



Warsaw, 8 January 2013

Regulatory Coordination and Markets Unit
DG Communications Networks and Technology
European Commission

**The public consultation on the revision of the Recommendation on Relevant Markets:
A response from the Polish Chamber of Electronic Communications**

On behalf of Polska Izba Komunikacji Elektronicznej (PIKE), a commercial chamber of Polish cable TV operators, I would like to thank for giving us this opportunity to take part in the consultation and to express our opinion on the list of markets susceptible to *ex ante* regulation. We consider this matter as being of utmost importance to PIKE because we are convinced that the way in which this list is going to be revised can have a huge impact on all activities of our Members and on the future of electronic communications network and services in Europe. In our opinion the most important issue is access to infrastructure, especially civil engineering structures, and therefore these services should be either explicitly included in the product dimension of Market 4/2007 or identified as a separate market to be defined and analysed by all NRAs.

Questions 1-3

PIKE agrees with the European Commission's opinion, that the most important technology change, which has to be taken into consideration while assessing rules on regulation in fixed electronic communications markets, is the shortening of local loop and replacement of copper wires with fibre wires. This observation, however true, may not be final. PIKE observes, that nowadays major problem, in providing cable operators' services to end users is access to civil engineering objects, that is not necessarily connected with the obligation to provide access to local loop. This consideration shall be expanded further on, in an answer to questions 7-8.

Questions 4-6

PIKE finds three criteria test as still appropriate. PIKE would like to stress however the need to use the test by NRAs with a special attention, paid to details, so as to prevent using it as a means of justifying its own actions. Unfortunately, examples of some Polish market examinations could be read as proving the opposite, resulting in partially random effects. In this aspect PIKE remains particularly dissatisfied with opinions voiced both by European

Commission, as well as Polish NRA, which might suggest taking a more relaxed position towards incumbent service providers, seeming to abandon a hard struggle to keep telecommunication markets free from cases of market power abuse and to promote competition, for the benefit of incumbents' investments funding. Polish cable operators' example shows, that a great development can be achieved, by regular investment in right technology networks. PIKE finds that supporting sub-optimal technologies (such as in certain cases xDSL), in order to provide funds to invest in NGA networks is a wrong choice. Having regard to Polish market example PIKE claims it is not the lack of funds, but an aggressive dividend policies that constitute a problem.

According to "National Broadband Plan", being currently prepared by Polish government, only 10% of Telekomunikacja Polska's broadband xDSL connections in use (being around 300.000) are in accordance with DAE. The following 90% of its copper network needs upgrading. Meanwhile almost 5 million cable operator connections are considered NGA or NGA-ready. As an effect among 7 million NGA or NGA-ready networks, only 300 thousand of them is considered to belong to the incumbent, who provides Internet access services to an almost third part of Polish market. Also ADSLx broadband coverage numbers are considered to be by far the lowest in EU (80%, by comparison to 97% average in EU, according to ETNO's Annual Economic Report 2012, p. 23).

These are not however consequences of competition problems faced by the incumbent, but an effect of a conscious strategy, aimed at maximizing profits at all costs. The incumbent has already declared, in its 2011 Annual Report (p. 17) to be "decided to keep its promise, to restrict investments after 2012, to previous level." It has to be considered meanwhile, that those 2012 investments involved building or modernizing network to the speeds, which are currently hardly offered by major cable operators, as too slow (with an exception of 200.000 loops modernized or built to the speed of 30 Mbit/s). Also ITU mentions Poland, as the only country that still offered a plan at 256 kbit/s, "with most countries advertising four times as much." (according to ITU's "Measuring the Information Society 2012", p.108).

The aforementioned problems may not also be blamed on market conditions, being similar to both the incumbent and cable operators – the fixed-broadband prices in Poland, considering purchase power adjustment, being above European average and growing (6,1% in last five years, comparably as in other EU countries, according to Ofcom's "International Communications Market Report 2012", p. 269).

Thus it is the cable operators, who – investing incomparably higher funds into developing and upgrading its networks – progress Poland as Digital Agenda ready, currently building networks predominantly in FTTx technologies. Incumbents' explanations of its failures to invest are thus not true. The predominant reason is an effect called in relation to the incumbent as an "investments strike". Telekomunikacja Polska refuses to invest, avoiding

infrastructural competition and spending more on dividends than investing in its' network, for the purpose of Internet access services provision (Telekomunikacja Polska's 2011 Annual Report). Thus PIKE declares it disapproves all policies aimed at tolerating market failures, in order to promote NGA investment by incumbents and thus repeating those failures on NGA level.

Questions 7-8

PIKE suggests to clearly formulate market 4 product scope as including access to civil engineering objects (in particular ducts), also not being substitutes of local loop. To date definition of market 4, including "wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location", very broad in its literary meaning, has in some cases been however narrowly interpreted, by the European Commission (in particular in 2007 Recommendation Explanatory Note). PIKE stands on a position that unequivocal inclusion of physical access to civil engineering objects would strongly promote goals set by the European Commission, allowing to remove current market failures in this aspect.

First of all – access to civil engineering objects meets the three step test criterion:

- a. there are very high and non-transitory barriers to entry,
- b. market structure does not tend toward effective competition within relevant time horizon,
- c. competition law alone does not adequately address the market failure concerned.

Secondly – those criteria are particularly obvious in case of Poland, where on one hand the incumbent had inherited, from previous economical system, an amount of ducts, exceeding its needs, while Polish law have made it increasingly difficult to build the new ones. It has also to be mentioned in Poland the city maps, used as basis to build networks, are extremely inaccurate, making investing even more difficult. Also has to be underlined, that – unlike in some countries, in Poland local governments hardly possess any civil engineering objects and the same is true for civil services providers, like water supply or energy companies. In any case those two types of providers do not constitute power, which might be used to counter incumbent's market power. Hence – even today Telekomunikacja Polska is said to possess locally up to 90% of viable ducts. Unequivocal inclusion of civil engineering objects physical access into the scope of product market 4 would also represent more technology neutral approach, allowing for even more infrastructure competition, being thus in line with European Commission policies. Civil engineering objects access is also a product obviously upwards both from BSA, as well as LLU. Such solution would also favour NRAs' greater freedom to flexibly adjust actual scope of market regulation, both by including and excluding, where justified, civil engineering objects, into the definition of product market 4.

Having said this, PIKE has to acknowledge that Polish law, thank to policy acquired by Polish NRA, has adopted regulations, in practice effecting in an obligation to provide access to ducts, resulting in a spectacular growth in competition. Almost 2 million broadband (NGA or NGA-Ready) have been provided by some 400 active cable operators, as well as almost 1 million of other broadband services exists. Having in mind Polish broadband market reality, in particular already discussed malperformance of the incumbent in the area of NGA roll-out, such effect has to be described as a spectacular achievement. However – new challenges arise, including rolling out NGA infrastructure in even sparsely populated areas. Such development cannot be achieved without an increased certainty of access to the civil engineering objects.

Questions 9-10

PIKE does not claim necessity to remove any of the markets, as specified in Recommendation 2007.

Questions 11-16

In PIKE's opinion there is no reason to add any other Markets to the Recommendation. However, should in the European Commission's opinion civil engineering objects' market, as specified in answer to Questions 7-8, be a separate market to market 4, it is PIKE's position, this market should be added as a separate one.

PIKE disapproves also a need to create an additional market of broadcasting. First of all – PIKE does not believe it meets the three criteria test. In particular, PIKE contests an actual need to define such market, due to copyright problems. Furthermore, additional problems arising from must carry rules, adopted in different countries, would have to be considered. Such event would surely create major market problems.

Having regard to the aforementioned, PIKE declares its full commitment in the further course of matter at hand.

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