

## Final Report of the Hearing Officer in Case No 71480 – Telenor

(2020/C 292/05)

This Final Report of the Hearing Officer in Case No 71480 – Telenor – is submitted pursuant to Article 16 of the EFTA Surveillance Authority Decision No 442/12/COL of 29 November 2012 on the function and terms of reference of the hearing officer in certain competition proceedings ('Terms of Reference').

The procedure and the draft decision to be submitted to the Advisory Committee in this case give rise to the following observations.

### 1. Introduction

The EFTA Surveillance Authority ('ESA') had in its possession information indicating that Telenor Norge AS <sup>(1)</sup> may have resorted to practices that constitute abuses of a dominant position within the meaning of Article 54 of the EEA Agreement and/or may have concluded agreements, or may have been party to concerted practices, which were contrary to Article 53 of that Agreement.

From 3 to 12 December 2012, ESA's Competition and State Aid Department ('CSA') carried out inspections at the premises of Telenor Norge AS and its parent company Telenor ASA (together referred to as 'Telenor'). The inspection of data obtained from Telenor continued at ESA's premises in Brussels from 12 to 14 March 2013, in the presence of Telenor representatives.

Subsequently, ESA and Telenor held various meetings, including state of play meetings, and exchanged correspondence. ESA issued requests for information to Telenor and to other operators in the mobile markets in Norway.

In the course of its investigation, ESA carried out an extensive investigation of Telenor's conduct in three Norwegian markets: (1) the market for wholesale mobile access and origination services; (2) the market for mobile broadband services to residential customers; and (3) the market for mobile communications services to business customers.

On 26 March 2014, ESA initiated proceedings against Telenor (Event No 697590; Decision No 135/14/COL), pursuant to Article 2(1) of Chapter III of Protocol 4 to the Surveillance and Court Agreement, with a view to adopt a decision under Section III of Chapter II of Protocol 4 to the Surveillance and Court Agreement.

### 2. Written procedure

On 1 February 2016, ESA adopted a Statement of Objections ('SO') addressed to Telenor (Document No 784362; Decision No 028/16/COL). The SO set out ESA's preliminary view that Telenor had infringed Article 54 of the EEA Agreement through applying: (1) a margin squeeze between wholesale access and origination prices and retail prices charged by Telenor for mobile broadband services to residential customers in Norway from January 2008 until the end of 2012 ('the margin squeeze abuse'); and (2) lock-in clauses in Telenor's retail contracts with business and government customers in Norway from January 2008 until the date of adoption of the SO ('the lock-in abuse').

Telenor was requested to reply to the SO by 11 April 2016. Upon request by Telenor (Document No 796438), ESA extended the deadline until 25 April 2016 (Document No 796492). On 25 April 2016, Telenor replied to the SO (Document Nos 802028 and 802055).

### 3. First oral hearing

In the reply to the SO, Telenor requested an oral hearing, as provided for in Article 6(1) of the Terms of Reference. Prior to the oral hearing, by letter dated 31 August 2016, ESA sent Telenor a list of questions arising from Telenor's reply to the SO (Document No 815872). The oral hearing was held on 3 and 4 October 2016 in Brussels.

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(1) Including its legal predecessor Telenor Mobil AS.

a. *Participants*

Present at the oral hearing were representatives from Telenor and Telia. Telia was permitted to be heard as an interested third party (Document No 807635). On behalf of ESA, the hearing was attended by representatives from CSA, the Legal & Executive Department and (for the first day of the hearing) the responsible College Member. In addition, the hearing was attended by representatives of the Norwegian Competition Authority (*Norwegian Konkurransetilsynet*) and the Norwegian Communications Authority (*Nasjonal Kommunikasjonsmyndighet*, hereinafter 'Nkom').

b. *Procedural issues*

Having reviewed all procedural issues, in particular those listed in Article 14(1)(a) to (d) of the Terms of Reference, namely:

- disclosure of documents and access to the file,
- time limits for replying to the SO,
- observance of the right to be heard, and
- the proper conduct of the oral hearing,

I have confirmed in my Interim Report dated 21 November 2019 (Doc No 922733) that the effective exercise of the parties' procedural rights had been respected. This view was further supported by the fact that neither before nor during the oral hearing did Telenor or Telia ask the Hearing Officer to review decisions taken by ESA with regard to any procedural issue.

c. *Conduct of the Oral Hearing*

To avoid the risk of undue time constraints, the oral hearing was conducted over two days, as requested by Telenor. The hearing was conducted entirely in English and recorded, as foreseen in Article 14(8) of Chapter III of Protocol 4 to the Surveillance and Court Agreement. Parts of the oral hearing were conducted in closed session, as provided for in Article 13 of the Terms of Reference.

The first day was allocated to the discussion of the margin squeeze abuse. After a short introduction by the Hearing Officer, CSA outlined their views of the allegations, as set out in the SO. The representatives of Telenor presented their views on the margin squeeze abuse. Telenor's legal representatives then made a presentation on key legal issues and, in particular, the assessment of dominance, the absence of indispensability (the necessity to use Telenor's network) and the choice of level of aggregation for the margin squeeze test. In addition, Telenor's representatives gave a presentation on key economic aspects of the case including, in particular, the margin squeeze abuse allegation and the findings in the SO regarding market definition and market shares. Each presentation was followed by a number of questions posed by different officers of CSA and duly answered by Telenor's representatives. Subsequently, Telia's representatives were given the opportunity to present their views on the case. Their oral submission focused on factual, rather than legal, issues relating to, in particular, the market definitions for the wholesale and the retail markets, capacity constraints and the findings on Telenor's dominance.

The second day was allocated to discussions on the lock-in abuse. Again, CSA gave an overview of the allegations in the SO, including the reasons for ESA's preliminary conclusion that the lock-in arrangements were abusive, as well as CSA's reasoning regarding market definition and dominance. As on the first day of the hearing, Telenor gave a separate presentation on each of the facts, the legal aspects and the economic effects of the lock-in arrangements. The business representatives of Telenor gave a detailed presentation on the development of the business customer segment and the development of the lock-in practices and the business rationale behind them. In the presentation on legal aspects, Telenor's representatives explained their view that the findings in the SO were characterised by a misunderstanding of the functioning of the markets and the lock-in practices, including why, in Telenor's view, ESA failed to recognise the pro-competitive nature of the subscription lock-in agreements. In this regard, Telenor's representatives explained that in their view ESA had failed to demonstrate that the lock-in arrangements were likely to have anti-competitive effects. In addition, a closed session presentation was given by Telenor's business representatives on the different contract arrangements that Telenor had in place for business customers. Following the closed session, Telia elaborated on their views on the lock-in abuse. Their presentation centred on issues concerning market definition and Telenor's dominance in the retail business market.

I have confirmed in my Interim Report dated 21 November 2019 (Doc No 922733) that the oral hearing had provided sufficient opportunity for Telenor and Telia to develop their views as to ESA's preliminary findings, pursuant to Article 10 (4) of the Terms of Reference.

#### 4. Subsequent procedure

Following the oral hearing, ESA sent additional requests for information on 13 February 2017 to Telia (Document Nos. 840673 and 1076450) and on 18 May 2017 to TDC SA ('TDC') <sup>(2)</sup> (Document No 857212). Telia and TDC replied on 14 March 2017 (Document Nos. 847236, 847237, 1076156, 1076158, 847239, 847240, 847241, 847242, 847808, 847809, 847810, 847811, 847812, 847813, 847814, 847815, 847817, 847818, 847819, 847820, 847821, 847822, 847823, 847824 and 847825) and 15 June 2017 (Document Nos. 880377, 1076043, 1076044, 1076045, 1076046, 1076047, 1076049, 1076050, 1076051, 1076052, 1076053, 1076054 and 1076055) respectively. On 12 October 2017, ESA held a state of play meeting with Telenor. At that meeting, ESA announced its intention to adopt a Supplementary Statement of Objections, based on additional information received after the hearing.

#### 5. Supplementary Statement of Objections

On 24 June 2019, ESA adopted a Supplementary Statement of Objections ('SSO') addressed to Telenor (Document No 1075321; Decision No 047/19/COL). In the SSO, ESA explained that it had decided, for reasons of prioritisation, to discontinue its investigation into the lock-in abuse. The SSO supplemented the original SO and had to be read together with the latter.

Telenor was permitted until 13 August 2019 to reply to the SSO. Upon request by Telenor, ESA extended the deadline until 20 August 2019 (Document No 1078100). Telenor disagreed with the length of extension granted and, by letter dated 8 July 2019 (Document No 1079670), requested the Hearing Officer to review Telenor's request that an extension should be granted until 16 September 2019. By letter dated 22 July 2019 (Document No 1079572), the Hearing Officer decided to extend the deadline until 2 September 2019, in order to reflect the fact that Telenor was not granted access to certain main documents kept in a data room until thirteen days after Telenor received the access to file DVD. Telenor replied to the SSO on 2 September 2019 (Document No 1085650).

#### 6. Second Oral Hearing

In the reply to the SSO, Telenor requested an oral hearing, as provided for in Article 6(1) of the Terms of Reference. The oral hearing was held on 10 October 2019 in Brussels.

##### a. Participants

Present at the oral hearing were representatives from Telenor. On behalf of ESA, the hearing was attended by representatives from CSA and the Legal & Executive Department. In addition, the hearing was attended by representatives of the Norwegian Competition Authority (*Norwegian Konkurransetilsynet*) and Nkom. Telia did not request to attend the oral hearing.

##### b. Procedural issues

Having reviewed all procedural issues, in particular those listed in Article 14(1)(a) to (d) of the Terms of Reference, namely:

- disclosure of documents and access to the file,
- time limits for replying to the SSO,
- observance of the right to be heard, and
- the proper conduct of the oral hearing,

I have confirmed in my Interim Report dated 21 November 2019 (Doc No 922733) that the effective exercise of the parties' procedural rights had been respected. This view was further supported by the fact that neither before nor during the second oral hearing did Telenor ask me to review decisions taken by ESA with regard to any procedural issue, except concerning the extension of the deadline to reply to the SSO, which was adequately resolved by the Hearing Officer (as explained above, in the second paragraph of Section 5).

<sup>(2)</sup> TDC SA is a Danish provider of telecom services.

### c. Conduct of the Oral Hearing

The oral hearing lasted one day. The hearing was conducted entirely in English and was recorded, as foreseen in Article 14 (8) of Chapter III of Protocol 4 to the Surveillance and Court Agreement. All parts of the oral hearing were conducted in open session.

The entire day was allocated to the margin squeeze abuse, the subject of the SSO. After an opening statement by the Hearing Officer, CSA outlined their views of the allegations, as set out in the SSO. The remainder of the speaking time was allocated almost entirely to Telenor. First, a representative of Telenor provided some general opening remarks and presented Telenor's views on the alleged abuse. Afterwards, Telenor's legal representatives gave a presentation on the procedural issues of the case, which touched upon Telenor's right to be heard, the burden of proof and some methodological issues. Concerning Telenor's right to be heard, Telenor submitted that the SSO failed to provide context or analyses and that thereby Telenor did not receive sufficient information to provide an adequate reply.

Afterwards, Telenor gave a presentation on actual or potential competition on the relevant downstream market and then another presentation on the downstream market definition, the latter presentation explaining the development of the residential mobile broadband market in Norway and covering some legal arguments. After the lunch break, the legal representatives of Telenor presented a margin squeeze analysis which focused, in particular, on the level of aggregation and an effects assessment. Subsequently, Telenor's economic advisors gave a presentation on economic issues, which covered, *inter alia*, market definition, level of aggregation, effects, use of Telia's margins, as well as modelling and methodological issues.

In the course of the hearing, CSA raised couple of questions, which were all addressed and answered by Telenor. At the end of the hearing, Telenor's representative ended with some final remarks and requested that Telenor should be given the opportunity to reflect whether it wished to have the opportunity to follow-up in writing in relation to any of the questions raised during the hearing. I have agreed to this request and required Telenor to indicate by 16 October 2019 whether Telenor considered its written submission on any of the questions to be necessary. On 16 October 2019, Telenor informed me that a follow-up written submission to some of the questions was considered necessary and that this submission would be made by 25 October 2019. I have agreed to this deadline. On 25 October 2019, Telenor submitted written answers (Document No 1093684) to two questions raised during the hearing relating to: (1) data in mobile telephony plans as substitute to stand-alone residential mobile broadband services to customers; and (2) service providers as potential wholesale suppliers.

In my Interim Report dated 21 November 2019 (Doc No 922733), I have provided my assessment that the oral hearing provided sufficient opportunity for Telenor to develop its views as to the preliminary findings of ESA, pursuant to Article 10(4) of the Terms of Reference.

Concerning Telenor's submission that the SSO failed to provide context or analyses and that thereby Telenor did not receive sufficient information to provide an adequate reply, I consider that the SSO provided sufficient context and analyses for Telenor to reply adequately to the SSO. For example, when ESA referred to documents as additional evidence in support of its preliminary conclusions, it made this reference in a specific context, with regard to a concrete subject and identified the relevant parts in these documents in support of its conclusions.

## 7. Subsequent procedure

On 7 November 2019, ESA sent a request for information to Telenor concerning internal and external market research exercises/surveys undertaken by Telenor during the period from 1 January 2007 to 30 September 2013 in respect of mobile data services in Norway (Document No 1095066). Telenor replied to this request for information on 15 November 2019 (Document No 1097450) and submitted comments on the market surveys concerned on 10 December 2019 (Document No 1103119).

On 13 December 2019, a brief status update call was held with Telenor.

On 13 January 2020, ESA sent a request for information (Document No 1097871) to Nkom, requesting documents and reports of surveys conducted by Nkom and/or other stakeholders during the period 2008 to 2012, as well as regarding information/presentations received from stakeholders on the substitutability between mobile broadband services and other services during the period 2008 to 2012. Nkom replied to this request for information on 20 January 2020 (Document No 1109079).

During a state of play meeting held by video conference on 12 February 2020, Telenor was informed of ESA's intention to send a letter of facts.

On 27 February 2020, ESA sent a letter of facts ('LoF') to Telenor (Document No 1110474), in order to provide it with an opportunity to comment on: (1) pre-existing evidence that was not expressly relied on in the SO and the SSO, but which, on further analysis of the file, ESA considered might be relevant to support the preliminary conclusions reached in the SO and the SSO; (2) additional evidence brought to ESA's attention after the adoption of the SSO; and (3) sensitivity calculations as a robustness check regarding Telia's and Telenor's wholesale customers' margins.

Along with the LoF, ESA granted Telenor access to all documents that were included in the file after issuing the SSO. As ESA also relied on a limited amount of information that was confidential *vis-à-vis* Telenor in the LoF, Telenor's external advisors were granted the possibility to access this confidential information via a data room procedure. Telenor did not, however, choose to avail itself of this possibility.

On 23 March 2020, Telenor replied to the LoF (Document Nos. 1123012, 1133599, 1135608, 1133600 and 1133601).

On 30 April 2020, ESA sent a request for information to Telenor requesting turnover-related data (Document Nos. 1130626 and 1126651), to which Telenor replied on 15 May 2020 (Document Nos. 1133295, 1133296, 1133371 and 1133372).

By email dated 18 May 2020 (Document No 1133872), ESA sent a question to Telenor regarding the underlying documents concerning the two-part data pricing option, which was referred to in Telenor's reply to the SO. Telenor replied to that question by email dated 25 May 2020 (Document No 1134573).

## 8. The Draft Decision

The scope of the infringements identified in the draft decision submitted to the Advisory Committee is narrower than in the original SO.

As explained above (in Section 2), the SO set out ESA's preliminary view that Telenor infringed Article 54 of the EEA Agreement through applying: (1) a margin squeeze between wholesale access and origination prices and retail prices charged by Telenor for mobile broadband services to residential customers in Norway from January 2008 until the end of 2012; and (2) lock-in clauses in Telenor's retail contracts with business and government customers in Norway from January 2008 until the date of adoption of the SO.

In the subsequent SSO (see above, first paragraph of Section 5), ESA decided, for reasons of prioritisation, to discontinue its investigation into the second alleged abuse set out in the SO, i.e. the lock-in clauses in conjunction with early termination penalties in the retail market for the provision of mobile communication services to business customers in Norway. Consequently, the SSO only concerned the alleged margin squeeze abuse, which was already set out in the SO. It is this margin squeeze abuse that the draft decision addresses.

In the draft decision, ESA finds that Telenor committed an abuse of a dominant position within the meaning of Article 54 of the EEA Agreement by imposing a margin squeeze between the wholesale market for access and origination services on public mobile telephone networks and the retail market for stand-alone mobile broadband services to residential customers in Norway, from and including 1 January 2008 until and including 31 December 2012 ('the Period under Consideration').

ESA identifies in the draft decision the wholesale market for access and origination services on public mobile telephone networks in Norway as the relevant upstream market and the retail market for the provision of stand-alone mobile broadband services to residential customers in Norway as the relevant downstream market.

In the draft decision, ESA concludes that Telenor held a dominant position in the wholesale market for access and origination services on public mobile telephone networks in Norway during the Period under Consideration and that, during the same time, Telenor had a high degree of market power in the retail market for the provision of stand-alone mobile broadband services sold to residential customers in Norway.

ESA further finds in the draft decision that, during the Period under Consideration, the spread between, on the one hand, the price charged upstream by Telenor to competitors for the supply of wholesale access and origination services on its public mobile telephone network and, on the other hand, the price charged by Telenor to its own customers at the downstream level for residential stand-alone mobile broadband services in Norway did not allow an equally or as efficient competitor, relying on such wholesale services, to compete with Telenor in the downstream market without incurring a loss.

Consequently, ESA finds that Telenor applied the margin squeeze to the following customers of wholesale access and origination services on its public mobile telephone network: (1) Network Norway from and including 1 August 2008 to and including 31 August 2010; (2) Ventelo from and including 1 January 2008 to and including 30 November 2010; and (3) service providers ('resellers') from and including 1 January 2008 to and including 31 December 2012.

With regard to these three infringements, the draft decision is narrower than the original SO. In the SO, ESA found a margin squeeze with regard to Network Norway for a three-year period from January 2008 to the end of 2010, which is now limited in the draft decision from and including 1 August 2008 to and including 31 August 2010. Concerning Ventelo, the SO referred to a five-year period from January 2008 to the end of 2012, whereas the draft decision now covers the period from and including 1 January 2008 to and including 30 November 2010. In addition, the draft decision no longer pursues the margin squeeze concerning Telenor's wholesale customer TDC, as originally foreseen in the SO. In the SSO, ESA found in respect of TDC that it was not active on the residential market, nor did it have plans to enter that market during the Period under Consideration. Consequently, TDC was not to be considered as an actual or a potential competitor on the relevant downstream market during that period. As a result, TDC is no longer part of the ESA's margin squeeze findings.

In the draft decision, ESA further concludes that the margin squeeze was capable of having anti-competitive effects in the relevant retail market and that Telenor's conduct could not be objectively justified.

All of the above findings in the draft decision correspond to the objections already contained in the SO and SSO, as supplemented by the LoF. The draft decision is based on the same relevant geographic and product markets at the upstream and downstream level, as set out in the SO and SSO. With regard to the margin squeeze abuse, the Period under Consideration is within the periods referred to in the SO and SSO and is now narrower than previously (as explained above). Further, ESA concludes that Telenor abused its dominant position by way of a margin squeeze in respect of Network Norway, Ventelo and service providers, constituting three separate infringements of Article 54 of the EEA Agreement. These three separate infringements were identified in the SO and SSO, as supplemented by the LoF.

In my opinion, and pursuant to Article 16(1) of the Terms of Reference, the draft decision deals only with objections in respect of which Telenor has been afforded the opportunity of making known its views.

## 9. Conclusion

In light of the above, I consider that the effective exercise of procedural rights of the addressees of the draft decision, including the right to be heard, has been duly respected at all stages of the proceedings.

Brussels, 3 June 2020.

Michael SÁNCHEZ RYDELSKI  
*Hearing Officer*

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