobile communications services.

10. Mobile telephony data services are distinct from mobile broadband and refer to services which allow end users to gain access to the internet via the same mobile communications subscription as voice and SMS/MMS services.

11. Access to a mobile network and origination services are preconditions for providing retail mobile communications services to end users. In order to offer such retail services, providers must either own a mobile network or enter into a wholesale agreement with an owner of such a network, such as Telenor. Based on the wholesale input, that is access and origination services, providers can offer both ordinary mobile communications services (that is mobile telephony data and voice and SMS/MMS services) and stand-alone mobile broadband services at a retail level to end users. End users can include both business and residential customers.

Undertakings supplying access (wholesale level): mobile network operators

12. Mobile network operators, that is owners of a mobile network, can offer both access and origination services to wholesale customers (upstream level) and retail access and mobile communications services to end users (downstream level) using their own mobile network.

13. Telenor and Telia Norge AS ("Telia") were the only mobile network operators with nationwide coverage during the relevant period. Until 2011, Telia was NetCom AS, and between 2011 and 2016 TeliaSonera Norge AS.

14. The term ICE will be used for Nordisk Mobiltelefon and its successor Access industries Inc., Telco Data and its successor ICE Communication Norge AS and sister company ICE Norge AS. ICE had its own mobile network, but without nationwide coverage. In June 2008, the ICE network covered 75 per cent of Norway's territory. In addition, during the relevant period the network only allowed mobile broadband and so called machine-to-machine services, and not mobile voice telephony. This was because the network was based on a specific technology.

15. Mobile Norway AS ("Mobile Norway", jointly established and owned by Tele2 Norge AS ("Tele2") and Network Norway, and from 2011 solely owned by Tele2) also had its own mobile network, but without nationwide coverage during the relevant period. The coverage of the Tele2/Mobile Norway network was limited during the main part of the relevant period. For example, it covered less than 17 per cent of the Norwegian population in July 2009. By the end of the relevant period (end of 2012) the population coverage was 60 to 65 per cent.

16. In 2015, Tele2 was acquired by Telia. The Norwegian national competition authority (*Konkurransetilsynet*) approved the merger subject to a number of conditions. One of the conditions for the approval was that ICE would have the opportunity to purchase part of Tele2's (Mobile Norway's) network/infrastructure.

Undertakings buying access (wholesale level): national roaming operators, mobile virtual network operators and service providers

17. Retail providers that offer retail mobile communications services and do not have the necessary infrastructure themselves to offer such services must, as wholesale customers, buy access to a mobile network from a supplier with a network such as Telenor, Telia or ICE. The type of network access that a wholesale customer requires will generally depend on whether it has, and, if so, the extent of, its own infrastructure.

18. Wholesale customers can be classified into national roaming operators, mobile virtual network operators and service providers.

19. A national roaming operator controls its own infrastructure but lacks access in specific geographical areas. To provide mobile communications services on the retail market a national roaming operator therefore needs to buy access from a mobile network operator with coverage in those areas. A national roaming operator can, in principle, also be a supplier in the wholesale market for access and origination services. Network Norway is an example of a national roaming operator. In April 2008, Network Norway entered into a national roaming agreement with Telenor.

20. A mobile virtual network operator must buy all its access and origination services from an external supplier (that is a mobile network operator or a national roaming operator), in order to provide mobile communications services on the retail market. However, it has its own core network and technical systems for interconnection and roaming with other network operators. A mobile virtual network operator can in principle resell access and origination services to service providers or other mobile virtual network operators. Ventelo, and TDC Norge AS ("TDC Norge") are examples of mobile virtual network operators. They each had a mobile virtual network agreement with Telenor from 2005, and during the relevant period.

21. A service provider is a pure reseller of mobile communications services and does not have its own infrastructure. Unlike national roaming operators and mobile virtual network operators, a service provider does not issue its own SIM cards. Such a provider must rely on one or more wholesale access providers for all its infrastructure and service delivery needs. A service provider can, in principle, resell wholesale access and origination services to other service providers. Hello AS and Phonero AS are examples of service providers with access agreements with Telenor during the relevant period.

IV Pre-litigation procedure

22. In 2012, ESA had information indicating that Telenor may have engaged in practices that constituted abuses of a dominant position within the meaning of Article 54 EEA, and/or may have concluded agreements, or may have been party to concerted practices, which were contrary to Article 53 EEA.

23. ESA carried out inspections at Telenor's premises in Fornebu, Norway, from 3 to 12 December 2012. The inspections continued at ESA's premises in Brussels from 12 to 14 March 2013, in the presence of Telenor representatives.

24. Between 2013 and 2015, ESA and Telenor exchanged correspondence and held several meetings. ESA issued several written requests for information to Telenor. ESA also collected information from other operators active in the mobile communications sector in Norway.

25. On 26 March 2014, ESA decided to initiate proceedings pursuant to Article 2(1) of Chapter III of Protocol 4 to the Surveillance and Court Agreement ("SCA"), concerning possible infringements by Telenor of Articles 53 and/or 54 EEA.

26. In a meeting with ESA on 7 August 2015, Telenor offered the possibility of commitments which could result in ESA adopting a commitments decision under Article 9, instead of a prohibition decision under Article 7, of Chapter II of Protocol 4 SCA. The proposal was explained in writing and in a meeting between Telenor and ESA. However, ESA did not consider it appropriate to accept commitments in respect of the margin squeeze practices. The discussions regarding such a potential decision did not proceed further and ESA decided to pursue the proceedings under Article 7.

27. On 1 February 2016, ESA adopted a statement of objections addressed to Telenor, in which it came to the preliminary conclusion that Telenor had abused its position of dominance in relation to alleged margin squeeze practices and applying lock-in clauses in conjunction with early termination penalties. ESA held, at this stage, that this was contrary to Article 54 EEA. ESA did not proceed with investigations related to Article 53 EEA.

28. On 25 April 2016, Telenor submitted its reply to the statement of objections. At the request of Telenor, an oral hearing was held on 3 and 4 October 2016. ESA sent additional requests for information to Telia and TDC Norge on 13 February 2017 and 18 May 2017, respectively. A meeting was held on 12 October 2017 to inform Telenor of identified evidence, documents and factual elements and of a number of additional arguments in support of the preliminary conclusions in the statement of objections, upon which ESA intended to rely in a potential decision.

29. On 24 June 2019, ESA adopted a supplementary statement of objections addressed to Telenor. It contained additional evidence, documents, factual elements and arguments identified by ESA in support of the preliminary conclusions reached in the statement of objections. However, the additional evidence and arguments in the supplementary statement of objections only concerned the alleged margin squeeze practices set out in the statement of objections. In the supplementary statement of objections, ESA informed Telenor that it had decided, for reasons of prioritisation, to discontinue its investigation into the second alleged abuse relating to the lock-in clauses in conjunction with early termination penalties.

30. On 2 September 2019, Telenor submitted its reply to the supplementary statement of objections. At the request of Telenor, another oral hearing was held on 10 October 2019.

31. Between November 2019 and February 2020, ESA sent additional requests for information to Telenor and to the Norwegian Communications Authority (*Nkom*) and held meetings with Telenor.

32. A letter of facts was sent to Telenor on 27 February 2020. This letter set out pre-existing evidence that was not expressly relied on in the statement of objections and the supplementary statement of objections, additional evidence brought to ESA's attention after the adoption of the supplementary statement of objections and sensitivity calculations as a robustness check regarding Telia and Telenor's wholesale customer's margins. Telenor replied to the letter on 23 March 2020.

33. Between April 2020 and the end of June 2020, ESA and Telenor exchanged correspondence, including an additional request for information and a status call with Telenor's counsel.

34. ESA adopted its decision against Telenor relating to the proceedings pursuant to Article 54 EEA on 29 June 2020.

V The Contested Decision

The relevant markets

35. In its decision, ESA defined the upstream market as the wholesale market for access and origination services on public mobile telephone networks in Norway.

36. The downstream market was defined as the retail market for the provision of stand-alone mobile broadband services to residential customers in Norway. ESA relied, in particular, on the following considerations in relation to the definition of this market:

(i) that mobile broadband and fixed broadband (including Wi-Fi) have a number of different characteristics and features, and therefore were complementary services rather than substitutes due to demand-side substitution considerations;

(ii) that stand-alone mobile broadband and mobile telephony data services have differences in product characteristics, usage and prices, and therefore were not substitutes due to demand-side substitution considerations;

(iii) that a supply-side response by providers of mobile telephony data services would not be sufficiently immediate and effective, as most suppliers did not have economic incentives to enter or to expand in the market for residential stand-alone mobile broadband;

(iv) that the cumulative competitive constraints exerted by fixed broadband services (including Wi-Fi) and mobile telephony data services was at best limited during the relevant period; and

(v) that mobile broadband services provided to business customers were not in the same market as residential stand-alone mobile broadband services. Residential customers could not have switched to a business-only subscription and most suppliers did not have the economic incentives to enter or to expand in the market for residential stand-alone mobile broadband with sufficient effectiveness and immediacy.

Dominance

37. ESA found that Telenor held a dominant position, within the meaning of Article 54 EEA, in the wholesale market for access and origination services on mobile networks during the relevant period. The conclusion was based on Telenor's market shares and the presence of barriers to entry/expansion, the lack of material competitive constraints from existing and/or potential competitors, as well as a lack of countervailing buying power on the market.

Abuse: the margin squeeze

38. ESA further found that, during the relevant period, the spread between prices charged in the wholesale market by Telenor to competitors for wholesale access and origination services on its mobile network and the prices charged in the retail market by Telenor to its own retail customers for residential stand-alone mobile broadband services in Norway did not allow equally efficient or as-efficient competitors to compete with Telenor in the retail market without incurring a loss, that is a margin squeeze.

39. ESA concluded that, if an equally efficient competitor of Telenor had to pay:

(i) the wholesale national roaming operator tariffs charged by Telenor to Network Norway, it would have earned negative gross margins in all months from 1 August 2008 to 31 August 2010;

(ii) the wholesale mobile virtual network operator tariffs charged by Telenor to Ventelo, it would have earned negative gross margins from 1 January 2008 to 30 November 2010;

(iii) the wholesale tariffs charged by Telenor to service providers, it would have earned negative gross margins during the entire period from 1 January 2008 to 31 December 2012.

40. ESA relied, in particular, on the following considerations:

(i) that, when deciding which retail services and tariff plans that should be included in the margin squeeze test, the appropriate level of product aggregation should be the relevant retail market, comprising Telenor's entire product portfolio on the market for residential stand-alone mobile broadband services;

(ii) that Telenor's gross margins were negative during the entire relevant period – based on the wholesale tariffs charged by Telenor to service providers – and during a major part of the relevant period – based on the wholesale national roaming operator tariffs charged by Telenor to Network Norway and the wholesale mobile virtual network operator tariffs charged by Telenor to Ventelo. This finding in itself shows that Telenor engaged in margin squeeze practices which were at least potentially capable of excluding competitors;

(iii) that the correct charges to use in the margin squeeze test are those that Telenor's wholesale customers actually paid based on the pricing option chosen by the wholesale customer; and

(iv) that, when conducting sensitivity testing based on Telenor's approach but with adjustments for switching costs, gross margins remained negative for the same periods as under ESA's initial margin calculations.

41. ESA considered that Telenor's conduct was likely to hinder, or was at least capable of hindering, the ability of actual or potential equally efficient competitors to trade on the relevant market. ESA noted that the finding of negative gross margins is sufficient to conclude that an effect which is at least potentially exclusionary is probable.

42. ESA considered that it was not required to show that Telenor's wholesale input was indispensable in order to show anti-competitive effects. However, ESA found that Telenor's affected wholesale customers had no effective and/or economically viable alternative to Telenor's wholesale input during the relevant period. ESA considered that Telia, which it held to be the only competitor with a nationwide network coverage, had limited incentives to compete with Telenor on the relevant market. Additionally, switching costs limited the scope and incentives for these wholesale customers to substitute away from Telenor's wholesale input.

43. In ESA's view, there was no objective justification for the foreclosure of competition at issue, and ESA noted that Telenor had not made such a claim. ESA concluded that Telenor abused its dominant position within the meaning of Article 54 EEA by engaging in the margin squeeze practices described. The margin squeeze was in relation to the wholesale tariffs for access and origination services on public mobile telephone networks in Norway and the retail prices for stand-alone mobile broadband services to residential customers in Norway.

Fines imposed

44. ESA considered that Telenor's behaviour amounted to three separate infringements of Article 54 EEA, and that the infringements' durations reflect the conclusions on the margin squeeze assessment.

45. ESA found that Telenor could or should not have been unaware of the anti-competitive nature of its conduct, and therefore, that Telenor committed the infringements intentionally or at least negligently.

46. ESA applied its methodology for determining fines set out in the Guidelines on the method of setting fines ("the Guidelines on fines") and imposed separate fines for each of the infringements. Further, ESA calculated each fine by reference to the relevant undertaking-specific wholesale values of sale and Telenor's retail values of sales in the relevant last full business year of the participation in the infringement. That is 2009 with regard to the infringements related to the wholesale national roaming operator tariffs charged to Network Norway and the wholesale mobile virtual network operator tariffs charged to Ventelo. With regard to the infringement related to the wholesale tariffs charged to the service providers, the value of sales in 2012 was used. Further, taking into account the Guidelines on fines, ESA concluded that the proportion of the value of sales to be used to establish the basic amounts of the fines should be 10 per cent. ESA then multiplied the basic amounts by the duration of each infringement. In addition, ESA added an additional amount (entry fee) of 10 per cent of the relevant values of sales in order to deter undertakings of a similar size and with similar resources from entering into the same type of infringement as Telenor.

47. ESA considered that neither mitigating nor aggravating circumstances were present. However, ESA considered that the basic amounts should be multiplied by 1.2 to ensure that the fines have a sufficient deterrent effect and noted that in 2019 Telenor had a turnover of approximately EUR 11.54 billion. The final amounts of the three fines were therefore EUR 32 562 000 for the infringement related to the wholesale national roaming tariffs charged to Network Norway; EUR 27 783 000 for the infringement related to the wholesale mobile virtual network operator tariffs charged to Ventelo; and EUR 51 606 000 for the infringement related to the wholesale tariffs charged to service providers.

48. Articles 1 to 3 of the operative part of the Decision read, in extract:

Article 1

1. Telenor ASA and Telenor Norge AS have infringed Article 54 of the EEA Agreement by applying unfair tariffs which did not allow an equally efficient competitor, relying on wholesale access and origination services on Telenor's public mobile telephone network in Norway, to replicate the stand-alone MBB [stand-alone mobile broadband] *services offered by Telenor Norge AS to residential customers in Norway without incurring a loss.*

2. The infringements covered the following periods and consisted of the following practices:

(a) From 1 August 2008 to 31 August 2010, charging wholesale NRO [national roaming operator] *tariffs to NwN* [Network Norway]*, on the basis of which an as-efficient competitor of Telenor would have earned negative gross margins;*

(b) From 1 January 2008 to 30 November 2010, charging wholesale MVNO [mobile virtual network operator] *tariffs to Ventelo, on the basis of which an as-efficient competitor of Telenor would have earned negative gross margins;*

(c) From 1 January 2008 to 31 December 2012, charging wholesale SP [service provider] *tariffs, on the basis of which an as-efficient competitor of Telenor would have earned negative gross margins.*

Article 2

For the infringements referred to in Article 1, the following fines are imposed on Telenor ASA and Telenor Norge AS, jointly and severally:

(a) for the infringement specified in Article 1.2(a), EUR 32 562 000;

(b) for the infringement specified in Article 1.2(b), EUR 27 783 000;

(c) for the infringement specified in Article 1.2(c), EUR 51 606 000.

…

Article 3

Telenor ASA and Telenor Norge AS shall immediately bring to an end the infringements referred to in Article 1 insofar as they have not already done so.

Telenor ASA and Telenor Norge AS shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

VI Procedure and forms of order sought by the parties

49. On 28 August 2020, Telenor lodged an application pursuant to Article 36 SCA seeking the annulment of the Contested Decision (the Application).

50. Telenor requests the Court:

(i) to annul the Contested Decision in whole;

(ii) in the alternative, to annul the Decision in part, that is in relation to two or one of the contested individual infringements; and

(iii) in the alternative, to annul the Decision in part in relation to service providers, in so far as 2011 and 2012 is concerned;

(iv) in the alternative, to annul or reduce the fines imposed on the applicants in exercise of the Court's unlimited jurisdiction; and

(v) to order ESA to pay the applicants' costs and expenses in connection with these proceedings.

51. On 3 September 2020, ESA was served with the Application. The President set 3 November 2020 as the deadline for the submission of ESA's statement of defence (the "Defence").

52. On 9 September 2020, ESA requested an extension from 3 November 2020 to 18 December 2020 of the deadline to lodge the Defence. ESA observed that the Application is nearly double the standard maximum number of 50 pages and is accompanied by 112 substantive annexes. Further, ESA argued that the complexity of the case means that it was appropriate to extend the standard two-month deadline for submitting a defence. ESA also observed that logistical challenges posed by the Covid-19 pandemic would

make the review of the arguments and the evidence more challenging. ESA also submitted that to the extent that the applicants had been authorised to exceed the standard page-limit in their Application, ESA should be similarly permitted to exceed the standard page-limit in its Defence by 40 pages.

53. On the 10 September 2020, the President, pursuant to Article 35(2) of the Court's Rules of Procedure ("RoP"), granted an extension of the time-limit for submitting the Defence until 3 December 2020. The President also authorised the submission of a defence of up to, but not exceeding 90 pages.

54. On 9 November 2020, ESA requested a further extension of time to lodge the Defence until 18 December 2020. ESA submitted that, shortly after the Court's grant of an extension, new restrictions relating to the Covid-19 pandemic were imposed in Belgium, in which ESA's offices are located, that made the work of submitting the Defence extraordinarily challenging.

55. On 12 November 2020, in light of the extraordinary circumstances, the President, pursuant to Article 35(2) RoP, granted upon an application from ESA an extension of the time-limit for submitting the Defence until 18 December 2020.

56. On 18 December 2020, ESA submitted its Defence.

57. ESA requests the Court:

(i) to reject the applicants' application for annulment in its entirety; and

(ii) to order the applicant to bear the costs of the present proceedings.

58. On 22 December 2020, ESA requested to resubmit its Defence omitting the inclusion of four paragraphs that concerned a procedural point. On 23 December 2020, the President granted this request.

59. On 8 January 2021, Telenor was served with the Defence. On 15 December 2020, Telenor had requested a longer deadline to submit its reply to the Defence (the "Reply"). Telenor submitted that due to national court proceedings concerning an alleged abuse of dominance by Telenor, the time and ability for Telenor to draft an adequate Reply in January and February 2021 were limited as the same personnel were engaged in Telenor's defence in both cases. The President set 19 March 2021 as the time-limit for the Reply in response to that request. Moreover, the President authorised the submission of a reply of up to, but not exceeding 35 pages.

60. On 11 March 2021, the Court received written observations from the Icelandic Government and the European Commission, pursuant to Article 20 of the Statute of the EFTA Court.

61. On 19 March 2021, Telenor submitted its Reply. On that same day, ESA was served with the Reply. The President set 26 April 2021 as the time-limit for the rejoinder to the Reply (the "Rejoinder"). In light of the length of the Reply, the President authorised the submission of a rejoinder of up to, but not exceeding 35 pages.

62. On 24 March 2021, ESA requested an extension of the time-limit for the Rejoinder until 21 May 2021. ESA observed that the Reply, with 35 pages, is longer than the usual length of documents in the Reply/Rejoinder round and that Telenor was granted an extension for submission of the Reply. ESA submitted that the principle of equality of arms may justify the grant of a longer period for the Rejoinder. ESA noted that its external counsel, Suzanne Kingston SC, had, similarly to Telenor's counsel, other court cases occupying time. Lastly, ESA also submitted that the Covid-19 pandemic continued to pose significant logistical challenges in the review and handling of the case.

63. On that same day, the President, pursuant to Article 36(2) and Article 78 RoP, granted an extension of the time-limit for submitting the Rejoinder until 3 May 2021.

64. On 3 May 2021, ESA submitted its Rejoinder.

VII Written submissions

Pleadings and written observations

65. Pleadings have been received from:

- the applicants, Telenor, represented by Siri Teigum, advocate; and

- the defendant, ESA, represented by Claire Simpson, Erlend Møinichen Leonhardsen and Carsten Zatschler, acting as Agents, and assisted by Suzanne Kingston SC.

66. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Heimir Skarphéðinsson and Inga Þórey Óskarsdóttir, acting as Agents; and

- the European Commission ("the Commission"), represented by Cristina Sjödin and Jan Szczodrowski, acting as Agents.

The Application

67. The Application contains four pleas:

(i) First plea: ESA erred when defining the relevant downstream market

a. The first plea, first issue: the assessment of demand-side substitution

b. The first plea, second issue: the assessment of supply-side substitution

(ii) Second plea: Telenor's conduct did not constitute an abuse of dominant position under Article 54 EEA

a. The second plea, first issue: ESA erred in its approach to the level of aggregation downstream for testing margins

b. The second plea, second issue: ESA erred when not taking the two-part data pricing option into account in its margin squeeze analysis

c. The second plea, third issue: ESA erred in its assessment of potential and actual effects

(iii) Third plea: ESA's power to impose fines based on the alleged margin squeeze of Network Norway and Ventelo is time-barred

(iv) Fourth plea: the Decision should be annulled with regard to the fines in whole or in part, or the fines should be reduced

Admissibility of certain annexes and documents

68. ESA claims that several annexes and arguments in annexes put forward by Telenor are inadmissible. According to ESA, whilst the body of the application may be supported and supplemented on specific points by references to extracts from annexed documents, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the Rules of Procedure, must appear in the application.[1]

69. ESA submits, in relation to the first plea, first issue, that annexes and arguments in Auxiliary Appendix A1 to the Application are inadmissible in so far as they are not referenced in the Application,[2] not sufficiently specified, and seek to add additional arguments of law and fact not made in the Application itself. The defendant requests the Court to declare that it cannot take into account the documents referred to in Auxiliary Appendix A1 which are not mentioned in the Application. ESA further requests that the

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[1] Reference is made to the judgments in *Nexans France* v *Commission*, T-135/09, EU:T:2012:596, paragraph 112, upheld in C-37/13 P, EU:C:2014:2030; and *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94.

[2] Reference is made to Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraphs 112 and 113.

arguments contained in that appendix are declared inadmissible, and in any event, that the arguments it contains should not be taken into consideration, in whole or in part, by the Court. Similarly, the defendant submits, in relation to the first plea, second issue, that the arguments in the report contained in Appendix A.24 to the Application ("Report for the EFTA Court") are inadmissible unless the arguments are contained in the Application itself.

70. ESA submits, in relation to the second plea, first and third issues, that in so far as Telenor relies on arguments in its reply to the statement of objections, ad hoc reports prepared by Charles Rivers Associations (that is the Effects Report and the Modelling Report), the comments on the supplementary statement of objections by Charles River Associations, Telenor's reply to the supplementary statement of objections and its comments on the letter of facts by reference, such arguments are inadmissible in so far as they are not mentioned in the Application. ESA contends that Telenor's attempt to engage in litigation by annex should be rejected for the same reasons as are observed above.

71. In their Reply, the applicants object to the plea of inadmissibility. Telenor argues that Auxiliary Appendix A1 presents the evidence in support of arguments in the Application, which is the function of an annex.[3] ESA's argument that documents in that appendix are not referenced in the Application is formalistic and unsupported by EFTA Court rules. In any event, ESA was able to respond to all of the annexes in question. In addition, all essential elements of the legal arguments relating to the other annexes referred to above are included in the Application.[4] The references to these annexes throughout the Application make it possible to determine precisely the elements in those annexes that support or supplement the arguments set out in the Application.

Jurisdiction of the EFTA Court

72. As a basis for their submissions, both parties comment on the jurisdiction of the Court. Telenor contends that the present proceedings fall within the criminal sphere for the purposes of Article 6 of the European Convention on Human Rights given the serious penalty imposed on Telenor.[5] Therefore, the decision of the authority which imposes such

[3] Reference is made to the judgments in *Microsoft v Commission*, 201/04, EU:T:2007:289, paragraph 99 and *Wabco Europe v Commission*, T-380/10, EU:T:2013:449, paragraph 163.

[4] Reference is made to *Mastercard and Others v Commission*, C-382/12 P, EU.C:2014:2201, paragraph 41.

[5] Reference is made to *Posten Norge*, cited above, paragraphs 87 and 88.

sanctions of a criminal nature must be subject to subsequent control by a judicial body that has full jurisdiction.[6]

73. Telenor submits that the review of legality involves review by the Court, in respect of both the law and the facts, of the arguments relied on by the applicants against the contested decision, which means that it has the power to assess the evidence, annul the Decision and to alter the amount of the fine.[7] It follows from the principle of the presumption of innocence that the undertaking to which the decision finding an infringement was addressed must be given the benefit of the doubt. Therefore, ESA bears the onus of demonstrating the existence of the circumstances that constitute an infringement and must submit precise and consistent evidence to establish the existence of the infringement.[8]

74. Telenor further contends that the principle of sound administration requires ESA to establish the facts and the relevant circumstances, by examining carefully and impartially all the relevant aspects of the individual case.[9] Telenor argues that ESA is required to investigate all the relevant circumstances and ensure that the evidence before it contains all the information which must be taken into account. Telenor further observes that the statement of reasons required under Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review.[10]

75. ESA submits that while, in the review of the legality of a decision, the Court must determine whether a decision is lawful, it cannot substitute its own reasoning for that of the author of the contested decision.[11] It maintains that in so far as the definition of the relevant market or the assessment of the competitive situation involves complex economic assessments by ESA, this is subject to only a limited review by the Court.[12]

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6 Reference is made to the judgment of the European Court of Human Rights ("ECtHR") in *A. Menarini Diagnostics S.R.L. v. Italy*, No 43509/08, 27 September 2011, paragraph 59; and *Posten Norge*, cited above, paragraph 91.

7 Reference is made to the judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 53.

8 Reference is made to *Posten Norge*, cited above, paragraphs 93 and 94.

9 Reference is made to the judgment in *Telefónica* v *Commission*, T-216/13, EU:T:2016:369, paragraph 164.

10 Reference is made to the judgment in *H&R ChemPharm* v *Commission*, C-95/15 P, EU:C:2017:125, paragraph 18 and the case law cited.

11 Reference is made to the judgment in *Galp and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 73; and *Posten Norge*, cited above, paragraph 96.

12 Reference is made to *Posten Norge*, cited above, paragraphs 95 and 96; and the judgments in *Microsoft* v *Commission*, cited above, paragraphs 87 and 482; *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266,

The relevant standard of review of such assessments is therefore that of a manifest error of assessment.

76. Further, ESA stresses that it is not necessary to adduce precise evidence in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by ESA, viewed as a whole, and whose various elements are able to reinforce each other, proves the existence of the circumstances that constitute the infringement in question.[13] While the decision must specify the evidence on which ESA's case hangs, it is not necessary for it to enumerate exhaustively all the evidence available but may refer to it in general terms.[14]

First plea: ESA erred when defining the relevant downstream market

77. By its first plea, Telenor raises two issues. The first issue concerns demand-side substitution with the applicants submitting (i) that ESA failed to follow its own market definition notice ("the Notice"),[15] and (ii) that ESA, when departing from the Notice, failed to provide sufficient evidence to substantiate its conclusion on demand-side substitution. In particular, ESA failed to lawfully assess whether residential stand-alone mobile broadband was subject to sufficient competitive constraints.

78. The second issue concerns supply-side substitution with the applicants submitting (i) that ESA's "most suppliers"-test errs in law, and (ii) that the use of negative margins to reject supply-side substitution is erroneous in law and assessment.

The first plea, first issue: the assessment of demand-side substitution

79. Telenor claims that stand-alone mobile broadband was part of a broader market comprising all alternatives for internet access, due to demand-side considerations. In the alternative, Telenor claims that mobile broadband was part of a market for mobile telephony data services comprising both business and residential customers. Telenor argues that ESA erred by abandoning the test for small but significant and non-transitory increase in price ("SSNIP"), without replacing it with any sufficient analysis.[16] ESA did

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paragraphs 32 and 33; *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraphs 198, 199 and 211; and *Deutsche Telekom* v *Commission*, T-271/03, EU:T:2008:101, paragraphs 184 and 185 and 195 to 207.

[13] Reference is made to *Posten Norge*, cited above, paragraph 94; and the judgments in *AstraZeneca* v *Commission*, cited above, paragraph 477; and *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraph 64.

[14] Reference is made to the judgment in *Dunlop Slazenger* v *Commission*, T-43/92, EU:T:1994:79, paragraph 34.

[15] Decision of the EFTA Surveillance Authority No 46/98/COL of 4 March 1998 on the definition of the relevant market for the purpose of competition law within the European Economic Area.

[16] Reference is made to the judgments in *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 516; and *Donau Chemie* v *Commission*, T-406/09, EU:T:2014:254, paragraph 74.

not provide reasons for abandoning the SSNIP test,[17] nor did it replace the test with any alternative objective guiding principle. ESA should have replaced the SSNIP test with an analysis of whether a sufficient proportion of customers viewed other products as interchangeable.[18]

80. ESA maintains that the market definition approach in the Decision is clearly set out and in line with the Notice and relevant case law.[19] Further, ESA argues that the duty to give reasons relates solely to the matters on which the Decision is based.[20]

81. The Commission observes that case law specifically confirms that the Commission is not bound to follow the SSNIP test to define the relevant market.[21] Further, it agrees with ESA that it is not necessary to specifically analyse and present quantitative evidence to demonstrate that a sufficient proportion of customers viewed other products as interchangeable. The Commission argues that the assessment of substitutability must be carried out as an overall assessment.[22]

82. Telenor also submits that ESA erred by basing its conclusion on selective evidence, dismissing relevant evidence and by failing to assess cumulative competitive constraints. ESA has also failed to investigate key matters. The assessment of demand-side substitution was incorrect because fixed broadband services and mobile telephony data services were sufficient substitutes. Further, Wi-Fi may have been a sufficient substitute, but ESA failed to investigate this. Lastly, Telenor argues that mobile broadband services to business customers were part of the relevant market.

83. ESA maintains that there is no requirement to gather every type of evidence, and that it relied on a wide range of information and evidence. The competitive constraints from fixed broadband services and mobile telephony data services were limited, both when taken individually and cumulatively.[23] ESA argues that fixed broadband services, Wi-Fi, mobile telephony data services and mobile broadband services to business

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[17] Reference is made to the judgment in *Donau Chemie* v *Commission*, cited above, paragraph 74.

[18] Reference is made to the judgment in *Topps Europe* v *Commission*, T-699/14, EU:T:2017:2, paragraph 81.

[19] Reference is made to *Posten Norge*, cited above, paragraph 94; and the judgments in *AstraZeneca* v *Commission*, cited above, paragraph 477; *Intel* v *Commission*, cited above, paragraph 64; and *Dunlop Slazenger* v *Commission*, cited above, paragraph 34.

[20] Reference is made to the judgments in *BAT* v *Commission*, 142/84 and 156/84, EU:C:1987:490, paragraph 70; and *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraphs 63 to 65, in particular paragraph 65.

[21] Reference is made to the judgments in *Topps Europe* v *Commission*, cited above, paragraph 82; and *Heidelberg Cement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraphs 330 to 331.

[22] Reference is made to the judgment in *Deutsche Börse* v *Commission*, T-175/12, EU:T:2015:148, paragraph 133.

[23] In relation to cumulative competitive constraints, reference is made to the judgment in *Atlantic Container Line* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 766, 782 and 824 to 825.

customers were all insufficient substitutes to residential stand-alone mobile broadband services because they met different consumer needs, and due to differences in pricing and other characteristics.

The first plea, second issue: the assessment of supply-side substitution

84. Telenor claims that ESA failed in its assessment of supply-side substitution from both mobile telephony data services and stand-alone mobile broadband to business customers. The applicants have two arguments in relation to this issue.

85. First, Telenor argues that ESA erred in law in its application of a "most suppliers"-test. It is not required that "near the universality" of suppliers of mobile telephony data services and stand-alone mobile broadband to business customers must have been able to enter the residential stand-alone mobile broadband market. Such a criterion is not in line with the Notice,[24] decisional practice[25] or case law.[26] Further, ESA erred when assessing supply-side substitution by wrongly including a criterion that most suppliers must have had the ability and the incentive to "expand their presence" in the market. Telenor claims that ESA errs in law in the Defence when excluding mobile network operators (Telia and ICE) from its supply-side substitution assessment.[27] In Telenor's view, the fact that products are produced using the same wholesale input (access and origination services) and the ability to supply the product justifies a market definition including both products.[28]

86. ESA maintains that its approach is consistent with the Notice,[29] decisional practice[30] and case law.[31] Further, the defendant explains that when the Decision refers to expansion in the context of supply-side substitution, it is referring to suppliers that had a passive residential stand-alone mobile broadband offering, but not supplying in practice.

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[24] Reference is made to the Notice, paragraph 20.

[25] Reference is made to Commission decisions: COMP/M.3916, *T-Mobile Austria/Tele.ring*; COMP/M.6497, *Hutchison 3G Austria/Orange Austria*, in particular paragraph 52; COMP/M.6992, *Hutchinson 3G UK/Telefonica Ireland*; and COMP/M.7018, *Telefonica Deutschland/E-Plus*.

[26] Reference is made to the judgment in *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraphs 57 and 79.

[27] Reference is made to the Commission decisional practice set out in footnote 23 and to COMP/M.5046, *Friesland Foods/Campina*.

[28] Reference is made to Commission decisions: COMP/M.6992, *Hutchison 3G UK/Telefonica Ireland*, paragraph 147; and COMP/M.6497, *Hutchison 3G Austria/Orange Austria*, paragraph 52.

[29] Reference is made to the Notice, paragraph 21.

[30] Reference is made to Commission decisions: COMP/M.5046 *Friesland Foods/Campina*, paragraph 159; and COMP/M.5658, *Unilever/Sara Lee*, paragraph 96.

[31] Reference is made to the judgment in *Amann & Söhne and Cousin Filterie* v *Commission*, cited above, paragraph 57.

For such suppliers, expansion is equivalent to de facto market entry. ESA argues that it did take the presence of mobile network operators into account, also in the Defence. However, to find supply-side substitution solely on the basis of such operators already supplying residential stand-alone mobile broadband would be contrary to the approach adopted in the Decision.[32] The Decision correctly found that the "most suppliers"-test was not met, because the three categories of non-mobile network operators (national roaming operators, mobile virtual network operators and service providers) did not have the incentive to enter or to expand in the market.

87. The Commission agrees with ESA in that the Notice must be interpreted as meaning that the ability to enter the product market is "nearly universal". The Commission also submits that in so far as Telenor contests an approach that is consistent with the Notice, Telenor must also indicate in which respect the Notice violates EEA law. Further, the Commission argues that the Application is internally contradictory when claiming that ESA erred by treating the non-mobile network operators' "expansion" as a de facto market entry, while at the same time claiming that ESA erred by not assessing supply-side substitution from mobile network operators.

88. In its Reply, Telenor claims that ESA unlawfully changed its reasoning in the Defence, when excluding mobile network operators from the supply-side substitution assessment.[33] ESA rejects this claim in its Rejoinder and maintains that there is no change of position or reasoning in its Defence.

89. Second, Telenor argues that the use of negative margins to reject supply-side substitution leads to a predefined abuse, that the methodology is unprecedented[34] and that the approach renders ESA's analysis arbitrary and unsustainable. Telenor argues, in the alternative, that ESA failed to take into account that the margins changed during the relevant period.

90. ESA rejects these arguments and maintains that its approach was in line with the Notice, decisional practice and case law.[35]

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[32] Reference is made to the Notice, paragraph 2.

[33] Reference is made to the judgments in *Philips* v *Commission*, T-92/13, EU:T:2015:605, paragraph 43; and *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 41.

[34] Reference is made to Commission decisions: COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, paragraph 88; COMP/38.784, *Wanadoo España vs. Telefónica*, paragraph 147; and AT.39523, *Slovak Telekom*, paragraph 84.

[35] Reference is made to the judgment of the Competition Appeal Tribunal (United Kingdom) Case No 1016/1/1/03 *Genzyme Ltd* v *Office of Fair Trading* [2004] CAT 4, paragraphs 366 and 359; Commission decision: COMP/C-3/37.792, *Microsoft*, paragraph 399, upheld in the judgment in *Microsoft* v *Commission*, cited above, paragraphs 527 to 530; the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraphs 113 to 116 and 134; Commission decisions: IV/M.774, *Saint-Gobain/Wacker-Chemie/NOM*,

The second plea: Telenor's conduct did not constitute an abuse of a dominant position under Article 54 EEA

91. By its second plea, Telenor raises three issues relating to the legal test for determining the existence of an abuse in the form of a margin squeeze.

92. The first issue concerns the correct aggregation level in the retail market for testing margins and is based on (i) a claim that ESA erred in law as to the correct approach to such aggregation and (ii) a claim that ESA erred in its assessment of the conditions of competition.

93. The second issue concerns the appropriate wholesale tariffs to be taken into account for the application of the equally efficient competitor test. Telenor claims that ESA erred (i) in law when using invoiced charges and not taking into account Telenor's two-part data pricing option, and (ii) in the assessment by rebutting Telenor's proposed margin squeeze analysis, which includes the two-part data pricing option.

94. The third issue concerns the assessment of potential and actual effects. Telenor claims that ESA (i) erred in law and assessment as to the correct approach to the analysis of effects, in particular in relation to the indispensability criterion, and (ii) failed in its assessments of the evidence relating to effects on market structure, entry, expansion, exits, prices and churn.

The second plea, first issue: ESA erred in its approach to the level of aggregation downstream for testing margins

95. Telenor claims that ESA erred in law in its approach to aggregation. Telenor contends that, where appropriate, as in this case, the margin squeeze analysis must be conducted across more than the relevant market identified in the market definition.[36] This is because the margin squeeze must be tested at the level that entry and exit decisions are made. ESA erred in its assessment of the conditions of competition, because competition occurred across a broader set of products than the product identified in the market definition.

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paragraph 36; COMP/38.784, *Wanadoo España vs. Telefónica*, paragraphs 172 and 147; COMP/M.2420, *Mitsui/CVRD/Caemi*, paragraphs 115 to 116; and COMP/M.1381, *Imetal/English China Clays*, paragraph 16; the judgment in *Slovenská pošta* v *Commission*, T-556/08, EU:T:2015:189, paragraph 112; and Commission decision: COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, paragraph 82.

[36] In particular, reference is made to Commission decision: COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, paragraphs 59 to 76, 115, 134 and 204.

96. ESA rejects these claims and maintains, supported by the Commission, that the margin squeeze test should be conducted at the level of residential stand-alone mobile broadband services, the relevant retail product market in this case.[37]

The second plea, second issue: ESA erred when not taking the two-part data pricing option into account in its margin squeeze analysis

97. Telenor claims that ESA erred in law when using the actual invoiced wholesale prices for its margin squeeze analysis. There is no case law nor any decisional precedent that requires testing of actual invoiced prices. The cases referred to by ESA do not concern situations where the supplier had given the customer the choice between different pricing options.[38] The analysis should consider the best options for an equally efficient competitor among the wholesale price options offered by the dominant wholesale supplier. The test applied by ESA reflects the actual choices made by the actual wholesale customers, based on their own product portfolio and not Telenor's. It is therefore not an equally efficient competitor test and in conflict with applicable law, including the principle of legal certainty.[39]

98. ESA maintains that it was in line with the case law and the equally efficient competitor test to carry out the margin squeeze analysis by reference to the wholesale prices charged to and paid by each wholesale customer group.[40] The Commission observes that the wholesale tariffs actually charged appear to be the correct tariffs, because it can be reasonably assumed that wholesale customers are rational market players that seek to minimise costs.

99. Telenor further argues that ESA should have taken the two-part data pricing option into account when conducting the margin squeeze analysis. This pricing option was an alternative price model offered by Telenor to its wholesale customers. According to

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[37] Reference is made to Case E-6/17 *Fjarskipti* [2018] EFTA Ct. Rep. 78, paragraph 62; and the judgments in *TeliaSonera*, C-52/09, EU:C:2011:83, paragraphs 62 to 63; *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraphs 252 and 253; and *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraphs 201 and 202.

[38] Reference is made to *Fjarskipti*, cited above, paragraph 59; Commission decisions: COMP/38.784, *Wanadoo España vs. Telefonica*, paragraphs 128 to 131, 423 to 425; COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom*, paragraphs 17 and 18, 149 to 151; AT.39523, *Slovak Telekom*, paragraphs 927 to 930, 939 and 1026; to the judgment in *TeliaSonera*, cited above, paragraphs 56 to 57 and 59 to 63; and to the judgment of the Competition Appeal Tribunal (United Kingdom) in *Genzyme Ltd* v *Office of Fair Trading*, cited above, paragraphs 113 and 117.

[39] Reference is made to the judgments in *TeliaSonera*, cited above, paragraph 44; and *Deutsche Telekom* v *Commission*, C-280/08 P, cited above, paragraph 202; and *Fjarskipti*, cited above, paragraph 63.

[40] Reference is made to *Fjarskipti*, cited above, paragraph 59; the judgments in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraphs 194 and 204; *TeliaSonera*, cited above, paragraph 112; and *Deutsche Telekom* v *Commission*, T-271/03, cited above, paragraph 191; and Commission decision: AT.39523, *Slovak Telekom*, paragraphs 855 and 922.

Telenor, the two-part data pricing option was available to Network Norway from November 2009 (or at the latest in March 2010), to Ventelo from January 2010 and to service providers from July 2010.

100. ESA contends that the two-part data pricing option was not contractually available to Network Norway before September 2010, and that Ventelo did not make use of the option to any appreciable extent before November 2010.

101. ESA states that it conducted sensitivity testing in its Decision, taking the two-part data pricing option into account. However, Telenor claims that ESA erred in the assessment by adjusting Telenor's model on the assumption that there were switching costs, in particular by excluding so called "legacy plans". Telenor argues that ESA's adjustments were based on an insufficient analysis of the facts, and relied on unjustified assumptions, disregarded relevant evidence and failed to adduce evidence and carry out required investigations. Telenor also contends that, when taking the two-part data pricing option fully into account, there is no margin squeeze in relation to Network Norway or to Ventelo. Under that approach, the margins for service providers are close to zero in 2011 and 2012.

102. ESA maintains that the claims of the applicants do not call the Decision's analysis relating to the sensitivity check and switching costs into question. The analysis was supported by relevant evidence and there was no manifest error of assessment. As regards Telenor's modelling, ESA maintains that, even when taking the two-part data pricing option fully into account, the gross margins for service providers would still have been negative or close to zero until the end of the relevant period.

The second plea, third issue: ESA erred in its assessment of potential and actual effects

103. Telenor claims that ESA erred in law when finding anti-competitive effects.[41] Telenor argues that ESA erred in law and assessment in its conclusion that access to Telenor wholesale input was indispensable.[42] Moreover, it was incumbent on ESA to produce evidence to demonstrate that the margin squeeze in fact was likely to produce such effects. However, the evidence in the case establishes that there were no likely anti-competitive effects.

104. ESA maintains that case law does not require additional evidence of anti-competitive effects in the case of negative gross margins.[43] The Icelandic Government and the Commission contend that ESA is not required to demonstrate actual anti-

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[41] Reference is made to the judgment in *TeliaSonera*, cited above, paragraph 72.

[42] In the Reply, reference is made to the judgment in *Bronner*, C-7/97, EU:C:1998:569, paragraph 41.

[43] Reference is made to *Fjarskipti*, cited above, paragraph 66; and the judgment in *TeliaSonera*, cited above, paragraph 73.

competitive effects.[44] ESA, the Icelandic Government and the Commission all argue that indispensability is not a legal requirement for finding anti-competitive effects.

105. Telenor argues that ESA disregarded relevant evidence and facts relating to effects on market structure, entry, expansion and exits. It argues further that ESA failed to assess a lack of actual negative effects on prices and the number of subscribers that left over a given period (churn). Should the Court find that ESA proved anti-competitive effects in relation to the Network Norway and Ventelo infringements, Telenor submits that the Decision should be annulled, nonetheless, in relation to the service providers infringement because, in relation to this latter group, ESA failed to establish potential or actual negative effects.

106. ESA maintains that the assessment of effects in the Decision was correct, and rejects the claims made by the applicants in this regard.

The third plea: ESA's power to impose fines on the basis of the alleged margin squeeze of Network Norway and Ventelo is time-barred

107. By its third plea, Telenor claims that ESA erred in law when imposing the fines relating to the Network Norway and Ventelo infringements, because its power to impose the fines is time-barred pursuant to Article 25 of Chapter II of Protocol 4 SCA. Telenor's alleged abuse relating to Network Norway ceased on 1 November 2009, and the alleged abuse relating to Ventelo ceased on 1 January 2010 Since the Decision is dated 29 June 2020 ESA's power to impose these fines is time-barred.

108. ESA rejects this claim and maintains that the Network Norway infringement did not cease until August 2010 and that the Ventelo infringement did not cease until November 2010.

The fourth plea: the Decision should be annulled with regard to the fines in whole or in part, or the fines should be reduced

109. By its fourth plea, Telenor submits that the fines imposed by ESA were disproportionate and claims, in particular, that (i) ESA erred when concluding that Telenor infringed Article 54 EEA intentionally or at least negligently; (ii) ESA erred in the calculation of fines by applying the wrong value of sales, overestimating the duration of the alleged infringements and failing to reduce the fines for mitigating circumstances; and (iii) the fines were overall disproportionate.

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[44] Reference is made to *Fjarskipti*, cited above, paragraph 62; and the judgment in *TeliaSonera*, cited above, paragraphs 62 to 65.

The fourth plea, first issue: ESA erred when concluding that Telenor infringed Article 54 EEA intentionally or at least negligently

110. Telenor argues that ESA failed to show that Telenor could not have been unaware of the alleged anti-competitive nature of its conduct, and that no evidence showed that Telenor deliberately behaved abusively. In particular, Telenor argues that it could not predict the unprecedented market defined by ESA nor the use of an unprecedented level of aggregation in the retail market for testing margins. Telenor acted in good faith throughout the period, with the intention of avoiding margin squeezes. Telenor's understanding that it was compliant was bolstered by regulatory authorities.[45]

111. ESA maintains that Telenor was or should have been aware of the anti-competitive nature of its conduct within the meaning of settled case law.[46] Further, the claims that Telenor could not predict the defined market or the level of aggregation for testing margins are without basis. ESA rejects the applicants' arguments that Telenor acted in good faith. ESA argues that the actions of national authorities cannot give rise to legitimate expectations on the part of undertakings that they are in compliance with EEA competition rules.[47] Neither does ignorance or mistake of law exempt an undertaking from the imposition of fines in so far as the undertaking could not have been unaware of the anti-competitive nature of its conduct.[48]

112. In its Reply, Telenor argues that the legality of the Decision on this point must be judged in the light of the Decision and not the Defence. ESA cannot supplement the reasoning of its Decision during the court procedure.[49] ESA rejects this argument in its Rejoinder and argues that it is not precluded from addressing the arguments raised in the Application.

The fourth plea, second issue: Calculation of fines

113. First, Telenor claims that ESA applied the wrong value of sales. ESA erred in law by including all of Telenor's wholesale revenue generated by each of Network Norway, Ventelo and the service providers, rather than using only the wholesale revenue which

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[45] Reference is made to a margin squeeze analysis conducted by the Norwegian Communications Authority (*Nkom*) in 2010 and Decision A2011-48 by the Norwegian Competition Authority (*Konkurransetilsynet*).

[46] Reference is made to the judgments in *Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 107; *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraph 320; and *Intel* v *Commission*, cited above, paragraph 1601.

[47] Reference is made to the judgments in *Schenker and Others*, C-681/11, EU:C:2013:404, paragraph 44; and *Deutsche Telekom* v *Commission*, C-280/08 P, cited above, paragraph 90.

[48] Reference is made to the judgments in *Schenker and Others*, cited above, paragraphs 37 to 38; and *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 238.

[49] Reference is made to the judgment in *Philips* v *Commission*, T-92/13, EU:T:2015:605, paragraph 43.

related to the provision of residential stand-alone mobile broadband (the relevant retail market). Further, ESA erred in law by including Telenor's full retail revenue for each of the three infringements.[50]

114. ESA and the Commission argue that ESA's approach was in line with case law and the concept of value of sales.[51] They further argue that ESA was entitled to separate fines and to take the retail value of sales into account three times because ESA found three separate infringements.

115. Second, Telenor claims that ESA overestimated the duration of the alleged infringements because the infringement ended at the latest when Telenor introduced the two-part data pricing option. ESA rejects this claim and refers to its rebuttal of the arguments relating to the end of the infringements under the applicants' second plea.

116. Third, Telenor claims that ESA failed to reduce the fines for mitigating circumstances. The fines should be annulled or reduced because (i) Telenor acted in good faith,[52] (ii) Telenor's conduct was at most negligent,[53] and (iii) of ESA's delays and periods of inactivity.[54]

117. ESA argues that its conclusion, that no reduction for mitigating circumstances should be granted, was wholly appropriate. It had already rejected the claim that Telenor acted in good faith. Further, in ESA's submission, the Decision's approach was not novel, and Telenor could not have been unaware of potential anti-competitive conduct. ESA also rejects the suggestion that any unreasonable delay occurred during the investigation, and argues that, even if there had been such delays, this could not result in a reduction of the fine.[55]

The fourth plea, third issue: Overall, the fines were disproportionate

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[50] Reference is made to the judgment in *Servier* v *Commission*, T-691/14, EU:T:2018:922, paragraphs 1264 to 1271.

[51] Reference is made to the Guidelines on fines (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Chapter II of Protocol 4 to the Surveillance and Court Agreement (OJ 2006 C 314, p. 84)), paragraph 13 (the paragraph number refers, however, to the numbering in the Commission's Fining Guidelines (OJ 2006 C 210, p. 2)); and to the judgments in *Team Relocations and Others* v *Commission*, T-204/08 and T-212/08, EU:T:2011:286, paragraphs 62 to 63; and *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraph 76.

[52] Reference is made to the judgment in *Deutsche Telekom* v *Commission*, T-271/03, cited above, paragraphs 312 to 313.

[53] Reference is made to the judgment in *Huhtamaki* v *Commission*, T-530/15, EU:T:2019:498, paragraph 183.

[54] Reference is made to *Posten Norge*, cited above, paragraphs 276 to 278.

[55] Reference is made to *CEPSA*, C-608/13 P, EU:C:2016:414, paragraphs 61 and 71; and *Villeroy & Boch*, C-664/13 P, EU:C:2017:59, paragraph 79.

118. Telenor argues that the total amount of the fines is out of proportion with the gravity and duration of the infringements, and that Norway, to which the geographic scope of the infringements is limited, is a relatively small national market. Lastly, Telenor argues that the proportion of the value of sales used to establish the amount of fines in order to reflect the gravity of the infringement is too high.[56]

119. ESA argues that an undertaking cannot take advantage of the allegedly limited impact of an infringement, in order to reduce its gravity.[57] Further, Norway is by far the largest economy for which ESA has responsibility. As regards the proportion of the value of sales used to establish the amount of the fines, ESA rejects the claim that the percentage used (10 per cent) is too high and maintains the reasons set out in the Decision.

120. In its Reply, Telenor observes that even if ESA relies on its discretion in setting the fine, this does not in any way impede or limit the Court's discretion under its unlimited jurisdiction.[58]

Per Christiansen
Judge-Rapporteur

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[56] Reference is made to ESA decisions: of 14 July 2010 in Case No 34250 *Norway Post/Privpak*; and of 14 December 2011 in Case No 59120 *Color Line*; and Commission decisions: COMP/37.990, *Intel*; and AT.40099, *Google*.

[57] Reference is made to the judgments in *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 165; *Versalis* v *Commission*, cited above, paragraphs 83 to 84; and *Industrie Riunite Odolesi*, T-69/10, EU:T:2014:1030, paragraphs 252 to 253.

[58] Reference is made to the judgments in *Timab Industries* v *Commission*, C-411/15 P, EU:C:2017:11, paragraph 109; and *Lietuvos geležinkeliai* v *Commission*, T-814/17, EU:T:2020:545, paragraphs 389 to 390, 393, 395 and 398.