EFTA SURVEILLANCE AUTHORITY

Brussels, 21 December 2017
Case No: 81373
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Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavik
Iceland

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

Dear Mr Gíslason,

Subject: Conditions and wholesale tariff for Míla's IP telephony service provided at a fixed location at Access Option 3 – Remedies

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

I. PROCEDURE

On 21 November 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 broadband access in Iceland.[2]

The notification became effective on the same day.

Pursuant to Article 6 of the Framework Directive, national consultations were carried out on the wholesale tariff and on the planned amendments to Míla's reference offer from 20 October to 9 November 2017 and from 27 October to 9 November 2017 respectively.

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[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 market 5 (i.e. market 5/2008) 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 6 December 2017, a request for information was sent to the PTA (Document No. 886460) and a reply was received on 11 December 2017 (Document No. 887916).

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 21 December 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. 21/2014,[3] the PTA designated Míla ehf. ("Míla") with significant market power ("SMP") on the market for wholesale broadband access. Furthermore, the PTA imposed obligations on Míla regarding access, non-discrimination, transparency, price control and cost accounting and separation of accounts.

The price control obligation, which applies to wholesale bitstream access offered through copper-based local loops, was cost-oriented based on the fully-allocated historical costing ("HC FAC") methodology.[4] The tariff was to be reviewed annually. With regard to the tariff structure, Míla was required to prepare tariffs for wholesale bitstream access at different locations on the network (Access Options 1-3) with both DSL standards (VDSL[5] and DSL[6]) and for virtual access to sub-loops ("VULA") with VDSL technology. In addition, Míla was required to prepare tariffs for priority and quality-controlled access for transmission of visual content using multicast technology and for priority and quality-controlled transmission of bitstream for IP telephony services (for the delivery of IPTV[7] and VoIP services[8]) as well as a cost-oriented wholesale tariff for access to hosting of external equipment and other facilities related to bitstream and access to support systems and information.

The PTA planned to take the Commission's 2013 Recommendation on non-discrimination and costing, as well as tariffs from analogous competition markets, into account for the evaluation of Míla's cost analysis. Moreover, the PTA held that the tariff for wholesale broadband access should relate logically to Míla's tariff for local loop access (local loop unbundling or "LLU").

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[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 European 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] Very High Bitrate Digital Subscriber Line.

[6] Digital Subscriber Line.

[7] Internet Protocol-TV.

[8] Voice over Internet Protocol.

Pursuant to Decision No. 21/2014, Míla was required to prepare a cost analysis and submit that to the PTA for endorsement within 6 months from the publication of the PTA's final decision.

The transparency obligation included the publication of a reference offer for wholesale bitstream access, including VULA, and related facilities and services. The reference offer was to be submitted to the PTA for endorsement no later than six months after the publication of the PTA's final decision, i.e. 13 February 2015.

On 22 November 2016, the PTA notified its updated market review and planned de-regulation of the retail market for access to the public telephone network provided at a fixed location in Iceland and the wholesale market for call origination on the public telephone network provided at a fixed location in Iceland (markets 1 and 2/2008).[9] The Authority commented *inter alia* on the need to ensure full implementation of obligations concerning wholesale broadband inputs sufficiently in advance of the planned withdrawal of remedies in markets 1 and 2/2008 and invited the PTA to monitor access to the wholesale inputs needed to facilitate effective competition for fixed telephony services in Iceland.

On 27 April 2017, the PTA notified draft measures implementing the price control obligations imposed on Míla in market 5/2008 by the PTA's Decision No. 21/2014.[10] With regard to the VoIP service, the notification only included a tariff under Access Option 1. In its response to the Authority's request for information,[11] the PTA noted that Míla had stated its intention to offer the VoIP service also under Access Option 3. However, as the technical solution was under consideration, no cost analysis had been prepared. The PTA committed to following the developments and to taking appropriate measures, if necessary, before the de-regulation of markets 1 and 2/2008 at the end of 2017. The Authority commented *inter alia* on the significantly delayed implementation of the price control obligations imposed on Míla in the PTA's Decision No. 21/2014 and also recalled its previous concerns that a fragmented implementation of individual remedies risks generating further uncertainty to the potential detriment of investment and innovation.

On 29 May 2017, the PTA notified draft measures implementing the transparency obligations imposed on Míla by the PTA's Decision No. 21/2014.[12] The Authority commented on the significant delay in the completion of the reference offer. The Authority also recalled *inter alia* that the availability of effective wholesale remedies in markets 4 and 5/2008 was significant to the PTA's decision to withdraw all regulatory remedies in markets 1 and 2/2008 by the end of 2017 and it urged the PTA to ensure the full implementation of the regulatory obligations foreseen by the PTA's Decision No. 21/2014.

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[9] Assessed by the Authority under Case No. 79865. See the Authority's comments letter dated 21 December 2016, Document No. 831564. The resulting decision is PTA Decision No. 23/2016 dated 23 December 2016.

[10] Assessed by the Authority under Case No. 80608. See the Authority's comments letter dated 29 May 2017, Document No. 856349.

[11] See Document No. 856125.

[12] Assessed by the Authority under Case No. 80773. See the Authority's comments letter dated 29 June 2017, Document No. 861326.

II.2. Current notification

The notified draft measure implements the price control and transparency obligations imposed on Míla by the PTA's Decision No. 21/2014 with regard to VoIP services provided at a fixed location at Access Option 3. The foreseen date of entry into force for the draft measure is 1 April 2018.[13]

The PTA notes that Míla did not previously offer this service. However, the PTA considers that the availability of a VoIP service under Access Option 3 is an important factor in levelling the playing field for parties to the fixed telephony market and is accordingly a prerequisite for being able to lift obligations from Síminn on the fixed line telephony market.[14]

As regards the price control obligation, the PTA accepts Míla's proposal that the tariff should be based on the price for VoIP at Access Option 1 with the addition of transmission on the Síminn network, where Síminn has Access Option 1. Additionally, costs for setup and maintenance of the service should be taken into account. In terms of cost calculation, the PTA accepts Míla's analysis, i.e. the Síminn tariff, Míla's internal costs and the foreseen demand for VoIP connections at Access Option 3.[15] The PTA observes that it is difficult to determine both costs and demand for this new service. It therefore considers it necessary to review the tariff when data on real costs and demand become available. Accordingly, the PTA requests Míla to separate costs for its VoIP service and to submit an audited cost analysis no later than 18 months from the entry into force of the tariff for VoIP at Access Option 3.[16]

On the basis of the above, the PTA proposes to set the wholesale tariffs as follows (excl. VAT):

VoIP on Access Option 3	**Tariff**
Set-up charge to electronic communications companies	1,073,280 ISK
Monthly charge per connection	233 ISK

In its reply to the Authority's request for information, the PTA indicated that it compared the proposed tariffs with Gagnaveita Reykjavíkur's monthly prices for VoIP over fibre [*... fjarlægt vegna trúnaðar...*]

[13] As indicated by the PTA in its reply to the Authority's request for information. The PTA also clarified in its reply to the request for information that Decision No. 21/2014 did not specifically prescribe the addition of VoIP at Access Option 3 to Míla's service offering. Following on from Decision No. 23/2016 and subsequent discussions with Míla on the preparation of this new service, the PTA requested a cost analysis for this service in June 2017, which Míla submitted in July 2017.

[14] See section 1.2 of the notified draft measure.

[15] In its reply to the request for information, the PTA clarified that, as this is a new service, the cost was based on current costs of up-to-date operational expenses and technologies in line with expected demand, thus reflecting the costs of an efficient modern network operator. Furthermore, the PTA noted that no objections were raised in the national consultation on the input costs and time projections for the provision of this service.

[16] I.e. no later than 18 months from 1 April 2018.

The PTA also expressed its view in the reply to the request for information that, as the proposed tariffs are comparable to prices on the national market and the cost analysis is considered to reflect efficiently-incurred costs, the proposed tariffs will send the correct "build or buy" signal to the market, as foreseen by the Commission's 2013 Recommendation on non-discrimination and costing.[17]

As regards the transparency obligation and Míla's reference offer for wholesale bitstream access, the PTA accepts Míla's proposal that the conditions for VoIP service on Access Option 3 should be added to the reference offer. Accordingly, the PTA proposes that a provision should be added specifying *inter alia* the relevant technology, setup and prioritisation principles that will apply to the operation of the VoIP service at Access Option 3.[18]

III. COMMENTS

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

Timely enforcement and effectiveness of remedies

The Authority recalls its comments in Case 79865[19] where it called upon the PTA to ensure the full implementation of all regulatory obligations in markets 4 and 5/2008 *sufficiently* in advance of the planned withdrawal of remedies in markets 1 and 2/2008.

The PTA has clearly underlined the importance of VoIP at Access Option 3 for competition in fixed telephony services in Iceland, seeing it as a prerequisite for lifting regulatory obligations on the fixed line telephony market. However, Síminn's obligations in markets 1 and 2/2008 will be lifted from 1 January 2018, while the current draft measure will only enter into force on 1 April 2018. While noting the three-month termination clause in Síminn's existing carrier pre-selection service contracts,[20] this relatively late finalisation of the VoIP service at Access Option 3 is not consistent with the Authority's above-mentioned comments in Case 79865. Such a delay in finalising important inputs for the fixed-line telephony markets may impair legal certainty for market participants and risks harming competition in those services.

The Authority thus calls upon the PTA to monitor closely the transition period between the removal of regulation in markets 1 and 2/2008 in January 2018 and the entry into force of the current draft measure in April 2018. In addition, in view of the cost and demand uncertainty for this service, the Authority encourages the PTA to ensure that the audited cost analysis is undertaken in a timely manner as planned.[21]

In accordance with Article 16 of the Framework Directive, the Authority would also like to recall that the imposition, maintenance, amendment or withdrawal of remedies is an

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[17] The PTA also recalled that the Equivalence of Inputs ("EoI") non-discrimination obligation was imposed on Míla in accordance with the Commission's 2013 Recommendation on non-discrimination and costing and that Míla has introduced a service portal with equal access for operators in accordance with this obligation.

[18] See Appendix 1 of the draft measure for the new Article 6.2 to be inserted in Appendix 5 to Míla´s reference offer for bitstream access with the heading "IP telephone service provided at a fixed location (VoIP) on Access Option 3".

[19]See footnote 9 above.

[20] As explained by the PTA in its reply to the Authority's request for information.

[21] See footnote 16 above.

integral part of the market analysis process. The fragmented specification of terms and conditions for individual access services in Iceland, significantly after the completion of the underlying market analysis, risks compromising transparency for access seekers and impairing their ability to build reliable business plans.[22]

Against this background, the Authority strongly urges the PTA to address its delayed and disjointed implementation of remedies. In this regard, the Authority encourages the PTA to undertake a timely analysis and notification of its next market review. Furthermore, as part of this next review, the Authority calls upon the PTA to ensure a coordinated implementation, as well as a sufficiently precise specification, of all related remedies.

Need to ensure an efficient and predictable approach to setting tariffs

According to the price control obligation, which the PTA imposed (in Decision No. 21/2014) for the market in question, the access tariffs resulting from Míla's costing analysis were to be compared with tariffs from analogous competition markets. The PTA also undertook to ensure that the access tariffs for the relevant market (i.e. market 5/2008) would relate logically to Míla's tariffs for local loop unbundling in market 4/2008.

In response to the Authority's request for information, the PTA indicated that it performed a comparison of Míla's average monthly tariffs with Gagnaveita Reykjavíkur's prices for VoIP over fibre. Given the significant reliance on Míla's costing information and projections in the notified draft measure, the Authority calls upon the PTA to provide a clear elaboration in its final measure of the scope of its tariff comparison exercise (for both its set-up and monthly charges), including the details and suitability of the comparators considered in meeting the objectives of the EEA regulatory framework.[23]

Furthermore, given the PTA's phased approach to implementing remedies in markets 4 and 5/2008 (as observed in the preceding comment), the Authority invites the PTA to specify in its final measure (also with regard to the objectives of the EEA regulatory framework) how a logical economic relationship is ensured between the current proposed tariffs and the wholesale tariffs for local loop unbundling, VULA and other wholesale broadband access inputs respectively.

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.

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[22] In this regard, the Authority recalls it comments in several cases on the fragmented implementation of individual remedies in Iceland. See, for example, Cases 77546, 75574, 80606, 80608, 80773 and 81255.

[23] Pursuant to Article 8(4) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L108, 24.4.2002, p.7, as referred to at point 5cj of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (the "Access Directive"), and Article 8 of the Framework Directive, as well as the Commission's 2013 Recommendation on non-discrimination and costing.

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 Recommendation[24], 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 days[25] 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

Gjermund Mathisen
Director
Competition and State Aid Directorate

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[24] 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").

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