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Hearing - principles for MST in Market 4 and 5 - NextGenTel's statements

1 Introduction

NextGenTel refers to Nkom's letter dated February 10, 2015 regarding a hearing of principles for a Margin Squeeze Test (MST) for LLUB and Broadband access in Market 4 and 5 within the regulatory framework for electronic communication. The principles are developed in a report by WIK Consult prepared for Nkom. The deadline for submitting comments was set to March 9, 2015. NextGenTel submitted comments to this hearing in letter of March 9, 2015.

Interested parties are invited to present new comments on the principles, taking into account the comments already presented by interested parties in the initial hearing. For our general comments to the principles, NextGenTel refers to the comments presented in the letter of March 9, 2015.

In the present letter NextGenTel has focused on the submitted comments by Telenor in their letter of March 9, 2015. For this reason we will follow Telenor's systematics limited to those subjects where we have comments.

2 General Comments

NextGenTel remarks that Telenor uses the opportunity to present arguments against the regulation of fibre access on the ground of investment-incentives. NextGenTel's understanding is that the regulation of such access is already decided, and is off-topic with respect to the current hearing. Hence, NextGenTel will not comment upon this issue but instead refer to the argument presented by NextGentel and other parties earlier in favour of such regulation.

However, at a general level, NextGenTel notice that Telenor seems to be concerned with its own investment incentives, and the role of predictability to facilitate such incentives. NextGenTel would like to point out that predictability in terms of reduced risk for Telenor, in many cases, means increased risk and lack of predictability for Telenor's wholesale customers, such as NextGenTel.

Transferring risks from Telenor to Telenor's wholesale customers will discourage the investment incentives by Telenor's wholesale customers. NextGenTel would like to point of that Telenor's investment in infrastructure under almost any variation of the MST, is safe relative to the risk faced by

Telenor's wholesale customers. Hence, it seems that the marginal benefit from providing predictability for Telenor's wholesale customers exceed the resulting marginal cost imposed on Telenor.

Consequently, Telenor's arguments with respect to investment incentives are imbalanced, and are likely to be contrary to overall investment incentives.

3 The level of efficiency

Telenor argues that a MST based on Equally Efficient Competitor (EEC) modified to take into account altnet's costs is a Reasonably Efficient Competitor Test (REC). According to Telenor, this is contrary to the purpose of the regulation. Telenor argue that a pure EEC test should be applied.

NextGenTel disagrees with Telenor's opinion on this matter. NextGenTel will in this case point out that procedural efficiency is an additional argument for altnet specific costs to be used as a benchmark. The reason is that while Telenor has an incentive and opportunity to conceal and understate costs, altnets have neither the incentives nor the opportunities to conceal costs. An altnet has an incentive to provide Nkom with necessary cost data to perform an MST. The relative more simple and limited operations associated with altnet's reduces any opportunity to conceal or manipulate cost elements.

Consequently, even if one would agree that EEC is the correct benchmark for assessing MST, using altnet's cost the relevant benchmark, subject to the possibility of rebuttal by Telenor, one would create an enforcement system that provides Telenor with an incentive to credible present its real costs.

4 The business model

In this section NextGenTel will only address Telenor's comment regarding the Market Share to be used in the MST. Telenor seems to have a unilateral focus on technology in addressing the efficient market share. NextGenTel would like to point out that different suppliers may have different efficient scales depending on technological, operational and business strategies and models.

This means that other suppliers may be efficient with a lower market share than Telenor. NextGenTel support the WIK report's choice of market share, or an even lower market share. This will contribute to efficient competition among efficient supplier subject to different technological and operational constraints.

5 Relevant retail products and markets

Telenor seems to disagree with the WIK report in basing user profiles for the MST test on parameters not only on profiles provided by Telenor, but also on the user profiles of altnets' customers.

NextGenTel disagrees with Telenor's position. If the MST should have any realistic opportunities in detecting and deterring margin squeeze harmful to competition and ultimately consumers, NextGenTel finds it paramount to base the test on a realistic measurement of the actual competition in the markets. This means that the actual user profiles of altnets' customers should be taken into account in the MST.

6 Relevant time frame and methodology for running the test

With respect to the timeframe for the MST, Telenor argue for a Discounted Cash Flow (DCF) test rather than the proposed steady state test.

NextGenTel strongly opposes the DCF test suggested by Telenor. Firstly, a DCF test may, dependent on how it is constructed leave substantial discretion to Telenor in shaping the outcome of the test, leaving Telenor's wholesale customers with a corresponding uncertainty.

Furthermore, NextGentel will point out that a DCF may fail to detect a margin squeeze. If Telenor's cash flow includes a "margin squeeze period" and a corresponding recoupment period, the test will fail to detect margin squeeze as there is no margin squeeze according to the test.

NextGenTel's position is that the relevant time period used for assessing MST as far as possible should reflect the problem associated with a margin squeeze, which is depriving consumers from the benefits of competition by making impossible to profitable compete for consumers on the merits. Hence, NextGenTel finds that steady-state approach based on average user life time is likely to perform better than the DCF approach suggested by Telenor.

7 The relevant cost standard

Telenor argue against the application of LRIC+ suggested in the WIK Report and Commision's guidance. Telenor argue that common costs should not be included in the test by instead applying an avoidable cost or incremental costs standard not including common costs.

NextGenTel disagrees with Telenor's position. Telenor, due to its size and scope, has larger possibilities than other market participants to recover common costs from other services. Telenor may find it profitable to operate with prices not covering common cost in the relevant product markets for a time frame sufficient to drive competitors out of the market.

NextGenTel opinion is that the LRIC+, or ideally a fully distributed cost standard, should be applied in the MST.

8 The reasonable profit

The WIK Report suggests that a WACC of 8.9 percent is a reasonable standard in assessing the profitability of an altnet in the MST. Telenor suggest this number to be lower.

NcxtGenTel cannot see how a lower WACC can be applied as a standard if there is to be competition in markets based on inputs from market 4 and 5. If Telenor leaves margins for competitors that will not secure investors this level of return on capital, it is hard to see that it is possible to attract investors to these markets.

9 Relevant downstream costs

Telenor argues that only avoidable costs are relevant. Hence, common costs and "other costs" should be excluded.

As pointed out in the discussion of "The relevant cost standard" above, NextGentTel means that all relevant costs associated with the production of the downstream products should be included in the MST, including a fair share of common costs.

NextGenTel fails to see the purpose of a MST at all if common costs are excluded from the test. In that case it is better to rely on the general margin squeeze test subsequent to competition law.

10 Trigger for applying the margin squeeze test

Telenor suggests "periodical test, at 12 month interval or complaint based only". This means longer periodicals than the 6 months periodicals suggested by the WIK report.

NextGenTel would like to point out that if the MST promotes an ex ante restorative effect and not only an ex post based deterrent effect, the test must be applied with shorter intervals than 12 months. If a Telenor's performs a margin squeeze in the beginning of a 12 month period, an efficient competitor may already be out of the market when a margin squeeze is established by Nkom. Hence, the periodically tests should be performed every 6 months or more often.

In addition, NextGenTel, would like to point out the need for a swift, easy-to-access and low cost complaint system. As pointed out in our initial comments, the periodical standard test is likely to fail in detecting margin squeeze on new innovative products introduced by Telenor's competitors. This gives Telenor an opportunity to free-ride on competitors' innovations, and discourages innovation by Telenor competitors in the first place. NextGenTel's experience is that general competition law is too rigid and slow to be relied on in such cases as case-handling time and procedural obstacles prevents competition law to be an effective instrument. This can be repaired by an easy to access complaint system within the electronic communication framework.

Yours sincerely,
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