

Brussels, 6 September 2005
Case No: 58296
Event No: 330986

Post- og teletilsynet
Postboks 447 Sentrum
0104 Oslo
Norway

Att.: Mr Willy Jensen
Director

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Dear Mr Jensen,

**Subject: Case 58296: Voice call termination on individual mobile networks
Comments pursuant to Article 7(3) of Directive 2002/21/EC¹**

I PROCEDURE

On 5 August 2005, the EFTA Surveillance Authority (“the Authority”) received a notification by the Norwegian regulatory authority, Post- og teletilsynet (“NPT”) concerning the market for voice call termination on individual public mobile telephone networks in Norway. On the same date, the Authority registered the notification under case number 58296. The notification consists of a summary notification form, a draft decision, a market analysis (Annex 1) and a summary of the results of the national consultation (Annex 2).

The national consultation pursuant to Article 6 of Directive 2002/21/EC (“Framework Directive”) was conducted between 31 March 2005 and 26 May 2005.

Pursuant to Article 7(3) of Directive 2002/21/EC (“Framework Directive”), national regulatory authorities (“NRAs”) in the EEA and the Authority may make comments on notified draft national measures to the NRA concerned.

II DESCRIPTION OF THE DRAFT MEASURE

II.1 Market definition

NPT has defined the relevant product markets as follows:

- Voice call termination on Telenor ASA’s mobile communications network
- Voice call termination on NetCom AS’ mobile communications network
- Voice call termination on Teletopia Mobile Communications AS’ mobile communications network

¹ Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, as referred to at point 5cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement.

- Voice call termination on Tele2 Norge AS' virtual mobile communications network

The relevant geographic markets are defined as the individual mobile networks' respective coverage areas in Norway, including coverage obtained through national roaming agreements, mobile virtual network operator ("MVNO") agreements or similar.

On the basis of the information available in the notification, the Authority concludes that the product market definition does not differ from that in the Authority's Recommendation on relevant markets².

II.2 Finding of significant market power ("SMP")

The criteria used by NPT to assess whether mobile network operators possess SMP in the relevant markets, as described above, are market shares, barriers to entry and potential competition, profitability, absence of or low countervailing market power, prices and price developments. NPT also examined the importance of the "calling party pays" (CPP) principle. On the basis of these criteria, NPT designates the following market players as having SMP: NetCom AS, Telenor ASA, Teletopia Mobile Communications AS and Tele2 Norge AS. NPT makes a finding that each of those operators individually possesses SMP for terminating calls in their own networks.

II.3 Regulatory remedies

NPT intends to impose the following regulatory remedies on the operators designated as possessing SMP:

On all SMP operators:

- Obligations of access/interconnection – to meet reasonable requests for interconnection in the form of termination in their respective mobile networks;
- Transparency obligations – obligations for publication and a reference offer.

On Telenor and NetCom:

- Obligation of non-discrimination;
- Price control obligation in the form of a price-cap with a glide path;
- Cost accounting obligation.

² EFTA Surveillance Authority Recommendation (No 194/04/COL) of 14 July 2004 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, as incorporated into the Agreement on the European Economic Area.

III COMMENTS

The Authority has examined the notification and has the following comments:

3.1 Correct references to applicable EEA legal bases

The new regulatory framework for electronic communications has been incorporated into the EEA Agreement.³ Based on its powers pursuant to the new regulatory framework and the Agreement on the establishment of a Surveillance Authority and a Court of Justice, the Authority adopted the following acts: a Recommendation on relevant product and service markets susceptible to *ex ante* regulation (“Recommendation on relevant markets”)⁴, Guidelines on market analysis and the assessment of SMP (“Guidelines”)⁵, and a Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive (“Article 7 Recommendation”).⁶ In order to ensure homogeneity throughout the EEA, the Authority has taken due account of the parallel Recommendations and Guidelines that have been issued by the European Commission, while introducing relevant amendments to reflect the purposes and specificities of the EEA Agreement.

NPT is hereby reminded that the correct legal references for the market reviews prescribed by the new regulatory framework are the Directives as incorporated in the EEA Agreement and the Recommendations and Guidelines issued by the Authority. References to the corresponding similar EU legislation are appropriate only in the absence of equivalent EEA measures.⁷

3.2 Sufficiency of competition law remedies

In section 7.3 of the notified draft measure, NPT makes an assessment of whether general competition law alone would suffice to address the competition problems identified in the relevant markets. NPT underlines that this is done to decide on the proportionality of intended measures.

The Authority wishes to recall that, for the markets that have been listed in the Annex to the Authority’s Recommendation on relevant markets, it has been assessed *a priori* that EEA competition law remedies alone would not suffice and that those markets are susceptible to *ex ante* regulation. NPT has concluded that the characteristics of the relevant markets for voice call termination services in Norway are such that the market definition does not deviate from market 16 in the Authority’s Recommendation on

³ Decision of the EEA Joint Committee No 11/2004 of 6 February 2004 amending Annex II (Technical regulations, standards, testing and certification), Annex X (Audiovisual services) and Annex XI (Telecommunication services) to the EEA Agreement, OJ L 116 of 22.4.2004, p.60, EEA Supplement to the OJ No 20, p. 14.

⁴ See footnote 2.

⁵ EFTA Surveillance Authority Guidelines of 14 July 2004 on market analysis and the assessment of significant market power under the regulatory framework for electronic communications networks and services referred to in Annex XI of the Agreement on the European Economic Area.

⁶ EFTA Surveillance Authority Recommendation of 14 July 2004 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁷ The Authority has refrained from adopting an Explanatory Memorandum to its Recommendation on relevant markets. The Explanatory Memorandum has been considered a document capable of being directly applicable to the EFTA pillar without any specific adaptation, due to its theoretical and methodological nature.

relevant markets. NPT has further designated one operator as having SMP in each of those markets. Pursuant to Article 8(2) of the Access Directive⁸, NPT is obliged to impose at least one of the sector-specific remedies listed in Articles 9 to 13 of the Access Directive on an operator that has been designated as possessing SMP in a given market. This implies that NPT is under a legal obligation to regulate the markets, irrespective of any existing or potential competition law remedies in the same markets. This is without prejudice to NPT's obligation to impose proportionate remedies. NPT has indeed decided to impose a number of obligations on the four SMP operators.

3.3 Cost accounting and pricing methodology

From the information provided in the notification, the Authority assumes that the cost methodology applied by NPT, underlying the setting of the price cap regime for Telenor and NetCom, is fully distributed historical cost based on the two operators' regulatory accounts. Only a brief description of these regulatory accounts is given in the draft measure itself. During 2005, NPT intends to consider whether it is appropriate to develop a long run incremental cost (LRIC) model as an alternative cost model for voice call termination on mobile networks. However, if developed, such a model could not be implemented before 1 January 2007. NPT declares that an assessment of LRIC and any decision to implement this methodology would be done separately and not as part of the notification at hand.

The Authority wishes to recall that Article 13(2) of the Access Directive requires that cost and pricing methodologies imposed by an NRA must promote efficiency, sustainable competition and maximise consumer benefits.

The Authority does not dispute that fully allocated costs may be a suitable starting point for the imposition of price regulation. Yet, the Authority would like to note that the cost accounting methodology currently employed by NPT with regard to Telenor and NetCom does not allow to determine an efficient termination price level in a market where ineffective competition is likely to persist. Although the Access Directive does not mandate a specific cost accounting methodology, the methodology chosen by an NRA must nevertheless promote efficiency and consumer welfare.

The Authority invites NPT to commit itself to introducing a cost and pricing methodology that allows consumers to benefit fully from efficient production of the service concerned. In accordance with Article 13(3) of the Access Directive, this may be a methodology independent of those used by Telenor and NetCom, such as LRIC. NPT is invited to do so within the time-frame of the current market review. Should NPT decide to modify the cost or pricing methodology imposed, a resulting draft measure to this effect must be notified under Article 7(3) of the Framework Directive.

3.4 Asymmetric application of remedies

The Authority recalls that Article 8(4) of the Access Directive requires obligations imposed by NPT to be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. In circumstances where it is likely that the market failure identified will be the same in all

⁸ Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as referred to at point 5c) of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement.

markets and where an NRA intends to impose different remedies on different operators within similarly defined markets, the asymmetric application of remedies should be adequately reasoned.

NPT has justified its intention to impose asymmetric price regulation on Telenor and NetCom by reference to differences in fully allocated actual cost structures between the two operators. Under the current price controls, the termination charges of Telenor are about 38% lower than those of NetCom. NPT has proposed that, at the end of the foreseen glide-path on 31 December 2006, the difference be reduced to approximately 28%.

Despite the fact that mobile voice call termination rates in Norway are considered by NPT to be amongst the lowest in the EEA, the Authority is concerned with a potential asymmetric termination rates regulation over a prolonged period of time. In the Authority's view, differentiated termination rates can only be compatible with the requirements of the new regulatory framework if the differences are justified by underlying differences in efficient production costs.

The Authority notes with concern that NPT has not stated a clear intention and time-line to determine, using an appropriate cost methodology, whether differentiated rates for the two operators could be justified on the basis of different efficient production costs for the service concerned.⁹ Comparatively low mobile termination rates in Norway do not necessarily imply that the termination rates applied by Telenor and NetCom are efficient from an economic point of view and maximise consumer benefit. This is also acknowledged by NPT.

Against this background, the Authority invites NPT to consider, in accordance with Article 13(3) of the Access Directive, the use of cost accounting methods to calculate the cost of efficient provision of the service, independent of those used by the operators. The Authority consequently reiterates its comment made in relation to the cost accounting and pricing methodology employed by NPT. The Authority encourages NPT to apply a cost methodology which produces an efficient price for the mobile termination product, such as for example the LRIC model referred to by NPT, and to set a concrete time-frame for the introduction of a new cost methodology.

Regarding obligations to be imposed on Teletopia and Tele2, NPT has concluded that the characteristics of the markets under discussion are similar and the identified market failure is the same in all four markets (i.e. 100% market share, high barriers to entry, possibility of abusing market power, specifically by sustaining prices at an excessively high level). Nonetheless, NPT intends – for proportionality reasons – not to impose any non-discrimination or price control obligations on Teletopia and Tele2. NPT has claimed that its approach is justified by referring to the limited subscriber numbers and limited overall economic impact of potentially excessive price-setting by Teletopia and Tele2. NPT has further reasoned that the compliance cost of imposing price control and cost accounting obligations on a small operator may be considered disproportionate.

The Authority is of the view that NPT has not duly substantiated its intended decision not to impose non-discrimination obligations on Teletopia and Tele2. The Authority invites

⁹ The Authority takes note that NPT had commissioned external consultants to look into the efficiency of the operations of both Telenor and NetCom. The Authority is, however, doubtful whether such an exercise, without providing for an efficient (hypothetical) cost model for the production of the termination service, is capable of establishing the efficient termination price for a given operator in a monopoly market such as the one at hand.

NPT to reconsider its position on this matter. The Authority likewise invites NPT to monitor closely the development of the termination prices charged by Teletopia and Tele2 in order to avoid sustaining any potential productive inefficiencies or excessive prices to the detriment of end-users in other mobile and fixed networks. The Authority further invites NPT to consider requiring Teletopia and Tele2 to provide access (interconnection) on fair and reasonable terms and conditions, including fair and reasonable prices.

V CONCLUDING COMMENTS

Pursuant to Article 7(5) of the Framework Directive, NPT shall take the utmost account of comments of other NRAs and the Authority and may adopt the resulting draft measure and, upon doing so, shall communicate it to the Authority.

The Authority's position on this particular notification is without prejudice to any position the Authority may take vis-à-vis other notified draft national measures.

Pursuant to point 12 of the Article 7 Recommendation, the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the information contained herein to be confidential. You are invited to inform the Authority within three working days following receipt of this letter whether you consider that, in accordance with EEA and national rules on confidentiality, it contains confidential information which you request to be deleted prior to such publication. You should give reasons for any such request. The request should be submitted through the eCOM Registry or by facsimile to +32 22 86 18 00, for the attention of the eCOM Task Force.

Yours sincerely,

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