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EFTA SURVEILLANCE
AUTHORITY

Post- og teletilsynet
Postboks 93
4791 Lillesand
Norway

For the attention of:
Mr Torstein Olsen
Director

Dear Mr Olsen,

Subject: Markets 4 and 5 - Remedies - Monitoring of compliance with the non-discrimination obligation using the Economic Replicability Test for fibre-based broadband access

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

I. PROCEDURE

On 6 July 2015, the EFTA Surveillance Authority (“the Authority”) received notification of a draft national measure in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Norwegian national regulatory authority, *Post- og teletilsynet* (“Nkom”), concerning the monitoring of compliance with the non-discrimination obligation using the Economic Replicability Test (“ERT”) for fibre-based broadband access in the markets for wholesale (physical) network infrastructure access (including shared and fully unbundled access) at a fixed location (market 4) and for wholesale broadband access respectively (market 5).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 4 and 5 respectively of the EFTA Surveillance Authority Recommendation of 5 November 2008 (Decision No 688/08/COL) on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive, OJ C 156, 9.7.2009, p.18 (the “2008 Recommendation”).

On 27 July 2015, the Authority sent a request for information to Nkom (Document No 765934), to which a reply was received on 30 July 2015 (Document No 768703).

National consultations were carried out, pursuant to Article 6 of the Framework Directive, during the periods from 10 February 2015 to 9 March 2015 and from 8 May 2015 to 1 June 2015 respectively.

The period for consultation with the Authority and the national regulatory authorities (“NRAs”) in the EEA States pursuant to Article 7 of the Framework Directive expired on 6 August 2015.

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 current draft decision is based on Nkom’s decision of 20 January 2014 designating Telenor ASA (“Telenor”) as an operator with significant market power (“SMP”) and imposing a set of remedies on both market 4 and market 5.³

In market 4, the following obligations were imposed:

- access obligations, including full and shared access to the copper-based network, access to fibre-based lines, access backhaul, co-location and access to information and support systems;
- price and accounting controls including a price cap of NOK 85 for copper-based local loop unbundling (“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 cost accounting for co-location relating to both copper and fibre-based LLU access;
- non-discrimination (between external operations and between own and external operations);
- transparency; and
- accounting separation (for fibre-based LLU).

In market 5, the following obligations were imposed:

- access, including broadband access to copper-based and fibre-based networks, access to co-location and information and support systems;
- 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;
- non-discrimination (between external operations and between own and external operations);
- transparency; and

³ The related draft decision was notified to the Authority in 2013, as registered under Case 74613. See the Authority’s comments letter of 9 December 2013 in Document No. 692088.