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Case No: 82766
Document No: 1039929

EFTA SURVEILLANCE
AUTHORITY

Norwegian Communications Authority
Postboks 93
4791 Lillesand
Norway

For the attention of:
Ms Elisabeth Aarsaether
Director General

Dear Ms Aarsaether,

**Subject: Case 82766 - Wholesale local access provided at a fixed location
Case 82767 - Wholesale central access provided at a fixed location for
mass-market products in Norway**

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

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 local access provided at a fixed location and the market for wholesale central access provided at a fixed location for mass-market products in Norway.²

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 5cl 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, (“the 2016 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 (“first RFI”) to NKOM (Document No. 1038356), to which a reply was received on 23 November 2018 (Document No. 1039885). An additional request for information (“second RFI”) was sent to NKOM on 23 November (Document No. 1039695) and a reply was received on 27 November 2018 (Document No. 1040209).

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.

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 last analysis of the market for wholesale local access provided at a fixed location and the market for wholesale central access provided at a fixed location for mass-market products was notified to and assessed by the Authority in 2013.³

At the time, the NPT⁴ concluded that market 4 of the 2008 Recommendation (“market 4”) included all relevant access technologies used to offer fixed broadband connections in the retail market, i.e. copper-based networks, cable TV networks, fibre and fixed radio access networks, and that it was national in scope. Both external sales and internal self-supply were included in the market. Leased lines and mobile broadband access were excluded. The NPT designated Telenor as an undertaking with significant market power (“SMP”) and imposed the following set of obligations: (i) access obligations, including full and shared access to the copper-based network, i.e. local loop unbundling (“LLU”) and sub-loop unbundling (“SLU”), access to fibre-based lines, access to backhaul, co-location and to information and support systems; (ii) price and accounting controls including a price cap of NOK 85 for copper-based LLU, cost-orientation based on fully-allocated historical costs for co-location and access to information and support systems, and for other relevant services associated with copper-based LLU, cost accounting for copper-based LLU and for co-location relating to both copper and fibre-based LLU access; (iii) non-discrimination; (iv) transparency; and (v) accounting separation (for fibre-based LLU).

The NPT defined market 5 of the 2008 Recommendation (“market 5”) as including the wholesale provision of broadband access products supplied via all relevant access technologies used to offer fixed broadband connections in the retail market, i.e. copper-based networks, cable TV networks, fibre and fixed radio access networks. The market covered all speeds offered by the wholesale provider’s retail business. Both external sales and internal self-supply were included in the market. Leased lines and mobile broadband access were excluded. The market was considered national in scope. The NPT designated

³ Case No. 74613; formerly markets 4 and 5 of the Authority’s 2008 Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (“the 2008 Recommendation”).

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

Telenor as an undertaking with SMP and imposed the following set of obligations: (i) access, including broadband access to copper-based and fibre-based networks, access to co-location and information and support systems; (ii) price and accounting controls, including cost-orientation based on fully-distributed historical costs for copper-based broadband access and for co-location and access to information and support systems, as well as cost accounting for copper-based broadband access and for co-location relating to both copper and fibre-based broadband access; (iii) non-discrimination; (iv) transparency; and (v) accounting separation (for fibre-based wholesale broadband access).

In its decisions, the NPT concluded that price controls were not necessary or proportionate for fibre-based wholesale broadband access in markets 4 and 5. Instead, it decided to impose an accounting separation obligation to ensure a follow-up of the non-discrimination requirement. Furthermore, the NPT stated that, if necessary, it would put in place “other suitable economic analyses such as margin squeeze tests”.

In its comments letter of 9 December 2013 on the NPT’s draft decisions for markets 4 and 5, the Authority commented, *inter alia*, on the need to ensure that commercially effective, fit-for-purpose wholesale access products were made available in respect of Telenor’s fibre-based broadband infrastructure without delay. Furthermore, the Authority commented on need to ensure equivalence of access (both technical and economic) to fibre-based infrastructure. On technical replicability, the Authority commented on the need to ensure that access seekers could use the wholesale access systems and processes with the same degree of reliability and performance as Telenor’s own downstream retail arm. On economic replicability, the Authority noted that, in the absence of a properly defined economic replicability test (“ERT”), the NPT might not be able to ensure a sufficient margin for replicability of retail offers by efficient competitors. The Authority therefore urged the NPT to develop and implement an *ex ante* ERT for broadband access products delivered over fibre-based infrastructure without further delay and to clarify the remedy it would adopt in the event that the ERT was not passed.

In July 2015, NKOM notified an ERT for VULA fibre (now re-named as VUA fibre) in market 5.⁵ In its reply, the Authority, *inter alia*, invited NKOM to review its choice of portfolio regularly in light of foreseeable market developments, to set out in detail the actions it intended to take in case the ERT was failed, and to implement the ERT without any further delay.

II.2. Market definition

As a starting point, NKOM considers that the retail market for standardised broadband access includes all fixed access technologies, i.e. copper, fibre, hybrid fibre coaxial (“HFC”),⁶ and fixed radio access networks (i.e. point-to-point and point-to-multipoint connections). Mobile broadband access and access products requested by companies that need access solutions with greater functionality and/or quality than provided by standardised mass-market products are not included in the relevant retail market.

NKOM then proposes to define the wholesale markets as follows:

⁵ Case No. 77605. VULA refers to virtual unbundled local access and VUA to virtual unbundled access; a key difference being that VULA products offer uncontended connections, whereas VUA products are contended.

⁶ HFC refers to a broadband network that combines optical fibre and coaxial cable; also referred to as cable TV networks.

Wholesale local access provided at a fixed location

Market 3a comprises access to physical wholesale products, as well as equivalent or comparable virtual wholesale products, in the copper and fibre networks, that have the following characteristics: (i) local access, (ii) a service-independent, “uncontended” connection, and (iii) the access buyer has control of the connection. Both external and internal sales are included in the relevant market. Leased lines and access products requested by companies that need access solutions with greater functionality and/or quality than provided by standardised mass-market products are not included.

The geographic market is defined as national.⁷

Wholesale central access provided at a fixed location for mass-market products

Market 3b comprises wholesale access at regional or central levels, and wholesale access offered at local level (which does not fulfil the other requirements for products in market 3a) via copper networks, fibre networks, HFC networks and fixed radio access networks. Both external and internal sales of wholesale products within the relevant fixed broadband technologies are included in the relevant market. Leased lines and access products requested by companies that need access solutions with greater functionality and/or quality than provided by standardised mass-market products are not included.

The geographic market is defined as national.⁸

II.3. Finding of significant market power*Wholesale local access provided at a fixed location*

NKOM intends to designate Telenor as an undertaking with SMP in market 3a, based, *inter alia*, on the following criteria: market share,⁹ an overall assessment of entry barriers, potential competition, prices, behaviour, and demand-side conditions.

Wholesale central access provided at a fixed location for mass-market products

NKOM intends to designate Telenor as an undertaking with SMP in market 3b, based, *inter alia*, on the following criteria: market share,¹⁰ an overall assessment of entry barriers, potential competition, prices, behaviour and demand-side conditions.

⁷ NKOM’s analysis showed no clear differences in retail competitive conditions in stable, clearly defined parts of the country to indicate that a geographic subdivision of the associated wholesale markets would be necessary. In its reply to the first RFI, NKOM also confirmed that there have been no geographic variations in wholesale prices applied by Telenor in former markets 4 and 5 since the previous market review.

⁸ See footnote 7 above.

⁹ Based on number of accesses at the end of 2017, Telenor had a market share of 53.5%, when both internal and external sales are included, and close to 100% of externally sold accesses. The equivalent market share was 66.3% at the end of 2014, which implies a reduction in market share of 12.8%. Lyse Fiber saw growth exceeding 2.6% in the same period and had a total market share of 16.1% at the end of 2017. Get had growth of 2.6% and a market share of 5.1%. The overall market share of other operators in the market increased gradually, and stood at 25.3% at the end of 2017. Given possible upgrading of the copper network in some areas, and Telenor’s increased focus on fibre, NKOM expects Telenor to be able to maintain a market share in excess of 50% during the timeframe of the analysis.

¹⁰ Based on number of accesses at the end of 2017, Telenor had a market share of 42.6%, when both internal and external sales are included, and close to 100% of externally sold accesses. The equivalent market share was 46.7% at the end of 2014, which implies a reduction of 4.1%. The market shares of Get and Lyse Fiber increased gradually during the same period and were 16.8% and 8% respectively, at the end of 2017. The

II.4. Regulatory remedies

NKOM proposes to impose the following set of obligations on the SMP undertaking:

Wholesale local access provided at a fixed location

- Obligation to accommodate any reasonable request for local, physical access to copper-based access networks (LLU and SLU);¹¹
- Obligation to provide VULA copper at least in the areas of Telenor's copper network that are being upgraded;¹²
- Obligation to accommodate any reasonable request for local, physical access to fibre-based point-to-point networks and any reasonable request for a local, virtual fibre-based access product (VULA fibre);¹³
- Obligation to provide access to the establishment of drop cables to "homes passed" in Telenor's established fibre network areas;¹⁴
- Obligation to provide access to backhaul services, co-location, cabling routes¹⁵ and information and support systems;
- Price control obligation –
 - i. long-run incremental cost ("LRIC") model for LLU and SLU access to the copper network;¹⁶
 - ii. margin squeeze tests¹⁷ for VULA copper and VULA fibre (no price obligation imposed in relation to local, physical access to the fibre-based access network)¹⁸;

overall market share of other operators increased by approximately 6% to 25% at the end of 2017. In the light of recent developments, as well as Telenor's declared focus on fibre and potential upgrading of the copper network, NKOM expects that Telenor's market share will remain in excess of 40% within the timeframe of the analysis.

¹¹ NKOM explains that, although the number of broadband accesses over the copper network is falling, the nationwide copper access network is still key and accounts for approx. 26% of retail accesses. For some providers, regulated access to Telenor's copper access network forms the main basis for retail activities.

¹² Telenor shall be obliged to provide access to VULA copper mainly at the Border Network Gateway ("BNG") level. Telenor shall furthermore be obliged to offer access to a local exchange with at least two ports reserved for external access.

¹³ NKOM considers that access at BNG level is the local connection level for fibre-based virtual access products. However, industry dialogue aimed at determining the functionality requirements for virtual local access in market 3a with regard to traffic prioritisation and service development will clarify the issue.

¹⁴ When Telenor establishes systematically-developed fibre access networks, there will generally be some potential customers in the development area that choose not to connect to the network during the establishment phase. Such potential customers are referred to as "homes passed". NKOM believes that it is proportionate to delineate an access obligation for the connection of "homes passed" to ensure that access seekers have equal opportunities as Telenor's own retail business, regardless of the distance from the established network to the household in question. Access buyers shall be given access to the same (up-to-date) "homes passed" list ("HP list") that Telenor's own retail business uses.

¹⁵ In its response to the Authority's second RFI, NKOM clarified that this includes access to ducts, manholes, pipes, poles and masts.

¹⁶ Resulting in monthly price caps for LLU as follows: 2019: NOK 73, 2020: NOK 75, and 2021: NOK 77.

¹⁷ Although not included in the present notification, it is proposed to align the margin squeeze tests for VULA copper and VULA fibre with the principles for the VUA fibre margin squeeze test, as further discussed in footnote 24 below.

¹⁸ NKOM notes that as the number of point-to-point fibre accesses in Telenor's network is very limited, it is not proportionate to impose price regulation. In 2015 and 2016 there were just under 2000 fibre accesses available for physical access and, while this increased to 5000 in 2017 following an acquisition, Telenor has indicated that the new fibre accesses will be converted to GPON during 2019-2020. In its reply to the first RFI, NKOM also noted that if the number of point-to-point fibre accesses were to increase and become a more substantial part of Telenor's network, NKOM would re-assess the conclusion not to impose price regulation.

- iii. cost orientation for other access (where not covered by the VULA margin tests) to backhaul, co-location, passive infrastructure and information and support systems based on fully-distributed historical costs;
- iv. establishment fee for connection of “homes passed” should not exceed listed price for Telenor’s own customers and any changes in Telenor’s listed price are subject to a two-month notice period.¹⁹
- Cost accounting obligation for local physical access to the copper-based network, as well as for co-location, including cable routes, and for backhaul services;
- Non-discrimination obligation in the form of equivalence of outputs (“EoO”) with a technical replicability test for new/substantially modified products;
- Obligation to publish a reference offer and key performance indicators (“KPIs”);
- Obligation to prepare service level agreements (“SLAs”) and associated compensation arrangements in form of service level guarantees (“SLGs”);
- Obligations regarding notice (three-year notice period if technology changes lead to a loss of existing wholesale access and a six-month notice period if a replacement wholesale access product is available) and fault correction policy; and
- Obligation of accounting separation for local, physical access to fibre-based access networks and for VULA fibre.

Wholesale central access provided at a fixed location for mass-market products

- Obligation to accommodate any reasonable requests for access to copper-based broadband access networks;
- Obligation to provide a virtual replacement product (VUA copper) at least in the areas of Telenor’s copper network that are being upgraded;
- Obligation to accommodate any reasonable request for central access to fibre-based access networks in the form of VUA fibre²⁰ (no access obligation for Telenor’s HFC network²¹ or for its fixed radio access network in market 3b²²);
- Obligation to provide access to “homes passed” as for market 3a above;
- Obligation to provide access to backhaul/transport services, co-location and information and support systems;
- Price control obligation -
 - i. price caps based on LRIC model for ADSL and VDSL services;
 - ii. prices for SHDSL broadband access products that do not deviate significantly from today’s level (no price caps modelled),²³

¹⁹ NKOM also states that Telenor’s own retail activity may not undertake a densification sale with the offer of a lower establishment fee than on the HP list at the time when the connection is offered to the end user.

²⁰ As for the VULA products, VUA products will mainly have a handover point at BNG level. NKOM will assess the need to maintain or adjust the obligation for access to VUA fibre, when the requirements for virtual local access in market 3a are determined.

²¹ NKOM notes technical challenges in making wholesale access available via Telenor’s HFC network, as well as that only a relatively limited (and potentially declining) number of HFC accesses would be available, with the vast majority covered by other access technologies. In its reply to the Authority’s first RFI, NKOM also stated that it would consider re-visiting its non-imposition of an access obligation on the HFC network if Telenor were to de-commission (parts of) its copper network in favour of HFC.

²² NKOM notes that Telenor’s offer of broadband access via fixed radio access remains very limited.

²³ SHDSL refers to symmetrical high-speed digital subscriber line. In its reply to the Authority’s second RFI, NKOM clarified that the number of SHDSL subscriptions has fallen by almost 20% from the end of H1 2017 to the end of H2 2018 and that the less strict price regulation is intended to reflect the market development.

- iii. margin squeeze test for VUA copper and VUA fibre;²⁴ and
 - iv. cost-oriented prices for the establishment of copper-based broadband access and other relevant supplementary services (where not covered by the VUA margin tests), including access to co-location, information and support systems and backhaul services, based on fully-distributed, historical costs.
- Cost accounting obligation for copper-based broadband access, as well as for co-location and backhaul services;
 - Non-discrimination obligation in the form of EoO with a technical replicability test as for market 3a above;
 - Obligation to publish a reference offer and KPIs;
 - Obligation to prepare SLAs and SLGs;
 - Obligations regarding notice (as for market 3a above) and fault correction policy; and
 - Obligation of accounting separation for VUA fibre.

In its reply to the Authority's first RFI, NKOM clarified that, in the event of any upgrading of the existing copper network, specifications and prices for VULA copper (in market 3a) and VUA copper (in market 3b) must be ready at the latest at the same time as Telenor notifies changes in the access network that entail the lapse of access already granted. Furthermore, the products must be available in time for delivery to the end customer no later than the date the physical access lapses. NKOM noted further its understanding that any decommissioning of the copper network in favour of fibre, HFC or LTE has been very limited to date.²⁵ As regards Telenor's fibre network, the VUA fibre product is currently available. However, NKOM cannot clarify precisely when the new VULA fibre product would be available for access seekers, as it depends on further discussions with the industry.

In relation to the "homes passed" obligation in markets 3a and 3b, NKOM clarified in its reply to the Authority's second RFI that it considers the proposed remedy justified and proportionate, taking into account, *inter alia*, the costs and risks that access seekers would face in constructing a drop cable. NKOM clarified further that setting the wholesale price cap for the establishment fee when connecting a home passed based on the fee charged by Telenor's own retail operations serves as a transparent proxy for the costs Telenor may be assumed to charge its own retail arm.

As concerns the proposal to impose an EoO obligation, rather than equivalence of inputs ("EoI"), in markets 3a and 3b, NKOM explained in its reply to the Authority's first RFI that it had requested and analysed documentation regarding Telenor's systems in connection to ordering, delivery and operation and maintenance ("O&M") of copper and fibre-based access products. The received documentation showed that Telenor's end-user business and

²⁴ The margin squeeze test for VUA fibre is included in the present notification. The portfolio in the margin squeeze test consists of the most commercially attractive "flagship" single/double/triple play products based on revenue and, to pass the test (performed twice a year), the portfolio as a whole and the gross margin on individual (standalone) products must be at least zero. Telenor will also report retail promotions/discounts for the flagship products for the purposes of the test. If the test is not passed, NKOM will normally require Telenor to correct the wholesale prices to a level that facilitates economic replicability.

²⁵ See also footnote 21 above regarding the anticipated development of the HFC network. As for LTE (long-term evolution), NKOM also recalls in its reply to the first RFI that Telenor is subject to wholesale access obligations for its mobile network in former market 15 of the Authority's 2004 Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation ("the 2004 Recommendation"). In the notification, NKOM also notes that it may be necessary to make a separate assessment of fixed-mobile broadband solutions if Telenor chooses to offer these in the future.

its access buyers have access to the same information via the same information lines, through different channels/interfaces. An important difference between Telenor's end-user business and the access buyers proved to be the functionality of the channels/interfaces. NKOM therefore made it clear that Telenor must offer wholesale products to external access buyers with the same price, functionality and conditions as apply to Telenor's internal retail operations. The draft decisions also state that system access, delivery, fault correction and migration are examples of aspects where there must be no discrimination between Telenor and external buyers of access. As a further precaution to avoid that the different interfaces lead to discrimination between internal retail operations and wholesale customers, NKOM has proposed to maintain the obligation on Telenor to report on core KPIs related to delivery and O&M. Furthermore, NKOM has imposed on Telenor a requirement to notify it as early as possible of any major technology changes, including major IT projects of relevance to both wholesale markets. NKOM considers that imposition of EoI would require major investments on the part of the SMP operator and would therefore not be proportionate.

III. COMMENTS

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

Evolution of competition from fibre and decreasing interest in copper investments

The Authority notes the growth in take-up of fibre-based broadband services in Norway, the ongoing rollout of fibre infrastructure by different providers, and Telenor's decreasing interest in upgrading the copper network. In this regard, the Authority invites NKOM to monitor the market closely during the forthcoming regulatory period. This includes taking into consideration any material changes in consumer preferences and competitive dynamics, including at a granular (market segment) level, with a view to identifying at the time of the next market review whether or not an effective chain of substitution is still present and/or if remedies²⁶ need to be adapted to reflect any changing competitive conditions.

Need to notify product characteristics and prices of virtual access products under Article 7 of the Framework Directive without delay

The Authority notes that NKOM does not foresee further national/EEA consultation with regard to the product characteristics of the VULA/VUA copper access products, although the consultation on the VULA fibre product may lead to some adjustments in the VULA copper product. In addition, NKOM cannot confirm a precise timeline for defining the final requirements of the VULA fibre product, albeit with indications for the end of Q1 2019. There is also no concrete timeline specified for consulting on the final margin squeeze tests for the VULA/VUA copper and VULA fibre products.

With a view to ensuring a timely introduction of all virtual offers necessary (in the event of underlying technology changes) for access seekers to compete effectively on the related retail broadband market(s), the Authority asks NKOM to clarify more precisely in its final measure the timeline for ensuring effective functional substitutes for physical and non-physical access products in Norway, in terms of both technical characteristics and pricing. In this respect, the Authority also reminds NKOM of its obligation stemming from the regulatory framework to notify measures falling under the scope of Articles 15 or 16 of the Framework Directive. The objective of this obligation is to analyse if such measures comply with EEA law, including the objectives foreseen in Article 8 of the Framework Directive,

²⁶ Depending on the outcome of any future competition assessment.

or if they create barriers to the internal market. The Authority therefore urges NKOM to proceed with finalising the implementation of the VULA/VUA obligations. This includes carrying out related consultations (under Article 7 of the Framework Directive) on the final details of the technical characteristics and pricing of such access products without any undue delay.²⁷

Need to reconsider pricing obligation for providing access to drop cables

The Authority notes that NKOM proposes to impose a specific obligation on Telenor to extend its fibre network, at the request of competing operators, by providing a connection to “homes passed” in Telenor’s established fibre network areas, as described in section II.4 above. The obligation shall apply regardless of the distance from the established network to the household in question, based on a HP list that Telenor’s own retail business uses. In this regard, the Authority invites NKOM to include additional proportionality considerations in its final measure, such as those set out in its reply to the Authority’s second RFI, in order to show that the proposed obligation is based on the competition problem identified and is the least intrusive measure available.

In addition, the Authority invites NKOM to reconsider its proposal to set its proposed wholesale price cap for the establishment of the drop cable to homes passed based on Telenor’s own retail charge for this component. The Authority has concerns that the proposed approach risks limiting retail pricing flexibility, as well as potentially reducing overall competitive uncertainty and tension on an important cost factor in the retail market. The Authority therefore asks NKOM to assess if alternative wholesale pricing mechanisms may be more appropriate and justified in that regard.

Effective monitoring of the non-discrimination obligation to ensure technical replicability

The Authority notes that NKOM intends to impose a non-discrimination obligation in the form of EoO rather than EoI. As stated in the Commission Recommendation on consistent non-discrimination obligations and costing methodologies,²⁸ EoI is in principle the surest way to achieve effective protection from discrimination. This is because access seekers will be able to compete with the downstream business of the vertically-integrated SMP operator using exactly the same set of regulated wholesale products, at the same prices and using the same transactional processes.

The Authority acknowledges NKOM’s view that the imposition of EoI in the Norwegian context would be disproportionate. At the same time, NKOM’s reply to the Authority’s first RFI demonstrates that, even in the presence of existing non-discrimination and KPI reporting obligations, the assessment of Telenor’s systems and routines in 2017 indicated that its channels/interfaces still had more fault-handling functionality and were more automated than those available to access buyers. In this regard, the Authority invites NKOM to make sure that appropriate safeguards and monitoring processes are in place to confirm an effective operation of the non-discrimination obligation (and that NKOM acts

²⁷ In that respect, the Authority welcomes NKOM’s commitment in its reply to the first RFI to require Telenor to develop the new VULA fibre product without undue delay and to set deadlines accordingly.

²⁸ Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L 251, 21.9.2013, pp. 13-32 (“Commission Recommendation on consistent non-discrimination obligations and costing methodologies”).

swiftly in the event of any disputes) such that technical replicability of Telenor's offers is ensured for the forthcoming regulatory period.

Need to monitor the impact of the costing methodology for copper access prices

NKOM proposes to continue to use a historical cost accounting approach for copper LLU, mainly with a view to ensuring stable and predictable wholesale prices over time, as well as to avoid an over-recovery of costs on Telenor's copper network services because of a change in costing approach during the lifetime of the assets.

The Authority recalls previous comments²⁹ by the European Commission that a model based on historical costing principles for all assets may not send appropriate build or buy signals, in particular when pricing access for legacy assets that may have been substantially depreciated, but which could be replicated in the competitive process (such as technical equipment or the transmission medium). The European Commission has noted that the more common BU LRIC+ model³⁰ with current cost accounting used by other NRAs, and recommended in the Commission Recommendation on consistent non-discrimination obligations and costing methodologies, is considered likely to meet that objective. At the same time, the European Commission has indicated that for civil engineering assets that are unlikely to be replicated in the competitive process, it may be appropriate to take into account the elapsed economic lifetime of the assets and the costs already recovered by the SMP operator.

The Authority recognises that demand for copper-based access services is currently decreasing and the rollout and take-up of fibre-based services is increasing in Norway, with Telenor also indicating further investment plans for fibre and a reduced interest in upgrading the copper network. In addition, the Authority notes that a flexible form of price control (i.e. margin squeeze tests) is proposed for access services delivered via Telenor's fibre and upgraded copper network infrastructure. NKOM also notes that existing regulation based on historical costing principles for copper network access has not had unintended negative consequences for investment and that fibre investments are high in Norway. Notwithstanding this, the Authority calls on NKOM to monitor the impact of the proposed wholesale copper access prices closely and to be prepared to review its price control remedy if investment incentives and infrastructure competition do not develop in the direction envisaged.

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.

²⁹ See, for example, Case No. LT/2015/1821.

³⁰ BU LRIC refers to bottom-up long run incremental cost.

Pursuant to Point 15 of the Procedural Recommendation,³¹ 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 days³² following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information that 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

³¹ 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").

³² The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.