

BEREC Opinion
on
Phase II investigation
pursuant to Article 7 of Directive 2002/21/EC as amended by
Directive 2009/140/EC:

Case PL/2012/1394
Wholesale Broadband Access Market
in 11 Communes in Poland

14 January 2013

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1 EXECUTIVE SUMMARY

On 9 November 2012, the European Commission registered a notification by the Polish National Regulatory Authority, Urząd Komunikacji Elektronicznej (UKE), concerning the market for wholesale broadband access market in 11 communes in Poland.

This notification is a continuation of the regulatory process initiated by UKE in the second market review that was notified to and assessed by the Commission in February 2011, where UKE defined a sub-national market consisting of almost the entire territory of Poland, except for 20 communes which UKE considered to be competitive. 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. The Commission also 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).

Instead of conducting a separate market analysis of the 20 communes, UKE notified a third market review, based on newly collected market data, in March 2012. UKE now considered that the entire territory of Poland constitutes a single geographical market and concluded that Telekomunikacja Polska S.A. (TP) has SMP in the entire territory of Poland. The degree of TP's market power would however vary between two different groups of communes. The Commission initiated a Phase II investigation in this case under Article 7a of the Framework Directive and, after consultations with BEREC, issued a Recommendation, requesting UKE to amend or withdraw its notification. 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 this notification.

After withdrawing the third market review, UKE carried out the analysis that the Commission requested in 2011, and re-assessed the competitive areas (11 communes were found competitive instead of the originally notified 20) and submitted this notification.

On 10 December 2012, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern the reliance on historical data of 2009 and 2010 and the conclusions based on these data, including the definition of the relevant market and the assessment of SMP, which contradicted UKE's more recent market analysis. The Commission also believed that there was a lack of sufficient evidence of UKE's regional market differentiation and a lack of thorough assessment of the demand-side of the WBA market. The Commission had doubts regarding UKE's arguments concerning the impact of potential competition and considered that the draft measure would create a barrier to the internal market.

On the basis of the analysis set out in this Opinion, BEREC shares the Commission's serious doubts. BEREC can see that it would be difficult to have a decision for the majority of the country based on one data set, and a separate decision for the remaining communes based

on a newer data set. Therefore, BEREC partially understands why UKE is willing to eliminate the current regulatory uncertainty and inconsistency in the wholesale broadband access market by finishing pending procedures based on the notified measure on data relevant to the second market review. However, BEREC is concerned about the fact that the two datasets (old and new data) produce different results and this suggests that the data are not reliable, and do not produce an adequate reflection of the market.

Moreover, the criteria applied to assess competition only require that 50% of retail customers in an area have access to three or more broadband providers based on infrastructure competition (in Poland, LLU take up is low, so the alternatives to the incumbent operator are mainly cable operators). However, this leaves some areas in the 11 communes up to 50% of retail customers with just two or even one provider. Indeed, UKE's analysis¹ suggests that one third of customers in supposedly competitive areas have the choice of just one or two or no operator at all. This does not seem consistent with effective retail competition, which seems to be UKE's primary justification for the lack of SMP at the wholesale level.

UKE's market assessment does not include historical data on the evolution of prices and market share neither at retail nor at the wholesale level, although these findings are very useful in concluding on regional markets and also in concluding on the lack of SMP at retail level. BEREC is of the opinion that along with the aforementioned historical data, UKE should also have provided clear trends and a forward looking approach to the retail and wholesale market, assessing whether any competition that already exists would be sustained and whether additional competition may arise.

BEREC considers that while there is some evidence of infrastructure based competition on the retail market, UKE could have strengthened its argument by explaining more clearly the interrelation of retail and wholesale markets with special regard on the self-supply of the vertically integrated alternative operators. Taking this reasoning into account, BEREC shares the Commission's serious doubts on the lack of thorough assessment of the demand-side of the WBA market and insufficient arguments concerning the impact of potential competition in this particular case.

BEREC recommends UKE withdraw this present notification supplementing the regulatory process initiated by UKE in the second market review that was notified to and assessed by the Commission in February 2011 and conduct a market analysis following the best practices of the Member States² and the Commission's guidelines on market analysis and the assessment of significant market power. In general, BEREC believes that objective principles should be applied by any NRA when assessing competition and the data used for the assessment should reflect the real state of the whole market.

¹ UKE has provided the following information on the number of operators present: 67.4 % of premises has choice of three or more operators; 16.1 % of premises has choice of two operators; 10.3 % of premises has choice of just one operator; 6.2 % of premises does not have access to any operators. This information was not in the notified decision that stated that network duplication amounted to 67.4 %.

² See in particular: ERG (08) 20 final ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies).

2 INTRODUCTION

Under Article 7 and 7a of the Framework Directive³, and Article 3(1a) of the BEREC Regulation⁴, one of the roles of BEREC is to deliver opinions on draft measures of national regulatory authorities (NRAs) concerning market definition, the designation of undertakings with significant market power (SMP) and the imposition of remedies, and to cooperate and work together with the NRAs. Article 2(a) of the BEREC Regulation requires BEREC to develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework.

On 9 November 2012, the Commission registered a notification by UKE concerning the market for wholesale broadband access in 11 communes in Poland. On 19 November 2012, a request for information (RFI) was sent to UKE, and a response was received on 23 November 2012. On 17 December 2012, the Commission sent another request for information to UKE and a response was received on 20 December 2012.

The Commission initiated a Phase II investigation, pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts⁵ letter on 10 December 2012. Under Article 7(4) of the Framework Directive, this has the effect of preventing the adoption of the notified draft measures for a two month period from the date of the serious doubts letter (the standstill period).

In accordance with the BEREC rules of procedure, the Expert Working Group (EWG) was established on 13 December 2012 with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

The EWG met on 19 December in Budapest. During this meeting the EWG also met with UKE to gather further information and clarification in response to the questions sent to UKE on the 17 December and to ask additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 21 December EWG held a conference call with the Commission upon the EWG's request. On this occasion the Commission explained in detail to the EWG the reasons behind its serious doubts. This gave the EWG a more complete understanding of the case.

A draft opinion was finalized on 7 January 2013 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 14 January 2013. This opinion is now being issued by BEREC in accordance with Article 7(5) of the Framework Directive.

³ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

⁴ Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

⁵ <https://circabc.europa.eu/sd/d/4a7c5b28-b892-4271-a096-10d40b7149cf/PL-2012-1394>.

3 BACKGROUND

3.1 Previous notifications

The first review

The first review of the market for wholesale broadband access was notified to and assessed by the Commission in 2006⁶. UKE defined a single national market for wholesale broadband access, designated TP as an operator with 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.

The second review

The second review of this market was notified to and assessed by the Commission in February 2011⁷. This 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 and were excluded from the review. Furthermore, the remedies were differentiated in 3 groups of communes, depending on the competitive pressure faced by TP. The Commission strongly commented on the exclusion of the 20 allegedly competitive communes from the market definition, and requested UKE to notify its draft measure concerning those communes without unjustified delay. 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.

The third review

Instead of conducting a separate market analysis of the allegedly competitive communes, excluded from the market definition in UKE's second market review, in March 2012 UKE notified its third market review⁸, based on newly collected market data. In this notification UKE considered that the entire territory of Poland constituted a single geographical market, and that defining separate sub-national markets (communes) was no longer justified. To justify its conclusion with regard to the definition of the geographic scope of the market UKE demonstrated that market conditions were sufficiently homogeneous there were no differences in fees for wholesale broadband access (WBA), costs of signal transmission or quality of WBA.

UKE concluded that TP had SMP in the entire territory of Poland, however the degree of TP's market power varied between two different groups of communes. In the communes belonging to Group 1, (Wroclaw, Torun, Lublin, Warszawa) TP was 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 retained a strong position on the wholesale market, and there was only 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.

⁶ PL/2006/0472, SG-Greffe (2006) D/204907.

⁷ PL/20011/1184, C(2012) 2036.

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

With regard to UKE's notification of the third market review, the Commission suspended UKE's draft 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 regarding the third market review. 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.

3.2 Current notification and the Commission's serious doubts

Current notification

By means of the present notification, instead of conducting a new market analysis, UKE has notified its draft decision concerning the communes which were excluded from the geographical scope of the market in UKE's second market review. 11 communes were identified using more stringent criteria than in the second review, which meant that 9 of the 20 communes were no longer found to be competitive.

These 11 communes account for 8% of the population of Poland in total.⁹ The size of each commune may vary considerably. UKE does not consider its draft 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 RFI UKE considered that the state of the market data used for assessment in its currently notified draft decision should be exactly the same as that of its decision concerning the remaining territory of Poland (adopted in April 2011).

As in the second review of the market 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.

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, LAN Ethernet, 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

⁹ See p 61 of the present notification.

communes, where according to UKE, the market conditions are significantly different than in the remaining territory of Poland.

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 possesses individually or jointly an SMP at the retail level on the territory of those 11 communes. Moreover, the duplication of infrastructure indicates substantial elasticity of supply and demand and possibility for the retail customers to freely choose or change their provider of broadband internet.

UKE considers that TP no longer has SMP in the relevant wholesale market, despite the fact that it is the only supplier and therefore holds a 100% market share. 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 only provided 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%¹⁰; this percentage is significantly higher in the areas surrounding the 11 communes and the remaining territory of Poland (13%¹¹).

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.

With regard to potential competition on the wholesale market, UKE concludes that two competitors (Netia S.A. and Telefonía Dialog S.A.) have sufficient resources to effectively compete with TP, in case they decide to enter the wholesale market for WBA by unbundling exchanges in the area. According to UKE's measure in 2010, only 3%¹² of retail broadband customers are supplied by the LLU operators in the territorial area of 11 communes, and in its reply to the first RFI, UKE stated that only 0,6% of population is supplied by LLU-based bitstream services. 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).

The Commission's serious doubts

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 considers that it creates barriers to the internal market for the reasons described in Section 4 below.

¹⁰ See p 20 and p 45 of the present notification.

¹¹ See p 21 of the present notification.

¹² See p 20 of the present notification.

4 ASSESSMENT OF THE SERIOUS DOUBTS

On 10 December 2012, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern compliance with Article 3(3), 8(5)(a), 15(3) and 16(3) of the Framework Directive, in particular:

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

Concerns of the Commission

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

The Commission points out that NRAs 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, NRAs have to exercise their powers impartially, transparently and in a timely manner.

The Commission notes that the currently notified draft decision was prepared by UKE in the first half of the year 2011, and was consulted on at the national level more than 14 months ago. UKE's conclusions are based on market data 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 notified to the Commission in March 2012. 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 remedy (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 noted that there were significant discrepancies between the areas which were considered by UKE as qualifying for lighter remedy (although still considered as SMP areas) in its third market review 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 RFI, did UKE reflect on the significant changes between its assessment and conclusions as currently notified, and those which were included in UKE's third market review in March 2012.

The Commission notes that 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 second market review 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 introduced two additional criteria (iv) no more than 10% of premises in a given municipal area have no access to the internet; and (v) the standard deviation of the share of the three largest operators is not larger than 10 percentage points. Moreover, UKE's third market review in March 2012 seriously undermines its present argumentation as to the need to finalise the regulatory process of its second 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 has serious doubts as to its compatibility with EU law and in particular the objectives referred to in Article 8 of the Framework Directive.

UKE's position

According to UKE, the data included in the notified measure in question and in the third market review notified in March 2012 to a significant extent differs due to a different method of data aggregation and collection as well as the method, accuracy and reliability of data reporting by telecommunications operators. Taking into account the large number of entities and the level of detail of collected data, these factors could have influenced the total result. However, it should not be considered that the data in the notified measure is incorrect and that structural changes in the area of 11 communes occurred would now undermine market assessment of 2009.

In particular, the merger of UPC and Aster, as explained by UKE, has no negative consequences for competition, since the anti-monopoly authority had agreed to that merger, on the condition that UPC sells the part of the network acquired from Aster where the network overlaps with UPC. This sale is due to take place in March 2013. The same level of network duplication will be ensured as a result. Therefore the merger of UPC and Aster does not have a substantial impact on market structure in the area of 11 communes. Moreover, UKE could not assess and take account of all effects of this merger if its implementation (of a conditional agreement for merger) will take place only in March 2013.

UKE is of the opinion that changes introduced in the decision of the second market review of April 2011, which is supplemented by the present notified measure, to a large extent resulted from comments raised by the Commission which requested stricter assessment criteria to better verify any errors in the assessment of competition at a detailed market level. In effect, the assessment of competition was even more rigorous and limited the number of competitive communes from 20 to 11 (although UKE said that the addition of the 4th criteria, that no more than 10% of premises in a given municipal area have no access to the internet, was not actually seen as being indicative of competition, but was included as Poland had a policy objective to increase broadband penetration). According to UKE, this amendment was obviously transparent and objective, and what is more, favourable for competition.

According to UKE, the Commission's assessment that the measure was not based on objective and transparent criteria is therefore arbitrary and leaves out the facts undermining this assessment.

BEREC opinion

BEREC partially understands why UKE based the notified measure on data relevant to the second round market review of April 2011, as UKE sees this measure as a supplement to the previous analysis (relating only to 11 communes).

However, the notified measure is not simply a supplement to the previous analysis as UKE has changed the analysis by adding two new criteria to categorise the level of competition on the retail market. BEREC is concerned that the addition of the two criteria creates a rather different picture of the extent of competition (with 11 communes found competitive rather than 20).

Moreover, this picture changes again with newer data and newer analysis. UKE's third market review in March 2012 finds SMP across the whole territory of Poland, although it applies the same five criteria to determine how to geographically differentiate the remedies. With the new data, the criteria show retail competition in only 4 communes instead of 11, and 2 of these 4 communes were deemed uncompetitive using the old data. UKE believes the move from 11 to 4 communes is because of differences in the dataset collected, rather than underlying changes in the market (although they do note that there is ongoing infrastructure investment). It is not clear that it is appropriate to update the previous analysis when there is information which suggests that the data used in that analysis is inaccurate.

There have also been some changes in the market, including the merger of UPC and Aster. BEREC believes that the divestment of areas of Asters' network where UPC and Aster overlap required by the anti-monopoly authority significantly reduces the impact of this merger. Nevertheless, the merger may nonetheless affect UPC's market shares within a commune, and so the outcome of the criteria UKE uses to assess SMP. Moreover, UKE does not provide any evidence that there have not been further changes in the market – indeed they note that there is ongoing infrastructure investment. The possibility of such changes in the market reinforces BEREC's concerns about the appropriateness of updating the previous decision.

In conclusion, BEREC is concerned by the use of historic data. Although UKE claims it is supplementing the previous decision, it does not apply the same criteria to assess competition, and the changes have a significant influence on the outcome. Moreover, it is not clear whether it is appropriate to supplement the decision, when there is more recent analysis which suggests a different outcome. More generally, BEREC is concerned that the assessment of SMP varies so significantly according to apparently minor changes in the principles used to assess competition and the data used, despite the supposed stability of the market. BEREC believes that NRAs should apply objective principles to assess competition, and accurate data that reflects the real state of the market.

4.2 Lack of sufficient evidence of regional market differentiation

Concerns of the Commission

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 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.

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 its 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 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.

UKE's position

First and foremost, UKE considers it has indicated behavioural and structural market factors that have an impact on competitive conditions and relevant market definition. UKE points out that in its notification (points 2.2.2, 2.2.3 and 2.2.4) it presents an analysis of retail prices depicting other price conditions in 11 communes than in the remaining areas. In particular, this analysis was based on customer behaviour (the distribution of different bundles and speed) and structural issues like the distribution of access infrastructure in the 11 areas, the neighbouring areas and other communes. Subsequently in point 2.3.2 of the notification, UKE presents a description of the wholesale market level (BSA services and LLU) and concludes that there is a different situation in respect to 11 communes, mainly based on findings at retail level such as market share in the different areas.

UKE also sums up in that section the products considered as substitutes in the wholesale market. As in previous cases, UKE does not include cable in Market 5. In the end at section 2.4.2 of the notification, UKE pointed out which particular structural and behavioural factors it considers to prove the existence of a separate geographic market covering 11 communes. These are mainly the same arguments as in previous sections concerning the retail market, but also other distinguishing factors like lower barriers to entry, strong competitive pressure at the retail level and different infrastructural conditions, the significant investment engagement and the unimportance of access products like BSA. In addition, UKE enumerates again different criteria for the separate geographical markets in particular: less than 40% market share for any operators at retail level; the high level of network duplication (67.4%¹³); customer behaviour (speed, prices) and competition constraints on operators.

BEREC opinion

BEREC notes UKE's emphasis on the retail market. BEREC considers it indeed important to describe in detail the retail market in order to conclude on possible sub-national markets and the competition situation at the wholesale Market 5. However, the relation between the retail and wholesale market has to be clearly described.

As the Commission observes, the prices of the low speed offers are significantly lower in the 11 communes. UKE also provided evidence that consumers seem to get better quality offers in the 11 communes, with higher speeds.

BEREC considers such results may be driven partly by differences in the cable footprint across the country, with some areas having significantly more overlapping networks than others. However, as discussed in the previous section, the extent to which the cable footprint differs between regions is very unclear, as the data used by UKE seems very unreliable. Indeed, UKE's third market review in March 2012, which BEREC understands was based on newer and more accurate data, did not find not enough evidence to conclude sub-national markets or the lack of SMP in any areas at retail or wholesale level. Therefore to the extent

¹³ See p 40 of the present notification: „...*The following structural and behavioural factors prove that the 11 areas of market 5 constitute a separate geographical market:*...

- *high level of network duplication amounting to, respectively, 67.4 %;...*”

that there is regional differentiation, due to the unreliability of the data it is not clear that UKE has accurately identified such regions. Moreover, it is not clear that any competition that does exist is sufficient to substantially reduce the market shares of TP, which in some areas in the 11 communes are above TP's national average. It may be added that UKE seemingly does not describe accurately how the situation at the retail level affects the wholesale market.

Furthermore, the criteria used to differentiate geographic regions do not appear to adequately reflect differences in competitive conditions. In particular, under UKE's third criteria used to assess competition, only 50% of consumers within an area are ensured the choice of three independent infrastructure operators, and so up to 50% of consumers in some areas in the 11 communes have the choice of two or perhaps even just one operator. UKE provides very little evidence of the distribution of cable and LLU networks within the communes. For example, it is not possible for BEREC to ascertain the percentage of the population within each commune that is just served by only one, or two or no operator at all¹⁴. UKE does however note that only two-thirds (67.4%) of the population in the 11 communes have duplicated networks¹⁵, implying nearly a third of the population rely only on TP. In such areas, it is not clear that there are any constraints on the retail or wholesale market. This reinforces the conclusion that to the extent that there is regional differentiation, UKE has not clearly shown that it has accurately identified such regions suggesting the need for continued regulation in at least parts of the 11 areas.

BEREC also considers that UKE could have strengthened its analysis considerably by providing further data on the pricing of TP and cable operators. In particular, it could have provided evidence on the price of broadband and telephone bundles. These are the most commonly purchased packages and moreover, the prices of broadband only offers are hard to compare as TP includes a fee for line maintenance if the user only takes internet access. In addition, UKE could have quantified the extent of the discounts offered by cable operators.

UKE focused its analysis on a particular time without giving further underlying quantitative evidence on other periods. BEREC believes that historical data on the evolution of prices and market share, at retail and also at the wholesale market, should have been included. These findings are needed to conclude on geographical sub-markets and also to conclude on the lack of SMP at retail level.

UKE should also have provided clear trends and a forward looking approach to the retail and wholesale market, assessing whether any competition that already exists would be sustained and whether additional competition may arise. This might be of particular importance as investments are continuing in these areas¹⁶, suggesting competition may increase in some areas. In addition, it implies that the older data used might not be reliable.

BEREC therefore considers that while there is some evidence of regional differentiation, UKE could have strengthened their conclusions by more evidence as described above. Taking this reasoning into account, BEREC shares the Commission's serious doubts on the lack of sufficient evidence for regional markets in this particular case.

¹⁴ See footnote 1.

¹⁵ See footnote 13.

¹⁶ UKE says that "*Due to the fact that strong competition in the analyzed 11 areas is based on infrastructure and significant investment engagement of entrepreneurs (and not on access products such as BSA), it should be deemed permanent*".

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

Concerns of the Commission

Compliance with Article 15(3) of the Framework Directive

UKE assessed the competitive constraints on the relevant market mainly by reference to infrastructure competition. However, UKE failed to demonstrate whether a seeker of TP's WBA product at the wholesale level would have any alternatives in the event of refusal to supply or price increase by TP. UKE did not demonstrate 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. Since UKE could not provide any information with regard to the number of exchanges where alternative operators can unbundle the local loop or the potential population coverage by the LLU operators, the Commission had serious doubts as to the compatibility with the principles of competition law of UKE's assessment of the ability of potential competitors to enter the market for WBA through the use of LLU. The Commission noted that UKE justified its conclusion as to effective competition (at the wholesale level) in the territory of the 11 communes by reference to the retail market concentration calculating the Herfindahl-Hirschman Index (HHI) but expressed serious doubts on the ability of potential competitors to effectively constrain TP from withdrawing the access offer.

UKE's position

Under point 2.3.2 of the decision, UKE argues that the share of BSA-based services is so low (4%), that the lack of availability of a regulated wholesale access makes no difference to the status of retail competition in the area of 11 communes.

According to UKE's assessment, due to the fact that TP has no competitive advantage at the retail level in these areas, it is unlikely that TP would refuse previously granted access, because by doing so, TP could lose its wholesale clients and could not re-gain retail clients (due to significant network duplication they could switch to another provider). UKE is of the opinion that TP's position in the retail market is too weak for its activities at the wholesale level to have any negative impact on the market.

Regarding the potential impact of the withdrawal of the obligation to apply a reference offer, UKE intends to define, by means of a separate decision, a time limit of 90 days for the transition period which is regarded long enough for alternative operators to adjust to the new market situation in the 11 communes.

BEREC opinion

UKE excluded CaTV offers from wholesale access market based on arguments found in the examination of supply side substitution¹⁷. Unlike the retail market demand side examination, UKE dedicated only one paragraph to the demand side in the wholesale market definition point which gives rise to concerns about the thoroughness of the present draft decision. UKE relied heavily in its argumentation on infrastructure based competition (CaTV networks), but did not examine whether the conditions were fulfilled to apply the methodology of the indirect price constraint. If UKE wanted to base its assessment on the methodology of the indirect price constraints, then UKE should have applied it more explicitly and with reliable evidence in either the market definition or in the SMP designation procedure.

UKE's second review of the market notified to the Commission assessed the absence of potential competition in the relevant market (entire Polish territory except for 20 communes) because there was only a very limited possibility that TP's main competitors (Telefonia Dialog S.A. and Netia S.A.) would be able to enter the market for WBA on the basis of local loop unbundling. UKE considers in its current notified draft decision that TP faces – beyond the strong retail competition – direct potential competition in the relevant market due to the presence of Netia S.A. and Telefonia Dialog S.A. In assessing the criteria of potential competition¹⁸ in the third round market analysis based on most recent data and notified to the Commission in March 2012, UKE considered, in line with its second decision for the whole territory of Poland excluding the competitive communes, that the criterion of potential competition is not met in the whole territory of Poland, and included the 11 communes as well. BEREC is concerned by the frequent change of position, which suggests the analysis is unreliable.

UKE should have examined applying the modified Greenfield¹⁹ approach whether market entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. However, UKE could not provide data on the number of exchanges TP had in the 11 communes nor on the number of local exchanges where alternative operators could unbundle the local loop. Therefore UKE failed to support its argument that the above mentioned potential LLU competitors are able to compete with TP in the relevant market. BEREC is of the opinion that without these data it is not possible to assess the extent to which potential competitors could enter the market.

UKE refers to the figure of the LLU usage (ratio of the WBA subscribers served based on LLU compared to total) as a proof of lack of wholesale demand, as the alternative operators were not interested in entering the market based on regulated access. However, the overall LLU take up is low, which would not support the assessment that the potential competition from LLU market could exert constraint on WBA market.

¹⁷ The supply side examination suffers from shortcomings (outdated technical and economic analysis and Figures in Chapter 2.3.4.2.), but this is out of scope of the current EWG investigation.

¹⁸ Unofficial translation of the UKE's notified draft Decision, case PL/2012/1311, p. 77.

¹⁹ Commission Staff Working Document, Explanatory Note, Accompanying document to the Commission Recommendation 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, SEC(2007) 1483 final, p 8.

UKE's reliance on the HHI justifying effective competition²⁰ with reference to the retail market concentration does not provide a solid basis to build an argument on. This index is sensitive to changes since 2011 due to mergers. The retail index could not take into account TP's outputs (BSA) and may not properly record the strong position of TP in the wholesale market. The calculation of retail market share seems inconsistent in the draft decision because the figure for xDSL access is 34% on Diagram 3 (p 9), but 37% on Diagram 12 (p 20) including LLU and BSA based retail access to xDSL. This again questions the reliability of the underlying information.

BEREC therefore considers that while there is some evidence of infrastructure based competition on the retail market, UKE could have strengthened its argument by explaining more clearly the interrelation of retail and wholesale markets with special regard on the self-supply of the vertically integrated alternative operators. Taking this reasoning into account, BEREC shares the Commission's serious doubts on the lack of thorough assessment of the demand-side of the WBA market and insufficient arguments concerning the impact of potential competition in this particular case.

5 CONCLUSIONS

On the basis of the analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Polish Regulatory Authority, UKE on the reliance on historical data and conclusions concerning the definition of relevant market and SMP assessment contradicting UKE's more recent market analysis; the lack of sufficient evidence of regional market differentiation; the lack of thorough assessment of the demand-side of the WBA market and insufficient arguments concerning the impact of potential competition; and the creation of barriers to the internal market - as expressed in the Commission's letter to UKE of 10 December 2012 – are justified.

BEREC is of the opinion that reliance on old data is not in itself a problem if there is evidence that there have been no significant changes since the data was collected. But in this case the more recent data show a very different picture to the old data. BEREC can see that it would be difficult to have a decision for the majority of the country based on one data set, and a separate decision for the remaining communes based on a newer data set. Therefore, BEREC partially understands why UKE by willing to eliminate the current regulatory uncertainty and inconsistency in the wholesale broadband access market by finishing pending procedures based the notified measure on data relevant to the second market review to remain consistent with the previous decision. However, UKE was not consistent as it applied different criteria to assess competition. Moreover, BEREC is concerned about the fact that the two datasets produce different results. This suggests that data are not reliable and/or do not produce an adequate reflection of the current state of the market. In either case, it does not seem appropriate to simply continue and base on a previous decision, in this case with apparently outdated and inaccurate data that in any case suggests the analysis may be unreliable.

²⁰ See p 53, p 58, and p 59 of the present notification.

Moreover, the criteria applied to assess competition only require that 50% of retail customers in an area have access to three or more broadband providers based on infrastructure competition (in Poland, LLU take up is low, so these alternatives to TP are mainly cable operators). However, this leaves some areas in the 11 communes up to 50% of retail customers with just two or even one provider. Indeed, UKE's analysis²¹ suggests that one third of customers in supposedly competitive areas have the choice of just one or two or no operator at all. This does not seem consistent with effective retail competition, which seems to be UKE's primary justification for the lack of SMP at the wholesale level. BEREC could not find historical data on the evolution of prices and market share, neither at retail nor at the wholesale level in UKE's market assessment, although these findings are generally useful to conclude on regional markets and also to conclude on the lack of SMP at retail level. BEREC is of the opinion that UKE should also have provided clear trends and a forward looking approach to the retail and wholesale market, assessing whether any competition that already exists would be sustained and whether additional competition may arise.

BEREC considers that while there is some evidence of infrastructure based competition on the retail market, UKE could have strengthened its argument by introducing the interrelation of retail and wholesale markets with special regard on the self-supply of the vertically integrated alternative operators.

In the light of the Commission's serious doubts and the argumentation above, BEREC recommends UKE withdraw this present notification supplementing the regulatory process initiated by UKE in the second market review that was notified to and assessed by the Commission in February 2011 and conduct a market analysis following the best practices of the Member States²² and the Commission's guidelines on market analysis and the assessment of significant market power. In general, BEREC believes that objective principles should be applied by any NRA when assessing competition and the data used for the assessment should reflect the real state of the whole market.

²¹ See footnote 1.

²² See in particular: ERG (08) 20 final ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies).