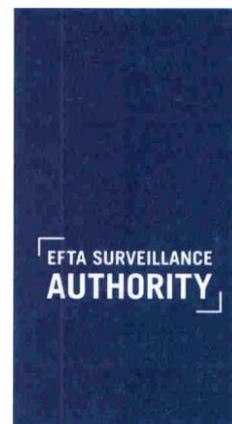


Póst- og Fjarskiptastofnun Sudurlandsbraut 4
108 Reykjavík,
Iceland

For the attention of: Mr.
Hrafnkell V. Gislason
Managing Director



Dear Mr Gislason,

Subject: Review of the Mila reference offer for wholesale bitstream access –
Remedies

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

1. PROCEDURE

On 29 May 2017, the EFTA Surveillance Authority ("the Authority") received a notification of a draft national measure in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Icelandic national regulatory authority, Póst- og Fjarskiptastofnun, ("the PTA"), concerning the market for wholesale broadband access in Iceland.²

The notification became effective on the same day.

A national consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 7 to 28 December 2016.³

EFTA SURVEILLANCE
AUTHORITY

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 market 5 in the previous 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").

³ In addition, a national consultation on the Mila draft reference offer had been carried out between 9 June and 23 August 2016.

On 12 June 2017, a request for information was sent to the PTA (Document No 860120), and a reply was received on 15 June 2017 (Document No 861409).

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 expires on 29 June 2017.

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.

11. DESCRIPTION OF THE DRAFT MEASURE

11.1. Background

Markets 4 and 5 in Iceland were previously notified to and assessed by the Authority under Case No 75750.⁴ The PTA designated Mila ehf. ("Mila") as an operator with significant market power ("SMP") on markets 4 and 5 and imposed obligations of (i) access, (ii) non-discrimination, (iii) transparency, (iv) separation of accounts and (v) price and accounting controls in both markets.⁵⁶

As part of the access obligation, access to copper loops (including sub-loop unbundling and naked DSL), fibre-based lines and to related facilities was to be facilitated, as well as access to virtual unbundled local access ("VULA"), e.g. to ensure continued access to local loops where vectoring is planned.

The transparency obligation imposed on Mila in market 5 included the publication of a reference offer for wholesale bitstream access, including VULA, and related facilities and services. The reference offer was to be submitted to the PTA for endorsement no later than six months after the publication of the PTA's final decision, i.e. 13 February 2015.

The Authority commented i.a. on the delay of six to seven years accumulated by the PTA in its reviews of markets 4 and 5 and emphasised that such delays may harm competition and reduce legal certainty for market participants. Against that background, the Authority urged the PTA to undertake a timely analysis and review of its next market review and to ensure a prompt and timely implementation of all the obligations foreseen in the draft measure.

11.2. Current notification

The notified draft measure concerns solely Mila's reference offer for wholesale bitstream access and foresees amendments to a draft reference offer, which was initially submitted by Mila to the PTA on 26 May 2016 ("the draft reference offer" or "the present draft reference offer"). In its reply to the Authority's request for information dated 12 June 2017, the PTA explained that it had repeatedly reminded Mila of its obligation to submit

⁴ Notified to the Authority on 11 July 2014 and assessed by the Authority on 11 August 2014, Document No 715771.

⁵ PTA Decision No 21/2014, published on 13 August 2014.

⁶ The PTA's previous reviews dated back to 2007 and 2008.

the draft reference offer. However, the PTA found it necessary to prioritise the scarce resources at both Mila and the PTA, and it had been considered more important to finalise the cost analyses for markets 4, 5 and 6/2008,⁷⁸ as well as Mila's reference offer for market 4/20088.

The PTA proposes to require Mila to make the following amendments to the draft reference offer:

- Amend the foreseen provision on limitation of Mila's liability so that no limitation applies when the cause of lack of connection, interruption of electronic communications or interference is due to intent or extreme negligence on the part of Mila.⁹
- Amend the foreseen provision authorising Mila to request a payment guarantee from a service purchaser so that a guarantee can only be requested in exceptional circumstances and then only for investments that do not form the basis for monthly charges and set-up charges for bitstream access.¹⁰¹¹
- Amend the foreseen provision on the transfer of rights and obligations so that the service purchasers and Mila have reciprocal rights and obligations. 1 1
- Amend the foreseen provision on limitations on compensation to service purchasers so that Mila is liable to pay compensation to service purchasers who have five or more orders/faults in each category and area in the relevant month.¹²

Moreover, the PTA proposes to oblige Mila to implement a number of amendments to the draft reference offer, which Mila proposed during the consultation phase with the PTA.¹³

In addition, the PTA proposes to impose on Mila an obligation to submit a revised draft reference offer with specifications for IPTV services under Access Option 3.¹⁴ The draft reference offer is to be submitted within three months following the publication of the PTA's final decision.

111. COMMENTS

The Authority has examined the notified draft measure and has the following comment:

⁷ Notified to the Authority on 27 April 2017 and assessed by the Authority on 29 May 2017 under Document No 854999, Document No 856349 and Document No 856654.

⁸ Notified to the Authority on 7 July 2016 and assessed by the Authority on 29 July 2016 under Document No 812955.

⁹ Para. 1 of the PTA Decision "Instruction for amendments".

¹⁰ Para. 2 of the PTA Decision "Instruction for amendments".

¹¹ Para. 3 of the PTA Decision "Instruction for amendments".

¹² Para. 4 of the PTA Decision "Instruction for amendments".

¹³ The last paragraph of the PTA Decision "Instruction for amendments".

¹⁴ The present draft reference offer includes connections for IPTV services under Access Options 1 and 2 only. However, pursuant to the PTA's Decision No 21/2014, Mila shall offer connections for IPTV services under all three Access Options. In order to avoid further delaying the implementation of the draft reference offer, the PTA proposes to deal with this matter subsequently.

Timely enforcement and effectiveness of remedies

The Authority notes that Mila submitted its draft reference offer with a delay of more than 15 months. Despite this significant delay, the draft reference offer is not complete as the specifications for IPTV services under Access Option 3 remain to be implemented.

Furthermore, the implementation of several other components foreseen in the PTA's Decision No 21/2014, i.e. obligations concerning access¹⁵ non-discrimination¹⁶ transparency¹⁷ and price control¹⁷, was significantly delayed.

Against this background, the Authority recalls that, in the interests of pursuing a consistent policy across all EEA States and ensuring effective and targeted regulation, it is important that regulators enforce remedies in a timely and effective manner following the conclusion of the underlying market analysis.

Furthermore, the Authority wishes to recall its comments issued under a significant number of cases, i.e. Cases No 75750, 77546, 79335, 80034, 80606 80608 and 80609 respectively. As noted in those cases, considerable delays in the enforcement of remedies imposed on the SMP operator risk harming competition and reducing legal certainty for market participants and the Authority reminds the PTA of its powers and obligations under the regulatory framework in that regard. The Authority has also previously expressed concerns that a fragmented implementation of individual remedies in Iceland risks generating further uncertainty to the potential detriment of investment and innovation.¹⁸

As regards the introduction of VULA, the Authority recalls its comment in Case No 80608 encouraging the PTA to ensure that VULA is an effective substitute for physical wholesale access options, not only from an economic, but also from a functional or technical perspective.

In addition, the Authority recalls that the availability of effective wholesale remedies in markets 4 and 5/2008 was significant to the PTA's decision to withdraw all regulatory remedies in markets I and 2/2008 by the end of 2017 as foreseen in the PTA's Decision No 23/2016¹⁹. In the Authority's comments on the planned deregulation of markets 1 and 2/2008, the Authority strongly urged the PTA to ensure the full implementation of all

¹⁵ For example, the details of the VULA product will only be finalised with the PTA's decision on the draft reference offer.

¹⁶ The foreseen Service Level Agreements, Service Level Guarantees and Key Performance Indicators in both markets 4 and 5/2008 were implemented with delays of 7-18 months. ¹⁷ Mila submitted its reference offer for market 4/2008 with an 8-month delay.

¹⁷ The PTA's draft measures implementing the price control obligations were only notified to the Authority on 27 April 2017.

¹⁸ See, for example, Case No 77546 and Case No 75574.

¹⁹ Notified to and assessed by the Authority under Case No 79865.

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regulatory remedies in markets 4 and 5/2008 sufficiently in advance of the foreseen withdrawal of remedies.²⁰

The Authority thus strongly urges the PTA to finalise the outstanding component needed to ensure the full implementation of the regulatory obligations foreseen by the PTA's Decision No 21/2014 within the three-month timeline foreseen by the PTA.

Moreover, the Authority invites the PTA to undertake a timely analysis and notification of the next market review, in line with the PTA's obligations under the EEA regulatory framework.

IV. FINAL REMARKS

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedies consulted on in the current notification will require re-notification in accordance with Article 7(3) of the Framework Directive.

Pursuant to Article 7(5) of the Framework Directive, the PTA shall take the utmost account of comments of other regulatory authorities and the Authority. It may adopt the resulting draft measure and, when it does so, shall communicate it to the Authority.

The Authority's position on the current notification is without prejudice to any position the Authority may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation²¹, 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 days²³ following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which you wish to have deleted prior to publication. You should give reasons for any such request.

Yours sincerely,

²⁰ See the Authority's comment letter dated 21 December 2016, Document No 831564.

²¹ EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, OJ C 302, 13.10.2011, p.12, and available on the Authority's website at <http://www.eftasurv.int/media/internal-market/recommendation.pdf> ("the Procedural Recommendation"). ²³ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.



Gunnar Thor Pá Gunnar

Director
Internal Market Affairs Directorate



Thor Pétursson



Gjeirmund Mathisen

Director
Competition and State Aid Directorate