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Norwegian Communications Authority (Nkom)  
Postboks 93  
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Norway

For the attention of:  
Mr Pål Wien Espen  
Director General

Dear Mr Espen,

**Subject: Wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products in Norway – Remedies – VULA fibre requirements and margin squeeze test**

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

## I. PROCEDURE

On 15 June 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, *Nasjonale Kommunikasjonsmyndighet* (“Nkom”), concerning remedies in the markets for wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products in Norway.<sup>2</sup> The notification consists of two measures: (i) the technical requirements for VULA fibre, and (ii) the price regulation of the VULA fibre service.

The notification became effective on the same day.

National consultations were carried out, pursuant to Article 6 of the Framework Directive, during the period 2 September to 1 October 2019 for the VULA fibre technical requirements and 19 January to 9 February 2021 for the VULA fibre price regulation.

On 28 June 2021, the Authority sent a request for information (“RFI”) to Nkom (Document No 1210280), to which a reply was received on 5 July 2021 (Document No 1212478).

<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”).

<sup>2</sup> Corresponding to markets 3a and 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 Framework Directive; adopted by Decision No 093/16/COL, OJ L 84, 30.3.2017, p. 7 (“the 2016 Recommendation”).

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 July 2021.

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

On 20 December 2018, Nkom adopted decisions designating Telenor ASA (hereafter “Telenor”) as a provider with significant market power (“SMP”) in the wholesale markets for local and central access provided at a fixed location (markets 3a and 3b) and imposing regulatory obligations.<sup>3</sup>

In relation to Telenor’s fibre wholesale access services, Nkom imposed obligations on Telenor to provide access to its virtual fibre-based access products in markets 3a and 3b (called VULA and VUA fibre services, respectively)<sup>4</sup> and also for margin squeeze tests to be carried out on both services.

On 31 March 2020, Nkom adopted a supplementary decision in market 3a, concerning the determination of final requirements for the VULA fibre product. At the time, Nkom considered that there was an urgent need to ensure that the enhanced VULA product was available as quickly as possible, in the interests of competition and of the access buyers’ end users, who could lose access to copper-based broadband due to Telenor’s closure of the copper network. For these reasons, the decision was adopted without prior consultation with the Authority under Article 7(6) of the Framework Directive (relating to provisional measures).<sup>5</sup> The currently notified draft decision aims, *inter alia*, at rendering Nkom’s decision permanent.

On 13 November 2020, Nkom adopted its decision to set maximum prices for Operator Delivery Port (“ODP”) connection.<sup>6</sup> The ODP is a fixed fee charged per point of handover, which can result in relatively high average prices per access, particularly for smaller access seekers with few retail customers, and can thereby discourage access to Telenor’s fibre network.

### II.2 Current notification

The current notification includes two separate draft measures relating to VULA fibre, namely: (i) the technical requirements of the service, and (ii) its price regulation (including the parameters of its margin squeeze test).

#### **VULA fibre technical requirements**

The draft decision sets out the technical features that must be met by Telenor’s wholesale VULA fibre service following stakeholder discussions at the Broadband Forum and Nkom’s assessment.

<sup>3</sup> See the Authority’s comments letter of 3 December 2018, [Document No 1039929](#).

<sup>4</sup> VULA refers to virtual unbundled local access (market 3a service) and VUA refers to virtual unbundled access (market 3b service).

<sup>5</sup> See [Document No 1132828](#).

<sup>6</sup> See the Authority’s no comments letter of 12 October 2020, [Document No 1155794](#).

In terms of the point of handover, Telenor's network structure follows two different schemes: (i) for a minority of exchanges, the ODP is co-located with the Optical Line Termination ("OLT") and the Border Network Gateway ("BNG"); and (ii) for the majority of exchanges, the OLT is situated closer to the end user and away from the exchange where the ODP and BNG are co-located.

Nkom discusses whether the point of handover for VULA fibre should be at the OLT (closer to the end user) or instead at the BNG level. Nkom concludes that it is not proportionate to impose an obligation on Telenor to provide access to all of its OLTs, mainly for two reasons. Firstly, only one access seeker has shown interest in accessing Telenor's network at the OLT rather than at the BNG level. Furthermore, in its reply to the Authority's RFI, Nkom indicated that the access seeker [REDACTED]. Secondly, access at all of Telenor's OLTs would require significant investments from Telenor/access seekers.<sup>7</sup>

For the above reasons, Nkom proposes to impose a general obligation for access at Telenor's BNG rather than at the network's OLT. However, it also requires Telenor to prepare a process for handling potential requests for access at OLT level, which may be considered reasonable in certain circumstances.

In addition, Nkom considers that the obligations regarding transparency and flexibility in traffic management will ensure that VULA appears as equivalent to physical access as possible and will reduce the need for access at the OLT. These obligations include (i) a detailed description of traffic management between OLT and BNG, and (ii) priority management between the two network elements.

In its measure, Nkom also describes other general features of the VULA fibre service.<sup>8</sup> Nkom concludes that it is not necessary to impose an obligation on Telenor to allow for access seekers' use of their own terminal equipment, given that access buyers have not expressed an interest in this option and that this is the most common approach followed by other NRAs in the EEA.

In relation to information and support systems, Nkom notes that Telenor made proposals in the context of the Broadband Forum and did not receive any comments. Thus, Nkom does not see a need to develop Telenor's proposal further and considers that Telenor's proposal combined with the obligations set out in the 2018 market review decision should be sufficient. These include a non-discrimination obligation and the need to involve access seekers in any change to the proposed solution.

Finally, Nkom notes that the point of handover for VULA fibre will be the same as that for the VUA fibre service in market 3b. For this reason, the NRA concludes that it is not necessary to impose an obligation on Telenor to continue to provide VUA fibre. Nkom indicated in its reply to the Authority's RFI that the new VULA functionality became available for all existing VUA lines at the same time as the VULA fibre service was available for ordering in November 2020, ensuring a smooth transition between the two services.

Although the point of handover for VULA fibre is the same as that for Telenor's VUA fibre product, Nkom indicated in its reply to the Authority's RFI that it considered VULA fibre a

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<sup>7</sup> Nkom describes three possible alternatives to allow for access at the OLT, all requiring some degree of investments by Telenor at its network OLT points, namely: (i) setting a direct ODP connection (to the extent that connection capacity and functionality at the OLT allow for this option); (ii) a new BNG node; or (iii) a new Layer 2 switch (which would result in additional costs from developing such a solution and operating a new type of equipment in the network).

<sup>8</sup> This includes the class of service, customer VLAN, service VLAN, multicast support, Ethernet frame formats and frame sizes, Layer 2 Ethernet protocol and protocol transparency, and quality of service requirements.

market 3a service given its improved features when compared to the existing VUA fibre product.<sup>9</sup>

### **VULA fibre price regulation**

The price regulation of VULA fibre is based on an economic replicability test (“ERT”) in line with the Commission’s 2013 Recommendation on consistent non-discrimination obligations and costing methodologies<sup>10</sup> (“the Commission’s 2013 Recommendation”) and BEREC’s 2014 Guidance on the regulatory accounting approach to the ERT.<sup>11</sup> Nkom notes that it will continue to use the model developed by Wik Consult for the VUA fibre product.

Nkom’s main assumptions underpinning the ERT are as follows:

- The use of an adjusted equally efficient operator, assuming:
  - a modelled alternative provider with a market share of 15% at ODPs with at least one hundred connected subscribers; and
  - an adjustment to Telenor’s data for cost items where Telenor’s data diverges from alternative providers’ data by more than 10%.
- In terms of the retail services:
  - the relevant retail products are internet access, voice services and IPTV;
  - the test will be carried out including the most attractive products (flagship products), which combined will represent at least 70% of total revenue and will include retail products with a market share of 10% or more;
  - standalone residential and business products offered using VULA fibre in market 3a will also be included in the margin squeeze test; and
  - other products may be included if they are expected to be important for competition in the relevant retail market.
- In terms of the wholesale services:
  - the wholesale prices include all price elements that the access buyer needs to purchase for access; and
  - the model uses the fibre-based wholesale products to which Telenor is required to grant access in market 3a.
- In terms of revenues, they include:
  - all price elements: recurring and non-recurring; and
  - discounts and promotions during the relevant time period;
- In terms of costs, they include:
  - all relevant costs, with fixed costs allocated over the corresponding lifetime;
  - the weighted average cost of capital (“WACC”) used in the model will be the WACC for fixed networks estimated by Nkom; and
  - the following relevant downstream costs: (i) own network costs; (ii) costs of terminating voice traffic on other networks; (iii) other costs (regulatory, TV content, etc.); (iv) retail costs; and (v) common costs (allocated using an equi-proportionate mark-up approach).

<sup>9</sup> These relate to technical differences (e.g. regarding class of service, customer VLAN, support for multicast), strengthened requirements in terms of transparency which more closely resemble the control associated with physical access, a new IT solution allowing management of access characteristics and supervision performance through testing and diagnosis and the process whereby access seekers may request modifications to the product.

<sup>10</sup> Commission’s 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, available [here](#).

<sup>11</sup> BEREC Guidance on the regulatory accounting approach to the economic replicability test, BoR (14) 190, 05.12.2014, available [here](#).

- In terms of the relevant time period:
  - Nkom proposes a steady state approach, whereby costs and revenues are allocated according to cost causation and broken down to a single time period; and
  - the model uses the average customer lifetime (60 months) as the reference time frame for the test.

In order to pass the test, the identified flagship products are tested as a combined group (portfolio), where each product is given a relative weight consistent with Telenor's customer base and at least one flagship product shall be a standalone product. Additionally, Nkom considers it necessary that Telenor's (i) standalone fibre products from the residential market shall have a positive gross margin, and (ii) the standalone fibre products from the business market shall have a positive gross margin of at least 40%.

Additionally, following ESA's comments regarding the need to consider an *ex ante* test for VULA fibre,<sup>12</sup> Nkom proposes an obligation on Telenor to document the economic replicability of its products prior to making any price or other changes to its flagship products.

Nkom intends to run the test twice every year, but may also decide to run the test at any other time on a discretionary basis if necessary.

### III. COMMENTS

The Authority has examined the notified draft measures and has the following comments:

#### **Need to ensure consistency with the Commission's Notice on the cost of capital**

Nkom indicates that it intends to use the WACC for fixed networks in its ERT model. In its reply to the Authority's RFI, Nkom noted that its decision on the WACC for fixed access dated back to 2017. Furthermore, Nkom recognised that there were several discrepancies between its approach and that described in the Commission's 2019 Notice on the cost of capital.<sup>13</sup>

The Authority considers that it is necessary to ensure consistency with the approach described in the Commission's Notice and, therefore, urges Nkom to review its cost of capital estimation and to notify its decision to the Authority without undue delay.

#### **Need to monitor aggregation level**

The Authority welcomes Nkom's proposal to safeguard replicability by including gross margin tests on standalone services in addition to the portfolio test. In line with the Commission's 2013 Recommendation, NRAs should consider whether it may be appropriate to include in the ERT particular retail products which may not be among the most relevant retail products of the SMP operator, but which are particularly attractive to alternative operators.<sup>14</sup>

The Authority considers that Nkom's choice of products to be tested should be reviewed regularly to ensure effective competition is safeguarded, including competition which may not take place across the full range of Telenor's product portfolio, e.g. in relevant retail

<sup>12</sup> See the Authority's decision in case 85355 ([Document No 1144415](#)).

<sup>13</sup> Commission Notice of 6 November 2019 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 C 375/1, 6.11.2019, available [here](#).

<sup>14</sup> See the Commission's 2013 Recommendation (also at footnote 10 above), Annex II, point (iv).

markets for which VULA is an input but which may not correspond to the definition of flagship products used by Nkom in its ERT.

#### 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>15</sup> the Authority will publish this document on its eCOM Online Notification Registry. Apart from the words highlighted on page 3, the Authority does not consider the information contained herein to be confidential. You are invited to inform the Authority within three working days<sup>16</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,

Gabrielle Somers  
Deputy 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, Gabrielle Somers.*

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<sup>15</sup> EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, OJ C 302, 13.10.2011, p. 12, and available [here](#) ("the Procedural Recommendation").

<sup>16</sup> The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.