**JUDGMENT OF THE COURT**

1 June 2022

(*Action for annulment of a decision of the EFTA Surveillance Authority – Article 61(3)(c) EEA – State aid – Admissibility – Obligation to initiate formal investigation procedure – Statement of reasons*)

In Case E-4/21,

**Sýn hf.**, established in Reykjavík, Iceland, represented by Dóra Sif Tynes, attorney,

*applicant*,

**v**

**EFTA Surveillance Authority**, represented by Michael Sánchez Rydelski, Ewa Gromnicka, Ingibjörg-Ólöf Vilhjálmsdóttir and Melpo-Menie Joséphidès, acting as Agents;

*defendant*,

supported by

**Iceland**, represented by Jóhanna Bryndís Bjarnadóttir, Haraldur Steinþórsson, Vera Sveinbjörnsdóttir, acting as Agents, and Jóhannes Karl Sveinsson, attorney,

*intervener*,

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

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur), and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicant, the defendant and the intervener,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by Dóra Sif Tynes; the defendant, represented by Michael Sánchez Rydelski; and the intervener, represented by Jóhannes Karl Sveinsson, at the remote hearing on 10 February 2022,

gives the following

**Judgment**

## I Introduction

1 By an application lodged at the Court's Registry on 9 July 2021 ("the Application"), Sýn hf. ("Sýn") brought an action under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), seeking the annulment of Decision No 023/21/COL of 26 March 2021 ("the contested decision") taken by the EFTA Surveillance Authority ("ESA") concerning aid to Farice ehf. ("Farice") for investment in a submarine telecommunication cable from Iceland to Ireland ("the third cable" or "the IRIS cable project").

2 The Application for annulment is based on two pleas. First, that ESA failed to open the formal investigation procedure pursuant to Article 1(2) of Part I of Protocol 3 to the SCA although 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*

3 Article 61(1) of the Agreement on the European Economic Area ("EEA Agreement" or "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.*

4 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;*

5 Article 16 SCA reads:

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

6 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.*

7 Article 1 of Part I of Protocol 3 to the SCA ("Protocol 3 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 its 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.*

8 Article 1 of Part II of Protocol 3 SCA, entitled "Definitions", 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.*

9 Article 4 of Part II of Protocol 3 SCA, entitled "Preliminary examination of the notification and decisions of the EFTA Surveillance Authority", reads, in extract:

*2. Where the EFTA Surveillance Authority, 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').*

10 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) ("SGEI Decision") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 66/2012 of 30 March 2012 (OJ 2012 L 207, p. 46) and is referred to at point 1h of Annex XV (State aid) to the EEA Agreement. The decision entered into force on 31 March 2012.

## III Facts and pre-litigation procedure

*Background*

11 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 provision of data centre services, under the brand name Vodafone, subject to a partnership agreement with Vodafone Group plc. Sýn was a shareholder in Farice from 2002 to 2008.

12 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 by the Icelandic Government. All of Farice's long-term borrowing comes from the Icelandic Treasury.

13 Farice operates two submarine cables running from Iceland to parts of Europe: FARICE-1 and DANICE. FARICE-1 connects Iceland with Scotland, with a branch unit to the Faroe Islands. DANICE connects Iceland with Denmark. FARICE-1 and DANICE are the only submarine cables running from Iceland to Europe, and they intersect in the Atlantic Ocean. A third submarine cable, Greenland Connect, runs from Iceland to Canada via Greenland. Greenland Connect is owned and operated by Tele Greenland. It terminates in Iceland and its traffic is directed through FARICE-1 and DANICE on the way to Europe. It is possible to buy services to mainland Canada, and from there to New York, from Tele Greenland.

14 Between 2010 and 2012, the Icelandic authorities engaged in a series of measures for the restructuring of Farice due to its financial difficulties. During the same period, the Icelandic authorities submitted various State aid notifications to ESA. These were later withdrawn because the Icelandic authorities concluded that the SGEI Decision applied to these measures. 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 under Article 1(3) of Part I of Protocol 3 SCA. The Icelandic authorities entered into a public service contract with Farice providing funding for its operations.

15 The first public service contract between Farice and the Telecommunications Fund ("the Fund"), representing the Icelandic authorities, was entered into on 12 April 2012.

16 According to Sýn, the introduction of the DANICE cable and Farice's ensuing financial difficulties 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 in which it concluded that the matter should not be investigated or pursued further.

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

18 In November 2018, the Minister for Transport and Local Government submitted a proposal to the Icelandic Parliament for a resolution on an electronic communications policy 2019 to 2033. According to the proposal, the introduction of a third submarine cable connecting Iceland and Europe was envisaged. Despite the possibility to buy access to the Greenland Connect cable from Tele Greenland, the Icelandic authorities considered this cable not to meet the requirements for serving as a backup for Iceland.

19 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 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.

20 The Fund's last payments under the public service contract were effected in 2018. It is claimed 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 services of a general economic interest parameters.

21 In January 2019, Sýn submitted a formal request for funding of seabed research in preparation for the introduction of the submarine cable project. In 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.

22 On 3 June 2019, the Icelandic Parliament approved the Government's proposal. The objectives of the telecommunications policy are, inter alia, to promote accessible and effective communications and to guarantee the security of infrastructure. To achieve those objectives, the policy emphasises that three active submarine cables are intended to connect Iceland with the rest of 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.

23 In December 2019, Sýn and the board of the Fund had a meeting during which 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 of the cable – to a so-called "carrier's carrier" model – as described in the contested decision.

24 In March 2020, the Fund engaged an independent expert to evaluate the feasibility of Sýn's and Farice's proposals for the third cable. 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 allegedly unverified, data from Farice and Sýn.

25 By letter of 29 April 2020, the Ministry of Transport and Local Government shared the results of the report with Farice and 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.

26 According to the contested decision, Sýn and Farice held a meeting in May 2020 to explore the details and validity of Sýn's proposal and to confirm pricing and quality from key suppliers. The contested decision further states that Sýn was not able to confirm the prices because the key suppliers had not been willing to confirm the prices. As 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. However, according to the Application, Sýn attended a meeting with Farice where it transpired that Farice had been provided with the expert's report and details of Sýn's project, including information on price. Subsequently, Sýn contacted the Fund to obtain information on the status of the project and to also receive the expert's report, as the report had only been shared with Farice. 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.

27 Later in 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 would therefore 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.

28 In 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 in April 2021.

29 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 to be considered as services of a general economic interest 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. The complaint remains under consideration.

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

*The contested decision*

31 On 26 March 2021, ESA adopted the contested decision. ESA found that the aid to Farice for investment in a third cable constituted State aid within the meaning of Article 61(1) EEA. ESA further stated that it had no doubts that this State 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.

32 ESA noted that the compatibility of State aid for the introduction of broadband networks was normally assessed under the Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ 2014 L 135, p. 51) ("the Broadband Guidelines"). However, since the measure specifically targeted the security issues raised by the lack of geographical diversity, it fell outside the scope of the Broadband Guidelines. ESA stated that it would nevertheless apply the principles of the Broadband Guidelines by analogy to the extent that they were relevant, because those guidelines were the most detailed guidance available for assessing the compatibility with the EEA Agreement of State aid to broadband infrastructure projects.

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

34 ESA accepted the Icelandic authorities' view that the selection of Farice as owner and operator of the third cable and the selection of a cable manufacturer and installer was exempt from the Icelandic Procurement Act, which implements Directive 2014/24/EU on public procurement. According to ESA, the measure's conformity with other relevant EEA law was also ensured.

35 ESA further found that, while the contract for construction and laying down of the third 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.

36 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 (time delay) between communications on the European continent compared with communications from the continent to Iceland would remain. ESA was therefore of the view that the third cable would not 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, was unlikely to materially alter the dynamics of intra-EEA trade on the relevant market.

37 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, proximity was essential. According to ESA, large users had therefore located data centres close to international network hubs and within proximity of densely populated areas.

38 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 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 influenced such decisions. ESA found that those factors were not altered by the measure.

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

40 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 EEA States, given the safeguards in place to minimise such adverse effect.

## IV Procedure and forms of order sought

41 On 9 July 2021, Sýn lodged the present action by an application which was registered at the Court on the same date.

42 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.*

43 On 14 July 2021, ESA requested an extension of time to lodge the statement of defence ("the Defence") and on 15 July 2021 the President granted an extension from 13 September to 27 September 2021. On 24 September 2021, ESA's Defence was registered at the Court. 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.*

44 On 27 September, Sýn was served with the Defence. The President set 25 October 2021 as the deadline for Sýn's reply ("Reply") to be submitted.

45 On 7 October 2021, Iceland applied for leave to intervene pursuant to the first paragraph of Article 36 of Protocol 5 to the SCA ("the Statute") and Articles 112 and 113 of the Rules of Procedure ("RoP"). On 22 October 2021, Sýn's Reply was registered at the Court.

46 On 26 October 2021, the President granted Iceland leave to intervene after having heard the parties in accordance with Article 114(1) RoP.

47 On 22 November 2021, the rejoinder from ESA was registered at the Court.

48 On 26 November 2021, Iceland submitted its statement in intervention pursuant to Article 115 RoP. Iceland supports the form 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.*

49 On 13 December 2021, Sýn submitted its response to the statement in intervention pursuant to Article 115(4) RoP. ESA did not submit any comments on Iceland's statement in intervention.

50 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and pleas and arguments of the parties, which are mentioned or discussed in the following only insofar as it is necessary for the reasoning of the Court.

## V Findings of the Court

*Admissibility*

51 ESA submits that the Application is inadmissible because Sýn is not an "interested party" within the meaning of Article 1(h) of Part II of Protocol 3 SCA. Conversely, Sýn submits that it is such an interested party.

52 According to established case law, an interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA may bring an action for the annulment of a decision by ESA, adopted in accordance with Article 4(3) of Part II of Protocol 3 SCA, to safeguard its procedural rights in a formal investigation procedure (see Case E-9/19 *Abelia and WTW AS* v *ESA*, judgment of 17 November 2020, paragraph 63 and case law cited).

53 Under Article 1(h) of Part II of Protocol 3 SCA, an "interested party" means, inter alia, any person, undertaking or association of undertakings whose interests might be affected by the granting of State aid, in particular competing undertakings and trade

associations. An undertaking which is not a direct competitor of the beneficiary of the aid may be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid (see *Abelia and WTW AS* v *ESA*, cited above, paragraph 64 and case law cited).

54 Farice operates the only two submarine cables running from Iceland to the rest of Europe and is responsible for the operation of the fibre optic cable systems and the wholesale of international data transfer to Iceland. In the Defence, ESA acknowledges that Farice enjoys a dominant position in the market for international connectivity in Iceland. In addition, Farice is active in the sale of services in relation to the market for international connectivity, including the market for data centres.

55 Sýn is an electronic communications and media company active in all telecommunications and broadcasting markets in Iceland. Sýn provides electronic communications services, including the provision of data centre services. Furthermore, Sýn was exploring several avenues to enter the market for international connectivity services in Iceland, inter alia, by engaging with different public and private actors. It appears from the reasoning of the contested decision and the evidence submitted to the Court that, at the time of the contested decision, Sýn was, at least, a potential competitor of Farice in the market for international connectivity. In that market Farice has a dominant position. In order to provide its data centre services, Sýn is dependent on obtaining international connectivity from Farice. Moreover, in providing data centre services, Sýn is operating in the same market for such services as Farice, which puts Sýn in a direct competitive relationship with Farice in that market.

56 In the light of the foregoing, it must be held that Sýn has established, to the requisite legal standard, that its interests could be adversely affected by the grant of the State aid. Accordingly, Sýn must be considered an interested party within the meaning of Article 1(h) of Part II of Protocol 3 SCA. Therefore, the Application is admissible.

*Substance*

First plea: infringement of the obligation to open the formal investigation procedure

57 When ESA reviews a notification from an EFTA State, the preliminary examination provided for under Article 1(3) in Part I of Protocol 3 SCA is intended merely to allow ESA to form an opinion at first sight on the existence of State aid, and if aid exists, on its partial or complete compatibility of the aid in question with the State aid rules of the EEA Agreement (see *Abelia and WTW AS* v *ESA*, cited above, paragraph 60 and case law cited). ESA may conclude in the preliminary examination that the notified measure does not constitute State aid. If ESA finds that the measure constitutes State aid, it may find that the measure is compatible with the EEA Agreement and raise no objections. However, this conclusion requires that there are no doubts in this regard.

58 It follows from Article 4(4) of Part II of Protocol 3 SCA that ESA shall decide to initiate the formal investigation procedure pursuant to Article 1(2) in Part I of that protocol after such preliminary examination if doubts are raised as to the compatibility with the

functioning of the EEA Agreement of a notified measure. ESA is thus obliged to initiate that procedure if it is unable to overcome all doubts or difficulties concerning the measure's compatibility with the EEA Agreement (see *Abelia and WTW AS* v *ESA*, cited above, paragraph 79).

59 The notion of the existence of doubts or serious difficulties is objective and relates to the circumstances in which the contested decision was adopted and to its content. The Court must compare the assessment of facts and law that ESA relied on to close the preliminary investigation, with the information available to ESA at the time of the contested decision. Judicial review by the Court will, by its nature, go beyond consideration of whether there has been a manifest error of assessment. Thus, if the assessment carried out by ESA during the preliminary examination is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see *Abelia and WTW AS* v *ESA*, cited above, paragraphs 81 and 82, and case law cited). The Court recalls that the preliminary examination cannot replace the formal investigation procedure.

60 It is Sýn that bears the burden of proof that ESA should have had doubts or serious difficulties concerning the compatibility of the notified measure with the functioning of the EEA Agreement. Sýn may discharge that burden by reference to a body of consistent evidence, in particular, concerning the circumstances and the length of the preliminary examination procedure and the content of the contested decision (see *Abelia and WTW AS* v *ESA*, cited above, paragraph 83 and case law cited).

61 The lawfulness of a decision not to raise objections based on Article 4(3) of Part II of Protocol 3 SCA depends on the question whether the assessment of the information and evidence which ESA had at its disposal during the preliminary examination phase should objectively have raised doubts as to the compatibility of the measure with the functioning of the EEA Agreement, given that such doubts must lead to the initiation of the formal investigation procedure in which the parties referred to in Article 1(h) of Part II of Protocol 3 SCA may participate (see Case E-1/12 *Den norske Forleggerforening* v *ESA* [2012] EFTA Ct. Rep. 1040, paragraph 100).

62 In addition, the lawfulness of a decision not to raise objections at the end of a preliminary examination procedure falls to be assessed by the Court, in the light not only of the information available to ESA at the time when the decision was adopted, but also of the information which could have been available to ESA. The information which could have been available to ESA includes that which seemed relevant to the assessment to be carried out and which could have been obtained, upon request by ESA, during the administrative procedure (compare the judgment in *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraphs 42 and 43).

63 ESA is required to conduct a diligent and impartial examination of the notified measure, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (compare the judgment in

*Commission* v *Tempus Energy and Tempus Energy Technology*, cited above, paragraph 44). When the existence and legality of State aid is being examined, it may be necessary for ESA, where appropriate, to go beyond a mere examination of the matters of fact and law brought to its knowledge (compare the judgment in *Achemos Grupé and Achema* v *Commission*, C-847/19 P, EU:C:2021:343, paragraph 49). It cannot be inferred from that obligation that it is for ESA, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain (compare the judgment in *Commission* v *Tempus Energy and Tempus Energy Technology*, cited above, paragraph 45). However, where ESA has been made aware of potentially relevant pieces of information which call into question the information at its disposal, it may be obliged to go beyond a mere examination of the information brought to its notice (compare the judgment in *Commission* v *Tempus Energy and Tempus Energy Technology*, cited above, paragraphs 50 and 51).

64 Sýn submits that the fact that an independent expert evaluated the proposals by Farice and Sýn and found 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. Sýn contends that the report of the independent expert demonstrates that, at the time, Sýn's proposal was significantly more cost effective. Furthermore, Sýn alleges that ESA did not make any attempts to verify the accuracy of the statements made by the Icelandic authorities in the notified measure regarding the confirmation of the prices included in Sýn's proposal nor give consideration to the fact that Sýn, as a competitor of Farice, would be reluctant to share further information with Farice at the time.

65 Furthermore, Sýn contends, with reference to documents annexed to the Application, that, contrary to the assertion of the Icelandic authorities, Sýn was not given any time or opportunity to renew offers and provide confirmation of prices. In particular, Sýn refers to an email of 29 May 2020, annexed to the Application. According to Sýn, that information was included in Sýn's complaint that was submitted to ESA in February 2021 and, thus, ESA was in possession of information which indicated that the information given by the Icelandic authorities was misleading when it adopted the contested decision. Sýn submits that this should have prompted ESA to conduct a more thorough investigation and request additional information.

66 ESA and Iceland have not refuted these allegations. Although Iceland has rejected Sýn's contention that "the information given by the Icelandic authorities was misleading" or should have "prompted [ESA] to conduct a more thorough investigation", it has not disputed the allegation that Sýn was not given any time or opportunity to renew offers and provide confirmation of prices. Conversely, ESA has not touched upon this issue at all or disputed that it was aware of this information, as alleged by Sýn. ESA has merely reiterated that Sýn's proposal relied on "unverified figures" without explaining why, if it considered that the figures were unverified, it did not seek to verify them by obtaining further information from Sýn, which had already submitted a complaint to ESA.

67 ESA received the complaint lodged by Sýn, which is annexed to the Application, whilst engaging in pre-notification discussions with Iceland relating to the notified measure. In its written submissions, ESA has sought to limit the scope of the complaint, stating, inter alia, in its rejoinder that "the scope of the complaint did not encompass the measure under assessment in the contested [d]ecision, since the complaint concerned payments already made that did not form part of the eligible costs of the measure under assessment". However, the complaint explicitly alleges that "actions of the Icelandic authorities related to the roll-out of a new submarine cable, including the payment for seabed research under the auspices of a public service obligation, constitute a flagrant breach of the EEA State aid rule which call for actions by [ESA]". In addition, as was confirmed by Sýn and ESA at the oral hearing, there was a meeting between Sýn and ESA on 10 March 2021 in order to follow up on Sýn's complaint. In that meeting, Sýn requested ESA to consider a suspension injunction in order to enforce the standstill clause provided for in Article 3 of Part II of Protocol 3 SCA, as it was of the view, which is set out in the complaint, that "currently there is an ongoing breach of the State aid rules related to the roll-out of a new submarine cable, which warrants [ESA's] immediate attention". At that point in time, Sýn was unaware that there were any ongoing pre-notification discussions between Iceland and ESA. Nevertheless, when the measure at issue was formally notified to ESA on 23 March 2021, ESA did not consider it pertinent to go beyond a mere examination of the information submitted by the Icelandic authorities concerning the alleged inability of Sýn to confirm its prices before adopting the contested decision on 26 March 2021 despite the fact that it was in possession of the email of 29 May 2020, submitted to ESA alongside the complaint.

68 In the light of the foregoing, it must be held that Sýn has established that ESA was aware of documents that called into question the information at its disposal and on which it relied in the contested decision, without going beyond a mere examination of the information submitted by the Icelandic authorities. By not obtaining further information on whether Sýn was actually able to confirm its prices, or whether it had been given that opportunity, ESA failed to satisfy its obligation to conduct a diligent and impartial examination of the notified measure so that it had at its disposal the most complete and reliable information. Therefore, it is inevitable to conclude that the examination conducted by ESA in this regard was insufficient and incomplete.

69 The Court notes that Sýn has only put forward arguments relating to the Broadband Guidelines in relation to the second plea. However, the Court is not precluded from examining whether the arguments put forward in support of the second plea are also capable of supporting the first plea (compare the judgment in *Commission* v *Kronopoly and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 57 to 59).

70 Sýn contends that ESA did not adequately state its reasons for concluding that the notified measure fell outside the scope of the Broadband Guidelines.

71 In that regard, it should be noted that ESA may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility with the EEA Agreement of aid measures envisaged by EFTA States. In adopting such guidelines and announcing, through their publication, that they will apply to the cases to which they

relate, ESA imposes a limit on the exercise of its discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see Case E-9/12 *Iceland* v *ESA* [2013] EFTA Ct. Rep. 454, paragraphs 57 to 59, and compare the judgment in *Commission* v *Tempus Energy and Tempus Energy Technology*, cited above, paragraph 143).

72 In the contested decision, ESA notes that the "compatibility of aid for the rollout of broadband networks, for the purposes of securing coverage, access or connectivity, is normally assessed under the Broadband Guidelines". Whilst also noting that a similar case was "assessed by the Commission directly under the Broadband Guidelines", ESA goes on to state in the contested decision that "[a]s the measure specifically targets the security issues raised by a lack of geographic diversity (redundancy), it falls outside the scope of the Broadband Guidelines". In support of this conclusion, the only authority relied on is ESA's own decisional practice. However, that conclusion is not supported by a sufficient analysis of the scope of application of the Broadband Guidelines. Whilst ESA's alleged failure to adequately state reasons under Article 16 SCA falls to be examined in relation to the second plea, sufficiently detailed reasons are required in order for the Court to be able to exercise its power of review. Although the contested decision states that "[t]he Broadband Guidelines' primary objective is ensuring widespread availability of broadband services to end users or access to higher speed internet" and "[t]he particularities of the measure and investment at hand demonstrate that the Guidelines target different types of measures than the one under assessment", it fails to set out what impact these statements should have on the scope of application of the Broadband Guidelines. Accordingly, the incomplete nature of the assessment on the scope of application of the Broadband Guidelines in the contested decision must be considered as another indication that ESA encountered serious difficulties in its preliminary examination.

73 Sýn has further submitted that ESA failed to apply the principles of the Broadband Guidelines in the assessment of the notified measure. As concluded above, the Court considers that ESA's assessment of the scope of application of the Broadband Guidelines was insufficient. However, ESA stated nevertheless that it would apply the principles of the guidelines by analogy to the extent they were relevant when assessing the measure directly under the EEA Agreement, since the guidelines were the most detailed guidance concerning State aid to broadband infrastructure projects available for assessing the compatibility of a notified measure with the functioning of the EEA Agreement. The Court notes that irrespective of whether the notified measure in the present case was outside of the scope of the Broadband Guidelines, those guidelines still may provide useful guidance on considerations that are relevant to the assessment of compatibility in general.

74 As submitted by Sýn, paragraph 74 of the Broadband Guidelines lists cumulative conditions which must be fulfilled to demonstrate the proportionality of a measure, including, inter alia, mapping and analysis, public consultation and a competitive selection process. It follows from that paragraph that the conditions listed must be fulfilled to demonstrate the proportionality of a measure. Failure to meet any of these

conditions would be likely to require an in-depth assessment which could result in a conclusion that the State aid is incompatible with the functioning of the EEA Agreement.

75 Even though ESA states in the contested decision that it would apply the guidelines by analogy, where relevant, the reasoning in the contested decision leaves little, if any, trace of the principles in the guidelines actually being applied. This is an indication that ESA's preliminary examination was incomplete.

76 It also follows from section 3.2.4.1 of the contested decision that ESA had information about the contact between Sýn and the Icelandic authorities in the period 2018-2020 regarding Sýn's interest in the third submarine cable. It follows from the information available to ESA that Sýn tried to enter the market for international connectivity services. Yet, the contested decision does not consider factors such as potential competitors on the wholesale market for international connectivity, public consultation of stakeholders and entry barriers to that market.

77 It is further evident from recitals 31 and 32 of the contested decision that ESA had information about the report from the independent consultant concluding that Sýn's proposal was more cost effective. Sýn submits that this should have raised doubts as to the compatibility of the measure with the functioning of the EEA Agreement. The Court notes that even if it was disputable, for example, that Sýn's proposal was more cost effective, the report together with the other factors mentioned above should have affected ESA's assessment.

78 It is apparent from examination of the first plea that there is a body of objective and consistent evidence that demonstrates that ESA adopted the contested decision despite the existence of doubts. Without needing to adjudicate on Sýn's other arguments, the Court concludes that the assessment of the compatibility of the notified measure with the functioning of the EEA Agreement gave rise to doubts which should have led ESA to initiate the procedure referred to in Article 1(2) of Part I of Protocol 3 SCA. Consequently, the contested decision must be annulled.

79 In view of the annulment of the contested decision, which is necessary in the light of the Court's conclusion on the first plea, there is no need to examine the second plea.

## VI Costs

80 Pursuant to Article 121(1) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Sýn has requested that ESA be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Pursuant to Article 122(1) RoP, Iceland is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls ESA Decision No 023/21/COL concerning aid to Farice ehf. for investment in a third submarine cable.**

2. **Orders ESA to bear its own costs and to pay the costs incurred by the applicant.**

3. **Orders Iceland to bear its own costs.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 1 June 2022.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President