JUDGMENT OF THE COURT

5 May 2022

(*Action for annulment of a decision of the EFTA Surveillance Authority – Competition – Article 54 EEA – Market definition – Abuse of dominant position – Margin squeeze*)

In Case E-12/20,

Telenor ASA and Telenor Norge AS, both established in Fornebu, Norway, represented by Siri Teigum, Eivind Sæveraas, and Heidi Jorkjend, advocates, and Timothy Ward, barrister,

applicants,

v

EFTA Surveillance Authority, represented by Claire Simpson, Erlend Møinichen Leonhardsen, and Carsten Zatschler, acting as Agents, and assisted by Suzanne Kingston, barrister,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision No 070/20/COL of 29 June 2020 relating to proceedings under Article 54 of the EEA Agreement; or, in the alternative, the annulment of the Decision in part; or, in the alternative, to annul or reduce the fines imposed on the applicants in that decision,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen (Judge-Rapporteur) and Nicole Kaiser (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having regard to the written pleadings of the applicants and the defendant, and the written observations of

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

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

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Timothy Ward; the defendant, represented by Claire Simpson, Erlend Møinichen Leonhardsen and Suzanne Kingston; and the Commission, represented by Cristina Sjödin and Jan Szczodrowski; at the remote hearing on 29 June 2021,

gives the following

Judgment

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I INTRODUCTION

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

2 The case concerns Decision No 070/20/COL ("the Decision") taken by the EFTA Surveillance Authority ("the Defendant" or "ESA") on 29 June 2020. ESA found that Telenor had infringed Article 54 of the Agreement on the European Economic Area (the "EEA Agreement" or "EEA") by abusing its dominant position in the wholesale market for access to and handling of data on mobile networks ("access and origination services").

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

4 ESA found three separate infringements related to three instances of margin squeezes imposed by Telenor on Network Norway AS ("Network Norway") from 1 August 2008 to 31 August 2010; on Ventelo AS, Ventelo Norge AS and Ventelo Bedrift AS (together "Ventelo") from 1 January 2008 to 30 November 2010; and on service providers from 1 January 2008 to 31 December 2012 ("the relevant periods"). Separate fines were imposed for each of these infringements. The fines amounted to EUR 111 951 000 in total.

5 Telenor's application is based on four pleas. By its first plea, Telenor submits that ESA erred when defining the relevant downstream market. By its second plea, Telenor submits that its conduct did not constitute an abuse. By its third plea, Telenor claims that ESA's power to impose a fine on the basis of the infringements relating to Network Norway and Ventelo is time-barred. By its fourth plea, Telenor submits that ESA erred in fact and in law, when calculating the fines. The fourth plea is formulated in Telenor's application as the claim that, in relation to the fines, the Decision should be annulled in whole or in part, or that the fines should be reduced.

II LEGAL BACKGROUND

6 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.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

7 Article 35 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

The EFTA Court shall have unlimited jurisdiction in regard to penalties imposed by the EFTA Surveillance Authority.

8 Article 36 SCA reads:

The EFTA Court shall have jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.

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.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.

9 Article 2 of Chapter II of Protocol 4 to the SCA ("Protocol 4 SCA"), entitled "Burden of proof", reads:

> *In any national or EFTA proceedings for the application of Articles 53 and 54 of the EEA Agreement, the burden of proving an infringement of Article 53(1) or of Article 54 of the EEA Agreement shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 53(3) of the EEA Agreement shall bear the burden of proving that the conditions of that paragraph are fulfilled.*

10 Article 23 of Chapter II of Protocol 4 SCA, entitled "Fines", reads, in extract:

> *...*
>
> *2. The EFTA Surveillance Authority may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:*
>
> *(a) they infringe Article 53 or Article 54 of the EEA Agreement; ...*

11 Article 25 of Chapter II of Protocol 4 SCA, entitled "Limitation periods for the imposition of penalties", reads, in extract:

> *1. The powers conferred on the EFTA Surveillance Authority by Articles 23 and 24 shall be subject to the following limitation periods:*
>
> *...*
>
> *(b) five years in case of all other infringements.*
>
> *2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.*
>
> *...*
>
> *5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the EFTA Surveillance Authority having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which the limitation is suspended pursuant to paragraph 6.*
>
> *...*

III FACTS

Telenor

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

Mobile communications services

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

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

15 Stand-alone mobile broadband services allow end users to gain access to the internet on large-screen devices (for example a laptop computer) via the mobile network by using a separate USB dongle, a mobile router or similar to connect the device to the internet without being confined to a fixed location (using fixed broadband through cabled connection and Wi-Fi at home or publicly available Wi-Fi). The term stand-alone mobile broadband services is used to distinguish mobile broadband subscriptions from other mobile communications services, such as mobile telephony and mobile telephony data services included in mobile telephony subscriptions.

16 Mobile telephony data services are distinct from stand-alone mobile broadband services. Mobile telephony data services refer to services which allow end users to gain access to the internet "on the go", for example during travel, on their mobile device via the same mobile communication subscription as voice and SMS/MMS services.

17 Because phone calls, text and multimedia messages and data traffic are generated on a mobile network, access to network and origination services on such a network are preconditions for providing mobile communications services to end users. Providers of such services must either own a mobile network or enter into a wholesale agreement with an owner of such a network, such as Telenor. Based on access and origination services, which is the wholesale input, providers can offer both ordinary mobile communications services and stand-alone mobile broadband services at a retail level to end users. End users can include both business and residential customers.

Undertakings supplying access

18 Mobile network operators are owners of a mobile network. Such operators can offer both access and origination services to wholesale customers and retail access and mobile communications services to end users while using their own mobile network.

19 Telenor and Telia Norge AS were the only mobile network operators with nationwide coverage during the relevant periods. Telia Norge AS changed its name from NetCom AS to TeliaSonera Norge AS in 2011, and to Telia Norge AS in 2016 (collectively referred to as "Telia").

20 ICE, including Nordisk Mobiltelefon and its successor Access Industries Inc., Telco Data and its successor ICE Communication Norge AS and sister company ICE Norge AS (collectively referred to as "ICE"), had its own mobile network, but without nationwide coverage in Norway. In June 2008, ICE's network covered 75 per cent of Norway's territory. During the relevant periods, however, the network only allowed mobile broadband and so-called machine-to-machine services. This was because ICE's network was based on a specific code-division multiple access (CDMA) technology. That technology was not compatible with other network operators' technology and required other types of devices. These devices, which were compatible with ICE's network were not compatible with the global system for mobile communications (GSM) or the universal mobile telecommunications system (UMTS). This ruled out national and international roaming, that is using other operators' networks when outside the coverage of ICE's own network. ICE's network did not allow ordinary mobile telephony services until it purchased parts of Tele2's network in 2015. In its market analysis of 5 August 2010, the Norwegian Communications Authority (*Nasjonal kommunikasjonsmyndighet*), determined, inter alia, that, for this reason, it was highly unlikely that ICE would contribute to any degree of competition at the wholesale level in the market for access and origination services on mobile networks within the period covered by that analysis.

21 Mobile Norway AS ("Mobile Norway"), jointly established and owned by Tele2 Norge AS ("Tele2") and Network Norway, and from 2011 solely owned by Tele2, also had its own mobile network. This network was without nationwide coverage during the relevant periods. The coverage of the Tele2/Mobile Norway network expanded during the relevant periods. In 2009, it covered less than 17 per cent of the Norwegian population. By the end of 2012, its population coverage was 60 to 65 per cent.

22 In 2015, Tele2 was acquired by Telia. The Norwegian Competition Authority (*Konkurransetilsynet*) approved the merger subject to a number of conditions. Due to the market situation, one of the conditions was that ICE would have the opportunity to purchase part of Tele2's (Mobile Norway's) network and infrastructure.

Undertakings buying access

23 Retail providers that offer retail mobile communications services and do not have the necessary infrastructure themselves to offer such services must, as wholesale customers, buy access to a mobile network from a network operator such as Telenor or Telia. The type of network access that a wholesale customer requires will generally depend on whether it has its own infrastructure, and, if so, the extent of that infrastructure. Wholesale customers can be classified into three groups: national roaming operators, mobile virtual network operators and service providers.

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

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

26 A service provider is a pure reseller of mobile communications services and does not have its own infrastructure. Unlike national roaming operators and mobile virtual network operators, a service provider does not issue its own SIM cards. Service providers must rely on one or more wholesale access providers for all their infrastructure and service delivery needs. A service provider can, in principle, resell wholesale access and origination services to other service providers.

IV PRE-LITIGATION PROCEDURE

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

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

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

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

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

32 On 1 February 2016, ESA adopted a statement of objections addressed to Telenor, in which it came to the preliminary conclusion that Telenor had abused its position of dominance contrary to Article 54 EEA in relation to alleged margin squeeze practices and applying lock-in clauses in conjunction with early termination penalties. ESA found that Telenor imposed a margin squeeze on its competitors (i) Network Norway, for a three-year period from 2008 to 2010; (ii) TDC Norge, for a five-year period from 2008 to 2012; (iii) Ventelo, for a five-year period from 2008 to 2012; and (iv) service providers, for a five-year period from 2008 to 2012. A potential breach of Article 53 EEA was no longer a part of the case.

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

34 On 24 June 2019, ESA adopted a supplementary statement of objections addressed to Telenor. It contained additional evidence, documents, factual elements and arguments identified by ESA in support of the preliminary conclusions reached in the statement of objections. ESA maintained that Telenor had imposed a margin squeeze on its competitors (i) Network Norway, from the beginning of August 2008 to the end of August 2010; (ii)

Ventelo, from the beginning of January 2008 to the end of November 2010; and (iii) service providers, from the beginning of January 2008 to the end of December 2012. In respect of TDC Norge, ESA concluded that TDC Norge was not active on the residential market, nor had planned to enter that market during the relevant periods. Therefore, TDC Norge could not be considered as an actual or a potential competitor on the relevant downstream market during that period and as a result no longer a part of ESA's margin squeeze findings. ESA informed Telenor that it had decided, for reasons of prioritisation, to discontinue its investigation into a second alleged abuse relating to the lock-in clauses in conjunction with early termination penalties.

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

36 Between November 2019 and February 2020, ESA sent additional requests for information to Telenor and to the Norwegian Communications Authority and held meetings with Telenor.

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

38 Between April and June 2020, ESA and Telenor exchanged correspondence, including an additional request for information.

39 ESA adopted the Decision against Telenor on 29 June 2020, finding three infringements of Article 54 EEA and imposing corresponding fines. ESA found that Telenor had imposed a margin squeeze on its competitors Network Norway, from 1 August 2008 to 31 August 2010; Ventelo, from 1 January 2008 to 30 November 2010; and service providers, from 1 January 2008 to 31 December 2012.

V THE DECISION

The relevant markets

40 In the Decision, ESA noted that the definition of the relevant markets serves as a tool to identify and define the boundaries of competition.

41 ESA observed that the primary purpose of the market definition at the upstream level was to provide a framework for the assessment of dominance. ESA defined that market as the

wholesale market for access and origination services on public mobile telephone networks in Norway. Telenor operates as a supplier of such services on that market.

42 In relation to the market definition at the downstream level, ESA observed that the primary purpose of that definition in this case was to provide a framework for assessing whether Telenor's pricing behaviour constituted an abuse of a dominant position. The downstream market was defined as the retail market for the provision of stand-alone mobile broadband services to residential customers in Norway.

43 ESA relied, in particular, on the following considerations in relation to the definition of the retail market. ESA found that mobile broadband and fixed broadband (including Wi-Fi) have a number of different characteristics and features, and therefore were complementary services rather than substitutes due to demand-side substitution considerations; that stand-alone mobile broadband and mobile telephony data services have differences in product characteristics, usage and prices, and therefore were not substitutes due to demand-side substitution considerations; that a supply-side response by providers of mobile telephony data services would not be sufficiently immediate and effective, as most suppliers did not have economic incentives to enter or to expand in the market for residential stand-alone mobile broadband; that the cumulative competitive constraints exerted by fixed broadband services (including Wi-Fi) and mobile telephony data services was at best limited during the relevant periods; and that mobile broadband services provided to business customers were not in the same market as residential stand-alone mobile broadband services. Residential customers could not have switched to a business-only subscription and most suppliers did not have the economic incentives to enter or to expand in the market for residential stand-alone mobile broadband with sufficient effectiveness and immediacy.

Dominance

44 ESA conducted an analysis of Telenor's position on the defined wholesale market for access and origination services on mobile networks. ESA found that Telenor held a dominant position in that market during the relevant periods. The conclusion was based on Telenor's market share and the presence of barriers to entry/expansion, the lack of material competitive constraints from existing and/or potential competitors, as well as a lack of countervailing buying power from wholesale customers on the market.

Abuse: the margin squeeze

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

46 ESA concluded that, if an equally efficient competitor of Telenor had to pay

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

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

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

47 In deciding which retail service prices and tariff plans should be included in the margin squeeze test, ESA found that the appropriate level of product aggregation should be the relevant retail market, comprising Telenor's entire product portfolio on the market for residential stand-alone mobile broadband services. ESA determined that the correct charges to use in the margin squeeze test were those that Telenor actually charged its wholesale customers. Based on the price charged to the wholesale customers, ESA found that an equally efficient competitor would have incurred negative gross margins throughout the relevant periods. This finding, in itself, showed that Telenor had engaged in margin squeeze practices which were at least potentially capable of excluding competitors; and that, when conducting sensitivity testing based on Telenor's approach, but with adjustments for switching costs, that is costs incurred by the customer from switching supplier, gross margins remained negative for the same periods as under ESA's initial margin calculations.

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

49 ESA considered that it was not required to show that access and origination services on Telenor's network, that is the wholesale input, was indispensable in order to show anti-competitive effects. Nevertheless, ESA found that its conclusion on anti-competitive effects was further confirmed by the consideration that Telenor's wholesale customers affected had no effective and/or economically viable alternative to its wholesale input during the relevant periods. ESA considered that Telia, which it held to be the only competitor with a nationwide network coverage, had limited incentives to compete with Telenor on the relevant market. ESA also found that switching costs limited the scope and incentives for the wholesale customers to substitute away from Telenor's wholesale input.

50 In ESA's view, there was no objective justification for the foreclosure of competition at issue, and ESA noted that Telenor had not made such a claim.

ESA's findings and the fines imposed

51 ESA adopted a decision finding that Telenor had infringed Article 54 EEA by applying unfair tariffs which did not allow an equally efficient competitor, relying on wholesale access and origination services on Telenor's public mobile telephone network in Norway, to replicate the stand-alone mobile broadband services offered by Telenor to residential customers in Norway without incurring a loss. The Decision specified three separate infringements relating to

(i) wholesale national roaming operator tariffs charged to Network Norway from 1 August 2008 to 31 August 2010;

(ii) wholesale mobile virtual network operator tariffs charged to Ventelo from 1 January 2008 to 30 November 2010; and

(iii) wholesale tariffs charged to service providers from 1 January 2008 to 31 December 2012.

52 ESA ordered Telenor to bring an end to the infringements insofar as it had not already done so, and to refrain from similar conduct in the future.

53 Further, ESA found that Telenor could or should not have been unaware of the anti-competitive nature of its conduct, and, therefore, that Telenor committed the infringements intentionally or at least negligently. Applying the methodology for the determination of fines under the guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Chapter II of Protocol 4 SCA, (OJ 2006 C 314, p. 84, and EEA Supplement 2006 No 63, p. 44) ("the fining guidelines"), ESA imposed separate fines for each of the three infringements.

54 Each fine was calculated by reference to the relevant undertaking-specific wholesale values of sales and Telenor's retail values of sales in the relevant last full business year of the participation in the infringement. That is 2009 with regard to the infringements related to the wholesale national roaming operator tariffs charged to Network Norway and the wholesale mobile virtual network operator tariffs charged to Ventelo, and 2012 with regard to the infringement related to the wholesale tariffs charged to the service providers.

55 Taking into account the fining guidelines, ESA concluded that the proportion of the value of sales to be used to establish the basic amounts of the fines should be 10 per cent. ESA then multiplied the basic amounts by the duration in years of each infringement. In addition, ESA added an additional amount (entry fee) of 10 per cent of the relevant values

of sales in order to deter undertakings of a similar size and with similar resources from entering into the same type of infringement as Telenor.

56 ESA considered that neither mitigating nor aggravating circumstances were present. The basic amounts were multiplied by 1.2 to ensure that the fines have a sufficient deterrent effect. ESA noted that Telenor in 2019 had a turnover of approximately EUR 11.54 billion. The fines were:

(i) EUR 32 562 000 for the infringement related to the wholesale national roaming tariffs charged to Network Norway;

(ii) EUR 27 783 000 for the infringement related to the wholesale mobile virtual network operator tariffs charged to Ventelo; and

(iii) EUR 51 606 000 for the infringement related to the wholesale tariffs charged to service providers.

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

Article 1

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

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

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

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

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

Article 2

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

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

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

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

…

Article 3

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

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

VI PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

58 On 28 August 2020, Telenor lodged an application pursuant to Article 36 SCA ("the Application"), registered at the Court on the same day, seeking the annulment of the Decision.

59 Telenor requests the Court:

(i) to annul the Decision of 29 June 2020 in Case No 71480 Telenor in whole;

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

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

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

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

60 On 9 September 2020, ESA requested an extension from 3 November to 18 December 2020 of the deadline to lodge its statement of defence ("the Defence").

61 On 10 September 2020, the President granted an extension to 3 December 2020, pursuant to Article 35(2) of the Court's Rules of Procedure in force at the time ("the former RoP").

62 On 9 November 2020, ESA requested a further extension of the deadline to lodge the Defence until 18 December 2020, because of extraordinary circumstances relating to the Covid-19 pandemic restrictions.

63 On 12 November 2020, the President granted this request pursuant to Article 35(2) of the former RoP.

64 On 18 December 2020, ESA submitted its Defence. ESA requests the Court:

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

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

65 On 15 December 2020, Telenor requested an extension to the deadline to submit its reply to the Defence ("the Reply"). The President set 19 March 2021 as the time-limit for the Reply in response to that request.

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

67 On 19 March 2021, Telenor submitted its Reply. On that same day, ESA was served with the Reply. The President set 26 April 2021 as the time-limit for the rejoinder to the Reply ("the Rejoinder").

68 On 24 March 2021, ESA requested an extension of the time-limit for the Rejoinder until 21 May 2021.

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

70 On 3 May 2021, ESA submitted its Rejoinder.

71 On 18 June 2021, the Court prescribed measures of organization of procedure pursuant to Article 49 of the former RoP, in which ESA was invited to respond in writing to questions posed by the Court. ESA was invited to list its activities in the case from 13 October 2017 until 23 June 2019 and to explain whether employee turnover or any other identifiable factors may have affected the progress of the case. On 25 June 2021, ESA submitted its response, registered at the Court on the same date.

72 The oral hearing was held remotely on 29 June 2021.

73 On 1 August 2021, the Court's new Rules of Procedure ("RoP") entered into force. On 21 September 2021, the Court prescribed measures of organisation of procedure pursuant to Article 57 RoP. ESA was requested to produce the full confidential version of the Decision and all documents referred to in that decision by 28 September 2021. On 28 September 2021, ESA submitted its response, registered at the Court on 28 September 2021. Further documents were submitted by ESA on 5 October 2021.

74 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.

VII FINDINGS OF THE COURT

Jurisdiction

The standard of the Court's review

75 According to the Court's established case law, fundamental rights form part of the general principles of EEA law (see Case E-1/20 *Kerim*, judgment of 9 February 2021, paragraph 43). The provisions of the European Convention on Human Rights ("ECHR") and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights. The principle of effective judicial protection, including the right to a fair trial, which, inter alia, is enshrined in Article 6 ECHR, is a general principle of EEA law (see Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraphs 85 and 86 and case law cited).

76 The Court notes that proceedings under Article 54 EEA may entail substantial fines. In the present case, fines amounting to EUR 111 951 000 in total were imposed on Telenor for intentional or at least negligent breaches of Article 54 EEA. Having regard to the nature of the infringements in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall within the criminal sphere for the purposes of the principle of effective judicial protection (see *Posten Norge*, cited above, paragraph 88).

77 It is not inconsistent with the principle of effective judicial protection to entrust the prosecution and punishment of breaches of competition rules to administrative authorities insofar as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for by the principle of effective judicial protection (compare the judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 51 and case law cited).

78 The review of such a decision must be undertaken by a judicial body that has full jurisdiction for the review in order to comply with the guarantees of the principle of effective judicial protection. Such a body must have the jurisdiction to consider all questions of fact and law relevant to the dispute, and have the power to annul the decision in full, on questions of both facts and law (see *Posten Norge*, cited above, paragraph 100 and case law cited).

79 Article 36 SCA provides for judicial protection against decisions of ESA. The review of legality involves a review by the Court, in respect of both the law and the facts, of the arguments relied on by an applicant against the contested decision, which means that it has the power to assess the evidence, annul the decision and to alter the amount of a fine. The role of the Court hearing an application for annulment of an ESA decision finding the existence of an infringement of competition law is to assess whether the evidence and other information relied on by ESA in its decision are sufficient to establish the existence of the alleged infringement (see *Posten Norge*, cited above, paragraph 87; and compare the judgments in *Villeroy & Boch SAS* v *Commission*, C-644/13 P, EU:C:2017:59, paragraph 67, and *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 68).

80 Compliance with the principle of effective judicial protection does not require that the Court should be obliged to undertake of its own motion a new and comprehensive investigation of the file. Judicial review must not lead to the Court substituting ESA's assessment with that of its own (see *Posten Norge*, cited above, paragraph 96; and compare the judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, cited above, paragraph 55).

81 In accordance with settled case law, ESA has a margin of discretion with regard to complex economic assessments in economic matters. The Court's review of complex economic appraisals made by ESA is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. These limitations are inherent in the concept of review of legality. However, this does not entail that the Court must refrain from reviewing ESA's interpretation of information of an economic nature (see *Posten Norge*, cited above, paragraphs 95 to 99; compare the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraph 69 and case law cited).

82 ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review. The Court must, inter alia, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether the evidence is capable of

substantiating the conclusions drawn from it (see *Posten Norge*, cited above, paragraphs 99 and 100; and compare the judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, cited above, paragraph 54).

The burden and standard of proof

83 In accordance with Article 2 of Chapter II of Protocol 4 SCA, it is ESA that bears the burden of demonstrating the existence of circumstances that constitute an infringement of Article 54 EEA. It follows from case law that it is necessary to take account of the principle of the presumption of innocence, and that the undertaking to which a decision finding an infringement was addressed must be given the benefit of the doubt. ESA must produce sufficiently precise and consistent evidence to support the conviction that the alleged infringements took place (see *Posten Norge*, cited above, paragraphs 93 and 94, and Case E-5/19 *F and G*, judgment of 4 February 2020, paragraph 41; compare the judgments in *JFE Engineering and Others* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraphs 177 to 179; and *Telefónica* v *Commission*, T-216/13, EU:T:2016:369, paragraph 124 and case law cited).

84 However, it is not necessary for ESA to adduce such proof in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by ESA, viewed as a whole, and whose various elements are able to reinforce each other, proves the existence of the circumstances that constitute the infringement in question (see *Posten Norge*, cited above, paragraph 94; compare the judgments in *JFE Engineering and Others* v *Commission*, cited above, paragraph 180, and *Intel* v *Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 163).

85 Proceedings before the Court are between the parties. It is for the applicant to raise pleas in law against the decision which they contest and to adduce evidence in support of those pleas. The applicant is required to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence to demonstrate that its objections are well founded (see *Posten Norge*, cited above, paragraph 268; and compare the judgments in *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraphs 131 and 132, and *Intel* v *Commission*, cited above, paragraph 166).

Admissibility of certain annexes and documents

86 In the Defence, ESA submits that the content of several annexes to the Application must be declared inadmissible. Specifically, ESA contests Telenor's reference to the Application's Annex A1, which sets out an overview of evidence relied on by Telenor in relation to its first plea, as well as several reports prepared by a consulting firm. ESA submits that those annexes and the arguments they contain must be declared inadmissible, insofar as they are only generally referred to in the Application.

87 The Court recalls that, in accordance with Article 19 of the Statute, an application must contain the pleas in law on which it is based. It follows from Article 32(3) of the former RoP, in force at the time the Application was lodged, that an application may have annexes containing the documents relied on "in support of it". Further, if an action is to be admissible, it is necessary for the basic matters of law and fact relied on to be indicated, at least in summary form, coherently and intelligibly in the application itself. The body of the application may be supported and supplemented on specific points by references to extracts from documents appended to it. However, a general reference to other documents, even those appended to the application, cannot make up for the absence of the essential arguments in law which must appear in the application itself. Furthermore, it is not for the Court to seek and identify in annexes the arguments on which the Court may consider the action to be based. The annexes have a purely evidential and instrumental function (see *Posten Norge*, cited above, paragraph 112, and compare the judgments in *Nexans France* v *Commission*, T-135/09, EU:T:2012:596, paragraph 112; and *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94).

88 Accordingly, the Court will only address arguments which are sufficiently set out in the Application itself. The Court will only address the claims of inadmissibility to the extent that it is necessary for the Court's reasoning (compare the judgment in *Intel* v *Commission*, cited above, paragraph 112).

The first plea: the relevant downstream market

89 By its first plea, Telenor submits that ESA erred when defining the relevant downstream market as the retail market for the provision of residential stand-alone mobile broadband services.

90 The first issue raised in the first plea concerns demand-side substitution. Telenor contends that ESA made errors of law and assessment and breached procedural requirements in its assessment of demand-side substitution. Telenor argues that ESA failed to follow its own market definition notice, failed to give reasons, failed to replace the "small but significant and non-transitory increase in price test" ("SSNIP test") with an adequate alternative, and failed to adduce sufficient evidence to substantiate its assessment.

91 The second issue raised in the first plea concerns supply-side substitution. Telenor argues that ESA made errors of law and assessment in its consideration of supply-side substitution, erring in its application of the legal test and by taking into account negative margins in the assessment.

First part of the first issue: failure to follow the market definition notice, give reasons and replace the SSNIP test with an adequate alternative

92 Telenor submits that ESA erred in law by failing to follow its own decision No 46/98/COL of 4 March 1998 on the definition of the relevant market for the purpose of competition law within the European Economic Area (OJ 1998 L 200, p. 46) ("the market definition

notice"), failed to provide reasons for not adhering to that notice, and failed to replace the SSNIP test with any objective method. In Telenor's view, ESA should have replaced the test with an analysis of whether a sufficient proportion of customers viewed other products as interchangeable.

93 The purpose of defining the relevant market is to identify in a systematic way the competitive constraints that the undertakings in question face, and to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. According to case law, the relevant assessment is whether there is a sufficient degree of substitutability or interchangeability between products. Interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue. The competitive conditions and the structure of supply and demand on the market must also be taken into consideration. Products that are effective substitutes for each other form part of the same market (compare the judgments in *Hoffmann-La Roche*, C-179/16, EU:C:2018:25, paragraph 51, and *Topps Europe* v *Commission*, T-699/14, EU:T:2017:2, paragraph 81).

94 The SSNIP test consists of postulating a hypothetical small (five to ten per cent) and lasting change in relative prices of a given product and evaluating the likely reactions of customers to that price change. If substitution is enough to make such a price increase unprofitable because of the resulting loss of sales, the substitutes are included in the relevant market (compare the judgment in *CEAHR* v *Commission*, T-427/08, EU:T:2010:517, paragraph 69). The test is a recognised quantitative methodology for defining a market and can provide clear indications of the substitutability of the products in question.

95 The Court notes that the SSNIP test is but one method of defining the relevant market. In certain situations the necessary information to conduct a SSNIP test may not be available, nor may the test always be appropriate. Determination of competitive constraints cannot be limited to an assessment of quantitative evidence in order to demonstrate that customers viewed other products as interchangeable. According to case law, ESA is not obliged to apply the SSNIP test. It may make use of other tools, such as comparing product characteristics, market studies, consumer preferences, views of other competitors and differences in prices to conduct its assessment of demand-side substitution (compare the judgments in *Topps Europe* v *Commission*, cited above, paragraph 82; *United Brands Company and United Brands Continentaal BV* v *Commission*, 27/76, EU:C:1978:22, paragraphs 12 to 35; and *Tetra Pak* v *Commission*, C-333/94 P, EU:C:1996:436, paragraphs 7 to 20).

96 As also follows from the market definition notice, analysis of product characteristics and intended use allows ESA, as a first step, to limit the field of investigation of possible substitutes. While differences in product characteristics are not in themselves sufficient to exclude demand substitutability, further evidence of substitution in the recent past, other

quantitative tests, views of customers and competitors, consumer preferences, barriers and costs associated with switching demand to potential substitutes, and different categories of customers and price discrimination all constitute relevant evidence to assess whether two products are demand substitutes in a specific case.

97 The Court recalls that the market definition must be carried out on a case-by-case basis. ESA is required to take the circumstances and facts of the specific case into account and carry out an individual appraisal of the circumstances of each case (compare the judgments in *Slovenská pošta a.s.* v *Commission*, T-556/08, EU:T:2015:189, paragraph 197, and *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 79).

98 The Court notes that, in sections 8.4.3.2 and 8.4.4.2 of the Decision, ESA conducted its analysis of demand-side substitution with fixed broadband and mobile telephony data services in accordance with established case law and the market definition notice. ESA based its assessment, as a starting point, on an analysis of product characteristics, the intended and actual usage, and prices of the services. ESA then further considered internal Telenor documents, the views of certain competitors of Telenor, as well as decisional practice and assessments from the Norwegian Communications Authority, the Norwegian Competition Authority, other national regulatory authorities in the EU, and the Commission.

99 Similarly, the analysis of demand-side substitution with business mobile broadband in section 8.4.6.2 of the Decision was also based on product characteristics and further substantiated by considerations on prices, the view of a competitor, and a decision of the Norwegian Competition Authority.

100 Accordingly, it must be held that ESA did not fail to follow the market definition notice, or to replace the SSNIP test with an adequate alternative.

101 Regarding Telenor's argument that ESA failed to state reasons for departing from the market definition notice, the Court observes that the market definition notice is intended to provide legal certainty. ESA would be under an obligation to provide reasons if it departed from that notice (compare the judgment in *Donau Chemie* v *Commission*, T-406/09, EU:T:2014:254, paragraph 74). However, ESA's approach to demand-side substitution is in line with both established case law and the market definition notice.

102 Consequently, Telenor's assertion that ESA erred in law by failing to follow the market definition notice, failed to provide reasons for departing from that notice and failed to replace the SSNIP test with an adequate alternative must be dismissed.

Second part of the first issue: failure to substantiate findings on demand-side substitution

103 Telenor argues that ESA failed to provide sufficient evidence to substantiate its conclusion that neither fixed broadband, public and semi-public Wi-Fi, mobile telephony data

services, nor business offerings were sufficient demand-side substitutes for residential stand-alone mobile broadband.

a) Fixed broadband as a substitute for mobile broadband

104 Telenor asserts that ESA erred in its assessment of facts and evidence, and contends that fixed broadband was an effective substitute for mobile broadband. In particular, according to Telenor, ESA has wrongly limited its assessment to observing product characteristics and their intended and actual use.

105 The Court observes that, as Telenor argues, considerations on product characteristics and intended use are not themselves sufficient to conclude whether two products are demand-side substitutes. However, ESA did not base itself on product characteristics and intended use alone. In section 8.4.3.2.1 of the Decision, ESA, as a starting point, based itself on product characteristics and how mobile broadband and fixed broadband have a number of different characteristics and features, inter alia, a difference in mobility, with mobile broadband allowing consumers to use the internet "on the go". ESA then further substantiated those findings in the Decision.

106 As ESA described in recitals 201 to 205 of the Decision, Telenor's own customer surveys substantiate the conclusion that the difference in product characteristics between fixed broadband and mobile broadband constituted an important explanation why consumers purchased and actually used mobile broadband during the relevant periods. The prices for mobile broadband services were also higher compared to those for fixed broadband.

107 Further, as described in recitals 209 and 212 of the Decision, Telenor itself, in a presentation to the Norwegian Communications Authority in 2011, considered that mobile broadband services typically featured caps on data volume for end users, and had slower speeds compared to fixed broadband. As argued by ESA, the fact that customers bought residential mobile broadband in addition to fixed broadband indicates that the products were complementary.

108 More importantly, the contemporary internal statements and documents from Telenor relied on by ESA in those recitals also reveal that Telenor itself viewed mobile broadband and fixed broadband to be complementary and separate non-substitutable products, based on both considerations of characteristics and usage during the relevant periods.

109 Similarly, statements submitted to the Norwegian Communications Authority by Telia and Ventelo, and a consumer survey conducted by that authority in 2013, referred to in recital 211 of the Decision, demonstrate that mobile broadband and fixed broadband were complementary products rather than substitutes.

110 As further demonstrated by ESA in section 8.4.3.2.3 of the Decision, decisional practice of the Norwegian Communications Authority, other national regulatory authorities, the

Norwegian Competition Authority and the Commission all provide evidence for the finding that fixed broadband and mobile broadband were part of separate markets during the relevant periods.

111 The assessments carried out by the Norwegian Communications Authority between 2005 and 2009, and 2010 and 2014 demonstrate that fixed broadband was not a substitute for mobile broadband. As late as in the "Analysis of the market for access and call origination on public mobile telephone networks" of 1 July 2016, the Norwegian Communications Authority concluded that fixed broadband had a disciplinary effect on mobile broadband only to a limited extent and that the two services were not substitutable. The 2012 report from the Body of European Regulators for Electronic Communications (BoR (12) 52), relied on in recital 223 of the Decision, shows that the majority of national regulatory authorities in the EU, based on the same considerations, found that fixed and mobile services belong to separate markets. In addition, as relied on by ESA in recitals 224 to 226 of the Decision, the Norwegian Competition Authority has in several cases found that fixed broadband and mobile data services belonged to separate markets.

112 Finally, as observed by ESA in recital 227 of the Decision, ESA's assessment does not contradict Commission decisional practice in telecoms merger cases, as argued by Telenor. The decisions at issue are Commission decision of 12 December 2012 in Case M.6497, *Hutchison 3G Austria/Orange Austria*, decision of 11 May 2016 in Case M.7612, *Hutchison 3G UK/Telefónica UK*, and decision of 1 September 2016 in Case M.7758, *Hutchison 3G Italy/Wind/JV*. In those decisions, the Commission found that fixed broadband services were not substitutable for mobile data services and did not form part of the same product market. This was due, inter alia, to product characteristics, and, in particular the differences in mobility.

113 In light of the foregoing, the Court considers that ESA did not fail to sufficiently substantiate its finding on the relevant market definition in the present case. In the Application, Telenor has however submitted several further arguments contesting that finding.

114 Inter alia, Telenor argues that ESA failed to take proper account of evidence when establishing that mobile broadband and fixed broadband were complementary. According to Telenor, ESA unjustifiably dismissed the value of evidence related to customer switching patterns.

115 The Court notes that, in section 8.4.3.2.4.1 of the Decision, ESA relied on evidence concerning such patterns, assessed it in light of other relevant evidence, and found that it could not be interpreted as an indication of substitution from mobile to fixed broadband. As the evidence relied on in recital 241 of the Decision demonstrates, customer surveys showed rather that a vast majority of respondents already had fixed broadband at home

when they acquired mobile broadband. The fact that customers saw the need to have both products indicates, as argued by ESA, that the services were complementary.

116 Similarly, the customer survey relied on as evidence in recital 242 of the Decision shows that, according to survey respondents, they terminated their subscription for mobile broadband due to the fact that they did not use it. The fact that respondents left the market for mobile broadband cannot necessarily be interpreted as an indication of substitution from mobile to fixed broadband.

117 Telenor contends that a large share of customers used mobile broadband at home, and argues that ESA failed to assess whether fixed broadband was a substitute for these customers. However, the fact that a large share of customers used mobile broadband at home does not contradict the finding that fixed broadband did not sufficiently constrain mobile broadband. As described by ESA in recitals 201 to 205 of the Decision, while evidence that customers were likely to use mobile broadband at home indicates that mobile broadband could be used instead of fixed broadband, it does not provide insight into whether fixed broadband was a substitute for mobile broadband. Even if it was possible for customers to substitute fixed broadband with mobile broadband, the question that is relevant for the assessment is whether customers would have been able to substitute mobile broadband with fixed broadband. In the case of asymmetric substitution, such as the present case, substitution from fixed to mobile broadband does not necessarily prove an ability to substitute from mobile to fixed broadband (compare the judgment in *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraphs 96 and 97).

118 Further, Telenor argues that ESA is highly selective in its finding of facts drawn from customer surveys relied on by ESA to substantiate its conclusion that fixed and mobile broadband were complementary. According to Telenor, ESA merely states the numbers and types of users, without any assessment of whether the customers would substitute mobile broadband subject to a price increase. Further, Telenor contends that ESA overlooked the fact that the surveys at issue also included business and residential customers, mobile telephony data services, and evidence from 2008 showing that complementary use of fixed and mobile broadband was more common for business users. Furthermore, Telenor argues that the surveys provide a distorted picture as the term "MBB" (mobile broadband) varies and usually includes access considered by ESA as mobile telephony data services.

119 The Court recalls, however, that ESA is not obliged to conduct a SSNIP test nor to quantify whether a specific number of customers viewed the product as interchangeable. The Court considers that ESA did not err in its assessment of the customer surveys referred to in recital 215 of the Decision. As argued by ESA, these surveys are specific in referring to the consumer segment, and the distinction between mobile broadband and mobile telephony data services was sufficiently clear. Even if complementary usage of fixed broadband and mobile broadband were more common for business users than for

residential customers, this does not undermine ESA's finding that mobile broadband and fixed broadband were complementary products.

120 Telenor also argues that it is irrelevant that fixed broadband and mobile broadband grew in parallel, as data usage in general was growing. However, as demonstrated by ESA in recital 216 of the Decision, the fact that subscriptions of both products grew indicates that the products were complementary, even if data usage increased in general. The evidence ESA relies on shows that end users who had access to fixed broadband primarily viewed mobile broadband as a supplement to fixed broadband. The fact that the number of fixed broadband subscriptions continued to increase whilst mobile broadband increased sharply, also indicated that customers considered mobile broadband as a supplement to fixed broadband access.

121 Telenor also disputes ESA's assessment of prices and argues that, depending on usage, mobile broadband for some customers would have been cheaper than fixed broadband. According to Telenor, this indicates that fixed broadband was not the cheapest alternative for all customers. However, this argument does not alter the finding that fixed broadband was not a substitute for residential stand-alone mobile broadband. As ESA submits, these customers would be even less likely to consider fixed broadband as an effective alternative to mobile broadband.

122 Finally, Telenor submits that ESA failed to take proper account of a number of material facts and disregarded a substantial body of evidence, which Telenor included in Annex A1 to the Application. As examples of those facts and evidence, Telenor claims that one out of four respondents in a 2008 survey viewed mobile broadband as a complete substitute to fixed broadband and that 20 per cent of new broadband customers chose mobile instead of fixed broadband alternatives. However, what is relevant for the assessment is whether customers would have been able to substitute mobile with fixed broadband. Thus, the Court does not consider that the examples Telenor refers to in the Application are capable of altering the conclusion that fixed broadband was not a sufficient substitute for mobile broadband.

123 As regards other facts and evidence referred to in Annex A1, the Court recalls that the essential arguments of law and facts that an application relies on must appear in the application itself. A general reference to other documents cannot make up for the absence of the essential arguments in law in the application. It is not for the Court to seek and identify in annexes the arguments on which the Court may consider the action to be based (see *Posten Norge*, cited above, paragraph 112; and compare the judgment in *Nippon Chemi-Con Corporation* v *Commission*, T-363/18, EU:T:2021:638, paragraph 55).

124 In the Application, Telenor merely makes a general reference to the Annex by stating that an "overview of all facts provided by Telenor related to FBB [fixed broadband], either ignored or wrongfully disregarded or devaluated is presented in Annex A1 Table 1".

Accordingly, arguments pertaining to the relevance of these facts must be regarded as inadmissible insofar as they are not sufficiently set out in the Application.

125 In light of the foregoing, the Court considers that ESA did not fail to provide sufficient evidence to substantiate its conclusion that fixed broadband was not a sufficient demand-side substitute. Nor did ESA err in its assessment of that evidence.

b) Public and semi-public Wi-Fi

126 Telenor argues that ESA failed in its assessment of fixed broadband and Wi-Fi by not obtaining evidence as to whether public and semi-public Wi-Fi could be considered a substitute for residential stand-alone mobile broadband.

127 However, as demonstrated by ESA in section 8.4.3.2.4.5 of the Decision, neither public nor semi-public Wi-Fi are mentioned as reasons for terminating a mobile broadband subscription in any of the relevant consumer surveys relied on by ESA. Moreover, as ESA noted in the Decision, in a decision of 11 May 2016 in Case M.7612, *Hutchison 3G UK/Telefónica UK*, and a decision of 1 September 2016 in Case M.7758, *Hutchison 3G Italy/Wind/JV*, the Commission found that mobile communications services could not be substituted by public Wi-Fi services. Of particular importance in this regard was the lack of nationwide coverage and sufficient density, even in 2016. Taking into account, in this context, Norway's challenging geography and sparse population, the Court agrees, as reasoned by ESA in the Decision, that the same considerations are applicable in determining whether public and semi-public Wi-Fi were a substitute for mobile broadband during the relevant periods in the present case. Both the inferior quality and security risks when using public and semi-public Wi-Fi also indicate that such services were not a part of the relevant market during the relevant periods.

128 In light of the foregoing, the Court finds that ESA has sufficiently substantiated its assessment that public and semi-public Wi-Fi did not by itself exert a sufficient competitive constraint. Telenor has not put forward any further arguments capable of undermining ESA's assessment or the evidence ESA relies on, but merely submits that ESA has failed in its obligation to investigate.

c) Mobile telephony data services

129 Telenor argues that ESA failed to address whether mobile telephony data services were a sufficient substitute for residential stand-alone mobile broadband. According to Telenor, ESA bases itself on highly selective evidence regarding mobile telephony data service options (i) customers who used their phone for internet access, (ii) use of tethering, that is the use of a mobile phone as a modem to connect to the internet on another (large-screen) device, and (iii) twin-SIM for other devices.

130 In the Decision, ESA considered that there were differences in product characteristics between the three methods end users could access the internet through mobile telephony

data services “on the go” during the relevant periods and residential stand-alone mobile broadband, as well as differences in usage.

131 As found by ESA in section 8.4.4.2 of the Decision, internal Telenor documents show that the option of accessing the internet directly from a smartphone was confined during the relevant periods, due to technical limitations. Even if the introduction of technological developments and increased use of smartphones mitigated many of the limitations during and after the relevant periods, these developments were not sufficient to conclude that mobile telephony data services exerted a material competitive constraint on stand-alone mobile broadband before the end of 2012. Telenor argues that ESA failed properly to assess evidence that showed the percentages of customers who used their mobile phone for internet access. However, the Court observes that ESA took that usage into account in the Decision at recital 286. As ESA substantiated, Telenor’s own customer surveys show that those percentages were still low before 2012. Moreover, that evidence must be assessed in light of the other relevant evidence such as product characteristics, other considerations on intended and actual use, pricing, contemporary internal Telenor documentation, views of competitors and decisional practice. These factors all reinforce the conclusion that mobile telephony data services were not sufficient substitutes to exert a competitive constraint on residential stand-alone mobile broadband.

132 In relation to tethering, the evidence relied on by ESA shows that that option was not an effective competitive constraint. In the relevant periods, not all mobile phones could be used for tethering, it was cumbersome, and consumer surveys showed that it was not a popular option. Further, internal Telenor correspondence from the end of the relevant periods in late 2012 reveals that Telenor itself considered that tethering would lead to prices of data for small screens and large screens converging in the future. Thus, this indicates that tethering and stand-alone mobile broadband services were not yet substitutes during the relevant periods.

133 As regards the twin-SIM option, the Court observes that the evidence ESA relies on in recital 295 of the Decision shows that twin-SIM was first introduced as an option by Telia in July 2010. Telenor offered its residential customers the possibility to buy additional data-only SIM cards only from December 2011, that is after the relevant periods relating to the infringements concerning Ventelo and Network Norway. As ESA substantiates, the significantly higher prices for the use of mobile telephony data services entailed that the twin-SIM option did not exert a competitive constraint on residential stand-alone mobile broadband during the limited part of the relevant periods it was available.

134 Consequently, the Court considers that ESA did not fail to address whether such services were a sufficient substitute for residential stand-alone mobile broadband, as argued by Telenor. Nor has ESA failed to produce sufficient evidence to substantiate those findings.

135 The Court notes that ESA assessed the competitive constraints from all mobile telephony data service options, that is options (i), (ii), and (iii) set out above, in the context also of evidence other than simply the share of users or the period when the options were available.

136 In particular, in section 8.4.4.2.2 of the Decision, the evidence ESA relies on shows that there were significant differences in prices per megabyte of data between residential mobile telephony data services and stand-alone mobile broadband for all three mobile telephony data options. As substantiated by ESA, the prices for mobile telephony data services were significantly higher than for stand-alone mobile broadband during the relevant periods. The Court agrees with ESA's finding that the more expensive pricing of data usage with a mobile telephony subscription compared to a mobile broadband subscription further confirms that the products belonged to separate markets.

137 As argued by Telenor, price differences alone may not be sufficient evidence of a lack of competitive constraint (compare the judgment in *KPN* v *Commission*, cited above, paragraph 76). However, this does not mean that price differences cannot be an indicator of whether there is sufficient competitive constraint. The Court also notes that ESA did not rely only on price differences in its assessment of mobile telephony data services.

138 Telenor claims that the price differences did not apply to all users. However, Telenor has not put forward any convincing argument or evidence that data usage with a mobile telephony subscription would have cost the same or been cheaper than stand-alone mobile broadband data usage for any significant group of customers. As found by ESA, price differences, based on average prices, indicate a lack of competitive constraint from mobile telephony data services in the relevant periods.

139 The Court finds that, in recitals 296 to 304 of the Decision, ESA sufficiently substantiated the finding that there were clear differences in actual and intended use between stand-alone mobile broadband services and mobile telephony data services during the relevant periods. In particular, there were differences in the average monthly amount of data consumption. Customers with a stand-alone mobile broadband subscription consumed a significantly higher volume of data. As argued by ESA, internal Telenor documents confirm that mobile broadband was purchased for more data-intensive tasks than mobile telephony subscriptions, as also noted by Telia in a letter to ESA in August 2016. The Norwegian Communications Authority's report regarding the Norwegian e-com market of 2015 shows that data traffic via mobile telephony services did not surpass traffic via stand-alone mobile broadband subscriptions until 2013.

140 In addition to the evidence of differences in characteristics and prices and intended and actual use, contemporary internal Telenor documents indicate that mobile broadband customers considered mobile broadband and mobile telephony data services to be complementary products rather than substitutes during the relevant periods. As further described in sections 8.4.4.2.4 and 8.4.4.2.5 of the Decision, both views of competitors and

decisional practice by the Norwegian Communications Authority, the Norwegian Competition Authority and the Commission further substantiate ESA's conclusion that the services belonged to separate markets during the relevant periods.

141 Telenor further argues that ESA was wrong to conclude that most mobile telephony subscriptions did not include sufficient data volume to satisfy stand-alone mobile broadband customers. Telenor argues that it had several call plans which satisfied the data volume needs of the vast majority of mobile broadband users.

142 In support of that argument, Telenor refers to a spreadsheet in Annex 98 to the Application with an overview of consumption. According to Telenor, the spreadsheet shows that "86% of the MBB [mobile broadband] customers consumed below 3GB and 74% consumed below 1GB of data" in 2012. However, as argued by ESA, Telenor both fails to specify how the Annex substantiates Telenor's argument and where in that document the Court can find the support for that assertion. As stated above, a general reference to other documents cannot make up for the absence of the essential arguments in law, which must appear in an application itself, and it is not for the Court to seek and identify the arguments in annexes (see *Posten Norge*, cited above, paragraph 112; and compare the judgment in *Nippon Chemi-Con Corporation* v *Commission*, cited above, paragraph 55).

143 Even if Annex 98 to the Application were capable of assisting Telenor's argument by demonstrating that some mobile telephony data services subscriptions could fulfil data consumption needs, that would not contradict ESA's finding and supporting evidence that mobile broadband and mobile telephony services belonged to separate markets. As ESA substantiates, mobile broadband customers made use of their stand-alone mobile broadband service, as is demonstrated by evidence on actual use. This is consistent with the finding that mobile broadband was considerably cheaper than data through mobile telephony data services and with Telenor's own internal assessments considering mobile telephony data services as complementary to and not a substitute for mobile broadband.

144 Telenor further claims that ESA erred in its assessment when not including mobile broadband data volumes that came from add-on options to a mobile telephony subscription, that is the possibility for mobile telephony subscribers to buy a data allowance equivalent to a stand-alone mobile broadband plan at the same price. That claim cannot be sustained. As argued by ESA, the possibility to add a mobile broadband plan to a mobile telephony plan is not relevant for the assessment of whether mobile telephony data services could be a substitute for mobile broadband.

145 Finally, Telenor has argued that ESA was wrong to disregard a substantial body of evidence submitted to ESA by Telenor and included in Annex A1, which, according to Telenor, demonstrates that there was significant substitutability at an earlier stage than found by ESA. According to Telenor, a number of other important facts regarding the use of small screen devices in particular can be derived from that evidence. However, in the

Application, Telenor only makes a general reference to the evidence by stating that "an overview of all facts provided by Telenor related to mobile telephony data services, either ignored or wrongfully disregarded or devalued is presented in Annex A1 Table 2". As found above, arguments pertaining to the relevance of such facts must be regarded as inadmissible insofar as they are not sufficiently set out in the Application.

146 Consequently, the Court finds that ESA provided sufficient evidence to demonstrate that mobile telephony data services were not a sufficient substitute for residential stand-alone mobile broadband based on demand-side considerations.

d) Cumulative constraints

147 Telenor argues that ESA failed to assess cumulative competitive constraints, that is whether fixed broadband and mobile telephony data services together exerted a competitive constraint on residential stand-alone mobile broadband.

148 This argument is unfounded. In section 8.4.5 of the Decision, ESA analysed the cumulative competitive pressure from fixed broadband and mobile telephony data services. ESA found that, taking into account the assessment of competitive constraints from fixed broadband and mobile telephony data services, the cumulative competitive constraint exerted by fixed broadband (including Wi-Fi) and mobile telephony data services was at best limited during the relevant periods.

149 The Court does not doubt this conclusion. There must be a sufficient degree of interchangeability between the products forming part of the same market, meaning that the different products in the market must be effective substitutes. As demonstrated by ESA in the Decision, the evidence shows that fixed broadband, mobile telephony data services and mobile broadband each had distinct usage and pricing. ESA's assessment of cumulative competitive constraints is in line with case law referred to above and the market definition notice.

e) Mobile broadband for business customers

150 Finally, under the first issue of the first plea, concerning demand-side substitution, Telenor argues that mobile broadband for business customers is part of the same market as residential mobile broadband.

151 However, as is apparent from the evidence relied on by ESA in section 8.4.6.2 of the Decision, differences between the residential and business segments, including differences as regards marketing, customer relations and the formation of contracts, made it appropriate to divide the offerings into two markets. As substantiated by Telenor's own comments in an annex to its reply to the statement of objections, the Norwegian Communications Authority's market analysis of 1 July 2016 and the Norwegian Competition Authority's decision V2018-20 show that residential customers could not switch to a business subscription. Further, even if Telenor did not formally offer a business

mobile broadband subscription until May 2011, mobile communications providers distinguished, in practice, between business and residential customers. Business customers bought broadband together with other mobile communications services and received discounts based on the volume of their combined purchases.

152 The Court does not find reason to doubt ESA's assessment and the evidence it relies on in concluding that business and residential mobile broadband were separate markets.

153 Accordingly, the submission that ESA failed to provide sufficient evidence to substantiate its conclusion on demand-side substitution must be dismissed.

First part of the second issue: the most suppliers test

154 By the second issue, Telenor challenges ESA's finding that there was no competitive constraint arising from supply-side substitution from mobile telephony data services and stand-alone mobile broadband for business customers.

155 In the first part of the second issue, Telenor argues that ESA's application of the "most suppliers" test is flawed. Specifically, Telenor argues that ESA wrongly required that "near the universality" of suppliers may switch from supply of the adjacent products to supply residential stand-alone mobile broadband in order for the products to form part of the same market. According to Telenor, such a requirement is neither in line with the market definition notice nor case law.

156 The Court recalls that supply-side substitution is a consideration of whether a market defined by demand-side substitution should be expanded to include other related products or services. The market definition may be expanded when suppliers of related products or services that are not demand-side substitutes, quickly and without incurring significant costs, can switch their production to offer products that would compete with the product or service in question. If the supply-side substitution constitutes an immediate and effective competitive restraint on the product or service in question, the substitute product or service should be considered part of the same relevant product market.

157 Thus, supply-side substitution may be taken into account where it exerts an as immediate and effective constraint as demand-side substitution. The criterion of supply-side substitutability implies that producers are able, by easy adaptation, to present themselves on that market with sufficient weight to constitute a serious counterbalance to producers already on the market (compare the judgment in *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 57).

158 As also expressed in paragraphs 20 and 21 of the market definition notice, supply-side substitution requires that a sufficiently large proportion of suppliers can switch production from the substitute product or service to the product or service in question. That implies

that most of the suppliers are able to switch production immediately and without significant increases in costs.

159 This entails, inter alia, that suppliers must be readily available to produce, distribute and commercialise the relevant products or services without delay; additional necessary assets must be available without incurring unrecoverable costs; consumers must regard the products or services as valid substitutes for the product or service in question; and it must be economically viable for suppliers to engage in production of the relevant products or services.

160 The Court notes that extending a market based on considerations of supply-side substitution is appropriate to reflect the competitive constraints on the product in question only when the switch of production between products or services is found to be technologically feasible and economically viable for most, if not all, of the undertakings selling one or more of those products.

161 In section 8.4.4.3.2 of the Decision, ESA considered the relevant test to apply for the assessment of supply-side substitution. In the Court's view, ESA correctly found that the test that must be applied is "whether most suppliers of [mobile telephony data services] had the ability and the economic incentives to enter the residential stand-alone [mobile broadband] market or to expand their presence in that market with sufficient effectiveness and immediacy". It is clear from the Decision that the legal test ESA applied is that of "most suppliers". This is so even if ESA illustrated the test with phrases such as "most if not all" and "nearly universal" as has been used, inter alia, in earlier Commission decisions such as the decision of 17 December 2008 in Case COMP/M.5046 *Friesland Foods/Campina*, and the decision of 17 November 2010 in Case COMP/M.5658 *Unilever/Sara Lee*.

162 Further, Telenor contends that the methodology used by ESA is unclear, that ESA established an unprecedented new test and that the economic foundation for the test is limited. However, the Court finds that the legal test applied by ESA is in line with case law, as well as the market definition notice and Commission practice, as referred to above. Accordingly, these arguments must be dismissed.

163 As ESA found in sections 8.4.4.3.3 and 8.4.6.3 of the Decision, suppliers of mobile telephony data services and business mobile broadband would be technically able to switch supply to residential stand-alone mobile broadband. However, as also found by ESA, most suppliers did not have the economic incentives to enter or to expand their presence in the residential stand-alone mobile broadband market with sufficient effectiveness and immediacy. Non-mobile network operators had to rely on the wholesale input from Telenor, the dominant operator, or Telia, on terms which made it impossible to enter or expand in the relevant market without incurring significant costs due to negative margins.

164 The Court does not find reason to question this assessment or the conclusions ESA drew from the evidence. Not only would there not have been economic incentives for entry into the relevant market, entry would not have been economically viable.

165 Telenor further argues that ESA wrongfully included an "expansion" criterion in its most suppliers test. According to Telenor, the test does not include the criterion that suppliers of residential stand-alone mobile broadband must also have incentives to "expand" their presence in the relevant market. Telenor contends that the test relates solely to entry into the relevant market by suppliers outside that market.

166 The Court recalls that supply-side substitutability requires that producers are able to enter the relevant product market and constitute a counterbalance to the producers already present on the market. Any competitive constraint from suppliers present on the market is included in the assessment of demand-side substitution. Suppliers already present on the relevant market do not represent any additional competitive constraint in the context of supply-side substitution. However, the Court understands ESA's reference to "expansion" merely to include in the assessment of supply-side substitution suppliers that only had a notional presence in the market for residential stand-alone mobile broadband. As ESA argues, such suppliers were in reality outside of the relevant market and could have had the potential to exert competitive constraints.

167 In any event, the Court does not find that the notion of "expanding presence" affected the assessment of whether supply-side substitution was immediate and effective. As demonstrated by ESA, neither the non-mobile network operators notionally present on the relevant market, nor those outside, would have been capable of constituting competitive restraints. All the non-mobile network operators in question would have had to rely on wholesale inputs from Telenor, the dominant operator, or Telia, rendering entry or expansion economically unviable, as sufficiently demonstrated by ESA. In other words, most suppliers did not have the economic incentives to enter the residential stand-alone mobile broadband market.

168 Telenor further argues that ESA failed in its assessment when rejecting the Norwegian Communications Authority's market analysis of 5 August 2010, in which mobile telephony data services were considered part of the relevant market. Telenor observes that ESA previously accepted that analysis. However, as argued by ESA, the market that was defined in that analysis was the wholesale market, which is not in dispute in this case. Therefore, that argument must be dismissed.

169 Telenor submits that ESA's assessment of supply-side substitution in the retail market is inconsistent with the assessment of the wholesale market for access and origination services, since in that assessment ESA found supply-side substitution by mobile network operators sufficient for it to reach a conclusion on the market definition. However, as argued by ESA, the mobile network operators were the only suppliers that could supply

access and origination services on that market. By contrast, also the non-mobile network operators were adjacent suppliers that potentially could become suppliers on the retail market for residential stand-alone mobile broadband. Supply-side considerations on the retail market must necessarily also take those suppliers into account in accordance with the most suppliers test. To do so cannot be regarded as inconsistent with the supply-side considerations for the purposes of defining the wholesale market.

170 Next, Telenor claims that ESA's legal test and rejection of supply-side substitution departs from Commission decisional practice. According to Telenor, Commission decisional practice confirms that it is correct to look at all the operators currently supplying the adjacent product.

171 As is pointed out by ESA, all operators supplying mobile telephony data services and mobile broadband to business customers during the relevant periods were in fact considered in sections 8.4.4.3.3 and 8.4.6.3 of the Decision in the assessment of supply-side substitution. ESA found the lack of economic incentives for non-mobile network operators decisive for that assessment. However, this does not mean that ESA did not consider all relevant operators in the assessment. As is clear from the Decision, ESA considered whether most suppliers had the technical ability and the economic incentives to enter the relevant market and found that even if suppliers had the technical ability, they did not have the economic incentives.

172 Telenor argues that it must be determinative for the assessment that the production of the adjacent products is based on the same wholesale input and the same infrastructure as the production of the focal product. Referring, inter alia, to Commission decisions of 28 May 2014 in Case COMP/M.6992 *Hutchison 3G UK/Telefonica Ireland*, and of 12 December 2012 in Case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*, Telenor argues that Commission decisional practice confirms supply-side substitution on this basis. Telenor refers to the same decisions in its argument that the Commission has confirmed that a retail market consisted of both mobile broadband and other mobile telephony services in several cases, based on supply-side substitution by mobile network operators.

173 These arguments must be dismissed. The Court recalls that the market definition must be made on a case-by-case basis. ESA must take into account the circumstances and facts of the specific case and is required to carry out an individual appraisal of the circumstances of each case without being bound by previous decisions (compare the judgments in *Slovenská pošta a.s.* v *Commission*, cited above, paragraphs 196 and 197, and *KPN* v *Commission*, cited above, paragraph 79). Whilst shared infrastructure between adjacent products or services, in this case the same wholesale input, may be an indicator of supply-side substitution, it is not in itself sufficient to establish supply-side substitution.

174 Accordingly, Telenor's assertion that ESA erred in law in its application of the most suppliers test must be dismissed.

Second part of the second issue: negative margins in supply-side substitution

175 Telenor argues that ESA erred in law and assessment when it took negative margins into account when rejecting supply-side substitution from mobile telephony data services and mobile broadband for business customers. In Telenor's view, using the existence of negative gross margins as an argument to define a narrow market and then testing margins within that market is to pre-define the abuse. According to Telenor, the methodology is unprecedented, and the result is effectively that supply-side substitution is ruled out in all margin squeeze cases.

176 The Court notes that it is in line with case law to take the costs and risks of a switch to production of the focal product into account when assessing supply-side substitution (compare the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraphs 113 to 116). As also follows from the market definition notice, in particular paragraphs 20 and 21, market definition may be expanded when suppliers of related products or services that are not demand-side substitutes, quickly and without incurring significant costs, can switch their production to offer products that would compete with the product or service in question. When supply-side substitution entails significantly adjusting tangible and intangible assets, additional investments, strategic decisions or time delays, such suppliers are not to be considered at the stage of the market definition.

177 In sections 8.4.4.3.3 and 8.4.6.3 of the Decision, ESA considered that the two mobile network operators, Telenor and Telia, were in a position to supply the wholesale input to non-mobile network operators on terms and conditions which prevented those relying on that input from providing residential stand-alone mobile broadband on an economically viable basis. ESA's approach does not imply a predetermination of the abuse, but rather a necessary assessment of the relevant facts in line with the market definition notice, decisional practice and case law. ESA did not rely only on evidence of the alleged abuse, that is in relation to Telenor's margins, but also on the margins available to the wholesale customers of Telia. This substantiates the finding that suppliers outside the relevant market would have faced unprofitable business cases and lacked the economic incentive to switch supply.

178 As ESA observes in the Defence, it would be a departure from the actual facts of the case to overlook significant commercial obstacles for suppliers to enter the relevant market. Not to take the lack of economic viability into account would have entailed including competitive constraints from suppliers of products outside the relevant market that would not have occurred in practice. It would also have involved subsequent risks to overlook potential competition and consumer harm. As ESA considered in the Decision, Telenor's and Telia's pricing practices form part of the conditions of competition in the market, and must be taken into account accordingly.

179 The Court adds that the market definition must take into account the relevant facts and circumstances of the individual case. ESA's approach in the Decision does not entail that supply-side substitution will be ruled out in any case related to margin squeeze, predatory pricing or rebates. Rather, that will depend on the specific facts of each case, in particular the structure and conditions of competition.

180 In support of its argument, Telenor refers in particular to Commission decisions in *Deutsche Telekom*, decision of 21 May 2003 in Case COMP/C-1/37.451, 37.578, 37.579, and *Telefónica*, decision of 4 July 2007 in Case COMP/38.784. According to Telenor neither of those cases make any references to negative margins in the assessment of supply-side substitution.

181 However, the Court considers that neither of those decisions can be understood to entail the conclusion that the economic viability of entry is irrelevant in the assessment of supply-side substitution. As pointed out by ESA, in the *Deutsche Telekom* decision supply-side substitution between narrowband and broadband markets was ruled out on the basis of significant costs. The *Telefónica* decision states that supply-side substitution will not be present when there are significant costs or risks associated with a switch of production. Even though the specific facts of those cases did not involve or refer to negative margins, this does not have as a logical consequence that such considerations of economic viability are not relevant.

182 Telenor further argues that ESA's reliance on the *Genzyme* case from the UK (judgment of 11 March 2004 in *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4) and the US Horizontal Merger Guidelines of the Department of Justice and the Federal Trade Commission must be disregarded. The Court notes that, although these judicial and administrative statements have no authority as a matter of EEA law, a reference to a judgment or administrative guidelines as illustrative examples does not render ESA's argument invalid.

183 Telenor also argues that the use of actual margins in assessing whether entry was economically viable creates a situation where the market definition varies depending on whether one supplier provides margins to their customers.

184 That assertion must be dismissed. Contrary to Telenor's arguments, the use of actual margins neither renders ESA's analysis arbitrary and unsustainable, nor does it create a situation where the market definition can vary depending on a single undertaking's pricing policy. In the Decision, as already established, ESA both considered and substantiated the finding that Telenor and Telia were the only two suppliers of the wholesale input, and supplied that input on terms that would make entry economically unviable for non-mobile network operators, thus ruling out supply-side substitution. That assessment is in line with both established case law and the market definition notice, based on the competitive conditions and the structure of supply for residential stand-alone mobile broadband

(compare the judgments in *AstraZeneca* v *Commission*, cited above, paragraph 31, and in *Topps Europe* v *Commission*, cited above, paragraph 81). Moreover, taking actual margins into account for assessing economic viability of entry is not contrary to paragraph 20 of the market definition notice, as argued by Telenor. Contrary to Telenor's assertion, the phrase "small and permanent changes in relative prices" in that paragraph does not refer to the methodology and appropriate test for economic viability of supply-side substitution. That wording merely refers to the hypothetical situation on the relevant market, in this case the retail market for residential stand-alone mobile broadband, to which supply-side substitution could be a response.

185 Finally, Telenor has argued that ESA failed to take into account that margins changed during the relevant periods. However, as ESA demonstrated in recital 410 of the Decision, supply-side substitution was not economically viable regardless of any change. The Court does not find reason to doubt this assessment.

186 Based on the considerations above, the Court finds that Telenor's assertion that ESA erred in law and assessment when taking negative margins into account when assessing supply-side substitution must be dismissed.

187 Consequently, Telenor's first plea, namely, that ESA erred when defining the relevant downstream market, must be dismissed.

The second plea: Telenor's conduct did not constitute an abuse

188 By its second plea, Telenor claims that ESA erred when finding that Telenor's conduct constitutes an abuse of a dominant position prohibited by Article 54 EEA. Telenor raises three issues.

189 The first issue concerns Telenor's assertion that ESA erred in law in its aggregation of the costs on the retail market for residential stand-alone mobile broadband for the calculation of Telenor's margins, and, in that respect, the assessment of the conditions of competition.

190 The second issue concerns Telenor's two-part data pricing option. Telenor alleges that ESA should have included that option in its margin squeeze analysis. During the relevant periods, Telenor introduced a second pricing option for its wholesale customers. The pre-existing pricing option involved a variable price model based on the volume of data consumed ("the variable price"). The new pricing option consisted of two parts: a smaller variable component, depending on the volume of data consumed, and a fixed component, based on the number of active SIM cards ("the two-part price"). After the two-part price was introduced, Telenor's wholesale customers could choose between the variable price and the two-part price for their purchase of the wholesale input. Telenor argues that ESA erred in law and in the application of the equally efficient competitor test by relying on the prices actually charged and by rejecting Telenor's margin squeeze analysis which included the two-part price.

191 The third issue concerns Telenor's argument that ESA erred in its assessment of the potential and actual effects on competition. According to Telenor, ESA erred in law by misapplying the indispensability criterion for finding abuse in the form of a margin squeeze, and erred in law and in its assessment of the facts by disregarding relevant evidence of effects on market structure, entry, expansion and exits. According to Telenor, ESA also failed to assess the lack of actual negative effects on market prices and changes in use.

Margin squeeze and abuse of a dominant position under Article 54 EEA

192 Abuse of a dominant position is prohibited under Article 54 EEA as incompatible with the functioning of the EEA Agreement insofar as it may affect trade between the EEA States. The purpose of the prohibition is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The notion of abuse of a dominant position is a legal notion that must be examined in the light of economic considerations (see *Posten Norge*, cited above, paragraph 126 and case law cited; and compare the judgment in *TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 22).

193 Abuse of a dominant position is an objective concept. It relates to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened because of the presence of the undertaking concerned, by methods different from those governing normal competition in products 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 (see *Posten Norge*, cited above, paragraph 130, and compare the judgment in *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 174).

194 Accordingly, Article 54 EEA not only refers to practices which may cause damage to consumers directly, but also to those practices which are detrimental to consumers through their impact on competition within a given market. An undertaking is not prohibited from acquiring a dominant position in a market on its own merits. Furthermore, it is not in itself a ground for criticism that an undertaking has a dominant position. However, it is settled case law that an undertaking which holds that position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the market (see *Posten Norge*, cited above, paragraph 127; and compare the judgment in *TeliaSonera*, cited above, paragraph 24).

195 In order to determine whether a dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all of the relevant circumstances and to investigate whether the practice tends to remove or restrict the buyers' freedom to choose the 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 (see *Posten Norge*, cited above, paragraph 128; and compare the judgment in *TeliaSonera*, cited above, paragraph 28).

196 The Court must examine the pricing practice at issue in the light of these principles in order to establish whether it constitutes an abuse of a dominant position. That examination is, in essence, whether the pricing practices introduced by Telenor were unfair insofar as they squeezed the margins of Telenor's competitors on the retail market for residential stand-alone mobile broadband services (compare the judgment in *TeliaSonera*, cited above, paragraphs 29 and 30).

197 In view of the exclusionary effect which it may create for competitors who are at least equally efficient as the dominant undertaking, a margin squeeze, in the absence of any objective justification, is, in itself, capable of constituting an abuse within the meaning of Article 54 EEA (compare the judgment in *TeliaSonera*, cited above, paragraph 31 and case law cited).

198 In the present case, there would be a margin squeeze if, inter alia, the spread between the prices for Telenor's wholesale input and the retail prices for the residential stand-alone mobile broadband services are either negative or insufficient to cover the specific costs of the broadband access input services which Telenor itself would have to incur in order to supply its own retail services to end users at those prices. Such a spread does not allow a competitor which is equally efficient as Telenor to compete for the supply of those services to end users. In such circumstances, although the competitors may be equally efficient, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability (see Case E-6/17 *Fjarskipti* [2018] EFTA Ct. Rep. 78, paragraph 59; and compare the judgment in *TeliaSonera*, cited above, paragraphs 32 and 33).

199 In addition, before the spread between the prices of those products can be regarded as squeezing the margins of competitors of the dominant undertaking, account must be taken not only of the prices of services supplied to competitors which are comparable to the services which the dominant undertaking itself must obtain to have entry to the retail market, but also of the prices of comparable services supplied to end users on the retail market by the dominant undertaking and its competitors. Similarly, a comparison must be made between the prices actually applied by the dominant undertaking and its competitors over the same period of time (compare the judgment in *TeliaSonera*, cited above, paragraph 35).

200 A margin squeeze constitutes an abuse within the meaning of Article 54 EEA, due to its effect of excluding competitors who are at least equally efficient as the dominant undertaking. Such abuse is capable of making it more difficult, or impossible, for competitors to remain in or enter the market. The anti-competitive effects do not necessarily have to be concrete. It is sufficient to demonstrate that the effect potentially may exclude competitors that are at least equally efficient as the dominant undertaking. Conversely, in the absence of any effect on the competitive situation of competitors, a pricing practice cannot be classified as an exclusionary practice where the penetration of those competitors in the market is not made more difficult (see *Fjarskipti*, cited above, paragraph 62; and compare the judgment in *TeliaSonera*, cited above, paragraphs 63, 64 and 66).

First issue: aggregation of costs for the margin squeeze assessment

201 Telenor argues that ESA erred in law in its aggregation of costs for testing Telenor's margins. Telenor asserts that ESA, in so doing, failed in its assessment of the conditions of competition by failing to take relevant evidence into account as regards the competitive situation. Accordingly, Telenor contends that ESA reached a conclusion that is not substantiated by evidence or by the reasons in the Decision.

202 In particular, Telenor argues that no company has ever supplied just residential stand-alone mobile broadband before, during or after the relevant periods; that stand-alone mobile broadband was seen as a supplement to other mobile telephony services; that residential stand-alone mobile broadband was a small market segment; that ICE only supplied stand-alone mobile broadband because it was technologically restricted from offering other services; and that the perceived importance of stand-alone mobile broadband was reduced during the relevant periods due to the technical and market developments, including the growth of smartphones, tablets and mobile telephony data services.

203 Telenor asserts that the margins should be tested at the level relevant for entry and exit decisions. According to Telenor, that level is most informative as to whether anti-competitive effects will arise for equally efficient competitors. Telenor argues that it is necessary to consider all relevant retail services that suppliers can offer using the wholesale product input, as it is that range that forms the basis of decisions on market entry and exit and as to how profitability is assessed.

204 In support of these arguments, Telenor argues, inter alia, that there is no rule that the margin squeeze assessment should be confined to margins for the product in the defined retail market, and that case law shows that a wider aggregation of products is permissible.

205 The Court notes that, according to established case law, the margin squeeze analysis must, in principle, be based on the relevant market. In the present case, that is the market for residential stand-alone mobile broadband, as observed by ESA and the Commission. The approach argued for by Telenor disregards the basic premise that the anti-competitive effect under Article 54 EEA follows from the potential of the abusive practice to make it more difficult to enter or remain on the market in question.

206 Examining whether the pricing practices of a dominant undertaking have an exclusionary effect on equally efficient competitors calls for an assessment of the possibilities of competition in the context of the market consisting of all the products which are particularly appropriate for satisfying consistent needs and are not readily interchangeable with other products (compare the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraph 201).

207 For this purpose, the determination of the relevant market serves to assess whether the dominant undertaking is able to hinder effective competition on that market (compare the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraph 202). To add the costs of products outside the market of substitutable products already defined would entail the inclusion of products which have been found not to

represent a competitive restraint in the market. This would undermine the purpose of the market definition since the assessment of the competitive conditions, restraints and potential anti-competitive effects would not function properly.

208 Rather, in order to assess the lawfulness of the pricing policy adopted by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs of the dominant undertaking on the retail market and on its strategy. On that basis, it can be established whether the dominant undertaking itself would have been able to offer its retail services to end users without a loss, or at a reduced profit, if it had been obliged to pay its own wholesale prices for its own input to the retail market. If the dominant undertaking would have been unable to offer its retail services without making a loss, competitors who risk being excluded from the market by the application of the pricing practice in question cannot be considered less efficient than the dominant undertaking. Consequently, the risk of their exclusion would be due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned (see *Fjarskipti*, cited above, paragraph 63; and compare the judgment in *TeliaSonera*, cited above, paragraphs 41 to 43).

209 Such an approach conforms to the general principle of legal certainty for the dominant undertaking. It takes the costs and the prices of the dominant undertaking into account and thus enables that undertaking to consider the lawfulness of its own conduct. Moreover, this is fully consistent with the dominant undertaking's special responsibility under Article 54 EEA. While a dominant undertaking knows its own costs and prices, it should not know those of its competitors (see *Fjarskipti*, cited above, paragraph 63; and compare the judgment in *TeliaSonera*, cited above, paragraph 44). Thus, as a general rule, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should be taken primarily of the prices and costs of the dominant undertaking on the relevant market (compare the judgment in *TeliaSonera*, cited above, paragraph 46).

210 However, the fact that the assessment of a margin squeeze must primarily take account of the prices and costs of the dominant undertaking, does not mean that an equally efficient competitor must be able to replicate the full product range of the dominant undertaking, in such a manner as Telenor's assertion entails. The Court notes, as argued by ESA, that this would amount to holding that an equally efficient competitor must offset the loss incurred as a result of the margin squeeze by potential revenues arising from other products. Telenor's view would entail that a dominant undertaking could squeeze the margins of its competitors in specific markets, provided that the losses thus incurred could be compensated with profits from related markets.

211 A system of undistorted competition can be guaranteed only if equal opportunity in the market is secured between all competitors. This means that Telenor is placed on an equal footing on the retail market with its equally efficient competitors. That would not be the case if the prices of the wholesale products paid to Telenor by its competitors could not be reflected in their retail prices or if the competitors, given the prices of Telenor's wholesale product, could offer those products only at a loss, which they would have to offset by

revenues from other markets (compare the judgment in *Telefónica and Telefónica de España* v *Commission*, T-336/07, cited above, paragraphs 202 to 204 and case law cited).

212 ESA conducted the margin squeeze test at the level of residential stand-alone mobile broadband services, as the defined relevant product market. ESA considered that it was appropriate to take into account Telenor's entire portfolio of stand-alone mobile broadband tariffs offered to residential customers during the relevant periods. In this respect, ESA did not err in law in its level of product aggregation for the purpose of the margin squeeze test. Rather, in light of the above, ESA's approach was in line with established case law.

213 Telenor's further assertions raised under the first issue of the second plea, namely that ESA failed in its assessment of the conditions of competition, are based on Telenor's view that ESA should have applied a wider level of aggregation. Since ESA's Decision is based on the appropriate level of aggregation, that is, residential stand-alone mobile broadband services, it follows that ESA did not fail to take relevant evidence into account as regards the competitive situation.

214 Accordingly, Telenor's arguments raised in the first issue of the second plea must be dismissed.

Second issue: failure to include the two-part price

215 Telenor argues that ESA erred in law and in the application of the equally efficient competitor test when limiting its margin squeeze analysis to prices actually invoiced, and not taking into account the two-part price offered by Telenor.

216 Telenor asserts that, among its wholesale customers, Network Norway could have chosen between the variable price and the two-part price from November 2009; Ventelo from January 2010; and the service providers as of July 2010 and throughout the remainder of the relevant periods.

217 Telenor argues that an equally efficient competitor that chose the two-part price could have obtained positive margins for stand-alone mobile broadband products during parts of the relevant periods. According to Telenor, ESA should have based its margin squeeze analysis on the pricing options that Telenor made available to its wholesale customers. Telenor therefore argues that ESA has failed to substantiate the finding that Telenor's pricing practices amounted to a margin squeeze, at least when the two-part price was available.

218 By limiting the margin squeeze analysis to prices actually invoiced, Telenor asserts that ESA erred in law in the correct application of the equally efficient competitor test; infringed the principle of legal certainty; applied inconsistent reasoning; failed to investigate; failed to take into account relevant evidence and adduce sufficient evidence; and reached conclusions that could not be substantiated on the basis of the analysis it performed and the reasons it gave.

219 The Court recalls that, according to established case law, a margin squeeze exists if the spread between the wholesale price invoiced to competitors and the dominant

undertaking's own retail price is negative or insufficient to cover the costs the dominant undertaking has to incur in order to supply the retail service.

220 The case law ESA relies on in the Defence and the Decision to substantiate its position that the invoiced prices are the relevant prices for a margin squeeze assessment does not concern situations where the dominant undertakings have given their competitors a choice between several price options. As argued by Telenor, those cases do not draw a distinction between offered prices and invoiced prices, which permits the conclusion that only the invoiced price is relevant in a case in which a dominant undertaking offers several price options.

221 However, in the Decision, ESA assessed both the prices charged and the two-part price, and found that Telenor's pricing practice in both cases led to negative margins for an equally efficient competitor during the relevant periods.

222 In recitals 870 to 876 of the Decision, ESA concludes that an equally efficient competitor which had to pay the price Telenor invoiced to Network Norway would have incurred negative margins in the period between 1 August 2008 and 31 August 2010. Similarly, ESA found that an equally efficient competitor paying the wholesale price as invoiced to Ventelo would have incurred negative margins from January 2008 to November 2010. An equally efficient competitor paying the wholesale price which Telenor invoiced to service providers would have reported negative margins in the period between January 2008 and December 2012.

223 As for the two-part price, ESA conducted a sensitivity and robustness check in order to assess Telenor's calculations based on that price option. ESA found that, even when adopting Telenor's own calculations on the two-part price and adjusting for parameters where ESA disagreed with Telenor's view on the relevance of certain factors, margins remained negative for the same periods.

224 Consequently, the argument that ESA erred by basing the margin squeeze analysis on the prices charged rather than the two-part price must be dismissed as ineffective.

225 Telenor has put forward a number of arguments contesting ESA's assessment of the two-part price, asserting, in essence, that ESA erred in its assessment of the facts and in its analysis.

226 The Court considers that ESA did not err in its assessment that it would be incorrect to include the two-part price in the analysis before that option was actually made part of the relevant contract. The evidence that ESA relies on in recitals 804 and 807 of the Decision shows that Telenor's offers to Network Norway in 2009 were unsigned drafts, which did not contain details of when they were sent, whether they were intended to apply in the context of the existing agreement between the parties, or whether additional or different related terms would apply. As the evidence also substantiates, the correspondence between Network Norway and Telenor shows active and protracted negotiations for about eight months. The unsigned drafts also concerned other related conditions. Furthermore, an offer by Telenor in March 2010 included a higher price than the price obtained by Network

Norway in August 2010. The two-part price was made part of the contract from September 2010.

227 Further, the Court finds that ESA did not err in considering that factors such as costs and administration in switching from one price option to another, a wholesale customer's expectations of its end users' future retail volumes, and the loss of volume discounts, are factors which had an influence on the choice whether to switch to the two-part price. Contrary to Telenor's argument, ESA did not fail to adduce evidence in support of the view that such factors are relevant. ESA has substantiated that relevance by the statement from TDC Norge referred to in recital 813 of the Decision, as well as by findings in the administrative proceedings by the Norwegian Communications Authority, upon an appeal to the Norwegian Ministry of Transport, and in a judgment of Borgarting Court of Appeal in subsequent court proceedings.

228 As described in recitals 826 and 827 of the Decision, ESA adjusted for these factors by setting a parameter for when dynamic switching between the plans was likely to be practicable. This allowed ESA to consider that a wholesale customer would not have possessed perfect information about the future evolution of its retail tariff plans and would have had to make a pricing choice based on retail volume projections, possible transaction costs, and the administration involved in changing its retail customers from one price option to another.

229 Telenor's calculations of the two-part price assumes that an equally efficient competitor would have chosen the variable price for the entire period both prices were available if the variable price was cheaper than the two-part price for more than four months. If the variable price was cheaper than the two-part price in a period of less than four months, Telenor's approach would apply the two-part price for the entire period. By comparison, ESA's approach applied the two-part price only to retail plans which were actively offered or marketed to end users in the retail market (active retail plans) from the time that the two-part price was made available. ESA did not apply the two-part price to customers on retail tariff plans that were no longer being actively marketed to end users.

230 The Court finds that ESA did not err in finding that it provided a more realistic margin squeeze analysis only to apply the two-part price to active retail plans. As ESA describes in recital 827 of the Decision, applying the two-part price to active retail plans only would have constituted a rational choice for an equally efficient competitor, as it would largely avoid the transaction and administration costs associated with switching retail customers between the two wholesale price options. Other than the adjustment for active retail plans, ESA based its calculations of the two-part price on the cost-minimising choice in line with the remainder of Telenor's own calculations. That is, it based the analysis on the cost-minimising choice for Telenor's wholesale customers on the observed traffic volumes.

231 Furthermore, ESA also did not err in considering that Telenor's assertion regarding the costs involved for a wholesale customer to switch to the two-part price option, which in some instances involved issuing new SIM cards to retail customers, did not reflect all the considerations relevant for that assessment. According to Telenor, the costs involved for

Network Norway and Ventelo in having to issue new SIM cards to customers, if they were to switch to the two-part price, could be recovered within one or two months. However, as argued by ESA, other factors must also be taken into account in addition to the administrative operational costs, including factors such as required planning resources.

232 Telenor argues that ESA's adjustments entailed that the calculations only applied to new end users, and not to existing users. However, as described in recital 839 of the Decision, and, as appears from ESA's calculations, ESA only adjusted for tariff plans which were no longer actively marketed. The two-part price was applied to existing plans which continued to be marketed after the two-part price was introduced.

233 Contrary to Telenor's assertion, the Court considers that ESA did not err in its assessment when it took the loss of volume discounts into account and that ESA's assessment is indeed supported by analysis. Based on the evidence and various wholesale agreements relied on in the Decision, ESA found that the variable price included a retroactive volume discount scheme tied to the number of voice minutes purchased each month. However, as the evidence ESA relies on in recitals 801 and 811 shows, the discount only applied to the variable price. Accordingly, ESA was correct to take the potential loss of volume discounts into account as additional switching costs when analysing the two-part price.

234 In conclusion, the Court rejects the claim that ESA has made an error in law, failed to adduce sufficient evidence, to substantiate the findings or to give reasons, or that ESA has made errors of assessment in the Decision's margin squeeze assessment. Accordingly, Telenor's arguments raised in the second issue of the second plea must be dismissed.

Third issue: failure in the assessment of potential and actual effects

235 Telenor argues, in essence, that ESA erred in law and in its assessment when finding that the alleged margin squeeze had anti-competitive effects. According to Telenor, ESA erred in its assessment of Telenor's wholesale input as indispensable, and disregarded relevant evidence and facts relating to the effects on market structure, entry, expansion and exit.

236 In the alternative, if the Court were to find that ESA has proved anti-competitive effects with respect to Network Norway and Ventelo, Telenor submits that the Decision must be annulled nonetheless in relation to service providers. According to Telenor, ESA has failed to establish potential or actual negative effects on competition at least in relation to this group of customers.

237 The Court notes that, according to established case law, the existence of a margin squeeze itself is not sufficient to constitute an abuse within the meaning of Article 54 EEA. For a pricing practice to be abusive, it must have an anti-competitive effect on the market (see *Fjarskipti*, cited above, paragraph 61 and case law cited).

238 That effect must relate to the possible barriers which such a pricing practice may create to the growth on the retail market of the services offered and, therefore, on the degree of competition in that market. Accordingly, the practice in question constitutes an abuse within the meaning of Article 54 EEA, where, given its effect of excluding a dominant

undertaking's competitors, who are equally efficient as the undertaking itself, by squeezing their margins, the dominant undertaking is capable of making it more difficult, or impossible, for its competitors to enter or remain in the market concerned (compare the judgment in *TeliaSonera*, cited above, paragraphs 62 and 63).

239 Even though a practice must have an anti-competitive effect on the market to be considered an abuse, that 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 that are at least as efficient as the dominant undertaking. Where a dominant undertaking implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, the pricing practice may constitute an abuse, even if it does not achieve the purpose of driving those competitors from the relevant market (see *Fjarskipti*, cited above, paragraph 62; and compare the judgment in *TeliaSonera*, cited above, paragraphs 64 to 66).

240 However, a margin squeeze cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice (see *Fjarskipti*, cited above, paragraph 62; and compare the judgment in *TeliaSonera*, cited above, paragraphs 64 to 66).

241 In that regard, the anti-competitive effect of a particular practice must not be purely hypothetical. The practice must, in the specific case, be capable of excluding competitors that are at least as efficient as the dominant undertaking. That assessment must be carried out in light of all the relevant circumstances, and seeks to determine whether the conduct in question produces actual or likely effects (compare the judgment in *Post Danmark II*, C-23/14, EU:C:2015:651, paragraphs 65 to 69).

242 According to established case law, whether the wholesale product is indispensable may be relevant for the assessment of the practice's effect on competition. Where access to the supply of the wholesale product is indispensable, competitors who are at least as efficient and who are unable to operate on the retail market other than at a loss or with reduced profitability suffer a competitive disadvantage on that market, such as to prevent or restrict their access to it or the growth of their activities on it. In such circumstances, at least potential anti-competitive effects are probable (see *Fjarskipti*, cited above, paragraph 66; and compare the judgment in *TeliaSonera*, cited above, paragraphs 69 to 71).

243 However, even when the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned. For example, if the margins are negative, an at least potentially exclusionary effect is probable. In such circumstances, equally efficient competitors would be compelled to sell at a loss. It is when margins remain positive that it is necessary to demonstrate that the pricing practice, for example by reason of reduced profitability, was likely to make it more difficult for competitors to trade on the market concerned (see *Fjarskipti*, cited above, paragraph 66; and compare the judgment in *TeliaSonera*, cited above, paragraphs 72 to 74).

244 In light of these considerations, the Court finds that anti-competitive effects must be established for a margin squeeze to be considered as an abuse. A finding of negative

margins substantiates the conclusion that the margin squeeze is capable of having such anti-competitive effects. Negative margins would compel equally efficient competitors to sell at a loss. A margin squeeze leading to negative margins is thus capable of excluding such competitors and making it more difficult, or even impossible, for those competitors to enter or remain in the market concerned.

245 In its assessment of the arguments raised in relation to the second issue raised under the second plea, the Court found that ESA substantiated its conclusion that both the prices offered and invoiced by Telenor to its customers led to negative margins throughout the relevant periods for Network Norway, for Ventelo and for service providers. In recitals 887 to 895 of the Decision, ESA found that Telenor's pricing practices were likely to hinder the ability of its actual or potential competitors at least equally efficient as Telenor from competing in the market for residential stand-alone mobile broadband services. ESA found that the negative margins potentially had a significant impact on the ability of such competitors to exert important competitive pressure in the market for residential stand-alone mobile broadband during the relevant periods, and on the competitors' ability to contribute to sustainable competition in both the relevant retail and wholesale markets over the long term.

246 In recitals 896 to 925 of the Decision, ESA substantiated these findings by relying on statements from Telenor's competitors and the Norwegian Competition Authority's findings in its decision against Telenor (V2018-20). ESA found that Telenor's competitors affected by the margin squeeze had no effective or economically viable alternative supply to Telenor's wholesale input, and, moreover, that switching costs limited the scope and incentives for those competitors to avoid Telenor's wholesale input.

247 The Court does not doubt ESA's assessment of the facts and evidence it relies on to support its findings. Furthermore, ESA did not err in law or in its assessment. ESA established that the margin squeeze imposed was likely to have negative effects on competition in the retail market for residential stand-alone mobile broadband services.

248 Telenor has raised a number of arguments contesting ESA's assessment to the effect that ESA has failed to demonstrate or provide reasons as to why Mobile Norway, ICE, Telia and other mobile virtual network operators and service providers, respectively, were not effective or economically viable alternative suppliers of the wholesale input to service providers. In this context, Telenor also argues that ESA, in general, has failed to provide sufficient reasoning and evidence that switching costs would limit the scope and incentives for wholesale customers to switch supply. According to Telenor, ESA failed to take relevant evidence of alternative suppliers of the wholesale input into account, which shows that the margin squeeze did not have any actual or likely anti-competitive effects.

249 As the Court has emphasised above, indispensability is relevant to the assessment, but it is not decisive. Even when the wholesale product is not indispensable, the practice may still be capable of having anti-competitive effects. That is the case, inter alia, when the margin squeeze leads to negative margins (see *Fjarskipti*, cited above, paragraph 66; and compare the judgment in *TeliaSonera,* cited above, paragraphs 70 to 75). As the Court also found

above, ESA demonstrated that the margin squeeze led to negative margins, which were capable of having likely or actual negative effects on competition in the retail market. Even if there were alternative suppliers, that does not necessarily alter the finding that the practice was capable of having likely or actual negative effects.

a) Mobile Norway as an alternative supplier

250 Telenor argues that ESA has failed to provide evidence and adequate reasoning showing that Network Norway and Tele2, through their jointly owned entity, Mobile Norway, were not an effective and economically viable alternative supplier of the wholesale input to service providers. According to Telenor, Mobile Norway had sufficient nationwide coverage to compete with Telenor on the wholesale market. Furthermore, the wholesale terms available to Mobile Norway would have entailed positive margins for service providers on the market for residential stand-alone mobile broadband from August 2010. Telenor argues that Network Norway and Tele2 were building their own network and could serve wholesale customers with an increasing share of their own wholesale input. Telenor also argues that ESA's findings are contrary to the Norwegian Competition Authority's preliminary finding in 2017, which found Mobile Norway to represent a viable potential competitor, and that ESA failed to take into account evidence available on Mobile Norway's wholesale customers.

251 However, the Court notes that, in the Decision, ESA found that Mobile Norway's network had a limited coverage during the relevant periods. It could only sell national wholesale access based on resale from Telenor or Telia. The prices it could offer were therefore affected by Telenor's and Telia's wholesale prices. In addition, switching costs made it difficult for Mobile Norway to expand on the relevant wholesale market.

252 The Court does not doubt ESA's assessment of the facts or evidence that ESA relies on to support these findings. Furthermore, ESA has not made any error in law or assessment in that regard. The fact that Network Norway and Tele2, through Mobile Norway, were present on the wholesale market does not, in itself, constitute evidence that negative effects were not likely.

253 Further, contrary to Telenor's argument, the finding that Mobile Norway only had a marginal presence in the wholesale market is not inconsistent with the Norwegian Competition Authority's assessment prior to its decision (V2018-20), in which Network Norway was considered as a potential competitor. The Court also notes that even though Network Norway and Tele2 had been able to compensate the negative margins on Telenor's network with positive margins on their joint network, this does not mean that the negative margins did not limit their ability to compete with Telenor on the wholesale market. Nor does it entail that the incremental costs on their own network were close to zero, as Telenor argues, since mobile broadband was offered over the mobile data network, which was being introduced at the time, with significant investment costs.

254 Similarly, the fact that Mobile Norway potentially could have offered the wholesale input on terms that provided for positive margins for service providers from August 2010 does

not, in itself, constitute proof that the margin squeeze did not affect competition. As argued by ESA, and substantiated in the Decision, service providers would be subject to switching costs, and it would only be the gross margins that would be positive to a limited extent.

255 Telenor also argues that it was insufficient for ESA to rely on statements from Network Norway, provided by Network Norway's successor parent company Telia, on the number of contracts with service providers which Network Norway and Tele2 held at the time. The Court does not view the evidence relied on by ESA in this regard as insufficient.

256 The Court considers that the arguments put forward by Telenor do not undermine ESA's findings. Therefore, the claim that ESA has not substantiated in the Decision the finding that Network Norway and Tele2 did not constitute an effective wholesale competitor eliminating the potential negative effects on competition of Telenor's pricing practice must be rejected.

b) ICE as an alternative supplier

257 Telenor argues that ESA has failed to provide evidence and reasons why ICE did not have a sufficient nationwide coverage to compete with Telenor in the wholesale market, as an alternative supplier to service providers. According to Telenor, ESA has not provided sufficient evidence and reasons why the fact that ICE only offered data traffic entails that ICE could not be considered a viable alternative supplier; and how loss of volume discounts rendered ICE a non-viable supplier and, in addition, ESA failed properly to investigate and take other relevant facts provided by Telenor into account.

258 The Court notes that ESA found that ICE's network during the relevant periods only allowed for mobile broadband and machine to machine services, because it was based on technology incompatible with the global system for mobile communication (GSM) and the universal mobile telecommunications system (UMTS) used by other operators, which ruled out roaming for mobile broadband outside ICE's own network. As argued by ESA, these inherent limitations to ICE's technology network entailed that wholesale customers using ICE's network would have had to conclude additional wholesale agreements with Telenor or Telia in order to provide ordinary mobile communications services in the retail market.

259 Contrary to Telenor's argument, the Court finds that ESA considered the extent of ICE's coverage. Inter alia, in the assessment of the competitive constraint exerted by ICE, ESA concluded that ICE only constituted a marginal competitor on the wholesale market. ESA's finding is substantiated by evidence, which shows, inter alia, that the Norwegian Communications Authority, in its market analysis of 5 August 2010, found that it was difficult for ICE to establish an attractive offer in the wholesale market based on the terms of access agreements with Telia. Thus, ESA found that ICE did not constitute an alternative supply to Telenor's wholesale input.

260 ESA further took account of the fact that customers who chose ICE for their wholesale supply for mobile broadband had to separate their supply between several suppliers and risked losing their volume discounts with Telenor. As the evidence relied on by ESA substantiates, the discounts that were applicable to different forms of access were a factor

that made it less attractive for customers to distribute traffic among several sellers of access. Even though customers could potentially have retained their discounts for other mobile telephony services, the level of the discount would have been affected by the volume supplied by ICE.

261 ESA did not fail to consider Telenor's argument concerning the population covered by ICE's network. Rather, ESA found that the arguments provided by Telenor did not alter its conclusion. ESA's findings were based on evidence provided by ICE's wholesale customers, the Norwegian Communications Authority's market analyses and information from Telenor itself. As such, ESA did not have insufficient information or evidence to assess ICE's capacity as an alternative supplier for the wholesale input.

262 Contrary to Telenor's argument, there is no contradiction between considering, on the one hand, that ICE did not constitute an efficient and viable supplier on the wholesale market due to its inability to offer mobile telephony services in general, and, on the other hand, concluding that there exists a separate retail market for residential stand-alone mobile broadband. As substantiated by ESA, the wholesale input was sold as a single product on the wholesale market but was sold separately on the retail market.

263 Furthermore, the Court considers that ESA did not ignore the fact that certain service providers had wholesale agreements with ICE. The Decision finds that ICE's customers entered the market in late 2011, and that ICE entered into additional wholesale agreements with Telenor and Telia. As such, this further substantiates the finding that ICE was not an effective alternative supplier on the wholesale market.

264 Accordingly, the assertion that ESA has not substantiated the finding that ICE did not constitute an effective wholesale competitor eliminating the potential negative effects on competition of Telenor's pricing practice must be rejected.

c) Telia as an alternative supplier

265 Telenor argues that ESA has not sufficiently established that Telia lacked incentives to compete and that it did not constitute an alternative supplier for service providers.

266 The Court notes that, in the Decision, ESA recognises that Telia constituted the only real competitor to Telenor on the wholesale market. However, ESA also found that Telia had limited incentives to compete due to its nature as a vertically integrated company that also was active in the retail market. Switching costs and long-term access agreements including exclusivity clauses, discount structures and minimum purchasing obligations constituted barriers for service providers to switch supply to Telia.

267 These findings were further substantiated by the evidence relied on by ESA, which demonstrated that the Norwegian Communications Authority had consistently found Telia not to be a sufficiently disciplinary market force towards Telenor. Further, Telenor and Network Norway themselves considered that Telia would not offer better terms than Telenor, and Telenor's own customers considered that quality, coverage and other factors made it virtually impossible to operate without Telenor.

268 Contrary to Telenor's assertion, ESA took the fact that Telia had wholesale customers into account. However, ESA nevertheless found that Telia remained only a limited competitor. It was not an economically viable alternative to Telenor on the wholesale market for service providers.

269 The Court does not doubt ESA's assessment of facts and evidence. The fact that, in general, vertically integrated companies, like Telia and Telenor, may have incentives to compete depending on the balance of effects on the wholesale and retail markets, as argued by Telenor with reference to reports compiled by a consulting firm, does not alter or undermine ESA's findings on this issue in the present case.

270 Accordingly, Telenor's arguments that ESA has not sufficiently established that Telia lacked incentives to compete and that it did not constitute an alternative supplier for service providers must be rejected.

d) Indirect supply from other suppliers

271 Telenor has argued that ESA failed to consider indirect supply from other mobile virtual network operators and service providers as an alternative supply for service providers. According to Telenor, ESA ignored the fact that some service providers were supplied by mobile virtual network operators and other service providers.

272 The Court notes that, in recital 914 of the Decision, ESA found that such operators could only resell access, as they had no network of their own. Accordingly, mobile virtual network operators and service providers reselling access would face the same unfavourable terms. As such, ESA substantiated the finding that mobile virtual network providers and service providers were not effective or economically viable alternative suppliers.

273 Telenor also argues that ESA has failed to recognise that both ICE and Telia were alternative suppliers to Network Norway, and that ICE, Telia and Network Norway were alternative suppliers to Ventelo.

274 The Court notes that, in the Decision, ESA found that neither Mobile Norway, ICE or Telia nor other mobile virtual network operators constituted effective and economically viable alternatives. Switching costs limited the scope and incentive for the wholesale customers affected to switch away from Telenor's wholesale input.

275 As the evidence relied on by ESA substantiates, Network Norway could not switch its supply to Telia without terminating its wholesale agreement with Telenor. A clause in its agreement prevented it from obtaining supply from other operators with nationwide coverage, which would have been Telia. The evidence also shows that Network Norway was tied to Telenor as a result of long contractual periods, exclusivity clauses with penalties and minimum purchasing obligations. The same contractual obligations also made it difficult for Network Norway to resell the wholesale input to others, as Telenor would then have been entitled to renegotiate its wholesale prices.

276 As is noted in recital 917 of the Decision, Telenor itself has observed that Network Norway and Tele2 both had long term contracts with Telenor and Telia, respectively, and could not

easily switch supplier. The evidence also substantiates the finding that Telenor itself considered it unlikely that Network Norway would be able to enter into agreements with another supplier.

e) Alternative supply for Ventelo

277 The Court notes that the evidence relied on in the Decision shows that Ventelo's ability to switch supply was limited due to a five-year contract with Telenor. As with Network Norway, the contract included penalty clauses for early termination and a clause prohibiting Ventelo from obtaining supply from other operators.

278 Telenor argues that Ventelo could have obtained residential stand-alone mobile broadband SIM cards from another supplier. That would have enabled Ventelo to make use of an alternative supplier for mobile broadband, while at the same time using its agreement with Telenor for mobile telephony. However, as ESA substantiated in the Decision, the practice in the wholesale market was that all wholesale input was purchased together. That practice limited the possibility to obtain telephony services and mobile broadband from several suppliers.

279 The Court notes that, even though an operator could possibly have obtained its supply from more than one supplier and mitigated the effect of the margin squeeze, that does not imply that there were no effects on competition in the retail market.

280 Telenor also argues that Ventelo had a wholesale agreement with Telia. However, as ESA found in the Decision, this agreement also led to negative margins and therefore did not constitute an economically viable alternative for Ventelo to avoid Telenor's margin squeeze.

281 The Court considers that ESA did not err in its assessment of facts or the evidence in this respect.

282 Accordingly, Telenor's arguments that ESA has not established (i) that neither ICE nor Telia were alternative suppliers to Network Norway; and (ii) that ICE, Telia and Network Norway were not alternative suppliers to Ventelo, must be rejected.

f) Failure to investigate and disregard of relevant evidence

283 Telenor has made a number of further arguments contending that ESA disregarded and failed to investigate relevant evidence and facts, which Telenor alleges contradict the finding that Telenor's pricing practice had likely anti-competitive effects.

284 Telenor argues that ESA failed to investigate whether any of the business-oriented suppliers, which reported a small part of their mobile broadband turnover, actually entered or tried to enter the market for residential stand-alone mobile broadband. However, the Court notes that, in recitals 957 to 966 of the Decision, ESA did consider the matter, and found that the entry of certain undertakings was consistent with the fact that the market was in a growth phase. ESA considered the evolution of the market shares in the retail market over the entirety of the relevant periods, and found that Telenor enjoyed a high

degree of market power. Telenor's market share in the retail market was approximately 50 per cent or above throughout those periods. By comparison, ESA found that customers exposed to the margin squeeze practices had insignificant market shares in the retail market. Neither Ventelo nor Network Norway achieved a market share above one per cent. The aggregated market share of other wholesale customers, including Telia's wholesale customers, was never above 5.5 per cent.

285 The Court does not doubt ESA's assessment of facts and evidence in this respect. ESA assessed the evolution of the market and market shares throughout the relevant periods. Consequently, the argument that ESA failed to investigate whether any suppliers tried to or entered the market must be dismissed.

286 Telenor also argues that there is no evidence that any entities left the market due to negative margins. That argument must also be dismissed. The effect of an abuse does not necessarily have to be concrete. It is sufficient to demonstrate that an abuse is capable of having an anti-competitive effect, which may potentially exclude competitors who are at least as efficient as the dominant undertaking. The fact that the practice does not achieve that purpose, does not alter its categorisation as abuse. As such, ESA is not under an obligation to prove that any entities left the market due to negative margins.

287 Telenor argues that the market share of wholesale customers grew throughout the relevant periods. According to Telenor, this contradicts ESA's finding that customers lacked margins to compete in the market. Telenor asserts that ESA does not explain why an increase from 1 per cent to 5.3 per cent is insignificant, and that ESA also rejects evidence that the market shares did not increase after the margin squeeze ended. According to Telenor, ESA's reasoning is insufficient to sustain a conclusion on effects.

288 The Court observes that, in the Decision, ESA found, as argued by Telenor, that the market share of wholesale customers throughout the relevant periods grew to 5.3 per cent in 2010. However, as ESA also found in the Decision, the market share remained low, and even declined to 4.1 per cent by 2012. Market shares can be affected by different factors. Smaller increases and declines in market shares therefore do not necessarily constitute evidence that anti-competitive effects are unlikely (compare the judgments in *Compagnie Maritime Belge Transports and Others*, T-24/93, T-25/93, T-26/93 and T-28/93, EU:T:1996:139, paragraph 149, and *Michelin* v *Commission (Michelin II)*, T-203/01, EU:T:2003:250, paragraph 245). In the Decision, ESA found it likely that Telenor's competitors could have exerted increased competitive pressure and that the market share of wholesale customers could have increased more significantly than was the case under the margin squeeze.

289 In recitals 945 to 984 of the Decision, ESA also examined all the specific circumstances of the case in its assessment of anti-competitive effects. That assessment included market behaviour and market outcomes also after the margin squeeze ended. ESA expressly considered Telenor's arguments in this regard and assessed that from 2013 onwards, the competitive pressure from other mobile telephony data services increased. Since that increase may have occurred as a result of numerous factors, such as technological

development, it does not undermine ESA's findings of likely anti-competitive effects during the relevant periods.

290 The Court does not doubt ESA's assessment of facts or the evidence it relies on. Nor did ESA err in its assessment of anti-competitive effects in this respect. Telenor's claim that the developments in market shares contradicts ESA's assessment must therefore be rejected.

291 Telenor also seems to contend that the fact that Telenor's customers which were not active in the retail market did not enter the market after the abuse ended implies that that the abuse was not capable of affecting competition in the first place. That argument must be rejected. The Court notes that the evidence ESA relies on in recitals 988 to 996 of the Decision shows that Ventelo entered the market for residential stand-alone mobile broadband in February 2011; that several service providers entered the market that year; and that a service provider that had a limited turnover in 2011 and 2012 increased its activity in 2014. Even though ESA is not required to demonstrate that competitors failed to enter the market due to the abuse, the fact that Ventelo and several service providers actually entered the market after the relevant periods, respectively, supports ESA's finding that anti-competitive effects were likely.

292 Telenor argues that the concerns expressed by Network Norway, Ventelo, and TDC Norge related to the commercial risks associated with supplying stand-alone mobile broadband appeared to be with the price of wholesale data, not with the alleged margin squeeze itself. The Court observes that the evidence relied on by ESA in recital 897 of the Decision shows that assertion to be incorrect. According to Network Norway, the margin squeeze was the main factor restricting it from offering mobile broadband services at competitive prices.

293 Telenor further argues that ESA failed to take evidence on prices and changes in the number of users into account. According to Telenor, that evidence contradicts ESA's finding that the margin squeeze was capable of having effects on competition. Telenor argues that the fact that mobile broadband prices fell and that the number of users increased indicates effective competition, contrary to ESA's findings.

294 However, the Court notes that ESA did in fact consider Telenor's arguments on changes in prices and numbers of users. In recitals 967 to 972 of the Decision, ESA found that falling prices and increasing volumes did not necessarily indicate strong competition. Prices and usage could be affected by other factors, such as an increase in consumer demand for data-based applications more generally. ESA found that Telenor had a high degree of market power in the retail market for residential stand-alone mobile broadband, which indicated that competition was limited.

295 The evidence relied upon by ESA further shows that Telenor itself described the market as a duopoly formed of itself and Telia. ESA also found that prices for mobile broadband in Norway did not compare favourably with prices for mobile broadband or mobile data consumption elsewhere. As ESA showed in the Decision, data usage rates in Norway were well below those in Sweden, Finland and Denmark. ESA also refers to an OECD

comparison of prices between Norway, Denmark, Finland and Sweden. That comparison showed that prices for mobile broadband in Norway either were significantly higher, or that mobile broadband packages generally included a significantly smaller volume of mobile data, as compared to neighbouring countries.

296 The Court does not doubt ESA's assessment of facts or the evidence it relies on in this regard. Any reduction in prices must be seen in the context of the negative margins imposed by Telenor. A fall in prices can, as shown in the Decision, be attributable to several factors, and does not necessarily prove that the negative margins were not capable of having anti-competitive effect. Moreover, an increase in the use of mobile broadband cannot be considered in itself as constituting evidence that the negative margins were not capable of having anti-competitive effects.

297 Accordingly, Telenor's argument that ESA failed to take evidence of falling prices and increased numbers of users into account must be rejected.

Alternative plea on service providers

298 Finally under the second plea, Telenor argues, in the alternative, in the event that the Court finds that ESA has established potential negative effects as a result of the margin squeeze in relation to Network Norway and Ventelo, that the Decision must be annulled nonetheless in relation to service providers. According to Telenor, ESA has failed to establish potential or actual negative effects on competition at least in relation to this group of wholesale customers.

299 However, Telenor's arguments in this regard are essentially the same as the arguments already considered. As the Court has found above, ESA has substantiated its finding that the margin squeeze had likely negative effects on the service providers' ability to remain in or to enter the market. Consequently, the argument that ESA has failed to establish that Telenor's practice resulted in negative effects for the service providers must be rejected.

300 As all of Telenor's arguments contesting ESA's finding that Telenor's pricing practice constituted an abuse by imposing a margin squeeze in relation to Network Norway, Ventelo and service providers, respectively, have been rejected, it follows that the second plea must be dismissed.

The third plea: ESA's power to impose fines is time-barred

301 By its third plea, Telenor argues that ESA's competence to issue fines for Telenor's infringements against Network Norway and Ventelo is time-barred pursuant to Article 25 of Chapter II of Protocol 4 SCA. Telenor argues that any abuse ceased when the two-part price was introduced. That is on 1 November 2009 for any abuse against Network Norway, or alternatively, when the standard offer was introduced in March 2010, and 1 January 2010 for any abuse against Ventelo.

302 In accordance with Article 25(1)(b), (2) and (5) of Chapter II of Protocol 4 SCA, the limitation period governing ESA's powers to impose fines for infringements of Article 54 EEA expires at the latest on the day ten years after the infringement ceased.

303 As the Court has established in its assessment of the second issue raised in Telenor's second plea, ESA has demonstrated that Telenor's infringement towards Network Norway lasted until 31 August 2010. ESA also demonstrated that the infringement towards Ventelo lasted until 30 November 2010.

304 Consequently, taking account of the fact that infringements against Network Norway and Ventelo ended on 31 August 2010 and on 30 November 2010, respectively, and that the Decision imposing fines was adopted on 29 June 2020, ESA's power to impose fines for the infringements towards Network Norway and Ventelo is not time-barred. Telenor's third plea must therefore be dismissed.

The fourth plea: the fines imposed

305 In the Application, and by its fourth plea, Telenor requests the Court to annul Article 2 of the Decision on fines and rule that no fines should be imposed. In the alternative, Telenor requests that the fines should substantially be reduced by the Court in the exercise of its unlimited jurisdiction.

306 Telenor raises five issues in this respect and argues that ESA erred in fact and in law (i) by concluding that Telenor infringed Article 54 EEA intentionally or at least negligently; (ii) in its calculation of the values of sales; (iii) in its estimation of the duration of the alleged infringements; and (iv) by failing to take mitigating circumstances into account. In any event, Telenor submits, as a fifth issue, that the Court should exercise its unlimited jurisdiction to reduce the fines for reasons of proportionality.

307 Under Article 23(2)(a) of Chapter II of Protocol 4 SCA, ESA may impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 54 EEA.

308 The Court recalls that ESA enjoys a broad discretion as regards the method of calculating fines. The fining guidelines aim to provide a framework for the exercise of that discretion and allow flexibility for ESA. However, the Court must assess ESA's exercise of that discretion (compare the judgment in *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraphs 75, 76 and 96, and case law cited).

309 Under Article 35 SCA, the Court has unlimited jurisdiction in its review of fines imposed by ESA. The Court will carry out a full review of the lawfulness of the fine. In that review, the Court is empowered to substitute its own appraisal for ESA's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see *Posten Norge*, cited above, paragraph 267).

310 The exercise of unlimited jurisdiction does not correspond to a review of the Court's own motion. Proceedings before the Court are between the parties. Thus, it is for the applicant

to raise pleas in law against a decision imposing a fine and to adduce evidence in support of those pleas (see *Posten Norge*, cited above, paragraph 268).

First issue: intent or negligence

311 Telenor argues that ESA has failed to show that Telenor could not have been unaware of the alleged anti-competitive nature of its conduct.

312 According to Telenor, there is no finding or evidence showing that it deliberately behaved abusively or had a plan to exclude competitors. Telenor argues that the evidence shows that it acted in good faith. It took diligent steps to avoid margin squeeze and to respect its obligations under the applicable sectoral regulations not to discriminate on prices between its wholesale customers. Further, Telenor argues that it could not have foreseen ESA's market definition and level of aggregation for analysing margins. It submits that it has done everything that could be expected with regard to its wholesale terms based on applicable case law and guidance, electronic communication regulations, and Telenor's ability to predict emerging patterns of demand and supply with regard to mobile data communications.

313 The Court notes that an infringement of Article 54 EEA is intentional or negligent within the meaning of Article 23(2)(a) of Chapter II of Protocol 4 SCA where the undertaking concerned could not be unaware of the anti-competitive nature of its conduct, regardless of whether it was aware that it was infringing the EEA competition rules. This is the case when an undertaking is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding of an abuse of that position. Ignorance or a mistake of law does not exempt an undertaking from the imposition of a fine insofar as the undertaking could not be unaware of the anti-competitive nature of its practice (see *Posten Norge*, cited above, paragraph 271; and compare the judgments in *Lietuvos geležinkeliai AB* v *Commission*, T-814/17, EU:T:2020:545, paragraph 345, and *Lundbeck* v *Commission*, C-591/16 P, EU:C:2021:243, paragraphs 156 and 157 and case law cited).

314 In recital 1050 of the Decision, ESA found that Telenor could or should not have been unaware that it held a dominant position in the market for access and origination services for public mobile telephony, that it ought to have been aware of the principles governing market definition in competition cases and that it could not have been unaware of the likely effects of its margin squeeze practices on the retail market for residential stand-alone mobile broadband.

315 The Court observes that it is not disputed that Telenor held a dominant position in the wholesale market for access and origination services for public mobile telephony services. Moreover, Telenor has not disputed that it was aware of that fact.

316 Telenor has asserted that it could not have foreseen ESA's market definition and level of aggregation for analysing margins. However, the Court notes that the assessment of the relevant market was based, inter alia, on product characteristics, considerations on intended and actual use, Telenor's contemporary internal documents and Telenor's own pricing and market analysis. Those are matters of fact of which Telenor could not have been unaware.

317 As the Court has found above, both ESA's market definition and level of aggregation was in line with established case law, and the assessment of the relevant market was in accordance with the market definition notice.

318 In relation to the claim that Telenor was unaware of the anti-competitive nature of its practice, the Court has established that ESA correctly found that Telenor's pricing practice, even when adjusted for the two-part price, entailed that an equally efficient competitor would have incurred negative margins if it had to pay the wholesale tariff that Telenor charged to Network Norway, Ventelo and to service providers. As ESA's assessment of those margins, in line with the principle of legal certainty, is based on Telenor's own costs and prices, Telenor could not have been unaware of those facts.

319 Furthermore, as the evidence ESA relies on in recitals 898 to 900 of the Decision confirms, in June 2009 Network Norway notified Telenor that Telenor's pricing practice placed Network Norway in a margin squeeze situation. It also follows from the evidence referred to in those recitals, that Telenor itself, based on its own quarterly margin calculations, considered that its pricing practices had to be adjusted to avoid a margin squeeze. As found by ESA, Telenor nevertheless continued to apply that pricing practice until the end of August 2010.

320 The fact that Telenor itself did not find that its practice was anti-competitive or, as a matter of law, defined the market or categorised its practice differently does not exempt it from a fine (compare the judgment in *Lundbeck* v *Commission*, C-591/16 P, cited above, paragraphs 157 and 158). Telenor ought to have been familiar with the principles governing market definition in competition cases and where necessary, taken appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail (compare the judgment in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 219 and case law cited).

321 Telenor submits that it acted diligently and in good faith throughout the relevant periods. It took steps to avoid a margin squeeze and to respect its obligations under the applicable sector-specific regulations not to discriminate on prices between its wholesale customers. Moreover, Telenor was, inter alia, subject to regulation which was designed to prevent margin squeeze in certain areas of Telenor's activities.

322 Telenor also argues that decisions by the Norwegian Communications Authority and the Norwegian Competition Authority gave Telenor reason not to consider the anti-competitive nature of its pricing policy. Based on a complaint by TDC Norge and Network Norway, the Norwegian Communications Authority performed a margin squeeze analysis of Telenor in 2010, and by Decision A2011-48, the Norwegian Competition Authority dismissed a complaint regarding alleged margin squeeze in the wholesale market for mobile communications.

323 The Court notes that the practice of national authorities cannot cause an undertaking to entertain legitimate expectations that its conduct does not infringe Article 54 EEA

(compare the judgment in *Lundbeck* v *Commission*, C-591/16 P, cited above, paragraph 170). Further, as argued by ESA, the Norwegian Communications Authority's analyses did not concern the facts of this case. Moreover, as the evidence ESA relies on shows, the Norwegian Communications Authority did identify negative margins in the market for residential stand-alone mobile broadband, and expressed concerns for the competitive situation in that market. In relation to the decision by the Norwegian Competition Authority, that decision did not concern the relevant market in the present case, and, as argued by ESA, the decision did not reject TDC Norge's complaint, but declined to prioritise the matter under the Norwegian Competition Act since the Norwegian Communications Authority was already investigating the matter.

324 Further, even where sector-specific regulations apply, undertakings remain subject to Article 54 EEA. The requirement for intention or negligence will be satisfied where the undertaking could not have been unaware that it had the genuine scope to set prices and thereby the ability to eliminate or reduce a margin squeeze (compare the judgment in *Deutsche Telekom* v *Commission*, C-280/08 P, cited above, paragraphs 84, 85 and 87). Regulatory obligations did not deprive Telenor of its decision-making autonomy or of its discretion to set its own prices.

325 Based on the above, the Court does not consider that there can be any doubts as to whether Telenor was aware of the essential facts that justify the finding of a dominant position and an abuse of that dominant position. Accordingly, the argument raised in the first issue, namely, that ESA erred in fact and law when finding that Telenor infringed Article 54 EEA intentionally or at least negligently, must be dismissed.

First part of the second issue: value of sales

326 Telenor argues that ESA erred in its calculation of fines by applying the wrong value of sales. According to Telenor, ESA erred by including all revenues in the wholesale market for the wholesale customers in question in each of the three alleged infringements.

327 Telenor argues that ESA erred in law and in fact by including sales, which were neither directly nor indirectly related to the infringements in question, contrary to the fining guidelines. According to Telenor, only the wholesale revenues relating to the provision of residential stand-alone mobile broadband are relevant when calculating the fine, whereas ESA included all Telenor's wholesale tariffs charged to Network Norway, Ventelo and to service providers.

328 Telenor argues that ESA has significantly exaggerated the economic importance of the infringements by including all wholesale sales, and effectively sought to capture a significant amount of wholesale turnover that is used across a wide range of retail products and by so doing artificially inflated the economic importance of the infringements.

329 The Court observes that, according to the fining guidelines, ESA is to take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market into account in determining the basic amount of the fine. The fining guidelines use the combination of the values of sales to which the

infringement relates and the duration of the infringement in order to provide an appropriate proxy to reflect the economic importance of the infringement. The value of sales thus constitutes an objective criterion giving a proper measure of the harm which the infringement does to normal competition (compare the judgments in *Team Relocations and Others* v *Commission*, cited above, paragraphs 74 and 75, and *Deutsche Telekom* v *Commission*, T-827/14, EU:T:2018:930, paragraphs 532 to 534 and case law cited).

330 It is established case law that an undertaking's overall turnover may be taken into account. The overall turnover constitutes an indication, albeit an approximate and imperfect one, of the undertaking's size and its economic power. ESA may also take into account the proportion of that turnover accounted for by the services in respect of which the infringement was committed, which thus gives an indication of the scale of the infringement (compare the judgment in *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraphs 50 to 52).

331 In this respect, the value of sales serves as the starting point for the calculation of the fine imposed on an undertaking. While the concept of the value of sales cannot extend to encompassing sales which do not fall within the scope of the alleged infringement, it would be contrary to that aim if the value of sales was understood as applying only to turnover achieved by the sales affected. Such a limitation would have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking and could lead to a fine which bears no actual relation to the scope of the infringement. Such a reward for abusive conduct would also adversely affect the objective of the effective investigation and sanctioning of infringements (compare the judgment in *Team Relocations and Others* v *Commission*, cited above, paragraphs 75 to 77).

332 The Court observes that, in section 15.3.1 of the Decision, ESA found that Telenor had abused its dominant position in the wholesale market by setting prices in the wholesale and retail markets that did not allow an equally efficient competitor to enter or compete profitably on the retail market. As such, ESA found that the infringement related to wholesale access in general, and considered that both Telenor's wholesale and retail sales were directly related to the infringements. Basing the value of sales on sales in both the wholesale and retail markets thus reflected the overall importance of the infringements in the case.

333 In recital 1064 of the Decision, ESA also considered and rejected Telenor's argument that the values of sales in the wholesale market should be further segmented based on the type of wholesale access. ESA found that the revenues were generated on that market and that the abuse directly concerned the entirety of those sales due to their sales in a bundle. ESA did however consider it appropriate only to take account of the wholesale value of sales generated by the undertakings in question in relation to each separate infringement.

334 The Court finds that ESA has not erred in fact or in law by including the wholesale revenues for the relevant wholesale customers in each of the three infringements. Since the abuse in this case consists of a margin squeeze that Telenor, through its dominant position on the wholesale market, imposed on its competitors, the infringement related directly to that

market. Accordingly, ESA's assessment of the basic amount of the fine is in line with established case law and the fining guidelines.

335 As a matter of principle, administrative fining practice in previous cases does not bind ESA in future cases (compare the judgment in *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, EU:C:2009:576, paragraph 233). In any event, the Court notes that the Commission decisions on which Telenor relies, Commission decision of 13 May 2019 in Case AT.40134, *AB InBev*, decision of 20 September 2016 in Case AT.39759, *ARA*, and decision of 18 July 2019 in Case AT.39711, *Qualcomm*, to illustrate ESA's supposed erroneous approach do not contradict ESA's inclusion of the wholesale values.

336 Accordingly, the argument that ESA erred in law by including all wholesale revenues for the wholesale customers in question must be dismissed.

Second part of the second issue: disproportionate "tripling" effect

337 Telenor argues that ESA erred in fact and in law by including Telenor's sales of stand-alone mobile broadband to residential customers three times, once for each of the three infringements. According to Telenor, this "tripling" effect resulted in an unjustified and disproportionate result.

338 Telenor points out that, during the administrative procedure, ESA identified separate infringements but regarded the alleged abuse as one infringement in the calculation of fines. However, in the Decision, ESA calculated the fines on the basis of three separate infringements. According to Telenor, this approach led to an error in law, and, moreover, the parallel imposition of multiple fines for the same alleged conduct led inexorably to a disproportionate and unfair result.

339 Telenor argues that ESA's approach makes Telenor worse off than it would have been had the infringements been considered a single and continuous infringement. If that had been the case, Telenor would have received a single fine and the retail value of sales would have been included only once.

340 The Court notes that Telenor only argues that the parallel imposition of three fines inexorably leads to a disproportionate and unfair result. Telenor makes no claim that ESA as a matter of law should have considered whether Telenor's practices constituted a single and continuous infringement. Nor does Telenor argue any breach of its rights of defence in that the Decision found three separate infringements rather than the one as considered in ESA's statement of objections, nor that the total of the separate fines exceeds the legal maximum of ten per cent of turnover provided for in Article 23(2) of Chapter II of Protocol 4 SCA. Rather, according to Telenor, ESA should at the very least have applied a correction factor to the values of sales to avoid results that in Telenor's view are disproportionate to the economic significance of the infringements, as examined by the General Court in *Servier* (judgment in *Servier SAS and Others* v *Commission*, T-691/14, EU:T:2018:922, paragraphs 1260 to 1271).

341 The Court notes that, since ESA found three separate infringements, it made no error in fact or in law in imposing three separate fines. In accordance with the fining guidelines, ESA took Telenor's retail revenue into account once in relation to each of the separate infringements as a basis for calculating each of the three separate fines.

342 Whether certain unlawful acts constitute a single and continuous infringement, or must be seen as several separate infringements, is, in principle, not without consequence for the sanction which may be imposed. Finding several separate infringements may lead to several separate fines. Whereas, in accordance with Article 23(2) of Chapter II of Protocol 4 SCA, the fine for a single and continuous infringement shall not exceed ten per cent of the total turnover, ESA may in a single decision find more than one infringement and impose more than one fine which together exceeds that ceiling. Moreover, fines may be imposed for separate infringements in a single set of proceedings or in separate proceedings at different points in time (compare the judgment in *Servier SAS and Others* v *Commission*, cited above, paragraph 1261). However, in the present case, the total amount of the separate fines is far below the ten per cent ceiling, as it represents only 0.97 per cent of Telenor's total turnover. As such, the resulting fine cannot be considered disproportionate in this respect.

343 As noted by the General Court in *Servier*, the Commission did in that case impose separate fines on each infringement. To avoid a potentially disproportionate result due to parallel imposition of multiple fines, the Commission applied an average reduction to the amount of the value of the applicants' sales taken into account to determine the amount of each fine, reflecting the degree of temporal and geographical overlap of the corresponding infringements specific to that case (compare the judgment in *Servier SAS and Others* v *Commission*, cited above, paragraph 1262).

344 However, as also argued by ESA and the Commission, the Court notes that even though the Commission applied a reduction to avoid a potentially disproportionate result due to the specific circumstances, there is no general requirement that ESA applies such a reduction when it imposes separate fines. The Court does not consider that there are any specific circumstances in the present case that suggest that ESA should have applied a similar reduction to the value of sales when calculating the basic amount of the fines.

345 Accordingly, the argument raised in the second part of the second issue, namely, that ESA applied the wrong values of sales, must be dismissed.

Third issue: duration of the alleged infringements

346 Telenor argues that ESA overestimated the duration of the infringements. Since the infringements, according to Telenor, were shorter than was found by ESA, the fine should be reduced in accordance with the fining guidelines.

347 Having regard to the Court's conclusion on the second plea, namely, that ESA has adduced sufficient evidence and substantiated its finding of the three instances of abusive margin squeeze infringing Article 54 EEA throughout the relevant periods, the submission that ESA overestimated the duration of the infringements must be dismissed.

First part of the fourth issue: annulment due to mitigating circumstances

348 Telenor claims that ESA erred in fact and in law by failing to reduce the fines due to mitigating circumstances. Telenor argues that the fines should have been reduced because it acted in good faith in accordance with regulatory authority decisions; that Telenor's conduct was at worst negligent; and that the fines should have been reduced because ESA's long delays violated Articles 6 and 13 ECHR and should be remedied.

349 Since ESA failed to reduce the fines due to mitigating circumstances, Telenor claims that the fines should therefore be annulled.

350 The Court notes that the fining guidelines provide that the basic amount may be reduced where ESA finds that mitigating circumstances exist and lists examples of mitigating circumstances which ESA may take into account. However, ESA is not required to grant a reduction. ESA retains a certain discretion in order to reflect mitigating circumstances in its assessment of the size of a potential reduction in the fines. Whether any reduction of fines is appropriate in this respect must be examined on the basis of all the relevant circumstances (compare the judgments in *Lundbeck* v *Commission*, T-472/13, EU:T:2016:449, paragraphs 830, 841 and 843 and case law cited, and *Caffaro* v *Commission*, C-447/11 P, EU:C:2013:797, paragraph 103).

351 Accordingly, Telenor's claim that the fines must be annulled because ESA has failed to reduce the fine because of the purported existence of mitigating circumstances must be dismissed.

Second part of the fourth issue: reduction of fines due to mitigating circumstances

352 By its alternative plea, Telenor requests that the Court exercises its unlimited jurisdiction to reduce the basic amount of the fines due to the alleged mitigating circumstances.

a) Good faith and negligence at most

353 Telenor submits that it acted in good faith in accordance with regulatory authority decisions and that its conduct could be considered negligent at most. However, as concluded above, Telenor was aware of the essential facts that justify the finding of a dominant position and an abuse of that position and could not have been unaware of the anti-competitive nature of its conduct. The Court finds no reason to reduce the basic amount of the fine on those grounds.

b) Delays and periods of inactivity

354 Second, Telenor argues that ESA's delays and periods of inactivity violate Articles 6 and 13 ECHR and constitute mitigating circumstances on the basis of which Telenor requests the Court to reduce the basic amount of the fine.

355 The Court notes that the principle of effective judicial protection, which is a general principle of EEA law, entails that everyone is entitled to a fair hearing and a legal process within a reasonable period of time. That principle applies in the conduct of administrative

proceedings under Article 54 EEA (see *Posten Norge*, cited above, paragraphs 85, 86 and 276, and case law cited; and compare the judgment in *Sumitomo Metal Industries and Nippon Steel* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 115).

356 ESA contends that, given recent case law of the European Court of Justice ("ECJ"), referring inter alia to paragraphs 61 and 71 of the judgment in *CEPSA* v *Commission*, C-608/13 P, EU:C:2016:414, there is no requirement to reduce a fine on grounds of the duration of the investigation.

357 The legal basis for the Court to exercise its unlimited jurisdiction to reduce the fine imposed in light of a breach of the requirement for a trial within a reasonable time is Article 35 SCA. It follows from Article 3 SCA, as well as established case law, that the Court is not under an obligation to interpret the main part of the SCA in light of the case law of the ECJ. Accordingly, it is for the Court to determine the relevance of that case law for the interpretation of the main part of the SCA (see Case E-8/19 *Scanteam*, judgment of 16 July 2020, paragraph 45).

358 It follows from the case law of the Court that the infringement of a fundamental right through failure to adjudicate within a reasonable time requires an effective remedy. The Court may reduce the fine imposed in cases where ESA has failed to conclude the administrative proceedings within a reasonable time as an appropriate redress (see *Posten Norge*, cited above, paragraphs 285 and 286).

359 In cases where the duration of the administrative proceedings at first sight seems too long, the duration must be assessed in the light of the circumstances specific to each case. This includes, in particular, the importance of the case for the person concerned, the complexity of the case and the conduct of the applicant and of the competent authorities. An examination is required as to whether there have been any actual delays which cannot be justified by the circumstances of the case (see *Posten Norge*, cited above, paragraph 276).

360 Telenor argues that the long duration of the proceedings violated the principle of legal certainty on which economic operators must be able to rely. According to Telenor, the present case is far less complex than many competition cases and concerns a relatively short period of time. As the case concerns an infringement of competition rules, legal certainty was important for Telenor and for the parties. Telenor was facing the prospect of a penalty of a criminal nature throughout the period of investigation.

361 By an annex to the Application, Telenor has presented to the Court a timeline with key steps of ESA's investigations and an overview of departure and arrival of certain personnel at ESA. Telenor argues that delays and periods of inactivity in the procedure were due to events for which ESA was responsible. According to Telenor, periods with delay and inactivity coincided with the departure and arrival of central members of ESA's case team.

362 In addition, Telenor points to the circumstance that the Decision appears to rely to a significant degree on documents received in response to requests for information sent by ESA in 2019 and 2020. In Telenor's view, it is difficult to see why ESA did not ask for these documents at a much earlier point in its investigation.

363 Due to these claims by Telenor, the Court prescribed measures of organisation of procedure on 18 June 2021. ESA was invited to list its activities in the case from 13 October 2017 until 23 June 2019 and to explain whether employee turnover or any other identifiable factors may have affected the progress of the case.

364 By its reply of 25 June 2021, ESA contended that the duration of the proceedings was reasonable in light of the complexity of the case and the full manner in which Telenor chose to exercise its rights of defence throughout the process. ESA contends that there were no delays or periods of inactivity in the investigation. ESA also argues that the case team was not insufficiently resourced and that neither changes in staff nor any other factor led to interruptions or delays.

365 The Court notes that ESA carried out its inspections at Telenor's premises in Fornebu, Norway, in December 2012, and in Brussels, Belgium, in March 2013, and issued numerous requests for information. Proceedings were initiated in March 2014. The initial statement of objections was adopted in February 2016. The first oral hearing took place in October 2016. Considering arguments raised by Telenor in its reply to the statement of objections and in that oral hearing, ESA sent further requests for information, and other meetings were held in 2018.

366 The Court also observes that, according to ESA's case file, in 2018 and 2019, ESA carried out extensive modelling of margins and scrutinised evidence further in light of the arguments raised by Telenor in the reply to the statement of objections and at the first oral hearing. ESA issued a supplementary statement of objections in June 2019 in response to Telenor's arguments. By this document, ESA also communicated its decision to discontinue its investigation into a second potential infringement.

367 Following the supplementary statement of objections, a second oral hearing was held in October 2019. Further requests for information were sent to Telenor and other parties. According to ESA, it received voluminous replies in response to these requests. A further meeting was held between Telenor and ESA in February 2020. A letter of facts was issued in the same month, to which Telenor replied in March 2020. Following a further request for information addressed to Telenor in April 2020 and an additional question to Telenor in May 2020, the Decision was adopted in June 2020.

368 In the Court's view, the present case concerns a complex infringement that has entailed significant and extensive investigation and analysis by ESA. As part of this process, Telenor has, rightfully, submitted extensive documentation, including economic consultancy papers attached to Telenor's replies to the statement of objections and to the supplementary statement of objections, and Telenor presented its views at the two oral hearings during the administrative procedure.

369 It was necessary for ESA to analyse the documents and data seized in the inspections. Since the case required consideration of whether a margin squeeze had occurred, it entailed the collection of a large volume of cost and pricing data, and application and detailed modelling of the equally efficient competitor test.

370 It appears to the Court that, throughout the procedure, Telenor has been given the opportunity to exercise its rights of defence and Telenor has fully availed itself of those rights. ESA has considered and properly addressed all of Telenor's comprehensive arguments and adduced detailed evidence on the issues raised by Telenor. Each of these issues have been subject to substantial economic and legal scrutiny by ESA to ensure that all Telenor's arguments were given fair and adequate consideration.

371 The Court considers that there have not been any undue delays or periods of inactivity in the context of the administrative proceedings. Although the additional steps, inter alia, the supplementary statement of objections and an additional oral hearing in the case, inevitably also added to the duration of the procedure, it was in the Court's view reasonable in light of the volume and complexity of the case and to ensure respect for Telenor's rights of defence, as well as to establish the basis for a thorough investigation.

372 There was no discontinuity in the resourcing of ESA's case team during the administrative procedure. Based on ESA's account on the activity and the progress of the case, there is nothing to indicate that the case team was insufficiently resourced or that changes in the case team led to any interruptions which cannot be justified by the circumstances of the case.

373 Accordingly, Telenor's claim that delays and periods of inactivity in the administrative procedure constitute mitigating circumstances which should lead to a reduction of the fine must be dismissed.

Fifth issue: proportionality

374 Telenor submits that the fines overall are disproportionate to the gravity of the alleged infringements and requests that the Court exercises its unlimited jurisdiction and substantially reduces the fines.

375 According to Telenor, the combination of (i) the size of the total amount of the fines compared to both the value of Telenor's sales in the retail market and to the value of Telenor's sales in the wholesale market related to residential stand-alone mobile broadband; (ii) the fact that the geographic scope of the infringement is limited to the relatively small Norwegian national market; and (iii) the fact that ESA decided that the proportion of the value of sales to be used to establish the basic amount should be ten per cent in order to reflect the gravity of the infringement; shows that the total amount of the fines is disproportionate.

376 The Court has held that ESA, in the Decision, correctly found three instances of margin squeeze in the market for residential stand-alone mobile broadband, the longest of which lasted five years. ESA enjoys a wide discretion as regards the method of calculating fines. This method includes various flexible elements which allows ESA to exercise its discretion in accordance with the provisions of Article 23 of Chapter II of Protocol 4 SCA (compare the judgment in *Caffaro* v *Commission*, cited above, paragraph 101).

377 As argued by ESA, there is long standing case law to the effect that a margin squeeze may constitute an abuse under Article 54 EEA. The Court adds that, as established in the Decision, the market for residential stand-alone mobile broadband played an important and growing role in the relevant periods, and the market was of substantial economic importance for mobile data consumption in Norway at that time. Any anti-competitive behaviour on the market was therefore likely to have had a considerable negative impact. Telenor held a dominant position in the relevant wholesale market throughout the duration of the infringements with a market share of between 63 and 71 per cent. Telenor also held a considerable degree of market power in the retail market for the provision of residential stand-alone mobile broadband. Moreover, the infringements covered the whole territory of Norway.

378 With reference to the behaviour and market power of Telenor, the Court finds no reason to exercise its unlimited jurisdiction to reduce the fine. Accordingly, Telenor's request in that regard must be dismissed.

379 Since none of the issues raised by Telenor under the fourth plea have been successful, the fourth plea must be dismissed in its entirety.

VIII COSTS

380 Under 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 ESA has requested that Telenor be ordered to pay the costs and Telenor has been unsuccessful in all its pleas, Telenor must be ordered to bear its own costs and those of ESA.

381 Pursuant to Article 122(1) RoP, interested persons, which intervene or submit observations in the proceedings, shall bear their own costs. Accordingly, the Icelandic Government and the Commission shall bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application in its entirety.**

2. **Orders Telenor ASA and Telenor Norge AS to bear their own costs and those of the EFTA Surveillance Authority.**

Páll Hreinsson Per Christiansen Nicole Kaiser

Delivered in open court in Luxembourg on 5 May 2022.

Ólafur Jóhannes Einarsson
Registrar

Per Christiansen
Acting President