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Viestintävirasto  
Kommunikationsverket (FICORA)

Itämerenkatu 3 A  
FI-00180 Helsinki  
Finland

For the attention of:  
Ms Asta Sihvonen-Punkka  
Director-General

Fax: +358 969 666 37

Dear Ms Hagman,

**Subject: Commission decision concerning cases FI/2012/1328-1329: Markets for wholesale physical network infrastructure access at a fixed location and wholesale broadband access**

**Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC**

## I. PROCEDURE

On 18 May 2012, the Commission registered a notification from the Finnish national regulatory authority, Viestintävirasto (FICORA)<sup>1</sup>, concerning the markets for physical network infrastructure access and wholesale broadband access<sup>2</sup> in Finland.

The national consultation<sup>3</sup> ran from 15 February 2012 to 16 March 2012 (for submissions in Finnish) and to 20 April 2012 (for submissions in Swedish).

On 31 May 2012, a request for information<sup>4</sup> was sent to FICORA and a response was received on 5 June 2012.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the

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<sup>1</sup> Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to markets 4 and 5 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Background**

The third review of the markets for physical network infrastructure access and wholesale broadband access in Finland were previously notified to and assessed by the Commission under case numbers<sup>5</sup> FI/2008/0839 and FI/2009/0900.

With regard to market 4, FICORA proposed to designate 32 fixed incumbent operators as having significant market power (SMP) in their respective regional markets for physical network infrastructure access in Finland. FICORA proposed to differentiate fibre from metallic local loops in respect of the cost orientation obligation. With regard to copper loops, it proposed obligations of access, transparency, cost orientation, non-discriminatory pricing and cost accounting. In addition, FICORA proposed an obligation of accounting separation on 9 operators. As to fibre lines, FICORA proposed to apply only obligations of access, transparency and non-discrimination (this latter covering both pricing and other terms and conditions).

In its "comments" letter, the Commission, whilst acknowledging that fibre networks were still at an early stage of development, did not believe that a differentiated regulatory treatment of fibre and copper loops is justified. Therefore, while noting FICORA's commitment to monitor the market and to amend the remedies imposed on fibre loops if necessary, it invited FICORA to impose remedies on fibre loops similar to those imposed on copper and to revisit its analysis along the lines of the NGA Recommendation once adopted. The Commission also invited FICORA to put in place appropriate migration arrangements.

As to market 5, FICORA proposed a market definition, which included all broadband platforms available in Finland (DSL, fibre, cable and fixed wireless). FICORA acknowledged that the conditions of competition in the operating areas (regions) of 32 incumbent operators, notably the local incumbent's high market shares, support a finding of SMP for 32 incumbent operators and consequently proposed to impose obligations of access, transparency and non-discriminatory pricing, but no other price control obligation.

The Commission issued a "comments" letter regarding the definition of geographic sub-markets proposed for de-regulation. In addition, the Commission reiterated the comments made in case FI/2008/0848 as regards the inclusion of cable in the market definition and the absence of any price control obligation.

### **II.2. Market definition**

#### Market 4

The relevant products and services in the market for wholesale network infrastructure access include 1) metallic local loops and optical fibre local loops, 2) parts of metallic and optical fibre local loops, 3) the transmission ability of the local loop for parallel use (shared access), 4) connections implemented by means of a dedicated wavelength in optical fibre local loops, and 5) equipment facilities that are required for putting in place

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<sup>5</sup> SG-Greffe(2008)D/208655 and SG-Greffe(2009)D/2294.

the equipment necessary for use of the local loop.

### Market 5

FICORA proposes to include DSL and Ethernet wholesale products, as well as self-supplied cable, since services over cable are regarded as a substitute at the retail level.

The relevant geographic markets, as defined by FICORA, are regional for both markets 4 and 5. The Finnish regulator identifies 111 regional markets<sup>6</sup>.

### **II.3. Finding of significant market power**

At the stage of SMP assessment, the regional markets are divided by FICORA into two groups in market 4. In group 1, the largest operators have above 50% of market shares in market 4 and at retail level. In group 2, the largest operators have a market share above 50% in market 4 but below 50% at retail level. In market 5, three groups are identified. In group 1, the largest operators have above 50% of market shares in markets 4, 5 and at the retail level. In group 2, the largest operators have market shares above 50% in both wholesale markets but their shares at retail level are below 50%. In group 3, FICORA identifies market shares above 50% in market 4 only, and shares below this threshold are found in market 5 and at retail level.

Against this background, in the market for wholesale physical network infrastructure access FICORA proposes to designate 27 operators (belonging to groups 1 and 2 as described above) as having SMP in all the 111 regional markets. In addition to the market shares analysis, FICORA considered, inter alia, other criteria i.e. (i) price developments<sup>7</sup>; (ii) potential competition<sup>8</sup>; (iii) countervailing buying power; (iv) size of operators; (v) the management of hard-to-reproduce infrastructure; (vi) technological advantage or superiority; (vii) ease or privilege of utilising capital markets and sources of funding; and (viii) diversity of products/services.

As regards the market for wholesale broadband access, FICORA proposes to designate 27 operators as having SMP in 104 regional markets which belong to groups 1 and 2, whereas the remaining 7 markets (from group 3) are considered to be competitive. Apart from the market shares, the Finnish regulator takes into account the following additional criteria: (i) price developments<sup>9</sup>; (ii) potential competition<sup>10</sup>; (iii) countervailing buyer

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<sup>6</sup> FICORA has defined the relevant geographic markets primarily from municipal-level information. FICORA has used the following cumulative criteria when defining the relevant geographic markets from all the existing 336 municipalities: i) the municipalities compose a physically contiguous geographic market area; ii) in terms of the number of local loops, the market share of the area's market leader in the municipalities belonging to one area is more or less equal (variation of  $\pm 10\%$ ); and iii) the number of competing telecommunications operators owning their own local loops in municipalities belonging to the area is more or less equal ( $\pm 1$  telecommunications operator).

<sup>7</sup> FICORA observes a decrease of prices for copper LLU, whereas fibre unbundling costs have increased.

<sup>8</sup> According to FICORA, the established operators are able to retain their own market power, as they can take advantage simultaneously both with metallic conductors and fibre-optic implemented interfaces.

<sup>9</sup> The prices of wholesale broadband products vary steeply region by region. According to FICORA, retail broadband prices are influenced by competition at retail level and special geographical circumstances. In groups 2 and 3 prices of wholesale broadband products are mostly lower than in the rest of Finland.

<sup>10</sup> FICORA emphasizes the role of mobile services. Mobile network operators have increasingly invested in the more advanced HSPA and LTE technologies, and the three largest network operators have already started offering services to retail subscribers on these networks. The coverage of these networks is however currently limited and their broadband services are targeted on the largest towns and cities. FICORA considers that mobile data-transfer services will constitute a direct price restriction for retail broadband products of 8Mb/s or less for the retail pricing of traditional fixed-network

power; (iv) size of the operators; (v) the management of hard-to-reproduce infrastructure; (vi) technological advantage or superiority; (vii) ease or privilege of utilising capital markets and sources of funding; and (viii) diversity of products/services.

## II.4. Regulatory remedies

### Market 4

FICORA intends to impose the following obligations on 8 operators<sup>11</sup> designated with SMP in their respective operating areas:

- obligation to lease part of a local loop and equipment facilities (for copper and fibre loops);
- transparency obligation, i.e. to publish delivery terms and tariff information (for copper and fibre loops);
- non-discrimination (for copper and fibre loops);
- obligation concerning pricing including:
  - cost orientation for fibre<sup>12</sup> but without any price caps and
  - price caps<sup>13</sup> for monthly rent of copper loops;
- cost accounting obligation (for copper and fibre loops).

With regard to the remaining 19 SMP operators FICORA proposes to impose the following remedies:

- obligation to lease part of a local loop and equipment facilities (for copper and fibre loops);
- transparency obligation, i.e. to publish delivery terms and tariff information (for copper and fibre loops);
- non-discrimination (for copper and fibre loops).

FICORA does not intend to impose any price caps with regard to fibre loops, as those price caps, in its interpretation of the Finnish Communications Market Act, can only be imposed in exceptional cases, if the price charged for the access rights clearly exceeds the general price level or if it is otherwise necessary in order to meet the purpose of access rights. Accordingly, FICORA can only impose a price cap when it is absolutely necessary and when ex-post enforcement of the cost orientation obligation has not resulted in truly cost oriented prices. FICORA does not substantiate in greater detail why it considers the proposed remedy to appropriately address the competition problem

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telecom operators, and therefore an indirect price restriction for the pricing of wholesale broadband services.

<sup>11</sup> These operators' combined market shares of all local loops in Finland amount to 93% in terms of population coverage and 96% in terms of turnover.

<sup>12</sup> FICORA does not set any method for cost oriented prices. SMP operators are required to prove that their prices are cost oriented and the regulator can either accept them or undertake additional actions from the ex-post perspective.

<sup>13</sup> According to the Finnish Communications Market Act, the price cap shall be specified in such way that it is cost oriented. The cost orientation is defined so that "a cost orientation price means a price that is reasonable taking into account the costs incurred and the efficiency of the operation. In assessing reasonableness, regard shall also be had of a reasonable return on capital, which is affected by the investment of the telecommunications operator and related risks.

identified in the market for physical network infrastructure access.

With regard to access to passive infrastructure, FICORA explains in its response to the Commission's request for information that access to ducts is not proposed, since ducts are not widely used. Ducts are primarily used in city centres, but in rural areas cables have been dug or ploughed into the ground.

FICORA does not define any migration rules from copper to fibre loops in its draft measures.

### Market 5

FICORA proposed to impose the following obligations:

- obligation to lease part of the local loop transmission capacity and equipment facilities;
- transparency obligation, i.e. to publish delivery terms and tariff information; and
- non-discrimination obligation concerning pricing and other terms.

The above-mentioned obligations will apply only with regard to wholesale broadband services above 8 Mbit/s<sup>14</sup>. Further to that, FICORA does not provide any justification, as to why it considers it proportionate and justified not to impose and price control remedies in market 5. In particular, FICORA does not invoke the provisions foreseen in the NGA Recommendation, most notably Recommend 36, which under certain circumstances provides that the imposition of a cost-orientation obligation is not necessary. There is no detailed reference to the non-discrimination<sup>15</sup> obligation which would allow to draw inferences about equivalence of access and its impact on competition.

## **III. ASSESSMENT**

The Commission has examined the notification and the additional information provided by FICORA and has the following comments:<sup>16</sup>

### **Inclusion of cable self-supply in the market definition**

The Commission would like to reiterate the comment expressed under case FI/2009/0900 and invite FICORA, as in the previous reviews, to revisit its approach to include cable in the market definition. The Commission note that the number of cable-based broadband subscriptions is growing and amounted to 256,000 subscriptions compared to 1,115,000 DSL lines. FICORA also stresses that in some cases it is the cable self supply which strengthens the SMP position, if a given SMP operator has both, a copper/fibre and cable network.

With regard to the indirect constraints, the Commission would like to underline that the competitive constraints stemming from cable should be sufficiently

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<sup>14</sup> According to FICORA, mobile data transfer services as well as wireless broadband subscriptions, which provide retail internet services up to 8 Mbit/s can be considered as partial substitutes vis-à-vis broadband and fibre-based connections.

<sup>15</sup> Apart from a general requirement to treat operators in the same way, FICORA does not propose to impose any strict rules which would ensure proper implementation and enforcement of non-discrimination obligation (e.g. the existence of mechanisms ensuring Equivalence of Access monitored by Key Performance Indicators)

<sup>16</sup> In accordance with Article 7(3) of the Framework Directive.

strong in order to be automatically taken into account at the market definition stage. There is also a risk of understating the real extent of market power at the wholesale level by including self-supplied market shares for all vertically integrated competitors, irrespective of whether they are actually constraining the market behaviour of the incumbent.

It is essential that the degree or strength of the constraint posed in particular by vertically-integrated companies is correctly estimated in the assessment. In that regard, when assessing the effect of indirect substitution through a SSNIP (small but significant non-transitory increase in prices) test it needs to be demonstrated that:

- (i) ISPs would be forced to pass a hypothetical wholesale price increase on to their consumers at the retail level based on the wholesale/retail price ratio without being able to absorb it;
- (ii) there would be sufficient demand substitution at the retail level to retail services based on indirect constraints such as to render the wholesale price increase unprofitable; and
- (iii) the customers of the ISPs would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices.

In any event, as confirmed by FICORA in its response to the request for information, the exclusion of self-supplied broadband cable-based access would not have led to a different regulatory outcome. Consequently, the Commission considers that since a conclusion on the exact scope of the market is not relevant in the present case for the purposes of the SMP assessment and the imposition of regulatory obligations, the inclusion of cable-based broadband access in the market definition can be left open.

### **Lack of migration rules**

The Commission would like to recall that migration from copper to fibre loops and the dismantling of exchanges substantially affects the business case for alternative operators.

Thus, the Commission would like to stress that FICORA should develop further remedies specifying in detail the migration process (including detailed information to be provided by the SMP operator in advance concerning its network rollout plans, the conditions for closing down the exchanges, and the methods of collocation for LLU operators at the newly-built access points and/or the provision of appropriate backhaul facilities if necessary), in addition to the obligation of transparency.

Furthermore, following the examination of the notification and the additional information provided by FICORA, the Commission considers that FICORA's draft measures concerning the wholesale markets for physical network infrastructure access and wholesale broadband access in Finland fall within Article 7a(1) of the Framework Directive as they fall under the Commission's powers of ensuring consistent application of remedies. In addition, FICORA's draft measures are in application of Article 16 of the Framework Directive and aim at the imposition of obligations set out in Articles 9-13 of the Access Directive.

Draft measures imposing regulatory obligations on undertakings with SMP in Finland may have an influence, direct or indirect, actual or potential, on the ability of

undertakings established in other Member States to offer electronic communication services. FICORA's notification comprises measures that have a significant impact on operators or users in other Member States, inter alia measures which affect prices for users. Consequently, such draft measure may affect the patterns of trade between Member States<sup>17</sup>.

The Commission has serious doubts as to the compatibility with EU law of FICORA's draft measures in its current form, in particular with the requirements referred to in Article 16(4) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive<sup>18</sup> in conjunction with Article 8 of the Framework Directive.

On the basis of the notification and the additional information provided by FICORA, the Commission has identified the following issues which raise concerns:

**Non imposition of appropriate price control for fibre infrastructure in market 4 and non imposition of price control obligation for copper and fibre infrastructure in market 5**

*Compliance with Article 8(4) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive*

The Commission points out that remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8(4) of the Access Directive should be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Moreover, the Commission refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In this regard, the Commission points out that the Commission may issue recommendations<sup>19</sup> on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises, in particular, where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market.

It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted a Recommendation on regulated access to Next Generation Access Networks (the "NGA Recommendation")<sup>20</sup>, setting out a consistent approach that the NRAs should follow regarding regulation of the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5).

For this purpose, the Commission recommended that NRAs should ensure that access remedies are maintained or amended where SMP is found on Markets 4

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<sup>17</sup> See Recital 38 of the Framework Directive.

<sup>18</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p.7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p.37.

<sup>19</sup> In accordance with Article 19 of the Framework Directive.

<sup>20</sup> Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p.35-46 (NGA Recommendation).

and 5<sup>21</sup>, and such access should normally be granted at cost-oriented prices.

While the Commission recognises that the NRAs have a certain margin of discretion, which allows them to take into account national circumstances, the Commission underlines that any alternative approach has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, such alternative approach would have to take into account characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive. Moreover, Article 8(1) of the Framework Directive obliges NRAs to make sure that the imposed regulation is technologically neutral.

#### *Non-imposition of price cap in market 4 for fibre*

The Commission takes note of FICORA's view that it can only impose a price cap when it is absolutely necessary and when ex-post enforcement of the cost orientation obligation has not resulted in truly cost oriented prices. However, already at this stage, the Finnish regulator acknowledges that current prices for fibre local loops are high and hinder competition<sup>22</sup>. This suggests that SMP operators, without proper regulation, are in a position to charge access rates at excessive levels. As a consequence of the proposed regulatory approach, those operators who would normally immediately obtain access to regulated fibre-based products, may choose to open dispute settlement procedures (delaying the price implementation) or wait for FICORA's intervention. In both scenarios market entries may be significantly delayed.

Moreover, regarding fibre local loops, even though FICORA explains that it is prevented from setting concrete prices in a form of price caps before the cost orientation obligation (as explained in footnote 12 above) is tested, the Commission points out that, when it comes to excessive pricing, it is usually the imposition of prices at a cost oriented level that can be considered as the only appropriate and most effective remedy. First of all, the Commission does not see a reason why the cost orientation obligation alone (without setting concrete methods for the cost orientation or price caps) would prove to be sufficient to tackle the competition issue, as FICORA itself concluded that it has not been able to do so in relation to copper infrastructure. Moreover, FICORA states that currently the overall cost for using the fibre loop is almost 16 times higher than the overall cost for copper loops. The Commission is concerned that such a striking difference in copper and fibre prices will have a negative impact on the take up of NGA. FICORA's approach does not appear to be in line with Article 8(5)a of the Framework Directive as it does not promote regulatory predictability. Based on the current FICORA's proposal, access seekers may suffer from lack of certainty resulting from unstable, not clearly regulated prices, subject to arbitrary decisions of SMP operators. In this spirit, Recital 3 of the NGA Recommendation sets out that consistency of regulatory approaches of NRAs is of fundamental importance to avoiding distortions to the single market and to creating legal certainty for all investing undertakings. It is also on this basis that the Commission recommended (in Recommend 25 and Annex 1 of the NGA

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<sup>21</sup> Recommends 25 and 31 of the NGA Recommendation.

<sup>22</sup> FICORA explains that fibre local loop connection fees, as well as monthly fees, have been on the rise since 2010. The overall cost of leasing fibre loops per month varied from just over € 34 up to € 430, the median being €307.50 per month.



Recommendation), that the price of fibre unbundling services should be set based on cost oriented prices (appropriately adjusted for investment risks), unless the derogation foreseen in Recommend 22 of the NGA Recommendation would apply. However, FICORA has not evoked the exception foreseen in Recommend 22 which relates largely to the existence of parallel alternative infrastructures.

#### *Non-imposition of price control in market 5 for copper and fibre lines*

As stated above, under Article 16 of the Framework Directive in conjunction with Article 8(4) of the Access Directive, obligations should be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Moreover, the Commission refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted a Recommendation on regulated access to Next Generation Access Networks (the "NGA Recommendation")<sup>23</sup>, setting out a consistent approach that the NRAs should follow regarding regulation of the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5). Against this background also FICORA's non imposition of price control for copper lines in market 5 as, in any case, both copper and fibre technologies belong to the same market, face similar competition problems, and should hence be regulated in a technologically neutral manner. The Commission is of the view that, bearing in mind that market 4 remedies are still not properly functioning (as evidenced by excessive LLU prices described above), in the downstream wholesale market, without any price-related obligations, SMP operators may be indeed incentivised to abuse their market power. by charging excessive wholesale prices for bitstream or applying margin squeeze.

In the absence of appropriate price controls (as proposed in this case) NRAs are usually not able to prevent the competition problems identified in the relevant wholesale markets. In particular, in order to ensure regulatory certainty for access seekers and thus promote efficient investment by all operators, access prices should normally be cost-oriented, transparent and set sufficiently in advance, in both markets 4 and 5.

Hence, the lack of clearly pre-defined, regulated prices does, in view of the Commission, not promote regulatory predictability as prescribed under Article 8(5) (a) of the Framework Directive, and may significantly delay market entries.

#### *Conclusion*

In view of the above, the lack of a price cap for fibre in market 4, as well as the lack of price control for both fibre and copper-based access products in market 5 does not appear to be compatible with EU law, in particular with the policy objectives and regulatory principles as set out in Article 8(4) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive.

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<sup>23</sup> Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p.35-46 (NGA Recommendation).

## **Lack of price control for copper based local loop unbundling services for 19 SMP operators**

*Compliance with Article 8(4) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive*

The Commission acknowledges that the 19 operators with SMP status, which would not be subject to any price control regime, provide a small part of wholesale services in comparison with the 8 operators which cover 93% of the Finnish population. The size of the market and limited customer base should not, however, be considered as a basis for relaxing remedies. Small markets, with strong (on a local scale) incumbents, who are not constrained by alternative operators due to limited incentives to invest in rural areas, are normally incentivised to exploit their market power at the expense of their actual or potential competitors.

Against this background, FICORA's approach not to regulate prices of LLU copper access services appears to be in violation of Article 8(4) of the Access Directive which requires that regulatory remedies be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8. FICORA's approach would also be in violation of Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings such regulatory obligations which are appropriate. Price regulation imposed in the relevant market should respect the principles of cost orientation and thus promote regulatory predictability and sustainable competition.

Moreover, having in mind that no price control obligation is envisaged for market 5 for these 19 operators, the Commission is concerned that these 19 operators, although designated as holding SMP, would not be constrained in any way when setting their prices for both wholesale infrastructure and broadband access services.

## **Lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s**

*Compliance with Article 8(4) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive*

FICORA considers that in the market for wholesale broadband access services it is not necessary to impose any remedies with regard to broadband services below 8 Mbit/s, provided by SMP operators, despite the fact that all services, independently of their speed are considered to be part of the same market. FICORA justifies its approach, pointing to the fact that services offering lower internet speeds via DSL or Ethernet (below 8 Mbit/s) are constrained by mobile and wireless networks at the retail level<sup>24</sup>.

The Commission notes that the different treatment of lower speed broadband access within the boundaries of the same product market might result in a different treatment between operators seeking access on lower and higher connections, which might result in a distortion of competition contrary to the objectives of Article 8(2) of the Framework Directive. Even if FICORA's assessment is correct and there are reasons not to impose the same set of remedies

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<sup>24</sup> In its reply to request for information, FICORA explains that the partial substitutability with wireless broadband subscriptions is based on broadband subscriptions slower than 8 Mbit/s, implemented by means of DSL or Ethernet technology. As regards mobile, FICORA explains that there is clear evidence of substitution between slower fixed broadband and mobile data-transfer subscriptions.

on lower speed lines, the existence of SMP warrants at least some appropriate specific regulatory obligations as prescribed by Article 16(4) of the Framework Directive.

The Commission's serious doubts stem from the fact that, in case the relevant product market is defined correctly, FICORA should impose appropriate remedies in the non-competitive market, in accordance with Article 8 (4) of the Access Directive and Article 16 (4) of the Framework Directive, in order to enable access seekers to respond to (the same) structure of demand which should exist for lower internet speeds. Therefore, given that similar competitive conditions usually lead to identification of similar competition problems, any deviation within a defined relevant market needs to be carefully substantiated - especially when it consists in not only addressing that competition problem with differentiated remedies, but with no remedies at all, as it is the case with FICORA's notification. If however the competitive conditions vary between the two identified segments of the market (i.e. below and above 8 Mbit/s), FICORA could alternatively, on the basis of principles of competition law, address these differences at the stage of the market analysis and SMP assessment.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measure regarding the markets for physical network infrastructure access and wholesale broadband access in Finland shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC<sup>25</sup>, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>26</sup> within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,  
For the Commission,

Joaquín ALMUNIA  
Vice-President

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<sup>25</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

<sup>26</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32.2.298.87.82.