



## PÓST- OG FJARSKIPTASTOFNUN

### **Decision no. xx/2017** **Míla Reference Offer for wholesale leased lines**

#### **I**

##### *Introduction*

This case concerns the new Míla ehf. (Míla) Reference Offer for leased lines, which replaces the old Míla Reference Offer on the same matter which is mainly from the year 2011, as amended by the PTA Decision no. 3/2011 from 16 February 2011. The current Míla Reference Offer is dated 1 March 2011. With the Post and Telecom Administration (PTA) Decision nos. 8/2014 (Market 6/2008), 21/2015 (Market 14/2004) and 33/2015 (Ethernet service on Market 14/2004), the obligation was imposed on Míla to practise transparency in the selling of leased lines in wholesale and to publish a reference offer for such wholesale access, which fulfilled conditions set by the PTA.

On 31 May 2016 the PTA received the first draft of the new Míla Reference Offer. The PTA opened national consultation on the Reference Offer last 16 August which ended last 15 September. No comments were received from parties to the market or from other stakeholders. Last 21 October the PTA sent for comment to Míla a draft of four changes to the Reference Offer that the Administration intended to propose. The idea was to bring these items into line with the Míla Reference Offer for local loops which the PTA had endorsed with its Decision no. 9/2016. A reply was received from Míla last 4 November where Míla objected to one of these four items. On 23 November the PTA opened national consultation on the draft Decision here under discussion which ended last 7 December. No comments were received.

In this case the conditions of the Reference Offer, other than tariff, are under discussion, but the PTA is processing two cases, in parallel to this case, which relates to the Míla tariff for various services on the relevant market. One case relates to prices on the leased line termination market (M6/2008) and the other relates to prices for trunk line segments of leased lines (M14/2004).

#### **II**

##### *Facts of the case*

With the PTA Decision no. 20/2007 Míla was designated as an undertaking with significant market power on the wholesale markets for termination and trunk line segments of leased lines and the appropriate obligations were imposed on the company in an effort to resolve

the competition problems that the PTA had identified on the markets in question. Among other things, Míla was to make and publish a reference offer for the service in question. The PTA received this Reference Offer in 2009. With its Decision no. 3/2011 dated 16 February 2011, the PTA made significant changes to the Reference Offer. The Míla Reference Offer currently in force for leased lines is mainly from the year 2009, but is dated 1 March 2011.

With its Decision no. 8/2014 (Market 6/2008), dated 6 May 2014, the PTA designated Míla as still having significant market power on the wholesale market for terminating segments of leased lines. The obligation to publish a reference offer was maintained on Míla. It was stated that the company should update the Reference Offer in force as necessary, for example because of changed needs of parties to the market or because of changed technology, and all changes to the Reference Offer should be submitted to the PTA for endorsement with adequate notice and these changes would not come into force without endorsement by the PTA.

With its Decision no. 21/2015 (Market 14/2004), dated 12 August 2015, the PTA designated Míla as still having significant market power on the wholesale market for trunk segments of leased lines. The obligation to publish a reference offer was maintained on Míla. It was stated that the company should submit a draft of a revised reference offer to the PTA within 6 months from the publishing of the Decision and no later than by 12 February 2016.

The PTA Decision no. 33/2015 dated 22 December 2015, dealt with the Míla Reference Offer for Ethernet service on the wholesale market for trunk segments of leased lines (Market 14/2004). More specifically, it dealt with the conditions of the Reference Offer in question with the exception of tariff.<sup>1</sup> The Reference Offer in question was endorsed for the time being and, no later than 12 February 2016, Míla was to submit a revised and comprehensive Reference Offer for leased line services, including Ethernet service. It was stated that the PTA would then review the updated Reference Offer and propose necessary changes as appropriate, before a final Decision would be made, subsequent to national consultation and to consultation with the EFTA Surveillance Authority (ESA) and with other regulatory bodies in the EEA.

In an Opinion of the EFTA Surveillance Authority (ESA) dated 21 December 2015, in connection with the above specified PTA Decision no. 33/2015, the ESA stated that according to a draft to this Decision, Míla should submit a revised draft to the PTA of the Reference Offer for leased lines no later than 12 February 2016 and that the PTA would open national consultation and consultation with ESA before a final Decision would be

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<sup>1</sup> Tariff for the Ethernet service in question had been endorsed with PTA Decision no. 23/2015 from 12 August 2015. The PTA made more Decisions concerning Míla tariff on the trunk line market for leased lines in 2015. These were PTA Decision no. 22/2015 on review of the Míla wholesale tariff for trunk line segments of leased lines dated 12 August 2015; PTA Decision no. 25/2015 on tariff for short-term connections dated 12 August 2015; PTA Decision no. 20/2015 on review of Míla wholesale tariff for MDH connections dated 12 August 2015 and PTA Decision no. 31/2015 on review of the above specified PTA Decision no. 24/2015 on review of Míla wholesale tariff for MDH connections, dated 22 December 2015.

made on the final material content of the Reference Offer. The ESA urged the PTA to conclude this matter at the earliest opportunity.

As stated here above, Míla was required to submit a draft to the Administration of a new comprehensive Reference Offer for leased lines no later than 12 February 2016. The Míla Draft Reference Offer was not however received by the PTA until last 31 May. Despite the fact that Míla had exceeded the above specified time limit from and including last 13 February, the PTA first and foremost emphasised that Míla should deliver the Reference Offer for bitstream access as soon as possible as it was more than a year since Míla's notice to deliver the draft of that Reference Offer had expired. The Reference Offer for bitstream was subsequently received by the PTA last 26 May and the Reference Offer here under discussion was received by the PTA last 31 May as previously stated. The PTA opened consultation on the Reference Offer here under discussion last 16 August, which ended last 15 September. No comments were received from parties to the market or from other stakeholders. On 23 November the PTA opened national consultation on the draft Decision here under discussion which ended last 7 December. No comments were received<sup>2</sup>.

The Míla draft of the Reference Offer for leased lines contains the following documents:

1. Main text of the Reference Offer
2. Appendix 1 - Product description and basic service of leased lines
3. Appendix 2a - Tariff for trunk segments of leased lines
4. Appendix 2b - Tariff for terminating segments of leased lines
5. Appendix 3 - Technical characteristics and terms and conditions for connection for leased lines
6. Appendix 4 - Service Level Agreements (SLA) and Service Level Guarantee (SLG)
7. Appendix 5 - Definitions

As stated here above, the PTA will in the case here under discussion, deal with all aspects of the Míla Reference Offer for leased lines with the exception of tariffs (Appendices 2a and 2b). They will, as stated above, be discussed in separate cases which are being processed by the PTA in parallel to this case.

A separate amendment report accompanied the revised Reference Offer from Míla. With respect to the aspects of the Reference Offer being dealt with in this case, the main changes were as follows according to Míla:

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<sup>2</sup> In this context, it can be mentioned that the PTA is processing Míla's cost analysis for wholesale leased line services. It is foreseen that the consultation process with the EFTA Surveillance Authority for the draft Decision on market 6/2008 (termination segment of leased lines) will take place in January 2017. However, the consultation process with the Authority for the draft Decision on market 14/2004 (trunk segment of leased lines) will not take place until September 2017. In the latter case, Míla has deadline until April 2017 to deliver its cost analysis to the PTA, based on operation date of the company for the year 2016. It can be mentioned as well that the aim of the PTA is to open formal consultation process with the Authority on Míla's tariffs on markets 4 and 5/2008 (local loops and bitstream) in January 2017.

### **Main text of the Reference Offer:**

The Reference Offer is based on the same grounds as the Reference Offer for leased lines currently in force and in addition to this the offer is harmonised with the Míla Reference Offer for local loops and bitstream. There are no material changes.

### **Appendix 1 - Product description and basic service of leased line**

Based on Appendix 1 “Basic service of leased lines” in the Reference Offer for leased lines currently in force and in addition to this the Section has been harmonised with the Míla Reference Offer for local loops and bitstream. The changes are:

- Product description and description of service related to leased lines are updated.
- The service level of leased lines is moved and presented in a separate Appendix on SLA and SLG.
- Price terms are included and updated. Were previously in Appendix 2a and 2b.
- Provisions on processing of applications and on terms for access are included and updated. Was previously in Appendix 5.
- Sections added on notifications of faults and disconnections.

### **Appendix 3 - Technical characteristics and technical terms and conditions for leased lines**

Based on Appendix 3 “Technical terms and conditions for leased lines” in the Reference Offer for leased lines currently in force. The changes are:

- Technical characteristics of leased lines updated.
- Technical characteristics of Ethernet service (MPLS-TP) added.

### **Appendix 4 - Service Level Agreements (SLA) and Service Level Guarantee (SLG)**

Based on Appendix 5 “Service level of leased lines” in the Reference Offer currently in force for leased lines. Harmonised with section on the same issues in the Reference Offer for local loops and bitstream. The changes are:

- Service level of leased lines updated.
- Service level guarantee with possibility for compensation added.

### **Appendix 5 - Definitions**

New Appendix. Was previously a separate section in the base agreement and in all appendices.

As stated here above, no comments were received from parties to the market on the Míla Reference Offer for leased lines or on the PTA draft Decision. On the other hand, the PTA considered it normal to harmonise four issues in the Reference Offer with the Míla Reference Offer for local loops which the Administration had endorsed with its Decision no. 9/2016. With respect to supporting arguments for these changes, the PTA refers to the above specified Decision. The proposals for changes were as follows:

**1. Section 9 in the main text of the Reference Offer shall be worded as follows:**

*“Mila is responsible for damage which can be attributed to disconnection, interruption of electronic communications or other interference in the operations of the electronic communications network, whether this may be attributed to failures in lines, failures in exchanges or to other reasons if the disconnection, interruption of electronic communications or other interference in question could be attributed to intent or extreme negligence on the part of Mila.”*

**2. Section 13 in the main text of the Reference Offer shall be worded as follows:**

*“Mila is authorised to request a guarantee from a service purchaser that the conditions of the agreement and of its appendices will be honoured. Should a guarantee be requested then it shall be in accordance with the expected scope of business but no higher than the amount of estimated monthly charges for access to leased lines for the next three months. Mila is also authorised to demand adequate guarantees for investments that need to be made to meet the special requests of service purchasers for access to leased lines. This last clause only applies in exceptional instances and then only for investments that do not form the basis for monthly charges and set-up charges for access to leased lines.”*

**3. Section 14 in the main text of the Reference Offer shall be worded as follows:**

*“Rights and obligations pursuant to this agreement shall not be transferred or given to another party without written permission of the counterparty.*

*Parties are however authorised to transfer rights and obligations pursuant to the agreement to other companies in a company group which it owns entirely on condition that the licence in question is transferred to the receiving company which declares in writing to Mila that it takes over all obligations of the transferor pursuant to the agreement.”*

**4. Item 13 in Section 8 in Appendix 1 shall be as follows:**

*“Should it be necessary for reasons for which the service purchaser is responsible, to vacate or alter premises for which Mila is responsible, which contain cables from electronic communications companies, the owners of such cables bear each individually the costs resulting from such changes. Should agreement not be reached between parties, the PTA can decide a division of costs.”*

The Míla opinion on the above specified PTA proposal for amendments was received by email dated last 4 February. There it was stated that Míla raised no objections to the first three changes. With respect to the last change, Míla referred to its prior comments and objections to the changes in wording of the item in question and reserved all rights to refer the decision on this item to the Appellate Committee or as appropriate to the courts when the final PTA Decision was made. Míla considered that this amendment to the conditions was in breach of the principle of legality. The fact that Míla had not appealed the decision on this item in the PTA Decision no. 9/2016 to the Appellate Committee or to the courts could not lead to a decision by the authorities becoming legal which had no grounds in law.

**III.**

*The conclusion of the Post and Telecom Administration*

In the light of the fact that the Míla Reference Offer currently in force for leased lines was significantly amended by the PTA in 2011 and because there are now no major changes

from the Reference Offer currently in force and because of the fact that no comments were received from parties to the market in the national consultations, the PTA intends to endorse the draft of the new Reference Offer received by Míla on last 31 May with specific changes. A new Reference Offer for leased lines shall come into force from and including 1 March 2017.

The PTA does not plan to make other changes to the Míla Reference Offer for leased lines other than those relating to harmonisation with the PTA Decision no. 9/2016, dated last 9 August, which dealt with the Míla Reference Offer for wholesale access to local loops. The PTA then proposes to make the same harmonisation with the Míla Reference Offer for bitstream access and that case is being processed by the PTA in parallel with this one. In an Appendix to the Decision one can see the amendments that the PTA plans to make on the Míla Reference Offer for leased lines. With respect to further reasoning, reference is made to the above specified PTA Decision no. 9/2016.

The item to which Míla has raised objections relates to the division of costs incurred with alterations to buildings controlled by Míla. The objections made at this point in time by Míla on the item in question add nothing materially to the Míla objections that were voiced with respect to an analogous item in the above-mentioned PTA Decision no. 9/2016. For this reason, the PTA intends to abide by its prior position, and refers to discussion on the above-mentioned item in that Decision in support of its case, see the following text from that Decision:

In the Míla draft to Item 11 of Section 3 of Appendix 1a to the Draft Reference Offer, the following conditions can be found:

*“Should it be necessary to vacate or alter premises for which Míla is responsible, which contain cables from electronic communications companies, the owners of such cables bear each individually the costs resulting from such changes. Should agreement not be reached between parties the PTA can decide a division of costs.”*

In the above mentioned PTA consultation document it was stated that Míla had deleted the words *“for reasons for which the service purchaser is responsible”* when compared with the wording of the Reference Offer in question. The PTA furthermore did not consider there to be reason to accept this amendment and the Administration proposed that the provision be unchanged and that it be worded as follows:

*“Should it be necessary for reasons for which the service purchaser is responsible, to vacate or alter premises for which Míla is responsible, which contain cables from electronic communications companies, the owners of such cables bear each individually the costs resulting from such changes. Should agreement not be reached between parties, the PTA can decide a division of costs.”*

### **3.6.2 Opinions of parties to the market**

In the Vodafone comments it was stated that Míla had made a proposal in its conditions with respect to the vacating premises that the words *“for reasons for which the service purchaser is responsible”* be deleted. The PTA had not accepted the Míla proposal and had proposed that the provision remain unchanged. It was Vodafone’s opinion that in instances like this, Míla should bear the cost of changes that were made. Míla sold access to its building for

which it charged a fee. The costs incurred with alterations should thus totally be borne by Míla. Míla was the company which profited from selling hosting to new parties, which meant that Míla should meet costs incurred in enabling entry of new parties. Other electronic communications companies that were already in situ should not participate in Míla costs related to cables that Míla employees laid themselves. The Vodafone views harmonised with the principles of non-discrimination and proportionality in administrative law.

### **3.6.3 Míla's opinion**

With respect to Item 11 of Section 3 in Appendix 1a to the Draft Reference Offer, Míla objected to the change that the PTA planned to make. Míla objected to the fact that the conditions should only apply to payment of costs if premises controlled by Míla needed to be vacated *“for reasons that the service purchaser was responsible”*.

In the first case, Míla did not own all of the hosting space which meant that in many instances Míla was dependent on decisions by the renter for changes to or termination of the lease agreement. In the second case, external circumstances such as instructions from official parties as a result of organisational changes could lead to a need to vacate or to change the location of the hosting. It was extremely unfair that such changes and adaptations should be entirely at Míla's cost. It was appropriate to point out that the practice with Míla for many years had been that each and every one paid his costs for moving his own cables when it was unavoidable to take such action. This had been done in good cooperation with parties to the market. Míla considered that such limitation of Míla's freedom to make agreements had no grounds in PTA's authority. Míla therefore proposed that the provision be worded as follows:

*“Should it be unavoidable to vacate or alter premises for which Míla is responsible, which contain cables from electronic communications companies, the owners of such cables bear each individually, the costs resulting from such changes. Should agreement not be reached between parties, the PTA can decide a division of costs.”*

In the Míla comments on the above specified Vodafone opinion, it was stated that with the Item in question no. 11 in Section 3 of the Appendix, Míla had not intended that customers should bear costs for alterations to distribution frames that were made because of new customers. This provision was included in instances where Míla needed to move facilities to new premises or when the owner of a building, other than Míla, demanded alterations to Míla facilities. Míla considered that in such instances it was normal that each party bore his part of the cost of moving. In such instances it was necessary to reconstruct facilities at a new location which meant that it was normal to treat the changes as termination of use of premises with subsequent reconstruction of facilities at a new location. This provision was normal and fair as at many locations the Míla technical space was located in premises owned by another party, which meant that Míla was therefore dependent on possible expiry of the lease agreement or that it might be terminated. In those instances, Míla would of course provide new premises into which it would be possible to move equipment and devices in order to minimise interference of service. Míla reiterated that this was a case of a business agreement governed by civil law which the PTA did not have authority to alter.

### **3.6.4 The position of the PTA**

Míla collects charges for hosting on the basis of the company's opex and capex in accordance with the obligation for price control, and Míla's costs for the premises it rents out at any given time are collected with these charges. For this reason, it is not possible to conclude that costs should accrue entirely to Míla for the changes in question, as asserted by the company.

As the PTA prescribes that the provision shall remain unchanged there is no change to the criteria on which Míla calculations are based when identifying costs for hosting.

With all of the above in mind, the PTA intends to adhere to the amendment in the above specified consultation document that it proposed with respect to Section 9. The provision shall be worded as follows:

*“Should it be necessary for reasons for which the service purchaser is responsible, to vacate or alter premises for which Míla is responsible, which contain cables from electronic communications companies, the owners of such cables bear each individually, the costs resulting from such changes. Should agreement not be reached between parties, the PTA can decide a division of costs.”*

The PTA furthermore reserves the right to review provisions in the Reference Offer at its own initiative or subsequent to complaints from parties to the market should there be reason to do so, after prior national consultation and consultation with the EFTA Surveillance Authority (ESA) and with other electronic communications regulatory authorities in the EEA

### *Decision*

**The Post and Telecom Administration agrees that the new Míla ehf. Reference Offer for leased lines comes into force from and including 1 March 2017 with those amendments prescribed in the Appendix to this Decision.**

**The PTA reserves the right to review provisions in the Reference Offer at its own initiative or subsequent to complaints from parties to the market should there be reason to do so, after prior national consultation and consultation with the EFTA Surveillance Authority (ESA) and with other electronic communications regulatory authorities in the EEA.**

**This Decision can be appealed to the Appellate Committee for Electronic Communications and Postal Affairs, see Article 13 of Act no. 69/2003 on the Post and Telecom Administration. The appeal shall have reached the Appellate Committee four weeks from the time that the party in question became aware of the Decision of the Post and Telecom Administration. Costs for an appeal are according to Paragraph 5 of Article 13 of the same Act, and in addition to this there is a special appeal charge to the amount of ISK 150,000 pursuant to Article 6 of Regulation no. 39/2009 on the Appellate Committee for Electronic Communications and Postal Affairs.**

*Reykjavik, XX February 2017*

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Hrafnkell V. Gíslason

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Óskar H. Ragnarsson

Accompanying documents:

1. Appendix on changes to the provisions of Míla Reference Offer