



E-4/21-25

REPORT FOR THE HEARING

in Case E-4/21

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

Sýn hf., established in Reykjavik, Iceland,

and

EFTA Surveillance Authority,

supported by

the Icelandic Government,

seeking the annulment of the EFTA Surveillance Authority's Decision No 023/21/COL of 26 March 2021, Aid to Farice ehf. for investment in a third submarine cable.

I Introduction

1. Sýn hf. ("Sýn") is an electronic communications and media company active in all telecommunications and broadcasting markets in Iceland. Sýn provides comprehensive electronic communications services, including the provisions of data centre services, under the brand name Vodafone subject to a partnership agreement with Vodafone Group plc. Sýn was a shareholder in Farice ehf. ("Farice") from 2002 to 2008.

2. The case concerns Decision No 023/21/COL ("the Contested Decision") taken by the EFTA Surveillance Authority ("ESA") concerning aid to Farice for investment in a third submarine cable. ESA found that the estimated EUR 50 million share capital increase for Farice for the construction of a third submarine cable constituted State aid. It also found that the State aid was compatible with the functioning of the Agreement on the European

Economic Area (“EEA Agreement” or “EEA”), pursuant to Article 61(3)(c) of the EEA Agreement.

3. In its application, Sýn seeks the annulment of the Contested Decision. The application is based on two pleas. First, that ESA has failed to open the formal investigation procedure pursuant to Article 1(2) of Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (“SCA”) given that there were reasons that should have raised doubts with regard to the compatibility of the measure with the EEA Agreement. Second, that ESA failed to fulfil its obligations under Article 16 SCA to adequately state reasons.

II Legal background

EEA law

4. Article 6 EEA reads:

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

5. Article 61(1) EEA reads:

Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

6. Article 61(3)(c) EEA reads:

The following may be considered to be compatible with the functioning of this Agreement:

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

7. Article 3(2) SCA reads:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

8. Article 16 SCA reads:

Decision of the EFTA Surveillance Authority shall state the reasons on which they are based.

9. The second paragraph of Article 36 SCA reads:

Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of the EFTA Surveillance Authority addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

10. Article 1 of Part I of Protocol 3 to the SCA reads, in extract:

1. *The EFTA Surveillance Authority shall, in cooperation with the EFTA States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the EEA Agreement.*

2. *If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid granted by an EFTA State or through EFTA State resources is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, or that such aid is being misused, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the Authority.*

...

3. *The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit any comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to*

Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

11. Article 1 of Part II of Protocol 3 to the SCA reads, in extract:

For the purpose of this Chapter:

...

(h) “interested party” shall mean any State being a Contracting Party to the EEA Agreement and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

12. Article 4 of Part II of Protocol 3 to the SCA reads, in extract:

...

2. Where the EFTA Surveillance, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the EFTA Surveillance Authority, after a preliminary examination, finds that no doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, in so far as it falls within the scope of Article 61(1) of the EEA Agreement, it shall decide that the measure is compatible with the functioning of the EEA Agreement (hereinafter referred to as a ‘decision not to raise objections’). The decision shall specify which exception under the EEA Agreement has been applied.

4. Where the EFTA Surveillance Authority, after a preliminary examination, finds that doubts are raised as to the compatibility with the functioning of the EEA Agreement of a notified measure, it shall decide to initiate proceedings pursuant to Article 1(2) in Part I (hereinafter referred to as a ‘decision to initiate the formal investigation procedure’).

...

13. Article 6(1) of Part II of Protocol 3 to the SCA reads:

The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the EFTA Surveillance Authority as to the aid character of the proposed measure and shall set

out the doubts as to its compatibility with the functioning of the EEA Agreement. The decision shall call upon the EFTA State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the EFTA Surveillance Authority may extend the prescribed period.

National law

14. The Icelandic Parliament adopted on 3 June 2019 a parliamentary resolution approving the Icelandic Government's policy in accordance with the Minister for Transport and Local Government's proposal for a resolution on the Electronic communications policy 2019 – 2023. Article 3, Numeral 1 of Parliamentary Resolution No 31/149 reads:

Analysis of ways to increase security and efficiency in data transfers to and from the country shall be carried out.

15. Article 5.15 of the State Budget for 2021 reads:

To increase the share capital of Farice ehf. with the aim to finance a new submarine cable.

III Facts

Background

16. Farice is a private limited liability company established in Iceland. It was founded in 2002 by Icelandic and Faroese parties. According to its articles of association, the purpose of Farice is the wholesale of international data transfer between countries through a fibre optic cable, the operations of fibre optic cable systems and the sale of services in relation to such activities. The Icelandic State acquired Farice in full in March 2019 following the classification of international submarine cables as infrastructure owned by the Icelandic Government. Farice is today fully owned by the Icelandic State and all long-term borrowing comes from the Treasury.

17. Farice operates two submarine cables running from Iceland to Europe: FARICE-1 and DANICE. FARICE-1 connects the east coast of Iceland with Scotland with a branch unit into the Faroe Islands. DANICE connects the south coast of Iceland with Denmark. The only other submarine cable connecting to Iceland is the Greenland connect cable which runs from Iceland to Canada.

18. From 2010 to 2012, the Icelandic authorities engaged in a series of measures for the restructuring of Farice due to its financial difficulties. The authorities designated the services of Farice as 'services of a general economic interest' ("SGEI") and entered into a public service contract with Farice providing funding for its operations. In the same period,

the Icelandic authorities submitted various State aid notifications to ESA. These were later withdrawn as the Icelandic authorities concluded that the Commission's SGEI Decision applied to these measures.¹ On 19 July 2013, ESA issued a comfort letter to the Icelandic authorities noting that Article 3 of the SGEI Decision exempted the Icelandic authorities from the prior notification obligation in Article 1(3) of Part I of Protocol 3 SCA.

19. The first public service contract between Farice and the Telecommunications Fund (*Fjarskiptasjóður*) ("the Fund"), representing the Icelandic authorities, was entered into on 12 April 2012. It follows from the contract that it is to be considered in compliance with the SGEI Decision.

20. According to Sýn, the introduction of the DANICE cable and the ensuing financial difficulties of Farice had a significant impact on Farice's pricing policy, which in turn, had a significant impact on Sýn as one of Farice's larger customers. Sýn submitted a complaint to the Icelandic Competition Authority maintaining that the conduct of Farice amounted to an abuse of a dominant position, inter alia, by reason of discrimination between customers and a lack of transparency. In 2016, the Icelandic Competition Authority published a decision where it concluded that the matter should not be investigated or pursued further.

21. In the period between October 2017 and 2020, the Icelandic Ministry of Transport and Local Government and the Ministry of Finance and Economic Affairs received several proposals from Sýn regarding the introduction of a third submarine cable. The proposals included both an independent project and a collaboration with the Norwegian undertaking Celtic Norse AS. These proposals did not entail financing in full by the private investors but required cooperation with the Icelandic State and/or Farice.

22. In November 2018, the Minister for Transport and Local Government submitted a proposal to the Parliament for a resolution on the Electronic communications policy 2019 to 2033. According to the proposal, the introduction of a third submarine cable connecting Iceland and Europe was envisaged by the Icelandic authorities. On 3 June 2019, the Icelandic Parliament adopted a parliamentary resolution approving the Government's telecommunications policy in accordance with the proposal. The objectives of this policy are inter alia to promote accessible and effective communications and to guarantee the security of telecommunication infrastructures. To achieve those objectives, the policy emphasised that three active submarine cables shall connect Iceland with Europe from different landing sites. As a geographically remote country, effective international connections are a prerequisite for the development of Iceland as a modern technology-based society. A serious disruption in international connectivity would cause major damage to the Icelandic economy and society as a whole.

¹ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3).

23. In December 2018, Farice signed a new public service contract with the Fund regarding the Icelandic authorities' work on the telecommunications policy. Farice was engaged to start preparations for the possible construction of a new submarine cable between Iceland and Europe. Farice was only compensated for the costs of the preparation work that it undertook on behalf of the Fund, which also included compensation for seabed research to be carried out by Farice in 2019. The Icelandic State's participation in further investment or costs for a third cable was neither secured nor structured at that time.

24. According to information on the Fund's website, the last payments under the public service contract were effected in 2018. It is stated in the application that payments for seabed research in 2019 and 2020 were not qualified as public service compensation and therefore not subject to scrutiny under the SGEI parameters.

25. On 16 January 2019, Sýn submitted a formal request to the Fund for funding of seabed research in preparation for the introduction of the submarine cable project. By letter of 8 February 2019 the Fund refused to engage in any discussions with Sýn, referring to the public service contract concluded with Farice in December 2018 according to which Farice was entrusted with seabed research as an intermediary.

26. On 17 December 2019, Sýn and the board of the Fund had a meeting where Sýn presented its case for a third submarine cable between Iceland and Ireland. Sýn offered to build a submarine cable for remuneration and required a guarantee that Farice would change its operating model and implement a so-called "carrier's carrier" model as defined in the Contested Decision.

27. In March 2020, the Fund engaged an independent expert to evaluate the feasibility of Sýn's project compared to Farice's proposal for a third submarine cable (the IRIS cable project). The expert's report was delivered in April 2020. According to Sýn, the report concluded that the project proposed by Sýn was more cost effective. According to the Icelandic authorities, the expert was instructed not to make recommendations. However, the report included recommendations and relied on available, but unverified, data from Farice and Sýn.

28. The Ministry of Transport and Local Government shared the results of the report with Farice. In an accompanying letter, the Ministry stated that Farice would be responsible for the project and the envisaged owner and operator of the new submarine cable. The Ministry urged Farice to take account of the fact that Sýn's proposal had been considered more cost effective by the expert. The Ministry stated that it found Sýn's proposal to change the operational model of Farice unacceptable.

29. In May 2020, Sýn and Farice had a meeting to explore the details and validity of Sýn's proposal and to confirm pricing and quality from key suppliers. Sýn was not able to confirm the prices since the key suppliers had not been willing to confirm the prices. Since

the foundation for the discussions between Farice and Sýn was the project's cost effectiveness, which was based on the prices submitted, the discussions were terminated.

30. On 22 May 2020, Sýn contacted the Fund to obtain information on the status of the project and the expert's report. Further, Sýn informed the Fund that, due to the delays, the previous offers from suppliers had expired, and that Sýn needed further information on the intentions of the Fund before it requested renewals of these offers.

31. On 29 May 2020, the Fund sent the expert's report to Sýn, stating that it considered the information on the expiry of the offers to be unacceptable. It further stated that it therefore would not engage in any further discussions with Sýn. It was further stressed that the Fund was not responsible for the project, since its role was limited to the provision of funds. The Ministry of Finance and Economic Affairs controlled the shares in Farice and appointed its board of directors. The Fund presumed that Farice would be entrusted with the introduction and operations of any submarine cables owned by the State.

32. On 2 December 2020, Sýn requested information on documents related to Farice from the Fund and the Ministry of Finance and Economic Affairs. After numerous follow-up requests, the Fund responded to Sýn's request on 12 April 2021.

33. On 23 February 2021, Sýn lodged a complaint with ESA. Sýn submitted that payments to Farice from the Icelandic State since 2013 had erroneously been classified as a public service compensation as the conditions of the SGEI decisions had never been met. Sýn thus argued that the payments amounted to State aid, which neither had been notified to nor approved by ESA. It argued that the aid measures had significantly distorted competition in the market to the detriment of Sýn. It further submitted that there was an ongoing breach of State aid rules related to the introduction of a new submarine cable which warranted ESA's immediate attention. According to the defence, the complaint is still under consideration with ESA.

34. The Icelandic authorities considered that there was a need to construct a third submarine cable between Iceland and Europe (the IRIS cable project). The authorities selected Farice to own, operate and oversee the construction of that cable.

35. On 23 March 2021, the Icelandic authorities notified ESA of their intention to provide aid to Farice for investment in the third submarine cable.

The Contested Decision

36. On 26 March 2021, ESA announced that it had adopted the Contested Decision. It found that the aid to Farice for investment in a third submarine cable constituted State aid within the meaning of Article 61(1) EEA. ESA further stated that it had no doubts that this aid was compatible with the functioning of the EEA Agreement pursuant to Article 61(3)(c) EEA. Therefore, ESA had no objections to the implementation of the measure.

37. ESA noted that the compatibility of the aid for the introduction of broadband networks was normally assessed under the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (“the Broadband Guidelines”). However, ESA stated in the Contested Decision that since the measure specifically targets the security issues raised by the lack of geographical diversity, it falls outside the scope of the Broadband Guidelines. Nevertheless, ESA stated that it would apply the principles of the Broadband Guidelines by analogy to the extent that they were relevant since the guidelines are the most detailed guidance available for assessing the compatibility with the EEA Agreement of State aid to broadband infrastructure projects.

38. In its assessment under Article 61(3)(c) EEA, ESA found, first, that the measure facilitated development in the market for international data transfer services specifically and the markets for electronic communications services in general.

39. ESA accepted the Icelandic authorities’ view that the selection of Farice as owner and operator of the IRIS cable and the selection of a cable manufacturer and installer was exempt from the Icelandic Procurement Act. That act implements Directive 2014/24/EU on public procurement. The measure’s conformity with other relevant EEA law was also ensured.

40. ESA further found that, while the contract for construction and laying down of the submarine cable had not been tendered out, Farice had engaged in a competitive selection procedure which had been conducted in line with the spirit and principles of Directive 2014/24/EU on public procurement.

41. When assessing the possible negative effects on intra-EEA trade, ESA found that, as a result of the geographical remoteness of Iceland, the natural data latency gap between communications on the European continent compared with communications from the continent to Iceland would remain. ESA therefore found it hard to see how the IRIS cable would have a material impact on the competitiveness of other EEA markets compared to Iceland. ESA thus found that the third cable, in and of itself, should not materially alter the dynamics of intra-EEA trade on the relevant market.

42. As regards the potential effect on data centres, ESA noted that the data centre market was not a single market of universal services since the digital needs of businesses were highly dependent on the applications hosted and operated in the data centres. For the largest users of data centres, closeness was key. Therefore, large users had located data centres close to international network hubs and within close proximity of densely populated areas.

43. ESA also noted that, while data centres might be more inclined to invest in projects in Iceland due to extended capacity and security of the international connection network following the construction of a third submarine cable, that was only one of multiple factors that would influence such a decision. Other factors, such as electricity prices, start-up costs

and regulatory environment also influence such decisions. ESA found that those factors were not altered by the measure.

44. Further, ESA considered that data centres and telecommunications companies did not operate on the same services market which justified differentiation in prices between the two customer groups. The fact that these different customers might be treated differently did not raise competition concerns. Moreover, nothing in the design of the measure led to discrimination between customers.

45. Finally, ESA found that the Icelandic authorities had demonstrated that the socio-economic benefits of the measure outweighed any potential adverse effect on competition or trade between the EFTA States given the safeguards in place to minimise the latter.

IV Procedure and forms of order sought

46. Sýn lodged the present action by application registered at the Court on 9 July 2021.

47. On 14 July 2021, ESA requested an extension of time to lodge the defence from 13 September 2021 to 13 October 2021. On 15 July 2021, the Registrar informed ESA that the President had granted an extension of the time limit for submitting a defence to 27 September 2021. ESA's statement of defence was registered at the Court on 24 September 2021.

48. Sýn's reply was registered at the Court on 22 October 2021. The rejoinder from ESA was registered at the Court on 22 November 2021.

49. Sýn requests the Court to order that:

1. *Decision No. 023/21/COL concerning aid to Farice ehf. for investment in a third submarine cable is annulled.*
2. *ESA is ordered to pay the full legal costs.*

50. ESA requests the Court to:

1. *Dismiss the Application as inadmissible or, in the alternative, as unfounded.*
2. *Order the Applicant to bear the costs of the proceedings.*

51. On 7 October 2021, the Icelandic Government submitted an application for leave to intervene pursuant to the first paragraph of Article 36 of the Statute of the EFTA Court ("the Statute") and Articles 112 and 113 of the Rules of Procedure of the EFTA Court

(“RoP”). The Icelandic Government supports the forms of order sought by ESA, and requests the Court to:

1. *Dismiss the application as inadmissible, or in the alternative, as unfounded.*

2. *Order the applicant to bear the costs of the proceedings.*

52. On 12 October 2021, the application to intervene was served on the parties in accordance with Article 114(1) of the RoP. On the same date, ESA stated that it would not submit observations on the application to intervene. Sýn did not submit any comments on the application to intervene.

53. On 26 October 2021, the President granted the Icelandic Government leave to intervene in the case pursuant to Article 36 of the Statute.

54. On 26 November 2021, the Icelandic Government submitted its statement in intervention pursuant to Article 115 of the RoP.

55. On 13 December 2021, Sýn submitted its reply to the statement in intervention pursuant to Article 115(4) of the RoP. ESA did not submit any comments on the Icelandic Government’s statement in intervention.

V Written procedure before the Court

56. Pleadings have been received from:

- Sýn, represented by Dóra Sif Tynes, acting as Counsel;
- ESA, represented by Michael Sánchez Rydelski, Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmsdóttir and Melpo-Menie Joséphidès, acting as Agents;
- the intervener, the Icelandic Government, represented by Jóhanna Bryndís Bjarnadóttir, Haraldur Steinþórsson, Vera Sveinbjörnsdóttir, acting as Agents, and Jóhannes Karl Sveinsson, attorney as Counsel.

VI Summary of pleas in law and arguments submitted

Admissibility

57. Sýn submits that it has standing to challenge the Contested Decision under Article 36 SCA as that decision is of direct and individual concern to it.

58. Sýn first submits that it is an interested party or a party concerned under Article 1(2) of Part I of Protocol 3 SCA read in conjunction with Article 6(1) of Part II of Protocol 3 SCA. According to Sýn, since the Contested Decision entails that a decision was made not to initiate the formal investigation procedure, an application to the Court is the only recourse available to safeguard its procedural rights under the formal investigation procedure.² Second, Sýn submits that it is individually concerned by the Contested Decision in that its position in the market is substantially affected by the State aid in question.³

59. ESA submits that the application is inadmissible. ESA argues that Sýn fails to substantiate its allegation that Sýn is individually concerned by the Contested Decision inasmuch as its position in the market is substantially affected by the State aid. ESA further submits that in order for the application to be admissible, Sýn must demonstrate that its competitive position in the market is at least negatively affected by the granting of the alleged aid.⁴

60. The Icelandic Government supports ESA's view. It contends that Sýn and Farice operate on different markets with no apparent overlap, and that the material provided by Sýn indicates that no individual concerns are affected by the measure.

Substance

61. Sýn's application is based on two pleas. By its first plea, Sýn argues that ESA breached its obligation to open the formal investigation procedure under Protocol 3 SCA. The first plea is based on three grounds which, in Sýn's submission, should have raised doubts with regard to the compatibility of the aid with the functioning of the EEA Agreement.⁵

62. First, Sýn submits that the absence of transparent consultations with stake holders and a comprehensive analysis of the exact nature of market failure should have raised doubts as to the compatibility of the aid measure with the EEA Agreement. Sýn argues that ESA's conclusions on the establishment of market failure rests exclusively on the Icelandic authorities' account of its discussions with Sýn. According to Sýn, based on the information available to ESA at the time of notification, there were ample grounds to raise doubts as to the Icelandic authorities' assessment of market failure.

² Reference is made to Case E-1/13 *Míla ehf. v ESA* [2014] EFTA Ct. Rep. 4, paragraph 53.

³ Reference is made to Case E-5/07 *Private Barnehagers Landsforbund v ESA* [2008] EFTA Ct. Rep. 62, paragraph 49, and Case E-23/14 *Kimek Offshore AS v ESA* [2015] EFTA Ct. Rep. 412, paragraph 71.

⁴ Reference is made to Case E-2/02 *TBW and Bellona v ESA* [2003] EFTA Ct. Rep. 52, paragraph 53, Case E-4/97 *Norwegian Bankers' Association v ESA* [1999] EFTA Ct. Rep. 1, paragraph 33, and the judgment in *Hamburger Hafen- und Lagerhaus v Commission*, T-69/96, EU:T:2001:100, paragraph 37.

⁵ Reference is made to *Míla ehf. v ESA*, cited above, paragraph 92.

63. Second, Sýn submits that, since the engagement of Farice to carry out seabed research prior to the adoption of the State aid measure happened outside of a transparent procurement procedure and without consultation of interested parties, it should have raised doubts with ESA as to the compatibility of the measure. Since the granting of funds for the seabed research was outside any review under the conditions of the public service contract, ESA should have had concerns as to the measure's compatibility with the stand-still obligation under Article 1 of Part I of Protocol 3 SCA. Sýn submits that ESA has not provided any reasoning for its conclusion that the funds provided to Farice for this research are severable from the aid measure under review.

64. Third, Sýn submits that the selection of Farice as the responsible body, owner and operator of the submarine cable, despite the existence of an independent expert opinion concluding that Sýn's proposal was more cost effective, should have raised doubts as to the compatibility of the measure with the functioning of the EEA Agreement. An independent expert had evaluated the project proposed by Farice and the proposals submitted by Sýn, and found that Sýn's proposal was more cost effective.

65. In addition, Sýn submits that the length of the preliminary examination procedure is noteworthy. Sýn refers to the Court's finding that the duration of the preliminary investigation, in conjunction with requests for additional information, may be evidence that the conditions are not fulfilled for basing a decision on the preliminary investigation.⁶

66. ESA rejects the grounds advanced by Sýn in support of the first plea and submits that the first plea must be dismissed as unfounded.⁷ First, ESA argues that Sýn has failed to explain from where the legal obligation for the Icelandic authorities to carry out a transparent consultation/selection procedure derives. ESA further argues that it addressed Sýn's interests in laying a third cable in the Contested Decision. Since Sýn's offer was to only build the submarine cable and not to operate it, ESA found that Sýn's offer could not be considered equivalent to the project envisaged by Farice. That Sýn signalled interest in participating in the construction of the third submarine cable does therefore not alter the reality of a market failure.

67. Second, ESA submits that it addressed Sýn's complaint in the Contested Decision and explained that the scope of the complaint did not encompass the measure under assessment in the Contested Decision, since the complaint concerned payments already made that did not form part of the eligible costs of the measure under assessment. ESA further submits that it in the Contested Decision clarified that with regard to the alleged aid

⁶ Reference is made to Case E-9/04 *The Bankers' and Securities Dealers' Association of Iceland v ESA* [2006] EFTA Ct. Rep. 42, paragraph 83.

⁷ Reference is made to the judgments in *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others v Commission*, C-817/18 P, EU:C:2020:637, paragraph 82, and *Commission v Tempus Energy Ltd and Tempus Energy Technology Ltd*, C-57/19 P, EU:C:2021:663, paragraph 40.

for the seabed research, this could be distinguished from investment costs for surveys, which form part of the eligible costs of the measure.

68. Third, ESA submits that it is disputable whether Sýn's project would have been more cost effective since it was only based on a single opinion, which relied on unverified figures. ESA argues that Sýn's offer was not equivalent to the project and financial support envisaged by Farice and that the obligation to consider the most cost-effective offer only exists where the authorities have decided to follow a competitive tender procedure.

69. As regards the length of the preliminary examination procedure, ESA submits that it lasted for two months, which is the standard duration of such a phase in State aid cases.⁸

70. The Icelandic Government supports ESA's arguments. It submits that Sýn has failed to provide legal grounds and arguments that meet the threshold for "serious doubts" and "serious difficulties" in determining the compatibility of the measure. According to the Icelandic Government, there is no general legal duty for a State to engage in public consultations and, moreover, Sýn has not pointed to any concrete examples of shortcomings or errors in the Icelandic Government's assessment of market failure.

71. Further, the Icelandic Government contends that the seabed research was a necessary, standalone preparatory measure to enable the Icelandic Government to assess the costs and feasibility of a new submarine cable. Consequently, the arrangement was not part of the notified State aid measure and thus not part of the Contested Decision.

72. Finally, the Icelandic Government submits that the cost estimate used by the expert was not verified and that Sýn specifically notified the Icelandic authorities that the supposed offer was no longer valid. The conditions on the operational function of the new cable set by Sýn, as well as concerns regarding national security and critical infrastructure, were factors taken into consideration when deciding to entrust Farice with the building of the new submarine cable. Sýn's proposition was based on a different business model, not only for the purposes of the new cable but also Farice's operation through the two different cables. Hence, in the view of the Icelandic Government, Sýn's business proposition is not relevant for the purposes of determining the compatibility of the State aid measure. Sýn's submission that its proposals were more cost effective fails factually, and, in addition, Sýn has not provided legal grounds to support the validity of that submission.

73. As regards the length of the preliminary examination procedure, the Icelandic Government submits that the duration of the preliminary investigation cannot be decisive or constitute indications of any difficulties raised by the notified measure.

⁸ Reference is made to the judgment in *Commission v Tempus Energy Ltd and Tempus Energy Technology Ltd*, cited above, paragraph 77.

74. By its second plea, Sýn claims that ESA breached its obligations under Article 16 SCA to adequately state reasons.⁹ This second plea is based on two grounds.

75. First, Sýn argues that ESA did not adequately state its reasons for concluding that the measure fell outside the scope of the Broadband Guidelines and which elements of the guidelines were not applicable to the assessment.

76. Second, Sýn submits that ESA committed a grave error of assessment when considering the impact of the aid measure on conditions of competition in the market. According to Sýn, ESA suggests in the Contested Decision that the remoteness of Iceland entails that the IRIS cable is not in a position to have a material impact on the competitiveness of other EEA markets compared to Iceland. Sýn argues that the market for data centres is EEA wide. Sýn further submits that ESA failed to provide any assessment of the impact of the strengthening of Farice's monopoly position in the international connectivity market on conditions of competition. Sýn argues that it is clear, from the information available to ESA, that Sýn had raised serious competition concerns with the Icelandic authorities and urged them to act on those concerns. Thus, Sýn submits that the information available to ESA should have called for an assessment of the potential impact on Farice's competitive advantage toward Sýn, which was not done. Sýn finally argues that ESA failed to state adequate reasons for why it considered the supposed safeguards in place to outweigh any potential adverse effects on competition on trade between the EEA States.

77. ESA argues that it explained why the Broadband Guidelines were not directly applicable in the Contested Decision, and that these could only be applied by analogy where relevant when assessing the measure directly under the EEA Agreement. ESA contends that this approach is consistent with its own decisional practice and that of the Commission.

78. As regards Sýn's argument that the impact of the aid on the conditions of competition should have led ESA to have doubts, ESA argues that the assessment under Article 61(3)(c) EEA does not require it to assess the relationship between aid beneficiaries and specific competitors, but only whether the trading conditions are affected to an extent contrary to the common interest. ESA submits that it was entitled to declare such aid compatible under Article 61(3)(c) EEA and that it assessed the conditions required by that provision. ESA states that it concluded in the Contested Decision that the State aid mainly had an effect on the wholesale market for international connectivity and the telecommunications market, both national and international. Additionally, ESA concluded that the aid may have an effect on the market for data centres. Concerning potential effects on competition, ESA considered that data centres and telecommunications companies did

⁹ Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v ESA* [2011] EFTA Ct. Rep. 16, paragraph 171, and Joined Cases E-10/11 and E-11/11 *Hurtigruten and the Kingdom of Norway v ESA* [2012] EFTA Ct. Rep. 758, paragraph 254.

not operate on the same services market which justified differentiation in prices between the two customer groups. The fact that these different customers might be treated differently did not raise competition concerns. Moreover, ESA states that it found that nothing in the design of the measure led to discrimination between customers, nor did it incentivise or make inevitable such discrimination.

79. The Icelandic Government supports ESA's arguments. It argues that it is clearly described in the Contested Decision why the Broadband Guidelines do not apply in this case. It further submits that the concerns raised by Sýn regarding the conditions of competition and Sýn's criticism of ESA for not assessing the impact of the aid measure were addressed in the Contested Decision. ESA found that that any negative effects on competition and trade were limited and outweighed by the positive effect of the measure. Hence, the issue was recognised and addressed, using accepted legal standards.

Per Christiansen
Judge-Rapporteur