



Norwegian
Communications
Authority

EFTA Surveillance Authority
Avenue des Arts 19H
1000 BRUSSELS

Our ref.: 2300455-24 -
Our date: 15.3.2024

Your ref.:
Your date: 12.3.2024

Contact: Marit Mathisen

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Request for information pursuant to Article 5 (2) of Directive 2002/21/EC

The Norwegian Communications Authority (Nkom) refers to the EFTA Surveillance Authority's (the Authority) request for information dated 12 March 2024 regarding Nkom's notification of the draft decision of the wholesale market for access and call origination on public mobile telephone networks in Norway (former market 15).

In the following, Nkom will provide information and explanations on the questions raised by the Authority in its request.

1. **Saga Mobil's margin squeeze claim.** ESA was approached by service provider Saga Mobil about an alleged margin squeeze by Telenor. Saga Mobil further explained its allegation in a call with ESA. The allegation is primarily related to the business market, which Saga Mobil particularly targets. Essentially, Saga Mobil claims that for bilaterally negotiated contracts, its costs (i.e. Telenor's wholesale price) are often above what Telenor is offering to its end-users (business customers). Saga Mobil did not provide any concrete evidence of its allegations to ESA at this stage.
 - a. Saga Mobil claimed that they discussed their claims against Telenor with Nkom. However, they do not feature in Annex 3, i.e. the summary of consultations. Did they not participate in the public consultation?

Nkom's response:

Saga Mobil did not participate in the public consultation. However, Saga Mobil have stated their concerns regarding margin squeeze and alleged examples of such practices in other dialogues.

Please provide an overview of Saga Mobil's engagement with Nkom about its margin squeeze claims, and if any actions were taken to address them.



Nkom's response:

- 6. September 2023: E-mail from Saga Mobil where Saga Mobile referred to specific retail offers from Talkmore in the business segment and questioned if these offers would be included in the margin squeeze test.
- Nkom followed up the inquiry in order to make sure that the retail offers in question were included in the subscription overview Telenor had provided for the upcoming margin squeeze tests. Nkom sent an email to Telenor with some questions. Telenor confirmed that the products were included in the overview. Six of the seven retail offers in the e-mail from Saga Mobil were considered to be representative products and included in the margin squeeze tests that Nkom carried out in October 2023.
- 1. March 2024: E-mail from Saga Mobil including examples of retail prices offered by Talkmore and Telenor to a specific business' customer.
- 4. March 2024: Reply from Nkom to Saga Mobil where Nkom explained that Nkom is in the process of carrying out new margin squeeze tests in market 15 and will take the information into account in the selection of retail products to be tested. Revenue for the selected products will be calculated based on Telenor's actual income from the sale of these products in the relevant period. All discounts and promotions are thus taken into account and the tested average price for the various products is therefore normally lower than Telenor's public price list.
- 4. March 2024: Reply from Saga Mobil where Saga Mobil maintains statements regarding concerns that the model does not reflect the retail prices in the market and that Saga Mobil is experiencing margin squeeze in certain tenders in the business market.

- b. Furthermore, Saga Mobil claims that one of the undue advantages that Telenor has is its **greater visibility of customers' consumption data**. Essentially, the claim has two legs.

First, because of its size on the retail business market (larger customer base), Telenor has an overall data advantage as it observes the consumption patterns of a large number of business customers. Telenor can use this information to its advantage, by better tailoring its offers to the customers' consumption patterns.

Second, Telenor has also visibility on Saga Mobil's customers' consumption patterns, because Saga Mobil uses Telenor's network. In theory, Telenor could use this information to target Saga Mobil's customers with tailor-made offers. However, Saga Mobil admitted they do not know if Telenor uses the data in this way.

- i. In relation to the first leg of the claim, have any other SPs or MVNOs reported Telenor's data advantage as a potential issue? Has Nkom had any internal discussion or assessment about the extent of such advantage?

Nkom's response:

Greater visibility of customers' consumption data due to larger customer base, has not been raised in the consultation. However, Nkom finds it reasonable to expect that Telenor has an advantage when it comes to analyzing customer consumption patterns. The large customer base has probably the potential to form a more robust foundation for tailoring retail offers in the business segment than the customer base of alternative providers. This could support the finding of SMP.

- ii. In relation to the second leg of the claim, we note that paragraph 223 of Nkom's Draft Decision addresses the issue of Telenor's information sharing, stating that Telenor cannot disclose access seekers' information to 'unauthorized persons'. However, the wording is somewhat generic. Is this sufficient to prevent Telenor's retail arm from using data generated by access seekers and available to Telenor's wholesale arm? Are there other provisions or laws preventing Telenor to exploit access seekers' data to its own advantage?

Nkom's response:

The issue is as ESA mentioned addressed in paragraph 223. The obligation outlined in this paragraph entails that Telenor must ensure that information received from access seekers during contractual relationships shall not be shared within Telenor other than what is necessary for the intended purpose of the information. Further, and according to this paragraph the access seeker will be entitled to receive further details of how such information is handled.

Nkom is not aware that access seekers have requested further information from Telenor on how such information is handled.

The draft decision paragraph 222 contains a relative narrow interpretation of the scope of the Electronic Communication Act section 4-13, where the duty of secrecy concerning access and interconnection is limited to information received in connection with negotiations. After a new assessment of this provision, Nkom believe that it should not be limited only to information received in connection with negotiations, but shall also apply to information received during the contractual relationship. The new draft Electronic Communications Act specifies such and interpretation in section 2-5:

"The duty to maintain confidentiality also applies to information that the provider receives during the contractual relationship. Nor shall such information be used within the provider's own business for anything other than what the information was intended to be used for when the information was provided." [Unofficial translation of the section].



Nkom will clarify the interpretation of the Electronic Communications Act section 4-13 in the final decision.

- c. Compared to previous Nkom's decisions, the current draft includes more granular applications of the margin squeeze test by segmenting Telenor's bilaterally negotiated offers to business customers into 7 separate groups. ESA raised this with Saga Mobil, but they questioned whether this would work in practice. Did Nkom have any contact with Saga Mobil about this new approach?

Nkom's response:

The new approach is developed and included in the draft decision to target competitive concerns in the business market on a less aggregated level than previous decisions. The background for this is among others concerns raised by Saga Mobile and other alternative providers in the business market. Saga Mobile did not comment on the approach during the consultation.

Nkom has already tested the new approach. Telenor has been submitting data at the granular level as supplementing trial test for the two latest rounds of margin squeeze testing.

2. **Reciprocal pricing for co-location.** We understand that the obligation on reciprocal pricing for co-location is currently pushed back in time, waiting for a more concrete proposal from Telenor and presumably a new consultation of the market. We note that the timeframe of the current market analysis is three years. Against this background, please elaborate on the expected timing of this upcoming new regulation. Is Nkom's plan to notify this obligation to ESA?

Nkom's response:

The proposal for reciprocal pricing was briefly brought up by Telenor in their consultation response 10. November 2023. The proposal was also discussed with Telenor in a follow-up meeting 9. January 2024.

As explained in the draft decision, Nkom believes that the proposal has merits, however it needs to be further detailed in order to be implemented in a transparent and objective manner. It is in Telenor interest to contribute to the development of detailed principles, therefore Nkom believe that Telenor will cooperate constructively with Nkom to develop such principle when the final market decision has entered into force.

Nkom will notify the final principles and the decision to ESA. The timing for such notification will mainly depend on the contributions from Telenor, which Nkom will assess and also consult with relevant market players. Nkom aims at finalizing the process by the end of 2024. If the process is finalized by this time, reciprocal pricing principles is expected to be operational for around 2,5 years.

The intention is that the principle will give incentives to all parties to negotiate effective and mutual co-location, also in the future when ex-ante regulation in M15 is lifted.

3. **Pricing parity clause between SPs and MVNOs.** After having explained the two approaches to the margin squeeze test relating to respectively SPs and MVNOs, paras 455 and ff of the Draft Decision explain that, in any event, Telenor's prices to MVNOs should not be less attractive than for SP. This requirement appears to cast doubt on the effectiveness of the margin squeeze test. Indeed, one would expect that a properly designed margin squeeze test would not need further rules on price levels. Please further elaborate on this, and explain the cases mentioned in the text where the prices for SPs were more favorable compared to those to for MVNOs.

Nkom's response:

The text in paragraph 455 indicates that there have been cases of more favorable wholesale prices for SPs than for MVNOS in previous regulatory periods. The reference is related periods before the margin squeeze test were implemented (2016).

The regulation imposes differentiated margin squeeze regulation for MVNO and SP in order to fully account for different characteristics of the business models and their needs, ref. chapter 7.5.3 in the draft decision (gross margin test on each representative product for SP vs full margin squeeze test of the residential and business market for MVNO access). The full margin squeeze test for MVNO is a stricter test than the gross margin test for SP, as the test includes retail costs. This will overall lead to more attractive wholesale prices for MVNO than for SP, however it doesn't prevent Telenor from introducing more attractive prices for specific services (voice, SMS or data). The requirement for relative prices is intended to form a safety net to prevent such practices.

4. **Changes to Telenor's wholesale prices.** The Draft Decision (paras 480 and ff) explains that in case Telenor fails the margin squeeze test, it should not attempt passing it by increasing its retail prices, but rather it should decrease its wholesale prices.

However, how this provision can be monitored or enforced is not immediately clear. In the mobile industry, retail price levels are typically changed with the introduction of new tariffs, rather than by changing the prices of existing tariffs. Therefore, in setting the prices for its new tariffs at the retail level, Telenor will also consider that its retail price will affect how stringent the regulation is going to be on its wholesale price. This suggests that Telenor has the ability, and presumably the incentives, to set the retail price of its new retail tariffs 'high enough' to meet the margin squeeze test at the wholesale level upstream, without adjusting its wholesale price downward.

In this context, please explain whether and how Nkom is planning to monitor and enforce this provision.

Nkom's response:

This provision refers to a situation where Nkom has conducted a margin squeeze test based on data collected from Telenor, and Telenor fails to pass the test (a negative margin). In this

case, Nkom will make a decision ordering Telenor to reduce the wholesale prices to a level necessary to ensure that the margin squeeze tests show a positive result. As stated in paras 490 Telenor can choose to change the price for voice, SMS or mobile data, or a combination of the prices for these three services. The wholesale prices must normally be rectified within ten business days from the rectification decision being made. Nkom will use the margin squeeze test Telenor failed to pass to check if the corrected wholesale prices would result in the test now being positive.

Naturally, Telenor can introduce new retail products with higher prices, but these will only be included in future tests if they are considered to be representative and will not affect the conducted test that Telenor failed to pass. Introducing new retail products will not prevent Telenor from having to reduce the wholesale price to correct the breach in the conducted test.

5. **Reporting of Volume Discounts.** Paras 406-411 describe how Telenor should handle volume discounts, and how they should be reported. The discussion is, however, somewhat unclear.

- a. First, it is not clear whether the volume discounts discussed in 406-411 refer to the “network operator costs”, the subject of the preceding paragraph 405.

Nkom’s response:

The volume discounts discussed in paragraph 406-411 relate to network operator costs. These costs include the cost that Telenor’s retail operations would have paid to their network operator if it were organised as an independent entity and had faced the same access prices as purchasers of national roaming and MVNO access from Telenor. In the accounting separation, Telenor calculates the network operator cost based on the reference offer for MVNO or national roaming. The reference offers include volume discounts.

- b. Second, para 407 mentions that a higher discount will make it easier for Telenor to achieve a positive result in the financial statement. How so? A discount is typically intended as a revenue loss for the operator.

Nkom’s response:

It appears to be a misunderstanding in the translation in paragraph 407. The arrangement in question is separated accounts and not the financial statement. The wording will be corrected in the final English version.

The volume discounts in the reporting of accounting separation are used to reduce the network operator costs. This is due to the approach mentioned above, where separated accounts show the network costs as if Telenor’s retail business was an independent entity facing Telenor’s wholesale prices.



The volume discounts in wholesale agreements are often divided into levels, where the discount increases with increasing wholesale volume. Using Telenor's volumes when calculating the volume discounts will entail an advantage for Telenor, as the network costs will be significantly reduced. The network costs will be significantly lower than what an access buyer with lower volume will be able to achieve, and this would not reflect the situation for buyers of access and therefore not be reasonable. Therefore, paragraph 407 reasons that the discounts obtained by the access buyer with the lowest volume during the period is used as a basis.

- c. Paras 410-411 refer to 'positive result' and 'negative or weak result', but which test is being applied? The margin squeeze test or another test?

Nkom's response:

Paragraph 410-411 refer to Telenor's reporting of the accounting separation, not the margin squeeze test. The reporting of separated accounts is a separate test in itself with the purpose to monitor the obligation for non-discrimination on price between internal and external provisions.

6. **Numerical example of the margin squeeze test.** Annex 4 to the Draft Decision reports the margin squeeze test model, in Excel. The model is only a skeleton, which will be fleshed out with actual data on a rolling basis during the timeframe of the decision. We understand, however, that Nkom already carried out some numerical examples based on previous data from Telenor. If possible, could you please share one of those numerical examples? It would be easier for ESA to review the model with actual data included.

Nkom's response:

Please find a version of the margin squeeze model that includes previous data as annex to this respond (the files are confidential).

7. **Tefficient report.** Para 444 refers to a report prepared by Tefficient for the Ministry of Local Government and Regional Development. Footnote 62 contains the link to the report, which however seems broken. Could you please provide the Tefficient report?

New link to the report:

[analysis-of-norwegian-mobile-revenue-data-usage-and-pricing-by-tefficient-for-kdd-26-sep-2023.pdf \(regjeringen.no\)](#)

The final decision will be updated with the new link.

8. **Representativeness of Telenor's tariffs for the margin squeeze test.** Para 452 of the Draft Decision states an efficient SP is geared towards offering products in *limited parts* of the retail market. Further, para 454 emphasizes that the margin squeeze test tailored for SP aims at ensuring that access seekers with SP agreements are not excluded from any *niches* of the retail market.

However, the margin squeeze test includes Telenor's tariffs accounting for around 70% of Telenor's subscriptions in the retail market, and ESA understand that these are the 'top' 70%, including the most popular tariffs first.

Please comment on whether this creates an inconsistency with the stated aim for the test, as Telenor's tariffs accounting for at least the top 70% of subscriptions are arguably tariffs aimed at the mass market, rather than niches.

Nkom's response:

As a starting point, Nkom considers it appropriate that the margin squeeze tests include around 70 per cent of the number of subscriptions in each of the retail markets. However, when selecting representative products, Nkom considers several criteria, not only related to the "top 70%" or the most popular tariffs. The following is stated in section 3.1.6 "Representative retail products" in Annex 2 "Principles for margin squeeze tests in Market 15".

"On assessing whether retail products are considered to be representative of the competition situation in the market, weight must among other things be given to whether the product is sold, whether the product is offered to new customers at a campaign price, and whether the access buyers have equivalent products that compete directly with Telenor's product. The aforementioned criteria are not exhaustive. It is of great importance that the product is subject to competition in the relevant retail market."

Before each margin squeeze test Nkom receives a complete list of all of Telenor's retail offers in both the residential and the business market. The list contains monthly information on the number of subscribers per product over the past six months. Based on this list, as well as product information from previous tests, Nkom makes a careful assessment of which products should be included in the next margin squeeze tests. Nkom aims to test products that covers all parts of the residential and business market, including niche products. The percentage of Telenor's products included in the tests has varied from above 70 % to above 90 %.

Nkom doesn't believe it would be a good solution to include all of Telenor's retail products in the margin squeeze tests, as this would include several old products that are no longer offered in the market, were Telenor still has some customers. These products are less relevant to the competition and would in fact make it easier for Telenor to pass the MVNO tests for the residential and business market.

To summarize, Nkom are of the opinion that the selection criteria and the thorough selection process employed for each round of tests, ensures that relevant products are tested, and the test is performed on a product level relevant for SP. Nkom does not find any inconsistencies between the selection of products and the stated aim for the SP-test.



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Please feel free to contact us if you have any further questions or need for clarification.

With regards

Kamilla Sharma
Director

Inger Vollstad
Head of Section

Electronically approved. No signature required

Markedet for tilgang til og samtaleoriginering i mobilnett (15.5) EFTA Surveillance Authority