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COMMISSION RECOMMENDATION

of 27/08/2012

**in accordance with Article 7a of 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 ("Framework Directive") in Case PL/2012/1311:
Wholesale broadband access market in Poland**

Only the Polish version is authentic.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to 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 ("Framework Directive")¹ and in particular Article 7a thereof,

Having called on interested parties to submit their observations pursuant to the provision cited above² and having regard to their observations,

Having regard to the opinion of the Body of European Regulators for Electronic Communication (BEREC)³,

Whereas,

1. PROCEDURE

- (1) From 1 February 2012 until 2 March 2012, the Polish Regulatory Authority, *Prezes Urzędu Komunikacji Elektronicznej (UKE)*, carried out national consultations⁴ concerning the third review of a wholesale broadband access market⁵ in Poland.

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 (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Notice published at: https://circabc.europa.eu/d/d/workspace/SpacesStore/e62f84f3-c12c-4c73-8c3e-6b4ca7d61080/PL_1311_web_notice_for_3rd_parties.pdf

³ Opinion of BEREC of 7 June 2012, BoR(12)66, published at: http://erg.eu.int/doc/whatsnew/bor_12_66.pdf

- (2) On 26 March 2012, the Commission registered a notification concerning the review of the above-mentioned market.
- (3) On 2 April 2012, a request for information (RFI)⁶ was sent to UKE, and a response was received on 5 April 2012.
- (4) On 26 April 2012, the Commission, pursuant to Article 7a(1) of the Framework Directive, informed UKE and BEREC, respectively, of the reasons why it believed that the draft measure would create a barrier to the internal market and its serious doubts as to its compatibility with EU law (the "Serious doubts letter").
- (5) The Commission received five third party observations⁷.
- (6) On 7 June 2012, BEREC delivered its opinion to the Commission⁸.
- (7) On 26 June 2012, a meeting between UKE, BEREC and Commission took place in order to identify the most appropriate and effective measure⁹ addressing the Commission's serious doubts.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Previous notifications

- (8) The first review of the market for wholesale broadband access was notified to and assessed by the Commission in 2006¹⁰. UKE has defined a single national market for wholesale broadband access, designated Telekomunikacja Polska S.A. (TP) as an operator with significant market power (SMP) and imposed a full set of remedies. With regard to price regulation, TP was to implement a Forward Looking Long Run Incremental Cost ("FL LRIC") model and to set its access prices based on costs incurred. Until an independent auditor confirms the accuracy of the calculation, UKE intended to control TP's access prices on the basis of the retail minus methodology.
- (9) The Commission invited UKE to specify in its final measure the details of the access remedy including the products subject to a reference offer, to keep separate accounts, and to charge cost oriented prices.
- (10) The second review of this market was notified to and assessed by the Commission in 2011¹¹. At that time UKE has defined a sub-national market consisting of almost the entire territory of Poland, except for 20 communes which UKE considered to be competitive. Furthermore UKE has differentiated remedies in three groups of communes, depending on the competitive pressure faced by TP. The Commission commented on the exclusion of the allegedly effectively competitive communes from

⁴ In accordance with Article 6 of the Framework Directive.

⁵ Corresponding to market 5 in Commission Recommendation 2007/879/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344, 28.12.2007, p. 65-69.

⁶ In accordance with Article 5(2) of the Framework Directive.

⁷ In accordance with Article 7a(2) of the Framework Directive.

⁸ In accordance with Article 7a(3) of the Framework Directive.

⁹ In accordance with Article 7a(4) of the Framework Directive.

¹⁰ PL/2006/0472, SG-Greffe (2006) D/204907.

¹¹ PL/2011/1184, SG-Greffe (2011) D/4675.

the market definition, and requested UKE to base its forthcoming notification of the draft measure concerning those 20 communes on a thorough analysis of all relevant structural (in particular market shares and its evolution over time and entry barriers) as well as behavioural factors (in particular differences in prices, product/service functionalities and marketing strategies).

- (11) Furthermore, the Commission commented on the conditions for geographic variation of remedies, as well as on the proposed non-imposition of a price control remedy in certain communes (so called "Group 2" communes, characterised by a weaker SMP position of TP).

2.2. The notified draft measure

2.2.1. Market definition

- (12) As in the second review of the market (2011), UKE considers that at the retail level the market for broadband access comprises the provision of broadband Internet access over copper, FTTx, coaxial cable, LAN Ethernet and leased lines. Wireless access (WiMax, CDMA, FWA and satellite), Wireless Local Access Network (WLAN) and mobile networks (GSM/UMTS/LTE) are excluded from the relevant market because of their technical limitation, their restricted coverage of the Polish territory and their inability to offer a sustainable and guaranteed quality of service comparable to fixed networks-based infrastructures.

- (13) UKE proposes to include xDSL and FTTx based-access in the relevant market for wholesale broadband access. UKE excludes from the relevant market access through cable TV¹², LAN Ethernet¹³, wireless and mobile networks (i.e. WiMax, GSM/UMTS/CDMA/LTE, WLAN, wireless radio access).

- (14) UKE considers that the geographical scope of the market is national.

2.2.2. Finding of significant market power

- (15) UKE proposes to designate TP as the SMP operator in the relevant wholesale market. TP is the only supplier and holds a 100% market share¹⁴.
- (16) UKE concludes that TP has SMP in the entire territory of Poland, however the degree of TP's market power varies between two different groups of communes¹⁵

¹² As before, UKE excludes cable TV networks from the product market at the wholesale level. UKE concludes that there are significant barriers to switching from wholesale bitstream to cable TV networks rendering such a switch uneconomical. UKE considers that although there is a theoretical possibility of access to cable networks at the wholesale level there are significant technical limitations and high costs for implementing such a solution. UKE states that there is lack of potential interest from alternative operators for such a wholesale offer, given that they have already invested into TP's Wholesale Broadband Access (WBA) offer.

¹³ UKE explains in particular that the adaptation of the existing transport layers of the Ethernet network to enable shared access would require a large investment, would be uneconomic given the significant costs incurred to reach the connection point, and cover a relatively small number of customers.

¹⁴ TP is the only entity providing WBA in Poland. Other infrastructure operators (e.g. LLU operators) at the moment do not grant WBA access to third parties but use their infrastructure to serve final customers through their retail arm.

¹⁵ In its draft measure UKE has justified in further detail why it chose administrative areas (communes) and not the footprint of TP's network (MDF areas) as basis for its SMP assessment, making reference to availability and reliability of data as well as the ability to take into consideration particularly cable networks.

(Group 1 and Group 2 communes). In the communes belonging to Group 1,¹⁶ TP is constrained in its behaviour at the wholesale level due to indirect competitive pressure from cable TV and alternative operators at the retail level. In Group 2 communes TP retains a strong position on the wholesale market, and there is only a very limited pressure from competition at retail level.

2.2.3. *Regulatory Remedies*

- (17) UKE proposes to address the different competitive pressures in the two different groups by differentiating remedies within the national WBA market.

Group 1 (communes of Warsaw, Torun, Wroclaw, Lublin):

- obligation to provide access to the network; and
- non-discrimination.

Group 2 (communes in the remaining territory of Poland):

- obligation to provide access to the network;
 - non-discrimination;
 - transparency (excluding FTTH);
 - accounting separation (excluding FTTH);
 - cost orientation based on forward looking long run incremental costs (FL LRIC)(excluding FTTH).
- (18) Under the non-discrimination and transparency obligations, TP will be required *inter alia* to provide copper based services at the same conditions (in terms of price, quantity, quality and available information) to alternative operators and to TP's retail division. TP shall furthermore prevent information sharing between the retail and the wholesale divisions of TP and implement a code of good practice directed to its employees in which the principles for ensuring non-discriminatory access to TP's network are established. TP will be obliged to use Key Performance Indicators (KPI)¹⁷ calculated separately for TP's retail arm and alternative operators.
- (19) With regard to Next Generation Access networks based on FTTH, UKE proposes to impose only access and non-discrimination¹⁸ throughout the entire territory of Poland.
- (20) Concerning the non-imposition of cost orientation for access to FTTH networks UKE argues that until now TP has not constructed any FTTH lines, and therefore the main identified competition problem is lack of investments. According to UKE, full regulation of future (not yet existing) FTTH networks, and in particular cost orientation, would be contrary to the principles of adequacy and proportionality of the remedies to the identified competition problems. UKE considers that the

¹⁶ Corresponding to 4 communal areas of 4 large cities in Poland (Wroclaw, Torun, Lublin, Warszawa).

¹⁷ With regard to Group 2 areas (because of supplementary obligations of transparency) the KPIs should be published on the official website of TP on a quarterly basis. They should also be available for operators using TP's wholesale services. The publication of KPIs with regard to Group 1 areas is not mandated by UKE.

¹⁸ With regard to FTTH lines in the entire territory of Poland, as well as with regard to all infrastructures in Group 1 areas, UKE does not propose to impose on TP an obligation to publish (nor even to provide at request of alternative operators) the reports on KPIs.

remedies imposed on market player(s) should not create investment barriers and unnecessary burdens.

- (21) Moreover, UKE considers that the currently implemented non-discrimination mechanisms, and in particular the TP-UKE Agreement¹⁹ and the transposition of the terms of the Agreement into the currently proposed draft measure will guarantee equivalent access not only to the copper, but also to the FTTH network in the near future. UKE considers that by means of the publication of KPIs and the, clearly imposed, margin squeeze test, UKE will be able to effectively monitor the development of prices for access to NGA networks on market 5.

3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE ARTICLE 7a PROCEDURE

- (22) The Commission expressed serious doubts as to the compatibility of the draft measure with EU law and provided reasons why it believed that the draft measure would create a barrier to the internal market.
- (23) The Commission agreed with UKE's market definition and SMP designation as well as identified competition problems, consisting of *inter alia* the risk of excessive pricing and margin squeeze.
- (24) The Commission noted that UKE proposes not to impose cost orientation for FTTH infrastructure. UKE stressed in this respect the early stage of development of fibre based products in Poland and the need to promote investments. Furthermore, in UKE's view, the proposed measures (including also the existing Agreement between TP and UKE) are sufficient to guarantee equivalence of access and therefore justify the non-imposition of cost orientation.

3.1. Compatibility with EU law

Lack of sufficient evidence supporting the non-imposition of cost orientation for FTTH infrastructure

Compliance with Article 8(4) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

- (25) The Commission referred to Article 8(4) of the Access Directive²⁰ which requires national regulatory authorities ("NRAs") to impose remedies which are 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, the Commission referred to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.
- (26) In addition, the Commission underlined that NRAs shall contribute to the development of the internal market by cooperating with each other, with the Commission and BEREC in a transparent manner to ensure not only the development

¹⁹ Agreement between UKE and TP SA signed on 22 October 2009. The Agreement is a voluntary, non-binding set of TP's commitments on compliance with regulatory obligations. The Agreement also stipulated no reductions of TP wholesale prices for a period of 3 years (until 31 December 2012), leading to above-cost charges. The duration of the Agreement has been extended and it will expire on 31 March 2013.

²⁰ Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities (the Access Directive), OJ L 108, 24.4.2002, p. 7.

of a consistent regulatory practice but also a consistent application of the Framework Directive and the Specific Directives (together, the "Regulatory Framework").

- (27) In this regard, the Commission pointed out that it may issue recommendations²¹ on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises in particular where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market. It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted a recommendation on regulated access to Next Generation Access Networks (the "NGA Recommendation")²², setting out a consistent approach that the NRAs should follow regarding regulation of the markets for wholesale network infrastructure access (Market 4) and wholesale broadband access (Market 5).
- (28) For this purpose, the Commission recommended that NRAs should ensure that access remedies are maintained or amended where SMP is found on Market 5²³. Further to that, NRAs should in principle impose cost orientation on wholesale broadband access products²⁴, unless functional separation or other forms of separation have proved effectively to guarantee equivalence of access²⁵. Where NRAs consider that, in a given geographic area, there is effective access to the unbundled fibre loop of the SMP operator's network and such access is likely to result in effective competition on the downstream level NRAs may also consider removing the obligation of wholesale bitstream access in the area concerned²⁶.
- (29) While the Commission recognised that the NRAs have a certain margin of discretion, which allows them to take into account national circumstances, the Commission underlined 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. In particular, such alternative approach would have to take into account characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.
- (30) In its decision opening the Phase II investigation the Commission pointed out that the Regulatory Framework does not foresee "regulatory holidays" (i.e. forbearance of regulation) as a means to foster investments in network infrastructure where the investing operator was found to have SMP. At the same time, Article 13(1) of the Access Directive states that "[...] *to encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a*

²¹ In accordance with Article 19 of the Framework Directive.

²² Commission Recommendation 2010/572/EU on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p.35-46 (NGA Recommendation).

²³ Recommend 31 of the NGA Recommendation.

²⁴ Recommend 35 of the NGA Recommendation

²⁵ Recommend 36 of the NGA Recommendation.

²⁶ Recommend 37 of the NGA Recommendation.

particular new investment network project." Therefore, the principle of cost orientation does not exclude incentivising the incumbent operator for potentially risky investments in future NGA networks. The Commission has in its NGA Recommendation, indicated mechanisms, which aim at providing incentives to invest, while maintaining the principle of cost oriented access (such as for example allowing for an appropriate risk premium while setting the cost oriented price).

- (31) Moreover the Commission has expressed its serious doubts as to whether the regulation proposed by UKE is sufficient to ensure equivalence of access for all operators to fibre based bitstream products offered by TP.
- (32) In this respect, the Commission noted that the Agreement between TP and UKE is not of a binding character and can only be considered as TP's voluntary commitments. Moreover, the Agreement itself is limited in time and expires already in March 2013, which is significantly before the end of the current market review period of three years.
- (33) While the Agreement appears to have improved TP's compliance with imposed obligations, the Commission has reason to believe that the Agreement has not delivered full non-discriminatory access to TP's network.

Insufficient mechanisms to monitor a non-discrimination obligation with regard to FTTH lines

Compliance with Article 8(5)(d) of the Framework Directive in conjunction with Article 10(2) of the Access Directive and Article 16(4) of the Framework Directive

- (34) The Commission expressed its serious doubts as to the extent of the non-discrimination obligation imposed in the notified draft decision. In particular the Commission had serious doubts as to whether the achievements brought about by the Agreement will be fully ensured.
- (35) In this respect the Commission noted that crucial elements of the Agreement are not transposed into the notified draft decision²⁷.
- (36) In particular, the Commission noted that the draft decision provides for only a very general obligation to use and apply Key Performance Indicators (KPIs), which are yet to be defined by TP, whereas the implementation of the Agreement resulted in a detailed list of very specific KPIs. The mechanism to monitor KPIs was constructed by UKE itself with respect to copper-based services and is built on two pillars: (i) the detailed non-discrimination remedy and (ii) transparency obligations under which access seekers would be in a position to monitor and detect any discriminatory practices of TP (using the requirement to publish KPIs and the relevant analysis of these indicators). The notified draft decision, however, does not provide anymore for the transposition of the provisions of the Agreement concerning the audits of TP's compliance with its obligations. Further, the Commission noted that TP will not be obliged to publish, or provide at the request of alternative operators, the results of KPI measurements for FTTH in the entire territory of Poland. TP will also not be

²⁷ UKE argues that those obligations can not be imposed on TP as it would amount to functional separation. The Commission notes however that the Agreement itself was falling short of functional separation of TP. The model which exists in Poland is characterised by the acceptance of voluntary commitments without establishing by way of direct regulatory intervention, a separate business unit that would supply access products also to the incumbent itself, therefore it might not qualify as functional separation. These arrangements appear to aim at enhancing the compliance with SMP obligations by way of commitments without imposing the rather intrusive remedy of functional separation.

obliged to provide any information on the prices and conditions of access to its FTTH network. This will considerably limit the ability of third parties to monitor and establish potential discrimination with regard to the provision of wholesale services.

- (37) On top of that the Commission noted that the non-imposition of accounting separation with regard to FTTH networks will seriously limit UKE's ability to conduct a margin squeeze test between TP wholesale and retail offers. UKE will not possess any reliable (audited) information with regard to TP's wholesale and retail costs.
- (38) In view of the above the Commission considered that in this particular case the draft measure as proposed by UKE did not appear to be compatible with EU law, in particular with the policy objectives and regulatory principles as set out in Article 8 and 16(4) of the Framework Directive, read in conjunction with Article 10(2) of the Access Directive.

3.2. Creation of barriers to the internal market

- (39) The Commission further noted that UKE's notified draft decision would create barriers to the development of the internal market. The pricing of wholesale broadband access as well as the incomplete enforcement of the non-discrimination obligation (in particular of its monitoring aspect) are important factors for actual or potential competing operators from other Member States who intend to provide services in Poland.
- (40) The Commission noted that, despite UKE's efforts to impose a non-discrimination obligation which mimics a functional separation scheme, the incomplete implementation of the relevant provisions from the Agreement lead to a situation in which it may be difficult to detect non-price related discriminatory practices whereas the level of access rates would be freely set by the incumbent operator.
- (41) Further to that the Commission considered that without cost-oriented access to TP's future FTTH infrastructure, and without sufficient competitive safeguards, TP's pricing decisions regarding high-quality broadband access could negatively impact on the ability of alternative operators to offer to their retail (business) customers pan-European connectivity and other cross-border services.

3.3. Conclusion on the serious doubts

- (42) The Commission concluded that UKE's notification does not provide sufficient justification of why the proposed approach for the market in question meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and can be considered to be in line with Article 8(4) of the Access Directive. Hence, the Commission expressed serious doubts that UKE's draft measure can be considered appropriate within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive, and in particular the objectives of promoting competition and user benefits pursuant to Article 8(2) of the Framework Directive. Further, the Commission concluded that the draft measure would create barriers to the internal market.

4. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES

4.1. Observations submitted by third parties

- (43) On 27 April 2012 the Commission posted a notice on its website inviting third parties to submit observations on the Commission's serious doubts letter.

- (44) Five interested parties submitted observations to the Commission. The observations were carefully considered.
- (45) Three parties asked the Commission to object to the non-imposition of key remedies including price regulation on wholesale broadband access including NGA and to challenge the market 5 notification submitted by UKE. In view of these parties, less strict regulation, as proposed for fibre networks, is not proportionate to address the identified and potential competition problems. Moreover, it was stressed that the concerns expressed by the Commission with regard to fibre networks apply equally to the situation in the four areas belonging to Group 1.
- (46) Additionally, one party, despite its support for the Commission's argumentation in the serious doubts letter, expressed its surprise with regard to the Commission's apparent acceptance of UKE's remedy differentiation on a municipality-group basis. This party stressed that the conditions of competition inside the 4 major cities are not homogenous, and in particular that there are areas within these cities where cable networks are not present (and hence presumably cable does not exercise indirect pricing pressure through the retail market), and where it is unviable for alternative operators to make use of local loop unbundling. According to this party, an MDF-by-MDF, and perhaps narrower aggregator-by-aggregator assessment, would reveal, in fact, that there are some areas in which TP is the sole provider of retail broadband and wholesale broadband access, or faces no retail or wholesale market pressure.
- (47) In the above context it was also stressed by some parties that UKE did not take into account in its analysis recent developments in the market, i.e. a merger of two large cable operators in Poland.
- (48) Two parties proposed a real deregulation of competitive geographic areas. It was stressed by them that in certain areas of Poland cable operators have a very strong market position and – without any regulation – they will always be in a position to offer more attractive retail services to end users. Furthermore, with regard to FTTH lines, both parties proposed to impose only an access (including the maintenance of a time to market (TTM) mechanism) and regulatory accounting obligations or even refrain from imposing an access obligation.

4.2. BEREC's opinion

- (49) On 7 June 2012 BEREC provided the opinion. In its opinion BEREC stated that the Commission's serious doubts were justified.
- (50) As regards the serious doubts expressed by the Commission on the compatibility with EU law, BEREC considers that UKE has not offered appropriate reasoning to demonstrate that the low deployment of the incumbent's FFTH network justifies the application of an only limited set of remedies on FFTH, i.e. access and non-discrimination.
- (51) According to BEREC the lack of deployment as such is not a justification to forbear from regulation, including application of a cost-orientation obligation, as regulation as such does not exclude incentivising investment. Proportionate and objectively justified ex ante remedies could rather remedy possible market failures to safeguard competition and at the same time promote efficient investment.
- (52) BEREC concludes that in light of the Regulatory Framework and in the absence of any specific economic reasoning from UKE the non-imposition of a transparency obligation and cost-orientation on FFTH has not been sufficiently justified.

- (53) BEREC considers that the Agreement concluded between UKE and TP cannot be regarded as another form of separation or as a similar agreement as it is voluntary and will expire in March 2013. As functional separation according to the Access Directive would have a permanent character, this requirement also has to be fulfilled in case of another form of separation.
- (54) Concerning effective compliance with non-discrimination requirements BEREC is of the opinion that the publication of some information on the provision of wholesale services, in particular KPIs, would reinforce UKE's monitoring activities and help to detect potential deviation as soon as possible.
- (55) BEREC agrees with the Commission that UKE did not present sufficient evidence to justify the non-imposition of cost-orientation on TP's fibre based network and that UKE's powers should be reinforced through transparency obligations in order to monitor compliance with the non-discrimination obligation.
- (56) Also as regards the creation of barriers to the internal market, BEREC states that the serious doubts expressed by the Commission are justified

4.3. Close cooperation between the UKE, BEREC and the Commission

- (57) UKE, BEREC and the Commission closely co-operated to identify the most appropriate and affective measures in line with Article 7a(4) of the Framework Directive. UKE did not provide additional reasons for the non-imposition of cost orientation for FTTH during the period of up to three months, during which the three parties should identify the most appropriate and effective measure.
- (58) The three parties agreed that a compromise could be found if, in line with the serious doubts of the Commission and the BEREC opinion, UKE could revise its draft measure by way of introducing a number of detailed additional competition safeguards, *de facto* amounting to an 'Equivalence of Input' approach to a non-discrimination obligation, so that the proposed regulation could be based on the nature of the problem identified, proportionate and justified as set out in Article 8(4) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive. Recommend 36 of the NGA Recommendation could be also invoked and cost orientation on FTTH in market 5 be waived.
- (59) The Commission and BEREC stressed that in order for UKE to justify the absence of cost orientation in the circumstances at hand, UKE would need to introduce the following additional competition safeguards (for FTTH in the entire territory of Poland):
- An improved transparency obligation regarding FTTH, comprising a number of selected KPIs and, where possible, audits, allowing alternative operators to track potential discrimination and providing the latter with correct investment signals/incentives;
 - A replicability safeguard also for FTTH-based retail products, ideally based on a TTM test;
 - An accounting separation obligation, in order to render any margin squeeze test applied useful;
 - Rendering the current, only conditional, cost-oriented access obligation for fibre in market 4 un-conditional, which could be achieved by way of a revised Reference Offer by the SMP operator, even on a voluntary basis, as a review of regulatory measures in market 4 may take too much time.

- (60) UKE indicated that it will assess whether the above mentioned competition safeguards -which were set out in writing after the meeting- could be provided in a revised draft measure. On 16 July 2012 UKE informed the Commission that it will neither amend nor withdraw its draft measure.

5. CONCLUSION OF THE PROCEDURE OPENED TO ENSURE CONSISTENT APPLICATION OF THE REMEDIES

- (61) In accordance with Article 7a(5)(a) of the Framework Directive, where a national regulatory authority maintains its draft measure pursuant to Article 7a(4), the Commission may, within one month following the end of the three month period referred to in Article 7a(1), and taking utmost account of BEREC's opinion, issue a recommendation requiring the national regulatory authority to amend or withdraw the draft measure including specific proposals to that end and providing reasons justifying its recommendation,.
- (62) The Commission considers, in line with the reasoning expressed in its serious doubts letter, that UKE should either mandate cost orientation for access to FTTH in market 5 or impose competition safeguards such as those indicated in paragraphs 59 and 60 of this recommendation, i.e. ensure effective equivalence of access, either through functional separation or similar arrangements. This includes measures specific to achieving effective non-discrimination in market 5. In addition, regard should be had to the competitive constraints arising from factors outside that market, such as adequate pricing and other conditions of access to market 4 (FTTH and/or copper or other NGA products), as well as retail competition based on other infrastructures.
- (63) In this respect, the Commission refers to the NGA Recommendation which indicates that where there is a proven track record that functional separation or similar agreements have resulted in fully equivalent access to NGA networks, and where there are sufficient competitive constraints on the SMP operator's downstream arm, NRAs have more flexibility when designing remedies, including the prices, for wholesale broadband access.²⁸ In particular, in case where UKE does not impose price regulation for FTTH it should guarantee the monitoring (by UKE itself and by the market participants) of the market conduct of the SMP operator through a specific set of KPIs.
- (64) The Agreement with TP as concluded on a voluntary basis and intended to expire in March 2013 does not ensure fulfillment of transparency obligations by TP.
- (65) The Commission also refers to the arguments provided by BEREC on the importance of reinforced monitoring activities of UKE in case of non-application of functional or similar separation.
- (66) Further to that, whilst the Commission recognises that NRAs have a margin of discretion to propose any alternative methodology to that recommended in its NGA Recommendation, it underlines that any alternative methodology has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, any alternative methodology has to take into account the characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

²⁸

Recital 36 of the NGA Recommendation.

- (67) The Commission, however, concludes, in line with BEREC's opinion, that UKE did not demonstrate that its notified measure fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, the draft measure is not in line with the policy objectives and regulatory principles concerning the promotion of efficient investments whilst preserving the principles of competition and non-discrimination as set out in Article 8(4) of the Access Directive as well as Article 8 and 16(4) of the Framework Directive, read in conjunction with Article 10(2) of the Access Directive.
- (68) In this context the Commission stresses that in its past²⁹ analysis of the wholesale broadband access market UKE considered it justified and proportionate to impose much more stringent regulatory measures preventing TP from discriminatory behaviours than in the current notification. In particular, a transparency obligation, comprising a number of clearly specified KPIs and an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs was imposed on both copper and fibre infrastructure.
- (69) Also another important regulatory tool which can effectively prevent TP from discriminatory practices is already imposed and implemented in the market, i.e. replicability requirements based on a TTM test. Therefore, an imposition of the latter with regard to FTTH lines should not be a difficult matter.
- (70) On the basis of the above, and recalling its reasons expressed in the serious doubts letter, the Commission issues the present recommendation requiring UKE to amend or withdraw the draft measures.

HEREBY ISSUES THIS RECOMMENDATION:

1. UKE should amend or withdraw the draft measure.
2. UKE should, where it intends to amend the draft measure, either mandate cost orientation for access to FTTH or impose competition safeguards instead. In the latter case, UKE should at least implement the following:
 - (a) An improved transparency obligation regarding FTTH, comprising a number of clearly specified KPIs and an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;
 - (b) A replicability requirement also for FTTH-based retail products, based on a TTM test;
 - (c) An accounting separation obligation covering also FTTH products;
3. Additionally UKE should introduce the appropriate amendment in the subsequent market 4 review: an unconditional cost-oriented access obligation to fibre in market 4, unless UKE provided evidence of a significant competitive constraint at retail level, attributable (i) to the absence of high and non-transitory structural barriers to entry and expansion, signified by the presence of well developed alternative infrastructures with comparable reach and/or (ii) to cost-oriented and non-discriminatory access to copper wholesale products.
4. The Commission will publish this recommendation on its web site. UKE is invited to inform the Commission within three working days following receipt of this recommendation whether it consider that, in accordance with European Union and national rules on business

²⁹ See cases PL/2010/1098 and PL/2011/1184.

confidentiality, it contains confidential information which UKE wishes to have deleted prior to publication. Any such request should be reasoned.

5. In accordance with Article 7(7) of the Framework Directive, where UKE decides not to amend the draft measure on the basis of this recommendation, it shall provide a reasoned justification.

6. In accordance with Article 7(6) of the Framework Directive, UKE shall communicate the adopted draft measure to the Commission by 27 September 2012. This period might be extended, at UKE's request, to allow UKE to undertake a public consultation in accordance with Article 6 of the Framework Directive.

7. This Recommendation is addressed to UKE.

Done at Brussels,

For the Commission
Neelie Kroes
Vice-President