JUDGMENT OF THE COURT

30 May 2018*

(*Article 54 EEA – Abuse of a dominant position – Margin squeeze – Right to claim damages – Applicability of provisions of the EEA Agreement in domestic proceedings – Significance of a final ruling of a competition authority)*

In Case E-6/17,

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

Fjarskipti hf.

and

Síminn hf.

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

THE COURT,

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

Registrar: Gunnar Selvik,

* Language of the request: Icelandic.

having considered the written observations submitted on behalf of:

- Fjarskipti hf. ("Fjarskipti"), represented by Dóra Sif Tynes, District Court Attorney, acting as Counsel;

- Síminn hf. ("Síminn"), represented by Halldór Brynjar Halldórsson, Supreme Court Attorney, acting as Lead Counsel, on behalf of Helga Melkorka Óttarsdóttir, Supreme Court Attorney;

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

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

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

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

having regard to the Report for the Hearing,

having heard oral argument of Fjarskipti, represented by Dóra Sif Tynes; Síminn, represented by Halldór Brynjar Halldórsson; the Icelandic Government, represented by Gizur Bergsteinsson; the Norwegian Government, represented by Ketil Bøe Moen and Henrik Kolderup; ESA, represented by Claire Simpson; and the Commission, represented by Giuseppe Conte, Gero Meeßen, Martin Farley, and Viktor Bottka, at the hearing on 31 January 2018,

gives the following

Judgment

I Legal background

EEA law

1 Article 54 of the Agreement on the European Economic Area ("the EEA Agreement" or "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.*

National law

2 The main part of the EEA Agreement is incorporated into the Icelandic legal order by the Act on the EEA Agreement No 2/1993 (*lög nr. 2/1993 um Evrópska efnahagssvæðið*) ("the EEA Act"). In addition, Article 54 EEA has been implemented in Article 11 of the Icelandic Competition Act (*Samkeppnislög nr. 44/2005*), which substantively mirrors Article 54 EEA.

II Facts and procedure

3 The parties to the dispute provide general telecom services in Iceland, including mobile phone services. Síminn commenced its telecom operation in 1994. Its predecessors were publicly owned and had a monopoly owning and operating general telecommunications networks in Iceland. This State monopoly was abolished by law on 1 January 1998.

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

4 Over time, several complaints against Síminn were filed with the Icelandic Competition Authority (*Samkeppniseftirlitið*) ("the Competition Authority"). One of the complaints concerned an alleged abuse of a dominant position in the form of a margin squeeze. By Decision No. 7/2012 of 3 April 2012, the Competition Authority found that Síminn had violated, inter alia, Article 11 of the Competition Act and Article 54 EEA by having applied, from the middle of 2001 to 2007, an unlawful margin squeeze against its competitors, including Fjarskipti, in the setting of its termination rates. A termination rate is the price paid for terminating a call that originates in one mobile network and ends in another.

5 Following the Competition Authority's decision, Síminn lodged an appeal with the Competition Appeals Committee (*Áfrýjunarnefnd samkeppnismála*). By a ruling of 22 August 2012, the Competition Appeals Committee upheld the Competition Authority's decision. On 26 March 2013, the Competition Authority and Síminn entered into a general settlement. That settlement included the point that the Competition Appeals Committee's ruling had become final and could no longer be referred to a court of law.

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

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

8 Termination rates had been determined through agreements between the companies in accordance with an obligation under the Icelandic Telecommunications Act. In April 2003, the Post and Telecom Administration (*Póst- og fjarskiptastofnun*) ordered Síminn to reduce the termination rates for phone calls ending in its mobile phone network. Síminn subsequently lowered its rates. The termination rates of its competitors, however, rose from April 2003 until almost the end of 2006.

9 Fjarskipti bases its action on the view that all those who incur loss or damage as a result of a violation of Article 54 EEA must be guaranteed compensation for such loss or damage.

10 According to the referring court, the interpretation of Article 54 EEA could be of substantial significance for the resolution of the case. On that basis, it decided to stay the proceedings and make a request to the Court for an advisory opinion. The request was sent by letter of 30 June 2017, and registered at the Court on 19 July 2017.

11 The District Court of Reykjavík has asked the following questions:

1. *Does it constitute part of the effective implementation of the EEA Agreement that a natural or a legal person in an EFTA State should be able to invoke Article 54 of the Agreement before a domestic court in order to claim compensation for a violation of the prohibitions of that provision?*

2. *When assessing whether the conditions are fulfilled for a compensation claim in view of a violation of competition rules, is it of significance whether the competent authorities have delivered a final ruling on a violation of Article 54 EEA?*

3. *Is it regarded as an unlawful margin squeeze, violating Article 54 EEA, when an undertaking in a dominant position on a wholesale market sets termination rates applying to its competitors in such a way that the dominant undertaking's own retail division would be unable to profit from the sale of telephone calls within its system if it had to bear the cost of selling them under the same circumstances, when the dominant undertaking itself is also obliged to purchase termination from these same competitors at a higher price than that at which it sells termination to its competitors?*

4. *Is the fact that an undertaking is in a dominant position on the relevant wholesale market sufficient for it to be guilty of applying an unlawful margin squeeze, violating Article 54 EEA, or must the undertaking also be in a dominant position on the relevant retail market?*

12 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

The first question

13 By its first question, the referring court asks whether it constitutes part of the effective implementation of the EEA Agreement that a natural or legal person should be able to

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

Observations submitted to the Court

14 All those who have submitted observations agree that this question should be answered in the affirmative.

15 Fjarskipti and the Norwegian Government emphasise that Article 3 EEA obliges the Contracting Parties to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

16 The Icelandic Government, the Norwegian Government, and the Commission note that Article 54 EEA and the corresponding Article 102 of the Treaty on the Functioning of the European Union ("TFEU") are sufficiently precise and unconditional as not only to impose obligations on those undertakings to which they are addressed, but also to establish rights for private parties. The Norwegian Government emphasises that this is not a question of direct effect in the sense that applies to non-incorporated directives under EU law, for which there is no equivalent under EEA law. The question is whether Article 54 EEA is sufficiently precise and unconditional to be directly applicable in the sense that it may be invoked by private parties in domestic legal proceedings.

17 Furthermore, the Icelandic Government, the Norwegian Government, ESA, and the Commission point to the fact that Article 54 EEA is implemented in Icelandic law.

18 Fjarskipti, the Icelandic Government, the Norwegian Government, and ESA state that the Court has held that private enforcement of Articles 53 and 54 EEA ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA (reference is made to Cases E-14/11 *Schenker North and Others* v *ESA* ("*DB Schenker I*") [2012] EFTA Ct. Rep. 1178, paragraph 132, and E-5/13 *Schenker North and Others* v *ESA* ("*DB Schenker V*") [2014] EFTA Ct. Rep. 304, paragraph 134).

19 Fjarskipti, the Icelandic Government, the Norwegian Government, ESA, and the Commission argue that the Court of Justice of the European Union has consistently held that anyone can claim compensation before national courts for harm caused by an infringement of Article 101 TFEU. The full effectiveness of that provision would otherwise be put at risk (reference is made to the judgments in *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraphs 24 and 26, and *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 59 and 60). The Icelandic Government, the Norwegian Government, ESA, and the Commission argue that the same should apply to Article 102 TFEU and Article 54 EEA.

20 The Icelandic Government, the Norwegian Government, ESA, and the Commission state that the existence of the right to claim damages strengthens the working of the competition

rules and that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition (reference is made to *Courage and Crehan*, cited above, paragraph 27, and *Manfredi and Others*, cited above, paragraph 91).

21 Finally, Fjarskipti, the Norwegian Government, ESA, and the Commission emphasise that in the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EEA law. Such rules are subject to the principles of equivalence and effectiveness (reference is made to *Courage and Crehan*, cited above, paragraph 29, and *Manfredi and Others*, cited above, paragraphs 62 and 64).

Findings of the Court

22 By its first question, the referring court asks, in essence, whether a natural or a legal person in an EFTA State may rely on Article 54 EEA as a basis for a damages action before a domestic court.

23 Article 3 EEA obliges the Contracting Parties to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Agreement. However, this does not entail that EEA law is directly applicable in domestic proceedings.

24 Furthermore, it is well established that there is no recognition of direct effect under the EEA Agreement. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 28 and 29). In order for individuals to be able to invoke an EEA provision in domestic proceedings, that provision must be, or have been made, part of domestic law in the EEA States in accordance with their constitutional and legal traditions.

25 In Liechtenstein and the EU Member States, the EEA Agreement is considered an integral part of domestic law without further action (see, respectively, Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 35, and the judgment in *Opel Austria*, T-115/94, EU:T:1997:3, paragraph 102). However, in Iceland and Norway, specific implementing measures are required. Both States have incorporated the main part of the EEA Agreement, in authentic language versions, into Icelandic and Norwegian law.

26 Consequently, the main part of the EEA Agreement is part of the internal legal order of all EEA States. It is therefore possible for an individual, in an action before a national court, to rely upon a provision of the main part of the EEA Agreement, as it is, or has been made, part of domestic law.

27 However, not all provisions in the main part of the EEA Agreement are framed in a manner capable of creating rights that individuals and economic operators can invoke before

national courts. It has been established that for the provisions of the EEA Agreement to have such effect, they must be unconditional and sufficiently precise (see, inter alia, Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092, paragraph 122 and *Opel Austria*, cited above, paragraphs 101 and 102). These requirements are necessary to ensure that a provision is sufficiently operational for a court to give effect to it.

28 Article 102 TFEU has been held to produce direct effect between individuals and create rights for the individuals concerned that must be safeguarded by the national courts (see *Courage and Crehan*, cited above, paragraph 23). It follows from the case law of the Court of Justice of the European Union that such effect will apply where an EU treaty provision is sufficiently clear, precise and unconditional. Article 102 TFEU is thus considered to fulfil these requirements. Article 54 EEA is identical in substance to Article 102 TFEU. In order to ensure equal treatment of individuals throughout the EEA and in view of the principle of homogeneity, Article 54 EEA must also be held to be sufficiently clear, precise and unconditional.

29 As regards specifically the possibility of relying on Article 54 EEA in damages actions, it should be remembered that the national courts, whose task it is to apply provisions of EEA law in areas within their jurisdiction, must ensure that those provisions take full effect and that the rights conferred on individuals are protected. The full effectiveness of Article 54 EEA would be put at risk if it were not open to an individual to claim damages for loss caused by conduct liable to restrict or distort competition (compare *Courage and Crehan*, cited above, paragraphs 24 to 26).

30 The existence of a right to claim damages strengthens, in particular, the working of the EEA competition rules and discourages agreements or practices that are liable to restrict or distort competition. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition (compare *Courage and Crehan*, cited above, paragraph 27). The Court has therefore held that private enforcement of Articles 53 and 54 EEA ought to be encouraged. While pursuing a private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest, thereby benefitting consumers (see *DB Schenker I*, cited above, paragraph 132, and *DB Schenker V*, cited above, paragraph 134).

31 Nevertheless, EEA law does not set out the procedural rules concerning the right to claim damages. In the absence of EEA rules, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions to safeguard rights that individuals derive from EEA law. Such rules must respect the principles of equivalence and effectiveness. This means that those rules must not be less favourable than those governing similar domestic actions and they must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (compare *Courage and Crehan*, cited above, paragraph 29). It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness.

32 The answer to the first question must therefore be that a natural or legal person must be able to rely on Article 54 EEA, as it is, or has been made, part of domestic law, in order to claim compensation before a national court for a violation of the prohibitions laid down in that provision.

The second question

33 By its second question, the referring court asks, in essence, whether it is of significance, when assessing a claim for compensation for a violation of competition rules, whether a competition authority has delivered a final ruling finding a violation of Article 54 EEA.

Observations submitted to the Court

34 All participants point to the fact that Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) ("the Damages Directive") has not been incorporated into the EEA Agreement. Article 9 of the Damages Directive contains rules on the effects of final rulings of national competition authorities in proceedings before national courts in the EU. There appears to be an agreement that the provisions of the Damages Directive, including Article 9, are not applicable in the EEA and that it falls under the procedural autonomy of each EEA State to lay down the detailed procedural rules for damages claims for breaches of competition law, subject to the principles of equivalence and effectiveness (reference is made to, inter alia, *Courage and Crehan*, cited above, paragraph 29).

35 Fjarskipti, however, notes that the Damages Directive codifies certain conditions for damages actions. Fjarskipti invites the Court to consider that the Damages Directive, albeit not incorporated, may serve as a point of reference also in the EFTA pillar, as codification of relevant case law. In Fjarskipti's view, it follows from the principles of homogeneity and loyalty combined that it is for the courts to balance the need for recognition of equal rights for individuals throughout the EEA against the possible effects of delayed incorporation. It calls for a careful consideration of whether EEA law can produce the same results as in the EU. The Norwegian Government submits that Article 9 of the Damages Directive was not intended to have a codifying nature and should therefore not be relied upon in the EEA. The Commission argues in a similar way and adds that, as the principles laid down in Article 9 do not derive from EU primary law, but only from secondary legislation not incorporated into the EEA Agreement, there are no grounds for establishing equivalent rules in the EEA.

36 All participants agree, furthermore, that a final ruling of a national competition authority finding a violation of EEA competition rules is not a precondition for domestic proceedings on a claim for damages. It is generally accepted that a private party may claim damages through stand-alone actions. Such actions play a vital part in the private enforcement of

EEA competition law, which the Court has held ought to be encouraged (reference is made to *DB Schenker I*, cited above, paragraph 132).

37 As for the situation where a final ruling has been made, there appears to be an agreement that a ruling should be of some significance and that national rules governing the degree of significance of that ruling granted in domestic proceedings must respect the principles of equivalence and effectiveness.

38 The Icelandic Government, the Norwegian Government, ESA, and the Commission state that, in practice and due to the complexity of competition cases, private parties have a tendency to await a national competition authority's decision before bringing actions for damages. National competition authorities are, given their wide-ranging investigative powers, generally better equipped than private parties to investigate and prove the existence of infringements. Follow-on actions are therefore common, since such actions make it easier in general for a claimant to bring a damages action for a violation of competition rules.

39 ESA argues that it would undermine the principle of effectiveness if national courts failed to take any account of a final ruling, given the time and resources the national competition authority has devoted to the investigation. The Norwegian Government argues that the ability of a private party to prove infringement of Article 54 EEA would be substantially reduced if it were not possible to rely on the analyses in a preceding ruling from a national competition authority. Fjarskipti submits that it would be tantamount to a breach of the principle of effectiveness if a natural or legal person were required to prove anew a violation of Article 54 EEA when such breach had already been firmly established by a national competition authority.

40 Síminn argues that a final ruling of a national competition authority may be submitted as evidence. However, the significance of such a ruling, when assessing whether the conditions for a compensation claim are fulfilled, varies and depends on national law on evidence and tort, neither of which have been harmonised in the EEA. The significance of such rulings should be limited, in the sense that stand-alone actions must be encouraged. The significance can never be such as to discourage stand-alone actions, which form a vital part of the effective enforcement of Articles 53 and 54 EEA.

Findings of the Court

41 By its second question, the referring court seeks clarification of whether it is of significance, when considering compensation claims for a breach of competition rules, that a national competition authority has delivered a final ruling finding a violation of Article 54 EEA.

42 Since it must be possible for an individual to claim damages for loss caused by conduct infringing EEA competition rules, that right cannot be restricted by requiring a claimant to

await the final result of a national competition authority's investigation. Moreover, such an investigation may not take place in every case. Consequently, a final ruling by a national competition authority is not a requirement for an individual's right to claim compensation for violations of the EEA competition rules.

43 However, the question referred must be understood to include the issue of whether such a final ruling must be taken into account when a national court assesses a claim for damages for a breach of competition law and, if so, what weight should be given to such a final ruling in national proceedings.

44 In the EU, this issue has been settled by the Damages Directive, in particular Article 9. However, that directive has not been incorporated into the EEA Agreement. Hence, the rules on procedure and remedies for violations of competition law, including the significance of a final ruling by a national competition authority, are not subject to harmonised rules in the EEA. Insofar as Fjarskipti has argued that the Damages Directive is a codification of principles laid down in case law, it should be observed that this does not apply in relation to Article 9. There is no requirement under EEA law for a final ruling of a national competition authority to be binding on a national court, when such a court assesses a damages claim.

45 In contrast, domestic rules denying such a final ruling any significance at all may be in breach of EEA law, in particular the principles of equivalence and effectiveness.

46 If Icelandic law permits, for example, a claimant to rely on a final ruling of a national competition authority in actions for damages based on national competition law, the principle of equivalence requires that a claimant benefits from the same procedural right in relation to actions for damages based on EEA competition law. It is for the referring court to determine the content of national rules and to draw the necessary conclusions under the principle of equivalence.

47 As regards the principle of effectiveness, it should be noted that national competition authorities have specialised competence and will generally invest significant resources into investigations of infringements of Articles 53 and 54 EEA. For this reason, claimants seem to prefer follow-on actions over stand-alone actions. Accordingly, if no significance at all were to be given to a final ruling of a national competition authority finding a violation, it could make it practically impossible or excessively difficult for a claimant in a follow-on action to prove that violation independently from the final ruling. Therefore, it would be incompatible with the principle of effectiveness if no significance at all is given to a final ruling in such actions. Moreover, the effective enforcement of competition rules and the efficient use of resources in this field could suffer.

48 In light of the above, the Court holds that the answer to the second question must be that it is not a prerequisite for a court's assessment of a damages claim for violation of competition rules that a national competition authority has handed down a final ruling

finding a violation of Article 54 EEA. Where a national competition authority has given such a final ruling, EEA law does not require that the ruling is binding on the national courts in a follow-on action. In the absence of EEA law governing the procedure and remedies for violations of competition law, it falls under the procedural autonomy of each EEA State to lay down the detailed rules on the degree of significance to be attached to a final ruling, subject to the principles of equivalence and effectiveness.

The third question

49 The third question concerns the situation where a dominant undertaking in a wholesale market charges termination rates to its competitors such that the dominant undertaking's own retail division would be unable to make a profit if it had to bear the cost of selling telephone calls under the same circumstances. The referring court asks whether, in such circumstances, it is of relevance to the finding of an unlawful margin squeeze that the dominant undertaking is itself obliged to pay a termination rate to its competitors that is higher than the rate it charges them.

Observations submitted to the Court

50 The Icelandic Government, the Norwegian Government, and the Commission submit that dominant undertakings have a special responsibility not to allow their conduct to impair competition (reference is made to, inter alia, Case E-15/10, *Posten Norge*, [2012] EFTA Ct. Rep. 246, paragraph 177, and the judgments in *Michelin*, 322/81, EU:C:1983:313, paragraph 57, and *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23).

51 The Norwegian Government and the Commission state that the concept of abuse of a dominant position is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (reference is made to, inter alia, *Posten Norge*, cited above, paragraph 130, and *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 27).

52 All participants agree that a margin squeeze may constitute an abuse under Article 54 EEA (reference is made to, inter alia, Case E-29/15 *Sorpa* [2016] EFTA Ct. Rep. 827, paragraph 116, and *TeliaSonera Sverige*, cited above, paragraph 31).

53 Fjarskipti, the Icelandic Government, the Norwegian Government, ESA, and the Commission argue that for a margin squeeze to be abusive, it must have anti-competitive effects. These effects need not be concrete, it is sufficient that they have the potential to exclude competitors who are at least as efficient as the dominant undertaking (reference is made to *TeliaSonera Sverige*, cited above, paragraph 64). In the assessment of whether

such anti-competitive effects exist, all the specific circumstances of a case must be taken into consideration (reference is made to *TeliaSonera Sverige*, cited above, paragraph 68).

54 Síminn submits that the question of whether a practice amounts to an unlawful margin squeeze depends on whether the practice excludes efficient competitors, as they would be forced to price their products on the relevant retail market at a loss or artificially reduced levels of profitability in order to compete with the dominant undertaking (reference is made to, inter alia, *TeliaSonera Sverige*, cited above, paragraph 33). In Síminn's view, a margin squeeze can thus not occur unless the practice excludes from the market those competitors that are as efficient as the dominant undertaking (reference is made to the judgment in *Intel*, C-413/14 P, EU:C:2017:632, paragraph 141). Síminn argues that the facts of the case show that no such exclusion occurred, as existing competitors competed profitably and a new competitor entered the market.

55 Fjarskipti, the Icelandic Government, ESA, and the Commission state that when assessing whether a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the dominant undertaking itself. Only where it is not possible, in particular circumstances, to refer to the prices and costs of the dominant undertaking should those of competitors on the same market be examined (reference is made to *TeliaSonera Sverige*, cited above, paragraph 46).

Findings of the Court

56 The third question relates to the criteria that need to be taken into account when assessing whether a pricing practice resulting in a margin squeeze constitutes an abuse of a dominant position in violation of Article 54 EEA. In essence, the referring court asks whether it is of relevance to that assessment that the competitors of the dominant undertaking in question charge higher rates than the corresponding rates charged by the dominant undertaking.

57 Article 54 EEA applies to dominant undertakings. The Court will address the requirement of dominance under the fourth question. In the context of the current question, the Court's assessment rests on the premise set by the referring court that an undertaking's dominance on the wholesale market is established.

58 An undertaking that holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the EEA internal market (see *Posten Norge*, cited above, paragraph 127, and compare *Intel*, cited above, paragraph 135 and case law cited). Article 54 EEA prohibits any abuse of a dominant position and provides a list of examples of what constitutes such conduct. The examples found in Article 54 EEA are not exhaustive and it follows from case law that a margin squeeze may constitute abuse under Article 54 EEA (see *Sorpa*, cited above, paragraph 116, and compare *TeliaSonera Sverige*, cited above, paragraph 31).

59 A margin squeeze may occur, for example, where a dominant undertaking in a wholesale market offers services to undertakings with which the dominant undertaking competes on a retail market where the service offered is an input. A margin squeeze exists if, inter alia, the spread between the wholesale price charged to competitors and the retail price charged to the dominant undertaking's own customers is negative or insufficient to cover the costs the dominant undertaking has to incur in order to supply the retail service. When this is the case, competitors as efficient as the dominant undertaking can compete on the retail market only at a loss or at artificially reduced levels of profitability (compare *TeliaSonera Sverige*, cited above, paragraphs 32 and 33).

60 The premise of the referring court's question is that a dominant undertaking's termination rate is set in such a way that the undertaking's own retail division would be unable to make a profit from the sale of telephone calls within its system if it had to bear the same costs it imposes on its competitors. In other words, the spread is negative or insufficient to cover the costs of supplying that service, thus constituting a margin squeeze.

61 However, the very existence of a margin squeeze is not sufficient for a finding of abuse. For a pricing practice to be abusive, it must have an anti-competitive effect on the market (compare *TeliaSonera Sverige*, cited above, paragraph 61).

62 A margin squeeze constitutes abuse within the meaning of Article 54 EEA where, given its effect of excluding competitors who are at least as efficient as the dominant undertaking by squeezing their margins, it is capable of making it more difficult, or impossible, for those competitors to enter the market concerned. The anti-competitive 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. 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 concerned is not made any more difficult by that practice (compare *TeliaSonera Sverige*, cited above, paragraphs 63, 64 and 66).

63 In order to assess the lawfulness of a pricing practice, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy. This approach conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (compare *TeliaSonera Sverige*, cited above, paragraphs 41 and 44). As the Commission has argued, it is also in line with the objective nature of the margin squeeze assessment, which looks more generally at the potential exclusionary effect on hypothetical as-efficient competitors rather than assess whether actual, individual competitors have in fact been excluded.

64 It cannot be ruled out that the costs and prices of competitors may be relevant to the examination of a pricing practice. However, those prices and costs should be examined only in particular circumstances, where it is not possible to refer to those of the dominant undertaking. When assessing whether a margin squeeze is abusive, account should thus as a general rule be taken primarily of the prices and costs of the dominant undertaking (compare *TeliaSonera Sverige*, cited above, paragraphs 45 and 46).

65 Therefore, the fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own does not preclude a finding that the dominant undertaking's pricing practice constitutes an abuse of a dominant position within the meaning of Article 54 EEA. The decisive factor in the assessment is whether the pricing practice causing a margin squeeze produces an effect on the retail market that is at least potentially anti-competitive.

66 In the assessment of the effects of a margin squeeze, it is necessary, inter alia, to consider whether the wholesale product is indispensable for the sale of the retail product and to determine the level of the margin squeeze. Where the supply of the wholesale product is indispensable, an at least potentially anti-competitive effect is probable. The same applies if the margin is negative, taking into account the fact that, in such a situation, competitors who are at least as efficient would be compelled to sell at a loss (compare *TeliaSonera Sverige*, cited above, paragraphs 69 to 73, and *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 143).

67 Furthermore, in the assessment of whether there are anti-competitive effects, all the specific circumstances of a case must be taken into consideration (compare *TeliaSonera Sverige*, cited above, paragraph 68). In the present case, the special characteristics of the telecommunications sector may lead to the effects on the market varying according to how services are provided at the retail level. The impact of termination rates would, inter alia, depend on what proportion they represent of the retail costs. Where the retail service entails payment for individual mobile phone calls, the termination rate may constitute a significant proportion of the retail cost and therefore have a higher potential impact on competition. However, where telephone calls are provided as one of several mobile telephony services in a fixed-price bundle package, the termination rate, and the connected margin squeeze, may represent a smaller proportion of costs and possibly have less impact on competition.

68 It is for the referring court to assess, on the basis of all the circumstances of the case before it, whether anti-competitive effects are present.

69 It must be added that an undertaking remains at liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is economically justified. The assessment of whether such justification exists must be made on the basis of all the circumstances of the case (compare *TeliaSonera Sverige*, cited above, paragraphs 75 to 77).

70 The answer to the third question referred is that the fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own, does not preclude a finding that the dominant undertaking's own pricing practice in the form of a margin squeeze constitutes an abuse of a dominant position within the meaning of Article 54 EEA.

The fourth question

71 By its fourth question, the referring court asks, in essence, whether it is required for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is dominant on both the relevant wholesale market and on the relevant retail market.

Observations submitted to the Court

72 All participants seem to agree that it is not required that an undertaking must be dominant on the relevant wholesale market as well as on the relevant retail market, for the finding of an unlawful margin squeeze in violation of Article 54 EEA.

73 All participants state that it follows from consistent case law that, in order to establish that an undertaking has applied an unlawful margin squeeze, it is sufficient for that undertaking to be dominant on the wholesale market; it does not depend on that undertaking being dominant also on the relevant retail market (reference is made, in particular, to *TeliaSonera Sverige*, cited above, and *Telefónica*, T-336/07, EU:T:2012:172, upheld on appeal in *Telefónica*, C-295/12 P, EU:C:2014:2062).

74 ESA emphasises that, in addition to a finding of dominance at the wholesale level, the other conditions for finding a margin squeeze must also be met. Dominance in itself is not prohibited (reference is made to *Michelin*, cited above, paragraph 57). Fjarskipti argues that the possibility for a dominant undertaking to affect the market and thus abuse its position is instrumental to any finding of an infringement of the competition rules.

Findings of the Court

75 Article 54 EEA applies to dominant undertakings. In the question referred, the contested pricing practice concerns a wholesale market for termination rates. It has been pointed out, inter alia by ESA, that the nature of termination services leads to each operator having full control of the market for such services with regard to its own network. However, this does not necessarily mean that each operator must also be considered to be a dominant undertaking. To be considered a dominant undertaking, in the context of EEA competition law, an operator must have sufficient economic strength and market power to behave to an appreciable extent independently of its competitors and its consumers (compare *Deutsche Telekom* v *Commission*, cited above, paragraph 170).

76 Whether an operator can behave independently of other operators when setting its termination rates must be considered in light of the specific circumstances of the case. To have a complete and fully functional market in telecommunications services, each operator needs access to all other operators' networks. Accordingly, there is an interdependence between the operators. As the Icelandic Government has pointed out, a legal obligation on all the operators to agree termination rates among themselves and to provide access to each other's networks may affect the assessment of the operators' ability to behave independently of each other. It is for the referring court to assess, in the context of both the principal action and the counter-action, whether Síminn and Fjarskipti have the required independence at the wholesale level to be considered dominant. In the following, the Court's assessment rests on the premise that the requirement of dominance in Article 54 EEA is fulfilled as regards the wholesale market.

77 Article 54 EEA gives no explicit guidance on the issue of whether, in cases concerning margin squeeze, the requirement of dominance applies to both the wholesale market and the retail market. Accordingly, the actual scope of the special responsibility imposed on a dominant undertaking must be considered in light of the specific circumstances of each case which show that competition has been weakened (compare *TeliaSonera Sverige*, cited above, paragraph 84).

78 The application of Article 54 EEA presupposes a link between the dominant position and the alleged abusive conduct. In the present case, the pricing practice in question takes place in the wholesale market, but the alleged abusive conduct and its effects on competition are related to the retail market. The presupposed link between dominant position and abusive conduct is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. However, in the case of distinct, but associated, markets, as in the case at hand, special circumstances may justify the application of Article 54 EEA to conduct found on the associated, non-dominated market and having effects on that market (compare *TeliaSonera Sverige*, cited above, paragraph 86).

79 Such circumstances may arise where the conduct of a dominant undertaking on a wholesale market consists in attempting to drive out at least equally efficient competitors in an associated retail market, in particular by applying a margin squeeze to them. Such conduct is likely to have the effect of weakening competition in the retail market, not least because of the close links between the markets concerned (compare *TeliaSonera Sverige*, cited above, paragraph 87).

80 Furthermore, in such a situation and in the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the retail market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits (compare *TeliaSonera Sverige*, cited above, paragraph 88).

81 Consequently, the question of whether a pricing practice introduced by a dominant undertaking in the wholesale market and resulting in margin squeeze of the undertaking's competitors in an associated retail market is abusive does not depend on whether that undertaking is dominant in that retail market (compare *TeliaSonera Sverige*, cited above, paragraph 89).

82 The Court notes that, although there is no requirement of dominance on the retail market, the undertaking's presence on that market cannot be considered irrelevant to the assessment of whether that undertaking's conduct constitutes unlawful abuse of a dominant position. The undertaking's position in and ability to affect the retail market is of relevance to the assessment of whether the conduct produces anti-competitive effects (compare *TeliaSonera Sverige*, cited above, paragraph 81).

83 In principle, such effects are to a large extent taken as given where the undertaking has a dominant position in the retail market, and they are also likely to occur where the undertaking has a prominent, albeit not dominant, presence. However, where an undertaking holds an insignificant position on the retail market, it is more difficult to demonstrate that the undertaking's pricing practice results in a margin squeeze that could affect the market in such a way as to produce the anti-competitive effects required for the finding of a violation of Article 54 EEA.

84 The answer to the fourth question referred is therefore that it is sufficient for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is in a dominant position on the relevant wholesale market. It is not required that the undertaking holds a dominant position also on the relevant retail market.

IV Costs

85 The costs incurred by the Icelandic and Norwegian Governments, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the District Court of Reykjavík hereby gives the following Advisory Opinion:

1. **A natural or legal person must be able to rely on Article 54 EEA, as it is, or has been made, part of domestic law, in order to claim compensation before a national court for a violation of the prohibitions laid down in that provision.**

2. **It is not a prerequisite for a court's assessment of a damages claim for violation of competition rules that a national competition authority has handed down a final ruling finding a violation of Article 54 EEA. Where a national competition authority has given such a ruling, EEA law does not require that the ruling is binding on the national courts in a follow-on action. In the absence of EEA law governing the procedure and remedies for violations of competition law, it falls under the procedural autonomy of each EEA State to lay down the detailed rules on the degree of significance to be attached to a final ruling, subject to the principles of equivalence and effectiveness.**

3. **The fact that a dominant undertaking is obliged to purchase termination services from other operators at a rate higher than its own, does not preclude a finding that the dominant undertaking's own pricing practice in the form of a margin squeeze constitutes an abuse of a dominant position within the meaning of Article 54 EEA.**

4. **It is sufficient for the finding of an unlawful margin squeeze in violation of Article 54 EEA that the undertaking in question is in a dominant position on the relevant wholesale market. It is not required that the undertaking holds a dominant position also on the relevant retail market.**

Páll Hreinsson Per Christiansen Martin Ospelt

Delivered in open court in Luxembourg on 30 May 2018.

Birgir Hrafn Búason
Acting Registrar

Páll Hreinsson
President