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EFTA SURVEILLANCE
AUTHORITY

Póst- og Fjarskiptastofnun
Suðurlandsbraut4
108 Reykjavík
Iceland

For the attention of:
Mr. Hrafnkell V. Gíslason
Managing Director

Dear Mr Gíslason,

Subject: Review of the Míla wholesale tariff for fibre optic to street cabinets and fibre optic in the access network – Remedies

Comments pursuant to Article 7(3) of Directive 2002/21/EC (Framework Directive)¹

I. PROCEDURE

On 13 October 2017, the EFTA Surveillance Authority (“the Authority”) received a notification of a draft national measure in the field of electronic communications, pursuant to Article 7 of the Framework Directive, from the Icelandic national regulatory authority Póst- og Fjarskiptastofnun, (“the PTA”), concerning the market for wholesale (physical) network infrastructure access at a fixed location and the market for wholesale terminating segments of leased lines in Iceland.²

The notification became effective on the same day.

A national consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 17 July to 18 August 2017.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33 (as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12), as referred to at point 5cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (the “Framework Directive”).

² Corresponding to markets 4 and 6 in the previous EFTA Surveillance Authority Recommendation of 5 November 2008 (Decision No 688/08/COL) on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive, OJ C 156, 9.7.2009, p.18 (“the 2008 Recommendation”).

On 30 October 2017, a request for information was sent to the PTA (Document No 879605), and a reply was received on 2 November 2017 (Document No 880821).

The period for consultation with the Authority and the national regulatory authorities (“NRAs”) in the EEA States pursuant to Article 7 of the Framework Directive expires on 13 November 2017.

Pursuant to Article 7(3) of the Framework Directive, the Authority and the EEA NRAs may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

In its Decision No 21/2014³, dated 13 August 2014, the PTA designated Míla ehf. (“Míla”) with significant market power (“SMP”) on the market for wholesale (physical) network infrastructure access at a fixed location. Furthermore, the PTA imposed obligations on Míla regarding access, non-discrimination (including equivalence of inputs), transparency (publication of reference offer), price control and cost accounting and separation of accounts.

The price control obligation which applies only to copper-based local loops (local loop unbundling or “LLU”) was cost-oriented, based on the fully-allocated historical costing (“HC FAC”) methodology⁴, and the tariff was to be reviewed annually. Pursuant to Decision No 21/2014, Míla was required to prepare a cost analysis and submit that to the PTA for endorsement no later than 6 months from the publication of the Decision. The PTA planned to take the Commission’s 2013 Recommendation on non-discrimination and costing⁵ into account for the evaluation of Míla’s cost analysis.

In its Decision No 8/2014⁶, dated 6 May 2014, the PTA designated Míla with SMP on the market for wholesale terminating segments of leased lines. Furthermore, the PTA imposed obligations on Míla regarding access, non-discrimination, transparency (publication of reference offer), price control and cost accounting and separation of accounts.

³ Notified to the Authority on 11 July 2014 and assessed by the Authority on 11 August 2014, Case No 75750, Document No 715771.

⁴ The PTA did not consider it appropriate to adopt a Bottom Up Long-Run Incremental Cost (“BU-LRIC”) model at that time due to the high implementation costs of such a cost model. In addition, the PTA emphasised that the tariff which was in force at the time of notification fell within the recommended price band foreseen in the Commission’s Recommendation 2013/466/EU on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (OJ L 251, 21.09.2013, p. 13), incorporated into the EEA Agreement by Decision 59/2015 of the EEA Joint Committee of 20 March 2015 at point 26n of Annex XI as adapted to that agreement by Protocol 1, (“the Commission’s 2013 Recommendation on non-discrimination and costing”).

⁵ European Commission Recommendation 2013/466/EU on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (OJ L 251, 21.09.2013, p. 13), incorporated into the EEA Agreement by Decision 59/2015 of the EEA Joint Committee of 20 March 2015 at point 26n of Annex XI as adapted to that agreement by Protocol 1.

⁶ Notified to the Authority on 3 April 2014 and assessed by the Authority on 5 May 2014, Case No 75278, Document No 706019.

The price control obligation was cost-oriented, based on the fully-allocated historical costing (“HC FAC”) methodology.⁷ Míla was required to prepare a cost analysis and submit that to the PTA for endorsement no later than 6 months from the publication of the PTA’s Decision. In addition, annual reviews of the tariff were foreseen. The PTA planned to compare the conclusion of Míla’s cost analysis against tariffs for analogous products within the EEA, in particular against tariffs based on the Bottom Up Long-Run Incremental Cost Plus (“BU LRIC+”) methodology and to only endorse a conclusion which it considered acceptable in the light of these other tariffs.⁸

On 27 April 2017, the PTA notified draft measures implementing the price control obligations imposed on Míla by the PTA’s Decisions No 8/2014⁹ and No 21/2014¹⁰. The PTA noted that Míla’s cost analysis with regard to fibre-optic to street cabinets was under assessment and that the PTA expected to publish a draft decision on Míla’s tariff for access to fibre-optic to street cabinets for national consultation in June 2017. The Authority commented i.a. on the significantly delayed implementation on the price control obligations imposed on Míla in the PTA’s Decision No 8/2014 and No 21/2014.¹¹

II.2. Current notification

The notified draft measure implements the price control obligation imposed on Míla by the PTA’s Decisions No 21/2014 and No 8/2014 with regard to fibre-optic in access network and fibre-optic to street cabinets.

The tariffs proposed in the notified draft measure are based on a cost model initially submitted by Míla on 23 December 2015, which was later updated to include costing data from 2016.

In terms of cost calculation, the PTA broadly accepts Míla’s analysis of the following elements:

- the weighted average cost of capital of 7% for 2016;
- operational costs (opex) for the year of 2016;
- capital expenditure (capex) for 2016; and
- revenue from setup charges¹².

In relation to the number of lines, the PTA accepts Míla’s calculation of line equivalents¹³.

⁷ The PTA did not consider it appropriate to adopt a Bottom Up Long-Run Incremental Cost (“BU-LRIC”) model at that time due to the high implementation costs of such a cost model.

⁸ The PTA considered that such an approach would produce tariffs in compliance with the objectives of the EU Commission with respect to supporting competition and to improving the investment environment on the electronic communications market in accordance with the Commission’s 2013 Recommendation on non-discrimination and costing.

⁹ Assessed by the Authority under Case No 80609, see the Authority’s Comments letter dated 29 May 2017, Doc No 856654.

¹⁰ Assessed by the Authority under Case No 80606, see the Authority’s Comments letter dated 29 May 2017, Doc No 854999.

¹¹ In addition, the Authority recalled its previously expressed concerns that a fragmented implementation of individual remedies risks generating further uncertainty to the potential detriment of investment and innovation.

¹² No change to the setup charge for fibre-optic lines in the access network is foreseen, however, the collection of setup charges will be modified with regard to connections comprised of a trunk line and access line(s) to account for shared travel for installation of such connections.

On the basis of the above, the PTA proposes to set the tariffs as follows (all tariffs exclude VAT):

Service	Price per month
Fibre-optic in access network, one thread	13,717 ISK
Fibre-optic in access network, one pair	19,595 ISK
Fibre-optic to street cabinet, 1 thread	6,858 ISK
Fibre-optic to street cabinet, 2 threads	9,798 ISK
Fibre-optic to street cabinet, 3 threads	12,737 ISK
Fibre-optic to street cabinet, 4 threads	15,676 ISK
Setup charge	96,680 ISK¹⁴

The PTA has compared the proposed tariffs against those in force in Denmark, Finland and Sweden and concludes that the proposed tariffs are not abnormally high or low.¹⁵

In response to the Authority's request for information, the PTA observes that the cost analysis initially submitted by Míla would have resulted in a significant price increase. This led the PTA to scrutinise the assumptions on which the cost model was based and, subsequently, to increase the lifetime of the fibre¹⁶ and to estimate the numbers of units sold on the basis of a forward-looking approach.

As regards the annual review of the tariff foreseen in the PTA's Decisions No 8/2014 and No. 21/2014, Míla is required to submit an updated cost analysis before April 2018.¹⁷ The PTA expects to publish its decision on a revised tariff before the end of 2018.¹⁸ In addition, the PTA observes that it has initiated the next market review on which basis it will decide whether the regulatory obligations foreseen in the PTA's Decision No 21/2014 will be continued.¹⁹

¹³ Míla has used the same line equivalence coefficient as that on which the current tariff is based. The PTA intends to accept Míla's proposal that instead of using the existing number of sold connections, an increase corresponding to developments in recent years should be used.

¹⁴ If a connection comprises a fibre-optic line in the access network and a trunk line, Míla will collect half of the setup charge for fibre-optic in the access network (i.e. ISK 48,340) and a setup charge for the trunk line (i.e. ISK 96,386).

¹⁵ The PTA considers that fibre to the building ("FTTB") is the product closest to the Míla fibre-optic lines. In reply to the Authority's request for information, the PTA explains that the proposed tariffs would appear to be above the prices in Finland, but below prices in Sweden. The PTA notes that in some cases, the price depends on the length of the fibre-line.

¹⁶ Based on Míla's experience with their fibre network and with practice in other countries.

¹⁷ The update is to be submitted in parallel with Míla's update of the cost models for the copper local loop and for wholesale bitstream access (pursuant to the price control obligations imposed on Míla in the PTA's Decision No. 21/2014).

¹⁸ Provided that no major changes are included in the cost analysis.

¹⁹ The market review will be carried out in application of the EFTA Surveillance Authority Recommendation of 11 May 2016 (Decision No 093/16/COL) on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive, OJ L 84, 30.3.2017, p. 7.

III. COMMENTS

The Authority has examined the notified draft measure and has the following comment:

Timely enforcement and effectiveness of remedies

The Authority notes that the implementation of the price control obligation imposed on Míla in the PTA's Decisions No 8/2014 and No 21/2014 has been significantly delayed, notwithstanding the fact that Míla submitted its cost analysis first in December 2015 (albeit, still over ten months later than the required submission dates).

It is recalled that, in the interests of pursuing a consistent policy across all EEA States and ensuring effective and targeted regulation, it is important that regulators enforce remedies in a timely and effective manner following the conclusion of the underlying market analysis.

Furthermore, the Authority wishes to recall its comments issued under Cases 80606, 80608 and 80609 respectively²⁰. As noted in those cases, considerable delays in the enforcement of remedies imposed on the SMP operator risk harming competition and reducing legal certainty for market participants. The Authority also reiterates its concerns that a fragmented implementation of individual remedies in Iceland risks generating further uncertainty to the potential detriment of investment and innovation.²¹

In addition, in view of past experience in Iceland where cost analyses have incurred considerable delays, the Authority encourages the PTA to ensure that the foreseen annual review of the tariffs is completed without undue delay. In this context, the Authority reminds the PTA of its powers and obligations under the regulatory framework in the enforcement of remedies in case of a reluctant implementation on the part of the operator designated with SMP.

The Authority also invites the PTA to monitor closely the relationship between the tariffs (and costing methodology) proposed for the above fibre-optic inputs and the evolution of competition and the investment environment in Iceland.²²

IV. FINAL REMARKS

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedies consulted on in the current notification will require re-notification in accordance with Article 7(3) of the Framework Directive.

Pursuant to Article 7(5) of the Framework Directive, the PTA shall take the utmost account of comments of other regulatory authorities and the Authority. It may adopt the resulting draft measure and, when it does so, shall communicate it to the Authority.

²⁰ To the same effect, see also the Authority's comments issued under Cases 75750, 77546, 79335 and 80034.

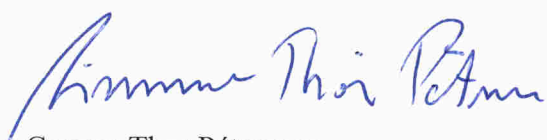
²¹ See, for example, Cases 77546, 75574 and 80606.

²² In this respect, the Authority notes the PTA's commitment to having regard to the Commission's Recommendation on non-discrimination and costing and that the PTA, in observing recent deployments of competing fibre networks in densely-populated areas, expects the proposed change in Míla's prices in the notified draft measure to promote further investment in fibre networks in Iceland.

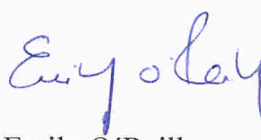
The Authority's position on the current notification is without prejudice to any position the Authority may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation²³, the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the information contained herein to be confidential. You are invited to inform the Authority within three working days²⁴ following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which you wish to have deleted prior to publication. You should give reasons for any such request.

Yours sincerely,



Gunnar Thor Pétursson
Director
Internal Market Affairs Directorate



Emily O'Reilly
Deputy Director for Competition
Competition and State Aid Directorate

²³ EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, OJ C 302, 13.10.2011, p.12, and available on the Authority's website at <http://www.eftasurv.int/media/internal-market/recommendation.pdf> ("the Procedural Recommendation").

²⁴ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.