

Brussels, 28 July 2014  
Case No: 75672  
Event No: 715018

EFTA SURVEILLANCE  
AUTHORITY

**Póst-Og Fjarskiptastofnun (PTA)**  
Sudurlandsbraut 4  
108 Reykjavík, Iceland

For the attention of:  
Hrafnkell V. Gíslason  
Managing Director

Dear Mr Gíslason,

**Subject: Case No 75672 – Wholesale broadband access in Iceland - Remedies - Míla's Reference offer – New services on access nodes**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC<sup>1</sup>**

## **I. Procedure**

On 26 June 2014, the EFTA Surveillance Authority (“the Authority”) registered a draft national measure, pursuant to Article 7 of the Framework Directive, from the Icelandic national regulatory authority, *Póst-Og Fjarskiptastofnun* (“the PTA”). The draft measure concerns Míla's Reference Offer for Bitstream<sup>2</sup> regarding its new services on access nodes other than those already provided under Access Option 1<sup>3</sup> in line with the transparency obligation imposed on Míla in the previous market analysis in 2008.<sup>4</sup>

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<sup>1</sup> 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 I (“the Framework Directive”).

<sup>2</sup> Corresponding to market 5 of the EFTA Surveillance Authority Recommendation (Decision No. 688/08/COL) of 5 November 2008 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.

<sup>3</sup> According to the PTA Decision no. 8/2008 (see the Authority's comments' letter under Case No 64016), Access Option 1 refers to access in the DSLAM or equivalent equipment at the location where the copper local loop connects to the distribution frame of the telephone exchange.

<sup>4</sup> See the Authority's comments' letter under Case No 64016.

The notification became effective on the same day. National consultation was carried out, pursuant to Article 6 of the Framework Directive, between 21 February 2014 and 11 March 2014.

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 28 July 2014.

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. Previous notifications

The last full review of the corresponding market was notified to the Authority in 2008.<sup>5</sup> In this review, a range of obligations was imposed on Síminn (now Míla ehf. (“Míla”)<sup>6</sup>) including, *inter alia*, obligations to provide access to facilities,<sup>7</sup> price control as well as transparency. Based on these obligations and Síminn’s submission of its cost analysis, the PTA issued a decision in 2010, setting Síminn’s tariffs for Access Options 1-4. In 2012, the PTA issued a decision<sup>8</sup> which followed a dispute between Fjarskipti ehf. (“Vodafone”) and Síminn concerning Vodafone’s bitstream access to Access Option 1. In this decision, the PTA obliged Síminn to accept Vodafone’s requests for Access Option 1 in xDSL,<sup>9</sup> including VDSL with multicast and VoIP capability at cost-analysed prices without unnecessary delay.<sup>10</sup> The dispute further related to the question whether special access nodes (Ethernet access nodes) were needed for the provision of the access in question. The PTA’s conclusion was that special access nodes were required for such access to become possible, *inter alia* due to security considerations.<sup>11</sup> The PTA furthermore considered that Vodafone should participate in the costs of such an arrangement. Temporary prices were set by the PTA<sup>12</sup> until final prices, after Síminn’s submission of its relevant cost analysis (due by 1 February 2013), would be endorsed by the regulator.<sup>13</sup>

<sup>5</sup> See footnote 3.

<sup>6</sup> The Decision of the Icelandic Competition Surveillance Authority no. 6/2013 dated 26 March 2013 on a settlement between Skipti hf. and the Competition Authority moved the bitstream access service from Síminn to Míla on 1 September 2013. The responsibility to provide a cost analysis has also been moved to Míla.

<sup>7</sup> The access obligations included access to Access Options 1 – 4 and to various types of broadband services, including multicast and VoIP (Voice over Internet Protocol) functionalities.

<sup>8</sup> See the PTA’s Decision No 38/2012 (“the PTA’s 2012 decision”).

<sup>9</sup> DSL (Digital subscriber line) is a family of technologies that provide Internet access by transmitting digital data over the wires of a local telephone network. xDSL stands for different variations of DSL, such as for example VDSL (Very-high-bit-rate digital subscriber line).

<sup>10</sup> Thus, the access option in question was to include the possibility for Vodafone to set up and control virtual channels with multicast capability and quality control which would enable Vodafone to operate its IPTV system on Síminn’s xDSL networks. In the case of VDSL, where DSLAM equipment was located in street cabinets, Síminn was temporarily authorised to provide the access in question in equipment in telephone exchanges where such equipment is categorised as equipment analogous to DSLAM in this connection, without, however, increased costs for Vodafone. The PTA stated that a more detailed description of the access in question would be prescribed in second-round review of the bitstream market (market 5) currently being finalised by the PTA.

<sup>11</sup> In the PTA’s opinion, such a solution was also simpler, more homogeneous and offered greater scalability. It was also more economical for Vodafone and for potential new parties.

<sup>12</sup> A specific start-up charge was set at ISK 250,000 for each access node to cover the cost of installation, finishing and definition of DSLAM VLAN set-up for the access node in question. In addition to this, Vodafone was to pay a monthly investment and operations charge of ISK 14,777 for 1 GB/s and ISK 18,538 for 10 GB/s. The charges in question were split between the two parties and included, *inter alia*, the

In the course of the following national consultation on Míla's cost analysis, which opened on 20 December 2013, the PTA established that Míla had used the above-mentioned access nodes for the delivery of services other than those falling under Access Option 1, as provided for in the PTA's 2012 decision.<sup>14</sup>

## II.2. Current notification

Under the present draft measure, the PTA envisages to allow Míla – under the requirements of obligations of transparency and non-discrimination (as imposed in its 2008 market review) – to provide more varied services other than those already provided under Access Option 1. As examples of the more varied services, the PTA indicates direct corporate connections, connections with mobile phone transmitters and backbone connections with IP networks. Míla shall be obliged to guarantee its customers in Access Option 1 the capacity required for the provision of xDSL to their customers.<sup>15</sup> Further, the PTA intends to introduce the possibility to purchase more than one VoIP connection at the same unit price as the first VoIP connection. Also, the condition that Míla's counterparty may only sell multicast and VoIP to end-users will be removed. The general 3-month termination provision in the Reference Offer shall also apply to access nodes.

In the PTA's view, by using its equipment more effectively, unit prices will be reduced for all parties using the system and, eventually, transferred to the retail market. In the PTA's view, the new services will enhance the competition on the electronic communications market, reduce the need for investment and simplify marketing efforts of parties not related to the Skipti Group (i.e., Míla and Síminn).

Míla should be authorised to offer the new services, provided that the obligations of non-discrimination and transparency are being observed. The above amendments shall be applicable upon the entry into force of the PTA's final decision on the presently notified draft measure.

## III. Comment

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

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purchase of access nodes, the annual license fee, hosting of equipment and surveillance. Should Vodafone make transactions with Síminn where the above specified temporary prices were used, the companies were to settle any possible difference retroactively when the PTA's final decision on the prices would be issued.

<sup>13</sup> A parallel decision, currently pending with the Authority under Case No 75574 (Cost analysis for Bitstream Access according to Access Options 1 and 3, with a deadline on 21 July 2014) deals with this cost analysis and final tariffs for the relevant services, including access prices for the access nodes. Vodafone's set-up charge in this analysis for access nodes is proposed to be reduced from ISK 250,000 to ISK 93,000.

<sup>14</sup> This different use of access nodes led the PTA to open a national consultation on 21 February 2014, as in the regulator's view, it had a fundamental importance in its assessment of Míla's cost analysis. The PTA ordered Míla in the meantime – on order for the company not to breach its obligations of non-discrimination or transparency – not to process further requests for services other than on the access nodes under Access Option 1 until a final decision by the PTA would be issued.

<sup>15</sup> Míla is not authorised to determine a purchaser's system structure and to control the kind of port delivered to them. Should the situation arise where 10 GB/s ports are not free, Míla may not reject a reasonable request for the Access Option 1 (though it may be necessary to delay delivery while new equipment is being acquired). The PTA shall be informed about such delays.

### **Need to justify the imposition of, or amendments to, remedies**

According to Article 16(2) of the Framework Directive, NRAs shall decide whether to impose, maintain, amend or withdraw obligations on undertakings on the basis of a market analysis. Furthermore, pursuant to Article 8(4) of the Access Directive, obligations should be based on the nature of the problem identified and should be proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

In this respect, the Authority notes that the PTA's review of market 5 dates back to 2008. Therefore, its currently proposed draft measure may no longer be based on market information which objectively corresponds to the actual market situation and might therefore not be appropriate to address the competition problems identified at the time of the relevant market review in 2008.

The Authority notes at the same time that the PTA's second-round review of market 5 is substantially advanced. Furthermore, with regard to the justification of the currently notified draft measure, the PTA notes that it is necessary to maintain the obligations on Mila regarding the xDSL bitstream services.<sup>16</sup>

However, taking account of the requirements of the EEA regulatory framework as set out above, the Authority repeatedly urges the PTA<sup>17</sup>, when adopting the final measure in the presently notified case, to explain in more detail how the competition problems identified in the course of the relevant market review in 2008 still necessitate the proposed draft measure.

## **IV. Final remarks**

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedy 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 may adopt the resulting draft measure and, if it does so, shall communicate the final measure 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 national measures.

Pursuant to point 15 of the Procedural Recommendation,<sup>18</sup> the Authority will publish this comments' letter on its eCOM Online Notification Registry. The Authority does not consider the information contained in this letter to be confidential. However, the PTA is invited to inform the Authority within three working days<sup>19</sup> following receipt of this letter if it considers, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which the PTA would like to have deleted prior to publication. The PTA should provide reasons for any such request.

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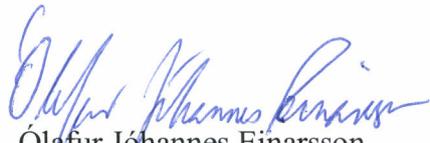
<sup>16</sup> See page 30 of the notified draft measure.

<sup>17</sup> The Authority has on many occasions issued similar comments, see for example Case Nos 75384 and 75574.

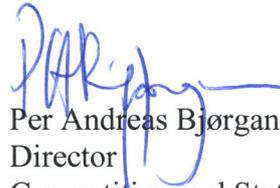
<sup>18</sup> EFTA Surveillance Authority Procedural Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, OJ C 302, 13.10.2011 p. 12-21 ("the Procedural Recommendation").

<sup>19</sup> The request should be submitted through the eCOM Registry or by e-mail to [Ecom@eftasurv.int](mailto:Ecom@eftasurv.int), marked for the attention of the eCOM Task Force.

Yours sincerely,



Ólafur Jóhannes Einarsson  
Director  
Internal Market Affairs Directorate



Per Andreas Bjørgan  
Director  
Competition and State Aid Directorate