

Alþingi
Erindi nr. Þ 135/3139
komudagur 3.9.2008

Brussels, 28 September 2006
Case No: 59759
Event No: 388569

EFTA SURVEILLANCE
AUTHORITY

Póst og fjarskiptastofnun
Suðurlandsbraut 4 2.h.
108 Reykjavík
Iceland

Att: Mr. Hrafnkell V. Gíslason, Director
Fax.: +354 5101509

Dear Mr. Gíslason,

Subject: Wholesale market for access and call origination on public mobile telephone networks in Iceland

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

I PROCEDURE

On 28 August 2006, the EFTA Surveillance Authority (hereinafter “the Authority”) registered a notification by the Icelandic national regulatory authority, *Póst og fjarskiptastofnun* (hereinafter “PTA”), relating to the wholesale market for access and call origination on public mobile telephone networks in Iceland, under case number 59759.

The notification consists of the following documents:

- A Summary Notification Form;
- A “Draft decision on the designation of undertakings with significant market power and imposition of obligations in the market for access and call origination on public mobile phone networks (market 15)”, (hereinafter “the notified draft measure”);
- Annex A: “Analysis of the wholesale market for access and call origination on public mobile telephone networks”;
- Annex B: “International price comparisons and development of the prices in the retail market for mobile phone services in Iceland”;
- Annex C: “Results of the PTA’s consultation regarding the draft of an analysis of the market for access and call origination on public mobile networks (Market 15)”;
- Information letter dated 8 September 2006 informing the Authority of the opening of a second national consultation.

The first national consultation in accordance with Article 6 of the Framework Directive 2002/21/EC¹ (hereinafter “FWD”) was carried out between 8 July 2005 and 15 September

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communication networks and services (Framework Directive), as

2005. A second national consultation, initiated on 8 September 2006 and closing on 2 October 2006, is currently ongoing.

Pursuant to Article 7(3) FWD, national regulatory authorities (hereinafter “NRAs”) in the European Economic Area (hereinafter “EEA”), the European Commission and the Authority may make comments on notified draft national measures to the NRA concerned.

The EEA consultation period under Article 7 FWD expires on 29 September 2006.

II DESCRIPTION OF THE DRAFT MEASURE

II.1 Market definition

PTA has not deviated from the definition set out for market 15 in the Authority’s Recommendation on relevant markets².

PTA has concluded that the relevant service market at the wholesale level consists of two distinct markets: the wholesale market for access and call origination on public GSM mobile phone networks; and the wholesale market for access and call origination on the NMT 450 mobile phone network. PTA justifies the definition of two separate markets on the basis of the following factors: GSM and NMT networks’ respective coverage areas (NMT covers the whole of Iceland, including its interior and costal waters); the different scope of services offered by the two networks; consumer perception of lack of substitutability; and significant and sustained price differences.

The wholesale service market for access and call origination on public GSM mobile phone networks consists of:

- all services for access and call origination on GSM mobile networks that are provided, or that can be provided;
- access to GSM via pre-paid cards and monthly subscriptions;
- access for both individuals/residences and corporations;
- access to SMS services;
- access to other data services, such as GPRS and EDGE.

The wholesale service market for access and call origination on the NMT 450 mobile phone networks consists of:

- all services for access and call origination on the NMT mobile network that can be provided;
- access to NMT via monthly subscription;
- access to NMT for both individuals/residences and corporations.

referred to at point 5c1 of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement.

² EFTA Surveillance Authority Recommendation (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 2001/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, as incorporated into the Agreement on the European Economic Area (hereinafter the “Recommendation on relevant markets”).

PTA is of the opinion that the geographical demarcation of both relevant service markets is Iceland.

II.2 Finding of significant market power (“SMP”)

Siminn and Og Vodafone are the two main operators providing mobile telephone network services in Iceland. IMC, the third licensed mobile network operator, has only a marginal share of the market and is, therefore, considered by PTA to be negligible for the determination of SMP in the relevant markets.

Siminn has a market share of 60-65% measured both in terms of customers and in revenues in the market for access and call origination on public GSM mobile telephone networks. In the market for access and call origination on the NMT 450 mobile phone network, Síminn is the sole operator with a corresponding 100% market share.

Og Vodafone has a share of 35-40% of the market for GSM mobile telephone services measures in both numbers of customers and revenues.

PTA concludes that Síminn possesses SMP both in the market for access and call origination on public GSM mobile networks as well as in the market for access and call origination on the NMT 450 mobile network.

Og Vodafone is no longer considered to possess SMP in the relevant mobile market and, therefore, PTA intends to withdraw any existing obligations on that operator in the market at hand.

In reaching its conclusion, PTA has assessed, among others, factors such as market shares, entry barriers, potential competition, countervailing buying power and prices and price trends.

Although a finding of individual dominance precludes a finding of joint dominance, PTA has also considered the possibility of the existence of joint dominance in the relevant GSM mobile network market.

II.3 Regulatory remedies

PTA intends to impose on Síminn the following regulatory obligations in the wholesale market for access and call origination on public GSM mobile phone networks:

- Access to the GSM network (incl. national roaming, co-location and joint utilisation, resale, mobile virtual network operator (MVNO) access);
- Non-discrimination;
- Transparency (publication and reference offer);
- Accounting separation;
- Price controls.

PTA intends to impose the following obligations on Síminn with respect to that undertaking’s NMT mobile network:

- Access (resale access only);
- Non-discrimination;

- Transparency;
- Price controls.

III COMMENTS

The Authority has examined the notification and the additional information provided by PTA and has the following comments³:

III.1 Second national consultation in parallel with Article 7 FWD notification:

PTA has chosen to run the second national consultation prescribed by Article 6 FWD at the same time as the consultation pursuant to Article 7(3) FWD. The Authority hereby reminds PTA that any material modification to the draft measure as a result of the additional comments made by interested parties in the framework of the ongoing second national consultation will require the draft measure to be re-notified under Article 7(3) FWD.

III.2 Limitation of PTA’s power to impose remedies:

Article 8, read in conjunction with Article 12 of the Access Directive 2002/19/EC⁴ (hereinafter “the Access Directive”), empowers NRAs to impose access obligations on operators designated as having SMP on the relevant market. Article 8(4) of the Access Directive provides that the obligations imposed on SMP operators shall be based on the nature of the problem identified, proportionate and justified in the light of the regulatory objectives laid down in Article 8 FWD.

Article 28 of the Icelandic Electronic Communications Act⁵ (hereinafter “ECA”) provides the national legal basis, corresponding to Article 12 of the Access Directive, for PTA to impose access obligations on SMP operators.

Article 35(4) ECA stipulates a moratorium on national roaming access to mobile phone stations for two years after they have been brought into use.

The Authority is concerned with the compatibility of Article 35 ECA with EEA law, in particular, with Articles 12 and 8(4) of the Access Directive. Access obligations such as those stipulated in Article 35 EAC may only be imposed by an NRA after the required discretionary assessment and on operators designated as having SMP. Article 35 EAC thus limits PTA’s powers to impose the most appropriate remedies.

In fact, it appears that PTA interprets Article 35(4) EAC as limiting its powers to impose the most appropriate national roaming access obligation in the case at hand. More precisely, PTA appears to interpret Article 35(4) EAC so as to restrict it from imposing a full set of national roaming obligations pursuant to Article 28

³ Pursuant to Article 7(3) FWD.

⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as referred to at point 5cj of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement.

⁵ *Lög um fjarskipti*, No 81 of 26 March 2003.

EAC on the designated SMP operator in the market for access and call origination on GSM mobile telephone networks.

Given the above concerns, the Authority reserves the right to pursue any related potential infringements of EEA law under its general powers in accordance with Article 109 of the EEA Agreement.

VI FINAL REMARKS

Pursuant to Article 7(5) FWD and under the reserve made under paragraph III.2 above, PTA may adopt the resulting draft measure and, where it does so, shall communicate the final measure to the Authority.

The Authority's position on this particular notification is without prejudice to any position the Authority may take *vis-à-vis* other notified draft national measures.

Pursuant to point 12 of the Authority's Article 7 Recommendation⁶, 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 days following receipt of this letter whether you consider that, in accordance with EEA and national rules on confidentiality, this document contains confidential information which you request to be deleted prior to such publication. You should give reasons for any such request. The request should be submitted through the eCOM Registry or by facsimile to +32 22 86 18 00, for the attention of the eCOM Task Force.

Yours sincerely,

Hallgrímur Ásgeirsson
Director
Internal Market Affairs Directorate

Amund Utne
Director
Competition and State Aid Directorate



Signed version

⁶ EFTA Surveillance Authority Recommendation (No 193/04/COL) of 14 July 2004 on notifications, time limits and consultations provided for in Article 7 of Directive 2001/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (the "Article 7 Recommendation").

