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EFTA SURVEILLANCE AUTHORITY DECISION

of 11 May 2016

EFTA SURVEILLANCE AUTHORITY RECOMMENDATION

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*), as adapted by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement

THE EFTA SURVEILLANCE AUTHORITY,¹

Having regard to 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 of 7 March 2002 on a common regulatory framework for electronic communications networks and services*² (hereinafter the Framework Directive), as adapted by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement, and in particular Article 15(1) thereof,

Having regard to the Authority's Recommendation of 5 November 2008 on relevant markets within the electronic communications sector susceptible to *ex ante* regulation³ (hereinafter the Authority's 2008 Recommendation) and the Authority's guidelines on market analysis and assessment of significant market power,⁴

Whereas:

- (1) On 9 October 2014, the European Commission (hereinafter the Commission) issued Recommendation 2014/710/EU on relevant product and service markets within the electronic

¹ Hereinafter referred to as "the Authority".

² OJ L 108, 24.4.2002, p. 33.

³ EFTA Surveillance Authority Recommendation of 5 November 2008 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), as adapted by Protocol 1 thereto and by the sectoral adaptations contained in Annex XI to that Agreement (OJ C 156, 9.7.2009, p. 18 and EEA Supplement No 36, 9.7.2009, p. 1).

⁴ The EFTA Surveillance Authority's Guidelines of 14 July 2004 on market analysis and the assessment of significant market power under the regulatory framework for electronic communications networks and services referred to in Annex XI of the Agreement on the European Economic Area (OJ C 101, 27.4.2006, p. 1 and EEA Supplement No 21, 27.4.2006, p. 1), hereinafter referred to as the "Authority's guidelines on market analysis and the assessment of SMP".

communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive.⁵

- (2) The starting point for the revision of the Authority's Recommendation on relevant markets is the Commission's Recommendation 2014/710/EU. In its revision process, the Authority has taken the approach that the comparison of market developments should be carried out against an EEA benchmark and not just taking into account the market situation within the individual EFTA States.
- (3) On the basis of market developments in the EFTA States it seems that, in general, the functioning of electronic communications markets in the three EFTA States is not likely to deviate to a larger extent (than is the case in individual EU Member States) from the average functioning of the markets in the European Union or in the whole of the EEA.
- (4) The objective of the EEA Agreement is to establish a dynamic and homogenous European Economic Area based on common rules and equal conditions of competition.⁶ In light of this objective and the considerations above, the Authority adopts a Recommendation aligned to the Commission's Recommendation 2014/710/EU in order to ensure a uniform application of the common regulatory framework and legal certainty for stakeholders within the electronic communications markets in the EEA.
- (5) The Framework Directive establishes a legislative framework for the electronic communications sector that seeks *inter alia* to respond to convergence trends by covering all electronic communications networks and services within its scope. The aim of the regulatory framework is *inter alia* to reduce *ex ante* sector-specific regulation progressively as competition in markets develops and, ultimately, for electronic communications to be governed by competition law only.
- (6) Article 15 of the Framework Directive provides that the Authority shall, after public consultation and consultation with the national regulatory authorities ("NRAs") in the EFTA States, adopt a recommendation on relevant product and service markets.
- (7) In line with this aim, the purpose of this Recommendation is to identify those product and service markets in which *ex ante* regulation may be warranted in accordance with Article 15(1) of the Framework Directive. The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. It is likely that NRAs will gradually be able to find retail markets to be competitive even in the absence of wholesale regulation, especially taking into account expected improvements in innovation and competition.
- (8) The definition of relevant markets may change over time as the characteristics of products and services may evolve and the possibilities for demand and supply substitution may change. With the Authority's 2008 Recommendation having been in force for more than 7 years, it is now appropriate to revise it on the basis of market developments that have occurred since its adoption. Hence, this Recommendation replaces the Authority's 2008 Recommendation and provides guidance to NRAs for forthcoming market reviews.
- (9) Article 15(1) of the Framework Directive requires the Authority to identify markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations in accordance with the principles of competition law.

⁵ OJ L 295, 11.10.2014, p. 79.

⁶ 4th consideration in the Preamble to the Agreement on the European Economic Area.

Competition law principles are therefore used in this Recommendation to define product markets in the electronic communications sector.

- (10) In accordance with Article 15(3) of the Framework Directive, it is for NRAs to define, in accordance with competition law and taking the utmost account of this Recommendation, relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory.
- (11) In accordance with Article 16(3) of the Framework Directive, *ex ante* regulatory obligations are only imposed in markets that are not effectively competitive. As explained in recital 27 of the Directive, these are markets where there are one or more undertakings with significant market power (“SMP”) and where national and EEA competition law remedies alone are not sufficient to address the competition problem identified. Furthermore, an analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable.
- (12) For both the Authority and the NRAs the starting point for the identification of wholesale markets susceptible to *ex ante* regulation is the analysis of corresponding retail markets. This retail analysis is done by taking into account demand-side and, where appropriate, supply-side substitutability from a forward-looking perspective over a given time horizon. When defining relevant markets in accordance with Article 15(3) of the Framework Directive, NRAs should identify a geographic area where the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different, having particular regard to the question whether the potential SMP operator acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others.
- (13) It should be assessed whether retail markets are effectively competitive from a forward-looking perspective in the absence of regulation based on a finding of SMP. On the other hand, the analysis should take into account the effects of other types of regulation applicable to the relevant retail and related wholesale market(s) throughout the relevant period.
- (14) When carrying out a market analysis under Article 16 of the Framework Directive, the assessment of a market should be done from a forward-looking perspective, starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments.⁷
- (15) If the retail market concerned is not effectively competitive from a forward-looking perspective in the absence of *ex ante* regulation, the corresponding wholesale market(s) susceptible to *ex ante* regulation in line with Article 16 of the Framework Directive should be assessed. When analysing the boundaries and market power within (a) corresponding relevant wholesale market(s) to determine whether it is/they are effectively competitive, direct and indirect competitive constraints should be taken into account, irrespective of whether these constraints result from electronic communications networks, electronic communications services or other types of services or applications that are comparable from the end-users’ perspective.⁸ On the other hand, if the retail market concerned is effectively competitive from

⁷ Point 20 of the Authority’s Guidelines on market analysis and the assessment of SMP. See footnote 4 above.

⁸ Such as, for instance, over-the-top (“OTT”) services which, although today may not be considered as direct substitutes to services provided by electronic communications service providers, technological developments are likely to result in their continuous expansion in the coming years.

a forward-looking perspective in the absence of *ex ante* wholesale regulation on the corresponding relevant market(s), this should lead the NRA to conclude that regulation is no longer needed at wholesale level. In such a case, the corresponding relevant wholesale market(s) should be assessed with a view to withdrawing *ex ante* regulation. Where wholesale markets are vertically linked in the supply chain, the wholesale market to be analysed first is the one that is most upstream from the retail market in question.

- (16) The wholesale markets listed in the Annex may have such characteristics as to justify *ex ante* regulation because overall they meet the following three cumulative criteria, which have also been used to identify markets susceptible to *ex ante* regulation in the previous versions of the Recommendation. The first criterion is the presence of high and non-transitory barriers to entry. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation. The second criterion addresses whether a market structure tends towards effective competition within a relevant time horizon. The application of this criterion involves examining the state of infrastructure-based and other competition behind the barriers to entry. The third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned. The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking market analysis to determine the presence of SMP. In particular, indicators of barriers to entry in the absence of regulation (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures.
- (17) As far as the first criterion is concerned, two types of barriers to entry are relevant for the purpose of this Recommendation: structural barriers and legal or regulatory barriers. Structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints and high sunk costs. A related structural barrier can also exist where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors.
- (18) Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other measures that have a direct effect on the conditions of entry and/or the positioning of operators in the relevant market. An example of a legal or regulatory barrier impeding or preventing entry into a market is a limit on the number of undertakings that have access to spectrum for the provision of underlying services. Other examples of legal or regulatory barriers are price controls or other price-related measures imposed on undertakings, which affect not only entry but also the positioning of undertakings on the market. Legal or regulatory barriers that are likely to be removed within the relevant time horizon should not normally be deemed to constitute a barrier to entry such as to fulfil the first criterion.
- (19) Barriers to entry may also become less relevant with regard to innovation-driven markets characterised by ongoing technological progress. In such markets, competitive constraints often come from innovative threats from potential competitors that are not currently in the market. In innovation-driven markets, dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing 'static' market. This Recommendation identifies markets where barriers to entry are expected to persist over a foreseeable period. In assessing whether barriers to entry are likely to persist in the absence of

regulation, it is necessary to examine whether the industry has experienced frequent and successful entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. The relevance of barriers to entry will depend *inter alia* on the minimum efficient scale of output and the costs which are sunk.

- (20) Even when a market is characterised by high barriers to entry, other structural factors in that market may entail that the market still tends towards becoming effectively competitive within a relevant time horizon. A tendency towards effective competition, under the second criterion, implies that the market will either reach the status of effective competition absent *ex ante* regulation within the period of review, or will do so after that period provided clear evidence of positive dynamics in the market is available within the period of review. Market dynamics may, for instance, be caused by technological developments, or by the convergence of products and markets which may give rise to competitive constraints being exercised between operators active in distinct product markets. This may also be the case in markets with a limited — but sufficient — number of undertakings having diverging cost structures and facing price-elastic market demand. There may also be excess capacity in a market that would normally allow rival firms to expand output very rapidly in response to any price increase. In such markets, market shares may change over time and/or decreasing prices may be observed.
- (21) The third criterion serves to assess the adequacy of corrective measures that can be imposed under competition law to tackle identified persistent market failure(s), in particular given that *ex ante* regulatory obligations may effectively prevent competition law infringements. Competition law interventions are likely to be insufficient where, for instance, the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable. Thus, *ex ante* regulation should be considered an appropriate complement to competition law when competition law alone would not adequately address persistent market failure(s) identified.
- (22) The application of these three cumulative criteria should limit the number of markets within the electronic communications sector where *ex ante* regulatory obligations are imposed and thereby contribute to one of the aims of the regulatory framework, namely to reduce *ex ante* sector-specific rules progressively as competition in the markets develops. Failure to meet any one of the three criteria would indicate that a market should not be identified as susceptible to *ex ante* regulation.
- (23) *Ex ante* regulation imposed at the wholesale level should be considered sufficient to tackle potential competition problems on the related downstream market(s). A downstream market should only be subject to *ex ante* regulation if competition on that market still exhibits SMP despite the presence of *ex ante* regulation on the related upstream wholesale market(s). Given the advances in competition that have been achieved thanks to regulation, this Recommendation identifies only relevant markets at the wholesale level. It is believed that their regulation can address a lack of effective competition at the wholesale level, which in turn is the cause of identified market failures in the related retail markets. Should an NRA nonetheless demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to *ex ante* regulation provided that the NRA has found that the three-criteria test prescribed in this Recommendation is met.
- (24) The markets listed in the Annex have been identified on the basis of the above-mentioned three cumulative criteria. The NRAs should start from a presumption that, in these markets, the three criteria are met. If, however, an NRA concludes that, absent regulation at the wholesale level, the retail market(s) as defined display(s) sustainable competition, it should also conclude that *ex ante* regulation is no longer needed at the wholesale level.

- (25) For the markets listed in the Annex, an NRA may still consider it appropriate, on the basis of specific national circumstances, to conduct its own three-criteria test. An NRA may conclude that the three-criteria test is or is not met in the national circumstances. If the three-criteria test is not met for a specific market listed in the Recommendation, the NRA should not impose regulatory obligations on that market.
- (26) NRAs may identify other markets than those listed in this Recommendation and apply the three-criteria test. In particular, if NRAs, having concluded that a retail market is not effectively competitive absent *ex ante* regulation, intend to regulate the corresponding wholesale market(s), and this/these market(s) is/are not listed in the Recommendation, they should always conduct the three-criteria test. In such a case, the wholesale market to be analysed first is the one that is most upstream from the retail market in question in the vertical supply chain. An NRA should conduct a gradual analysis of the markets that are situated downstream from a regulated upstream input, to determine whether they would be effectively competitive in the presence of regulation upstream, until it reaches the retail market(s).
- (27) NRAs should also apply the three-criteria test to those markets listed in the Annex to the Authority's Recommendation of 14 July 2004 on relevant markets within the electronic communications sector susceptible to *ex ante* regulation⁹ and to the Authority's 2008 Recommendation which are no longer listed in the Annex to this Recommendation if they are currently regulated in the light of national circumstances, in order to assess whether, on the basis of such national circumstances, such markets are still susceptible to *ex ante* regulation.
- (28) Newly-emerging markets should not be subject to inappropriate *ex ante* regulatory obligations, even if there is a first-mover advantage, in accordance with the Framework Directive. Newly-emerging markets are considered to comprise products or services where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three-criteria test. The purpose of not subjecting newly-emerging markets to inappropriate *ex ante* regulatory obligations is to promote innovation as required by Article 8 of the Framework Directive; at the same time, foreclosure of such markets by the leading undertaking should be prevented, as also indicated in the Authority's guidelines on market analysis and the assessment of SMP.¹⁰ Incremental upgrades to existing network infrastructure rarely lead to a new or emerging market. The lack of substitutability of a product has to be established from both demand- and supply-side perspectives before it can be concluded that it is not part of an already existing market. The emergence of new retail services may give rise to a new derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products.
- (29) NRAs shall make accessible to the Authority and to the other EEA NRAs the results of the application of the three-criteria test carried out in accordance with this Recommendation and falling within the scope of Article 7(3) of the Framework Directive. Failure to notify a draft measure which affects trade between the EFTA States as described in recital 38 of the Framework Directive may result in infringement proceedings being taken against the EFTA State concerned.

⁹ EFTA Surveillance Authority Recommendation of 14 July 2004 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), as incorporated into the Agreement on the European Economic Area, adopted by Decision 194/04/COL.

¹⁰ See footnote 4 above.

- (30) The markets listed in the Annex to the Recommendation no longer include two markets that were listed in the Authority's 2008 Recommendation (markets 1 and 2) as they no longer fulfil the three-criteria test. As there may be a degree of variation across the EFTA States in the pace of the expected or foreseeable market developments which underlie this finding at EEA level, specific national circumstances may justify that an NRA could find that market 1 of the Authority's 2008 Recommendation or other retail markets related to market 2 of the Authority's 2008 Recommendation are not yet effectively competitive from a forward-looking perspective absent appropriate and proportionate wholesale remedies. NRAs could thus justify continuing *ex ante* regulatory intervention at wholesale level provided that the three-criteria test is satisfied in the national circumstances for the subsequent review period. The remaining markets of the Authority's 2008 Recommendation still warrant *ex ante* regulation, although the boundaries of markets 4, 5 and 6 of the Authority's 2008 Recommendation are redefined. NRAs take into account their national circumstances when delineating these markets.
- (31) This Recommendation has been subject to a public consultation and consultation with NRAs and other national authorities in the EFTA States.¹¹

HEREBY RECOMMENDS:

1. In defining relevant markets appropriate to national circumstances in accordance with Article 15(3) of the Framework Directive, NRAs should analyse the product and service markets identified in the Annex.
2. When identifying markets other than those set out in the Annex, NRAs should demonstrate, and the Authority will verify, that the following three criteria are cumulatively met:
 - a) the presence of high and non-transitory structural, legal or regulatory barriers to entry;
 - b) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry;
 - c) competition law alone is insufficient to adequately address the identified market failure(s).
3. When considering that any of the markets set out in the Annex is not susceptible to *ex ante* regulation in the specific national circumstances, NRAs should demonstrate, and the Authority will verify, that at least one of the three criteria set out in point 2 is not met.
4. NRAs should consider all relevant competitive constraints, irrespective of whether the sources of such constraints are deemed to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user.
5. This Recommendation is without prejudice to market definitions, results of market analyses and regulatory obligations adopted by NRAs in accordance with Articles 15(3) and 16 of the Framework Directive prior to the date of adoption of this Recommendation.
6. This Recommendation is addressed to the EFTA States.

¹¹ The consultation took place between 4 February and 18 March 2016.

Done at Brussels, 11 May 2016

For the EFTA Surveillance Authority

Sven Erik Svedman
President

Frank Büchel
College Member

This document has been electronically signed by Sven Erik Svedman, Frank Buechel on 11/05/2016

ANNEX

- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location
- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3: (a) Wholesale local access provided at a fixed location
(b) Wholesale central access provided at a fixed location for mass-market products
- Market 4: Wholesale high-quality access provided at a fixed location