

Brussels, 5 May 2014
Case No: 75278
Event No: 706019

EFTA SURVEILLANCE
AUTHORITY

Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavík
Iceland

For the attention of:
Mr Hrafnkell Gíslason, Director

Subject: Case No 75278 – Market for wholesale terminating segments of leased lines in Iceland

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. Procedure

On 3 April 2014, the EFTA Surveillance Authority (“the Authority”) registered a draft measure, pursuant to Article 7 of the Framework Directive, from the Icelandic national regulatory authority (“NRA”), *Póst- og Fjarskiptastofnun* (“the PTA”), relating to the market for wholesale terminating segments of leased lines in Iceland.²

The notification became effective on the same day. National consultation was carried out, pursuant to Article 6 of the Framework Directive, between 27 November 2013 and 20 January 2014.

A request for information³ was sent to the PTA on 17 April 2014 and a response was received on 23 April 2014.

The period for consultation with the Authority and the NRAs in the EEA States pursuant to Article 7 of the Framework Directive expires on 5 May 2014.

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 6 of the EFTA Surveillance Authority Recommendation of 5 November 2008 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (the Framework Directive), as adapted by Protocol I thereto and by the sectoral adaptations contained in Annex XI to that Agreement; OJ C 156, 9.7.2009, p.18 (“the Authority’s Recommendation on Relevant Markets”).

³ In accordance with Article 5(2) of the Framework Directive.

II. Description of the draft measure

II.1. Previous notification

In its first-round review of the market for wholesale terminating segments of leased lines,⁴ the PTA defined the relevant market in a technology-neutral manner, including both digital and analogue lines with all possible technology and transmission media/protocols. The definition thus included traditional copper lines, as well as Ethernet connections and fibre-optic lines. The geographic dimension of the relevant market was defined as the entire territory of Iceland. The PTA designated Síminn hf. (“Síminn”) and its sister company Míla ehf. (“Míla”) with significant market power (“SMP”) on that relevant market. Wholesale obligations were imposed for access to leased lines at reasonable request, price control and cost accounting,⁵ non-discrimination, transparency (publication of a reference offer) and accounting separation. All wholesale leased lines within the Skipti Group have since been transferred to Míla.⁶

II.2. Market definition

According to the PTA, the terminating segment of a leased line lies between the user and the node point/telephone exchange and connects users to a point where the trunk line system takes over. These connections have a symmetric and stable (permanent) capacity and are leased to other electronic communications companies enabling them to provide services on various retail markets. The market covers both digital and analogue lines and connections with all transmission capacities⁷ and all possible technologies (IP-MPLS⁸, Frame Relay, Ethernet and Ethernet VLAN, symmetrical digital subscriber lines (such as SHDSL), SDH/PDH⁹ and MPLS-TP and various wavelength division multiplexing solutions (WDM, CWDM, DWDM)¹⁰, as well as all relevant transmission media¹¹ (dark fibre, copper and wireless connections), which facilitate the lease of dedicated connections with symmetric capacity. As the PTA has not found any indication that operators charge regionally differentiated prices or offer regionally differentiated services or service quality, the market is deemed to be national in scope.

⁴ See the Authority’s comments letter of 26 March 2007, Case No 59834, Event No 414592.

⁵ The PTA directed Síminn to prepare a cost model based on historical costs within one year from the date of the entry into force of the PTA’s final decision. In accordance with the above obligation, Míla submitted its cost analysis on 28 November 2011. The PTA subsequently endorsed the cost analysis (with specific amendments) and the tariff came into force on 1 March 2012. In 2013 (see the Authority’s comments letter of 26 July 2013, Case No 74047, Event No 678479), the PTA endorsed an increase in the monthly fee for terminating segments of leased lines over Míla’s copper local loops.

⁶ See footnote 12 below for further details.

⁷ In its reply to the request for information, the PTA clarified that it finds the relevant product market to comprise all capacities due *inter alia* to the identification of a chain of substitution on the supply side and the PTA’s opinion that the market definition has not materially changed since its first-round review in 2007.

⁸ Internet Protocol - Multiprotocol Label Switching.

⁹ SDH stands for Synchronous Digital Hierarchy and PDH stands for Plesiochronous Digital Hierarchy.

¹⁰ CWDM stands for Coarse Wave Division Multiplexing and DWDM stands for Dense Wave Division Multiplexing.

¹¹ According to the PTA, fibre-optic connections have increased rapidly in recent years. In addition, wholesale rental of dark fibre termination segments is rather common in the relevant market. Furthermore, the PTA notes that radio connections can be more economic than fixed-line connections, e.g. in sparsely-populated areas or even in some urban areas, and are comparable and substitutable with fixed-line transmission media.

II.3. Finding of significant market power

The PTA finds Míla to have SMP on the relevant market.¹² In reaching this conclusion, the PTA considered *inter alia* that (i) the company's market share was 69% based on revenue and over 80% based on connections at the end of 2012;¹³ (ii) significant entry barriers still persist; (iii) there is little possibility for innovation or potential competition as the market is largely saturated and there is asymmetry between the market position held by Míla and other companies; (iv) the Skipti Group is vertically integrated; and (v) countervailing buying power is generally negligible.

II.4. Regulatory remedies

The PTA proposes to impose the following remedies on Míla:¹⁴

- Access: covering all types of wholesale access that is reasonable to provide including resale, co-location or joint utilisation (including joint utilisation of cable ducts, buildings and masts), open access to technical interfaces, communications protocols and other technologies which ensure interactive services and interconnection of networks, access to support systems and appropriate information. In addition, Míla shall provide a specific period of notice for all technical migration, including the provision of a list of planned excavation and duct activities (civil works) with 6 months notice;¹⁵
- Non-discrimination;¹⁶
- Transparency and publication of a reference offer;
- Accounting separation; and
- Price control and cost accounting.

¹² In its last review, the PTA found Síminn and Míla to have SMP on the relevant market. In September 2012, Síminn took over most of the management of the leased lines from Míla, including those belonging to the terminating segments. This was reversed subsequent to a decision by the Icelandic Competition Authority decision in March 2013. This means that Síminn has no revenue on the relevant market and Míla manages all sales of wholesale leased lines within the Skipti Group.

¹³ The other operators which have entered the relevant market since the PTA's last review are Gagnaveita Reykjavíkur with a 21% market share and smaller regional companies such as Tengir and Gagnaveita Skagafjarðar with a total market share of about 10% in revenue terms.

¹⁴ In assessing the impact of existing obligations and the need for new obligations, the PTA took into consideration the agreement between the Icelandic Competition Authority and the Skipti Group from March 2013, according to which a clear separation was made between the Skipti Group's core systems and the retail operations of Síminn, strengthening Míla's independence and imposing a set of remedies on both companies. The PTA came to the conclusion that, notwithstanding this agreement, there is a need for the imposition of *ex ante* remedies upon Míla in order to address the market failures as analyzed in the current market review as well as to ensure predictability for the competitors of the Skipti Group with regard to access to Míla's networks. The obligations which are currently imposed on Síminn will be withdrawn.

¹⁵ In its reply to the request for information, the PTA informed the Authority that it is difficult to publish precise roll-out plans with a long notice period in Iceland and it is common practice for Icelandic municipalities and public utilities to advance their civil works with only a short period of notice. As Míla needs to react to these schedules, the PTA deems the 6-month notice period to be sufficient. However, the PTA intends to monitor the situation and re-evaluate the length of the notice period, if needed. The draft measure further specifies that access already granted cannot be withdrawn without the agreement of the PTA and subsequent to a minimum 6-month period of notice to the electronic communications companies concerned.

¹⁶ In order to monitor compliance with the non-discrimination obligation, the PTA intends to require Míla to collect and publish regularly certain key performance indicators, such as for delivery of orders, products and services, maintenance and service switching parameters. The PTA also intends to require Míla to provide service-level guarantees.

With regard to price control, the PTA prescribes the application of a HCA FAC costing methodology (i.e. historic cost accounting based on fully-allocated costs).¹⁷ In this respect, the local loop costs are based on Mila's wholesale tariff for local loop unbundling and the price of specific equipment for terminating segments of leased lines is to be based on the replacement cost of a modern equivalent asset and a reasonable re-use of equipment. Based on these principles, Mila is obliged to submit – within 6 months of the publication of the PTA's final decision¹⁸ – the company's cost analysis and proposed tariff to the PTA.¹⁹ When assessing the conclusion of Mila's cost analysis, the PTA intends to take into consideration analogous products within the EEA and in particular those countries where a recognised methodology, such as BU-LRIC+, is applied. The PTA will also endeavour to verify whether Mila's tariff logically relates to Mila's local loop unbundling prices due to the risk of over- or under-pricing by the Skipti Group.²⁰ The resulting wholesale tariff will only come into force after endorsement by the PTA and subsequent to national and EEA consultation.

III. Comments

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

Market review timing and timely enforcement and effectiveness of remedies

The Authority notes that the PTA's first-round review of market 6 dates back to 2007. Consequently, the PTA has accumulated a delay of almost seven years in the market analysis procedure between its first-round review and the present notification of its second-round review.

Furthermore, the Authority notes that the delay in implementing the cost analysis prescribed in the first-round market review in 2007 amounts to almost five years, i.e. Mila's relevant tariffs entered into force only in 2012.

If an NRA does not analyse the relevant markets at regular intervals, or considerably delays the enforcement 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. Market players need to have a consistent and up-to-date overview of the prevailing regulatory and competitive conditions to determine their business and investment choices with respect to entry and/or expansion in electronic communications networks and services markets across the EEA and within the individual EEA Member States.

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, the Authority urges the PTA to ensure a prompt implementation of the obligations proposed in the presently notified measure.

¹⁷ The PTA states that the implementation of a BU-LRIC (Bottom-Up Long-Run Average Incremental Cost) methodology would entail high costs for the PTA which, due to its size, the regulator cannot support.

¹⁸ The PTA explains that the existing Mila wholesale tariff for terminating segments of leased lines shall remain in force until the proposed tariff is available and has been endorsed by the PTA. The tariff shall then be reviewed annually.

¹⁹ At the same time, Mila is also obliged to submit a report from an independent auditor to the PTA.

²⁰ The PTA considers it proper that a review of tariffs on market 6 should in each instance take place in parallel with a review of market 4 as the cost of the access network is to a large degree common to both of the above specified markets.

In this regard, the Authority also draws the PTA's attention to the revised Article 16(6) of the Framework Directive,²¹ pursuant to which NRAs shall carry out an analysis of the relevant markets under normal circumstances within three years from the adoption of a previous measure relating to those markets in order to take account of the high level of technical innovation and the highly dynamic nature of the electronic communications sector.

Forthcoming notification of implementation of price control under the Article 7 procedure

The Authority notes the PTA's intention to consult on the proposed implementation of the price control methodology and on the resulting wholesale tariffs under the Article 7 procedure. Since this subsequent notification will concern the precise application of the proposed methodology, including the PTA's review process, as well as the level of the final resulting wholesale tariff, the Authority reserves its right to examine the proposed price control methodology in further detail in that forthcoming EEA consultation process.

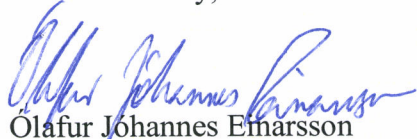
IV. Final remarks

Pursuant to Article 7(5) of the Framework Directive, the PTA may adopt the resulting draft measure and, if it does so, shall communicate the final measure 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 national measures.

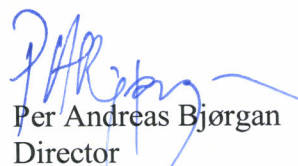
Pursuant to point 15 of the Procedural Recommendation, the Authority will publish this comments letter on its eCOM Online Notification Registry. The Authority does not consider the information contained in this letter to be confidential. However, the PTA is invited to inform the Authority within three working days²² following receipt of this letter if it considers, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which the PTA would like to be deleted prior to publication. The PTA should provide reasons for any such request.

Yours sincerely,



Ólafur Johannes Einarsson
Director

Internal Market Affairs Directorate



Per Andreas Bjørgan
Director

Competition and State Aid Directorate

²¹ As amended by Directive 2009/140/EC, OJ L 337, 18.2 2009, p.37 and Regulation 544/2009, OJ L 167, 18.6.2009, p.12. The revised Framework Directive entered into force in the EU Member States on 25 May 2011. For the EEA EFTA States it is currently in the preparatory stage for the incorporation into the EEA Agreement.

²² The request should be submitted through the eCOM Registry or by e-mail to Ecom@eftasurv.int, marked for the attention of the eCOM Task Force.