

Brussels, 18 November 2021  
Case No: 87557  
Document No: 1237520

Fjarskiptastofa  
Sudurlandsbraut 4  
108 Reykjavik  
Iceland

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

Dear Mr Gíslason,

**Subject: Review of Míla tariffs for hosting and electricity - Remedies**  
**Comments pursuant to Article 7(3) of Directive 2002/21/EC**  
**(Framework Directive)<sup>1</sup>**

## I. PROCEDURE

On 18 October 2021, 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, *Fjarskiptastofa* (“ECOI”). It concerns a review of Míla’s wholesale tariffs for hosting and electricity in relation to the market for wholesale unbundled access to copper local loops, the market for wholesale broadband access, the market for wholesale terminating segments of leased lines and the market for wholesale trunk segments of leased lines in Iceland.<sup>2</sup>

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<sup>1</sup> 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. Directive (EU) 2018/1972 will repeal, inter alia, the Framework Directive. However, until JCD No 275/2021 enters into force, the Framework Directive remains applicable.

<sup>2</sup> Corresponding to markets 4, 5 and 6 of 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 (“the 2008 Recommendation”) and market 14 of EFTA Surveillance Authority Recommendation of 14 July 2004 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance

The notification became effective on the same day.

National consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 29 June 2021 to 20 July 2021.

The period for consultation with the Authority and the national regulatory authorities (“NRAs”) in the EEA States, pursuant to Article 7 of the Framework Directive, expires on 18 November 2021.

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

## II. DESCRIPTION OF THE DRAFT MEASURE

### II.1. Background

The Mila wholesale tariffs for hosting facilities for equipment in buildings and masts, with the addition of electricity, are based on the obligations imposed on the company by ECOI’s Decision no. 8/2014 dated 6 May 2014 (concerning Market 6 from the 2008 Recommendation),<sup>3</sup> Decision no. 21/2014 dated 13 August 2014 (concerning Markets 4 and 5 of the 2008 Recommendation)<sup>4</sup> and Decision no. 21/2015 dated 12 August 2015 (concerning Market 14 of the 2004 Recommendation).<sup>5</sup> Furthermore, ECOI Decision no. 11/2014 dated 3 June 2014 contains the last review of the prices for lease of facilities in buildings and on masts.<sup>6</sup>

Mila has been designated as an operator with significant market power (“SMP”) in all of the above-mentioned markets.

### II.2 Current notification

In the currently notified draft measure, ECOI establishes new Mila wholesale tariffs for hosting facilities for equipment in its buildings and on its masts, and for electricity.

The cost analysis results in (i) monthly rental prices for the lease of facilities in buildings – with prices differentiated based on location category and category of cabinet size/square meter use - and (ii) monthly rental prices for the lease of facilities on masts – with prices differentiated based on location category and category of size/position on the mast. In addition, prices for electricity are calculated according to monthly kWh use, differentiated based on location.

ECOI applied the following main rules when reviewing the tariffs for hosting services:

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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 Economic European Area (No 194/04/COL) (“the 2004 Recommendation”).

<sup>3</sup> Notified to and assessed by the Authority under Case No 75278. See the Authority’s comments letter dated 5 May 2014, Document No 706019.

<sup>4</sup> Notified to and assessed by the Authority under Case No 75750. See the Authority’s comments letter dated 11 August 2014, Document No 715771. (An updated review of these markets (now Markets 3a and 3b/2016) was notified to and assessed by the Authority under Case 87359. See the Authority’s comments letter dated 14 October 2021, Document No 1229617).

<sup>5</sup> Notified to and assessed by the Authority under Case No 77596. See the Authority’s comments letter dated 3 August 2015, Document No 763837.

<sup>6</sup> Notified to and assessed by the Authority under Case No 75384. See the Authority’s comments letter dated 2 June 2014, Document No 708210.

- The cost analysis shall cover the cost of leasing facilities for equipment in Míla's buildings and on Míla's masts.
- The price shall be calculated for location-based access to buildings and masts. Míla shall divide investments in buildings and masts into categories depending on whether the investments belong to mixed hosting operations (halls), urban areas, rural areas or uninhabited areas.
- Míla's tariff shall contain as a minimum the price for varying lease units and shall cover all hosting services provided by Míla today to its own service departments or to other related parties or parties cooperating with Míla and to other electronic communications companies.
- The tariffs for leasing of facilities on masts shall be divided into categories based on a combination of size in square metres and position on the mast.
- The cost base shall be the historical costs of Míla's assets ("HCA") based on the preceding financial year in each instance.
- The cost allocation methodology shall be fully allocated cost ("FAC"), i.e. based on allocating all costs to the services in question.
- Allocation of costs shall be based on accounting separation.
- The OPEX of the hosting services, including allocated indirect costs (i.e. management and IT) shall be captured in accordance with separation of accounts.
- The CAPEX of the hosting services shall be calculated based on the value-in-use of operational assets, where the replacement cost of the asset is taken into account in each instance.
- Evaluation of operational assets shall reflect the value in use of assets. The criteria shall be that timber buildings have a 30-year lifetime, concrete buildings have a 50-year lifetime, surveillance systems have a 6.67 year lifetime, ventilation systems have a 15-year lifetime, refrigeration equipment has a 10-year lifetime and diesel engines have a 13-25 year lifetime.
- The annuity depreciation method shall be used to calculate annual costs of operational assets.
- The cost of the total number of hosting in buildings and masts shall be calculated.
- The required rate of return shall be the weighted average cost of capital ("WACC") of the capital tied to assets used in connection with the provision of the hosting services, where the risk premium reflects the risk related to operations on the relevant market.
- The average unit price for individual hosting units shall be calculated as the average cost for the category of location, based on allocated OPEX and CAPEX, taking into account the varying services, the number of lease units and their size. Míla is authorised to use equivalents to decide unit costs.

### Calculation of WACC

In its cost analysis, ECOI took into account a real WACC of 6.9% - calculated for 2018. ECOI decides annually on the WACC value which was most recently calculated for the year 2020. ECOI noted that on 6 November 2019, the European Commission issued a Notice on the calculation of the cost of capital for legacy infrastructure ("WACC Notice").<sup>7</sup> Nevertheless, ECOI decided to use the WACC for the year 2018 as the basis for calculation of annual investment cost for the 2018 capital base. In addition, ECOI

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<sup>7</sup> Communication from the Commission, Commission Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector, OJ C 375/1, 6.11.2019.

requests Míla to update the cost analysis for access to facilities with cost data and WACC for the year 2021 and to submit the new calculation to ECOI no later than 1 April 2022.

### III. COMMENTS

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

#### **Need to update cost data used in the costing analysis and need to comply with the Commission's WACC Notice**

The Authority notes that ECOI uses 2018 data in its cost analysis for the present tariff calculation. The Authority notes further that the methodology used by ECOI to calculate the WACC is not consistent with the methodology set out in the WACC Notice. In particular, there seem to be disparities in the calculation of the risk-free rate and the equity risk premium. Paragraph 71 of the WACC Notice allows for a transition period only until 1 July 2021. Furthermore, the WACC Notice indicates that it is appropriate to update the WACC value at least once per year to take account of recent economic conditions.

Despite the discussion that the Authority had with ECOI in the context of case 86639, earlier this year,<sup>8</sup> ECOI decided to deviate from the WACC Notice and use an outdated WACC for the year 2018, in line with the cost basis used in its tariff calculation. The Authority acknowledges that ECOI requests Míla to update the cost analysis for access to facilities with cost data and WACC for the year 2021 and to submit the new calculation to ECOI no later than 1 April 2022.

In view of the above, the Authority would like to strongly urge ECOI to update both the cost basis used for the present tariff calculation and its WACC calculation, in order to align it with the WACC Notice, and to subsequently notify the new calculation to the Authority without undue delay.

#### **Market review timing and timely enforcement and effectiveness of remedies**

The Authority notes that ECOI's last review of related tariffs dates back to 2014. Furthermore, this remedy is based on certain market reviews (e.g. Market 6 of the 2008 Recommendation and Market 14 of the 2004 Recommendation) which date back to 2014 and 2015 respectively, implying a delay of six to seven years in the review cycle for these markets.

If an NRA does not analyse the relevant markets at regular intervals, or considerably delays the enforcement (or updating of) imposed remedies on the SMP undertaking, this may harm competition on those markets and reduce legal certainty for market participants with regard to the applicable regulatory conditions. Therefore, it is imperative that NRAs re-visit market reviews (and related remedies) at regular intervals to ensure that any decisions to impose, maintain, amend or withdraw obligations, as foreseen in Article 16(2) of the Framework Directive and Article 67(5) of the Code,<sup>9</sup> are taken on the basis of up-to-date and relevant market analyses.

Against this background, the Authority strongly encourages ECOI to undertake a timely analysis and notification of the next full reviews of the markets in question, in line with ECOI's obligations under the EEA regulatory framework.

### IV. FINAL REMARKS

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<sup>8</sup> See the Authority's comments letter of 22 April 2021, Document No 1193192.

<sup>9</sup> See footnote 1 above for the full reference to the Framework Directive and the Code.

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

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

Pursuant to Point 15 of the Procedural Recommendation,<sup>10</sup> the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the information contained herein to be confidential. You are invited to inform the Authority within three working days<sup>11</sup> 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,

Jónína S. Lárusdóttir  
Director  
Internal Market Affairs Directorate

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

*This document has been electronically authenticated by Emily O'Reilly, Jonina S. Larusdottir.*

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<sup>10</sup> EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, OJ C 302, 13.10.2011, p. 12, and available on the Authority's website at <http://www.eftasurv.int/media/internal-market/recommendation.pdf> ("the Procedural Recommendation").

<sup>11</sup> The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.