EFTA SURVEILLANCE AUTHORITY

Brussels, 3 February 2017
Case No: 80034
Document No: 835393

Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavik,
Iceland

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

Dear Mr Gíslason,

Subject: **Wholesale leased lines – Remedies – Míla´s Reference Offer**

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

I. PROCEDURE

On 5 January 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 wholesale market for 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 23 November to 7 December 2016.

[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 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") and market 14 in the earlier EFTA Surveillance Authority Recommendation of 14 July 2004 (Decision No 194/04/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 101, 27.4.2006, p. 1 ("the 2004 Recommendation").

On 13 January 2017, a request for information was sent to the PTA (Document No 835149), and a reply was received on 18 January 2017 (Document No 836685).

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 6 February 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

Market 6/2008 was previously notified to and assessed by the Authority under Case No 75278.[3] Market 14/2004 was previously notified to and assessed by the Authority under Case No 77596.[4]

In both markets 6/2008 and 14/2004, the PTA designated Míla ehf. ("Míla") as an operator with significant market power ("SMP") and imposed obligations of (i) access, (ii) non-discrimination, (iii) transparency, (iv) separation of accounts and (v) price and accounting controls in both markets.[5]

As regards the non-discrimination obligations imposed on Míla in both markets, Service Level Agreements ("SLAs"), Service Level Guarantees ("SLGs") and Key Performance Indicators ("KPIs") were to be put in place. The full implementation of the SLAs and SLGs was foreseen no later than six months after the publication of the PTA´s final decisions, *i.e.* for market 6/2008 no later than 6 November 2014 and for market 14/2004 no later than 12 February 2016. The full implementation of the KPIs was for market 6/2008 foreseen no later than three months after the publication of the PTA's final decision, *i.e.* by 6 August 2014 and for market 14/2004 no later than 6 months after the publication of the PTA's final decision, *i.e.* by 12 February 2016. In its reply to the Authority´s request for information dated 13 January 2017, the PTA indicated that the implementation of the KPIs for market 14/2014 together with the SLAs and the SLGs for both markets is pending and that the KPIs for market 6/2008 have been published since June 2015. In its reply, the PTA indicated that the outstanding SLAs and SLGs are to be implemented as part of the notified draft reference offer and it also provided an expected publication timeframe of 1 March 2017 for Míla's outstanding KPIs. The PTA clarified further that going forward it will monitor Míla´s compliance with its imposed obligations more closely.

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[3] Notified to the Authority on 3 April 2014 and assessed by the Authority in its comment letter dated 5 May, see Document No 706019.

[4] Notified to the Authority on 1 July 2015 and assessed by the Authority in its comment letter dated 3 August 2015, see Document No 763837.

[5] PTA Decision No 8/2014, published on 6 May 2014 and PTA Decision No 21/2015, published on 12 August 2015.

The transparency obligation imposed on Míla in market 6/2008 comprised the publication of a reference offer for leased line termination segment access and related facilities and services. With regard to market 14/2004, the transparency obligation included the publication of a reference offer for trunk segments of leased lines and related facilities and services. The reference offers were to be submitted to the PTA for endorsement no later than six months after the publication of the PTA´s final decision, *i.e.* for market 6/2008 by 6 November 2014, and for market 14/2004 by 12 February 2016. In its reply to the Authority´s request for information, the PTA explained that over the course of 2014 and 2015, it had finalised market analyses for markets 4/2008, 5/2008, 6/2008 and 14/2004 and imposed various obligations on Míla, including reference offers and cost analyses. All the imposed obligations were subject to a 6-month time limit for implementation by Míla, and, therefore, the PTA considered that some prioritisation was needed. The PTA considered finalisation of the reference offers and cost analyses for markets 4/2008 and 5/2008 should take priority. Consequently, the reference offers for leased lines were delayed.[6]

The price control obligations imposed on Míla in both markets included cost-orientation based on a HC FAC methodology (i.e. historic cost accounting based on fully-allocated costs), for terminating segments of Míla´s leased lines and for trunk segments of Míla´s leased lines, respectively. Míla was to submit its cost analysis and proposed tariff for market 6/2008 to the PTA for endorsement no later than six months after the publication of the PTA´s final decision, *i.e.* 6 November 2014. As regards market 14/2004, Míla´s tariffs were to be reviewed no later than by the end of December 2016 and new tariffs would only come into force after endorsement by the PTA and subsequent to national consultation and consultation with the Authority. According to the present draft measure, Míla´s cost analysis for market 6/2008 is only currently being processed by the PTA and notification to the Authority is foreseen for January 2017. As regards the cost analysis for market 14/2004, consultation with the Authority is not foreseen until September 2017.[7]

The Authority commented *i.a.* on the delay of six to seven years accumulated by the PTA in its reviews of markets 6/2008 and 14/2004,[8] and emphasised that such delays may harm competition and reduce legal certainty for market participants. Against that background, the Authority urged the PTA to undertake a timely analysis and review of its next market review and to ensure a prompt and timely implementation of all the obligations foreseen in the draft measures.

II.2. Current notification

The notified draft measure concerns solely Míla´s reference offer for wholesale leased lines and foresees amendments to a draft reference offer, which was initially submitted by Míla to the PTA on 31 May 2016 ("the draft reference offer").

As a starting point, the PTA notes that in 2011 the PTA did significantly amend Míla´s reference offer for leased lines (i.e. the reference offer currently in force) and considers that the draft reference offer does not foresee any major changes. In addition, the PTA notes that no parties submitted comments during the national consultation. Therefore, the

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[6] In addition, the PTA notes that due to a heavy workload and lack of personnel, the PTA´s case handling in connection with the notified reference offer had taken longer than expected.

[7] See footnote 2 of the draft measure.

[8] The PTA´s previous reviews dated back to 2007.

PTA does not foresee any changes to the draft reference offer except for those required to harmonise it with Míla's reference offer for wholesale access to local loops[9].

The PTA proposes to require Míla to make the following amendments to the draft reference offer:

- amend the foreseen provision on limitation of Míla´s liability so that no limitation applies when the cause of lack of connection, interruption of electronic communications or interference is due to intent or extreme negligence on the part of Míla;[10]
- amend the foreseen provision authorising Míla to request a payment guarantee from a service purchaser so that the maximum guarantee is limited to an equivalent of estimated monthly charges for access to leased lines for a period of three months;[11]
- amend the foreseen provision on the transfer of rights and obligations so that the service purchasers and Míla have reciprocal rights and obligations;[12]
- amend the foreseen provision on costs related to vacating or altering premises so that Míla will only be relieved of bearing the costs when reasons falling under the responsibility of the service purchaser have made it necessary to vacate or alter premises[13].

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 several components of the non-discrimination, transparency and price control obligations for both markets 6/2008 and 14/2004, as foreseen by the PTA´s Decision No 8/2014 and the PTA´s Decision No 21/2015, has been significantly delayed. For instance, Míla submitted its draft reference offer more than 18 months after the time limit foreseen in the PTA´s Decision No 8/2014 and almost 4 months after the time limit foreseen in the PTA´s Decision No 21/2015. However, the PTA did not take any formal steps against Míla for this late submission.

In addition, the KPIs for market 6/2008 foreseen for implementation no later than 6 August 2014 were not published until June 2015, and the SLAs and SLGs foreseen no later than 6 November 2014 for market 6/2008 and no later than 12 February 2016 for market 14/2004 are still to be put in place. The same is the case for the KPIs for market 14/2004 which pursuant to the PTA´s Decision No 21/2015 were foreseen for publication no later than 12 February 2016.

In addition, it is observed that the implementation of the price control obligations in markets 6/2008 and 14/2004, as foreseen in the PTA´s Decision No 8/2014 and the PTA´s Decision No 21/2015, are equally delayed.

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[9] Notified to and assessed by the Authority under Case No 79335. See the Authority´s comment letter dated 29 July 2016, Document No 812955.

[10] Para. 1 of the draft national measure.

[11] Para. 2 of the draft national measure.

[12] Para. 3 of the draft national measure.

[13] Para. 4 of the draft national measure.

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.

Moreover, the Authority wishes to recall its comments issued under Cases 75750, 77546 and 79335, 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.[14]

The Authority welcomes the commitment made by the PTA to monitor Mila´s compliance with its imposed obligations more carefully. 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 thus strongly urges the PTA to finalise all of the measures necessary to ensure the full implementation of the regulatory obligations foreseen by the PTA´s Decision No 8/2014 and the PTA´s Decision No 21/2015 without any further delay.

Finally, the Authority invites the PTA to undertake a timely analysis and notification of the next market reviews, 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[15], 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[16] following receipt of this letter if you consider, in accordance

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[14] See, for example, Case No 77546 and Case No 75574.

[15] 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").

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

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,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate

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