

BEREC Opinion

Phase II investigation

**pursuant to Article 7a of Directive 2002/21/EC as amended by
Directive 2009/140/EC:**

Case FI/2012/1328-1329:

**Wholesale physical network infrastructure access at a fixed
location (market 4) and wholesale broadband access (market 5)
in Finland**

27 July 2012

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1. EXECUTIVE SUMMARY

On 18th of May 2012, the Commission registered a notification by the Finnish national regulatory authority, Viestintävirasto (hereinafter FICORA), concerning the markets for physical network infrastructure access (market 4) and wholesale broadband access (market 5) in Finland.

In the relevant market 4, FICORA proposes to include metallic and optical fibre local loops and sub loops, shared access, dedicated wavelength and equipment facilities. Market 5 includes DSL and Ethernet wholesale products, as well as self-supplied cable.

FICORA identifies 111 regional markets for both markets 4 and 5.

With regard to market 4, FICORA designates 27 operators as having SMP in all the 111 regional markets, and intends to impose the following obligations on 8 operators designated with SMP in their respective operating areas: access to local loop for copper and fibre loops; transparency; non-discrimination; cost orientated pricing price cap for copper but without price cap for fibre; cost accounting obligation.

FICORA has decided not to submit the decisions on obligations for the remaining 19 SMP operators in market 4 for notification.

With regard to market 5, FICORA proposes to designate 27 operators as having SMP in 104 regional markets, whereas the remaining 7 markets are considered to be competitive. FICORA intends to impose the following obligations: access to local loop transmission capacity and equipment facilities; transparency; non-discrimination obligation concerning pricing and other terms.

The obligations will apply only with regard to wholesale broadband services with a capacity of 8 Mbit/s and above.

On 18th of June 2012 the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. Commission's doubts concern:

- Non imposition of appropriate price control for fibre infrastructure in market 4
- Non imposition of price control obligation for copper and fibre infrastructure in market 5
- Lack of price control for copper based local loop unbundling services for 19 SMP operators
- Lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s

Based on the Framework Directive, as amended, BEREC is issuing the current opinion on the serious doubts expressed by the Commission in accordance with article 7(a). On the basis of the assessment set out in this Opinion, BEREC considers that the Commission's serious doubts are mostly justified.

Regarding the non-imposition of price control in market 5 for copper and fibre lines, BEREC recommends FICORA to impose a price control obligation on all SMP-operators in this market.

Regarding the lack of price control for copper based local loop unbundling services for 19 SMP operators, the remedies decisions for these operators have not been registered for notification by FICORA. BEREC's assessment is that a matter of whether or not a national regulatory authority has fulfilled the information requirements of article 7(3) is not to be subject to examination by BEREC within this context. Moreover, the information at BEREC's disposal is not sufficient to understand FICORA's motives for not imposing a price control obligation on the operators in question. Hence, BEREC cannot express an opinion on this issue.

Regarding the lack of remedies to be imposed for wholesale broadband access services below 8 Mbit/s, BEREC recommends FICORA to impose appropriate remedies without taking the availability of mobile data services into consideration.

2. INTRODUCTION

Legal basis of the investigation

According to article 7 of the Framework Directive¹, as amended, it is provided that where a national regulatory authority intends to take a measure which (a) falls within the scope of Articles 15 and 16 of the above Directive (i.e. procedure for the identification and definition of markets and market analysis procedure), or articles 5 and 8 (imposition, amendment or withdrawal of obligations) of the Access Directive², as amended, and (b) would affect trade between Member States, it shall make the draft measure accessible to the Commission, BEREC and the national regulatory authorities in other Member States. National Regulatory Authorities, BEREC and the Commission may make comments to the national regulatory authority concerned only within one month.

According to article 7a in the same directive, it is provided that where an intended measure covered by Article 7(3) aims at imposing, amending or withdrawing an obligation on an operator in application of Article 16 in conjunction with Article 5 and Articles 9 to 13 of Directive 2002/19/EC (Access Directive), and Article 17 of Directive 2002/22/EC (Universal Service Directive), the Commission may, within the period of one month provided for by Article 7(3) of this Directive, notify the national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with Community law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification.

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 and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009.

² 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.

The development of the procedure

On 18th of May 2012, the Commission registered a notification from the Finnish Regulatory Authority, FICORA, concerning the markets for physical network infrastructure access (market 4) and wholesale broadband access (market 5) in Finland. On 31st of May 2012, a request for information (RFI) was sent to FICORA, and a response was received on 5th of June 2012.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 18th of June 2012. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC Opinion on the justification of the Commission's serious doubts on the case.

On 26th of June 2012, the EWG sent a list of questions to FICORA and answers were received on 27th of June.

The EWG met on 28th of June 2012 in Stockholm. During this meeting the EWG held an audition with representatives of FICORA to gather further information and clarification. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 5th of July the Commission answered a few questions through an email exchange.

A draft opinion was finalized on 19th of July 2012 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 27th of July 2012. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The third review of the markets for physical network infrastructure access and wholesale broadband access in Finland were previously notified to and assessed by the Commission under case numbers FI/2008/0839 and FI/2009/0900.

With regard to market 4, FICORA proposed to designate 32 fixed incumbent operators as having significant market power (SMP) in their respective regional markets for physical network infrastructure access in Finland. FICORA proposed to differentiate fibre from metallic local loops in respect of the cost orientation obligation. With regard to copper loops, it proposed obligations of access, transparency, cost orientation, non-discriminatory pricing and cost accounting. In addition, FICORA proposed an obligation of accounting separation on 9 operators. As to fibre lines, FICORA proposed to apply only obligations of access, transparency and non-discrimination (this latter covering both pricing and other terms and conditions).

In its "comments" letter, the Commission, whilst acknowledging that fibre networks were still at an early stage of development, did not believe that a differentiated regulatory treatment of fibre and copper loops is justified. Therefore, while noting FICORA's commitment to monitor

the market and to amend the remedies imposed on fibre loops if necessary, it invited FICORA to impose remedies on fibre loops similar to those imposed on copper and to revisit its analysis along the lines of the NGA Recommendation once adopted. The Commission also invited FICORA to put in place appropriate migration arrangements.

As to market 5, FICORA proposed a market definition, which included all broadband platforms available in Finland (DSL, fibre, cable and fixed wireless). FICORA acknowledged that the conditions of competition in the operating areas (regions) of 32 incumbent operators, notably the local incumbent's high market shares, support a finding of SMP for 32 incumbent operators and consequently proposed to impose obligations of access, transparency and non-discriminatory pricing, but no other price control obligation.

The Commission issued a "comments" letter regarding the definition of geographic submarkets proposed for de-regulation. In addition, the Commission reiterated the comments made in case FI/2008/0848 as regards the inclusion of cable in the market definition and the absence of any price control obligation.

Current notification and the Commission's serious doubts

The relevant products and services in market 4 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.

In 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.

The relevant geographic markets, as defined by FICORA, are regional for both markets 4 and 5. FICORA identifies 111 regional markets.

In market 4, the regional markets are divided by FICORA into two groups. In group 1, the largest operators have above 50% of market shares 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.

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 the 111 regional markets. With regard to the definition of remedies, FICORA proposes to differentiate between the remedies for eight bigger operators covering 83 of the 111 sub-national markets, and the remedies for 19 smaller operators covering 28 of the 111 sub-national markets.

In market 4, FICORA intends to impose the following obligations on 8 operators 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. 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 fibre but without any price caps and
- price caps for monthly rent of copper loops;
- cost accounting obligation (for copper and fibre loops).

FICORA does not intend to impose any price caps with regard to fibre loops, as those price caps, in its interpretation of the Finnish Communications Market Act, can only be imposed in exceptional cases, if the price charged for the access rights clearly exceeds the general price level or if 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.

With regard to access to passive infrastructure, access to ducts is not proposed, since 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.

FICORA does not define any migration rules from copper to fibre loops in its draft measures.

In FICORA's opinion, the decisions on obligations for the remaining 19 SMP operators in market 4 are not to be subject to notification. Hence, FICORA has not registered the decisions for notification. However, FICORA proposes to impose the following remedies for these 19 operators:

- obligation to lease part of a local loop and equipment facilities (for copper and fibre loops);
- transparency obligation, i.e. to publish delivery terms and tariff information (for copper and fibre loops);
- non-discrimination (for copper and fibre loops).

Moreover, FICORA proposes to withdraw the cost orientation and the cost accounting obligations under the justification that the said 19 operators provide a small part of wholesale services in comparison with the eight bigger operators which cover 93% of the Finnish population.

As regards market 5, three groups of markets are identified. In group 1, the largest operators have above 50% of market shares in markets 4, 5 and at the 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 market shares above 50% in market 4 only, and shares below this threshold are found in market 5 and at retail level.

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.

In 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.

The above-mentioned obligations will apply only with regard to wholesale broadband services with a capacity of 8 Mbit/s and above. FICORA does not provide any justification as

to why it considers it proportionate and justified not to impose any price control remedies in market 5.

The Commission has identified the following issues which raise concerns:

- Non-imposition of price cap in market 4 for fibre
- Non-imposition of price control in market 5 for copper and fibre lines
- Lack of price control for copper based local loop unbundling services for 19 SMP operators
- Lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s

4. ASSESSMENT OF THE SERIOUS DOUBTS

On 18th of June 2012, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern compliance with Article 8(4) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive, in particular:

On the serious doubts regarding the non-imposition of appropriate price control for fibre infrastructure in market 4

Commission's concerns

The Commission points out that remedies should be 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. Moreover, NRAs are required to impose on SMP undertakings appropriate regulatory obligations.

According to the "NGA Recommendation", NRAs should ensure that access remedies are maintained or amended where SMP is found on Markets 4 and 5, and such access should normally be granted at cost-oriented prices.

The Commission recognises that the NRAs are allowed to take into account national circumstances, but underlines 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.

The Commission takes 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. However, the Finnish regulator acknowledges that current prices for fibre local loops are high and hinder competition.

Even though FICORA explains that it is prevented from setting concrete prices in a form of price caps before the cost orientation obligation is tested, the Commission points out that, when it comes to excessive pricing, it is usually the imposition of prices at a cost oriented level that can be considered as the only appropriate and most effective remedy. The Commission does not see a reason why the cost orientation obligation alone would prove to be sufficient to tackle the competition issue, as FICORA itself concluded that it has not been

able to do so in relation to copper infrastructure. Moreover, FICORA states that currently the overall cost for using the fibre loop is almost 16 times higher than the overall cost for copper loops. The Commission is concerned that such a striking difference in copper and fibre prices will have a negative impact on the take up of NGA. The Commission concludes that the lack of a price cap for fibre in market 4 does not appear to be compatible with EU law.

FICORA's view

FICORA underlines that according to the Finnish Communications Market Act, the maximum price (price cap) may be set only in exceptional cases, if the price charged for the access rights clearly exceeds the general price level or it is otherwise necessary in order to meet the purpose of access rights.

Accordingly, FICORA can impose a price cap only when it is absolutely necessary and when ex-post enforcement of the cost orientation obligation has not resulted in truly cost oriented prices. In present situation where cost orientation obligation is not yet tested, national law prevents imposing price caps on fibre local loop. In the SMP decisions issued in 2009, FICORA did not impose cost orientation obligation to fibre local loops, since they had not previously been subject to regulation. In practice, the cost orientation obligation is the only price control obligation that FICORA can impose to fibre local loops at the moment.

FICORA will monitor the effects of the proposed cost orientation obligation for the pricing of fibre local loop. FICORA can assess the cost orientation of fibre local loop by its own initiative or based on complaints. If FICORA finds out that the fibre local loop prices are not cost oriented, FICORA can issue a decision and set a maximum price in the decision. If FICORA finds out that the cost orientation obligation is not sufficient, FICORA can and will amend the obligations, for example introduce price caps.

At this stage, cost orientation obligation enables FICORA to collect the cost information and when necessary to give binding decisions regarding the level of the fibre local loop prices. The collected data is necessary in case there is need for heavier obligations, such as price cap.

FICORA has already started to develop assessment principles for fibre local loop and aims to publish the main criteria for the assessment of cost orientation of fibre local loop before the obligations will enter into force. FICORA has also commissioned a study where independent consultants are currently assessing the current acceptable rates of return on regulated products (WACC) and whether the rate of return should be higher for fibre local loops.

BEREC's assessment

According to art. 13 of the Access Directive, as amended, an NRA may impose obligations relating to cost recovery and price controls in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

Article 8(4) of the Access Directive, as amended, requires regulatory remedies to be based on the nature of the problem identified, proportionate and justified in the light of the

objectives laid down in Article 8. Article 16(4) of the Framework Directive requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

BEREC agrees with the Commission that the only remedy by which a tendency towards excessive prices at the wholesale level can directly be targeted is a price control and cost accounting obligation according to art. 13 of the Access Directive.

From FICORA's analysis of market 4, it is clear that there are problems with excessive pricing on one or more of the regional markets,³ with a price range from 34 to 430 EUR for fibre optic local loops. There are also indications of price squeeze, where the retail price of a fibre based broadband connection is significantly lower than the price of a fibre optic local loop.⁴

Hence, from a directive conform view, all the necessary prerequisites are fulfilled for FICORA to impose an obligation of cost oriented price with a price cap on one or more operators. Also FICORA acknowledges this fact.

However, FICORA argues that it is unable to include any amendments of this kind in the SMP decisions now subject to notification due to the way that the European Regulatory Framework has been transposed in Finnish law. Although acknowledging possible NRA's constraints derived from the national law, BEREC's analysis is limited to assessing the compatibility of the measure with Community law and the creation of potential barriers to the single market, as determined by the Framework Directive. In this sense, BEREC is not in the position to interpret and draw conclusions based on national law.

In conclusion, BEREC shares the Commission's serious doubts that the lack of a price cap for fibre in market 4 does not fully comply with the policy objectives and regulatory principles of the Regulatory Framework.

On the serious doubts regarding the non-imposition of price control in market 5 for copper and fibre lines.

Commission's concerns

The Commission is of the view that, bearing in mind that market 4 remedies are still not properly functioning, without any price-related obligations in the downstream wholesale market, SMP operators may indeed be incentivised to abuse their market power by charging excessive wholesale prices for bitstream or applying margin squeeze.

³ Ficora analysis M4, p.9:

"telecommunications operators reported that they had to drop their end customers in situations where an established telecommunications operator had replaced a metallic conductor local loop with a fibre-optic local loop."

"the excessively high lease price for fibre-optic local loops, which has been so expensive that the telecommunications operator leasing the local loop could not offer broadband service as advantageously to the end customers as they could have been able to offer when leasing a metallic conductor local loop."

⁴ Ficora analysis M4, p.20

In the absence of appropriate price controls, NRAs are usually not able to prevent the competition problems identified in the relevant wholesale markets. In particular, in order to ensure regulatory certainty for access seekers and thus promote efficient investment by all operators, access prices should normally be cost-oriented, transparent and set sufficiently in advance, in both markets 4 and 5. Hence, the lack of clearly pre-defined, regulated prices does, in view of the Commission, not promote regulatory predictability as prescribed under Article 8(5) (a) of the Framework Directive, as amended, and may significantly delay market entries.

FICORA's view

FICORA has considered that ex-ante regulation of the wholesale broadband access market can be reduced and the obligations on slower (below 8 Mbit/s) wholesale broadband products can be removed. FICORA does not agree with the Commission that regulation should be tighter. A cost orientation obligation has never been imposed because the market analysis does not support tightening the obligations, i.e. the introduction of price control obligations. At the same time FICORA has not received any complaints on wholesale broadband access products prices. According to FICORA information, either Finnish Competition Authority has not received any complaints on wholesale broadband products. In many cases most of the entrants are using mainly their own network equipment and they are only leasing local loops. In most of the cases there is no need for bitstream. The use of wholesale broadband access products is decreasing and the importance of the market for wholesale broadband access in Finland is diminishing. FICORA underlined that the price cap obligation is not possible as a remedy because a cost orientation obligation has not been tested.

BEREC's assessment

According to art. 13 of the Access directive, as amended, an NRA may impose obligations relating to cost recovery and price controls in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

Article 8(4) of the Access Directive requires regulatory remedies to be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8. Article 16(4) of the Framework Directive requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In its analysis of market 4, FICORA presented the results of a questionnaire distributed to telecommunications operators. New entrant operators or operators entering new regional markets emphasised their concerns about the high rental prices for fibre-optic local loops.⁵

FICORA also stated in its analysis that the fibre-optic local loop connection fees as well as monthly fees have partially increased after 2010. The overall monthly price of leasing a fibre-

⁵ Decision Nr 349/9411/2001: Market Analysis of Significant Market Power on the wholesale markets for fixed network access, see page 9

optic local loop varied from just over EUR 34 Euro up to over 430 Euro. The median total cost was 307.50 Euro per month.

In the analysis of market 5, FICORA emphasised that the number of wholesale broadband products leased has decreased, from 73 000 in June 2008 to 43 000 at the end of 2010⁶. In relation to the total number of full and shared access local loops, 345 000 at the end of 2010⁷, wholesale broadband products are little used.

According to FICORA, the price of wholesale broadband products varies steeply region by region. These prices are influenced by the demand for wholesale broadband products, the market power of established telecom undertakings, and the significance of wholesale broadband products in the provision of retail broadband services. In 2011, the one-off charge applied by SMP-operators for a wholesale broadband access products (DSL) varied from 95,00 Euro to 240 Euro, and the monthly fee from 12,90 Euro to 56,20 Euro (1 Mbit/s) or 17,67 to 74,70 Euro (24 Mbit/s). Because the existing telecom undertakings have invested in their own DSL and Ethernet networks and use their own active equipment to provide retail services, the pricing of wholesale broadband products mainly affects the small, emerging undertakings⁸.

In light of the information presented by FICORA, BEREC's view is that the Commission's serious doubts are justified. With reference to the characteristics of market analysis and obligations imposed by FICORA on operators on market 4 and 5, BEREC also considers it appropriate to quote the introduction to the NGA Recommendation⁹, p. 20. *"Where remedies imposed on Market 4 lead to effective competition in the corresponding downstream market, in the whole market or in certain geographic areas, other remedies could be withdrawn in the market or areas concerned. Such withdrawal would be indicated, for instance, if the successful imposition of physical access remedies were to render additional bitstream remedies redundant."*

BEREC would like to emphasise that a coherent approach to the regulation of market 4 and 5, and an appropriate reflection of the ladder of investment principles, may raise a need for regulation of market 5 in case both markets are not characterized by effective competition.

FICORA's analysis clearly shows that neither the regulation of market 4, nor the regulation of market 5, has prevented SMP operators from applying excessive pricing on wholesale access products. FICORA's analysis has not shown any evidence that there are other

⁶ Decision Nr 350/9411/2011: The Analysis of significant market power in the market for wholesale broadband access, page 30, These figures only include wholesale broadband products leased by telecommunications undertakings to third parties, so they do not include connections leased by undertakings to their own service undertakings (known as "own use").

⁷ The figure includes local loops and top band of local loops together with wholesale broadband products. Not all local loops are necessarily used for broadband, see page 30 of FICORA Decision Nr 350/9411/2011

⁸ The undertakings of significant market power named in the 2009 decision were not set an obligation to comply by the cost-oriented pricing in wholesale broadband services markets, see page 33 of FICORA Decision Nr 350/9411/2011

⁹ Commission Recommendation of 20 September 2012 on regulated access to Next Generation Access Networks (NGA), 2010/572/EU

constraints operating in the market that would prevent the SMP operators from applying excessive wholesale prices. Hence, BEREC shares the Commission's view, that the absence of price-control obligations could represent an incentive for SMP operators to abuse their market power, by charging excessive wholesale prices for bitstream or applying excessive margin in the downstream wholesale market.

The regulation of market 5 is aimed at enabling other operators than SMP operators to provide retail broadband services equivalent to those provided by SMP operators, at an affordable price and under the same technical terms and conditions. The lack of demand for wholesale broadband products cannot per-se justify the non-imposition of price control remedies, especially taking into account the, in many cases excessive, price levels indicated in the market 5 analysis.

In case both markets (4 and 5) are not working properly it is necessary to guarantee new entrants the possibility to compete with SMP operators, using their infrastructure to provide services. At the same time not imposing price control obligations could create uncertainty in the future development of the market.

In conclusion, BEREC shares the Commission's serious doubts about the non-imposition of price control in market 5 for copper and fibre lines. In BEREC's opinion, the obligations imposed by FICORA on SMP operators in market 5 are not sufficient to prevent the competition problems identified in the market analysis. Referring to article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations, BEREC therefore recommends FICORA to impose a price control obligation on all SMP-operators in this market.

On the serious doubts regarding lack of price control for copper based local loop unbundling services for 19 SMP operators

Commission's concerns

The Commission has expressed serious doubts about the lack of price control for copper-based local loop unbundling (LLU) services for the 19 smaller SMP operators. The issue raised by the Commission on the non-imposition of price control remedy for copper-based LLU services for 19 SMP operators, can be summarised as follows.

Although acknowledging that the 19 SMP operators provide a small part of wholesale services in comparison with the bigger eight operators, the Commission notes that the size of the market and the limited customer base should not be considered as a basis for relaxing remedies. Moreover, the Commission points out that strong (local) incumbents in small markets that are not constrained by alternative operators because of limited incentives to invest in rural areas, could be incentivised to exploit their market power at the expense of their (actual or potential) competitors.

The Commission considers that FICORA's approach not to regulate prices of copper LLU access services is in violation of *i*) Article 8(4) of the Access Directive – which requires regulatory remedies to be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 – and *ii*) Article 16(4) of the Framework Directive – which requires NRAs to impose on SMP undertakings appropriate

regulatory obligations. According to the Commission, the imposition of a price regulation should respect the principles of cost orientation in order to promote regulatory predictability and sustainable competition.

In addition, the Commission is concerned that these 19 operators would not be constrained in any way when setting their prices for both physical infrastructure and broadband access services.

FICORA's view

FICORA emphasised that the 19 smaller operators are very small with limited market power; they do not have a significant impact on the Finnish wholesale market and do not affect trade between Member States. For the above reasons, FICORA decided not to notify the draft decision for the 19 operators to the Commission under Article 7 of the Framework Directive. In addition, FICORA notes that the Commission probably exceeded its powers when it raised doubts about the obligations proposed for the 19 smaller operators. Although in FICORA's opinion there is no obligation to notify the draft decision to the Commission, FICORA will inform the Commission of the final decision once it will be submitted to the 19 operators.

As for the remedies to be imposed, FICORA notes that the price regulation can be too burdensome for a small operator because of its limited resources, and the regulation could result in more costs for the operator than benefits for the users.

BEREC's assessment

FICORA's non-notification

The decisions on obligations for the remaining 19 SMP operators have not been registered for notification by FICORA. This is confirmed by the Commission in an e-mail on 5th of July 2012 following a BEREC request for clarification.

Taking the above into consideration, BEREC's assessment is that a matter of whether or not a national regulatory authority has fulfilled the information requirements of article 7(3) is not to be the subject of an examination by BEREC within this context.

Lack of price control

With regard to the serious doubts raised by the Commission on the lack of price control for copper-based LLU services for 19 SMP operators, the information at BEREC's disposal is not sufficient to understand FICORA's motives for not imposing a price control obligation on the operators in question. Hence, BEREC cannot express an opinion on whether a price control obligation would be justified or not.

On the serious doubts regarding the lack of remedies to be imposed for wholesale bitstream services below 8 Mbit/s

Commission's concerns

The Commission notes 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 on lower and higher capacity connections respectively, 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 existence of SMP warrants at least some appropriate specific regulatory obligations as prescribed by Article 16(4) of the Framework Directive.

The Commission's serious doubts stem from the fact that, in case the relevant product market is defined correctly, FICORA should impose appropriate remedies in the non-competitive market, in accordance with Article 8 (4) of the Access Directive and Article 16 (4) of the Framework Directive, in order to enable access seekers 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. If however the competitive conditions vary between the two identified segments of the market (i.e. below and above 8 Mbit/s), FICORA could alternatively, on the basis of principles of competition law, address these differences at the stage of the market analysis and SMP assessment.

FICORA's view

FICORA has considered that ex-ante regulation of the wholesale broadband access market can be reduced and the obligations on the wholesale broadband products below 8 Mbit/s can be removed. Thus, FICORA has differentiated obligations between two different wholesale product classes and has proposed proportionate and justified obligations based on the nature of the problem identified in the market analysis as it have been mandated on Article 8(4) of the Access Directive.

Finland has the highest mobile broadband penetration in Europe. Mobile data-transfer subscriptions and wireless broadband subscriptions implemented by means of Flash-OFDM, WLAN, or WiMAX technology can be considered a partial substitute in the broadband service retail market for broadband subscriptions implemented by means of DSL technology or, in optical-fibre networks Ethernet technology. This substitutability primarily concerns broadband subscriptions slower than 8 Mbps, implemented by means of DSL technology or, in optical-fibre networks, Ethernet technology.

There is clear evidence of the substitution between the slower fixed broadband implemented via DSL or Ethernet (below 8 Mbit/s) and mobile data-transfer subscriptions.

End-users have replaced their slower fixed broadband subscriptions with mobile data-transfer subscriptions, or with faster (8 Mbit/s or above) fixed broadband subscriptions.

The fixed network operators cannot offer slower fixed broadband subscriptions with as low a price as the mobile network operators can offer their mobile data-transfer subscriptions, because the cost for offering fixed broadband services is relative high compared to the cost for offering mobile data-transfer services.

Mobile data-transfer subscription prices exert a direct constraint on the pricing of fixed broadband subscriptions. Even though fixed broadband operators are pricing their

subscriptions based on the prices of mobile data transfer subscriptions, they are losing market shares on the retail market.

Regarding the inclusion of mobile data in the market analysis and SMP assessment, FICORA's view is that this is very complex. The burden of data collection especially for the operators but also for the NRA would be unsustainable. For the market analysis on market 5 FICORA has collected municipality-level-data for 336 municipalities in Finland).

Mobile network operators had problems to offer municipality-level information to FICORA because operators cannot connect mobile broadband subscriptions by end-users addresses to the correct municipality. Imprecise market data would have affected the result of the market analysis so that the outcome of the analysis would have been unreliable and unjustified.

FICORA also states that maintaining the present regulation will impose to the regulated operators disproportional regulatory costs to maintain reference offers (including pricing) and processes.

BEREC's assessment

The view of BEREC is that, in the light of the information presented by FICORA, the Commission's serious doubts are justified.

Substitutability between mobile and low capacity fixed broadband

BEREC does not share FICORA's opinion that there is a clear substitutability between mobile and fixed broadband. When analysing the statistics given in the market analysis, BEREC comes to the following conclusions.

The huge increase of mobile subscription has not caused any reduction of the number of fixed subscriptions, which have remained rather stable since 2007. There is no evidence of a migration of customers from low capacity fixed broadband to mobile broadband.

The subscriptions up to 10 Mbps make up 59% of the fixed broadband market. The share is decreasing, but it is too early to say that there is no more demand on this segment of the market. There is also no evidence that mobile substitution should be the cause of this reduction, it could as well be an end-user preference for high capacity fixed broadband.

According to FICORA, retail subscriptions for mobile data services normally cost only one third of what a fixed subscription with the equivalent capacity would cost.¹⁰ In BEREC's view, this fact cannot be interpreted as a sign of substitutability, but rather the contrary. If the mobile and fixed subscriptions were substitutes, there would not be such a big price difference between the two, with one substitute being three times more expensive than the other.

To conclude, BEREC does not support FICORA's view that the general availability of mobile data services justifies the withdrawal of all remedies on the market segment for fixed wholesale broadband access below 8 Mbit/s.

¹⁰ Ficora analysis M5, p.15: The retail price of a mobile communications network data transfer subscription in relation to the connection speed with DSL or Ethernet subscription is on the whole nearly three times as cheap.

Disproportional costs of regulation

BEREC, in the same context as the Commission has stated, wants to emphasise that the way FICORA has chosen to address the competition problems in the low capacity segment of the market is demonstrated not by imposing with differentiated remedies, but by not imposing remedies at all. In BEREC's view, there are combinations of remedies whose imposition will not induce any regulatory cost for the operators, like transparency or non-discrimination.

Neither does BEREC share the opinion that maintaining access regulation on the provision of low capacity wholesale broadband services would cause disproportional costs for the operators. All capacities of a wholesale broadband access service are included within a single reference offer, operated by the same production processes regardless of capacity provided, and within a single cost model. A reduction of the number of products provided will not cause any cost reductions for the operators in relation to maintaining the Reference Offer and providing the service.

In conclusion, BEREC does not support FICORA's view that the general availability of mobile data services justifies the withdrawal of all remedies on this market segment. BEREC recommends FICORA to impose appropriate remedies without taking the availability of mobile data services into consideration.

5. CONCLUSIONS

On the basis of the assessment set out in section 4 above, BEREC considers that the Commission's serious concerns regarding the draft decision of the Finnish Regulatory Authority - as expressed in the Commission's letter to FICORA of 18th of June 2012 – are mostly justified.

BEREC shares the Commission's serious doubts that the lack of a price cap for fibre in market 4 does not fully comply with the policy objectives and regulatory principles of the Regulatory Framework.

BEREC shares the Commission's serious doubts about the non-imposition of price control in market 5 for copper and fibre lines. In BEREC's opinion, the obligations imposed by FICORA on SMP operators in market 5 are not sufficient to prevent the competition problems identified in the market analysis.

Regarding the lack of price control for copper based local loop unbundling services for 19 SMP operators, the remedies decisions for these operators have not been registered for notification by FICORA. BEREC's assessment is that a matter of whether or not a national regulatory authority has fulfilled the information requirements of article 7(3) is not to be subject to examination by BEREC within this context. Moreover, the information at BEREC's disposal is not sufficient to understand FICORA's motives for not imposing a price control obligation on the operators in question. Hence, BEREC cannot express an opinion on this issue.

BEREC shares the Commission's serious doubts regarding the lack of remedies to be imposed for wholesale broadband access services below 8 Mbit/s. BEREC does not support FICORA's view that the general availability of mobile data services justifies the withdrawal of all remedies on this market segment.

In the light of the Commission's serious doubts and the argumentation above, BEREC wish to make the following recommendations.

Regarding the non-imposition of price control in market 5 for copper and fibre lines, BEREC recommends FICORA to impose a price control obligation on all SMP-operators in this market.

Regarding the lack of remedies to be imposed for wholesale broadband access services below 8 Mbit/s, BEREC recommends FICORA to impose appropriate remedies without taking the availability of mobile data services into consideration.
