REPORT FOR THE HEARING

in Case E-6/17

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

Fjarskipti hf.

and

Síminn hf.

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

I Introduction

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

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

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

II Legal background

EEA law

4. Article 54 EEA reads:

> *Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.*
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> *Such abuse may, in particular, consist in:*
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> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
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> *(b) limiting production, markets or technical development to the prejudice of consumers;*
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> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

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

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

National law

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

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

III Facts and procedure

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

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

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

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

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

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

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

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

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

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

1. **Does it constitute part of the effective implementation of the EEA Agreement that a natural or a legal person in an EFTA State should be able to invoke Article 54 of the Agreement before a domestic court in order to claim compensation for a violation of the prohibitions of that provision?**
2. **When assessing whether the conditions are fulfilled for a compensation claim in view of a violation of competition rules, is it of significance whether the competent authorities have delivered a final ruling on a violation of Article 54 EEA?**
3. **Is it regarded as an unlawful margin squeeze, violating Article 54 EEA, when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than that at which it sells termination to its competitors?**
4. **Is the fact that an undertaking is in a dominant position on the relevant wholesale market sufficient for it to be guilty of applying an unlawful margin squeeze, violating Article 54 EEA, or must the undertaking also be in a dominant position on the relevant retail market?**

IV Written observations

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

- Fjarskipti, represented by Dóra Sif Tynes, District Court Attorney, acting as Counsel;

- Síminn, represented by Halldór Brynjar Halldórsson, District Court Attorney, acting as Lead Counsel, on behalf of Helga Melkorka Óttarsdóttir, Supreme Court Attorney;

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

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

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

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

V Summary of the arguments submitted

Fjarskipti

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

19. Under the first question, Fjarskipti submits that the ECJ has consistently held that individuals or economic operators can rely on the competition provisions of the Treaty on the Functioning of the European Union ("TFEU") before a national court. The full effectiveness of those provisions and in particular the effect of the prohibition laid down therein, would be put at risk if it were not open to any individual to claim damages for loss suffered by a conduct liable to restrict or distort competition.[3] The importance of private enforcement has also been stressed by the Court, stating that this ought to be encouraged, as private enforcement could contribute significantly to the maintenance of effective competition in the EEA. The right to seek damages in the EEA should be in parallel to similar rules under EU law.[4]

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

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

22. Fjarskipti argues that it would be tantamount to a breach of the principle of effectiveness if a natural or legal person would be required to prove anew a violation of Article 54 EEA where this has already been firmly established by national competition authorities. Where there is a final decision in place, as in this case, it would be contradictory to the obligations under the EEA Agreement if that decision could not be relied upon before a national court in an action for damages.

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

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

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

emphasises the importance of taking into account the principles of equivalence and effectiveness.

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

25. Fjarskipti argues that for the finding of abuse it must be established that a practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anti-competitive effect that may potentially exclude competitors who are at least as efficient as the dominant undertaking.[5]

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

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

Síminn

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

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

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

able to invoke Article 54 EEA before a domestic court in order to claim compensation for a violation of the prohibition in that provision.

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

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

31. Síminn further argues that stand-alone actions close the "enforcement-gap" created by the competent authorities' lack of resources to pursue all infringements. Such actions both increase the deterrence effect of the competition rules and the likelihood of such infringements being detected. It is not necessary to always refer to a decision by the Commission or competent authority having established an infringement.[7] The right and the effectiveness of Article 54 EEA itself must be protected by allowing actions for damages before the national courts.

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

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

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

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

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

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

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

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

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

The Icelandic Government

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

38. The Iceland Government submits that private enforcement should be encouraged, as it helps maintaining effective competition in the EEA.[12] The full effect of the competition rules applicable in the EEA would be put at risk if it were not open to any person to claim damages for loss caused to them by a contract or by conduct liable to restrict or distort

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

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

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

competition.[13] National courts have an essential part to play in the application of EEA competition, as they protect the subjective rights under EEA law by awarding damages to the victims of infringement.[14] The Icelandic Government thus proposes that the Court should answer the first question referred in the affirmative.

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

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

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

42. With regard to the third question, the Icelandic Government points out that dominant undertakings have a special responsibility not to allow their conduct impair genuine

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

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

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

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

43. However, Article 54 EEA only applies to dominant undertakings; as such, it is necessary to examine the position of both plaintiff and defendant in the relevant markets.[20] The Icelandic Government submits that when assessing if a network operator has applied an unlawful margin squeeze, it is moreover necessary to analyse the surrounding factors of the case and take into account all the relevant circumstances. In this respect, it notes that some network operators, such as Síminn, are in a particularly strong position largely as a result of the monopoly it enjoyed before the liberalisation of the telecommunications sector.

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

45. In order to assess the existence of a margin squeeze, it is necessary to look at the costs and the strategy of the dominant undertaking, assessing the difference between wholesale and retail prices. However, there is no need to demonstrate that such prices are

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

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

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

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

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

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

in themselves abusive.[22] In this regard, the Icelandic Government notes that the approval by a national regulator of the prices set by a dominant operator does not preclude their qualification as abusive under Article 54 EEA if the dominant operator is allowed to adjust them.[23] Moreover, for a margin squeeze to be abusive, such a practice must have anti-competitive effects on the market, and such effects do not need to be concrete, but rather have the potential of excluding competitors who are at least as efficient.[24]

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

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

48. With regard to the fourth question, the Icelandic Government merely notes that it is settled case law that it is not necessary for an undertaking dominant on the upstream market to be dominant also on the downstream market in order to establish that it has applied an abusive margin squeeze. Indeed, the fact that a dominant undertaking's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of the prohibition in Article 102 TFEU and, equivalently, Article 54 EEA.[27]

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

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

23 Reference is made to *Deutsche Telekom*, cited above, paragraphs 80 to 90.

24 Reference is made to the judgments in *TeliaSonera Sverige*, cited above, paragraph 64, and *Telefónica*, C-295/12 P, EU:C:2014:2062, paragraph 124.

25 Reference is made to *TeliaSonera Sverige*, cited above, paragraphs 75 to 77.

26 Reference is made to the judgment in *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraph 186 and case law cited.

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

The Norwegian Government

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

51. With regard to the first question, the Norwegian Government recalls that Article 3 EEA obliges the Contracting Parties to take all appropriate measures to ensure the fulfilment of obligations arising from the EEA Agreement. As Article 54 EEA and Article 102 TFEU are sufficiently precise and unconditional, they may not only impose obligations on the undertakings to which they are addressed, but also establish rights on private parties to protect their interests in case of breach. In this regard, the Norwegian Government emphasises that this is not a question of direct effect in the sense that applies to non-incorporated directives under EU law, to which there is no comparison under EEA law, cf. Article 7 EEA. Rather the issue is whether Article 54 EEA, having been implemented in Icelandic law, is sufficiently precise and unconditional to not only impose obligations on undertakings, but also to establish rights for private parties to protect their interests.

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

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

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

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

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

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

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

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

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

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

59. With regard to the third question, the Norwegian Government recalls that due to the nature of the termination service and the existence of absolute entry barriers in the relevant markets, each network owner is normally deemed to hold a dominant position in the market for termination of calls in its own network.[31] Potential competition concerns arise when operators set prices at the wholesale level while being vertically integrated into retail calls markets where they compete with their wholesale customers. One such potential competition concern is unfair pricing, referring to the incentives that terminating operators have to raise rivals' costs by setting termination prices at levels that impede their rivals' ability to compete in downstream retail markets.

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

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

62. Furthermore, the Norwegian Government submits that, in order to establish whether a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there

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[31] Reference is made to the seventh recital in the preamble of the EFTA Surveillance Authority Recommendation of l3 April 2011 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EFTA States (ESA Recommendation 2011).

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

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

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

is an effect that may potentially exclude competitors who are at least as efficient as the dominant undertaking.[35]

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

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

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

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

ESA

67. With regard to the first question, ESA notes that the full effect of EEA competition rules would be put at risk if there were no possibility of claiming damages before a domestic court for a loss caused by a breach of Article 54 EEA.[37] Similarly to the Icelandic and Norwegian Governments, ESA points to the vital role of national courts in applying EEA competition rules and ensuring their enforcement through actions by private parties.[38]

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

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

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

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

Moreover, by way of legal background, ESA refers to the Damages Directive, which reiterates the right to claim full compensation for anyone who suffers harm caused by an infringement of EU competition law.

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

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

70. ESA notes that it is for the national court to establish whether the relevant procedural rules in national law respect such principles. As for the principle of effectiveness, the court should review, inter alia, the national rules on lapse of claims and limitation periods (including their length and the extent to which they are suspended during any investigation of the national competition authorities), as well as how difficult it is for litigants to bring follow-on or stand-alone damages claims for breaches of Article 54 EEA (for example, the rules on discovery or disclosure, and on burden of proof). In this regard, ESA suggests that the national court takes into account the approach of the Damages Directive which, albeit not incorporated into the EEA Agreement, can be seen as an example of a framework in which effective remedies for breaches of competition rules take place.[41] The national court must ensure that where national limitation periods are not suspended during the investigation of a competition authority, the limitation period is long enough to ensure an effective remedy for a breach of Article 54 EEA.[42]

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

72. As for the second question, ESA makes two preliminary remarks. First, it notes that it understands the term "competent authorities" used in that question to mean the Icelandic

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

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

[41] Reference is made to Article 10 of the Damages Directive.

[42] Reference is made to *Manfredi and Others*, cited above, paragraphs 78 to 82.

Competition Authority and the Competition Appeals Committee, which were competent and required to rule on whether there was a breach of Article 54 EEA in the present case. They acted under Article 3(1) and Article 5 of Chapter II of Protocol 4 SCA, which provide for the decentralised enforcement of the EEA competition rules by the competition authorities of the EFTA States. Protocol 4 SCA was amended to include the necessary provisions analogous to those of Regulation 1/2003 and thereby decentralise enforcement of Articles 53 and 54 EEA within the EFTA pillar. Second, ESA states that it considers a "final ruling" to be one which cannot be, or can no longer be, appealed by normal means. This encompasses the ruling in the case before the referring court.

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

74. ESA notes that in the EU, a final infringement decision will constitute full proof before civil courts in the same Member State and at least *prima facie* evidence of an infringement before courts of other Member States. It will also be of procedural significance in the EU.[43] The harmonising rules of the Damages Directive are not yet incorporated into the EEA Agreement. The general principles of equivalence and effectiveness nevertheless apply. A national court must bear these principles in mind when considering whether to take into account a final ruling, and if so, to what extent it should be taken into account.

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

76. ESA argues that, when considering how much weight to attach to a final ruling, the national court should be free to consider all the relevant facts and circumstances of the case, including the amount and quality of evidence in the relevant ruling. ESA considers

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

that in all but the most exceptional cases, a final ruling should be considered at least prima facie evidence that an infringement of Article 54 EEA took place. It should be within the national court's discretion to decide that a final ruling constitutes irrefutable proof of the infringement, for the purposes of bringing a follow-on damages claim.

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

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

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

80. ESA argues that for a margin squeeze to be considered abusive, the practice must have an anti-competitive effect on the market, but this need not be concrete. It is sufficient to demonstrate that the margin squeeze is capable of having an effect that may potentially exclude competitors that are at least as efficient. Whether the exclusion takes place or not, is not decisive. A negative margin (wholesale price is higher than the relevant retail price) is at least potentially exclusionary, given that competitors would be compelled to sell at a loss.[45] As for a positive margin, it must be demonstrated that the application of that pricing practice was likely to make it at least more difficult for the operators concerned to trade on the relevant market, for example by reason of reduced profitability.[46]

81. Concerning the existence of so-called asymmetric termination rates, as in the case at hand, ESA takes the view that such a situation does not in itself preclude the finding of an unlawful margin squeeze in breach of Article 54 EEA. In order to establish whether a

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[44] Reference is made to *TeliaSonera Sverige*, cited above, paragraph 32.
[45] Reference is made to *TeliaSonera Sverige*, cited above, paragraph 73.
[46] Reference is made to *TeliaSonera Sverige*, cited above, paragraph 74.

margin squeeze is abusive, each case must be assessed in its own specific context and circumstances.[47]

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

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

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

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

86. With respect to the fourth question, ESA notes that the ECJ has ruled that so-called double dominance is not necessary for the finding of an abusive margin squeeze in breach of Article 54 EEA.[49] It is only required that the vertically-integrated undertaking concerned has a dominant position on the relevant wholesale market, and not that it also holds a dominant position on the relevant retail market.[50] ESA emphasises that, in addition to

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

48 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 62.

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

50 Reference is made to *TeliaSonera Sverige*, cited above, paragraph 89.

finding a dominance at the wholesale level, the other conditions for finding a margin squeeze must be met; dominance itself is not prohibited.[51]

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

The Commission

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

89. As for Article 102 TFEU, the ECJ has held that it produces direct effects in private relationships, as well as creating rights for individuals that must be safeguarded.[52] Moreover, it is also established that national courts must ensure the full effect of such provisions.[53] In the Commission's view, the same finding should apply to Article 54 EEA. Both Article 102 TFEU and Article 54 EEA establish the same obligation as regards the prohibition of abuse of a dominant position. Likewise, the obligation to provide for an effective remedy in damages for a breach of competition rules, must – in view of the principle of homogeneity and the aim of ensuring equal treatment of individuals throughout the EEA[54] – be interpreted as being sufficiently precise and unconditional to have direct legal effect. Article 54 EEA is in any event implemented in Article 11 of the Icelandic Competition Act. That provision is identical in substance to Article 102 TFEU and Article 54 EEA. It must therefore be interpreted accordingly as regards the obligation to provide for an effective remedy in damages for a breach of that prohibition.

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

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51 Reference is made to *Michelin*, cited above, paragraph 57.

52 Reference is made to the judgments in *BRT and SABAM*, Case 127/73, EU:C:1974:25, paragraph 16; and *Guérin automobíles v Commission*, C-282/95 P, EU:C:1997:159, paragraph 39.

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

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

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

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

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

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

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

95. With regard to the third question, the Commission submits that the fact that a dominant undertaking in an upstream wholesale market is obliged to purchase similar services from competitors on the downstream retail market at a higher price than its own,

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

does not in itself exclude the possibility of finding an unlawful margin squeeze by the dominant undertaking.

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

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

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

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

100. The Commission notes that it is open to a dominant undertaking to demonstrate that its conduct was objectively justified; meaning that its conduct is either objectively necessary, or that the exclusionary effect produced may be counterbalanced by advantages in terms of efficiency that also benefit consumers.[59] The Commission further notes that, although it is not relevant for the assessment of Síminn's conduct, a finding by the referring

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

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

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

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

court that Fjarskipti had also engaged in an unlawful margin squeeze could potentially have an impact on Fjarskipti's ability to claim compensation or the attainable amount for compensation. The same would apply with respect to Síminn's claim in the counter-action. These, however, are matters to be determined by the referring court on the basis of the national rules governing the damages action.

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

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

Per Christiansen
Judge-Rapporteur

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