



## EUROPEAN COMMISSION

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Urząd Komunikacji Elektronicznej  
(UKE)

18-20 Kasprzaka Street  
01-211 Warsaw  
Poland

For the attention of:  
Ms. Magdalena Gaj  
President

Fax: +48 22 53 49 253

Dear Ms Gaj,

**Subject: Commission Decision concerning Case PL/2012/1394: Wholesale broadband access market in 11 communes in Poland**

**Opening of Phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC**

### I. PROCEDURE

On 9 November 2012 the Commission registered a notification from the Polish National Regulatory Authority, Urząd Komunikacji Elektronicznej (UKE)<sup>1</sup>, concerning the market for wholesale broadband access (WBA)<sup>2</sup> in 11 administrative communes in Poland.

The national consultations<sup>3</sup> ran from 27 July 2011 to 26 August 2011 (i.e. 14 months prior to the notification). The deadline for the EU consultation is 10 December 2012.

On 19 November 2012 a request for information (RFI)<sup>4</sup> was sent to UKE and a response was received on 23 November 2012.

Pursuant to Article 7(4) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to

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<sup>1</sup> Under Article 7 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), 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.

<sup>2</sup> Corresponding to market 5 in Commission Recommendation 2007/879/EC of 17 December 2007 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

the internal market or its serious doubts as to its compatibility with EU law.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Previous notifications**

The first review of the market for wholesale broadband access was notified to and assessed by the Commission in 2006<sup>5</sup>. 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.

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.

The second review of this market was notified to and assessed by the Commission in February 2011<sup>6</sup>. At that time UKE 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 differentiated remedies in 3 groups of communes, depending on the competitive pressure faced by TP. The Commission strongly commented on the exclusion of the allegedly competitive communes from the market definition, and requested UKE to notify its draft measure concerning the 20 remaining communes without unjustified delay. Moreover the Commission urged 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).

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 an allegedly weaker SMP position of TP).

Instead of conducting a separate market analysis of the 20 communes, excluded from the market definition in UKE's second market review<sup>7</sup> in March 2012 UKE notified its third market review<sup>8</sup>, based on newly collected market data. In its notification UKE now considered that the entire territory of Poland constitutes a single geographical market, and that it is no longer justified to define separate sub-national markets (communes). To justify its conclusion with regard to the definition of the geographic scope of the market UKE demonstrated that market conditions are sufficiently homogenous, there are no differences in fees for wholesale broadband access<sup>9</sup>, costs of signal transmission or

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<sup>5</sup> PL/2006/0472, SG-Greffe (2006) D/204907.

<sup>6</sup> PL/2011/1184, C(2012) 2036.

<sup>7</sup> As the market situation with regard to those communes has not been re-notified, TP continues to be designated as SMP operator and continues to be regulated (full set of remedies).

<sup>8</sup> PL/2012/1311, C(2012) 2967 and C(2012) 5913.

<sup>9</sup> The wholesale charges for WBA are uniformly regulated thorough the entire territory of Poland.

quality of WBA.

On the basis of its assessment UKE concluded that TP has SMP in the entire territory of Poland, however the degree of TP's market power would vary between two different groups of communes<sup>10</sup>. In the communes belonging to Group 1, (Wroclaw, Torun, Lublin, Warszawa) TP is constrained in its behaviour on the wholesale level due to indirect competitive pressure from cable TV and alternative operators at the retail level. In Group 2 communes (rest of the country) TP retains a strong position on the wholesale market, and there is only a very limited pressure from competition at retail level. In its notification in March 2012 UKE proposed to address the different competitive pressures in the two different groups within one national WBA market by differentiating remedies. With regard to Group 1 UKE proposed only an obligation of access and non-discrimination (both for copper and FTTH network), with regard to Group 2 additional obligations of transparency, accounting separation and cost orientation based on FL LRIC.<sup>11</sup>

With regard to UKE's notification of the 3<sup>rd</sup> market review the Commission suspended UKE's decision and initiated an in-depth investigation and, after consultations with BEREC, issued a Recommendation, pursuant to Article 7a(5) of the Framework Directive, requesting UKE to amend or withdraw its notification. In its Recommendation the Commission pointed to the lack of sufficient evidence justifying the non-imposition of cost orientation and to insufficient mechanisms to monitor non-discrimination with regard to FTTH infrastructure.

On 11 September 2012 UKE withdrew its notification. The withdrawal was accompanied by UKE's press release in which UKE presented its position on the Recommendation, its reasons for the withdrawal of the notification, and UKE's intention to conduct a new market analysis in 2013<sup>12</sup>.

By means of the present notification, instead of conducting a new market analysis, UKE has notified its draft decision concerning 11 of the 20 communes which were excluded from the geographical scope of the market in UKE's 2<sup>nd</sup> market review. In that regard UKE does not consider its decision a "new" regulation of market 5, but rather a continuation of the regulatory process initiated in its second market review. For that reason UKE has notified its decision as it was drafted in early 2011 and used old market data, collected in 2009-2010 for the purpose of its second market review. In its reply to the request for information UKE considered that the state of the market data used for assessment in its currently notified draft decision should be exactly same as that of its decision concerning the remaining territory of Poland (adopted in April 2011).

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<sup>10</sup> 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.

<sup>11</sup> Those additional obligations would apply only to TP's copper network, but not to FTTH.

<sup>12</sup> UKE's press release: "[...] Nevertheless, due to the market stability and regulatory predictability, I decided to accept the recommendation of the European Commission, as well as the opinions expressed by European regulatory authorities united in BEREC. Next year, we will conduct a new analysis of the wholesale broadband access market and then we will select appropriate regulatory measures - said Magdalena Gaj, President of UKE."; EN version available at [http://www.en.uke.gov.pl/ukeen/index.jsp?place=Lead01&news\\_cat\\_id=56&news\\_id=1035&layout=1&page=text](http://www.en.uke.gov.pl/ukeen/index.jsp?place=Lead01&news_cat_id=56&news_id=1035&layout=1&page=text) (last accessed on 23.11.2012).

## II.2. The notified draft measure

### II.2.1. Market definition

As in the second review of the market (PL/2011/1184) 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.

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 TV<sup>13</sup>, LAN Ethernet<sup>14</sup>, wireless and mobile networks (i.e. WiMax, GSM/UMTS/CDMA/LTE, WLAN, wireless radio access).

With regard to the geographical scope of the relevant wholesale market UKE reaches the conclusion that it is appropriate to define a narrow market consisting of the territory of 11 communes, where according to UKE, the market conditions are significantly different than in the remaining territory of Poland. Although UKE has defined the relevant (product) market as a wholesale market for WBA, the geographic dimension of such market has been determined almost exclusively on the basis of the assessment of the competitive situation at the retail broadband market. In order to justify its geographic market definition UKE has assessed the following structural and behavioural elements:

- 1) in a given municipal area, none of the operators has a share of 40 % or more in terms of the number of clients on the retail broadband access market;
- 2) in a given municipal area there are at least three operators who provide retail broadband Internet access;
- 3) at least 50 % of premises in a given municipal area have access to the infrastructure of at least three operators;
- 4) no more than 10 % of premises in a given municipal area have no access to the Internet;
- 5) the standard deviation of the share of the three largest operators is not larger than 10 percentage points.

The main element pointing towards a definition of a separate geographic (wholesale) market is the fact that UKE has not determined the presence of any operator who possess individually or jointly a significant market power at the retail level (there is no operator having more than 40% of the retail broadband market), on the territory of those 11

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<sup>13</sup> 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 WBA 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.

<sup>14</sup> 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.

communes. Moreover, the duplication of infrastructure indicate substantial elasticity of supply and demand and possibility for the retail customers to freely choose or change their provider of broadband internet. Other elements pointing towards a definition of a separate wholesale market for the 11 communes include: a) customer preferences at the retail level<sup>15</sup>; b) characteristics of supply of retail broadband; c) lower prices; d) significantly lower entry and expansion barriers; e) customer switching at the retail level.

In addition, UKE presents an assessment of the above criteria (at the retail level) in the communes surrounding the 11 communes. UKE observes different competitive conditions like lower access speeds, higher prices, higher market share of TP, as well as higher market share of the LLU and WBA operators (what can be directly linked to the absence of CaTV networks in such surrounding areas).

Importantly, in its argumentation regarding the definition of the geographic market UKE does not reflect on the situation of the supply and demand-side at the wholesale market.

### *II.2.2. Finding of significant market power*

UKE considers that TP does no longer have SMP in the relevant wholesale market, despite the fact that it is the only supplier holding a 100% market share<sup>16</sup>.

UKE considers that the market shares are not a reliable criterion to assess TP's market power, since TP would still maintain 100% even if it would provide only a small number of access lines of WBA (by volume). In addition UKE observes that on the territory of the 11 communes the retail broadband access which is provided by means of WBA constitutes only 4%; this percentage is significantly higher in the areas surrounding the 11 communes and the remaining territory of Poland (13%).

UKE's assessment is also based on the following additional criteria: (i) low barriers to entry and expansion; (ii) economies of scale and scope; (iii) vertical integration; (iv) existence of countervailing buyer power; and (v) existence of potential competition<sup>17</sup>.

With regard to potential competition on the wholesale market UKE concludes that 2 competitors (Netia and Telefonía Dialog) have sufficient resources to effectively compete with TP, in case they decide to enter the wholesale market for WBA. However, according to UKE's measure only 3% of broadband customers are supplied by the LLU operators. Moreover, in its reply to the Request for Information (RFI) UKE stated that in the territorial area of 11 communes only 0.6% of population is supplied by the LLU operators. Furthermore, in its reply to the RFI UKE has not presented any data concerning the number of TP's local exchanges in the area of the 11 communes, the number of local exchanges where LLU operators can unbundle the local loop, nor the potential reach of the LLU operators (in terms of population or households).

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<sup>15</sup> Preference for higher speed offers from CaTV providers.

<sup>16</sup> 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.

<sup>17</sup> There is only a very limited chance that TP's main competitors, i.e. Netia S.A. and Telefonía Dialog S.A. (since end of 2011 Telefonía Dialog belongs to Netia's capital group), will be able to enter the market for WBA on the basis of local loop unbundling.

### *II.2.3. Regulatory Remedies*

Despite finding effective competition on the relevant market (territory of 11 communes), in its notified measure, UKE does not propose to revoke currently existing remedies. The draft measure refers only to market definition and SMP assessment. Nevertheless, where UKE concludes that the relevant market is effectively competitive it should withdraw any existing obligations in accordance with Article 16(3) of the Framework Directive.<sup>18</sup>

### **III. ASSESSMENT**

The Commission considers that the notified draft measure falls under the Commission's powers as set out in Article 7(4) of the Framework Directive.

The Commission has serious doubts as to the compatibility of UKE's draft measure with EU law and consider that it creates barriers to the single market.

The Commission considers at this stage that the segmentation of the product and geographic market proposed by UKE is not supported by sufficient evidence. In consequence, UKE's assessment of effective competition on such potentially inappropriately defined market may lead to the removal of obligations from an operator which could potentially maintain SMP position on a properly defined market. For that reason UKE's measure creates a barrier to single market. Further, the Commission notes that pursuant to Articles 3 and 8(5)(a) of the Framework Directive, NRAs shall promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods. Moreover, the national regulatory authorities shall exercise their powers impartially, transparently and in a timely manner.

The Commission considers that the market definition and the assessment of SMP which is not based on reliable market data and which does not reflect current market conditions, which are known to UKE, is contrary to the principles of competition law. Moreover the Commission has serious doubts whether UKE's market definition and the assessment of competitive constraints on the defined relevant market follow the competition law principles. In that regard the Commission has serious doubts as to the compatibility of the notified measure with Article 15 (3) of the Framework Directive. The Commission, therefore, expresses serious doubts as to the compatibility of the proposed relevant market definition and SMP assessment with EU law for the following principal reasons:

#### **Reliance on historical data; conclusions concerning the definition of relevant market and SMP assessment contradicting UKE's more recent market analysis**

##### *Compliance with Article 3(3) and 8(5)(a) of the Framework Directive*

The Commission points out that national regulatory authorities have to apply objective, transparent, non-discriminatory and proportionate regulatory principles by, *inter alia*, promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods. Moreover, the national regulatory authorities have to exercise their powers impartially, transparently and in a timely manner.

The Commission notes that the currently notified draft decision has been prepared by UKE in the first half of the year 2011, and has been consulted at the national level more than 14 months ago. UKE's conclusions are based on market data

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<sup>18</sup> The Commission reminds UKE that any withdrawal of remedies should also be notified to the Commission in accordance with Article 7 of the Framework Directive.

which are not more recent than December 2009 (for infrastructure rolled-out) and the last quarter of 2010 (for the pricing data on the retail broadband market). UKE's current proposal omits important changes which took place in the market in 2010 and 2011 and therefore have significant and direct impact on UKE's SMP analysis e.g. a merger of two large cable operators, who are present in some of the 11 communes. The Commission also points out that since UKE's public consultation on the currently notified decision (July-August 2011), UKE has undertaken a new data collection and a new market analysis which it has notified to the Commission in March 2012.<sup>19</sup> In the latter draft decision UKE reached considerably different conclusions concerning the market definition (namely, that it is national in scope), the SMP assessment (UKE proposed to designate TP as SMP operator in the entire territory of Poland), and consequently the remedies (UKE proposed to maintain on TP the obligations of access and non-discrimination in 4 communes in which TP faced stronger competitive pressure). Moreover the Commission notes that there are significant discrepancies between the areas which have been considered by UKE as qualifying for lighter remedies (although still considered as SMP areas) in its notification in March 2012, and which according to UKE's present notification are considered to be competitive.

Neither within the scope of the notified measure, nor in its reply to the Request for Information, did UKE reflect on the significant changes between its assessment and conclusions as currently notified, and those which were included in UKE's more recent market assessment (notified in March 2012).

UKE's argumentation that its current proposal is a continuation of regulatory process initiated at its second market review has to be rejected. UKE's draft decision, notified under case PL/2011/1184 distinguished between non-competitive and allegedly competitive areas (20 communes) on the basis of the following three criteria: (i) there are at least 3 operators present, (ii) none of those operators have more than 40% market shares and (iii) at least 50% of premises have access to at least 3 operators. The current proposal however, by introducing additional two criteria, is not compatible with the previously assessed draft measure. At the margins of the above-mentioned elaborations, the Commission observes that UKE failed to consult at national and EU level the status of 9 communes which initially were allocated to the group of 20, allegedly competitive areas, however are not anymore included in the group of 11 communes proposed for deregulation in the current draft measure. Moreover, UKE's notification of a full market assessment (3<sup>rd</sup> round) in March 2012 seriously undermines its present argumentation as to the need to finalise the regulatory process of its second round of market review.

For the above reasons, the Commission considers, at this stage, that the notified measure is not based on objective and transparent criteria and therefore have serious doubts as to its compatibility with EU law and in particular the objectives referred to in Article 8 of the Framework Directive.

### **Lack of sufficient evidence of regional market differentiation**

#### *Compliance with Article 15(3) of the Framework Directive*

The Commission notes that UKE relies to a considerable extent on its assessment of the retail market for the purpose of market definition and SMP assessment of

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<sup>19</sup> PL/2012/1311, C(2012) 2967, C(2012) 5913.

the relevant wholesale market for WBA. The Commission acknowledges that in the area of 11 communes there are noticeable differences at the retail level, compared to the remaining part of the Polish territory, namely with regard to the preferred access technology (CaTV over xDSL), and higher access speeds. However the Commission notes as well that other consumer preferences, such as for example for service bundles, remain broadly similar in both areas.

With regard to pricing the Commission considers that UKE has not provided conclusive evidence that there are differentiated regional pricing schemes, neither at the retail nor at the wholesale level. UKE's assessment takes into account exclusively the prices for stand-alone broadband access, although such offers represent only around 20% of the total retail broadband access market. While indeed there are significant retail price differentials for the lowest-speed broadband access (up to 50%), for higher speed access the difference between CaTV, alternative xDSL operators and TP does not seem to be significant.<sup>20</sup>

Moreover, in its assessment in the notified measure, as well as in its reply to the RFI, UKE fails to provide any conclusive and quantifiable evidence on regional price differentiation. UKE could not provide any quantifiable evidence indicating that CaTV operators, who are present both within and outside those 11 communes apply differentiated prices. Similarly, no such evidence has been provided for TP, although lack of price differentiation at the retail level has been explained by UKE (in the reply to the RFI) by reference to uniformly regulated wholesale prices for wholesale broadband access. In this context the Commission notes that UKE itself considers<sup>21</sup> that *“TP in order to apply differentiated prices at the retail level would have to prove, that there are objective factors and circumstances justifying differentiated treatment of customers in different areas, otherwise TP would be exposed to financial penalties for discrimination of its customers through discriminatory pricing.”* Bearing in mind that UKE applies in Poland – with regard to TP's retail offers – a replicability test based on price/margin squeeze, and TP has allegedly not proved so far the existence of objective factors and circumstances justifying a differentiated treatment of customers in different areas, the Commission has serious doubts about UKE's conclusions in the notified draft measure with regard to regional market differentiation.

Finally, the Commission notes that UKE has not provided any examples of regional price differentiation by the alternative operators (operating on the basis of xDSL or WBA). While the Commission acknowledges that UKE's arguments concerning the uniform wholesale price regulation could to some extent explain TP's preference for uniform pricing at the retail level, the Commission is of the opinion that there are not such constraints on alternative operators providing retail broadband access on the basis of LLU or WBA. Such operators would be expected to apply lower prices in allegedly competitive (regional) market, in order to compete with other infrastructure operators.

For the above reasons the Commission at this stage considers that UKE's market definition does not follow the principles of competition law and therefore does not comply with Article 15 (3) of the Framework Directive.

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<sup>20</sup> According to UKE retail broadband prices for speeds of 2 Mbit/s are approximately the following: 51 PLN (CaTV), 48 PLN (alternative xDSL operators), and 79 PLN (TP). For speeds of 6 Mbit/s: 70 PLN (CaTV and alternative xDSL), 82 PLN (TP).

<sup>21</sup> See UKE's response to the RFI.



## **Lack of thorough assessment of the demand-side of the WBA market and insufficient arguments concerning the impact of potential competition**

### *Compliance with Article 15(3) of the Framework Directives*

As described above, UKE assessed the competitive constraints on the relevant market mainly by reference to infrastructure competition. In its assessment UKE fails to demonstrate whether an access seeker to TP's WBA product at the wholesale level would have any alternatives in the event of refusal to supply<sup>22</sup> or price increase by TP. Firstly, UKE considers that WBA is not, and will not be in nearest future, supplied by CaTV operators. Even if CaTV operators would be technically able to provide such access and would decide to do so in the event of TP's withdrawal/increase of prices for WBA, UKE has not demonstrated whether and to what extent the operators on the demand side of the WBA market would be able to migrate their customers to the CaTV platform.

Furthermore, the Commission has serious doubts as to the compatibility with the principles of competition law of UKE's assessment of the ability of potential competitors (Netia and Dialog, as identified by UKE) to enter the market for WBA, which they could offer on the basis of LLU. Despite the Commission requests UKE could not provide any information with regard to the number of TP's local exchanges in those 11 communes, the number of exchanges where alternative operators can unbundle the local loop or the potential population coverage by the LLU operators. UKE stated that it does not possess such data. According to UKE's notification only 3% of retail broadband lines (or 0.6% of population, as stated in UKE's reply to the RFI) in the 11 communes are provided on the basis of LLU. At the same time, in 4 (out of 11) communes considered by UKE as competitive, TP's retail market shares are between 30% and 40%, i.e. above TP's national average.<sup>23</sup> The Commission notes that UKE justifies its conclusion as to effective competition (at the wholesale level) in the territory of the 11 communes by reference to the retail market concentration. UKE calculates the Herfindahl–Hirschman Index (HHI) for market operators within the 11 communes and in neighbouring areas, and reaches the conclusion that HHI for the 11 communes is much lower. The Commission notes that the HHI calculations for the neighbouring communes indicate in 5 (out of 11 areas) a market concentration of near monopoly (HHI between 8079 and 9959), while the HHI for the 11 communes indicate a very concentrated market (in 8 out of 11 communes HHI is between 2500 and 3300).

On the basis of the assessment of UKE's notification the Commission has, at this stage, serious doubts as to the ability of potential competitors to enter the relevant wholesale market and effectively constrain TP from withdrawing the access offer or increasing the price for WBA in the territory of 11 communes.

For the above reasons the Commission, at this stage, considers that UKE's assessment of competitive constraints on the defined relevant market does not

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<sup>22</sup> Such situation might occur either as outright refusal to provide WBA on commercial terms, or as a constructive refusal stemming from for example lowering TP's retail prices, and hence squeezing the margin between the wholesale and the retail products.

<sup>23</sup> While the following data is not included in the recently notified measure, it was submitted to the Commission by UKE with its 3rd market assessment (PL/2012/1311):

[...]

follow the principles of competition law and therefore does not comply with Article 15 (3) of the Framework Directive.

### **Creation of barriers to the internal market**

The Commission concludes, at this stage, that UKE's draft decision would create a barrier to the development of the internal market. The finding of effective competition on the basis of most likely outdated market data and UKE's findings which contradict UKE's most recent assessment of the WBA market in Poland carries considerably negative consequences for actually or potentially competing operators from other Member States who intend to provide services in Poland.

The Commission believes that a potential withdrawal of existing regulatory obligations, which could be based on the conclusions of currently notified draft measure, may create distortions in the internal market. The removal of obligations which should immediately follow from UKE's determination of effective competition, in circumstances where there are serious doubts as to the appropriateness of market definition and SMP assessment by UKE may lead to situation of withdrawal of access to essential wholesale input. Further to that, without appropriate regulated access to TP's infrastructure (based on legacy copper or future FTTH lines), TP will be able to unjustifiably limit the expansion of alternative providers of broadband access at the retail level. This would negatively impact on the ability of alternative operators to offer to their retail (business) customers pan-European connectivity and other cross-border services.

In the light of the above, the Commission takes, at this stage, the view that the notified regulatory measure would create a barrier within the single market, as UKE would be obliged to withdraw obligations imposed on TP in accordance with Article 16(3) of the Framework Directive.

The above assessment reflects the Commission's preliminary position on these particular notifications, and is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

The Commission points out that, in accordance with Article 7 of the Framework Directive, the draft measure regarding the market definition and finding of significant market power concerning Wholesale Broadband Access in Poland shall not be adopted for further two months.

Pursuant to Recital 17 of Recommendation 2008/850/EC<sup>24</sup>, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>25</sup> within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

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<sup>24</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

<sup>25</sup> Your request should be sent either by email: [CNECT-ARTICLE7@ec.europa.eu](mailto:CNECT-ARTICLE7@ec.europa.eu) or by fax: +32.2.298.87.82.

Yours sincerely,  
For the Commission  
Neelie Kroes  
Vice-President of the Commission