

Brussels, 15 November 2021  
Case No: 87556  
Document No: 1246932

Norwegian Communications Authority  
Postbox 93  
4791 Lillesand  
Norway

For the attention of:  
Mr Pål Wien Espen  
Director General

Dear Mr Espen,

**Subject: Market for wholesale central access provided at a fixed location for mass-market products in Norway – Remedies – Price regulation for fixed wireless access**

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

## **I. PROCEDURE**

On 13 October 2021, 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 Norwegian national regulatory authority, *Nasjonal Kommunikasjonsmyndighet* (“Nkom”). It concerns price regulation for fixed wireless access (“FWA”) on the market for wholesale central access provided at a fixed location for mass-market products in Norway.<sup>2</sup>

The notification became effective on the same day.

---

<sup>1</sup> 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 5 cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (“the Framework Directive”). On 24 September 2021, the EEA Joint Committee adopted Decision (“JCD”) No 275/2021 incorporating Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), as corrected by OJ L 334, 27.12.2019, p. 164 and OJ L 419, 11.12.2020, p. 36 (“the Code”), into the EEA Agreement. Directive (EU) 2018/1972 will repeal, *inter alia*, the Framework Directive. However, until JCD No 275/2021 enters into force, the Framework Directive remains applicable.

<sup>2</sup> Corresponding to market 3b of the EFTA Surveillance Authority Recommendation of 11 May 2016 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (*Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*); adopted by Decision No 093/16/COL, OJ L 84, 30.3.2017, p. 7, (“2016 Recommendation”).

National consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 13 October 2021 to 3 November 2021.

On 2 November 2021, the Authority sent a request for information (“RFI”) to Nkom (Doc No.1242271), to which a reply was received on 5 November 2021 (Doc No. 1245786).

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 15 November 2021.

Pursuant to Article 7(3) of the Framework Directive, the Authority and the NRAs may make comments on notified draft measures to the NRA concerned.

## II. DESCRIPTION OF THE DRAFT MEASURE

### II.1. Background

On 20 December 2018,<sup>3</sup> Nkom adopted a decision designating Telenor ASA (“Telenor”) as a provider with significant market power (“SMP”) and imposed on the operator a full set of obligations, including an obligation for Telenor to provide wholesale access to FWA in the market for wholesale central access provided at a fixed location for mass-market products in Norway (“Market 3b”).

Furthermore, in a decision of 2 September 2020,<sup>4</sup> Nkom required Telenor to meet any reasonable request for wholesale access to FWA. Telenor was also requested to set reasonable prices for FWA at the same level for all access buyers, to ensure non-discrimination and to provide documentation on the actual costs associated with the implementation of FWA without undue delay. In this regard, Nkom intended to subsequently consider whether a more detailed price regulation was needed for FWA.

### II.2 Current notification

In the currently notified draft decision Nkom specifies underlying principles for the application of a margin squeeze test in relation to FWA on Telenor’s mobile network.

The model for margin squeeze tests for FWA, as described by Nkom, is developed with the European Commission’s Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment<sup>5</sup> and BEREC’s Guidance on the regulatory accounting approach to the economic replicability test<sup>6</sup> as a starting point.

The margin squeeze test principles for FWA were developed with the principles used for VULA fibre in Market 3a as a starting point.<sup>7</sup> The overall objective of the margin squeeze test is to ensure that buyers of FWA wholesale access can achieve a margin by replicating Telenor’s portfolio of products. In addition to a portfolio-based test, Nkom

---

<sup>3</sup> Notified to and assessed by the Authority under Case No 82766. See also the Authority’s comments letter of 3 December 2018 [here](#).

<sup>4</sup> Notified to and assessed by the Authority under Case No 85355. See also the Authority’s comments letter of 23 July 2020 [here](#).

<sup>5</sup> European Commission (2013): 2013/466/EU: Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment., OJ L 251, 21.9.2013, p. 13–32.

<sup>6</sup> Commission draft Recommendation on non-discrimination and costing methodologies, BEREC Opinion, BoR (13) 41, 26 March 2013.

<sup>7</sup> Notified to and assessed by the Authority under Case No 86990. See also the Authority’s comments letter of 9 July 2021 [here](#).

proposes to set a requirement for a gross margin greater than or equal to zero for individual FWA products offered by Telenor. To ensure that migration to FWA does not exclude access seekers from competition, Nkom will combine *ex post* and *ex ante* tests.

Nkom applied the following general principles for the price squeeze test, as described in the notified draft decision:

- Nkom imposes an obligation on Telenor to offer wholesale prices for FWA that prevent access seekers from being subject to a margin squeeze. To ensure that the margin squeeze prohibition is observed, Nkom will perform a portfolio-based margin squeeze test. This requirement entails that Telenor must offer access to external providers at a price that enables access seekers to replicate a portfolio of all of Telenor's products in the retail market and achieve a margin greater than or equal to zero.
- As a general rule, Nkom will perform margin squeeze tests twice a year. Nkom may also perform margin squeeze tests at its own initiative when appropriate, for example, if new wholesale products for FWA are introduced. However, the prohibition on offering access prices that subject the access seeker to margin squeeze will be an ongoing requirement and will thus not be limited to the times when the margin squeeze tests are performed.
- In connection with the margin squeeze tests, Nkom will obtain relevant information from Telenor and relevant alternative providers. Nkom will normally set a deadline of two months for the submission of the requested information. The margin squeeze test will be performed as soon as possible after the requested information has been received, and normally within 30 days.
- Nkom will assume a weighted average cost of capital ("WACC") in the margin squeeze test based on Nkom's current decision regarding the WACC for fixed networks, which is based on assessments made by Professor Thore Johnsen (revised in 2017).
- To ensure that access seekers are not excluded from parts of the retail market, Telenor must further pass a gross margin test for all standalone FWA products sold in the retail market. This entails that Telenor's total monthly income associated with each standalone FWA product in the retail market must at any time be greater than or equal to the related total wholesale costs. Nkom will ask Telenor to document that the gross margin test is passed in connection with data retrieval for the margin squeeze test, i.e. normally twice a year.
- To ensure that migration to FWA does not exclude access seekers from competition, Nkom will combine the *ex post* margin squeeze test with *ex ante* margin squeeze tests. The *ex ante* margin squeeze tests make it possible to test price changes for existing retail products and prices for new retail provision prior to their launch.
- Prior to price reductions or other product changes to one or more FWA products, Telenor must therefore document to Nkom that financial replicability will be safeguarded. The calculations will be made by applying the last completed margin squeeze test, with updated prices and subscription figures. Telenor must prove to Nkom that the portfolio does not show a negative result. Telenor must also provide documentation of passing gross margin tests for the products in question. On the launch of new FWA products in the retail market, e.g. new speeds, Telenor must provide Nkom with documentation of passing a gross margin test.

- To ensure that Telenor can implement changes efficiently, retail prices can be adjusted at the same time as Telenor proves that it has passed the margin squeeze and/or gross margin tests.

In its reply to the Authority's RFI, Nkom confirmed its intention of updating the WACC in order to align it with the Commission's WACC Notice<sup>8</sup> and presented an estimated timeline for a formal notification in January 2022.

### III. COMMENTS

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

#### **Need to comply with the Commission's WACC Notice**

The Authority notes that the methodology used by Nkom to calculate the WACC is not consistent with the Commission's WACC Notice. The WACC estimate is based on outdated data from 2016 and 2017, and there seem to be methodological disparities in the calculation of the risk-free rate and the equity risk premium.

Paragraph 71 of the Commission's WACC Notice allowed for a transition period only until 1 July 2021. Nkom has already confirmed its intention of updating the methodology to be aligned with the Commission's WACC Notice and presented a timeline for that revision. The Authority takes note of Nkom's current work on the update of the WACC calculation and its intention to notify such an update to the Authority early next year.

In view of the above, the Authority strongly urges Nkom to carry out that update of the WACC calculation and to notify the new calculation to the Authority, without undue delay, in order to align it with the Commission's WACC Notice at the earliest opportunity.<sup>9</sup>

### 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, Nkom 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 Recommendation,<sup>10</sup> the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the

---

<sup>8</sup> Communication from the Commission, Commission Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector, OJ L 343, 14.12.2012, p. 1.

<sup>9</sup> See also the Authority's comments letter of 9 July 2021 in Case No 86990 on Nkom's notification of VULA fibre requirements and margin squeeze test, as referred to in footnote 7 above.

<sup>10</sup> 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").

information contained herein to be confidential. You are invited to inform the Authority within three working days<sup>11</sup> 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,

Jónína Lárusdóttir  
Director  
Internal Market Affairs Directorate

Emily O'Reilly  
Deputy Director for Competition  
Competition and State Aid Directorate

*This document has been electronically authenticated by Emily O'Reilly, Jonina S. Larusdottir.*

---

<sup>11</sup> The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.