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Antall vedlegg

RESPONSE TO NATIONAL CONSULTATION ON THE USE OF MARGIN SQUEEZE TEST FOR FIBER ACCESS IN MARKETS 4 AND 5

1. Introduction

Broadnet AS and Homenet AS (jointly "**Broadnet**") hereby submit their comments to the Norwegian Communications Authority's ("**Nkom**" or "**the Authority**") national consultation 8 May 2015 on the use of a margin squeeze test for fiber access in Market 4 and 5.

This letter contains information that is business sensitive to Broadnet AS. We request that Nkom exempts highlighted passages from public disclosure further to section 13 of the Public Administration act and section 13 of the Freedom of information act.

Nkom has called for comments to the margin squeeze model enclosed in appendix 2. Broadnet is not in a position to provide input to this excel sheet. Due to Telenor Norge AS ("**Telenor Norge**") excessive wholesale prices for VULA and LLU fiber access products it is at present not a viable business case to offer broadband services on the basis of such input. As Broadnet does not buy these wholesale services we do not possess the relevant data related to costs and revenues that is required in order to test the model. Also, as Nkom has decided to not give other players access to the Telenor-data to be included in the test. In consequence we are not in a position to comment on the specific model.

This response supplements our response to WIK's draft margin squeeze principles 9 March 2015. In the following Broadnet will elaborate on our position concerning select parts of Nkom's draft decision as well as the margin squeeze principles put forward by WIK in appendix 2.

2. Broadnet's comments on Nkom's draft decision

2.1. Too narrow scope for the margin squeeze test

As we have already stated in our comments 9 March 2015 Broadnet welcomes the introduction of an economic replicability test in markets 4 and 5. However, Nkom's suggested approach to the margin squeeze testing in the consultation document is somewhat flawed.

The Authority has decided to only test fiber based products. However, the majority of broadband accesses both in the high speed and low speed segments will be based on Telenor's copper network in the medium to long-term (10 years).¹ The price cap as well as non-discrimination and accounting separation obligations for LLU imposed in market 4 will not effectively deter or prevent margin squeeze behavior related to this infrastructure. Broadnet urges Nkom to reconsider its position and include copper based products in the test. Such an approach is truly technology neutral. It will protect and enforce the fledgling competition by ensuring a level playing field between the incumbent operator and the various access seekers.

Broadnet has previously voiced concerns over Telenor's bundling of regulated broadband and non-regulated products at the wholesale market (e.g. broadband access and leased lines). We asked that Nkom took this into account when developing the test in order to detect and discourage exclusionary pricing behavior. As we understand both WIK and Nkom rejects this approach.

Broadnet asks that the Authority either reconsider its position concerning the design of the test or give firm commits that it will review and, if necessary, intervene against anti-competitive bundling. Its consistent failure to examine these issues legitimizes Telenor's current practices to the detriment of competitors and customers.

2.2. Lack of enforcement measures

In its comments to the draft decisions in markets 4 and 5 9 December 2013 the Efta Surveillance Authority ("ESA") strongly urges Nkom to provide firm guidance on how it would ensure compliance should Telenor fail the economic replicability test (page 12):

"In view of the above, the Authority proposes that, without further delay, the NPT:

[...]

- Clarify the remedy it will adopt in the event that the above replicability test is not passed, using the enforcement tools provided for in the Regulatory Framework, so as to ensure compliance."

Broadnet is somewhat surprised that Nkom fails to do so in the draft decision. On page 5 the Authority states (our translation)²:

"The margin squeeze tests described in this document will be a tool when enforcing the non-discrimination obligation in market 4 and marked 5. If Nkom concludes that Telenor does not comply with the non-discrimination obligations it will normally consider instructing a correction of Telenor's wholesale prices, cf. section 10-6 of the Ecom act. Further, Nkom will have to reconsider the imposed remedies, including the need to impose cost oriented prices on Telenor."

Broadnet cannot see that this statement clarifies which remedies Nkom will impose, how, when and within which deadlines. The Authority merely states the obvious - that the regulatory framework gives it the power to direct Telenor to adjust wholesale prices.

Quite to the contrary the draft decision gives the impression that Nkom will not automatically intervene should the dominant player fails the margin squeeze test. The Authority seems to hold that demonstrable negative margins will only be one of several factors in an overall assessment of whether the wholesale prices are "discriminatory". This could for instance very well lead Nkom to not intervene if the separate accounts demonstrate positive result even though Telenor's prices fail the margin squeeze test.

Broadnet warns Nkom against following the approach outlined in the draft decision. It is not in line with regulatory best practice in the EEA or the approach of NRA's in comparable jurisdictions.

A properly defined margin squeeze test is the only effective tool to ensure equivalence of input.³ We therefor ask that Nkom in the finals decision provides firm guidance on when it will intervene, how and within which deadlines. Also, intervention should not require a timely, "on

² Original version: "Marginskvistestene som er beskrevet i dette dokument, vil være et verktøy for å følge opp ikke-diskrimineringsforpliktelsene i marked 4 og marked 5. Dersom Nkom kommer frem til at Telenor ikke oppfyller ikke-diskrimineringsforpliktelsene vil det normalt være aktuelt å pålegge retting av Telenors tilgangspriser, jf. ekomloven § 10-6. Nkom vil videre måtte revurdere den pålagte virkemiddelbruken, herunder vurdere behovet for å pålegge Telenor krav om kostnadsorienterte priser."

³ ESA comments page 12: "As regards the accounting separation obligation, the Authority has doubts as to whether the obligation - as currently envisaged - will effectively address potential abusive or discriminatory behaviour at the wholesale level, since Telenor will not be required to report the first relevant separated accounts data before July 2015. [...] Further, in the absence of a properly-defined ex ante economic replicability or margin squeeze test, the Authority is not convinced that the NPT will be able to ensure that a sufficient margin remains between wholesale and retail prices to allow for replicability of retail offers by efficient competitors."

average" assessment of the non-discrimination obligation. Negative margins should in itself be sufficient to intervene.

3. Broadnet's comments on the principles for the margin squeeze test

In the industry meeting WIK stated that the proposed margin squeeze model is reasonable and that Nkom's consultants have taken all comments "into account". Broadnet disagrees with this perception. As far as we can see all our comments have been rejected. WIK has in effect made no adjustments on the basis of input from the market players. Further, there are several key flaws and shortcomings that affect the quality of this tool.

In our comments 9 March 2015 we stated of double play and triple play offers including non-regulated TV services are not relevant for the business market. The end-users do not require this service. In order to detect margin squeeze behavior Nkom needs to test single play offers separately. This comment has not been taken into account.

Nkom's portfolio approach gives the dominant operator too large flexibility to cross-subsidize services to the detriment of competitors thorough the weighting of the various cost components. Also, as oppose to what WIK stated in the industry meeting this is not merely a conservative assumption. Broadnet holds that it is incorrect as only Telenor is in a position to offer the whole portfolio. It will also lead to erroneous results as the model overstates the margin of access seekers.

Further, the model still seems to exclude corporate accounts from the test. They represent the majority of Broadnet's customer base. Such an assumption is neither representative nor correct. We ask that Nkom takes this customers segment into account when finalizing the model.

WIK holds that the test should reflect an alternative operator with a 20 % market share. This is not a realistic assumption. Due to limited scope of the imposed access obligations, Telenor's considerable first mover advantage and the excessive wholesale prices, no alternative operator will achieve a market share of more than 10 % for fiber based services in the medium to long term.

Broadnet once again asks that Nkom tests Telenor's new products and services prior to, not after launch. This is necessary in order to avoid further first mover advantages for the dominant operator. In our experience it takes the Authority a minimum four months to assess whether Telenor's wholesale prices complies with the non-discrimination obligation and a further six months to intervene. More commonly the investigations drag on for more than a year. In practice Telenor will be in a position to market and sell new services for more than a full year even if the pricing exposes competitors to a margin squeeze.

4. Concluding remarks

Please contact Mette E. Johansen by telephone (No +47 930 81 017) or e-mail (mej@broadnet.no) should you have question regarding this response or require further input and/or data.

Kind regards

Broadnet AS



Per Morten Torvildsen

CTO