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## **Notification of draft decision concerning monitoring of compliance with the obligation of non-discrimination using margin squeeze test for fibre-based broadband access**

The Norwegian Communications Authority (Nkom) refers to the decision dated 20 January 2014 in which Telenor ASA (Telenor) was designated as a provider with significant market power and was imposed specific obligations in the wholesale market for Broadband access (Market 5). Further, Nkom refers to the consultation of 10 February 2015 on the principles for the use of margin squeeze tests for fibre-based LLU and Broadband access in Markets 4 and 5, as well as the subsequent correspondence with the operators regarding this matter. Nkom also refer to the notification of decision dated 8 May 2015 concerning monitoring of compliance with the obligation of non-discrimination when using the margin squeeze test for fiber-based LLU and Broadband access in Markets 4 and 5.

### **1. Contents**

This notification of the draft decision contains the underlying principles for Nkom's use of margin squeeze tests as a tool in monitoring compliance with the obligation of non-discrimination for fibre-based Broadband access in Market 5, including that Telenor shall submit relevant information to Nkom. In Chapter 2, Nkom presents the basis for the notification. Furthermore, Nkom reviews the legal basis in Chapter 3, and describes the principles and the method Nkom will apply for the margin squeeze test in Chapter 4. Chapter 5 contains the draft decision.

This draft decision has 4 attachments. The principles that form the basis of the margin squeeze test, including summary of the national consultations on the principles for a margin squeeze test, are provided in Annex 1. Further, the margin squeeze test model is stated in Annex 2, and the user manual for the margin squeeze test in Annex 3. Annex 4 is a summary of the comments after Nkom`s notification of decision.

## 2. Background

### 2.1. Decisions in Markets 4 and 5

In Nkom's decision dated 20 January 2014 a number of specific obligations were imposed on Telenor to remedy identified and potential competition problems in Market 4 and Market 5. The competition problems identified were related to vertical leveraging of market power and single market dominance, hence various forms of discriminatory behaviour, including discrimination on price.

In its analysis of potential competition problems, Nkom writes<sup>1</sup>:

*"A possible consequence of price discrimination is that the costs for some or several competitors will be higher than the costs for the dominant provider's own retail business, and competitors may thus experience a price squeeze. Price squeeze in this context is to be understood as differences between access charges in the LLU market and the Broadband access market respectively, and between the Broadband access market and the vertically integrated provider's retail prices, which means that margins are so low that efficient competitors in the broadband market and the retail market cannot achieve a reasonable rate of return and therefore at risk of being squeezed out of the market."*

Based on the identified competition problems, Telenor was inter alia directed to meet all reasonable requests for fibre-based LLU access, ref. the Market 4 decision, and fibre-based Broadband access, ref. the Market 5 decision. In both decisions, Telenor was subject to the obligation of non-discrimination.

It appears from the decisions in Markets 4 and 5 that it will be developed margin squeeze tests for fiber-based LLU and fiber-based broadband access as a tool for monitoring the obligation of non-discrimination.

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<sup>1</sup> See section 5.2.3.1 of the decisions

## 2.2. Decision of appeal regarding Markets 4 and 5 decision

Nkom's decisions in Markets 4 and 5 dated 20 January 2014 were complained by, respectively, TDC AS (TDC), Telenor and NextGenTel AS (NGT). The Ministry of Transport and Communications made a decision in the appeal cases on 18 December 2014. In its appeal decision the Ministry of Transport and Communications confirmed Nkom's two decisions with a few clarifications.

In connection with the question of the use of margin squeeze tests as a tool to monitor compliance with the obligation of non-discrimination in Markets 4 and 5, the Ministry of Transport and Communications stated in section 5.10:

*"The Ministry of Transport and Communications refers to Telenor's comment that NPT does not have the authority to impose a future margin squeeze test. ... The Ministry cannot see that NPT's decision to start work on developing a margin squeeze test with a view to a future decision is an element that can be appealed at the present time. The Ministry has therefore concluded that Telenor's objection cannot be upheld."*

...

*"The Ministry of Transport and Communications refers to TDC's appeal and the company's request that the Ministry shall clarify the content of the obligation of non-discrimination. ... NPT has notified that a margin squeeze test will be developed to monitor compliance with the obligation of non-discrimination. Through the underlying principles on which this test is built, and through the rules on which the Authority will base the use of the test, the Authority is emphasising the importance of the obligation of non-discrimination. The test, as well as the rules for the execution of the test, will be subject to consultation. The Ministry will not anticipate this work and find it not appropriate to specify the non-discrimination obligation further in this decision."*

## 2.3. National consultation

As part of its efforts to prepare a margin squeeze test, Nkom conducted in the period 10 February to 9 March 2015 a national consultation on the principles for the use of margin squeeze tests in Markets 4 and 5. The participants were also informed that Nkom, in consultation with WIK Consult, were in the process of developing a margin squeeze test for both markets. Nkom asked for input to the principles that were the basis for the margin squeeze tests.

Consultation documents and other publicly available information related to the work have continuously been made available on Nkoms website. Summary of this hearing is attached the principles document (Appendix 1).

#### **2.4 Notification of decision**

The decision on implementing the obligation of non-discrimination in Markets 4 and 5 by using the margin squeeze test for fiber-based LLU and fiber-based broadband was notified by Nkom 8 May 2015, and the deadline to comment on the notification was set to 1 June 2015.

The notification of decisions and other publicly available information related to the work have continuously been made available on Nkoms website. Summary of the comments on the notification is listed in Appendix 4.

#### **2.5 Assessment of the proportionality of a margin squeeze test for fiber-based LLU**

Nkom has done a new assessment of the proportionality of implementing a margin squeeze test for fiber-based LLU. In view of the very limited number of fiber accesses that will be available for fiber-based LLU, Nkom considers that there is no basis at present for carrying out such a test. Therefore, Nkom will not issue at this stage a decision of monitoring the non-discrimination requirement using margin squeeze test fibre-based LLU in Market 4. Meanwhile, Nkom emphasize that non-discrimination requirement in Market 4 will be monitored through Telenor's reporting of accounting separation in Market 4. Nkom also refers to Appendix 4 summarizing comments after the notification of decisions.

### **3. Legal basis**

Telenor was designated as having significant market power in Nkom`s Market 5 decision of 20 January 2014. According to the Electronic Communications Act § 3-4 first paragraph, providers with significant market power shall be subject to one or several specific obligations imposed by § 4-1 and §§ 4-4 for 4-10.

Nkom has imposed an obligation on Telenor to provide access on non-discriminatory terms in Market 5, cf. Electronic Communications Act § 4-7. The obligation applies to both copper and fiber-based access.

In the Market 5 decision, section 7.4 on non-discrimination, paragraph 272, Nkom writes:

*"A margin squeeze test for fiber-based Broadband access will give NPT an additional tool to monitor the non-discrimination obligation. NPT follows in large extent ESAs argument that accounting separation alone is not necessarily sufficient to ensure predictability with regard to non-discriminatory prices for fiber-based Broadband access. NPT will therefore start working on developing a margin squeeze test immediately after this decision enters into force."*

Telenor was obliged to prepare and report accounting separation for fiber in Market 5, cf. Electronic Communications Act § 4-8. It was also stated that as a complement to the accounting separation there would be developed a margin squeeze test as a tool to further evaluate the fulfillment of the obligation of non-discrimination, ref. Section 7.6.4 in Market 5 decision, paragraph 324. Other parts of the decisions also provided that the requirement for non-discrimination will be monitored through the margin squeeze test. Nkom refers in this connection to paragraph 229 in Market 5 decision, where Nkom considers the need to impose price controls pursuant to the Electronic Communications Act § 4-9. It follows therefore that a margin squeeze test will be used as a supplement to the accounting separation when considering whether Telenor complies with the non-discrimination obligation.

The Ministry of Transport and Communications' decision in the appeal dated 18 December 2014 upheld Nkom's decision. As stated in section 2.2, the Ministry of Transport and Communications stated in its appeal decision that the decision to start work on developing a margin squeeze test with a view to a future decision is not in itself an element that can be appealed. In addition, The Ministry of Transport and Communications expressed that Nkom, through establishing the principles of a margin squeeze test and the rules Nkom will base the application of the test, will emphasize the importance of non-discrimination obligation, and stated that the margin squeeze test, as well as rules for the practice of it, will be subject to consultation.

The determination of principles and methods for the use of margin squeeze tests as a tool to monitor compliance with the obligation of non-discrimination should be regarded as an individual decision.

#### **4. Margin squeeze tests – Principles and methods**

Based on the facts of the case presented above and the applicable law, Nkom has developed principles and methods for performing margin squeeze tests as a tool to monitor Telenor's



compliance with its obligation to offer fibre-based Broadband access on non-discriminatory terms.

Principles and methodology for implementation of margin squeeze tests are described in the appendices.

The margin squeeze tests described in this document will be a tool to monitor non-discrimination obligations for fiber-based Broadband access in Market 5. If Nkom determines that Telenor does not meet non-discrimination obligations, it will normally be appropriate to require correction of the Telenor's access prices, cf. Electronic Communications Act § 10-6. Nkom will continue to reassess the imposed use of remedies, including assessing the need to impose on Telenor an obligation of cost-oriented prices.

## **5. Draft decision**

Pursuant to the Market 5 decision of 20 January 2014 on the designation of providers with significant market power and imposing specific obligations in the wholesale market for Broadband access (Market 5), cf. Section 7.4 in order to provide access on non-discriminatory terms after Electronic Communications § 4-7, Nkom establishes hereby principles and method for use of the margin squeeze test for monitoring the obligation of non-discrimination between Telenor's own retail operations and external buyers of regulated fiber-based access in market 5.

The requirement of non-discrimination on price means that Telenor shall pass the margin squeeze test as defined in Annex 1 (Principles for margin squeeze tests for fibre access in Market 5) and Annex 2 (The margin squeeze model). The definition of a margin squeeze follows from Chapter 2 of the principles document, and the principles for conducting the tests subject to Chapter 3. In addition, Telenor shall comply with the requirement for a positive gross margin for individual broadband products, as described in the principles document Chapter 4.

Kind regards,

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Director

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Head of Section



Number of appendices: 4

Annex 1: Principles for margin squeeze tests for fibre access in Market 5

Annex 2: The margin squeeze model (Excel)

Annex 3: User manual for the margin squeeze model

Annex 4: Consultation response note