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Umhverfis- og samgöngunefnd/Environmental and Transportation Committee
Althingi
101 Reykjavik
2 April 2019

Ref: Case No. 639, 149th Parliament Session 2018-2019, Bill on Allocation and Efficient Construction of High Capacity Telecommunications Networks

Dear Sir/Madam,

After recently meeting with the management of Gagnaveita at the FTTH Council Conference at the end of March 2019 in Amsterdam, where the issue of the transposition of the Broadband Cost Reduction Directive into Icelandic law was discussed, I wish to make a number of observations which I believe may be relevant for your considerations. I have many years' experience working on broadband development, formerly as a senior economist in the European Commission, as an advisor to the OCED and I am currently managing a consultancy in Brussels where inter alia I act as an advisor to the FTTH Council Europe.

The first observation is that, while access to physical access infrastructure such as ducts and poles is generally positive for the deployment of fibre solutions in the market, this is not always the case and significant limitations are imposed on those physical access obligations in specific instances. The legislative text of the broadband cost reduction directive makes clear that access to infrastructure must pass an appropriateness and proportionality test so that investment incentives are not undermined either now or in the future. In essence, there is a strong desire to bring new investors into the sector and if those investors have to give access to their passive infrastructures then that might cause them not to invest in the first place, or limit their investments in the future. These issues are even more pertinent today as the deployment of fibre networks often requires excess fibre to be deployed upfront in order to meet future demand for future services. There is a real risk that third party access could undermine the incentive to build that additional fibre that will only be used in the future. Gagnaveita explained to me that it is managing its own network in order to free up fibres so as to supply these new services. It would be a perverse outcome, if by investing to anticipate new wholesale opportunities (e.g. backhaul for 5G mobile services) a firm exposed itself to an obligation to grant third party access for traditional services.

The application of the provision in the Broadband Cost Reduction Directive must always following the principles of appropriateness and proportionality. In particular, the granting of one form of access may not really be the best means of ensuring access when there are other

means to achieve the same ends with alternative methods. Such methods may provide virtually the same functionality and flexibility to the access seeking operator but at a fraction of the cost or without business disruption of other means. This circumstance is also provided for in the Directive where it is stated that where viable alternative means to one form of access is available then that can be sufficient. In many Member States, Wholesale Only operators provide access on a virtual rather than physical basis to access seekers and this is considered sufficient.

Article 3(3)(f) of the Directive notes that facility owners can refuse access inter-alia where:

'the availability of viable alternative means of wholesale physical network infrastructure access provided by the network operator and suitable for the provision of high-speed electronic communications networks, provided that such access is offered under fair and reasonable terms and conditions.'

Were access to the dark fibre of Gagnaveita to be mandated then, depending on its network topology, the costs of implementing a shared access solution would be extremely high and that cost would have to be borne by the access seeker. Not only would the price charged need to cover the cost of access, it would also need to be adjusted to reflect the impact on Gagnaveita's business case. These cost would of course need to be guaranteed in advance because, *a priori*, such investments might make no commercial sense in the network context in Iceland. As noted in Article 3 of the Broadband Cost Reduction Directive:

'Where the dispute relates to access to the infrastructure of an electronic communications network provider and the national dispute settlement body is the national regulatory authority, it shall, where appropriate, take into account the objectives set out in Article 8 of Directive 2002/21/EC. Any price set by the dispute settlement body shall ensure that the access provider has a fair opportunity to recover its costs and shall take into account the impact of the requested access on the business plan of the access provider, including the investments made by the network operator to whom access is requested, in particular in the physical infrastructures used for the provision of high-speed electronic communications services.'

The new regulatory framework for telecoms in Europe, is called the EECC and one of the principal objectives of the EECC is to foster investments in these new Very High Capacity Networks (VHCNs).¹ VHCN is essentially about investments in fibre and nothing else. In the case of fixed networks, it is defined as "Fibre to the Home" or "Fibre to the Building" (or its "equivalent" but, as defined, it is difficult to see how it can have a practical equivalent). In the case of mobile networks, it means "Fibre to the Base Station". In terms of access to physical infrastructures these are set out most fully in Article 61 of that code. However, Article 61(3)

¹ VHCNs are defined in Article 2 of the Code as: "either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation; network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point".

set out a significant exemption from that obligation for firms such as Gagnaveita which operate as Wholesale only firms.

Article 61(3) notes that

*National regulatory authorities shall not impose obligations in accordance with the second subparagraph **on providers of electronic communications networks where they determine that:***

- (a) **the provider has the characteristics listed in Article 80(1) and makes available a viable and similar alternative means of reaching end-users by providing access to a very high capacity network to any undertaking, on fair, non-discriminatory and reasonable terms and conditions; national regulatory authorities may extend that exemption to other providers offering, on fair, non-discriminatory and reasonable terms and conditions, access to a very high capacity network; or***
- (b) **the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects.***

By way of derogation from point (a) of the third subparagraph, national regulatory authorities may impose obligations on providers of electronic communications networks fulfilling the criteria laid down in that point where the network concerned is publicly funded.

In practice therefore, the new regulatory regime emphasises investment in fibre and the protection of those investments above the need to grant access to physical infrastructure where the firms involved do not have incentives to discriminate (i.e. for wholesale-only firms such as Gagnaveita identified in Article 80 (1)).

Finally, it is worth considering the potential impact that passive access obligation would have on Gagnaveita's business model and how this would ultimately impact on consumers. As noted, it would be counter-intuitive for Gagnaveita to continue to free up fibre or deploy additional fibres if it was likely to be obliged to give that fibre to its competitor so it could compete with it. It's decision to deploy additional fibre or remodel its network to free up fibre is discretionary but in the near term such investment activity is critical to the well being of Icelandic consumers and business. Right now, the telecom sector is grappling with a means to deliver 5G services in a timely and economic fashion. A key component to 5G deployment is the availability of sufficient fibre in the network to provide backhaul for 5G. One mantra today is that without fibre, there can be no 5G. Gagnaveita is working to free up fibre in its network for this purpose where it does not have sufficient capacity even though 5G is not yet deployed. Gagnaveita potentially runs the risk of having that 'spare capacity' handed to its competitor so that it can compete on the wholesale level. The logical response would be to not prepare for 5G so as to eliminate that risk. If they continued and others got access to the fibres, it would not be available for 5G.

Without additional fibre being available, real 5G services will have to wait until sufficient fibre is deployed in the access network. The FTTH Council cost model shows that deploying fibre in an existing network in such a manner raises the network costs very significantly. The unfortunate consequence of granting third party access to dark fibre would be to delay 5G and to raise the cost of 5G services to consumers as extensive cost modelling has shown that



sequential deployment of FTTH and 5G is much more expensive than a co-ordinated approach and such costs are ultimately to be borne by consumers.

I would be happy to discuss these matters in person if the committee consider it appropriate and if further questions arise.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Tony Shortall". The signature is written in a cursive style with a large initial 'T' and a long horizontal stroke.

Tony Shortall

Director