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COMMISSION RECOMMENDATION

of 18.10.2012

in accordance with Article 7a 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") in

Cases FI/2012/1328-1329: Markets for wholesale physical network infrastructure access at a fixed location and wholesale broadband access

Only the Finnish version is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to 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")¹ and in particular Article 7a thereof,

Having regard to the opinion of the Body of European Regulators for Electronic Communications (BEREC)²,

Whereas:

1. PROCEDURE

- (1) From 15 February 2012 to 16 March 2012 (for submissions in Finnish) and to 20 April 2012 (for submissions in Swedish) the Finnish national regulatory authority, Viestintävirasto (FICORA), held national consultations³ concerning the markets for physical network infrastructure access (market 4) and wholesale broadband access⁴ (market 5) in Finland.

¹ 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 Opinion of BEREC of 27 July 2012, BoR(12)72, published at http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/

³ In accordance with Article 6 of the Framework Directive.

⁴ 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.

- (2) On 18 May 2012, the Commission registered a notification from FICORA⁵, concerning the above-mentioned markets 4 and 5 in Finland.
- (3) On 31 May 2012, a request for information⁶ was sent to FICORA and a response was received on 5 June 2012.
- (4) On 18 June 2012, the Commission informed FICORA and BEREC of the reasons why it believed that the draft measures would create a barrier to the internal market and its serious doubts as to their compatibility with EU law (Serious doubts letter)⁷.
- (5) The Commission did not receive any third party observations⁸.
- (6) On 27 July 2012, BEREC delivered its opinion to the Commission⁹.
- (7) On 5 September 2012, a meeting between FICORA, BEREC and the Commission took place in order to identify the most appropriate and effective measure¹⁰ to address the Commission's serious doubts.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Market definition

- (8) As regards market 4 the relevant products and services 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 the equipment necessary for use of the local loop.
- (9) As to 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.
- (10) The relevant geographic markets, as defined by FICORA, are regional for both markets 4 and 5. The Finnish regulator identifies 111 regional markets¹¹.

⁵ 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.

⁶ In accordance with Article 5(2) of the Framework Directive.

⁷ In accordance with Article 7a(1) of the Framework Directive.

⁸ In accordance with Article 7a(2) of the Framework Directive.

⁹ In accordance with Article 7a(3) of the Framework Directive.

¹⁰ In accordance with Article 7a(4) of the Framework Directive.

¹¹ FICORA has defined the relevant geographic markets primarily based on municipal-level information. FICORA has used the following cumulative criteria when defining the relevant geographic markets on the basis of all 336 municipalities: i) the municipalities together make up 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

2.2. Finding of significant market power

- (11) As regards market 4 the regional markets are divided by FICORA into two groups. In group 1, the largest operators have market shares above 50% 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 market shares above 50% in markets 4 and 5 and 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 operators with market shares above 50% only in market 4, and shares below this threshold are found in market 5 and at retail level.
- (12) Against this background, in market 4 FICORA proposes to designate 27 operators (belonging to groups 1 and 2 as described above) as having SMP in all 111 regional markets. In addition to the market shares analysis, FICORA considered other criteria i.e. (i) price developments¹²; (ii) potential competition¹³; (iii) countervailing buying power; (iv) size of the operators; (v) the management of hard-to-reproduce infrastructure; (vi) technological advantage or superiority; (vii) ease of access or privileged access to capital markets and sources of funding; and (viii) diversity of products/services.
- (13) As regards market 5, 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 developments¹⁴; (ii) potential competition¹⁵; (iii) countervailing buyer power; (iv) size of the operators; (v) the management of hard-to-reproduce infrastructure; (vi) technological advantage or superiority; (vii) ease of access or privileged access to capital markets and sources of funding; and (viii) diversity of products/services.

2.3. Regulatory remedies

number of competing telecommunications operators owning their own local loops in municipalities belonging to the area is more or less equal (± 1 telecommunications operator).

¹² FICORA observes a decrease of prices for copper LLU, whereas fibre unbundling costs have increased.

¹³ According to FICORA, the established operators are able to retain their own market power, as they can take advantage simultaneously of both metallic conductors and fibre-optic implemented interfaces.

¹⁴ The prices of wholesale broadband products vary widely 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.

¹⁵ 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 telecom operators, and therefore an indirect price restriction for the pricing of wholesale broadband services.

- (14) As regards market 4 FICORA intends to impose the following obligations on 8 operators¹⁶ 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. obligation 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 fibre¹⁷ but without any price caps and
 - price caps¹⁸ for monthly rental 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. obligation to publish delivery terms and tariff information (for copper and fibre loops);
 - non-discrimination (for copper and fibre loops).
- (15) FICORA does not intend to impose any price caps with regard to fibre loops, as such price caps, in its interpretation of the Finnish Communications Market Act, can only be imposed in exceptional cases, i.e. when the price charged for the access rights clearly exceeds the general price level or when 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 identified in market 4.
- (16) With regard to access to passive infrastructure, FICORA explained in its response to the Commission's request for information that access to ducts is not proposed

¹⁶ 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.

¹⁷ FICORA did not set any method for determining 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 an ex-post perspective.

¹⁸ According to the Finnish Communications Market Act, the price cap is to be specified in such way that it is cost oriented. Cost orientation is defined such 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".

because 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.

- (17) FICORA did not lay down any rules for the migration from copper to fibre loops in its draft measures.
- (18) As regards 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.
- (19) The above-mentioned obligations will apply only with regard to wholesale broadband services above 8 Mbit/s¹⁹. Further to that, FICORA did not provide any justification as to why it considers it proportionate and justified not to impose price control remedies in market 5.
- (20) Moreover, FICORA did 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-discrimination²⁰ obligation which would allow drawing inferences about equivalence of access and its impact on competition.

3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE ARTICLE 7a PROCEDURE

- (21) The Commission expressed serious doubts as to the compatibility of the draft measure with EU law, in particular as regards compliance with Article 8(4) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive.

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

- (22) The Commission pointed out that remedies imposed on SMP undertakings under Article 16 of the Framework Directive in conjunction with Article 8(4) of the Access

¹⁹ According to FICORA, mobile data transfer services as well as wireless broadband subscriptions, which provide retail internet access services up to 8 Mbit/s can be considered as partial substitutes vis-à-vis broadband and fibre-based connections.

²⁰ 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 the non-discrimination obligation (e.g. the existence of mechanisms ensuring Equivalence of Access monitored by Key Performance Indicators)

Directive²¹ should be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8.

- (23) In this regard, the Commission pointed out that, with a view to ensuring correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework it had adopted the NGA Recommendation based on Article 19 of the Framework Directive to further the achievement of the objectives set out in Article 8 of that Directive. The NGA Recommendation sets out a consistent approach that the NRAs should follow regarding regulation of markets 4 and 5. In this regard, the Commission recommends that NRAs should ensure that access remedies are imposed where SMP is found on these markets, and such access should normally be granted at cost-oriented prices²².
- (24) While the Commission recognised that the NRAs have a certain margin of discretion, which allows them to take into account national circumstances, the Commission underlined 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.

Non-imposition of price cap in market 4 for fibre lines

- (25) The Commission took 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. At the same time, FICORA already acknowledged that current prices for fibre local loops are high and hinder competition²³. 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, the Commission observed that those operators who would normally immediately obtain access to regulated fibre-based products, might choose to open dispute settlement procedures (delaying the price implementation) or wait for FICORA's intervention. In both scenarios market entries could be significantly delayed.
- (26) The Commission did 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 problem, as FICORA itself concluded that it had not been able to do so in relation to the copper infrastructure. Moreover, FICORA stated that currently the overall cost for using the fibre loop was almost 16 times higher than the overall cost for copper loops. The Commission was concerned that such a striking difference in copper and fibre prices would have a negative impact on the take up of NGA networks.

²¹ 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 (Access Directive) as amended by Directive 2009/140/EC.

²² See Recommends 25 and 35 of the NGA Recommendation.

²³ 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.

- (27) The Commission also expressed serious doubts that FICORA's approach did not appear to be in line with Article 8(5)a of the Framework Directive as it did not promote regulatory predictability. Based on FICORA's proposal, access seekers might suffer from lack of certainty resulting from unstable, not clearly regulated prices, subject to arbitrary decisions of SMP operators. The Commission recommends²⁴ that the price of fibre unbundling services should be set based on cost oriented prices, unless the derogation foreseen in Recommend 22 of the NGA Recommendation applies. However, the Commission noticed that FICORA did not evoke 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

- (28) The Commission reiterated 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.
- (29) In this regard, the Commission expressed serious doubts with regard to the non-imposition of price control for copper lines in market 5 since both copper and fibre technologies belong to the same market and face similar competition problems, and should hence be regulated in a technologically neutral manner. The Commission was of the view that, bearing in mind that market 4 remedies were still not properly functioning (as evidenced by excessive LLU prices), in the absence of price-related obligations in the downstream wholesale market, SMP operators might abuse their market power by charging excessive wholesale prices for bitstream or by applying a margin squeeze.
- (30) The Commission concluded that the lack of clearly pre-defined, regulated prices did not promote regulatory predictability as prescribed under Article 8(5)a of the Framework Directive, and might significantly delay market entries.

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

- (31) FICORA does not propose to regulate prices for access to copper-based local loops of 19 SMP operators. The Commission acknowledged that these 19 SMP operators provide only a small part of wholesale services in comparison with the 8 operators covering 93% of the Finnish population. However, the Commission also pointed out that the size of the market and limited customer base should not be considered as a basis for relaxing remedies, as small but strong (on a local scale) incumbents, that are not constrained by alternative operators, can also exploit their market power at the expense of their actual or potential competitors.
- (32) Moreover, having in mind that no price control obligation is envisaged for market 5 for these 19 operators, the Commission was concerned that these 19 operators would not be constrained in any way when setting their prices for both wholesale infrastructure and broadband access services.

²⁴ Recommend 25 and Annex 1 of the NGA Recommendation.

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

- (33) FICORA considers that, in market 5, 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 justified this 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 level²⁵.
- (34) The Commission noted 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 to lower and higher speed 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 on lower speed lines, the Commission reiterated that the existence of SMP warrants at least some appropriate regulatory obligations as prescribed by Article 16(4) of the Framework Directive.
- (35) Similar competitive conditions usually lead to identification of similar competition problems. Therefore any deviation within a defined relevant market needed to be carefully substantiated by FICORA - 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. The Commission however suggested that, if the competitive conditions vary between the two identified segments of the market (i.e. below and above 8 Mbit/s), FICORA could have alternatively, on the basis of principles of competition law, addressed these differences at the stage of the market analysis and SMP assessment.

4. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES

4.1. Observations submitted by third parties

- (36) On 27 April 2012 the Commission posted a notice on its website inviting third parties to submit observations on the Commission's Serious doubts letter.
- (37) The Commission did not receive any observations from interested parties.

4.2. BEREC's opinion

- (38) On 27 July 2012 BEREC provided its opinion on the Commission's serious doubts.
- (39) As regards the non-imposition of the appropriate price control (price caps) for fibre infrastructure in market 4, BEREC agreed with the Commission that the only remedy that can directly target excessive prices at the wholesale level is cost orientation with a price cap. It added that there are also indications of price squeeze, since the retail price of a fibre based broadband connection is significantly lower than the price of a

²⁵ In its reply to the request for information FICORA explained 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 explained that there is clear evidence of substitution between slower fixed broadband and mobile data-transfer subscriptions.

fibre local loop. BEREC explained that even though FICORA acknowledged this, it was not in a position to impose price caps due to the way the Regulatory Framework had been implemented into Finnish law.

- (40) BEREC also shared the Commission's serious doubts as regards the non imposition of the price control obligation in market 5.
- (41) With regard to the lack of price control for copper based local loop unbundling services for 19 SMP operators, BEREC concluded that the information at hand was insufficient to come to a conclusion on this issue, as it could not understand FICORA's motives and hence express its opinion.
- (42) As regards the lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s, BEREC considered that the Commission's serious doubts were justified, especially since FICORA is not imposing remedies at all. With regards to the substitutability between mobile and low capacity fixed broadband, BEREC came to the conclusion that there is no evidence of migration of customers from low capacity fixed broadband to mobile broadband. BEREC also noted that the subscriptions for up to 10 Mbps make up 59% of the fixed broadband market. As regards pricing, FICORA's observation that retail subscriptions for mobile data services normally cost only a third of what a fixed subscription with equivalent capacity would cost is, according to BEREC, an indication that these services are not substitutable, rather the opposite.

4.3. Close cooperation between FICORA, BEREC and the Commission

- (43) FICORA, BEREC and the Commission closely co-operated to identify the most appropriate and effective measures in line with Article 7a(2) of the Framework Directive. In that regard, a meeting was held in Helsinki on 5 September 2012.
- (44) FICORA understood the Commission's and BEREC's view that a price control in form of a price cap both for copper and fibre unbundling was necessary, given the absence of any competition safeguards. However, FICORA mentioned again that, according to national law, it would first have to try out lighter pricing obligations before it may impose stricter obligations, such as *ex ante* price caps. Moreover, FICORA explained that a national court has recently annulled one of FICORA's earlier decisions setting a price cap for copper LLU without however contesting the need to impose such a measure²⁶.
- (45) The Commission pointed out that, as lighter pricing obligations already proved to be insufficient in market 4 (i.e. with regard to copper), a stricter, homogeneously applied regulation for copper and fibre should be mandated, which would not only be in compliance with current law in Finland, but will also be the right regulatory response, in the absence of any other competition safeguard such as effective non discrimination or infrastructure competition. As FICORA does not have any appropriate cost model at the moment (not even for copper as a result of the above-mentioned decision of the national court), the Commission proposed that a price control for all access products belonging to the product market should be mandated in the current measure, whereas the exact level of prices could be determined at a

²⁶ The Court, without contesting the need to impose such a measure, disagreed with the costing methodology applied by the Finnish regulator.

later stage (as, objectively, FICORA would need some time to work on the cost model).

(46) As regards market 5, the Commission, supported by BEREC, stressed that without a properly functioning market 4 (i.e. in the absence of a functioning copper anchor or infrastructure competition and effective non-discrimination rules) a price control obligation would need to be mandated. Also, in line with Article 16(4) Framework Directive, at least one obligation should be imposed with regard to bitstream services below 8 Mbit/s.

(47) During the meeting held in Helsinki, FICORA stated that, at this stage it does not consider to withdraw its notification.

5. Conclusion of the procedure to ensure a consistent application of remedies

(48) In accordance with Article 7a(5)(a) of the Framework Directive, where an NRA maintains its draft measure pursuant to Article 7a(4), the Commission may, within one month following the end of the three month period referred to in Article 7a(1), and taking utmost account of BEREC's opinion, issue a recommendation requiring the NRA to amend or withdraw the draft measure including specific proposals to that end and providing reasons justifying its recommendation.

(49) The Commission refers to Article 8(4) and 13(2) of the Access Directive which require NRAs to impose remedies that are 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, in particular Article 8(2) which requires the NRAs to ensure that users derive maximum benefit in terms of choice, price and quality and that there is no distortion or restriction of competition in the electronic communications sector. In addition, Recital 20 of the Access Directive stipulates that the method of cost recovery should be appropriate in the particular circumstances, taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.

(50) The Commission takes note of FICORA's explanation that, according to the Finnish Communications Market Act, it must first try out whether lighter pricing obligations work and are sufficient. Only after that FICORA may, according to that Act, impose stricter obligations, for example pre-determined price caps. In this context, the Commission observes that FICORA has already proved that the imposition of lighter remedies was insufficient and proposed to impose a price control remedy for copper infrastructure. Irrespective of the recent court ruling, the Commission considers that the imposition of cost orientation is indispensable for the proper functioning of market 4 in Finland.

(51) However, the Commission recognizes that FICORA, at the moment, does not have an appropriate cost model for the calculation of copper access charges. Therefore a price and cost orientation for copper unbundling should be mandated in the current measure whereas the exact level of prices could be determined at a later stage.

(52) With regard to the non-imposition of price control in market 5, the Commission concludes that absent a functioning upstream market 4, the imposition of some form of price control is also appropriate at least for the presently offered copper based

bitstream services. Absent such copper constraint there is no guarantee that the SMP operators would not also charge excessive prices for wholesale broadband access.

- (53) Also, in line with Article 16(4) Framework Directive, at least one obligation should be imposed with regard to bitstream services below 8 Mbit/s, which constitute part of the market which is considered by FICORA itself as (i) non-competitive and (ii) susceptible to *ex ante* regulation. FICORA should thus impose appropriate remedies in the non-competitive market in order to enable access providers 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.
- (54) The Commission believes that following a successful implementation of cost-oriented copper access charges in market 4, which, following FICORA's assessment, is likely to result in effective competition at retail level, the wholesale broadband access obligation in market 5 could eventually be lifted.
- (55) With regard to fibre based services, the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, has adopted the NGA Recommendation, setting out a consistent approach that the NRAs should follow regarding regulation of markets 4 and market 5 for NGA infrastructures.
- (56) According to Recommends 25 and 35 of the NGA Recommendation NRAs should in principle impose cost orientation on fibre based physical infrastructure access and wholesale broadband access products.
- (57) With regard to market 4 the Commission would like to stress that where certain remedies, which ensure equivalence of access to alternative operators, are imposed by NRAs (such as an equivalence of input obligation combined with a replicability test), and where there is a significant competitive constraint (from operators with cost-oriented access to the copper network or from other infrastructure-based competitors such as cable or LTE by virtue of their demand side substitutability at retail and/or wholesale level), there should be no need to apply cost orientation to NGA products, i.e., fibre loops and bitstream services.
- (58) On the basis of the evidence provided in the present case the Commission considers, however, that no such competition safeguards are in place at present which could warrant the lifting of cost orientation. However, FICORA should explore whether stricter non-discrimination rules together with a cost-oriented copper access product could lead to recalibration of regulation of future fibre networks.
- (59) With regard to BEREC's position not to issue an opinion on the Commission serious doubts regarding the lack of price control to be imposed on the 19 SMP operators in market 4, it has to be stressed that, although FICORA's notification did not contain separate individual draft decisions concerning the mentioned 19 SMP operators (as it was the case for the 8 largest SMP operators), the Commission made its assessment on the basis of: (i) FICORA's market definition and SMP assessment contained in the

document "Market analysis regarding significant market power in the market for wholesale network infrastructure access at a fixed location" and (ii) the reply to the RFI, in which FICORA elaborated on the regulatory remedies imposed on these 19 operators. Against this background the Commission maintains its concerns regarding the lack of price control to be imposed on these operators.

HEREBY ISSUES THIS RECOMMENDATION:

1. FICORA should either amend or withdraw the draft measures on the basis of this Recommendation.
2. As regards copper-based access products in markets 4 and 5, FICORA should mandate a price control obligation in the form of cost-oriented price caps on all SMP operators, whereas the level of prices could be determined at a later stage based on an appropriate cost model. The wholesale broadband access obligation could, as the case may be, be lifted in those geographic areas where effective access to the local loop is likely to result in effective competition at retail level.
3. In addition, FICORA should impose appropriate and specific regulatory obligations with regard to wholesale broadband access services below 8 Mbit/s.
4. With regards to fibre infrastructures FICORA should mandate cost orientation for wholesale broadband access unless sufficient competition safeguards are imposed which render this unnecessary. In the latter case, FICORA should at least implement the following:
 - (a) Equivalence of input, which generally requires SMP operators' own downstream operations to use the same products, processes, and prices as those used by their retail rivals. As equivalence of input can only be fully implemented over a longer time period, this requirement could consist in immediate terms in a firm obligation on and commitment by the SMP operators to undertake certain key initiatives over a set time period;
 - (b) A transparency obligation regarding fibre, comprising a number of clearly specified KPIs and an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;
 - (c) A replicability requirement also for fibre based retail products;
 - (d) An accounting separation obligation covering also fibre products.
5. In any case, FICORA should additionally impose a cost-oriented access obligation on fibre in market 4, unless it provides evidence of a significant competitive constraint at retail level, attributable to (i) the absence of high and non-transitory structural barriers to entry and expansion, signified by the presence of well developed alternative infrastructures with comparable reach and/or (ii) cost-oriented and non-discriminatory access to copper wholesale products.
6. The Commission will publish this recommendation on its web site. FICORA is invited to inform the Commission within three working days following receipt of this recommendation whether it considers that, in accordance with European Union and national rules on business confidentiality, it contains confidential information which FICORA wishes to have deleted prior to publication. Any such request should be reasoned.

7. In accordance with Article 7a (6) of the Framework Directive, FICORA shall communicate the adopted draft measure to the Commission by 18 November 2012. This period might be extended, at FICORA's request, to allow FICORA to undertake a public consultation in accordance with Article 6 of the Framework Directive.

8. In accordance with Article 7a (7) of the Framework Directive, where FICORA decides not to amend the draft measure on the basis of this recommendation, it shall provide a reasoned justification.

9. This Recommendation is addressed to FICORA.

Done at Brussels, 18.10.2012

For the Commission
Neelie KROES
Vice-President