

Annex 1

Analysis of the market for fixed network termination with Lyse Tele AS

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Summary and conclusion

This document is the Norwegian Post and Telecommunications Authority (NPT)'s analysis of the market for fixed network voice call termination with Lyse Tele AS (Lyse). The document constitutes an annex to a draft decision concerning directives on specific obligations in the relevant product market. The market corresponds with Market 9 of ESA's recommended list of 18 relevant product markets for *ex ante* regulation.

On 24 March 2006 NPT made decisions in the markets for origination, termination and transit of services on the fixed public telephone network (Markets 8-10). In the markets for termination in individual fixed networks (Market 9) 13 providers were designated as having significant market power. At the same time these providers were imposed specific obligations. Lyse established themselves as a provider of fixed network termination after NPT's decision was taken. NPT therefore believes that there is a need to analyse the market for fixed network termination with Lyse.

Section 1 contains a description of the background and legal framework for the analysis. Section 2 provides a description of the relevant product market and related retail markets. In section 3 the market is delineated on the basis of ESA's predefined market. In section 4 the market is defined geographically. The geographic market is considered to be equal to the geographical coverage of Lyse's and their partner's networks.

In sections 5 and 6 the market is analysed. In the markets for fixed network termination NPT has previously found that all operators who at the time in question have such services and have influence over their own termination charge have significant market power. NPT has not identified any specific conditions that separate Lyse significantly from other providers of termination. Thus NPT has concluded that also Lyse has significant market power in the market for fixed network voice call termination to their own end users.

The reason that Lyse has been found to have significant market power is the company's market share of 100 %, the absolute barriers to entry that exist and the fact that Lyse has incentives to charge high prices. However, the market power is counteracted to a degree by the bargaining power of their customers (in particular Telenor). This bargaining power is deemed as being able to prevent Lyse from setting extremely high prices over a longer period of time, but is not necessarily strong enough to prevent Lyse setting prices that are disproportionately high.

1 Background and legal framework for the market analysis

1. This document contains the market analysis that Norwegian Post and Telecommunications Authority (NPT) has carried out in accordance with current regulations for electronic communications for what is considered the relevant market for voice call termination on individual public telephone network provided at a fixed location by Lyse Tele AS (Lyse).

2. The analysis was circulated for national consultation on 6 July 2007 as an annex to a draft decision against Lyse. NPT received comments from Lyse on 24 August 2007.

3. On 24 March 2006 NPT made decisions in the markets for origination, termination and transit of services on the fixed public telephone network (Markets 8-10). In the markets for termination in individual fixed networks (Market 9) 13 providers were designated as having significant market power. At the same time these providers were imposed specific obligations.

4. The following providers were designated as having significant market power in Market 9:

- Consorte AS (now Intelcom Group ASA)
- Equant Norway AS
- MCI WorldCom AS (now Verizon AS)
- NetCom AS
- NextGenTel AS
- Priority Telecom Norway AS (now Hafslund Telekom AS)
- SmartCall AS (now Get AS)
- TDC Song AS
- Tele2 Norge AS
- Telenor ASA
- Telio AS (now Telio Telecom AS)
- UPC Norge AS (now Get AS)
- Ventelo Norge AS

5. In May 2007 Lyse entered into an agreement with Telenor establishing direct interconnection between the fixed networks of the companies. On the basis of this agreement Lyse becomes a provider of fixed network termination. There is therefore a need to analyse the relevant market.

6. Both the product market and the geographical market are defined, and the relevant market is analysed. The market analysis forms the basis of the application of sector-specific remedies in the relevant market.

7. The markets and the analyses of them will be subject to regular reassessments. In the analysis of Markets 8-10 dated 24 March 2006 NPT stated that the authority intended to prepare new analyses of these markets over the course of two years. NPT will include Lyse in

the next assessment of Markets 8-10 together with other providers in Market 9. This analysis is therefore limited in the extent to which it is forward-looking for up to about one year.

8. As described in Section 1 in NPT's analyses dated 24 March 2006 and in the document "Methodology for market analysis"¹ (the Methodology Document), the work on market analysis may be divided naturally into three phases:

1. Define relevant markets by defining relevant product markets and defining geographic markets.
2. Carry out market analyses of each of the relevant markets, with a view to designating any undertakings with significant market power.
3. Impose obligations on those providers identified as having significant market power.

9. The analysis contains NPT's evaluations in Phases 1) and 2). The analysis is annex to a draft decision in which NPT imposes obligations on the provider considered to have significant market power in the relevant market.

10. In the Electronic Communications Act² the definition of significant market power is, in accordance with § 3-1, as follows:

"A provider has significant market power when the provider individually or jointly with others has economic strength in a relevant market affording the provider the power to behave to an appreciable extent independently of competitors, customers and consumers. Significant market power in one market may result in a provider having significant market power in a closely related market."

11. The identification of providers with significant market power is to be carried out in accordance with the guidelines and recommendations prepared by the Commission and the EFTA Surveillance Authority (ESA) under the new framework directive for electronic communication services:

- Guidelines on market analysis and the assessment of significant market power (hereinafter referred to as "the Guidelines")³
- Recommendation on relevant markets (hereinafter referred to as "the Recommendation")⁴

12. For more information about the legal framework for the market analysis and the methodology for defining markets we refer to NPT's analyses of markets 8-10 dated 24 March 2006.

2 Overview and history

13. Section 2 of NPT's market analyses dated 24 March 2006 contains a description of the development in end user and wholesale markets for fixed telephony in Norway. NPT refers to this description for general background information about the markets for fixed telephony and the interconnection regime in Norway.

¹ "Metode for markedsanalyse" (Methodology for Market Analysis) of 6 January 2005, prepared by NPT

² The Electronic Communications Act, "Ekomloven", is available in Norwegian at <http://www.lovdatab.no/all/hl-20030704-083.html>. An unofficial English translation is found at <http://www.npt.no>.

³ EFTA Surveillance Authority Guidelines 14 July 2004

⁴ EFTA Surveillance Authority Recommendation 14 July 2004 with Explanatory Memorandum (EU document prepared in conjunction with the Commission's Recommendation)

14. In 2000 Lyse started to provide fixed telephony in the end user market in Rogaland fylke. The service was based on a resale agreement with Telenor, whereby both PSTN/ISDN subscriptions and traffic was resold.
15. In 2002 Lyse started offering Voice over Broadband (VoB) via own fibre accesses as a part of the company's triple play offering in the private market. This telephony service is produced in a specific virtual network. Internet access is the main service in Lyse's triple play offering. All Lyse's fibre customers must buy this service. The customers can choose whether they want to buy VoB and TV services as parts of the triple play offering.
16. Lyse also provides fixed telephony in the business market via own customer accesses through the products "telefoni aksess", "ip-centrex" and "telefoni VPN".
17. Lyse has established a partner model for their triple play service and has entered into partnership with several players in different parts of the country. In this model Lyse has the responsibility for, *inter alia*, service production, service delivery, operation and surveillance, 2. line support and training. The partners, including Lyse's own market unit, take care of the customer contact and are responsible for marketing and sales of the triple play product in their respective geographical regions and sell this product under their own brand. Lyse is responsible for building and operating the core network, while the partners build and operate metro and access networks.
18. Lyse has informed NPT that they as of 1 July 2007 have the following partners on the triple play product, in addition to their own market unit: Agder Breiband, BaneTele, Bykle Breiband, Dalane Breiband, EB, Etne Elektrisitetslag, Finnås Kraftlag, Fitjar Kraftlag, Fredrikstad Fibernett AS, Hadeland Energi Bredbånd, Haugaland Kraft, Klepp Breiband, Kragerø Energi Bredbånd, Kvinnherad Breiband, Lier Fibernett, Lofotkraft Bredbånd, Notodden Energi, NTE Bredbånd, Sandefjord Bredbånd, Skagerak Energi, Skånevik Ølen Kraftlag, Sola Bredbånd, Suldal Elverk KF, Sunnhordland Kraftlag, Tysnes Breiband, Vesterålskraft Bredbånd and Viken Fibernett.
19. According to information gathered from the providers in connection with NPT's telecom statistics, Lyse and their partners had in total more than 40.000 fixed telephony customers as of 31 December 2006.
20. In May 2007 Lyse entered into an interconnection agreement with Telenor and was then established as a provider of fixed network termination. Lyse has previously had a connection to TDC Song's network and has exchanged traffic through this connection. The traffic that previously was sent via TDC Song will in the future go via Telenor and possibly other providers who Lyse may establish direct interconnection with.
21. Since Lyse produces the fixed telephony service and handles the interconnection for all their partners, Lyse's termination service also includes traffic which is terminated with Lyse's partners.

3 Definition of the relevant product market

3.1 The Recommendation's definition of Market 9 (call termination)

22. NPT's definition of Market 9 is based on the guidelines given in the Recommendation and the Commission's Explanatory Memorandum. The Recommendation bases its definition of the wholesale market for call termination on the public telephone network provided at a fixed location on the fact that call termination is a necessary part of the retail market for the

transmission of (integrated) telephone calls. The Recommendation points out that although it is usually possible to choose access to various levels on the network to obtain call termination, it is the lowest interconnection level that it deems relevant for defining the call termination market. The reason for this is the possibilities for substitution on the demand side between the various interconnection levels on the network (a small non-transitory price increase on a high level is assumed to lead to significantly higher demand for access at a low level).

23. According to the Recommendation, the reason that there are few alternatives to termination of voice calls for providers in the retail market is that in most relevant locations there is only one access line. And where more than one such line exists, it is not possible for the calling end user's provider to choose the access line (and provider) to be used for call termination. A provider of call termination services has thus in practice a monopoly on the termination of calls (voice) to its end users. On this basis the Recommendation concludes that each provider of voice call termination in the wholesale market represents a separate relevant market.

3.2 NPT's assessment of delineations between Markets 8 – 10 and other product markets

24. In NPT's analyses of Markets 8-10, dated 24 March 2006, NPT has defined the markets for origination, termination and transit in fixed networks. NPT has, *inter alia*, excluded mobile telephony, Internet services, leased lines and traffic to value added services from the markets. The three markets were also defined in relation to each other. Furthermore, NPT assessed whether VoB was included in the markets.

25. The state of affairs in relation to technical and market issues have not changed significantly since 2006 and NPT is of the opinion that the market definitions made in the original analyses are still valid. We will therefore mainly refer to the assessments in section 3 of the analyses dated 24 March 2006. The conclusions are repeated below.

26. Market 9 consists of termination of voice calls to own telephony customers in fixed networks. NPT will emphasize that the definition of the market is based on the delivery of the telephone service, and not the actual physical network. Even if customers physically connected to Lyse's network may choose other providers of VoB, it will not be possible in practice for other providers to perform termination to customers whose telephony service is provided by Lyse. They would have to have subscriptions with more than one VoIP provider, with a different telephone number for each subscription. This would be quite impractical and involve added costs for these customers.

3.3 Conclusion

27. NPT has, in view of Norwegian conditions, found that the market definition appearing in the Recommendation for Market 9 also fit the Norwegian market.

28. In this analysis, NPT will regard fax calls in the same way as voice calls.

29. Interconnection-related services are considered part of Market 9.

30. Traffic with a basis in VoB adapted for any-to-any connectivity is included in Market 9.

31. The product market for call termination (Market 9) consists of the conveyance of voice calls from the lowest point for the exchange of interconnection traffic to an end user who is connected to a fixed electronic communications network. For calls taking place solely between end users belonging to a single provider, the terminating part of the call within an interconnection area will be included in Market 9. However, this is of little practical importance for the analysis. Termination of voice calls by providers who have influence over their own termination charge, constitutes separate markets.

32. Lyse provides termination of voice calls to own end users and has influence over their own termination charge. Thus, termination with Lyse constitutes a separate market. Termination of traffic to end users who are customers with Lyse's partners is also included in the market.

33. The following services are not included in Market 9:

- Mobile telephony
- Internet services
- Access to the Internet based on broadband or dedicated access
- Leased lines
- Value added services

4 Definition of the relevant geographic markets for call termination

34. In accordance with the Guidelines, paragraph 57, the geographic market may be defined as that area in which the relevant product is offered on approximately similar and sufficiently homogeneous conditions of competition. The degree of substitutability both on the supply and the demand side may be taken into consideration in the assessment of the geographic market and, as a part of such a substitutability assessment on the demand side, preferences and geographic purchase patterns should be taken into account. However, the Guidelines, paragraph 60, point out that geographic markets in the electronic communication sector have traditionally been determined by reference to the relevant network's area of coverage as well as the effective boundaries (jurisdiction) of the legal regulation of the market.

35. The markets for call termination on fixed and mobile networks (Markets 9 and 16) differ from the remaining predefined markets in that a relevant market is defined for each provider of voice call termination.

36. Lyse base their termination services on their own and their partners' access networks and provide services in a limited geographic area. Telephony services, including voice call termination from Lyse, are geographically limited to Lyse's and their partners' networks.

37. Lyse, like Telenor and other providers in Market 9, provides voice call termination at prices independent of geography within their network. In view of this, the geographic market is deemed to correspond to the geographic extent of Lyse's and their partners' networks in Norway.

5 Assessment of criteria for significant market power in the market for fixed network termination with Lyse

5.1 General considerations on assessing criteria for significant market power and competition issues in Market 9

38. The market for call termination on individual public telephone networks provided at a fixed location (Market 9) and the market for voice call termination on individual mobile networks (Market 16) are different from the other defined relevant markets in that the total national market is not the starting point. The analyses of the call termination markets are based on the competitive situations related to the services of each provider. The provider that controls call termination access has, in practice, a monopoly in the relevant market. In other respects, NPT refers to the fact that ERG has identified special competition problems related to call termination. This is discussed in particular in Chapter 5 of the remedies document from ERG⁵.

39. Just as with NPT's analysis of Market 16, NPT finds that in regard to Market 9 it is not appropriate to assess all the criteria for significant market power as they appear in the Guidelines. The reason for this is that several of these criteria are deemed to be of little relevance for the call termination markets, and that assessing the criteria that are omitted would not have changed the result of the analysis. The following criteria relating to significant market power are assessed: *market share, profitability/price developments, entry barriers/innovation and market power on the demand side.*

5.2 Market share⁶

40. Assessment of market share is a natural starting point for analyses of significant market power (dominance), cf. the Guidelines, paragraph 76. A provider's market share should exceed 40 % before this factor indicates significant market power. If the market share is over 50 %, it would be exceptional were the provider not to be considered to have significant market power. As a rule providers with less than 25 % market share are not considered to have significant market power.

41. As stated previously, each provider offering termination of voice calls on fixed locations constitutes a separate relevant market. This means that each provider has a 100 % market share in the respective markets. NPT finds that Lyse offers termination of voice calls on fixed networks and set their own termination charges, and Lyse has a market share of 100 % in the market of fixed network termination with Lyse.

42. According to information gathered from the providers in connection with NPT's telecom statistics, Telenor had more than 70 % of the total termination in fixed networks in 2006, measured in traffic minutes. Even though the quality of these figures have not been thoroughly assured, it is clear that Telenor has a high market share in the total market of voice call termination in fixed networks. As Lyse previously has not had any external termination offer, NPT has no information about the number of minutes terminated by Lyse in 2006. In

⁵ Revised *ERG Common Position on the approach to Appropriate remedies in the new regulatory framework*, which was approved in May 2006, is available on NPT's website, <http://www.npt.no> under the menu selection SMP.

⁶ Cf. the Guidelines, paragraphs 76 and 77.

2006 Lyse and their partners had a total market share of about 1 % in the end user market for fixed telephony, measured by traffic minutes. Normally there will be a relationship between the number of originated minutes and the number of terminated minutes and there is no reason to believe that Lyse differ significantly in relative size from the other smaller providers in Market 9.

43. Even if each provider of termination of voice calls on fixed locations constitutes a separate relevant market, the difference in the magnitude of Telenor's services and those of Lyse and other providers in Market 9 is not without importance for the degree of market power. In this regard NPT refers to section 5.5.

44. The 100 % market share means that there is a strong presumption that Lyse has significant market power for voice call termination to their own customers and that they can largely act independently of customers and other providers.

45. However, market share alone is insufficient to determine whether a provider has significant market power, but must be viewed in context with the other relevant assessment criteria, cf. the Guidelines, paragraph 79.

5.3 Profitability and price developments

46. If over a period of time an operator operates with a price that is substantially higher than the underlying costs and thereby achieves high profitability (compared with alternative investments), this may be an indicator of significant market power.

47. However, allowance must be made for the possibility that high profitability over a given period of time may be the result of other factors than market power, for example the benefits of efficiencies, innovation or accounting write-offs that do not necessarily correspond to the actual value reduction in invested capital.

48. Similarly, low profitability is not necessarily an argument against the operator being assessed as having significant market power, but may be a result of inefficient production.

49. The development of prices over time may likewise indicate something about the degree of competition, possibly the degree of potential competition, and can thereby provide a pointer to whether a provider has market power.

50. NPT has no specific information regarding the profitability of Lyse in Market 9 as Lyse just recently has started offering termination. Therefore NPT will not give any weight to the criterion profitability in this analysis.

51. As of 1 January 2008 Telenor's charges for termination within a local interconnection area were 5.4 øre per call, 3.8 øre per minute peak and 2.6 øre per minute off-peak, respectively (all prices have been unchanged since 1 October 2004). According to NPT's decision 24 March 2006, Telenor's prices are regulated by a price cap on this level. Before this Telenor's interconnection prices have since 1998 been required to be cost oriented.

52. The prices of other operators' voice call termination services on their fixed networks have not been regulated before NPT's decision 24 March 2006, and NPT therefore deems that their prices may largely indicate the degree of their market power. In termination of voice calls on fixed networks the practice for the first few years was by and large price reciprocity, i.e. all providers had the same prices as Telenor. However, in the last years an increasing number of providers have set their prices at a higher level than Telenor. Some providers still have the same termination charges as Telenor, e.g. Telecom Group and NextGenTel. Some providers have only slightly higher prices than Telenor. For example, as of 1 January 2008

Tele2's charges for termination within a local interconnection area were 5.4 øre per call, 4.1 øre per minute peak and 2.9 øre per minute off-peak, respectively. A few providers have significantly higher prices than Telenor. As of 1 January 2008 both Hafslund's and Ventelo's charges for termination within a local interconnection area were 11.6 øre per call, 7.1 øre per minute peak and 5.0 øre per minute off-peak, respectively.

53. Initially, Lyse set identical termination charges to Hafslund and Ventelo. This was done after NPT on 2 May 2007 took a decision mandating Telenor, as a provider with significant market power in Market 9, to enter into an interconnection agreement with Lyse, including purchasing termination from Lyse. However, following an appeal by Telenor, NPT concluded that the Electronic Communications Act § 4-3 third paragraph did not give the sufficient legal basis for mandating Telenor to purchase termination from Lyse. The decision was therefore reversed. Following this, Telenor and Lyse have disagreed about the price for termination with Lyse.

54. In early 2005, first PortIT, and then SmartCall, increased their termination charges to a level equivalent to about 15-25 times that of Telenor's termination charge (up to 63 øre per minute). However, within a relatively short period these prices were reduced to a level close to the level of other providers. The reason for the price reduction appears to have been that Telenor left a voice message with price information to its subscribers initiating calls to end users of SmartCall and PortIT⁷. Since then, Port IT has left the Norwegian telephony market.

55. In NPT's view, the fact that these extremely high prices were reduced a short while later, indicates that these providers do not have the freedom to set extremely high prices for call termination. On the other hand, the fact that many operators set significantly higher termination charges than Telenor's level, indicates that the providers have significant market power.

56. On this basis, NPT finds that price developments indicate that providers other than Telenor can also have significant market power in the market for voice call termination to own end users in fixed networks. In NPT's view, this is also true for Lyse, who initially set significantly higher termination charges than Telenor, and who has clearly indicated an intention to have higher termination charges than Telenor.

5.4 Entry barriers⁸ and potential competition

57. Potential competition from new operators will normally affect a dominant operator's behaviour in the market, including pricing. Various forms of entry barriers may, however, weaken or remove the basis for potential competition.⁹

58. Voice call termination to a fixed location is performed on the network to which the receiver of the call is connected. To NPT's knowledge, there is no technology on the fixed network that enables anyone other than the provider with the customer relationship with the called party to provide the call termination service. This applies both to services based on traditional circuit-switched technology and services based on VoB.

⁷ End users of PortIT include in this connection end users of operators who had entered into an agreement with PortIT for indirect interconnection with Telenor and other providers. PortIT set the prices of call termination to the networks of these operators.

⁸ Cf. the Guidelines, paragraph 81.

⁹ ESA writes about entry barriers in, *inter alia*, the Guidelines, paragraph 81: "In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant market share."

59. The absence of the capability of others to offer such services constitutes the crux of the competition problem in this market and is the direct reason that the individual networks are considered as separate markets. Any change in the capability of others to provide such call termination will thus imply a completely different competitive situation in this market. However, NPT does not see any indications that any such technology will be put into service in the foreseeable future.

60. Another factor is that the Calling Party Pays principle in practice reduces the significance of competition in the call termination markets. This is because the principle basically implies that the end users will not have any incentive to switch providers because competitors offering lower termination charges enter the market.

61. In the same manner as with NPT's analyses of other providers in Market 9 and of Market 16, the entry barriers for termination with Lyse have been viewed as virtually absolute, at the same time as potential competition is relatively moderate. Furthermore, like with the other analyses of Market 9 and Market 16, NPT deems it inappropriate to assess other possible structural or strategic barriers to entry.

5.5 Conditions on the demand side

62. The presence of customers with bargaining power can restrict a provider's opportunity to behave independently in the market. Such countervailing buying power may be the result of a customer's size, purchasing volume or the customer having something to offer, for example better market access to other markets.

5.5.1 General considerations on countervailing buying power in Market 9¹⁰

63. The demand side in Market 9 is represented by providers to which the calling party has a customer relationship. This will be Telenor, providers who base themselves on carrier pre-selection from Telenor, providers other than Telenor who produce call origination themselves, providers of VoB, providers of mobile telephony and providers abroad.

64. There are three factors indicating that the customers' bargaining power in Market 9 is weaker than most other business relationships between a buyer and a seller.

- a. The originating operator has no freedom of choice in its demand for call termination.
- b. The originating providers' ability to deny their counterpart a corresponding service when traffic flows in the opposite direction is insignificant. The reason for this is that the government can mandate entry into interconnection agreements (including mandating the provision of call termination), cf. Electronic Communications Act § 4-2, second paragraph, to ensure end-to-end connectivity.
- c. The Calling Party Pays principle implies a lack of incentive for the operators to offer low termination charges. High termination charges will by themselves provide high revenues with virtually the same cost level as with low prices. Moreover, a high termination charge could worsen the competitors' operating conditions in the retail market.

65. Nevertheless, these factors are no impediment to the possible existence of a certain amount of countervailing buying power. However, this is contingent on the customer being able to charge a relatively high price for equivalent and/or other services when the roles are

¹⁰ The criterion corresponds to "absence of or low countervailing buying power" in the Guidelines, paragraph 79.

reversed. The customer can also exercise market power by seeking to inform the end users directly about higher prices for calling relevant called parties.

5.5.2 Countervailing buying power in relation to Lyse's call termination services

66. In NPT's analysis of Market 9, dated 24 March 2006, the other providers than Telenor are assessed together when it comes to countervailing buying power. Lyse's call termination services on fixed networks have much in common with the services from these providers. Lyse and these other providers have the following conditions in common, which at the same time differentiate them from Telenor:

- a. Their call termination services are very limited compared with Telenor.
- b. Their negotiating counterpart for most of their demand is large (Telenor).
- c. Only a marginal share of the call termination that they perform is generated by calls from their own end users.
- d. They have previously not been subject to specific market regulation.

67. Like the other providers in Market 9, Lyse has an incentive to set high call termination charges. Lyse, as a new provider in Market 9, has initially no regulatory requirements regarding the price the company can charge for termination.

68. Other providers than Telenor have had little direct interconnection traffic among themselves; instead such traffic is routed as transit traffic through Telenor. However, the negotiations have primarily been conducted between Telenor and each of the other providers. Earlier, use of the reciprocity principle was common between Telenor and the other providers. This may indicate that in the past the demand side (in this context primarily Telenor) has had a strong enough negotiating position to counteract these companies' monopoly situations, both through its size and by its influence on the interconnection regime, including the formulation of standard terms and conditions. However, the extent of reciprocity may, to a certain degree be historically determined and be due to the advantages of simplicity.

69. However, in recent years more and more of the other providers have increased their termination charges for traffic to geographic numbers. Some providers have chosen to have a termination charge that is only marginally higher than Telenor's termination charge. However, others have set a termination charge nearly double that of Telenor. Initially, Lyse set higher termination charges than Telenor (minute rates of 7.1 øre and 5.0 øre, respectively, while Telenor's comparable minute rates are 3.8 and 2.6 øre). This indicates that Telenor's bargaining power is not sufficient to prevent Lyse and other providers in Market 9 from setting higher termination charges.

70. Telenor has lately required other parties to have reciprocal termination charges with Telenor to enter into new interconnection agreements in the fixed network. This requirement was the basis for the conflict between Telenor and Lyse regarding the establishment of a new interconnection agreement. According to NPT's decision 24 March 2006 Telenor is required to accept all reasonable requests for interconnection. This requirement has up to now not included an obligation to buy termination from other providers. However, NPT now prepares for a change in the regulation which means that the requirement will include an obligation to buy termination from other providers such that the traffic can go both ways and any-to-any communication is ensured¹¹. This will prevent Telenor from mandating other provider's

¹¹ See NPT's draft decision 29 February 2008 regarding a purchase obligation for providers in Market 9.

termination charges. The fact that Telenor is subject to regulation of its interconnection services and in other areas, serves to reduce Telenor's bargaining power.

71. As mentioned in section 5.3, in early 2005, PortIT and SmartCall increased their termination charge to a level about 15-25 times higher than Telenor's prices (up to 63 øre per minute). Telenor then elected to increase its retail price correspondingly for calls to end users connected to PortIT and SmartCall. At the same time Telenor informed its customers about the high price through a voice message before commencement of the call. Even if implementation of such voice messages met technical problems in the beginning, this step by Telenor was determinative in the reduction of the termination charges shortly after to about the same level as other providers.

72. Telenor's ability to influence the end customers through, *inter alia*, setting up relevant retail prices correspondingly, and simultaneously introducing voice messages with price information, therefore appears to hinder providers from setting extremely high prices and maintaining them over long periods. However, it appears that Telenor cannot prevent Lyse and other providers from setting prices for termination that will be disproportionately high. In this context, disproportionate means prices that are inefficient in an economic sense.

5.5.3 Conditions on the demand side – summary

73. In principle, the bargaining power of customers is small due to lack of choice in call termination. Nor are they able in practice to deny their counterpart equivalent service when traffic flows are reversed.

74. Lyse and other providers of call termination services primarily have Telenor as their negotiating counterpart. Even though Telenor, through its strong position in this and other markets, may have a certain amount of bargaining power, higher termination charges by many of the other providers show that Telenor's bargaining power is not sufficient to counteract the market power of these providers. The introduction of an obligation to buy termination from other providers contributes to reduce Telenor's bargaining power. At the same time, NPT believes that Telenor has sufficient bargaining power to be able to prevent providers from establishing, over the long term, extremely high termination charges, *inter alia* through the use of voice messages with price information, should the difference in retail prices be sufficiently large. Nevertheless, there is a certain probability that providers other than Telenor can also set termination charges that are disproportionately high.

6 Designation of provider with significant market power in the area of call termination

75. The assessment of significant market power builds on the Guidelines, section 3.1, and is based on the different criteria discussed in the market analysis in section 5 above. In accordance with the Guidelines, paragraph 76, and with a starting point in the existing market conditions, NPT has based the assessment of significant market power on a forward-looking market analysis. The time horizon for this analysis is approximately one year. However, NPT will monitor the market closely. If there are changes in the market conditions that suggest that the analysis should be revised on an earlier stage, NPT will carry out such a new analysis.

76. The Electronic Communications Act § 3-1, cf. the Framework Directive, Article 14 (2), states that:

“A provider has significant market power when the provider individually or jointly with others has economic strength in a relevant market affording the provider the power to behave to an appreciable extent independently of competitors, customers and consumers.”

77. This is an important starting point for the assessment of significant market power. The same is true of the amplification in the Guidelines, paragraph 74, that in *ex ante* assessments of market power it must be assessed in particular whether a provider’s strength in the market makes it possible to implement price increases without this causing a significant sales/revenue reduction for this provider.

78. For the sake of clarity NPT wishes to emphasise that it is significant market power that is the relevant subject of assessment and not anti-competitive misuse of significant market power. It is therefore not central to the assessment whether any market power/dominance is actually misused or not. However, this does not mean that a provider’s behaviour in the market is irrelevant to the assessment of significant market power. Even if structural factors carry the most weight in the assessment, behaviour that contributes to creating or maintaining competitive advantage for a provider who already has a dominant position in the market may imply a strengthening of this provider’s market power.

79. Significant market power may be achieved by one provider alone (single dominance) or together with others (collective dominance). However, the question of collective dominance is not relevant for the market in question, since there is only one provider in the market.

80. The following factors indicate that Lyse has significant market power in the market for voice call termination provided at a fixed location by Lyse:

- Lyse has a market share of 100 %.
- The market has absolute entry barriers resulting from the fact that no possibility exists for other operators to provide call termination service to Lyse’s end users.
- Lyse has incentive and possibility to set relatively high prices.

81. Lyse’s termination services are primarily demanded by Telenor. Telenor’s negotiating strength appears to only a certain extent to be able to counteract the market power Lyse has at the outset. Through, *inter alia*, the use of voice messages with price information, Telenor will nevertheless be able to prevent Lyse from setting extremely high prices over a long period of time. However, it is not a given that Telenor can prevent Lyse from setting disproportionately high prices.

82. NPT believes that Lyse’s market share of 100 % for voice call termination to their own end users, the inherent entry barriers in this market, Lyse’s incentive to set relatively high termination charges as well as the existence of high prices for a number of providers are compelling circumstances that imply that Lyse must be deemed to have significant market power in the market for fixed network termination with Lyse.

83. Based on this NPT has concluded that Lyse has significant market power in the market for fixed network voice call termination with Lyse.

Annex 1. Glossary

Access network	Is the last portion of the circuit on the network between the individual end user, which the end user uses exclusively up to the node on the transmission network that the end user shares with another on the transport network.
Broadband	Designation of an electronic communications network with high transmission capacity (bandwidth), i.e. capacity that does not restrict the transmission of sound, data and full-motion video. Since the capacity needs will change with the development of new applications, services and technologies, the definition of broadband must be dynamic.
Call origination	The initial portion of the conveyance of a call, which ends at the first point on the network that can exchange interconnection traffic.
Called party	Subscriber receiving calls for electronic communications services.
Calling party	Subscriber who initiates an electronic communications service.
End user	Any physical person or body corporate entering into an agreement for access to an electronic communications network or communications service for their own use or to rent out.
Interconnection	Function allowing the conveyance of traffic between providers such that end users can communicate with one another and have access to public electronic communications services independent of which provider they are connected to.
Provider	Any physical person or body corporate that provides others with access to an electronic communications network or service.
Telephone service	Electronic communications service that transmits voice between terminal equipment connected to network termination points on an electronic communications network
Termination	The last portion of the conveyance of a call, which begins at the last point on the network that can exchange interconnection traffic.
Transit	Service for transmitting a call from one connection point to another point of interconnection on a telecom operator's network.
Voice over Broadband (VoB)	Telephony supplied via a broadband connection and where the voice signals are transferred with the use of IP (Internet Protocol).