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Norwegian Communications Authority (Nkom)
Postboks 93
4791 Lillesand
Norway

For the attention of:
John-Eivind Velure
Acting Director

Dear Mr. Velure,

Subject: Markets for wholesale local access provided at a fixed location and wholesale central access for mass-market products in Norway - Remedies

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

I. PROCEDURE

On 30 June 2020, the EFTA Surveillance Authority (“the Authority”) received a notification of two draft measures in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Norwegian national regulatory authority, *Nasjonal Kommunikasjonsmyndighet* (“Nkom”), concerning the wholesale local access provided at a fixed location (“market 3a”) and wholesale central access for mass-market products (“market 3b”) in Norway.² The first draft measure concerns both markets 3a and 3b and the second draft measure concerns market 3b only.

The notification became effective on the same day.

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”).

² Corresponding to markets 3a and 3b of 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, (“2016 Recommendation”).

National consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 28 November 2019 to 19 December 2019 for the market 3b draft decision, and from 20 December 2019 to 27 January 2020 for the markets 3a and 3b draft decision.

On 13 July 2020, the Authority held an informal meeting with Nkom to discuss both draft measures.

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 30 July 2020.

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 MEASURES

II.1. Background

The full market reviews for wholesale local access provided at a fixed location and wholesale central access for mass-market products were previously notified by Nkom to the Authority on 1 November 2018.³ In its final decision on 20 December 2018, Nkom designated Telenor as the significant market power (SMP) operator and imposed access obligations, including price control obligations for wholesale access services to Telenor’s network in both markets.⁴ Additionally, Nkom imposed the notice periods for changes to infrastructure shown in the Table below.

Impact of change	Notice period
Loss of accesses	3 years notice
Loss of accesses to sub-loop	3 years notice
Loss of access but with relevant replacement product in same wholesale market	6 months
Does not affect access products	3 months
Migration due to high repair cost on copper	< 3 months
Change to access where no access seeker is making use of access service	1 month

In its reply to the Authority’s request for information on 23 November 2018, Nkom noted its understanding that any decommissioning of the copper network in favour of fibre, HFC or LTE had been very limited to date. However, shortly after Nkom’s final decision, Telenor announced on 30 January 2019 that it would replace its copper network by the end of 2022 and that copper access would be replaced by fibre-based or wireless broadband access.⁵

II.2 Current notification

³ See the Authority’s comments letter of 3 December 2018, Case No 82766, Document No 1039929.

⁴ The final decisions are available on the Authority’s website, for market 3a ([here](#)) and market 3b ([here](#)).

⁵ See page 7 of Telenor’s quarterly presentation for the Q4 2018, available at <https://www.telenor.com/wp-content/uploads/2018/10/Telenor-Q4-2018-presentation-e037eebf34e67c85b4a3ea0be22e1d5f.pdf> and the transcript of the quarterly call, available at <https://www.telenor.com/wp-content/uploads/2018/10/Telenor-Group-Q4-2019-transcript.doc>.

In its draft measure in markets 3a and 3b, Nkom amends the access obligation on Telenor to ensure that it maintains access to its copper-based network for the 5 years following the entry into force of its decision. Additionally, Nkom imposes an obligation on Telenor to prepare a draft plan for the migration from copper-based infrastructure without undue delay. Nkom notes that the migration plan could allow Telenor to decommission its copper network prior to the 5-year deadline, as long as relevant replacement products are provided and the migration path is agreed with Nkom. Telenor is also required to inform access buyers and Nkom of new replacement products for DSL-based broadband no later than six months before the company offers the products to its own end users. The objective of these amendments is to ensure that Telenor does not use the replacement of its copper infrastructure to avoid its access obligations and foreclose competition. Furthermore, Nkom seeks to provide incentives to Telenor to agree on a migration path with operators currently enjoying access to its network, in line with the Commission's 2010 NGA Recommendation.⁶

Nkom's draft measure in market 3b concerns Telenor's fixed mobile broadband ("FMB") service. FMB is one of the services that Telenor recently launched and which it expects will replace its copper network in the long term. The service is provided over Telenor's mobile network, but it can only be used from the end user's address or immediate vicinity, as it has a 'geo-lock' connecting it to only to a small number of base stations in a pre-determined area. Currently, Telenor offers a residential and business FMB service. The residential service is marketed with download speeds in the 10–60Mbit/s range and up to 1 000 GB consumption per month. The business service is marketed with download speeds of up to 20 and 40Mbit/s and monthly usage up to 1.5 Terabyte. Telenor only offers the service in the geographic areas where it has customers on its copper network, but not where it provides broadband services based on its HFC or fibre network.

During the informal discussions with the Authority, Nkom indicated that while provided over the mobile network, the 'geo-lock' features of FMB, and the fact that it has been introduced by Telenor as a potential long-term substitute of broadband services over copper, indicated that it should be considered a market 3b service. However, at this stage Nkom does not view FMB as a relevant replacement product for copper-based access in either market 3a or 3b, due to the service's characteristics – in particular the fact that the service will not be offered to HFC/fibre-based customers and that the lower quality of service of FMB implies that it will not be a demand-side substitute for an important proportion of copper-based customers in the foreseeable future.

In its draft measure, Nkom requires Telenor to meet any reasonable request for access to FMB, with an equivalent interface to what Telenor offers for service provider access on its mobile network, no later than one month after the entry into force of the decision. For this, Telenor is required to provide estimates of the price of FMB access no later than four weeks after the entry into force of the decision. Telenor is also required to prepare a documented process for registering and assessing requests received for access to FMB, including requests that go beyond the features of the applicable reference offer. Telenor is also required to maintain an updated overview of addresses where FMB is available for sale and to access buyers.

⁶ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), 2010/572/EU, OJEU, 25 September 2010.

In relation to the price of access to FMB, Telenor is requested to set reasonable prices at the same level for all access buyers, to ensure non-discrimination and to provide documentation on the actual costs associated with the implementation of FMB access without undue delay. Following this, Nkom plans to consider more detailed price regulation of FMB access in the autumn of 2020.

III. COMMENTS

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

Need to ensure appropriate access remedies following Telenor's announcement

The Authority agrees with Nkom that the new situation created by Telenor's announcement in January 2019 required a new assessment to ensure that the remedies imposed by Nkom in its December 2018 decision remained appropriate. In the absence of an agreed migration path, the Authority considers that an obligation on Telenor to maintain copper access for a period of 5 years is consistent with Article 12 of the Access Directive.⁷ In this regard, the obligation to meet reasonable requests for access to, and use of, specific network elements and associated facilities over this period seeks to avoid hindering the emergence of a sustainable competitive market at the retail level and to avoid a situation that would not be in the end user's interest.

Furthermore, the Authority agrees that Nkom's obligations are fully aligned with the 2010 NGA Recommendation, which states that SMP obligations

“should continue and should not be undone by changes to the existing network architecture and technology, unless agreement is reached on an appropriate migration path between the SMP operator and operators currently enjoying access to the SMP operator's network. In the absence of such agreement, NRAs should ensure that alternative operators are informed no less than 5 years, where appropriate taking into account national circumstances, before any de-commissioning of points of interconnection such as the local loop exchange.”⁸

Additionally, the obligations proposed by Nkom are aligned with Article 81 of the European Electronic Communications Code (“the Code”),⁹ in ensuring a transparent timetable and conditions, an appropriate notice period for transition, the availability of alternative products of at least comparable quality providing access to the upgraded network infrastructure substituting the replaced elements, if necessary to safeguard competition and the rights of end users. Although the Code has not been incorporated into the EEA Agreement, the Authority understands that it will enter into force in Norway prior to the finalisation of the replacement of Telenor's copper network.

Following Nkom's decision, Telenor will be able to enter into discussions with access seekers, under the supervision of Nkom, to ensure an appropriate balance of interests, to agree on a migration path that will not undermine the regulatory regime set up by the regulator. In the interim, the Authority notes that Nkom should monitor developments in

⁷ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7, as referred to at point 5 cj of Annex XI to the EEA Agreement (“the Access Directive”).

⁸ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), 2010/572/EU, OJEU, 25 September 2010, paragraph 39.

⁹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJEU L 321/36, 17.12.2018.

the market closely and ensure that Telenor does not use its fault repair policy or other mechanism to discriminate against access seekers or bypass its access obligations, for example, through the decommissioning of copper lines at short notice on the basis of repair costs.

Finally, the Authority agrees with Nkom that the objective of the present draft measure was not to have a fresh review of the market situation, but rather was solely aimed at addressing the situation created by Telenor's unilateral announcement in January 2019, just one month after Nkom's decision and with no prior discussion with either Nkom or access seekers. For this reason, the Authority fully supports Nkom's position that a new market analysis was not required at this point in time, just months after Nkom's previous round of market analysis.

Need to consider an *ex ante* margin squeeze test for VULA fibre

Following the new technical specifications of the VULA fibre service, the Authority invites Nkom to consider whether it is appropriate to move from an *ex post* to an *ex ante* margin squeeze test for this wholesale access service. This would result in an obligation to test any changes in the prices of existing retail offers or the prices of new retail offers launched by Telenor using the VULA fibre wholesale inputs, prior to them being offered to retail customers, in order to ensure that they do not result in a margin squeeze. Telenor's announcement in January 2019 is likely to increase the scope for competition in fibre and for this reason the Authority believes that Nkom should ensure that the migration to fibre does not result in a foreclosure of competition from access seekers.

Need to consider a granular geographic market analysis and civil engineering access in the next market review

While the Authority agrees with Nkom that a new market analysis was not required at this point in time, it would like to reiterate the need for a granular market segment analysis in the next market review. The Authority expects that the increased intensity of competition in fibre could result in changing market conditions, particularly at granular geographic level. For this reason, the Authority invites Nkom to ensure that such granular analysis of competition is included in the next market review round.

Additionally, the Authority would like to stress the need to consider access to civil engineering assets in the next market analysis. As indicated in the Code (*emphasis added*):

“Where civil engineering assets exist and are reusable, the positive effect of achieving effective access to them on the roll-out of competing infrastructure is very high, and it is therefore necessary to ensure that access to such assets can be used as a self-standing remedy for the improvement of competitive and deployment dynamics in any downstream market, *to be considered before assessing the need to impose any other potential remedies*, and not just as an ancillary remedy to other wholesale products or services or as a remedy limited to undertakings availing themselves of such other wholesale products or services.”¹⁰

A civil engineering access remedy could prove beneficial in Norway in the context of greater competition in fibre between alternative operators and also in light of the fact that Telenor is expecting to replace copper access with FMB, while other access seekers may have a preference for continuing to provide broadband services to these customers using the fixed infrastructure, for which they are likely to require civil engineering access. The

¹⁰ *Id.*, recital 187.

development of a civil engineering access remedy, including price regulation, is likely to require significant time and resources. For this reason, the Authority invites Nkom to consider such assessment as an integral part of the next market review, in order to ensure that, if considered appropriate by Nkom, the remedy is introduced with no delay relative to the market review.

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, Nkom 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,¹¹ 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 days¹² 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,

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¹¹ 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").

¹² The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.

This document has been electronically authenticated by Gjermund Mathisen, Gabrielle Somers.