

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

**Case PL/2012/1311
Wholesale broadband access (Market 5) in Poland**

7 June 2012

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1. EXECUTIVE SUMMARY

On March 26th 2012, the European Commission registered a notification by the Polish national regulatory authority, UKE, concerning the third review of the market for wholesale broadband access¹ (WBA) in Poland. UKE proposes to include xDSL and FTTx based-access in the relevant market for WBA and considers that the geographical scope of the market is national. TP is identified as the SMP operator in the relevant wholesale market.

UKE considers the exclusion of the imposition of cost-orientation and transparency obligations on FTTH necessary in order to avoid creating investment barriers and unnecessary burdens due to the low penetration of this technology². Furthermore, UKE considers that, based on article 36 of Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access (NGA Recommendation)³. Cost-orientation is not necessary, because the Agreement signed by TP would ensure equivalence of access for the alternative operators also to fibre access products.

The Commission has expressed serious doubts in regard to the non imposition of cost-orientation for FTTH infrastructure taking into account the NGA Recommendation. The Commission highlights that NRAs should in principle impose cost orientation on wholesale broadband access products unless functional separation or other forms of separation have proved effectively to guarantee equivalence of access is highlighted by the Commission.

The Commission has expressed serious doubts as well on the insufficiency of mechanisms to monitor a non-discrimination obligation with regard to FTTH lines. Although UKE considers that the transposition of the Agreement into regulatory decisions would ensure non discrimination, the Commission is concerned by the fact that not all the elements of the Agreement have been transposed into the draft decision.

BEREC has analysed the arguments put forward by the Commission and UKE concluding that based on UKE's arguments included in the draft measure, BEREC shares the Commission's doubts regarding the non-imposition of cost-orientation to TP's fibre based network and regarding UKE's powers, through transparency obligations, to monitor the compliance of the non-discrimination obligation.

¹ Market 5 of the 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 (Recommendation on relevant markets)

² At the end of 2011, the number of connections based on FTTH amounted to 8 028, that is, a 0, 1% of the market.

³ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Networks (NGA), (2010/572/EU)

2. INTRODUCTION

On March 26th 2012, the European Commission (“the Commission”) registered a notification by the Polish national regulatory authority, *Prezes Urzędu Komunikacji Elektronicznej* (hereinafter UKE), concerning the third review of the market for wholesale broadband access⁴ (WBA) in Poland. On April 2nd 2012, the Commission sent a request for information to UKE and a response was received on the 5th of April 2012.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC (Framework Directive)⁵, with a so called serious doubts letter on April 26th 2012. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established on the 8th of May 2012 with the mandate to prepare an independent BEREC opinion on the justification of the Commission’s serious doubts on the case.

On the 11th of May 2012 the initial meeting of the EWG took place in Barcelona. During this meeting a conference call was held with UKE to gather further information and clarification on the notification. On the 16th of May 2012, the EWG held a conference call with the Commission to gain further insight on the case and, in particular, of the Commission’s serious doubts.

A draft opinion was finalized on the 1st of June 2012 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on the 7th of June 2012. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

3.1. Previous Notifications and other facts

The first review of the wholesale broadband access market was conducted in 2006 under case PL/2006/0472. UKE defined a single national market for WBA, designated *Telekomunikacja Polska S.A.* (hereinafter TP) as an operator with significant market power (SMP) and imposed the obligations to provide access to the TP network, non discrimination, transparency, accounting separation and price control calculated by the means of a Forward Looking Long Run Incremental Cost (FL LRIC) model. Until the full implementation of the cost model UKE imposed a price control on the basis of a 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.

On the 22nd of October 2009, the President of UKE and TP concluded an Agreement (hereinafter the Agreement) that establishes a voluntary set of TP’s commitments on compliance with regulatory obligations. This Agreement includes elements such as investment obligations, determination of wholesale prices, terms of cooperation between TP

⁴ see footnote 1

⁵ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

and the alternative operators, dispute resolution and separation of the TP internal IT systems.

In 2010, UKE notified to the Commission a Reference Offer which, inter alia, contains rules and procedures associated with the launching of new wholesale services by TP, a requirement to carry out a margin squeeze test (related to copper-based products) prior to the launch of a new retail service by TP, and detailed price lists setting out the charges for the main services.

The second review of the market was notified and assessed by the Commission in 2011 under case PL/2011/1184. UKE included xDSL and FTTx (including FTTH) in the relevant WBA market and defined a sub-national market consisting of almost the entire territory of Poland, except for 20 communes, where UKE identified a higher degree of competition. UKE announced a separate notification for the 20 communes' geographic market. With regard to the sub-national market, UKE differentiated remedies in 3 groups of communes, according to the competitive pressure faced by TP. The following remedies were imposed:

- i. Group 1 communes: obligation of access, non-discrimination, accounting separation, and price control.
- ii. Group 2 communes: obligations of access, non-discrimination, and transparency⁶.
- iii. Group 3 communes: obligation of access.

The Commission commented on the exclusion of the allegedly 20 competitive communes from the geographical market definition, on the conditions for geographic variation of remedies within the notified sub-national market and on the proposed non imposition of a price control remedy in certain communes.

3.2. Current notification and the Commission's serious doubts

UKE proposes to include xDSL and FTTx based-access in the relevant market for WBA and considers that the geographical scope of the market is national. TP is identified as the SMP operator in the relevant wholesale market. However, UKE considers that the degree of TP's market power in 4 communes allows geographic differentiation of remedies in 2 Groups:

- i. Area 1 (communes of Warsaw, Torun, Wroclaw, Lublin) where only the obligation to provide access to the network and non-discrimination would be imposed.
- ii. Area 2 (communes in the remaining territory of Poland with a lower level of competition): where obligation to provide access, non discrimination, transparency (excluding FTTH), accounting separation (excluding FTTH) and cost-orientation (excluding FTTH) would be imposed.

UKE considers it proportionate to impose a limited set of remedies on FTTH (only access and non-discrimination) in order to avoid creating investment barriers and unnecessary burdens due to the low penetration of this technology⁷. Furthermore, UKE considers that the Agreement signed by TP would ensure equivalence of access for the alternative operators also to fibre products.

The Commission has expressed serious doubts on the following points:

⁶ Both for Group 1 and 2 the transparency obligation includes the quarterly publication of KPIs. UKE clarified that even in the areas where price control is not mandated the margin squeeze would be applicable.

⁷ At the end of 2011, the number of connections based on FTTH amounted to 8 028, that is, a 0, 1% of the market.

i) *The non imposition of cost-orientation for FTTH infrastructure* taking into account the Commission Recommendation of the 20th of September 2010 on regulated access to Next Generation Access (NGA Recommendation). The Commission highlights the need to impose cost-orientation on wholesale broadband access products unless functional separation or other forms of separation have proved effectively to guarantee equivalence of access..

ii) *The insufficient mechanisms to monitor a non-discrimination obligation with regard to FTTH lines.* Although UKE considers that the transposition of the Agreement into regulatory decisions would ensure non-discrimination, the Commission is concerned by the fact that not all the elements of the Agreement have been transposed into the draft decision. In particular, the notification provides for a general obligation to use Key Performance Indicators (KPI) while the Agreement establishes a specific list of KPIs and the obligation to publish them. Moreover, as TP will not be obliged to publish information on price and conditions of access to the FTTH network, the alternative operators will not be able to monitor the non-discrimination obligation of the access conditions. The Commission also considers that the non-imposition of accounting separation with regard to FTTH networks will jeopardize UKEs' ability to conduct a margin squeeze test.

The Commission concludes that UKE's draft decision would create a barrier to the internal market as prices of wholesale products and the non-discrimination obligation are important factors for actual or potential competition.

4. ASSESSMENT OF THE SERIOUS DOUBTS

4.1. Evidence supporting the non-imposition of cost-orientation for FTTH

4.1.1. Application of the NGA Recommendation

Concerns of the Commission

The Commission points out that remedies imposed on Market 5 should follow the NGA Recommendation. In particular pursuant to paragraph 35, NRAs should in principle impose cost-orientation unless functional separation or other forms of separation have proved effectively to guarantee equivalence of access (paragraph 36). In addition, NRAs could consider removing this obligation when there is effective access to the unbundled fibre loop of the SMP operator's network and that such access is likely to result in effective competition on the downstream level (paragraph 37). According to the Commission an alternative approach must be appropriate in the light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

UKE position

From the point of view of UKE the Commission's doubts based on non-compliance with the NGA-recommendation are not justified. According to Article 288 of the Treaty on the Functioning of the European Union (TFEU) recommendations and opinions shall have no binding force. Pursuant to Article 19 (2) of the Framework Directive NRA can choose not to follow a recommendation.

BEREC Opinion

As pointed out by BEREC in the Opinion on Case NL/2012/1299, BEREC shares UKE's view that recommendations and opinions shall have no binding force. Pursuant to Article 19 (2) of the Framework Directive NRA's can choose not to follow a recommendation. Thus the assessment of the compatibility with EU law cannot be based only on non-compliance with the NGA Recommendation. However, according to Article 19 of the Framework Directive, NRAs should take the utmost account of the Commission's recommendations. When a NRA does not follow a recommendation, it has to inform the Commission and give the reasons for its position.

Insofar as UKE in its decision refers to the exception included in article 36 of the Recommendation, UKE does not deviate from the Recommendation. Insofar as UKE further argues that the current competitive situation in the Polish market makes the application of some of the provisions of the NGA Recommendation disproportionate, UKE attempts to give reasons, why it did not follow the Recommendation. As shown in 4.1.2, BEREC is of the opinion, that UKE has not provided sufficient justification for the alternative approach. BEREC therefore considers that the Commission's serious doubts are justified.

4.1.2. Lack of investment – incentivising investment

Concerns of the Commission

The Commission considers that the regulatory framework does not foresee "regulatory holidays" (i.e. forbearance of regulation) as a means to foster investments in network infrastructure where the investing operator was found to have SMP. At the same time, Article 13(1) of the Access Directive states that "[...] *to encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.*" Therefore, according to the Commission, the principle of cost-orientation does not exclude incentivising the incumbent operator for potentially risky investments in future NGA networks. The Commission has in its NGA Recommendation indicated mechanisms, which aim at providing incentives to invest, while maintaining the principle of cost oriented access (such as for example allowing for an appropriate risk premium while setting the cost oriented price).

The Commission underlines that the lack of an appropriate cost model setting truly cost-oriented fibre WBA prices implies that access seekers (as well as access providers) will not be in a position to reliably assess potential investment costs and subsequent revenue streams associated with NGA roll-out. As a result, in the Commission's view, instead of promoting the roll out of new networks, UKE's approach may hamper investment in next generation technology by alternative operators during the period of this market review.

UKE opinion

According to UKE, from the point of view of the development of the NGA network and ensuring end-users with very fast Internet access, the key problem both in area 1 and area 2 in market 5 is the low indicator of development and range of the FTTH infrastructure, in particular the TP network. This situation requires applying strong regulatory incentives in the form of mitigating the regulation of WBA to the FTTH infrastructure. Due to the very high

costs of building the FTTH network, it is justified to limit the regulatory intervention in the scope of access to that infrastructure only to the essential remedies.

UKE is of the opinion that even if including a risk premium the imposition of the cost-orientation obligation would create a high burden, hindering the investment decisions due to the difficulties with approval from management, shareholders, banks and other financial sources. In a regulated environment the business plan cannot be based on free market prices but on regulated prices, which most often are disadvantageous, even if a risk premium is included in the calculation of such prices. Especially at a stage of just planning investments, creation of barriers like far-going unnecessary regulation is wrong and may hamper the accomplishment of the Commissions Digital Agenda's objectives in Poland.

BEREC opinion

In this case, according to UKE, the geographical market of FTTH, excluding dedicated optical fibres leading to individual undertakings or office buildings, is limited to a few housing estates in Poland. Although some NRA's in the past have – due to the lack of existing and foreseeable deployment of FTTH – regarded it to premature to include FTTH access in the relevant market,⁸ UKE concludes that in the current situation it is justified to include fibre access in the relevant market. UKE considers WBA based on fibre a structural substitute for WBA based on copper and considers it is essential to assure the availability of fibre-based WBA in the nearest future.

BEREC considers that NRA's should, after the finding of SMP in accordance with the market analysis and objective market factors, choose the appropriate regulatory obligations, which have to be based on the nature of the problem identified and proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC.

ERG in the Common Position on remedies⁹ established the link between competition problems and appropriate remedies according to the electronic communication framework. In this document, ERG identifies measures that NRAs could take to promote infrastructure competition, including replication of the network elements by alternative operators where it is efficient.

BEREC also considers that *“the imposition of cost-orientation, including a rate of return adequately reflecting the investment risk, simulates the effects of competitive markets and therefore does not reduce investment incentives”*¹⁰. However, it was also highlighted that *“the imposition of cost-orientation should follow the market analysis and be based on the specific competitive conditions. Therefore, it is not appropriate to presume a general obligation of cost-orientation nor to make mechanistic exemptions”*.

BEREC understands that the lack-off of deployment of FttH-networks to which competition should be created is the main problem in Poland. However, BEREC is of the opinion that this lack of deployment as such is not a justification to forebear from regulation (including cost-

⁸ E.g. Case BE/2011/1228. There were no comments from the commission on this point. Case AT/2010/1136. The Commission comment in this case was that “taking into account the current status of FTTH roll-out by the incumbent in Austria, it is the view of the Commission that the exclusion of FTTH based products from the market definition does not impact the regulatory outcome in the present case. However, given the rapid developments in the relevant market the Commission urges RTR to monitor closely market developments and to undertake a new full market analysis within the shortest possible timeframe.

⁹ Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework, (ERG(06) 33)

¹⁰ see I/ERG Response to the draft NGA Recommendation, ERG (09) 16rev3

orientation) since regulation in itself does not exclude incentivising investment. On the contrary, proportionate and objectively justified ex ante remedies could both remedy (potential) market failures to safeguard competition and promote efficient investments. To create legal certainty and stimulate investment in FTTH by the incumbent and access seekers that want to migrate from wholesale copper access to wholesale fibre access, BEREC considers it of particular importance that there will be certainty regarding the (future) regulatory conditions (including prices) that will apply, both on copper and on fibre.

In this case, UKE identifies in area 2 all potential competition problems¹¹, including price discrimination and margin squeeze. Moreover, UKE identifies that in the nearest future competition problems may arise due to the liquidation of copper access points and the fact that the existing copper networks may not be able to meet the requirements to provide broadband access¹². In area 2, UKE proposes to apply all remedies, including cost-orientation on copper access, but proposes not to impose cost-orientation on fibre access. As stated above, BEREC considers that different treatment of copper and fibre is not unjustified and discriminatory as such, but should be motivated by differences in identified competition problems between copper and fibre (e.g. an analysis that effective access to the unbundled fibre loop of the SMP operator's network and/or other remedies on the WBA-market, such as an effective implementation of access, non-discrimination and transparency are sufficient to guarantee equivalence of access so that cost-orientation on FTTH is not proportionate and justified.¹³)

In area 1, TP has a weaker position than in area 2. In area 1 UKE proposes to impose a more limited set of remedies on copper and fibre (only access and non-discrimination). BEREC notices that the serious doubts of the Commission are only about fibre access and not about copper access. Given the stronger position of competitors on the retail broadband market in area 1 compared to area 2, BEREC considers that it may be justified not to impose a cost-orientation obligation in area 1, because indirect competitive constraints may take away the risk of excessive prices and/or margin squeeze. Like in area 2, BEREC however questions the motivation by UKE not to impose cost-orientation on fibre. BEREC considers that a limitation of remedies cannot as such be justified by the lack of deployment of FTTH-networks and the need to incentivise investment.

In conclusion, according to BEREC, NRAs should determine the most appropriate remedies based on the market failures identified. Although remedies should, in accordance with the objectives of the regulatory framework, promote efficient investment in telecommunications networks, the lack of FTTH investment in Poland could not as such justify the non-imposition of cost-orientation.

4.1.3. Equivalence of access ensured by TP-UKE Agreement

Concerns of the Commission

The Commission has serious doubts whether the proposed regulation is sufficient to secure equivalence of access for all operators to fibre based WBA products offered by TP. The Commission notes that the Agreement between TP und UKE is not of a binding character

¹¹ See paragraph 6.3 of the Decision.

¹² Page 91 of the TPE Decision.

¹³ See also Recommend 36 of the NGA Recommendation.

and can only be considered as TP's voluntary commitments. Moreover the Agreement itself is, according to the Commission, limited in time and expires already in March 2013, which is significantly before the end of the current market review period of 3 years.

While the Agreement appears to have improved TP's compliance with the imposed obligations, the Commission considers that the Agreement has not delivered full non-discriminatory access to TP's network. In the view of the Commission the clause of the Agreement which provides the "freezing" of charges (above their cost oriented levels) for all wholesale access products, for example, could have a discriminatory effect on new entrants.

UKE position

UKE elaborates that the Agreement implemented far-reaching changes in the organisation, functioning and structure of TP, relating to the implementation of the obligation of non-discrimination and to the prevention of the flow of prohibited information, inaccessible to alternative operators.

These changes included in particular:

- i. Distinguishing the wholesale section of TP, which includes all wholesale activities of TP in regard to the retail section of TP, undertakings within the TP Group and alternative operators (AO);
- ii. Implementation of securities against the flow of illicit information (the so-called Chinese Walls), which include the following information flow protection measures:
 - Separation of IT systems;
 - Procedure of using prohibited information by unauthorised persons, including the Chinese Walls Regulations, Code of Good Practices;
 - Physical separation of the Retail TP section employees from the Wholesale TP section and Corporate TP section, as well as introducing unambiguous identification of the specific domain of employees at the level of electronic IDs and email;
 - The adoption of rules for the allocation and withdrawal of access to protected information prohibited for specific employees;
 - The internal audits to verify the functioning of the mechanisms adopted and identifying necessary improvements;
 - The implementation of the modified Office Instructions, ensuring the protection of information transmitted against unauthorised access by unauthorised persons;
 - The introduction of mechanisms allowing selective insight into the corporate email of employees in justified cases;
 - The audit of the document storage places in the light of identification and protection of prohibited information;
 - The introduction of document templates containing prohibited information and the obligation to clause correspondence;
- iii. The training of employees and cooperating undertakings concerning observance of non-discrimination principles;
- iv. The introduction of separate incentive systems for persons involved in the provision of wholesale services for the Retail TP section, undertakings from the TP Group, and AOs;

- v. The double employment prohibition, consisting of the fact that an employee of the Wholesale section cannot be employed based on an employment contract or other legal relation in other TP Sections or undertakings within the TP Group;
- vi. Publication of the monthly KPIs used to assess the efficiency of the processes carried out inside TP.

This demonstrates, according to UKE, that the TP-UKE Agreement leads to imposing measures similar to a functional separation. These measures in practice prevent price discrimination, since in most cases they would disclose the efforts of establishing discriminatory conditions for the provision of services.

BEREC opinion

According to paragraph 36 of the NGA Recommendation, NRAs should analyse whether the obligation of cost-orientation on mandated wholesale broadband access is necessary to achieve effective competition in case functional separation or other forms of separation have proved effectively to guarantee equivalence of access. In the absence of cost-orientation NRAs should monitor the SMPs operator's pricing behaviour by applying a properly specified margin-squeeze test.

In recital 39 of the NGA Recommendation it is illustrated that, where there is a proven track record that functional separation or similar agreements have resulted in fully equivalent access to NGA networks by alternative operators and the downstream arm of the SMP operator, and where there are sufficient competitive constraints on the SMP operator's downstream arm, NRAs have more flexibility when designing remedies for wholesale broadband access. In particular, the price of the WBA product could be left to the market. However carefully monitoring as well as performance of an appropriate margin squeeze test as set out above would be essential to avoid anti-competitive outcomes.

BEREC according to this considers that the Recommendation acknowledges that wholesale prices could be left to market forces when, either through functional separation or "similar agreements", the equivalence of access is guaranteed.

In this respect, as the remedy of functional separation is not imposed on TP¹⁴, in order to invoke this exception laid down in paragraph 36 of the NGA recommendation, UKE has to show that other forms of separation (Recital 39 of the NGA Recommendation refers to "similar agreements") have proved effectively to guarantee equivalence of access.

According to UKE, the Agreement leads to imposing measures similar to a functional separation and is therefore another form of separation/similar agreement in the sense of the Recital 39 of the NGA recommendation.

BEREC considers that the Agreement cannot be regarded as another form of separation or as a similar agreement.

As the Agreement was negotiated and concluded in order to avoid functional separation imposed by the Polish regulator by means of an administrative decision¹⁵, it may be true that the measures laid down in the agreement are mostly congruent with a functional separation.

¹⁴ In January 2009 the President of UKE has decided to launch proceedings on imposing the obligation of functional separation on TP but till the present day this proceedings were not concluded.

¹⁵ See BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences, Annex I Functional separation in practice: EU experiences, p. 14; see also 9. of the preamble of the Agreement.

According to Article 13a (1) and (2) of the Access Directive¹⁶, functional separation would be the result when a vertically integrated undertaking places activities related to the wholesale provision of relevant access products in an independently operating business entity, which shall supply access products and services to all undertakings including to other business entities within the parent company on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

In the Agreement, TP undertook to single out within its structure the unit dealing with the provision of wholesale services which, based on non-discriminatory grounds, has to provide these services to both the part of TP responsible for retail operations, to other entities of the TP Group as well as to alternative operators. TP has also to submit information on compliance with the non-discrimination principle on a regular basis within its own organisation to the President of UKE, by means of KPIs (key performance indicators) and quarterly reports audited by independent parties.

TP also committed itself to differentiate the motivational and bonus programs for the employees involved in the provision of wholesale services and for the employees dealing with retail services. Furthermore according to the agreement, the remuneration in the wholesale part of TP has to be commensurate with the results of this part only (regardless of the results of the retail part and the results of the entire company) whilst the proper level of the KPIs, mentioned above, is maintained. The agreement also contains commitments of TP in the field of the organizational culture of employees involved in provision of wholesale services which provide for proper training on the principle of non-discrimination and the introduction and compliance with a set of rules and practices on the conduct of TP's employees, especially as far as the non-discrimination principle is concerned.

TP committed itself to limit the flow of unlawful information both within the company as well as between the entities of the TP Group. This limitation of unlawful information flow is foreseen through separation of the employees involved in the provision of wholesale services from the employees of the retail part and through implementation of the code of good practices and also the computer infrastructure and the systems transmitting information within TP are to be separated. As a result, the information systems of TP are to function in such a way as to guarantee the transparency of internal organization of TP and the companies within the TP Group as well as equal access to information for all entities. Wholesale services are based on the agreement provided by the wholesale part by means of separated information systems, to which other TP's departments and companies of the TP Group have no access.

This shows that the Agreement covers some, but not all the main characteristics of a functional separation.

But – as the Commission pointed out correctly – the fact that the agreement is voluntary and will expire in March 2013, prevents it from acting as another form of separation in the sense of the NGA Recommendation. As functional separation imposed according Art.13a of the Access Directive would be of a permanent character (or at least for the market review period in which it is imposed) also the other form of separation has to meet this requirement.

¹⁶ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

Moreover – as also argued by the Commission – the agreement lacks a binding character. According to § 18 No.3 of the Agreement, TP declares that all actions specified in the Agreement will be taken voluntarily, as part of TP's operations on the telecommunications market and according to § 18 No.5 of the Agreement. In addition, none of the provisions of the Agreement shall be subject to execution in civil law proceedings or pursuant to provisions concerning executive proceedings in administration. This implies that it cannot act as a substitute for functional separation in the sense of the NGA recommendation as there are no legal instruments to effectively safeguard equivalence of access in case of a breach of the agreement by TP.

4.2. Insufficient mechanisms to monitor the non-discrimination obligation

Concerns of the Commission

The Commission has serious doubts on the ability of UKE to maintain the achievements brought by the Agreement with the obligations imposed in the decision despite the fact that UKE has transposed some of the provisions into regulatory decisions and Interconnection Reference Offers.

According to the Commission, some crucial elements from the Agreement are not transposed into the notified draft decision, in particular, Key Performance Indicators (KPIs). The current KPIs, applied to copper based wholesale services, are very specific and they were built up based on the detailed non-discrimination and transparency obligations imposed. Under these obligations, TP was obliged to publish KPIs, allowing access seekers to monitor and detect discriminatory practices.

The Commission considers that the proposed remedies do not impose on TP the obligation to audit TP's compliance of its obligations or to publish or provide information about the results of KPIs measurements for FTTH to alternative operators. Moreover, TP would not have to provide information on conditions of prices and access to its fibre network, limiting the ability of alternative operators to effectively request the wholesale services.

Finally, the non imposition of accounting separation with regards to FTTH, according to the Commission, will limit UKE's ability to effectively apply a margin squeeze test on TP's retail offers.

UKE opinion

According to UKE, transparency obligations are not needed in area 1 because the competitive position of TP is weak and therefore, the incentives to conduct anticompetitive practices are low. Therefore, the non-discrimination obligation is considered by UKE to be sufficient to assure the existing competitive level.

NGA roll-out envisaged by UKE is based on FttC/B which will be covered by the full set of obligations, including transparency, imposed on the copper network, whereas extending them to FTTH deployments, foreseen only in the new houses states, is disproportionate in the light of the market analysis.

According to UKE, the draft decision transposes most of the provisions of the Agreement. Moreover, the fact that TP is not providing WBA to its subsidiary, Orange, eliminates most of the incentives of TP to unduly discriminate.

Regarding KPIs, UKE considers that its draft decision details the elements about which UKE has to provide information on wholesale services. In addition, UKE considers that the NRA is the body in charge of monitoring the effective compliance of the non-discrimination obligation and not third parties, such as access seekers. Indeed, the current framework provides tools regarding information gathering, such as request for information and inspection, as well as dissuasive measures (possibility to impose fines up to 3% of TP's revenues).

Finally, regarding the margin squeeze test, UKE estimates that the relevant costs to undertake the test on FTTH would be essentially the same as FttC/B. Given that copper based connections, including those mixed with fibre, would be subjected to cost and accounting separation obligations, no further obligations are required for fully based fibre connections. Furthermore, alternative operators have the opportunity to comment on the price squeeze test.

BEREC opinion

According to BEREC's analysis of the decision, it is important to highlight that the non-discrimination obligation is imposed in area 1 and 2 regardless of the underlying network technology (sections IV.2 and V.2 of the decision). In both sections, UKE imposes the obligation of providing wholesale access to third parties in not worse conditions, in terms of price, quality and quantity, to the conditions offered to its own retail section. This general obligation is detailed with several provisions such as ensuring execution of orders in not worse conditions, implementation of a good practice codes, preventing exchange of information, etc. KPIs calculation (to retail section and individual access seekers) is also included within non-discrimination provisions.

The transparency obligation, including obligations to provide and publish information, is covered by sections IV.3 affecting area 2 and excluding FTTH lines¹⁷. Therefore, the potential wholesale access based on TP's fibre network imposed by the decision would not be covered by any transparency obligations in the whole Polish territory (even in area 2, where detailed measures are imposed in copper based WBA).

BEREC does not, as stated above, share the position that deregulation of WBA could be considered an appropriate incentive to promote investments. Likewise, the lack of investment should not be considered a market failure that could be remedied by the withdrawal of regulatory measures imposed in accordance with the regulatory framework. In addition, the fact that TP is not providing wholesale services to its subsidiary Orange does not prevent TP from undertaking discriminatory practices as TP itself is providing retail broadband services.

- *Necessity of transparency obligations to effectively monitor the non-discrimination obligation*

According to UKE's decision, an access obligation on TP's FTTH network is required, both in area 1 and 2. Indeed, TP is obliged to provide a wholesale service based on this network at least 6 months in advance of the commercial launch of its retail service.

¹⁷ Regarding copper based wholesale services, TP is obliged to announce at least once every quarter the calculated KPI on its website as well as to provide them to alternative operators using regulated wholesale services. Moreover, transparency obligations affect also to IT systems and the information included in them, announcing in advance new access points to the network, publish technical specifications of the services, etc.

BEREC considers that this obligation would be ineffective if access seekers do not get the necessary information, including price and access conditions. Moreover, as UKE points out, non-discrimination is a key element that would assure a fair access of alternative operators to those services included in markets where TP is deemed to have SMP, allowing a non-distorted competition in downstream markets.

However, effective compliance of non-discrimination requires the suitable tools to monitor the conditions in which TP is providing wholesale services to its retail arm compared to the ones of the alternative operators. Any deviation has to be detected as soon as possible given the effects that such practices have in the market in particular, when some of them could be rather permanent, it affects the perceived image from alternative operators by end users.

For this reason, BEREC considers that UKE's monitoring activities could be reinforced by alternative operators' surveillance by obliging TP to publish certain information and, in particular, KPIs. In fact, UKE acknowledges in its decision that KPIs along with an adequate obligation of transparency, connected with announcing and providing KPIs will facilitate the prevention of discriminatory practices through the disclosure of irregularities and breaches of obligations on the part of the incumbent operator in relation to individual telecommunications undertakings using TP services.

Indeed, according to BEREC's establishes in the principle 11b of the review of the Common Position on wholesale unbundled access, wholesale broadband access and wholesale leased lines¹⁸ establishes that the results of monitoring KPIs should be made available to all operators in the market.

Therefore BEREC considers that, in addition to the submission to the NRA of all relevant information, the publication of some information on the provision of wholesale services facilitates monitoring the compliance of non-discrimination obligation.

- Transparency obligations are not an excessive burden

The imposition of the transparency obligations would not necessarily mean an excessive burden for operators as it has to be proportionate to the market failure detected.

BEREC considers that the low roll out of TP's FTTH network could justify the non-imposition of a Reference Offer. However, as stated above, disclosure of relevant information is necessary for alternative operators to request the potential services and to effectively monitor the compliance of non-discrimination obligation.

Therefore, BEREC considers that it would not be disproportionate to impose some transparency obligations to TP related to the provision of WBA based on TP's fibre network.

- Necessity to impose accounting separation to perform a margin-squeeze test

¹⁸ See page 30 of the BEREC's Review of the Common Positions on wholesale unbundled access, wholesale broadband access and wholesale leased lines, Stage 1 High Level Principles on issues of non-discrimination of 1 March 2012, BoR (12) 10: "The results of monitoring KPIs should be made available to all operators in the market. To determine whether they could have been discriminated against, alternative operators would need to be able to compare the levels of service they have received to those provided by the SMP player a) to its downstream business and b) the industry average. In this way, each alternative operator would have access to three sets of data determining the service levels received by itself, the SMP player's down-stream arm and the industry average (where only the latter two would be in the public domain)."

The Commission considers that UKE could require accounting data from TP to effectively perform a margin-squeeze test. For this reason, the non imposition of accounting separation reduces the UKE's ability to conduct this test.

BEREC does not in all circumstances share the Commission's view as NRAs could opt to perform a margin-squeeze test following the "Reasonable Efficient Operator" (REO) approach instead of the "Equally Efficient Operator" (EEO), as recommended by the Commission (considering recital 26 of the NGA Recommendation). When a REO approach is adopted, an NRA has to build up a test modelling the cost faced by an alternative operator and not by the incumbent. Therefore, in case UKE follows this approach, it could conduct a margin-squeeze test without the need of real cost data from the SMP operator.

In this respect it has also to be considered that the cost data needed for the margin-squeeze test are primarily the additional costs which are necessary to create an end-customer product from the wholesale product and not the costs for the regulated wholesale product.

However, as stated above, BEREC considers that the draft measure does not include the relevant provisions for UKE to properly perform this test on FTTH connections.

In answer to a request for information from BEREC expert working group, UKE explained that the margin-squeeze test is treated as a means of verification of the wholesale price level. As a regulatory tool it is according to UKE not used for defining the final price, but for verification whether the price (obtained f.e. under cost-orientation assumption) fulfils the non-discrimination assumption. Therefore the legal basis for the conduction of margin-squeeze tests would be the non-discrimination obligation, which is imposed on the SMP operator.

Nevertheless in the proposed draft measure the margin-squeeze test is referred to as a means of determining access fees under the obligation of cost-orientation (see IV.5.b and 6. of the statement of the proposed draft measure). The procedure of conducting the margin squeeze/price squeeze test is described in the reference offer, (see IV.7. of the statement of the proposed draft measure). Both obligations do not apply for FTTH in area 2 municipalities and also not for all WBA access-products in area 1 municipalities

Hence, even if UKE does deduce its ability to conduct a margin-squeeze test with regard to FTTH from the non-discrimination obligation, neither the procedure of its conduction nor the means of collecting data for the test are specified in the decision (cost data for copper and partially fibre-based products would not be available for area 1 municipalities).

5. CONCLUSIONS AND RECOMMENDATIONS

BEREC considers that where a national regulatory authority chooses not to follow a recommendation it shall give reasons for its position in accordance to market situation. In the case of the Polish market, an essential point to be considered is the low deployment of incumbent's FTTH network, as this element has been argued by NRAs to exclude this technology from the relevant market.

However, in this case, UKE opted to include FTTH in the relevant market, but proposed only a limited set of remedies on FTTH (access and non-discrimination) on the basis of providing additional incentives to TP to invest in the new fibre networks. Moreover, according to UKE the existence of an agreement between TP and UKE (similar to a functional separation) and

the performance of a price squeeze test on TP's retail broadband offers justifies the non-imposition of a transparency obligation, accounting separation and cost-orientation and permits UKE to invoke the exception included in paragraph 36 of the Recommendation.

BEREC concludes that UKE's arguments do not sufficiently justify the non-imposition of a transparency obligation and cost-orientation on FTTH:

- i. The lack of deployment of fibre networks as such is not a justification to forebear from regulation since regulation in itself does not exclude incentivising investment.
- ii. UKE does not argue that there are sufficient indirect constraints that justify the non-imposition of cost-orientation on FTTH access lines in area 2.
- iii. The Agreement does not represent another form of separation as it does not cover the whole period of market review and is not legally binding for TP.
- iv. As UKE has not imposed transparency obligation as such, the remedies included in the decision are not sufficient neither to assure equivalence of access (as TP is not obliged to provide relevant information to request access) nor to effectively monitor the non-discrimination obligation.

For the reasons above, based on UKE's arguments included in the draft measure, BEREC shares the Commission's doubts regarding the lack of evidence supporting the non-imposition of cost-orientation to TP's fibre based network and reinforce UKE's powers, through transparency obligations, to monitor the compliance with the non-discrimination obligation.

Nevertheless, UKE could have explored the effective competition problems that could arise in the market given the low penetration of FTTH connections in the Polish market (according to UKE, the geographical market of FTTH, excluding dedicated optical fibres leading to individual undertaking or office buildings, is limited to a few housing estates in Poland) and, in particular, the competitive pressure faced by TP in area 1 by alternative infrastructures that are currently providing access services with similar capabilities of FTTH connections. Depending on this analysis, cost-orientation could be disproportionate as TP has not the ability and/or incentive to impose WBA excessive prices.