

# Appendix B3



PÓST- OG FJARSKIPTASTOFNUN

**Conclusions from PTA additional consultation on preliminary draft analysis of the markets for wholesale network infrastructure access at a fixed location (M4) and for wholesale broadband access (M5)**

**11 July 2014**

## Introduction

On 20 December 2013 the Post and Telecom Administration opened a limited additional consultation on specific amendments to the preliminary draft market analysis of the wholesale markets for network infrastructure access at a fixed location and broadband access (Markets 4 and 5). News on this was published on the Administration's website and the consultation documents were sent to stakeholders.

The notice to send in comments expired on 24 January 2014 and the following parties sent their comments.

- Fjarskipti ehf. (Vodafone)
- IP-fjarskipti ehf. (Tal)
- Mila ehf. (Míla)
- Siminn hf. (Siminn)

The consultation document for the additional consultation is entitled Appendix B2 and in this document which is entitled Appendix B3 there is discussion on the comments received for this limited additional consultation and the position taken by the PTA is explained. In Appendix B1 there is discussion on the comments received on the original preliminary draft to the above specified analysis where the consultation took place during the period 7 March to 7 May 2013.

### 1. General comments

**Tal** sent a letter to the Administration to the effect that the company had acquainted itself with the proposed amendments in the additional consultation and makes no comments on the amendments.

#### **The position of the PTA**

This position taken by Tal supports the planned PTA conclusion.

**Mila** makes the comment that the company considers the Settlement between Skipti and the Competition Authority to be an important factor that the PTA shall take into consideration in market analyses. The Settlement constitutes very significant organisational changes in the Group which constitute implementation of clear separation between the Group's core systems and on the Siminn retail operations. The Settlement and those organisational changes, conditions and restraint brought by the Settlement will prevent vertical integration in the Group benefiting Siminn to a greater extent than other companies on the market.

In the additional consultation, Mila comments on the preliminary draft had been taken into account with general discussion on the Settlement and its impact on market analysis, but Mila does not agree with the PTA on the limited impact that the Settlement has on PTA analysis and on the planned obligations, as despite the substantial obligations of the Settlement, the PTA considers that

it does not have the impact of reducing or lightening the obligations that the PTA feels it must impose. Mila objects to this and considers it to be contrary to the principle of proportionality.

### **The position of the PTA**

As is pointed out by Mila in its comments the Group is vertically integrated and is one economic entity in the understanding of competition law. This has not been changed by the Settlement. The PTA analysis takes into account the Group's opportunities to exercise this vertical integration to maintain and strengthen significant market power on the relevant markets. The Settlement is a relatively recent development and has not yet been fully implemented, and in addition to this its implementation is not fully in accordance with the commitment undertaken by the Group. Furthermore there are now tentative negotiations between the Competition Authority and Skipti on amendments to the Settlement. Despite the fact of the PTA considers that the making of the Settlement was a positive step towards ensuring competition on the electronic communications market, the PTA cannot take the Settlement into account at this stage in its analyses prior to the Settlement having been fully implemented and having effected the changes to the relevant markets that the position of the Group is permanently changed even though the Settlement were to be no longer in force. The PTA therefore considers that given the competition problems that have been identified on the relevant markets, the obligations that the PTA plans to impose on Mila are necessary at this stage and in accordance with proportionality. Obligations may at a later stage be withdrawn in part or in full if the obligations now proposed and that will be imposed and the obligations prescribed by the Settlement in question lead to a discernible change in the state of the market to the disadvantage of the Group. This has not yet happened. Reference is made to detailed discussion on the impact of the Settlement on the PTA market analysis in question in Appendix B2.

**Vodafone** comments on the PTA Decision to not withdraw obligations on Mila on the relevant markets on the occasion of the Settlement with the Competition Authority. Vodafone considers it important to take into account that the company Siminn and Mila are still part of the same Group. That relationship alone is justification for not making changes to the obligations in question as those companies are a single economic entity in the understanding of competition law.

### **The position of the PTA**

Vodafone here agrees with the planned PTA conclusion and this strengthens the PTA's position with respect to the Settlement.

**Siminn** considers that the preliminary analysis needs to be reviewed in its entirety in the light of the fact that it is almost one year old and that changes have occurred on the market. Siminn considers that it leads a situation where uncertainty with respect to responsibility and obligations of parties limits the right to protest and the possibilities for parties to make useful observations.

### **The position of the PTA**

With the Settlement between Skipti and the Competition Authority, changes have not occurred on the market that render the PTA analysis obsolete, particularly when the amendments covered by the additional consultation had been taken into account and the text revised accordingly. The Skipti

Group is still responsible for the same service even though various service items have been transferred between units within the Group, that is to say from Siminn to Mila. The circumstances and involvement of the parties have not changed to any significant degree during the period of almost 1 year which has passed since the preliminary draft was published. The PTA will however update statistical data in the analysis such that it refers to end of year 2013. The PTA will on the other hand closely monitor markets and review the analysis sooner than planned should there be reason to do so. The PTA considers that it has respected in an adequate manner, the right of parties to the market to object in the initial consultation on the preliminary draft and the limited additional consultation where among other things the impact that the PTA considers the Settlement in question to have had on the analysis was dealt with.

**Mila** wishes to reiterate that the company disagrees with the geographical delineation presented in the preliminary draft and considers it a simple matter to define the Capital City Area as a separate market where Mila asserts that GR has significant market power.

Mila considers it no less worthy of criticism that the PTA does not define a geographical market in the light of the fact the PTA considers copper to be on the wane and demand for fibre-optic to be on the increase. The Mila access network is a copper network and Mila needs to embark on development in order to meet this demand. The PTA must investigate prices for GR local loops in the Capital City Area to be able to assert with any certainty that the price is the same for access to local loops across the whole country. Mila considers the PTA analysis of geographical markets to be significantly flawed and demands that the Administration perform a fully valid study of geographical markets.

### **The position of the PTA**

The additional consultation here under discussion did not cover geographical definitions of the markets in question.

This issue is answered in detail in both the preliminary draft and in the responses to comments received on the draft (Appendix B1). The PTA conclusion in the preliminary analysis is that the country is a single market, that under current market circumstances fibre-optic local loops do not have an advantage or dominance over copper local loops and that Mila has the position of a company with significant market power for the whole country.

## **2. Comments on numbered items**

**Siminn** agrees with the PTA position presented on page 12 in the additional consultation document on the lifting of obligations on Siminn to provide Access Option 4 and considers it to be justified.

### **The position of the PTA**

This position is in accordance with the planned PTA conclusion.

**Mila** comments on item 5.2 on page 13 in the additional consultation document with respect to planned amendments to the obligation for non-discrimination and for transparency on the local loop market (M4) as the PTA proposes that the Mila period of notice to notify related and unrelated parties on distribution, building or other development of local loop networks and of related service and important innovations, be shortened from 1 year to 6 months in Paragraph 671 the preliminary draft. In the opinion of Mila, 6 months' notice to notify is still too long and in reality totally unnecessary. Mila considers the wording to be too wide reaching and it seems that the company cannot install a new street cabinet with VDSL, install VDSL in a telephone exchange, lay copper or fibre-optic in a new district, take fibre-optic into use in an established district or lay new fibre-optic to a company, without notifying with 6 months' notice. Such a six-month wait by a customer for local loop is totally unacceptable where such a task normally takes a few weeks. Mila considers it adequate that non-discrimination is respected and that all related and unrelated parties are informed at the same time, but that a specific period of notice is unnecessary.

### **The position of the PTA**

In this instance Mila is over-interpreting the obligation and its wording. This period of notice applies to a changed arrangement in the development of local loop networks (M4), and not to development of bitstream service (M5) such as VDSL through those local loop networks, as in such cases the period of notice is 3 months. On the other hand it is correctly understood by Mila that when one speaks of building and distribution of local loop networks, this refers to the laying of copper or fibre-optic in new districts or to the introduction of fibre-optic into established districts. On the other hand Mila over-interprets the PTA wording when Mila feels it is unable to perform repairs and improvements on specific local loops.

The PTA considers it important that when Mila embarks on the tasks here in question, that is to say the building or development of the local loop network, that all parties to the market, related and unrelated, are aware of this building, innovation or development with sufficient notice for them to be able to react to this development in their operations and compete with the Group on a level playing field at the retail level. It can also be important that network operators can possibly share ditches, ducts and other civil works.

The PTA will examine the above comment from Mila with respect to whether the wording of Paragraph 671 in the preliminary draft on the shortening of the period of notice from 1 year to 6 months could be clearer, so that it clearly applies to network development and not to individual local loops.

**Vodafone** comments on the planned PTA Decision to shorten the Mila period of notice to inform about civil works and upgrading of systems on Markets 4 and 5 and considers it extremely important that the PTA clearly prescribe how such a notification process should take place. Vodafone places strong emphasis on the PTA ensuring to the extent possible that electronic communications companies on the market feel secure and confident with respect to information that relates to non-discrimination and that the companies can compete on a level playing field, such as with respect to preparing themselves for the distribution, building and development proposed by Mila, and that it be prevented that one company should have an advantage with respect to this issue.

### **The position of the PTA**

Vodafone here provides further support for the PTA conclusion on the necessity for an adequate period of notice, for reasons of non-discrimination, with respect to access to information on development of Mila networks, systems and wholesale service. The PTA however considers there to be no need to elaborate in detail the manner in which such notification should take place. The PTA will however without doubt monitor that Mila complies adequately with this obligation.

**Vodafone** comments on item 5.2 in the additional consultation document on the lengthening of the Mila period of notice to make service level agreements, service level guarantees and to publish key performance indicators on the local loop market (M4), from 3 months to 6 months. Vodafone considers this documentation to be important and to be a part of company preparation for new products on the relevant markets and thus necessary for other electronic communications companies. Other electronic communications companies base their service, pricing and offers on this data. While a reference offer and the above accompanying documentation are not available, it is difficult to make purchasing decisions. Vodafone therefore proposes that the period of notice in question should not be lengthened. Vodafone submits the same comment with respect to the lengthening of the same kind of notice on the market for access to bitstream service, M5.

### **The position of the PTA**

The PTA considers that the innovation constituted by the publication of key performance indicators, service level agreements and service level guarantees, requires significant work which cannot be performed in the required detail in a period of 3 months. It is for this reason that the PTA proposes that Mila be given 6 months' notice instead of the 3 months proposed in the preliminary draft but the Administration will strictly monitor that the timeframe is adhered to.

**Mila** comments on Paragraph 5.3 in the additional consultation document on planned amendments to the non-discrimination obligation on Market 5, where it is proposed that Paragraphs 834 and 848 in the preliminary analysis be amended to the effect that the period of notice to notify changes in bitstream service will be shortened from 6 months to 3 months. Mila considers the wording here to be wide reaching where the intention appears to be to cover all possible changes that could take place in the Mila network. Mila has up to this point in time taken care to give 3 months' notice when a specific telephone exchange is converted to VDSL. Mila considers non-discrimination in notification to be sufficient to fulfil the non-discrimination obligation. In Mila's opinion, specific periods of notice are thus unnecessary and should be withdrawn.

### **The position of the PTA**

The PTA planned to impose 6 months' notice on Siminn bitstream wholesale in order to make fairly stringent requirements on Siminn wholesale and to ensure non-discrimination against competitors of Siminn retail. With the transfer of bitstream service to Mila as a result of the Settlement with the Competition Authority and with the separation from Siminn retail, the PTA considers it adequate to shorten the notice in question to 3 months. In the opinion of the PTA a three-month period of notice is adequate for service providers in competition with the Group to have time to prepare their sales operations as a result of changes to Mila bitstream service. Such a

period of notice is important for the purpose of creating consensus and credibility with respect to the position of Siminn in relation to Mila.

The period of notice in question is related to provision of information on changes that could impact service that Mila wholesale customers offer to their end users. In the preliminary draft it is stated that information shall among other things contain planned prices, conditions, technical specifications, scheduled upgrades, distribution or innovation, updated position on upgrades/distribution and planned connection points. It is clear that this does not apply to minor changes or upgrades that do not have a direct impact on wholesale products on the relevant market.

**Vodafone** comments on amendments to the non-discrimination obligation on Market 5 in Paragraph 5.3 in the additional consultation document to the effect that while IP-MPLS service is still under Siminn control it is not possible to shorten the Mila notification requirement for changes to the arrangement for bitstream service, from 6 months to 3, as the Siminn IP-MPLS service is a very important part of bitstream service until Mila has built its own system.

### **The position of the PTA**

According to the Settlement between Skipti and the Competition Authority Mila shall have completed the build of its own MPLS system to provide bitstream service within 1 year from the date of the Settlement. This period expired on 8 March 2014 and it is clear that Mila has not completed the build, although it has commenced. The Settlement furthermore allows for Mila having access to the Siminn IP-MPLS system for a longer period of time than the 1 year in question if required. One can assume that when the Decision on the basis of this analysis is published in the spring of 2014, Mila will be introducing its own MPLS system which will mostly take over from the Siminn IP-MPLS system which now serves bitstream service for Mila. The above specified comment from Vodafone should not in the opinion of the PTA lead to the Administration retracting its intention to shorten the notice in question from 6 months to 3 months and nor should the Mila comments lead to this period of notice being completely withdrawn. In this issue the PTA is practising a certain level of proportionality.

**Vodafone** makes a comment on Paragraph 6.1 in the additional consultation document to the effect that there is no detailed coverage on the Mila connection points for provision of service according to Access Options 1-3 while the access options are covered in detail with respect to other aspects. Vodafone considers it to be a minimum requirement that Mila inform about all connection points on offer for bitstream access.

### **The position of the PTA**

The PTA considers an analysis document such as this one and a Draft Decision not to be the proper place for discussion on such connection points or their implementation. The arrangement of the access options is described and the PTA considers it proper that information on connection points is provided as part of the revised Mila reference offer, which the PTA will scrutinise subsequent to this market analysis.

**Mila** makes the comment on Paragraph 6.1 in the additional consultation document that the company can agree that it is correct to review the start-up and monthly charges, which may not act as an entry barrier. Such charges can however be justified and have been the practice for a long time, for example in the leased line tariff. Mila points out that the company is developing an MPLS-TP system which will be used for example for Access Option 2 and should Access Option 2 be used then the functionality of wholesale switches will be transferred into the Mila trunk line network. One has to keep in mind that Mila took over obligations and decisions that previously applied to Siminn with respect to wholesale switches and Mila reminds that the company aims at changed system design where the arguments in the obligations and decisions on the existence and use of wholesale switches will not apply in the same manner. When this system design is in place it would be appropriate to review the cost analysis of the tariff.

### **The position of the PTA**

In the additional consultation document the PTA mentions that it is not normal that network operators like Mila collect start-up charges or monthly charges from system elements such as wholesale switches. The PTA wording does not refer to general use of start-up charges or monthly charges, but solely to the above specified wholesale switches. The start-up and monthly charges in force for wholesale switches are based on the PTA Decision no. 38/2012 which prescribes on the use of wholesale switches and on related charges. From the time that the Decision was published, circumstances have changed and more experience has been gained on the use of wholesale switches. The PTA considers that in the next cost analysis for Access Options 1-3 the question will be examined as to whether one should view costs for wholesale switches as part of total costs for the Mila access system and whether this cost should thus be included in the price for bitstream access, regardless of whether one or more parties request access. It will be in Mila's hands to find an economic solution to the provision of bitstream access to more than one party in an adequate manner, whether this is done using a wholesale switch or in another manner.

**Vodafone** is happy with the PTA position in Paragraph 6.1 in the additional consultation document to the effect that it is not normal that a network operator at wholesale level collect start-up charges and monthly charges for system elements such as network switches. Should be PTA plans not be implemented, Vodafone considers it important that the PTA review how start-up and monthly charges are distributed between parties. There are currently 3 parties that use wholesale switches, Mila itself, Siminn and Vodafone and not two, as was the case before.

### **The position of the PTA**

The PTA refers to the above answer to the Mila comments on Paragraph 6.1.

**Vodafone** requests that the PTA explain clearly how the Administration sees the settlement between companies of costs that have been laid out in connection with wholesale switches on the basis of Decision no. 38/2012. Vodafone considers it important that the PTA adopt such a position, as changing circumstances could provide the Skipti Group with a subsidy paid by Vodafone for half of the outlay investment resulting from the above specified Decision.

### **The position of the PTA**

The settlement of these costs and decisions on cost analysis of tariff are not within the scope of this additional consultation. Such decisions will be made elsewhere and the PTA indicates among other things in this respect the additional consultation dated last 21 February on cost analysis for access to wholesale switches for Access Option 1 (Market 5). A final Decision in this matter is expected to be published at the same time as the Decision in the case here under discussion.

**Mila** expresses its pleasure at the conditions proposed by the PTA for Access Option 2 and the Mila authorisation to withdraw the offer of Access Option 1, and agrees with this.

### **The position of the PTA**

The Mila comment strengthens the PTA conclusion on this issue and the PTA would also like to reiterate that the offer of Access Option 1 should not be withdrawn without the prior endorsement of the PTA.

**Vodafone** considers it important for the provision of Access Option 2, which the PTA announces in Paragraph 6.1 in the additional consultation document, that electronic communications companies have at any given time the option of choosing which service the company intends to use at each location. Electronic communications companies must have the possibility of flexible decision-making with respect to customer needs. Vodafone considers it important that Mila explain Access Option 2 and make it competitive with other access options and more conducive to economies. Vodafone can on the other hand not accept that other access options be discontinued because each and every customer has varying needs which can require that access options be changed at short notice.

### **The position of the PTA**

The Vodafone comments on Access Option 2 strengthen the PTA conclusion that it is necessary to offer this access option on the market. The PTA reminds that Mila will not be able unilaterally to discontinue Access Option 1 as prior endorsement by the PTA will be necessary for this. In such a case it will be first and foremost the main principle that an access request is normal and fair which will be taken into consideration in each instance.

**Siminn** comments on the discussion on page 16 in the additional consultation document which deals with the Mila authorisation to withdraw the offer of Access Option 1 if a request is received for Access Option 2. Siminn cannot accept this proposal as presented. Siminn reiterates that the withdrawal of Access Option 1 could never be made with a unilateral decision and without the agreement of the electronic communications companies in question. Even though one company were to request Access Option 2, it could serve the interests of another company to continue to use Access Option 1. Siminn considers that it needs to be better explained and in more detail, when and under what circumstances it should be authorised to withdraw Access Option 1 and when not. Siminn considers that it should not be authorised to withdraw Access Option 1 without the agreement of the party using this option and under no circumstances should the request of another company, even if it is reasonable, have an impact on the company that uses, or requests the use of, Access Option 1.

**The position of the PTA**

The PTA reiterates that Mila will not be authorised to unilaterally withdraw the offer of Access Option 1. PTA prior endorsement is required in each instance. The fact that Mila receives a fair and normal request for Access Option 2 does not mean the automatic withdrawal of Access Option 1. It only means that if Mila is offering Access Option 2 in a specific area the company is authorised to make a request to the PTA for the withdrawal of Access Option 1. Such a request would then be subject to national consultation, where stakeholders can comment on the suggested changes to the offer of Access Options. In the processing of such cases the PTA would try to take into account that periods of notice should be normal and that parties to the market would not suffer any damage whatsoever from such transfer of service, should Mila request for transfer from Access Option 1 to Access Option 2 in specific areas be accepted.