Brussels, 6 May 2024
Case No: 91792
Document No: 1453097

Fjarskiptastofa
Suðurlandsbraut 4
108 Reykjavik
Iceland

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

Dear Mr. Gíslason,

Subject: Wholesale local access provided at a fixed location (market 3a/2016) and wholesale central access provided at a fixed location for mass-market products (market 3b/2016) in Iceland - Market analysis and remedies

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

I. PROCEDURE

On 5 April 2024, the EFTA Surveillance Authority ("**ESA**") 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, *Fjarskiptastofa* (the Electronic Communications Office of Iceland or "**ECOI**"). It concerns the market analysis and remedies for the market for wholesale local access provided at a fixed location (market 3a/2016) and the market for wholesale central access provided at a fixed location for mass-market products (market 3b/2016) in Iceland[2].

[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**"). On 24 September 2021, the EEA Joint Committee adopted Decision ("**JCD**") No 275/2021 incorporating Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), as corrected by OJ L 334, 27.12.2019, p. 164 and OJ L 419, 11.12.2020, p. 36 ("**the Code**"), into the EEA Agreement. The Code will repeal, *inter alia*, the Framework Directive. However, until JCD No 275/2021 enters into force, the Framework Directive remains applicable.
[2] Corresponding to markets 3a and 3b in the 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*); adopted by Decision No 093/16/COL, OJ L 84, 30.3.2017, p. 7 ("**the 2016 Recommendation**").

The notification became effective on the same day.

Three national consultations were carried out, pursuant to Article 6 of the Framework Directive, between: 15 September and 16 October 2023; 29 November 2023 and 3 January 2024; and 23 January 2024 and 6 February 2024.

ESA had regular prenotification exchanges with ECOI.

During the notification period, on 16 April 2024, ESA sent a request for information to ECOI (Doc No. 1446107), supplemented by further questions sent by email on 17 April 2024 (Doc. No. 1450932). A reply to all those questions was received on 19 April 2024 (Doc No. 1451382). ESA sent an additional request for information on 24 April 2024 (Doc. No. 1452053) and received a reply from ECOI on 29 April 2024 (Doc. No. 1453090). On that same day, ECOI also sent an email with additional information (Doc. No. 1453098).

The period for consultation with ESA and the national regulatory authorities in the EEA States ("**EEA NRAs**"), pursuant to Article 7 of the Framework Directive, expires on 6 May 2024.

Pursuant to Article 7(3) of the Framework Directive, ESA and the EEA NRAs may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Previous market reviews

ECOI notified market reviews for markets 3a and 3b in September 2021[3].

At that time, ECOI defined the retail market as comprising access to broadband services at a fixed location via copper connections with xDSL technology, fibre connections, and cable connections. ECOI found that mobile network connections, satellite connections, fixed wireless access, and high-quality connections for companies did not belong to the same retail market.

ECOI defined the wholesale local access market (3a) as comprising access networks (local loops, full and shared access) provided at a fixed location, both copper and fibre-optic and related facilities, along with virtual solutions ("**virtual local loop unbundling**" or "**VULA**"), which fulfil the same needs as leasing the local loop. Cable TV and Wi-Fi networks were not included in the relevant market, due *inter alia* to their small scale in Iceland.

As to the wholesale central access market (3b), ECOI defined it as comprising various virtual solutions offered in copper or fibre-optic networks, which provide connections between end users and central access points in an electronic communications network for mass-market internet access, along with related services, such as VoIP[4] and IPTV.[5] Cable TV and Wi-Fi networks were excluded from the relevant market.

---

[3] Notified to and assessed by ESA under Case No 87359.
[4] Voice over Internet Protocol ("**VoIP**") is a technology allowing voice communication over the internet.
[5] Internet Protocol television ("**IPTV**") is a technology allowing the transmission of television content over the internet.

For both markets 3a and 3b, ECOI found that the geographic market was national in scope and could not be segmented into sub-national markets, as competitive conditions were somewhat differing, yet not sufficiently heterogeneous across different municipalities, nor sufficiently stable.

However, in 17 out of a total 69 municipalities in Iceland[6], ECOI introduced geographic differentiation of the remedies imposed on Míla ehf. ("**Míla**"), designated as an operator with significant market power ("**SMP**") together with its owner at the time, Síminn hf. ("**Síminn**"), on both markets 3a and 3b. Those 17 municipalities represented the more competitive areas identified by ECOI based on two key indicators: (i) a fibre network competing with Míla, covering a minimum of 75% of households and companies; and (ii) Síminn holding a retail market share below 50%.

On both markets 3a and 3b, ECOI imposed the following obligations on Míla (and to some extent on Síminn as part of the same vertically integrated group):

(i) access;
(ii) non-discrimination;
(iii) transparency;
(iv) price control on copper and Economic Replicability Test on fibre; and
(v) cost accounting.

In the 17 municipalities making up the more competitive area, the following remedies did not apply on market 3a: (i) access to ducts and conduits, and (ii) the obligation to advertise civil works; and on both markets: (iii) the obligation to give notice, of 5 years on market 3a and of 2 years on market 3b, concerning migration of network systems.

ESA had the following comments on the notification:

i) <u>Need to clarify instability of local competitive developments in geographic market definition.</u>

ESA had, in particular, concerns regarding the extent to which ECOI's indicators provided a sufficiently comprehensive insight into whether or not Míla faced appreciably different conditions of competition in certain municipalities in Iceland, especially in the operating area of Gagnaveita Reykjavíkur ("**GR**"), now Ljósleiðarinn ehf. ("**Ljósleiðarinn**"). Further, ESA considered that ECOI's assessment should have examined more closely the distinct incentives that wholesale-only competitors (such as GR) have relative to vertically integrated incumbents when it comes to fostering retail competition.

ii) <u>Need to ensure that remedies are justified and proportionate in all areas.</u>

ESA urged ECOI to explain in its final decision how almost a full set of remedies in the 17 more competitive municipalities was justified and proportionate based on the nature of the competition problems identified.

iii) <u>Reassessment of geographical market analysis and notification to ESA.</u>

ESA underlined ECOI's commitment to revisit the geographic analysis by 2022 and urged ECOI to engage in an early dialogue with ESA.

iv) <u>Market review timing and timely enforcement and effectiveness of remedies.</u>

---

[6] Corresponding to around 70% of the total population.

ESA noted the significant delay in the review cycle for markets 3a and 3b, and thus strongly urged ECOI to undertake a timely analysis and notification of the next full reviews in line with ECOI's obligations under the EEA regulatory framework.

Further developments

Following ECOI's 2021 market analysis there have been a number of developments.

The private equity firm Ardian France SA completed the acquisition of Míla from Síminn. The Icelandic Competition Authority approved the merger with conditions on 15 September 2022 ("the Settlement"). Following the merger, Síminn remains active on the retail market, whereas Míla operates at wholesale level. The Settlement entailed in particular significant changes to the wholesale agreement between Míla and Síminn, as well as commitments from Míla to certain conditions for its operation, and a statement on the company's disintegrated operations and commercial independence[7].

Based on the information contained in the notification of 5 April 2024, on 29 December 2022 (Case No 3/2001), the Appellate Committee for Electronic Communications and Postal Affairs ("**the Committee**") of Iceland ruled on appeals brought by Míla and Síminn against ECOI's 2021 market analysis decision.

In essence, the Committee annulled the aspects of that market analysis that were based on the assumption that Míla and Síminn belonged to the same group. The Committee stated in its ruling that, despite the wholesale agreement that was part of Síminn's sale of Míla, it was not clear that milder measures could not be imposed to address the potentially harmful effects on competition in the relevant markets.

The Committee further ruled that until the new analysis was issued, obligations pursuant to the appealed decision should continue to be in force with specific amendments resulting from the sale of Míla, notably the withdrawal of SMP obligations on Síminn.

The Committee ruled that ECOI had to carry out a new market analysis by no later than 15 September 2023. However, as the new market analysis was not completed by then, on 15 September 2023, ECOI published a provisional measure maintaining the existing obligations on Míla until ECOI's final decision on the market analysis would come into force. On 29 February 2024, ECOI prolonged the validity of the initial provisional measure (due to expire on 1 March) until 1 June 2024 or until the entry into force of a final decision on the market analysis, whichever date is earlier. Both the initial provisional measure and the subsequent extension thereof were communicated to ESA, pursuant to Article 7(6) of the Framework Directive, and published by ESA on the eCom registry[8].

II.2. Market definition

Background

Market definition is the exercise of delineating the boundaries of where competition takes place in a meaningful way. Typically, this exercise refers to products (i.e. product market definition), defining the set of products that compete with each other, and geographies (i.e. geographic market definition), defining the areas or geography where the conditions of competition are sufficiently homogeneous.

The concept of substitutability is key for market definition. The extent by which two products or geographies can be substituted with each other is a meaningful proxy of the extent of competitive pressure that the two products or geographies exert on each other. One can

[7] See the press release of the Icelandic Competition Authority here.
[8] Under Case No 90932.

distinguish between demand-side substitutability, measuring to what extent customers or final consumers consider two products or geographies interchangeable, and supply-side substitutability, measuring to what extent firms can redirect their production to other products or geographies in a timely manner (thereby 'substituting' their production capabilities).

The framework or thought experiment generally followed for defining relevant markets is the Hypothetical Monopolist Test, also known as the **SSNIP** test (Small but Significant Non-transitory Increase in Prices). In essence, the test asks whether a hypothetical monopolist producing a given set of products or active in a certain area would find it profitable to permanently increase its prices by a small but sizeable amount (typically, 5-10%).

If the answer is yes, then that set of products or area is the relevant market. If the answer is no, then it must be that other products or areas outside of those considered are exerting a competitive pressure, such that the relevant market is wider. This means that either customers switch away from the hypothetical monopolist products (i.e. demand-side substitutability) or other companies in neighbouring markets observe profit opportunities and timely switch their production to compete more fiercely with the hypothetical monopolist (i.e. supply-side substitutability). Both cases would make the desired price increase by the hypothetical monopolist unprofitable.

Application to the present case

For defining the relevant product and geographic markets, ECOI takes the following steps.

First, ECOI examines the conditions of competition for the provision of broadband services at **retail level**. Although it is a preliminary step, as the regulated market is the wholesale market, competition at the retail level is ultimately what regulation wants to foster.

Moreover, features of the retail market are relevant for the definition of the upstream wholesale market. Generally, the relevant wholesale market includes services allowing the provision of broadband services to final customers at the retail level. Therefore, the assessment of the product market at retail level has important implications on the assessment of the product market at wholesale level.

Second, ECOI defines the relevant product market at **wholesale level** (i.e. the wholesale market). As a starting point, ECOI refers to ESA's 2016 Recommendation[9] that included two main wholesale markets for the provision of internet connections: **market 3a**, the market for wholesale local access provided at a fixed location, and **market 3b**, the market for wholesale central access provided at a fixed location for mass-market products. ECOI proceeds with assessing the relevant set of wholesale products belonging to markets 3a and 3b.

Third, ECOI assesses the relevant **geographic market** for each of markets 3a and 3b.

Retail market. At the retail level, ECOI finds that broadband services provided via copper connections with VDSL technology (but not ADSL), fibre connections, and cable network connections belong to the relevant retail market, as well as mobile broadband services accessed through mains-connected routers (using either 4G, 4.5G and 5G technologies).

The most notable development compared to the previous market analysis is ECOI's detailed assessment of the substitutability between fixed broadband services and broadband services provided through mobile networks. ECOI based its assessment on a number of elements, including: (i) end-customer survey data, (ii) usage and sales data from

[9] See fn. 2.

the mobile operators, and (iii) electronic communications operators' views. ECOI concludes that substitutability exists at the retail level with mobile broadband services accessed via mains-connected routers.

The relevant retail market does not include broadband services through fixed wireless access ("**FWA**") and satellite connections. The adoption of these forms of access has been limited in Iceland until now, and ECOI considers that its assessment and conclusions would not be affected by the inclusion of these services.

Market 3a (wholesale market for local access). ECOI concludes that physical access to copper (VDSL) and fibre networks, and the related local virtual access solutions (VULA), belong to market 3a.

ECOI considers that cable systems, satellite connections, FWA, and other mobile network access services, do not belong to this relevant market. Local access is currently technically unfeasible through the cable system, and there is no indication that access to satellite connections could be a viable option for wholesale customers. Wholesale access through FWA and other types of mobile networks is technically feasible, but ECOI notes that there has been very limited interest of wholesale customers towards the mobile technology, and it is unlikely that this will change significantly over the upcoming review period.

Market 3b (wholesale market for central access). ECOI concludes that virtual access solutions offered centrally on fibre networks, copper networks and mobile networks over mains-connected network routers at a fixed location, all belong to market 3b. This excludes cable systems, FWA, and satellite connections.

Unlike for market 3a, ECOI considers that access through mobile networks is part of the relevant market 3b. This is because (i) certain bitstream-like access services of market 3b through mobile networks are already provided to access seekers, and (ii) mobile network operators extensively self-supply similar services, to operate the network and provide mobile services to end-users.

Geographic market. The geographic assessments for markets 3a and 3b are similar, and the following summary refers only to the relevant differences between the two.

Compared to the previous market analysis, ECOI adopts a more granular approach to the definition of the geographic market. ECOI defines the municipality as the basic geographic unit to analyse the relevant geographic markets. In each municipality, ECOI assesses the following factors:

- parallel network deployments;
- access barriers;
- number of electronic communications operators and respective market shares, as well as market concentration;
- pricing; and
- other aspects.

ECOI then aggregates municipalities into three areas (Area A, B and C) based on a set of criteria which largely describe the level of competition within the municipality. Area A corresponds to municipalities which are likely competitive. Area B corresponds to municipalities where Míla has a high market share. Area C corresponds to municipalities where the company Tengir hf. ("**Tengir**") has a high market share (applicable only to market 3a). A sizeable number of municipalities, however, remain uncategorised, and ECOI conducts a more in-depth competitive assessment for each of them.

The cumulative criteria to define **Area A** (likely competitive areas) are the following:

(i) the percentage of parallel coverage of 2 fixed-line networks is above certain thresholds;
(ii) the highest market share in the wholesale market is below certain thresholds;
(iii) at least 4 electronic communications operators in the retail market; and
(iv) no operator in the retail market has more than 50% market share.

ECOI defines four scenarios by varying thresholds of criteria (i) and (ii). For example, for parallel coverage of 90% the wholesale market share threshold is 70%. For parallel coverage in the range 75%-90% the wholesale market share threshold is 65%, etc.

On market 3a, ECOI finds that 8 municipalities fulfil these criteria, corresponding to 67% of the population in Iceland.

On market 3b, ECOI finds that 10 municipalities fulfil these criteria, corresponding to 73% of the population in Iceland.

The cumulative criteria to define **Area B** (Míla has a high market share) are:

(i) the percentage of parallel coverage by fixed networks is below 40%;
(ii) Mila has a market share above 70%; and
(iii) there is one operator in the retail market with at least 50% market share.

On market 3a, ECOI finds that 15 municipalities fulfil these criteria, corresponding to 6% of the population in Iceland.

On market 3b, ECOI finds that 13 municipalities fulfil these criteria, corresponding to 5% of the population in Iceland.

The cumulative criteria to define **Area C** (Tengir has a high market share) are:

(i) Tengir has a market share above 70%; and
(ii) there is one operator in the retail market with at least 50% market share.

On market 3a, ECOI finds that 6 municipalities fulfil these criteria, corresponding to 1% of the population in Iceland.

On market 3b, ECOI does not define an Area C.

As mentioned above, a sizeable number of municipalities remain uncategorised, and ECOI assesses them individually, defining them as single markets.

On market 3a, ECOI finds that 35 municipalities do not fall into any of the categories mentioned above, corresponding to 26% of the population in Iceland. ECOI therefore concludes that there are 38 geographic markets in market 3a.

On market 3b, ECOI finds that 41 municipalities do not fall into any of the categories mentioned above, corresponding to 22% of the population in Iceland. ECOI therefore concludes that there are 43 relevant geographic markets in market 3b.

II.3. Finding of significant market power

For both markets 3a and 3b, ECOI uses the following main criteria to assess the existence of significant market power (SMP) in each relevant geographic market:

1. market shares on the relevant wholesale market and, as appropriate, on the retail market;
2. deployment of electronic communications networks, including the existence of parallel networks;
3. control of facilities that are difficult to duplicate;
4. total size and strength of electronic communications companies;
5. potential competition;
6. countervailing buying power;
7. vertical integration and comparable situations; and
8. long-term access agreement related to the relevant market.

Wholesale local access provided at a fixed location (market 3a)

Based on the criteria above, ECOI proposes the following SMP designations on market 3a.

ECOI envisages designating Míla as the operator with SMP in the following 26 municipalities, which includes the 15 municipalities in Area B (i.e. where Míla has a high market share) and 11 additional municipalities assessed by ECOI individually:

- Bláskógabyggð
- Dalabyggð
- Fjallabyggð
- Fjarðabyggð
- Grindarvíkurbær
- Grímsnes- og Grafningshreppur
- Grundafjarðarbær
- Húnabyggð
- Húnaþing vestra
- Kaldrananeshreppur
- Langanesbyggð
- Múlaþing
- Norðurþing
- Rangárþing eystra
- Skaftárhreppur
- Skagabyggð
- Skagafjörður
- Snæfellsbær
- Strandabyggð
- Suðurnesjabær
- Sveitarfélagið Hornafjörður
- Sveitarfélagið Skagaströnd
- Sveitarfélagið Stykkishólmur
- Sveitarfélagið Vogar
- Tálknafjarðarhreppur
- Vesturbyggð

In all other municipalities the remedies currently applicable to Míla will be withdrawn, including in particular but not limited to the 8 municipalities in Area A (already identified at the market definition stage as an area with likely competition).

However, in certain municipalities not included in Areas A or B, either Tengir or Ljósleiðarinn will be subject to *ex ante* regulation.

Tengir is to be designated as having SMP in the following 8 municipalities, including the 6 municipalities in Area C (where Tengir has a high market share) and 2 additional municipalities assessed by ECOI individually:

- Akureyrarbær
- Dalvíkurbyggð
- Eyjafjarðarsveit
- Grýtubakkahreppur
- Hörgársveit
- Svalbarðsstrandarhreppur
- Vopnafjarðarhreppur
- Þingeyjarsveit

ECOI intends to designate Ljósleiðarinn as the SMP operator in the following municipality, which ECOI assessed individually:

- Sveitarfélagið Ölfus

Wholesale central access provided at fixed location for mass-market products (market 3b)

Using the same criteria as for market 3a, ECOI proposes the following SMP designations on market 3b.

Míla is proposed to be designated as having SMP in the following 31 municipalities, including the 13 municipalities in Area B (high market share of Míla):

- Akureyrarbær
- Dalabyggð
- Dalvíkurbyggð
- Eyjafjarðarsveit
- Eyja- og Miklaholtshreppur
- Fjallabyggð
- Fjarðabyggð
- Grindavíkurbær
- Grundarfjarðarbær
- Húnabyggð
- Húnaþing vestra
- Kaldrananeshreppur
- Langanesbyggð
- Múlaþing
- Norðurþing
- Reykhólahreppur
- Skaftárhreppur
- Skagabyggð
- Skagafjörður
- Snæfellsbær
- Strandabyggð
- Suðurnesjabær
- Sveitarfélagið Hornafjörður
- Sveitarfélagið Skagaströnd
- Sveitarfélagið Stykkishólmur
- Sveitarfélagið Vogar
- Tálknafjarðarhreppur
- Vestmannaeyjabær

- Vesturbyggð
- Vopnafjarðarhreppur
- Þingeyjarsveit

Míla's current regulatory obligations will be lifted in all other municipalities, including but not limited to the 10 municipalities in Area A (already identified at the market definition stage as an area with likely competition).

That said, in two of the municipalities not belonging to Areas A or B either Ljósleiðarinn or Austurljós ehf. ("**Austurljós**") will be designated as having SMP based on an individual assessment of competitive conditions in those municipalities.

Ljósleiðarinn is to be designated as the SMP operator in the same municipality as in market 3b, i.e.:

- Sveitarfélagið Ölfus

Austurljós is to be designated as the SMP operator in:

- Fljótsdalshreppur

II.4. Regulatory remedies

Introductory remarks on the wholesale-only status assessment by ECOI

At the outset, it should be mentioned that ECOI has examined for each of the four SMP operators whether they meet the definition of *wholesale-only* undertaking in Article 59 of the Icelandic Electronic Communications Act no. 70/2022, which made Article 80 of the Code[10] part of the Icelandic legal order.

ECOI's conclusion is negative for all companies. Therefore, ECOI finds that the lighter regulatory regime prescribed for SMP operators formally designated as wholesale-only undertakings[11] is not applicable as such to any of the four SMP operators in question. That said, when considering the proportionality and appropriateness of the remedies, ECOI has considered for each of the SMP operators whether and to what extent they display elements of vertical integration beyond the formal definition in Article 59 of the Electronic Communications Act no. 70/2022.

As indicated in footnote 1, pending the entering into force of JCD No 275/2021, the Framework Directive remains applicable. Therefore, while ESA takes into account the information above as relevant background for the assessment of the proportionality and the appropriateness of the remedies, compliance with the conditions in Article 80 of the Code for designating wholesale-only undertakings does not form part of ESA's assessment in the present case.

Against this background, ESA recalls that its assessment of the remedies is based on the currently applicable regulatory framework, and in particular on Article 8(4) of the Access Directive[12]. Pursuant to that provision, regulatory obligations shall be based on the nature

[10] See reference in footnote 1.
[11] In essence limiting, as a general rule, the possible SMP remedies to access, non-discrimination, and fair and reasonable pricing.
[12] Directive 2002/19/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 referred to at point 5 cj of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 ("**the Access Directive**").

of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

Wholesale local access provided at a fixed location (Market 3a)

Obligations on Míla

In market 3a, in the 26 municipalities where Míla is to be designated as the SMP operator, ECOI intends to impose on Míla the following set of remedies:

(i) access;
(ii) non-discrimination; and
(iii) fair and reasonable prices (or in specified cases cost-oriented prices).

i. Access

The access obligation implies, for both copper and fibre, that Míla shall meet reasonable requests to provide either physical unbundling (including dark fibre) or VULA. In cases where such type of access is impossible or the access request is unreasonable, Míla will still be bound to meet reasonable requests for VULA access or bitstream in the form of Access Option 1. According to ECOI, it is very unlikely that physical unbundling would be deemed impossible in case of P2P (point-to-point) State-aided networks[13], whereas that is typically the case for access to Míla's PON (Passive Optical Network) infrastructure.

In addition, Míla will be required to grant access to civil engineering assets such as ducts and conduits, as well as to grant shared access to facilities.

ii. Non-discrimination

Míla will be required to ensure Equivalence of Input ("**EoI**"), i.e. offer the same terms and conditions (such as prices, time scales, systems and processes used) and provide the same information to all access seekers.

Míla will further be required to conclude service level agreements ("**SLAs**") with all access buyers, to issue service level guarantees ("**SLGs**") including fines on Míla for non-compliance, and to publish key performance indicators ("**KPIs**").

iii. Price control

As a general rule, Míla will be required to set fair and reasonable prices for products falling within market 3a (on both copper and fibre).

ECOI will monitor and act, either upon a complaint or on its own initiative, to ensure that the obligation will be complied with. ECOI will take into account, in particular, the following criteria when called upon to decide whether prices are fair and reasonable[14]:

(a) whether prices have changed abnormally in relation to general price developments and whether non-discrimination has been ensured;
(b) benchmarking against prices in comparable areas in Iceland where greater competitive pressure is in place (e.g. average monthly prices for local loop access and start-up charges); and

---

[13] Therefore, for State-aided infrastructure, Míla cannot provide VULA or bitstream instead of physical access to accommodate access requests in market 3a.
[14] The list is not exhaustive. Moreover, ECOI specifies that it will first examine criteria (a) and (b) before deciding whether to use criteria (c), which requires a more complex assessment.

(c) whether prices reflect the cost of efficiently providing the service on the relevant geographic market, including reasonable profit.

Regarding access to ducts and conduits as well as shared access to facilities, Míla will be required to set cost-oriented prices, which ECOI will notify to ESA separately. However, in 3 municipalities (Fjallabyggð, Norðurþing and Rangárþing eystra), Míla will only be subject to the obligation to set fair and reasonable prices for access to ducts and conduits. The main reason for this exception is that parallel coverage of fixed networks in those 3 municipalities is between 40 and 60%, which is a significantly higher level than in the other 23 municipalities where Míla is the SMP operator.

In the areas where Míla is no longer designated as SMP operator (which account for about 80% of Iceland's population), all obligations currently imposed on Míla will be withdrawn. In the areas where Míla is still deemed to have SMP, all obligations other than those described above – such as transparency, accounting separation, and to a large extent price control and cost accounting – will be lifted.

Obligations on Tengir

In the 8 municipalities where Tengir is to be designated as having SMP, ECOI intends to impose the following obligations on Tengir:

(i) access;
(ii) non-discrimination; and
(iii) fair and reasonable prices.

When defining the scope of obligations on Tengir, ECOI takes into account, among other things, the size, financial strength and access to capital conditions, and economies of scale and scope of the company, in particular compared to Míla. ECOI also notes that competitive conditions are in general much worse in those areas where Mila has SMP, among other things with respect to limited parallel coverage of fixed lines. Further, Mila has significant buyer power vis-à-vis Tengir and superior technical abilities.

The access obligation notably covers access to Tengir's fibre network (dark fibre), access to ducts and conduits as well as shared access to facilities. Tengir's fibre network has a P2P architecture, so that physical access is in principle always possible and Tengir will not be required to provide VULA.

The non-discrimination obligation takes the form of EoI (as for Míla). It does not include requirements concerning SLAs, SLGs and KPIs. The main reason for a less strict treatment compared to Míla's is the disproportionate burden it would imply for Tengir given its small size and limited capabilities.

The requirement to set fair and reasonable prices will apply to all forms of regulated access within market 3a. The principles and procedures in case of breach are the same as for Míla.

Obligations on Ljósleiðarinn

ECOI envisages the following remedies in the municipality where Ljósleiðarinn has SMP (Sveitarfélagið Ölfus):

(i) access;
(ii) non-discrimination; and
(iii) fair and reasonable prices.

As for Tengir, when defining the scope of obligations on Ljósleiðarinn, ECOI takes into account various factors. In particular, ECOI notes that Ölfus is a municipality with a small population and with a high degree of parallel fixed network coverage. Generally, competitive conditions are better than in the municipalities where Mila has SMP. Further, Ljósleiðarinn has less economies of scale and scope, is financially less strong and has worse access to capital conditions than Mila.

The access obligation notably covers access to Ljósleiðarinn's fibre network (dark fibre), access to ducts and conduits, as well as shared access to facilities. Ljósleiðarinn has a P2P fibre network, but it has stated that going forward it will in some cases build PON fibre, where physical unbundling might not be feasible. Ljósleiðarinn will not be required to provide VULA. For those segments of Ljósleiðarinn's fibre network that were built without State aid, Ljósleiðarinn may choose to offer bitstream access instead of local access[15].

Just as for Tengir and for similar reasons, the non-discrimination obligation will be based on EoI, but will not include SLAs, SLGs and KPIs.

The requirement to set fair and reasonable prices will apply to all forms of regulated access within market 3a. The principles and procedures in case of breach are the same as for Míla.

Wholesale central access provided at fixed location for mass-market products (Market 3b)

Obligations on Míla

In market 3b, in the 31 municipalities where Míla is to be designated as the SMP operator, ECOI intends to impose on Míla the following set of remedies:

(i) access;
(ii) non-discrimination; and
(iii) fair and reasonable prices.

Míla is obliged to provide bitstream in the form of so-called Access Options 1, 2, 3 and 4.

Options 1, 2, and 3 are based on the classic topology of an incumbent network, where a trunk network connects relatively big central offices ("**CO**") in which a large number of local loops converge for access. The active equipment is placed in the central offices and the access network is passive between the CO and the customer, based on access network branches of large cables to street cabinets that distribute the local loops to a set of customers. Access Option 1 is at each CO and is the option most often used by Míla's customers; Access Option 2 is at a regional level where access to a collection of COs can be concentrated; and Access Option 3 is for access at the national level. Access Options 1 and 2 were developed to oblige Síminn to offer alternative operators access that would allow the alternative operators to leverage their trunk networks that were beginning to take form at the time.

With Access Option 4 retailers are enabled to access fully ready Internet access for resale, the same as is available to Síminn. Access Option 4 is newly imposed on Míla (whereas it had been imposed on Síminn in the past) as Míla has taken over from Síminn the technical operations needed to provide this service and there is considerable demand for it.

The non-discrimination remedy is, as for market 3b, based on EoI and includes requirements concerning SLAs, SLGs and KPIs.

[15] For the State-aided segments, Ljósleiðarinn will be obliged to offer dark fibre access if requested by the access seeker.

Prices shall be fair and reasonable subject to ECOI's monitoring and decision-making powers (in case of a complaint or on its own initiative) as described for market 3a.

Obligations on Ljósleiðarinn

ECOI envisages the following remedies in the municipality where Ljósleiðarinn has SMP (Sveitarfélagið Ölfus):

(i) access;
(ii) non-discrimination; and
(iii) fair and reasonable prices.

As for market 3a, ECOI took into account the limited size and abilities of the company when choosing the remedies.

Ljósleiðarinn will be obliged to continue offering a form of access that it already provides voluntarily, i.e. a type of bitstream that ECOI considers comparable to Míla's Access Option 3. ECOI found it neither necessary nor proportionate to require Ljósleiðarinn to develop a new bitstream access option solely for one municipality, Ölfus, which is small and has few inhabitants. ECOI adds that it has not detected any interest from retailers for other access options with Ljósleiðarinn.

The non-discrimination obligation will be based on EoI. For the reasons already explained in the section on market 3a, it will not include SLAs, SLGs and KPIs.

Ljósleiðarinn will need to set fair and reasonable prices for its 3b regulated access. The principles and procedure in case of breach are the same as for Míla.

Obligations on Austurljós

In the municipality where Austurljós is designated as having SMP (Fljótsdalshreppur), ECOI intends to impose on it the following obligations:

(i) access; and
(ii) non-discrimination.

When selecting the remedies, ECOI took into account the very small size and capabilities of Austurljós (it only has a staff of 4), as well as the very low number (37) of connections concerned. Therefore, based on proportionality considerations ECOI designed a lighter set of remedies for this area.

Similarly, as for Ljósleiðarinn, Austurljós will be mandated to offer a form of bitstream access described by ECOI as comparable to Míla's Access Option 3. Austurljós already provides this access product on a voluntary basis. Austurljós will not have to provide other forms of access such as dedicated VLAN.

The non-discrimination remedy will be simplified for Austurljós. It will imply not discriminating between self-supply and third-party access (in essence, ensuring the same quality of access) but not up to the level of strict EoI requirements, which would require developing a relatively sophisticated system. The company will not need to comply with SLAs, SLGs and KPIs either.

Finally, no price obligations will be imposed, again based on proportionality considerations as well as the lack of significant risks and implications in terms of excessive pricing.

III. COMMENTS

ESA has examined the notified draft measure and has the following comments:

Need to monitor closely the development of substitutability with broadband via mobile networks

Fixed-mobile convergence/substitution is an important development observed in many EEA countries.

ESA welcomes ECOI's in-depth investigation and assessment of the substitutability of fixed(-line) broadband with broadband access via mobile networks. This is enriched with multiple customer surveys, data from mobile operators and the views of market participants at large.

ECOI finds that there exists substitutability between fixed broadband solutions and mobile network solutions through mains-connected network routers at a fixed location of use. Further, in its reply to ESA's request for information of 24 April 2024, ECOI explained that this definition does not cover mobile network connections through mobile devices mainly due to the absence of a continuous/dedicated connection and the loss of Wi-Fi connection when a mobile device is removed from the given premises. In its submission, ECOI undertook to add reasoning to that effect in the final measure.

ESA welcomes such a commitment from ECOI. However, ESA finds that ECOI should further strengthen its reasoning to appropriately reflect all demand-side and supply-side substitutability considerations relevant for a finding on fixed-mobile substitution with regard to mobile phones. That analysis should look beyond the mobility aspect inherent to mobile phones, which is also shared to some extent by mobile network routers. ESA therefore calls on ECOI to comprehensively assess, on the basis of available data, aspects such as in particular technical differences, quality of service, demand patterns, pricing, and convergence of fixed and mobile offers.

For the next market review cycle, ESA encourages ECOI to closely monitor the development of the market on this aspect. It is plausible that with the further development of 5G networks (and 6G in the future), mobile phones and mobile phone subscriptions will become a viable point of access to the internet at comparable quality and commercial terms as fixed broadband.

ECOI finds substitutability between fixed broadband and mobile networks (through mains-connected network routers at a fixed location of use) in the retail market and in market 3b, but not in market 3a. This is due to primarily the absence of commercial offerings for the current review period. However, ECOI notes that local access through mobile networks is technically possible, such that mobile networks could in principle be included in market 3a. This may also be connected to the development of FWA solutions. ESA encourages ECOI to monitor the development of the mobile market also in relation to the adoption of wholesale solutions falling within the boundaries of market 3a.

Need to define criteria allowing for a broader aggregation of geographic markets in the next market analysis

ESA welcomes ECOI's granular approach to defining of the relevant geographic markets, which addresses ESA's relevant comments in the previous market review (case 87359, see section II.1 above). A detailed geographical analysis allowed delineating the areas with competition issues and was pivotal for partially lifting regulation.

However, ESA notes that following ECOI's methodology for aggregating geographic areas, a majority of the municipalities remain uncategorised, i.e. not attributable to either of the Areas defined by ECOI, both in market 3a and in market 3b. Consequently, there is a high number of relevant geographic markets, and ECOI needed to carry out many detailed and lengthy SMP assessments at municipality level. This is a cause of concern because it may indicate that the criteria for the aggregation are too strict.

ESA encourages ECOI to reassess the aggregation criteria closely in the period leading up to the next market analysis, with a view to limiting the number of municipalities that require an ad-hoc SMP assessment. This is especially the case for the criteria defining Area A, aggregating the likely competitive areas. For example, the criteria on the retail market (i.e. no operator with a market share above 50%, and at least 4 operators) could be made less strict. Likewise, the criteria pertaining to the wholesale market (i.e. the percentage of parallel network coverage, and the highest market share in the wholesale market) could also be relaxed, especially with further developments of wholesale-only offerings.

In addition, the aggregation criteria for Area B (high market share of Míla) and Area C (high market share of Tengir) in market 3a diverge to the extent that the criterion "parallel fixed network coverage below 40%" only applies to Area B. In this regard, ESA considers that any divergence should be properly justified and explained in the final measure.

As a more general point, ESA notes that in the assessment of the geographic markets, elements typically more associated with the SMP assessment feature prominently, including the assessment of market shares and of the competitive dynamics. ESA recognises that this is to an extent unavoidable, as the competitive conditions in a given area are the main factor that needs to be examined to define a relevant market. Similar approaches are also adopted by other EEA NRAs. However, ESA considers that more emphasis should be placed on the structural elements underlying the competitive conditions, such as the extent of parallel networks, which is a criterion already examined by ECOI.

Finally, ESA refers to ECOI's commitment given at the time of the previous notification to revisit the previous market analysis, notably the geographic market definition, by the end of 2022 (case 87359, see section II. above). ESA underlines that providing realistic and credible commitments is key not just in terms of institutional cooperation with ESA but especially with a view to ensuring regulatory predictability and consistency for the market. At the same time, ESA understands that the main reasons for the significant delay in ECOI's work have been unforeseen developments such as the sale of Míla to Ardian and the appeals against ECOI's 2021 decision, together with the complexity of carrying out a geographic market assessment. In view of those circumstances, ESA recommends to ECOI to include these explanations for the delay in the final measure.

Need to be consistent in applying the criteria for the SMP assessment

As mentioned in section II.3 above, ECOI identifies eight criteria for conducting the SMP assessment, including, among other things, market shares, parallel network deployment, degree of vertical integration, long-term access agreements, etc.

In this regard, ESA points out that when applying those criteria to each relevant geographic market, ECOI does not appear to consistently carry out a comprehensive assessment of all eight criteria for all geographic markets. The lack of a consistent sequence/graphic representation of the criteria further affects the clarity of the analysis.

ESA also observes that it might be reasonable to emphasise certain criteria more than others and make cross-references to considerations in other parts of the SMP section to avoid repetitions in an already lengthy and complex text (cf. the last comment below).

In its email of 29 April 2024, ECOI committed to strengthen the reasoning for the SMP assessments in all geographic markets, as well as to add a ninth criterion (economies of scale and scope). ESA welcomes this commitment and accordingly invites ECOI to review the reasoning in the draft decision to ensure that the assessment is consistent across geographic markets and that there is no discrepancy in the treatment of different areas.

Need to monitor market developments with a view to further deregulating where appropriate

ESA welcomes that ECOI's new market analysis lifts regulation for a significant part of the country, measured in terms of population coverage.

ESA encourages ECOI to keep monitoring the market(s) with a view to further deregulating it/them. ESA notes, in particular, that the proposed regulation also imposes remedies on market participants that have entered the market(s) following liberalisation. To promote infrastructure and service competition, the primary purpose of regulation should be regulating the incumbent and former monopolist to make the market contestable for new entrants.

In this spirit, it may be justified to consider different approaches when assessing the competitive position of new entrants and the competitive position of the incumbent, and when imposing regulation on them.

ESA further notes that new entrants have gained market positions in a competitive environment subject to regulation. Maintaining regulation while changing the regulated entity should be avoided, unless strictly necessary to address the underlying competition problem.

Need to design appropriate and proportionate remedies

ESA welcomes the appropriateness and proportionality considerations made by ECOI when selecting the remedies to be imposed on each of the four SMP operators.

ESA recognises the importance of factors such as the conditions of competition in the geographic market concerned (in a forward-looking perspective), the degree of vertical integration (if any) as well as the size and capabilities of the undertaking concerned.

Those considerations have, in particular, guided ECOI when assessing the extent of regulation to be imposed on operators that have developed in a context of nationwide regulation of the incumbent and have not themselves been regulated before, i.e. Tengir, Ljósleiðarinn and Austurljós. ESA finds it appropriate and proportionate that ECOI has adapted the scope of the access, non-discrimination and price remedies, to the nature of the identified competition problem coupled with the abilities of each SMP operator.

Beyond that, as noted in ESA's comment above, ESA calls on ECOI to take a cautious approach when introducing new obligations on operators that have gained in competitiveness, thus contesting a previously monopolistic market or otherwise dominated by the incumbent. A finding of new SMP operators which requires regulatory intervention in the light of the competitive situation and the competition problem identified is still a possibility. However, the regulator should not lose sight of a key objective of *ex ante* regulation, which is to promote infrastructure competition (besides service competition). That objective might be frustrated or undermined by perpetuating regulation, especially by regulating operators that have emerged as credible challengers to the incumbent and are still growing, thereby contributing positively to the competitive dynamic in the market.

Regarding Míla, ESA agrees with ECOI's approach to lift regulation in certain areas and relax the remedies in other areas. ESA welcomes that in its analysis ECOI has striven to balance the significant changes in terms of vertical separation with the remaining competition problems associated with the advantages still enjoyed by Míla, including the persistence of elements of vertical integration due to the close relationship with Síminn.

In conclusion, ESA invites ECOI to monitor the remedies throughout this regulatory cycle and to amend them where appropriate, following national consultation and notification to ESA. ESA also invites ECOI to notify without delay the details of the cost-oriented pricing remedy on Míla for access to civil engineering access and shared use of facilities. Should ECOI observe significant market developments, a new market analysis should be carried out without delay with a view to further deregulating the market(s) where justified by the continued evolution of competition.

Need to ensure that the level of detail in the market analysis does not come at the expense of the ability to review and comment effectively by the relevant stakeholders

ESA appreciates the complexity of the analysis and, as mentioned in the other comments, welcomes the detailed investigative steps undertaken by ECOI. However, there needs to be a balance between the amount of detail included in the decision and the ability of stakeholders to review and comment the draft during the limited time of public consultations.

Taken together, the draft decision and the appendixes are over 1,000 pages long. Because of its length, it required multiple rounds of consultations on different sections of the analysis. But even when segmented, the analyses were complex and the sections very long. This may limit the ability of relevant stakeholders to fully read, analyse and understand the draft decision and to provide meaningful comments. This is particularly the case considering that some stakeholders in Iceland, such as for example access seekers, are small enterprises which may not have dedicated staff for regulatory affairs.

The length of the documents also makes them prone to clerical errors, which may affect the reader's comprehension of the decision. This is especially the case when, as in the current case, the drafts need to be updated significantly following the feedback from the consultations. The notification includes documents that need to be translated for ESA's review, which adds a further layer where clerical mistakes may happen. For example, ESA found some inaccuracies in the draft decision, which increased the complexity of ESA's review requiring clarifications from ECOI.

In view of the above, ESA invites ECOI to carefully consider the need for clear and intelligible texts to preserve the effectiveness of the national consultation and notification processes. For the next market analysis, ESA encourages ECOI to attempt to streamline and shorten the drafts, to make it easier for stakeholders to provide informed and meaningful views. For example, sections of the market analysis are generally introduced by lengthy preambles, which could be removed or streamlined. This would also limit the risk of clerical errors due to changes in the draft and in the translation.

IV. FINAL REMARKS

On a procedural note, ESA 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, ECOI shall take the utmost account of comments of other regulatory authorities and ESA. It may adopt the resulting draft measure and, when it does so, shall communicate it to ESA.

ESA | EFTA Surveillance Authority

ESA's position on the current notification is without prejudice to any position ESA may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation[16], ESA will publish this document on its eCOM Online Notification Registry. ESA does not consider the information contained herein to be confidential. You are invited to inform ESA within three working days[17] 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,

Filip Ragolle
Deputy Director for Competition and Regulation
Competition and State Aid Directorate

This document has been electronically authenticated by Filip Ragolle.

[16] 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 here ("the Procedural Recommendation").

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