

Brussels, 19 December 2014
Case No: 76462
Event No: 730516



Póst- og fjarskiptastofnun (PTA)
Sudurlandsbraut 4
108 Reykjavík, Iceland

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

Dear Mr. Gíslason,

Subject: Wholesale broadband access in Iceland - Remedies – Tariff and conditions for VDSL+ for corporate connections and domain and ports for interconnection

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

I. Procedure

On 19 November 2014, the EFTA Surveillance Authority (the “Authority”) received a notification of a draft national measure in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Icelandic national regulatory authority, *Póst- og fjarskiptastofnun* (the “PTA”). The draft measure concerns the remedies imposed on the wholesale broadband access market² in Iceland and in particular the tariffs and conditions for VDSL+ for corporate connections as well as domain and ports for interconnection.

The notification became effective on the same day. National consultation pursuant to Article 6 of the Framework Directive was carried out in the period from 17 September 2014 to 8 October 2014.

On 5 December 2014, the Authority sent a request for information to the PTA, to which a reply was received on 10 December 2014.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33 (as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12), as referred to at point 5cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (the “Framework Directive”).

² Corresponding to market 5 in EFTA Surveillance Authority Recommendation 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 (the “Recommendation on relevant markets”).

The period for consultation with the Authority and the national regulatory authorities (“NRAs”) in the EEA pursuant to Article 7 of the Framework Directive expires on 19 December 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. Background

The draft measure is based on the PTA’s Decision No 21/2014,³ by which Míla ehf. (“Míla”) was designated with significant market power (“SMP”) on markets 4 and 5. The PTA imposed a set of remedies, including the obligation to provide access (including sub-loop unbundling), non-discrimination, separation of accounts, price and accounting controls as well as transparency.

Under the obligation of transparency, Míla was to publish its reference offer for bitstream access and for related facilities and services.⁴ The obligation of price control included cost-orientation based on a fully allocated historic cost methodology for access to wholesale bitstream access offered through copper-based local loops at different locations on the network.⁵ In addition, Míla was obliged to calculate cost-oriented wholesale tariffs for access to hosting of external equipment and to other facilities related to bitstream and access to support systems and information.⁶

II.2. Current notification

Under the present draft measure, in accordance with the imposed remedies of transparency and price control, the PTA envisages to authorise Míla to amend its reference offer for bitstream with respect to the tariff and conditions for new products, namely VDSL+ for corporate connections as well as domain and ports for interconnection with the Míla systems in Access Options 3.⁷

By its Decision No 13/2014 of 30 June 2014, the PTA authorised Míla to commence the provision of the above new products at temporary prices prior to the current notification and thus before the regulator’s final decision on the relevant tariffs and conditions (which are subject to the present notification). The PTA justified its decision by reference to the importance of these new products to the Icelandic market.⁸ Míla would apply the tariffs

³ The decision concerned the market for wholesale (physical) network infrastructure access at a fixed location (market 4 of the Recommendation on relevant markets) as well as market 5 in Iceland, as notified to and assessed by the Authority on 11 August 2014 under Case No 75750.

⁴ The reference offer was to be submitted to the PTA for endorsement no later than three months after the publication of the final decision.

⁵ I.e. for Access Options 1-3 with both DSL standards (VDSL and DSL) and for virtual access to sub-loops (VULA) with VDSL technology.

⁶ Míla was to submit its cost analysis to the PTA for its endorsement no later than six months after the publication of the final decision. It was envisaged that the tariffs would be reviewed annually.

⁷ 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.

⁸ In its reply to the Authority’s request for information, the PTA further stated that its Decision No 13/2014 did not contain a market definition, a designation of undertakings with significant market power or an imposition, amendment or withdrawal of obligations in the relevant market. In the PTA’s view, Decision No 13/2014 was an interpretation of the obligations of transparency and cost control previously imposed on Míla (by the PTA’s Decision No 8/2008 on market 5) which allowed the operator to commence its offering of the new products in question. Further, a national consultation on the above Decision No 13/2014 took

and conditions on a temporary basis, and retroactively settle any difference in price within a month of the PTA's final decision on tariffs.

II.2.1. VDSL+ for corporate connections

VDSL+ for corporate connections from users to the next network connection point is intended to be offered in Access Option 1⁹ or Access Option 3, depending on which is more convenient for the customers of Mila.

As this is a new product, the PTA underlines that the take-up is not clear. Therefore, the PTA intends to take into account Mila's estimates, according to which the number of connections should reach [REDACTED] after one year.¹⁰ Further, according to the PTA, VDSL+ will in any case be a part of Mila's product portfolio which will be examined in Mila's cost analysis to be submitted in February 2015.¹¹ At that point in time, the PTA foresees that there should be more experience on the development and demand for this product.

The PTA intends to allow for the following monthly prices,¹² which should enter into force in the month subsequent to the publication of the currently consulted draft measure:¹³

(1) Monthly charge, VDSL+ in Access Option 1¹⁴	
Annual investment cost - configuration and registration	ISK [REDACTED]
Operating costs	ISK [REDACTED]
Base price - Access Option 1 ¹⁵	ISK [REDACTED]
Total	ISK 2,424

(2) Monthly charge VDSL+ in Access Option 3	
Annual investment cost - configuration and registration	ISK [REDACTED]
Operating costs	ISK [REDACTED]
Base price - Access Option 1	ISK [REDACTED]
Access to IP network	ISK [REDACTED]
Total	ISK 5,420

(3) Set-up charges – ISK 3,166 for new connections on the local loop.

place between 13 May and 27 May 2014. The PTA states that it would have not considered issuing a temporary decision in case the national consultation resulted in significant objections or negative comments from the stakeholders. Therefore, in the PTA's view, its Decision No 13/2014 was not subject to a communication to the Authority under Article 7(6) of the Framework Directive.

⁹ Access Option 1 refers to access in the DSLAM (next network interconnection point) or equivalent equipment at the location where the copper local loop connects to the distribution frame of the telephone exchange.

¹⁰ For the calculation of the annual investment cost, the PTA also uses Mila's WACC of 7.6% for 2013 as well as the monthly charge for VDSL in Access Option 1 of ISK 912.

¹¹ In accordance with the PTA's Decision No 21/2014, as referred to above.

¹² The differences between the temporary prices as imposed under the PTA's Decision No 13/2014 and the currently proposed tariffs are envisaged to be recalculated retroactively for the period in question.

¹³ Further details of items included in the service can be found in Appendix 7A and 7B attached to Mila's Reference Offer for bitstream services which is the object of the current consultation.

¹⁴ All prices exclude VAT.

¹⁵ The cost analysis and base prices for Access Options 1 and 3 were notified to and assessed by the Authority on 21 July 2014 under Case No 75574.

II.2.2. Domain and ports for interconnection

According to the PTA, domains and ports are intended for internet service providers in order to be able to provide services over Míla's xDSL and GPON systems in Option 3, where a connection between the internet service provider and the backbone network needs to be in place.

Míla's tariff for domain and ports for interconnection with Míla's system is based on the fact that Míla is reselling the service from Siminn.¹⁶ In the current draft measure, the PTA intends to allow Míla to charge a 20% handling fee on top of Siminn's charge for the service in question. The PTA considers this estimate to be within normal limits.¹⁷

Further, the PTA envisages to examine in further detail Míla's handling fees for domain and ports in the upcoming cost analysis which Míla is required to submit in February 2015.¹⁸

Under the current draft measure, the PTA intends to endorse the following tariffs for Míla's domains and ports,¹⁹ which should enter into force in the month subsequent to the publication of the currently consulted draft measure:²⁰

(1) Set-up charges ²¹	
Setting up of the first domain	ISK 114,173
Setting up of additional domain	ISK 28,543
(2) Monthly fee	
Port up to 1 Gb/s	ISK 9,986
Port 10 Gb/s	ISK 59,921

III. Comments

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

¹⁶ For internet service parties to be able to offer their internet services through Míla's networks in Access Option 3, there needs to be a connection between the internet service provider and the backbone network. As Míla has not developed its own backbone network, it has to purchase access to Siminn's backbone network (access to BRAS, the Broadband Remote Access Server). The price is based on Siminn's price for this service.

¹⁷ According to the PTA, resale involves a certain amount of handling which generate costs. The following is given as examples of the service provided by a reseller and of the costs which can accrue: sales costs, accounts relationships with customers and funding of accounts receivable, depreciation of accounts receivable, second level service with customers, information systems, share in common costs (for example premises, office and salary costs) and interconnection of networks. The PTA also informs that this approach is in accordance with its previous implementation in the PTA's Decision No 35/2011 on cost analysis of leased lines.

¹⁸ In accordance with the PTA's Decision No 21/2014, as referred to above.

¹⁹ The differences between the temporary prices as imposed under the PTA's Decision No 13/2014 and the currently proposed tariffs are envisaged to be recalculated retroactively for the period in question.

²⁰ Further details of items included in the service are to be found in Appendix 6 attached to the currently consulted Míla's Reference Offer for bitstream services.

²¹ All prices exclude VAT.

Need for communication of provisional measures to the Authority in line with Article 7(6) of the Framework Directive

The Authority takes note of the fact that the PTA, on 30 June 2014, has adopted a decision (Decision No 13/2014) which authorised Míla to commence the provision of new bitstream products. In this Decision, the PTA also set temporary prices for the products in question, pending a final decision which is subject to the present notification.

The Authority recalls that Article 7(6) of the Framework Directive provides that *“In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, by way of derogation from the procedure set out in paragraphs 3 and 4, in order to safeguard competition and protect the interests of users, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission and the other national regulatory authorities. A decision by the national regulatory authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.”*

In this regard, the Authority acknowledges that the PTA carried out a national consultation procedure before the adoption of its Decision No 13/2014, which did not result in significant objections or negative comments from the stakeholders. Further, according to the PTA, it was reasonable and justifiable to allow Míla to commence offering the relevant products before the PTA’s final decision on the relevant tariffs and conditions, so as not to delay their introduction to customers who were demanding these solutions as well as the positive impact on incentives of market players to invest. The Authority also notes that, in the PTA’s view, its Decision No 13/2014 did not necessitate a communication to the Authority under Article 7(6) of the Framework Directive as it did not contain a market definition, designation of undertakings with significant market power or an imposition, amendment or withdrawal of obligations in the relevant market. In the PTA’s view, Decision No 13/2014 was an interpretation of the obligations of transparency and cost control previously imposed on Míla which allowed the operator to commence its offering of the new products in question.

The Authority notes, however, that the PTA’s Decision No 13/2014 appears to fulfil the conditions of Article 7(6) of the Framework Directive as it imposed temporary prices on Míla.²² The PTA has not, however, communicated its provisional measure, accompanied by full reasons, to the Authority in accordance with the above-mentioned provision.

Nevertheless, in light of the PTA’s above explanation, and the fact that with the presently notified draft measure, the PTA renders its Decision No 13/2014 permanent, in compliance with the obligation stemming from Article 7(6) of the Framework Directive, the Authority reminds the PTA at this stage that provisional measures adopted by an NRA should follow the procedure set out in Article 7(6) of the Framework Directive. The use of this provision is, however, limited to exceptional circumstances in order not to undermine regulatory predictability, stability and certainty in the relevant market and where there is an urgent need to act in order to safeguard competition and the interests of users.

²² Provisional measures which set prices are subject to Article 7(6) of the Framework Directive, see for example Commission decision concerning Case DE/2014/1660.

Importance of further review of pricing without undue delay

The Authority notes that the tariffs for the new wholesale services are based on a number of assumptions. For instance, the uptake of the VDSL+ services is uncertain and Míla assumes [REDACTED] clients, which has an impact on the suggested price levels. Similarly, the handling fee of 20% that forms part of the tariff for domain and ports for interconnection with Míla's system is not based on an actual cost calculation. Given the above, the Authority underlines the importance of a timely and strict enforcement of the price control remedy, as imposed in the PTA's Decision No 21/2014 on markets 4 and 5, which in particular requires Míla to submit its cost analysis to the PTA by February 2015.

IV. Final remarks

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

Pursuant to Article 7(5) of the Framework Directive, the PTA is required to take utmost account of the comments of the Authority and of any other regulatory authorities. It 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 Recommendation²³, the Authority will publish this document on its eCOM Online Notification Registry. The Authority does not consider the information contained herein to be confidential. However, the PTA is invited to inform the Authority within three working days²⁴ 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,



Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate



Gjermund Mathisen
Director
Competition and State Aid Directorate

²³ EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5c1 of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol I thereto, OJ C 302, 13.10.2011, p.12, and available on the Authority's website at <http://www.eftasurv.int/media/internal-market/recommendation.pdf> ("the Procedural Recommendation").

²⁴ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.