

Brussels, 11 August 2014
Case No: 75750
Event No: 715771



EFTA SURVEILLANCE
AUTHORITY

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

For the attention of:
Hrafnkell V. Gíslason
Managing Director

Dear Mr Gíslason,

Subject: Case No 75750 – Markets for Wholesale (physical) network infrastructure access (including shared and fully unbundled access) at a fixed location and Wholesale broadband access in Iceland

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. Procedure

On 11 July 2014, the EFTA Surveillance Authority (“the Authority”) registered two draft measures, pursuant to Article 7 of the Framework Directive, from the Icelandic national regulatory authority, *Póst-Og Fjaraskiptastofnun* (“the PTA”), concerning the second review of (i) the wholesale (physical) network infrastructure access market (including shared and fully unbundled access) at a fixed location² and (ii) the wholesale broadband access market³ in Iceland.

The notification became effective on the same day. National consultation was carried out, pursuant to Article 6 of the Framework Directive, between 7 March 2013 and 18 April

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 I (“the Framework Directive”).

² Corresponding to market 4 of 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”).

³ Corresponding to market 5 of the 2008 Recommendation.

2013.⁴ An additional consultation was held between 20 December 2013 and 24 January 2014.⁵

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 11 August 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 MEASURES

II.1. Background

The last full reviews of the markets for wholesale (physical) network infrastructure access (including shared and fully unbundled access) at a fixed location (market 4) and for wholesale broadband access (market 5) in Iceland were notified to and assessed by the Authority in 2007⁶ and 2008.⁷ Both markets consisted of the wholesale provision of broadband access products supplied via copper. The PTA excluded other technologies from the market such as cable and fibre-optic networks, satellite connections and fixed wireless networks.

On market 4, the PTA designated Míla hf. (“Míla”) as an operator with significant market power (“SMP”) and imposed a set of remedies which included the obligations to provide access to copper local loops (local loop unbundling or “LLU”) and related infrastructure including information and support systems, non-discrimination (as regards price and other conditions of access), transparency, accounting separation and price control (cost orientation) as well as cost accounting obligations.

On market 5, Síminn hf. (now Míla)⁸ was designated as an operator with SMP. The PTA put the following obligations in place: access to networks and related infrastructure, non-discrimination, transparency, accounting separation and price control (cost orientation).

II.2. Current notifications

II.2.1. Market definition

a) Market 4

The relevant service market covered by this notification is the wholesale (physical) network infrastructure access market (including shared and fully unbundled access) at a

⁴ In accordance with Article 5 of the 2008 Recommendation.

⁵ This additional consultation was limited in scope to specific changes to the draft measures, such as those resulting from the Settlement (mentioned below, footnote 8), and amendments to the price control obligation (e.g. timelines), to the non-discrimination and transparency obligations, and to the access obligation on market 5.

⁶ See the Authority’s letter under Case No 63207.

⁷ See the Authority’s letter under Case No 64016.

⁸ 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. This means that Síminn no longer operates on the relevant wholesale market.

fixed location. The PTA concludes that the market includes copper-based and fibre-based local loops. Other methods of connecting to access networks at a fixed location are not considered to be substitute products and are thus not part of the relevant product market.

b) Market 5

The PTA concludes that market 5 includes the wholesale provision of broadband access products through copper-based and fibre-based networks. Other methods of broadband access are not considered substitutable and are thus not part of the relevant product market.

II.2.2. Geographic market definition

The relevant geographic market for both markets 4 and 5 is defined as Iceland. In the PTA's view, there are no clear and stable boundaries between geographic areas with differentiated and sufficiently heterogeneous competitive conditions which would justify dividing the country into regional markets. Furthermore, the PTA has not observed significant differences in the prices or quality of services by region.

II.2.3. Assessment of SMP

The PTA designates Míla as an SMP operator in both markets 4 and 5. The criteria used by the PTA to assess SMP on these markets include: (i) market shares, (ii) Míla's overall size and in particular its access network as well as market experience, (iii) entry barriers including sunk costs, (iv) economies of scale and scope, (v) distribution and sales network, (vi) barriers to growth, (vii) vertical integration, (viii) limited countervailing buying power, (ix) limited potential competition and (x) limited choice together with high switching costs.

As regards market 4, the PTA indicates that Míla had the largest market share with about 83% at the end of 2013 in terms of the numbers of local loops in use.⁹ Gagnaveita Reykjavíkur ehf. ("GR") was next with 15%. Other companies had a joint share of less than 2%.

In market 5, Míla had a market share of about 76% in terms of wholesale provision of bitstream access at the end of 2013, while GR accounted for 24%.¹⁰

⁹ Míla's market share was 100% in the PTA's previous market analysis in 2007. The PTA explains the decrease mainly by reference to GR's significant development in recent years, developing the country's largest fibre-optic network. Even though GR does not generally lease fibre-based LLU externally but supplies it internally for its own use, the PTA proposes to include its share in the relevant market as it considers that GR might exert competitive pressure on Míla's LLU offering via supply-side substitutability. The PTA confirms that GR is in the position to constrain Míla's behaviour in the relevant market as a small but significant and non-transitory increase in wholesale price could induce wholesale customers to look more towards GR. In any case, the PTA takes into account the internal nature of GR's supply in the relevant market in the subsequent assessment of the significant market power. Additionally, the PTA notes that if GR's share was not considered part of that market, Míla would have a market share of almost 100%, even though uptake of GR's fibre connections may increase in the future.

¹⁰ While the PTA has also considered a market share scenario, including the self-supply of FjarSKIPTI (Vodafone Iceland; "Vodafone"), it explains that Vodafone's ability to exert competitive pressure on Míla's bitstream operations is diminishing due to its use of a legacy ADSL system, while the market is moving to VDSL and fibre technology. The PTA therefore considers that the most relevant market share situation is one where Vodafone's self-supply is not taken into account. If Vodafone's self-supply was taken into account in the relevant market, then Míla would still have a market share of about 65% in terms of

II.2.4. Regulatory remedies

a) Market 4

On market 4, the PTA proposes to impose the following regulatory remedies on Míla:

- Access, including the requirement that Míla is to accede to normal and reasonable requests for full and shared access to the copper-based network, including sub-loop unbundling and access to the lower frequency range and to the upper frequency range (naked DSL), as well as access to fibre-based lines¹¹ and to related facilities.¹² Further, Míla is to be obliged to provide access to co-location along with access to support systems and appropriate information. Míla is also to be required to notify all technical migration plans with advance notice and to allow for open access to technical interfaces, communications protocols and other technologies which ensure interoperability of services. In addition, Míla is to provide a list of planned excavation and duct activities (civil works) with a six-month notice period.

The PTA notes that it might be problematic to provide more than one VDSL operator with access to street cabinets due (*inter alia*) to a lack of space and to the costs connected with enlarging existing cabinets.¹³ In order to ensure access to local loops which use the VDSL standard and where vectoring is planned,¹⁴ the PTA intends to require the provision of open virtual local access ("VULA")¹⁵ which would need to fulfil the following conditions:

- access at each of Míla's existing VDSL locations;
- access independent of the service provided on the line;
- specific and fixed definition of line capacity;
- full control of access and service definitions and full control of customer premises equipment.

In those street cabinets where VDSL equipment is already in place and where VULA has been activated, the PTA plans to provide an exception from Míla's

connections in use, while GR would be next with 21%. Vodafone would account for about 13% and other companies for less than 1%.

¹¹ Access to fibre-optic local loops is to be provided from the cabinet/node point in the distribution frame to the network connection point of the end user. Fibre-optic deployments in Iceland are based primarily on the Point-to-Point ("P2P") architecture (operated mainly by GR), and the Gigabit Passive Optical Network ("GPON") (operated by Míla). The access obligation relates to providing open access to Míla's GPON fibre-based local loops. Míla currently offers the possibility to lease access to its fibre local loops without equipment, although electronic communications providers other than Síminn have not yet availed themselves of this service.

¹² The PTA does not propose access obligations for shared access to fibre-based connections due to a lack of operational and financial feasibility. Míla will, however, be authorised to resolve the need for shared access with virtual networks over bitstream through fibre-based local loops, after having received approval from the PTA. The PTA also considers there to be no need to impose access obligations for fibre-optic sub-loops since such access is in reality technically impossible.

¹³ The PTA points out further problems such as crosstalk (where VDSL signals from different users affect the quality of the service).

¹⁴ The use of vectoring increases the capacity of VDSL connections and reduces crosstalk.

¹⁵ VULA involves providing a connection from an aggregation point to the end user in such a manner that the party leasing VULA can control the service to end users in the same manner as if it operated its own VDSL system with all of the technical and performance specifications needed to provide any kind of service over bitstream (including VoIP and IPTV).

obligation for access to copper sub-loops. The PTA notes that the exemption from the copper sub-loop obligation would depend on two factors, namely credible plans for introducing vectoring and the offer of VULA.¹⁶

The obligation for wholesale access to copper-based local loops may not be discontinued if replaced by fibre-based local loops (technical migration) unless an agreement on the migration process has been reached between Míla and the leasing party. If no agreement can be reached, Míla will be obliged to publish all prospective changes with a 5-year notice period.¹⁷

- **Non-discrimination**¹⁸ between external operations and between internal and external operations in the form of an Equivalence of Inputs (“EoI”) requirement. This implies that Míla is to be obliged to offer the same price, use the same service procedures and systems, the same time limits and to publish the same information about the services (such as development and distribution information) towards its external and internal operations with regard to both copper- and fibre-based local loops. Míla is also to give internal and external parties the opportunity to influence the development of new wholesale products and planned interfaces.¹⁹ Furthermore, Míla is to be obliged to make Service Level Agreements (“SLAs”) with all purchasers of local loops²⁰ as well as issue Service Level Guarantees (“SLGs”).²¹ Míla is also to publish Key Performance Indicators (“KPIs”).²²
- **Transparency** for copper- and fibre-based LLU, as well as for VULA,²³ including the publication of a reference offer.²⁴
- **A separation of accounts**, in order to ensure that the non-discrimination and transparency obligations are met.

¹⁶ Furthermore, such an exception would only be granted to Míla after a specific endorsement by the PTA. If Míla has not applied vectoring within three months after the exception has been granted, the PTA would revoke it.

¹⁷ Deviations may be allowed from the 5-year notice period following an endorsement by the PTA. As to the process, the PTA intends to hold a consultation among stakeholders (if it finds Míla’s request to be material and proportionate) and to grant the exemption only if the stakeholders would have a sufficient alternative, without undue hardship in the process of migrating between the systems.

¹⁸ The non-discrimination obligation is to be fully implemented no later than three months after the publication of the final decision. Should Míla not meet this requirement, the PTA reserves its right to impose a price obligation with respect to Míla’s fibre-based LLU.

¹⁹ The PTA can perform a technical and/or economic replicability test to check whether external parties can replicate the product offer of internal parties in a sustainable manner (technical and/or economic replicability test). Should the PTA conclude that the product offer is not replicable, it can instruct Míla to alter its product offer and/or offer new wholesale products to enable external parties to replicate the product offer.

²⁰ All SLAs are to be completed within six months after the publication of the final decision and are to be published on Míla’s website.

²¹ The SLGs are to cover all necessary service issues that relate to non-discrimination, such as orders, delivery, service access, service switching and maintenance. They are also to be put in place within six months after the publication of the final decision, and published on Míla’s website.

²² The KPIs, which include *inter alia* criteria relating to the processing of orders, delivery of service, maintenance services and service switching, should be split between internal and external transactions. The implementation deadline is the same as for SLAs and SLGs.

²³ Míla is to be obliged to publish information related to access to local loops. This would include, for example, information on registration of local loops, technical descriptions, network characteristics, terms and conditions for delivery and use, and tariffs.

²⁴ The reference offer is to be submitted for the PTA’s endorsement no later than six months after the publication of the final decision.

- **Price and accounting controls**, including cost-orientation based on a HC FAC methodology (i.e. historic cost accounting based on fully-allocated costs) for copper-based LLU.²⁵ The tariff for copper-based LLU is to be reviewed annually.²⁶ The PTA does not propose a price control for wholesale access delivered via fibre local loops.²⁷

The PTA plans to take the Recommendation on non-discrimination obligations and costing methodologies into account when evaluating Míla's cost analysis of its copper-based LLU. The PTA notes that it will also set the LLU price having regard to Míla's bitstream prices. If the PTA considers Míla's analysis to be unacceptable, having regard to the above Recommendation, the PTA intends to reject the tariff proposed by Míla.²⁸ As a result, the PTA would then set prices according to an average of access prices set by NRAs on comparable markets (in accordance with the Recommendation) on non-discrimination obligations and costing methodologies.²⁹ The PTA further proposes cost accounting for both copper- and fibre-based LLU access, and for related facilities.³⁰

b) Market 5

On market 5, the PTA proposes to impose the following regulatory remedies:

- **Access**,³¹ including acceding to normal and reasonable requests for open access for specific network facilities on local loops (copper and fibre) at the wholesale level³²

²⁵ The PTA does not consider it appropriate to adopt a BU-LRIC cost model at this time in the light of high implementation costs. Furthermore, the PTA emphasises that Míla's current tariff for copper-based LLU, equivalent to 8.5 € (as endorsed by the PTA's Decision No 15/2013 in 2013), falls within the recommended price band according to Commission Recommendation 2013/466/EU on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, OJ L 251, 21.09.2013, p.13 ("the Recommendation on non-discrimination obligations and costing methodologies").

²⁶ The PTA envisages that Míla is to submit the cost analysis to the PTA for its endorsement no later than six months after the publication of the final decision.

²⁷ According to the PTA, the main reason for this is Míla's limited development of fibre-based local loops. The number of Míla's fibre-based local loops in use was [REDACTED] at the end of 2013, which amounted to about [REDACTED] of the total number of fibre-based local loops in use (and [REDACTED] of the total number of local loops in use). The PTA notes that Míla is to be obliged to fulfill the conditions of full non-discrimination and is not to engage in a margin squeeze. The PTA further notes that it can perform a margin squeeze test if it identifies a need for such a test, and – should the test show abnormal pricing by Míla – it is in a position to prescribe amendments to Míla's tariff. The PTA intends to apply any such *ex post* margin squeeze test using the Equally Efficient Operator ("EEO") method, having regard to the approach taken by the competition authorities and in particular to the margin squeeze test used by the Icelandic Competition Authority in its Decision No 7/2012 on Siminn's illegal price squeeze in the mobile market.

²⁸ The PTA also underlines that it may endorse tariffs which fall outside of the price band specified in the Recommendation on non-discrimination obligations and costing methodologies in the event of special circumstances (such as very significant changes to the ISK's exchange rate).

²⁹ The PTA confirms that a new tariff for copper-based LLU would only come into force after an endorsement by the PTA, subsequent to consultation under Articles 6 and 7 of the Framework Directive.

³⁰ Míla is to submit its cost accounting no later than six months after the publication of the final decision. At the same time, Míla is also to submit a report from an independent auditor evaluating the correctness of its cost accounting.

³¹ In order for Míla's bitstream access to be perceived as an adequate wholesale service, the PTA intends to require the following conditions:

- access at each of Míla's existing bitstream locations;
- access independent of the service provided on the line;
- specific and fixed definition of line capacity;
- full access to service/service definitions and full control of customer point of service equipment.

and at various locations in the network (i.e. Access Options 1-3³³), as well as access to the backbone network and to other related facilities together with access to information and support systems. As is the case for market 4, the obligation for bitstream access remains in place even if technical migration takes place unless an agreement on the migration process has been reached between Míla and the leasing party. If no agreement can be reached, Míla is to inform affected parties of all technical migration plans with a 2-year notice period.³⁴

- **Non-discrimination**³⁵ between external operations and between internal and external operations in the form of EoI (as already described for market 4 above).³⁶ The non-discrimination obligation also includes an obligation to publish plans for distribution, enlargement or other developments of Míla's bitstream networks with the same notice period as for Míla's own operations and with a minimum of three months. Furthermore, Míla is to give parties the opportunity to influence the development of new wholesale products and planned interfaces. The PTA also clarifies that a bitstream operator may publish VDSL roll-out plans for a specific area three months in advance and by doing so secure priority rights to VDSL development in that area for the three-month period.
- **Transparency**, including the publication of a reference offer for bitstream access, including VULA, and for related facilities and services.³⁷
- **A separation of accounts.**
- **Price and accounting controls**, including cost-orientation based on a HC FAC methodology for access to wholesale bitstream access offered through copper-based local loops at different locations on the network (Access Options 1-3) with both DSL standards (VDSL and DSL) and for virtual access to sub-loops (VULA) with VDSL technology.³⁸ In addition, a cost-oriented wholesale tariff should be

³² This includes access to broadband services such as VoIP and Multicast. According to the PTA, the integration of telephone, Internet and TV services through the same connection (triple play) is necessary for service providers to compete on the relevant market.

³³ 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. Access Option 2 refers to access after ATM/IP transmission in the SMP operator's trunk line network (i.e. the SMP operator handles the transmission of signals from the DSLAM equipment to the other electronic communications undertaking's termination point at the IP/ATM trunk line network). Access Option 3 refers to access after transmission via ATM/IP on the SMP operator's trunk line network to another electronic communications undertaking's connection point. To promote increased efficiency in the provision of wholesale bitstream services, Míla will be authorised, upon a fair and normal request and with the PTA's prior endorsement, to withdraw the offer for Access Option 1 for specific geographic areas where Access Option 2 is a more economic option. Access Option 2 must, however, fulfill the same requirements as Access Option 1 with respect to the service offer, quality control, multicast, communications protocols, etc. The withdrawal shall be notified to the parties with (at least) a 6-month notice period. Access Option 4, which was imposed in the last market review, is proposed to be withdrawn in the current draft measure due *inter alia* to a lack of demand for this service.

³⁴ Deviations may be allowed from the 2-year notice period following an endorsement by the PTA. See the conditions which apply in market 4 under footnote 17, above.

³⁵ As for market 4, the non-discrimination obligation is to be fully implemented no later than three months after the publication of the final decision. See footnote 18, above.

³⁶ In order to ensure that Míla fulfils the EoI obligation, the PTA can perform a technical and/or economic replicability test to check whether external parties can replicate the product offer of internal parties in a sustainable manner. See footnote 19, above, for further details of the replicability test.

³⁷ The reference offer is to be submitted to the PTA for endorsement no later than three months after the publication of the final decision.

³⁸ A basic price for best-effort bitstream access services and a price for quality-controlled bitstream access services (e.g. for the delivery of TV and VOIP services) should also be shown.

calculated for access to hosting of external equipment and to other facilities related to bitstream and access to support systems and information.³⁹ It is envisaged that the tariff would be reviewed annually.

In assessing the tariff proposed by Míla, the PTA proposes to take into account *inter alia* the Recommendation on non-discrimination obligations and costing methodologies, as well as tariffs from analogous competition markets. The PTA underlines that it will also set the tariff having regard to Míla's LLU prices. If the PTA considers Míla's analysis to be unacceptable, the regulator would reject the proposed tariff and implement benchmarking or another methodology to achieve results which are in accordance with the Recommendation. The PTA envisages the implementation of cost accounting for wholesale bitstream services within six months after the publication of the final decision.⁴⁰

The PTA does not propose to impose price control on wholesale bitstream services offered through fibre-based local loops. However, the price for access to Míla's fibre-based loops should not be abnormal in comparison with the pricing of bitstream access through copper-based local loops. Míla is also to be obliged to fulfil the conditions of EoI and not engage in pricing which could lead to a margin squeeze of the wholesale and retail bitstream services within the Skipti Group. As for market 4, the PTA notes that it may implement a margin squeeze test in the event that Míla's tariffs are abnormal, and may impose changes to the tariff if necessary.⁴¹

III. Comments

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

Need to ensure equivalence of access to fibre-based infrastructure in markets 4 and 5

The PTA does not propose price control in respect of wholesale access to fibre infrastructure in either market 4 or market 5. The Authority recognises the currently limited stage of Míla's fibre-based infrastructure and that it may be important, in order to promote efficient investment and innovation, to allow operators investing in NGA networks a certain degree of pricing flexibility to test price points and differentiated offers.

However, in order to ensure that such pricing flexibility does not lead to excessive pricing or margin squeeze in markets where SMP has been found, additional safeguards to protect competition should be in place. For example, such safeguards would include demonstrating effectively functioning equivalence of access (both technical and economic) and that competitive conditions prevail, e.g. through demonstrable price constraints stemming from cost-oriented copper lines or effective infrastructure-based competition.

³⁹ Míla is to submit its cost analysis to the PTA for its endorsement no later than six months after the publication of the final decision.

⁴⁰ Míla is also to submit a report from an independent auditor evaluating the correctness of its cost accounting.

⁴¹ See footnote 27, above.

○ *Technical equivalence of access*

With regard to technical equivalence of access, the Authority notes the PTA's confirmation that it intends to apply EoI to all (copper- and fibre-based) access products and to associated and ancillary services in the relevant markets. The PTA also proposes to enforce this obligation within three months (in market 4) and within six months (in market 5) after the publication of the final decision. The PTA also clarifies that in the event that EoI is not implemented, it may impose a price obligation with respect to Míla's fibre-based infrastructure.

○ *Economic equivalence of access*

With regard to economic equivalence of access, the Authority notes that the PTA may perform an *ex post* economic replicability test to identify whether external parties can replicate the product offer of internal parties in a sustainable manner.

The Authority further notes that the PTA intends to instruct Míla to alter its product offer and/or offer new wholesale products to enable external parties to replicate the product offer in the event that the PTA concludes that the product offer is not replicable. However, despite identifying potential competition problems associated with possible obstructions of wholesale access in the relevant markets, the PTA does not specify any further details⁴² or timelines regarding the application of its proposed economic replicability test.

In view of the above, the Authority invites the PTA to develop and implement an *ex ante* economic replicability test for broadband access products delivered over fibre-based infrastructure related to markets 4 and 5.

The details of the *ex ante* economic replicability test which the PTA will apply should clearly specify the relevant retail products, the relevant cost standard and the downstream costs taken into account, as well as the relevant wholesale inputs concerned and the time period for applying the test.

The Authority notes that any draft decisions regarding the above would be subject to consultation at national and EEA level pursuant to Articles 6 and 7 of the Framework Directive.

Forthcoming pricing decisions implementing the proposed costing methodology

The PTA plans to evaluate Míla's application of the proposed costing methodology for both markets 4 and 5 six months after the publication of the present draft decision and subsequently to notify its draft final pricing decisions to the Authority in line with Article 7 of the Framework Directive.

Against this background, the Authority recalls its comment in Case No 74047 regarding the methodology for calculating wholesale access tariffs for copper local loops in Iceland. In particular, it reminds the PTA of the need in its forthcoming pricing decisions to provide a clear elaboration of the relevant steps involved in determining the precise level of the proposed wholesale access prices and how the chosen pricing approach in each instance meets the objectives of the EEA

⁴² Apart from clarifying the proposed efficiency standard (EEO) and its intention to take into account relevant competition experience. See footnote 27, above.

regulatory framework.

Priority rights to VDSL development in market 5

The PTA proposes to include a provision in its non-discrimination obligation such that where a bitstream operator publishes its VDSL roll-out plans for a specific area, it can secure priority rights to VDSL development in that area for a three-month period. According to the PTA, the purpose is to increase willingness to invest in VDSL development.

The Authority invites the PTA to explain in its final measure precisely how this proposed provision is based on the nature of the competition problems identified in the course of its market analysis and is considered proportionate and justified in the light of the objectives laid down in Article 8 of the Access Directive.⁴³ Furthermore, the Authority calls on the PTA to explain the legal mechanism according to which it proposes to apply this provision to non-SMP bitstream providers and to further explain how it proposes to ensure that it would not have the effect of deterring or impeding investment by alternative broadband providers in Iceland.

Market review timing and timely enforcement and effectiveness of remedies

The Authority notes that the PTA's first-round reviews of markets 4 and 5 date back to 2007 and 2008. Consequently, the PTA has accumulated a delay of six to seven years in the market analysis procedure between its first-round reviews and the present notification of its second-round reviews.

If an NRA does not analyse the relevant markets at regular intervals, or considerably delays the enforcement of imposed remedies on the SMP undertaking, this may harm competition on those markets and reduce legal certainty for market participants with regard to the applicable regulatory conditions. Market players need to have a consistent and up-to-date overview of the prevailing regulatory and competitive conditions to determine their business and investment choices with respect to entry and/or expansion in electronic communications networks and services markets across the EEA and within the individual EEA Member States.

In this context, the Authority urges 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. Further, the Authority urges the PTA to ensure a prompt and timely implementation of all of the obligations proposed in the presently notified measure.

In this regard, the Authority also draws the PTA's attention to the revised Article 16(6) of the Framework Directive,⁴⁴ pursuant to which NRAs shall carry out an

⁴³ Pursuant to Article 8(4) of 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, OJ L108, 24.4.2002, p.7, as referred to at point 5c) of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol I ("the Access Directive").

⁴⁴ As amended by Directive 2009/140/EC, OJ L 337, 18.2.2009, p.37 and Regulation 544/2009, OJ L 167, 18.6.2009, p.12. The revised Framework Directive entered into force in the EU Member States on 25 May

analysis of the relevant markets under normal circumstances within three years from the adoption of a previous measure relating to those markets in order to take account of the high level of technical innovation and the highly dynamic nature of the electronic communications sector.

IV. Final remarks

Further to the above comments, and also with regard to future reviews of these markets, the Authority notes the available guidance concerning market 4 and 5, including the Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Networks (NGA),⁴⁵ and the Recommendation on non-discrimination obligations and costing methodologies.


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.

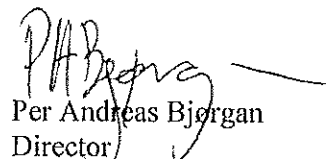
Pursuant to Article 7(5) of the Framework Directive, the PTA is required to take utmost account of the comments of the Authority and of any other regulatory authorities and may adopt the resulting draft measure and, where it does so, must communicate it to the Authority.

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,⁴⁶ 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 days⁴⁷ 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.

Yours sincerely,


 Janne Britt Krakhellen
 Acting Director
 Internal Market Affairs Directorate


 Per Andreas Bjørgan
 Director
 Competition and State Aid Directorate

2011. For the EEA EFTA States it is currently in the preparatory stage for incorporation into the EEA Agreement.

⁴⁵ Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Networks (NGA), OJ L 251, 25.9.2010, p.35, referred to at point 26 (l) of Annex XI to the EEA Agreement.

⁴⁶ 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").

⁴⁷ The request should be submitted through the eCOM Registry or by e-mail to Ecom@eftasurv.int, marked for the attention of the eCOM Task Force.