Brussels, 21 July 2014
Case No: 75574
Event No: 715657

EFTA SURVEILLANCE AUTHORITY

Póst-Og Fjarskiptastofnun (PTA)
Sudurlandsbraut 4
108 Reykjavík, Iceland

For the attention of:
Hrafnkell V. Gíslason
Managing Director

Dear Mr Gíslason,

Subject: Case No 75574 – Wholesale Broadband Access - Remedies - Cost analysis for Bitstream Access according to Access Options 1 and 3[1] in Iceland

Comments pursuant to Article 7(3) of Directive 2002/21/EC[2]

I. Procedure

On 20 June 2014, the EFTA Surveillance Authority ("the Authority") registered a draft national measure, pursuant to Article 7 of the Framework Directive, from the Icelandic national regulatory authority, *Póst-Og Fjarskiptastofnun* ("the PTA"). The draft measure concerns the costing analysis (calculation of new prices) for bitstream access according to Access Options 1 and 3 in Iceland.[3]

The notification became effective on the same day. National consultation was carried out, pursuant to Article 6 of the Framework Directive, between 20 December 2013 and 13

[1] Access Options 1 and 3 are further defined in footnote 7 below.

[2] 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 I ("the Framework Directive").

[3] Corresponding to market 5 (Wholesale broadband access) of the EFTA Surveillance Authority Recommendation (Decision No. 688/08/COL) of 5 November 2008 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.

January 2014. The PTA opened an additional consultation from 21 February 2014 to 11 March 2014.[4]

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 July 2014.

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. Previous notifications

The last full review of the corresponding market was notified to the Authority in 2008.[5] In this review, a range of obligations was imposed on Síminn (now Míla ehf. ("Míla"))[6] including *inter alia* obligations to provide access to facilities, as well as price control (cost orientation). The access obligations included access to Access Options 1 – 4[7] and to various types of broadband services, including multicast and VoIP[8] functionalities. As regards the price control, a preliminary retail minus (-35%) obligation was also imposed until the prescribed cost analysis could be completed.

Based on these obligations and Síminn's submission of its cost analysis, the PTA issued a decision in 2010 setting Síminn's tariffs for Access Options 1-4.

In a subsequent decision taken in 2012 concerning a dispute between Fjarskipti ehf. ("Vodafone") and Síminn on the delivery of bitstream services under Access Option 1, the PTA obliged Síminn to accede to Vodafone's requests for Access Option 1 with multicast and VoIP capabilities at cost-oriented prices without undue delay. It further set temporary prices (to apply until the PTA had endorsed Síminn's cost-oriented prices)[9] and obliged Síminn to submit all prices in connection with its VDSL[10] access, along with the underlying cost analysis, by 1 February 2013. The PTA was to review the new cost analysis and to set final prices for the relevant service.

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[4] This additional consultation was limited in scope to the new tariff for access to wholesale switches (access nodes) according to Access Option 1.

[5] See the Authority's comments' letter under Case No 64016.

[6] The Decision of the Icelandic Competition Surveillance Authority no. 6/2013 dated 26 March 2013 on a settlement between Skipti hf. and the Competition Authority moved the bitstream access service from Síminn to Míla on 1 September 2013. The responsibility to provide a cost analysis has also been moved to Míla.

[7] According to the PTA Decision no. 8/2008, Access Option 1 refers to access in the DSLAM or equivalent equipment at the location where the copper local loop connects to the distribution frame of the telephone exchange. Access Option 2 refers to access after ATM/IP transmission in the SMP operator's trunk line network; that is, the SMP operator handles the transmission of signals from the DSLAM equipment to the other electronic communications undertaking's termination point at the IP/ATM trunk line network. Access Option 3 refers to access after transmission via ATM/IP on the SMP operator's trunk line network to another electronic communications undertaking's connection point. Access Option 4 refers to access through the resale of the SMP operator's broadband services.

[8] Voice-over-Internet Protocol.

[9] The PTA also imposed an obligation that - in those transactions in which the above-specified temporary prices were charged – the possible difference with respect to the final prices would be calculated when the final PTA decision was available and the parties would be obliged to complete a retroactive adjustment within a month from the entry into force of the PTA's final decision.

[10] Very-high-bit-rate digital subscriber line.

II.2. Current notification

In the draft measure as currently notified, the PTA proposes to set new prices for bitstream access according to Access Options 1 and 3 based on a HC FAC methodology (i.e. historic cost accounting based on fully-allocated costs) with 2012 costing information, as updated by Míla with new costing information in October 2013.[11]

With regard to the price control obligation for xDSL bitstream services, including the currently notified bitstream access prices according to Access Options 1 and 3, the PTA explains that it finds it necessary to maintain the obligation on the basis of its findings in its ongoing review of market 5 which is being finalised in parallel. The following tariffs are envisaged to enter into force at the end of the month following publication of the PTA's currently notified draft measure:

Table 1 – Prices for Access Option 1

Connection (upper frequency range of local loop)	**Monthly unit price[12]**
ADSL/VDSL _access part of network per user (EUDP)[13]	ISK 912

Multicast, Access Option 1	**Monthly price for 1 Mb/s**
Reserved bandwidth for each Mb/s per DSLAM[14]	ISK 13.63

VoIP, Access Option 1	**Monthly unit price**
VoIP service per user (EUDP)[15]	ISK 55.85

Table 2 – Prices for Access Option 3

Connection (upper frequency range of local loop)	**Monthly unit price**
ADSL/VDSL _access part of network per user (EUDP)[16]	ISK 1,367

[11] As regards Access Option 2, the PTA notes that, although it might create opportunities for smaller operators and be more economical than Access Option 1, in particular outside of the capital area, no demand has been reported yet for this kind of access. The PTA is currently in the process of finalizing its draft second-round review of market 5, in which it envisages granting Míla the possibility to withdraw Access Option 1, under certain conditions and after the PTA's endorsement, in areas served by Access Option 2. Míla's new cost analysis for Access Option 2 shall be submitted to the PTA no later than three months from the publication of the currently notified final measure and any tariffs applied in the interim period shall use the existing tariff as a reference and then be subject to a retroactive adjustment following the final pricing decision. The new tariff for Access Option 2 shall be in line with the new tariff for Access Options 1 and 3. The PTA explains further that it does not consider it necessary to maintain an access obligation for Access Option 4 in the upcoming market 5 review.

[12] All prices exclude VAT.

[13] Compared to the current temporary prices, the price for an ADSL connection according to Access Option 1 will increase from ISK 911 to ISK 912 and the price for a VDSL connection according to Access Option 1 will drop from ISK 1,093 to ISK 912.

[14] The multicast price will increase from the temporary tariff of ISK 12.51 to ISK 13.63 for each Mb/s of reserved bandwidth in DSLAM.

[15] The price for VoIP for a defined connection will increase from ISK 52 to ISK 55.85.

Additional tariffs for wholesale switches in Access Option 1 are proposed as follows:

Table 3 – Access to wholesale switches

Set-up charge for Access Option 1[17]	ISK 93,000

Table 4 – Monthly fees for ports

Port	Monthly charge per port
1 Gb/s	9,289
10 Gb/s	14,862

The notified measure also proposes set-up fees for local loops with new connections and alteration charges for changes from ADSL to VDSL in Access Options 1 and 3. The existing set-up fee for the local loop is ISK 3,166. The fee for taking over an xDSL service (change of a service provider) is ISK 1,329.

The PTA intends to make no distinction between prices for ADSL and VDSL services in Access Options 1 and 3. According to the NRA, dividing backbone network costs equally between ADSL and VDSL services will foster greater stability and predictability in pricing during the VDSL roll-out period, leading to an advantageous investment environment.[18]

According to the PTA, the costing analysis will be reviewed regularly (on an annual basis) in order to ensure predictability and transparency in the tariffs for bitstream access. The next review of Míla's cost analysis will be carried out 6 months after the entry into force of the forthcoming PTA's decision on market 5 and then annually as set out above.

In addition, in accordance with the PTA's 2012 decision on temporary prices (see footnote 8 above), the retroactive adjustment of fees, should be completed within a month from the entry into force of the PTA's currently notified draft measure.[19]

[16] The price for an ADSL connection according to Access Option 3 will decrease from ISK 1,629 to ISK 1,367, while the price for a VDSL connection according to Access Option 3 will increase from ISK 1,116 to ISK 1,367.

[17] The set-up fee is composed of the costs for the set-up and connection of the first port in each wholesale switch for Access Option 1. The charge for the cost of the set-up and connection of ports which are used for services other than Access Option 1 are collected according to Míla's tariff for billed hours and service.

[18] The PTA further explains that in the HC FAC cost model used in the last cost analysis the cost of ADSL was based on national coverage, covering both urban and rural (uneconomical) areas, while the cost of VDSL was based on urban (economical) areas, i.e. where VDSL roll-out actually started. According to the PTA, such a geographic differentiation could lead to VDSL wholesale prices which are too low and ADSL prices which are too high in the transition from ADSL to VDSL services, in particular for backbone costs in rural areas until VDSL has fully (or mostly) replaced ADSL. In the PTA's view, it is important to diminish the disadvantages of the HC FAC cost model in a situation where it could give inappropriate investment signals for the new technology (VDSL), prolonging the transfer period.

[19] The current draft measure allows for a price of ISK 885 for connection according to Access Option 1 from 1 February 2013 to 31 July 2013 and ISK 912 from 1 August 2013. For TV services, VoIP and wholesale switches, the prices as specified in Tables 1-4 above are applicable.

III. Comments

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

Cost-oriented approach to VDSL pricing

When setting regulated prices in line with the EEA regulatory framework for electronic communications, the Authority recalls that NRAs should seek *inter alia* to: (i) promote efficiency and sustainable competition, (ii) ensure that end users enjoy maximum benefits, and (iii) encourage efficient investment in infrastructure.[20]

Furthermore, a costing methodology that provides the appropriate 'build-or-buy' signal should strike an appropriate balance between ensuring efficient entry and sufficient incentives to invest in and deploy faster and better quality broadband networks and services.

As noted in section II.2 above, the PTA proposes to make no distinction in the price for ADSL and VDSL services in Access Options 1 and 3, so as to promote greater pricing stability and predictability during the VDSL roll-out period. The Authority invites the PTA to explain in more detail how this proposed approach to VDSL pricing is in line with the principles of the EEA regulatory framework as described above. Specifically, the Authority asks the PTA to explain how the proposed approach is consistent with the principle of cost orientation, reflecting the costs of an efficient network operator and setting appropriate 'build-or-buy' signals over the forthcoming regulatory period, thereby balancing the need to maintain sustainable competition and encourage efficient investment in infrastructure during the transition phase to the new technology and services.

Need to justify the imposition of, or amendments to, remedies

According to Article 16(2) of the Framework Directive, NRAs shall decide whether to impose, maintain, amend or withdraw obligations on undertakings on the basis of a market analysis. Furthermore, pursuant to Article 8(4) of the Access Directive, obligations should be based on the nature of the problem identified and should be proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

In this respect, the Authority notes that the PTA's review of market 5 dates back to 2008. Therefore, its currently proposed draft measure may no longer be based on market information which objectively corresponds to the actual market situation and might therefore not be appropriate to address the competition problems identified at the time of the relevant market review in 2008.

The Authority notes at the same time that the PTA's second-round review of market 5 is substantially advanced. Furthermore, the PTA has noted that,

[20] See, for example, Article 8 of the Framework Directive, as well as Recital 20 and Article 13 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 L 108, 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"). Furthermore, Article 13 of the Access Directive notes that when setting price controls, including cost-oriented prices, NRAs must take into account the investment made by the operator and allow a reasonable rate of return on adequate capital employed, taking into account the risks involved, as well as ensuring that any such price control serves to promote efficiency and sustainable competition and maximize consumer benefits.

according to its findings in that ongoing market 5 review, it is necessary to maintain the price control on xDSL bitstream services provided by Míla. However, taking account of the requirements of the EEA regulatory framework as set out above, the Authority invites the PTA, when adopting the final measure in the presently notified case, which is still based on the PTA's 2008 market review decision, to explain in more detail how the competition problems identified in the course of the relevant market review in 2008 still necessitate the currently proposed draft measure.

Transparency and predictability of the wholesale access tariff review process

As regards the process for regular review and revision of wholesale access tariffs in Iceland, the Authority is conscious of the importance of predictability of wholesale access prices in providing a clear framework for investment and for driving competition. The Authority is concerned that an intermittent or incremental review process risks generating legal and economic uncertainty which may negatively affect investments and innovation.

In this respect, the Authority points to the fact that the prices for Access Option 2 are not included in the currently notified measure. The PTA notes that there has been no demand for Access Option 2 until now and that, if it had extended the cost analysis to cover all possible market 5 services, the currently proposed decision would have been delayed for several months. While noting this background, the Authority is concerned that only setting the prices for Access Options 1 and 3 now, with the pricing decision for Access Option 2 deferred until later in the year, may not facilitate legal certainty and enable market participants to make investment decisions at this stage taking the full range of access options into account.

Furthermore, the Authority notes that that the present draft measure mentions that a more detailed costing decision is expected in Q1 2015 following the completion of the ongoing second-round review of market 5. In that respect, the PTA appears to reserve its position on a number of costing decisions (e.g. relating to wholesale switches, costs of VoIP and multicast access, set-up and alteration charges) until that more detailed pricing decision in 2015. The Authority is concerned that this incremental approach to price setting may have implications for regulatory transparency and certainty with a consequent impact on market players' incentives to invest in Iceland.

For the purpose of its future pricing decisions, the Authority thus calls on the PTA to avoid, where possible, applying partial or temporary approaches to price-setting and to adopt a comprehensive, stable and predictable approach to setting forward-looking prices across the range of products in the relevant market(s) in question.

Finally, the Authority notes that prices proposed in the present draft measure have a retroactive effect with respect to temporary prices that were set in the context of PTA's decision in 2012. For the purpose of its future pricing reviews, the Authority asks the PTA to also avoid, where possible, setting new prices with retroactive effect, as this may further lead to legal uncertainty for market players and have a negative impact on incentives to invest.

Reasonable period for national public consultation under Article 6 of the Framework Directive

The Authority notes that, for the presently notified draft measure, the PTA carried out a national consultation on the main draft measure only between 20 December 2013 and 13 January 2014. While an additional consultation was carried out between 21 February and 11 March 2014, this dealt with specific issues only.[21] Since five of the days during the above-mentioned consultation period on the main draft measure were national public holidays in Iceland, it appears that interested parties were given only 12 days to submit their comments to the PTA.

Against this background the Authority takes this opportunity to recall that any changes to price levels are considered to be material changes to the nature or scope of a remedy capable of having an appreciable impact on the market. The Authority thus underlines the importance of a transparent consultation process on all pricing changes ensuring that all interested parties have an opportunity to comment on draft measures within a reasonable period pursuant to Article 6 of the Framework Directive.

IV. Final remarks

The Authority also notes the available guidance concerning markets 4 and 5, including the European Commission's Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks[22], and the European Commission's Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.[23]

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedy 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 may adopt the resulting draft measure and, if it does so, shall communicate the final measure to the Authority.

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

Pursuant to point 15 of the Procedural Recommendation,[24] the Authority will publish this comments' letter on its eCOM Online Notification Registry. The Authority does not consider the information contained in this letter to be confidential. However, the PTA is

[21] See footnote 4 above.

[22] Commission's Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p.35, referred to at point 26 (l) of Annex XI to the EEA Agreement.

[23] 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.

[24] EFTA Surveillance Authority Procedural Recommendation of 2 December 2009 on notifications. time limits and consultations provided for in Article 7 of the Framework Directive, OJ C 302, 13.10.2011 p. 12-21 ("the Procedural Recommendation").

invited to inform the Authority within three working days[25] following receipt of this letter if it considers, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which the PTA would like to have deleted prior to publication. The PTA should provide reasons for any such request.

Yours sincerely,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate

Per Andreas Bjørgan
Director
Competition and State Aid Directorate

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[25] The request should be submitted through the eCOM Registry or by e-mail to Ecom@eftasurv.int, marked for the attention of the eCOM Task Force.