COMMISSION DECISION

of 29.11.2013

pursuant to Article 7(5) of Directive 2002/21/EC
(Withdrawal of notified draft measures)
Case FI/2013/1498: wholesale markets for call termination on individual public telephone networks provided at a fixed location in Finland

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,


Having regard to the opening of the second phase of investigation pursuant to Article 7(4) of the Framework Directive on 2 October 2013,

Having regard to the additional information provided by the Finnish national regulatory authority, Viestintävirasto (FICORA),

Having regard to the notice posted on the Commission’s website on 4 October 2013 inviting third parties to submit observations on the Commission’s serious doubts letter (the Notice),

Having regard to the opinion issued by the Body of European Regulators for Electronic Communications (BEREC) on 29 October 2013.

Whereas:

I.  PROCEDURE

(1) On 2 September 2013, the Commission registered a notification² from the Finnish national regulatory authority, FICORA, concerning the review of the wholesale markets for call termination on individual public telephone networks provided at a fixed location in Finland under case number FI/2013/1498.

(2) On 9 September 2013, a request for information³ (RFI) was sent to FICORA and a response was received on 13 September 2013.

³ In accordance with Article 5(2) of the Framework Directive.
(3) On 2 October 2013, the Commission, pursuant to Article 7(4) of the Framework Directive, informed FICORA that it had serious doubts as to the compatibility of the draft measures with EU law (the serious doubts letter) and that it considered that the proposed measure would create a barrier to the internal market.\(^4\)

(4) On 4 October 2013, the Commission posted a notice on its website inviting third parties to submit observations on the Commission’s serious doubts letter. By the deadline foreseen for such observations (11 October 2013), no observations have been submitted to the Commission.

(5) On 16 October 2013, the Commission sent an additional request for information to FICORA. FICORA’s response was received on 21 October 2013.

(6) On 29 October 2013, the Commission received the draft opinion of BEREC.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Market definition

(7) In the context of this market review, FICORA defines the wholesale market for voice call termination as the transmission of incoming voice traffic from the point of interconnection to the called party. FICORA acknowledges that it is not possible to substitute wholesale call termination provided in a given fixed network with call termination provided in another network.

(8) FICORA, therefore, concludes that there are 31 relevant geographic markets limited to the network of each operator providing wholesale call termination services.

(9) The corresponding retail market is defined as telephony services, i.e. voice and subscription.

II.2. Finding of significant market power

(10) FICORA first analyses the substitutability of voice services in the retail market and considered that mobile telephone subscriptions and fixed VoIP\(^5\) subscriptions are substitutes for fixed telephone subscriptions. Therefore, also calls made from these subscriptions are substitutes for calls made from fixed telephone subscriptions. On the supply side, FICORA also notes that local loop unbundling is another possibility for operators to enter the market\(^6\). FICORA’s considerations are based on the following elements:

(a) The costs incurred from switching from fixed to mobile telephone subscription cannot be regarded as significant taking into consideration that it is much less expensive to use a mobile subscription than a fixed subscription.

(b) The availability of mobile is at least as good as the availability of fixed telephone subscriptions. Almost everywhere in Finland, end users can select a

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\(^4\) C(2013) 6598

\(^5\) FICORA notes that only a minor part of end-users are using VoIP services in Finland. Thus, VoIP services do not have a major influence on the conclusions made in the market analysis. Many operators (incumbents and entrants) have ceased offering VoIP services because VoIP services are not competitive vis-à-vis mobile services, which most of the end-users are using.

\(^6\) This substitutability analysis has already been presented by FICORA in its recent review of the market for wholesale call origination on the public telephone networks provided at a fixed location (market 2 of the Recommendation on relevant markets). The notification has been assessed under case FI/2013/1444, C(2013)2862, in which no comments were addressed to FICORA.
telephone subscription provider among at least one fixed network operator and three mobile network operators.

(c) The majority of end-users in Finland have switched to using mobile telephone services only. Also, 98-99% of residents and 96% of non-residential customers have one or more mobile telephone subscriptions.

(11) FICORA further observes that in recent years less and less end-users use both fixed and mobile telephone subscriptions, with a very small share of end-users using a fixed subscription only. In 2012, 14% of residential users had a fixed subscription and 98% a mobile subscription, 13% had both a fixed and a mobile subscription, 1% had a fixed only subscription, and 85% had only a mobile subscription. For 2010, the respective figures for non-residential customers were as follows: 54% had both a fixed and a mobile subscription, 2% had only a fixed subscription and 97% had a mobile subscription only.

(12) FICORA clarifies with respect to non-residential customers that the main reasons for large companies in particular to still use fixed telephony are: customer service, habits, incompatibility of mobile phones with other systems. However, the number of fixed telephone subscriptions used by non-residential customers has dropped by more than a quarter.

(13) The volume of fixed subscriptions is strongly declining (by 53% in five and a half years), the annual average decrease being 12% and FICORA expects it to fall further. The number of mobile subscriptions has increased during the same period, the average annual growth being 9%.

(14) The average retail price for a three minute call originated in a mobile network (irrespective of the destination network) is 7 eurocents/min, whereas the prices for a call originated in a fixed network are as follows: 6 eurocents/min for a local Fixed to Fixed call, 13 eurocents/min for a long-distance Fixed to Fixed call and 21 eurocents/min for a Fixed to Mobile call. According to FICORA, in case of an increase of retail prices (due to a FTR increase), even the cheapest Fixed to Fixed call would become more expensive than a call made from a mobile network.

(15) In the reply to the RFI FICORA indicated that the majority of mobile operators have priced Mobile to Fixed calls and Mobile to Mobile calls similarly. There is a small difference between average MTRs (EUR 0.028) and FTRs (EUR 0.0242) in Finland. This difference has been decreasing during the last years.

(16) In 2011, 10% of terminated call minutes in Finland were terminated in a fixed network. This figure includes call minutes terminated within the same network. This share was 23% in 2007.

(17) FICORA concludes that end users can substitute calls made to a fixed telephone subscription by making a call from a fixed or mobile telephone subscription to a mobile telephone subscription.

(18) Following its analysis of substitutability at retail level, FICORA analyses countervailing buyer power in the wholesale market for fixed termination and maintains that an increase in wholesale call termination prices would lead to the substitution of calls away from the network that raised wholesale call termination charges, and that this would exercise a sufficient constraint on FTRs, which would make a FTR rise unprofitable.
FICORA specifies in the response to the RFI that it does not expect discriminatory and asymmetric FTRs for the following reasons: (i) efficient substitutes are available in the retail market; (ii) presence of many fixed network operators providing termination services, none of them having a market share over 50%, and (iii) fixed network operators are both buying and selling termination services from each other so that the termination traffic is roughly in balance between operators.

Consequently, if one of the operators tries to apply FTRs in a discriminatory and non-symmetric way other operators could respond to this (e.g. by raising FTRs vis-à-vis the operator which raised FTRs in the first place). Should they do so, they risk harming themselves when end-customers switch telephone service providers, calls are reduced, or diverted to mobile numbers. FICORA confirms that, even though each operator has a 100% (market) share of providing call termination to subscribers in its own telephone network, the market power is constrained by end users' behaviour in the retail market.

FICORA states in the reply to the first RFI that the finding of non-SMP is based on sufficient countervailing buying power coming from indirect competitive constraints at retail level.

While taking into account that termination rates have no direct impact on the called party due to the calling party pays (CPP) principle, FICORA considers that a change in FTRs may affect indirectly the behaviour of the called party. If the called party is not called anymore and cannot therefore enjoy the benefits of a subscription, the FTR increase would lead to end-users switching to mobile networks thus reducing both the retail and wholesale revenues of the fixed operator who has increased its termination rate.

The rise in FTRs would also lead to a reduction/diversion of calls to that operator and a reduction in the operator's termination revenues. The net effect of the FTRs' increase on the wholesale revenue depends on the price elasticity of demand for calls made to the fixed network. In this respect, FICORA distinguished three scenarios: on-net fixed call termination, off-net Fixed to Fixed call termination and Mobile to Fixed call termination. Given that under the first scenario the increase in the FTR has an impact mainly on the networks' own end-users, FICORA concentrates its analysis on the two last scenarios.

In the Mobile to Fixed termination scenario, FICORA explains that given regulation of MTRs, mobile operators could absorb an increase in FTRs only by increasing the retail price for a call made to the company who has increased the FTR. FICORA sustains in this respect that some mobile and fixed offers are already characterised by "network-dependent" pricing, i.e. price differentiation depending on the destination network of the call. Thus, FICORA argues that there are no factors that would prevent mobile operators from increasing their retail price.7

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7 In its reply to the RFI, FICORA gives the following arguments to support this statement: The majority of mobile operators do not distinguish between Mobile to Fixed and Mobile to Mobile calls. There is a small difference between average MTR (EUR 0.028) and FTR (EUR 0.0242) in Finland. This difference has been decreasing during the last years. Also, the mobile operators in Finland face a competitive situation in the voice services retail market, with the majority of their retail income coming from voice services. Additionally, the Finnish mobile call rates are currently at a low level, which is a sign of competitive retail pricing. FICORA refers to a recent European Commission's comparison of mobile call prices, the per-minute cost of a mobile call in Finland was EUR 0.061, a low value compared to the EU average of EUR 0.091. It is not expected that the operators would absorb significantly increased production costs in a situation where they have the opportunity to raise the retail
Fixed to Fixed off-net scenario: in case one operator raises its FTRs, other fixed operators can either increase their own FTRs or retail prices for the subscriber of the network whose FTRs have risen. The same reasoning applies as in the Mobile to Fixed scenario.

The countervailing buyer power of the operators is, therefore, according to FICORA leveraged through the retail customers. FICORA refers in this respect to the explanatory note to the recommendation on relevant markets\(^8\), according to which price setting of wholesale call termination on a given fixed telephone network might be constrained by demand substitution at the retail level, provided that the substitute (mobile in the present case) leads to an effective constraint on the setting of call termination charges by making it unprofitable for a telecoms operator to raise wholesale termination charges.

FICORA further stresses the fact that such alternatives might include terminating the call to the called party on a mobile network instead of the fixed network. Based on its market analysis, FICORA argues that there is an effective constraint on the markets for fixed voice call termination in Finland coming from an effectively competitive retail market which includes both fixed and mobile services and that therefore there is no SMP on the relevant markets.\(^9\)

FICORA states that it can in exceptional circumstances impose obligations on a non-SMP operator including an obligation to interconnect at reasonable prices. According to Finnish law, the general interconnection obligation implies interconnection at reasonable terms. Furthermore, FICORA could impose specific interconnection obligations on non-SMP operators.

FICORA concludes that none of the operators has significant market power in the market for call termination on individual public telephone networks provided at a fixed location in Finland.

III. THE COMMISSION'S SERIOUS DOUBTS

On 2 October 2013, the Commission, pursuant to Article 7(4) of the Framework Directive, informed FICORA that it had serious doubts as to the compatibility of the draft measure and particularly the proposed SMP assessment with EU law and that it considered that the proposed measure would create barriers to the internal market.

In its decision the Commission found that FICORA has not provided convincing evidence that demand substitution at retail level exercises competitive constraints strong enough to make a FTR increase unprofitable.

The Commission therefore expressed its serious doubts that despite a 100% market share, operators would not have SMP on their respective markets for call termination on individual public networks provided at a fixed location in Finland. Moreover, the Commission expressed its view that basing market deregulation on a non-SMP price.

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finding, which is not supported by sufficient evidence, may lead to excessive pricing (incurred at the expense of the operators and eventually consumers in the Member States from where the calls originate and where FTRs are regulated), thus creating barriers to the internal market.

IV. OBSERVATIONS SUBMITTED BY THIRD PARTIES

(33) No observations have been submitted by third parties.

V. BEREC OPINION

(34) On 29 October 2013, the Commission received BEREC's Opinion on the Commission's serious doubts letter. In its opinion, BEREC states that it considers that the Commission’s serious doubts regarding the draft decision of FICORA are justified.

(35) BEREC shares the Commission’s concern about the absence of any quantitative analysis that would demonstrate the impact of increased FTRs on retail prices.

(36) BEREC notes inter alia that FICORA has not presented evidence or data to highlight that Finland’s retail market dynamics are likely to sufficiently mitigate the market power of each of the 31 fixed network operators in the wholesale market for call termination on the public telephone network at a fixed location. In BEREC's view, no material evidence was presented to show, among other things, the extent to which i) wholesale FTRs are reflected in retail prices; ii) the called party of the terminating fixed network is aware of and sensitive to the costs faced by those calling them; and iii) such called parties would sufficiently react to such sensitivities to the costs faced by calling parties by changing their behaviour through switching to alternatives such as a mobile service.

(37) In this respect, BEREC observes that FICORA has not demonstrated, for example, the extent to which the impact of any increases in wholesale FTRs might be effectively constrained by retail consumer behaviour (subject to the degree to which FTRs are passed through into retail prices).<sup>10</sup>

(38) In addition, BEREC agrees with the Commission that FICORA should have analysed the behaviour of specifically non-residential customers as the divergent figures of 13% and 54% (of customers owning both mobile and fixed subscriptions) suggest that a further investigation of the two segments is warranted. BEREC shares the Commission observation that the 54% figure of non-residential users who have both mobile and fixed subscriptions could be an indication that these services are complementary rather than substitutable at least for some non-residential customers.

(39) While it accepted that some fixed to mobile substitution may occur, BEREC agrees with the Commission’s view that a more thorough investigation is required of this relationship, taking into account that insufficient evidence was provided to prove to what extent fixed subscribers would effectively switch to mobile subscriptions because of the increase in FTRs, or call mobile numbers instead of calling fixed numbers.

<sup>10</sup> Having regard, as BEREC indicates, to a number of factors, including the calling party’s: i) awareness of the identity of the called party’s fixed network operator (which due to fixed number portability may not be possible); ii) awareness of the cost of making calls to the called party of a particular fixed network operator; iii) sensitivity to such call costs and changes in costs; and iv) the extent to which any calling party’s changes in behaviour in response to such sensitivities, say through switching to alternative forms of communication or reducing their consumption, might effectively constrain FTR setting behaviour.
BEREC also shares the Commission’s concerns that FICORA’s proposal to lift regulation from the fixed voice call termination markets in Finland, where there are doubts that FICORA has provided sufficient evidence to prove that operators would not have SMP, might lead to excessive pricing.

BEREC observes that lifting regulation could also create an asymmetry of termination rates within Finland and compared to other Member States. Absence of regulation could thus create a barrier to the internal market, if other NRAs set FTRs based on the methodology recommended by the Commission and FICORA deviates from that methodology, without valid justification.

Moreover, in relation to the possible reciprocal increase of wholesale call termination charges among fixed operators, BEREC observes that FICORA has not presented an in depth analysis that takes into account operators’ market shares, geographic coverage, traffic direction and other matters affecting operators' ability to raise termination rates without reducing their wholesale revenues.

Overall, it is BEREC’s opinion that the evidence as presented by FICORA is insufficient and does not sufficiently justify its conclusion of lifting the SMP status of all fixed network operators.

Pursuant the Article 7(5) of the Framework Directive, the Commission shall take utmost account of the opinion of BEREC.

V. ASSESSMENT

First of all, the Commission considers that the draft measure falls within Article 7(4)(b) of the Framework Directive and that it would affect trade between Member States.

The Commission considers that the draft measure falls within Article 7(4)(b) of the Framework Directive because FICORA has not provided convincing evidence that, despite a 100% market share, operators would not have SMP on the market for call termination on individual public telephone networks provided at a fixed location.

The Commission considers that the draft measure may have an influence, actual or potential, on the ability of the undertakings established in other Member States to offer electronic communications services, in particular fixed telephony retail services in Finland. The draft measure has a significant impact on operators or users in other Member States, inter alia by affecting prices for users, which in case of excessive pricing at wholesale level, are likely to increase. Consequently, such draft measure may affect the patterns of trade between Member States.

According to Article 14 (2) of the Framework Directive, an undertaking shall be deemed to have significant market power if either jointly or with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

Also, under Article 16(1) of the Framework Directive, NRAs should take utmost account of the SMP guidelines when carrying out an analysis of the relevant markets.

11 See Recital 38 of the Framework Directive.
12 Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).
Point 73 of the SMP Guidelines indicates *inter alia* that in an ex-ante environment, market power should be essentially measured by the ability of the undertakings to raise prices without incurring a significant loss of sales and revenues. Moreover, according to point 78 of the SMP Guidelines, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of SMP.

(50) As a result, an assessment of whether any operator has SMP on the wholesale fixed termination markets has to (i) be based on a thorough and overall analysis of the economic characteristics of the markets concerned and (ii) demonstrate that a rise in FTRs would be unprofitable for operators providing the relevant services.

(51) The Commission considers that FICORA has not provided sufficient evidence that demand substitution at retail level exercises constraints strong enough to make the FTR increase unprofitable, thus failing to demonstrate that operators providing fixed voice call termination are not able to behave independently on the relevant markets.

(52) Furthermore, pursuant to Article 8(2)(b) of the Framework Directive, NRAs shall promote competition in the provision of electronic communications services by ensuring that there is no distortion or restriction of competition in the electronic communications sector.

(53) In this respect, and as further reasoned below, the Commission considers that the reservations expressed in its serious doubts letter are still valid.

(54) FICORA has not provided convincing evidence that, despite a 100% market share, operators would not have SMP on the market for call termination on individual public telephone networks provided at a fixed location.

(55) FICORA firstly argues that an increase in the wholesale call termination price would lead to the substitution of calls away from the network that raised wholesale call termination charges, which would exercise a sufficient constraint on FTRs, thus making a FTR rise unprofitable. FICORA’s conclusion is based on the assumption that an increase in FTRs would translate into higher retail prices since competing operators would not be able to absorb such an increase.

(56) While the Commission does not question in principle that wholesale input costs for fixed termination may be passed-through to the Finnish retail calls market, FICORA has not provided any quantitative analysis supporting this assertion. Nor has FICORA recognized that pass-through may only be partial and possibly insufficient to exercise a constraint on FTRs.

(57) In this respect, the Commission notes that FICORA has neither explained how the cost of wholesale inputs is reflected in individual operators’ retail pricing structure, nor has it illustrated the extent to which the increase in FTRs is translated into retail prices, based on either the network-specific pricing schemes FICORA refers to in the notification, or on an assessment of the FTRs’ share of the average retail tariffs depending on the call type. Therefore, the Commission considers that FICORA has not provided an in-depth analysis of the relationship between input costs and retail prices in the Finnish calls market, which should be the starting point for the analysis of the alleged pass-through.

(58) Moreover, the Commission notes that FICORA does not explain to which extent it might be feasible to raise retail prices in response to an increase of wholesale input
costs in effectively competitive retail markets (as assumed by FICORA). On this point, BEREC has also observed in its opinion that FICORA did not present sufficient evidence that would support its position that an increase in FTRs would be fully passed on to the retail prices of customers calling the network which raised FTRs.

More specifically, the Commission shares BEREC's assertion that the non-SMP status of fixed network operators is based on a general 'one-size-fits-all' indirect constraints analysis for both residential and non-residential segments, when FICORA’s own data seems to suggest differences as regards the extent to which customers belonging to each segment are likely to switch to alternatives.

BEREC has stressed in its opinion that FICORA has not provided sufficient evidence that indirect constraints from the business segment would be effective, particularly in view of FICORA's own assertion that non-residential users maintain both fixed and mobile services due to customer service, habits, and the incompatibility of mobile phones with other systems. BEREC concludes that certain non-residential users need to maintain their fixed line services and would not be in a position to switch to being mobile only. These conclusions are also shared by the Commission.

Even where the pass-through was as effective as suggested by FICORA, and substitution would occur at retail level, this would, in the Commission's view, not automatically imply a constraint on FTRs. In this respect, no sufficient evidence was presented that a FTR rise would be unprofitable for operators providing fixed voice call termination services. The Commission considers that even in the presence of fixed to mobile substitution, an increase in FTRs may in fact be profitable despite the associated decline in volume, depending on the elasticity of demand for fixed and mobile call services. Since FTRs are still below MTRs (albeit in Finland only with a very small difference of EUR 0.0038), it may, for example, be profitable for fixed operators to raise their FTRs to the MTR level or possibly beyond, with the associated harm to consumers.

Finally, even where fixed operators chose not to raise FTRs from their current level this would not in itself be suggestive of an absence of SMP. Given the absolute high level of FTRs (at €cents 2.42) FTRs may well be excessive and profit maximising at their current levels and FICORA's analysis be liable to the so-called Cellophane fallacy, where the failure of a SSNIP test carried out on the monopoly price level cannot ascertain whether a company is in a dominant position.

In view of the above, the Commission underlines that FICORA's focus on fixed to mobile substitution is not sufficient to conclude on the effectiveness of indirect

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13 As regards the pass-through between wholesale and retail prices, FICORA states in the additionally provided information that the degree of pass-through is not important since even today the retail prices for fixed calls are higher than the retail prices for mobile calls. The Commission stresses that in order to conclude on the impossibility of operators to at least partially absorb an increase in FTRs, FICORA should have provided supportive evidence based on a quantitative analysis of revenue losses and resulting operators' margins (and not on the difference between retail tariffs for fixed and mobile calls, which is rather an argument supporting the fixed to mobile substitution).

14 It has to be noted that the costs for terminating a call at a fixed location are normally 9 to 10 times higher on average as compared to the costs for terminating a call in a mobile network. Moreover, cost-oriented FTRs in the EU are set at a considerably lower level than FTRs in Finland (as demonstrated by EU benchmark in footnote 20).

15 See also point 42 of the SMP guidelines.

16 Small but Significant Non-transitory Increase in Price.
constraints, i.e. whether they would be strong enough to constrain the behaviour of operators providing fixed voice call termination. In this respect, the Commission considers that while fixed to mobile substitutability at retail level may be at a rather advanced state in Finland, no convincing evidence is provided to which extent fixed subscribers would effectively switch to mobile subscriptions or mobile numbers are called instead of fixed ones because of an FTR increase, whether this would make a FTR increase unprofitable, and whether the current level of FTRs is not already causing consumer harm.

(64) There is further evidence of a more systemic problem, which might arise on the Finnish fixed call termination markets absent regulation, which is not sufficiently addressed by FICORA. In FICORA’s ‘fixed-to-fixed’ call scenario outlined above, FICORA states that fixed operators could (i) increase their retail prices in response to an increase of FTRs, or (ii) raise their own FTRs. FICORA does not assess the factors influencing the calling parties’ operators’ choice between these two options.

(65) FICORA stresses 17, however, that whatever response to an FTR increase the fixed operator chooses, the end-user well-being would not be affected and an assessment of the possible response options is not relevant for the SMP assessment. In this respect, the Commission firstly underlines that in case the operator chose to increase its FTRs, this would mean that the operator does not face constraints to increase his termination charges, and be indicative of SMP. Secondly, the Commission cannot follow FICORA’s assertion that end-users would be unaffected by a reciprocal rise in FTRs especially because the impact on retail call charges has not been fully assessed by FICORA. Neither has FICORA provided an assessment of the factors that would influence the choice between the two options and, thus, their overall impact on the alleged indirect constraints.

(66) For all the above reasons, the Commission considers that FICORA has not provided sufficient evidence to support the finding of absence of SMP on the wholesale markets for call termination on individual public telephone networks provided at a fixed location in Finland, thus violating Article 14 (2) of the Framework Directive.

(67) Hence, the Commission considers that the draft measure is in breach of Articles 16(1) and 8(2)(b) of the Framework Directive requiring the NRAs to promote competition in the provision of electronic communications services by ensuring that there is no distortion or restriction of competition in the electronic communications sector.

(68) The Commission also concludes that the proposed deregulation of the fixed voice call termination markets could create barriers to the internal market. In this respect the Commission considers that if adopted in a non-competitive wholesale market, FICORA’s draft measure would lead to excessive pricing at the wholesale level, which in turn may increase the costs for the provision of fixed services at the retail level and lower the ability of other operators and service providers (including those established in other Member States) to provide electronic communication services in Finland. Such excessive pricing is incurred at the expense of the operators, and eventually consumers, in the Member States from where the calls originate and where FTRs are regulated, and in particular where they are regulated at the cost efficient level. Those operators would not be able to raise their own FTRs in response to an increase of FTRs by monopolists, terminating calls in Finland. Furthermore, the Commission considers that deregulation of the fixed voice call termination markets based on a

17 See FICORA’s response to the Commission’s second RFI.
flawed SMP assessment could strengthen the already considerable asymmetry of termination rates within Finland and as compared to other Member States.

(69) In this respect, the Commission notes that already now termination rates in Finland are asymmetrical since each operator uses the cost-accounting system it has chosen. However, based on the information provided the magnitude of FTR asymmetry in Finland cannot be properly determined since the only available data is the average FTR level.

(70) It is important to stress, however, that by applying asymmetrical FTRs FICORA deviates from the Commission' recommended approach of setting symmetrical FTRs at the level of costs incurred by an efficient operator. Lifting regulation would reinforce this deviation even further.

(71) In addition, the Commission notes that despite regulation, FTRs in Finland are very high, and that based on the evidence provided by FICORA indirect constraints or countervailing buyer power are unlikely to constrain FTRs today or in the future. According to BEREC data the FTR applied by the incumbent in Finland of 2.42 eurocents/min is already today the highest in Europe. The Commission further notes that the gap between Finnish and other Member States' FTRs will increase with the ongoing implementation of the recommended bottom-up long run incremental cost model (BU-LRIC) in many Member States. Any considerable asymmetry in fixed termination rates within the EU not only distorts and restricts competition but has a significant detrimental effect on the development of the internal market, and therefore results in a violation of the principles and objectives of Article 8 (2) and (3) of the Framework Directive. The implementation of a common approach to regulating FTRs is therefore particularly important to reduce these considerable asymmetries in the EU.

(72) The Commission therefore concludes that in the absence of a proper SMP assessment, i.e. based on a thorough analysis of the competitive conditions, the proposed deregulation of the fixed voice call termination markets is not justified and creates barriers to the internal market.

VI. CONCLUSION AND PROPOSALS FOR AMENDING THE DRAFT MEASURES

(73) Following the detailed examination of FICORA’s notified draft measure, its submissions, and having taken utmost account of BEREC’s opinion, and for the reasons stated above, the Commission concludes that the evidence available does not support the finding of effective competition on the defined relevant market as proposed by FICORA.

19 BoR(13)60: Berec Termination Rates Benchmark Snapshot as of January 2013.
20 Countries who have implemented the recommended BU-LRIC model for fixed termination.

<table>
<thead>
<tr>
<th>Country (Art.7 case number)</th>
<th>Target Rate (€ct/min)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR (FR/2011/1236)</td>
<td>0.08</td>
</tr>
<tr>
<td>DK (DK/2012/1385)</td>
<td>0.06 peak; 0.032 off-peak; 0.063 call set up</td>
</tr>
<tr>
<td>IE (IE/2012/1371)</td>
<td>0.098</td>
</tr>
<tr>
<td>MT (MT/2012/1402)</td>
<td>0.0443</td>
</tr>
<tr>
<td>BG (BG/2013/1409-1410)</td>
<td>0.256</td>
</tr>
</tbody>
</table>
The Commission notes that the regulatory framework does not exclude the possibility to de-regulate a market listed in the Recommendation on relevant markets, provided that evidence gathered through a thorough market analysis confirms the presence of effective competition.

The Commission has not found any conclusive evidence supporting the deregulation of the fixed call termination market in Finland. FICORA has not presented any conclusive evidence on effective demand constraints that would prevent operators from setting fixed termination rates at excessively high levels. The evidence brought forward by FICORA does not point towards the finding of sufficient competitive safeguards based on countervailing buyer power.

Therefore, the Commission considers that the draft measure with regard to SMP assessment is not compatible with EU law, Articles 14, 16(1) and 8(2) of the Framework Directive.

HAS ADOPTED THIS DECISION:

Article 1

FICORA shall withdraw the draft measure notified to the Commission on 2 September 2013 and registered under case number FI/2013/1498.

Article 2

The Commission invites FICORA to undertake a new market analysis of the wholesale markets for call termination on individual public telephone networks provided at a fixed location in Finland, having regard to the Commission's present decision and BEREC's opinion.

Should FICORA, in the light of the new market analysis, still consider it justified to lift the regulation on the market for call termination on individual public telephone networks provided at fixed location, FICORA shall in particular:

– strengthen, by means of a quantitative analysis, its assessment of i) how wholesale price increases would be passed through, taking into account also the wholesale/retail price ratio, and ii) to what extent the fixed to mobile substitution at the retail level renders the wholesale price increase unprofitable;

– demonstrate that FTRs' increase will translate into higher retail prices especially in the context of competitive retail call markets. To this end FICORA should provide a rigorous analysis of the interrelation between input costs and retail prices, including *inter alia* a quantitative assessment of the impact of increased FTRs on retail prices and of the (in)capacity of competing operators to absorb such an increase;

– provide further evidence that fixed subscribers would effectively switch to mobile subscriptions and/or mobile numbers are called instead of fixed numbers because of the increase of FTRs;

– further assess the state of fixed to mobile substitutability whereby (a) analysing the global share of both (residential and non-residential) customers having both fixed and mobile subscriptions, (b) providing comparable data (i.e. for the same reference year/time period) for each of the two segments, and (c) assessing more in depth the behaviour of those (specifically non-residential) customers, which subscribe to both fixed and mobile and are less susceptible to switching services in response to a FTR increase.
Article 3

This Decision\textsuperscript{21} is addressed to:

Viestintävirasto (FICORA)
Itämerenkatu 3 A
FI - 00180 Helsinki
Finland

Done at Brussels, 29.11.2013

For the Commission
Neelie KROES
Vice-President

\textsuperscript{21} Pursuant to point 14 of the Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. FICORA is invited to inform the Commission within three working days following receipt whether it considers, in accordance with European Union and national rules on business confidentiality, that this document contains confidential information which it wishes to have deleted prior to such publication. FICORA should give reasons for any such request. The request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.