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Norwegian Communications Authority (NKOM)
Postboks 93
4791 Lillesand
Norway

For the attention of:
Mr Torstein Olsen
Director

Dear Mr Olsen,

Subject: Wholesale market for access and call origination on public mobile telephone networks in Norway (former market 15)

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

I. PROCEDURE

On 11 May 2016, 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 Norwegian national regulatory authority, *Nasjonal kommunikasjonsmyndighet* (“NKOM”), concerning the wholesale market for access and call origination on public mobile telephone networks in Norway.²

The notification became effective on the same day.

A national consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 16 September 2015 to 2 November 2015.

On 25 May 2016, the Authority sent a request for information to NKOM,³ to which a reply was received on 30 May 2016. A second request for information was sent on 8 June 2016

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 15 of the EFTA Surveillance Authority Recommendation (No 194/04/COL) of 14 July 2004 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive (“the 2004 Recommendation”).

³ Pursuant to Article 5(2) of the Framework Directive.

and a reply was received on 9 June 2016.

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 13 June 2016.

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

NKOM previously notified the wholesale market for access and call origination on public mobile telephone networks in 2010.⁴ The market included access and call origination (outgoing voice calls) on public GSM and UMTS mobile networks at the wholesale level, access by prepaid cards/subscriptions and post-paid subscriptions, access for residential and business customers, originating SMS and other mobile data services. Access and origination on fixed networks, mobile broadband telephony and international roaming were excluded from the market. NKOM designated Telenor ASA (“Telenor”) as having significant market power (“SMP”) on the relevant market and imposed the following obligations: access (national roaming, mobile virtual network operator (“MVNO”) access and co-location), non-discrimination, publication of reference offers, accounting separation, as well as price and accounting controls (co-location at cost-oriented prices; the price control on national roaming was discontinued).

II.2. Market definition

In the present notification, NKOM defines five relevant retail markets as follows: 1) the residential market for bundled mobile telephony services;⁵ 2) the business market for bundled mobile telephony services; 3) the residential market for mobile broadband (“MBB”) services;⁶ 4) the business market for MBB services; and 5) the market for machine-to-machine (“M2M”) communication services in mobile networks.⁷

In the relevant derived wholesale market, NKOM includes access on all public GSM, UMTS and LTE networks, as well as origination of voice, text messaging and data services for the

⁴ See the Authority’s comments letter of 30 July 2010, Case No 68198, Event No 565977. The first round review was notified to and assessed by the Authority on 20 January 2006, Case No 68198, Event No 562254.

⁵ Bundled mobile telephony services include access, call origination, and origination of SMS, other mobile data services and international roaming.

⁶ Dedicated MBB refers to internet access provided via mobile networks independently of voice telephony and SMS services. According to NKOM, the price per GB for ordinary mobile subscriptions and for MBB subscriptions is converging. However, NKOM maintains MBB subscriptions as a separate market mainly due to the lack of integration of voice and SMS services in MBB subscriptions, limited availability of voice over LTE (Long Term Evolution), and product differences in terms of the amount of included data.

⁷ M2M services using mobile networks are not, in NKOM’s view, substitutable for ordinary mobile subscriptions but are produced with the same input factors as ordinary mobile services and thus constitute a closely related market at retail level. Telenor has currently a market share of above 90% of subscriptions for M2M communications in mobile networks.

following access types:

- national roaming access;
- MVNO access; and
- service provider access.

The above includes access to offer ordinary mobile services, MBB and M2M services but excludes international roaming. Access to co-location is also included in the relevant wholesale market.

NKOM considers the relevant geographic market to correspond to mainland Norway.

II.3. Evaluation of whether the wholesale market for access and call origination on public mobile telephone networks is still susceptible to *ex ante* regulation in Norway (the three-criteria test)

Pursuant to Article 2 of the Authority's 2008 Recommendation,⁸ the following three criteria must be cumulatively met in order for a market, which is not listed in the Recommendation, to be considered susceptible to *ex ante* regulation:

- The presence of high and non-transitory structural, regulatory or legal barriers to entry;
- A market structure which does not tend towards effective competition within the relevant time horizon; and
- The insufficiency of competition law alone to address the markets failure(s) concerned adequately.

With regard to the first criterion, NKOM takes into account the following factors: structural barriers to entry (control over infrastructure which is difficult to duplicate and sunk costs)⁹, economies of scale and scope, access to capital and sales channels, as well as regulatory barriers to expansion.

In this regard, NKOM notes that the well-developed networks of Telenor and Telia Norge AS (“Telia”) result in high consumer expectations for coverage and quality. NKOM assumes that, to be a competitive alternative, a new provider rolling out a network¹⁰ must be able to offer its end-users the same high coverage and quality as the established operators and will depend on access to existing infrastructure in establishing that network.¹¹ In

⁸ 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 C156, 9.7.2009, p.18 (“the 2008 Recommendation”).

⁹ With its distinctive topography and scattered dwellings, rolling out mobile networks in Norway requires very large investments. NKOM previously estimated the costs at around NOK 2 billion for an MVNO operator to become (by 2012) a national operator with its own radio network covering 75% of the population.

¹⁰ ICE Communications AS (“ICE”) has historically offered mobile broadband in the retail market based on its network with CDMA (Code Division Multiple Access) technology in the 450 MHz band, with a 75% geographical coverage, mainly in areas with scattered settlements and holiday properties (due to the characteristics of the frequency band in use). Following its receipt of extensive frequencies (as Telco Data) in the 800, 900 and 1800 MHz bands in the 2013 spectrum auction, ICE has upgraded its CDMA network with LTE and rolled out LTE in the 800 MHz band to cover 40% of the population. So far, ICE has only used this network for dedicated MBB services. ICE also launched traditional mobile telephony products in the retail market in 2015 based on wholesale access to Telia’s network.

¹¹ At the end of 2013, Mobile Norway (previously jointly owned by Tele2 Norge AS (“Tele2”) and Network Norway), had expanded its 2G/3G network to cover 75% of the population. Mobile Norway has since

addition, NKOM underlines that (following the multi-frequency spectrum auction in 2013) a shortage of available spectrum resources constitutes a high regulatory barrier to entry.

As to the second criterion, Telenor's wholesale market share¹² in 2015 in terms of voice traffic minutes amounted to 59%, whereas Telia had a market share of 41%. Telenor's market share based on data traffic via ordinary mobile subscriptions was 60% in 2015 and Telia's was 40% in the same period. At retail level, Telenor and Telia also cover around 90% of the market. In NKOM's opinion there is significant uncertainty as to whether ICE will be able to become an attractive provider of access within the forthcoming regulatory period.¹³ In addition, there is little indication that access buyers have significant buyer power, or that Telenor is disciplined by other operators on the supply-side of the relevant market.¹⁴ Therefore, NKOM concludes that there is insufficiently clear evidence of dynamics within the relevant time horizon which indicate that the market tends towards effective competition. The second criterion is therefore fulfilled.

Under the third criterion, NKOM analyses whether competition law alone could be sufficiently effective to remedy the market failures. In this respect, NKOM believes that there are general structural problems (as identified in the assessment of the preceding two criteria) and refusal of access and margin squeeze behaviour could have negative impacts or lead to irreversible damage on the market.¹⁵ NKOM therefore finds that there is still a need for predictable access. Further, any margin squeeze found in the relevant market could be handled, according to the NRA, more effectively and quickly under an *ex ante* regime. On this basis, NKOM deems the third criterion, and consequently the three-criteria test as a whole, to be fulfilled.

II.4. Assessment of significant market power

NKOM intends to designate Telenor with SMP in the wholesale market for access and call

discontinued its operations due to a lack of frequency resources following the 2013 spectrum auction. In 2014, Telia entered into an agreement with Tele2 for the acquisition of all shares in Tele2's Norwegian activities. The merger was approved by the Norwegian Competition Authority on 5 February 2015 subject to a number of conditions. These included ICE taking over Network Norway's customer base and parts of Mobile Norway's infrastructure, as well as the possibility for ICE to avail of national roaming and service provider access and co-location from Telia, together with the opportunity to acquire three Tele2 stores. In addition, Telia undertook to offer MVNO access more generally to Norwegian operators for a specified period.

¹² Traffic from MVNO providers and service providers is included in the traffic of the network owners. Market shares are described further in section II.4 below.

¹³ NKOM has specified a time horizon of two to three years for this draft decision. According to NKOM, ICE's position in the wholesale market during this time horizon will depend *inter alia* on the company's roll-out strategy, when it obtains a significant customer base, and the development of the national roaming terms over time. NKOM notes several elements of uncertainty in this respect and cannot assume, at this time, that ICE will be able to sufficiently discipline the established operators on the supply-side of the relevant wholesale market within the forthcoming review period. (See also footnote 10 above).

¹⁴ For example, NKOM notes that the wholesale access terms concluded between Telia and ICE as part of the Tele2 acquisition are relatively static in nature. The access agreement also does not include an obligation of non-discrimination and, from a forward-looking perspective, NKOM considers there is uncertainty regarding the development of the relationship between retail and wholesale prices over time. Telia's standard offer for MVNO access was also established as part of the acquisition and the requirement for it to offer MVNO access is due to expire at the end of 2016.

¹⁵ NKOM refers to a number of appeal cases during the last review period relating to co-location, discrimination, margin squeeze and appeals concerning Telenor's new standard agreement. The appeals were partly upheld and have led to legal requirements and infringement fines for Telenor due to excessive charges and denial of access.

origination on public mobile telephone networks in Norway.

In reaching its conclusion, NKOM relies, *inter alia*, on market shares, profitability, vertical integration, entry barriers associated with economies of scope and potential competition, as well as a lack of countervailing buyer power.

Since NKOM’s previous market review, Telenor’s retail market share in terms of both revenues and subscriptions (for both residential and business) has remained relatively stable at above 50%.¹⁶ Telia, by contrast, experienced declining retail market shares up to the acquisition of Tele2 and then, post-acquisition, experienced an increase in the first half of 2015 to 33% in terms of revenue and 38% in terms of subscriptions respectively.¹⁷

The table below also represents the wholesale market shares, both before and after Telia’s acquisition of Tele2, for mobile telephony subscriptions, originated voice minutes and data traffic via mobile telephony subscriptions for the years 2014 and 2015.

Wholesale Market Shares						
	Mobile telephony subscriptions		Originated minutes		Data traffic via mobile telephony subscriptions	
	2014	2015	2014	2015	2014	2015
Telenor	56%	58%	64%	59%	60%	60%
Telia	26%	42%	28%	41%	33%	40%
Tele2	18%		8%		6%	

Source: NKOM - Annex 1 of the notified draft measure + reply to the request for information

Telenor’s share of mobile telephony subscriptions in 2015 (58%) did not change significantly following Telia’s acquisition of Tele2. However, Telenor’s share of originated minutes declined from 64% in 2014 to 59% in 2015,¹⁸ while Telia’s shares increased from 28% to 41% due to the acquired Tele2 traffic. According to NKOM, the above changes in shares for originated minutes (and data traffic) cannot be attributed to competition as a result of attracting access buyers, but rather to the acquisition of Tele2.

Further, NKOM assesses profitability as a possible indicator of the ability to maintain prices higher than in a market with effective competition. While it does not have Telenor’s EBITDA¹⁹ figures for its Norwegian mobile operations alone,²⁰ NKOM is of the view that Telenor enjoys significantly higher profitability than Telia. Telenor’s figures have been stable over time and show a general improvement from the previous market review, which NKOM attributes largely to its mobile activity (or assumes at least that it does not give an overvalued picture of the profitability of its mobile operations). On the other hand, Telia’s EBITDA margin for its mobile operations has developed negatively since the previous market review, with the exception of a marginal increase in 2014. Furthermore, the difference between Telenor and Telia’s Average Revenue Per User (“ARPU”) for their respective mobile operations has widened in the period since the previous market review

¹⁶ Telenor’s market share based on revenue even increased by almost 4% since the previous market analysis in 2010.

¹⁷ Up from approx. 21% of revenue and 23% of subscriptions in 2014.

¹⁸ Telenor currently has no buyers of national roaming (following Telia’s acquisition of Tele2) but it has two buyers of MVNO access, TDC and Phonero, as well as nine buyers of service provider access.

¹⁹ Earnings before interest, taxes, depreciation, and amortization.

²⁰ In this respect, NKOM relies on Telenor’s publicly available data only.

with Telenor's customers generating more income per subscription throughout that period, even between 2014 and 2015 following the Telia / Tele 2 acquisition. It is uncertain, according to NKOM, to what extent the Tele2 acquisition will affect profitability in the forthcoming regulatory period, although it appears to have had a limited effect on Telenor's overall revenue to date. NKOM concludes that the assessment of profitability supports the conclusion that Telenor has SMP.

As regards vertical integration, NKOM is of the view that – due to customer perceptions regarding its coverage in terms of both population and geography - Telenor's retail and wholesale activities enjoy an advantage compared to other vertically-integrated operators (Telia and ICE).²¹ In addition, Telenor's ownership and control of underlying input factors (such as infrastructure for transmission capacity, location sites, etc.)²² and a broad range of services can also give Telenor advantages that no other operators can achieve.

In addition, NKOM recalls its conclusion under the second criterion of the three-criteria test that there is no clear evidence that the third network could sufficiently discipline the two established wholesale suppliers within the forthcoming regulatory period. It finds that there is also no evidence that the MVNOs, TDC and Phonero, would be able to exert buyer power on Telenor. According to NKOM, this is due to the limited customer base of the two MVNOs, as well as to exclusivity clauses during the agreement period limiting their ability to purchase access from other wholesale providers. With regard to ICE, its buyer power will also depend to a certain extent on what volume the company can offer when it withdraws from the agreement with Telia, which can also be expected to decrease as it rolls out its own network. NKOM further does not have sufficient evidence that competition from Telia (or its attractiveness to access buyers) will be significantly stronger than before. In its reply to the Authority's request for information, NKOM confirms that it has not observed any material changes in Telenor's access pricing or other terms and conditions of wholesale access following the Telia / Tele2 acquisition.

On the basis of the factors described above, together with the conclusions from the three-criteria test, NKOM intends to designate Telenor with SMP.²³

II.5. Regulatory remedies

NKOM proposes to impose the following regulatory remedies on Telenor as the SMP

²¹ NKOM notes that, when acquiring Tele2, Telia confirmed that there was "significant asymmetry between Telenor and TSN [Telia] when it comes to coverage, capacity and speed – the "quality" in the networks" and that "the most quality-conscious customers are loyal to Telenor". NKOM also notes that the preference for Telenor's coverage seems to be even stronger in the business market. While NKOM acknowledges an element of uncertainty regarding whether the asymmetry in the network quality and coverage will endure, it notes that customer perceptions of the networks will probably take some time to change. NKOM refers further, in its reply to the request for information, to recent capacity restrictions on the use of Telia's wholesale inputs by a new service provider, Banzai 4G AS ("Banzai"). The maximum amount of data that Banzai is permitted to offer in ordinary mobile subscriptions using Telia's wholesale input seems to be 5GB. According to NKOM, Telenor has not set restrictions on wholesale data volumes in its current access agreement.

²² To achieve high data speeds in mobile networks, the development is towards a larger share of fibre to the base stations. Unlike Telenor, Telia does not own its own fibre network and is therefore dependent on buying its transmission capacity from others.

²³ NKOM explains that the existence of individual dominance precludes the possibility of ascertaining collective dominance. Therefore, NKOM has not examined collective dominance.

operator:

- Access – Telenor will be required to meet all reasonable requests for national roaming access,²⁴ MVNO access,²⁵ service provider access and co-location. In relation to the service provider access obligation, which was not imposed in previous market reviews, NKOM explains in its reply to the Authority’s request for information that Telenor has incentives to deny effective wholesale access in order to restrict retail competition. NKOM also believes that Telenor is *de facto* offering access to service providers based on unreasonable terms (e.g. with reference to exclusivity requirements, unconditional and one-sided permission to make changes, and a pricing structure with potential exclusionary effects). In the absence of a fully-established third mobile network, NKOM considers that service providers could contribute competition and increased product diversity at service level and could, in the longer term, contribute traffic to a third network.²⁶ In relation to the obligation to offer co-location, this includes reasonable requests requiring capacity extensions for infrastructure. As part of the overall access obligation, Telenor will also be restricted *inter alia* from setting requirements for negotiation exclusivity and for exclusive purchase obligations at group level.
- Non-discrimination - Telenor should refrain from discriminating between its own operations and external buyers of regulated access and between external providers which use the same form of access. This includes *inter alia* a requirement to offer the above forms of wholesale access with an alternative that is based exclusively on variable prices.²⁷
- Transparency – Telenor will be required to publish reference offers for all of the above types of access. In addition, Telenor will be prevented *inter alia* from including terms in its reference offers that give it unconditional and one-sided permission to make changes, as well as from including any exclusive purchase obligations at group level.
- Accounting separation for national roaming (when Telenor receives a request for such access) and MVNO access.
- Price and accounting controls.

Regarding the price and accounting control, NKOM finds it appropriate to use margin

²⁴ According to NKOM, the national roaming agreement between ICE and Telia might be terminated within the forthcoming review period as there is uncertainty regarding the attractiveness of Telia’s terms for the entire period of the agreement (discussed further above). As ICE does not possess adequate negotiating power to discipline Telenor’s access offer, NKOM considers it necessary to have a regulatory requirement that would enable ICE to negotiate such access effectively.

²⁵ MVNO providers are, in NKOM’s view, important to the goal of sustainable competition.

²⁶ NKOM also notes a decline in independent service providers. Further, only Telenor and Telia currently offer service provider access and, in NKOM’s view, ICE’s terms of access to Telia’s network do not give it the possibility to offer sufficiently attractive service provider access and ICE has not concluded any service provider access agreements to date. In addition, there are no indications that MVNOs will establish meaningful wholesale activities over the coming years.

²⁷ In its reply to the request for information NKOM notes that, due to very limited fixed costs (in the long-run), a variable-only pricing model could better reflect the underlying cost structure and that such models still appear common in commercially-negotiated MVNO agreements. Further, in NKOM’s view, pricing models with fixed components (e.g. monthly fees per subscriber) could create more inefficiencies and limit the flexibility for access seekers to compete (as Telenor could influence competitiveness in the way it designs its tariffs). However, Telenor also has the possibility to negotiate other pricing models with access seekers (which could take up such offers if favourable).

squeeze tests²⁸ for the various forms of access to be conducted every six months as follows:

- A full margin squeeze test for agreements on national roaming, to be tested on the same range of representative retail products as for MVNO access (see below). NKOM does not intend to develop the full margin squeeze test for national roaming further at this time as ICE, which is currently the only potential purchaser of this form of access, is in a relatively long-term contract with Telia.
- A full margin squeeze test for MVNO access agreements: this test would be applied on a multi-market level²⁹ comprising: (i) a combination of the residential market for bundled mobile telephony plus the residential market for mobile broadband services, and (ii) a combination of the business market for bundled mobile telephony services plus the business market for mobile broadband services. The access agreement that complies with the obligation to offer variable prices only will be used as an input for calculating access costs. Further, the representative products / product portfolios that will be tested within the groups in points (i) and (ii) above are those that on aggregate constitute 70% of the number of subscriptions in each of the retail markets or on an individual basis constitute at least 10% of the number of subscriptions in the relevant retail market.³⁰
- A gross margin test for service provider access: this test will include the same range of representative products as for the MVNO margin squeeze test and will also use variable access prices. The individual products in this test must, however, show a positive gross margin. NKOM considers this a less stringent obligation which would provide sufficient opportunity for this group of access buyers to compete, while at the same time maintaining incentives to invest.
- In addition, for each form of access, Telenor is obliged to set prices that ensure a positive gross margin for each individual retail mobile product that Telenor is selling at the time of testing.³¹

NKOM explains in its reply to the Authority's request for information that the full margin squeeze tests for MVNO and national roaming and the positive gross margin test for service provider access may include discontinued products depending on subscription share. The positive gross margin test for all access forms will only include active products. The margin squeeze tests will start after the final decision enters into force, relying on data gathering on 1 April and 1 October of each year. If the decision enters into force in the near future, NKOM intends to gather data and to perform the test without delay, before the October deadline. Any failure to meet the above obligations will provide a basis for NKOM to order Telenor to correct its access prices and it may

²⁸ NKOM has developed principles for the various margin squeeze tests (Annex 2 of the notified draft measure) and a corresponding model (Annex 4 of the notified draft measure). These include basing the margin squeeze tests on the principle of an adjusted equally efficient operator ("adjusted EEO"). NKOM previously developed margin squeeze tests in 2013 to assess whether Telenor had applied discriminatory access terms in contravention of its non-discrimination obligation. However, NKOM's decision was cancelled by the Ministry of Transport and Communications on 26 November 2014 due to a lack of prior notification to the Authority.

²⁹ In its reply to the Authority's request for information, NKOM confirms that all access forms will be tested against retail services specified on a multi-market level and not for each individual retail market. The retail market for M2M communications services is not included in these multi-market (portfolio) margin squeeze tests. The Authority thus understands that the precise scope of the retail market definition has less immediate impact on the outcome of this market review process.

³⁰ NKOM assumes that this relevant sample of products / product portfolios will give a balanced and current picture of competition on the underlying markets.

³¹ NKOM clarifies that this obligation also applies to products which do not form part of the full margin squeeze test (e.g. M2M products). For this obligation, Telenor is to provide documentation of compliance upon request.

consider fines. In addition, NKOM proposes an obligation of cost-oriented prices for co-location.

III. COMMENTS

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

Risk that requirement for positive gross margin test on all active retail mobile products offered by Telenor is disproportionate and incompatible with EEA law

The Authority refers to Article 8(4) of the Access Directive³² that requires NRAs to impose remedies which are based on the nature of the problem identified and are proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Article 13(2) of the Access Directive further specifies that NRAs shall ensure that any pricing methodology that is mandated serves to promote efficiency and sustainable competition. Moreover, the Authority refers to Article 16(4) of the Framework Directive, which requires NRAs to impose appropriate regulatory obligations on SMP undertakings.

In this context, the Authority doubts that NKOM's proposal to perform a product-specific test, requiring a positive gross margin for each individual retail product that Telenor delivers across its mobile network, would strike the balance foreseen in the above-mentioned provisions. The Authority recalls that proportionality is a general principle of EEA law. According to NKOM, measuring gross margin at product level is a proportionate obligation to avoid the exclusion of alternative operators from specific parts of the market. However, this rationale is inconsistent with NKOM's rationale for performing the other margin squeeze tests at a multi-market level (which it considers the proportional level) rather than testing for individual retail markets.

If the product aggregation level in NKOM's general portfolio-based margin squeeze tests adequately reflects the anticipated scope of demand and supply conditions (and related entry decisions) for the services in question, then in principle it should not be necessary to perform this additional product-specific test. The Authority has concerns that NKOM's proposed product-specific positive gross margin test is disproportionate and unduly burdensome.

Further, given the current stage of market development in Norway, the Authority also questions the extent to which this requirement for a positive gross margin on every single mobile product offered by Telenor is consistent with the promotion of efficiency and sustainable competition. If NKOM's general portfolio-based margin squeeze tests are specified correctly, alternative operators should in principle have sufficient flexibility to compete efficiently across relevant markets/portfolios, assuming these are appropriately aligned with anticipated supply decisions over the regulatory period.

Pursuant to the above, the Authority has doubts regarding the compatibility with EEA law of NKOM's proposed requirement for a positive gross margin on all of Telenor's active retail mobile products. The Authority thus strongly urges NKOM to refrain from applying

³² 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 ("the Access Directive").

this overall product-specific gross margin test over the coming regulatory period.

Need to ensure clear and appropriate level of product aggregation in NKOM's National Roaming, MVNO and Service Provider margin squeeze tests and to test at that level of aggregation for each access form

In its notified draft measure, NKOM stated that the access buyer's margin may be calculated for each market included in the model or for multiple markets combined. However, further to the Authority's request for clarification on this point, NKOM confirmed that national roaming (if relevant), MVNO and service provider access will be tested for two multi-market portfolios / combinations only and not for individual retail markets (see section II.5 above). The service provider access test must, however, show a positive gross margin for every single product included in the relevant portfolio.

Against this background, the Authority invites NKOM to clarify in its final decision the precise level of product aggregation at which the margin squeeze tests for national roaming, MVNO and service provider access will be applied over the forthcoming regulatory period. The Authority also calls upon NKOM to ensure that its chosen level of product aggregation in the margin squeeze tests sufficiently reflects anticipated demand and supply conditions for the services in question, and, if not, to re-align the aggregation level (portfolio) accordingly, for example, based on a relevant product market defined in accordance with competition law principles.

In addition, the Authority doubts the proportionality and compatibility with EEA law of NKOM's proposal for the service provider test to require every single product within the representative portfolio to show a positive gross margin. If (as noted above) the relevant aggregation level in the portfolio test is specified in accordance with demand and supply conditions, the Authority (referring also to the competition problems identified by NKOM for this access category as set out in section II.5 above) does not see a need for this product-specific requirement. As for the preceding comment, the Authority calls on NKOM to refrain from applying this product-specific margin test for service provider access and to test the margin only at the relevant level of product aggregation identified in line with expected market conditions.

Need to justify variable access pricing obligations based on the nature of the competition problem(s) identified

In its reply to the Authority's request for information, NKOM sets out a number of reasons for requiring Telenor (as part of the non-discrimination obligation) to offer an access alternative that is based exclusively on variable prices and (as part of the price control) to perform margin squeeze tests using variable access prices only. This reasoning appears to largely reflect NKOM's perceptions of an efficient pricing structure in this market.³³ The Authority invites NKOM (pursuant to Article 8(4) of the Access Directive) to explain more precisely in its final adopted measure the nature of the competition problem(s) that these new requirements are specifically aimed at addressing and why they are deemed proportionate and justified and not unduly restrictive of wholesale pricing flexibility on a forward-looking basis.

³³ See footnote 27 above.

Need to monitor wholesale market developments very closely and to re-visit the market analysis without any undue delay

Telia's acquisition of Tele2 in 2015, and the wholesale access agreement concluded between Telia and ICE in that context, represent an important change in the wholesale market since the previous market review. The Authority notes NKOM's observations regarding market perceptions of Telenor's network coverage and capacity to date, as well as the recent nature of Telia's wholesale market share gains as a consequence of the acquisition. The Authority also recalls NKOM's views concerning the relatively uncertain nature of ICE's wholesale access agreement with Telia, including its concerns regarding the lack of a mechanism for a dynamic wholesale pricing structure over time. At the same time, in not specifying a full margin squeeze test for national roaming at this stage, NKOM relies *inter alia* on the fact that ICE is in a relatively long-term contract with Telia which appears partly inconsistent with the preceding observations.

However, taking account also of Telia's consolidated position in retail markets post-acquisition, the Authority notes further NKOM's concerns regarding Telia's potentially compromised incentives to offer effective wholesale access throughout the forthcoming regulatory period. In addition, NKOM has not observed any material changes in Telenor's access pricing or other terms and conditions of wholesale access following the Telia / Tele2 acquisition.

Against this background, and noting the ongoing development of the third mobile network in Norway, as well as the very recent nature of the Telia / Tele2 acquisition and the wholesale access agreements concluded in that context, the Authority calls on NKOM to establish a mechanism for monitoring the wholesale market very closely over the coming period. NKOM should, using its information-gathering powers under Article 5(1) of the Framework Directive, regularly assess key indicators in the wholesale market such as developments in available suppliers,³⁴ market shares, terms and conditions of access, profitability, etc.

Should this regular monitoring exercise reveal any tendency towards effective competition, absent *ex ante* regulation, NKOM should re-visit its analysis of this market (and re-consult at national and EEA level) without any undue delay.

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

³⁴ For example, if ICE was to start offering wholesale access and/or if buyers of MVNO access were to offer service provider access.

Authority may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation³⁵, 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 days³⁶ 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,



Olafur Johannes Einarsson
Director
Internal Market Affairs Directorate



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

³⁵ EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5c1 of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by 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").

³⁶ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.