



Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji

Warszawa, November 2012

KIGEiT/ /11/2012

Mr. Robert Madelin
Mr. Reinald Krüger

European Commission
DG Connect
Rue de la Loi 200
B-1049 Brussels
Belgium

Ref: Case PL/2012/1394 Poland: Notification of Market 5 – Wholesale Broadband Access (11 communes)

**POLISH CHAMBER OF COMMERCE FOR ELECTRONICS AND
TELECOMMUNICATIONS POSITION ON CONSULTATION RESULTS OF PRESIDENT
OF UKE DECISION STATING THAT IN THE MARKET OF WHOLESALE BROADBAND
ACCESS IN THE 11 COMMUNES OCCURS EFFECTIVE COMPETITION**

In this position of the Polish Chamber of Commerce for Electronics and Telecommunications (hereinafter referred to as "**KIGEiT**") wishes to present comments on the draft decision where President of UKE is planning to take off regulatory obligations from Telekomunikacja Polska S.A. (hereinafter referred to as "**TP**") in the 11 communes (hereinafter referred to as "**Draft decision**"), asking to open second phase of the proceedings against Poland. We would also like to request for a meeting about the matter in order to discuss the situation on the Market 5 and actions taken by the NRA in relation to Market 4 and Market 5.

I. Summary of KIGEiT position:

- a) Draft decision is based on data from 2009 that are outdated and do not correspond with the current facts;*
- b) In the subsequent notification to the European Commission (based on data collected in 2011), President of UKE admitted the fact that as many as 9 out of 11 communes*

- from the Draft decision are non-competitive and regulatory obligations on them shall be maintained;*
- c) President of UKE analysis do not include the fact of UPC and Aster fusion as a result of which (from the beginning of 2012) in the market there is only one operator. It radically changes the situation in the Warsaw market;*
 - d) Draft decision in no way refers to above changes and does not explain why the President of UKE is basing on the analysis of the relevant market from 2009, rather than on an analysis from 2011;*
 - e) Until today President of UKE didn't approve reference offer implementing regulatory obligations from SMP decision from 2011 (decision from 28th April 2011 nr DART-SMP-1/10(47), hereinafter referred to as "SMP Decision I"). Despite this delay, President of UKE considered as more important to issue Draft decision taking off regulatory obligations in the 11 communes from TP;*
 - f) The actions of the President of UKE raise serious doubts as to the credibility of the market analysis;*
 - g) The actions of the President of UKE seem to indicate that the President of UKE has a bias for taking care of TP's interests rather than ensuring that TP comply with its regulatory obligations.*

II. Regulatory dualism

First of all, we must point out that we are surprised to the publish if the results of consultations conducted over 14 months ago, and furthermore, notifying the Draft decision to the European Commission. At this point, we recall that in the letter from 23rd March 2011 concerning the notification of the Market 5 SMP Decision I, the EC stated: *"The Commission asks UKE to notify its draft measure concerning the 20 remaining communes without unjustified delay"*. We understand that the words *"without unjustified delay"* means that the President of UKE need more than 1.5 year to submit this analysis to the EC. We emphasize that, regardless of the above, until today, for more than 1.5 year from the date of issuance of SMP Decision I, the President of UKE has not implemented reference offer including new TP regulatory obligations in the Market 5. The effect of this is TP denial of implementation of regulatory obligations set out in SMP Decision I. We hope that also in this respect, the EC will give its position on the *"immediate actions of the President of UKE."*

Therefore, it must be emphasized, that from the consultation process of the Draft decision in August 2011, on the telecommunications market in Poland occurred a number of changes. Analysis that are base of the Draft decision, due to the passage of significant amount of time since commence of data collection (January 2009), have become largely obsolete. At this point, if only by way of example, we indicate that from January 2012 Aster is no longer on the market, due to the consolidation with UPC, Aster simply ceased to exist, and thus on one of the competitive markets (according to the President of UKE), instead of two cable operators (UPC and Aster) there is only one operator. As is evident from the after – consultation comments, President of UKE decided that this fact has co influence on the case (sic). It must be indicated that the President of UKE was fully aware of that change on the telecommunication market. On 2nd March 2012 President of UOKiK (Urząd Ochrony Konkurencji i Konsumentów, Office of Competition and Consumer Protection) presented its position after consultation process of SMP Decision II Draft. In its position, President of UOKiK stated (p. 6): *"Aster and UPC are one entity (they have joint market share) The indicated circumstance requires consideration and which is directly related to the correction,*

of the final shape of the groups 1 and 2 areas of the market covered by the regulations.” As President of UKE began consolidation process of Draft decision without any changes concerning consolidation of Aster and UPC, it must be pointed out that President of UKE did not take into consideration that opinion.

We emphasize that according to the information included in the justification of the Draft decision, the basis for its issuance are broadband market data collected by the President of UKE from 6th January 2009 (!). To this day passed almost four years.

On this basis, on 12th February 2010, the President of UKE launched administrative proceedings terminated on 28th April 2011 by issuance of SMP Decision I. In this decision, the President of UKE divided the territory of the country in the areas in which on the TP there were imposed various regulatory obligations. President of UKE cut off from the Market 5 area 11 communes (not 20 communes, as in the previously consolidated project).

At the same time, on 18th March 2011, the President of UKE again began collecting data about the broadband market for the purposes of new analysis.

Based on the new analysis, on 25th January 2012 President of UKE informed TP about launching administrative proceeding in a matter of determine the market of wholesale broadband access, determine whether on the market there is SMP operator, designation of SMP operator in case there is not effective competition on the market and impose on the SMP operator regulatory obligations, as well as to maintain, amend or repeal regulatory obligations imposed before (proceeding nr DART-SMP-6040-3/12).

From 1st February 2012 until 2nd March 2012 the President of UKE conducted consultation process of the draft decision nr DART-SMP-6040-3/12 (hereinafter referred to as “**SMP Decision II Draft**”). On 26th March 2012 President of UKE notified SMP Decision II Draft to the EC.

It shall be considered, whether current activity of President of UKE shall be based on analysis carried out in 2009 or on more recent – from 2011. What’s more, it shall be discussed why with having more recent data about relevant market, which results differ from earlier analysis (what will be discussed below) President of UKE continues regulatory actions based on outdated-market-analysis. ~~We underline that Draft decision do not provide answers in this regard.~~

III. Geographic markets

In SMP Decision I President of UKE cut out from the relevant market 11 communes:
Bielawa, Lublin, Zielona Góra, Nowy Dwór Mazowiecki, Płońsk, Warszawa, Białystok, Łomża, Braniewo, Elbląg, Olsztyn.

According to the law, in those communes in the scope of BSA service, regulatory obligations imposed in President of UKE decision from 12th February 2007 nr DRT-SMP-6043-23/05(33) are still applicable.

President of UKE justified cutting off the area of 11 communes from the relevant market with the presence in that areas of high level of competition (at least 50% of households in the area

have access to the infrastructure of at least three providers of retail Internet access, less than 10% premises in a given area do not have Internet access, the standard deviation of the shares of the three largest operators of no more than 10 percentage points).

President of UKE divided the rest of the Poland into three groups and diversified regulatory obligations imposed on TP. In total, the President of UKE, in addition to the abovementioned 11 communes, limited regulatory obligations of TP in 239 communes.

In SMP Decision II Draft, based on the analyses from 2011, the President of UKE defined the scope of the Market 5 as the geographic market area covering the whole Poland. President of UKE cut off from the relevant market FTTH access. President of UKE, basing on more recent analyses, limited regulatory obligations imposed on TP only in the four communes: Wrocław, Toruń, Lublin and Warsaw.

Here we can see that:

- a) From the earlier 11 communes from SMP Decision I, in SMP Decision II Draft concerns only two communes: Warszawa and Lublin;
- b) Communes recognized earlier as competitive, in SMP Decision II Draft were recognized as non-competitive and President of UKE anticipated maintenance of regulatory obligations in those communes.

Unfortunately, Draft decision do not explain these discrepancies and do not provide answer to the question what is the reason of such variation of President of UKE approach.

In justification of SMP Decision II Draft President of UKE stated (p. 56):

"The analysis carried out by the President of UKE indicates on the national extent of wholesale broadband access market. The area where TP and operators using access to TP network are involved in the process of demand and supply of wholesale broadband services, is the area of the whole Poland. Competitive conditions in the market are similar and sufficiently homogeneous, and the differences found are not fixed, so they do not justify distinguishing local markets, but at the most only geographical diversity of regulatory obligations."

Given the above, it is difficult to sustain the justification (published by the President of UKE about 6 months before the publication of the Decision SMP II Draft) of the Draft decision, where the President of UKE, referring to the cutting off regulatory obligations in the area of 11 communes, states (p. 40):

"conditions of competition on distinguished 11 competing areas, both at wholesale and retail level, are significantly different from those in the other areas of the country, because in 11 commune areas, competitors may develop and carry out their activities on a commercial basis, without barriers and obstacles to development market that arise in presence of dominance in this market."

Above statements are facing each other in obvious contradiction. In our opinion, carrying out new analysis of the market after which the President of UKE was planning to issue SMP Decision II Draft, excludes the possibility of issuance a regulatory decision on the basis of analyses carried out by the President of UKE in 2009.

At the same time, we emphasize that the SMP Decision II Draft met with a veto from the European Commission. What is important, the reason for the veto was not defective determination of the President of UKE in competitive communities, but:

- a) No sufficient evidences for the validity of non-imposition of cost orientation obligation in the case of FTTH infrastructure;
- b) Insufficient mechanisms to monitor the obligation of non-discrimination with respect to FTTH lines;
- c) Implementing barriers hindering development of internal market.

EC position was supported by BEREC.

As a result of the opening of the second phase of the proceedings against Poland, President of UKE withdrew the SMP Decision II Draft and announced to carry out new analysis. Meanwhile, it seems that President of UKE continues to lighten regulatory obligations imposed on TP and in the situation in which the “*regulatory holidays*” under the SMP Decision II Draft proved to be impossible to implement, President of UKE does not cease in its efforts to lighten regulatory obligations imposed on TP and seeks to cut off these duties in the 11 communes, where for 9 out of 11 those communes President of UKE had already prepared SMP Draft Decision II confirming that those communes are not competitive. The logic of the President of UKE is difficult to understand, and the only reasonable conclusion is striving at all costs to remove regulations imposed on TP as far as possible and without regard to the consequences for competition and consumers.

IV. EC position

Position of EC from EC decision from 23rd March 2011 nr SG-Greffe (2011) D/4675 (hereinafter referred to as “**EC Decision**”) shall also be presented.

In notified to the EC draft SMP Decision I, President of UKE cut off 20 communes from relevant market. In final SMP Decision I President of UKE cut off only 11 communes.

In EC Decision it was stated that the President of UKE, while removing regulatory obligations from TP in communes cut off from the relevant market, should prove that (i) competition conditions in those communes are sufficiently homogeneous and that (ii) differences in supply and demand - compared with a large part of the Polish territory which is the subject of the present application - are stable and significant enough to justify the definition of a separate market.

Referring to the differences in supply and demand in the 11 communes in the area compared to the rest of the Poland, there should be noted fragment from justification from SMP Decision II Draft:

“The area where TP and operators using access to TP network are involved in the process of demand and supply of wholesale broadband services, is the area of the whole Poland. Competitive conditions in the market are similar and sufficiently homogeneous, and the differences found are not fixed, so they do not justify distinguishing local markets, but at the most only geographical diversity of regulatory obligations.

(...)

On Polish territory, there is no difference in the rates for wholesale broadband access, signal transmission costs or the quality of the wholesale broadband access services.”

These fragments of SMP Decision II Draft directly shows that after an analysis of the wholesale broadband access market, it should have been stated that there is no justification to exclude any areas (communes) in the field of Market 5 where TP has imposed regulatory obligations.

V. KIGEiT position from 26th August 2011

Regardless to the above comments, we fully maintain our position presented during consultation process, in particular:

- a) there are no reasons to extract sub-markets, as well as wrong areas taken into account during analysis (communes instead of MDF areas);
- b) lack of analysis of other criteria justifying geographical division;
- c) wrong criteria taken into account while determining effective competition in the market;
- d) market analysis and Draft decision contradiction with the ladder of investment theory.

In the opinion of KIGEiT, in comments to the results of the consultation process published on the UKE website, President of UKE did not include any substantive arguments questioning the validity of claims and positions of the KIGEiT. President of UKE limited only to the vague and perfunctory comments, often passing over the claims and arguments of KIGEiT, which shows, that the *de facto* President of UKE has no arguments questioning the reasoning of the KIGEiT.

Given the above, we request the initiation of the second phase of EC investigation due to the fact that Draft decision may create a barrier to the internal market.