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Case No: 82768  
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EFTA SURVEILLANCE  
AUTHORITY

Norwegian Communications Authority  
Postboks 93  
4791 Lillesand  
Norway

For the attention of:  
Ms Elisabeth Aarsaether  
Director General

Dear Ms Aarsaether,

**Subject: Market for wholesale high-quality access provided at a fixed location and the removal of obligations in the wholesale market for leased lines with capacities up to and including 8 Mbit/s in Norway**

**Article 7(3) of Directive 2002/21/EC (Framework Directive)<sup>1</sup>: No comments**

## I. PROCEDURE

On 1 November 2018, the EFTA Surveillance Authority (“the Authority”) received a notification of draft national measures in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Norwegian national regulatory authority, *Nasjonale Kommunikasjonsmyndighet* (“NKOM”). It concerns the market for wholesale high-quality access provided at a fixed location and the wholesale market for leased lines with capacities up to and including 8 Mbit/s in Norway.<sup>2</sup>

The notification became effective on the same day.

<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”).

<sup>2</sup> Corresponding to market 4 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, (“the 2016 Recommendation”) and formerly market 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”).

NKOM carried out a national consultation, pursuant to Article 6 of the Framework Directive, during the period from 12 January to 12 March 2018.

On 20 November 2018, the Authority sent a request for information (“RFI”) to NKOM (Document No. 1038356), to which a reply was received on 23 November (Document No. 1039885).

The period for consultation with the Authority and the national regulatory authorities (“NRAs”) in the EEA States, pursuant to Article 7(3) of the Framework Directive, expires on 3 December 2018.

## II. DESCRIPTION OF THE DRAFT MEASURE

### II.1. Background

In its previous market review in 2012,<sup>3</sup> the NPT<sup>4</sup> concluded that only leased lines with capacities up to and including 8 Mbit/s formed part of the market for terminating segments. NPT designated Telenor as an undertaking with significant market power (“SMP”) on that market and imposed the following set of obligations: (i) access; (ii) price and accounting controls: cost-oriented prices for wholesale leased lines, cost-oriented prices for co-location and other associated services, cost accounting system based on fully-allocated historical costs and cost accounts for co-location; (iii) non-discrimination; (iv) transparency; and (v) accounting separation.

The Authority had no comments as to the outcome of the market analysis.<sup>5</sup>

### II.2. Market definition<sup>6</sup>

As a starting point, NKOM has concluded at retail level that all types of capacity and data communication products that are offered to companies that require access products with greater functionality/quality than standard broadband subscriptions are included in this market. Dark fibre is not included in the retail market for high-quality access products.

As for the relevant wholesale market, NKOM’s former market 6, which NKOM had defined as the wholesale market for leased lines with capacities up to and including 8 Mbit/s, is now included within NKOM’s proposed market 4, which it defines more broadly as follows:

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<sup>3</sup> Case No. 71503.

<sup>4</sup> NKOM was formerly known as Post- og teletilsynet (“NPT”).

<sup>5</sup> Leased lines above 8 Mbit/s, wavelengths and dark fibre have thus not been regulated in Norway since 2012.

<sup>6</sup> In its reply to the RFI, and taking account of the new 2016 Recommendation, NKOM considered it appropriate to analyse new markets 3a, 3b and 4 within the same process, thus implying a delay in conducting an updated analysis of NKOM’s former market 6.

### *Wholesale high-quality access provided at a fixed location*

At wholesale level, all products that form the basis for high-quality access products in the retail market and which also satisfy specific requirements for product characteristics associated with quality, availability and service level, are part of the market, regardless of the capacity and technical interface of the dedicated connections. Wholesale sales of leased lines, optical channels and data communication services (including IP-VPN and Ethernet-VPN) are examples of products included in this market. Dark fibre does not satisfy the specified requirements for product characteristics and is therefore not included in this market.

The relevant geographic market is national.

### **II.3. Three-criteria test**

Since the market for wholesale high-quality access provided at a fixed location is a new market in the 2016 Recommendation, and it is only leased lines with capacities up to and including 8 Mbit/s that have been subject to sector-specific regulation in Norway since 2012, NKOM has found it appropriate to conduct a three-criteria test<sup>7</sup> to determine whether the market qualifies for sector-specific *ex ante* regulation in Norway.

Under the first criterion, NKOM has assessed structural and regulatory barriers to entry. Telenor is still the only provider in the Norwegian market with continuous, nationwide trunk and access infrastructure. The development of alternative access infrastructure has contributed to the reduction of entry barriers in recent years, but the alternative access infrastructure is still very fragmented and is primarily oriented towards offering standardised access products to the mass market. The barriers to entry are still particularly high for operators that want to compete with Telenor on nationwide services.

Therefore, NKOM concluded that Telenor's control over a nationwide access network is still a significant barrier to entry in the market and consequently the first criterion is met.

Under the second criterion, NKOM has assessed whether the market tends towards effective competition within the relevant time horizon. In particular, NKOM analysed the development in market shares at retail and wholesale level, price development, price differentiation, switching costs, lock-in mechanisms, barriers to growth and potential competition.

At wholesale level, Telenor had an overall market share of 47% for wholesale sales of capacity products and data communications in 2017 (external sales only); Broadnet is the second largest provider with a market share of 32%.<sup>8</sup> Telenor is also the largest provider at retail level with a 24% market share of end-user sales of capacity products and data communications services in 2017; however, the market share of Telenor's five largest

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<sup>7</sup> For a market to qualify for sector-specific *ex ante* regulation, three cumulative criteria must be satisfied: 1) the presence of high and non-transitory barriers to entry; 2) the market structure does not tend towards effective competition within the relevant time horizon; and 3) competition law alone is insufficient to adequately address the market failure(s) concerned.

<sup>8</sup> Telenor had a relatively stable market share in the period from 2013 to 2015 at just below 60% of wholesale sales, but decreased to 53% in 2016 and further to 47% in 2017. In the same period, Broadnet had a relatively stable market share at just below 30% of wholesale sales up to 2016, increasing to 32% in 2017, due, *inter alia*, to the acquisition of the Xfiber company. None of the other providers in this wholesale market had market shares exceeding 7%. At the same time, the 2017 figures showed increased market shares for several of the other providers in the wholesale market besides Telenor.

competitors was between 9-20% for the same period. NKOM considers that the market is thus characterised by effective competition despite the absence of wholesale regulation beyond current regulation of leased lines with capacities up to and including 8 Mbit/s. In addition, NKOM finds that there is significant potential competition in both the retail and wholesale market from the many local/regional fibre operators. Comparison between market shares at end-user and wholesale levels thus does not indicate, according to NKOM, that any possible market power in the wholesale market has been utilised to strengthen the position in the end-user market for high-quality access products. The competition in the end-user market therefore appears to be effective, even though competition at wholesale level is more limited, and despite the absence of regulation at wholesale level beyond the transfer capacity of up to and including 8 Mbit/s.

In its reply to the Authority's RFI, NKOM pointed to declining wholesale sales in the lower speed category and that the development in actual and potential competition from Broadnet, TDC and local/regional operators means that Telenor will have incentives to provide effective wholesale access to terminating segments of leased lines post deregulation. Furthermore, remedies available in markets 3a and 3b may help to mitigate possible concerns due to the more geographically fragmented nature of alternative operators' networks.<sup>9</sup>

Finally, NKOM concludes that other factors analysed under the second criterion<sup>10</sup> give no indication that the market does not tend towards effective competition, thus the second criterion in the three-criteria test is not satisfied.

The three-criteria test is therefore not satisfied for the market for wholesale high-quality access provided at a fixed location in Norway. Thus, NKOM concludes that this market does not qualify for sector-specific *ex ante* regulation.

#### II.4. Regulatory remedies

Given that the relevant market for wholesale high-quality access provided at a fixed location (market 4) does not qualify for sector-specific *ex ante* regulation, NKOM proposes to withdraw all remedies previously imposed on Telenor in the market for terminating segments of leased lines up to and including 8 Mbit/s (former market 6).<sup>11</sup> NKOM foresees a six-month transitory period before the withdrawal to allow operators to adapt.

### III. NO COMMENTS

The Authority has examined the notified draft measure and has no comments.

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<sup>9</sup> Market 3a comprises wholesale local access provided at a fixed location, while market 3b comprises wholesale central access provided at a fixed location for mass-market products. These markets were notified in parallel to the Authority under Case No. 82766 and Case No. 82767 respectively.

<sup>10</sup> With regard to price development, NKOM notes that standard list prices are not widely used in the retail market for high-quality access products. Since there is a large degree of heterogeneity between different customer needs for access solutions in this market, it is difficult to make price comparisons over a specific period of time. However, NKOM explains that two of the largest system integrators in the retail market that do not have their own access infrastructure have reported that they are experiencing increased competition at the wholesale level and that this has recently been reflected in some significant price reductions.

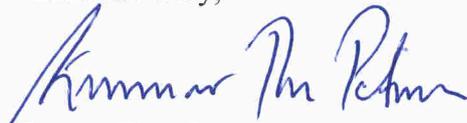
<sup>11</sup> As NKOM's proposed definition of the market for wholesale high-quality access provided at a fixed location (market 4) includes its former market 6, NKOM proposes to remove the obligations on Telenor in its former market 6 based on its finding that market 4 does not meet the three criteria test for *ex ante* regulation.

#### IV. FINAL REMARKS

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>12</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>13</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,



Gunnar Thor Petursson  
Director  
Internal Market Affairs Directorate



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

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<sup>12</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>13</sup> The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.