EFTA SURVEILLANCE AUTHORITY

Brussels, 29 May 2017
Case No: 80606
Document No: 854999

Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavik,
Iceland

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

Dear Mr Gíslason,

Subject: Review of the Míla wholesale tariff for copper local loops – Remedies

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

I. PROCEDURE

On 27 April 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 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 31 March to 19 April 2017.[3]

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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 4 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").

[3] Previous versions of the draft national measure were submitted for public consultation between 23 December 2015 and 29 January 2016 and between 26 April and 16 May 2016.

On 9 May 2017, a request for information was sent to the PTA (Document No 854703), and a reply was received on 12 May 2017 (Document No 856127).

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 29 May 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[4], 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, 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") methodology[5], and the tariff was to be reviewed annually. With regard to the tariff structure, fully unbundled access (i.e. access to both the lower and upper frequency ranges of the local loop) was considered basic access. Accordingly, access seekers would be required to pay the full access charge regardless of how the local loop is used.

The PTA planned to take the Commission's 2013 Recommendation on non-discrimination and costing into account for the evaluation of Míla's cost analysis, yet the PTA underlined that it may endorse tariffs which fall outside of the price band specified in that Recommendation in the event of special circumstances such as very significant changes to the ISK's exchange rate. Moreover, the tariff for copper-based LLU should relate logically to Míla's bitstream prices.

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 Authority commented i.a. on the need for the PTA in its forthcoming pricing decisions to provide a clear elaboration of the relevant steps involved in determining the

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

[5] 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").

precise level of the proposed wholesale access prices and how the chosen pricing approach in each instance meets the objectives of the EEA regulatory framework. Furthermore, the Authority noted the delay of seven years accumulated by the PTA in its review of market 4[6] and urged the PTA to ensure a prompt and timely implementation of all the obligations foreseen in the draft measure.

II.2. Current notification

The notified draft measure implements the price control obligation imposed on Míla by the PTA's Decision No 21/2014 with regard to the copper access network.

In parallel with the present notification, the PTA has submitted draft measures concerning the price control obligations imposed on Míla pursuant to the PTA's Decisions No 21/2014 and 8/2014 with regard to bitstream access and terminating segments of leased lines respectively.[7]

The PTA notes that the price control obligation laid down in Decision No 21/2014 includes fibre-optic to street cabinets and that the PTA is currently analysing a cost analysis from Míla in this respect. In its reply to the Authority's request for information, the PTA explains that it expects to publish its draft decision on Míla's tariff for access to fibre-optic to street cabinets for national consultation in June.

The tariffs proposed in the notified draft measure are based on a cost model initially submitted by Míla on 27 March 2015, which was later updated to include costing data from 2016.

The PTA proposes to modify the tariff structure foreseen in the PTA's Decision No 21/2014, so that there will be no distinction between the tariff for access to copper sub-loops from the street cabinet and access to copper loops from the telephone exchange respectively. The PTA explains that this simplified tariff will reflect the changed circumstances since the adoption of the PTA's Decision No 21/2014, namely that, given the roll-out of VDSL[8] and the increasing replacement of copper loops in rural areas with fibre, the length of copper local loops is decreasing and so is the difference with regard to the length from street cabinets and telephone exchanges respectively.[9]

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

- the pre-tax weighted average cost of capital of 7% for 2016;
- operational costs (opex) for the year of 2016;

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[6] The PTA's previous review dated back to 2007.

[7] Assessed by the Authority under Case No 80608 (Míla's wholesale tariff for bitstream access) and Case No 80609 (Míla's wholesale tariff for terminating segments of leased lines).

[8] Very High Bitrate Digital Subscriber Line.

[9] In its reply to the Authority's request for information, the PTA notes that Míla has not registered separately the costs of unbundling the copper loop from street cabinets and telephone exchanges respectively. The PTA observes that due to the shorter length of the copper sub-loop, it could be argued that unbundling the copper sub-loop from the street cabinet is less costly than unbundling the copper loop from the telephone exchange, However, as noted above, the PTA explains firstly that the length of copper loops is decreasing and secondly that according to Míla, the operating costs per unit for copper sub-loops are higher mainly due to maintenance operations being less efficient.

- capital expenditure (capex) for 2016;[10] and
- revenue from setup charges and access to distribution frames.

In relation to the number of leased copper lines, the total number of leased local loops at the end of 2016 is taken into account.[11]

On the basis of the above, the PTA proposes to set the monthly charge for access to local loops at ISK 1,406. The PTA proposes the following service ranking for the purposes of paying the local loop charge: PSTN[12], Internet, IPTV[13] and VoIP[14]. According to the PTA, this ranking will cause a minimum of disruption compared to the tariff structure currently in force.[15]

In addition, the PTA proposes that the setup charge remains ISK 3,166 and that access to the distribution frame is set at ISK 1,104 per month for every 100 lines.

The PTA estimates that the proposed charge will increase Míla's annual revenue by about 5%.

With regard to the price band foreseen in point 41 of the Commission's 2013 Recommendation on non-discrimination and costing, the PTA observes that, depending on the calculation method used to update the price band to 2016 and convert it to ISK, the proposed local loop charge respectively exceeds or falls below the foreseen price band.[16] The PTA considers that the fluctuation in the updated price band levels are mainly due to changes to the ISK exchange rate and proposes not to benchmark the local loop charge against the price band.

The PTA proposes that the monthly charge for access to local loops shall enter into force at the same time as the new Míla tariffs for bitstream access.[17]

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[10] The PTA accepts Míla's proposal that a forward-looking view of investment costs in the copper network should be applied so that investment costs are calculated as the investments indexed to the year 2016 with the addition of investments foreseen for 2017 and 2018. As a consequence, older investments are omitted from the cost analysis. The PTA notes that this forward-looking view of investment costs in the copper network is justified because of Míla's expected investment in fibre-optic local loops to replace copper local loops which could yield a high unit price for copper local loops. The PTA considers that this forward-looking approach for the calculation of the investment base promotes price stability.

[11] In its reply to the Authority's request for information, the PTA explained that the cost model foreseen in its Decision No 21/2014 did not reflect a gradual shift from a copper to a Next Generation Access ("NGA") network. However, to ensure the requisite pricing stability in compliance with the Commission's 2013 Recommendation on non-discrimination and costing, a reference was made to the price band foreseen in point 41 of that Recommendation.

[12] Public Switched Telephone Network.

[13] Internet Protocol-TV.

[14] Voice over Internet Protocol.

[15] In its reply to the Authority's request for information, the PTA explained that under the current tariff structure, the service providers pass on the local loop charge to the PSTN end user, or, in the case that no PSTN service is bought, to the Internet service end user through a so-called retail line fee. By continuing the ranking order for PSTN and Internet, changeover costs can be avoided. Additionally, the PTA explained that IPTV is placed third in the ranking order, because there are far more users buying IPTV than VoIP.

[16] If the price band is calculated by firstly indexing it to the 2016 level using the Harmonised Index of Consumer Prices and secondly converted to ISK using the average exchange rate for 2016, it comes to ISK 1,093 – 1,367. However, if the price band is calculated by firstly converting it to ISK using the average exchange rate for 2012 and then indexed to the 2016 level using the Building Cost Index, the price band comes to ISK 1,466 – 1,832.

[17] Notified to and assessed by the Authority in parallel with the present notification, see note 7.

As regards the annual review of the tariff foreseen in the PTA's Decision No 21/2014, Míla is required to submit an updated cost analysis before April 2018. 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]

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 Decision No 21/2014 has been significantly delayed, notwithstanding the fact that Míla submitted its cost analysis first in March 2015 and then its updated analysis in December 2015.

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 75750, 77546, 79335 and 80034, respectively. 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.[20]

Moreover, the Authority recalls 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 as foreseen in the PTA's Decision No 23/2016[21]. In the Authority's comments on the planned deregulation of markets 1 and 2/2008, the Authority strongly urged the PTA to ensure the full implementation of all regulatory remedies in markets 4 and 5/2008 sufficiently in advance of the foreseen withdrawal of remedies.[22]

In the light of the above and, in particular, the deregulation of markets 1 and 2/2008 planned to enter into force in less than 8 months, the Authority emphasises the pressing need for the PTA to finalise all of the measures necessary to ensure the full implementation of the price control obligation foreseen in the PTA's Decision No 21/2014 without any further delay.

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[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.

[20] See, for example, Case No 77546 and Case No 75574. In this respect, the Authority notes, for example, the separate process underway for reviewing Mila's tariff for access to fibre loops to street cabinets which is not included in the current draft measure.

[21] Notified to and assessed by the Authority under Case No. 79865.

[22] See the Authority´s comment letter dated 21 December 2016, Doc No. 831564.

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.

Finally, the Authority welcomes the fact that the PTA has initiated its next market review and invites the PTA to undertake a timely analysis and notification of the next market review, in line with the PTA's obligations under the EEA regulatory framework.

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.

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[23], 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[24] 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	Gjermund Mathisen
Director	Director
Internal Market Affairs Directorate	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.