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Urząd Komunikacji Elektronicznej  
(UKE)

18-20 Kasprzaka Street  
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Poland

For the attention of:  
Ms. Magdalena Gaj  
President

Fax: +48 22 53 49 253

Dear Ms Gaj,

**Subject: Commission Decision concerning Case PL/2012/1364: Access to ducts and facility sharing in Poland**

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

## **I. PROCEDURE**

On 6 September 2012, the Commission registered a notification from the Polish national regulatory authority, Prezes Urzędu Komunikacji Elektronicznej (“UKE”)<sup>1</sup>, concerning access to ducts and facility sharing<sup>2</sup> in Poland.

UKE conducted three separate national consultations<sup>3</sup> in November 2011, January 2012 and June 2012.

On 17 September 2012, a request for information<sup>4</sup> was sent to UKE and a response was received on 20 September 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities

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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> UKE has not defined a separate market for duct access or other elements of infrastructure. The notified decision partially amends the access to ducts obligations imposed on the basis of the SMP finding concerning the market for network infrastructure access (market 4), and imposes further obligations on the basis of Article 12 of the Framework Directive.

<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.

(NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

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

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

UKE previously notified its analysis of the relevant market and designated the Polish incumbent, Telekomunikacja Polska S.A (TP), as having significant market power ('SMP') in the market for network infrastructure access.<sup>5</sup> In that decision UKE has, *inter alia*, imposed on TP an obligation to provide access to its telecommunications ducts (to the extent that they are part of the defined relevant market). As a consequence TP had to amend its reference offer, and subsequently submit the amended offer for UKE's approval.

Furthermore, by virtue of UKE's decisions issued in September 2001 (and subsequently amended in July 2011) on the basis of national law implementing Article 12 of the Framework Directive ("Co-location and sharing of network elements and facilities") TP has been obliged to provide access to its ducts, also to those falling outside the scope of the market for network infrastructure access (market 4).<sup>6</sup> According to further explanations provided by UKE in its reply to the Request for Information (RFI) UKE in principle could in certain circumstances oblige any telecommunications provider to share and to provide access to its network elements, including ducts, conduits, manholes, cabinets, etc. Further, in the reply to the RFI UKE stated that it does not exclude issuing, in the future, individual decisions mandating access to ducts addressed to other telecommunication providers.

### **II.2. The notified draft measure**

UKE considers that the notified draft decision falls entirely under Article 12 of the Framework Directive, and imposes obligations which are not related to the finding of significant market power (SMP) in any defined relevant market. Nevertheless UKE further explains in its reply to the RFI, that the need to amend TP's reference offer relating to access to ducts results also from TP's SMP position on market 4 and inclusion of access to ducts within the market definition of that market. In that respect, although being outside the SMP context, the notified draft decision has a material impact on the scope of remedies imposed in market 4.

The geographical coverage of TP's ducts to which access is mandated on the basis of the notified draft decision extends beyond the delineation of market 4 (corresponding only to ducts in the local loop, i.e. between the end user and local exchange). According to the notified draft decision TP should provide access to ducts at each level of its network, provided that it is technically possible.

In the notified draft measure UKE proposes to amend the reference offer for access to ducts with regard to a number of details and technical issues concerning the cooperation between TP and the telecommunication operators seeking access to TP's ducts. The

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<sup>5</sup> UKE's decision was notified and assessed by the Commission under the case number PL/2010/1137, SG Greffe 2010 D/17253.

<sup>6</sup> The decisions from September 2001 and July 2011 have been issued on the basis of national provisions implementing Article 12 of the Framework Directive, and are outside the framework of the SMP decisions; those decisions have not been notified to the European Commission.

amendments provide for a number of improvements and resolution of issues encountered by alternative operators while requesting access to TP's ducts. The main changes relate to the procedure for requesting the access (by means of a template Framework Contract and a template for a specific contract for a given route), technical plans and specifications, duct inspections and clearance, cable installations, guarantees and penalties, maintenance and service works, supervision of works inside the ducts. With regard to the exchange of information between TP and access seekers the decision provides for the possibility to use the electronic communication via a dedicated IT platform<sup>7</sup> (or paper-based, at the choice of the access seeker).

A significant change of the existing reference offer concerns the introduction of access to ducts on the basis of a specific type of contract for Indefeasible Rights of Use ("IRU").<sup>8</sup> This type of duct access is limited only to a specific purpose, namely to the roll-out of networks which are co-financed by means of state aid and/or EU funded projects. According to UKE, access to ducts on the basis of IRU is necessary to ensure equal competition between TP and alternative network operators when they apply for participation in state and/or EU funded projects.

With regard to setting the prices for access to ducts in the notified draft decision UKE proposes to continue to set the prices on the basis of the costs incurred. The notified draft decision maintains unaltered the main rate for 1 meter of duct access, used for calculations of monthly rental fees (depending on the diameter of the occupied space); the draft decision updates other prices, such as for each hour of TP's supervision of engineering works.

With regard to the payment for duct access on the basis of IRU the notified draft decision provides for a one-off payment for the entire duration of use (15-25 years). The one off payment is calculated as a sum of monthly payments, from which a discount of 6% is deducted.<sup>9</sup>

UKE provides extensive justification of the proposed measure, mainly giving arguments concerning the need of effective, rational utilisation of existing infrastructure, efficient investments in NGA networks, stimulation of network roll-out and innovative services, providing maximum benefit to end-users, and promoting sustainable competition. In its argumentation UKE recalls also the economical and physical impracticability of duplication of passive infrastructure, as well as reasons of environment protection and town and country planning.<sup>10</sup>

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<sup>7</sup> The dedicated IT platform should be made available by 1 April 2013 and it should be used for ordering, verification of technical conditions, gathering of information concerning TP duct information, fault reporting and monitoring, payments.

<sup>8</sup> The access to ducts on the basis of IRU is characterised by a long-term contract (15-25, as opposed to 10 years in all other cases), additional safeguards concerning the stability of the contract (revocation of such contract is only possible in extraordinary circumstances), possibility of sub-leasing and installing 3<sup>rd</sup> party fibre, one-off payment for the entire duration of the lease.

<sup>9</sup> The level of the discount is set on the basis of reference rate used for calculation of state aid by the National Competition Authority.

<sup>10</sup> UKE underlines that in highly urbanized areas telecommunication operators must compete for the scarce resource with other utilities (water, electricity, heat distribution networks, sewage).

### III. COMMENTS

The Commission has examined the notification and the additional information provided by UKE and has the following comments:<sup>11</sup>

#### **Access to ducts on the basis of Article 12 of the Framework Directive**

The Commission recognizes that access to existing civil engineering infrastructure may facilitate roll-out of Next Generation Access networks. As recently announced<sup>12</sup> the Commission is encouraging the greater re-use and sharing of duct infrastructure as the main measures to reduce the costs of NGA roll-out. In fact, the Commission has constantly recalled that access to ducts could be an important part of a remedy imposed to address problems associated with physical network access.<sup>13</sup> In principle, access to ducts may prove to be a less intrusive measure than access to dark fibre, and under certain circumstances it may be economically feasible and technically possible for alternative operators to lay down their own fibre lines. Mandating access to ducts may thus encourage alternative operators to climb the ladder of investment instead of relying on the incumbent's dark fibre or active products. Facilitating the access to ducts is likely to support the roll-out of broadband networks in Poland and consequently, to reach objectives of social cohesion and economic growth as set out in the Digital Agenda for Europe.<sup>14</sup>

The Commission notes that UKE's regulatory aim is to ensure effective and efficient utilisation of existing duct infrastructure. The Commission recalls that, imposition of infrastructure sharing obligations according to Article 12 of the Framework Directive must comply with the principle of proportionality and must meet the requirements provided in that Article. Such requirements would be met if the operators are deprived of access to viable alternatives because of the need to protect the environment, public health and security or to meet town and country planning objectives.

While the Commission considers that the requirements set out in Article 12 of the Framework Directive have been met, UKE's main regulatory objective - the efficient and rational utilisation of (all) existing duct infrastructure - will not be achieved merely by the imposition of access obligations on only one, out of many, telecommunication operators. Therefore, the Commission would like to call on UKE to impose duct sharing obligation on other operators, as far as they also own or control similarly suitable duct infrastructure.

#### **Indefeasible rights of use of duct infrastructure**

The Commission notes that UKE proposes to introduce a specific type of access to ducts based on indefeasible rights of use, for the specific purpose of state aid and/or EU funded network roll-out projects. The specific type of access is

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<sup>11</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>12</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/554>.

<sup>13</sup> Cases FR/2008/0780 (SG-Greffe (2008) D/204722), EE/2009/0942 (SG-Greffe (2009) D/4719), SE/2010/1062 and section 4.2.2. of the Explanatory Note accompanying the Recommendation on Relevant Markets.

<sup>14</sup> Communication of the Commission of 26.8.2010 COM(2010) 245 final/2 A Digital Agenda for Europe.

characterised by long-term lease (15-25 years), up-front payment of rent for the entire contract duration, additional safeguards against revocation of access rights, and further sub-letting.

The Commission notes that the need for such specific type of access to ducts seems to be motivated not by real requirements of the telecommunication operators, but rather stems from administratively imposed strict conditions relating to qualification of costs for the purpose of state aid and/or EU funded projects. The Commission further notes that such strict conditions, amounting to administrative barriers, are not based on any binding provisions of EU law nor binding provisions of national Polish legislation, but result from administrative decisions<sup>15</sup> of local/regional government authorities. While the Commission does not question the need for long-term contracts for access to ducts and their stability (protection against one-sided revocation of access rights), the introduction of this specific type of access appears to be artificial and not based on an economic assessment, but rather on a need to address administratively created barriers to investments. The Commission would like to draw UKE's attention to the fact that the need for access to ducts on the basis of IRU would not have arisen, but for restrictively drafted conditions for participation in projects co-funded with state aid and/or EU funds.

The Commission considers that in principle the imposition of access to ducts on the basis of IRU does not seem to contravene the EU regulatory framework. However, it is proposed to underline that the measure has to respect the regulatory principles set out in Article 8 of the Framework Directive, in particular the principle of non-discrimination and proportionality.

Pursuant to Article 7(7) of the Framework Directive, UKE shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

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15 In a form of "guidelines", "instructions", and "recommendations" stipulating that only the costs of constructing or acquiring the infrastructure on the basis of IRU is a qualified cost for the purpose of state aid and/or EU financed projects.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>16</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>17</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.<sup>18</sup> You should give reasons for any such request.

Yours sincerely,  
For the Commission,  
Robert Madelin  
Director-General

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<sup>16</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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>17</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.

<sup>18</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.