EFTA SURVEILLANCE AUTHORITY

Brussels, 29 July 2016
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Póst- og Fjarskiptastofnun
Sudurlandsbraut 4
108 Reykjavik,
Iceland

For the attention of:
Mr. Hrafnkell V. Gíslason
Managing Director

Dear Mr Gíslason,

Subject: **Wholesale market access to local loops in Iceland – Remedies – Míla´s Reference Offer**

Comments pursuant to Article 7(3) of Directive 2002/21/EC (Framework Directive)[1]

I. PROCEDURE

On 7 July 2016, the EFTA Surveillance Authority ("the Authority") received a notification of a draft national measure in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Icelandic national regulatory authority, Póst- og Fjarskiptastofnun, ("the PTA"), concerning the wholesale market for access to local loops in Iceland.[2]

The notification became effective on the same day.

A national consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period from 2 February to 1 March 2016.

[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, OJ L 108, 24.4.2002, p. 33 (as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12), as referred to at point 5cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (the "Framework Directive").

[2] Corresponding to market 4 in the previous EFTA Surveillance Authority Recommendation of 5 November 2008 (Decision No 688/08/COL) on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive, OJ C 156, 9.7.2009, p.18 ("the 2008 Recommendation").

On 19 July 2016, a request for information was sent to the PTA (Document No 812644), and a reply was received on 22 July 2016 (Document No 813163).

The period for consultation with the Authority and the national regulatory authorities ("NRAs") in the EEA States pursuant to Article 7 of the Framework Directive expires on 8 August 2016.

Pursuant to Article 7(3) of the Framework Directive, the Authority and the EEA NRAs may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Markets 4 and 5 in Iceland were previously notified to and assessed by the Authority under Case No 75750.[3] The PTA designated Míla ehf. ("Míla") as an operator with significant market power ("SMP") on markets 4 and 5 and imposed obligations of (i) access, (ii) non-discrimination, (iii) transparency, (iv) separation of accounts and (v) price and accounting controls in both markets.[4]

As part of the access obligation, access to copper loops (including sub-loop unbundling and naked DSL), fibre-based lines and to related facilities was to be facilitated, as well as access to virtual unbundled local access ("VULA"), e.g. to ensure continued access to local loops where vectoring is planned. In its reply to the Authority´s request for information dated 22 July 2016, the PTA noted that the VULA product is currently under national consultation as an appendix to the reference offer for market 5 (discussed further below).[5]

As regards the non-discrimination obligation, an Equivalence of Inputs ("EoI") requirement was to be fully implemented in market 4 no later than three months after the publication of the PTA´s final decision and in market 5 no later than 6 months after the publication of the PTA´s final decision, *i.e.* no later than 13 November 2014 and 13 February 2015 respectively. In its reply to the Authority´s request for information dated 22 July 2016, the PTA observed that with regard to the implementation of the EoI requirement in market 4, Míla has informed the PTA that it complies fully with the said requirement. Additionally, the PTA noted that it had received no complaints from the market players on that issue.

Moreover, Service Level Agreements ("SLAs"), Service Level Guarantees ("SLGs") and Key Performance Indicators ("KPIs") were to be put in place. The full implementation of the SLAs and SLGs in markets 4 and 5 was foreseen no later than six months after the publication of the PTA´s final decision, *i.e.* no later than 13 February 2015. The full implementation of the KPIs in markets 4 and 5 was foreseen no later than three months

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[3] Notified to the Authority on 11 July 2014 and assessed by the Authority on 11 August 2014, Document No 715771.

[4] PTA Decision No. 21/2014, published on 13 August 2014.

[5] The PTA also noted in its reply that the number of households passed with the possibility of vectoring connections is around 92,000 households in the Capital City Area, Thorlakshofn, Hveragerdi and Akranes, and that in most areas where Míla has introduced vectoring, the end-users also have the possibility to access fibre-optic connections owned by Míla´s competitors.

after the publication of the PTA´s final decision, *i.e.* no later than 13 November 2014. In its reply to the Authority´s request for information dated 22 July 2016, the PTA indicated that the implementation of the SLAs and the SLGs is pending (to be implemented as part of the draft reference offer) and that the KPIs have been published since June 2015.

The transparency obligation imposed on Míla in market 4 covered copper- and fibre-based LLU as well as VULA and comprised the publication of a reference offer. With regard to market 5, the transparency obligation included the publication of a reference offer for wholesale bitstream access, including VULA, and related facilities and services. The reference offer for market 4 was to be submitted to the PTA for endorsement no later than six months after the publication of the PTA´s final decision, *i.e.* 13 February 2015.[6] In its reply to the Authority´s request for information dated 22 July 2016, the PTA explained that it had been in regular contact with Míla over the submission of the draft reference offer, and that Míla had requested extensions to the foreseen time limit. During this period, the PTA urged Míla to complete the draft reference offer as soon as possible, but it did not take any formal steps against Míla, *i.a.* due to a lack of resources within the PTA.

The price and accounting controls obligation in market 4 included cost-orientation based on a HC FAC[7] methodology for copper-based LLU[8] and cost-accounting for both copper- and fibre-based LLU access and for related facilities. In market 5, the price and accounting controls obligation included cost-orientation based on HC FAC methodology for wholesale bitstream access offered through copper-based local loops with DSL technology and for VULA with VDSL[9] technology,[10] and cost-accounting for wholesale bitstream services (through copper or fibre-optic local loops).[11] In both markets 4 and 5 Míla was to submit cost analyses to the PTA for endorsement no later than six months after the publication of the PTA´s final decision, *i.e.* 13 February 2015.

The Authority commented *i.a.* on the delay of six to seven years accumulated by the PTA in its reviews of markets 4 and 5,[12] and emphasised that such delays may harm competition and reduce legal certainty for market participants. Against that background, the Authority urged the PTA to undertake a timely analysis and review of its next market review and to ensure a prompt and timely implementation of all the obligations foreseen in the draft measure.

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[6] The reference offer for market 5 was to be submitted to the PTA no later than three months after publication of the PTA's final decision, *i.e.* 13 November 2015. In its reply to the Authority´s request for information dated 22 July 2016, the PTA noted that Míla´s draft reference offer for services in market 5 is under national consultation until 15 August 2016.

[7] Historic cost accounting based on fully-allocated costs. In the light of high implementation costs, the PTA did not consider it appropriate to adopt a BU-LRIC cost model.

[8] The PTA did not impose a price control obligation for wholesale access delivered via fibre-based local loops.

[9] Very High Bitrate Digital Subscriber Line.

[10] The PTA did not propose a price control for wholesale bitstream services offered through fibre-based local loops.

[11] For the cost accounting obligations in both markets 4 and 5, Míla was to submit its cost accounting no later than six months after the publication of the PTA´s final decision, *i.e.* on 13 February 2015.

[12] The PTA´s previous reviews dated back to 2007 and 2008.

II.2. Current notification

The notified draft measure concerns solely Míla´s reference offer for wholesale access to local loops and foresees amendments to a draft reference offer, which was initially submitted by Míla to the PTA on 9 October 2015 ("the draft reference offer").[13]

The PTA proposes to require Míla to make the following amendments to the draft reference offer:

- Amend the definition of "local loop" to include fibre-optic lines and include definitions of "Sub-loop", "demarcation box" and "demarcation point" as specified in the draft measure;[14]
- Amend the foreseen provision on limitation of Míla´s liability so that no limitation applies when the cause of lack of connection, interruption of electronic communications or interference is due to intent or extreme negligence on the part of Míla;[15]
- Amend the foreseen provision authorising Míla to request a payment guarantee from a service purchaser so that the maximum guarantee is limited to an equivalent of estimated monthly charges for local loop access for a period of three months;[16]
- Amend the foreseen provision on the transfer of rights and obligations so that the service purchasers and Míla have reciprocal rights and obligations;[17]
- Include a definition of VULA in Appendix 1a;[18]
- Amend the foreseen provision on costs related to vacating or altering premises so that Míla will only be exempt from bearing the costs when reasons falling under the responsibility of the service purchaser have made it necessary to vacate or alter premises;[19]
- Amend the foreseen provision on Míla´s right, in the case of a fault in a copper local loop, to transfer the local loop lease service from copper to fibre-optic so that the migration requires prior agreement with end users and service purchasers;[20]
- Amend the foreseen provision on measurements on local loops so that it includes minimum requirements and allows service purchasers to see examples of the measurements available;[21]
- Amend the foreseen provision introducing the technical conditions for shared access to copper local loops with regard to those connection locations where Míla offers VDSL with vectoring to comply with the obligations laid down in the PTA´s Decision 21/2014;[22]

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[13] The PTA notes that it is processing a case in parallel concerning Míla´s tariffs and expects to conclude on the cost analysis and the subsequent appendix of wholesale prices for access to local loops (market 4) and on the cost analysis and prices for wholesale access to bitstream including prices for the VULA product (market 5) in November 2016. In its reply to the Authority´s request for information dated 22 July 2016, the PTA indicated that the costing notifications are foreseen for October 2016.
[14] Paras. 1 and 11 of the draft national measure.
[15] Para. 2 of the draft national measure.
[16] Para. 3 of the draft national measure.
[17] Para. 4 of the draft national measure.
[18] Para. 5 of the draft national measure.
[19] Para. 6 of the draft national measure.
[20] Para. 7 of the draft national measure.
[21] Para. 8 of the draft national measure.
[22] Para. 9 of the draft national measure.

- Amend the foreseen provision introducing the technical conditions as regards maximum distance between xDSL equipment and CPOA[23] so that the maximum distance does not apply to arrangements which are already established;[24]
- Amend the foreseen provision on limitations on compensation to service purchasers so that Míla is liable to pay compensation to service purchasers who have five or more orders/faults in each category and area in the relevant month.[25]

III. COMMENTS

The Authority has examined the notified draft measure and has the following comment:

Timely enforcement and effectiveness of remedies

The Authority notes that the implementation of several components of the access, non-discrimination, transparency and price control obligations for both markets 4 and 5, as foreseen by the PTA´s Decision No 21/2014, has been significantly delayed. For instance, Míla submitted its draft reference offer with a significant delay of almost 8 months. As noted above, the draft reference offer was to be submitted to the PTA no later than six months after the publication of the PTA´s final decision, *i.e.* no later than 13 February 2015, but the PTA did not take any formal steps against Míla for this late submission. Moreover, the implementation of Míla´s reference offer in market 5 is also significantly delayed.

In addition, the KPIs foreseen no later than 13 November 2014 were not published until June 2015 and delays have also occurred with regard to the implementation of the SLAs and the SLGs, which pursuant to the PTA´s Decision No 21/2014 were foreseen no later than 13 February 2015.

Furthermore, the details of the VULA product have still not been finalised two years after the adoption of Decision No 21/2014, even though some vectoring has already been introduced.

In addition, it is observed that the implementation of the price control obligations in markets 4 and 5, as foreseen in the PTA´s Decision No 21/2014, are equally delayed.

Against this background, the Authority wishes to recall its comments issued under Cases 75750 and 77546 respectively and, in particular, the need for a prompt and timely implementation of the obligations foreseen in the PTA´s Decision No 21/2014. As noted in those cases, considerable delays in the enforcement of remedies imposed on the SMP operator risk harming competition and reducing legal certainty for market participants. The Authority has also previously expressed concerns that a fragmented implementation of individual remedies in Iceland risks generating further uncertainty to the potential detriment of investment and innovation.[26]

The Authority thus strongly urges the PTA to finalise all of the measures necessary to ensure the full implementation of the regulatory obligations foreseen by the PTA´s Decision No 21/2014 without any further delay.

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[23] Connection Point for Open Access.
[24] Para. 10 of the draft national measure.
[25] Para. 12 of the draft national measure.
[26] See, for example, Cases 77546 and 75574.

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Moreover, the Authority invites the PTA to undertake a timely analysis and notification of the next market review, in line with the PTA´s obligations under the EEA regulatory framework.

IV. FINAL REMARKS

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedies consulted on in the current notification will require re-notification in accordance with Article 7(3) of the Framework Directive.

Pursuant to Article 7(5) of the Framework Directive, the PTA shall take the utmost account of comments of other regulatory authorities and the Authority. It may adopt the resulting draft measure and, when it does so, shall communicate it to the Authority.

The Authority's position on the current notification is without prejudice to any position the Authority may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation[27], the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the information contained herein to be confidential. You are invited to inform the Authority within three working days[28] following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which you wish to have deleted prior to publication. You should give reasons for any such request.

Yours sincerely,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate

Emily O´Reilly
Deputy Director for Competition
Competition and State Aid Directorate

[27] EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, OJ C 302, 13.10.2011, p.12, and available on the Authority's website at http://www.eftasurv.int/media/internal-market/recommendation.pdf ("the Procedural Recommendation").

[28] The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.