



ROYAL NORWEGIAN MINISTRY  
OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

EFTA Surveillance Authority

Avenue des Arts 19H

1000 Brussels

BELGIUM

BELGIUM

Your ref

Our ref

Date

88562

22/5648-4

21 September 2022

**Regarding request for information concerning enforcement of ex-ante regulation pursuant to Directives 2002/21/EC and 2002/19/EC**

Reference is made to the letter from the EFTA Surveillance Authority (ESA) 22 July 2022 regarding enforcement of ex-ante regulation pursuant to Directives 2002/21/EC (Framework directive) and 2002/19/EC (Access directive). ESA invites the Norwegian Government to clarify or comment on a list of defined issues, as well as to provide any other information we would deem relevant to the case. Please find below the answers from Norway.

- 1) Please list all complaints covered by article 20 of the Framework Directive that have been submitted to Nkom since 1 January 2018 and indicate for each complaint:**
- a) the date on which the complaint was submitted,**
  - b) the object of the complaint,**
  - c) the date on which a binding decision was adopted.**
  - d) In the event that a binding decision was not adopted within the 4 months' timeframe, please indicate whether the complaint has been considered to fall under the exceptions, and on what grounds.**

**Nkom case #1805808 – Telenor vs. Com4 Sweden**

The case on dispute resolution was filed 30 November 2018 when Telenor informed Nkom that the company had sent notice of termination of international roaming agreement to the Swedish company Communication for Devices in Sweden AB (Com4 Sweden). Nkom stated that termination of this type of contract requires an advance approval from Nkom cf. section 3 number 6, fifth paragraph of Regulation 531/2012 of 13 June 2012 on roaming on public

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mobile communications networks within the Union. Nkom approved Telenor's request for termination of the contract in its decision 6 March 2019.

Com4 Sweden AB appealed Nkom's decision to the Ministry of Local Government and Modernisation 26 March 2019. During the appeal process Nkom did not find ground to change its decision. The Ministry received Nkom's recommendation to confirm the decision 24 April 2019. The Ministry's decision is still pending.

#### **Nkom case #1806085 – Broadnet vs. Telenor**

The complaint was submitted by Broadnet AS on 18 December 2018 and was related to Telenor's obligation in former market 4 to notify any decommissioning of their legacy copper network. Telenor notified Broadnet about a closure of copper lines in the Fornebu area in November 2018.

Nkom's decision in market 4 imposed on Telenor a notice period of three years for the copper lines concerned. Telenor had stated that it was necessary to decommission the copper lines earlier than instructed by the regulation due to an order by the Norwegian Public Roads Administration. The order related to the extension of the E18 highway between Bærum and Oslo. The announced closure implied that Broadnet would lose wholesale access to 126 copper lines with effect from 30 November 2019. Broadnet argued that Telenor did not comply with the obligation in the former market 4 decision to notify decommissioning of copper lines.

During the handling of the dispute, Telenor informed Nkom that the Norwegian Public Roads Administration had changed its plans for the development of E18 and that they had postponed the decommissioning of the copper lines until 30 November 2021. The postponement implied that Telenor complied with the relevant SMP obligation.

On 26 March 2019, Nkom concluded that there was no longer a dispute to resolve and thus Nkom ended the dispute resolution. Nkom did however clarify some matters in the current regulation of Market 3a related to Telenor's obligation to notify decommissioning of copper lines.

#### **Nkom case #1906128 – GlobalConnect vs. Telenor**

The complaint was submitted by GlobalConnect to Nkom 30 October 2019. In the complaint GlobalConnect accused Telenor of being in breach of requirements in market 3a (M3a-decision of 20 December 2018) relating to access and non-discrimination when it came to delivery precision and fault correction in Telenor's copper network. On the basis of the complaint, Nkom found reason to assess if the level of Telenor's delivery and fault correction precision, implied a breach of the said obligations in M3a.

In the complaint GlobalConnect also claimed that Telenor's practice of cost limits in relation to fault corrections constituted a breach of the M3a regulation. This matter was dealt with in a separate process, where Nkom together with the industry came to a mutual understanding

on new cost limits that would entail fault correction of more than 99 percent of all faults concerning access seekers. This mutual understanding came into effect from January 2021.

This case had several complex issues to it. There were difficult assessments to be made, which included, among others, the time period over which the KPIs should be assessed and how large any deviation from the SLA must be for it to be considered a breach of the non-discrimination obligation and/or the access obligation (if the quality had been so poor for all or part of the period that it could be considered a breach of the access obligation). It was also necessary to thoroughly assess whether there was discrimination between external and inhouse operations. Telenor's claim that the differences in fault correction and delivery precision were due to conditions outside their control, such as weather conditions and difficulties relating to subcontractors, also added complexity to the considerations that were necessary. Thus, the case brought new questions to be considered, which needed a careful assessment, including several meetings with both parties to clarify all the necessary aspects of the case.

Nkom concluded in its decision 19 February 2021, that Telenor for an extensive period had been in breach of the non-discrimination obligation regarding delivery precision, but not fault corrections. Telenor was subsequently ordered to take corrective action so that access buyers would experience the same delivery precision as Telenor's inhouse operations.

Both GlobalConnect and Telenor appealed Nkom's decision. During the appeals process Nkom did not find ground to change its decision. The Ministry received Nkom's recommendations to confirm the decision 13 October 2021. The Ministry's decision is still pending.

### **Nkom case #2103669 – GlobalConnect vs. Telenor**

This case can also be considered part of the extensive follow-up of Telenor's decision to decommission its copper network and Nkom's decision from September 2020 which requires Telenor to maintain wholesale access to its copper network until September 2025 unless Telenor develops a migration plan and gets it approved by Nkom.

In the decision, Telenor is granted two limited exceptions to the obligation to maintain the copper network:

- 1) In the event of a fault in the copper access network ("error correction policy"), and
- 2) when changes must be made to the copper access network due to "circumstances beyond Telenor's control".

By "circumstances beyond Telenor's control" is meant all matters that have not been initiated by Telenor itself, which means that an order is given by an external initiative holder that makes changes to the copper access network necessary (referred to as "third party initiatives/activities").

Examples under exception 2) could include third party initiatives/activities such as road construction that would make it economically not viable to maintain the copper lines due to

cost of moving and/or re-establishing the existing copper infrastructure. Decommission based on the exception should not take place before it is necessary.

In this case GlobalConnect argued that Telenor was increasingly using this exception as a justification for copper decommission rather than the cost of fault correction.

The case developed during the winter/spring of 2021 (through dialogue with the parties) and included both specific copper accesses, but also Telenor's understanding of the exemption in the regulation. Nkom did not consider that dispute resolution, in accordance with Section 11-2 of the Electronic Communications Act, was requested before 30 June 2021.

In this case Nkom found it necessary to closely monitor Telenor's behaviour in the market, thus implementing a far more frequent reporting scheme on Telenor (reports every two weeks with specific requirements for the information provided from Telenor when notifications on decommission were sent out). Nkom's own findings seemed to confirm that Telenor, after having agreed on the new levels of cost for fault corrections, increasingly was justifying its decision to decommission copper lines based on third-party initiatives/activities.

However, when reviewing the submitted material, Nkom found it difficult to draw clear conclusions as to whether the exception in the regulation had been met or not. The challenges were particularly related to difficulties in verifying Telenor's or the company's subcontractors' analyses of which accesses were directly affected by the relevant initiative/activity beyond Telenor's control. The same applied to whether the cost estimates that Telenor presented to the authority represented the cheapest solution for restructuring, and that the closure would not take place earlier than can be justified in the circumstances beyond Telenor's control. The total number of cases where decommission of copper access was justified in the exception "circumstances beyond Telenor's control" also presented a challenge.

As a consequence, Nkom also considered alternative ways to solve the case, cf. the alternative approach described in Framework Directive Article 20 (2). After thorough considerations Nkom decided that the most appropriate and effective way forward would be to change the decision requiring Telenor to maintain access to the copper network. The altered obligation on Telenor shifts the exemption from a qualitative to a more quantitative assessment. In Nkom's view the altered obligation is better fit for purpose, and the authority's experience so far is that copper decommission notified on the basis of this exemption has dropped to a significantly lower level.

The 13<sup>th</sup> of May 2022 Nkom issued a decision changing Telenor's obligations, and at the same time clearly expressing that the general rule still would remain that access to copper lines should be maintained also in the event of third-party initiatives/activities. The parties were also informed that Nkom would not go forward with the dispute resolution process. The changed requirement would allow decommission as a limited exception if the cost of maintaining the copper access surpasses a specific cost level. Telenor was also provided with the alternative to offer the access buyer new solutions based on other technologies than copper or to pay compensation. This decision was done in accordance with the procedure in Framework Directive Article 7 (6). Nkom uploaded the document 8 June 2022 for subsequent notification of the decision to the ESA.

On 3 June 2022 Nkom received complaints from GlobalConnect regarding both the decision setting new requirements for allowing copper decommissioning due to third party initiatives/activity and the decision not to solve the dispute through a binding decision. The same day Telenor also filed an appeal against the first decision. Nkom is currently evaluating these three complaints.

### **Nkom case #2105252 – Chilimobil vs. Telenor**

On 1 July 2021 Chilimobil requested Telenor to see the Annex to the MVNO-access agreement which includes the price model. Telenor declined the request four days later because of Chilimobil's prior default to pay etc. to Telenor (a case stemming from the years leading up to 2016/2017). Nkom was informed of the refusal the same day. A formal complaint was sent by Chilimobil to Nkom 13 August 2021. Chilimobil claimed that the refusal was in violation of the Market 15 decision.

In the correspondence with Nkom, Telenor argued that the refusal was not a breach of the obligations in the Market 15 decision. In Telenor's opinion Chilimobil's request could not be considered a "reasonable request" in accordance with the regulation, due to the business behaviour (which included several instances of breach of agreement) from Chilimobil during a previous access agreement.

Without any delay and based on the information received, Nkom made it clear to both parties that according to the Market 15 decision it would be sufficient to send a request for MVNO-access to see the unpublished prices in the annex to the MVNO-agreement.

Nkom was subsequently informed by the parties that they would start to negotiate a new MVNO-access agreement. Based on this information, Nkom closed the case 30 August 2021 because a dispute no longer existed.

### ***2) Please provide the list of exceptions that fall under Article 20 of Framework Directive and explain how Nkom decides on whether a given complaint should fall under an exception. Furthermore, please explain the internal process of dealing with complaints.***

In accordance with Section 11-2 of the Electronic Communications Act a "[...] decision on the dispute shall be reached as soon as possible and by no later than four months after the matter is brought before the Authority. In special cases the deadline may be extended." The Authority may also "[...] refrain from making a decision if the conflict can be resolved by other means, cf. for example section 11-1".

In the public guidelines for case management, see attachment no. 1, it is described that whether a case is considered to be an exceptional case will be "decided after a concrete assessment of the circumstances of the individual case. Such an assessment can be made initially and during the proceedings. The assessment will include factors such as the complexity of the case. Nkom will assess as early as possible in the complaint handling whether the present case is considered an exceptional case, and if so present Nkom's position to the parties (unofficial translation)".

Both the internal and the public case management guidelines are attached to this letter in English (unofficial translation). The Norwegian versions of the guidelines have previously been shared with ESA, including on 11 December 2020.

- 3) Please clarify whether parties have a right to appeal Nkom's decisions adopted pursuant to Article 20 of the Framework Directive and what is the procedure for the appeal, and, if so:**
- a) list all complaints where Nkom's decisions have been appealed, and**
  - b) indicate the timeframe for adoption of decisions following an appeals procedure, if applicable.**

Decisions pursuant to this article can be appealed to the Ministry of Local Government and Regional Development, and in accordance with general rules of appeal found in Chapter VI of the Public Administration Act. According to normal procedure any appeals should be sent to Nkom, who will then circulate the appeals to interested parties for comments. At the same time Nkom will start evaluating the grounds listed in the appeal(s).

As part of the appeal process Nkom may rescind or alter its original decision. If Nkom decides to uphold the decision, the authority issues a recommendation to the Ministry (the appeal body). Interested parties are given the opportunity to comment on the recommendation made by Nkom within two weeks after the date of the recommendation.

According to the guidelines for complaint handling issued by the Ministry, Nkom should complete its part of the appeal procedure within two months after receiving a complaint. It has proven somewhat difficult to uphold this timeframe for all complaints.

- 1. Nkom case #1805808 – Telenor vs. Com4 Sweden
- 2. Nkom case #1906128 – GlobalConnect vs. Telenor
- 3. Nkom case #2103669 – GlobalConnect vs. Telenor

- 4) With regards to Nkom's decisions adopted following a consultation process pursuant to Article 7(3) of the Framework Directive please explain how appeals are handled by the appeals body, in particular**
- a) the appeals procedure for the parties,**

The appeals procedure follows the same procedure as described in question 3.

- b) list Nkom decisions which were appealed since 1 January 2018 and provide timeline for the adoption of the decision by the appeal body.**

1. Markets 3a and 3b: Nkom decision 20 December 2018. These decisions have been appealed by Telenor, GlobalConnect and NextGenTel. A recommendation to confirm Nkom's decision was sent to the Ministry 29 March 2019. The decision by the appeal body is still pending.

2. Market 3a: Nkom decision 31 March 2020 setting technical requirements to VULA fibre. This decision was notified to ESA 15 June 2021 together with a notification of price

regulation of the VULA fibre service. GlobalConnect has appealed Nkom's decision. Nkom is in the process of finalizing its recommendation to the complaint.

3. Market 15: Nkom decision 14 May 2020. This decision was appealed by several operators. Recommendation to confirm Nkom's decision was sent to the Ministry 1 September 2020. The decision by the appeal body is still pending.

However, during the appeal procedure Nkom decided to amend part of the price obligation imposed on Telenor. The decision to amend the market 15 decision was made 1 September 2020. This amended decision has also been appealed by several parties.

A recommendation to confirm Nkom's amended Market 15 decision was sent to the Ministry 20 November 2020. The appeal body has not reached its conclusion, but the Ministry has granted Telenor a partial postponement of one of the new requirements pending the outcome of this appeal procedure.

4. Markets 3a and 3b: Nkom decision 2 September 2020 to amend previous Market 3a and 3b decisions (requirements to maintain access to copper network and access to FWA). These decisions have been appealed by Telenor, GlobalConnect and Motorola. A recommendation to confirm Nkom's decision was sent to the Ministry 16. June 2021. The decision by the appeal body is still pending.

5. Market 3a and 3b: Nkom decision 30 November 2021 relating to price regulation for FWA. The decision has been appealed by Telenor. Recommendation to confirm Nkom's decision was sent to the Ministry 24 February 2022. The decision by the appeal body is still pending.

6. Market 3a: Nkom decision 23 August 2021 regarding VULA price regulation tool. The decision has been appealed by Telenor. Recommendation to confirm Nkom's decision was sent to the Ministry 27 October 2021. The decision by the appeal body is still pending.

7. Market 3a and 3b: Nkom decision 13 May 2022 regarding decommission of copper lines due to third party initiatives/activities. The decision has been appealed by Telenor and GlobalConnect, but so far, Nkom has not sent any recommendation to the Ministry. However, the Ministry 24 June 2022 granted Telenor a partial postponement of the new requirements pending the outcome of the appeals procedure. The decision by the appeal body is still pending.

Due to significant amount of extra work in connection with the Covid pandemic, the Ministry is experiencing significant delays in its work with the appeals. We are now fully operational and progressing satisfactorily with both the appeals related to market 3a and 3b and market 15.

**c) In case the appeals body changed substantial aspects of Nkom's decision please explain whether the decision was subsequently notified to ESA under Article 7(3) of the Framework Directive.**

NA.

**5) Article 7(6) of the Framework Directive stipulates that in exceptional circumstances, a national regulatory authority may immediately adopt proportionate and provisional measures in order to safeguard competition and protect the interests of end-users. Please explain whether those Nkom decisions can be appealed and what is the appeals procedure. Please also give a list of appealed decisions in these cases and explain the timeframe and handling of the appeals.**

These decisions can be appealed as any other Art 7 decisions issued by Nkom, according to general rules set out in Norwegian Public Administrative Law. Nkom has issued two decisions based on the process in Article 7(6):

1. Market 3a: Nkom decision 31 March 2020 setting technical requirements to VULA fibre. This decision was notified to ESA 15 June 2021 together with notification of price regulation of the VULA fibre service. After discussions with ESA, it became clear to Nkom that a provisional measure should be in force for a limited time only before a non-provisional decision is notified. GlobalConnect has appealed Nkom's decision. Nkom is in the process of finalizing its recommendation to the complaint.
2. Market 3a and 3b: Nkom decision 13 May 2022 regarding decommission of copper lines due to third-party initiatives/activities. This decision was notified to ESA 8 June 2022. The decision has been appealed but so far Nkom has not sent any recommendation to the Ministry. However, the Ministry 24 June 2022 granted Telenor a partial postponement of the new requirements pending the outcome of the appeal procedure.

**6) Please indicate whether decisions mentioned under points 1, 4 and 5 adopted by the appeals body can further be challenged in court.**

Yes. According to Section 11-2 of the Electronic Communications Act, fourth indent "That a matter has been submitted to the Authority pursuant to the first paragraph does not preclude the right to litigation before the ordinary courts of law". The Administration Act section 27b does not apply. This means that the right to appeal does not need to be used before a lawsuit is filed.

**7) Please elaborate on Nkom's enforcement powers stemming from Norwegian law in case of non-compliance of the significant market power (SMP) designated operator with obligations imposed by Nkom (legal basis and application in practice).**

As part of the enforcement powers Nkom may i.e. issue decisions ordering an undertaking to take corrective actions and make changes, see Section 10-6 of the Norwegian Electronic Communications Act. Such decision can be accompanied by coercive fines for each day the non-compliance continues, see Section 10-7 of the same Act.

In some instances, Nkom has imposed infringement fines in accordance with Section 10-13 of the Act because of non-compliance with requirements set out in the SMP-decisions:

1. On 15 January 2019 Nkom issued a fine of NOK 4 million to Telenor for failure to comply with the duty to provide information cf. Section 10-3 of the Electronic Communications Act – Nkom case #160584. In this case, Telenor provided incorrect, incomplete and untimely

information in connection with Nkom's order of 12 September 2018 on the disclosure of information for the implementation of margin squeeze tests in Market 15.

2. On 15 October 2021 Nkom issued a fine of NOK 15 million to Telenor in relation to Nkom case #1906128 (see previous description of the case above). In Nkoms opinion Telenor's failure to meet the non-discrimination obligation when it came to delivery precision constituted a serious violation of the regulation.

Decisions to take corrective action and make changes, and infringement fines are the two most commonly used enforcement powers by Nkom in case of non-compliance by operators designated with SMP. But as the list show, Nkom has found it necessary to use infringement fines twice in the last 2 ½ years in our dealings with Telenor, making decisions to take corrective action or changing the regulation itself what has caused majority of the work.

### **Final remarks**

All of the listed cases above serve to show that Nkom has handled a very large caseload since the beginning of 2018.

There is a clear causal link between Telenor's unilateral decision to decommission the copper network from January 2019 and the very large caseload. The decision to decommission the copper network changed several of the assumptions that were the basis for the Market 3a/b regulation, issued in December 2018. Since February 2019 Nkom has worked tirelessly with the broadband markets, countering the consequences of Telenor's decision (i.e. the attempt to find a compromise migration plan that could allow for a faster decommission of the network, new decisions on the continuation of access to the copper network until 2025, follow up in order to make the access obligation sufficiently efficient, new access requirements/prices regarding FWA, and so on), and in addition handling complaints related to the decommissioning.

Several of the complaints have proved complicated, such as the complaint about a breach of non-discrimination for delivery precision and error correction. As a consequence, much time and effort has been spent in order to clarify the different cases, both through continues dialogue with the concerned parties, but also through extensive written correspondence. Nkom has also had to prioritize between the various cases in order to limit potentially negative effects on the market as much as possible.

Yours sincerely

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Assistant Director General

*This document is signed electronically and has therefore no handwritten signature*