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Case No: 77596
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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: Wholesale market for trunk segments of leased lines in Iceland
Comments pursuant to Article 7(3) of Directive 2002/21/EC (Framework Directive)¹

I. PROCEDURE

On 1 July 2015, 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 trunk segments of leased lines.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 December 2014 to 24 February 2015.

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 expired on 3 August 2015.

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.

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 14 of the EFTA Surveillance Authority Recommendation (No/194/04COL) of 14 July 2004 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, as incorporated into the Agreement on the European Economic Area (the “2004 Recommendation”).

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The PTA's first review of the wholesale market for trunk segments of leased lines in Iceland was notified to the Authority on 23 February 2007 and assessed under Case No 59834.³ As regards the relevant product market, the PTA defined this market in line with the 2004 Recommendation which was in force at the time and considered it to cover data transfer capacity – i.e. digital lines with all possible technologies and data transfer media – sold to electronic communications undertakings for the purpose of interconnection of their networks and distribution locations. The PTA considered switching of lines, i.e. services which allow the user to decide varying destinations for the transmission of signals in each instance they are sent, to fall outside the definition of leased lines.

As to the relevant geographic market for wholesale trunk segments of leased lines, the PTA defined two markets, i.e. the Reykjavik area on the one hand, and the rest of the country on the other.⁴ In Decision no. 20/2007, the PTA designated the operators Mila ehf (“Mila”) and Síminn hf (“Siminn”) as having significant market power (“SMP”) on both geographic markets.

In its decision the PTA imposed obligations on Mila and Siminn regarding access to leased lines on normal and reasonable requests, price control and cost accounting, non-discrimination, transparency (publication of reference offer) and accounting separation. In particular, the PTA required Mila and Siminn to prepare a cost model for the calculation of the wholesale prices for trunk segments of leased lines based on historical costs.

The PTA approved the most recent cost analysis and tariffs for former market 14 in its Decision no 14/2011. On 1 July 2015, the PTA also notified to the Authority draft measures concerning cost analyses and tariffs for Mila as regards the market for trunk segments of leased lines (registered under Case 77597).

II.2. Market definition

The PTA indicates that since the previous analysis⁵ some technological changes have taken place on the market. According to the PTA, permanent connections between two or more connection points at fixed locations where all connection points are defined prior to the setup of lines, which are for the sole use of the party leasing the lines and which provide symmetric transmission capacity, should be considered substitutes for each of the other communication protocols used on the condition that they provide similar transmission capacity. Thus, the PTA considers that there exists a chain of substitution so that newer communications protocols and transmission media are in the same market as older ones.

The PTA concludes that the previously established product market definition of trunk segments for leased lines should be continued and that the following communications protocols and transmission media belong to the relevant market:

³ See the Authority's comments letter dated 26 March 2007 (Document No 414592).

⁴ This definition of two geographic markets was criticised by the Authority which in its comments letter of 26 March 2007 observed that the geographic segmentation was not supported by market data.

⁵ See section II.1. Background above.

Protocols:

- Asynchronous transfer mode (ATM)
- Pre-specified quality transmission with Internet protocol (for example IP-MPLS⁶)
- Multiprotocol Label Switching - Transport Profile (MPLS-TP)
- Ethernet and Ethernet VLAN⁷
- Synchronous Digital Hierarchy / Plesiochronous Digital Hierarchy (SDH/PDH)
- Wavelength division multiplexing (WDM, CWDM and DWDM)

Transmission media:

- Dark fibre (without endpoint devices)
- Copper (or other metal threads)
- Wireless connection.

As regards the relevant geographic market, the PTA submits that the nature of demand does not vary from one region to another, or at least not to a significant degree. Furthermore, the PTA considers that the competitive conditions are not sufficiently heterogeneous between different regions to allow for the definition of several geographic markets. Consequently, the PTA defines one relevant geographic market as no clear and stable boundaries as to varying competitive conditions in different regions can be established. On this basis, the PTA considers the Icelandic territory to constitute the relevant geographic market.

II.3. The three criteria test

Due to the fact that the wholesale market for trunk segments of leased lines is no longer recommended by the Authority for *ex ante* regulation⁸, the PTA has to conduct the so-called “three criteria test”⁹ in order to assess whether the market is still susceptible for *ex ante* regulation.

Due to the high level of sunk costs necessary to compete in the market for trunk segments of leased lines and the fact that alternative operators do not enjoy the same economies of scale and scope as Mila, the PTA considers that the market for trunk segments of leased lines is still characterised by high and non-transitory barriers to entry.

Furthermore, the PTA considers that there is no tendency toward effective competition in the market for trunk segments of leased lines. In this regard, the PTA observes that Mila’s current market share of 75-80%¹⁰ continues to be well above reference levels for SMP, although it has dropped by []% over the past 9 years. However, the decrease has been gradual and relatively minor, and the PTA does not foresee that this will change as there are limits to the increase in competition that could come from the alternative operators on the market, because their networks are much smaller than Mila’s. In addition, the PTA

⁶ Internet Protocol – Multiprotocol Label Switching.

⁷ Virtual Local Area Networks.

⁸ See the 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.

⁹ This involves assessing if, for the wholesale market for trunk segments of leased lines, (i) there are still high and non-transitory barriers to entry, (ii) there is no tendency towards effective competition and (iii) the application of *ex post* competition law alone does not suffice to address the competitive concerns identified in the market.

¹⁰ Market share assessed on the basis of revenue.

does not foresee that any new companies will enter the market in the coming years, at least not any with a substantial network.

Lastly, the PTA considers that the application of *ex post* competition law does not suffice on its own to address the identified market failures as the market requires substantial and frequent intervention by the authorities which can only be assured through *ex ante* regulation.

II.4. Finding of significant market power

Since the previous analysis, Siminn has transferred its operation of leased lines to Mila and, therefore, Siminn no longer operates on the market for trunk segments of leased lines.

Consequently, the PTA intends to withdraw the designation of Siminn as a SMP operator and to designate only Mila as a SMP operator. For this purpose the PTA has analysed the market share, overall company size, control of infrastructure that is difficult to duplicate, sunk costs, economies of scale and scope, access to capital, access to distribution and service systems, barriers to growth, product diversification / bundling, vertical integration, customer countervailing buyer power and pressure from substitute products.

II.5. Regulatory remedies

The PTA indicates that the actual and/or potential competition concerns which were identified in the previous market analysis persist. Hence, the PTA finds the following actual and/or potential competition concerns to exist in the market for trunk segments of leased lines: excessive pricing, cross-subsidisation, margin squeeze, denial of access, discrimination and lack of transparency regarding prices and product information.

Consequently, the PTA finds it necessary and appropriate to maintain as regards Mila the obligations which were imposed in the PTA's Decision no. 20/2007. However, the PTA intends to make adjustments to these obligations in order to take account of technological developments in the market as well as the PTA's experiences drawn from the implementation of the obligations.

The PTA proposes to maintain the following obligations on Mila:

- (i.) Access;
- (ii.) Non-discrimination;
- (iii.) Transparency;
- (iv.) Accounting separation;
- (v.) Price control; and
- (vi.) Cost accounting for those parts of the electronic communications operations necessary for giving access to trunk segments of leased lines.

Mila is required to accommodate normal and fair requests for access to trunk segments of leased lines and related services at wholesale level. The PTA considers that Mila should provide all types of wholesale access to trunk segments of leased lines that it provides to its own units or to other parties within the Siminn Group, (to which Mila belongs), to other electronic communication companies. Furthermore, all forms of wholesale access that are fair and normal to provide and can strengthen competition on the market for trunk segments of leased lines are covered by the access obligation.

The access obligation imposed includes an obligation to comply with appropriate and reasonable requests for joint utilisation or co-location, resale access, open access to technical interfaces, protocols and other technologies, as well as interconnection. Access shall be granted without unnecessary delays.¹¹

As regards the non-discrimination obligation, it is proposed *inter alia* that unrelated parties should be informed about construction and other developments of Mila's leased lines services with the same notice as parties related to Mila and that this notice should not be shorter than 6 months. It is further proposed that Mila should give related and unrelated parties the opportunity to influence development of new construction and planned interfaces.¹² The PTA also plans to require Mila to make service level agreements ("SLAs") and to provide service level guarantees ("SLGs") and to further collect and publish key performance indicators ("KPIs") within 6 months from publication of the final decision on this analysis.

In relation to the proposed transparency obligation, the PTA notes that an updated reference offer should be submitted to it no later than 6 months after the publication of the final decision.

The PTA requires Mila to implement a cost-oriented wholesale tariff for trunk segments of the company's leased lines. The cost analysis methodology to be used is based on historical cost accounting ("HCA") allocated to the relevant service on a fully-allocated cost ("FAC") basis. Furthermore, the PTA notes that if Mila's cost analysis returns a conclusion that the PTA considers unacceptable when considering the development on comparable markets then the PTA may request a review of that conclusion.

In parallel to the present notification, the PTA has notified cost analyses and resulting wholesale tariffs for trunk segments of leased lines (see Case 77597) which will come into force at the same time as the publication of the decision based on the present market analysis. Mila is further required to review these tariffs no later than by the end of 2016 and then on an annual basis.¹³ However, new wholesale tariffs will be subject to the PTA's authorisation subsequent to national consultation and consultation with the Authority.

Finally, the PTA indicates that as Mila is a legal entity within the Siminn Group, any transfer of the leased lines operations from Mila to another entity within the Siminn Group will entail a similar transfer of the obligations imposed.

¹¹ It is further proposed that Mila should announce all technical migration with a specific period of notice. More specifically, Mila should publish a list of planned excavation and duct activities (civil works) with six months' notice and Mila should further notify parties in the market about all changes to system design that are likely to alter competitiveness (such as decommissioning of systems or services) with at least 5 years' notice. In addition, if a service is to be discontinued then the planned changes should be notified to the electronic communications companies involved as soon as possible and no later than 6 months prior to the planned changes.

¹² The PTA notes that, in order to ensure fulfilment of the obligation in question, it can perform a technical and/or economic investigation as to whether unrelated parties can replicate the product offers of related parties.

¹³ The PTA also proposes that Mila shall submit a description of its cost accounting to the PTA no later than 6 months after the publication of its final decision.

III. COMMENTS

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

Market review timing and timely enforcement and effectiveness of remedies

The Authority notes that the PTA's first-round review of former market 14 dates back to 2007. Consequently, eight years have passed since the PTA last conducted a full review of the market in question. Furthermore, the Authority observes the late implementation of the price control remedy since the completion of the first-round market review. In this regard, the wholesale tariff for trunk segments of leased lines based on the cost model specified in the PTA's Decision no. 20/2007 was only finalised in 2011, despite the price control remedy having been imposed by the PTA in 2007.

The Authority refers to its comment in Case 75750¹⁴ on market review timing and timely enforcement and effectiveness of remedies and reiterates that if an NRA does not analyse the relevant markets at regular intervals to ensure an up-to-date overview of the prevailing competitive situation, or considerably delays the enforcement of imposed remedies on the SMP operator, this may harm competition on those markets and reduce legal certainty for market participants.

In this context, the Authority urges 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. Further, while noting the draft measures on cost analyses and wholesale tariffs notified in parallel to the Authority (registered under Case 77597) which are due to enter into force at the same time as the publication of the decision on the present market analysis, the Authority urges the PTA to ensure a prompt and timely implementation of all of the obligations proposed in the presently notified measure.

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 NRAs 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 Recommendation¹⁵, the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the

¹⁴ See the Authority's comments letter of 11 August 2014.

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 5c1 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

information contained herein to be confidential. You are invited to inform the Authority within three working days¹⁶ 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,



Gabrielle Somers
Acting Director
Internal Market Affairs Directorate



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

Protocol 1 thereto, OJ C 302, 13.10.2011, p.12, and available on the Authority's website at <http://www.eflasurv.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.