

## **Annex 3**

# **Results from the consultation on Nkoms notification of decisions in the market for access and call origination on public mobile telephone networks (former Market 15)**

**1 July 2016**

# Contents

- 1 Introduction..... 3
- 2 Comments on the market definition ..... 4
- 3 Comments on the three-criteria test ..... 5
  - 3.1 First criterion: high and non-transitory entry barriers..... 5
  - 3.2 Second criterion: The market is not tending towards effective competition ..... 7
    - 3.2.1 Consultation response from Telenor..... 8
    - 3.2.2 Consultation responses from other operators..... 16
  - 3.3 Third criterion: General competition law is insufficient ..... 17
- 4 Comments on the analysis of significant market power ..... 19
- 5 Comments on the description of competition problems..... 22
- 6 Comments on the choice of special obligations..... 23
  - 6.1 General comments on the choice of special obligations ..... 23
  - 6.2 Access..... 25
    - 6.2.1 Consultation responses regarding requests for national roaming..... 25
    - 6.2.2 Consultation responses regarding MVNO access..... 27
    - 6.2.3 Consultation response regarding service provider access ..... 28
    - 6.2.4 Consultation responses regarding requests for co-location ..... 31
    - 6.2.5 Consultation responses regarding other forms of access ..... 34
    - 6.2.6 Consultation responses about the detailed description of the access obligation ..... 35
  - 6.3 Non-discrimination..... 42
  - 6.4 Publishing of reference offers ..... 44
  - 6.5 Accounting separation ..... 47
  - 6.6 Price controls..... 50
    - 6.6.1 Consultation responses regarding price controls for service provider access, national roaming and MVNO access ..... 50
    - 6.6.2 Consultation responses regarding price controls for co-location ..... 56
- 7 Report from Espen R. Moen and Christian Riis ..... 57
- 8 Obligation to charge reasonable price for establishment of new access agreement ..... 59

# 1 Introduction

This document summarises the consultation responses the Norwegian Communications Authority (Nkom) received to its notification of a decision in the market for access to and call origination in public mobile communications networks (previously Market 15). The notification was circulated nationally for consultation in the period 16 September 2015 – 2 November 2015<sup>1</sup>.

The following parties submitted responses to the consultation:

- Chili Mobil AS (Chili Mobil)
- ICE Norge AS and ICE Communication Norge AS (ICE)
- The Norwegian Competition Authority
- TDC AS and Get AS (TDC/Get)
- Telenor ASA (Telenor)
- TeliaSonera Norge AS<sup>2</sup> (TeliaSonera)

Nkom also received a consultation response from a potential market operator that for competition reasons wanted to keep its identity anonymous. Nkom found reasons for accommodating this pursuant to section 14 of the Freedom of Information Act and section 13 of the Public Administration Act. This operator is referred to as “Anonymous operator” in this document.

Nkom invited the operators to comment on the consultation responses received by 27 November 2015, but no operator submitted comments. To highlight some of the consultation responses further, Nkom sent specific questions in an email on 26 November and in a letter to Telenor on 27 November 2015. Telenor responded to the email on 3 December 2015, and its comments on the gross margin test are included in the summary of consultation responses. Telenor's response to the letter, which was received on 4 December 2015, has also been taken into consideration in the summary.

The statements from the various respondents are summarised in accordance with the chapters of the notification. Nkom also briefly summarises its views on the relevant comments and how the Authority has dealt with them.

Further, on assignment from Telenor, Espen R. Moen and Christian Riis from Oeconomica DA have written an assessment of Nkom's market analysis and draft decision. The assessment was sent to Nkom on 3 December 2015. The assessment was also presented in a meeting with Nkom on 8 December 2015. The conclusions in the report are summarised in chapter 7 of this document, where Nkom also offers its assessment. The input from Moen and Riis has been taken into consideration in the analysis and decision where relevant.

In chapter 8 Nkom notifies that Telenor, according to the Electronic Communications Act section 4-9, will be made subject to an obligation to charge reasonable price for establishment of new access agreements. This in addition to the price controls that were consulted nationally.

---

<sup>1</sup> The original deadline for consultation responses was 19 October 2015. On the request of some operators, a general extension was given to 2 November 2015.

<sup>2</sup> TeliaSonera Norge AS changed name to Telia Norge AS 1 March 2016. In this document the name TeliaSonera is used since this name was during the consultation.

The individual consultation responses and the assessment from Moen and Riis are available on Nkom's website.<sup>3</sup>

## 2 Comments on the market definition

### **Assessment and conclusion in notification of decisions**

Nkom has defined the relevant wholesale market so as to include wholesale access to all public GSM, UMTS and LTE networks, and origination of voice, SMS and data services for the following external forms of access: access to national roaming, MVNO access and service provider access. Both access in order to offer ordinary mobile services and access in order to offer M2M services are included.

### **Consultation responses**

**Telenor** mainly agrees with the market definition Nkom has used at the retail level, but points out that it is unclear whether dedicated subscriptions for mobile broadband are included in the relevant retail market. Telenor believes this must be clarified to ensure that the analysis does not start with a wrong definition.

Further, Telenor comments on Nkom's inclusion of access to M2M services in the market definition:

- It is inconsistent for Nkom to specify that access to offer M2M services is included in the relevant wholesale market when M2M communication in mobile networks is not included in the relevant retail market.
- There are many technologies other than mobile technology that are equally relevant input factors for the production of M2M services (for example powerline communications, radio mesh, WLAN and various Near Field Communications solutions). Nkom has not made a substitutability assessment of these technologies.
- M2M communication can be offered using foreign SIM-based international roaming, and this means that there are many more operators that must be included in the analysis (a global market). This may mean that the market must be expanded geographically beyond Norway.

**TDC/Get** agrees with Nkom's market definition.

**Anonymous operator** agrees with Nkom's market definition, but adds that the relevant market should also include other forms of access that are in the borderland between the three categories.

### **Nkom's assessment**

In Nkom's view, from the point of view of the end-users, mobile broadband is not substitutable with traditional mobile subscriptions. Nkom also believes that there is insufficient demand-side substitutability to consider dedicated subscriptions for mobile broadband to be part of the retail market for bundled telephony mobile services<sup>4</sup>. In the updated market analysis Nkom has clarified that the market for mobile broadband is a separate, closely related retail market. At the wholesale level the same input factors are used to offer data traffic in traditional mobile

<sup>3</sup> See <http://www.nkom.no/marked/markedsregulering-smp/marked/marked-15>

<sup>4</sup> The retail market for traditional mobile telephony services (voice, SMS, data) will henceforth be referred to as the retail market for bundled telephony mobile services.

subscriptions and in dedicated subscriptions for mobile broadband. The access price for mobile data traffic has also not been tied to how the product is offered in the retail market. In the market definition, Nkom assumes that access to data traffic is included in the relevant product market (wholesale level), regardless of whether data traffic is sold as a dedicated subscription for mobile broadband in the retail market or as a service in a traditional mobile subscription.

In the same manner, Nkom finds that M2M communication via mobile networks is not part of the retail market for bundled telephony mobile services as it is not substitutable with traditional mobile subscriptions. Seeing that M2M communication in mobile networks in a large degree is produced with the same input factors as ordinary mobile services, Nkom believes that M2M communication in mobile networks must be defined as a separate, closely related retail market. At the wholesale level the network owner's access agreements normally do not make distinction between data traffic used to offer M2M services or to offer other data services. In this context, Nkom therefore finds that access to data traffic is included in the relevant wholesale market, regardless of whether the traffic is sold as M2M services in the retail market or as traditional mobile traffic.

Nkom acknowledges that the retail market for M2M communication in mobile networks can be disciplined by services offered by other technologies and international operators. In the Norwegian market Telenor has nevertheless a market share above 90 percent of subscriptions for M2M communication in mobile networks, which indicates that Telenor has built up a strong position compared to the other operators in the Norwegian market, and Telenor's offer is thus in a small degree affected by disciplining factors. Nkom believes that it is important to facilitate competition for providing M2M services in mobile networks, since this is a market with a large potential for growth.

With regard to comments on access based on other forms of access, these are considered in the chapter on access.

Nkom has made some minor qualifications in the market definition, including a clarification that mobile broadband and M2M communication in mobile networks are not part of the retail market for bundled telephony mobile services, but separate, closely related markets.

In addition Nkom has done a closer assessment of whether there are reasons to separate the retail markets for ordinary mobile telephony and mobile broadband in residential and business markets respectively. Nkom has concluded that differences related to the service offers and the competition situation give reasons to separate both these retail markets in a residential and a business market. The market analysis is updated in accordance with this.

## **3 Comments on the three-criteria test**

### **3.1 First criterion: high and non-transitory entry barriers**

#### ***Assessment and conclusion in notification of decision***

In the analysis, Nkom has concluded that there are high and non-transitory entry barriers in the relevant market, fulfilling the first criterion.

### **Consultation responses**

**Telenor** believes that Nkom's description of entry barriers lacks nuance and is exaggerated. Nkom has not substantiated that the sunk costs in mobile networks are so great that they represent an entry barrier in Norway. Nkom has also not substantiated that the existence of economies of scale creates entry barriers.

Telenor highlights that ICE chose to establish itself in the market long before Tele2 was acquired by TeliaSonera. The decision to make significant investments in frequency resources was made on a commercial basis. Nkom's claim that ICE has overcome entry barriers by acquiring existing infrastructure is therefore incorrect.

Telenor also writes that it is striking that Nkom on the one hand finds that access to coverage frequencies represents an entry barrier in the market for access to mobile networks, while ahead of the allocation of frequency resources in the 900 and 1800 MHz bands the same Authority found that the competition situation does not provide a basis for special adaptations "for presumed financially 'weaker' competitors".

As TeliaSonera, ICE and Telenor all have good access to frequency resources, it cannot be correct that access to coverage frequencies represents an entry barrier for operators wanting to be providers in the wholesale market, unless Nkom wishes to facilitate the entry of a fourth or fifth operator in the Norwegian market.

Like Nkom, **TDC/Get** believes that the wholesale market is still characterised by high and non-transitory structural entry barriers caused by sunk costs, and in contrast to previously there are now significant regulatory entry barriers. TDC/Get notes that the amount of frequency resources that are available (some frequency resources in the 900 and 1800 MHz band are planned auctioned in the time horizon of the analysis) are so limited that if a new operator was to win these, it would incur a cost disadvantage when building a mobile network. TDC/Get questions whether it would be at all possible to establish a competitive network on the remaining frequencies.

In its consultation response, **ICE** writes that with its acquired frequencies it is the only operator, along with Telenor and TeliaSonera, that has the necessary frequency resources to contribute to the goal of an effective infrastructure competition. The rollout ICE has started is time-consuming and capital intensive.

**Anonymous operator** supports Nkom's argument that a costly establishment in Norway represents a structural barrier for entry (new operator) and expansion (ICE). A lack of frequency resources exacerbates the entry barriers for a possible fourth operator.

The **Norwegian Competition Authority** agrees with Nkom that significant investments in infrastructure, a large share of sunk costs, significant economies of scale for established operators, and the shortage of frequency resources are important factors for entry to the market, and these represent significant entry barriers.

### **Nkom's assessment**

Nkom specifies that the starting point for assessments of entry barriers is an entry that can impact market dynamics. Nkom has described this as being equivalent to the entry of a mobile network operator (MNO) with at least 75 per cent population coverage and more than 50 per cent of traffic in its own network.

Using the LRIC models, the investment costs to achieve such an entry are estimated to be about NOK 2 billion. Nkom maintains that this is a significant investment and that the costs to

a great degree represent sunk investments. Tele2's network was financed through asymmetrical termination rates and achieved the above-mentioned population coverage. In 2013, it became clear that Tele2 in the future would not have access to sufficient frequency resources to utilise the established infrastructure. Tele2 sold parts of the network to ICE, and the rest of the infrastructure was part of the merger with TeliaSonera. In this process, it became clear that Tele2's mobile network had a limited financial sales value<sup>5</sup>. In Nkom's view, this is an example of investments being irretrievable, or in other words sunk costs. Significant investments, which in turn mean that costs must to a greater extent be seen as fixed rather than variable, are in Nkom's view an indication that it is necessary to utilise investments at a large scale in order to successfully enter the market.

ICE has existed as a niche operator in the Norwegian market for several years. In 2013, it chose to enter the market heavily by purchasing significant frequency resources based on commercial assessments and without knowing whether they would get access to established infrastructure. The large investments, which were necessary, support Nkom's assessment of there being significant entry barriers in this market. ICE's acquisition of existing infrastructure enabled the company to offer comprehensive retail products in the market faster than it otherwise would have been able to. ICE's new position also enables offers in the wholesale market in the longer term. The acquisition of infrastructure as a basis for entry as a full-scale provider cannot be relied on as a regular way of entering the market. It also cannot be used to argue that there are no entry barriers. The scope of investment in frequency resources was significant and shows that there are entry barriers in the market.

To Telenor's arguments about how the assessment of frequency resources is included in the three-criteria test, Nkom notes that the purpose of testing the first criterion is first and foremost to assess structural market conditions. It is sufficient to document the existence of entry barriers, which is done by Nkom. The concrete frequency management includes considerations and issues that influence the design of frequency auctions. The quotes Telenor refers to related to the specific management of the remaining 2x15 MHz in the 1800 MHz band and therefore cannot be understood to mean that there are no entry barriers in the market, even though there are three operators that have frequency resources.

The fact that there are three operators today with sufficient coverage frequencies does not mean that there are no entry barriers in the market, as Telenor claims. The regulation is not meant to protect specific, individual operators. It is the characteristics of the market itself that are the starting point for the assessment.

The comments from TDC/Get, ICE, Anonymous operator and the Norwegian Competition Authority are apt to strengthen Nkom's findings, and Nkom upholds the conclusion that the first criterion has been met.

### **3.2 Second criterion: The market is not tending towards effective competition**

#### ***Assessment and conclusion in notification of decision***

Under the second criterion, Nkom assessed whether the market has characteristics that do not make it tend towards sustainable competition. Nkom concluded that there are no sufficiently

---

<sup>5</sup> See for example InsideTelecom on 8 October 2014 (<http://www.insidetelecom.no/artikler/ice-kjoper-hele-tele2-nettet/164193>), 13 November 2014 (<http://www.insidetelecom.no/artikler/netcom-selger-3g-frekvenser-til-ice-for-en-krone/165406>) and 7 December 2015, where it was stated that ICE has valued the assets it acquired to nearly twice the purchasing amount (<http://www.insidetelecom.no/artikler/halv-pris-for-network-norway/217844>).

clear indicators of dynamics in the market within the time horizon of the analysis that suggest that the market will tend towards sustainable competition without ex ante regulation.

### **3.2.1 Consultation response from Telenor**

**Telenor** believes that the actual competition in the market and the dynamic market development that can be expected in the coming years indicate that there is functioning competition in the market. Telenor supports its arguments in three main ways, each of which is reproduced and assessed below.

#### **1) Competition in the retail market has been strengthened**

In Telenor's view, competition in the retail market is stronger now than at the last analysis in 2010. Since downstream competition is working, Telenor believes there are no grounds for sector regulation. The company notes that the effects of the strong competition between network operators, MVNOs and service providers among other things is shown in consistently low and falling retail prices in the retail market as well as the increasing amount of data included in flat-rate packages at no extra cost.

In its consultation response, Telenor references a report from RBC Capital Markets dated 1 September 2015 which concluded that the Norwegian electronic communications market has the lowest prices in Europe when earnings are adjusted to purchasing power, and the Norwegian market is thus below the European average. According to Telenor, this provides clear indications that competition has increased since the last analysis.

As in the last market analysis, Telenor believes that Nkom does not substantiate or document why falling and relatively speaking low retail prices are not clear indications of functioning competition, independent of sector-specific regulation.

Furthermore, Telenor believes Nkom place great emphasis on market shares in a "network market" and uses these as support for an ongoing regulation of Telenor. Instead of analysing market shares and competition in the wholesale market, Nkom focuses on market shares at the network level, though there is no such externally relevant network market. According to Telenor, this weakens the analysis of the wholesale market significantly. Telenor believes Nkom among other things must place emphasis on the fact that the customers' actual behaviour in the wholesale market throughout the period since the last analysis gives clear indications that there is well-functioning competition between Telenor and TeliaSonera in this market.

Further, Telenor believes that Nkom's notification of a decision and the associated market analysis creates the impression that Telenor demands negotiation exclusivity. Telenor denies this, noting that it sets no limitations on the opportunities buyers of access have to negotiate with other providers of access while negotiating with Telenor (nor are such limitations imposed before or after).

Other issues Telenor believes to be indicative of increased competition in the market include changes in the market shares at the retail level throughout the period since the last analysis. Measured in the number of subscriptions, there has been a drop in the market shares of both Telenor and TeliaSonera, and before the acquisition Tele2 had increased its market share since the last analysis. As a result of the acquisition, TeliaSonera's market share grew significantly, at the same time as ICE established its efforts in the retail market and will become a clear alternative for retail customers beyond mobile broadband. Additionally, several operators have established offers for retail customers since the last analysis (including Com4, Lyca Mobile, Chili, PepCall, Banzai) and consolidations have been completed on the provider



side (TDC/Get and Phonero/Ventelo). Telenor believes Nkom must give much greater weight to these issues.

### ***Nkom's assessment***

Nkom does not agree with Telenor's contention that Nkom does not substantiate why falling and low retail prices do not indicate competition, independently of sector-specific regulation. For Nkom, the key assessment criterion is whether the relevant wholesale market tends towards sustainable competition. That there is competitive pressure in the retail markets is also clear in Nkom's analysis, but as long as there are insufficiently clear indications of the wholesale market tending towards sustainable competition, Nkom cannot assume that competition in the retail markets will continue without sector-specific ex ante regulation.

With regard to the calculation of the market shares at the wholesale level, Telenor largely does not explain how it believes these should be calculated. Nkom also perceives Telenor to want sales to one's own enterprises to not be included in the basis for setting market shares at the wholesale level. In chapter 2.4.1 of the analysis, Nkom has explained why internal sales are included and refer to the fact that Nkom believes that this provides the most correct picture of the relative strength at the wholesale level. In terms of customer behaviours, Nkom assumes that this refers to changes of host networks etc. These issues are considered in chapter 4 of the summary, which discusses the analysis of significant market power.

Nkom has previously seen examples of Telenor having required negotiation exclusivity<sup>6</sup>. Nkom finds this type of exclusivity to be unreasonable. At the same time, Nkom has referred to the Ministry of Transport and Communications' (the Ministry) decision dated 20 December 2012, which states that exclusivity that affects the ability to negotiate limits competition and will generally violate the Electronic Communications Act. TeliaSonera is also clear in its consultation response that this form of exclusivity is unfortunate. However, that Telenor claims that this form of exclusivity is not practised (any longer) is positive.

Telenor is correct in its description of both Telenor and TeliaSonera having had their market shares reduced since the last analysis, as measured by the total number of ordinary mobile subscriptions. However, when looking at market shares measured by turnover, Telenor has increased its share despite the slight decline in the share measured by the number of subscriptions. After the first half of 2015, Telenor had a significantly higher share of the total turnover for ordinary mobile subscriptions (58.3 per cent) than the share measured by the number of subscriptions (53.7 per cent). However, TeliaSonera has found that their share measured in turnover has also declined since the last analysis. At the end of the first half of 2015, TeliaSonera's share measured by turnover was 32.8 per cent, while it was 38.0 per cent measured by the number of subscriptions. In the assessment of the relative strength of the operators, Nkom believes that market shares measured by turnover are just as important a measurement parameter. With regard to new entrants in the retail markets, these are discussed in chapter 4.3.5. The significance of the above-mentioned consolidations is considered in chapter 5.11 about buyer power. Nkom believes these issues have been adequately considered.

## **2) Nkom does not give weight to the Norwegian Competition Authority's assessments**

Telenor is of the view that when the Norwegian Competition Authority's decision gives ICE significant and sufficient help to establish itself to ensure infrastructure competition, this also indicates that current market conditions are apt to facilitate increasing competition in the wholesale market in the next two to three years.

---

<sup>6</sup> Letter from Telenor to Network Norway dated 15 June 2012.

Telenor notes that Nkom's analysis is to be future-oriented with a time horizon of two to three years, and therefore believes that Nkom must assume that the market structure will remain as it is for the future, regardless of whether organic growth or acquisitions created it.

Telenor notes that after having conducted a thorough assessment of competition in the same market that is subject to regulation, the Norwegian Competition Authority concluded that the terms imposed on TeliaSonera in connection with the acquisition of Tele2 *"in total [will] help offset the impact on competition in the wholesale market that will result from the merger"*. Further that *"the Norwegian Competition Authority's view is that in combination, the measures will help offset the limitations on competition that arise in the residential market as a result of the merger"*.

According to Telenor, the Norwegian Competition Authority has concluded that the terms of the agreement between ICE and TeliaSonera *"give[s] ICE the opportunity to compete aggressively in the retail market, that the terms can make ICE a provider in the wholesale market as well"*.

Telenor also emphasises that in its assessment of whether TeliaSonera's request for a temporary permit to use frequency resources should be allowed (dated 15 June 2015), the Ministry greatly emphasised the importance of the package of terms from the Norwegian Competition Authority, with the view to achieving the goal of having a third mobile network. Telenor believes it seems inconsistent for the Ministry in its decision to state that the Norwegian Competition Authority's package of terms is clearly a suitable tool for achieving the goal of a third mobile network, while Nkom retains Telenor's obligation to provide access to national roaming and for MVNOs, and now also for service providers – without justifying the need for any of this. This is particularly the case given that there are now three operators that can and have incentives to compete in the wholesale market.

### ***Nkom's assessment***

Nkom notes that the Norwegian Competition Authority has considered whether the remedying measures were adequate to remedy the limitations on competition that arose as a result of the merger. Its assessment was not about whether the measures would lead to the competition problems that existed in the market before the merger would be remedied and thus not about whether the measures alone were adequate to achieving sustainable competition. Further, Nkom notes that the Norwegian Competition Authority's consultation response supports the assessment that it is unclear whether ICE in the time period of the analysis will become an operator that can discipline the providers in the market. The Norwegian Competition Authority also agrees with Nkom that the need for predictability indicates that there is a continued need for sector-specific regulation. Nkom therefore does not see that its analysis and decision conflicts with the Norwegian Competition Authority's assessments in connection with the merger. Nkom also notes that in their consultation responses, TDC/Get and Anonymous operator have stated that compared to 2010, the market is more concentrated after TeliaSonera acquired Tele2 and that it will take time before ICE has the technical infrastructure, organisation and experience necessary to offer more attractive wholesale products; see chapter 3.2.2 below.

Nkom also believes that the Ministry's assessment in the case about a temporary permit to use frequency resources cannot be understood to mean that the Ministry meant that the package of measures alone was a sufficient tool through which to achieve sustainable competition.

### **3) Telenor's market behaviour does not support a need for regulation**

Telenor refers to the fact that Nkom in section 4.3.7 evaluates whether Telenor's market behaviour is indicative of there being effective competition. According to Telenor, Nkom uses the development of Telenor's terms of access as a sign that there is a continued need for regulation, and Telenor believes that Nkom's assessment is both factually and legally deficient. Additionally, Telenor believes that all complaints and legal conflicts with TDC and Network Norway are used to support the claim that competition is not functioning. In Telenor's view, Nkom's assessments are characterised by prejudice and an underlying perception that Telenor in every context seeks to limit competition.

Telenor believes that Nkom has made an erroneous assessment of the terms of access and makes the following comments:

#### Price structure in agreements

Telenor believes that it is the Ministry's and Nkom's own decision and interpretation of the regulation have led to changes in the price structure, not that the competition in the market does not work. Telenor changed the price structure in the reference offers as a direct consequence of the Ministry's decision in the TDC complaint, where the Ministry (and Nkom) thought that a price structure like the one Network Norway had negotiated in its roaming agreement with Telenor was clearly more beneficial for the buyer of access and that not offering the same price structure to TDC was a breach of the non-discrimination obligation.

Telenor does not see any way of complying with the non-discrimination requirement, as interpreted by the Ministry and Nkom, other than through reference offers. Telenor has repeatedly asked Nkom to explain how it thinks Telenor can comply with the non-discrimination obligation, as Nkom and the Ministry interpret it, without using reference offers. Telenor cannot see having received any clarification, and as an example makes reference to Nkom and the Ministry not having given any guidelines for the volume that is to be used when comparing prices in different agreements (c.f. the non-discrimination obligation), but having assumed that a specific consideration must be made of this on a case by case basis.

#### Volume obligations

Telenor believes that Nkom's explanation of effects of volume obligations in paragraph 365 of the analysis is incorrect. Nkom's claim that volume obligations safeguard "established network owner's needs" while the interests of providers that are developing networks "are not safeguarded to the same extent" is undocumented and according to Telenor this indicates a lack of understanding of commercial negotiations and the value of such obligations for buyers of access. In all markets, volume obligations provide a basis for lower prices for the buyer. For example, through the agreement of September 2010 in which it among other things undertook volume obligations, Network Norway received significantly reduced prices. In the case between TDC and Telenor, Asker og Bærum District Court assumed that the volume obligation was of value to Telenor, which could justify a lower price for Network Norway. Telenor believes that Nkom in any case cannot use volume obligations to support ongoing regulations when Telenor, as Nkom knows, has not had volume obligations in its agreements since June 2013 (new reference offers).

#### Roaming exclusivity

Telenor notes that Nkom assumes that the roaming exclusivity clause in Telenor's agreements is a sign that competition is not working (cf. paragraph 366 of the analysis), without providing any further justification for this.

Telenor finds it remarkable that Nkom here disregards the fact that the clause was considered by the Asker og Bærum District Court on 29 November 2012, which reached the following

conclusion (page 43 of the judgement): *"In total, it is therefore the Court's assessment that the exclusivity that is part of the double roaming prohibition in the agreement between Telenor and Network Norway, when viewed in light of the rest of the agreement and the economic and market context it is part of, is not apt to limit competition in the relevant market. The Court therefore does not see the roaming exclusivity clause as entailing an undue exploitation of Telenor's dominant position."*

Additionally, Telenor believes that Nkom disregards the fact that in its new reference offers, Telenor has provided for a much shorter agreement period than was the case in the aforementioned agreement with Network Norway, which means that buyers of access at relatively short intervals can compare offers from the existing network operator against those from other operators and in this way exercise buyer power.

#### Right to make changes

According to Telenor, the provision of the reference offer stipulating that Telenor can amend the agreement (with the option for the buyer of access to terminate the agreement before its expiry if the change disadvantages the buyer of access) is a direct result of the Ministry's decision in the TDC complaint.

Telenor believes that it needs to ensure that all buyers of access have the same agreements. Previous complaints show that Telenor cannot rely on what it perceives to be objective differences between the access agreements to necessarily be considered to comply with the regulation. Telenor's experience also shows that Telenor would be exposed to considerable regulatory risk, and likely also time-consuming conflicts, if its ability to make changes depended on buyers of access and the authorities considering the changes to be necessary as a result of Telenor's regulatory obligations.

With regard to the content of the changes, Telenor believes that the agreement in any case cannot be changed in a manner that breaches its obligations under the Electronic Communications Act and any market regulations. This ensures that the interests of the buyer of access are also safeguarded. Telenor believes the provision regarding Telenor's right to make changes is based on Telenor's need to minimise regulatory risk. The right to make changes also follows explicitly from the current Market 15 decision (paragraph 215), and Telenor is therefore of the view that it cannot be used to justify that the market does not tend towards sustainable competition.

#### Sanction clauses

According to Telenor, the District Court understands this clause in an entirely different way than Nkom chooses to. Telenor refers to the District Court's statement about the clause: *"However, when looking at the history of the agreement and Network Norway's consistent threats and complaints that parts of the agreement between the parties are illegal, the Court can understand that Telenor wanted to incorporate such provisions in the agreement. There are no grounds to believe that Telenor wished to enter illegal agreements and Telenor has a legitimate interest in trying to limit the scope of accusations and conflicts around its agreements."*

Given that the Court has considered the same factual situation and justification for the clause, Telenor finds it striking that Nkom completely disregards the Court's assessment of the clause, made after reviewing the history of the agreement and the statements of parties and witnesses. Telenor believes that Nkom in any case cannot use the sanctions clause to justify ongoing regulation when Telenor has not had such a clause in any agreements other than the agreement with Network Norway, and also does not have such a clause in the new reference offer.

Telenor believes that Nkom also uses complaints from access operators and its own decisions regarding discrimination between external buyers of access as evidence that the market does not tend towards competition.

#### The corrective decision related to the appeal regarding discriminatory behaviour

On 23 March 2012, Nkom made a decision on a complaint made by TDC, and imposed Telenor to present an offer in compliance with the decision, which Telenor believes it did to the best of its ability by the deadline. TDC did not accept this offer, which in the spring and summer of 2012 led to a number of "interpretation letters" from Nkom about how to understand Nkom's own decision. Telenor believes that since Nkom had to provide extensive interpretations of its own corrective decision, this documents that Nkom's original decision in no way was clear.

In Telenor's view, it is clearly misleading for Nkom to blame Telenor for the time it took for Telenor's offer to comply with the way Nkom, after several clarifications, understood its own decision. According to Telenor, this is not a situation that can be used to support the claim that the market does not tend towards sustainable competition, as it was caused by an unclear decision from Nkom.

#### Discrimination between forms of access

Further, Telenor believes that the Ministry's decision on TDC's complaint is also taken to support the claim that competition is not working, cf. paragraph 381 of the analysis: *"In Nkom's view, it is reasonable to see Telenor's discrimination between external buyers of access as an indication that the relevant market does not tend towards sustainable competition."*

Telenor objects to this for several reasons: first, Nkom completely disregards that the Asker og Bærum District Court went to great lengths to state that the price difference between the Network Norway agreement and the TDC agreement did not violate the non-discrimination obligation. Second, in the notification Nkom states that the prohibition on discriminating between external buyers only applies within each form of access and not between forms of access, cf. paragraph 325 of the notification. Based on Nkom's proposal in the notification, TDC would consequently not have succeeded with its complaint that Telenor had violated the regulation by giving lower prices to Network Norway than to TDC. It is reasonable to understand the notification such that Nkom sees the regulation, as it has stood thus far, as inappropriate to its purpose and as having unintended consequences. In other words: an issue that Nkom no longer finds problematic – discrimination on price between external buyers of access – is nevertheless used to support the argument that sector regulation remains necessary.

#### Complaint regarding margin squeeze

Telenor also refers to the fact that in its review of cases that leads to the conclusion that the market does not tend towards competition, Nkom highlights TDC and Network Norway's complaints about a claimed margin squeeze, cf. paragraph 391 et seq. of the analysis. However, based on the complaints, Nkom conducted margin squeeze tests and Telenor notes that this led to a conclusion that Telenor had not behaved in violation of the non-discrimination obligation. To Telenor, it is therefore very unclear why these cases are mentioned in this context. Telenor believes that these complaints cannot help support the claim that the market does not tend towards competition, given that they were unfounded.

#### Nkom's decision in a complaint regarding data speeds

Telenor notes that in its decision dated 18 September 2014, Nkom finds that Telenor has breached the non-discrimination obligation in the current market decision by not offering buyers of access the same speeds that are offered Telenor's own retail operations. Telenor

disagrees strongly with the decision, and has appealed. Even if one accepts Nkom's understanding of what an offer should look like, Telenor believes that an assessment must be made of the impact of failing to present an offer on competition in the market. When Telenor, to avoid any doubt whatsoever, in October 2013 made an offer in writing to buyers of access for increased data speeds under existing access agreements and with no other changes in terms, there was still no buyer of access that wanted to pay for higher speeds.

Telenor believes that if the offer had been presented in the manner Nkom believes it should have been at an earlier date, this would have been of no significance to competition in the market. Again, this substantiates that the case is not about discrimination of buyers of access, but that buyers of access did not want to pay for such speeds.

#### Complaint regarding co-location

In paragraphs 382 and 383 of the analysis, Nkom explains the main arguments in Mobile Norway's complaint to Telenor in November 2011, which related to co-location. Telenor notes that Nkom concludes the explanation with a statement that it *"cannot see that Telenor's behaviour related to co-location is sufficiently disciplined by other operators in the market, and thinks Telenor's behaviour in this case is an indication that the relevant market does not tend towards sustainable competition"*.

Telenor thinks that Nkom is here drawing conclusions about the market and the workings of the market on a very limited and erroneous basis. Each year, Telenor receives a large number of requests for co-location. As conveyed in the mediation with Mobile Norway, in the period from January 2010 to March 2012, Telenor received 2,291 applications for co-location, of which 260 (11 per cent) came from Mobile Norway. The largest share of the applications was thus from operators other than Mobile Norway, including TeliaSonera and the emergency network. Telenor received no complaints from these operators. With regard to Mobile Norway's co-location requests back in 2012, Telenor tried to process the applications quickly and accommodate as many applications as possible, even though Telenor thought Mobile Norway had made limited preparations on its side for many of the applications. As is explained in the analysis, Telenor and Mobile Norway did reach an agreement about all locations, so that Mobile Norway's complaint in the end only related to Telenor's duty to justify and document rejections.

In recent years too, Telenor has received about 1,350 requests for co-location a year, and accommodates about 97 per cent of the requests. With the exception of Mobile Norway's 2011 complaint, Telenor has still not received any complaints. Telenor finds it to be striking that Nkom does not attempt to conduct a comprehensive analysis of this market and of Telenor's handling of the co-location requests.

#### Other conflicts

Telenor also refers to paragraphs 386-390 of the analysis, where Nkom gives an account of "other conflicts". Here, it discusses a dispute between Telenor and Network Norway about the validity of the access agreement under competition and electronic communications law, as well as TDC's claim for damages against Telenor in the aftermath of the TDC decision. Telenor refers to the fact that Nkom has not considered the documents in the case, but *"notes that these are conflicts that have arisen in the access market for mobile services"*. Nkom makes no mention of why these cases are discussed or of their significance to the analysis, but according to Telenor it is difficult to understand it in any way other than that Nkom attempts to give the impression that the conflicts in themselves indicate limited competition.

According to Telenor, Nkom does not discuss the possibility that the buyers of access consciously continue their successful strategy of achieving beneficial terms by using the regulatory ambiguity of Nkom's decision at no risk or cost.

Telenor asks that Nkom clarifies what it means by this paragraph, especially in light of the fact that in the Network Norway case the District Court found for Telenor regarding the claims about violations of competition and electronic communications law (in an enforceable judgement). Telenor also refers to the fact that TDC lost its case in the District Court (not a final and enforceable judgement).

### ***Nkom's assessment***

In its assessment of the second criterion, Nkom has first and foremost considered structural market conditions, in line with ESA's guidelines. Nkom has also assessed whether the dominant operator's behaviour within the previous regulatory period can further illuminate the second criterion. In Nkom's view, the structural conditions in themselves provide sufficient basis for concluding that the second criterion has been met. The assessment of market behaviour also supports this conclusion and provides a better basis for further illuminating the competition problems. There are also no special, individual cases that form the basis for Nkom's view that Telenor's behaviour in the regulatory period supports the conclusion that the second criterion has been met. It is the totality of the conflicts in the period that Nkom believes contributes to illuminating market conditions. Nkom will therefore only briefly comment on the main points in Telenor's contentions about the specific cases.

Nkom has not found that the consultation responses it has received have provided a basis for changing its conclusions regarding the assessment of the second criterion, but it has adjusted some individual areas in line with Telenor's input.

### Price structure in agreements

In the notification of decision, Nkom stated that the price structure must not be a barrier for buyers of access to compete with Telenor, including in selected parts of the retail market. Nkom gave notice that Telenor must offer a variable price structure, because a price structure with a fixed price per SIM reduces the access buyer's flexibility and has unfortunate exclusionary effects. Nkom has neither highlighted nor given weight to the current price structure in the assessment of whether the market tends towards sustainable competition.

### Volume obligations

Nkom does not disagree with the statement that volume obligations can have value for Telenor that can justify lower prices for buyers of access. However, Nkom believes that volume obligations, along with exclusivity requirements and other terms, in total can limit the dynamics of the market.

### The prohibition on double roaming / exclusivity requirement

Nkom is aware of the District Court's assessment of the exclusivity provision in the access agreement with Network Norway. Nkom will update the decision to show the District Court's assessment, although this does not alter Nkom's conclusion. Nkom also welcomes that Telenor has shortened the lock-in period in the access agreement and will take this into consideration in the analysis.

### Right to make changes

Telenor justifies the clause about the unilateral right to make changes based on regulatory interventions. Nkom does not disagree that Telenor may have a legitimate right to change an agreement in some contexts, for example due to regulatory issues. However, Nkom believes that an unconditional and unilateral right to make changes is unreasonable.

### Sanction clauses

The Ministry's assessment of the sanction clause was in line with Nkom's assessment. Nkom is aware that the District Court's assessment of the need for such a clause was different, but nevertheless upholds the conclusions the authorities have reached. That Telenor does not have such a clause in the new reference offer is welcome, but Nkom nevertheless believes it is relevant to mention it in a historical presentation.

### The corrective decision related to the appeal regarding discriminatory behaviour

Nkom recalls that the Ministry concluded that Telenor's prices for TDC were discriminatory. A long time passed before prices were presented that corrected this issue. Nkom maintains that this indicates that buyer power or other disciplining factors were not present, and that this is a sign of a lack of competition in the market.

### Complaint regarding margin squeeze

The discussion of complaints and conflicts in the analysis would have been lacking if the margin squeeze complaints had not been included. However, the analysis states that Nkom rejected complaints about margin squeezes based on the economic analyses presented. The text of the analysis has been slightly adjusted to make it even clearer that these are historical conditions.

### Nkom's decision in a complaint regarding data speeds

The Ministry made a decision on Telenor's appeal on 9 November 2015. The Ministry upheld Nkom's decision to impose infringement fines on Telenor. The Ministry believed that the violation of the non-discrimination obligation was serious and that the fine thus was not too high. The violation had given Telenor unjustified competitive advantages. This decision strengthens Nkom's assessment that Telenor's market behaviour within the current regulatory period indicates that Telenor has largely not been disciplined by buyer power or other competitors.

### Complaint regarding co-location

In terms of Telenor's contentions about co-location, Nkom believes that after the Ministry's confirmation of the infringement fine, there is little doubt that the complaint was correctly filed based on Telenor having exploited its market power.

### Other conflicts

Nkom has noted Telenor's comments and has removed text that Telenor found ambiguous from the final decision.

## **3.2.2 Consultation responses from other operators**

**TDC/Get** believes that the market will not sufficiently move towards sustainable competition within the time horizon of the analysis (two to three years). In TDC/Get's view, the current competitive situation is the result of a number of structural conditions:

- The costs related to establishing a mobile network in a relatively mature market represents a significant economic barrier.
- Telenor has high market shares.
- There are a number of examples of the misuse of market power that indicate that competition has been weakened both at the wholesale and retail levels.

Furthermore, TeliaSonera's acquisition of Tele2 has already weakened the limited dynamics in both the retail and wholesale markets. From 2006 and until 2014, Telenor and TeliaSonera faced increasing competition from Tele2/NwN for retail and SMB customers (and to some



degree at the wholesale level in the form of access for service providers). The company had obtained a significant number of customers through acquisitions and organic growth. At the time of the acquisition, the mobile network had been developed with coverage in parts of the country. This gave Tele2/NwN some degree of buyer power in negotiations with network owners, which also benefited other wholesale customers.

**Anonymous operator** notes that TeliaSonera acquired Tele2, which was the only real challenger to the two mobile operators with nation-wide networks. The market is therefore far more concentrated than in 2010. Furthermore, several larger, independent service providers have either been bought up or disappeared from the market.

According to the operator, ICE is currently not a credible third mobile operator in Market 15. It will take time before the company has the technical infrastructure, organisation and experience necessary to offer attractive wholesale products. Norwegian mobile subscribers are focused on coverage and quality, and many perceive Telenor to have the best mobile network. The operator believes it will take a long time to "train" the market to accept that ICE's future LTE network is a satisfactory alternative to "Telenor coverage" and "NetCom coverage".

The access agreement with TeliaSonera has thus far not turned ICE into an aggressive challenger in the retail market. Until the company launches services in its own network, the operator believes ICE in any case will have a cost disadvantage compared to both the host operator and Telenor. In contrast to the two established operators, ICE also does not benefit from economies of scale or scope. At the same time, all experiences suggest that it is challenging to grow in the Norwegian market. For instance, in nine years Tele2 only managed to grow its market share from 5 to 15 per cent. This took place in a far less mature market with higher profitability and less need for investments.

The **Norwegian Competition Authority** agrees that the third network is important to the competition in Norwegian mobile markets. The Norwegian Competition Authority's decision regarding TeliaSonera's acquisition of Tele2 facilitate the establishment of ICE as an MVNO in mobile telephony and the expansion of its own mobile network. However, the Norwegian Competition Authority agrees with Nkom that it is uncertain whether ICE will become an operator of such significance within the relevant time period that sufficient competitive dynamics arise between providers in the market.

#### ***Nkom's assessment***

The consultation responses from TDC/Get, Anonymous operator and the Norwegian Competition Authority support Nkom's assessments and entail no concrete changes in the analysis.

### **3.3 Third criterion: General competition law is insufficient**

#### ***Assessment and conclusion in notification of decisions***

In its analysis, Nkom has made an assessment of whether general competition law can address the structural problems in the market in a sufficiently effective, appropriate and predictable manner. The notification concludes that this is not the case and that the third criterion thus has been met.

#### ***Consultation responses***

**Telenor** believes that general competition law suffices. According to Telenor, Nkom has not documented why general competition law is insufficient and has misunderstood the purpose of electronic communications regulation and competition regulation.

The main purpose of sector regulation is to solve limitations on competition tied to access to networks, and such access is provided over a long period. TeliaSonera has supplied access voluntarily for a number of years, and now also has clear access obligations through the Norwegian Competition Authority's decision in the merger case between TeliaSonera and Tele2.

Furthermore, much of what Nkom seeks to regulate are issues that are at the core of what competition law handles, including questions about exclusivity, volume obligations and durations in particular. This is not about denying access to downstream competitors without network access. In a dispute between Telenor and Network Norway, the District Court made decisions on these three issues pursuant to competition law. This case illustrates the advantages of competition law, in that it can also be enforced directly in the courts, in addition to directly by the Norwegian Competition Authority.

**TDC/Get** contends that competition law does not seem to deter Telenor from exploiting market power. In the past five years, Nkom has repeatedly identified behaviour harmful to competition, but the competition authorities have not intervened. In order to compete effectively, buyers of access such as TDC/Get need the quick interventions only ex ante regulation is apt to ensure.

**Anonymous operator** agrees with Nkom that the third criterion has been met. General competition law does not provide predictable framework conditions. The prohibition on misusing a dominant position is not an appropriate tool to ensure access to infrastructure or intervening against pricing with an excluding effect. The Norwegian Competition Authority and ESA conducted a raid against Telenor in December 2012, but there is still no conclusion. By comparison, Nkom has intervened against a number of behaviours harmful to competition in the past five years.

The **Norwegian Competition Authority** agrees that the need for predictability and quick interventions in this market is indicative of a continued need for sector-specific regulation.

### ***Nkom's assessment***

There are high and non-transitory entry barriers, and the market is not moving towards sustainable competition, see the above. Nkom maintains that there is a need for a close monitoring of the market with the opportunity to make frequent interventions. Nkom further maintains that behaviours that limit competition can result in irreversible harm in the market, and that to achieve sustainable competition it is very important that buyers of access are ensured predictable access to infrastructure.

In terms of what Telenor refers to as the advantages of general competition law – the opportunity to seek private enforcement in the courts in addition to enforcement through public authorities – this will be part of the assessment. However, in Nkom's view this issue is of minor importance in the assessment of whether general competition law alone suffices.

The element that TeliaSonera voluntarily has offered access and through the Norwegian Competition Authority's decision is also obligated to offer access, is not sufficient to considering general competition law to alone be sufficient.

Nkom does not agree with Telenor's contention that the notification must be based on a misunderstanding of the purposes of electronic communication and competition regulations.

On this issue, we also refer to the Norwegian Competition Authority in its consultation response agreeing that the need for predictability and quick interventions are indicative of a continued need for sector-specific regulation.

The consultation responses received do not entail a need to make changes to the assessment of the third criterion.

## 4 Comments on the analysis of significant market power

### ***Assessment and conclusion in notification of decisions***

Based on a presumption about significant market power that is strengthened by a number of other issues, Nkom has concluded that Telenor can act independently of competitors, customers and consumers in the period covered by the analysis.

### ***Consultation responses***

**Telenor** believes that Nkom has not conducted an assessment of significant market power in compliance with the case processing requirements in the Electronic Communications Act and the Public Administration Act. Nkom overlooks several central issues showing that Telenor cannot act independently of customers, competitors and consumers and that the terms of section 3-1 of the Electronic Communications Act thus are not met.

Telenor notes that Nkom has not emphasised:

- that Telenor and TeliaSonera have strong incentives to enter agreements with wholesale customers to increase the utilisation rate of their own networks, as none of the operators have capacity limitations.
- that both network owners offer national coverage, and that through its market behaviour and expressed strategy, TeliaSonera has shown that it is willing and able to invest in the network to achieve coverage equal to that of Telenor.
- that TeliaSonera has seen significant organic growth in both retail revenue (2.7 per cent) and EBITDA (8.5 per cent) in the last quarter.
- the Norwegian Competition Authority's assessment of ICE's position and opportunities. Telenor notes that in the Norwegian Competition Authority's decision, ICE has received entry assistance that is sufficient to allow it to become a competitor in the wholesale market as well.

Telenor also emphasises that if TeliaSonera or any other operator appears as a real and complete alternative to Telenor, Telenor cannot behave independently in the market.

Telenor furthermore refers to characteristics of functioning competition:

- Low prices: prices in the retail market remain low and are falling.
- Customers compare providers and switch providers. Telenor believes that buyers of access' actual switches of providers since 2002, as well as the fact that several customers in the wholesale market have agreements with multiple providers simultaneously, shows that an operator cannot act independently.
- Access agreements are often re-negotiated in the course of the period covered by the agreement. In such cases, buyers of access normally negotiate with more than one provider. Telenor has been close to winning or losing customers several times. Telenor refers to examples it believes shows there is competition between TeliaSonera and Telenor about attracting buyers of access.

- Telenor believes that it lost Tele2 as a buyer of access in its network independently of TeliaSonera's acquisition of Tele2, and therefore believes that Nkom's assessment that the loss of traffic from Tele2 was caused by the acquisition is remarkable.

**TeliaSonera** believes that the competition landscape in the market is more nuanced than Nkom assumes in the notified regulation. TeliaSonera writes that it has strengthened its competitiveness significantly since the last market decision and in the times ahead it will become even better equipped than previously to challenge Telenor. The acquisition of Tele2's Norwegian operations, combined with the massive investments in rolling out new infrastructure and improving old infrastructure, will contribute to further intensifications of competition in this market in the years ahead.

**Chili Mobil** agrees with Nkom's descriptions in the market analysis and believes that the terms Telenor offers show that Telenor can behave independently of competitors and buyers of access. Chili Mobil provides examples of access prices and changes to these that according to that company show that Telenor exploits its dominant position to limit competition from service providers in the retail market.

**ICE** writes that it generally agrees with Nkom's conclusion designating Telenor as a provider with significant market power.

**TDC/Get** agrees with Nkom's conclusion that Telenor has significant market power, and notes that there is a legal presumption that the company has significant market power (based on its market shares) and that other structural issues also support this conclusion. The acquisition of Tele2 meant that the only operator with buyer power disappeared from the market.

TDC/Get also comments that the previous monopolists in the other Nordic countries have experienced a decline in their market shares in the current regulatory period, while Telenor by comparison has retained and to some degree strengthened its position in the Norwegian market. The company believes that this is partly caused by misuse of market power, as there are a number of examples of Telenor having exploited its dominant position in relation to buyers of access in the current regulatory period, cf. Nkom's description of the complaints. This has made it possible to protect the company's retail operators from competition.

**Anonymous operator** writes that like Nkom, it believes that Telenor to a great degree can act independently of competitors, customers and consumers in the period covered by the analysis. The operator notes that Telenor's market shares alone are so high that they entail a legal presumption that the company dominates Market 15. In a market with sustainable competition, market shares would over time be distributed evenly (33 per cent to each operator); Telenor has instead increased its market share based on turnover. The operator also notes that structural issues support this conclusion. It refers to high structural and regulatory entry barriers, economies of scale and scope, vertical integration and conditions at the retail level such as high brand loyalty, lock-ins of customers and control of distribution networks.

The operator highlights the fact that since the last analysis, the only operator with some degree of buyer power (Network Norway and Tele2) has disappeared from the market.

It also notes that unlike TeliaSonera, Telenor controls critical infrastructure related to transmission, broadband and fixed telephony. The company thus has a unique opportunity to transfer market power from adjacent markets to retain its position in mobile services, which there are signs of the company actually doing.

### ***Nkom's assessment***

The consultation responses clearly show that there are divided views on the designation of Telenor as a provider with significant market power. Buyers of access support Nkom's conclusion, while Telenor, and, to some degree, TeliaSonera argue that they are in competition. Below, Nkom provides its views of opposing arguments.

Nkom does not agree that it has overlooked the issues Telenor mentions. Telenor's incentives to provide access are discussed in chapter 5.11 of the analysis (about buyer power), and whether TeliaSonera will become an equal operator within the time horizon of the analysis in terms of entering agreements with wholesale customers has been emphasised in chapters 5.5 and 5.11 of the analysis. We refer to these chapters for a more detailed assessment of the above-mentioned issues. Additionally, reference is made to the fact that several operators in their consultation responses emphasised that the only operator with buyer power (Tele2) has disappeared from the market. Nkom does not disagree that TeliaSonera has strengthened its competitiveness, but Nkom nevertheless believes that in combination, the issues considered in the analysis indicate that Telenor in the next two to three years will be able to act independently of TeliaSonera and other competitors and customers.

TeliaSonera has seen growth both in turnover and EBITDA margin in the third quarter of 2015. Nevertheless, the margins for the first three quarters of 2015 are lower than for the corresponding period in 2014, and thus still far lower than Telenor's profitability figures. These are not issues Nkom has overlooked, and financial reports in the aftermath of the notification also do not change the conclusion in the market analysis.

With regard to the assessment of ICE's position and opportunities, Nkom has made an assessment in chapter 4.3.8 and concluded that there are insufficiently clear indications that ICE will be able to discipline the established operators on the provider side within the time horizon of the analysis. This is supported by consultation responses from other operators, and in its consultation response the Norwegian Competition Authority clearly stated that it agrees with Nkom in this assessment.

In terms of the characteristics of effective competition, Telenor believes that the continued low and falling retail prices is a central characteristic of competition. In its analysis, Nkom has presented figures for price developments from Teligen based on so-called OECD baskets (chapter 4.3.6). The figures show that the price development in Norway has been relatively stable in the past two and a half years. Compared to other countries, the figure shows higher prices in Norway as at August 2015 than in Denmark, Finland, Sweden and England, while prices are lower than in Iceland, Germany and the Netherlands. The central issue for Nkom is nevertheless whether there is competition in the relevant wholesale market. In Nkom's view it cannot be assumed that competition in the retail markets will remain without sector-specific ex ante regulation.

In its consultation response, Telenor has prepared an overview of buyers of access that have changed their host networks since 2002, as well as of which providers have / have had access to multiple host networks simultaneously. Nkom notes that Telenor believes that access to multiple networks is a sign of effective competition. However, as described in the analysis, since 2008 Telenor has required exclusivity for access to national roaming, and corresponding requirements were implemented in the reference offer for MVNO access in 2013; see chapter 4.3.7.2 of the analysis. Nkom does not disagree with Telenor's claim that access to multiple networks simultaneously can be a sign of competition to provide access, but Telenor's own agreement provisions and the company's follow up of these shows that Telenor in practice has not accepted such access.

With regard to changes of host networks, Nkom notes that the two MVNOs that have been in the Norwegian market the longest, TDC and Phonero (previously Ventelo), have only bought access to Telenor's network since being established in 2005. Furthermore, there is currently two other buyers of MVNO access and both have had agreements with TeliaSonera since they were established. Admittedly, the precursor to Lycamobile (Barablu) had an agreement with Telenor, and Com4 has agreements with both TeliaSonera and Telenor. As mentioned in the analysis, there have been some switches of host operators among the smaller service providers in recent years. However, overall Nkom does not agree with Telenor that actual switches of host networks in the Norwegian market are indicative of effective competition.

Nkom maintains that the loss of traffic in Telenor's network from Tele2's customers is due to the acquisition and not competition, as Telenor claims. Tele2 signed an agreement with Telenor in April 2014 to transfer all of the group's traffic to this network, effective from 1 July 2014. The merger agreement between TeliaSonera and Tele2 was entered on 4 July that year. That traffic was subsequently moved to TeliaSonera cannot in Nkom's view be ascribed to competition, as the company shortly before had stated that it wanted to provide its customers with the best services using Telenor's network.<sup>7</sup>

Based on the consultation responses, Nkom has made some minor changes to the text of the analysis of significant market power, but the conclusion is upheld.

## 5 Comments on the description of competition problems

### ***Assessment and conclusion in notification of decisions***

Nkom believes there are several issues related to the vertical transfer of market power and single market dominance that represent serious potential competition problems in the relevant market. Nkom believes that this is supported both by the incentives the market structure provides and by examples of behaviour from the current regulatory period.

### ***Consultation responses***

**Chili Mobil** agrees with Nkom's descriptions of the competition problems and finds that price discrimination and quality discrimination are the biggest challenges. According to Chili Mobil, quality discrimination is mainly related to the way data speeds are packaged by Telenor in the retail market and the access price Chili Mobil must pay to match Telenor's data speeds. Price discrimination is mainly tied to a price structure with high SIM fees, but also to the differentiation of speed classes used to calculate the SIM fee.

According to Chili Mobil, none of Telenor's brand names (Telenor, Djuce and Talkmore) offer subscriptions with a lower maximum speed than 10 Mbit/s and several subscriptions are offered at higher speeds, up to 20-50 Mbit/s. The SIM fee that buyers of access pay Telenor is differentiated based on speed classes. Chili Mobil states that it defines the speed of its subscriptions itself, but it believes that demand dictates the speed it must select and that this demand is primarily driven by Telenor through its marketing of data speeds. Chili Mobil is experiencing a direct pressure to pay Telenor for higher speeds in order to be able to compete for the same retail customers as Telenor. Further, Chili Mobil points out that the speed classes are based on theoretical maximum speeds. Chili Mobil believes it must pay for speeds it does not receive, and also points out that it must field questions from dissatisfied customers who experience lower speeds. Chili Mobil finds it to be very paradoxical that Telenor can force

---

<sup>7</sup> <http://www.tek.no/artikler/na-far-tele2-og-one-call-4g/159474>

buyers of access to pay for speeds that Telenor neither guarantees nor has a duty to fulfil, and that the greatest paradox of all is that Telenor itself does not pay an equivalent cost component.

**TDC/Get** recognises Nkom's description of the competition problems and believes that denial of access, price discrimination, quality discrimination, cross-subsidies, delaying tactics and undue demands are particularly relevant competition problems. TDC/Get points to concrete cases that it believes substantiates that these are not merely potential but highly relevant competition problems in the market. These cases include Telenor's infringement fine for not having given buyers of access access to high-speed mobile data services, the decision on illegal unequal treatment between TDC and Network Norway, the decision that found that Telenor's prices meant that TDC could not achieve profitability in individual segments, as well as the complaint and notification of decision on terms of contract about exclusivity, unilateral changes and price models that impose a disadvantage on or remove predictability from buyers of access.

### ***Nkom's assessment***

Nkom notes Chili Mobil's comments on the packaging of data speeds. However, Nkom remarks that Telenor has some discontinued subscriptions with a speed limit of 6 Mbit/s, and that Telenor Kontant has a speed limit of 6 Mbit/s. All post-paid subscriptions for sale are marketed with speeds up to 10 Mbit/s or more. As it is the subscriptions that are marketed and for sale that drive competition, Nkom understands that subscriptions with maximum speeds below 10 Mbit/s are not interesting/relevant for Chili Mobil.

That Chili Mobil's customers do not get the theoretical speeds the customers are paying for is something network owners too must relate to. Telenor provides information on its website about coverage and speed varying depending on several issues. Network owners cannot guarantee experienced speeds, as these among other things depend on many issues outside of their control (for example, how many people are on the network simultaneously, topography, weather and building design). That speed classes at the wholesale level are also based on theoretical speed classes is therefore not unreasonable, in Nkom's view.

Nkom notes that TDC/Get, as an MVNO, recognises the notification's description of competition problems. For assessments of the concrete cases, see chapter 3.2 of this summary, which also includes Telenor's views.

Based on the consultation responses and some new assessments, Nkom has adjusted the description of the competition problems.

## **6 Comments on the choice of special obligations**

### **6.1 General comments on the choice of special obligations**

#### ***Assessment and conclusion in notification of decisions***

Nkom has concluded that the main principle for the choice of remedies should still be principle 3, or in other words the facilitation of infrastructure investments. At the same time, Nkom believes it is important to emphasise principle 2 somewhat more (utilising existing infrastructure as much as possible), as MVNO operators and service operators are considered to independently be of significance as operators that can contribute to service competition and innovation at the product level.

In the notification, Nkom has explained that the proportionality principle means that obligations that are stricter than necessary shall not be imposed.

### **Consultation responses**

**Telenor** believes that Nkom has not sufficiently substantiated that there is a basis for a stricter regulation of Telenor than those imposed in the previous decisions from 2006 and 2010. This must be reflected in Nkom's use of remedies.

Telenor cannot see that Nkom's choice of regulatory principles is in line with the purpose of the regulation. To the contrary, the regulation is apt to cut the ground away from under the third operator and impair its ability to establish itself as a wholesale supplier in the market for mobile access.

Further, Telenor believes that if Nkom maintains the regulation of Market 15, Nkom must make a qualitative choice of principle for the choice of remedies. In any circumstance, there cannot be a basis for regulating in accordance with both principles 2 and 3. In this context, Telenor refers to Nkom's remedies document, which states that the Authority in all decisions considers whether the regulation should be based on either principle 2 or principle 3. Telenor believes that this lack of clarity can benefit operators that do not invest in their own infrastructure.

**TeliaSonera** believes that increasing the regulatory pressure in the market is a step in the wrong direction. The company is concerned that it might harm the development of effective competition at the network level. In TeliaSonera's assessment, nothing has happened since the last market decision that indicates that the regulation should be made stricter. On the contrary, it would be more obvious to lighten the regulatory pressure, or retain the current obligations.

**ICE** writes that it is generally in agreement with the obligations that are imposed on Telenor. According to ICE, to succeed in becoming an effective competitor with its own infrastructure, it is important that the regulation of Telenor counters actions in the market that hinder the opportunity to effectively develop infrastructure, and that reasonable measures are imposed on Telenor to facilitate infrastructure competition. In its consultation response, ICE has pointed to issues the company believes to be crucial for its development into an effective network operator that can challenge the established operators.

**Anonymous operator** believes that the purpose of the regulation should be to stimulate the competition between network owners and wholesale customers. The authorities should also stimulate service competition by facilitating new entrants such as MVNOs and service providers.

The **Norwegian Competition Authority** believes that the need for more infrastructure competition in the mobile market suggests that the development of a third network should be facilitated. The Norwegian Competition Authority therefore shares the view that the main emphasis should be on principle 3 in the selection of remedies. Furthermore, the Norwegian Competition Authority writes that it agrees with Nkom that regulatory principle 2 is also relevant, as MVNOs and service providers can be of independent significance for service competition and innovation.

### **Nkom's assessment**

The principles for the selection of remedies that follow from Nkom's remedies document provide guidance about the selection of remedies. However, it is not the case that remedies are derived directly from the selection of principle 2 or 3, and it is also not the case that the selection of one governing principle means that the other principle cannot be taken into



account. Nkom has chosen the specific remedies and defined their contents based on the competition problems in the market.

Nkom maintains that the main purpose of the regulation in Market 15 is sustainable competition based on infrastructure, which means that the overarching and governing principle must be principle 3. At the same time, Nkom believes that as long as there is insufficient competition to provide access, there is a need to secure choices for end users by facilitating the ability of other operators to compete in the market based on access to established infrastructure. Nkom thus does not agree with Telenor that regulation cannot safeguard both considerations. Nkom also refers to the Norwegian Competition Authority in its consultation response stating that both regulatory principles should be safeguarded.

With regard to Telenor's claim that the regulation is apt to cut the ground away from under the third operator, Nkom refers to the consultation response from ICE, where it comments that it generally agrees with the obligations being imposed on Telenor. ICE has also commented on two issues it believes to be especially important to it being able to establish itself as a competitor with its own infrastructure (exclusivity and co-location). ICE has otherwise not pointed to aspects of the regulation that may be disadvantageous for it.

In terms of the need to strengthen regulation, Nkom believes that the competition problems in the market and the observed behaviour under the current regulations justify the need for some parts of the obligations to be strengthened in this decision. The need to strengthen some parts of the regulation is discussed in the imposition of the specific obligations.

Against this background, Nkom believes that none of the consultation responses received provide a basis for changing the overarching selection of regulatory principle or other general issues related to the choice of remedies.

## **6.2 Access**

### ***Assessment and conclusion in notification of decision***

In its notification, Nkom concluded that Telenor should be ordered to comply with any reasonable request for access to and call origination on its mobile network. Requests for national roaming, MVNO access, access for service providers and co-location will normally be considered reasonable.

Below, Nkom discusses the consultation responses received for each of the different forms of access.

#### **6.2.1 Consultation responses regarding requests for national roaming**

**Telenor** writes that there is in any case no basis for imposing on the company an access obligation for anything other than national roaming. An obligation to offer national roaming would suffice to strengthen ICE's opportunities for growth.

However, Telenor believes that ICE is ensured national coverage through its agreement with TeliaSonera regarding national roaming, and that it can thus offer competitive services while its own network is being developed. Nkom's notification of a decision has the same time frame as the Norwegian Competition Authority's time perspective in mergers: about two to three years. Telenor believes that ICE's concerns thus have been safeguarded. Reference is also

made to Nkom writing under section 7.1.3 that it does not expect new providers with their own radio networks within the time horizon of the analysis.

Telenor also believes that an order to provide seamlessness with two-way handover would be disproportionately invasive and very unreasonable. Telenor is not aware of there having been any significant developments in this area, or of such developments being expected. Telenor expects Nkom to be specific in terms of the technological development Nkom refers to.

One of the challenges related to two-way seamlessness is the neighbour list issue. Telenor is aware that there is functionality that can facilitate separate neighbour lists for each IMSI series for 3G. For 2G, this will require the development/adaptation of special functionality in both the core network and the radio networks. LTE has no support for IMSI-based neighbour lists. In Telenor's perception, there are great challenges and many pitfalls in a possible facilitation of two-way seamlessness for an operator that buys national roaming. The way Telenor has understood it, the functionality that can make neighbour lists possible per IMSI series for 3G only envisions a situation in which operators share networks (network sharing) and not situations in which one operator buys national roaming from the other operator.

EXEMPT:



**TeliaSonera** believes that the access agreement with ICE and the obligations the Norwegian Competition Authority has imposed on it related to the remedying measures, provide the third mobile operator with a satisfactory safety network. This was a basic prerequisite for approving the acquisition of Tele2. Instead of retaining the obligation, Nkom should leave it to the market operators to compete about offering this form of access. TeliaSonera warns against maintaining a regulatory safety net that prevents a development towards effective competition at the network level.

TeliaSonera comments that Nkom's specification of the access obligation with regard to two-way handover only means that the obligation is even less specific. To avoid giving operators false hopes, and to avoid giving rise to unnecessary regulatory processes and costs, the final decision should stipulate whether a request for seamlessness with two-way handover is reasonable or not. This may for example be done by stipulating that it is reasonable, provided there are technical solutions to allow it.

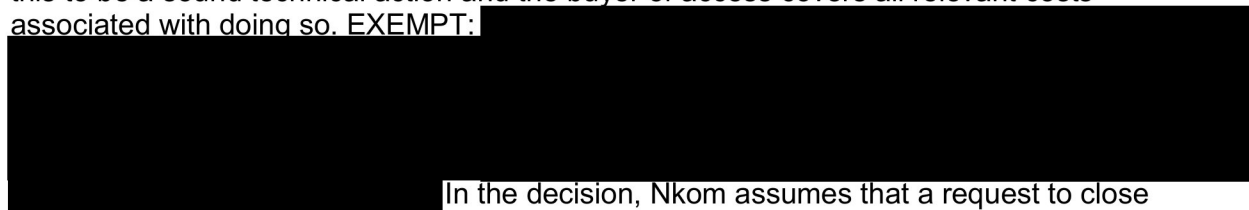
### ***Nkom's assessment***

Nkom believes that there is a need to direct Telenor to meet reasonable requests for access even though ICE is ensured access to TeliaSonera's network within the time horizon of the analysis. Such an obligation gives ICE a regulatory safety net that may make any negotiations after the lock-in period more effective, and ICE's negotiating position will also be strengthened when it re-negotiates the terms of the agreement. Furthermore, it may be that other operators can get access to frequencies, for example in a second-hand market, through acquisitions or otherwise, and thus may need access to national roaming. Nkom also refers to the Norwegian Competition Authority in its consultation response stating that the need for more infrastructure competition in the mobile market suggests that the development of a third mobile network should be facilitated.

With regard to two-way seamless handover, Nkom is aware that this is currently technically complicated, but Nkom believes that it cannot be discounted that this may be possible within

the time horizon of the analysis. As new technology is introduced, such as VoLTE, there will likely be greater opportunities to realise this type of technical solution. Nkom therefore believes that a request for seamlessness with two-way handover will not necessarily be unreasonable. This will have to be determined as required in the event of a specific request based on available technological solutions at the relevant time.

In the notification, Nkom has directed Telenor to provide geographic coverage. This is in line with the company's offer in the publicly available reference offer. However, the current reference offer also includes a provision that Telenor on the written request of a buyer of access must close access to Telenor's network in specific areas, as long as Telenor believes this to be a sound technical action and the buyer of access covers all relevant costs associated with doing so. EXEMPT:



In the decision, Nkom assumes that a request to close access to Telenor's network in specific areas will normally be reasonable, as long as it is a technically sound option.

In Nkom's view, none of the consultation responses received provide a basis for significant changes related to the obligation to provide access to national roaming. Nkom has made some minor changes to the text of the decision.

## 6.2.2 Consultation responses regarding MVNO access

**Telenor** refers to the Norwegian Competition Authority having directed TeliaSonera to offer MVNO access to the end of 2016. TeliaSonera has moreover offered such access to buyers of access for several years without being obligated to do so. When the authorities have ensured that MVNO access is offered in the market, presumptions are against the necessity of directing Telenor to offer such access.

Nkom's notified ordering of Telenor to offer MVNO access on strictly regulated terms will weaken ICE's opportunities to attract MVNOs in the wholesale market. This may lead to ICE not being able to utilise capacity in its own mobile network and also not achieving the necessary economies of scale.

Telenor therefore thinks that Nkom's notified regulation regarding the ordering of access for MVNOs is unnecessary and violates the objective of securing sustainable infrastructure competition.

**TeliaSonera** believes that in reality there is no longer a basis for maintaining the obligation to meet reasonable requests for access from MVNOs. There is competition to offer this form of access. Furthermore, the number of MVNOs has grown in the current regulatory period, and the obligation can therefore be discontinued.

TeliaSonera questions two specific statements in the notification:

- section 105<sup>8</sup>: That "reasonably efficient providers" are forced to leave the market will, in TeliaSonera's view, can hardly be said to weaken the ability to achieve sustainable competition.
- section 107: Nkom writes that it is not currently anticipated that existing or new MVNOs will establish themselves as providers with their own radio networks within the time horizon of the analysis. This statement directly conflicts with the statement in paragraph 85. Given that in the coming regulatory period, spectrum will be both allocated and prepared for allocation in the 900 MHz and 700 MHz bands, TeliaSonera is of the view that new entrants remain highly relevant.

**TDC/Get** believes that MVNOs make positive contributions to competition and service development in the short and medium term. Compared to service provider access, MVNO access makes it easier to assume a greater share of service production. Further, MVNO access provides greater flexibility in terms of the design and pricing of services (especially important in the business market) and it becomes possible to offer joint services across national borders. TDC/Get believes it is crucial to maintain the access regulation.

### ***Nkom's assessment***

Nkom believes there is a need to impose an obligation on Telenor to offer MVNO access, even though TeliaSonera is obligated to provide such access until the end of 2016. First of all, the duration of TeliaSonera's obligation is short. Further, Nkom believes that based on its experiences of the current regulation, there is a need to impose specific terms for MVNO access within the time horizon of the analysis. Nkom also does not agree with TeliaSonera that there is competition to offer MVNO access: see chapter 7.1.3 of the decision. TDC/Get's consultation response also describes a situation other than an access market characterised by competition.

With regard to ICE's ability to offer MVNO access, Nkom believes that it is too soon to assume that ICE will be able to compete effectively in the offering such access within the next two to three years. The Norwegian Competition Authority also makes this point in its consultation response. Nkom therefore believes that the regulation must secure MVNO access within this time frame, but that in the longer term it is important that ICE can fill its network with traffic via its own wholesale agreements.

With regard to TeliaSonera's comments on the specific sections of the text, Nkom has clarified these in the decision. Apart from the above, in Nkom's view none of the consultation responses received provide a basis for changing the obligation to meet reasonable requests for MVNO access.

### **6.2.3 Consultation response regarding service provider access**

**Telenor** believes that competition to offer service provider access is growing and that it is unnecessary, disproportionate and in violation of the goal of infrastructure-based competition to order Telenor to offer this form of access.

Telenor believes that the number of service providers in 2006 and 2010 were not higher than it is now. Any reduction in the number of service providers has rather been caused by service providers having been merged into the companies that until 2015 were described by the

<sup>8</sup> "A development in the direction of fewer operators, where reasonably efficient providers are forced to leave the market, will weaken the ability to achieve sustainable competition in the mobile markets."

authorities as the third mobile network, and which the authorities thought was a crucial contributor to achieving sustainable competition. Telenor believes that the size of the service providers has a greater impact on competition to offer access than their number. The service providers that buy access to Telenor's mobile network have seen significant customer growth since 2010 and have thereby achieved greater buyer power.

Telenor believes Nkom's conclusion that ICE's terms of access are inadequate to allowing it to offer attractive service provider access is wrong and conflicts with the Norwegian Competition Authority's assessment of the terms of access ICE is facing. Service providers Telenor meets with say that they have offers from more than one other operator in addition to Telenor.

EXEMPT: [REDACTED]

[REDACTED] As of today, Erate Norge AS (which recently acquired Hello Norge AS) also has a role as a facilitator for service provision and is backed by a number of service providers. In this way, it is even easier to get established as a service provider.

That MVNO operators historically have generally not offered access for service providers is in Telenor's view a historical situation that is irrelevant to assessing the current competitive situation and for two to three years into the future. EXEMPT: [REDACTED] is an situation that supports the argument that competition to offer service provider access is increasing.

That Nkom believes that the terms of the reference offer for service provider access are unreasonable is not an indication that competition is not effective. The changes Telenor has made in the reference offer for service provider access, in effect from 1 January 2015, are a direct consequence of Nkom's enforcement of the current regulations. In a meeting with Telenor in May 2013, Nkom clearly expressed that service providers shall not have better terms than MVNOs and buyers of national roaming. To avoid significant regulatory risk, Telenor has found it necessary to harmonise the reference offer for service provider access with the reference offers for MVNO access and national roaming. It is thus the regulation and not a lack of competition that caused these changes.

Additionally, Telenor wants to point out that ordering Telenor to offer service provider access at strictly regulated terms will weaken ICE's opportunities to establish itself in the wholesale market as a provider of service provider access. In this way, the regulation will impair the company's opportunities to utilise capacity in its own mobile network and achieve the necessary economies of scale.

**TeliaSonera** writes that it does not agree with Nkom's assessments of the competitive situation for service providers. According to TeliaSonera, no changes have occurred since the last market decision that indicate that there are grounds for re-introducing this obligation. As in 2010, there are currently only two operative providers and additionally one potential provider on the supply-side of this market. ICE's potential as a provider on the supply-side is, in TeliaSonera's view, equivalent to the potential that the previous market decision found Network Norway to have.

TeliaSonera is of the view that re-introducing an access obligation that was discontinued in 2006 represents a step in the wrong direction given the overarching goal of withdrawing the sector-specific market regulation as effective competition develops within the various segments of the wholesale market. As mentioned, there is competition to offer access to service providers. The decline in the number of service providers is not caused by a lack of competition or the exercise of market power. The development is caused by "several bankruptcies, acquisitions and mergers", cf. paragraph 93 of the analysis. In TeliaSonera's

assessment, the reduction of the number of operators following consolidations and bankruptcies is a natural development of a competitive and mature market, not a documentation of competition problems.

**Anonymous operator** supports Nkom's proposal to impose a general, technology-neutral access obligation that makes it possible to enter the market as a service provider or MVNO, as the differences between MVNO and service provider access are about to disappear. The company agrees that there are no longer any signs of an effective competition between Telenor and TeliaSonera about such wholesale customers. At the same time, most independent operators have been bought up. Furthermore, ICE does not appear to be an alternative provider based on its access agreement with TeliaSonera.

Further, the terms of access must make it possible for buyers of access to challenge Telenor in individual segments, and the final decision must clearly state that Telenor has an obligation to meet requests for access that entail that a customer only uses part of the services (e.g. limited to SMS or mobile data) or solutions that cross the wholesale products Telenor is currently offering.

### ***Nkom's assessment***

When Nkom has stated that there are no longer any signs of effective competition to offer access to service providers, this is due to several circumstances. First and foremost, this is based on the same terms of agreement that limit competition and that are included in Telenor's agreements with services providers in other access agreements.

In Nkom's view, the development of the number of service providers and their size does not provide clear indications that competition is effective, but as the changes are relatively minor it is not very meaningful to draw conclusions from these. Electronic communications statistics from 2009 (the basis for the last market analysis) show two "large" service providers not owned by Telenor or TeliaSonera: OneCall and Lebara (owned by Network Norway). These two had market shares of 2.1 and 2.7 per cent, respectively. The category "other operators", which were mainly service providers, represented about three per cent of the market. At the end of the first half of 2015, Chili Mobil was the largest service provider with a 1.1 per cent market share, while the category "other operators" constituted 3.8 per cent of the number of subscriptions.

With regard to whether ICE's terms of access are adequate to allowing it to offer attractive access for service providers, Nkom notes that the Norwegian Competition Authority supports Nkom's assessment of the need for regulated access for service providers. The Norwegian Competition Authority also believes that Nkom should consider a full margin squeeze test for service providers. In Nkom's understanding, this also indicates that it is doubtful whether ICE's access agreement allows it to resell attractive service provider access. However, in the longer term Nkom agrees that it is important that ICE can fill its network with traffic by offering wholesale access, cf. the equivalent assessment as for MVNO access.

However, Nkom believes and has stated that the terms of regulated service provider access must not be too attractive, or in other words so attractive that it becomes unprofitable to invest in one's own infrastructure. However, this does not mean that Telenor can transfer terms that seem unreasonable in agreements about national roaming and MVNO access to also include service provider access.

With regard to the comment that the terms of access must make it possible to challenge Telenor in individual segments, Nkom points at the differentiated price controls, which reflects

the expected presence for operators on the different forms of access. The price controls, together with the demand for a variable price structure, will remedy the competition problems.

With regard to the comment that Telenor must have an obligation to meet requests for access that entail that the customer only uses some of the services (e.g. limited to SMS or mobile data), or solutions that cross the wholesale products Telenor is currently offering, Nkom cannot see a need to change the access obligation to safeguard this. The access obligation includes all of the above-mentioned services, and it is up to the buyer of access to package the retail product with the desired services. With regard to solutions that cross the wholesale products Telenor is currently offering, a concrete assessment must be made about whether the request is reasonable or not, with the criteria in section 4-1(2) of the Electronic Communications Act as a point of departure.

In Nkom's assessment, none of the consultation responses received entail a need for significant changes related to the obligation to offer service provider access. Based on the responses, Nkom has made some minor amendments to the text.

#### **6.2.4 Consultation responses regarding requests for co-location**

On several points **Telenor** disagrees with Nkom's (and the Ministry's) assessment about what the co-location obligation entails and how far it stretches, cf. Nkom's decision dated 6 December 2013, affirmed by the Ministry on 21 May 2015. Telenor gives notice that if Nkom and the Ministry uphold this understanding in a new decision, Telenor will consider bringing relevant parts of the decision to the courts.

Telenor's main objections to the notification of the imposition of obligations related to co-location are:

- Nkom significantly expands the interpretation of what co-location is and which obligations Telenor can be made subject to in that context, without the legal authority to do so. Including reasonableness in the interpretation of what co-location is according to the definition in the Electronic Communications Act and other relevant sources is incorrect; see Nkom's paragraph 124.
- Telenor maintains that the co-location obligation does not include capacity expansions. The placement of other operators in existing infrastructure is quite different from expanding capacity, including "exchanging masts and cabins", to accommodate requests. Such an obligation to expand facilities can clearly be a burden and requires clear legal authority. In this context, Telenor refers to Nkom's summary of access in section 7.1, which states that "'Access' means making facilities and/or services available for other providers on specific terms". Telenor thinks that Nkom here summarises the natural linguistic understanding of "access" to, among other things, co-location – namely, access to established infrastructure. If the legislator had meant for a provider with significant market power to be obligated to expand capacity for others, this had to be stated explicitly.
- Further, Telenor contests the claim that there are grounds for ordering Telenor to change antennas. Such an obligation has no support in the wording ("co-location") or in other relevant legal sources and is also not mentioned in previous market decisions. Nkom's (and the Ministry's) description of such an obligation thus appears to be entirely without basis in law. The fact that Telenor is to be obligated to make "reasonable antenna changes" while the third parties that are already placed at the location

apparently would not be subject to equivalent obligations also substantiates the unreasonableness of Nkom's interpretation.

- Further, Nkom states that *"the objective of the obligation regarding co-location and real considerations indicate [...] that an obligation to accommodate reasonable requests for co-location also entails a duty to provide information."* In Telenor's view, the duty to provide information in connection with co-location is currently exhaustively regulated in section 2-6(1)(1) of the Electronic Communications Regulations, which imposes an obligation to publicise information about *"where co-location can be offered, and if practically possible, the free capacity"*. The provision does not impose an obligation to supply mast drawings. In Telenor's view, Telenor's obligations also cannot be based on what appears to be situation-specific reasonableness assessments by Nkom. Such a regulation is completely unpredictable. Telenor's understanding is supported on this point too by the fact that breaches are sanctioned by penalties and charges.
- In terms of the requirements regarding documentation and justification of rejections, cf. sections 7.1.5.5 and 8.1 of the notification, Telenor maintains that the requirement does not entail an obligation to justify why Telenor may not want to make capacity expansions or change antennas, given that the Electronic Communications Act in Telenor's view does not provide a legal basis for such an obligation.
- Further, Telenor does not understand what Nkom is saying in paragraph 147, which states that the company requesting access in a possible appeal to Telenor regarding a denial of access must justify why the access is reasonable, so that Telenor can make a comprehensive assessment of the request. If Telenor is to provide a comprehensive justification for a rejection based on the assessment criteria in section 4-1 of the Electronic Communications Act, this presumes that the requester of access accounts for why the request is reasonable. Such an account cannot wait until a possible appeal. If the obligation is upheld, Nkom must be clearer about how this is to be complied with.

**TeliaSonera** questions whether there is a need to retain this obligation regarding co-location, and refers to ICE having been offered to take over the mobile network / locations of Mobile Norway, as well as a co-location agreement with TeliaSonera, in connection with the merger with Tele2. Further, TeliaSonera believes that Nkom stretches reasonableness assessments under section 4-1 of the Electronic Communications Act in relation to the specification or guidelines related to Telenor's obligation to implement capacity expansions to realise co-location. In TeliaSonera's assessment, it would be more natural to assess the obligation regarding co-location in such cases under section 4-4 of the Electronic Communications Act.

**ICE** supports Nkom's conclusion regarding the co-location obligation. ICE emphasises that the right to opt out (12 months both for Telenor and others) should be practised with caution, as it can give Telenor the option to keep ICE (as a developer and competitor) at arm's length for a shorter period. ICE believes that Telenor must refer to specific plans if an application is rejected based on the right to opt out. The enterprise making the request must receive a specific and verifiable justification for any rejection, cf. section 4-4(6) of the Electronic Communications Act.

ICE also believes that Telenor must facilitate compression measures related to the use of space in the infrastructure (for example, the use of Dual Band equipment that transmits on two frequencies).

### **Nkom's assessment**



Nkom believes that questions about how far the co-location obligation extends must, if necessary, be determined based on a specific assessment of whether a request is reasonable or not. Nkom does not agree with Telenor that this is an incorrect approach. Nkom also refers to the Ministry having had the same starting point as Nkom when it assessed whether the Electronic Communications Act authorised the imposition of capacity expansions, cf. its decision of 21 May 2015.

The issue is also whether a request for co-location that entails capacity expansions in relation to existing or planned infrastructure is reasonable. The electronic communications authorities do not believe that the Electronic Communications Act authorises the imposition on providers with significant market power an obligation to offer co-location in infrastructure that does not already exist or is planned. The simplest measures that can expand capacity<sup>9</sup> do not require any construction and shall, as a starting point, be chosen when possible. Other measures, such as replacing masts and cabins, will be more extensive and require construction, as Telenor notes. However, both Nkom and the Ministry believe that section 4-4(4) of the Electronic Communications Act, along with the assessment criteria for reasonable requests in section 4-4(2) of the Electronic Communications Act, authorises the option of requiring providers with significant market power to expand capacity if an assessment of the other indicators of reasonable requests indicate that it should be expanded.

With regard to the replacement of antennas, Nkom is aware that it may entail significant disadvantages for Telenor and that this must be given considerable weight in the comprehensive assessment of whether such a request is reasonable or not. Nkom nevertheless believes that an antenna replacement can be ordered in cases where other considerations heavily indicate that the request is reasonable. That third parties that are already placed at the location are not subject to an equivalent obligation cannot be given any weight. The sector-specific regulation in the Electronic Communications Act authorises precisely a right to asymmetrical regulation in order to facilitate sustainable competition. Providers with significant market power must tolerate special interventions in their legal position when the terms stipulated in the Act have been met.

With regard to providing mast drawings and other information, this has been thoroughly assessed both in Nkom's decision dated 6 December 2013 and in the Ministry's appeal decision dated 21 May 2015. Nkom sees no reason to repeat these assessments. Both bodies concluded that mast drawings with an overview of antennas or equivalent information must be considered necessary information that Telenor is required to provide.

If, after having received information about whether there is free capacity or not, an operator requests placement at a location which is already known to have no free capacity, the operator must be expected to justify why such a request should nevertheless be met. Nkom thus agrees with Telenor that this should not be postponed until a complaint is made to Telenor; this has been taken into consideration in the decision.

With regard to the documentation and justification requirements, Nkom maintains that Telenor when rejecting a request is required to justify why it will not expand capacity or replace antennas. In order to not undermine section 4-4(6)(2) of the Electronic Communications Act, there must be a requirement that when Telenor's rejection relates to capacity expansion or the replacement of antennas, it must justify why such measures are not possible. The justification

---

<sup>9</sup> Typical measures Nkom considers to be relevant may be removing equipment in masts and cabins that are not in use, virtual co-location, moving equipment to make room for more cabinets, strengthening masts, extending masts, expanding cabins, replacing cabins, replacing masts and replacing antenna.

and documentation must be in a form that makes it possible for the operator making the request to assess and verify it.

With regard to TeliaSonera's comment about the need for a co-location obligation, Nkom believes that it is not changed by ICE having taken over locations from Mobile Norway and having a co-location option with TeliaSonera. In Nkom's view, TeliaSonera's comments about Nkom stretching the reasonableness assessments related to the implementation of capacity expansions confirm that the competition to offer co-location is limited and that there is still a need for regulated access to co-location in order to ensure greater predictability about the possibilities of getting such placements. Nkom considers co-location to be a very important form of access in relation to the goal of infrastructure competition.

Nkom agrees that the right to opt out must be practised with caution, and that rejections based on the right to opt out must be justified.

Based on the consultation responses, Nkom has made minor changes to the discussion of the co-location obligation in the decision. However, in Nkom's view none of the consultation responses received provide a basis for larger changes to the design of the obligation.

#### **6.2.5 Consultation responses regarding other forms of access**

**Chili Mobil** believes that the decision must allow for an obligation to provide new forms of access that are requested by providers to be imposed on Telenor. Specifically, Chili Mobil refers to:

- Access to all access technologies Telenor uses itself.
- Chili wishes to produce the VoLTE and VoWifi service on its own EPS and IMS infrastructure and buy access to the macro network over the so-called S8 interface, to ensure seamless hand-in and hand-out for VoWifi services to the end user. Chili therefore wants Telenor to be obligated to offer access to terminate the VoWifi service in its own EPS/IMS infrastructure to save voice costs in Telenor's mobile network. Chili is not aware of any technical limitations that prevent Telenor from offering an S8 interface for VoLTE production in Chili's core network.
- Access to Telenor's agreements about international roaming so that the providers' operator codes are conveyed in Telenor's existing agreements. Today, Telenor offers international roaming via a sub-range in Telenor's own IMSI series, and this prevents MVNOs from using their own PLMNID, which is important to the production of their own services, such as VoWifi. The agreements about international roaming allow an operator to use multiple operator codes in the same agreement. There is therefore nothing that in principle prevents Telenor from re-selling international roaming with the provider's own PLMNID, its own SIM card and with its own IMSI series.

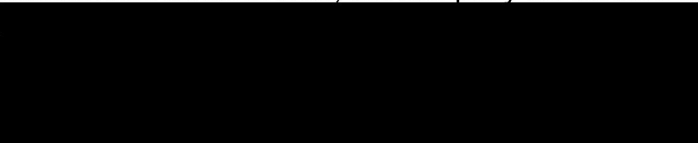
**Anonymous operator** writes that the market should also include other forms of access that are in the borderland between the three categories.

#### ***Nkom's assessment***

The access obligation covers any reasonable request for access within the market for access and call origination in mobile networks. The market definition will therefore set the framework for the access obligation. Further, if necessary a specific assessment must be made of whether a request is reasonable pursuant to section 4-1(2) of the Electronic Communications Act. This means that if there is disagreement between the parties about whether a request for access falls within the obligation, reasons and justifications must be presented. As part of this,

Telenor must document and justify any rejection, and Nkom will subsequently be able to assess the specific request.

As a basic principle, Nkom believes that buyers of access must be able to offer products of a quality equivalent to Telenor if they are to compete effectively. Through the non-discrimination obligation, Nkom has found that buyers of access must get access to the same broadcasting services that Telenor uses to realise its retail services, within the framework of the access obligation.

With regard to the opportunities to produce VoLTE and VoWifi services, in Nkom's understanding this will be possible for operators with MVNO access that have their own network infrastructure. If Chili Mobil establishes itself as an MVNO, the company will be able to produce these services itself. EXEMPT: 

Should a conflict arise, Nkom will be able to assess whether a request like that described by Chili Mobil is reasonable.

With regard to international roaming, Nkom believes that it is important that buyers of access also have access to offering their customers these services. This applies in particular to operators that do not have alternative ways of offering this. However, at this time Nkom does not wish to give more detailed indications of which technical solutions would be reasonable. The central issue is that buyers of access have the opportunity to offer services equivalent to those offered by Telenor. If Chili Mobil establishes itself as an MVNO with its own PLMNID, SIM card and IMSI series, it will be able to enter its own agreements about international roaming.

Nkom has made some minor specifications in relation to the access obligation, without these changing the content of the obligation.

## **6.2.6 Consultation responses about the detailed description of the access obligation**

### **6.2.6.1 Reasonable, fair and timely terms**

**Telenor** believes that the notification is based on an incorrect interpretation of section 4-1 of the Electronic Communications Act, cf. Article 12 of the Access Directive. The content of the access obligation can only be specified to the degree that the absence of such a specification / alternative terms would constitute a denial of access. Telenor has referred to a letter dated 25 September 2015 in another case, where the company referred to the provision in Article 12(1) last subsection of the Access Directive had to be read in light of Article 12(1), which discusses "denial of access or unreasonable terms and conditions having a similar effect". In the letter, Telenor also maintains that the permission to impose terms only applies at the time of the regulation, not in subsequent enforcement.

When imposing obligations, the authorities must consider whether these are proportionate, in the light of the goals of electronic communications regulations, cf. Article 12(2) of the Access Directive and Article of the Framework Directive. The ability to set reasonableness requirements are to prevent the setting of terms that are so unreasonable that buyers of access in practice are subject to a denial of access. Such terms must be seen in light of the general purposes of the regulation, cf. Article 8 of the Access Directive, and are something entirely different from a general permission to police the reasonableness of contracts.

The yardstick is not concrete reasonableness between Telenor and buyers of access in the manner that is familiar from contract law provisions allowing the policing of the reasonableness of contracts.

Nkom has not justified that the terms Nkom discusses in the following in practice amount to a denial of access or violate specific obligations under chapter 4 of the Electronic Communications Act.

### ***Nkom's assessment***

Nkom is of the opinion that Section 4-1 of the Electronic Communications Act grants authority to set requirements regarding fair/reasonable terms. That the regulatory authority shall be able to set such requirements is also stated explicitly in Article 12, no. 1 subpara 3 of the Access Directive.

It follows from this that in connection with such obligations, Nkom may impose conditions about reasonableness, fairness and timeliness.

Nkom does not agree that the permission to impose reasonableness requirements etc. is limited to cases where the absence of a specification would constitute a denial of access or be equivalent to a denial of access. Such a limitation cannot be derived from the wording of the provision of the Directive. In Nkom's assessment, Article 12(1) also does not on its face support such an interpretation. Here, Nkom briefly refers to the fact that the provision is not exhaustive, cf. the expression "inter alia". In Nkom's assessment, it is too narrow an understanding of the purpose of the Article when Telenor assumes that it is limited to questions about whether buyers of access in practice are subjected to denials of access.

Nkom agrees with Telenor that access obligations, like other obligations, are subject to the general requirement regarding proportionality. This is also stipulated in the first part of Article 12(1) of the Access Directive, cf. Article 8(4) and through Article 12 (2). The imposition of reasonableness requirements etc. related to the imposition of access obligations is, in Nkom's view, not in itself especially burdensome for Telenor.

Based on the comment, Nkom has adjusted parts of the text presented in the notification.

### ***6.2.6.2 Denial of access based on price***

**TDC/Get** believes that the access obligation sets independent material thresholds for Telenor's pricing, and refers to Nkom, in its decision dated 13 December 2013, not sharing this interpretation. Nkom's interpretation in this decision opens for predatory pricing. TDC/Get writes that in a limited period, Telenor can increase its access pricing significantly, both for internal and external operations, to drive competitors out of the market. TDC/Get asks Nkom to specify that the access obligation also covers denial of access based on price.

### ***Nkom's assessment***

In principle, Nkom agrees that an operator can use price behaviour to act in a manner that is equivalent to a denial of access. However, in Nkom's view, the competition problems related to such a denial of access can most effectively be remedied through the non-discrimination on price requirement in the regulation, supported by an accounting separation requirement as well as the price control that imposes a prohibition on margin squeezes. Consequently, Nkom cannot see that the access obligation is of independent significance as a point of intervention related to pricing behaviours that in isolation could be considered a denial of access. In this context, Nkom refers to the Ministry's decision dated 4 June 2015, which states that: "*if, by*

*setting very high access prices, Telenor aimed to exclude TDC from the market, this would meant that the company would have to charge equivalently high prices from its own retail operation. An accounting separation would then likely show a negative result, which would entail a violation of the non-discrimination requirement. The Ministry finds it unclear which other denials of access TDC refers to that would not be covered by the non-discrimination obligation". And further: "against this background, there is therefore no reason for discussing TDC's contention about Telenor's violation of the access obligation in greater detail".*

Nkom has adjusted parts of the text in chapter 7.1.7 of the decision to highlight these assessments.

### **6.2.6.3 Exclusivity**

**Telenor** notes that the company does not set any limitations on buyers of access' opportunities to negotiate with other providers of access.

Telenor contends that limitations on its opportunity to claim supply exclusivity requires authorisation in chapter 4 of the Electronic Communications Act. There would be a basis for such a limitation if an access agreement with such a requirement is so unreasonable as to be equivalent to a denial of access. Telenor contests that this is the case.

It is not "necessary" (cf. section 4-1 of the Electronic Communications Act) that buyers of access also have access to entering parallel access agreements with other providers. Buyers of access would then be able to offer better coverage than Telenor itself is able to provide. This not an interest worthy of protection, cf. the judgement from the Asker og Bærum District Court of 29 November 2012, in which the Court among other things stated that it would not be "reasonable to prevent Telenor from having a double roaming prohibition in its agreement about national roaming". If buyers of access can market and offer better coverage than network providers, there is a clear risk that network owners would re-assess their investment strategies.

According to Telenor, paragraph 160 of the notification can be interpreted to mean that Nkom believes that in order to secure sustainable competition, it is necessary to ensure that buyers of access have better network access than Telenor has itself. There is no basis for such an interpretation.

There is nothing that indicates that exclusivity is apt to impair buyers of access' opportunities to exercise buyer power. On the contrary, exclusivity will contribute to strengthening the buyer power of buyers of access. Exclusivity allows network owners to get the entire volume or nothing, which provides an incentive to lower prices, cf. the judgement from the Asker og Bærum District Court.

In Telenor's view, which is clearly supported by the District Court judgement, Nkom lacks the legal basis for directing Telenor to meet any reasonable request for access without at the same time claiming company and group exclusivity.

Nkom's justification for allowing Telenor to claim exclusivity at the SIM level also applies to other forms of exclusivity. In Telenor's view, exclusivity at the SIM level is insufficient to maintaining coverage incentives. Even if a customer can only choose one network for their SIM, the operator can market its offering as adapted to the coverage where the customer is.

Telenor also refers to the fact that many telephones can use dual SIM, that e-SIM is anticipated in the market within a few years, and that many customers have multiple SIM in the same subscription.

Telenor also refers to a concept that is currently mainly available as a limited experiment in the American market. In this concept, Google offers services based on a SIM with multiple profiles installed. Google has entered MVNO agreements with two network providers, and the customer is moved automatically between the mobile networks and seamlessly from Wifi networks to available mobile networks. The customer relationship is exclusively with Google, and the customer achieves better coverage than by being the customer of one of the two network providers. It cannot be discounted that a further development of this concept can be implemented commercially outside the American market as well, forcing operators to find new business models. Nkom should also have included this in its assessment of Nkom's perspective on the development of the competitive landscape in the market. Ex ante regulation without sufficient flexibility may turn out to become destructive for established operators.

To maintain competition for coverage between network operators, it is very important that exclusivity is permitted at all levels.

**TeliaSonera** believes that exclusivity clauses that target the ability to negotiate both limit buyer power and prevent other wholesale providers from participating in the competition for customers. TeliaSonera therefore considers the specification in the notification that negotiation exclusivity cannot be accepted to be very important.

TeliaSonera agrees with Nkom that it would be unreasonable if buyers of access could offer better coverage than host operators, and this would also reduce the development incentives for mobile operators.

Exclusivity requirements at a group level are a competition problem. This type of term inhibits the courses of action available to buyers of access and hinders effective competition at the network level. In TeliaSonera's view, company exclusivity is in a different position and does not appear unreasonable. The argument in the notification related to exclusivity at the subscription level (SIM level) is just as relevant to exclusivity at the company level. Without the ability to impose an exclusivity requirement at the company level, one provider could offer subscriptions with coverage in multiple networks and thus in principle achieve about the same competitive advantages as from selling one subscription with coverage in multiple networks.

**ICE** agrees with Nkom that exclusivity in negotiations will prevent buyers of access from having the opportunity to pitch operators against each other and that negotiation exclusivity is an unreasonable term.

The exclusivity clause in Telenor's reference offers and their effects make it impossible for ICE to compete for parts of the volumes of Telenor's wholesale customers and it thus has a strong exclusionary effect in the wholesale market. Exclusivity at levels between the group level and the SIM level, such as at the product category and brand name levels, may also have such an effect. It is important that Nkom strictly enforces the prohibition on exclusivity. The prohibition must also be monitored through controls that ensure that Telenor's reference offers and negotiations do not impose other terms or behave in a manner that has the same effect.

**TDC/Get** believes that Telenor's requirement about exclusivity at the company and group levels puts an effective damper on competition for wholesale customers. TDC/Get has made a complaint to Nkom under current regulations about Telenor's exclusivity provision. Therein, it has among other things argued that the exclusivity provision at the group level goes far

beyond Telenor's stated purpose and has a lock-in effect in that TDC/Get is prevented from entering an agreement with other providers of access. Furthermore, the Danish parent company is prevented from establishing new, independent operations in Norway that buy access from TeliaSonera or ICE.

**Anonymous operator** believes that the Market 15 decision must retain the prohibition on the use of exclusivity clauses at the group and company levels. Such terms remove all negotiating power and deprive TeliaSonera of all incentives to compete for wholesale customers. In the current market, Telenor's competitors gain no competitive advantage by selling different coverages through different companies. Individual customers must still choose between Telenor and NetCom coverage. It is also the case that most end users believe that Telenor's network provides the best coverage.

### ***Nkom's assessment***

Telenor has stated that it now does not impose a negotiation exclusivity requirement. Telenor has previously imposed such a requirement, cf. chapter 3.2.1 above. Nkom also notes TeliaSonera's consultation response stating that the specification is important. Nkom maintains that Telenor is not permitted to demand such exclusivity. Given that Telenor no longer imposes a negotiation exclusivity requirement, such a limitation is in Nkom's view not very burdensome for Telenor.

With regard to provider exclusivity, there is no basis for setting the same absolute prohibition on every form of exclusivity as for negotiating exclusivity. Nkom agrees that whether a specific request for access is reasonable will be determined by an assessment pursuant to section 4-1 of the Electronic Communications Act, cf. chapter 7.1 of the notification. Among other things, this assessment shall include a balancing of the provider's interest to have control over its own infrastructure against the need to give others the access "necessary" to offer competing services.

In the decision, Nkom has made specifications about reasonable/fair terms, and thus set requirements related to the exclusivity provisions that can be included in Telenor's access agreements. Section 4-1 of the Electronic Communications Act grants the authority to set such requirements. That the regulatory authority shall be able to set such requirements is also stated explicitly in Article 12, no. 1 subpara 3 of the Access Directive.

Telenor has referred to the judgement of the Asker og Bærum District Court dated 29 November 2012. Nkom notes that the judgement was not about whether Nkom is authorised to set requirements about reasonableness, and finds that the judgement is of less significance in this context.

Nkom recognises that coverage and capacity are important competition parameters and require large investments. The regulation does not aim to give buyers of access better network access than host operators. There is thus no basis for Telenor's perception that the notification appears to be based on it being "necessary to secure better network access for buyers of access than Telenor has itself". Telenor will have a legitimate interest in buyers of access not being able to offer coverage that can actually be understood to be better than what Telenor itself is able to offer. However, in Nkom's assessment it is unnecessary to claim such extensive exclusivity to safeguard the legitimate interests.

Telenor's legitimate interests must also be weighted against other interests. Nkom maintains that extensive exclusivity provisions may limit the dynamics of offering access. This is not limited to the protection of buyers of access, as Telenor appears to think.

A third, competitive wholesale provider will depend on having a relatively large share of traffic in its own network. Traffic in its own network can arise either through its own end users or by selling access. The opportunity to produce parts of a buyer of access' volume will in Nkom's assessment be especially important for the third network in the development phase. Extensive exclusivity clauses will in Nkom's assessment reduce the third network's opportunities to increase traffic in its own network by producing parts of an access buyer's volume. In Nkom's view, extensive exclusivity clauses in reality reduce the third network's opportunities to increase traffic in its own network by selling access.

Nkom agrees with Telenor that requirements about exclusive delivery places the seller of access in a position where it must choose between "all or nothing", and that such a situation, viewed in isolation, gives incentives to lower prices. However, this must be assessed in light of the characteristics of the relevant market. Further, the fact that extensive exclusivity provisions weaken access buyers' opportunities to enter access agreements with multiple network owners – and the fact that allowing such agreements would enhance the negotiating power of access buyers – must be taken into consideration. That the opportunity to enter access agreements with several network owners might enhance the negotiating power of access buyers also appears to be in line with what Telenor has previously stated, cf. its consultation response<sup>10</sup> ahead of the Market 15 decision in 2006:

*"Access fees can also not be said to represent a barrier to switches, as several service providers have entered agreements with both Telenor Mobil and NetCom. Several service providers therefore also have mobile operations in both networks. This gives service providers a strong negotiating position, in that they can direct all new customers to one of the operators for shorter or longer periods."*

Nkom maintains that extensive exclusivity provisions can weaken the ability of buyers of access to exercise buyer power, and also notes that several consultation responses make the same point.

Nkom stated in the notified decision that a network owner will have a legitimate need to require SIM-exclusivity. In the opinion of Nkom, Telenor will be able to protect itself against buyers of access having better coverage by incorporating less invasive clauses than exclusivity at the group level. Nkom maintains that a group-level exclusivity requirement is an unreasonable term that cannot be incorporated into Telenor's access agreements. Nkom also notes that several consultation responses support Nkom's assessment that exclusivity at the group level is a competition problem.

In the view of Nkom, the considerations that apply for group exclusivity also largely apply to exclusivity on company level. In the decision, Nkom has made specifications regarding exclusivity on company level and brand names. Nkom has also changed the term "SIM card" to "SIM" to emphasize that the considerations in relation to exclusivity on SIM-level is not limited to "traditional" SIM cards.

As stated in some of the consultation responses, there are also other forms of exclusivity than the group, company and SIM levels. Telenor has also referred to dual SIM, e-SIM and Google Fi, and that these can raise questions regarding exclusivity. Nkom notes that dual-SIM telephones are not very prevalent, that e-SIM lays still some time ahead, and that, according to Telenor, Google Fi is an "experimental" project in the American market.

---

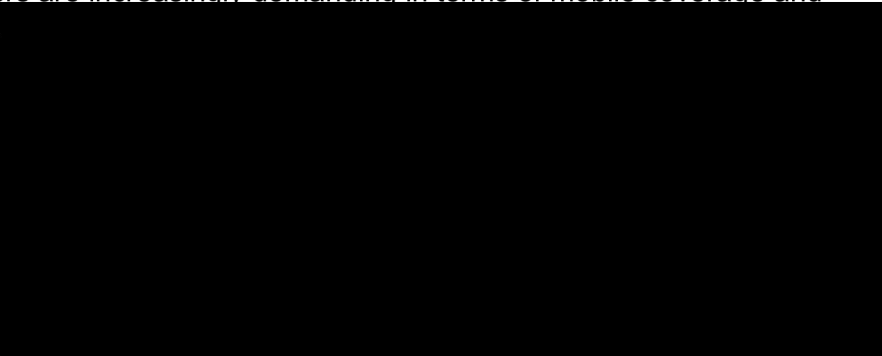
<sup>10</sup> Telenor's letter date 29 June 2005 page 19



Based on the responses, Nkom has made some adjustments to the decision, including seeking to give further guidance and made further specifications regarding exclusivity requirements.

#### **6.2.6.4 Indoor coverage**

**Chili Mobil** agrees with Nkom's assessments and the conclusion that Telenor must provide access to the solutions Telenor itself uses to improve indoor coverage.

**TDC/Get** notes that end users are increasingly demanding in terms of mobile coverage and capacity indoors. EXEMPT: 

#### ***Nkom's assessment***

With regard to indoor coverage, Nkom has given notice that buyers of access must also get access to the solutions Telenor offers to improve indoor coverage. In general, Nkom believes that Telenor must meet reasonable requests to change coverage / improve indoor coverage at the locations the buyer of access requests, in the same way as Telenor does for its own customers. According to Telenor, it already practices equal treatment in this regard. A rejection of such a request must be justified and if necessary Nkom can decide whether the request must be considered reasonable or not.

Nkom understands Telenor to say that it has different systems of implementing coverage improvements, in which financing, construction contributions and lock-in periods vary depending on what Telenor can profitably implement. In general, Nkom believes that buyers of access that request a change of coverage must expect to cover the costs of the measure. However, the terms for such measures must be reasonable and fair. Nkom will have to specifically evaluate terms if a conflict leading to a complaint should arise.

Nkom has revised chapter 7.1.7.3 of the decision as a result of the consultation responses.

#### **6.2.6.5 Production of SIM cards**

**Chili Mobil** asks Nkom to specify that Telenor cannot demand that SIM card production must be done by Telenor, as is done for MVNOs and service providers today. This represents a high extra cost and long production times. If buyers of access can establish their own agreements, Chili Mobil believes that the cost can be reduced while also allowing the buyer of access greater control of the ordering and delivery process, so as to cut down delivery times.

#### ***Nkom's assessment***

**Telenor** justifies the requirement that service providers buy SIM cards from Telenor based on security concerns. Nkom finds that it is not unreasonable that service providers must relate to Telenor's approved suppliers for the production of SIM cards, as SIM card production means

that the supplier gains access to very sensitive information. An MVNO handles SIM card production itself, as such operators have their own HLR.

Nkom has not found that this comment provides reasons for changing the decision.

## 6.3 Non-discrimination

### ***Assessment and conclusion in notification of decisions***

In the notification, Nkom concluded that Telenor should be directed to not discriminate on price and other terms of access for national roaming, MVNO access, service provider access and co-location. Further, Nkom believed that the non-discrimination requirement for pricing had to apply between Telenor ASA's own retail operations and external enterprises and between external buyers of the same form of access.

### ***Consultation responses***

**Telenor** believes that Nkom goes beyond what is authorised by section 4-7 of the Electronic Communications Act. The non-discrimination requirement is unclear, unpredictable, disproportionate and burdensome.

Regarding the requirement that services Telenor uses to improve the quality of products covered by the access obligation shall be made available to buyers of access so that the buyers can offer their retail customers a service of equivalent quality to that which Telenor offers and at the same time as Telenor offers it, Telenor has the following comments:

- In some cases an *"improved product quality"* will depend on the buyer of access making upgrades and/or adaptations in order for their retail customers to achieve a corresponding quality improvement. Telenor cannot be given responsibility for either the quality or timing, as these depend on issues outside of Telenor's control.
- Further, in some cases the standard for new technical upgrades for network operators may be in place before there are solutions for how these can be implemented in a responsible manner for a buyer of access (for example when LTE is implemented in the network).
- The requirement is *exclusively* relevant in cases where the buyer of access cannot themselves produce the quality-improvement services. Anything else would be incompatible with the buyer of access having to compete with Telenor's own retail operations.

In Telenor's view, the non-discrimination obligation cannot entail that Telenor is prevented from making upgrades in its own network, if there are no adequate technical solutions for how to implement these for buyers of access.

With regard to the requirement that Telenor be directed to provide an alternative price structure if the offered price structure prevents buyers of access from competing in select parts of the retail market (section 187 of the notification), Telenor contests that section 4-7 of the Electronic Communications Act authorises such a requirement, and contends that any such requirement must be authorised by section 4-9 of the Act, cf. Telenor's comments to Nkom's notification of a decision of 31 August 2015. Telenor perceives Nkom to thus set requirements to the margin between the retail price and the access price down to the individual segment level.

Nkom does not account for the way in which a fixed charge breaches the non-discrimination obligation. Nkom also does not take into consideration that the current price structure at the

access level reflects the price structure Telenor is currently offering in the main segment of the retail market. In Telenor's understanding of Nkom's comments about the Norwegian Competition Authority's decision, the access agreements TeliaSonera offers ICE are also based on a fixed charge per SIM combined with variable prices. This shows that the Norwegian Competition Authority has considered this to be a price structure that is apt to facilitate competition.

Telenor also comments that the notification does not state whether a buyer of access shall be able to select multiple price structures for their operations or whether a buyer of access must choose one of the price structures for their entire operations. Nkom has also not considered that the ability to offer multiple price structures has practical limitations.

Telenor also makes reference to its comments to Nkom's notification of 31 August, which are made applicable here as well.

**TeliaSonera** makes the following comments about the requirement that buyers of access must get access to the same broadcasting services that Telenor uses to realise its own retail service, including the same speeds as Telenor's customers can get at any given time (section 184 of the notification):

- It must be technically possible to get access to the same broadcasting service used to realise its own retail service. This was not the case when 4G was introduced, for example. This should be made clear in the specification.
- The provider must be able to differentiate access prices based on the speeds it gives access to. If providers do not have the option of differentiating, this could negatively affect their investment incentives.

**TDC/Get** believes that a specification must be made stipulating that the non-discrimination requirement also covers external partners (including Evry, Atea and external customers), not just the services Telenor supplies to its integrated retail operations (internal brand names such as Telenor, Dj Juice, Talkmore and Dipper).

TDC/Get also writes that in light of the changed market structure, it agrees with the proposal to limit the prohibition on discrimination to only apply between external customers using the same form of access.

**Anonymous operator** writes that it agrees with Nkom that detailed requirements about non-discrimination are an appropriate measure.

### ***Nkom's assessment***

Nkom believes that the prerequisites Telenor and TeliaSonera require in order for buyers of access to gain access to the same quality-enhancing services and broadcasting services are reasonable. Nkom will include these in the decision.

However, Nkom does not agree that a requirement about alternative price structures cannot be authorised by section 4-7 of the Electronic Communications Act. The purpose of a non-discrimination requirement is that competition shall take place on equal terms. To achieve this, the fact that operators that are to compete with Telenor in the retail market are not identical to Telenor must be taken into consideration. When Nkom has designated Telenor as a provider with significant market power, there is a presumption that other providers are not as big or as broadly present in all parts of the retail market.

The preparatory works to the Electronic Communications Act stipulate that the non-discrimination provision means that equal cases shall be treated equally. Furthermore, it follows that the proportionality consideration means that different cases may be treated differently and that the obligations that are imposed must be proportional to the intended objectives<sup>11</sup>. Nkom thus believes there is a basis for imposing a requirement that the price structure of the access agreements must allow buyers of access to compete in parts of the market. It cannot be the case that they have to be as broadly present as Telenor.

In this context, Nkom is of the view that an access agreement without fixed fees per SIM, i.e. only traffic related (variable) prices, will give more flexibility for access buyers than an access agreement with fixed fee per SIM. Nkom has among other things justified the requirement by the fact that the payment obligation should be tied to the use of the network/traffic, seeing that traffic is the main cost driver.

With regard to the Norwegian Competition Authority's assessment of the terms of access that TeliaSonera has given ICE, Nkom notes that this assessment was of whether the remedying measures in total would remedy the limitations on competition arising from the merger. This means that the access agreements along with other measures were compared to an alternative situation. The Norwegian Competition Authority's decision, which meant that the merger was permitted with conditions, thus went no farther than to ensure that competition was not made worse compared to the alternative situation. This is not the same as the price structures of the agreements being appropriate for facilitating competition.

Nkom finds that if Telenor offers multiple access agreements or multiple price options, then buyers of access must be able to base their overall purchase of access on several price options.

Further, Nkom believes that the specification TDC/Get proposes is reasonable. To the extent Telenor is using partners and dealers in its distribution of own services in the retail market, the terms that are offered to such partners should also be offered to external buyers of access. On this basis, Nkom has elaborated and made some specifications in the discussion of the non-discrimination obligation.

## 6.4 Publishing of reference offers

### ***Assessment and conclusion in notification of decisions***

In the notification, Nkom concluded that Telenor would be imposed to prepare and publish reference offers for national roaming, MVNO access, service provider access and co-location. The obligation to publish reference offers does not include information about prices related to national roaming, MVNO access and service provider access. However, the information must be made available to operators requesting access. Telenor would further be imposed to send copies of agreements that had been entered into to Nkom (not for co-location), and notify other providers and Nkom about changes to the agreements.

### ***Consultation responses***

**Telenor** disagrees with Nkom's interpretation of section 4-6 of the Electronic Communications Act. In Telenor's view, the provision does not authorise the imposition of requirements

---

<sup>11</sup> Cf. Proposition no. 58 (2002-2003) to the Odelsting, page 102.

regarding the content of a reference offer. Such requirements must be authorised by other provisions in chapter 4 of the Electronic Communications Act.

Telenor understands Nkom to be imposing Telenor to offer multiple reference offers per form of access if Telenor after negotiations has entered agreements with buyers of access on terms other than those in the applicable reference offer. This is more burdensome than the current obligation, disproportionately burdensome and is contrary to the purpose of the regulation.

In Telenor's assessment, the unilateral right to make changes in the current reference offer is necessary to ensure compliance with applicable regulations. Telenor's internal service provider must also relate to the changes made to the reference offer. The right to make changes is not discriminatory, as Nkom claims, but rather necessary to allow Telenor to comply with the non-discrimination requirement.

In terms of the requirement to provide a guarantee and prognosis, in Telenor's view it must be able to require a guarantee based on turnover for a certain number of months and not solely based on ongoing traffic costs. For example, Telenor must be able to require a guarantee for the fixed price element of an agreement.

In Telenor's view, Nkom significantly exaggerates the importance to existing and potential buyers of access of having access to Telenor's reference offers on its website. It should be sufficient for the website to list contact information and the forms of access Telenor offers. A potential buyer of access must in any case contact Telenor for the price terms. The Norwegian Competition Authority has not published or required the publication of the national roaming agreement TeliaSonera must offer or the agreement about national roaming between TeliaSonera and ICE. Telenor assumes that the same considerations regarding not publishing these agreements apply to Telenor's access agreements.

In Telenor's perception of the notification, Nkom believes that Telenor is not permitted to implement disadvantageous changes. The purpose of an obligation to give notice of disadvantageous changes two months before they are implemented therefore appears unclear to Telenor. Nkom must provide a more detailed explanation of which situations such a two-month notice period applies to.

**TDC/Get** agrees with Nkom that it is necessary to prohibit "unreasonable terms" in the reference offer for MVNO access. In TDC/Get's view, in the current reference offer Telenor has incorporated several provisions that only reduce the room of action open to buyers of access (exclusivity clause) or their predictability (unilateral permission to change the offer). Such provisions do not protect any legitimate interest for Telenor, and at the same time they reduce the competitiveness of buyers of access, and possibly their ability to change providers.

According to chapter 7.3.5, Telenor must inform Nkom of changes to the offers by a stipulated deadline, and according to chapter 7.3.6 it must give notice of disadvantageous changes at least two months before they are implemented. According to TDC/Get, Telenor has previously argued that these obligations give Telenor an independent right/authorisation to change the reference offer. To avoid disagreement, TDC/Get believes that Nkom should specify that these obligations do not give Telenor an independent right to change agreements it has entered beyond the mechanisms for making amendments that the parties have agreed to.

In TDC/Get's view, Telenor's price structure with additions for speed entails that wholesale customers in practice are forced to use the same terms in the retail market as Telenor does. TDC/Get welcomes Nkom's specification that Telenor must offer at least two different price

models, so that buyers of access can freely choose the price model that works best in the retail market.

**Anonymous operator** welcomes Nkom's specifications related to the preparation and publication of reference offers. In the company's view, among other things it is necessary to direct Telenor to offer an access agreement with variable prices only. Market regulation must also prohibit terms of agreement that entail that Telenor has the right to unilaterally change prices etc.

### ***Nkom's assessment***

With regard to Telenor's argument that section 4-6 of the Electronic Communications Act does not authorise the imposition of content requirements on the regulated operator's reference offers, Nkom refers to the Ministry's appeal decision dated 6 October 2006 on the appeal from Telenor dated 13 March 2006 of Nkom's decision dated 20 February 2006 in the LLUB market (Market 11 at the time)<sup>12</sup>. In that decision, the Ministry made a decision on whether Nkom could, under section 4-6 of the Electronic Communications Act, require that Telenor's reference offers contain provisions on compensation and on whether the provision authorised the imposition of content requirements regarding a possible compensation scheme. According to the Ministry, the provision permits the stipulation of which central terms in the reference offers Telenor at a minimum must publish information about. The Ministry concluded that section 4-6 of the Electronic Communications Act authorises both the imposition of requirements that the reference offer contains specific provisions on compensation and the setting of content requirements regarding the compensation provision. Consequently, Nkom finds that section 4-6 of the Electronic Communications Act authorises the imposition of content requirements for Telenor's reference offers. TDC/Get and Anonymous operator agree with Nkom that it is necessary to impose requirements regarding the terms of the reference offers.

Requirements for reference offers, as described in the notification of decision, may entail that Telenor must have reference offers with alternative price structures for each form of access. For example, the reference offers cannot be based on a price structure with a fixed fee per SIM as the only option. In the notification, Nkom has required Telenor to at minimum offer an access agreement with variable prices only. Both TDC/Get and Anonymous operator welcome this. It is up to Telenor whether this is solved through several alternative price structures in one reference offer, or through multiple reference offers for each form of access.

Telenor emphasises the importance of having a unilateral right to make changes, to ensure compliance with applicable regulations. In the notification, Nkom finds that the mechanisms for making changes to the access agreements must be designed so that changes can only be made consequent to negotiations and agreement between the parties. If Telenor is to use a unilateral right to make changes, the change must be tied to an underlying cause – legal requirements can be an issue that justify changes. Beyond this, an unconditional right for Telenor to make changes will be unreasonable and uncertain for a buyer of access and may limit buyers of access' opportunities to compete effectively in the retail market. Nkom does not agree with Telenor that Telenor's internal service provider faces the same uncertainty as buyers of access. Nkom finds it to be unlikely that Telenor's wholesale operation will make changes that in the short or long term weaken its retail operations and Telenor Norge's financial development. Nkom therefore maintains that terms of agreement that give Telenor a unilateral and unconditional right to make changes cannot be incorporated in reference offers for regulated access.

---

<sup>12</sup> [http://www.nkom.no/marked/markedsregulering-smp/marked/marked-4-og-5/\\_attachment/1655?\\_ts=13899e78ccf](http://www.nkom.no/marked/markedsregulering-smp/marked/marked-4-og-5/_attachment/1655?_ts=13899e78ccf)

With regard to Telenor's comments about its obligation to give notice of disadvantageous changes when Telenor also perceives itself to not be permitted to make disadvantageous changes, Nkom refers to the paragraph above in which, among other things, legal requirements can justify a need to make changes to terms of agreement. The notification obligation will in such cases ensure that buyers of access can take the changes into consideration in their own terms and comply with the Electronic Communications Act's notification deadline in relation to their own retail customers. However, the notification obligation does not give Telenor a unilateral right to change agreements it has entered.

With regard to guarantees, Nkom believes that for the access agreements with variable prices that this decision requires, a guarantee requirement must be based on ongoing traffic costs. For other alternative agreements Telenor can base guarantee requirements on other parameters.

The requirement regarding publication on Telenor's website is in Nkom's view important to make other obligations, such as access and non-discrimination, effective. Nkom does not find the fact that the Norwegian Competition Authority based on other legal authority approved the merger between TeliaSonera and Tele2 and subsequent to proposals from the parties about remedying measures that did not include publication to indicate that Telenor should not be imposed to publish reference offers pursuant to section 4-6 of the Electronic Communications Act. Nkom does not agree with Telenor that the publication requirement for reference offers is disproportionately burdensome for Telenor, and therefore maintains that Telenor is directed to publish the reference offers, as authorised by section 4-6 of the Electronic Communications Act.

Nkom has made some adjustments to the decision as a result of the consultation responses.

## **6.5 Accounting separation**

### ***Assessment and conclusion in notification of decisions***

In the notification, Nkom concluded that there was a need to impose Telenor to prepare an accounting separation for its mobile operations in Norway, between the network operation and the retail operation. The reporting shall provide the basis for verifying compliance with the prohibition of price discrimination against MVNO providers and providers that buy national roaming.

### ***Consultation responses***

**Telenor** notes that Nkom proposes to impose Telenor to fulfil a margin squeeze test at a lower aggregate level than an accounting separation. If the company passes the margin squeeze test at a lower level, a margin squeeze test in the form of an accounting separation at the overall level would also be passed. Telenor therefore believes that an accounting separation requirement would be superfluous, and that it would not be proportionate to impose both an accounting separation and a margin squeeze test on Telenor.

Telenor believes that the current accounting separation regime is set up in a reasonable manner so as to monitor the non-discrimination obligation. However, it would be unreasonable to order Telenor to report an accounting separation for something other than Telenor's (main) reference offer. Individual agreements that may deviate from the (main) reference offer will be entered based on negotiations and the concrete wishes of the buyer of access in question. Normally, such a buyer of access will focus on an isolated or narrow customer segment in the

mobile market. Any deviating terms of access will therefore not be tailored to the entire mobile market, but to this specific segment. By monitoring the non-discrimination obligation regarding prices through an accounting separation for the entire mobile market by using prices agreed upon for one isolated segment, Nkom will effectively remove any incentives and opportunities for Telenor to offer wholesale prices adapted for just one individual customer segment.

Telenor refers to paragraph 340, which states that for each income item, a corresponding cost item shall be included where relevant. The type of cost item Nkom refers to here is unclear to Telenor. Telenor's cost items will normally not be linked to the individual income items, but mainly to customers and customer segments.

**TDC/Get** asks Nkom to reconsider the proposal to retain an aggregated accounting separation or replace the obligation with a functional separation requirement. TDC/Get believes that the accounting separation has not been an effective control mechanism in the current regulatory period. This is, among other things, because:

- It is an aggregated model for the entire market based on an EEO approach. The estimates do not provide meaningful information about whether buyers of access are able to achieve a positive margin.
- Information from Telenor indicates that the model includes revenue that falls outside the market, and excludes costs that should be included. This means that profitability is over-estimated.
- Because of the reporting periods, the accounting separation is not able to capture campaign rebates of a limited duration.
- The model is not transparent. Nkom has refused access buyers access to the underlying figures and it has thus not been possible to verify the estimates.
- Nkom has not intervened in Telenor's prices when the model has shown negative results, referring to the fact that the average result is positive. The Authority has thus accepted cross-subsidies between different services, even as these subsidies harm competition.
- Since 2010, Telenor has consistently referred to it only being obliged to remain within the prices that follow from the accounting separation. This occurred most recently in its comments to the order to correct the price model in the reference offers on 25 September 2015. Telenor also justified the discriminatory prices the company made TDC subject to in the autumn of 2010 by reference to the accounting separation.

TDC/Get believes that the value of the model is further reduced when the reporting areas are combined so that the results are estimated for mobile data, voice and SMS combined. If the reporting is to be retained, the residential and business segments should be calculated separately.

**Anonymous operator** notes that Telenor will be ordered to prepare an accounting separation between the network operation and the internal retail operation for its mobile operations in Norway. The reporting "shall form a basis for monitoring compliance with the prohibition on price discrimination against MVNO providers". Anonymous operator disagrees with this and notes that since the spring of 2011, the reporting has shown that an accounting separation is an inappropriate tool for monitoring compliance.

Anonymous operator believes the statement is too general and also only shows Telenor's own profitability, given the prices of the access agreements. Anonymous operator has not registered any willingness to enforce the discrimination prohibition, even when the reporting has uncovered very negative results. It therefore believes that this special obligation is more a shield against criticism than a method for monitoring compliance, and that the remedy should be removed.



### ***Nkom's assessment***

In contrast to Telenor, Nkom believes that the accounting separation reporting has a function in addition to the price control remedy in the decision. The accounting separation entails a direct monitoring of the requirement regarding non-discriminatory prices between internal and external operations, and the reporting provides a comprehensive picture of Telenor's mobile operation. This gives Nkom a good overview of financial developments in the retail markets for mobile services and more extensive information than that given in the company's public reporting. It is of great importance to Nkom to follow the development of Telenor's total mobile operation through regular reporting of an accounting separation. The margin squeeze test is a tool for monitoring the price control Telenor is made subject to in the form of a prohibition against putting buyers of access in a margin squeeze. This test is necessarily conducted at a less aggregated level.

Telenor comments that it is only appropriate to report an accounting separation based on one (main) reference offer and not for terms of access directed to a specific segment and that are not adapted to the entire mobile market. In the notification of decision, Nkom sets a requirement that Telenor must offer an access agreement with variable prices only, but notes that the non-discrimination requirement does not prevent Telenor from having several different access agreements for the same form of access. The transparency obligation being imposed pursuant to section 4-6 of the Electronic Communications Act entails that all agreements that have been negotiated must be made available to other buyers of the same form of access. However, Nkom agrees with Telenor that reporting an accounting separation is appropriate for reference offers that cover the entire mobile market and not for isolated segments of the mobile market. Nkom takes this into account in the decision.

That each revenue item in the accounting statement must have a corresponding cost item is a principle that follows from Nkom's previous accounting separation decision from 29 October 2010. Selling a product in the retail market has associated costs, and this cost must be included in the calculation of the accounting separation so that the revenue and cost sides correspond where relevant. Detailed and corresponding information about revenue and costs provides the opportunity to isolate the effects of including (or excluding) individual products or services in the accounts and increases the opportunities to analyse the reported figures. Nkom believes this is an important principle that must be retained.

With regard to TDC's consultation response that a functional separation<sup>13</sup> requirement should be imposed for Telenor's operations, Nkom believes that the competition problems in the market do not indicate that it would be proportionate to impose this requirement on Telenor. Nkom also disagrees with TDC and Anonymous operator that the accounting separation has not been an effective control mechanism in the current regulatory period. In the analysis, Nkom refers to several issues from the current regulatory period that indicate that the sector-specific regulation, including the accounting separation requirement, has been a necessary, disciplining mechanism for Telenor's terms of access at the wholesale level. Nkom believes that an accounting separation combined with price controls in the form of margin squeeze tests is an effective tool for remedying existing competition problems. The functional separation requirement is thus not proportionate when there are less invasive remedies.

TDC does not describe which included revenue and excluded costs lead to over-estimated results. It is precisely with the view to assessing such questions that Nkom relies on the principle that revenue items shall have a corresponding cost item, cf. the above discussion.

---

<sup>13</sup> Section 4-9a of the Electronic Communications Act.

An accounting separation captures campaign rebates of a limited duration, as it is the accounted earnings that are included in the statement.

With regard to TDC's comment that Nkom has failed to intervene when the model has shown a negative result and cross-subsidies, Nkom assumes that this refers to the separate accounting statements for voice/SMS and data traffic. In its previous discussion of accounting separations, Nkom has provided reasons for why this separation between products has not turned out to be appropriate for the purpose of the reporting. This is because reporting at a lower aggregate level entails greater complexity and uncertainty related to cost distribution, which is not desirable. The growth of fixed-price products has contributed to the revenue and cost distribution between voice/SMS and data traffic having become less precise than previously. The principles for distributing shared costs also affect the result. Nkom's view has therefore been that voice/SMS and data traffic cannot be considered in isolation. The statement would not assist in an assessment of cross subsidies. Nkom therefore upholds the assessment of the removal of separate accounting statements for voice/SMS and data traffic.

TDC is also of the view that the residential and business market should be reported separately in an accounting separation. Nkom notes that the same complexity and uncertainty as mentioned above could arise from such a division. Given that the margin squeeze test is to be conducted at a more detailed level, Nkom does not believe it is proportionate to change the accounting separation reporting.

Nkom has made some changes to the decision as a result of the consultation responses.

## **6.6 Price controls**

### ***Assessment and conclusion in notification of decisions***

Nkom has given notice that Telenor will be made subject to price controls for the forms of access national roaming, MVNO access, service provider access and co-location. The notification stipulates that price controls targeting the mentioned forms of access will consist of a prohibition on putting buyers of access in a margin squeeze. Agreements for national roaming and MVNO access need to pass full margin squeeze tests, and agreements for service provider access need to pass gross margin tests. In addition, the notification stipulates a requirement for a positive gross margin for products in sale for the mentioned access forms. For co-location, Nkom gave notice that Telenor will be made subject to a requirement for cost-oriented prices as well as a reporting of cost accounts on request.

#### **6.6.1 Consultation responses regarding price controls for service provider access, national roaming and MVNO access**

**Telenor** believes that the price controls are unjustified and disproportionate and makes the following comments:

##### ***Gross margin tests***

On request from Nkom, Telenor has explicated its original comments on the margin squeeze test requirement. Telenor believes that the notification does not sufficiently clearly stipulate that it involves a gross margin test requirement for all forms of access, and in its original consultation response it therefore based its comments on the assumption that the positive gross margin requirement only applied to service provider access. This summary of consultation responses provides a synthesis of Telenor's contentions.

Telenor believes that a requirement to a gross margin test for all of Telenor's retail products for sale for all three forms of access entails a detailed regulation that is both unnecessary and disproportionately strict. According to Telenor, such a regulation would effectively prevent the company from being competitive in segments at the "extremes" of the market, and will at the same time remove Telenor's incentives to offer a broad product portfolio in the entire market, as well as limit product development and investments. Telenor believes that this conflicts with the purpose of the Electronic Communications Act and economic efficiency considerations. In its original consultation response, Telenor explained that access prices at the wholesale level are based on average prices in the market, and an access price that is required to produce a gross margin for all products in the market must contain both low fixed charges and low variable prices to ensure a margin at the "extremes" of the market. Telenor believes that the notification does not provide adequate justification for imposing a positive gross margin requirement, and in this context it refers to EEA law and chapter V of the Public Administration Act. Telenor also believes that excluding volume rebates from gross margin tests is incorrect.

#### *Requirement regarding a full margin squeeze test*

Telenor does not believe that there is a basis for imposing margin squeeze tests for each of the segments in the residential and business markets. If a margin squeeze test is to be imposed, it must be implemented for the overall market. Telenor calls for a further clarification in order to provide better predictability. In this context, it emphasises the lack of description of the assumptions related to i) other economic analyses, ii) the inclusion of new products, iii) deviance from the principle of using Telenor's customers' usage patterns, and iv) any adjustments beyond scale.

#### *Margin squeeze test principles*

Telenor disagrees with the choice of the adjusted EEO principle, and believes this reduces its investment incentives. Telenor believes that if an adjusted EEO is nevertheless used, scale must be the only adjustment. Any other adjustment would lead to an unpredictable regulation.

Telenor believes that there are several unclear issues related to the choice of retail products, usage patterns and subscription distributions to be used in the test. Which products for mobile broadband are to be included in the test and which method is to be used to select these are also unclear. Further, Telenor believes that it is unclear which issues Nkom will emphasise when it considers whether newly launched products are to be included in the test, and which issues Nkom will emphasise if it deviates from the principle of using the usage patterns of Telenor's customers is also unclear. Similarly, Telenor believes that Nkom does not indicate the relevant issues and assessment criteria to be used if it deviates from the principle of using Telenor's subscription distribution.

Telenor assumes that termination revenue from messages will also be included in the margin squeeze test.

With regard to costs related to the retail operation, Telenor reports on these in the accounting separation. In Telenor's view, a possible adjustment of the costs must reflect the products included in the margin squeeze test, in line with the adjusted EEO principle. For example, Telenor believes that costs related to M2M subscriptions should be eliminated. Further, Telenor notes that it does not have an overview of possible uses of cost information from other operators in the margin squeeze models, and that it is prevented from being able to ensure a positive margin given the inclusion of data from other operators.

Telenor believes that a testing frequency of every six months is too burdensome and believes that an annual test frequency is more reasonable.

**TeliaSonera** believes that there is no reason to introduce a special price control for the three forms of access; service provider, MVNO and national roaming. The company claims that a strict price regulation may destroy the development of competition in the market, including locking competition to only focusing on price. Additionally, the company believes that price controls are disproportionately burdensome and unclear, and that Nkom has not considered the internal consistency between all the tests. Further, it claims that the notified margin squeeze tests can lead to results other than those from margin squeeze tests pursuant to section 11 of the Competition Act and Article 54 of the EEA Agreement. TeliaSonera believes that a possible margin squeeze model rather should assist in controlling compliance with the non-discrimination obligation.

**Chili Mobil** finds that a price control that requires Telenor to substantiate and document that service providers can have a positive gross margin and that an MVNO shall avoid a margin squeeze based on the reference agreements are necessary minimum measures to ensure that the price terms Telenor offers prevent unprofitable operations for buyers of access.

With regard to the gross margin requirement, this must be formulated as a requirement to a positive gross margin and not as a "prohibition on negative gross margins". Further, the company believes that a minimum requirement must be stipulated regarding a specific margin level (as a percentage) that will provide an opportunity to cover costs at the retail level.

Chili Mobil states that relying on Telenor's figures is a weakness, and also questions how rebated prices will be taken into consideration in the margin calculations. Chili Mobil believes that all price models offered as part of access agreements must pass a margin squeeze test and a gross margin test. Further, the company expresses concern that a margin squeeze will be discovered too late, and believes that it should be specified that Nkom can conduct margin evaluations when Nkom receives copies of agreements entered and impose changes with immediate effect.

On a general basis, the **Norwegian Competition Authority** notes that the margin squeeze tests in the notification deviate somewhat from the terms for showing a margin squeeze in competition law. The Norwegian Competition Authority nevertheless finds that a specification of the price terms for various forms of access through a prohibition on putting buyers of access in a margin squeeze can, along with pre-determined principles, enable an effective and predictable regulation. Specifically, the Norwegian Competition Authority notes that Nkom should consider whether the price control for service providers should be designed in the same manner as for the other forms of access.

**Anonymous operator** believes that price control is an appropriate remedy and notes that rate of return requirements are included with a view to uncovering excluding pricing.

**TDC/Get** believes that the notified regulation is balanced and apt to ensuring sustainable competition in the short and long term. At the same time, the company claims that the model must be changed in accordance with specific input, and that if the changes are not made, cost-oriented prices based on price-minus for Telenor's largest business customers should be used instead.

With regard to the specific suggestions for changes to the margin squeeze model, TDC/Get believes that the model must not contain revenue that is not directly tied to the access product the company buys from Telenor, as this can contribute to over-estimating profitability. Additionally, TDC/Get believes that it would be natural to use the retail prices Telenor offers its 10 largest customers as a point of departure. Furthermore, TDC/Get believes that by not testing the key account segment separately, and by planning a combined assessment of the

business segment, there is significant risk that the margin squeeze test does not capture a significant share of turnover in the business market. TDC/Get believes that the test should use a usage pattern and subscription distribution of a reasonably efficient MVNO, and not be based on Telenor's figures. With regard to rate of return requirements, TDC/Get believes that it is unclear whether the margin squeeze test takes this into account, and it asks that this be included. To ensure effective enforcement, TDC/Get also asks that the Authority assumes responsibility for automatically requiring lower prices when Telenor does not pass the test.

### ***Nkom's assessment***

In the notification process, ESA has expressed that a requirement for a positive gross margin, for all products for sale for all access forms, is unduly burdensome. Nkom has taken ESA's comment, together with the responses from the national consultation, into account, and is therefore not imposing such a requirement on Telenor.

On the basis of the comments from ESA, responses from the national consultation and a new assessment, Nkom has concluded that an efficient price control remedy for service provider access will be a requirement for a positive gross margin for each of the products that are subject to the regular margin squeeze and gross margin tests. Nkom has assessed whether a test for service provider access, with a requirement for a positive gross margin aggregated for each of the defined retail markets would be less burdensome for Telenor, and at the same time support the purpose of the regulation. Service providers are targeting a smaller part of the retail markets, and almost entirely base their operations without own infrastructure investments. This type of operator is therefore, to a larger degree, dependent on being able to replicate standalone products with a positive gross margin as a minimum. Costs for the retail operation are expected to be incurred by each provider, and a negative gross margin can thus prevent alternative service providers from operating profitably, which can lead to the competition problems in the market continuing. Nkom is therefore of the opinion that the gross margin requirement per product for each of the representative products, is the most proportional price control mechanism for service providers. The Norwegian mobile market is characterised by vertical integration, and there is therefore a close connection between the services available in the retail markets and the network services available in the wholesale market. Nkom's regulation facilitates competition around services in the short term, and will facilitate competition in the wholesale market in the longer term. The impositions in the decision are changed to reflect the final formulation of the price control remedy.

The need for regulation and stringent measures is documented in the market analysis and the effect of the measures that are imposed are, in Nkom's view, sufficiently documented. Nkom has done some specifications in the updated decision to clarify the need. Nkom cannot see that the requirements set in the Public Administration Act have not been complied with in the notification of decision.

With regard to Telenor's contentions about access prices being adapted to the "extremes" of the market, Nkom understands Telenor to refer to segments in the retail markets with differing needs and willingness to pay. Nkom believes that this can be solved by having multiple access agreements or price options adapted to the needs of the different forms of access. The decision states that requirement for a positive gross margin only apply to representative products which is replicated based on service provider access.

With regard to Telenor's objections related to volume rebates, Nkom agrees that these can give a distorted picture. Nkom has made specifications in the text about the principles for margin squeeze tests, to make it clear that volume rebates are included in all the tests.

Regarding the segment division of the margin squeeze tests, Nkom believes that it is proportionate to test the residential and business markets separately for MVNO access. This is supported by the updated market analysis, where Nkom has concluded that the residential markets and business markets are separate retail markets, both for bundled telephony mobile services and mobile broadband. The accounting separation is a test of the overall market, and a margin squeeze test for the overall market would, in Nkom's view, not contribute to getting a more nuanced picture of the competition. However, national roaming will be tested combined for the residential and business markets, because buyers of this form of access are expected to be present in most of the retail markets.

Telenor wants a further clarification for the principles for the margin squeeze test and emphasises a need for regulatory predictability. In this regard, Nkom believes that the principles have already been designed in a manner that provides adequate guidance, given that the remedies are to be sufficiently robust to handle the dynamics and developments in the market, both for retail products and usage patterns. One of the purposes of the margin squeeze test is for it to provide a picture of the actual competition, and this requires that the values included in the calculations represent the current situation. These are issues Nkom wishes to emphasise in the assessment of which products and usage patterns are to be included in the test, and also when assessing the need for other economic analyses that can supplement the overall picture.

Nkom has concluded that using adjusted EEO is a proportionate principle that mainly entails the adjustment of Telenor's data for scale. The adjustment may also involve an adaptation of cost structures that naturally follow from differences in scale, including the distribution of fixed and variable costs in the retail operation. Nkom believes that this approach is necessary in order for the margin squeeze tests to reflect the profitability of an operator with a significantly lower market share than Telenor. Nkom also doubts that an adjusted EEO principle significantly reduces Telenor's investment incentives.

On the basis of Telenor's comments on the need for further clarification on the selection of products, Nkom has adjusted the text in the decision and the principles for margin squeeze tests. It is specified that the representative products are selected from Telenor's subscription distribution, based on data up to 12 months backward in time, not limited to products that are subject to new sale. Relative weights are based on the subscription distribution close up to the time of the tests. The mobile broadband products to be included in the margin squeeze tests are selected using principles described in Chapter 3.2 of the principles document.

Nkom confirms that termination revenue for messages is included in the margin squeeze test.

With regard to Telenor's contentions about retail costs related to M2M, in Nkom's view these represent a small share that do not influence the margin estimates, and it is therefore disproportionate to isolate these. It is also not impossible that a buyer of access offers M2M products, and that this is an integrated part of the retail operation.

Telenor contends that it is prevented from ensuring a positive margin if the margin squeeze test uses information from other operators. Nkom notes that it is sometimes difficult to get information from Telenor, and that sometimes Telenor's figures will be irrelevant given the market share assumptions that are part of the margin squeeze test. In such cases, it will be necessary to use sources other than Telenor's accounts to set realistic costs for the test.

Nkom does not agree with Telenor that a testing frequency of every six months is disproportionately burdensome. The market can change significantly over the course of a year,

and margin squeeze tests every six months are, in Nkom's view, necessary for the effective enforcement of the price controls.

With regard to TeliaSonera's objections, Nkom upholds its assessment of the need for price controls as justified in the notification of decision. Nkom cannot see that the actual development of network expansion and retail products indicate that competition will be on price only.

Nkom does not agree with TeliaSonera that the internal consistency between the tests has not been assessed. However, to comply with ESA's request to refrain from imposing a requirement for a positive gross margin for all products for sale, this part of the notified obligations is omitted. In Nkom's view, the tests complement each other and are necessary to the fulfilment of the objective of ensuring that buyers of access can be competitive in different parts of the retail market.

With regard to the comment that the margin squeeze tests can lead to other results than under general competition law, Nkom refers to the consultation response from the Norwegian Competition Authority, in which that Authority also notes that the margin squeeze tests that Nkom gave notice of deviate somewhat from the terms for documenting margin squeezes under competition law. The Norwegian Competition Authority nevertheless believes that a prohibition on placing buyers of access in a margin squeeze can enable an effective and predictable regulation within the relevant time period. Nkom cannot see that the margin squeeze tests are disproportionate and sees no reason to discuss TeliaSonera's claim in further detail. Nkom also notes that the Norwegian Competition Authority asked Nkom to assess whether the margin squeeze test should apply to service provider access as well.

With regard to Chili Mobil's proposal that a positive gross margin requirement should be formulated, Nkom believes that such a formulation for all practical purposes is no different from a "prohibition on negative gross margins"<sup>14</sup>. To avoid confusion, Nkom is solely using the formulation "requirement for a positive gross margin" in the decision. Further, Nkom has found that it is not proportionate to set a specific minimum requirement to the size of the margin other than that it must be positive. The individual products are expected to have different operating margins, and providers are best placed to assess which price plans are to be used for different customer groups to maximise overall profit.

With regard to rebates on the retail price, information about actual rebates in the retail markets is part of the information collection from Telenor in advance of each margin squeeze test. This information will be used in the calculations.

Nkom cannot see that Chili Mobil has justified why using Telenor's figures represents a weakness. Nkom assumes that the quality of the figures provided by Telenor and other operators for use in the margin calculations are tailored to the purpose. In this context, it is relevant to note that Telenor for years has submitted extensive accounting information to comply with regulatory obligations.

Regarding Chili Mobil's contention that all access agreements must pass the test, Nkom is of the view that market issues can determine the design of access agreements; for instance, access agreements adapted to niches in the market. Nkom finds that it is proportionate for one

---

<sup>14</sup> The formulations "prohibition on negative gross margin" and "requirement for a positive gross margin" was used in the consultation without ascribing different meanings.

of the access agreements for each form of access to pass the test<sup>15</sup>. Further, Nkom believes that the notified decision already incorporates some degree of flexibility with regard to the fact that unforeseen events may lead to a need to assess compliance with price obligations beyond the stipulated tests every six months. However, as a clear starting point, Nkom believes that conducting the notified tests every six months suffices, both to uncover any price squeezes in time and in relation to predictability for operators and for follow-up by the authorities.

Nkom has considered the Norwegian Competition Authority's consultation response regarding price controls of service providers. Nkom believes that it is currently sufficient to limit the obligation to a requirement that access agreements for service providers must show positive gross margin. However, Nkom has specified the description for the semi-annual test for service providers to specify that the requirement for a positive gross margin applies for the chosen representative products. This range of products is also included in the tests for MVNO and national roaming. The cost structures and service composition of the service providers will vary depending on the business model selected by each individual service provider. The business models also differ from that which is normally representative of an adjusted EEO. Nkom therefore believes that the gross margin requirement is both proportional – given the competition problems – and adapted to this form of access.

Regarding the comments from Anonymous operator and TDC/Get about rate of return requirements, Nkom notes that the margin squeeze test includes capital costs and that rate of return requirements for invested capital thus is already taken into account.

TDC has also made a number of proposals for changes that in Nkom's view are justified on the basis of TDC's own experience and thus aim to remedy the challenges TDC has in the market. Nkom empathises with these responses but notes that the proportionality assessments have led to the margin squeeze test being designed on the basis of the adjusted EEO principle (not REO), and is unable to incorporate TDC-specific considerations. With regard to TDC's contention about a lack of a separate testing of key accounts, Nkom believes that the different tests that cover the business markets is sufficient for uncovering potential breaches of the price controls

Neither TDC's nor any other consultation response includes information that justifies a price-minus regulation. Nkom therefore upholds the notified price control with the smaller adjustments stipulated herein.

Based on the assessments above, Nkom has made changes to the decision and the principles for the margin squeeze tests.

### **6.6.2 Consultation responses regarding price controls for co-location**

Given that Nkom is retaining the requirement regarding cost-oriented prices for co-location, **Telenor** agrees with Nkom's assessment that cost-oriented prices must apply to all of Telenor's base stations combined, and not per base station.

Regarding cost accounts, Telenor says that it can present these within a relatively short time span for base stations owned by Telenor Norge AS. However, for base stations owned by Norkring AS, there will be no existing cost account that can be used as a basis for preparing a

---

<sup>15</sup> On the semiannual implementation of the margin squeeze test for the access forms national roaming and MVNO and the gross margin test for service providers, Telenor's reference offers based on variable prices must pass the test.



complete cost account for Nkom for all base stations. A request for cost accounts must therefore provide enough time to obtain the necessary information.

Telenor agrees with Nkom's assessments about construction contributions for capacity expansions, and that buyers of co-location must pay rent for placements in a facility that they also have paid construction contributions for, as the rental price is based on average costs.

**TeliaSonera** wishes to emphasise the specification about construction contributions for capacity expansions related to co-location. It is important in principle that whoever needs the capacity expansion covers the costs arising from the capacity expansion. These costs must not be recovered through a general rent increase for all tenants.

**ICE** believes that the final decision should stipulate that buyers of access are not required to cover more than a pro rata share of the cost of capacity expansions: in other words, the buyer of access' needs divided by the total capacity expansion.

### ***Nkom's assessment***

Nkom finds that the cost accounts for co-location must also include placements with Norkring, but has taken note of the fact that it will take Telenor some time to present the total cost accounts the first time this is requested.

With regard to capacity expansions, in the notification Nkom assumed that whoever requests a capacity expansion must cover the cost of this through construction contributions. In principle, this means that whoever requests a capacity expansion must cover all costs, even if the capacity expansion means that some capacity becomes available. In Nkom's view, it would not be reasonable to direct Telenor or others to absorb the cost of any free capacity that arises from a measure it did not itself need. However, Nkom adds that Telenor must as a starting point always select the cheapest and simplest measure that can free up capacity. This may involve removing equipment that is not in use or moving equipment to make room for more cabinets. More demanding measures, such as mast replacements, requires greater justification in order for Telenor to be ordered to implement them, and it must therefore be assumed to be rare for an operator to have to pay for such a measure. In such cases, it is up to the entity making the request to consider alternative measures.

In the decision, Nkom has specified that the cost accounts must also cover base stations owned by Norkring AS. Nkom cannot see having received consultation responses that entail a need for significant changes to price controls related to co-location.

## **7 Report from Espen R. Moen and Christian Riis**

### ***Consultation responses***

Espen R. Moen and Christian Riis from Oeconomica DA have prepared an assessment of Nkom's market analysis and notification of decision, on assignment from Telenor. In the report, they summarise their comments on the notification of decision:

1. Ex ante regulation is generally associated with significant costs. The competition problem must therefore be identified and be sufficiently serious to justify such regulation. Such an analysis has not been presented.
2. Nkom introduced regulatory principles that have the explicit objective of allowing less efficient operators to survive in the market. This can cause a loss of efficiency for society.

3. The notification does not sufficiently analyse how the proposed regulations will affect competition between the networks. They fear that the proposals will limit the opportunities available to a third network.

### ***Nkom's assessment***

Nkom does not agree that competition problems have not been identified in Market 15. In the report, Moen and Riis claim that Nkom does not substantiate its conclusion that denial of access, or behaviour equivalent to denials of access, is a core problem in the market. Moen and Riis note that in many cases, monopolists will have incentives to outsource downstream activities if there are more efficient operators in the market.

Nkom has described the competition problems both in chapter 5 of the notification and in chapter 5.11 of the market analysis of buyer power. In both documents, Nkom justifies its conclusions by the fact that Telenor has incentives to maintain and obtain competitive advantages in the retail markets rather than selling wholesale access. Telenor's share of earnings from sales to end users is significantly larger than its wholesale earnings. As Telenor is broadly present in different retail markets (business, residential, M2M), access for external operators will in most cases entail competition with its own retail operations. On this basis, Nkom believes that Telenor would have incentives to prioritise the retail markets. In addition to revenue directly from the sale of subscriptions to its own mobile customers, Telenor can also sell additional products to its customers from other parts of Telenor's product portfolio (Canal Digital, Wimp, etc.). In practice, Nkom therefore cannot see that Telenor has sufficient independent interest in outsourcing downstream activities, as Moen and Riis claim.

Further, in chapter 4.3.7 of the market analysis about market behaviours, Nkom has described several complaints processed by Nkom and the Ministry in the current regulatory period. The complaints show that Telenor has not been disciplined by other operators to a degree that has prevented it from exploiting its market position. Among other things, Nkom refers to a complaint about co-location and discrimination on price and quality. Nkom believes these cases support the argument that there are competition problems in the market and a need for regulation.

Moen and Riis contend that the regulation makes it possible for less efficient operators to survive in the market. Nkom's assessment is that until there is sufficient competition to offer network access, there is a need to facilitate the situation for external buyers of access. This also includes buyers of access that are not building networks. Nkom does not disagree that it is the lack of horizontal competition (at the network level) that represents the core problem in the market. Remedies pursuant to regulatory principle 3 are therefore decisive for Nkom. However, while awaiting infrastructure-based competition there is also a need to stimulate competition regarding services. The reason for this is that such providers contribute to a diverse product market for end users, and in the longer term they can be important wholesale customers for the third network.

Furthermore, the dominant operator will have scope and scale advantages that other operators cannot utilise to the same degree. The regulatory remedies that are imposed must be designed in such a way that alternative operators that are efficient in their operations can compete on equal terms. In a purely statistical perspective, it is natural for the dominant operator to have scope and scale advantages that make it more efficient than other, smaller, operators. However, ex ante regulations are based on the theory that the benefits of dynamic efficiency will offset any short-term efficiency losses.

In this context, it is also necessary to take a closer look at how the access regulation is designed. Nkom believes that the notified regulation, including the price regulation, represents a safety net for buyers of access and that it does not facilitate inefficient entrants. The requirement to a positive gross margin for service providers sets a requirement that in practice means that access seekers are ensured revenue that covers the cost of buying network access. Retail costs (marketing, invoicing, etc.) must then be covered through the pricing of products in competition with Telenor. For MVNO access, the positive margin requirement mean that the operators are also to be ensured coverage of retail costs pursuant to the adjusted EEO principle. This means that the regulation, which is to facilitate sustainable competition, accepts that other operators do not have the scope and scale advantages of the dominant operator. This approach corresponds to the presumptions about dynamic efficiency.

Moen and Riis are also concerned about the options available to the third network, and among other things write: *"A regulation that entails lower access prices to Telenor's network will lead to a very unfortunate weakening of ICE's opportunities to compete in the wholesale market."* Nkom does not disagree with Moen and Riis that wholesale customers will be important to getting traffic volumes in the third network. However, it seems that the argument is based on a presumption that ICE is immediately able to offer a competitive access product. However, Nkom's experience from Tele2's network development is that in order to offer attractive wholesale products, the network must have relatively good coverage<sup>16</sup> as well as a large share of traffic in its own network. At the beginning of 2016 ICE had 40 per cent population coverage via the 800 MHz band, but all traffic related to traditional mobile subscriptions is based on access to Teliasonera's network. Based on Nkom's experiences, assessments of ICE's terms of access and input from buyers of access, it is too early to assume that ICE can already offer attractive wholesale access. Nkom therefore believes that it is appropriate to facilitate access to Telenor's network for wholesale customers until there are clear signs of competition between three networks offering access.

Further, Nkom believes that the notified regulation of access does not remove the opportunities for other operators to offer attractive terms of access. As mentioned above, the notified regulation only represents a safety net for buyers of access. There are opportunities to offer prices at a level between Telenor's regulated prices and prices based on own costs, as well as to compete on terms other than price.

Nkom has adjusted and in some cases explicated the text of the analysis based on Moen and Riis' contentions.

## **8 Obligation to charge reasonable price for establishment of new access agreement**

After the national consultation on Nkom's draft decision, Nkom have assessed the need for regulating Telenor's price for establishment of new access agreements. Telenor will as the dominant provider have incentives to impede new market entry by raising the price for establishment and implementation of new access agreements. Since obligations regarding both price and price structure are tightened in this decision, including prohibition of margin squeeze pursuant to section 4-9 of the Electronic Communications Act, the need for an

---

<sup>16</sup> Nkom has previously estimated that a network needs a minimum 75 per cent population coverage to compete effectively with established network owners: see appendix 1 (chapter 4.3.8.1 of the market analysis).

obligation to charge reasonable price for establishment of new access agreements are increased, due to the risk of detrimental rebalancing of prices.

Nkom acknowledge that there are certain costs attended with the implementation and facilitation for new access seekers, including technical installations, testing etc. However, it is Nkoms view that such price should be reasonable, in the sense that the price does not constitute an unfounded barrier of entry.

Nkom will against this background impose an obligation on Telenor to charge reasonable prices for establishment of new assess agreements. Details about the obligation is provided in the decision chapter 7.5.6