

Decision concerning the market for wholesale high-quality access provided at a fixed location (Market 4) and the removal of obligations in the wholesale market for leased lines with capacities up to and including 8 Mbit/s (former Market 6)

Case 1505331

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Summary

Based on the analysis of the market for wholesale high-quality access provided at a fixed location (Market 4), cf. Annex 1, the Norwegian Communications Authority (Nkom) has concluded that this market does not qualify for sector-specific ex ante regulation. Nkom has conducted a so-called three-criteria test, and found that the second of the three cumulative criteria that must be met in order to impose sector-specific ex ante regulation cannot be said to be satisfied. The market for wholesale high-quality access provided at a fixed location will therefore not be regulated.

The wholesale market for terminating segments of leased lines (former Market 6) which, in accordance with national conditions, Nkom has defined as the wholesale market for leased lines with capacities up to and including 8 Mbit/s, is now included in the definition of Market 4. In Nkom's decision of 20 April 2012, Telenor ASA (Telenor) was designated as a provider with significant market power and was imposed specific obligations in the wholesale market for leased lines with capacities up to and including 8 Mbit/s. Based on the conclusion in the analysis, there are no longer grounds for continuing this sector-specific regulation. Nkom therefore adopts a decision stating that the obligations imposed on Telenor in the above-mentioned decision are removed.

To ensure that the affected providers have the opportunity to adapt to a deregulated market, Nkom is of the view that it is reasonable to impose a transitional period of six months after Nkom adopts a decision to remove obligations in the wholesale market for leased lines with capacities up to and including 8 Mbit/s

Contents

- 1 Introduction and background..... 4
- 2 Decision on Market 4..... 5
- 3 Removing current specific obligations in the former Market 6. 5
- 4 Consequences of removing the obligations 6
- 5 Need for transitional period and the decision’s date of implementation 7
- 6 Appeal..... 8

Annex 1: Analysis of the market for wholesale high-quality access provided at a fixed location (Market 4)

Annex 2: The result of the consultation process for Nkom’s notice of decision concerning the market for wholesale high-quality access provided at a fixed location (Market 4) and the removal of obligations in the wholesale market for leased lines with capacities up to and including 8 Mbit/s (former Market 6)

Annex 3: Response from ESA

1 Introduction and background

Pursuant to Section 3-2 and 3-3 of Act no. 83 of 4 July 2003 relating to electronic communications (the Electronic Communications Act), Nkom is obligated to analyse the various markets for electronic communications and identify undertakings with significant market power. If one or more undertakings are designated as having significant market power, at least one obligation shall be imposed over and above the general obligations pursuant to the Electronic Communications Act and associated regulations. In Nkom's decision of 20 April 2012, Telenor was designated a provider with significant market power and directed to meet specific obligations in the wholesale market for leased lines up to and including 8 Mbit/s (former Market 6).

Nkom has conducted an analysis of the market for wholesale high-quality access provided at a fixed location, cf. Annex 1. This analysis was carried out in accordance with the Recommendation of the EFTA Surveillance Authority (ESA) of 11 May 2016 concerning relevant markets for ex ante regulation (the Recommendation). The wholesale market for high-quality access to fixed access networks constitutes Market 4 in the Recommendation. The market is based on Market 6 in ESA's previous recommendation regarding relevant markets, but is now focused on wholesale products that allow buyers of access to offer services to companies that need greater functionality/quality than is provided by the standard access products in the mass market.

Even though the market for wholesale high-quality access provided at a fixed location is included in ESA's current Recommendation, national regulatory authorities have the option of conducting a three-criteria test to assess whether national market conditions suggest that sector-specific ex ante regulation remains justified in the relevant markets. In the analysis, Nkom has chosen to conduct a three-criteria test for the market for wholesale high-quality access provided at a fixed location (Market 4), because the market definition was changed in the Recommendation and the market development suggests that there is a need to assess whether this market qualifies for sector-specific ex ante regulation. Nkom's conclusion in the three-criteria test is that this market does not qualify for sector-specific ex ante regulation, because the second of the three cumulative criteria cannot be said to have been met.

Since Nkom has concluded that Market 4 does not meet the three criteria for sector-specific ex ante regulation, there are no grounds for conducting new market analyses with a view to clarifying whether any one provider has significant market power. As mentioned in Annex 1, Section 1.1, Market 4 will include products in the former Market 6. There are therefore also no grounds to continue the conclusion in Nkom's decision of 20 April 2012 (former Market 6) in which Telenor was designated as a provider with significant market power in the market for leased lines with capacities up to and including 8 Mbit/s and had specific obligations imposed. On this basis, Nkom withdraws the designation of Telenor as a provider with significant market

power in the wholesale market for leased lines with capacities up to and including 8 Mbit/s and removes the obligations that were imposed on Telenor.

From 12 January 2018 to 12 March 2018, Nkom conducted a national consultation process concerning Market 4 and the removal of obligations in the former Market 6. The consultation is summarised in Annex 2.

In the light of the national consultation, Nkom prepared a draft decision concerning Market 4 and former Market 6. The draft was translated into English, and notified to ESA on 1 November 2018, cf. Electronic Communications Act Section 9-3, the Framework Directive Article 7 and ESA's Article 7-recommendation¹. ESA submitted its response to Nkom's notification on 3 December 2018, cf. Annex 3. ESA had no comments.

2 Decision on Market 4

As stated in the analysis in Annex 1, Nkom's conclusion is that the three-criteria test has not been satisfied for the market for wholesale high-quality access provided at a fixed location in Norway. The three-criteria test consists of three cumulative criteria, i.e. all three criteria must be satisfied for a market to qualify for sector-specific ex ante regulation. Nkom is of the view that the first criterion has been satisfied, but has concluded that the second has not been satisfied.

On this basis, Nkom finds that the market for wholesale high-quality access provided at a fixed location does not qualify for sector-specific ex ante regulation.

3 Removing current specific obligations in the former Market 6.

In the Market 6 decision of 20 April 2012, Telenor was designated as an undertaking with significant market power in the wholesale market for leased lines with capacities up to and including 8 Mbit/s. Some of the most important obligations imposed on Telenor in the decision were:

- Obligation meet any reasonable request for access to wholesale leased lines up to and including 8 Mbit/s, cf. Section 4-1 of the Electronic Communications Act. Such access also included access to co-location and any other necessary additional services, cf. Section 4-4 of the Electronic Communications Act.

¹ EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

- Obligation to cost-orient the prices for access to co-location and any other necessary additional services requested as part of the establishment of leased lines in Market 6, cf. Section 4-9 of the Electronic Communications Act.
- Obligation to compile cost accounts for lines in Market 6, cf. Section 4-9 of the Electronic Communications Act.
- Obligation to compile cost accounts for co-location, cf. Section 4-9 of the Electronic Communications Act.
- Obligation of non-discrimination, both between external operators and between internal and external operators, cf. Section 4-7 of the Electronic Communications Act.
- The obligation to prepare a reference offer, including prices, price calculation methodologies and any discounts and discount criteria for wholesale leased lines with capacities up to and including 8 Mbit/s. The reference offer shall be published, cf. Section 4-6 of the Electronic Communications Act.
- Obligation to adopt an accounting separation system in Market 6 through which the accounts of a network undertaking that produces and supplies leased lines with capacities up to and including 8 Mbit/s in the wholesale market are separated from Telenor's retail business that supplies leased lines with corresponding capacities in the retail markets, cf. Section 4-8 of the Electronic Communications Act.

In light of the conclusion above that the market for market for high-quality access provided at a fixed location does not qualify for sector-specific ex ante regulation and since the former Market 6 is included as part of this market, Nkom cannot see that there are grounds for continuing these obligations for leased lines with capacities up to and including 8 Mbit/s. Based on this, Nkom removes the obligations relating to these wholesale products.

4 Consequences of removing the obligations

The current obligations imposed on Telenor in the wholesale market for leased lines with capacities up to and including 8 Mbit/s are designed to avert competition problems associated with, among other things, various forms of discriminatory behaviour and overpricing. In Nkom's view, the importance of the competition problems in this market has decreased compared with the previous situation, see Section 3.4 in Annex 1. The deregulation of Telenor's services in this market will therefore have limited consequences. Nkom sees no evidence that the competition in the market is negatively affected to any degree, while the competition problems that the current regulation is intended to counteract have to a large extent been reduced since the previous decision.

The demand for products in the former Market 6 has declined in recent years as there has been a transition towards products with higher capacity and/or other features (including optical channel, dark fibre and data communication services). Nkom believes that this development will continue. There are also more providers than previously that are able to supply access products in different parts of the country. This indicates that Telenor still has incentives to offer products in former Market 6 on market terms, even though the company no longer will be subject to regulation for this type of products. Reduced demand and multiple potential providers of alternative products also indicate that the consequences of repealing the regulation in the wholesale market for leased lines with capacities up to and including 8 Mbit/s will be limited.

Nkom also refers to the fact that Telenor will still be regulated in the wholesale markets for local and central access, respectively, provided at a fixed location (Markets 3a and 3b). This means that Telenor still will be mandated to give access to copper- and fibre-based access networks, e.g. in the form of LLU and Broadband Access. Alternative providers could in many cases consider using this type of products in order to complement their own infrastructure.

Since the competition problems in the market have decreased in importance, Nkom also believes that general competition law will be more effective in counteracting any competition problems relating to any discriminatory behaviour that may still arise in the market. In view of this, Nkom believes that the absence of sector-specific ex ante regulation will not have any significant adverse consequences as regards the competition in the market even if competition problems could potentially still arise.

5 Need for transitional period and the decision's date of implementation

With regard to removing imposed obligations, Article 16 of the Framework Directive sets a requirement that affected parties are to be notified in order to ensure that they are given a reasonable transitional period, cf. paragraph 114 of ESA's Guidelines². ERG's guidelines on remedies³ place emphasis on the need for a transitional period to be based on an assessment of potential consequences, particularly in the retail market. The ERG report on the transition from sector-specific regulation to ordinary competition regulation⁴ gives further guidelines and emphasises the degree to which removal of the existing regulation affects other providers. The purpose and length of a transitional period shall, in this respect, give alternative service providers an adequate opportunity to adapt to a new market situation without sector-specific ex ante regulation. With regard to what is considered an adequate transitional period, ERG's

² EFTA Surveillance Authority Guidelines of 14 July 2004.

³ ERG (06) 33, Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework. (In 2009 ERG was replaced by The Body of European Regulators for Electronic Communications (BEREC).

⁴ ERG (09) 40 ERG Report on Transition from sector-specific regulation to competition law.

report states that it normally should not be as long as a normal decision period (2-3 years). Affected providers must have time to readjust and the opportunity to negotiate new agreements with Telenor or enter into agreements with other providers in the market.

Nkom considers a transitional period of six months after the decision is made to suffice. In addition, the consultation period that followed the notification of the decision and the time that Nkom took to prepare a final decision, including notifying the ESA, have given the operators concerned more time to adapt to deregulation of the market. Nkom therefore decides that the obligations in Nkom's decision of 20 April 2012 (former Market 6) be removed six months from the date of the adoption of this decision.

Telenor is ordered to compile cost accounts for leased lines and co-location in the former Market 6 and accounting separation in the former Market 6. The final reporting of cost accounts and accounting separation in the former Market 6 will be for 2018, with reporting by 1 July 2019.

With regard to the obligation to compile cost accounts for co-location, Telenor has compiled joint cost accounts for co-location in the former Markets 4, 5 and 6. As a matter of form, it is noted that the obligation to compile costs accounts for co-location in the former Markets 4 and 5 will be continued, cf. decisions in Markets 3a and 3b.

6 Appeal

The decision may be appealed, cf. Section 11-6 of the Electronic Communications Act, and Section 28 of the Public Administration Act. The deadline for appealing decisions is normally three weeks, cf. Section 29, first paragraph, of the Public Administration Act. Due to the coming Christmas period and public holidays, Nkom believes that there are grounds for an extended appeal deadline, cf. Section 29, fourth paragraph, of the Public Administration Act. The deadline for appeal is therefore set at five weeks from the decision date. Appeals must be addressed to the Ministry of Transport and Communications but should be sent to the Norwegian Communications Authority. Only the Ministry of Transport and Communications may make a decision on deferred implementation of the decision, cf. Section 11-6 (4) of the Electronic Communications Act and Section 42 of the Public Administration Act. If, during any appeal, implementation of the decision is postponed, the removal of existing obligations will be postponed until a final decision on the appeal.