



EUROPEAN COMMISSION

Brussels, 3.7.2017
C(2017) 4722 final

Viestintävirasto (FICORA)
Itämerenkatu 3 A
00180 Helsinki
Finland

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

Fax: +358 295 390 270

Dear Ms Sihvonen-Punkka,

Subject: Commission Decision concerning Case FI/2017/1990: Wholesale high-quality access provided at a fixed location in Finland.

Article 7(3) of Directive 2002/21/EC: No comments

Case FI/2017/1991: Wholesale local access provided at a fixed location in Finland,

Case FI/2017/1992: Wholesale central access provided at a fixed location for mass-market products in Finland.

Comments pursuant to Article 7(3) of Directive 2002/21/EC

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

1. PROCEDURE

On 1 June 2017, the Commission registered notifications from the Finnish national regulatory authority, (FICORA)¹, concerning the market for wholesale local access provided at a fixed location, the market for wholesale central access provided at a fixed location for mass-market products, and the market for wholesale high-quality access provided at a fixed location in Finland².

¹ 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.

² Corresponding, respectively, to markets 3a, 3b and 4 in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications

There were two national consultations, the first one starting on 24 January 2017 and the second one starting on 8 May 2017³.

On 9 June 2017, a request for information (RFI)⁴ was sent to FICORA and a response was received on 14 June 2017.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned. Moreover, pursuant to Article 7a of the Framework Directive, the Commission may notify the 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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The market for wholesale high-quality access provided at a fixed location was previously notified and assessed by the Commission under case FI/2009/0986⁵. FICORA confirmed the geographic definition of the market according to the borders of the traditional operating areas of telecommunications operators. FICORA included in the relevant product and service markets all terminating segments of leased lines which begin and end in the operator's traditional operating area, irrespective of their transmission capacity and of the underlying technology. Connections that reach from one traditional operating area to another are regarded as backbone connections. FICORA identified 31 operators as having SMP in their respective operating areas and imposed on all SMP operators the following remedies: (i) obligation to provide line rental of a leased line; (ii) obligation to publish delivery terms and tariff information; (iii) obligations concerning pricing and other terms. The Commission had no comment.

The markets for wholesale local access provided at a fixed location and the market for wholesale central access provided at a fixed location for mass-market products were notified and assessed by the Commission under cases FI/2012/1328-1329⁶. The relevant products and services in the market for wholesale local access included copper and optical fibre loops, the local loop for parallel use (shared access), and connections implemented by means of a dedicated wavelength in optical fibre local loops. The central access market included DSL and Ethernet wholesale products, as well as self-supplied cable. The relevant geographic markets were regional for both

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 295, 11.10.2014, p. 79.

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ C(2009)8528.

⁶ C(2012)4264.

markets, defined taking the municipalities as starting point for the geographic delineation of the markets. FICORA identified 111 regional markets.

In the market for wholesale local access FICORA designated 27 operators as having SMP in all the 111 regional markets, while in the market for wholesale central access, FICORA proposes to designate 27 operators as having SMP in 104 regional markets, whereas the remaining 7 markets were considered to be competitive. The SMP operators were grouped on the basis of their combined market share at wholesale and retail level.

As regards remedies FICORA proposed in the market for wholesale local access to impose on 8 of the SMP operators the following remedies: (i) access; (ii) transparency obligation; (iii) non-discrimination; (iv) obligation concerning pricing including cost orientation for fibre without any price caps and price caps for the monthly rental of copper loops; (v) cost accounting obligation. In the market for wholesale central access FICORA imposed on all the SMP operators the following obligations: (i) access; (ii) transparency; (iii) non-discrimination. The above-mentioned obligations were applied only with regard to wholesale broadband services above 8 Mbit/s.

The Commission commented on the inclusion of cable in the market definition and absence of defined migration rules and decided to open a second phase investigation on several other issues. The Commission, in particular, had serious doubts regarding the non-imposition of an appropriate price control for fibre infrastructures in the market for wholesale central access. In the Commission's opinion FICORA's approach would have put SMP operators, without a proper regulation, in a position to charge access rates at excessive levels. Moreover, a disputed rate could have significantly delayed market entries. As regards the non-imposition of a price control obligation for copper and fibre infrastructures in wholesale central access market the Commission underlined that, given that the remedies in the upstream market were still not properly functioning (as evidenced by excessive LLU prices), the lack of price-related obligations may indeed have incentivised SMP operators to abuse their market power by charging excessive wholesale prices for bitstream services or applying a margin squeeze. The Commission questioned as well the lack of price control for copper based local loop unbundling services for 19 SMP operators, arguing that even in small markets SMP operators are incentivised to exploit their market power at the expense of their actual or potential competitors. Finally, the Commission also expressed serious doubts on the lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s. The different treatment of lower speed broadband access within the boundaries of the same product market might result in a different treatment of operators seeking access to lower and higher speed connections, which might result in a distortion of competition. In view of the above, the Commission stated that FICORA's proposed regulation did 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. At the end of the second phase investigation the Commission adopted a recommendation asking FICORA to amend or withdraw the proposed draft measures.

2.2. Market definition

2.2.1. *Market for wholesale high-quality access provided at a fixed location.*

FICORA includes in the product market high-quality access provided at a fixed location with either SDH/PDH or Ethernet. Such access can be provided over copper networks, fibre networks or radio links. As regards the geographic definition of the market, FICORA confirmed the segmentation of the market into different areas, but differently from the previous market analysis, in the current notification it proposes to use municipalities as geographic unit.⁷ As a result, 89 relevant geographic wholesale markets are defined.

FICORA observes that, although the market position of the SMP operators have not changed significantly and the market shares remain still above 50% in many geographic areas, compared to the previous market analysis there are now several competing undertakings in the market for high-quality access at a fixed location in some geographic areas. The development of competition assessed by FICORA is such that 32 areas out of 89 are considered to be competitive in the current market analysis.

2.2.2. *Market for broadband services at retail level*

FICORA starts its analysis assessing the competition conditions in the markets for broadband services at retail level. It observes that the competitive pressure coming from mobile devices has significantly increased in recent years⁸, however, the tendency in the Finnish retail markets is to use mobile devices as complementary to fixed broadband connections. XDSL remains the most commonly used broadband service technology. However, the number of xDSL subscriptions has decreased progressively⁹, while the number of other broadband technologies has increased¹⁰. Subscriptions are, however, generally

⁷ The criteria taken into account to define the geographic markets are: (i) municipalities form a physically homogenous geographic market area; (ii) the number of undertakings in the market for high-quality access at a fixed location is more or less the same; (iii) in the municipalities within the market area the market leader is the same, with a market share of at least 50 per cent; (iv) the number of high-quality access lines at a fixed location owned by telecommunications operators in the area is sufficiently large to prevent regulation of the areas in excessively small detail.

⁸ In particular, data transferred over the mobile networks has nearly doubled every year in Finland due, in particular, to the fact the mobile subscriptions have unlimited data transfer volumes and the high coverage of new networks. LTE currently covers 76% of households.

⁹ From 2011 to the middle of 2016, the number of xDSL subscriptions decreased by 29%. In particular, the number of ADSL subscriptions decreased by 40%, while the number of VDSL subscriptions increased by 220%. Despite the significant increase, VDSL subscriptions have only partly replaced services offered on older copper technologies, which were replaced as well by services offered on broadband technologies other than copper. It is worth noting that in the recent years many traditional telecom operators have dismantled copper networks in sparsely populated areas which has reduced the availability of ADSL services.

¹⁰ In 2016, of all retail subscriptions 46% were xDSL, 24% were cable (including DOCSIS 3.0), 23% were Ethernet, 6% FTTH, 0.2% were wireless fixed access subscription, and 0.1% other technologies. In particular, since 2011 Ethernet subscriptions have increased by 220% and in the same period FTTH subscriptions have increased by 140%.

priced according to quality and not on the basis of the underlying technology¹¹. FICORA observes a positive trend in the availability¹² and in the number of subscriptions of high speed broadband. As a consequence, subscriptions of less than 10Mbit/s represent only 20% of all subscriptions while their corresponding figure was 60% in 2011. FICORA notes, furthermore, that already at retail level it is possible to observe a significant variation of the competition conditions between different geographic areas having regard, in particular, to the market shares of the different operators.

2.2.3. *Market for wholesale local access provided at a fixed location*

FICORA includes in the relevant market: (i) copper and fibre local loops; (ii) copper and fibre sub-loops; (iii) shared access to a local loop; (iv) VULA products on copper and optical fibre networks¹³.

As regards the definition of relevant geographic markets, FICORA confirms the segmentation of the market into different areas and proposes to use municipalities as geographic units aggregating them in areas with homogenous characteristics¹⁴. On this basis FICORA has defined 150 separate regional geographic markets.

FICORA's analysis of the trends on the market indicates that the number of local loops has decreased by 38% compared to 2010¹⁵. While the majority of local loops are still based on copper¹⁶, the proportion of fibre local loops is

¹¹ Prices are homogeneous in the geographic area of reference. In 2016 the prices for subscriptions between 10Mbit/ and 30Mbit/s, which represented 55% of all subscription, were €47.90 for DNA, €26.90 for Elisa, and €29.90 for Telia on copper, and €24.90 for Telia on fibre. Prices for subscriptions with the highest speed of 100Mbit/s, which represented 25% of all subscriptions, were €34.90 for DNA on cable and €55 for DNA on fibre, €39.90 for Elisa and €39.90 for Telia.

¹² At the end of 2015 about 52% of household could have access to a fixed broadband subscription of 100 Mbit/s and about 58% of household could have access to a subscription of 30Mbit/s.

¹³ According to FICORA a VULA product with certain technical characteristics could be considered as a substitute for copper and fibre local loops. VULA products are not yet offered on the market, however, where FFTC solutions or vectoring have already been implemented in copper networks, active network devices have been upgraded so that they support the supply of VULA. FICORA has not yet considered whether a further ex-ante regulation regarding details of the product characteristics need to be adopted.

¹⁴ The municipalities are aggregated according to the following cumulative criteria: i) municipalities form a physically homogenous geographic market area; (ii) measured by the number of local loops, the market share of the area's market leader in municipalities in that area is nearly identical, and the market leader is the same in these municipalities; iii) the number of competing telecommunications operators that own local loops in municipalities included in the area is nearly identical.

¹⁵ FICORA ascribes this development to the decrease in the number of ADSL subscriptions and the dismantling of copper networks by some telecommunications operators in particular where copper networks have not been replaced by fibre networks.

¹⁶ According to FICORA, 87 % of local loops are using copper and 13% fibre. In 2010, the corresponding figures were 98 % and 2%, respectively.

increasing as a result of fibre networks roll out. However, the largest part of local loops is used by telecom operators for self-provisioning¹⁷.

2.2.4. *Market for wholesale central access provided at a fixed location for mass-market products.*

The product market for central access includes: (i) bitstream products offered on copper and fibre networks; (ii) self-supply of cable networks.

The cable networks have been mainly developed by telecom operators in areas where they already had an SMP position in the broadband market through their copper networks. While currently there are no wholesale products offered over cable networks, FICORA recognises that even if it is technically possible to implement a wholesale product comparable with the product delivered over copper or fibre networks, given its technical characteristics the cable product would not be commercially profitable.¹⁸ However, FICORA acknowledges that broadband services offered over cable networks represent currently the most significant alternative for broadband services offered over copper and fibre networks at retail level, and therefore they exert an indirect constraint to be taken into account when assessing, in particular, the competitive conditions on the markets.

FICORA observes that the number of leased bitstream products has continued to decrease since the last market analysis¹⁹ and it expects this trend to continue in the near future. The decrease concerns, in particular, copper products that have been partially replaced by fibre products²⁰. Bitstream products delivered over fibre have so far been increasing very slowly even though there is a clear growing demand for these products on the market. In FICORA's opinion this is due mainly to the high wholesale prices for the fibre local loops.

The relevant geographic market for bitstream products is defined in accordance with the geographic market for the local access market.

¹⁷ At the end of 2015, approximately 16% of all copper local loops and 11% of all fibre local loops were leased out to others. The percentage varies significantly for the regional operators which sell around 61% of their capacity.

¹⁸ In particular, FICORA points out that for an alternative operator it would be economically feasible to purchase a wholesale cable product only in case he would be able to offer it to a large number of customers and divide its frequency range between them.

¹⁹ Since the end of 2010 the number of leased lines products has decreased by 43%. Large telecom operators sold 78% of the products, small operators 8%, regional operator 2%, and others 2%.

²⁰ The increase of the fibre offer is due in significant part to regional operators which sell 3000 out of 4300 of the bitstream products provided over fibre.

2.3. Finding of significant market power

2.3.1. Market for wholesale high-quality access provided at a fixed location

FICORA has assessed the markets in the different geographic areas taking into account not only market shares²¹, but also potential competition, vertical integration and negotiating power as well the impact of the terms and conditions of broadband State aid rules on the exercise of market power.

FICORA observes that the demand for higher capacity is growing on the market and at the same time the number of leased lines increased slightly²².

As a result 18 operators are proposed to be designated as having SMP in their respective markets areas.

2.3.2. Market for wholesale local access and Market for wholesale central access provided at a fixed location.

FICORA proposes to designate 21 operators with significant market power in 131 markets for local access and 21 operators with significant market power in 127 markets for central access. The criteria used by FICORA are *inter alia*: market shares, not easily replicable infrastructure, countervailing buyer power, and high entry barriers. As regards price behaviour FICORA observes that the prices of copper products have remained in most cases stable over the past years notwithstanding the lack of an imposed price cap, while the prices for fibre have been set at a level significantly higher compared to the level calculated on the basis of the LRIC+ model²³. The reported copper price stability arises in a context where the SMP operators have been subject to a general obligation of cost orientation, and the prices cited are therefore not commercial prices, but represent rather operator estimates of their cost-based price which have been notified to FICORA and accepted under a non-objection procedure.

The largest operators on the market are Elisa Corporation, DNA Plc, and Telia Finland, the remaining telecom operators are small operators belonging to the Finnet Association²⁴. However, all the traditional telecom operators are

²¹ The market shares of the SMP operators in the different geographical areas vary between 50% and over 90%.

²² At the end of 2015, over 22% of high-quality access lines had been leased out compared to 20% in 2008. It is still more common to hire leased lines than local loops, for example.

²³ FICORA observes that for certain operators the wholesale prices are even four times higher than the cost oriented level calculated on the basis of the LRIC+ model.

²⁴ In 2016 the markets share at national level calculated on the basis of broadband subscriptions were for Elisa Corporation 34 %, for Telia Finland 30%, and for DNA Plc 25% . The combined market share of the Finnet Association's companies was 12%, while other telecommunications operators had 4%. In terms of local loops available, the three main operators accounts for 94% regarding copper loops and 12% regarding fibre loops, while in terms of bitstream connections leased they account for 78%. In addition to traditional telecom operators and regional network operators some utility companies have entered the market as well.

vertically integrated operators and own copper and fibre networks and some of them have developed cable networks as well²⁵.

FICORA observes that over the past ten years, in different parts of Finland, cooperatives and municipal companies have been established and have rolled out fibre networks mainly in areas with low population density. These regional network operators follow in most of the cases an open access model. Moreover, given that the majority of them have received State aid to build fibre networks they are subject to the obligations set for state aid²⁶. FICORA states that regional network operators do not have any position of significant market power in the local and central access markets²⁷. In FICORA' opinion this is mainly due to the fact that they aim to promote competition in retail services over in their networks in order to provide customers with reasonably priced and high-quality retail services. Therefore, FICORA argues that their competitive behaviour differs significantly from the traditional, vertically integrated telecommunications operators, which aim normally to maximise returns.

2.4. Regulatory remedies

2.4.1. Market for wholesale high-quality access provided at a fixed location

FICORA proposes with regard to all 18 SMP operators to maintain the set of remedies imposed in the previous market analysis: (i) access; (ii) transparency; and (iii) non-discrimination²⁸.

2.4.2. Market for wholesale local access provided at a fixed location

According to FICORA there is a need to reinforce the remedies previously imposed on the three major operators²⁹. In particular, FICORA proposes to impose the following remedies: (i) access to the local loop, sub-loop and shared access both for copper and fibre, including services and facilities; (ii)

²⁵ The following operators offer broadband subscriptions over cable: Elisa Corporation, DNA Plc, Telia Finland, Blue Lake Communications, Kaisanet, Lounea, Mikkelin Puhelin and Vakka-Suomen Puhelin. They have developed the cable network mainly in their SMP geographic area but also in geographic areas where a different operator has SMP.

²⁶ In accordance with the legislation on supporting broadband investments in rural areas (1186/2009), the operators which have received State aid to roll out fibre are obliged to provide access to the network at a reasonable price and with non-discriminatory terms.

²⁷ Most of the regional network operators have built their network in scarcely populated areas where other operators have SMP. FICORA observes that some of them have significantly increased their market shares, but FICORA considers nevertheless that such increase is not sufficient to designate them as SMP operators.

²⁸ These obligations do not apply to networks for which the operators have received or will receive government broadband State aid. In this case the obligations set when the State aid is granted will apply usually for the duration of seven years. Once these obligations are expired the SMP obligations will apply.

²⁹ Namely: DNA Plc , Elisa Corporation and Telia Finland.

virtual unbundled local access (VULA)³⁰; (iii) obligation to terminate fibre local loops³¹; (iv) non-discrimination³² and technical replicability, including KPIs; (v) transparency and (vi) cost accounting.

The scope of the VULA obligation is limited as a VULA product is not foreseen to be provided on fully fibre-based networks, including PON networks. In this respect, FICORA argues that on the fibre networks there is no change taking place which would harm the competitors.

As regards the price obligation FICORA proposes to impose a cost orientation with a price cap set on the basis of a LRIC+ model for fibre products and fair and reasonable prices for VULA³³. Concerning the price control of services provided over the copper infrastructure FICORA argues that there is no evidence of operators' market behaviour which would need to be addressed by imposing a price control for copper services. In particular, FICORA argues that the copper prices currently applied are stable and below the prices calculated on the basis of the LRIC+ model and, moreover, there is a clear decreasing trend in the number of services provided over copper (both at wholesale and at retail level).

As regards the 18 small operators, FICORA proposes, following a proportionality assessment³⁴, to impose the following remedies: (i) access to the local loop, sub-loop and shared access both for copper and fibre, including services and facilities; (ii) virtual unbundled local access (VULA)³⁵; (iii) obligation to terminate fibre local loops; (iv) non-discrimination of price terms and conditions; (v) transparency; (vi) the obligation to offer VULA services at fair and reasonable prices.

³⁰ Operators are obliged to offer VULA in case of: (a) changes in the multiplexing areas of their copper network by dividing these into smaller areas, for example, by building networks using the FTTC/VDSL technology, and/or (b) implementation of vectoring on copper sections of its network..

³¹ Operators are obliged to fulfil reasonable requests regarding access to fibre local loops in situations where fibre local loops have been built, but they have not yet been terminated or connected throughout the whole length of the cable.

³² The obligation of non-discrimination includes prices, terms and conditions. The application to apply non-discriminatory prices requires that SMP operators price their wholesale products at such a level that an equally efficient operator buying these products could offer related retail services at a profitable rate.

³³ According to FICORA a fair and reasonable price for VULA services corresponds to the price applied for copper services.

³⁴ FICORA argues that the differences between large operators and small operators are such that the imposition of the same obligations would be not justified and proportionate. The three larger operators account for 90% of the turnover of the fixed networks and cover 90% of the population in Finland. Moreover, small operators are small enterprises that range from 8 to 263 employees.

³⁵ See footnote 30 for the scope of VULA obligations.

2.4.3. *Market for wholesale central access provided at a fixed location for mass-market products*

In the market for wholesale central access FICORA proposes to confirm the remedies already imposed on the three main operators: (i) to provide access to bitstream services; (ii) transparency and (iii) non-discrimination in terms of prices, terms and conditions.

As regards the 18 small operators FICORA proposes to impose only the following obligations: (i) provide access to bitstream services and (ii) transparency. FICORA proposes to withdraw the obligation of non-discrimination previously imposed as it is considered no longer necessary to promote competition and remove barriers to competition in the central access market³⁶.

3. ASSESSMENT

The Commission has examined the notification regarding market for wholesale high-quality access provided at a fixed location in Finland and the additional information provided by the NRA and has no comments.³⁷

The Commission has examined the notifications regarding markets for wholesale local and central access in Finland and the additional information provided by FICORA and has the following comment.³⁸

1. SMP Designation

Non-designation of regional operators as having SMP in markets 3a and 3b

The Commission observes that regional network operators have rolled out fibre networks and some of them have significantly developed their market position in their areas of operation. Many of these operators are not offering services on the retail market, but they are active at wholesale level in areas where there are no alternative networks. FICORA states that regional network operators, even when they have significant market shares, do not have significant market power on the local and central access markets. This conclusion is mainly based on the assumption that these operators are either cooperatives or municipal companies and that their behaviour on the markets differs significantly from the traditional, vertically integrated telecommunications operators. While the latter aim normally to maximise their profits, regional network operators aim, in FICORA's view, to promote retail competition and to provide customers with reasonably priced and high-quality retail services.

The Commission considers that the existence of significant market power is a distinct question from that of how such power is exercised, or could be foreseeably

³⁶ FICORA has reached this conclusion mainly considering the decreasing trend in the market for wholesale bitstream products which since the end of 2010 has fallen by 43% and the fact that the 18 smaller SMP operators accounted for only 8% of all broadband products.

³⁷ In accordance with Article 7(3) of the Framework Directive.

³⁸ In accordance with Article 7(3) of the Framework Directive.

exercised, in the absence of regulation. In particular, the legal status of regional network operators or the question by whom these operators are controlled is irrelevant for the existence of significant market power.

The logically subsequent question of possible abuse of market power is better addressed in considering the need for and appropriate scope of any regulatory remedies. The Commission acknowledges that the majority of these operators have received State aid to build fibre networks and therefore are obliged to provide access to their network at a reasonable price and with non-discriminatory terms. Moreover, those which pursue a purely wholesale business model give rise to fewer competition risks, for example as regards discrimination, and are likely to have a stronger interest in market penetration by their various wholesale customers, especially in the current initial deployment phase, thus justifying a less interventionist supervision model to guard against excessive pricing.

However, the Commission considers that FICORA's broad conclusion regarding the inappropriateness of ex ante regulation of cooperative or municipal network providers, irrespective of the business model or of State Aid conditionality, should be further substantiated with an analysis of the actual market behaviour, investigating, in particular, prices and conditions of access granted by regional operators, as it cannot be excluded that they exert a certain market power in the areas where they have reached already a significant market position.

2. Remedies

Furthermore, following the examination of the notification, the Commission considers that the notified draft measures fall under the Commission's powers of ensuring the consistent application of remedies as set out in Article 7a of the Framework Directive, as the notified measures aim at imposing obligations on undertakings in conjunction with Articles 9 to 13 of the Access Directive³⁹.

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 the ability to access crucial network bottlenecks to serve end-users. Consequently, such draft measures may affect the patterns of trade between Member States in a manner which might create a barrier to the single market⁴⁰.

The Commission has serious doubts as to the compatibility with EU law of FICORA's draft measures concerning the ability of alternative operators to obtain local and central access provided at a fixed location in Finland in its current form, in particular with the requirements referred to in Articles 8(4) and 10, 12(1) and (2), and 13 of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive.

³⁹ 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

⁴⁰ See Recital 38 of the Framework Directive.

On the basis of the notification and the additional information provided by FICORA, the Commission has serious doubts in this regard for the following principal reasons:

Uncertainty regarding wholesale access price developments in market 3a and 3b

Lack of appropriate price control for copper infrastructures and for VULA in market 3a

The Commission underlines that obligations imposed on SMP undertakings under Article 16(4) 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 the Article 8 of the Framework Directive.

In its market analysis FICORA has determined that the copper infrastructure still plays an important role, as approximately 87% of all local loops in Finland are based on the copper infrastructure. Similarly, at the wholesale level, the large majority of unbundled local loops is copper-based (91%), while only 9% of all unbundled loops are based on fibre. Despite the continued centrality of the copper infrastructure, FICORA proposes to withdraw the cost orientation obligations imposed on the three large SMP operators with regard to the copper-based infrastructure, providing for non-discrimination including non-price-discrimination. Similarly, wholesale local access products in the networks of the 18 small SMP operators will be subject exclusively to non-discrimination.

With regard to pricing, in its previous regulatory decision FICORA obliged the undertakings to apply cost oriented prices, without setting a pre-determined price cap (i.e. ex-post price control). In this context, FICORA observed that since 2013 the wholesale monthly rental fees of copper local loops increased in the networks of the 3 large operators by up to 20%⁴¹. Such price increases have been proposed by SMP operators, based on their own calculations, which were not subsequently challenged by FICORA.⁴²

Such a significant price increase, following the last market review, does not appear to indicate that the market has found a stable, commercially driven price equilibrium that is durable even in the absence of any regulatory obligations as regards wholesale prices. On the contrary, this price development appears consistent with a continued ability and incentive of SMP operators to raise prices up to the perceived limits of the then applicable, ex post pricing supervision regime, and the stability observed after 2013 is likely also to reflect the constraints of a regime whereby any subsequent price rises would also have had to be notified to and approved by FICORA. Thus, unlike a situation where freely negotiated agreements on reasonable commercial terms with wholesale access seekers could be assessed as reducing or

⁴¹ For Elisa the monthly rental fee increased from €10.69 to €12.80; for Telia from €12.40 to €13.99; and for DNA from €12.10 to €14.90. On top of the monthly rental fees a one-off activation fee is charged (by Elisa €75.00, by Telia €70, and by DNA €81).

⁴² Moreover, taking into account the one-off installation charges, FICORA itself calculated the monthly wholesale fees over a period of 12 months at the level of €19.05 (Elisa), €19.82 (Telia) and €21.65 (DNA), and did not challenge such wholesale fees, which are significantly higher than those in other EU countries.

negating the need for regulatory intervention, the current market situation in Finland does not seem to give sufficient assurances of the lack of necessity of price controls on SMP operators' copper networks.

The Commission notes FICORA's argument against imposing cost orientation, namely the fact that the currently observed monthly rental prices for the local loop are still below the costs resulting from FICORA's LRIC+ model, as well as the fact of decreasing importance of copper infrastructure. The Commission further acknowledges that FICORA will actively monitor the development of prices of copper loops and will intervene if necessary.

However, the Commission considers that the proposed remedies are insufficient to prevent the SMP operators from increasing their local access prices, also beyond the modelled LRIC+ levels. In view of the information submitted by FICORA, SMP operators have also in the past increased local access prices and there is no reason to believe that operators will not do so in the future, potentially even (considerably) beyond the level of FICORA's own LRIC+ model, in the absence of any price control obligation.

The Commission considers that neither has FICORA presented any evidence as to the constraints exercised by alternative infrastructures (some of which, i.e. certain cable networks, are controlled by the SMP operators themselves), nor will the limited proposed remedies on the downstream market for wholesale central access be able to sufficiently constrain the SMP operators' pricing on the local access market.

Furthermore, the Commission notes that FICORA imposes for all operators only fair and reasonable pricing with regard to VULA services. According to FICORA's further explanations provided in the response to the request for information, "fair and reasonable" is to be understood as prices equal to the prices for wholesale copper based local loops. The Commission considers that in conjunction with the lack of appropriate regulation, or other constraints, on the pricing of the copper local loops, such a fair and reasonable pricing obligation linked to the copper price applied in the wholesale market is likely to be insufficient to ensure stable, predictable, and appropriate VULA prices.

The Commission recognizes FICORA's intention to secure access prices at their current level which are the result of the previous regulatory regime, and that it may regard the higher cost-oriented rates resulting from its new price control (LRIC+) model as having a destabilising effect on a market which is still at the early stages of the copper-fibre replacement and migration. However, in the view of the Commission, the lifting of price control altogether is, for the above reasons, unlikely to secure wholesale price stability. Moreover, the cost increase resulting from FICORA's cost model (as well as the significant difference in the cost estimates generated for different SMP operators across the country) seems likely to be attributable to a great extent to the fact that the model averages costs across areas with very different population densities, which are differently distributed in the different SMP operators' respective network coverage areas, and which are moreover subject to greatly varying likelihoods of unbundling by alternative operators. FICORA could have considered de-averaging of the local access rates

coming out of its LRIC+ model, resulting in lower rates closer to the current ones in those areas susceptible to copper loop unbundling.⁴³

The Commission therefore considers, at this stage, that FICORA has not set appropriate price control remedies, which would be able to constrain SMP operators from exploiting their significant market power in the market for wholesale local access.

In view of the above considerations the Commission considers, at this stage, that the lack of clearly defined prices for wholesale local access products, both physical as well as virtual, is not appropriate and in line with requirement expressed in Articles 8(4) and 13 of the Access Directive read in conjunction Article 16(4) and Article 8(5)a of the Framework Directive, as it does not promote regulatory predictability..

Appropriateness of cost methodology for fibre services in market 3a

FICORA observes that the number of wholesale local access services provided over copper networks are very high (87%), while the proportion of local loops provided over fibre networks is still low (i.e. 13%). In addition, FICORA argues that the prices for wholesale services based on fibre networks are high and are hindering the development and take-up of fibre.

The Commission notes FICORA's intention to impose a price control on services provided over fibre. However, the Commission underlines that it is important in order to promote efficient investment and innovation, in accordance with Article 8(5)(d) of Framework Directive, to allow those operators investing in NGA networks a certain degree of pricing flexibility. Where a NRA decides to regulate wholesale price for access to NGA infrastructures (which in most cases is yet to be built) it should appropriately reflect the costs of the roll out of such infrastructure. In the current case, where significant differences exist between relatively few urban areas and vast scarcely populated territories, FICORA's application of the BU-LIRIC+ model leads to significantly different wholesale prices for the three largest operators. This, incorrectly, assumes ubiquitous fibre presence (for the purpose of cost modelling), whereas it can reasonably be expected that the operators would target urban areas first and that a full fibre deployment throughout their respective network footprints will not be completed in the forthcoming market review period. FICORA's price setting approach leads to a situation where operators investing in areas of similar competitive characteristics (as to cost structure and retail price levels) would benefit from significantly different (regulated) wholesale tariffs for access. As result, such price control obligation could prevent operators from competing on a level playing field, instead of promoting efficiency and sustainable competition and maximise consumer benefits.

The Commission considers that in this specific situation a cost obligation like an ex ante Economic Replicability Test (ERT) could allow more price flexibility at wholesale level, while at the same time assuring a sufficient margin for access seekers. Where the ERT may lead to wholesale rates in scarcely populated areas

⁴³ In the alternative, and in line with the approach taken by the Dutch regulatory authority (see case NL/2015/1794), FICORA could have 'frozen' access prices at their current level in recognition of modelling difficulties and the overall objective to secure stable and predictable access prices for legacy infrastructures for as long as the underlying wholesale markets are deemed to be characterised by SMP..

which (due to national retail pricing) would potentially lead to the under-recovery of costs in those areas, operators could still address this by way of price differentiation on the retail market, if considered appropriate. Such price flexibility should be complemented with the reinforcement of the non-discrimination obligation and the imposition of technical replicability that FICORA is already proposing, as well as with stable and predictable copper prices.

The Commission recognizes FICORA's intention to significantly lower fibre access charges below their current level. The Commission believes that wholesale rates previously proposed as cost-oriented would not pass an ERT which builds on retail flagship products which have been chosen on the basis of their relevance for current and future competition, in recognition of their retail market shares in terms of volume. On the basis of the information provided by FICORA, fibre based *retail* products are currently priced significantly below current *wholesale* fibre access charges, which should in turn lead to significantly lower wholesale access charges compared to their current level. FICORA has, in any case, sufficient flexibility in its design of the ERT to safeguard fibre access charges which are particularly relevant for alternative operators and their specific customer focus at retail level.

The Commission considers, at this stage, that FICORA's proposed cost methodology and in particular its application is not appropriate and in line with the requirement expressed in Articles 8(4) and 13 of the Access Directive in conjunction 16(4) and Article 8(5)b of the Framework Directive, as it does not promote efficient investment and innovation.

Non-imposition of price control obligation in market 3b for copper and fibre lines

The Commission recalls that obligations imposed on SMP undertakings under Article 16(4) 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 that Article 8 of the Framework Directive.

FICORA proposes not to impose any price regulation on market 3b, both for large operators as well as for small operators. As regards the 3 larger SMP operators, FOCORA proposes to impose only the obligation to apply non-discriminatory prices, as part of the non-discrimination obligation. FICORA argues that there is no evidence of competition problems on the central access market that would justify the imposition of a price control obligation when this obligation was not even imposed previously. Moreover, FICORA points towards the decrease in the demand for wholesale central access.

Since no price control obligation is envisaged for market 3a for small SMP operators, and the price control for large operators in market 3a is limited to products offered on fibre networks, the Commission is concerned that the SMP operators would not be constrained in any way when setting their prices on the downstream wholesale central access services.

Moreover, FICORA ascribes the low take up of bitstream products implemented over fibre networks to the very high prices for the fibre local loops without submitting any other wholesale pricing information and price trends regarding the wholesale central access with its notification.

The Commission is of the view that in such circumstances, taking particular account of the lack of appropriate remedies in the wholesale local access market, SMP operators might abuse their market power by charging excessive wholesale prices for bitstream services or by applying a margin squeeze. Moreover the Commission notes that FICORA did not provide any further element, except for the decrease of numbers of lines, regarding the competitive market situation, to justify the lack of imposition of any price control on this market which was already the subject of the previous Commission recommendation⁴⁴.

The Commission points out as well that FICORA proposes to withdraw the non-discrimination obligation which was previously imposed on the small SMP operators in the market for wholesale central access. The non-discrimination obligation is considered to be to be an important remedy in order to ensure that alternative operator can have access to the wholesale product at the same terms and conditions. The Commission stresses that, particularly in conjunction with the lack of imposition of price control on small operators, both on wholesale local access and wholesale central access, the non-discrimination obligation would at least ensure some form of price control, namely in the form of non discriminatory pricing. The Commission, moreover, underlines that FICORA did not provide evidence on market developments which give grounds for the removal of the non-discrimination obligation (only) from the smaller SMP operators nor did FICORA assess how the removal of the non-discrimination obligation will affect the market. On the contrary, it underlines the importance of the bitstream products in order to promote competition on the broadband retail market, reduce the threshold for market entry and facilitate competition at network level.

Moreover, bitstream services are the only alternative for competitors to offer retail services, especially where the SMP operator uses PON technology, as is the case for many small SMP operators. The Commission considers that smaller SMP operators could still use discriminative practices with regards to bitstream services to protect their SMP area from competition, even towards large operators when they compete in the same area offering products at national level.

In view of the above considerations the Commission considers, at this stage, that the lack of price control obligation for wholesale central access products is not appropriate and in line with the requirements expressed in Articles 8(4) and 10 (non discrimination obligation), and 13 of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive and does not promote sustainable and effective competition, as required under Article 8(5)a of the Framework Directive

Non imposition of VULA in case of PON networks in market 3a

FICORA proposes not to impose the obligation to provide VULA services over networks based on PON technologies. In particular, FICORA argues that VULA has not been considered necessary in fibre networks as there was no change taking place which would negatively affect the competitors, as compared to the upgrade of copper networks. Moreover, FICORA points out that in PON networks the situation

⁴⁴ See footnote 7.

differs from upgraded copper networks, as unbundled services have not in practice been available in PON networks. FICORA has also taken into consideration that a VULA remedy in relation to PON networks would affect mainly the smaller operators and would not be proportionate.

The Commission acknowledges that at present PON networks account for only 2% of the fibre networks. However, the Commission points out that those NRAs have to take into account the principle of technology and service neutrality when imposing remedies. The Commission further recalls that the development of networks based on PON architecture may prevent physical unbundling or at least makes it financially unfeasible compared to other network topologies. As the access obligation is still considered appropriate and proportionate by FICORA, even for the small operators which have developed PON networks, the Commission underlines that a VULA product has been considered appropriate by many NRAs to respond to these competition problems and to avoid that bitstream would be the only option for competitors to access another operator's PON network. This is the case in Finland as well where in absence of an alternative access product in the wholesale local access market on PON networks, the only alternative to compete at retail level in the areas where the PON network topology has been deployed would be the use of a bitstream product. Moreover, the availability of a VULA services could ultimately promote the diversification of services and the increase of competition on the retail market. On the contrary, the non-imposition of VULA regarding certain network technologies gives an incentive to deploy a specific network technology to avoid regulation which goes against the objective to promote competition in a technologically neutral manner.

In view of the above considerations the Commission considers, at this stage, that the lack of availability of an access product on wholesale local access market is not appropriate and in line with requirement expressed in Articles 8(4) and 12(1) and (2) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive and does not promote and safeguard competition as required under Article 8(5)c of the Framework Directive.

Conclusions

The Commission has serious doubts that the draft measures notified by FICORA in its current form is – pursuant to Article 8(4) of the Access Directive – based on the nature of the problem identified, proportionate and objectively justified in the specific Finnish context and meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, in particular as regards the promotion of competition and of efficient investment in the interest of end users. In addition, based on the information currently available, the Commission has serious doubts that the draft measure is able to safeguard competition in the long term, as required by Articles 10, 12 and 13 of the Access Directive and can be considered to be appropriate in light of Article 16(4) of the Framework Directive.

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 measures concerning the markets for wholesale local access and

wholesale central access provided at a fixed location for mass-market products in Finland shall not be adopted for a further three months.

Pursuant to Article 7(7) of the Framework Directive, FICORA may adopt the draft measure to the extent only concerning the wholesale high-quality access provided at a fixed location in Finland, and, where it does so, shall communicate it to the Commission.

Pursuant to Recital 17 of Recommendation 2008/850/EC⁴⁵, 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 Commission⁴⁶ 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,
Margrethe VESTAGER
Member of the Commission

⁴⁵ 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.

⁴⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.