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EFTA SURVEILLANCE
AUTHORITY

Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavík,
Iceland

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

Dear Gíslason,

Subject: Retail market for access to the public telephone network provided at a fixed location in Iceland

Wholesale market for call origination on the public telephone network provided at a fixed location in Iceland

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

I. Procedure

On 22 November 2016, the EFTA Surveillance Authority (“the Authority”) received a notification of draft national measures 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”). The draft measures concern: i) the retail market for access to the public telephone network provided at a fixed location in Iceland² and ii) the wholesale market for call origination on the public telephone network provided at a fixed location in Iceland.³

The notification became effective on the same day.

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 5 cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (“the Framework Directive”).

² Corresponding to market 1 of the EFTA Surveillance Authority Recommendation of 5 November 2008 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (Framework Directive); adopted by Decision No 688/08/COL, OJ C 156, 9.7.2009, p. 18 (“2008 Recommendation on relevant markets”).

³ Corresponding to market 2 of the 2008 Recommendation on relevant markets.

National consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period 7 October 2016 to 7 November 2016.

On 5 December 2016, the Authority sent a request for information to the PTA (Doc No. 829327), to which a reply was received on 8 December 2016 (Doc No. 830392).

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 22 December 2016.

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 measures

II.1. Background

II.1.1. The retail market for access to the public telephone network provided at a fixed location in Iceland

The PTA’s second review of the retail market for access to the public telephone network provided at a fixed location in Iceland was notified to and assessed by the Authority under Case No. 73636.⁴

The retail market for access to the public telephone network provided at a fixed location included any form of connection with an electronic communications network that provides fixed line access to public telephony services for residential and non-residential customers, regardless of the infrastructure or technology on which the access is based. Thus, the market was not limited to analogue (PSTN⁵) and digital (ISDN⁶) access to the copper local loop, but it also included access to services provided through a broadband (high-speed) connection such as access to VoIP⁷ services provided via DSL⁸ and fibre networks.

The relevant geographic market was defined as Iceland and the PTA designated Siminn hf. (“Siminn”) as having significant market power (“SMP”).

The PTA proposed to impose the following remedies on Siminn: access, carrier selection and pre-selection, non-discrimination, transparency, price control and cost accounting. The remedies applied only to Siminn’s PSTN/ISDN network and services and not to Siminn’s provision of VoIP services.

In its comments, the Authority observed that the price-control related remedies should be notified under the Article 7 consultation procedure. Moreover, the Authority noted the importance of regulators enforcing remedies in a timely and effective manner following the conclusion of the underlying market analysis and urged the PTA to ensure the effectiveness of the proposed remedies.

⁴ See the Authority’s comments letter dated 14 June 2013 (Doc No. 674115).

⁵ Public Switched Telephone Network.

⁶ Integrated Services Digital Network.

⁷ Voice over Internet Protocol.

⁸ Digital Subscriber Line.

II.1.2. The wholesale market for call origination on the public telephone network provided at a fixed location in Iceland

The PTA's second review of the wholesale market for call origination on the public telephone network provided at a fixed location in Iceland was notified to and assessed by the Authority under Case No. 72796.⁹

The wholesale market for call origination on the public telephone network provided at a fixed location included the origination of calls, choice of route in the telephone exchange and connection for the origination stage of the call. Transit from the end user by local copper loop to the distribution frame and from there to the first telephone exchange on the route before reaching the next stage (the next stage being either transit or termination of the call) was included. The relevant market also comprised call origination for the purpose of accessing dial-up Internet service provision. Calls between networks or entirely within the same network belonged to this market.

The relevant geographic market was defined as Iceland and the PTA designated Siminn as having SMP.

The PTA proposed to impose the following remedies on Siminn: access, non-discrimination, transparency, accounting separation and price control.

II.2. Market definition

II.2.1. The retail market for access to the public telephone network provided at a fixed location in Iceland

In the present draft measure, the PTA includes in the relevant market any kind of connection with an electronic communications network that provides fixed line access to public telephony services for residential and non-residential customers, regardless of the electronic communications infrastructure or technology on which the access is based. Thus, the market is not limited to analogue (PSTN) and digital (ISDN) access to the copper local loop. It includes access to public telephone networks provided at a fixed location through other access networks with a fixed network connection point which includes access to VoIP at a fixed location with the assistance of a variety of technical solutions, including both xDSL (all kinds of DSL) and fibre-optic connections.

The PTA does not consider VoIP services that do not use telephone numbers to belong to the relevant market. According to the PTA, it is usually not possible to use such a service to call or receive dialled calls from PSTN/ISDN networks. Moreover, it is only possible to connect to a limited group of users with this service. Therefore, the PTA considers that VoIP services that do not use telephone numbers are mainly used as an addition, and not an alternative, to traditional fixed telephony services.

The PTA notes that although variations of VoIP services that do not use telephone numbers exist, which offer telephone calls from computers to telephone numbers for a fee, thereby increasing the usability of the service, the substitutability between traditional fixed telephony services and VoIP services that do not use telephone numbers is limited because it is not possible to call the Internet telephone user from a traditional fixed line telephone.

⁹ See the Authority's no comments letter dated 6 December 2012 (Doc No. 654378).

The relevant geographic market is defined as Iceland.

II.2.2. The wholesale market for call origination on the public telephone network provided at a fixed location in Iceland

Similarly to the second market review, the service considered by the PTA to be part of the relevant market is the setting up of calls, choice of route in the telephone exchange and connection for the origination stage of the call. At this stage, transit from the end user by local copper loop, or by any kind of connection provided at a fixed location (e.g. bitstream connection) to the distribution frame or to an analogous network connection point, and from there to the first telephone exchange on the route before reaching the next stage (the next stage being either transfer or termination of the call) is considered part of the relevant market.¹⁰

The relevant geographic market is defined as Iceland.

II.3. Application of the three-criteria test

Pursuant to recital 27 of the 2016 Recommendation on relevant markets¹¹, the PTA applies the three-criteria test to consider whether the markets under consideration continue to be susceptible to *ex ante* regulation.¹² To this end, the PTA undertakes a joint assessment of the two markets.

As a starting point, the PTA notes that the usage of fixed telephony services is on the decline both in terms of the number of subscriptions¹³ and of traffic volumes¹⁴.

Moreover, in terms of general market information, the PTA observes a significant increase in the use of VoIP in recent years. The number of VoIP subscriptions was just under 6,000 at the end of 2008, but had increased to 43,000 at the end of 2015, corresponding to about one third of the total number of subscribers to fixed telephony services.

According to the PTA, most if not all providers of fixed telephony services now direct their attention towards IP technology as the future transit technology for fixed telephony services. The PTA indicates that it is becoming increasingly difficult to maintain the

¹⁰ The PTA notes in its market analysis that definition of this market remains unchanged from the definition provided in its previous market analysis.

¹¹ EFTA Surveillance Authority Recommendation of 11 May 2016 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (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 and by the sectoral adaptations contained in Annex XI to that Agreement, adopted by Decision No 093/16/COL, not yet published ("2016 Recommendation on relevant markets").

¹² Further to recital 27, in conjunction with recital 16, of the 2016 Recommendation on relevant markets, when identifying that markets, which are not listed in the Annex, remain susceptible to *ex ante* regulation at national level, NRAs should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must not tend towards effective competition within a relevant time horizon, and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

¹³ The number of subscribers to the PSTN service declined from over 140,000 in 2008 to just over 91,000 at the end of 2015.

¹⁴ The volume of fixed call minutes declined from over 2 billion in 2001 to under 400 million minutes in 2015.

telephone exchange equipment used in traditional fixed telephony networks and to procure spare parts. Therefore, the PTA considers that fixed telephony services in Iceland will migrate from traditional PSTN technology to IP protocols within only a few years.

The PTA notes that Siminn, whose market share in terms of the number of subscriptions in the retail access market in 2015 was 62%, has announced its plans to migrate fixed telephony services to VoIP. While no definitive schedule has been published, Siminn has indicated plans to complete the migration by the end of 2020. In addition, the PTA observes that the electronic communications companies operating on the fixed telephony services markets are increasingly directing customers from PSTN to VoIP.

The number of Single-Billing Wholesale Line Rental (“SB-WLR”)¹⁵ subscriptions has fluctuated in recent years, increasing until 2015 when the number of subscriptions was around 8000, but showing a decrease in 2016 with only 3,500 subscriptions by the end of the first half of the year.

The first criterion: high and non-transitory entry barriers

The PTA considers that the advent of VoIP telephone technology and the steadily increasing distribution of fibre-optic connections have led to significantly decreased entry barriers in recent years.

According to the PTA, close to all residential and non-residential parties in Iceland have access to connections (fixed or mobile) capable of carrying VoIP services, resulting in possible transit routes for VoIP to almost all users of fixed telephony services. More than 90% of residential and non-residential parties have access to high-speed connections over a fixed network, and work to develop fixed networks is systematically in progress across the whole country.

In addition, with regard to access to the wholesale broadband inputs that are required to offer VoIP services, the PTA refers to the access obligations imposed on Mila in the market for wholesale network infrastructure access at a fixed location¹⁶ and in the market for wholesale broadband access¹⁷. These obligations which were foreseen in the PTA’s Decision No. 21/2014, include as regards market 5/2008, that access seekers shall have the possibility of delivering bitstream at various places in the network:

- in DSLAM or equivalent equipment at the place where the copper local loops connect to the telephone exchange distribution frame and/or telephone exchange fibre-optic distribution frame, street cabinet or other equipment space (“Access Option 1”);
- by ATM/IP transit in the Mila trunk line network, i.e. where Mila handles transit of signals from DSLAM and/or fibre-optic distribution frame to the connection point of another electronic communications company to the ATM/IP trunk line network (“Access Option 2”); and
- after transmission with ATM/IP on the Mila trunk line network to the connection point of another electronic communications company with the previously mentioned network (“Access Option 3”).

¹⁵ In Iceland, typically referred to as “single billing carrier pre-selection (“SB-CPS”).

¹⁶ Market 4 of the 2008 Recommendation on relevant markets.

¹⁷ Market 5 of the 2008 Recommendation.

The PTA considers that these obligations allow alternative providers of fixed telephony services to provide VoIP services at any location in Iceland based on leased bitstream connections. According to the PTA, this leads to reduced investment requirements for new providers of fixed telephony services as it is not necessary to build a local loop system or to lease local loops to be able to provide a VoIP service.

In response to the Authority's request for information, the PTA indicated that at present only Access Option 1 is available, but that a reference offer including bitstream Access Option 3 is under review and is expected to become valid no later than 1 March 2017. Moreover, the PTA has indicated that the same reference offer will include the details for the VULA¹⁸ product that was part of the obligations imposed on Mila in market 4/2008 in the PTA's Decision No. 21/2014.¹⁹

With regard to pre-selection, single billing carrier pre-selection and resale of fixed telephony services, the PTA notes that the settlement agreement between Siminn and the Competition Authority foresees the obligation on Siminn to maintain these wholesale access services.²⁰

In the light of the above, the PTA concludes that the entry barriers are no longer high and non-transitory. However, the PTA does consider it necessary to continue to closely monitor the relevant markets and indicates that it will be prepared to examine the need for a new market analysis, in case of significantly changed circumstances in the structure of the markets or in the conduct of the network operators.

The second and the third criterion

The PTA considers that it is not necessary to assess the second and third criteria, as the first out of the three cumulative criteria is not fulfilled.

The PTA considers one year to be an appropriate transition period for the proposed deregulation of both markets (*i.e.* it plans to lift obligations by 31 December 2017). In response to the Authority's request for information, the PTA has indicated that one year is considered sufficient for the operators to adapt their technologies and product offers.

III. Comments

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

Barriers to entry and availability of effective wholesale remedies in markets 4 and 5/2008

¹⁸ Virtual Unbundled Local Access.

¹⁹ Additionally, the PTA has indicated that it expects the price control obligations imposed on Mila in both markets 4 and 5/2008 to be fully implemented so that the resulting tariffs can enter into force on 1 March 2017. As regards the PTA's development of the *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 PTA has observed that it has not performed such a test, because it has not been aware or had any reasonable request from market players indicating that for economic reasons unrelated parties cannot replicate the fibre-based broadband access product offers of related parties.

²⁰ The PTA notes however that after 1 January 2017, Siminn may request to have the obligation lifted. The Competition Authority shall process such a request within 115 working days and shall in that process seek the PTA's opinion before deciding on the request.

The Authority recognises the relatively low reliance on SB-WLR in Iceland, as well as the strong uptake of VoIP services reported by the PTA in recent years and the widespread availability of high-speed connections for both residential and non-residential customers.

At the same time, the Authority notes that the PTA's analysis and conclusions with regard to the lack of high and non-transitory entry barriers in the relevant markets rely *inter alia* on regulatory remedies imposed on Mila in markets 4 and 5/2008 pursuant to the PTA's Decision No. 21/2014. However, several components of the access, transparency and price control obligations for both markets 4 and 5/2008, *i.e.* obligations aiming at ensuring the availability of the necessary wholesale inputs, remain to be fully implemented.

In its comments under Cases 75750, 77546 and 79335 respectively, the Authority underlined the need for a prompt and timely implementation of the obligations foreseen in the PTA's Decision No 21/2014. 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.²¹

Further to these previous comments, and noting the significance of the regulatory obligations foreseen in the PTA's Decision No 21/2014 to the PTA's conclusions in the present draft measures, the Authority strongly urges the PTA to ensure the full implementation of all regulatory obligations in markets 4 and 5/2008 without any further delay. Such implementation should take place sufficiently in advance of the planned withdrawal of remedies in markets 1 and 2/2008.

Moreover, the Authority invites 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, so that such a test can be performed without delay in case there is reason to believe that Mila does not fulfil the non-discrimination obligation imposed on it in both markets 4 and 5/2008.

Monitoring of tendency towards effective competition

The Authority notes the PTA's observation that Siminn's market share for fixed telephony services (albeit gradually decreasing) is still relatively high and that there could be a need to re-examine the markets at short notice if, for example, problems arise in connection with wholesale bitstream access services for VoIP providers. In addition, the Authority notes the uncertain timeframe regarding the expected migration of Siminn's own fixed telephony services to VoIP technology.

Against this background, the Authority invites the PTA to continue to closely monitor the predicted migration trends and access to the corresponding wholesale inputs needed to facilitate effective competition for fixed telephony services in Iceland.

²¹ See, for example, Cases 77546 and 75574.

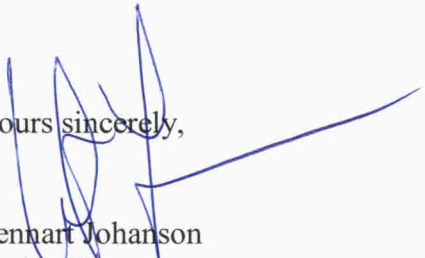
IV. Final remarks

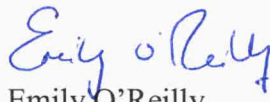
Pursuant to Article 7(5) of the Framework Directive, the PTA shall take the utmost account of comments of other regulatory authorities and the Authority. It may adopt the resulting draft measure and, when it does so, shall communicate it to the Authority.

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,²² 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 days²³ 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,


Lennart Johanson
Acting Director
Internal Market Affairs Directorate


Emily O'Reilly
Deputy Director for Competition
Competition and State Aid Directorate

²² 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").

²³ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.