EFTA SURVEILLANCE AUTHORITY

Brussels, 29 May 2017
Case No: 80608
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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: **Review of the Míla wholesale tariff for bitstream access – 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 broadband access 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 5 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.

Rue Belliard 35, B-1040 Brussels, tel: (+32)(0)2 286 18 11, fax: (+32)(0)2 286 18 00, www.eftasurv.int

On 9 May 2017, a request for information was sent to the PTA (Document No 854704), and a reply was received on 12 May 2017 (Document No 856125).

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 broadband access. 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 wholesale bitstream access offered through copper-based local loops, was cost-oriented based on the fully-allocated historical costing ("HC FAC") methodology.[5] 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[6] and DSL[7]) 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[8] and VoIP services[9]) 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 both the Commission's 2013 Recommendation on non-discrimination and costing and tariffs from analogous competition markets into account for the evaluation of Míla's cost analysis. Moreover, the PTA held that the tariff for

[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").

[6] Very High Bitrate Digital Subscriber Line.

[7] Digital Subscriber Line.

[8] Internet Protocol-TV.

[9] Voice over Internet Protocol.

wholesale broadband access should relate logically to Míla's tariff for local loop access (local loop unbundling or "LLU").

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 decision to provide a clear elaboration of the relevant steps involved in determining the 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 six years accumulated by the PTA in its review of market 5[10] 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 wholesale broadband access offered through copper-based local loops.

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 Decision No 21/2014 and 8/2014 with regard to copper local loops and terminating segments of leased lines respectively.[11]

The tariffs proposed in the notified draft measure are based on a cost analysis initially submitted by Míla on 31 August 2015. However, the cost analysis for VULA and Access Option 2 was not submitted until 31 May 2016. Subsequently, a number of updates of the cost analysis were requested by the PTA including an update with costing data from 2016.

In terms of the cost calculation for Access Option 1[12], 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[13];
- capital expenditure (capex) for 2016[14]; and
- calculation of line equivalents for each service.

[10] The PTA's previous review dated back to 2008.

[11] Assessed by the Authority under Case No 80606 (Míla wholesale tariff for copper local loops) and Case No 80609 (Míla wholesale tariff for terminating segments of leased lines).

[12] Access Option 1 refers to access in the DSLAM (Digital Subscriber Line Access Multiplexer) or equivalent equipment at the location where the copper local loop connects to the distribution frame of the telephone exchange.

[13] Compared to the latest cost analysis, Míla proposes a significant increase in opex. When taking into account i.a. recent changes to the network, the PTA considers the increase in opex justifiable. Moreover, the PTA observes that when opex for 2016 is benchmarked against 2014 and 2015, there is no great difference.

[14] Based on estimated replacement costs for the equipment needed to fulfil the need of the current number and location of end-users. In its reply to the Authority's request for information, the PTA notes that it has looked closely at the calculation of investment costs and that most unit prices are based on current cost since Míla's network has been upgraded (to VDSL) recently.

As regards Access Option 2[15], the PTA accepts Míla's proposal that the tariff should be calculated on the basis of the tariff for Ethernet service with the addition of the tariff for connection to end users according to Access Option 1.

As regards Access Option 3[16], the PTA accepts Míla's proposal that the tariff should be based on Access Option 1 with the addition of costs for data transit. In its reply to the Authority's request for information, the PTA explains that Access Option 3 will also include a VoIP service, however, the technical details of this service remain to be considered and a tariff for this service is, therefore, not included in the draft measure.[17]

As regards the special tariff for the delivery of VoIP services, the PTA accepts Míla's proposal that the tariff should remain unchanged. However, the PTA notes the need to review this tariff in the next update of the cost analysis as the VoIP traffic volume is likely to increase as a result of Siminn's forthcoming decommissioning of the PSTN[18] system.

As regards the special tariff for delivery of IPTV services, the PTA requests Míla to take into account the increase in TV traffic for the division of costs between Internet, IPTV and VoIP.

As regards VULA[19], the PTA accepts Míla's analysis but observes that because VULA is a new service, it is difficult to estimate the demand for it. Moreover, the PTA considers that there is much uncertainty about the costs connected to the setup and operation of VULA. Accordingly, the PTA requests Míla to identify, in a precise manner, the recorded work hours and other costs for licence fees, implementation and operation of VULA so that these data can be used as a basis for the next tariff review which is expected to take place within a year from publication of the PTA's final decision.[20]

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

Access Option 1

Connection	Monthly price
ADSL and VDSL	691 ISK
ADSL + 2 Mb/s	1,573 ISK
ADSL + 4 Mb/s	1,888 ISK

[15] Access Option 2 refers to access after ATM/IP transmission in the SMP operator's trunk line network (i.e. 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).

[16] 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.

[17] The PTA commits to follow the development and take appropriate measures if necessary before the de-regulation of markets 1 and 2/2008 at the end of 2017.

[18] Public Switched Telephone Network.

[19] In its reply to the Authority's request for information, the PTA explains that it plans to notify a draft decision on Míla's reference offer for wholesale bitstream access (including a specification of the technical implementation of VULA) before the end of May 2017.

[20] In its reply to the Authority's request for information, the PTA explains that it has no immediate plan for introducing a margin squeeze test to ensure that access seekers relying on the VULA product can compete effectively in related markets. The PTA considers that the VULA product is only relevant for access seekers with a minimum of 2,500 end users that otherwise would be willing to invest in their own VDSL hardware. To date no such access seekers have shown an interest in the VULA product.

ADSL + 6 Mb/s	2,045 ISK
ADSL + 8 Mb/s	2,124 ISK
ADSL + 14 Mb/s	2,203 ISK
VDSL + 50 Mb/s	2,517 ISK
VDSL + 100 Mb/s	3,147 ISK
G.SHDSL + 2 Mb/s	3,368 ISK
G.SHDSL + 4 Mb/s	6,158 ISK
G.SHDSL + 5 Mb/s	4,144 ISK
G.SHDSL + 10 Mb/s	6,918 ISK
G.SHDSL + 15 Mb/s	10,605 ISK
G.SHDSL + 20 Mb/s	14,749 ISK

Other services	**Price**
Taking over xDSL service	1,329 ISK
Changes from ADSL to VDSL	3,166 ISK
New connection	3,166 ISK

Access to ports for business connections at wholesale switch or similar

Port	**Price**
1 Gb/s	7,000 ISK
10 Gb/s	35,000 ISK

Multicast and unicast

Service	**Monthly price**
Transmission, per Mb/s	22.33 ISK

VoIP

Service	**Monthly price**
VoIP, per unit	55.85 ISK

VULA

Service	**Price**
Setup fee	4,200,000 ISK
VULA access price, per month	70,000 ISK
VULA monthly price, per connection	79 ISK

Access Option 3

Service	Monthly price
ADSL and VDSL	1,205 ISK
ADSL + 2 Mb/s	2,392 ISK
ADSL + 4 Mb/s	2,996 ISK
ADSL + 6 Mb/s	3,383 ISK
ADSL + 8 Mb/s	3,655 ISK
ADSL + 14 Mb/s	4,094 ISK
VDSL + 50 Mb/s	6,606 ISK
VDSL + 100 Mb/s	8,936 ISK
G.SHDSL + 2 Mb/s	4,314 ISK
G.SHDSL + 4 Mb/s	7,495 ISK
G.SHDSL + 5 Mb/s	5,975 ISK
G.SHDSL + 10 Mb/s	9,032 ISK
G.SHDSL + 15 Mb/s	13,194 ISK
G.SHDSL + 20 Mb/s	17,739 ISK

Other services	Price
Taking over xDSL service	1,329 ISK
Changes from ADSL to VDSL	3,166 ISK
New connection	3,166 ISK

Interconnection of Internet Service Providers with the xDSL and GPON system for Access Option 3

Setup fee	Price
Setup of first domain	114,173 ISK
Setup of additional domain	28,543 ISK

Ports	Monthly price
Port up to 1 Gb/s	9,986 ISK
Port 10 Gb/s	59,921 ISK

The PTA considers that the proposed tariffs entail relatively low price increases and will not disrupt the current pricing relationship between LLU, Access Option 1 and Access Option 3.

Furthermore, in terms of the pricing relationship between LLU, Access Option 1, Access Option 3 and VULA, the PTA considers that the proposed tariffs reflect the ladder of investment. Moreover, it is the PTA's assessment that the additional costs for VULA are justifiable when compared to the investment costs needed for a complete VDSL system.[21]

In terms of benchmarking against tariffs from analogous competition markets, the PTA notes that the proposed tariffs for Access Option 1, Access Option 3 and VULA are lower than similar fibre-optic based products. In the light of fibre-optic based products being superior to copper-based products (e.g. offering higher data rate and more stability), the PTA considers the price difference justifiable.[22]

The PTA proposes that the tariffs under notification shall enter into force at the same time as the new Míla tariffs for access to local loops and for terminating segments of leased lines respectively.[23]

As regards the annual review of the tariffs 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.[24] 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.[25]

III. COMMENTS

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

Timely enforcement and effectiveness of remedies and need to ensure ongoing economic replicability of broadband-related services

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. For instance, Míla submitted its cost analysis for VULA more than 15 months after the time limit foreseen in the PTA's Decision No 21/2014. However, the PTA did not take any formal steps against Míla for this late submission.

Against this background, the Authority recalls 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,

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[21] By way of example, the PTA calculates that an access seeker with 5,000 end-users and an investment timeframe of 5 years will incur additional costs of ISK 110 per month per end-user when using the VULA product.

[22] In response to the Authority's request for information, the PTA explains that it has obtained the VULA tariffs applicable in Norway and Denmark respectively. However, due to various differences, (i.a. with regard to the tariff structure), the PTA does not consider it possible to compare the tariffs without a thorough analysis.

[23] Notified to and assessed by the Authority in parallel with the present notification, see note 11.

[24] Provided that no major changes are included in the cost analysis.

[25] 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.

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 has also previously expressed concerns that a fragmented implementation of individual remedies in Iceland risks generating further uncertainty to the potential detriment of investment and innovation.[26]

In addition, 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[27]. 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.[28]

Yet, the Authority notes that the notified draft measure does not include the foreseen wholesale tariff for VoIP services under Access Option 3 despite the current draft measure noting the importance of this latter access option.

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.

The Authority welcomes further the PTA's commitment to undertake a thorough review of the VULA tariff based on relevant costing data from 2017 within a year from the publication of the PTA's final decision. In this context, the Authority would like to recall that VULA was mandated by the PTA, as part of its review of market 4/2008, with the purpose of providing an alternative wholesale access option in areas where Míla introduced vectoring. Accordingly, the Authority strongly encourages the PTA to ensure that VULA is an effective substitute for other physical wholesale access options in market 4/2008, both from an economic and functional perspective.

In view of past experience in Iceland where cost analyses have incurred considerable delays, the Authority strongly urges the PTA to ensure that the forthcoming review of the VULA tariff is completed without any delay. Similarly, the Authority invites the PTA to ensure that the foreseen annual review of all other tariffs pertaining to this market 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.

Moreover, the Authority wishes to recall its comments issued under Case No 79865, in which the Authority invited the PTA to closely monitor the need to develop an ex ante economic replicability test for broadband access products delivered over fibre-based infrastructure related to markets 4 and 5/2008, as foreseen in the PTA's Decision No 21/2014. The Authority invites the PTA to consider performing such a test, and where

[26] See, for example, Case No 77546 and Case No 75574.
[27] Notified to and assessed by the Authority under Case No 79865.
[28] See the Authority's comment letter dated 21 December 2016, Document No 831564.

appropriate also for broadband access products delivered over VDSL infrastructure[29], without delay in case there is reason to believe that Míla does not fulfil the non-discrimination obligation imposed on it in both markets 4 and 5/2008.

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[30], 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[31] 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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[29] For example, as outlined in section II.2 above, the PTA has noted some costing uncertainties related to the new VULA product.

[30] 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").

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