

Brussels, 20 March 2012
Case No: 68596
Event No: 626248

Póst- og Fjarskiptastofnun (PTA)

Attention: Mr Hrafnkell V. Gíslason, Managing Director
Sudurlandsbraut 4
108 Reykjavík, Iceland

Dear Mr Gíslason,

Subject: Wholesale market for access and call origination on public mobile telephone networks in Iceland (former Market 15)

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

I. Procedure

On 20 February 2012, 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 Directive¹ from the Icelandic national regulatory authority, *Póst- og Fjarskiptastofnun* (PTA). The notification became effective on the same day. The draft measure concerns the second round review of the wholesale market for access and call origination on public mobile telephone networks in Iceland.

The market corresponds to former market 15 in the list of markets contained in the Annex to the Authority’s 2004 Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.² That market was removed from the list in the Authority’s revised Recommendation in 2008.³

National consultation pursuant to Article 6 of the Framework Directive was carried out in the period from 30 August 2011 to 11 October 2011.

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 EFTA Surveillance Authority Recommendation (Decision 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.

³ 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 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 communication networks and services), OJ C 156, 9.7.2009, p.18.

The period for consultation with the Authority under Article 7 of the Framework Directive expires on 20 March 2012.

II. Description of the draft measure

II.1. Background

The first round review of the Icelandic wholesale market for access and call origination on public mobile telephone networks was notified to and assessed by the Authority under Case No 59759 on 28 September 2006.⁴ PTA identified two distinct wholesale product markets: the market for access and call origination on (i) public GSM mobile phone networks, and on (ii) the NMT 450⁵ mobile phone network. It concluded that Siminn hf. ("Siminn") had significant market power in both markets.

On the market for access and call origination on GSM mobile phone networks, obligations were imposed on Siminn for access (including national roaming, co-location and joint utilisation, resale, mobile virtual network operator access), non-discrimination, transparency (publication and reference offer), accounting separation and price control.

On the market for access and call origination on the NMT mobile phone network, obligations were imposed on Siminn for resale access, non-discrimination, transparency and price control.

II.2. Market definition

PTA considers that the relevant market is composed of:

- All services for access and origination of telephone calls in GSM/UMTS mobile phone networks,⁶ that are provided or that can be provided.
- Access to GSM/UMTS with prepaid cards and monthly subscriptions.
- Access for individuals/homes and companies.
- Access to SMS services.
- Access to other data transfer services with the exception of dedicated data transfer subscriptions.⁷

PTA excludes from the scope of the relevant market access and origination of telephone

⁴ The Authority commented – among other things – on PTA's interpretation of a national provision which limited PTA's power to impose remedies, and in particular which provided for a two-year moratorium on national roaming access to mobile phone stations after they had been brought into use. The Authority reserved its right to pursue any related potential infringements of EEA law in this regard. Thereafter, PTA re-notified its draft measure on 9 November 2006 with several amendments relating to how PTA intended to construe the interplay between the above-mentioned provision and its general power to impose remedies (Case No 61039).

⁵ NMT 450 was the only analogue mobile phone network in Iceland (accessible in highland and coastal waters) and was operated by Siminn between 1986 until the discontinuation of the service in 2010.

⁶ Since the previous market analysis, 3G services based on the UMTS technology have been introduced in Iceland. According to PTA, there is no difference and no distinction can be made to access at wholesale level to telephone calls in GSM and UMTS networks. Therefore PTA considers the latter to fall within the scope of the relevant market.

⁷ The NMT system was discontinued from 1 September 2010 and therefore no longer forms part of the relevant market.

calls in a fixed network, telephone calls using IP technology (VoIP), termination of telephone calls in mobile phone networks, termination of SMS in GSM mobile phone networks, international roaming, and dedicated data transfer subscriptions in mobile phone networks. The NMT 450 services, which were considered as a separate service market in PTA's previous analysis of the relevant market, are no longer examined in the notified draft measure as the services were discontinued in 2010.

According to PTA, the relevant geographic market is national in scope, that is, limited to Iceland.

II.3. Evaluation of whether the market is still susceptible to *ex ante* regulation (the three-criteria test)

Pursuant to Article 2 of the Authority's 2008 Recommendation, when identifying markets they consider should be subject to *ex ante* regulation other than those set out in the Recommendation, national regulatory authorities (NRAs) must ensure that the following three criteria are all met:

- The presence of high and non-transitory structural, regulatory or legal barriers to entry.
- A market structure which does not tend towards effective competition within the relevant time horizon.
- The insufficiency of competition law alone to address the markets failure(s) concerned adequately.

In its draft measure, PTA assesses whether former market 15 should remain susceptible to sector-specific *ex ante* regulation.

First criterion - barriers to entry

PTA takes the view that the relevant market is characterised by high structural entry barriers – control of infrastructure not easily duplicated; large sunk costs; economies of scale and scope – making new entry unlikely, in spite of the availability of licences for allocation of spectrum.

Market developments, including customers' expectations concerning coverage and quality, indicate that from the beginning new providers must be able to provide services everywhere in Iceland in order to be able to compete with the established providers, Siminn, Fjarskipti ehf. ("Vodafone") and Nova. Duplicating networks fully from the beginning is assumed to be unjustifiable financially due, *inter alia*, to very high sunk costs, the small size of the market and the disparate nature of the population in Iceland. Therefore, new providers are dependent on access to existing infrastructure in order to compete in the market.

Other factors also complicate new entry: vertical integration; access to finance; technical superiority.

Second criterion - tendency towards effective competition

The assessment of the second criterion is forward-looking. PTA examines whether active competition is possible in the next two to three years by looking at current developments in market shares and prices as well as pricing behaviour, control of facilities that are

difficult to replicate, product differentiation and integration of services, possible competition and market concentration.

On the retail level, Siminn's market share has been continually decreasing, both in terms of revenues (from 66% in 2005 to a little under 49% in mid-2011) and the number of customers (from 62% in 2005 to 40.3% in mid-2011). As regards Vodafone, the company also lost market shares during the same period (from 38% to 30.5% in terms of customers). In addition, PTA emphasises the fact that by mid-2011 three more companies were active on the retail market: apart from Siminn and Vodafone, Nova, Tal and Alterna also commenced operations.

On the wholesale market, there are three active network operators. Siminn and Vodafone provide coverage of the whole country, and Nova covers 90% of the population⁸. According to PTA, the development of the market shares during the past years has tended towards a levelling between these three companies. Siminn's market share – although still the largest among all operators – has been constantly decreasing – from 62% in 2005 in terms of number of customers to 43% in 2011. During the same period, Vodafone's market share in terms of customers dropped from 38% to 33%.

The successful market entry of Nova at the end of 2007 is the most significant change that has taken place on the market since the last market analysis. By the middle of 2011 it had a little under 28% market share by number of minutes and a little under 24% by number of customers.

The three largest companies have all been and can be approached by virtual network and resale parties operating retail mobile phone services and current agreements are partly the result of the access obligation imposed on Siminn in 2007 but also of voluntary agreements entered into by Vodafone.

PTA considers that there is no longer evidence of significant reluctance to enter into access agreements, which was the case previously, due in part to the incentive of mobile operators to use excess capacity in their network systems. This indicates, in PTA's view, that the market is moving towards effective competition.

In that light, PTA considers that the second criterion is not fulfilled and that control over access to mobile phone networks is no longer needed.

PTA does not further examine the third criterion.

II.4. Regulatory remedies

As the conclusion of PTA, after assessing circumstances on the relevant market, is that the market is moving in the direction of effective competition within the time-frame under examination, the conditions are no longer in place for the imposition of *ex ante* obligations on undertakings on the market.

In that light, PTA proposes to withdraw the current obligations imposed on Siminn (obligations of non-discrimination, price control, transparency, accounting separation and access).

⁸ Nova has developed a 3G network in the capital city area and in a number of urban areas as its frequency licence does not permit the development of a network covering the whole country. The operator has made an agreement with Vodafone on the reciprocal use of networks (i.e., Nova's customers have access to 2G services outside Nova's coverage area while Vodafone customers can use Nova's 3G network).

In PTA's view, the parties affected by the decision are mainly those companies that have access agreements with Siminn. The withdrawal of the obligations could result in the need to review agreements in force or to make new agreements. Some service providers on the retail market might need or wish to change service providers on the wholesale market because of the withdrawal of regulation. Similarly, parties with agreements on national roaming could consider it appropriate to enlarge their networks.

Against that background, PTA considers that access should continue to be assured for a period sufficient for any such adaptations to be made, and therefore proposes to withdraw the access obligation after a grace period of 12 months from the publication of the decision. In respect of the other obligations to be withdrawn, PTA proposes a 6-month grace period from the publication of the decision; in its view, the withdrawal of such obligations has a lesser impact on retail parties.

Finally, PTA considers there to be a need to continue to closely monitor the market and is prepared to examine whether a new analysis needs to be made should circumstances on the market change significantly because of a change in structure of the market or in behaviour of network operators.

III. Comments

The Authority has examined the notified draft measure and has no comments.


IV. Final remarks


Pursuant to Article 7(5) of the Framework Directive, PTA may adopt the resulting draft measure and, if it does so, shall communicate the final measure 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 national measures.

Pursuant to point 15 of the Procedural Recommendation, the Authority will publish this comments letter on its eCOM Online Notification Registry. The Authority does not consider the information contained in this letter to be confidential. However, you are invited to inform the Authority within three working days⁹ 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 would like to be deleted prior to publication. You should provide reasons for any such request.

Yours sincerely,


Olafur Johannes Einarsson
Director
Internal Market Affairs Directorate


Tormod Sverre Johansen
Acting Director
Competition and State Aid Directorate

⁹ The request should be submitted through the eCOM Registry or by facsimile to +32 2 286 1800, marked for the attention of the eCOM Task Force.