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COMMISSION DECISION

of 22 June 2011

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union (TFEU)**

(COMP/39.525 – Telekomunikacja Polska)

(Only the Polish text is authentic)

"Parts of this text have been edited to ensure that business secrets and other confidential information are not disclosed. Those parts are enclosed in square brackets with an asterisk [*] or replaced by an appropriate summary [*summary*]".

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(COMP/39.525 – Telekomunikacja Polska)

(Only the Polish text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union¹,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty², and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 17 April 2009 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty³,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case⁴,

Whereas:

¹ OJ C 115, 9.5.2008, p. 47.

² OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Article 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Article 81 and 82, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision

³ OJ L 123, 27.4.2004, page 18.

⁴ OJ C 324, 9.11.2011, pages 3-7.

I. INTRODUCTION AND SUMMARY OF THE INFRINGEMENT

- (1) Broadband Internet access is a key element of the information society. The main technology used in Poland to provide broadband internet access services is DSL (digital subscriber line), which provides Internet access using a telephone line. The incumbent Telekomunikacja Polska S.A. ("TP", "incumbent") is the only Polish telecommunications operator that has a nation-wide fixed telephone network. It rolled out this local access network over significant periods of time protected by exclusive rights and was able to fund investment costs through monopoly rents from the provision of voice telephony infrastructure and services.
- (2) In order to provide broadband Internet access to end-users, alternative operators ("AOs") basically have two possibilities. First, they can build an alternative local access network: this option is not economically viable as it requires significant time and huge investments. Second, they can contract wholesale broadband access from TP. Two types of wholesale broadband access products namely: BSA –broadband wholesale access and LLU – local loop unbundling, are exclusively provided by TP. Alternative operators ("AOs"), in order to be able to compete on the retail market, are dependent upon TP who is an unavoidable trading partner.
- (3) The Commission has defined three relevant product markets (i) the retail market, which is the downstream market of broadband access services offered at a fixed location by telecommunications operators to their own end-users, (ii) the market for wholesale broadband access and (iii) the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. TP is dominant on all these markets.
- (4) Since 2003, when TP was recognized as a significant market power operator, TP has had an obligation to grant access to its local access network at LLU and BSA levels. Conditions and procedure for granting such access were laid down in the BSA and LLU Reference Offers ("RO").
- (5) The Commission has found that between 3 August 2005 and 22 October 2009 TP was abusing its dominant position by refusing to supply its wholesale broadband products. The Commission found that TP consciously planned and engaged in practices aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products. TP's abusive pattern of conduct consisted in: (i) proposing unreasonable conditions at the beginning of access negotiations with AOs, (ii) delaying the negotiations with AOs, (iii) limiting access to its network, (iv) limiting access to subscriber lines and (v) refusing to provide reliable and complete General Information.
- (6) TP's refusal to supply constitutes a violation of Art. 102 TFEU. It lasted 4 years and 2 months.

II. PROCEDURE

- (7) Between 23 and 26 September 2008, the Commission, assisted by the Polish Office for Competition and Consumer Protection ("UOKiK"), carried out on-the-spot inspection under Article 20(4) of Regulation (EC) No 1/2003 ("Regulation 1/2003") at the premises of Telekomunikacja Polska S.A. ("TP") in Warsaw, Poland.
- (8) On 3 December 2008 TP lodged with the Court of First Instance an application seeking the annulment of the Commission decision of 4 September 2008 ordering TP and all undertakings directly or indirectly controlled by it, to submit to the

inspection referred to in recital (7) above (T-533/08). TP withdrew its application on 18 February 2010.

- (9) On 17 April 2009 the Commission decided to initiate proceedings in the present case within the meaning of Article 2(1) of Regulation (EC) No 773/2004 and Article 11(6) of Regulation 1/2003. During the investigation, DG Competition sent several requests for information pursuant to Article 18 of Regulation 1/2003 ("RFIs") to TP, to alternative operators ("AOs") which either purchased or were interested in purchasing TP's wholesale broadband Internet access products and to the Polish regulator competent for telecommunications (Office of Electronic Communications – UKE).
- (10) On 26 February 2010 the Commission adopted a Statement of Objections ("SO"). In the SO, the Commission took the preliminary view that TP held a dominant position in the relevant markets and had abused its dominant position by refusing to supply AOs with its wholesale broadband Internet access products, thereby inhibiting the development of competition on the retail broadband market in Poland.
- (11) TP submitted its reply to the SO ("SO Reply") on 2 June 2010.
- (12) On 15 April 2010 TP submitted a draft commitments proposal⁵ in accordance with Article 9 of the Regulation 1/2003. TP's commitments proposal repeats to a great extent and in a less precise manner the existing regulatory obligations and the Agreement with UKE signed in October 2009. Two State of Play meetings between TP and the Commission services were organised on 6 September and 9 December 2010. During those meetings TP was informed that commitments would not be an appropriate way of concluding the case.⁶
- (13) In accordance with Article 27(1) of Regulation 1/2003, TP requested to be heard on the matters to which the Commission had taken objection. An Oral Hearing took place on 10 September 2010.
- (14) The following companies and associations were granted the status of Interested Third Party by the Hearing Officer: Netia, PTC and KIGEiT (The Chamber of Electronics and Telecommunications). The Commission informed the Interested Third Parties and UKE of the nature and subject matter of the proceedings by sending them a non-confidential version of the SO. Netia, KIGEiT and UKE participated in the Oral Hearing.
- (15) On 28 January 2011, the Commission sent to TP a letter drawing TP's attention to a number of specific items of evidence relating to the Commission's existing objections, which the Commission indicated it might use in a potential final Decision ("letter of facts").
- (16) On 7 March 2011 TP submitted its written reply to the letter of 28 January 2011 ("reply to the letter of facts").
- (17) Access to file was granted to TP on 9 March 2010 following the SO. In addition, TP received access to all new documents in the case file on 28 January 2011, together with the letter of facts.

⁵ TP's Commitments of 15 April 2010 with Annexes; EN version – supplemented by , Memorandum of 26 April 2010 to TP's Commitments.

⁶ See recital 13 of Regulation 1/2003: *"commitment decisions are not appropriate in cases where the Commission intends to impose a fine"*.

III. THE PARTIES CONCERNED BY THE DECISION

1. The addressee of the Decision – Telekomunikacja Polska S.A.

- (18) The present Decision is addressed to Telekomunikacja Polska S.A. ("TP"), a telecommunications company belonging to Telekomunikacja Polska Group.⁷ TP was established in 1991 from a State monopolist called "*Polish Post, Telegraph and Telephone*." The privatization of TP began in 1998, when it was listed on the Warsaw Stock Exchange. At the same time TP's global depository receipts were listed on the London Stock Exchange. In 2000 France Télécom became a strategic investor in TP. At present, France Télécom holds 49,79% of TP's shares, Capital Group International, Inc 5,06%, and the remaining 45,15% are held by other shareholders.⁸ The revenue of the TP Group in 2010 amounted to PLN 15,7 billion (EUR 3,93 billion) and the net income reached PLN 108 million (EUR 27,03 million).⁹
- (19) TP operates on the whole territory of Poland where it remains the market leader in electronic communications. The range of services it offers includes voice telephony, data transmission, radiocommunication, multimedia and related services provided on fixed line and mobile, land and satellite networks.
- (20) As a company with significant market power ("SMP") under the regulatory framework for electronic communications on a number of markets, TP is obliged to provide certain services on regulated conditions, including the offer of wholesale broadband Internet access services to other electronic communication operators, on the basis of which these operators may construct their own retail broadband offers (see chapter V).
- (21) In the present Decision, the Commission refers in several instances to TP's relations with its 100% owned subsidiary PTK Centertel Sp. z o.o. ("PTK"). PTK, originally a mobile operator, provides since October 2007 also fixed retail broadband services on the basis of TP's wholesale broadband access product.¹⁰ Its share of the broadband Internet access market in terms of revenues was 1,9 % in 2009. As part of the same capital group TP and PTK cooperate closely, also in relation to the provision of broadband Internet access services. Their joint activities in that area include technical assistance provided by TP to PTK, consulting services, marketing services, sales logistics, planning of PTK's network development, management and maintenance, IT development, purchase policy, corporate communications and space rental.¹¹

2. Alternative Operators

- (22) There are numerous Internet Service Providers ("ISPs") offering retail broadband Internet services in Poland on the basis of their own DSL network, wholesale access products purchased from TP, or other technologies such as cable and

⁷ Information from TP's website, page 1, http://www.tpagepl/prt/pl/o_nas/o_firmie/grupa_tp/ downloaded and printed on 5 August 2009.

⁸ TP Group annual report 2010, page 25, http://www.tp-ir.pl/~media/Files/T/Telekom-Polska/pdf/financial-reports/2010/tp_ar2010_en_2.pdf.

⁹ Idem, page 38, values in EUR on the basis of ECB reference exchange rate for Polish zloty, available at: http://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=120.EXR.A.PLN.EUR.SP00.A

¹⁰ TP signed the broadband wholesale access contract with PTK on 16 July 2007; TP's reply to the RFI of 22 December 2008, page 17.

¹¹ TP's reply to RFI on 4 February 2009, page 1.

others. In this Decision the operators that provide retail broadband Internet access services on the basis of TP's wholesale broadband access products (BSA or LLU access)¹² are referred to as alternative operators ("AOs"). Amongst them, the biggest are Netia S.A. ("Netia") and Telefonía Dialog S.A. ("TD" or "Dialog").

- (23) Netia, the second largest provider (after TP) of broadband Internet access services based on DSL, started providing retail services on the basis of TP's BSA product in November 2006 and services based on LLU in December 2007. On 27 February 2009 Netia acquired Tele2 Polska Sp. z o.o. ("Tele2"), another AO providing broadband Internet access services based on DSL. Netia's market share was 4,8 % in 2009, including Tele2's market share.
- (24) Dialog, the third largest provider of broadband Internet access services based on DSL, started providing retail DSL services on the basis of TP's BSA wholesale product in July 2007. Its market share was 3 % in 2009.
- (25) There are also many other AOs mentioned in the present Decision. These are: GTS Energis Sp. z o.o. („GTS Energis”), EXATEL S.A. („EXATEL”), TK Telekom Sp. z o.o., earlier as Telekomunikacja Kolejowa Sp. z o.o. („TK”), Długie Rozmowy S.A. („Długie Rozmowy”), Polkomtel S.A. („Polkomtel”), Mediatel S.A. („Mediatel”), Polska Telefonía Cyfrowa Sp. z o.o. („PTC”), Sferia S.A. („Sferia”), MNI S.A. („MNI”), Intertele S.A. („Intertele”), Lupro Krzysztof Lutczyń („Lupro”), Firma H.U. Kompex („Kompex”), Telekomunikacja Novum Sp. z o.o. („Novum”), Supermedia Sp. z o.o. („Supermedia”), ATM S.A. ("ATM S.A."), P.H.U. TELSAT Grzegorz Kawka ("TELSAT"), GH NET Jacek Gzyl, Piotr Hnacik sp. j. ("GH NET"), WDM Computers („WDM”), eTOP Sp. z o.o. („eTOP”), e-Telko Sp. z o.o. („e- Telko”), Naukowa i Akademicka Sieć Komputerowa ("NASK"), ESPOL Sp. z o.o. ("ESPOL"), Multimedia Polska S.A. ("Multimedia Polska"), Syriusz Sp. z o.o. ("Syriusz"), SSH Sp. z o.o. ("SSH"), Premium-Internet S.A. ("Premium-Internet"), Media-Com Sp. z o.o. ("Media-Com"), Mikrotel Sp. z o.o., ("Mikrotel") and Petrotel Sp. z o.o. ("Petrotel"). Some of these operators, although having signed wholesale contracts with TP, did not start providing broadband Internet services based on TP's wholesale products or stopped providing them.
- (26) Retail Internet services in Poland are provided also by various cable operators. The largest ones are: UPC Polska Sp. z o.o., Multimedia S.A., Vectra S.A. and Aster Sp. z o.o. The market share of the largest cable operator, UPC Polska Sp. z o.o., was 8,3 % in 2009.
- (27) The underdevelopment of the Polish broadband markets resulted in the emergence of many micro internet providers offering broadband services on the basis of Ethernet technology, mainly in small towns and housing complexes. Their number is estimated by UKE at about 1430, the majority of which offer their services to less than 200 subscribers.¹³ The expansion of such micro AOs is unlikely due to their limited resources.

IV. THE PRODUCTS CONCERNED BY THE DECISION

- (28) The products concerned by the present Decision are wholesale and retail fixed broadband Internet access products (including fixed wireless). They will be outlined in sections 1 and 2 below.

¹² BSA stands for Bitstream Access, LLU stands for Local Loop Unbundling.

¹³ UKE's reply to the RFI of 17 November 2009, page 3.

- (29) Broadband Internet access, as opposed to narrowband access, has a number of distinctive features:
- (i) upload and download speeds which are significantly higher than those offered by dial-up Internet access,
 - (ii) possibility of an always-on connection,
 - (iii) ability to use the same access line for telephone calls or other communications while still linked up to the Internet.
- (30) All these characteristics have to be present simultaneously for an Internet access service to be defined as broadband. They are not available in practice using dial-up internet access services *via* telephone lines ("PSTN" or "ISDN"), which only allow to narrowband services.
- (31) Users increasingly demand higher speed - "broadband" access. In this context, "bandwidth" is used to describe the capacity of a communications connection. The greater the capacity of the connection (*i.e.* the "broader" the band), the greater the amount of information that can be passed over it, meaning that more data can be delivered in a given period of time (thus a higher "speed" connection). This enables the user to accelerate their access to the content, to use services such as VoIP (Voice over Internet Protocol) telephony or multiplayer games, and to access larger files, such as digital video and music, or even receive TV channels.
- (32) Fixed broadband Internet access (including fixed wireless access) is different from mobile Internet access. In view of the features of the latter, described in section X.1.1, mobile Internet access does not belong to the relevant market and therefore is not described in this chapter.

1. Retail fixed broadband Internet access in Poland

- (33) The retail fixed broadband Internet access offers available in the Polish mass market, which will be described in the following recitals, can be differentiated according to:
- (a) connection speed,
 - (b) technology.

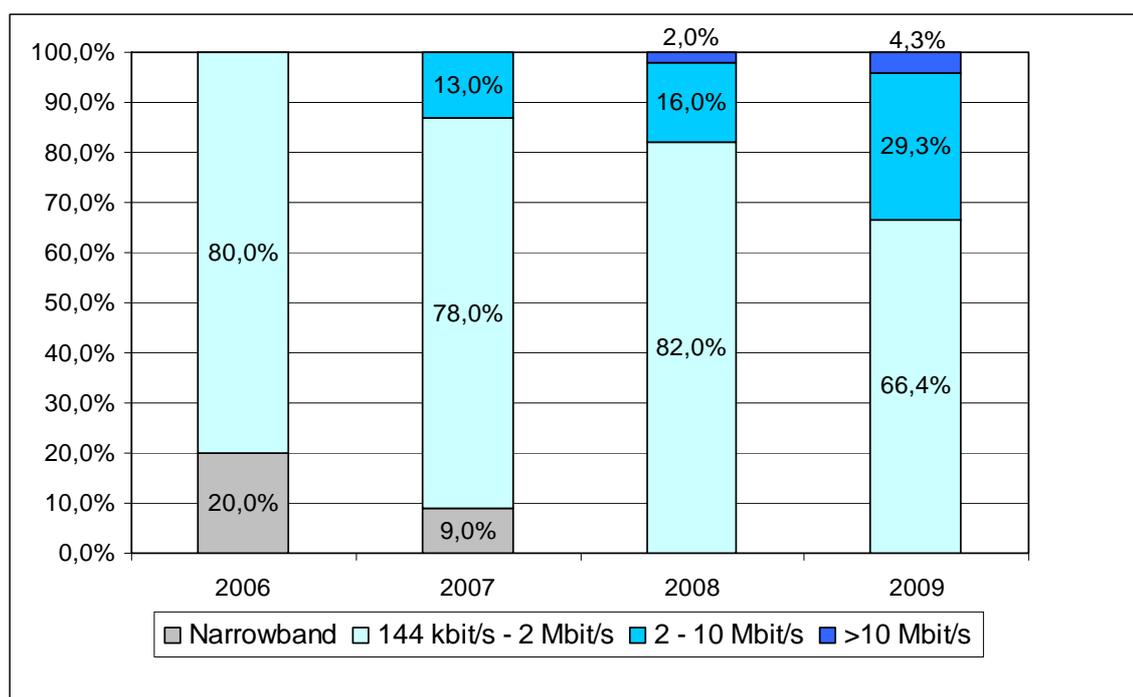
(a) Connection speed

- (34) Most operators in Poland offer broadband access with connection speeds of 512 kbit/s, 1 Mbit/s, 2 Mbit/s, 6 Mbit/s, 8 Mbit/s, 10 Mbit/s and even up to 20 Mbit/s.¹⁴
- (35) As shown in Figure 1, broadband subscriptions offering connection speeds of up to 2 Mbit/s remain the most popular and constituted over 66% of all subscriber lines in Poland in 2009. The share of faster connections between 2 Mbit/s and 10 Mbit/s grew in 2009 and reached nearly 30% at the end of the year. This positive trend was also noticeable in connections up to 10 Mbit/s where the number of

¹⁴ UKE, Analysis of prices for broadband Internet access services provided by operators in their own network and based on BSA/LLU access contracts, April 2009, page 3 and UKE, Report on telecommunication market in 2009, June 2010, page 16.

users doubled to reach 4.3%. Simultaneously, narrowband practically disappeared from the Polish market.

Figure 1. Connection speed of subscriber lines in Poland

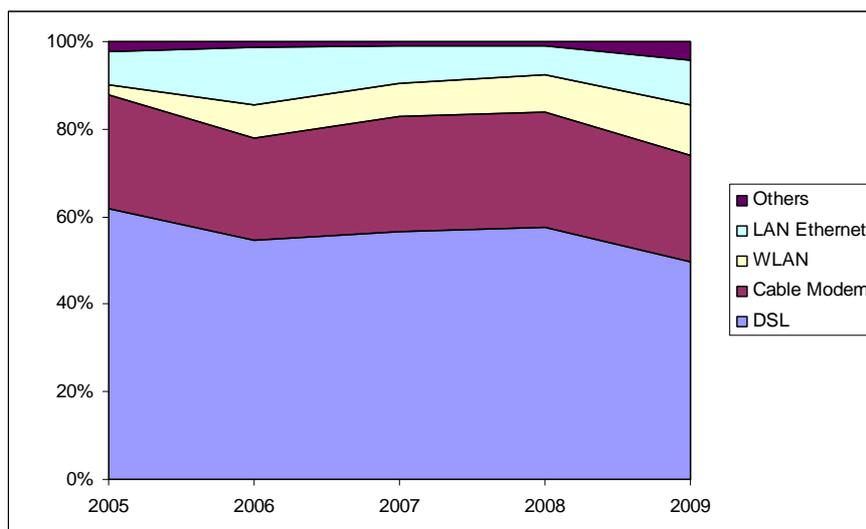


Source: UKE, market study of July 2009 p.16 and UKE, Report on the telecommunications market in 2009, June 2010, p. 5.

(b) Technology

- (36) Fixed broadband Internet access in Poland is provided over various technological platforms:
- (a) DSL
 - (b) Cable modem
 - (c) LAN Ethernet / Fixed WLAN
 - (d) Other technologies.
- (37) All these technologies have their distinctive features which will be outlined in the following recitals. The evolution of their share in the Polish broadband market is outlined in Figure 2. DSL technology remains the most important in the provision of fixed broadband Internet access. It had had a significant share of between 50% to over 60% in the period between 2005 and 2009.

Figure 2. Technologies in the provision of fixed broadband Internet access in Poland



Source: UKE documents:UKE, Report on telecommunication market in 2008, p. 44 and UKE notification decision of market 4, 2010, p. 14.

(a) DSL

- (38) DSL (Digital Subscriber Line) is a technology which makes it possible to use the existing local loop of the public switched telephone network (PSTN) for simultaneous high-capacity transmission of digital data, voice and video. It achieves this by dividing the voice and data signals on the copper telephone line into distinct frequency bands. This technology requires the installation of DSL access modules (DSLAMs) in the local telephone exchanges or at nodes in the access network.
- (39) There are a number of DSL-based technologies, often collectively referred to as xDSL, e.g. Asymmetric Digital Subscriber Line ("ADSL"), Symmetric DSL ("SDSL"), High bit rate DSL ("HDSL"), or Very high bit rate DSL ("VDSL"). "Asymmetric" indicates that the transmission capacity is different to and from the user. Because most households consume more data than they generate, the network is designed so that the in-coming and out-going capacities of the copper wire are "asymmetric", allowing greater capacity for incoming data, i.e. the capacity to the user (download capacity) than for out-going data from the user (upload capacity).
- (40) DSL is the predominant technology for the provision of fixed broadband internet in the market in Poland with a stable share fluctuating from 62% to over 50% in the period covering from 2005 to mid 2010¹⁵. In addition to TP, other operators use TP's DSL network based on which they provide broadband services, 13 AOs provide services based on BSA contracts with TP since September 2007¹⁶ and 7

¹⁵ Annex to TP's reply to the letter of facts, UKE draft notification decision, February 2011, page 24.

¹⁶ PTC, PTK Centertel, Sferia, MNI, Intertele, Mediatel, Netia, eTop, eTelko, GTS Energis, TK Telekom, Telefonía Dialog (TP's reply to the RFI on 4 February 2009 and TP's reply to RFI on 17 December 2010, reply to Q.11).

AOs provide DSL services based on LLU contracts with TP since September 2006.¹⁷ DSL technology covers 64% of the Polish population.¹⁸

b) Cable modem

- (41) Digital cable TV networks are able to offer bi-directional data transfer bandwidth in addition to voice and digital TV services. Cable television operators provide broadband Internet access taking advantage of the high bandwidth of their network. As is the case with the local loop for fixed telephony, conventional coaxial cable networks used for the transmission of TV signals may be upgraded to allow the provision of high speed Internet access by installing a cable modem in the customer premise and a Cable Modem Termination System (CMTS) at the network's central exchange. In terms of theoretical peak performance, cable technology supports 120 Mbps for download capacity and 10 Mbps for upload capacity. However, the actual bandwidth depends on how many users share the connection to the central exchange. This type of broadband access will hereafter be referred to as cable modem.
- (42) Cable modem is the second most popular technology for fixed broadband Internet access in Poland. In 2009 cable operators accounted for 1.58 mln subscribers, which is about 24% of the market for fixed broadband Internet access.¹⁹ Geographically, the cable network in Poland covered only 8,000 km² (or approximately 3% of the territory) and was limited to larger cities.²⁰ The main cable TV operators reached 5.17 mln households in 2009; however, not all households had the possibility of accessing broadband internet through cable modems due to the network limitations.²¹ Cable networks remain fragmented and do not cover rural areas.

c) Ethernet LAN and Fixed Wireless LAN

- (43) Ethernet is a network standard for Local Area Networks ("LANs"). An Ethernet LAN typically uses coaxial cable or special grades of twisted pair wires. The most commonly installed Ethernet systems provide transmission speeds up to 10 Mbps; however, new Ethernet standards allow to provide transmission speeds up to 10 Gbps. LAN networks are usually deployed by local Internet Service Providers in areas without DSL or cable coverage. LANs are very fragmented covering single buildings or streets with a relatively small number of subscribers.
- (44) Fixed Wireless LANs ("WLAN") extend the reach of LANs by providing wireless connectivity. WLAN technologies are based on the 802.11 group of standards specified by the international Institute of Electrical and Electronics Engineers (IEEE) and are commonly referred to as Wireless Fidelity or WiFi. Designed originally for cable replacement in corporate environments, WLANs have become popular in providing IP connectivity in residential, office and campus environments. Fixed WLAN technologies allow broadband access with

¹⁷ Komplex, Lupro, WDM, Multimedia, SSH, Syriusz, Netia; TP's reply to the RFI on 20 January 2009 to q. 3.1, page 66 and TP's reply to RFI on 17 December 2010, reply to Q.12).

¹⁸ European Commission, 14th Implementation Report, page 265.

¹⁹ Report on telecommunication market in 2009 roku, June 2010, page 12-13.

²⁰ data for 2008, UKE, Market study, July 2009, page 23 ("UKE market study of July 2009").

²¹ 3,5 million household (26% of the total households) had this possibility in 2008. UKE, Market study of July 2009, page 23. In 2008 there were 13 337 040 households. Source: UKE, detaliczny rynek dostępu do Internetu szerokopasmowego, April 2009, page 17.

connection speeds that may come close to the wired broadband speeds provided by DSL and cable. WiFi transmitters achieve ranges of up to 70 meters indoors and up to 250 meters outdoors.²² Premises such as airports, hotels or restaurants with local WiFi connectivity are referred to as "hotspots". Similarly to LANs, WLANs are highly localized.²³

- (45) Wireline and fixed wireless local access networks (LANs) based on the Ethernet protocol have been deployed throughout Poland mainly by local providers offering highly localized access predominantly in smaller towns or where other types of infrastructure are not available. Their subscriber base is usually of around 10 – 200²⁴ households and in 2008 they accounted for 15% of fixed broadband subscriber lines in Poland.²⁵

d) Other technologies

- (46) Alongside xDSL, cable and LAN/WLAN, there are some other technologies currently being used in Poland to provide retail broadband services. These technologies include for example fiber lines ("FTTx"), CDMA, WiMAX, FWA and satellite. However, in Poland these technologies are still at an early stage of development and represented at the end of 2009 4.3% of all broadband access lines in Poland.²⁶ Internet access can also be provided through mobile networks based on 3G technologies. For the reasons specified in the market definition section mobile technologies are not covered by the present Decision.
- (47) In addition to the technologies introduced above, so-called "multiple-play" offers have been introduced by cable and DSL operators since 2005. These often include "double play" offers, which bundle voice telephony and Internet, "triple play" offers, which also include television over broadband and "quadruple-play", which adds mobile telephony to the latter. "Multiple-play" offers have from the beginning been at the core of the attempts of cable operators to enter and expand in the broadband internet access market. They have become increasingly popular among operators offering DSL services as such offers increase the average revenue per user (ARPU) and reduce churn. The customer also benefits from reduced prices and a single point of contact for service and technical issues.²⁷

2. Wholesale broadband Internet access products in Poland

- (48) In order to provide broadband Internet access to the end-users, AOs have two possibilities: (i) to develop an alternative network including the "last mile" (i.e. the last element of access network connected to premises of an end-user): this option would require significant time and enormous investments, making it economically unviable (see section X.1.2); or (ii) to purchase from the incumbent

²² See 802.11n standard from 2009.

²³ Information from IEEE's website, page 1, <http://www.ieee.org/portal/site/emergingtech/index.jsp?techId=48> downloaded and printed on 11 November 2009.

²⁴ UKE, Market study of July 2009, page 22.

²⁵ UKE, Raport o stanie rynku telekomunikacyjnego w 2008 roku, June 2009, page 44. Mobile broadband was excluded from the calculation.

²⁶ UKE, Consultation Document on Market 4, 2010, page 14.

²⁷ UKE, Report on telecommunication market in 2008, June 2009, page 39.

operator a wholesale broadband Internet access product on the basis of which they may offer a retail broadband service.

- (49) There are two wholesale broadband Internet access products available in Poland:
- (a) wholesale broadband access ("BSA")
 - (b) local loop unbundling ("LLU").
- (50) The BSA access product is a wholesale product providing transmission capacity on the basis of the incumbent operator's network to AOs. It enables AOs to purchase wholesale broadband services and resell them with some technical modifications to end-users and do not require AOs' investment in costly equipment.²⁸ BSA wholesale services consist in the transmission of data between the Service Access Node ("SAN")²⁹ accessible to an AO and an end-user connected to a telephone line.
- (51) A difference is often made between different types of BSA: (i) a BSA offer at DSLAM level³⁰ (number 1 in Figure 3); (ii) a BSA offer at ATM level³¹ (number 2 in Figure 3); and (iii) a BSA offer at IP level (managed or unmanaged) (numbers 3 and 4 of Figure 3).³²
- (52) Since 10 May 2006, when the first reference offer for BSA ("RBO") was introduced, AOs had access to the BSA wholesale product at ATM level only. Then, on 6 May 2008 UKE modified the RBO, mandating access also at DSLAM and IP levels (managed and unmanaged IP).³³ TP implemented additional levels of access on 23 November 2009 (for DSLAM and IP Managed) and on 1 March 2010 for IP Unmanaged.³⁴ In view of the late implementation of DSLAM and IP levels the present Decision focuses on the provision of BSA at the ATM level.

Figure 3. TP's wholesale Internet broadband access products

²⁸ ERG Common Position on Bitstream Access, Adopted on 2nd April 2004 and amended on 25th May 2005, page 4.

²⁹ A Service Access Node is a place where an AO obtains access to TP's network for providing services.

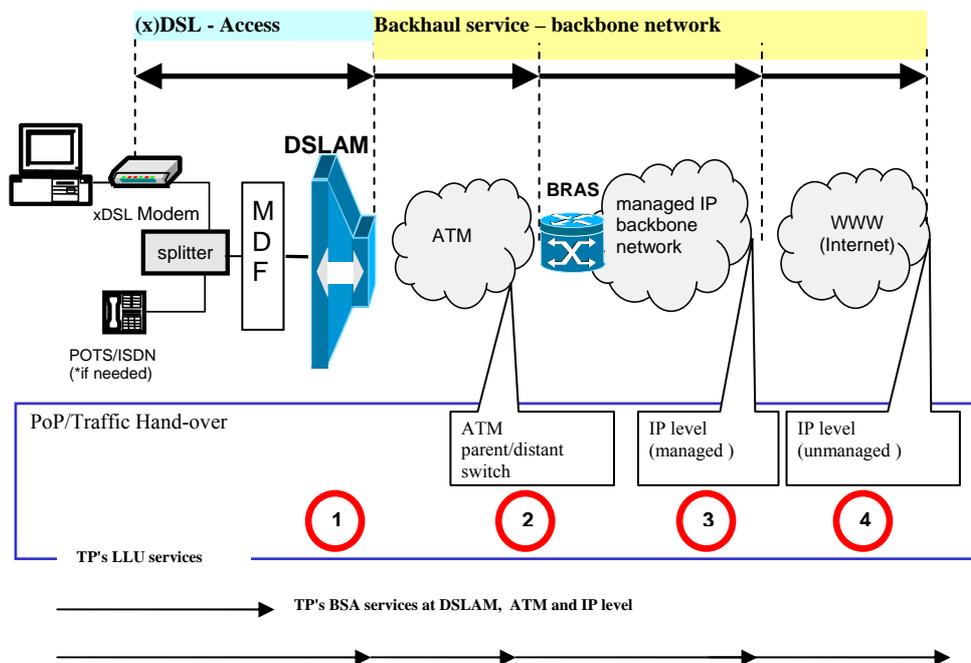
³⁰ DSLAM level – access is provided at DSL access modules (Digital Subscriber Line Access Multiplexer - DSLAM). TP provides xDSL access line and hands over bitstream transmission directly at DSLAM level, so an AO provides the backhaul service itself.

³¹ ATM level – access is provided at Asynchronous Transfer Mode nodes where an AO accesses TP's xDSL network (via STM-1 or STM-4 interfaces).

³² Access at DSLAM level means that TP provides the xDSL access line and hands over bitstream transmission directly at DSLAM level, so an AO provides the backhaul service itself. The AO has therefore more control over quality parameters and can offer customers a final product with slightly better technical characteristics, but that access requires larger investment compared to other types of access. On the other hand, access at IP level refers to a situation when TP provides an AO xDSL access line and backhaul service and hands over bitstream transmission at IP level (in the public Internet network based on IP protocol). Access at managed IP level allows access to TP's network also to those AOs that did not invest in the ATM network and enables them to start cooperating with TP already after the deployment of one SAN which could allow them to provide the service in all territory of the country. Access at unmanaged IP level does not require deployment of any SANs by an AO, so that an AO who does not have its network could enter the market and use TP's network as a service provider.

³³ See footnote 32.

³⁴ TP's reply to RFI on 25 November 2010, page 1; It is noted that TP offered AOs to introduce those level of access on different dates (the end of November 2009 for DSLAM and IP Managed and the end of March for IP Unmanaged and ATM in VBR and CBR traffic class), page 11.



Source: UKE market study of July 2009.

- (53) The local loop unbundling covers access to the local loop or the sublocal loop. Access to the local loop contains a part of the access network between the MDF³⁵ of the operator who owns the relevant infrastructure and the end user's premises. Access to a local subscriber sub-loop contains a part of the access network between a concentrator (or another indirect network access device which is placed closer to the end-user than the MDF) and the end user's premises.³⁶ LLU wholesale access services allow AOs to access higher bandwidth services. That grants AOs the broad control of the service range on the subscriber line, with the ability to adjust the service to specific end-users' needs.
- (54) As the only undertaking having a local access network in the entire Polish territory, TP is the only provider of fully unbundled and shared access to the local loop in Poland. Since 1 October 2003, TP has been obliged to grant access to its local access network at LLU and BSA levels³⁷ in the Polish wholesale broadband market.
- (55) Accessing each of these wholesale broadband access products requires from an AO different levels of network deployment (and related investment) and also allows different levels of differentiation of retail offers.
- (56) TP made LLU services available to AOs in October 2007 when the first local loop was unbundled. BSA access at ATM level was implemented in October 2006, at DSLAM and IP managed level in November 2009 and at IP unmanaged level and ATM level in VBR and CBR traffic class in March 2010.
- (57) The wholesale broadband offers available in Poland are outlined in sections 2.1 and 2.2.

³⁵ The main distribution frame (MDF) is a closet or area which contains equipment which multiplexes users' transmission mediums over a high-capacity medium. A main distribution frame multiplexes many DSL lines over a larger cable.

³⁶ Under definitions identified by the RUOs.

³⁷ See chapter V.

2.1 Wholesale broadband access ("BSA")

- (58) BSA has been available in Poland since 10 May 2006, when the first RBO at ATM level was introduced. The access to TP's local access network was available through the Service Access Nodes for data transfer using the ADSL technology. TP was obliged to give access to its nodes at ATM level and to provide functionalities of the relevant elements of its network.³⁸ In addition, TP was obliged to provide additional services needed for the activation and maintenance of lines. On 4 May 2008, the provision of BSA services using VDSL (transmission speed from 12 to 55 Mbit/s) and SDSL (transmission speed 1.536 Mbit/s or 2 Mbit/s) was added.
- (59) Access at ATM level means that TP provides the xDSL subscriber line and backhaul services and hands over its bitstream transmission to an AO at the ATM node.³⁹ Contrary to what happens in case of LLU, an AO purchasing BSA products has more limitations to adjust the characteristics of its service that are related to the choice of technology standards or equipment used to provide connectivity over the local loop. Some functionalities, like the maximum upload and download speeds are already pre-established. However, thanks to its control over the broadband remote access server ("BRAS") and elements of its own network, the operator using BSA can make certain choices⁴⁰ about the bandwidth and the reliability of its backhaul service⁴¹ and offer end-user products with different technical characteristics by altering quality of service parameters.
- (60) TP hands-over the traffic to the AOs at the regional and local SANs. In order to have national coverage, an undertaking should be connected at either 12 regional SANs or 72 local SANs. AOs would preferably access TP's network at every regional SAN, which is easier and requires less investment. When the regional SAN's capacity reaches the limit identified in the RBO, the AO has to migrate to the specific local SANs which correspond to the area covered by a specific regional SAN. Although AOs have the possibility to access SANs covering the entire territory of Poland, certain AOs decide to request access only to specific SANs. They choose to limit their operations to selected areas, which are presumably more profitable.
- (61) There are three basic forms to connect the networks of AOs to TP's network: (i) directly through a fibre (a line connection) or (ii) through a leased line (a dedicated connection) when an AO does not deploy its own fiber and leases a line from TP or (iii) through collocation⁴², which allows to connect to TP's network the AOs' equipment already located for the purpose of other regulated services in TP's building.⁴³

³⁸ Such as: (i) subscriber lines together with cards in a DSLAM, (ii) data transmission network (ATM network, DSLAM switches for transmission data between subscriber lines and SANs), (iii) ATM nodes for activating SANs.

³⁹ See footnote 32.

⁴⁰ By running the BRAS the undertaking can subdivide the virtual path into further virtual paths and thereby define the minimum throughput in hours of high traffic demand.

⁴¹ Backhaul services allow network operators to aggregate data (such as Internet traffic) to a centralised location in a town or region, and then connect that location to even bigger sites.

⁴² Connection through collocation means that an AO provides the telecommunication infrastructure between its network and a SAN in TP's network. AO's transmitters are located in TP's premises, either on collocated space or in collocation room.

⁴³ TP's building or another location close to TP's building, which is defined by the RBO as "remote location".

- (62) By the end of 2010, 24 AOs had BSA access contracts with TP (either signed or imposed by UKE). 13 AOs are providing retail services based on TP's infrastructure.⁴⁴ The first AO's orders for subscriber lines were activated in October 2006; by the end of 2009, 440 000 broadband lines were provided via BSA, which amount to 15.5%⁴⁵ of the total number of TP's xDSL lines.

2.2 Access to the local loop ("LLU")

- (63) LLU has been available in Poland since February 2005, when the first reference offer for LLU ("RUO") was introduced.⁴⁶ The local loop is the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the MDF or equivalent facility in the fixed public telephone network. In accordance with the regulatory framework for electronic communications⁴⁷ TP is obliged by regulation to give AOs access to the local loop or to the sub-local loop. Access to the local loop means full or shared access to a subscriber line between the subscriber's premises and an access point to the PSTN network at TP's MDF. Access to the sub-local loop means full or shared access to a subscriber line between the subscriber's premises and an indirect access point, namely at a node of the access network placed closer to a subscriber than the MDF, which could be in a street cabinet or in a cable box or cable post connecting with the PSTN network.
- (64) Fully unbundled access to the local loop means the provision to the AO of access such that the latter can use the full frequency spectrum of the twisted copper pair and offer both voice and data services such as Internet access. With fully unbundled access the end user no longer receives any service from the incumbent: the AO can provide the end user with both voice and data services.
- (65) Shared access to the local loop means the provision to the AO only of the use of the non-voice band frequency spectrum of the twisted copper pair. Thus, an AO contracting shared access is able to provide the end user with broadband services, while another operator (another AO or the incumbent) continues to provide the end user with voice telephony services.⁴⁸ LLU services enable AOs to lease partly or wholly the above described part of a subscriber line and to provide voice and/or data transmission services directly to the end-user.
- (66) Fully unbundled access to local loop is implemented based on analogue, digital ISDN and digital xDSL access, while shared unbundled access to local loop is implemented based only on digital xDSL access. There is also a possibility to unbundle subscriber lines using more advanced technology: SDSL and HDSL⁴⁹;

⁴⁴ PTC, PTK Centertel, Sferia, MNI, Intertele, Mediatel, Netia, eTop, eTelko, GTS Energis, TK Telekom, Telefonica Dialog (TP's reply to RFI on 4 February 2009 and TP's reply to RFI on 17 December 2010, reply to Q.11).

⁴⁵ UKE, Report on telecommunication market in 2009, June 2010, page 12.

⁴⁶ Decision No DRT-WWM-6062-9/04 (54) of 28 February 2005, see the subsequent decisions listed in section VI.2.

⁴⁷ See chapter V for details on the EU regulatory framework.

⁴⁸ As regards shared access, the first and the second RUO of 28 February and 9 August 2005 identified the scenario in which only TP would provide the end user with voice telephony services, but the subsequent RUO (on the basis of which LLU services in fact were provided by TP) included also a possibility for another undertaking to provide voice telephony services.

⁴⁹ SDSL - *Symmetric Digital Subscriber Line*, a technology which uses a full band of frequency of the line so it excludes the possibility to provide voice services on that line at the same time; allows to

however in this case TP has the right to deactivate the services in case the activation of the service using those advanced technologies worsens significantly the quality of service provided by TP or by other AOs.

- (67) As the only undertaking having a local access network in the whole territory of Poland, TP is the sole provider of fully unbundled and shared access to the local loop. Although LLU has been available in Poland since February 2005, the first local loop was actually unbundled in mid-November 2007. LLU development was stagnant until 2 Q 2009, and since then the number of unbundled lines has been increasing steadily reaching in 2 Q 2010 75 803 lines; this represents still a low number of 2.89% of the xDSL lines in Poland in 2009.⁵⁰ By the end of 2010, 31 AOs had LLU access contracts with TP (either signed or imposed by UKE). 7 AOs are providing retail services based on TP's infrastructure.⁵¹ These above factors support the Commission decision on opening the proceedings (see recital (9) above).

V. THE REGULATORY FRAMEWORK

- (68) EC Regulation 2887/2000⁵² on local loop unbundling, which was directly applicable to EU Member States since 2 January 2001, required operators holding "significant market power" ("SMP") on the fixed public telephone network to give access to local loop unbundling ("LLU") and to publish a Reference Offer ("RO"). In addition, the previous EU regulatory regime was applicable in all Member States, consisting of several Directives which set out rules for access to network owned by the SMP operator.⁵³
- (69) Although Poland did not enter the EU until 1 May 2004, it started to adapt its legislation in accordance with the *acquis communautaire* since 1 February 1994.⁵⁴ As a consequence, the Polish Telecommunications Law of 21 July 2000 was introduced⁵⁵ and under its provisions TP was designated an SMP operator for the provision of universal service. Then, on 1 October 2003 new amendments to the Law were introduced⁵⁶, whereby TP was also identified as an SMP operator providing services of and access to the fixed public telephone network and was required to grant access to its local access network at LLU and BSA level.⁵⁷ In

use the max. capacity of 2.312 kbit/s on one pair of cable; HDSL – *High Data Rate DSL*, allows to connect the network with the capacity of 2 Mbit/s for upload and download.

⁵⁰ UKE, Analysis on the development of LLU, October 2010, page 4-5.

⁵¹ Data as of 8 January 2009 based on TP's reply to RFI on 20 January 2009 to q. 3.1, page 66 and UKE, Raport o stanie rynku telekomunikacyjnego w 2008, page 71-72.

⁵² Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ [2000] L 336/4.

⁵³ Inter alia, Directive 97/33/EC on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ[1997] L199/32) and Directive 98/10/EC on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment (OJ [1998] L 101/24).

⁵⁴ The date of entering into force of the Europe Agreement (OJ [1993] L 348/2), which constituted the legal framework of relation between Poland and EU Member States.

⁵⁵ The Telecommunication Act of 21 July 2000 (OJ No 73, item 852).

⁵⁶ The Act of 22 May 2003 on amending the Telecommunications Act (OJ No 113, item 1070) entered into force on 1 October 2003.

⁵⁷ See Art. 1 point 58 and Art. 6 of the Act of 22 May 2003 on amending the Telecommunications Act (OJ No 113, item 1070). See OJ L 108, 24.04.2002, p.33 and OJ L 337, 18.12.2009, p.37 respectively.

particular, TP was obliged to provide access to the local loop (together with collocation and access to cable lines and to relevant IT systems) under clear, fair and non-discriminatory conditions and to provide broadband data transmission services on conditions not worse than those TP applied to its own company or to its subsidiaries.

- (70) Further to the changes in the Telecommunications Law, a National Regulatory Authority ("NRA") was established in 2000. In accordance with Art. 3 of the Framework Directive⁵⁸ *Urząd Komunikacji Elektronicznej* ("UKE") is the NRA that operates in Poland.
- (71) When Poland entered the EU on 1 May 2004, a new Telecommunications Law ("TL")⁵⁹ implementing the 2002 regulatory framework⁶⁰ was adopted. The new TL provided that UKE had to analyse electronic communication markets in accordance with Article 7 of the Directive 2002/21/EC ("The Framework Directive")⁶¹ on a regular basis. As a result of these market analyses, UKE would designate undertakings with SMP, and establish the *ex ante* regulatory obligations to be imposed on such undertakings to ensure more effective competition and better rights for consumers.
- (72) Under regulatory obligations stemming from Art. 42 of the Telecommunication Law, TP is obliged to submit a draft RO to UKE. UKE then launches administrative proceedings in which it invites TP and other interested third parties to comment on the draft RO. After taking into consideration all arguments and opinions of TP and interested parties (including the associations of operators) UKE issues a decision introducing a RO. Subsequently, TP can request UKE to

⁵⁸ See OJ L 108, 24.04.2002, p.33 and OJ L 337, 18.12.2009, p.37. See footnote 60. UKE was designated as a National Regulatory Authority (together with the Ministry of Infrastructure competent only for identifying relevant markets in the form of a Ordinance) on the basis of Art 3 of the Framework Directive and was granted competencies to analyse relevant markets, determine if a relevant market is effective competitive, and if not, to identify operators with SMP and specify the regulatory obligations which should be imposed on those operators under the Telecommunications Act of 16 July 2004. New amendments to the Telecommunications Act of 24 April 2009 assigned the competence to identify relevant markets exclusively to UKE.

⁵⁹ Polish Telecommunications Law of 16 July 2004 (OJ No 171, item 1800), later amended, *inter alia*, by Act of 24 April 2009 (OJ No 85, item 716) and Act of 29 October 2010 (OJ No 229, item 1499).

⁶⁰ The European regulatory framework for electronic communications networks and services consists of a series of Directives adopted in 2002. For instance, Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services ("Authorisation Directive"); Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("Access Directive"); Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive). Those Directives were amended by Directive 2009/140/EC and Directive 2009/136/EC on 25 November 2009 to take account new developments of the telecommunications sector. Amendments shall be adopted by EU's member states by 25 May 2011.

⁶¹ The regulatory framework for electronic communications networks and services consists of a series of Directives, which require national regulatory authorities (NRAs) to carry out periodic reviews of at least certain markets listed in specific Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive. These market analyses have to be carried out on a prospective basis applying EC competition Act principles, and based on them, NRAs are to designate undertakings with significant market power (SMP), if any, and establish the *ex ante* regulatory obligations to be placed on such undertakings. The NRA's draft measures have to be notified to the European Commission under Article 7 of the Framework Directive. The Commission can comment on the measures and exercise veto powers with regard to the market definitions and SMP designations of the NRAs if they are not compatible with EU law.

review that decision (which, in practice, TP did in all cases). If this happens, UKE reconsiders the case and may maintain or modify the RO.⁶² In consequence, the ROs introduced on the Polish market have been modified. The first RUO was introduced on 28 February 2005 and the first RBO was introduced on 10 May 2006. All versions and modifications of the ROs are listed in Table 1 and Table 3.

- (73) The ROs contain the rules securing reasonable and non-discriminatory AOs access to TP's wholesale products. They include *inter alia* rules on: negotiating and signing of access/collocation contracts, access to TP's network and provision of wholesale services by TP, access to subscriber lines, access to information, processing of AO's orders, handling of complaints and malfunctions, general rules on parties' liability, dispute resolution and termination of the contract and the level of fees for TP's wholesale services.
- (74) Such catalogue of minimum standards guaranteed for AOs constitutes a basis for the negotiations of access and collocation contracts and annexes between TP and AOs.⁶³ Having ROs as a departing point, AOs and TP can agree on conditions different than those set up in the RO, tailored to the needs of a concrete AO.
- (75) The NRA can intervene in case of an inability of TP and AOs to reach a conclusion in the negotiations or of problems with accessing to TP's network. The Telecommunications Law lists cases of such interventions namely when i) the negotiations between TP and an AO on concluding an access contract are not taken up, ii) TP has refused to give access to its network, iii) an access contract is not concluded within 90 days, iv) an access contract was not concluded within the specified deadline (less than 90 days) determined by UKE *ex officio* or upon written request of a party (Art. 27 point 2a and 2b). In this case UKE has the right to resolve specific disputed issues or define all the cooperation conditions necessary for accessing to TP's network.⁶⁴ In certain cases the NRA imposed such decisions (see Table 5).
- (76) Moreover, UKE can also amend the signed contracts *ex officio* when it is justified by the need to protect the interest of end-users, or to protect effective competition or the interoperability of services (Art. 29) as it did it on several occasions.⁶⁵ In those cases, UKE usually found evidence on discrepancies in the signed contracts through inspection proceedings, on the basis of information submitted by AOs or signed access contracts submitted by TP.⁶⁶
- (77) UKE finalised its analysis of the wholesale markets for broadband access and local loop unbundling on the basis of Art. 7 of the Framework Directive and imposed the relevant remedies by decisions adopted on 14 February 2007 and 26

⁶² TP submitted motions to review ROs and as a result, UKE issued for instance for LLU decisions of 3 April 2007 (modifying the RO of 5 October 2006) and decision of 29 May 2009 (modifying the RO of 28 November 2008) and for BSA decision of 4 October 2006 (modifying the RO of 10 May 2006) and decisions of 4 November 2008 and of 12 April 2010 (modifying the RO of 6 May 2008) .

⁶³ Art. 26 TL.

⁶⁴ Chapter "Telecommunications access" including Art. 26-45 of the Polish Telecommunications Law of 16 July 2004.

⁶⁵ e.g. UKE's decisions of 31 July 2007 as regards definitions in certain BSA access contracts, UKE's decision of 9 November 2007 on a subscriber activation fee for BSA, UKE's decision of 11 February 2008 on non-active lines for certain BSA access contracts, UKE's decisions on resignation from the services as regards BSA.

⁶⁶ TP is obliged to send certain access contracts to UKE within 14 days since they are concluded (Art. 33 TL).

June 2007⁶⁷. These decisions imposed the following obligations on TP: to meet reasonable requests to get access to specific elements of TP's network and its facilities (Art. 34)⁶⁸; non-discrimination obligation, namely to offer to AOs services under equal conditions in comparable circumstances and offering services and providing the necessary information under terms that are not worse than those applied to itself and to its subsidiaries (Art. 36); transparency obligation, in particular making information available on the provision of access: technical specifications of the network and equipment, network characteristics, rules and conditions of the service provision and network use (Art. 37); publication of a RO in a specified scope and time limit (Art 42); accounting separation and price control (Art. 38, 39 and 40). TP shall present a draft Reference Offer to UKE three months after the regulator's decisions were adopted.⁶⁹

- (78) In 2009, UKE launched a process aimed at introducing functional separation of TP. To avoid functional separation, TP on 22 October 2009 signed a voluntary agreement with UKE ("the Agreement") in which TP committed itself *inter alia* to respect the existing regulatory obligations, conclude contracts in line with conditions of the Reference Offers, apply the non-discrimination principle, introduce a forecasting system for AOs' orders, apply a model of cooperation between operators, provide applications enabling AOs access to general information, terminate court and administrative proceedings against regulatory decisions introducing the Reference Offers or amending/introducing bilateral access conditions between TP and AOs and modernise within the next 3 years its broadband network so as to enable the provision of at least 1,200,000 new broadband lines.⁷⁰
- (79) As regards LLU, the new regulatory decision was imposed on TP on 30 December 2010.⁷¹ The new market analysis demonstrated that there are still problems on that market, which hinder the existence of fair and effective competition and which could harm consumers and prevent AOs from using TP's network (e.g. the possibility to impede AOs' access to TP's network and the relevant wholesale services, the possibility for discriminative practice towards AOs comparing with TP's retail arm or its subsidiaries, the possibility to overestimate the fees for the service). TP was obliged in that decision to give access to local loop and sub-loops based on copper and fiber technologies and give access to network infrastructure (cable ducts, dark fibers and backhaul

⁶⁷ UKE decision of 14 February 2007, DRT-SMP-6043-23/05 (33) and of 26 June 2007, DRTD-SMP-6043-8/06 (31).

⁶⁸ The obligation refers to providing access to specific network elements (e.g. to BSA lines, local or sub-local loops, network nodes), namely interconnecting the networks, providing proper functions of the network and granting access to interfaces, protocols or other key technologies necessary for interoperability of services, providing telecommunication infrastructure, collocation and other forms of shared use of buildings, concluding negotiations as for access in good faith and providing formerly established access to specific networks, equipment and associated facilities.

⁶⁹ The period of 3 months is defined in the regulatory decisions imposing obligations on the SMP operator.

⁷⁰ UKE-TP Agreement on 22 October 2009, page 4.

⁷¹ UKE Decision No DART-SMP-6040-2/10 (52), published at UKE's website: http://www.uke.gov.pl/gALLERY/37/02/37023/Decyzja_TP_2_10.pdf, downloaded and printed on 8 February 2011.

services). Similarly, the decision for BSA was adopted on 28 April 2011.⁷² The market analysis revealed that there were still problems hampering fair and effective competition⁷³, TP was obliged in the decision to provide wholesale products covering xDSL and FTTx technologies.

- (80) In conclusion, it is underlined that since 1 October 2003 when TP was identified as a SMP operator for LLU and BSA, there has been an uninterrupted and ongoing obligation imposed on TP to provide access to wholesale access products for local loop unbundling and BSA.

VI. PROCEDURES AND CONDITIONS FOR ACCESSING WHOLESALE BROADBAND PRODUCTS

- (81) The regulations on LLU and BSA were established in Poland to facilitate the entry of AOs into the retail broadband market through TP's wholesale BSA and LLU products. Under the Polish regulation TP was obliged to supply these products to AOs in accordance with the rules specified in the ROs.
- (82) The procedure of the RO's imposition by the President of the Polish NRA foresees a central role for the incumbent in the preparatory phase of such access rules. The incumbent is under an obligation to prepare a draft RO, which is, at the next stage, subject to an administrative proceeding in which alternative operators and operators' associations can also take an active part. Once all parties to the proceeding (TP and AOs) have been heard the President of UKE imposes the RO conditions on TP.
- (83) The RO conditions and procedures, to which the Commission refers to in the present Decision, constitute only minimum standards guaranteed for the AOs. They were put in place to ensure AO's access to TP's network and wholesale broadband services on reasonable and on non-discriminatory terms. It should be well understood that the obligation to apply these minimum standards does not exclude a possibility for an AO to demand more advantageous, tailor-made conditions during negotiations with TP.⁷⁴

1. Wholesale Broadband Access (BSA)

- (84) The first RBO was published on 10 May 2006. That offer was later on modified or replaced by subsequent decisions of UKE⁷⁵. Each RBO had an immediate applicability clause under which TP was obliged to respect the minimum standards established therein from the moment of its publication. For each RBO, TP prepared a standard contract which served as a basis for negotiations and which should at least mirror the guaranteed RBO rules. Table 1 below presents the draft contracts used by TP to negotiate access contracts with AOs and the RBOs on which they were based.

⁷² UKE Decision No DART-SMP-6040-1/10 (47), published at UKE's website:http://www.uke.gov.pl/_gAllery/41/15/41159/Decyzja_TP_1_10_Rynek_5.pdf, downloaded and printed on 25 May 2011.

⁷³ *Inter alia*, the decision points to TP's discriminatory practices vis-a-vis AOs' accessing TP's network.

⁷⁴ Telecommunications Law, Chapter of market analyses; Chapter of telecommunication access (in particular Art. 21-25d and Art. 43 of the Telecommunication Act).

⁷⁵ Decision of 4 October 2006 modifying the previous RBO, Decision of 6 May 2008 introducing a new RBO, Decision of 4 November 2008 modifying the previous RBO, Decision of 12 April 2010 modifying the previous RBO solely in terms of a price list.

Table 1. RBOs and TP's standard contracts

RBO	TP's standard contract
10 May 2006	25 June 2006 ver. 9
4 October 2006	25 January 2007 ver.15 2 July 2007 ver. 21 16 January 2008 ver. 21bis
6 May 2008	-
4 November 2008	22 December 2008 BSA 2008 ver.1
	3 March 2009 ver. 1 bis ⁷⁶
	28 August 2009 ver. 3
	16 September 2009 ver. 4
	30 September ver. 5
12 April 2010	6 May 2010 ver. 2
	3 August 2010 ver. 2.1

Source: Commission's table based on TP's data.

- (85) In fact, for certain RBOs TP prepared different versions of standard contracts. For instance, under the RBO of 4 October 2006, TP prepared 3 versions of standard contracts, versions 15, 21 and 21bis, which were used in the negotiations with AOs. TP sent to a particular AO a version of a standard contract applicable on the date of the AO's request to begin negotiations. If a RBO was changed when negotiations were already ongoing with a particular AO, that AO did not need to send a new motion for concluding a contract and restart the negotiations.
- (86) To facilitate the incumbent's obligation to prepare a draft access and/or collocation contract for the purpose of negotiations with AOs, as from 6 May 2008, each RBO contained such a sample of draft contract reflecting all RBO provisions.⁷⁷
- (87) The steps and deadlines outlining the process that AOs need to follow to acquire TP's wholesale products are presented in Table 2 below on the basis of the exemplary RBO of 4 October 2006⁷⁸ and will be described in greater detail in the following subsections:
- Section 1.1 describes the negotiation process which leads to the conclusion of an access contract;
 - Section 1.2 outlines the process of gaining access to a point of interconnection, called SAN⁷⁹;
 - Section 1.3 describes the process of subscriber line activation,
 - Section 1.4 outlines the access to General Information.

⁷⁶ First, in its reply to the RFI on 5 August 2009 TP informed that that version applied from 22 December 2008 (page 2), then it in its reply to the RFI on 8 December TP explained that the version applied from 3 March 2009 (page 4).

⁷⁷ See Annexes 3 and 4 to the RBO of 6 May 2008.

⁷⁸ Although the RBOs of 4 October 2006, 6 May 2008, 4 November 2008 and 12 April 2010 (referred to as "the subsequent RBOs") contain modifications, of which the main changes are included in this section's footnotes, this particular RBO is a good example of relevant steps and deadlines applicable to BSA since an important number of AOs signed BSA contracts on the basis of this RBO.

⁷⁹ See footnote 29 .

Table 2. Steps and deadlines in acquiring TP's BSA wholesale product

Action required	Maximum number of working days
Negotiation of access contract – 90 calendar days	
AO submits a complete motion for access	
Formal verification of the motion by TP	2
TP sets the date of the first meeting	3
First meeting between AO and TP takes place	7
Signing of the access contract (in calendar days)	90⁸⁰
Access to Service Access Node	
AO submits the order for connection	
Formal verification of the order by TP	3⁸¹
Technical audit by TP ⁸²	14
AO accepts the terms and conditions of TP	21
AO activates the connection to SAN	24-30⁸³
Tests	14⁸⁴
Commercial launch of the SAN after tests	21
Activation of subscriber lines	
AO submits the order for line activation	
Formal verification of the order by TP	2
Technical verification of the order by TP	2
Order implementation	2
Provision of General Information – 7 days	
AO submits a complete request for General Information	
TP provides General Information	7⁸⁵

Source: RBO of 4 October 2006.

1.1 Concluding an access contract

- (88) In order to conclude an access contract with TP, an AO has to submit to TP a formal motion in writing.⁸⁶ The contract should be concluded by the parties

⁸⁰ Although the subsequent 2008 RBOs did not define the time frame for concluding the access/collocation contracts, the deadline of 90 days has been binding for TP as it originates from Art. 27 (2a)(2b) of the Telecommunications Act.

⁸¹ If the order is not formally correct, the AO has 3 working days to make necessary amendments under the RBO of 4 October 2006 and 5 working days in the subsequent RBOs of 6 May 2008 and 4 November 2008.

⁸² If the result of the audit is negative, TP proposes an alternative technical solution. Once the alternative solution is accepted by the AO and the AO submits a relevant motion again, TP has 14 days to issue technical conditions related to the new solution. In the case of collocation and line connection TP also sends cost estimates.

⁸³ For dedicated lines it is 24 working days, for collocation it is 30 working days. If TP needs to purchase equipment from external suppliers the deadline is extended by 1 month. If TP needs to expand the ATM node the deadline can be extended to 8 months. Under the 2008 RBOs the deadline can be extended to 4 months (if a DSLAM node must be deployed) or 8 months (if an ATM or an IP node must be deployed).

⁸⁴ As from the 4 November 2008 RBO, the tests were not foreseen. SAN is activated within 14 working days from the termination day of its deployment/modification.

⁸⁵ There is no detailed procedure for the provision of the GI in subsequent 2008 RBOs.

within 90 days from the date of submitting the complete motion based on the terms and conditions of the RBO.⁸⁷

- (89) TP, after receiving a complete motion, should:
- (i) set, within 3 working days, the date of the first meeting, which should be held not later than after 7 working days, with the aim of launching negotiations;
 - (ii) indicate TP's representatives authorised to negotiate the terms and conditions of the access contract with the AO, and
 - (iii) send a draft access contract to the AO.

1.2 Access to a SAN

- (90) The process which follows the conclusion of the negotiated agreement is the access to a SAN. An AO has to connect its network to at least one of TP's 12 Regional or 72 Local SANs in order to get access to wholesale broadband services and a possibility to activate subscriber lines situated in a specific service area.⁸⁸
- (91) An order for a connection to a specific SAN must be sent to TP in writing. Provided that the order meets formal requirements stipulated by the RBO, TP conducts a technical audit within 14 working days.⁸⁹ Then, TP informs the AO about the technical possibilities and conditions for the SAN's deployment or modification⁹⁰ using the connection mode specified by the AO (*i.e.*: collocation, line connection or dedicated connection). If there is no reaction from TP to the AO's order within 14 working days, TP's lack of response to the order is automatically considered as a positive response.
- (92) If there are no technical possibilities for the deployment/modification of a SAN in the mode specified in the AO's order, TP shall inform the AO, presenting a detailed justification and an alternative solution (another mode of connection or modification of a SAN). If the AO accepts TP's alternative solution, it sends to TP a new order to access the SAN.⁹¹ TP has 14 working days to send to the AO the technical conditions and cost estimates of the alternative connection; then, the AO has 14 working days⁹² to send them back to TP signed and accepted.

⁸⁶ In case the motion does not meet the formal requirements, TP requests within 2 working days that an AO completes it or provides additional information. An AO has 2 working days to complete the motion.

⁸⁷ Although the subsequent 2008 RBOs do not explicitly mention this provision, the 90-day deadline for concluding contracts is binding as it is clearly defined in Art. 27(2a) and (2b) TL.

⁸⁸ In case an AO wants to access at the DSLAM level the number and localisation of SANs are provided by TP as the GI and if an AO wants access at the IP level it could choose one SAN among 12 SANs defined in the 2008 RBOs.

⁸⁹ If an order has not met the formal requirements stipulated in the RBO, TP shall request an AO to complete it or present additional explanations within 3 working days, after which an AO should submit the properly modified order within the next 3 working days. The subsequent 2008 RBOs extended this deadline to 5 working days (see section 2.8, point 5 of the RBOs).

⁹⁰ The RBO imposes on TP an obligation to deploy a new SAN, on an AO's request, if a SAN is not available at the required localization, or to modify the capacity of an existing SAN, when the SAN is overloaded.

⁹¹ The RBO of 4 November 2008 also underlined that if the order for deployment of a SAN was submitted in accordance with the AO's forecast, TP should not refuse to activate that order (see point 2.8.6 of the RBO).

⁹² Under the 2008 RBOs, an AO has 21 working days.

- (93) The deployment/modification of a SAN takes from 24 to 30 working days⁹³ and this period can be prolonged if the deployment of a SAN requires TP to purchase new technical equipment or to develop an ATM node.⁹⁴ After the SAN's deployment or its modification, an acceptance report is signed by TP and the AO and the necessary tests are carried out. The commercial activation of a SAN takes place no later than 21 working days after such tests.⁹⁵

1.3 Orders for subscriber lines and their activation

- (94) Once an AO has obtained access to a SAN, it can start operating at the retail level, winning clients located in the service area of that SAN. In order to provide retail services to interested customers, an AO has to submit a formal order to TP⁹⁶ for the activation of a subscriber line together with the subscriber's statement that it wishes to purchase broadband services from that AO. The next step involves TP conducting a formal and technical verification of the order.
- (95) During the formal verification, TP checks firstly whether an AO is entitled to submit BSA orders, namely whether it has concluded a BSA contract with TP, whether all the required information is provided in the order form, whether the subscriber's statement that he/she wishes to use the AO's retail services is attached and whether it is compatible with the data in the order. Then, TP verifies if the customer's data in the order is compatible with the data in TP's systems⁹⁷ and whether there is another order in TP's system concerning the same subscriber line which would exclude the AO's order.⁹⁸
- (96) After TP has accepted the order formally, it verifies the technical possibility to provide broadband services on that subscriber's line⁹⁹ and informs the AO within 2 working days about positive or negative technical conditions for order activation. If there is no response from TP on the results of the technical verification, the response is considered as positive.¹⁰⁰
- (97) Initially, *i.e.* since November 2006, AOs were informed about a negative formal verification by letter sent electronically and about a negative technical verification

⁹³ The precise duration depends on what mode of connection an AO has chosen; for line and dedicated connections it is 24 working days and for collocation it is 30 working days.

⁹⁴ 1 month for purchasing equipment, 8 months for deployment of ATM node. Under 2008 RBOs - 4 months if a DSLAM node must be deployed and 8 months if an ATM or IP node must be deployed.

⁹⁵ As from 4 November 2008 RBO tests were not foreseen. PDU is activated within 14 working days from the termination day of its deployment/modification.

⁹⁶ Such an order should be sent within 20 working days (40 working days as of the 2008 RBOs) from the subscriber's signature on the statement confirming the intention to use the service of the AO.

⁹⁷ TP in its reply to the RFI of 20 January 2009, q. 3.10, (page 2) informed the Commission that it verifies an order positively if the data it contains is compatible with the data in at least one of TP's systems.

⁹⁸ If the order has not met the formal requirements, as from 4 October 2006 TP had 2 working days to request the AO to complete the order. The AO had to react within 2 working days under the RBO of 4 October 2006 and within 3 days under the RBOs of 2008.

⁹⁹ TP in its reply to the RFI of 20 January 2009, q. 3.10, (page 8) indicated that it verifies, *inter alia*, whether the SAN is overloaded or has reached its full capacity, whether the line parameters meet the requirements for the ordered service option, and the availability of a path on a given DSLAM for the ordering operator (VPI, VCI) [*i.e.* Virtual Path Identifier, Virtual Channel Identifier].

¹⁰⁰ The subsequent RBOs did not treat the lack of response as a positive one. In addition the RBO of 4 November 2008 determined that if there are no technical possibilities to activate an order in the specified xDSL technology, in an ATM traffic class or a service option, TP proposes an alternative solution for activation together with a possible cost estimate within 8 working days.

by a posted letter. Since July 2007 TP informed AOs about a negative verification by a report in Excel format covering multiple orders. As of 28 November 2007, in case of a negative formal verification, TP provided AOs with the address data contained in its databases.¹⁰¹

- (98) If an AO considers that TP's rejection of certain orders is unfounded, it may complain to TP. If the incumbent operator finds the complaint founded, the order is processed.¹⁰² Since October 2008, orders previously rejected on formal grounds are accepted by TP if an AO attached to the order the subscriber's statement confirming the correctness of the data.¹⁰³ TP introduced an internal procedure to deal with unduly rejected BSA orders only on 18 February 2008.¹⁰⁴
- (99) TP is obliged to implement the order (*i.e.* configure all equipment in the telecommunications network and launch all the procedures necessary for an AO to start providing subscriber services) within 2 working days from its acceptance. TP can refuse to implement the order if it concerns a type of line on which TP does not provide BSA services, if there is no technical possibility to implement that order, or if there is a danger to network integrity.¹⁰⁵
- (100) Different deadlines and procedures apply to non-active lines under the RBOs of 2008. After TP has accepted the order formally, it verifies the technical possibilities to provide broadband services on that non-active subscriber line and informs the AO within 5 working days about the positive or negative technical conditions for order activation. TP, as a rule, is not obliged to establish a subscriber's termination point, which is provided by the AO. If there are no technical possibilities to activate that line TP proposes to the AO, within 8 working days¹⁰⁶, an alternative solution together with cost estimates. In that case the AO submits within 21 working days a relevant new order for activation under the proposed alternative solution. The activation of the order takes place on a day of technical acceptance of the establishment of the subscriber's termination point.¹⁰⁷

1.4 Provision of General Information

- (101) The scope of the General Information covers the number of subscriber lines in areas served by specific SANs, the number of subscriber lines excluded from that

¹⁰¹ TP's reply to RFI of 20 January 2009 to q. 3.10, page 11-12; TP's reply to RFI on 3 March 2009 to q. 29, page 116.

¹⁰² *Idem*, page 10.

¹⁰³ *Idem*, page 12. However, in its reply to q. 28 of RFI of 03 March 2009, (page 115) TP clarified that this procedure was used only as regards Netia.

¹⁰⁴ TP's reply to RFI of 3 March 2009 to q. 31, page 119.

¹⁰⁵ Under the RBO of 2006 TP is not obliged to provide BSA services on certain lines, e.g. lines to public payphones, lines with alarm numbers, lines with permanent incapacity for providing xDSL, lines on which emergency numbers are installed, leased lines, lines including elements changing signal parameters, lines with NMT technology, lines with radio sections, lines connected to PABX (servicing inter-switch signalling), ISDN-BRA and ISDN-PRA lines. The RBOs of 2008 also foresaw the same scope of lines on those TP is not obliged to provide BSA services. It also added that TP can refuse the activation of a line if there is no technical possibility to implement an order – and if an AO did not accept an alternative solution. In addition, the 2008 RBOs stipulated that TP cannot reject an order for a subscriber line in a service option which does not exceed the parameters of the service option previously provided by TP on that subscriber line to its own customer or other AO.

¹⁰⁶ See section 4.1 point 9 b) of the RBO of 4 November 2008.

¹⁰⁷ See section 4.1 point 9 of the 2008 RBO.

area, service areas of specific SANs, technical parameters of data transmission in TP's ATM network and of TP's equipment used for interconnection, as well as technical parameters of modems, microfilters/splitters, the reference list of equipment standards recommended for providing services, and the monthly subscription fees paid by customers for a subscriber line for a specific service option and service version set in line with the price list of the RBO.¹⁰⁸

- (102) Initially, AOs had to request the General Information in writing.¹⁰⁹ The provision of General Information by TP should be free of charge, on paper or electronically and later also *via* an IT interface (for the access to the IT interface an AO pays a one-time fee specified in the RBO) and provided within 7 working days from the application date.¹¹⁰

2. Local Loop Unbundling

- (103) The first LLU Reference Offer ("RUO") was published on 28 February 2005. That offer was later on modified or replaced by subsequent Decisions of UKE.¹¹¹ Each new RUO had an immediate applicability clause under which TP was obliged to respect the minimum standards established therein from the moment of its publication.¹¹² For each RUO, TP prepared a standard contract which served as a basis for negotiations. It should at least mirror the guaranteed RUO rules. Table 3 below presents the draft contracts used by TP to negotiate access contracts with AOs and the RUOs on which they were based.¹¹³

¹⁰⁸ The RBO of 6 May 2008 added to that list also a list of addresses of SANs at DSLAM level, and a service area for specific SANs at IP level, the number of DSLAMs in specific SANs and technology xDSL used by DSLAMs, and the list of offered service options. The subsequent RBO of 4 November 2008 added the range of numbering and addresses of subscriber lines in specific SANs.

¹⁰⁹ See point 3.1.1.2 of the RBO of 10 May 2006 and of the RBO of 4 October 2006.

¹¹⁰ TP is obliged to verify an AO's motion for the GI formally within 2 working days. If the request does not meet the formal requirements TP asks the AO to complete it or to provide additional explanations within next 2 working days. There is no detailed procedure for the provision of the GI in subsequent 2008 RBOs.

¹¹¹ Decision of 9 August 2005 introducing a new RUO, Decision of 5 October 2006 introducing a new RUO, Decision of 3 April 2007 modifying the previous RUO, Decision of 28 November 2008 introducing a new RUO, Decision of 29 May 2009 modifying the previous RUO.

¹¹² See section 1.4.4, point 1 of the RUO of 5 October 2006 and of 3 April 2007 and Art. 26(1) TL.

¹¹³ TP did not provide information on its standard contract(s) originating from the first two RUOs.

Table 3. RUOs and TP's standard contracts

RUO	TP's standard contract
28 February 2005	-
9 August 2005	-
5 October 2006	4 January 2007 ver. 14 15 March 2007 ver. 16
3 April 2007	11 May 2007 ver. 18
28 November 2008	17 February 2009 LLU ver. 1 12 March 2009 LLU ver. 2 16 March 2009 LLU ver. 3 12 May 2009 LLU ver. 4 15 May 2009 LLU ver. 5
29 May 2009	26 June 2009 ver. 6 22 September 2009 ver. 7 22 October 2009 ver. 8

Source: data based on TP's replies to the RFIs.

- (104) To facilitate the incumbent's obligation to prepare draft access and/or collocation contracts for the purpose of negotiations with AOs, as from 5 October 2006, each RUO contained sample draft contracts reflecting the most recent RO provisions.¹¹⁴
- (105) The steps and deadlines outlining the process of acquiring TP's wholesale products by AOs on the example of the RUO of 3 April 2007¹¹⁵ are presented in Table 4 below and will be described in greater detail in the following subsections:
- Section 2.1 describes the negotiation process which leads to the conclusion of access and collocation contracts;
 - Section 2.2 outlines the process of establishing collocation and placing of a correspondence cable;
 - Section 2.3 describes the process of the activation of a subscriber's line;
 - Section 2.4 outlines the access to General Information.

Table 4. Steps and deadlines in acquiring TP's LLU wholesale product

Action required	Maximum number of working days
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¹¹⁴ See the RUO of 5 October 2006.

¹¹⁵ Although the RUOs of 3 April 2007, of 28 November 2008 and 29 May 2009 (referred to as "the subsequent RUOs" contain modifications, of which the main are included in this section footnotes, this particular RUO is a good example of deadlines applicable to LLU since a big number of AOs signed LLU contracts on the basis of this RUO.

Negotiation of access and of the collocation contract – 90 calendar days	
AO submits a motion for access/collocation	
Formal verification of the motion by TP	2
TP sets the date of the first meeting	2
Signing of the access contract (in calendar days)	90 ¹¹⁶
Signing of the collocation contract	5 ¹¹⁷
Collocation and provision of dedicated space or collocation room	
AO submits the order for collocation	
Formal verification of the order by TP	2
Technical verification by TP and cost estimates ¹¹⁸	14
AO accepts the terms and conditions of TP	21
AO prepares the technical project	50
TP evaluates the technical project and signs the contract ¹¹⁹	14
TP provides a dedicated space or a collocation room	30 ¹²⁰
Installation of the correspondence cable (optional) ¹²¹	
AO submits the order for installation	
Formal verification of the order by TP	2
Technical verification by TP and cost estimates ¹¹⁸	14 ¹²²
AO signs the terms and conditions of TP	21
Installation of the correspondence cable (in calendar days)	30 days – 4 months ¹²³
Activation of active subscriber lines	
AO submits the order for line activation	
Formal verification of the order by TP	2
Technical verification by TP and cost estimates ¹¹⁸	7*
TP unbundles the subscriber line	20 ¹²⁴
Activation of non-active subscriber lines	
AO submits the order for the line activation	

¹¹⁶ Although the 2008 and 2009 RUOs did not define the time frame for concluding the access/collocation contracts, the deadline has been binding for TP as it originates from Art. 27 (2a)(2b) of the Telecommunications Act.

¹¹⁷ The subsequent RUOs do not contain such a deadline.

¹¹⁸ If TP issues a negative response, the AO has 5 working days to change the order in line with TP's suggestion. TP has 5 days to evaluate the amended order.

¹¹⁹ If the technical project requires changes, the AO has 21 working days to make necessary amendments, after which TP has an additional 10 days to evaluate the modified project.

¹²⁰ The deadline for the preparation of collocation space with access to the local loop can be extended to 2 months. At this stage TP provides also the information on the area serviced by an MDF within 10 working days. The subsequent RUOs foresee the provision of information on the area serviced by an MDF at the stage of the provision of the GI.

¹²¹ A correspondence cable to a Remote Location is an alternative way of accessing the local loop where an AO does not use the dedicated space or the collocation room provided by TP but connects a cable to its own location.

¹²² The subsequent RUOs foresee respectively 3 and 7 working days for formal verification and technical audit.

¹²³ The deadline for installation of a correspondence cable at TP's facilities is 30 calendar days, and 4 months in the remote location. Under the subsequent RUOs the installation of a correspondence cable should be conducted within 2 months.

¹²⁴ A subscriber line used to provide xDSL services is to be unbundled within 30 working days. The subsequent RUOs foresee 14 working days for the activation of an active line.

Formal verification of the order by TP	2
Technical verification by TP and cost estimates ¹¹⁸	7*
TP unbundles the subscriber line	20 ¹²⁴
AO completes the customer termination point	
AO submits request for the connection to TP	2 ¹²⁵
TP connects the termination point to MDF	5
Provision of General Information – 5 days	
AO submits the formal request for General Information	
TP provides General Information	5
Technical audit¹²⁶	
AO submits the formal request for the technical audit	
Formal verification of the request by TP	2 ¹²⁷
TP provides the results of the technical audit	5

Source: RUO of 3 April 2007.

* After the formally complete request / motion / order is submitted

2.1 Concluding an access and collocation contract

- (106) To get access to a local subscriber loop, an AO first has to submit a motion to conclude an access and/or collocation contract with TP.¹²⁸ The contract should be signed by TP and the AO within 90 days from the date of the motion.¹²⁹ If the motion is not complete, the AO has 2 working days to complete it or provide additional information. Once the motion is complete, TP is obliged to specify within 2 working days the date of a meeting with the aim of launching negotiations and indicate TP's representatives authorised to negotiate terms and submit the draft contracts. The collocation contract should be concluded not later than 5 days from the date of signing the access contract.¹³⁰

2.2 Orders for collocation or for a correspondence cable

- (107) The RUOs foresee that an AO submits an order for collocation or its modifications and then TP verifies the motion formally within 2 working days. In case of formal deficiencies, the AO is requested to modify the motion or to provide additional information within 2 working days. TP is obliged to verify the technical possibilities of the implementation of the order and to reply to the AO within 14 working days. Along with a positive response, TP provides its technical

¹²⁵ The subsequent RUOs foresee 3 working days (see section 1.1.4, point 11).

¹²⁶ Technical audit was obligatory only for subscriber lines using SDSL or HDSL technologies. Under the subsequent RUOs technical audit is obligatory for subscriber lines using any xDSL technology except ADSL.

¹²⁷ The subsequent RUOs foresee 3 working days.

¹²⁸ According to TP, not all AOs use collocation and request collocation contracts; e.g. small AOs access the LLU services via corresponding cables instead, TP's reply to the RFI on 2 March 2009 to Q. 5, page 20.

¹²⁹ The subsequent RUOs did not define that time frame for concluding the access/collocation contracts. A 90-day deadline, however, is stipulated in Art. 27 (2a)(2b) TL.

¹³⁰ The subsequent RUOs did not define the maximum number of working days to conclude a collocation contract.

terms and conditions as well as cost estimates for the implementation of the order. Simultaneously, TP is obliged to reserve the network resources (e.g. TP's technical equipment) needed for the implementation of that order. If TP issues a negative response due to the lack of technical possibilities, it is obliged to provide the AO with a detailed justification and, if possible, propose an alternative solution.¹³¹ TP's lack of response within 14 working days is considered to be a positive response.

- (108) The AO ought to accept the technical requirements and cost estimates proposed by TP within 21 working days and deliver a technical project for collocation prepared in line with TP's technical requirements within 50 working days. If the AO fails to accept TP's technical requirements or submit its technical project in the specified time frame, TP may not grant access to the local loop in due time.¹³² TP provides comments on the documents received and, in case of any deficiencies, it calls for their modification or requires additional information.
- (109) Then, the complete document is verified again by TP, after which, if accepted, it is sent back to the AO together with the signed copy of the collocation contract. As soon as the collocation contract enters into force, TP provides the AO with information on the area serviced by a specific MDF in the form of a list of streets with numbering resources (*i.e.* which telephone numbers are used in the area covered).¹³³ TP is also obliged to provide the AO with the dedicated collocation space¹³⁴ or the collocation room¹³⁵ for network interconnection or for other regulated services within 30 working days¹³⁶ (or within 2 months for the collocation space with access to a local loop).
- (110) Another alternative for providing access to local loop may be the installation of a correspondence cable between TP's MDF and the AO's Distribution Frame, a sewage well to which an AO wants to connect to or to an AO's remote location¹³⁷. In this case, the AO submits a properly completed order (which is also considered as a request for installation) to which TP should reply within 14 working days. TP verifies the order on formal grounds within 2 working days and if it has not met formal requirements asks the AO to modify it or submit additional information within the next 2 working days.¹³⁸ If TP responds positively, it informs the AO

¹³¹ If an AO accepts an alternative solution proposed by TP, it must submit the modified order within 5 working days. TP replies positively within 5 working days attaching to its response the technical requirements and cost estimates and in parallel reserving relevant network resources (see section 1.1.4 point 8 of the RBO of 3 April 2007). Under the subsequent RBOs an AO is not obliged to submit a new motion for an alternative solution but to accept the technical condition presented by TP within 21 working days (see section 1.1.6 or 1.1.7 point 8 of the RUO of 28 November 2008 and 29 May 2009, respectively).

¹³² The subsequent RUOs stipulated the order is invalid and the AO must submit a motion again (see section 1.1.6 or 1.1.7 point 13).

¹³³ The subsequent RUOs did not foresee the separate provision of this information as the data is provided within the GI.

¹³⁴ Space in a room used by TP for its own needs, located in the building of TP and allowing collocation.

¹³⁵ The space in the premises allowed for the operators in the building property of TP and intended for shared usage of AOs.

¹³⁶ The subsequent RUOs foresee 22 working days.

¹³⁷ Remote Location – AO's premises in which an AO places its equipment (in the collocation site) or made accessible by TP, located far from the building in which an access point to TP's network is situated.

¹³⁸ The subsequent RUOs defined the following time frame: 3 working days for TP to call an AO to complete a motion, 3 working days for an AO to complete a motion and submit addition

about its technical terms and conditions and cost estimates. In the event of a negative response, it informs the AO about the lack of technical possibilities to execute the order and, if possible, it shall propose an alternative solution¹³⁹. In case the AO accepts the alternative solution, it should send the modified order to TP within 5 working days and on that condition TP accepts the order and transfers to the AO its technical terms and conditions and reserves its network resources.¹⁴⁰ If the AO does not sign or send these documents back within 21 working days, the order is considered invalid. The installation of a correspondence cable shall be made within the scheduled date indicated in the technical terms and conditions, not exceeding 4 months for installation in the remote location or 30 days for installation in TP's facilities.¹⁴¹

2.3 Orders for subscriber's lines and their activation

- (111) Once an AO receives access to a collocation room or a dedicated space or installs a correspondence cable, it is able to start operating at the retail level and presents TP with orders for the activation of subscriber lines. Access to the subscriber line is made in two forms: full access or shared access.
- (112) An AO submits an order to TP together with a subscriber's statement accepting the unbundling of its local loop and with a declaration on resigning from TP's services.¹⁴² Firstly, in the formal verification phase TP checks whether an AO is entitled to submit LLU orders, namely whether it has concluded an LLU contract with TP, whether all required data is provided in the order form, whether the subscriber's statement on switching from TP to that AO is attached and whether it is in line with the data in the order.
- (113) Next, TP verifies whether all the data in the order are compatible with the data in TP's systems¹⁴³ and whether there is another order concerning the same subscriber line in TP's systems which would exclude the AO's order. The AO is obliged to place the order no later than 30 days after signing the subscriber's statement, as otherwise it will be considered invalid.¹⁴⁴
- (114) TP should conclude the formal verification within 2 working days. If the order does not meet the formal requirements, TP requests the AO to complete it or to

explanation, 7 working days for TP's reply to a motion (see section 1.1.7.1 or 1.1.8.1 point 4, 6 and 7 of the RBOs)

¹³⁹ In case TP does not propose any alternative solutions it should present a detailed explanation for the lack of technical possibility to execute the order.

¹⁴⁰ The subsequent RUOs do not require from an AO to submit a motion again, just to accept TP's technical condition for an alternative solution within 21 working days (see section 1.1.7.1 or 1.1.8.1 point 10 of the RUOs).

¹⁴¹ The subsequent RUOs foresee 2 months for the installation of a correspondence cable (see section 1.1.7.2 or 1.1.8.2 point 1 of the RBOs).

¹⁴² A number portability document should be also attached if the AO intends to use for the subscriber the same number that the subscriber had with TP.

¹⁴³ TP in its reply to the RFI of 22 December 2008 informed the Commission that, as for BSA orders, it accepts LLU orders if the data they contain are compatible with the data in at least one TP's system (TP's reply to RFI on 20 January 2009 to q. 3.10, page. 2; see also footnote 97). The order is also accepted if a subscriber's statement confirming the correctness of the data is attached. That rule was imposed by the NRA through a modification of the BSA access contract between TP and Netia (TP's reply on 2 March 2009, page 18).

¹⁴⁴ The subsequent RUO foresees 120 working days.

provide additional explanations within 2 working days.¹⁴⁵ Next, TP verifies the possibility to execute the order within 7 working days from the day of receiving the formally correct order and sends a positive reply together with the terms and conditions, or a negative reply when it is not technically possible to execute the order.¹⁴⁶ The absence of TP's reply within 7 working days is considered as a positive reply.¹⁴⁷

- (115) The unbundling of a specified active subscriber line is made within 20 working days (and of a subscriber's line used to provide xDSL services within 30 working days).¹⁴⁸ If the AO accepts the alternative solution, it submits the modified order to TP within 5 working days and then TP transmits a positive response to the AO, along with its technical terms and conditions.¹⁴⁹
- (116) As for non-active lines, the deadlines for formal and technical verification are the same as for active lines. In that case an AO has to prepare the subscriber's termination point at its own costs, according to the technical terms and conditions issued by TP. Then it notifies to TP about the completion of the termination point and within 2 working days submits a request to connect the subscriber's termination point to TP's network. TP must then prepare an access local loop at a MDF for that subscriber line within 5 working days. The subscriber line is activated after AO's termination point is accepted by TP and an AO.¹⁵⁰

2.4 Provision of General Information and technical audit

- (117) Similarly, as in the case of BSA (see recital (102)), according to the RUOs, in order to obtain the General Information an AO has to submit a motion in writing or *via* TP's IT system. TP formally verifies the motion within 2 working days¹⁵¹ and, in case it discovers formal shortcomings, the AO has 2 working days to complete the order or submit additional explanations.¹⁵² TP is obliged to provide the General Information free of charge, in writing or electronically, or give access

¹⁴⁵ TP is obliged not to consider any subsequent orders for the same active or non-active subscriber line until the consideration of the order submitted by the AO has been completed.

¹⁴⁶ In the event of temporary technical possibilities, TP shall inform the AO about adjustment actions to be taken to give the AO access to lines; when the technical possibilities do not exist TP shall propose an alternative solution together with a detailed justification. In case there are no technical possibilities and TP could not propose any alternative solutions, it should give a detailed explanation for its refusal.

¹⁴⁷ As for BSA, if an AO considers that TP's rejection of certain orders is unfounded, it may complain to TP. If the incumbent operator finds the complaint founded, the order is processed. TP introduced its internal procedure to deal with unduly rejected LLU orders only on 18 June 2008 (see TP's reply to the RFI of 22 December 2008, page 10-11 and TP's reply to the RFI of 16 February 2009, page 119).

¹⁴⁸ The 2008 RUO decreased the time for activation of an active subscriber line to 14 working days.

¹⁴⁹ The subsequent RUOs do not contain the AO's obligation to submit a motion again as those RUOs do not foresee an alternative solution. TP's refusal to activate a subscriber line can cover only the temporary period necessary to make any adjustment work.

¹⁵⁰ The subsequent RUOs did not stipulate a deadline for connection of the subscriber's termination point but merely a deadline for AO to submit a motion for that connection (i.e. 3 working days or other time frame agreed between the parties (see section 1.13 point 15 of the RBOs).

¹⁵¹ It is assumed that the motion meets formal criteria if it contains all required information and all necessary annexes are attached.

¹⁵² The subsequent RUOs foresee 3 working days.

to the General Information *via* its IT system¹⁵³ within 5 working days after receiving a formally correct motion.

- (118) The AO may also submit to TP a motion for performing a technical audit of a given subscriber line for a fee. This motion is verified formally in the same time frame as the request for the General Information.¹⁵⁴ TP should deliver the results of this audit within 5 working days, thus providing AOs with more detailed technical information not available in the General Information and allowing them to identify more precisely the technical possibilities for providing services on a specific subscriber line.

VII. THE COMMISSION'S COMPETENCE AND THE RULE OF "*NE BIS IN IDEM*"

1. TP's arguments on the Commission's lack of competence to investigate TP's practices and findings of the Commission

- (119) In its SO Reply¹⁵⁵ and during the Oral Hearing¹⁵⁶ TP claimed that the Commission has no competence to investigate TP's behaviour in the wholesale broadband markets in Poland. To support its claims TP raised several arguments summarised below.
- (120) Firstly, TP underlines that TP's obligations to provide access to its network and relevant wholesale services are subject to Polish regulation, which is effective, guarantees AOs a non-discriminatory access to TP's network and protects competition on the market. A proper application of this regulation is guaranteed by the Polish National Regulatory Authority – UKE.¹⁵⁷ Due to the division of competences and responsibilities between the Commission and national authorities "*ex post intervention by the Commission on the issues for which UKE has already exercised and continues to exercise effective control does not seem appropriate.*"¹⁵⁸
- (121) Secondly, TP raises¹⁵⁹ that UKE has issued many decisions and imposed fines on TP in order to ensure an adequate and non-discriminatory treatment of AOs and preserve effective competition on the Polish broadband Internet markets. In this regard, TP adds that the Polish National Competition Authority (UOKiK) initiated competition proceedings in 2007 and closed the investigation in 2008 without finding an infringement on TP's side.¹⁶⁰

¹⁵³ The RUO foresees one-time fee for accessing TP's IT system. TP in its reply to the RFI of 23 February 2009 admitted that it had not made available to AOs an IT interface used *inter alia* to provide GI, as well as to submit LLU orders. As regards GI, TP provides it instead on a DVD. See TP's reply to the RFI of 22 December 2008 to q. 5, page 20. In addition, TP in its SO Reply (SO Reply paragraph 964, page 227) explained that TP started providing GI via its IT system since 1 April 2010.

¹⁵⁴ The subsequent RUOs defined 3 working days as a time frame for an AO to complete or submit additional explanation (see section 1.1.2.2 point 5 of the RUOs).

¹⁵⁵ SO Reply, paragraphs 2, 10-102.

¹⁵⁶ TP's presentation at the Oral Hearing, pages 2-4.

¹⁵⁷ SO Reply, paragraphs 14 – 21.

¹⁵⁸ TP's presentation at the Oral Hearing, page 4 (slide 8).

¹⁵⁹ SO Reply, paragraphs 22 – 29.

¹⁶⁰ *Idem*, paragraph 28.

- (122) Thirdly, according to TP¹⁶¹ the difficulties identified in the SO have been largely remedied before the SO was issued (or will be solved in the near future) by the Agreement between TP and UKE of 22 October 2009 ("the Agreement", see chapter IX). The effective implementation of the Agreement is monitored by UKE. To this end, TP claims that the fact that the Commission did not mention in the SO the said Agreement prevented the incumbent from fully exercising its rights of defence.¹⁶²
- (123) Fourthly, TP alleges¹⁶³ that there is no Community interest to impose on TP sanctions for a behaviour that was already sanctioned by UKE and/or was terminated by the Agreement. Therefore, TP demands that the Commission should refrain from pursuing the case.¹⁶⁴ In this regard TP asserts that both UKE and the Commission pursue the same interests, ensuring that there is no distortion or restriction of competition in the electronic communications sectors and removing obstacles to the provision of those services. According to TP, the Access Notice of 1998¹⁶⁵ establishes that the Commission may only intervene where the competition intervention brought before the national authorities is not solved within an acceptable timeframe and where there is a substantial cross-border element. To support its claims, TP cites the Commission decision *BT/MCI I* as an example where the Commission decided not to take any action on discrimination since the company was already subject to non-discriminatory obligations under the regulatory framework.¹⁶⁶
- (124) Finally, TP asserts that the Commission's objections are against the principle of legitimate expectations because the decisions of the President of UKE created on TP's side legitimate expectations that TP's behaviour is in line with Art. 101 and Art. 102 TFUE.¹⁶⁷
- (125) Each of these arguments is addressed in turn in the recitals below.
- (126) Firstly, TP's contention on the Commission's lack of competence due to the existence of Polish regulation is misconceived. The Court of Justice and the General Court of the European Union have consistently held that competition rules may apply where sector specific legislation exists.¹⁶⁸ The General Court held in *Deutsche Telekom*, and the Court of Justice upheld it, that NRAs "operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition law."¹⁶⁹ Moreover, as indicated in *Deutsche Telekom* it has to be shown that the undertaking subject to the regulation has the commercial discretion to avoid or end the abusive

¹⁶¹ SO Reply, paragraphs 30 – 58.

¹⁶² Idem, paragraph 102.

¹⁶³ SO Reply, paragraphs 59 – 71.

¹⁶⁴ SO Reply, paragraphs 72 – 84.

¹⁶⁵ Access Notice OJ 98/C 265/02.

¹⁶⁶ Idem, paragraphs 59-84.

¹⁶⁷ SO Reply, paragraph 8.

¹⁶⁸ Judgment of the Court of Justice of 11 November 1997 in Joined Cases C-359/95 and C-379/95 P *Commission and France vs. Ladroke Racing* [1997] ECR I-6225, paragraph 34; Judgment of the Court of First Instance of in Case T-228/97 *Irish Sugar vs. Commission* [1999] ECR II-296, paragraph 130; Judgment of the General Court of 30 March 2000 in Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* [2000] ECR II-1807, paragraphs 59 et seq.

¹⁶⁹ Judgment of the General Court of 10 April 2008 in Case T-271/03, *Deutsche Telekom*, ECR [2008] II-477, paragraph 113 and judgment of the Court of Justice of 14 October 2010 in case C-280/08 *Deutsche Telekom vs. Commission*, not published yet, paragraph 80-96.

practices on its own initiative.¹⁷⁰ The Court also held that "*if a national law merely encourages or makes it easier for undertakings to engage in anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC [now Art. 101 and 102 TFEU].*"¹⁷¹ In the present case it is uncontested that TP has always had the commercial discretion to refrain from the identified practices which form together a refusal to supply. To this end, the signature of the Agreement in October 2009 and the steps TP undertook following the Agreement¹⁷² clearly show that TP, if it only wanted to, could have eliminated the abusive practices.

- (127) Secondly, the Commission recalls that the decisions of UKE, which TP refers to in support of its arguments, do not contain any findings on Article 102 TFEU. UKE is not a competition authority but a regulatory authority. The enforcement of competition law in Poland is the competence of the Polish NCA (UOKiK). In this regard, TP is wrong to claim that the proceedings initiated by UOKiK¹⁷³ in 2007 should preclude the Commission from bringing the current case.
- (128) The *Deutsche Telekom* judgement is a good illustration of why TP's arguments on the Commission's lack of competence are flawed. The Court of Justice established that even under the assumption that the regulator is obliged to consider whether the behaviour of the company concerned is compatible with Article 102 TFEU, the Commission would not be precluded from finding that the company was responsible for an infringement of Art. 102 TFEU.¹⁷⁴ The Regulator in Poland did not assess the compatibility of TP's behaviour with Art. 102 TFEU but even if it had done so "*the Commission cannot be bound by a decision taken by a national body pursuant to Art. 102 TFEU.*"¹⁷⁵
- (129) Furthermore, the above mentioned UOKiK proceedings are unrelated to the issues investigated by the Commission in the present case. UOKiK's investigation of TP's alleged practices infringing the collective interests of consumers was based on Art. 24 of the Polish Law on the protection of competition and consumers¹⁷⁶ and not on Art. 9, which is the equivalent of Art. 102 TFEU in the said Law. In addition to the narrower scope of UOKiK's investigation, covering only BSA provision to Netia and GTS, the fact that UOKiK closed the case at the investigation stage does not mean that there was no infringement. As was pointed out by the AG Mazak and confirmed by the ECJ judgement of 3 May 2011 in case C-375/09, "*while Regulation No 1/2003 empowers the NCAs to adopt 'positive' decisions on the merits, (...) [t]here is nothing in (...) Regulation No 1/2003 for that matter, that specifically confers on NCAs the competence to declare formally that there was no breach of Article 102 TFEU in an individual case. Rather, it is clear that an NCA may decide only 'that there are no grounds*

¹⁷⁰ General Court in Case T-271/03, *Deutsche Telekom*, paragraph 105. See also Court of Justice in Case C-280/08 *Deutsche Telekom*, paragraphs 80-96.

¹⁷¹ Court of Justice in Case C-280/08 *Deutsche Telekom*, paragraph 82.

¹⁷² See Chapter IX.

¹⁷³ Annex 01 and 02 to SO Reply.

¹⁷⁴ Court of Justice in Case C-280/08 *Deutsche Telekom*, paragraph 120.

¹⁷⁵ General Court in Case T-271/03, *Deutsche Telekom*, par. 120, Judgement of the Court of Justice of 14 December 2000 in Case C-344/98 *Masterfoods Ltd vs. HB Ice Cream Ltd* ("*Masterfoods*"), [2000] ECR I-11369, paragraph 48.

¹⁷⁶ Act of 16 February 2007 on the protection of competition and consumers, [in PL: *Ustawa o ochronie konkurencji i konsumentow*], Dz.U. 2007, No 50, pos. 331 with changes.

for action' on its part (...)."¹⁷⁷ Therefore, by the virtue of Article 5 of Regulation No 1/2003, the NCA cannot adopt the decision stating that the infringement of Art. 102 TFEU did not take place. The Court of Justice explained that "*a 'negative' decision on the merits would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, which is one of the objectives of the Regulation highlighted by recital 1 in its preamble, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law.*"¹⁷⁸

- (130) Thirdly, contrary to what TP argues, the Commission did not violate TP's rights of defence by not mentioning the Agreement in the SO. It should be noted that at the time of the SO's adoption (February 2010), it was too early to analyse whether the Agreement had an impact on TP's behaviour.¹⁷⁹ Furthermore, the Agreement contains only voluntary commitments.¹⁸⁰ The provisions contained therein do not constitute an enforceable resolution of the President of UKE and are not subject to execution in civil or administrative law proceedings. In addition, the Agreement is forward-looking.¹⁸¹ Certain commitments were not expected to be implemented immediately after the signature of the Agreement. For example, in the Agreement TP committed to provide AOs with IT applications allowing access to the General Information by 31 March 2010, which is 6 months following the signature of the Agreement. Lastly, the Commission notes that despite TP's claim on the fundamental importance of the Agreement, TP chose not to mention it to the Commission prior to receiving the SO.
- (131) Fourthly, TP is wrong to assume that there is no Union interest in the Commission's intervention. In line with the applicability of Art. 102 TFEU, the Commission took into consideration the Union interest. The NCA with whom the Commission was cooperating closely was not investing TP's practices of a refusal to supply. The Commission in its Guidelines on the enforcement priorities in applying Article 102 TFEU indicated that cases of a refusal to supply in the sense of Article 102 of the TFEU will be considered as an enforcement priority if specified conditions are met.¹⁸² It should also be recalled that in paragraph 293 of the SO, on the basis of the evidence stemming from UKE, the Commission pointed out that despite the regulation in place and the sanctions imposed by UKE, TP did not change its anticompetitive behaviour, which negatively affected the development of wholesale broadband services in Poland. "*The penalties,*

¹⁷⁷ Opinion of AG Mazak in Case C-375/09 *President of UOKiK v. Tele2*, paragraph 29, not published yet. See also judgment of the European Court of Justice of 3 May 2011 in Case C-375/09, *President of UOKiK v. Tele2*, paragraphs 22-23, not published yet.

¹⁷⁸ Judgment in Case C-375/09, *President of UOKiK v. Tele2*, paragraph 28.

¹⁷⁹ Still at the moment of the Commission's assessment of the market situation following the Agreement, that is between August and October 2010, because of the limited amount of time elapsed between the signature of the Agreement and the Commission's inquiry, there was a limited number of AOs that could respond to the Commission's questions. The Commission emphasised this in the letter of facts sent to TP on 28 January 2011, page 18, fn. 81.

¹⁸⁰ Art 18(3) of the Agreement.

¹⁸¹ TP itself in its SO Reply (paragraphs 48-55) describes the Agreement's effects as forward-looking.

¹⁸² See "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings*", Communication from the Commission C(2009) 864 final of 9 February 2009, OJ 2009/C 45/02. The conditions of a refusal to supply are: i) the refusal relates to a product or service which is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on that downstream market and (iii) the refusal is likely to lead to consumer harm.

although being part of sanctions for non-compliance with the decisions of the President of UKE, are not capable of enforcing a change in TP's anticompetitive behaviour and having a positive impact on the development of sales of the wholesale services. As described above, through the appeals and long-lasting court proceedings, these measures are not severe for TP that anticipates their costs in its business planning. Additionally, the profits from infringements and protection of economic interests potentially overrate the level and costs of sanctions."¹⁸³

- (132) In addition, TP's reference¹⁸⁴ to the Commission's decision case *BT/MCI I* does not disprove the Commission's need to intervene in the present case. In essence, TP claims that the Commission, by recognising the regulatory mechanisms in place, decided not to intervene in the said case. A careful reading of the decision reveals however that in its ex-ante merger analysis the Commission left the door open for future interventions should the existing rules prove insufficient. The Commission said in particular that "[t]he abovementioned regulatory constraints, together with the additional explanations provided by the parties, have permitted the Commission to conclude that it is not necessary for it to take any further action as of now, including requesting the parties to make appropriate undertakings to the effect that they will neither discriminate nor cross-subsidize. However, should this conclusion prove to be wrong in the future, the Commission will immediately apply the competition rules of the EC Treaty [emphasis added] (and if applicable those of EEA Agreement) as required."¹⁸⁵
- (133) Finally, by issuing the present Decision the Commission does not infringe the principle of legitimate expectations. It is clear from the well-established case-law and most recently from the *Deutsche Telekom* judgement (see recitals (126) to (128)) that sector-specific regulation does not exclude the application of competition law. What is more, it is clear from that case law that TP should have been aware that its behaviour might be assessed both from a regulatory and a competition law perspective by the different competent authorities.
- (134) For the reasons above, the Commission concludes that TP's arguments on the Commission's lack of competence are unfounded.

2. TP's arguments on the application of the "ne bis in idem" principle and findings of the Commission

- (135) TP claims in its SO Reply¹⁸⁶ that some of the competition concerns raised by the Commission in the SO have already been sanctioned or have been effectively dealt with under a procedure at the national level by UKE. According to TP, a separate fine by the Commission for the same facts would therefore violate the principle of *ne bis in idem*.
- (136) Pursuant to the principle of *ne bis in idem*, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset. As established by the ECJ judgement in the *Aalborg Portland*

¹⁸³ UKE market study of July 2009, page 88.

¹⁸⁴ SO Reply, paragraph 80.

¹⁸⁵ See the Commission's Decision of 27 July 1994; Case IV/34.857 - *BT-MCI*, O.J. L 223, 27.08.1994, page 36-55, paragraph 57.

¹⁸⁶ SO Reply, paragraphs 85-102.

case, the application of this principle is subject to the threefold condition of identity of facts, unity of offender and unity of the legal interest protected.¹⁸⁷

- (137) With regard to UKE decisions on which TP relies¹⁸⁸, the Commission considers that at least one of the three above mentioned cumulative conditions is not met, namely the unity of the legal interest protected.
- (138) As pointed out by the General Court in its *Deutsche Telekom* judgment NRAs "operate under national law which may, as regards telecommunications policy, have objectives which differ from those of Community competition law."¹⁸⁹ The procedure conducted and the penalty to be imposed by the Commission on the one hand and the Polish NRA on the other clearly pursue different ends. The aim of the first is to preserve undistorted competition within the European Union, whereas the aim of the second encompasses other objectives such as "development and use of modern telecommunications infrastructure", "maximum benefits for users in terms of choice, price and quality of telecommunications services" and "net neutrality"¹⁹⁰. In particular, while imposing access obligations the President of UKE has to ensure the balancing of the following broad criteria: "the interests of users of telecoms infrastructure", "promotion of modern telecommunication services", "public interest including protection of environment", "the integrity of network and interoperability of services" and "non-discriminatory access conditions."¹⁹¹ Hence, for example while imposing the first RBO in May 2006 President of UKE took into account the following factors: "non-discrimination principle", "minimum entry barriers", "financial attractiveness for new operators", "costs' neutrality for the incumbent", and "adequate technical and organizational solutions".¹⁹² It should also be noted that none of the decisions of UKE to which TP refers in support of its argument contain a reference to Article 102 TFEU. Indeed, UKE is not a competition authority but a regulatory authority. It has never intervened to enforce Article 102 TFEU.
- (139) It follows from the above that UKE's and the Commission's proceedings are not designed to "protect the same legal asset."¹⁹³
- (140) With regard to the Agreement of 22 October 2009 which, according to TP, would have "resolv[ed] all competition issues on the Polish wholesale Internet broadband access markets"¹⁹⁴ the Commission notes that the Agreement cannot be considered as relevant in the context of the application of the principle of *ne*

¹⁸⁷ Judgment of the Court of 7 January 2004 *Aalborg Portland A/S v. Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, paragraph 338.

¹⁸⁸ SO Reply, paragraphs 23-27 and 90.

¹⁸⁹ Judgment of the General Court of 10 April 2008 in Case T-271/03, *Deutsche Telekom*, ECR [2008] II-477, paragraph 113 and judgment of the Court of Justice of 14 October 2010 in case C-280/08 *Deutsche Telekom vs. Commission*, not published yet, paragraph 80-96.

¹⁹⁰ Art. 1(2) points 2, 4, 5 of TL.

¹⁹¹ Art. 28(1) point 1, 3, 5 and 7 of TL.

¹⁹² RBO Decision of UKE, 10 May 2006, page 18.

¹⁹³ See Judgment of the Court of 7 January 2004 *Aalborg Portland A/S v. Commission*, paragraph 338. The European Courts have repeatedly recognized that the preservation of undistorted competition within the EU represents a specific and distinct legal interest protected by the Commission in the context of the application of Articles 101 and 102 TFEU, see by analogy: General Court judgement of 9 July 2003 in case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, ECR [2003] II -2597, point 90 upheld by the judgment of 18 May 2006 of the European Court of Justice in case C-387/03.

¹⁹⁴ SO Reply, paragraph 91.

bis in idem. The Agreement only contains voluntary commitments¹⁹⁵ and therefore did not finally acquit TP with an infringement. Its provisions are forward-looking and their implementation goes beyond the infringement period established in the present case. It is also noted that the Agreement does not refer to Art. 102 TFEU.

- (141) Since one of the cumulative conditions is not satisfied, it should be concluded that the present case does not give rise to concurrent penalties in breach of the *ne bis in idem* principle.
- (142) Nevertheless, the Commission while setting the amount of fine (see recitals (919) - (920)), although is not under any legal obligation to do so, decided to take into account the penalties already imposed by UKE on TP via final decisions for infringements which partially overlap with facts described in the present Decision. The Commission identified two such decisions of UKE.¹⁹⁶

3. Conclusion

- (143) The Commission has competence to adopt the present Decision. The Court of Justice and the General Court of the European Union have consistently held that competition rules may apply where sector specific legislation exists. The legal basis for the Commission's intervention is not the same as the NRA's. UKE adopts its decisions on the basis of the Polish telecommunications law while the Decision is based on the Article 102 TFEU.
- (144) With regard to the *ne bis in idem* principle, it must be noted that UKE's regulatory decisions do not satisfy the condition of the "*identity of legal interest protected*" as they clearly pursue different ends. The aim of the Commission's investigation and the fine imposed is to preserve undistorted competition within the European Union, whereas UKE's proceedings, as explained above, pursue other objectives.
- (145) Nevertheless, the Commission, while setting the final amount of fine, decided to take into account the penalties imposed by the NRA for infringements which partially overlap with facts described in the present Decision.

¹⁹⁵ Art. 18(3) of the Agreement.

¹⁹⁶ These are the Decisions signalled by TP in the reply to the letter of facts, paragraphs 467-468:
(1) UKE's decision of 3 April 2007 (DKE-SSE-029-5/06(43)) imposing a fine of 1 000 000 PLN for not respecting the minimum standards of BSA offers in the draft contracts. The final judgement of the Court of Protection of Competition and Consumers of 26 June 2008 lowered the fine to 800 000 PLN (184 860 EUR). TP paid the fine on 6 August 2009. This penalty concerned only one of over 20 unreasonable conditions listed in the draft decision and contained in TP's BSA access contracts (namely the definition of 'service option').
(2) UKE's decision of 17 August 2007 (ORZ-WE-029-2/07(39)) imposing a fine of 33 000 000 PLN (8 260 946 EUR) for offering to AOs worse contractual conditions than foreseen in the LLU Reference Offer. The decision was confirmed by the final judgment of the Court of Appeal of 9 April 2010. TP paid the fine on 20 April 2010. This fine was imposed only for unreasonable conditions contained in version 14 of TP's LLU access contract while the Commission in the decision also indicated unreasonable conditions contained in TP's subsequent standard contracts. Information on the payment of penalties is available on the website of UKE: http://www.uke.gov.pl/uke/index.jsp?news_cat_id=392&news_id=3013&layout=1&page=text&plac=e=Lead01.

VIII. TP'S PROVISION OF WHOLESALE BROADBAND PRODUCTS

- (146) The evidence gathered in the Commission's investigation indicates that in many instances TP has hindered AOs from efficiently accessing the incumbent operator's network and using its wholesale broadband products. These numerous obstacles created by TP have delayed the development of the broadband market in Poland.
- (147) This chapter describes TP's pattern of abusive conduct vis-à-vis AOs at all stages of the process of accessing TP's wholesale products. It is structured in the following way:
- section 1 illustrates TP's strategy to limit competition,
 - section 2 describes problems encountered by AOs at the stage of negotiating contracts for a wholesale broadband product, including a description of TP's practice of presenting in its draft contract unreasonable conditions and TP's dilatory behaviour in the negotiations,
 - section 3 covers the AOs' difficulties to access TP's network,
 - section 4 refers to the difficulties AOs encountered at the stage of accessing subscriber lines,
 - finally, section 5 relates to the insufficient provision of complete and reliable information by TP.

1. TP's strategy to limit competition

- (148) The evidence gathered by the Commission during its investigation indicates that TP consciously planned and engaged in practices aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products.
- (149) The existence of such a market strategy is confirmed by contemporaneous documents of TP seized during the inspection at the incumbent's premises. These documents prove that, even before the introduction of the first RO, TP focused its efforts on creating impediments to the development of competition on relevant markets.
- (a) Already in 2003 TP conducted a project called "*Unbundling of the local loop*", headed by the CEO of TP, which aimed at "*the impediment of [alternative] operators' access to the local loop*" and at a "*maximal retention of TP's customers*".¹⁹⁷ The correspondence of October 2003 between Senior Executives of TP mentions as one of the achievements: "*the creation of the LLU process based on the [alternative] operators' maximal impediment in obtaining information on TP's network*".¹⁹⁸
- (b) In the same vein, another internal document lists: "*broadband Internet access and access to local loop (DSL/Unbundling local loop)*" as products of "*high risk of retail loss*" where, therefore, TP was planning to "*[l]imit wholesale offer for [those] products*".¹⁹⁹

¹⁹⁷ Inspection document, page 11.

¹⁹⁸ Idem, page 12.

¹⁹⁹ Inspection document, page 17.

- (c) TP's general approach to wholesale broadband services is outlined in TP's internal presentation from 15 April 2005. It indicates that *"TP's strategy is to minimize PKO [TP's Wholesale Division] sales to protect retail revenues."*²⁰⁰
- (d) From the same presentation it can be seen that, prior to the introduction of the first RBO in 2006, TP was interested in delaying the process of introducing the BSA product. The said presentation foresees to *"[l]aunch pilot project to delay implementation of regulatory [BSA] offer."*²⁰¹
- (150) As part of this strategy TP refused to comply with regulatory obligations. Evidence from UKE illustrates, *inter alia*, that until 2008 TP refused to prepare a draft RBO, although by means of it TP had a chance, in cooperation with the Regulator, to lay down fair network access conditions. UKE stated that *"[d]espite the coherency in legal stipulations and calls from the President of URTiP [later UKE], TP consistently refused to comply with the obligation to prepare a draft BSA reference offer and finally never prepared one."*²⁰² Instead, following the introduction of the RBO by UKE, TP decided to contest all regulatory decisions bringing them before Polish courts. To this end UKE stated: *"[t]he introduction of the BSA and LLU Reference Offers was hampered by TP as inter alia the incumbent did not discharge, among others, its duty to prepare the draft reference offer or proposed in the reference offers definitions and contractual clauses non-compliant with the Telecommunications Law and the SMP decision. TP brought before the court all decisions introducing the BSA and LLU ROs, although this did not result in removing any ROs from the legal order."*²⁰³
- (151) Although TP finally prepared a draft RBO in 2008, the draft *"was at the origin of a number of obstacles hampering the development of competition in the market and led to the lowering of competitiveness of the AOs interested in accessing TP's network, what was also pointed out several times during the proceedings by KIGeiT."*²⁰⁴
- (152) TP's market strategy vis-à-vis AOs is particularly clearly visible, as from 2005, when the detailed regulatory measures in the form of RUO were introduced. Evidence in the file illustrates that TP felt the growing competitive pressure from AOs and created a number of obstacles to stifle the AOs' access to wholesale broadband products.²⁰⁵ These impediments, present at each stage of accessing wholesale products, are described in detail in sections 2 to 5.
- (153) In view of TP's disregard of regulatory obligations UKE had to intervene on a number of cases and even sanctioned the incumbent.²⁰⁶ UKE stated in 2009 that despite the sanctions imposed, TP did not change its behaviour, which affected negatively the development of wholesale broadband services in Poland: *"The penalties, although being part of sanctions for non-compliance with the decisions of the President of UKE, are not capable of enforcing a change in TP's*

²⁰⁰ See page 4, internal TP's presentation of 15 April 2005. Original in English; emphasis in the original.

²⁰¹ *Idem*, page 10. Original in English.

²⁰² UKE's comments to the SO Reply of TP, page 1- 2.

²⁰³ *Idem*.

²⁰⁴ *Idem*, page 5.

²⁰⁵ In addition, as rightly pointed out by the President of the NRA, *"[w]hile implementing the inter-operator cooperation, TP does not take at all into account the fact that such cooperation is for TP the source of income (...)"* UKE's comments to the SO Reply of TP, page 49.

²⁰⁶ For fines imposed by UKE see recital (142).

anticompetitive behaviour and having a positive impact on the development of sales of the wholesale services. As described above, through the appeals and long-lasting court proceedings, these measures are not severe for TP that anticipates in advance their costs in its business planning."²⁰⁷

- (154) The Commission notes also in this respect that only when confronted with the possibility of functional separation in 2009, TP finally committed to respect the regulatory obligations in the Agreement TP signed with UKE on 22 October 2009.²⁰⁸ The content of the Agreement (see chapter IX), which foresees a series of measures to be undertaken by TP to enhance the market situation and guarantee equal and non-discriminatory access to its network by AOs, confirms the existence of problems which resulted from TP's market strategy.
- (155) A reference to TP's strategy can also be found in the statements of AOs. PTC, for instance, in its submission of 26 March 2009, summarised the situation on the market in the following way: *"In PTC's assessment, TP's strategy on the market of providing BSA and LLU services aims at limiting the development of the Alternative Operators' business as regards the provision of the broadband Internet access. In our view, the regulatory obligations imposed on TP should force this operator to act as if it functioned on the effectively competitive market. However TP, despite its regulatory obligations, has not treated and does not treat the Alternative Operators as wholesale customers, whose needs should be identified and met (...), but only as companies whose market impact should be limited. The strategy adopted by TP in relation to the Alternative Operators makes these operators to face a large number of problems in cooperation with TP, which relate to the ongoing cooperation, as well as strategic issues.*"²⁰⁹

Arguments of TP

- (156) In the SO Reply TP denied the existence of any strategy. By reference to the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty²¹⁰ TP purports that in the case at stake the Commission has no grounds for action as *"the Commission does not provide convincing evidence that would allow it to conclude that TP has put in place a strategy to foreclose its competitors."*²¹¹ TP also purported that *"TP has successively followed the recommendations of the Polish Regulator aiming at improvement the competitiveness of the Polish market for telecommunications and reacted as soon as it became aware of difficulties encountered by AOs, in order to ensure effective*

²⁰⁷ UKE market study of July 2009, page 88.

²⁰⁸ See *"reasons behind launching the preparations towards functional separations"*, UKE market study of July 2009, pages 5 – 7.

²⁰⁹ PTC's reply to RFI on 26 March 2009, page 4.

²¹⁰ SO Reply, paragraph 107-108. TP emphasis that according to the *"Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings"*, Commission will act *"on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anticompetitive foreclosure"* and that as regards the evidence of any exclusionary strategy, *"the Commission considers that "this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct."*

²¹¹ SO Reply, paragraph 111.

competition."²¹² During the Oral Hearing TP argued that it "*implemented and followed the strategy of wholesale services development.*"²¹³

- (157) In the reply to the letter of facts TP qualified the Commission's evidence on the strategy as "*fragmented and old.*"²¹⁴ TP also put into question the Commission's reference to the documents on the strategy, which predate the accession of Poland to the EU or the abuse period identified in the SO.²¹⁵ TP concluded that "*even if TP does not deny the existence of the problems in accessing its network and wholesale products, they took place mainly in 2006 and 2007*" the difficulties were often "*purely technical in its nature*" and TP undertook various measures to remedy the situation.²¹⁶
- (158) TP's contention regarding its market strategy is not convincing for a number of reasons. As a preliminary remark, it is noted that TP does not contest the obstacles the AOs were facing. Whether there is any objective justification for them is analysed in section X.4.5.
- (159) As regards TP's strategy, firstly, the Commission underlines that the reference to TP's plan to "*impede [alternative] operators' access to the local loop*", "*minimise PKO [TP's Wholesale Division] sales*" or "*delay the implementation of regulatory [BSA] offer*" referred to in recitals ((149)(a) to (d)) is confirmed by an ample evidence on obstacles actually created by TP (see sections 2 - 5 below). Such evidence is in line with the strategy contained in the internal documents of TP (see section 1) and can be seen as an illustration of the implementation phase of TP's strategy.
- (160) Secondly, TP misunderstood the Commission's Guidelines on the application of Art. 102 TFEU. In fact, the parts of Guidelines to which TP refers to in its SO Reply concern the type of evidence the Commission can use in order to identify the "*likely anti-competitive foreclosure.*" Amongst the evidence the Commission may decide to use for this purpose are *inter alia* the documents confirming the actual foreclosure or even direct evidence of exclusionary strategy of competitors. It is however not a condition *sine qua non* for the Commission to prove the existence of an abuse by demonstrating that a strategy to foreclose actually existed. Nevertheless, in the present case, in addition to the evidence of anticompetitive practices presented in sections 2 - 5 below the Commission uses the evidence on TP's strategy in order to interpret the dominant undertaking's conduct. This is fully in line with the Guidelines.²¹⁷
- (161) Thirdly, the reference to two internal TP's documents from 2003, predating the accession of Poland to the EU does not extend the period of the abuse. The fact that the Commission does not have the power to establish an infringement for the period before 1 May 2004 does not necessarily mean that it cannot use evidence from that period. Evidence from the period before 1 May 2004 can still be included in a decision when relevant for proving an infringement in the period

²¹² Idem, paragraph 113.

²¹³ TP's presentation at the oral hearing, pages 25-26.

²¹⁴ TP's reply to the letter of facts, paragraph 8.

²¹⁵ Idem, paragraphs 8 – 11.

²¹⁶ Idem, paragraphs 12 and 25.

²¹⁷ See paragraph 20, 6th tiret, last sentence of the "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings*", Communication from the Commission C(2009) 864 final of 9 February 2009, OJ 2009/C 45/02.

after 1 May 2004. In case *Bank Austria Creditanstalt*²¹⁸ the CFI held that "*the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement. It is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct in issue.*" In this case the pre-accession documents are relevant for assessing the compatibility of TP's post-accession conduct with Art. 102 TFEU in full knowledge of the facts and their context.

- (162) In the case at stake, it is essential to show TP's approach to the implementation of up-coming regulatory obligations. It is worth mentioning here that Poland started to adapt its legislation to *acquis communautaire* since 1 February 1994 and that on 1 October 2003 TP was identified as an SMP operator providing services of an access to the fixed public network and was required to grant access to its local access network at LLU and BSA level.²¹⁹ Noticeably the internal memo on the strategy to impede AOs access to LLU comes as of October 2003, therefore from the period when strategic decisions on the measures indispensable to comply (or not to comply) with regulatory obligations had to be taken.
- (163) In addition, the Commission has documents proving that such strategy, established already in the pre-accession period, continued post-accession (see recitals (149) (c) - (d)).
- (164) Finally, TP's argument that "*TP has successively followed the recommendations of the Polish Regulator to improve the competitiveness of the Polish telecommunications market and reacted as soon as it became aware of difficulties*"²²⁰ is flawed. The evidence from UKE referred to in recitals (150)-(153) shows that TP based its relation with the Regulator on the denial of TP's obligations stemming from the Telecommunications Law or the SMP decisions and questioned the NRA's decisions in the courts. In addition, as explained in recital (154) only in October 2009 did TP commit itself to respect the law and change a number of abusive practices the AOs had been facing for years.

2. Negotiations of contracts for a wholesale broadband product

2.1 TP's practice of presenting unreasonable conditions in its draft contracts

- (165) Following a request of an AO for concluding a contract for access to the wholesale broadband services, TP should present it with a draft access or collocation contract, which will constitute a basis for negotiations. Such a contract should contain, at least, minimum standards contained in the binding RO and TP should follow the rules and obligations of the Polish Telecommunications Law.²²¹

²¹⁸ T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraph 89.

²¹⁹ See recital (69).

²²⁰ SO Reply, paragraph 113.

²²¹ Art. 26 (1) of the Polish TL: "*Telecommunications undertakings, while negotiating the provisions of a telecommunications access contract, shall take account of obligations imposed on them.*", and Art. 43 (6) of the Polish TL: "*The operator, who is under obligation referred to in Article 42 par. 1 [SMP obligation] is obliged to conclude contracts for telecommunications access on terms no worse for the other contracting parties than those specified in the approved offer (...)*".

- (166) A number of AOs stated in their replies to the Commission's RFIs, that in practice TP's draft contracts contained disadvantageous conditions or lacked certain necessary stipulations. In its submissions of 20 January 2009 and 4 November 2010, TP itself listed discrepancies between its draft contracts and the ROs.²²² In fact, TP's draft contracts, despite several modifications, did not even meet the conditions set in the ROs and contained provisions which were disadvantageous to the AOs.
- (167) The Commission's analysis of such contractual proposals, presented in detail below, reveals a significant number of unreasonable conditions that TP tried to impose in the negotiations of access and collocation contracts, which did not even meet the minimum conditions set in the ROs. Some of these proposals were enforced by TP and included in the signed contracts.
- (168) At the outset of this section it is important to note that TP could have used as a basis for negotiations the sample access and collocation contracts which, in order to facilitate negotiations, were attached to the ROs as of 2006 for LLU and as of 2008 for BSA.²²³ TP, however, did not use these sample contracts for negotiations and even refused to accept such a contract when an AO, following the impasse in negotiations, proposed it as an alternative to TP's standard contract (see recitals (337) - (338) and footnote 522).²²⁴ The Commission notes that this practice is in line with TP's market strategy to limit competition (see section VIII.1). To this end, it is also worth remarking that although TP argued that it was unable to use such sample contracts prepared by the NRA because of a need to specify a number of details in the bilateral contracts, TP finally agreed to use them as of October 2009 following the Agreement with UKE.
- (169) The remainder of this section is structured as follows: subsections 2.1.1 and 2.1.2 outline examples of unreasonable contractual conditions related to BSA and LLU respectively as well as specific arguments TP made in the SO Reply and to the letter of facts. Subsection 2.1.3 presents TP's horizontal arguments and the Commission's counter arguments. Finally, subsection 2.1.4 concludes on the facts.

2.1.1. Conditions related to BSA

- (170) The Commission has grouped the identified unreasonable conditions related to standard BSA contracts in the following way:
- (a) exclusion of contractual clauses to the detriment of AOs,
 - (b) modification of contractual clauses to the detriment of AOs,
 - (c) extension of deadlines to the detriment of AOs.

(a) Exclusion of contractual clauses to the detriment of AOs

- (171) TP excluded from its standard BSA contracts a number of contractual clauses to the disadvantage of AOs. They concern: the definition of 'registration', the provision of an IT interface, inspections, the provision on the assumed positive

²²² See footnote 436.

²²³ The first samples of draft contracts were included in the RBO of 6 May 2008 and the RUO of 5 October 2006.

²²⁴ Inspection document, page 6.

reply, the exclusion of the provision of service on non-active lines and on lines on which TP stopped providing PSTN services, and the clause on the usage of PNNI interface.

Definition of 'Registration'

- (172) Under the RBO²²⁵ “*registration*” meant the first action carried out by a subscriber, within 14 days after the service installation, aimed at confirming that the service was working properly (i.e. that the speed of the maximum data transmission is correct). Such registration implied establishing the first connection to Internet by a subscriber and therefore checking the possibility of using the service ordered. In addition, the RBO stipulated that an AO has the right to withdraw its order within 30 days from the registration. A number of AOs - Telefonía Dialog, Tele2 and Polkomtel - drew the Commission's attention to the removal of the notion of “*registration*” from TP's standard and concluded contracts, which shortened the time at the disposal of the AO to withdraw from the BSA service on a particular subscriber line and which influenced the day from which a subscriber is charged for the service. TP's exclusion of the definition of registration from the standard contracts allowed an AO to withdraw its order only within 30 days from the date when an order had been implemented, thus shortening by 14 days the available time for withdrawal of the order.²²⁶
- (173) Moreover, the RBO identified the date of registration as the date from which a subscriber was charged for the services. TP again adjusted the provisions of the standard contracts so that charging started from the day the AO's order for a subscriber line was implemented. This in practice meant that a subscriber could be charged even 14 days earlier than it was foreseen under the RBO. In Polkomtel's view, this “*the lack of this stipulation can have a negative impact on activating services on particular subscriber lines. Fees would be charged without the confirmation of the proper working of the line.*”²²⁷ Tele2 stated that removing customers' registration caused “*many problems in the implementation of BSA services for a subscriber and discrepancies in the duration of a retail and wholesale contract.*”²²⁸
- (174) TP raises²²⁹ that the definition of “*registration*” in the 2006 RBOs improperly identified TP's obligations as it would require TP to be involved in the process of providing retail services to AOs' end users. Furthermore, TP points out that in the 2008 RBOs UKE modified the definition of “*registration*” and maintained it only at the IP level, because only on that level TP is responsible for the process of a subscriber's registration. This allegedly proves that TP's removal of that definition was justified.
- (175) The Commission cannot accept the above arguments of TP. The mechanism of registration was included in the 2006 RBO and was adjusted later only to adapt it

²²⁵ See part 1.1 of the RBOs.

²²⁶ Telefonía Dialog's submission on 9 October 2009, page 8; “*The lack of the definition of registration means that the 30-day period counted from the date of activation significantly shortens the time for verification of technical parameters of the service and the available time for withdrawal of the order*”. See also Polkomtel's answer to RFI on 17 March 2009, page 6 and Tele2's reply to RFI on 20 March 2009, page 7.

²²⁷ Polkomtel reply to RFI on 17 March 2009, page 6.

²²⁸ Tele2 reply to RFI on 2 April 2009, page 13.

²²⁹ SO Reply, paragraphs 136-139.

to market developments.²³⁰ UKE confirmed to the Commission that while establishing the mechanism of registration it had to reconcile the interests of three parties: TP, an AO and a subscriber. From this perspective, giving a subscriber 14 days to register is a compromise solution as it gave more time to the AO to inform its subscribers about the service installation, to check whether the service worked properly and if not take a decision on the withdrawal of the BSA service on particular subscriber lines and which avoided a situation where a subscriber paid for the service before actually using it²³¹ (see also recitals (286)-(290)). In addition, the 2008 RBO kept the definition of registration only at the IP level, but it also kept, for the other access levels, the provision of the 2006 RBO, that gave AOs 14 days to inform their customers on the activation of the services, check whether the services work properly on the subscriber lines and if not take a decision on the withdrawal of the BSA service on a particular subscriber line. New stipulations, although not called registration, maintained the same meaning.²³²

Provision of IT interface

- (176) Within 6 months after the first RBO entered into force, that is, by November 2006, TP was obliged to provide AOs with an IT interface giving *inter alia* access to the General Information needed for assessing their business opportunities on the broadband retail market. This tool, of critical importance for AOs, should also allow AOs' to prepare forecasts, submit motions and calculate fees.²³³ In version 9 of its standard contract, TP excluded the provisions on the IT interface. In the next version (15) TP inserted provisions on the possibility for an AO to request access to a sample IT interface by 30 June 2007, and then to access the IT interface under the condition that the AO submits a relevant application within a specific deadline. TP inserted the provisions enabling AOs to request directly the IT interface only in version 21 of its standard contract on 2 July 2007 (see table Table 1. RBOs and TP's standard contracts).²³⁴

²³⁰ UKE explained that in 2008 there was no longer a necessity to keep that definition in the RBO as the registration was transferred to the level of unmanaged IP, where TP has to provide the service to a subscriber. See UKE's comments to TP's reply, page 12: "*the definition of the registration in that scope in the RBO 2008 was unnecessary as it was dedicated to the IP unmanaged level (...) on which TP is responsible for all technical services for BSA.*"

²³¹ UKE's comments to TP's reply, page 11: "*In view of the President of UKE the solution [the registration] introduced to the Offer is correct as it takes account of the necessity of arrangements conducted by three independent parties such as TP, a Benefiting Operator [AO] and a subscriber. In that situation the period of 14 days for carrying out the registration by the AO's subscriber is in the President's view a compromise solution.*" So, the registration mechanism allowed AOs to inform their subscribers about the implementation of the order and allowed for make all the arrangements before the activation the service and the payment is made.

²³² See section of 4.1 point 19 and 21 of the RBO of 4/11/2008: "*a day of starting the provision of the service it is assumed the date following 14 days of the date of the service installation (...) The charge for the service activation for a subscriber line and a subscriber fee for the provision of the service are charged since the beginning of the service provision.*"

²³³ See section 3.1.1.1 point 1 of RBO of 10 May 2006 and section 3.1.1.1 point 1 of RBO of 4 October 2006; "*Within a period of 6 months after the RBO entered into force, TP shall provide the Benefiting Operators [AO] with access to the IT system interface, enabling access to databases with information provided for under the GI and ensuring correct and effective motion and order submission related to the Service, fee calculation and assessing the possibility to provide the Subscriber Service in the given premises.*"

²³⁴ TP's answer to RFI on 5 March 2009, pages 4-5.

- (177) In this regard, PTC noted that in the contract concluded with TP on 22 May 2007 there were general provisions as regards the future functioning of an IT interface (without however indicating a date for its launching), and emphasised that *"the lack of access to an interface to TP's IT system is a crucial obstacle for providing retail services by an Benefiting Operator [AO], in particular in developing the sale activities on the mass market. PTC has agreed and implemented with TP a Model of Data Exchange which enables the most primitive communication (via e-mails) throughout the process of implementation of an order for a subscriber line, maintenance of subscriber lines (as for breakdowns or breaks) or resignation from subscriber lines."*²³⁵ TP argues that PTC intentionally signed the contract without the stipulations on the IT interface because the parties intended to discuss the issue later.²³⁶ This is not confirmed by the evidence, which shows that the AO was interested in using the functionality of the IT interface and TP refused to introduce it in the contract²³⁷ justifying it by the lack of the system in place.²³⁸ Subsequently, when PTC requested access to the IT interface on 31 October 2008²³⁹ TP rejected it due to the fact that there were no provisions on IT interface in the signed access contract.²⁴⁰ TP itself admits in the SO Reply (paragraph 164) that instead of providing the IT interface it proposed to AOs the Model of Exchange Information and a sample interface, which did not meet the requirements of the RBO.
- (178) TP's assertion²⁴¹ that it activated the IT interface in accordance with the RBO's requirements²⁴² is incorrect. While in the SO Reply TP does not state exactly when it launched the interface which met all the requirements of the RBO, it is evident from other evidence in the file²⁴³ that TP did not meet the deadline of 6 months which the RBO set for the activation of the IT interface (i.e. November

²³⁵ PTC's answer to RFI on 26 March 2009, pages 6-7.

²³⁶ SO Reply, paragraph 166.

²³⁷ PTC's minutes of 19 October 2006, pages 2-3.

²³⁸ TP stated that this provision will be added after its implementation by an annex to the signed contract (PTC's minutes of 19 October 2006, page 2-3). Subsequently, after signing the contract PTC asked TP whether it would provide the IT interface and in what functionality, but TP responded negatively and informed PTC that it use a Model of Exchange of Information instead (PTC's minutes of 11 March 2008, page 9-10).

²³⁹ PTC's motion for accessing the IT interface, pages 1-2.

²⁴⁰ TP's email sent to PTC on accessing the IT interface, page 1.

²⁴¹ SO Reply, paragraphs 161-166.

²⁴² Idem, paragraphs. 163, page 32.

²⁴³ Based on the information from UKE's decision of 17 July 2007, TP activated the IT interface for BSA services to its systems on 19 November 2006. It is not however clear to what extent that IT interface was a complete version and met all requirements identified in the RBO. During the negotiation meeting with PTC on 19 October 2006, TP mentioned testing a new version of the IT system which it would "probably" implement in half a year (minutes of 19 October 2006, page 1). In addition, after almost 2 years PTC asked about the deadline for implementing the IT system and its functionality. TP merely informed PTC that the actual system is the Model of Data Exchange (minutes of 11 March 2008, page 1). Subsequently, PTC asked TP on 3 February 2009 whether it would provide the interface to its IT system and if so, what its functionality was. TP clearly responded that it did not provide the interface and for all AOs it provided the GI at its website (PTC's minutes of 3 February 2009, page 23). TP actually proposed a kind of source of information for BSA services in 2006 on its website. That was not an interface as it did not allow for functionalities as such as process motions and orders (TP's reply to the RFI of 16 February 2009, reply to Q.45, p.135-136). Additionally, TP, for the purpose of submitting and process orders, prepared the Model of Data Exchange based on e-mail communications and FTPs. However, that communication channel was not a substitute for the IT interface, only a poorer replacement (PTC's minutes of 3 February 2009, page 9-10 and 23).

2006). In fact, TP was aware of this obligation much earlier and had more than 6 months to prepare a fully functional IT interface. UKE noted that "*TP should have been aware about its obligation of the provision of the IT system since at least 29 April 2004 when a regulation on conditions related to accessing the LLU was issued.*"²⁴⁴ Also in this regard, the fact that TP gave access to a sample interface as of 25 January 2007 in the standard contract, version 15 was not an extra offer from TP, as it was provided with delay and it was not a fully operational tool what is confirmed by TP's internal documents: "*the functionality [of the interface for BSA] was delivered in limited (insufficient for operators) scope.*"²⁴⁵

- (179) The example of PTC and those of other AOs²⁴⁶ contradict TP's general allegation that AOs were not interested in the IT interface.²⁴⁷ Also, the fact that at present 8 AOs have access to the interface²⁴⁸ proves its usefulness. It is also not excluded that initially AOs were discouraged from using the IT interface because of its poor quality and limited functionality.²⁴⁹

Inspections

- (180) The RBOs of 2006 require TP to submit to an inspection by an AO in case TP refuses orders for accessing TP's network or orders for the activation of subscriber lines because of lack of technical possibilities and the danger for the network's integrity.²⁵⁰ However, in its standard contracts, TP excluded that possibility. Telefonía Dialog, E-Telko, Supermedia, Tele2 and Polkomtel found these provisions to be essential for AOs in order to assess and verify the reasons of TP's technical refusal.²⁵¹ Telefonía Dialog pointed out in this context "*an additional hindrance, for the verification of the reasons for TP's refusals.*"²⁵²
- (181) In this respect, Polkomtel clearly indicated that "*TP has not agreed to insert (...) the Reference Offer provisions defining rules for conducting the so-called inspection which enables to examine the quality and technical standard of the services provided by TP to Polkomtel.*"²⁵³ In the same vein, GTS stated that this

²⁴⁴ UKE's comments to the SO Reply, page 14.

²⁴⁵ Internal presentation of TP of 17 August 2007, page 13; also internal presentation of 23 August 2007, page 19.

²⁴⁶ Several AOs (Netia, Tele2, PTC, Polkomtel, e-TOP, Premium Internet S.A., Media-Com Sp. z o.o., Media Tel S.A., Mikrotel Sp. z o.o.) were interested in accessing to the interface as they submitted the relevant motions; see TP's reply to RFI of 16 February 2009, Answer to Q.45, page 135-136.

²⁴⁷ SO Reply, page 32 and TP's reply to RFI of 16 February 2009, Answer to Q.45, pages 135-136.

²⁴⁸ SO Reply, paragraph 964, page 227.

²⁴⁹ See also recitals (531) - (534).

²⁵⁰ See section 3.1.3 of the RBO of 10 May 2006 and 4 October 2006. In case TP replies negatively to motions or orders submitted by an AO referring to the lack of technical possibilities or a danger to TP's network integrity, an AO may submit a separate motion to conduct within 7 days an inspection with the aim of verifying the reasons for the refusal. TP must present the inspection conditions within 2 days after an AO submits the motion. The inspection actions are put into the report and an AO pays for the inspection based on the price list. This is the only solution provided by the Reference Offer for an AO to check the real conditions which exist in TP's network if it assumes that TP's refusal is unfounded.

²⁵¹ Telefonía Dialog's reply to RFI on 9 October 2009, page 7; E-Telko's reply to RFI on 13 March 2009, page 2; Supermedia's reply to RFI on 16 March 2009, page 6; Tele2's reply to RFI on 20 March 2009, page 8; Polkomtel's submission to RFI on 17 March 2009, page 5.

²⁵² Telefonía Dialog answer to RFI on 9 October 2009, page 7.

²⁵³ Polkomtel's submission to RFI on 17 March 2009, page 5.

created a situation in which an AO did not have "a possibility to verify technically TP's responses in questionable, adverse or unclear cases."²⁵⁴ In Tele2's view, this "revoked in practice the possibility to examine whether TP's information or actions are based on facts."²⁵⁵ As a result of UKE's intervention,²⁵⁶ the inspection provisions were inserted into the contract concluded between TP and Tele2. Tele2 used the possibility several times – yet in one case TP refused to accept Tele2's inspection request.²⁵⁷ Despite the RBO's provisions, AOs were also deprived of the possibility to conduct an inspection in case they suspected that they had received the access to broadband services on worse technical conditions than TP's retail arm.

- (182) TP argues²⁵⁸ that the exclusion of those provisions was based on certain security reasons and the necessity to protect TP's business secrets (AOs could obtain confidential information about TP's equipment and the number and the scope of TP's services). In addition, special knowledge was needed in order to conduct properly such an inspection and none of the AOs possessed it. Furthermore, TP claims that conducting the inspection was a too far-reaching obligation imposed on it which did not take into account its negative effects. This is allegedly confirmed by further modifications of the RBOs in 2008 where UKE accepted TP's arguments that an inspection is a burdensome obligation which does not lead to the intended effects and which entails a risk of revealing TP's business secrets. UKE would also have found that the remaining mechanisms in the new RBO were sufficient to protect AO's interest. The limited usefulness of the inspection was confirmed as well by Tele2's example as all inspections conducted by Tele2 confirmed the legitimacy of TP's refusals. In addition, TP stated that once it refused that Tele2 conducts an inspection due to the fact that there were no possibilities in DSLAMs.
- (183) The Commission does not find TP's arguments cogent. Firstly, the inspection obligation imposed by the 2006 RBOs was considered reasonable and necessary to ensure that TP would not reject orders on a big scale. As UKE informed the Commission "TP did not claim that this requirement should be removed from the BSA Offer. In the view of the President of UKE this rule did not impose heavy duties on TP and did not bear any danger for TP's interests."²⁵⁹ Therefore, TP, bound by this obligation, should have included that mechanism in its relations with AOs. Secondly, the question of a potential disclosure of TP's secrets during an AO's inspection was subject to a reasoned opinion of UKE in PTC's decision of 30 July 2007. In a similar situation, the NRA underlined that "(...) the possibility to conduct an inspection by PTC is a very important element of inter-operator cooperation for providing the Access to local subscriber loop service. The provisions of Art. 11 of the draft decision are in line with the 2006 RUO [LLU Offer]. The inspection conducted by PTC is to verify the reasons for TP's negative responses to an AO's request or order and to check whether the conditions under which TP provides its Access to local subscriber loop service to

²⁵⁴ GTS's answer to RFI on 18 March 2009, page 3.

²⁵⁵ Tele2's answer to RFI on 2 April 2009, page 14, "In practice, the lack of inspections revoked Tele2's possibility to examine whether TP's information or actions are based on facts. After the introduction of the inspection in the contract, Tele2 used the possibility of such verification a few times– and in one case TP refused to give its consent to an inspection".

²⁵⁶ NRA's Decision No DRTH-WWM-60600-31/07 (22) of 8 August 2007.

²⁵⁷ Tele2's answer to RFI on 2 April 2009, page 14.

²⁵⁸ SO Reply, paragraphs 209-214.

²⁵⁹ UKE's comments to TP's SO Reply, page 20, last indent.

AOs are not worse, in terms of its availability and quality of the services provided to its Subscribers. Contrary to what TP indicated in its opinion during the consultation process, it is the opinion of UKE that such actions would not require AOs to access all information systems and equipment, which would involve the disclosure of TP's business secrets."²⁶⁰ Thirdly, it is not factually correct to state that UKE recognised TP's arguments and removed the notion of inspection in the 2008 RBOs. The inspection obligation was actually removed as the 2008 RBOs introduced new rules for submitting orders and did not give TP the right to refuse an order due to the lack of technical possibilities. Therefore, the inspection initially introduced to check TP's reasons for refusing the order for a subscriber line was not needed anymore.²⁶¹ In this regard, Tele2's examples confirm the usefulness of that mechanism. Furthermore, TP's argument concerning the rejection of one of Tele2's motions for inspection is also not plausible as TP did not have the right to refuse a request for inspection.²⁶² Finally, TP's arguments on the AO's lack of special knowledge are not forceful as TP should not require from AOs any specific knowledge about its network.

Assumed positive reply

- (184) The RBO of 6 May 2006 stipulated that TP must verify the technical possibilities of modifying a service option within 5 working days.²⁶³ TP's lack of reply meant that the technical verification was assumed to be positive. However, TP, in version 9 of its standard BSA agreement²⁶⁴, while proposing to shorten the deadline to 3 working days, removed the provision of an assumed approval in case of lack of response.²⁶⁵ This gave TP the possibility to reject the modification on technical grounds after that deadline, to the detriment of the AO.
- (185) TP confirmed²⁶⁶ that it excluded the provision on the assumed positive reply from version 9 of the standard contract but remarked that in the subsequent contract versions it reinserted the provision in line with the RBO. TP added that although it removed the provision from version 9 of the standard contract the signed contracts with [AO, AO, AO and AO], which concluded their contracts based on version 9, contained that provision. Additionally, TP argues that [AO] received even better conditions foreseeing 3 days for TP's response (instead of 5 days) and the provision on the assumed positive reply. In [AO's] contract, TP included the deadline of 5 days for both negative and positive replies). Finally, TP alleges that the Commission did not identify what damage AOs could suffer as a result of the removal of the assumed positive reply in case of a lack of TP's response within the deadline. In this regard, TP notes that the assumed positive reply did not guarantee AOs that the order would be actually implemented.

²⁶⁰ SO Reply, Annex 16, UKE's Decision for PTC, page 249. Also the similarly UKE justified the modification of Decision of 12 October 2007 for Tele2: see SO Reply, Annex 12 to SO Reply, page 78.

²⁶¹ UKE's comments to TP's SO Reply, page 21.

²⁶² See section 3.1.3, point 1 of the RBO of 10 May 2006 and of 4 October 2006.

²⁶³ See section 3.1.2.4 point 3 of the RBO of 10 May 2006.

²⁶⁴ See Art. 11(4) of TP's standard contract, v. 9.

²⁶⁵ Telefonía Dialog's reply to RFI on 13 March 2009, page 20 and Telefonía Dialog's submission on 9 October 2009, page 8: "*No provision of an assumed approval of the order in case of no response of TP*".

²⁶⁶ SO Reply, paragraphs 192-195.

- (186) TP's arguments cannot be accepted for a number of reasons. Firstly, the provision of the assumed TP's positive reply gave AOs the certainty that the order would be processed positively. The RBO clearly stipulates that "*If[i]n case TP does not reply within the deadline, it is considered as an acceptance of the order.*"²⁶⁷ Thus, the aim of that provision was to avoid the situation where TP does not respond to AOs requests and avoids the implementation of AOs' orders in due time. It was an essential provision for AOs especially in relations with their clients. The presumption of TP's approval after 5 days gave AOs the certainty of a fast implementation of the modification of the service option for their clients who wished to upgrade the capacity of their access to the Internet. Therefore, the exclusion of that stipulation could have influenced AO's image towards their clients since AOs had to wait for TP's approval longer than the RBO stipulated. UKE in its opinion on SO Reply underlined that "*the rule was introduced in order to ensure a timely and consequently faster implementation of orders. Withdrawal of this rule could have resulted in obstructions on the part of TP in the implementation of orders, even though a failure to meet deadlines entailed contractual penalties.*"²⁶⁸ Additionally, if TP did not respond in due time, an AO would have a legitimate right to assume TP's positive response and to inform its clients about the approval of a modified service option. If a few days later it turned out that TP actually rejected the modification due to the lack of technical possibilities the AO would be put in a difficult position towards its clients. Finally, the Commission notes that the objection concerning the lack of the assumed positive reply relates to version 9 of TP's standard contract and proves that TP tried to disadvantage AO's position already at the beginning of the negotiations. This does not exclude the fact that some AOs (such as [AO and AO]) managed to convince TP to introduce the missing clause.²⁶⁹

Exclusion of the provision of service on non-active lines and on lines on which TP stopped providing PSTN services

- (187) The RBO of 4 October 2006 stipulated that BSA should be provided on active and non-active subscriber lines. However, TP, until 2 July 2007, in its standard contracts, excluded the possibility to provide BSA on non-active lines. Polkomtel indicated that due to this limitation "*it did not have access to the part of the market, which essentially decreased the attractiveness of launching commercial activities based on the contract.*"²⁷⁰
- (188) Similarly, during the negotiations with Netia, TP proposed an additional limitation concerning the supply of BSA services, consisting in a provision giving TP the right to cease providing BSA services on a subscriber line if TP stopped providing PSTN services on that particular line. In this case, TP wouldn't be obliged to justify the reasons for the termination of the service to an AO. Netia found that "*the stipulation introduced into the contract counter to the Reference Offer unjustifiably limits Netia's possibility to provide retail Internet broadband access if TP stops to provide wholesale or retail services on the given subscriber line. (...) the fact that TP ceased providing the service should not automatically lead to the necessity of Netia ceasing providing the service.*"²⁷¹ MNI also

²⁶⁷ RBO of 10 May 2006, section 3.1.2.4 point 3, sentence 2.

²⁶⁸ UKE's comments to the SO Reply, page 19.

²⁶⁹ See also recitals (280) and (281).

²⁷⁰ Polkomtel's answer to RFI on 17 March 2009, page 5.

²⁷¹ Netia's submission on 20 March 2009 to RFI, pages 3-4.

indicated that this stipulation prevented an AO from providing BSA services on WLR's lines.²⁷²

- (189) As regards the non-active lines TP argues that UKE imposed that obligation too early on TP.²⁷³ TP essentially claims that it had no technical capacity to activate the BSA service on non-active lines in the time stipulated in the RBO of 4 October 2006 but undertook the necessary actions to adjust its IT systems and service processes and started providing BSA service on non-active lines from October 2007. Subsequently, TP alleges that it was objectively justified to stop providing PSTN services due to the lack of appropriate functionality in TP's systems between October 2006 and October 2007 (a subscriber was non-active in voice services so TP could not register the subscriber and proceed with the order for that subscriber).²⁷⁴ Since the RBO of October 2006 TP started to prepare appropriate functionality in its systems. TP adds that since October 2007 TP did not switch off the service after having resolved the contract with PSTN customers and included the process of naked BSA²⁷⁵ into "The Model of Data Exchange" agreed with operators in 2007.
- (190) As a general remark, the Commission recalls that TP refused to provide the service on non-active lines and on lines on which TP stopped providing PSTN services despite the clear obligation of the 2006 RBO to do it. UKE, in its comments to TP's SO Reply, informed that already in 2006 it received signals from KIGeIT and PIIT (Polish Chamber of Information Technology and Telecommunications) that TP did not want to provide the service on non-active lines. UKE explained that TP's argument on the lack of technical capacity was not plausible "*due to the fact that TP was implementing orders on non-active lines within its own network*". UKE added that "*there are no recognised technical obstacles, which would lead to the necessity to stop providing the service by TP (...)the technical problems in launching the BSA service on a non-active line due to, for instance, the implemентаiton of appropriate system functionalities in its integrated environment for the processing of orders.*"²⁷⁶ In addition, the Commission also notes that UKE introduced *ex officio* numerous access contracts including TP's obligation to provide BSA service on non-active lines and on lines on which TP stopped providing PSTN services (decisions of 31 July 2007 for Netia, eTel, Intertele, Tele2, GTS Energis, Exatel, E-Telko; decisions of 11 July 2008 for PTC, Polkomtel, Vectra, MNI, Długie Rozmowy).²⁷⁷ Finally, TP stated that it started providing the service on non-active lines from October 2007 and did

²⁷² MNI's submission on 18 March 2009 to RFI, page 10.

²⁷³ SO Reply, paragraphs 196-198.

²⁷⁴ Idem, paragraphs 199-202.

²⁷⁵ Naked BSA means a service when only Internet services are provided on the given subscriber line with the fee for line maintenance if the subscriber does not use voice services.

²⁷⁶ UKE comments to SO Reply of TP, pages 19-20. TP simply raised the issues of the lack of the legal ground to provide that service, presenting additional obstacles caused by the lack of detailed provisions in the RBO on that service, practical untenable problems to provide that service or proposing the higher level of a fee for that service (see e.g. decision for Netia of 31 July 2007, page 5 published on UKE's website: <http://www.bip.uke.gov.pl/gallery/44/05/4405.pdf> and decisions issued by UKE for PTC, Polkomtel, Vectra and MNI on 11 February 2008, page 6, published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=70&layout=1&offset=60&count=30.

²⁷⁷ See UKE decisions of 31 July 2007 published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=59&layout=1&offset=30&count=30

not terminate the BSA service on lines on which TP stopped providing PSTN services from October 2007 but it only did so for the operators which had appropriate provisions in their bilateral contracts. This does not mean that from October 2007 all AOs were treated in the same way as still in February 2008 UKE had to modify some bilateral contracts.²⁷⁸

Usage of the PNNI interface

- (191) The RBOs of 2006 provided for a possibility to use either a PNNI²⁷⁹ or a UNI²⁸⁰ interface in ATM technology in a SAN used to access BSA services. However, in its first draft contract TP limited the use of the interface to UNI only. GTS pointed out that in this manner TP limited *"possibility to create services in the given geographic area and created a strong dependance on the architecture of TP's network. As a result, [there was] less effective usage of the network and impediments in reaching the national coverage, in accessing all local subscriber loops."*²⁸¹ Also Długie Rozmowy noted that TP introduced *"limited possibilities/capacities of VC²⁸² for a Regional SAN."*²⁸³
- (192) TP argues²⁸⁴ that the usage of the PNNI interface would have endangered the integrity of TP's network and as a consequence would have had an impact on providing other telecommunication services.²⁸⁵ In order to substantiate its claim, TP presents a test of its R&D Centre. TP also draws the attention to the fact that in the subsequent RBO of 2008, UKE, taking into account TP's arguments, replaced the PNNI interface with the AINI interface.²⁸⁶ Furthermore, TP states that the usage of the PNNI interface was impossible in practice as it could overload more STM-interfaces than in case of the usage of the UNI interface. TP also adds that the usage of the UNI interface did not create additional costs on the AOs' side compared to the PNNI interface for which AOs would have had to purchase additional equipment. Finally, the advantages of the UNI interface were proven as neither Netia nor GTS nor other AOs decided to use the AINI interface following its introduction.

²⁷⁸ See UKE's decisions on 11 February 2009 issued for PTC, Polkomtel, Vectra, MNI, Długie Rozmowy, see http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=70&layout=1&offset=60&count=30.

²⁷⁹ PNNI (Private Network to Network Interface) is an interface located in the network node which specifies signalling and management functions between two networks, or two service providers.

²⁸⁰ UNI (User to Network Interface) is an interface which specifies signalling and management functions between the services provider and the end-user.

²⁸¹ GTS's submission on 13 October 2009, page 4.

²⁸² A virtual channel; ATM networks use virtual channels and virtual paths to transmit the data through the network.

²⁸³ Długie Rozmowy's reply to RFI on 19 March 2009, page 4.

²⁸⁴ SO Reply, paragraphs 152-160.

²⁸⁵ TP explained that the danger to TP's network was caused by the specific characteristic of the PNNI interface, namely that it works the best in a homogeneous network with a strictly defined addressing scheme. There is no possibility to filter the routing exchange information in this interface, so the connection via this interface to the OA's network equipment, the addressing scheme of which are unknown by TP, could cause a danger for the stability of TP's network.

²⁸⁶ Namely with NNI Interface with AINI protocol. NNI (Network to Network Interface) is an interface which specifies signaling and management functions between two networks (two nodes of networks). PNNI (Private Network to Network Interface) is also an interface uses for signaling and management functions between two networks but with the function of exchanging the information about topology of these networks.

(193) The Commission cannot accept TP's arguments. Firstly, UKE explained in its opinion to TP's SO Reply that the consequences of the inclusion of the PNNI interface were analysed during the proceedings for the modification of the 2006 RBO and UKE did not identify any threats to the integrity or security of TP's network. UKE explained that while deciding on the inclusion of the PNNI interface it also took into consideration the reasoning of KIGEiT and PIIT, the associations of the operators, which claimed that "*the PNNI interface gives greater possibility in the creation of virtual paths between DSLAM and the SAN what is essential for the effective data transmission.*"²⁸⁷ In this context it should be emphasised that "*it should be noted that TP admitted during the proceeding that the PNNI interface can be used for the connection of the Benefiting Operator to TP's network.*"²⁸⁸ The test of R&D Centre presented by TP in its SO Reply also proved that "*the usage of the PNNI interface for the connection of the ATM network of two operators is possible (...) it requires the significant reconfiguration of the network.*"²⁸⁹ In addition, the 2008 RBO introduced the obligation to use the AINI interface, namely the NNI²⁹⁰ interface with AINI protocol, which was the same type of interface as the PNNI interface introduced previously by the 2006 RBO. During the proceeding for introducing the 2008 RBO, as it had already done in 2006, TP proposed to exclude the PNNI interface and maintain only the UNI interface. UKE did not find that argument convincing and endorsed instead the NNI interface with AINI protocol, which was accepted by all parties to the proceedings.²⁹¹

(b) Modification of contractual clauses to the disadvantage of AOs

(194) TP introduced in its standard contracts clauses which did not mirror the stipulations of the relevant RBOs to the detriment of AOs. Such modifications concerned the following clauses: the definition of a 'service option', the provision related to forecasts of orders, imbalanced conditions for exceeding the forecast limits, a clause under which the AO had to prove TP's fault, the moratorium on penalty payments, provisions on the activation of BSA orders and on the single return of a fee for a technical audit.

Definition of 'service option'

(195) In the RBO of 10 May 2006 a "service option" was described as "*an option of the service characterised by technical parameters and functionalities expressed in the maximum downstream and upstream capacity, affecting the level of subscription fees paid by a Benefiting Operator for using specific subscriber lines.*"²⁹² Then, the RBO of 4 October 2006 emphasized that the service option should not include any data volume limits comparable to those imposed by TP on the retail users of

²⁸⁷ UKE's decision of 4 October 2006, page 63.

²⁸⁸ Idem.

²⁸⁹ SO Reply, Annex 006, page 274.

²⁹⁰ RBO of 6 May 2008, section 2.5.2, point 2.

²⁹¹ UKE's comments to the SO Reply, page 13.

²⁹² See section 1.1. point 21 of the RBO of 10 May and 4 October 2006, e.g. service option 256 (namely the capacity less or equal to 256 kbit/s transferred to an end-user and 128 kbit/s transferred from an end-user) or service option 1024 (the capacity less or equal to 1024 kbit/s transferred to an end-user and 256 kbit/s transferred from an end-user).

TP's ADSL services.²⁹³ However, TP, in version 9 and version 15 of its standard contract included definitions²⁹⁴ which referred to data volume limits. Thus, AOs which exceeded the limits had to foresee additional charges for data volumes exceeding this limit also at the wholesale level; this has had an impact on the level of subscription fees and the functionality of the service. Netia noted that *"introducing data transfer limits increases significantly the costs of purchasing wholesale services from TP and as a consequence increases Netia's costs of selling its retail services."*²⁹⁵ Telefonía Dialog pointed out *"the narrowing of the definition leading to limiting the functionality of the service."*²⁹⁶ MNI also brought the Commission's attention to these differences.²⁹⁷

- (196) TP admits²⁹⁸ the limits on data volume but contests its negative impact claiming that no AOs was charged for exceeding volume limits and that TP's retail division was restricted in the same way. TP further claims that it proposed to AOs an annex withdrawing this limitation on 28 March 2007 shortly after it stopped applying this limitation for its retail part (in February 2007). The Commission does not accept TP's arguments. Firstly, TP's proposal had to be taken into account by AOs' in their business planning since AOs had to foresee the obligation to pay fees identified in the signed contracts for exceeding such a volume limit and take them into consideration while setting a level of subscriber fees in their retail offers²⁹⁹ (see also recitals (283) - (284)). Secondly, although TP proposed to AOs an annex withdrawing that limit on 28 March 2007, there is evidence that this unreasonable condition was kept even in mid 2007 when UKE needed to intervene and modified it³⁰⁰. The period in which the unreasonable condition applied however is secondary to the fact of the volume limits imposed by TP.

Provision related to the forecasts of orders

- (197) There are numerous indications in the Commission's file related to the imposition by TP on AOs of disadvantageous provisions related to the forecasts of orders including contract provisions allowing TP to refuse to activate BSA orders in case

²⁹³ The President of UKE stated in the RBO of 4 October 2006, that the *"service option does not include limits of data transmission similar to those imposed by TP on end-users to whom the services in ADSL technology are provided."*

²⁹⁴ TP's reply on 5 March 2009, annexes to q. 8, page 2, and TP's reply on 2 March 2009, attachment v.15, page 6. The properly modified definition was inserted in v. 21 of TP's standard contract implemented from 2 July 2007.

²⁹⁵ Netia's answer to RFI on 20 March 2009, page 5: *"Introducing data transfer limits increases significantly the costs of purchasing wholesale services from TP and as a consequence increases Netia's costs of selling its retail services. It is also a source of additional income for TP"*.

²⁹⁶ Telefonía Dialog's submission of 09 October 2009, page 2. *"A feature not present in the Reference Offer – limit for transfers, exceeding which led to the the limited functionality of the servicethere was added to the definition ."*

²⁹⁷ MNI's reply to the RFI on 18 March 2009, page 8

²⁹⁸ SO Reply, paragraphs 129-133.

²⁹⁹ See Art 8(6) of v. 9 and Art. 9(6) of v. 15 of the standard contracts and the price list annexed to the standard contracts, table 11.

³⁰⁰ See UKE's decision of 12/07/2007 for Telefonía Dialog published at UKE's website <http://www.bip.uke.gov.pl/gAllery/41/99/4199.pdf> and UKE's decision of 8/08/2007 for Tele2 published at UKE's website: <http://www.bip.uke.gov.pl/gAllery/44/39/4439.pdf>; See also SO Reply, para 133.

an AO's forecast has been slightly exceeded and penalties related to the non-compliance of an AO with its own forecasts.³⁰¹

- (198) According to the RBO's provisions on forecasts, AOs are under an obligation to estimate a number of subscriber lines, types of interfaces in a given SAN and a number of orders for given service options on a quarterly basis.³⁰² As confirmed by AOs, TP extended the scope of the forecasts. TP demanded that the forecasts also encompass the quantity of data (in GB) which an AO is going to transmit additionally through a particular SAN.
- (199) In this context GTS explained that: *"there was no possibility to establish a proper forecast (the contract required identifying the forecast for the parts of the network whose real usage will depend on the accessibility in TP. As a result, TP gained a right to impose fees on an AO in case of differences between the forecast and the actual number of orders not resulting from the AO's actions or their abandonment."*³⁰³ In Telefonía Dialog's view *"these TP's additional requirements, exceeding the scope of the RO, forced Dialog to forecast additional data"*, could give TP the opportunity *"to reject orders of AOs on formal grounds."*³⁰⁴
- (200) TP argues³⁰⁵ that these provisions were inserted in the access contracts solely to improve cooperation between AOs and TP. To this end, TP notes that the RBO stipulates only the minimum standards, so it did not exclude the possibility to insert *"more advantageous solutions"*, such as information on expected network traffic needed to ensure the better quality of services provided by AOs. Secondly, TP asserts that these provisions never constituted grounds for the rejection of forecasts and orders by TP.
- (201) The Commission does not find TP's arguments convincing. The requirement to foresee the quantity of data (in GB) constituted an additional burden imposed on AOs and not *"a more advantageous solution."* The forecast for the numbers and types of ports (interfaces) was sufficient for TP to assess the expected traffic in the network.³⁰⁶ In addition, the clause whereby *"TP charges an increased by 100% fee for an additional amount of data transfer sent [through the SAN] above the upper limit"* (as foreseen in Art. 16 point 7 of the standard contract version 9), brought an additional impediments to the AOs. It is not relevant to determine whether TP charged that fee in reality, as the stipulation proposed by TP in the standard contract disadvantages the position of AOs at the beginning of negotiations, which means that the contractual stipulation is worse than the BSA Offer stipulations (see recital (280) and next).

Imbalanced conditions for exceeding the forecast limits

- (202) There are indications in the file of some additional detailed forecasting provisions proposed by TP which resulted in important imbalances between the parties' rights. For instance, the contract TP proposed to Netia gave TP the right (i) to charge a higher fee (up to 100%) for transferring additional data volumes

³⁰¹ Telefonía Dialog's reply on 9 October 2009, page 4, 8, 9, 10; GTS's reply on 13 October 2009, page 3; Długie Rozmowy's reply to RFI on 19 March 2009, page 4; Netia's reply to RFI on 20 March 2009, page 12-13.

³⁰² See section 2.1.3 point 1-2 of the RBO of 10 May 2006 or of the RBO of 4 October 2006 .

³⁰³ GTS's submission on 13 October 2009, page 3.

³⁰⁴ Telefonía Dialog's reply on 9 October 2009, page 9.

³⁰⁵ SO Reply, paragraphs 217-222.

³⁰⁶ This is in line with the assessment of UKE, see UKE's comments to the SO Reply, page 21.

exceeding the forecast; (ii) to charge a higher installation fee (up to 100%) for every service performed exceeding the upper forecasted limit; (iii) to charge a higher installation fee (up to 100%) for every interface in a SAN activated above the upper limit. At the same time, TP exempted itself in bilateral contracts from paying a contractual penalty for not examining the AO's motion or order in due time and for not connecting an AO to TP's network in due time, for not increasing the capacity of a physical connection node in the fixed deadline or for not meeting the deadlines for the migration between a Regional SAN and a Local SAN.

- (203) In practice the preparation of forecasts was difficult for AOs due to the limited information they obtained from TP. In this context, Netia noted that *"the preparation of a real forecast was unfeasible in practice for an AO due to the necessity to identify a number of orders for every one of 84 connection nodes, for which geographical ranges were never provided by TP. Thus, without knowing which subscriber lines were within which particular connection node it was not possible to measure the exact number of orders for a particular node."*³⁰⁷ In Netia's view *"TP has an excellent instrument to punish an operator for the lack of information on TP's network."*³⁰⁸
- (204) TP argues³⁰⁹ that the obligation to submit a forecast for the volume of orders was introduced by the RBO and that the RBO clearly stated that detailed rules on the forecasts and the consequences of deviation from them would be identified in the bilateral contracts. TP underlines that the obligation of presenting the forecasts was introduced in order to ensure the proper functionality of the network and was not aimed at punishing AOs for their lack of knowledge about TP's network as Netia argued. The importance of the submission of correct forecasts is furthermore strengthened by the fact that the President of UKE allowed the imposition of fines in case an AO does not comply with the forecasting obligation. In addition, TP underlines that the RBOs of 2006 did not oblige TP to provide information on the geographical range of SANs. That obligation was only introduced by the RBO of 6 May 2008. Therefore, Netia's problems with presenting the proper forecasts allegedly due to the lack of accurate information received from TP could be explained solely by the reasons related to that AO's own conduct. Even if after the RBO of 6 May 2008 TP presented the information about the geographic scope and addresses of subscriber lines in the SANs, Netia still paid a penalty for incorrect planning of the number of BSA orders in the 4th quarter of 2009.
- (205) The above arguments of TP cannot be accepted for the following reasons. Firstly, the Commission notes that the RBOs of 2006 did in fact leave detailed provisions to be agreed in bilateral contracts between AOs and TP; still, the bilateral conditions agreed by parties should be balanced for both sides and should not contradict the general purpose of RBOs. This was proved by the subsequent UKE decisions modifying the signed access contracts in which UKE did not consider the forecasts conditions as balanced for both sides. For example in the decision for Tele2 of 8 August 2007, UKE stated that: *"rules on forecasts must set equal obligations for both sides. Besides, the correct forecasts should be possible to determine"* as Tele 2 claimed that *"it needs much more information from TP to*

³⁰⁷ Netia's submission on 20 March 2009, page 12.

³⁰⁸ Idem.

³⁰⁹ SO Reply, paragraphs 223-227; TP in its reply to the Letter of facts states that AOs have the exact information on geographical scope of the SANs, however, the Commission assessed that argument after the SO Reply and presented its view in that paragraph.

determine the proper forecast."³¹⁰ Secondly, in the RBO of 6 May 2008 UKE did not find the increased fees for an additional data transmission to be reasonable³¹¹. The 2008 RBOs included a list of fees which TP could charge for exceeding the level of the forecasts; however, these regulatory fees were significantly lower than the ones TP provided in the bilateral contracts. Finally, as regards Netia's claims on the difficulties to prepare correct forecasts due to the lack of proper data on the geographic scope of SANs, Netia confirms that it "*did not receive the data on the geographical range of a BSA SAN from TP. Therefore, it was impossible to submit forecast per Local SAN.*"³¹² In this regard UKE stated that "*[w]ithout information about the range of numbers of subscriber lines or their addresses serviced by a given SAN, an AO could have problems in submitting correct forecasts in respect to a given SAN. In such cases, a precise definition of the area to which marketing actions are directed by AOs is of key importance. If an AO has no information as to which line is allocated to a given SAN, its forecasts will be inherently flawed.*"³¹³ In addition, the Commission notes that the RBOs defined the catalogue of the General Information (GI) which should not be considered in limitative terms. In fact TP should provide the information which was necessary for an AO to comply with the provisions of the signed contract in particular since the forecast requirements were determined by TP itself and partly dependent on information provided by TP. Netia confirms that the penalty paid in the 4th Quarter of 2009 was related to the incorrect planning of the number of BSA orders; however this does not contradict Netia's claim that previously it did not have the necessary information to submit correct forecasts.³¹⁴

A clause under which the AO had to prove TP's fault

- (206) Polkomtel pointed out that in its standard contract TP introduced the necessity for an AO to prove that not meeting the deadlines resulted from TP's fault. Polkomtel noted that "*these modifications proposed by TP SA significantly worsened Polkomtel SA's position in comparison with what was provided for in the Reference Offer, as proving the fault of TP SA may be impossible for operational reasons.*"³¹⁵
- (207) TP claims³¹⁶ that the RBO did not stipulate provisions on the burden of proof in case the deadline was not met so the parties had the right to settle this matter. Since the RBO does not refer to the burden of proof in that case, that provision could not have worsened Polkomtel's situation.
- (208) The Commission finds TP's argument unconvincing. TP's stipulation on the burden of proof defined non-equal conditions for the parties. It is extremely difficult, if not impossible for the AO to prove that the deadline was not met due

³¹⁰ Decision of 8 August 2007 issued for Tele2 published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=59&news_id=668&layout=11&page=text, page 11 and 15. See also the decision issued for Netia of 2 July 2008 published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=70&news_id=1023&layout=11&page=text, page 4-7, 15-16 and 22.

³¹¹ UKE's decision of 6 May 2008, page 43.

³¹² Netia's reply to RFI of 2 December 2010, page 1.

³¹³ UKE's comments to the SO Reply, page 21.

³¹⁴ Netia's reply to RFI of 2 December 2010, op.cit., page 1.

³¹⁵ Polkomtel's submission to the RFI on 17 March 2009, pages 6-7.

³¹⁶ SO Reply, paragraphs 231-232.

to TP's behaviour as the AO has a very limited access to the possible evidence which is mainly in TP's possession. This example clearly illustrates that in cases where the RBOs left to the parties some margin of discretion to decide further about their contractual relations, TP used its position to impose on AOs unreasonable obligations. In addition, contrary to TP's argument, UKE stated that "[i]t is not possible to agree with TP's arguments. Art. 32 of the BSA Offer does not limit in any way TP's responsibility for a failure to meet deadlines to cases where it was at fault. It only lays down a general rule of contractual penalties for a failure to meet deadlines. TP may defend itself against a contractual penalty only in cases where it is proven that an AO was responsible for failure to meet a deadline. (...) The burden of proof of lack of responsibility rests with TP."³¹⁷ *Moratorium on penalty payments*

- (209) Moreover, in its standard contract TP stipulated that provisions on contractual penalties are not applicable during the four quarters of the first contractual year as regards TP's failure to deal in due time with: (i) the increase of capacity of its physical points of interconnection, (ii) migrations between regional and local SANs and (iii) a BSA motion or order. According to Netia, removing its right to seek penalties during the period in question "*made it impossible for Netia to exert influence [over TP] as regards its contractual obligations*" in the above-mentioned cases. "*Therefore, TP's delays in implementing Netia's orders could cause difficulties for Netia to gain customers and cause their unsubscribing from already submitted orders which were being activated with delay.*"³¹⁸ GTS also pointed out the lack of possibilities to penalise TP for its incorrect or delayed performance. In GTS' view "*as a result the subscribers [of the AOs] had to wait many months for the activation of their orders, with impunity of TP. After the end of that moratorium, there was a sudden increase of the quality of service and timely implementation of orders.*"³¹⁹
- (210) TP argues³²⁰ that the introduction of this moratorium did not aim at impeding the provision of the service for AOs, but was aimed at ensuring a rational equivalence of rights and obligations of the parties. The moratorium was proposed as a counterbalance to the RBO's rules³²¹ which released AOs from the obligation to submit the proper forecasts in the first year of the contract. Furthermore, TP underlines that GTS wrongly assumed that the end of the moratorium on penalty payments led to a better quality of services. In fact, the quality of BSA services improved after TP implemented supportive instruments and automated processed for handling orders by TP.
- (211) The Commission is not convinced by TP's arguments. Firstly, the moratorium excluded the AOs' possibility to seek contractual penalties independently of the reasons of TP's problems with timely or proper implementation of AOs' orders in the first year of providing the services.³²² That possibility was not foreseen in the RBO and therefore constituted a worse condition.³²³ Secondly, although it is true

³¹⁷ UKE's comments on SO Reply, page 22.

³¹⁸ Netia's reply to the RFI on 20 March 2009, pages 2-3.

³¹⁹ GTS's submission on 13 October 2009, page 3.

³²⁰ SO Reply, paragraphs 233-236.

³²¹ The Commission notes that point 2.1.3 point 9 of the RBO of 4 October 2006 provided that TP was not obliged to pay the penalty in case it was proved that TP did not meet its obligations as a result of a faulty forecast presented by an AO in the first year of the contract implementation.

³²² See Art. 29 (2) or Art 28 (6) of standard contracts v. 9, v. 15, v. 21 and v. 21bis.

³²³ See section 3.3.2 of the RBO of 10 May 2006 and of 4 October 2006 .

that the RBO provisions released AOs' from the obligation to submit correct forecasts in the first contractual year, the RBO clearly stated that TP may avoid the responsibility of breakdowns or breaks in providing the service only if it proves that those were caused by incorrect forecasts.³²⁴ Therefore the moratorium on contractual penalties which unconditionally released TP from the obligation to prove that the difficulties in the timely and proper provision of services were actually caused by exceeding forecasts of AOs was contrary to the RBOs standards. This reasoning is in line with UKE, which stated that: "*In demanding such a moratorium, TP breached a regulatory obligation imposed on it. The introduction of the moratorium led to an irregular implementation of the contract, and consequently of the obligation imposed on TP, without any negative consequence for TP, while deteriorating the image of the competitor.*"³²⁵

Activation of BSA orders

- (212) As regards the grounds for refusing the activation of a BSA order, the RBO foresees only three instances,³²⁶ namely: (i) an order concerns the specific types of lines enumerated in the RBO,³²⁷ (ii) there are no technical possibilities to activate a service option requested in the order; (iii) the activation of the order would cause a threat for TP's network integrity. However, in its draft contracts TP extended the list of grounds for refusal of AOs' orders by the following additional circumstances: (iv) if an AO submits an order exceeding the orders' forecast for the relevant quarter of the year; (v) if an AO's infringes essential provisions of an earlier contract (or the present contract), in case the effects of that infringement had not been removed before the order submission; and (vi) if an AO owes payments to TP in relation to an earlier contract (or the present contract).³²⁸ The RBO's list of the reasons enabling TP to refuse the activation of an order is clearly defined and therefore in the Commission's view the three additional reasons for rejections proposed by TP in its draft contracts do not meet the minimum standards set by the RBO.
- (213) Several AOs (Polkomtel, Telefonía Dialog, e-Telko and Sferia) commented on this issue. Telefonía Dialog stressed that TP's extension of grounds for refusing the activation of BSA orders constituted "*an additional obstacle in the implementation of the orders for the service (...) As a consequence TP could abstain from the obligation to provide the services.* TP's proposal of the two latter reasons was mostly incomprehensible as other provisions of the RBO or general

³²⁴ See the quote from UKE's decision introducing the RBO of 4 October 2006, page 67: "*Accepting partly the allegations of TP S.A. , the President of UKE introduced to the Offer a provision indicating that when the incorrect forecasts submitted by the Benefiting Operator cause difficulties in providing the service, TP S.A. will be exempted from the responsibility in respect thereof, including the obligation to pay contractual penalties. the President of UKE accepted the arguments of TP S.A. that it should not bear negative consequences of incorrect forecasts, even if in the initial stage a Benefiting Operator will not be able to carry out precise estimates in this regard. It should be noted that TP S.A. will be required to demonstrate that these were the incorrect forecasts that produced such a negative result and only then it may be released from the responsibility for providing the services improperly*".

³²⁵ UKE's comments to the SO Reply, page 22.

³²⁶ See e.g. section point 3.1.2.1 point 9 and section 3.1.2.4 point 5 of the RBO of 4 October 2006.

³²⁷ See footnote 105.

³²⁸ See Art. 4(5) of TP's standard contracts (v. 9, 15, 21 and 21bis).

law protect TP against any unreliable AO³²⁹. In the context of an AO exceeding forecasts Telefonía Dialog explained that this *"could lead to an inability on AOs' side to sell services despite technical possibilities on TP's side."*³³⁰

- (214) Furthermore, in case an AO exceeds the upper limit of its order forecast of a given service option in a given quarter, TP reserved itself the right to refuse the modification of the BSA service option, although according to the RBO only the lack of technical possibilities could justify the refusal of that modification. This issue was noted by E-Telko, Telefonía Dialog and Netia. Netia pointed out that *"the additional reasons for refusing to implement the orders for modifying the service option, introduced by TP and not existing in the Offer, further strengthened TP's position vis-à-vis Netia. The possibility to refuse the implementation of an order even in cases of forecasts being slightly exceeded may prevent Netia from providing the retail service to new potential customers and thus allow TP to strengthen its position."*³³¹
- (215) TP does not deny³³² that it introduced the additional reasons for refusing the activation of BSA orders and clarifies that as of 22 December 2008 TP modified its standard contracts in accordance with RBO stipulations. At the same time TP argues that the RBO did not stipulate comprehensively all essential aspects of the cooperation between AOs and TP. The added instances are, in TP's view, rational and constitute a common standard in business cooperation.
- (216) The Commission does not accept TP's arguments for the reasons explained below.
- (217) Firstly, the RBO clearly established a limited list of justified reasons for refusal of the activation of AOs' orders and does not allow TP to add other reasons of refusal to the detriment of AOs, limiting AOs' possibilities to access TP's network.³³³
- (218) Secondly, TP's explanation that it extended the list in order to protect itself against an unreliable operator is not plausible since the RBO foresaw special provisions for the termination of the contract in case any party flagrantly violates the provisions of the contract.³³⁴
- (219) Thirdly, TP's justifications to reject AOs' orders which exceeded previously submitted forecasts cannot be accepted either. It must be noted here that in the subsequent 2008 RBO UKE introduced a provision which stipulated that in case an AO exceeds the forecast, TP is obliged to make best efforts and to activate the AO's order despite the exceeded forecasts. In these cases TP does not guarantee a timely activation and has the right to an increased installing fee.³³⁵ Thus, even when the RBO envisaged detailed provisions on forecasts it never went so far as

³²⁹ RBO of 4 October 2006, section 3.5.2, point 1 and section 4.1 point 7 and RBO of 6 May 2008, section 7.13, point 1, section 7.7 and section 7.2, point 9, and the provisions of the Civil Code, chapter II – Consequences of the default of commitments.

³³⁰ Telefonía Dialog's submission of 9 October 2009, page 4-5; See also Netia's reply to the RFI on 20 March 2009, page 6; Polkomtel's reply to the RFI on 17 March 2009, page 7, Polkomtel stated in its submission that *"Additional tightening rules introduced by TP (...) in case an AO owes payments to TP (...) will have a negative impact on the process of the service for subsequent subscriber lines."*

³³¹ Netia's submission on 20 March 2009, page 10.

³³² SO Reply, paragraphs 184-191.

³³³ See UKE's decision of 8 August 2007 issued for Tele2: http://www.bip.uke.gov.pl/_gAllery/44/39/4439.pdf, pages 3 and 19.

³³⁴ See section 3.5.2 of 2006 RBO.

³³⁵ 2008 RBO, section 6.1, point 3b). TP has right not to guarantee a timely activation and has the right to an increased installation fee.

to give to TP the right to refuse to activate the orders that exceeded the forecasts. Additionally, TP enforced very strict rules on forecasts and many AOs could not fulfill those conditions (see recitals (197)-(205)).

- (220) Fourthly, TP's reason for rejection related to the AOs' problems with payments is not acceptable as the RBOs clearly stipulated TP's right to calculate the statutory interests in case of late payments.³³⁶ The same protection derives also from the general rules in the civil law³³⁷ and therefore there was no need to refuse the activation of AOs' orders.

Single return of a fee for a technical audit

- (221) With regard to the technical audit, which TP performs at the request of an AO - in order to provide more detailed information on the possibility to deliver broadband services on a given subscriber line - the RBO of 4 October 2006 stipulated that in case the results of TP's technical audit did not reflect the real technical conditions, TP should pay a penalty to the AO.³³⁸ The penalty should be equal to the double of the fee that the AO paid for the technical audit, as well as a refund of the fees incurred by the AO in relation to the provision of the BSA service on the line.³³⁹ However, both TP's standard and concluded contracts³⁴⁰ provided for the single technical audit fee to be returned instead of the double.
- (222) TP argues³⁴¹ that the obligation to return the double fee was introduced by the RBO of 4 October 2006 so the contracts signed on the basis of the previous RBO did not have such stipulation and that the modification to bilateral contracts could be introduced only when the AO asks for it. Such interpretation of TP is undermined by the fact that TP also excluded the return of a double fee in all standard contracts (version 15, 21, 21bis)³⁴² under the jurisdiction of the 2006 RBO and the 2008 RBO. Thus, it is undisputable that TP proposed worse conditions to AOs in respect to the binding RBO even in July 2008. Also, the cases of TP's negotiations with Polkomtel and TK, which were completed under the RBO of 4 October 2006, illustrate that TP refused to guarantee the minimum refund to AOs foreseen by the RBO.³⁴³

(c) Extension of deadlines to the disadvantage of AOs

³³⁶ The RBO of 4 October 2006, section 4.1, point 7 and the RBO of 6 May 2008, section 7.2, point 9.

³³⁷ See Art. 481(1) of the Civil Code.

³³⁸ See section 3.1.2.7 point 6, the RBO of 4 October 2006 and see also section 4.5 point 5, the RBO of 6 May 2008 and of 4 November 2008 .

³³⁹ In this context, Polkomtel pointed out that TP's standard contract did not foresee provisions allowing an AO to claim full compensation from TP for costs and expenses borne by an AO in case the AO made a wrong decision based on incorrect data presented by TP. In the case of TK (see TK's reply to the RFI on 16 March 2009, page 4), the contract concluded with TP, foresaw a reduced compensation that the AO was entitled to. See Polkomtel's answer to RFI on 17 March 2009, page 6.

³⁴⁰ TP's standard contracts v. 9, Art 14, point 5 and v. 15, Art. 16, point 5, v.21, and v. 21bis, Art. 15, point 5. See TP's reply to RFI on 2 March 2009, TP's assessment of the differences between the RBO's provisions, its standard contracts and concluded contracts, see e.g. pages 20, 96, 139, 183, 220.

³⁴¹ SO Reply, paragraphs 215-216.

³⁴² Idem.

³⁴³ TK's reply to the RFI on 16 March 2009, page 2 and Polkomtel's reply to RFI on 17 Mach 2009, page 4.

- (223) A number of modifications introduced by TP to its standard contracts modified the deadlines foreseen in the ROs to the detriment of AOs. These concern the following deadlines: for technical and financial complaints, for the implementation of dedicated and line connections, for migration from regional to local SANs, for deployment of a physical connection node and for subscriber's statement validity.

Technical and financial complaints

- (224) An instance of extended deadlines in favour of TP relates to the fact that TP did not differentiate between technical and financial complaints in its standard contract (version 21).³⁴⁴ Consequently, the deadline for dealing with the AOs' technical complaints got extended to 30 days (or 60 days in complex cases) as compared to 5 days (or 14 in complex cases) in the RBO.³⁴⁵ In addition, although the previous versions of TP's standard contract (versions 9 and 15) distinguished between the two types of complaints (financial and technical) they still extended the deadline for dealing with technical complaints to 14 days (or even to 30 days in complex cases), beyond what the RBO foresaw. TP's new favourable conditions in standard contracts were maintained until 2008.³⁴⁶ In this context [AO] explained that the provisions on complaints had a negative impact on the relations with customers who, in view of the lengthy procedure and their inability to use the requested services, unsubscribed from [AO's] services. [AO] also added that this situation deteriorated its image among its customers.³⁴⁷
- (225) TP argues³⁴⁸ that UKE, in the RBO of 6 May 2008, removed the distinction between technical and financial complaints and identified only one deadline of 14 days,³⁴⁹ which confirms the rationality of TP's argument for a uniform treatment of technical and financial complaints. In light of this modification, TP believes that its behaviour cannot be treated as detrimental to AOs. In addition, TP states that the prolonged deadline for technical complaints up to 30 or even 60 days was necessary at the initial stage of the activation of wholesale services, since AOs submitted orders exceeding their forecasts. TP adds that the Polish NCA examined this issue and closed the proceeding without finding an infringement on TP's behalf. TP then claims that TP's late execution of complaints could not deteriorate Netia's image among its customers. In TP's view, the complaint procedure is not used for removing technical failures of a line, and therefore it cannot influence the AO's customers. Technical failures of subscribers' lines are removed under another procedure for technical interventions. Furthermore, in TP's view it is difficult to anticipate whether the deterioration of [AO's] image was caused by TP's behaviour. In this regard, TP presented the results of UKE's control proceedings which revealed that [AO] wrongly implemented the obligations on processing the complaints, which in TP's opinion could have deteriorated [AO's] image towards its clients.

³⁴⁴ TK's submission on 16 March 2009, page 4-5.

³⁴⁵ See section 3.2.1 point 3 of the RBO of 10 May 2006 and 4 October 2006 and section 3.2.2., points 4 and 5, of the RBO of May 2006 and points 3 and 4 of the RBO of 4 October 2006.

³⁴⁶ TP's first standard contract BSA v. 1 of 22 December contained the exact provision of the RBO of 6 May 2008.

³⁴⁷ [AO's] reply to RFI on [*] 2009, page 9.

³⁴⁸ SO Reply, paragraphs 177-183.

³⁴⁹ As a consequence the deadline for technical complaints initially stipulated in the RBO as 5 days was prolonged to 14 days.

- (226) The Commission does not find the above TP's arguments cogent. Firstly, it should be underlined that the Commission assessed the unreasonable condition with regard to financial and technical complaints based on the stipulations of RBOs of 2006 which defined a deadline of 5 days and therefore at that time TP was obliged to apply the conditions of those RBOs. Secondly, although it is true that in the RBO of 6 May 2008 UKE removed the distinction between technical and financial complaints, in doing so UKE indicated a deadline of 14 days, and not 30 or even 60 days, as TP proposed to AOs. Thirdly, TP's proposal of a prolonged deadline for dealing with complaints was discussed with UKE during the 2008 RBO proceedings and UKE explained to TP that "*The deadlines proposed by TP [up to 30 days or 60 days] are unacceptable as there is a conflict between them and AOs' obligations vis-à-vis their customers (...) In addition, a detailed analysis of TP's rules and procedure for Neostrada TP (...) proves that TP is able to process the complaints within 14 days.*"³⁵⁰
- (227) Furthermore, the Commission cannot accept TP's arguments on the necessity for prolonging the deadlines due to the excessive forecasts of AOs. The unreasonable condition in question was proposed to AOs during the negotiations of access contracts, so at a time when TP by no means could predict that AOs, after the contract is signed, would send more orders than forecasted. This clearly shows TP's strategy to disadvantage AOs.
- (228) Moreover, the mere fact that the Polish NCA closed its proceedings without a decision as to the existence of the infringement does not confirm the absence of an infringement. In fact the NCA closed proceedings on the basis of Art. 131 par. 1 of Polish Act on the Protection of Competition and Consumers at the initial stage without pronouncing itself on the existence of infringement. In any event, the fact that the NCA closed proceedings does not mean that there was no violation of Article 102 TFEU. As the General Court recently confirmed, the Commission alone is empowered to make a finding that there was no breach of Article 102 TFEU.³⁵¹ Article 5 (2) of Regulation No 1/2003 precludes an NCA to take a decision stating that there has been no breach of Article 102 TFEU.
- (229) Finally, it was clearly not in [AO's] interest to worsen its image by not applying the proper rules of the complaint process for its customers. UKE's control proceeding revealed that TP did not activate the majority of [AO's] orders properly and on time (e.g. "*only 57% of orders [were activated] as of 12 March 2007*"). UKE stated that "*it should be assumed that the deterioration of the relations between [AO] and its subscribers was primarily caused by TP's actions as regards the timeliness of responding to orders submitted by Netia, which gave rise to complaints made by subscribers to [AO].*"³⁵² Furthermore, the Commission finds TP's argument on the lack of influence of the complaint procedure on AO's customers unconvincing. The RBO clearly stated that "*a Benefiting Operator can submit a technical complaint due to an improper performance or a failure to activate the services by TP.*"³⁵³ This demonstrates that the complaint procedure has a direct impact on the customers of AOs.

Dedicated and line connections

³⁵⁰ RBO decision of 6 May 2008, page 44.

³⁵¹ Judgement of the Court of 4 May 2011 in C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA*, para 29.

³⁵² UKE's opinion to SO Reply, pages 17 and 18.

³⁵³ The 2006 RBO, section 3.2.1, point 1 and the 2008 RBO, section 7.3 point 2.

- (230) According to the 2006 RBO,³⁵⁴ TP was under an obligation to implement a dedicated connection or line connection to a SAN within a maximum of 24 days³⁵⁵ after an AO accepts TP's technical conditions for the deployment of a SAN. This period could get extended to 6 or 8 months in case TP did not possess the relevant infrastructure.³⁵⁶ In this respect, TP's standard contracts foresaw a possibility to further extend that period in case TP needed additional time for administrative permissions. In [AO's] contract, to the detriment of the AO, TP inserted an additional 11-month period of extension.³⁵⁷ Tele2 pointed out that TP's modifications in this area introduced *"the possibility of extending the period of SAN's deployment and thereby of postponing the commencing of BSA service provision by Tele2."*³⁵⁸ Furthermore, Polkomtel also indicated that TP in its standard contract, (finally accepted by the AO), inserted a condition allowing it to refuse to establish a dedicated connection.³⁵⁹ Netia estimated that *"the introduction of this solution by TP may extend Netia's awaiting for connecting to TP's network from 6 to 17 months (...) and thus significantly postpones in time the possibility to offer its retail services based on TP's network. That way TP can indirectly strengthen its position on the retail service market."*³⁶⁰
- (231) TP's argument³⁶¹ that it needed more time for a deployment of SANs in case administrative permissions were necessary is not convincing as the additional time of 6 and 8 months foreseen in the RBOs of 2006 already allowed TP to obtain such administrative permissions or agreements from third parties. This reasoning is in line with UKE's assessment. The NRA confirmed³⁶² that while establishing regulatory deadlines in the 2006 RBOs it took into consideration the time needed for administrative permissions and other time-related arrangements necessary for the completion of investment process in the infrastructure. In particular, UKE underlined that it took into account the problems with TP's practice of slow deployment of SANs. UKE established specified deadlines basing itself on the provisions of the Reference Interconnection Offer which regulated in detail the process of SANs' deployment³⁶³ The Commission therefore believes that TP had no valid reasons for further extension of the said deadline under the 2006 RBO as it was obliged to apply these deadlines until the RBO of 2008 and could not extend the said deadline freely. The modification of 2008 did not automatically prolong the deadline but only exceptionally prolonged it upon the proof that administrative proceedings are ongoing. Although, during the revision of the RBO in November 2008, UKE admitted that the deadline for SAN

³⁵⁴ The RBO of 10 May 2006 stipulated a deadline of 30 days which could be extended to 6 months (for a dedicated connection) or to 8 months (for a line connection) in case TP does not have proper infrastructure. The RBO of 4 October 2006 introduced a 24-day period for SAN's deployment for a dedicated line and a line connection which could be extended for 1 month in case TP must purchase technical equipment from external suppliers and for 8 months in case TP needed to upgrade an ATM node.

³⁵⁵ The previous RBO of 10 May 2006 identified 30 days for the implementation of dedicated and line connection.

³⁵⁶ See part 2.3.1 point 1 and 2.5.1 point 1 of the RBO of 10 May 2006 and see also part 3.1.1.4.5 point 1, 3 and 4 of the RBO of 4 October 2006.

³⁵⁷ [AO's] answer to RFI on [*], pages 7-8.

³⁵⁸ Tele2's answer to RFI on 2 April 2009, page 12.

³⁵⁹ Polkomtel's answer to RFI on 17 March 2009, pages 7-8.

³⁶⁰ Netia's answer to RFI on 20 March 2009, pages 7-8.

³⁶¹ SO Reply, paragraphs 167-171.

³⁶² UKE's opinion to SO Reply of TP, page 14-15.

³⁶³ UKE's decision on the RBO of 4 October 2006, page 81.

deployment may be further extended by the time needed for necessary administrative permissions, UKE decided³⁶⁴ that in case where different reasons for prolongation of deadline occur all together (i.e. a need to buy equipment from external contractors, a need to extend SAN's capacity and a need to obtain administrative permissions) TP is not allowed to cumulate those deadlines.

AO's migration from regional to local SANs

- (232) Similarly, the deadline for AO's migration from Regional to Local SANs was extended by TP in its standard contracts³⁶⁵ and in the agreed contracts from the 30 (or 24)³⁶⁶ days foreseen in the RBO of 4 October 2006 to 60 days. In this regard, TP does not contest that such a stipulation was contained in its standard contracts; however it remarks that in practice the migration took 10 working days. Moreover, TP states³⁶⁷ that most AOs signed the access contract under the RBO of 5 May 2006 in which the deadline was set at 60 days.
- (233) The Commission cannot accept this argument. Firstly, TP's practice of conducting the migration within 10 working days is not supported by any documents. Secondly, the Commission is assessing the potential impact of contractual proposals which disadvantaged AOs at the beginning of the negotiation. It is irrelevant whether later TP migrated the AO in a shorter period, as the AOs had to take that longer deadline into account in their business planning. Finally, TP was still proposing unreasonable condition after the introduction of the RBO of 4 October 2006. For instance, TP proposed to Polkomtel the unreasonable condition of a 60-day deadline for a migration and signed the contract with this unfavourable condition on 18 May 2007.³⁶⁸

Physical connection nodes

- (234) According to the RBO of 10 May 2006, if TP was unable to deploy a physical connection node within 30 days, it should submit to the AO a detailed explanation and an alternative solution.³⁶⁹ However, in its standard contract TP introduced additional instances where the further postponement of this deadline would be possible³⁷⁰. For instance, if the deployment required purchasing the equipment, the implementation period could be prolonged for the time needed to purchase it. Telefonía Dialog considered that modification as an additional constraint imposed by TP.³⁷¹

³⁶⁴ UKE's decision of the RBO of 4 November 2008, pages 24 and 134.

³⁶⁵ All TP's standard contracts: v. 9, 15, 21 and 21 bis.

³⁶⁶ See section 2.1.1.4. point 10 of the RBO of 4 October 2006: "*The migration process shall take place within a time limit agreed by the parties, yet not longer than that within the time defined under the Offer for the purpose of extending the launching of a new local point of interconnection specific modes*"; (30 days for collocation and 24 days for a line and dedicated connection).

³⁶⁷ SO Reply, paragraphs 172-173.

³⁶⁸ Polkomtel's reply to RFI of 23 February 2009.

³⁶⁹ See section 2.5.1.5 of the RBO of 10 May 2006.

³⁷⁰ TP's standard contract, v 9, Art. 21, point 4 and Art. 22 point 4; v 15, Art. 22, point 4, Art. 8 point 9 and Art. 23 point 5; v 21 and 21bis, Art. 21 point 4 and Art. 8 point 9 and Art. 22, point 5.

³⁷¹ Telefonía Dialog's reply on 9 October 2009, page 11; "*Additional limitations related to the possibility of extending the order implementation deadlines based on reasons independent from Operators.*"

- (235) TP argues³⁷² that it cannot control the time necessary for the execution of contracts with suppliers of the network elements. It also states that UKE accepted this reasoning and that the RBO of 6 May 2008 foresees the same phrasing that TP introduced in the standard contracts.
- (236) The Commission does not accept TP's argument on its lack of influence on external suppliers. Firstly, TP is one of the largest companies in Poland and has a significant bargaining power as well as the freedom to choose solid contractors able to meet even tight deadlines. TP was therefore in a position to demand from suppliers the timely execution of contracts. Secondly, it is not true that in the RBO of 6 May 2008³⁷³ UKE recognised TP's reasoning and extended the 30-day deadline³⁷⁴. In fact, like the previous 2006 RBO also the RBO of 2008 allowed for a prolongation of that deadline by 1 month only (and not by 3 months as in the version 15 of TP's contract).

Limited validity of subscriber statements

- (237) In its standard contract (version 9), TP provided that a subscriber statement requesting the services of an AO is valid for 20 working days after the subscriber's signature. Version 9 of TP's standard contract stipulates that "*in order to start providing the service an AO submits a written order properly filled in and signed by a person authorised to represent the AO ("Order") (...) together with the subscriber's statement.*"³⁷⁵ This is disadvantageous in comparison to the RBO rule, which foresaw that the 20 working days of validity of the subscriber statement would only be relevant for the purpose of presenting the order.³⁷⁶ As Telefonía Dialog explained "*the Offer stipulated that the AO must submit the order within the 20 days after the order was signed by the subscriber (at a later stage of the verification and implementation of the order that deadline of 20 days has no impact on the process). The access contract stated that if the whole process of the order approval is not complete within 20 days (...), it should be commenced from the beginning.*"³⁷⁷ Telefonía Dialog found this element to be an "*additional restriction*" imposed on the AOs.
- (238) TP argues³⁷⁸ that there was no difference between TP's standard contract and the RBO and that the same period of validity of a subscriber statement was maintained. This is factually incorrect. The validity of a subscriber's statement is linked to the placement of a correct motion by an AO. By requiring that, TP effectively reduced the period of validity of such a statement by a period necessary for completing an order under formal grounds. The RBO in contrast merely stipulated that an order should be submitted by an AO within 20 days after the signing of the subscriber statement.³⁷⁹ TP very often mentioned the "*exceeded*

³⁷² SO Reply, paragraphs 174-176.

³⁷³ Section 2.8 points 7-10.

³⁷⁴ The RBO of 4 October 2008 introduced the deadline of 30 days for collocation and of 24 days for line connection.

³⁷⁵ TP's standard contract v.9, Art. 7 (1).

³⁷⁶ The 2006 RBOs stated clearly: "*In order to start providing the service a Benefiting Operator submits a written order to (...), within 20 days from the day of signing the statement by a subscriber*", see section 3.1.2.1 point 1.

³⁷⁷ Telefonía Dialog's reply to RFI on 13 March 2009, page 18-19 and Telefonía Dialog's submission on 9 October 2009, pages 7-8.

³⁷⁸ SO Reply, paragraphs 203-208.

³⁷⁹ RBO of 10 May 2006, section 3.1.1.1 point 1 and the standard contract v 9, Art. 7(1).

period from the date of the signature of a statement by a subscriber" as a reason to reject AOs' orders.³⁸⁰ Between 2007 and 2010 TP rejected over 6 400 orders of AOs for this reason.³⁸¹ Netia clarified that the rejection of an order under formal grounds (also due to lack of validity of a subscriber statement) "*requires from AO to contact a client again*"³⁸², which prolongs unnecessary the process of the submission of an order. Additionally, TP's statement according to which it sometimes included a longer period for the validation of the subscriber statement in the contract (e.g. 40 or 50 days) cannot be taken into consideration as it is not supported by any document.

- (239) TP introduced in its standard contracts additional limits regarding the implementation of subscriber orders. This is further outlined in paragraphs (212) to (220) above.

2.1.2. Conditions related to LLU

- (240) The Commission has grouped the identified unreasonable conditions related to standard LLU contracts in the following way:

- (a) exclusion of contractual clauses to the detriment of AOs,
- (b) modification of contractual clauses to the detriment of AOs,

(a) Exclusion of contractual clauses to the detriment of AOs

- (241) TP excluded from its standard LLU contracts a number of contractual clauses to the disadvantage of AOs. They concern: the definition of 'General Information', the definition of 'virtual collocation', the provision of an IT interface, and inspections.

Definition of General Information

- (242) The RUO's definition of General Information (GI) identifies the minimum scope of data that TP had to provide to AOs.³⁸³ The evidence at the Commission's disposal reveals that TP did not include the definition of GI in its first standard contract (version 14). TP did define GI in subsequent standard contracts (version

³⁸⁰ TP's reply to the RFI of 22 December 2008, page 5, item 21; TP among the reasons (codes) for the rejections on formal grounds in the verification process used also "*exceeded period from the date of the signature of a statement by a subscriber*".

³⁸¹ TP's reply to RFI on 4 February 2009 and 17 December 2010, respectively.

³⁸² Netia's reply to RFI on 20 March 2009, page 2. See also UKE comments to TP's SO Reply, page 20.

³⁸³ See the definition of the GI on page 4 of the RUO both of 5 October 2006 and of 3 April 2007, which covers details on e.g. localization (of addresses) of TP's MDF, geographic area serviced by the given MDF, numbering range of the requested access node at the MDF's level, localization of collocation sites, the number of main cables ended in the MDF and the number of pairs (capacity), the number of engaged pairs in the main cable, technical parameters of copper pairs, the localization (the address) of the main rank for every main cable, geographic area serviced by the main rank, the numbering range of the requested access node at the main rank's level, the number of distributive cables ended in the main rank, the number of pairs ended in the main rank for every distributive cable, the technical parameters of copper pairs for the given distributive cable, the localization (address) in which the distributive rank is located for every distributive cable, the technical possibilities for connecting a correspondence cable, the geographic area serviced by the distributive rank, the number of subscriber connections ended in the distributive rank, the number of subscriber connections engaged in the distributive rank and the technical parameters of subscriber connections in the distributive rank.

16 and 18) but narrowed its scope.³⁸⁴ Such definition did not include TP's obligation to provide the information on e.g. localization, address, in which a distributive cabinet is placed, for each distribute cable, the geographic area covering by a distributive cabinet (number of streets and buildings), number of subscriber lines connected to the distributive cabinet, number of subscriber lines occupied in the distributive cabinet, technical parameters of subscriber connections in the distributive cabinet (e.g. length of cable), or number of subscriber pairs in the distributive cabinet to which subscriber lines are connected. A number of AOs drew the Commission's attention to this matter.³⁸⁵ Telefonía Dialog, for instance, pointed out that the lack of that definition allowed TP to provide to AOs "*general information of poor quality making it impossible to prepare a retail offer, not to mention its implementation.*"³⁸⁶

- (243) TP purports³⁸⁷ that the introduction of the GI definition in its standard contracts was not necessary as the RUO contains such a definition and obliged TP to provide an AO with GI even before concluding an access contract.³⁸⁸ TP explains that its limitation of the scope of the GI definition in standard contracts, versions 16 and 18 "*was adequate to TP's actual data provision capabilities (i.e. adequate to the scope of data which was in TP's possession).*"³⁸⁹ For these reasons, but also in view of the NRA's decision governing TD's access to GI, TP finds TD's statement unfounded. In any case, TP clarifies that it always sought to provide GI on the best possible level. In conclusion, TP reaffirms, by reference to RFI replies of Netia and Tele2 that none of the mentioned AOs received worse conditions than defined in the RUO.
- (244) The Commission does not accept TP's arguments. Firstly, it is noted that the access contract signed between TP and an AO gives the latter legal certainty in the bilateral cooperation and constitutes a legal point of reference in court disputes between the parties. Secondly, TP's justification on the exclusion of GI definition from the contract due to the fact that GI is provided prior to the conclusion of the contract is misleading. An AO has a right to submit a motion for GI at every stage of cooperation, also after the conclusion of the access contract (e.g. an AO can ask for GI about local loops located in a geographic area not previously considered by an AO). The definition in the access contract does not respect the minimum conditions stipulated in the RUO. Thirdly, TD's argument regarding the poor quality of GI provided by TP shows that the lack of precise definition of GI in the access contract led to the circumvention of TP's obligations to provide reliable and complete data. This fact is also confirmed by other AOs and described in detail in section VIII.5. Finally, as regards Netia and Tele 2 although the signed contracts indeed contained the reference to the relevant definition of GI, the standard contract of TP did not include that definition and therefore it put AOs in a disadvantageous situation at the beginning of the negotiations.

³⁸⁴ See Art. 1 of TP's standard contracts see v. 14; v. 16 and v. 18.

³⁸⁵ Netia's answer to RFI on 20 March 2009, page 17, Tele2's answer to RFI on 2 April 2009, page 15 and Telefonía Dialog's answer to RFI on 13 March 2009, page 32.

³⁸⁶ Telefonía Dialog's reply to RFI on 13 March 2009, op. cit., page 32.

³⁸⁷ SO Reply, paragraphs 286-292.

³⁸⁸ TP in its reply to the letter of facts indicates that in the final clause of the contract it was stipulated that in cases not regulated by that contract "*the parties*" should use the provisions of the RUO, of the Civil Code and of the secondary law"; see TP's reply to the letter of facts, page 8.

³⁸⁹ SO Reply, paragraph 291, page 60.

Definition of 'virtual collocation'

- (245) TP's standard contract totally omitted the definition of '*virtual collocation*'. This kind of collocation allows AOs to collocate even if they do not have physical access to collocation sites. Telefonía Dialog considered this omission as "*narrowing AO's possibilities*" to collocate under such circumstances.³⁹⁰
- (246) TP admits³⁹¹ that it excluded that definition from the standard access contracts but stresses that it maintained it in the collocation contracts, and therefore that the modification could not have any impact on the situation of AOs. TP remarks that in practice AOs did not submit any formal motions for a virtual collocation because, in TP's view, such solution is not advantageous for AOs in the form defined in the RUO. Instead, TP offered a more beneficial solution – the so called "*quasi virtual collocation*", which gave an AO an opportunity to place its equipment in TP's racks in all locations where there are technical possibilities even if TP was not the owner of the building.
- (247) The Commission does not find TP's argument convincing. Firstly, TD was well placed to assess the potential impact of TP's proposal. Secondly, TP did not provide evidence that that definition was included in the collocation contract with that AO. Besides, many statements of AOs contradict TP's argument. During the discussion between UKE, TP and AOs on LLU problems in 2008, AOs indicated that TP does not offer the virtual collocation.³⁹² Thirdly, TP should have included provisions on the virtual collocation as required by the RUO. In case where an AO had already signed contracts for other regulated services, it did not have to sign an additional collocation contract. This does not exclude the possibility to add that definition also in the proposed collocation contracts which serve a different purpose; these contracts, as TP itself stated, stipulated detailed conditions for setting up AO's equipment. Finally, TP's offering of a quasi-virtual collocation did not bring any advantages to AOs as it was prepared and offered by TP only from 2009, i.e. much later than that unreasonable condition emerged in the standards contract.³⁹³

Provision of IT interface

- (248) Contrary to the RUO, TP's standard contract did not foresee the provision of an IT interface allowing AOs' access to TP's databases. Telefonía Dialog considered that this constituted "*a limitation to AO's possibility to gain customers*."³⁹⁴
- (249) TP argues³⁹⁵ that it did not incorporate such stipulation in its standard contract but that in any case its obligation to provide an interface derives directly from the RUO and therefore there was no need to include this provision in the standard contracts. Moreover, TP underlines that it was not ready to implement the IT interface and that no AO had a system in place to connect to TP's interface.

³⁹⁰ Telefonía Dialog's reply to RFI on 13 March 2009, op. cit., page 30.

³⁹¹ SO Reply, paragraphs 277-282; TP repeats the same arguments in its reply to the letter of facts, page 8.

³⁹² See:

http://www.ukc.gov.pl/uke/index.jsp?place=Lead24&news_cat_id=263&news_id=3014&layout=8&page=text

³⁹³ TP's reply to RFI of 4 November 2010, page 43.

³⁹⁴ Telefonía Dialog's reply to RFI on 13 March 2009, page 32.

³⁹⁵ SO Reply, paragraphs 326-331.

- (250) The Commission does not find TP's justification valid. It is indisputable that the provision on access to TP's data base via the interface should be included in the standard contract and that TP had enough time to prepare itself for the provision of such IT tool.³⁹⁶ In addition to the arguments on the definition of GI above (see recitals (242) - (244)) the Commission remarks also that the lack of provision of the IT interface is related to TP's strategy not to provide reliable and complete data essential to AOs, which is dealt with in detail in section VIII.5 of the present Decision.

Inspections

- (251) TP also excluded the RUO's provisions on inspections from its standard contracts version 14, 16 and 18. These key stipulations gave AOs the right to check the technical availability of local subscriber loops, for instance in cases where TP refused access to them. In Telefonía Dialog's view, the lack of those provisions invalidated an AO's right to claim an inspection to verify TP's refusals on technical grounds.³⁹⁷ Moreover, Netia indicated that *"the lack of provisions of the Offer in the signed contract on conducting the inspection in case of TP's negative response to Netia's orders for the realization of the Access to a subscriber localloop service, on the basis of the lack of technical conditions or threat of the network integrity, hinders in practice Netia from verifying the authenticity of information on the lack of technical possibilities to provide the service."*³⁹⁸
- (252) TP argues³⁹⁹ that there was no need to include "inspection" provisions in the contracts with AOs as TP's obligation was based on the RUO itself and that it is irrelevant in this regard whether that provision was in an AO's signed contract, as the inspection could be used by an AO even before signing the access contract (see section 1.1.9 point 1 and 2 of the RUO). Finally, TP rejects the arguments of TD and Netia on the lack of ability to verify whether there are technical possibilities to provide services.
- (253) The Commission does not find these arguments convincing. The RUO gave AOs the right to claim the inspection and constituted an essential tool ensuring that TP does not reject AOs' order on unreasonable grounds and provides services to AOs not worse than the services provided by TP to its own customers.⁴⁰⁰ TP is wrong to argue that the right of an AO to claim inspection can be derived solely on the basis of the RUO as the RUO does not create binding and enforceable rights and obligations for parties. Moreover, UKE rightly pointed out that the exclusion of the inspection mechanism negatively affected AOs' right to demand the reimbursement of the cost of conducting the inspection.⁴⁰¹ Furthermore the provision of an inspection mechanism in the bilateral contract would have given AOs the basis to defend their rights in civil courts proceedings. In addition, UKE did not accept TP's proposal to exclude that mechanism from the access contract

³⁹⁶ TP was aware of the obligation to provide such an interface since 29 April 2004 when the Regulation on conditions related to accessing the LLU was issued by the Ministry of Infrastructure (Dz. U. No 118, pos. 1235); See also UKE's opinion to SO Reply, page 14.

³⁹⁷ Telefonía Dialog's reply to RFI on 13 March 2009, Idem, page 31.

³⁹⁸ Netia's reply to RFI on 20 March 2009, op. cit., pages 23-24.

³⁹⁹ SO Reply, paragraphs 293-297; TP repeats in its reply to the letter of facts the same arguments, see TP's reply to the letter of facts, page 8.

⁴⁰⁰ Section 1.1.9, point 2, which describes AOs' possibility to verify whether TP has implemented the access service to a local subscriber loop on terms not inferior to those granted to its own subscribers.

⁴⁰¹ TP's reply to the letter of facts, page 36-37.

as "it is a very essential element of inter-operator cooperation in terms of providing the access services to LLU [a subscriber local loop.]"⁴⁰²

(b) Modification of contractual clauses to the detriment of AOs

- (254) TP introduced clauses in its standard contracts which did not mirror the stipulations of the relevant RUOs, to the detriment of AOs. Such modifications concerned the following clauses: restrictions as regards the implementation of AOs' orders for subscriber lines, the definition of 'shared access to the unbundled local loop', the definition of 'collocation', the definition of a 'subscriber line', the fee for the technical audit and the extended deadlines for technical complaints.

Restrictions as regards the implementation of AOs' orders for subscriber lines

- (255) With regard to the procedure of implementation of AOs' orders for subscriber lines, TP's standard contracts (version 14, 16 and 18) contained provisions which were worse than the conditions stipulated in the RUO. In this respect, the RUO stipulates that within 7 working days from the date of submission of an order meeting the formal requirements TP must: (a) reply positively and provide the technical information necessary to implement such an order, (b) if there is no technical possibility to execute an order because of a specific temporary situation, TP may refuse to implement the order during the period necessary to solve such a temporary situation, (c) if there is no technical possibility to implement an order, TP must submit a justification detailing the lack of technical possibilities and present an alternative solution and (d) in case it is not technically possible to execute an order and there is no alternative solution, TP is obliged to present a detailed justification explaining the reasons.⁴⁰³
- (256) In its standard contracts (versions 14, 16 and 18), however, TP removed points (b) and (c) and disengaged itself from its obligation to inform AOs about an alternative solution in case it is not technically possible to implement the order.⁴⁰⁴ Netia noted that "*those [modified provisions] hinders the offering of retail services based on TP's wholesale service because even if Netia requests TP to submit information on an alternative solution, it has no guarantee that TP, not being obliged, will propose an alternative solution to the AO.*"⁴⁰⁵
- (257) Although TP admits⁴⁰⁶ that this discrepancy existed in the first versions of standard contracts it argues that it was justified by the fact that the RUO in question was under revision by UKE. Furthermore, TP seems to argue that this difference had no practical influence on AOs as TP always assumed that it is obliged to provide the up-to-date information on alternative solutions if requested by an AO.

⁴⁰² UKE's decision of 30/07/2007 issued for PTC published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=59&news_id=654&layout=11&page=text, page 45.

⁴⁰³ See section 1.1.6. p. 14 of the RUO of 5 October 2006 and section 1.1.6., page 15 of the RUO of 3 April 2007 .

⁴⁰⁴ TP's standard contracts see v. 14, Art. 12 (14), v. 16, Art. 12 (14) and v. 18, Art. 12(15).

⁴⁰⁵ Netia's reply to RFI on 20 March 2009, page 21.

⁴⁰⁶ SO Reply, paragraphs 298-300; TP repeats in its reply to the letter of facts the same arguments, see TP's reply to the letter of facts, page 9.

- (258) The Commission does not find TP's interpretation convincing. TP's proposal was not safeguarding even the minimum rights the RUO established. It is also noted that UKE did not accept TP's motion to suspend the RUO during the amendment proceedings and therefore TP had to apply the RUO provisions with the immediate effect.⁴⁰⁷ The discrepancy existed in all TP's standard contracts (versions 14, 16 and 18) and it was proposed to any AOs which started negotiating the access contract with TP. Therefore, contrary to TP's view this discrepancy had an influence on any AO who started negotiations with TP on the basis of those contracts. In addition, it is of no importance whether TP informed AOs about an alternative solution at later stages of the cooperation as it proposed these unreasonable conditions at the beginning of the negotiation with AOs. The arbitrary exclusion of TP's duty in this regard is another example of TP's pattern of abusive conduct which had a negative impact on AOs and the length of negotiations.

Definition of shared access to the unbundled local loop

- (259) Telefonía Dialog drew the Commission's attention to TP's narrowing of the definition of "*shared access to the unbundled local loop*" in comparison to the definition established in the RUO. This type of access was defined in the RUO as "*the possibility to use the non-voice part of the Local Subscriber Loop or Local Subscriber Subloop with the simultaneous possibility for another telecommunications operator to use the Local Subscriber Loop or Local Subscriber Subloop and provide telephone services using the voice frequency bands of the same Local Subscriber Loop or Local Subscriber Subloop.*"⁴⁰⁸ TP's proposal limited this type of access to cases where TP uses the voice part of the frequency band.
- (260) TP claims⁴⁰⁹ that the limitation related only to the voice part of the band which in reality could not influence the provision of LLU services because the latter are based on non-voice frequency bands only. Furthermore, TP argues that the definition is based on the Telecommunication Law (TL) which in Art. 2 (5) defines the shared access to local loop as "*the use of the local subscriber loop enabling the utilization of the full frequency bandwidth of the subscriber loop or the non-voice frequency bandwidth of the subscriber loop while keeping the possibility to use the local subscriber loop by its operator in order to provide telephony services*". This means, in TP's view, that the right to use a subscriber loop is not held by any telecommunications undertaking but by the owner of a local subscriber line (in this case TP). Finally, TP points out that the differences in the definition resulted from the physical conditions of unbundling: TP must have the possibility to recover the costs of the maintenance of a subscriber line by providing services on this line; if two AOs are providing the service on that line, TP is not able to recover the maintenance costs of a subscriber line.
- (261) The reasoning on the part of TP is incorrect. To begin with, TP's argument on the definition relates only to the voice part of the band and can not be accepted, as the access to the shared local loop relates to the unbundling of the non-voice part of the band in cases when another operator (not only TP) uses the voice frequency

⁴⁰⁷ UKE's decision of 3 April 2007 on the RUO, pages 128-129.

⁴⁰⁸ See the definition of "shared unbundling" as it was stipulated in the RUO of 5 October 2006 and of 3 April 2007, page 4.

⁴⁰⁹ TP's SO Reply, paragraphs 242-247; TP repeats the same arguments in the reply to the letter of facts, see page 7.

band (for example on the basis of WLR service). Secondly, the definition of "shared unbundling" in the TL is general, in contrast to the RUO which includes detailed provisions to develop and implement the LLU services properly. The provisions of RUOs do not contradict but implement and specify the general rules of TL for the purpose of wholesale services. In addition, UKE in its opinion on the SO Reply stated that "TP's proposal aimed at restricting AO's rights to apply for shared access to local subscriber loop."⁴¹⁰ UKE found the RUO definition justified by the needs of an operator wishing to provide the WRL services on the voice part of the band and the LLU services on the non-voice part of a subscriber line.⁴¹¹ Finally, TP's argument that in such a case TP is deprived from the possibility to recover maintenance costs of the line cannot be accepted either. In the case where two AOs are using the subscriber line (and TP is excluded from the provision of services to its end-users) the maintenance costs of the usage of a subscriber line are covered by the income from LLU and WLR services.⁴¹²

Definition of collocation

- (262) The evidence in the file confirms the discrepancy between TP's proposal and the RUO definition of the term "collocation." In particular, TP's proposal to Netia and Telefonía Dialog limited the term "collocation" to LLU and interconnection services, while the RUO defined it for all regulated services. This potentially obliged AOs to collocate once again and bear the costs of such collocation if they wanted to collocate in a location where the collocation was already established for the purpose of other wholesale products (e.g. leased lines). In this respect, Telefonía Dialog indicated some negative potential impacts of this unreasonable condition: "a necessity to use a collocation separately for different regulated services leads AOs to incur the same costs several times to TP. Limitations introduced by TP [in its standard contracts] have had an impact on increasing Dialog's costs of providing Dialog's services, as a consequence Dialog's offer on the retail market could not be competitive."⁴¹³ Evidence submitted by Netia confirms similar restrictions.⁴¹⁴ In addition, the RUO provides that an AO may use for LLU services the collocation contracts it has concluded for providing other services (e.g. interconnection, BSA, leased lines). For this purpose, the AO would have to submit a technical project.⁴¹⁵ Netia and Tele2 noted that TP excluded this from its standard contract.⁴¹⁶

⁴¹⁰ UKE's comments to SO Reply of TP, page 23.

⁴¹¹ UKE's decision of 5 October 2006, page 16; UKE stated in this regard: „Considering the need to enable the telecommunications undertakings to provide wholesale access service to TP's telecommunications network (later called "WLR") and by that ensuring the compliance with approved Offer (...) the President of UKE considered the introduction in the Offer of the change to the definition of shared access in the form indispensable for the realisation of the WRL well founded"

⁴¹² UKE's comments to SO Reply of TP, page 23.

⁴¹³ Telefonía Dialog's reply to RFI on 13 March 2009, op. cit., page 30.

⁴¹⁴ Netia's reply to RFI on 20 March 2009, page 18: "the omission of leased line services in the catalogue of regulated services would result in the situation in which, contrary to the provisions of the Offer, Netia could not use the collocation space of leased line services to receive access to a local subscriber loop."

⁴¹⁵ Section 1.1.4 point 38 of the RUO of 5 October 2006: "If the operator uses in a particular location collocation/rent/lease contracts applicable to a TP premise, TP and the operator do not need to conclude a separate detailed collocation contract. The operator attaches the approved technical project to the existing contract. In this case, immediately after the approval of the project the operator can proceed to the installation of equipments for the purpose related to the implementation

- (263) TP confirms⁴¹⁷ that it proposed modified definition of collocation during the negotiations with TD and Netia but underlines that it was never included such modified phrasing of the definition of collocation in the final contracts with the AOs. TP also explains that it based its proposal on a TL phrasing which was different than the one of the RUO. TP modified the definition of collocation as at that time the RUO was appealed by TP and therefore was not final. TP finds the claim on the negative financial impact for AOs misleading since it has never imposed that modified definition but only proposed it during negotiations.
- (264) The interpretation proposed by TP is not convincing. Firstly, the AOs were asked by the Commission to refer to potential negative consequences of TP's proposal and were well placed to assess potential negative consequences on its own business. Therefore, TD's argument on the financial risk originating from TP's proposal remains valid. Secondly, the RUO is enforceable immediately even if TP submits a request for reconsideration, unless the NRA decides differently. Therefore, TP should have proposed to AOs the definition consistent with the RUO already at the beginning of negotiations. In any case, UKE rejected TP's request to suspend the application of the RUO of 5 October 2006.⁴¹⁸ Thirdly, there is no contradiction between the TL and the RUO as the latter details the rules applicable to the provisions of LLU services. The modification of the definition was also explained by UKE.⁴¹⁹ Finally, UKE in its comments to TP's SO Reply underlined that *"UKE's issuing regulatory decisions which replaced access contracts - and the introduction in those decisions of contractual definitions which were in line with the Offers was a consequence of TP's failure to fulfil its obligation to conclude agreements on terms not worse than specified in the Offers. (...) TP's withdrawal of the definition of "collocation" which was not in compliance with the Offer was the result of a threat of an intervention by the President of UKE and not by a good will on the part of TP."*⁴²⁰
- (265) As for the definition of collocation as foreseen in the RUO, TP admits⁴²¹ that the provision of other regulated services was excluded from the standard LLU contract (version 14) however asserts that it had no practical importance as the exclusion concerned a very limited period of time (from 4 January to 14 March 2007, namely 3 months only). TP explains that it excluded the provision of other regulated services because at that time there was a high risk that the provisions on

of LLU Access". See also Additional Tele2's reply to RFI on 23 February 2009, op. cit., page 10-11 and Netia's reply to RFI on 20 March 2009, op. cit., page 18-19.

416 Additional Tele2's reply to RFI on 23 February 2009, op.cit., page 10-11; Netia's reply to RFI on 20 March 2009, op. cit., page 18-19; TP's standard contract, v.14, Art. 36, paragraph 1.3.

417 SO Reply, paragraphs 257-265. TP repeats the same arguments in its reply to the letter of facts, see page 7.

418 UKE's decision on RUO of 5 October 2006, pages 95-97.

419 UKE's comments to the SO Reply of TP, page 25: UKE explained the grounds of the modifications of that definition inserted into the RUO: *"The President of UKE, in view of the narrowing interpretation of the collocation definition recognized that it was necessary to change that definition (...). Under Article 2(15) of TL [Telecommunications Law], collocation means <the provision of physical space or technical facilities to accommodate and connect the necessary equipment of an Operator which connects its network to that of another operator, or use of access to the local subscriber loop>. The above definition speaks clearly about "connecting to" and not about "uniting of" networks or "attaching" the equipments located in the collocation room. Therefore, the above mentioned definition does not limit collocation to the service of connecting networks, or, in accordance with the interpretation given by TP only to the local subscriber loop, and it does not indicate that the collocation should be different for different regulated services."*⁴¹⁹

420 Idem, pages 25-26.

421 SO Reply, paragraphs 312-319.

LLU services were not clear enough. TP had to check other contracts which could have an influence on providing LLU service and after TP finalized the analysis it inserted those rules in the next standard contract (version 16). In addition, TP did not entirely exclude the provision of other regulated services as this was foreseen in collocation contracts.

- (266) The Commission does not agree with TP's arguments. Firstly, it is indisputable that the definition should have been inserted immediately into the standard contracts and that TP's argument that it had to verify other contracts is irrelevant. Even if such verification was needed, TP could have conducted it at the stage of the preparation of the new RUO conducted by UKE. Moreover, although TP claims that the unreasonable condition had a limited period of validity (3 months), it is noted that the definition was proposed to many operators who negotiated on the basis of version 14 of TP's standard contract containing that unfavourable clause (eg, Dłgie Rozmowy, Exatel, GTS, Supermedia, Tele2, Telefonía Dialog and WDM Computers)⁴²². Secondly, it is also indisputable that TP should have inserted the definition into the access contract and it is not relevant that it inserted it in the collocation contract. As the RUOs foresee the possibility of using collocation contracts already concluded for other regulated services, the AOs did not need to sign a new collocation contract.⁴²³

Definition of subscriber line

- (267) The evidence in the file also indicates that TP's standard contract excluded non-active lines from the "*subscriber line*" definition, while the definition in the RUO includes both active and non-active lines.⁴²⁴ According to Telefonía Dialog the definition used by TP "*causes serious limitations to some of Telefonía Dialog's rights because it excluded the use of non-active lines. Therefore, as regards non-active lines it is not possible to change full unbundling into shared unbundling, shared into full unbundling or to deactivate unbundling in all forms (...)*"⁴²⁵ Furthermore, Netia stated that under the proposed conditions: "*contrary to the Offer TP created the situation in which Netia could not use shared unbundling on non-active lines.*"⁴²⁶
- (268) TP confirms⁴²⁷ that it proposed the said phrasing of the definition in its standard contracts. TP explains that at the same time the definition of "*a non-active subscriber line*" was introduced in the standard contracts, so under the separate provisions related to non active lines AOs could submit a motion for the activation of a non-active subscriber line. TP explained that it introduced that discrepancy in order to avoid repetition of definitions since these two terms were

⁴²² TP's submission on 4 February 2009, pages 3-5.

⁴²³ UKE's decision of 3 April 2007; page 112-113, UKE stated that "*In case the parties are bound by the collocation contract and the detailed collocation contract for the purpose of other regulated services, it is unnecessary to conclude additional contracts which related to the same collocation room*";

⁴²⁴ Idem, "*changed the meaning of the notion [of subscriber line] defined in the LLU Reference Offer as EAA [an active line] and LAN [a non-active line], granting the same meaning as "an active line" defined in the RUO. That amendment is completely unjustified as regards the content of the contract because apart from that it creates serious impediments of some TD's rights, additionally it generates many interpretative problems in the subsequent part of the contract and leads to regulatory discrepancies on many issues related to the unbundling of a non-active line.*"

⁴²⁵ Telefonía Dialog's reply to the RFI on 13 March 2009, pages 30-31.

⁴²⁶ Netia's answer to RFI on 20 March 2009, pages 18-19.

⁴²⁷ SO Reply, paragraphs 270-276.

already used separately in the RUO. Referring to TD and Netia's objections, TP explains that in case an AO asked for a shared unbundling on the non-active line, TP activated the full unbundling for the same price as the activation of shared access was irrational. In addition, in that case an AO benefited from lower costs of equipment (there was no need to purchase a splitter from TP).

- (269) Firstly, the Commission underlines once again that it assessed the potential impact of the proposed definitions (see paragraphs (283) - (284)). Secondly, the Commission agrees with TP that the separate provisions on non-active subscriber lines were introduced by TP in other parts of standard contracts (v. 14 and 16). However the Commission notes that these provisions did not cover all of TP's obligations in this regard. The introduction of the definition of "a subscriber line" referring only to an active line excluded the possibility for AOs to use those RUOs provision which referred to "*subscribers' lines*" in broad terms (i.e. both as non-active and active lines). This concerns for example a possibility to deactivate the service previously established on a non-active line or to use the collocation set up for other regulated services on the non active lines.

Fee for the technical audit

- (270) Under the RUO, an AO can claim a reimbursement for the technical audit if its results prove that TP deprived an AO from providing services on a particular subscriber line. In particular, TP was required to reimburse the costs for carrying out the technical audit, the fee for unbundling a subscriber line and the related subscriber fee to the AO if the latter resigned from the line activation.⁴²⁸ In the standard contract proposed to Tele2 and Telefonía Dialog, TP limited the costs subject to reimbursement to either the cost of conducting a technical audit or the costs for activating and providing the service on a particular subscriber line. In Telefonía Dialog's view, "*the elimination of the operators's possibility to get reimbursed for the entire technical audit costs, born by an AO because of TP's fault, raises the costs of the Operator and makes it impossible for an AO to restore a competitive retail offer.*"⁴²⁹
- (271) TP admits⁴³⁰ that the proposed clause did not correspond to the RUO requirements but argues that the mechanism defined by the RUO was unclear and irrational. Therefore, TP introduced its own phrasing which, according to TP, did not aim at hampering the position of AOs. TP then underlines that the issue concerned only the first version of its standard contract after which TP introduced even more beneficial conditions than in the RUO.
- (272) The Commission cannot accept TP's arguments. Firstly, the RUO leaves no interpretation doubts and clearly lists the conditions for reimbursement.⁴³¹ Secondly, the possibility to receive reimbursement according to RUO is crucial as it applies also in situations where the technical audit conducted by TP was positive but where, after activating a subscriber line for that AO, the provision of service turned to be impossible due to a previous mistake of TP (as the RUO states "*the result of technical audit, due to incorrect data in TP's IT systems, does*

⁴²⁸ See section 1.1.2.2 point 10 of the RUO of 5 October 2006 and of 3 April 2007 .

⁴²⁹ Telefonía Dialog's reply to RFI of 13 March 2009 pages 31-32, see also TP's standard contract, v. 14, Art. 11(11), v. 16 Art. 11 (11).

⁴³⁰ SO Reply, paragraphs 333-341.

⁴³¹ RUO of 5 October 2006, point 1.1.2.2.

not correspond to factual situation"⁴³²). In these cases, according to the RUO, TP must return to an AO unjustified costs, i.e. costs for carrying out the technical audit, the fee for unbundling a subscriber line and the related subscriber fee. Thirdly, this clause confirms the general pattern of TP's behaviour where TP, although under obligation to respect the RO rules, instead of transposing such rules to its standard contracts, preferred to limit AOs rights.

Extended deadlines for technical complaints

- (273) The RUO's timelines envisaged for dealing with technical and financial complaints submitted by AOs were not respected.⁴³³ TP in its standard contract (versions 16 and 18) removed the difference between technical and financial complaints. Consequently, the 5 or 14 day deadline established in the RUO for TP to deal with the AOs' technical complaints got extended to 30 or 60 days.
- (274) TP admits⁴³⁴ that in the standard contracts (versions 16 and 18) it removed the difference between technical and financial complaints. TP argues that this was justified as in fact technical complaints are similar to financial ones (e.g. the correction of a fee, the consideration of some discounts). TP adds that the unification of the procedure did not cause any harm to AOs because the removal of technical breakdowns was governed by other provisions of the RUO and because all technical complaints were examined within 5 days with the possibility of prolongation to 14 days. At the same time TP introduced a prolonged validation period for submitting the complaints (of 12 months, as compared to 90 days as stipulated in the RUO).
- (275) The Commission does not agree with TP's arguments. The technical complaints are not identical to financial complaints and the unjustified removal of the difference between those two types of complaints prolonged the RUO deadlines for dealing with the technical complaints. The RUO defined technical complaints as complaints relating to the improper activation of the services. TP prolonged the period for responding to the technical complaints from 5 (or 14) days to 30 or (60 days). Better conditions offered in some cases cannot serve as compensation for worse conditions in other cases. This reasoning is supported by UKE which stated that "*[t]he position taken by TP implying that technical complaints are identical to financial complaints is completely wrong. Technical complaints are inextricably linked with breakdowns, as indicated in the provisions of the Reference Offer.*"⁴³⁵

2.1.3. General TP's arguments

- (276) In addition to the specific arguments of TP which were dealt with in sections 2.1.1 and 2.1.2 above, TP made a number of general points regarding the Commission's objections which will be dealt with in the remainder of this subsection.

⁴³² See footnote 428.

⁴³³ See e.g. points 1.4.1. and 1.4.2. of the RUO of 3 April 2007. TP has 5 days to deal with the technical complaints and 30 days for financial complaints. This can be extended to 14 and 60 days respectively in particular justified situations.

⁴³⁴ SO Reply, paragraphs 347-351; TP repeats in its reply to the letter of facts the same arguments, page 11.

⁴³⁵ UKE's comments to the SO Reply of TP, page 37.

- (277) The Commission notes TP itself listed a long list of discrepancies between its contractual proposals and the ROs.⁴³⁶

Lack of negative influence of the unreasonable conditions on the provision of BSA/LLU services

- (278) In its SO Reply⁴³⁷ TP argues that the Commission "*limits itself solely to the comparison of the content of draft standard contracts and provisions of the Reference Offer and did not assess whether the identified modifications aimed at or led to offer AOs the conditions less favourable than in the ROs.*"⁴³⁸ TP essentially asserts that the Commission relied on the arguments of AOs and did not prove that the alleged unfavourable conditions proposed by TP had actually negatively influenced the provision of BSA/LLU services and "*what kind of damage might be suffered by the AOs.*"⁴³⁹ In fact, according to TP, the contractual proposal made at the beginning of negotiations did not have any negative impact on the AOs as:

- (i) certain clauses were only proposed at the beginning of negotiations but finally not included in the signed contracts⁴⁴⁰ or TP never executed certain clauses,⁴⁴¹
- (ii) in case of omitted clauses the AOs could directly apply the valid RO's definitions,⁴⁴²
- (iii) a number of negotiations did not end up with a signed contract with an AO but rather with a contract imposed by UKE's regulatory decision, which was fully in line with the RO,⁴⁴³
- (iv) TP challenged in court the respective RO and therefore it was not obliged to apply it in its standard contracts.⁴⁴⁴

- (279) The Commission finds the above reasoning put forward by TP incorrect on several counts explained below.

- (280) To begin with, it is worth recalling that the Commission's objection refers to TP's proposal of unreasonable conditions in its draft standard contracts which served as a basis for negotiations with AOs. TP, as a dominant company, has "*a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.*"⁴⁴⁵ The evidence in the file confirms that TP was aware about the obligations it had to comply with. In a reply to the letter of facts TP said

⁴³⁶ TP's reply to the RFI on 20 January 2009 to q.3.1, page 65; e.g. the prolonged period for the modification of a SAN or its deployment was of 3 months (in contrast with 1 month stipulated in the RO); the introduction by TP of limits and fees for additional volume of data transmission; the possibility to refuse to implement an order in case an AO exceeded the upper limit of its forecasts for orders; exclusion of the provision of the BSA services on lines on which TP stopped providing PSTN services; TP's reply to RFI of 4 November 2010, page 11-42.

⁴³⁷ SO Reply, paragraphs 128, 129-133, 172-173, 188, 195, 217-222, 257-265, 270, 286-292, 349-350.

⁴³⁸ SO Reply, paragraph 131.

⁴³⁹ SO Reply, paragraph 195.

⁴⁴⁰ SO Reply, paragraphs 194-195, 240.

⁴⁴¹ Idem, paragraphs 129-133, 153-157, 173, 217-222.

⁴⁴² Idem, paragraphs 288, 293, 321, 327-328.

⁴⁴³ Idem, paragraphs 240, 258, 270, 321.

⁴⁴⁴ Idem, paragraphs 261, 299.

⁴⁴⁵ Case 322/81, *Michelin v Commission*, [1983], ECR 3461 paragraph 57.

*"In the case of a new Reference Offer is approved a telecommunications undertaking is obliged to follow the offer and cannot conclude contracts containing conditions worse for the other party than those of the contained in the RO."*⁴⁴⁶ At the same time, the examples referred to above in recitals (170) - (275) confirm that TP did not respect the binding obligations and proposed unreasonable conditions which did not even meet the RO requirements.

- (281) It is true that not all unfavourable provisions contained in TP's proposals were introduced into the contracts signed with AOs. It cannot be denied that, despite the overall negotiating strategy of TP and the AOs' limited bargaining power, some AOs managed to convince TP to abstain from some unreasonable clauses. Furthermore, the core of the Commission's argument relates to the fact that TP tried to disadvantage AOs position already at the beginning of negotiations and refused to propose the minimum standards established in the ROs during the negotiation. In this respect, it is also irrelevant whether unreasonable terms were included in the signed contracts at a later stage or whether TP actually executed such terms.
- (282) Furthermore, AOs had a legitimate expectation that TP would propose conditions that were at least as good as what they were entitled to by regulation. Instead, as a result of TP's adverse behaviour, AOs had to engage in lengthy negotiations to obtain the minimum legal standards and were sometimes forced to choose between signing a contract which was less advantageous than the RO in force, continue the long negotiation process with TP, or revert the case to UKE. Moreover, TP is wrong to argue that it was not obliged to include certain RO terms in the bilateral contracts with AOs as such RO terms applied in any case. In fact, ROs do not create binding and enforceable rights and obligations for AOs. Only a bilateral contract could guarantee minimum standard to an AO that in case of non-compliance could be challenged in court.
- (283) As regards TP's allegation on the absence of negative impact of TP's proposals on AOs it is also recalled that the Commission only assessed the potential impact of the unreasonable conditions proposed by TP. In the request for information sent at the beginning of the investigation the Commission asked AOs to assess the *"possible impact of the differences on the company's opportunities to provide BSA/LLU services in the mass market"*.⁴⁴⁷ Therefore, the statements of AOs the Commission refers to in the present Decision relate to the potential and not, as TP wrongly assumes, to the actual effects of TP's proposals.
- (284) AOs are in any event well placed to assess the possible impact of such contractual clauses. During the negotiations, AOs, faced with contractual proposals diverging from the ROs, had already analysed TP's contractual proposals to determine the risks and consequences they would bear and the profitability of their business. The fact that the cooperation between certain AOs and TP is based on a contract established by UKE, following the impossibility of a compromise, does not in any case disqualify such AOs to point to unreasonable clauses TP tried to impose in the negotiations with these AOs.
- (285) Also, the unreasonableness of TP's proposal is also confirmed by the numerous interventions of the regulator on the market on the basis of AOs' requests or *ex officio* (see Table 5). Also, as demonstrated in section VIII.2.2.2 TP's proposal of unreasonable conditions had a serious impact on the length of the access or

⁴⁴⁶ TP's reply to the letter of facts, paragraph 121, page 25.

⁴⁴⁷ RFI sent to the AOs on 23 February 2009, page 19.

collocation negotiations. Finally, it is also noted that the mere fact that TP challenged an RO in court does not suspend its applicability. In all instances, TP's motions for the suspension were rejected by UKE or court.⁴⁴⁸

Unclear provisions in the ROs and subsequent modifications of the ROs

- (286) In its SO Reply⁴⁴⁹, TP attempts to blame the Regulator arguing that the provisions contained in the ROs, which TP had to reflect in the standard contracts, (i) were not clear enough or (ii) were too burdensome. TP therefore justifies its actions by the necessity to render such clauses (i) more precise or (ii) feasible to execute. In this regard, TP contests also the reasonableness of certain regulatory measures and puts an emphasis on the fact that it was right to enforce them because UKE recognised the soundness of some of TP's proposals and changed certain RO's stipulations accordingly.⁴⁵⁰
- (287) The Commission does not find TP's arguments plausible for a number of reasons which are explained below.
- (288) Firstly, although TP had always right to participate in the administrative proceedings leading to the adoption and modification of a RO it chose not to cooperate with the Regulator and obstructed the process.⁴⁵¹ UKE explained that "*[d]espite the clear wording of the regulations, as well as calls of the President of the NRA, TP consistently refused to fulfil the obligation to prepare a draft reference offer for Bitstream Access Services and, in the end, it never prepared such an offer. It only submitted its position on the matter. The purpose of that document was to delay the issue of a decision regarding the BSA offer, rather than to fulfil its obligations. (...) In view of the opportunistic position taken by TP, the regulatory authority undertook ex officio the work on the preparation of a draft reference offer, i.e. it availed of alternative competences provided in order to enforce that regulatory obligations.*"⁴⁵²
- (289) Secondly, as rightly pointed out by UKE "*on the basis of the Code of Administrative Procedure, TP may approach the President of the UKE to seek explanation of the content of a decision.*"⁴⁵³ TP availed of this right only once.⁴⁵⁴
- (290) Thirdly, the validity of the ROs and the clauses contained therein, established to secure non-discriminatory access of AOs to TP's network, can not be questioned retroactively. That would be against the principle of legitimate expectations of AOs. The change of wording of certain RO terms over time, which could have as an origin various market developments, the evolution of the needs of the AOs, the development of new technologies and reasoned justifications presented by market

⁴⁴⁸ UKE's decision on RUO of 5 October 2006, page 95-97 and UKE's decision on RUO of 3 April 2007, p. 128-129.

⁴⁴⁹ SO Reply, paragraphs 136-138, 152-160, 177-183, 185-191, 223-227, 231-232, 233-236.

⁴⁵⁰ Idem, paragraphs: 138, 153, 169-170, 176, 178, 209-214; This relates to the clauses of: registration (paragraphs 136-139), the PNNI interface (paragraph 153), the prolonged deadline for the deployment of line and dedicated connections (paragraphs 169-170) for the deployment of physical termination points (paragraph 176), the deletion of the differentiation between the financial and technical complaints (paragraph 178), conducting an inspection (paragraph 209-214).

⁴⁵¹ See circumstances for adoption of BSA offer of 4 October 2006, UKE's decision on BSA of 4 October 2006, 9.47-48 and last paragraph on page 49

⁴⁵² UKE's comments to the SO Reply, page 2.

⁴⁵³ Idem, page 41.

⁴⁵⁴ Idem, page 40-41.

players,⁴⁵⁵ cannot justify TP's non-compliance with the obligation to offer AOs conditions not worse than the ones of the ROs. As stated in this Decision on a number of occasions, all ROs are binding on TP from the moment of their imposition, namely from the date of TP's receipt of the relevant RO decision.⁴⁵⁶

Contract modifications due to external factors independent from TP

- (291) In the SO Reply⁴⁵⁷, TP refers to its technical capacity and dependence on external factors and argues that certain contractual proposals, although different from the minimum requirements of the ROs, were influenced by such circumstances and therefore justified.
- (292) TP raises the issue of lack of technical possibilities to offer a service in the form required by the ROs. TP essentially argues that in view of such constraints it preferred not to give to AOs the right to a service it would not be able to render. TP uses this argument with regard to the following clauses: the implementation of PNNI interface⁴⁵⁸, the provision of IT interface⁴⁵⁹, the provision of the service on non-active lines⁴⁶⁰ and on lines when TP stopped providing PSTN services⁴⁶¹, and as regards limited access to the shared local loop⁴⁶². TP also points to its reliance vis-à-vis external parties subcontracted by TP for provision of services or equipment. Moreover, TP raises the issue of its dependence on administrative authorities' decisions, which were necessary to execute some of TP's obligations and had an impact on TP's compliance with the ROs' deadlines. TP uses this argument with regard to the following clauses: the activation of leased lines and line connections⁴⁶³ and the deployment of physical connection points.⁴⁶⁴
- (293) The Commission cannot accept TP's arguments for the following reasons. To begin with, the Commission notes that TP was aware of its regulatory obligation to provide access to its network and of the technical requirements necessary for the provision of such services at least since 1 October 2003 (see paragraph (69) in the section V). Therefore, TP had sufficient time to adapt its internal IT systems and to conduct the necessary configuration of its network. The evidence in the case file indicates that TP did not prepare sufficiently its systems, organisational structure and employees to the future requirements.⁴⁶⁵ Instead, TP was implementing projects aiming at creating obstacles for AOs (see recital (149), point (a) and (d)). Also, for a long time TP concentrated on contesting the

⁴⁵⁵ BSA Decision of 4 October 2006, page 48.

⁴⁵⁶ See Art. 42 and 43 of the Polish Telecommunications Act.

⁴⁵⁷ SO Reply, paragraphs 152-160, 161-166, 167-171, 175-176, 196-198, 199-202, 246, 326-331.

⁴⁵⁸ SO Reply, paragraphs 153-160.

⁴⁵⁹ Idem, paragraphs 161-166, 330.

⁴⁶⁰ Idem, paragraphs 197-198.

⁴⁶¹ Idem, paragraphs 199-202.

⁴⁶² Idem, paragraph 246

⁴⁶³ Idem, paragraphs 167-168

⁴⁶⁴ Idem, paragraph 175.

⁴⁶⁵ Inspection document, TP's internal presentation of April 2007, page 74; Inspection document, email from TP Director of TP Sales and Service Division to the Director of Client-Operators Department of 21 December 2007, page 23; Inspection document, internal presentation of 26 November 2007, page 23.

competences of UKE rather than working with the Regulator on the optimal access rules for AOs.⁴⁶⁶

- (294) Moreover, TP's argument on the dependence on third parties and external factors are not convincing for two reasons. First, TP is one of the 10 biggest companies in Poland and has significant bargaining power and capacities to choose solid contractors which are able to meet tight deadlines. While it is normal that TP may contract external companies for different types of work, TP should be able to demand the proper execution of such work. Second, the ROs already foresee extended deadlines for receiving necessary administrative permits if TP needs to conduct work or investments in its network.

2.1.4. Conclusion

- (295) In light of the evidence outlined in sections 2.1.1 - 2.1.3, it is concluded that TP proposed unreasonable contractual conditions at the beginning of access negotiations with AOs. In particular, in its BSA and LLU standard contracts, TP excluded certain clauses, modified certain provision and extended the foreseen regulatory deadlines to the detriment of AOs. Such behaviour of TP forms part of the incumbent's strategy aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products.

2.2 TP's dilatory techniques in the negotiations

- (296) Within the number of working days specified in each case in the ROs TP is obliged to:
- (i) set the date for starting the negotiations aimed at signing a wholesale broadband contract after receiving an AO's motion for such a contract,
 - (ii) indicate the persons authorised to represent TP in the negotiations and
 - (iii) provide the AO with the relevant draft contract.⁴⁶⁷
- (297) The ROs and the Polish Telecommunications Law foresee a maximum period of 90 calendar days within which an access contract should be concluded.⁴⁶⁸ After this period the NRA may issue a decision imposing the access rules for a particular AO.
- (298) Table 5 below presents the data on the duration of BSA and LLU access and/or collocation negotiations between TP and AOs between 2005 and 2010.⁴⁶⁹ The last

⁴⁶⁶ UKE's comments to the SO Reply p 1 and next, see also UKE's decision on BSA of 4 October 2006, p. 47-48 and last paragraph on page 49.

⁴⁶⁷ As regards BSA services, all RBOs indicated the same deadlines. TP is obliged to provide an AO with a relevant draft contract within 3 working days to: (i) set the date of the first negotiation meeting which will be scheduled not later than in 7 working days, (ii) indicate the persons authorized to negotiate and (iii) provide the AO with the draft contract. As regards LLU, the first and the second RUO (both of 2005) gave TP 14 working days to undertake the above-mentioned actions, while the later RUOs limited this period to 2 working days. The date of the first negotiation meeting should not be set later than in 2 working days.

⁴⁶⁸ See section 3.1.1.3., point 5 of the RBO of 4 October 2006: "*The Access contract should be concluded between TP and AO, in line with the RO rules, within 90 days from the AO's valid motion.*" Art. 27 (2a) (2b) of the Telecommunications Law.

⁴⁶⁹ For the purpose of coherency and in light of certain discrepancies between the data provided by AOs and by TP, the Commission decided, to the advantage of TP, to rely on TP's data.

column of the table refers to the delays in concluding such contracts, in days, i.e. the number of days exceeding the 90 day period in which the contract should be concluded. In situations where the NRA had to intervene the date of the relevant decision imposing a contract was taken as the date of concluding negotiations.

- (299) The list is not exhaustive as it serves only to illustrate the large scale of the problem. In particular the table does not show delays shorter than 85 days.
- (300) TP reported on over 250 BSA/LLU negotiations opened, out of which only in 103 cases the negotiations were concluded with a signed contract. The data in the Commission's possession indicates that out of these 103 cases only in 31 the foreseen maximum framework of 90 days was respected; this was particularly the case in 2010, after the Commission had opened proceedings in the present case (April 2009).⁴⁷⁰ Therefore, it can be stated that the delays concerned 70% of the motions submitted by AOs.⁴⁷¹

Table 5. Delays in the negotiation process

AO	BSA/LLU assess/collocation contracts	Complete motion of AO	Signature of the contract by TP⁴⁷²	NRA's decision	Delay (over 90 days)
GTS Energis	BSA access contract modification	21/03/2007 ⁴⁷³	17/09/2009 ⁴⁷⁴		821
Netia	LLU access contract	11/04/2005	26/04/2007		655
Tele2	LLU access contract	5/10/2005	no contract signed	12/10/2007	647
GTS Energis	LLU access contract	18/05/2005	16/04/2007*		608
Exatel	LLU access contract	8/11/2006	5/08/2008		546
Długie Rozmowy	BSA access contract - IP level	1/10/2008	no contract signed	19/03/2010	444
Exatel	LLU collocation contract	5/03/2007	5/08/2008		429
PTC	LLU access contract	20/03/2006	no contract signed	30/07/2007	407
Supermedia	LLU access contract	26/01/2007	no contract signed	21/04/2008	361
EXATEL	BSA access contract modification	30/05/2008	18/08/2009		355
TK Telekom	BSA access contract	28/06/2006	30/08/2007		338
Supermedia	BSA access contract	4/01/2007	no contract signed	21/02/2008	323
Telefonia	LLU access contract	21/06/2006	no contract	31/07/2007	315

⁴⁷⁰ In 2010 in 10 out of 11 cases TP respected the deadline of 90 days.

⁴⁷¹ TP admitted that the average length of the negotiations significantly exceeded the foreseen framework; see TP's reply to the RFI of 16 February 2009, page 97 point 5.

⁴⁷² The Commission is aware that in these instances the AOs signed the contract later than TP (marked with a (*)) (e.g. 1 day later, in case of the contract with GTS Energis of 16 April 2007). In such instances TP's date of signing was taken into account.

⁴⁷³ In view of the long negotiations, the motion of the AO was updated three times in 2008: on 14 February, 15 May, 2 June.

⁴⁷⁴ GTS Energis in its submission of 13 October 2009, page 1 stated that these negotiations ended on 17 September 2009 with a signed access contract under the 2008 RBO.

Dialog			signed		
Multimedia	LLU access contract	17/12/2008	14/01/2010		303
Multimedia	LLU collocation contract	17/12/2008	14/01/2010		303
MNI	BSA access contract	12/05/2006	18/05/2007*		281
PTC	BSA access contract - DSLAM, IP levels	6/10/2008	2/10/2009		271
PTK	BSA access contract	18/08/2006	16/07/2007		242
Tele2	LLU collocation contract	3/01/2007	no contract signed	28/11/2007	239
e-Telko	BSA access contract modification	17/10/2006	7/09/2007*		235
Netia	BSA, LLU collocation contracts	4/02/2009	8/12/2009		217
PTC	BSA access contract	25/07/2006	22/05/2007		211
Multimedia Polska	LLU access contract	11/10/2006	no contract signed	1/08/2007	204
Długie Rozmowy	BSA access contract	19/05/2006	2/03/2007		197
ATM S.A.	BSA access contract	22/06/2006	25/03/2007*		186
Petrotel	BSA access contract	30/01/2007	8/10/2007*		161
EXATEL	BSA access contract modification	23/11/2006	11/07/2007		140
Tele2	BSA access contract	12/05/2006	27/12/2006*		139
Telefonia Dialog	BSA access contract modification	29/11/2006	no contract signed	12/07/2007	135
eTop	BSA access contract	31/07/2006	7/03/2007		129
MNI	BSA access contract modification	13/10/2006	18/05/2007*		127
Netia	BSA access contract modification	20/06/2008	14/01/2009		118
Tele2	BSA access contract modification	18/01/2007	no contract signed	8/08/2007	112
VECTRA	BSA access contract	27/11/2006	14/06/2007		109
Netia	BSA access contract modification	27/10/2006	10/05/2007		105
Polkomtel	BSA access contract	19/09/2006	28/03/2007*		100
LuPro	LLU access contract	23/10/2006	30/04/2007		99
WDM	LLU access contract	6/03/2007	5/09/2007		93
Netia	BSA access contract modification	10/08/2007	5/02/2008		89
Novum	BSA access contract	13/08/2007	7/02/2008		88
TD	LLU collocation	19/12/2008	14/06/2009		87
TK Telekom	Collocation contracts modification	21/11/2007 ⁴⁷⁵	16/05/2008*		87
Novum	LLU access contract	13/08/2007	5/02/2008		86

Source: Commission's table based on TP's submissions.

⁴⁷⁵ The AO did not submit a formal motion, negotiations began on the basis of a bilateral agreement.

- (301) Table 5 illustrates two types of negotiating scenarios which led to significant delays. In the first scenario, despite the numerous obstacles on TP's side, the lengthy negotiations ended with a contract between TP and an AO. In the second scenario, in view of the unreasonable conditions imposed by TP and its negotiating strategy, no contract is signed and the AO decides to refer the case to the NRA, which issues a decision (see the fifth column). The date of such a decision closes the negotiating period.
- (302) In the recitals below, the Commission will refer to the evidence that illustrates the incumbent operator's dilatory tactics at different stages of the negotiations. This will be addressed in the subsequent subsections in the following order:
- delays at the beginning of access negotiations (2.2.1),
 - further delays at the stage of negotiating contractual clauses(2.2.2),
 - TP's representatives lack of power to commit TP (2.2.3),
 - unreasonably long procedure for signing the contracts (2.2.4),
 - TP's overall negotiation strategy (2.2.5).

2.2.1. Delays at the beginning of the access negotiations

- (303) Delays occurred already at the beginning of the negotiations, when TP is under the obligations to set the date for starting the negotiations and to provide the AO with a draft contract within a number of days specified in the relevant RO (3 days in case of RBOs and 14 or 2 days in case of RUOs).⁴⁷⁶ For illustration purposes, the Commission gathered in Table 6 below some examples of significant delays which occurred at the early stage of negotiations, where despite the complete motion of an AO the negotiations could not begin as TP delayed the transmission of a draft contract. For instance, in the case of GTS, despite the deadline of 3 days, TP sent the AO the standard contract 214 days later.

Table 6 Delays in sending the draft contract

AO	BSA/LLU access/collocation contracts	TP receiving a complete motion	TP sending the draft contract	Relevant deadline (in days)	TP transmits a draft contract (in days)
GH Net	BSA access contract	26/05/2008	7/01/2009	3	226
GTS Energis	BSA access contract modification	2/06/2008	2/01/2009	3	214
TD	BSA access contract - IP and DSLAM levels	11/07/2008	6/01/2009	3	179
PTC	BSA access contract - IP and DSLAM levels	6/10/2008	26/03/2009	3	171
Netia	LLU collocation contract	11/04/2005	7/09/2005	14	149
Długie Rozmowy	BSA access contract - IP level	1/10/2008	6/01/2009	3	97

⁴⁷⁶ See footnote 467.

Multimedia Polska	LLU access contract	11/10/2006	17/01/2007	2	96
Netia	LLU access contract	11/04/2005	1/07/2005	14	81

Source: Commission's table on the basis of TP data.

- (304) Several AOs drew the Commission's attention to such a delaying tactic of TP. For instance, Netia described several situations in which significant delays in commencing the negotiation process were caused by TP and resulted from TP's late provision of the contract. Netia provided TP with a motion for an LLU contract on 11 April 2005, but it only received TP's draft LLU contract on 1 July 2005⁴⁷⁷, *i.e.* 81 days later.⁴⁷⁸ In addition, Netia received TP's draft collocation contract only on 7 September 2005, *i.e.* over 5 months⁴⁷⁹ after Netia's motion, despite the AO's repeated requests in the meantime.⁴⁷⁹ In the case of another motion by Netia for a BSA contract sent to TP on 19 May 2006⁴⁸⁰ there was also a delay as Netia received the draft BSA contract from TP only on 21 June 2006, that is, 23 days later (as opposed to 3 days foreseen in the relevant RBO).⁴⁸¹
- (305) In some instances such delays on TP's side led to discontinuing the negotiations. This was the case of GH Net.⁴⁸² In this respect the AO stated that it "*is still interested in purchasing BSA, but due to the long time it took to receive TP's draft contract, it is no longer a priority for the company.*"⁴⁸³ It should be added that GH Net presented TP with a motion for a BSA contract on 20 May 2008 which was further updated on 2 June 2008, and that TP provided GH Net with its draft contract only on 22 December 2008, that is, with a delay of more than six months.
- (306) The Commission requested further explanations from TP during the Oral Hearing concerning the delays at the beginning of the negotiations. The Commission referred to the cases of GH Net and Multimedia where significant delays in transmitting the relevant draft contract occurred. Unfortunately, TP was unable to explain what caused such delays and demanded to be given a right to reply in writing to this question. The written statement of TP in this respect did not bring any valid justification but only the following general statement, in which TP asserts that a 3 or 5 month-delay in commencing negotiations "*is not unjustified considering the complex character of the LLU and collocation contracts, the need*

⁴⁷⁷ TP itself confirms that it received Netia's motion on 11 April 2005, but indicates that the negotiations started only on 3 August 2005 (see TP's reply to RFI on 4 February 2009, page 11).

⁴⁷⁸ Netia's reply to RFI on 24 March 2009, pages 5-6; Netia's reply to the RFI, page 2: "*Netia points out that, in the case of the LLU contract negotiations it sent a proper motion on 11 April 2005 and the contract was transmitted by Telekomunikacja Polska S.A. on 1 July 2005 – waiting time for the contract equalled in this case 81 days!*"

⁴⁷⁹ Netia's reply to the RFI of 23 February 2009, pages 2-3: "*In relation to Netia's motion of 11 April 2005. Telekomunikacja Polska S.A. was obliged to (...) negotiate the collocation contract. Despite Netia's calls, during the meetings which aimed at concluding an access contract Telekomunikacja Polska S.A. was primarily stressing that "it will define the planned date of the transmission of the draft collocation contract". A draft collocation contract was sent to Netia on 7 September 2005, that is 5 months after Netia provided the motion to conclude an access contract.*"

⁴⁸⁰ The date of 21 June 2006 confirmed in the meeting Note in TP's reply to RFI of 22 December 2008.

⁴⁸¹ Netia's reply to the RFI of 23 February 2009, pages 2-3; "*In the case of the BSA contract negotiations, Netia sent a motion to Telekomunikacja Polska S.A. on 19 May 2006 (updated motion on 29 May 2006). Telekomunikacja Polska S.A. submitted a draft contract on 21 June 2006, that is, within 23 days, despite the obligation to communicate it within 3 working days.*"

⁴⁸² GH Net Jacek Gzyl, Piotr Hnacik s. j.

⁴⁸³ GH Net's reply to the RFI of 23 February 2009, page 3.

for internal agreements of TP Units in charge of wholesale services, lawyers and technical services."⁴⁸⁴

- (307) There is in any case no justification on TP's side for such behaviour as TP could have made use of the sample contract prepared by UKE, in line with the relevant RO and attached to it.⁴⁸⁵
- (308) TP refers to the evidence on the negotiations with Global Connect, Profiline, Telbeskid or WIP and claims that "*TP fulfilled its obligation to [promptly] start the negotiations*"⁴⁸⁶ and that delays did not occur. It is noted that this evidence does not stand in opposition to the observation of the Commission that in a number of cases TP delayed the beginning of negotiations. In fact, as mentioned in recital (300) above, the delays concerned 70% and not 100% of the negotiations. Furthermore, the examples of the AOs above concern only a few very small market players who could not threaten the market position of TP and prove that TP could have respected the deadlines in the negotiations and replied to AOs' motions promptly.

2.2.2. Further delays at the stage of negotiating contractual clauses

- (309) The evidence in the file indicates that the length of negotiations was seriously impacted by the fact that TP insisted during the negotiations on the unreasonable clauses contained in TP's draft standard contracts. This is illustrated by statements of a number of AOs which replied to the Commission's request for information.
- (310) GTS Energis was one of the operators that experienced TP's dilatory practices. As illustrated in Table 5 above, the LLU access contract negotiations between the AO and TP lasted 698 days that is the negotiations exceeded the regulatory time framework by 608 days. GTS remarked that "*among the different factors affecting the length of the process (...) one should mention: (i) a long time for negotiating the agreement terms reflecting the stipulations of the [Reference] Offer, to which TP objects or interprets them differently, and which are often key to the basic concepts of cooperation.*"⁴⁸⁷
- (311) Exatel is another AO which was faced with delayed negotiations. The LLU access negotiations between the AO and TP lasted 636 days, surpassing the 90-day deadline by 546 days. In its statement to the Commission Exatel directly pointed out that "[t]he negotiation practice shows that TP rather selectively applies the rules contained in the specific [Reference] Offers (...); - Arbitrary modifications of the decisions of the UKE's President by TP which de facto modifies the stipulations of the Offer while negotiating contracts with operators;- TP modifies the provisions of the BSA Offer during the contract negotiations with operators in an unauthorized manner."⁴⁸⁸
- (312) Another operator, Polkomtel, indicated that "*during the negotiations the lack of agreement of TP SA to employ vis-à-vis Polkomtel SA provisions corresponding to those of the RBO, and those offered to other market participants*"⁴⁸⁹ had a negative impact on the length of the negotiations.

484 TP's letter to the Hearing Officer, pages 4 and 5.

485 See recital (168).

486 SO Reply, pages 89 - 90.

487 GTS Energis' reply to the RFI of 23 February 2009, page 2.

488 Exatel's reply to the RFI of 23 February 2009, page 7.

489 Polkomtel's reply to the RFI of 23 February 2009, Annex 1, page 2.

- (313) Also, in the case of Supermedia's negotiations of LLU and BSA access contracts, TP presented to this operator its standard contract which contained different provisions from those in the relevant ROs. After six months of unsuccessful negotiations, Supermedia had to request the President of UKE to issue decisions as regards BSA and LLU. They were issued on 21 February 2008 and 21 April 2008 respectively.⁴⁹⁰
- (314) As explained by Tele2, the fact that TP's proposal did not even meet the provisions of the relevant RO resulted in "*no possibility for achieving a consensus between the parties.*"⁴⁹¹ In such a difficult situation AOs were forced to choose between further delays, if the case was referred to the NRA, or agreeing on worse terms in order to foster the beginning of broadband service provision. This was for instance the case of Tele2 that explained: "*in Tele2's assessment, a significant part of TP's proposals was inconsistent with the Reference Offer. Therefore, Tele2 asked the President of UKE to issue a decision to replace the contract. However, given Tele2 intention to start providing the BSA service as soon as possible, it finally concluded a contract with TP, accepting provisions partially disadvantageous and inconsistent with the Reference Offer.*"⁴⁹²

2.2.3. TP's representatives lack of power to commit the company

- (315) The Commission's file contains evidence indicating that during negotiations of BSA or LLU contracts TP was represented by persons who were not authorised to agree on changes proposed by AOs to TP's draft contract. This prolonged and distorted the negotiations. Consequently, AOs could not be certain that the reached compromise would be reflected in the contract signed by TP.
- (316) In this respect GTS Energis remarked that: *the people that take part in the negotiation meetings on TP's side cannot unambiguously and definitively confirm any negotiated terms, thus de facto terms "agreed" during the meetings are agreed only "provisionally".*⁴⁹³
- (317) Similarly, Netia indicated that "*in many situations the persons participating in the negotiation meetings were not authorised to amend the text of the agreement /annex, this prolonged the negotiation process due to the fact that every change had to be discussed internally in Telekomunikacja Polska which lasted a long period of time. Changes related to issues of substance, but often also to editorial issues.*"⁴⁹⁴ In the same vein e-Telko stated that "*the long period of negotiations was caused by the lack of decision-making power of the persons from TP S.A. participating in meetings.*"⁴⁹⁵

⁴⁹⁰ Supermedia's reply to the RFI of 23 February 2009, pages 3-5. Supermedia submitted to TP a motion compliant with the formal requirements for a BSA agreement on 8 January 2007 and for a LLU agreement on 26 January 2007. After 6 months of negotiations, Supermedia requested on 4 June and 30 May 2007 that the President of UKE issued decisions as regards BSA and LLU. The President of UKE issued those decisions on 21 February 2008 (see decision no DHRT-WWM-60600-68/07 (28)) and 21 April 2008 (see decision no DHRT-WWM-60600-67/07(28)), respectively.

⁴⁹¹ Tele2's reply to the RFI of 23 February 2009, page 5.

⁴⁹² Idem.

⁴⁹³ GTS Energis reply to the RFI of 23 February 2009, page 2; See also MNI's reply to the RFI of 23 February 2009, page 6.

⁴⁹⁴ Netia's answer to the RFI of 23 February 2009, page 4.

⁴⁹⁵ E-Telko's reply to the RFI of 23 February 2009, page 4.

- (318) In addition, [AO] stated that despite having reached an agreement on some provisions during the negotiations with TP, at a later stage TP changed these terms, going back to its original proposal. Consequently "[AO] has been forced to accept the status quo or give up signing the contract."⁴⁹⁶
- (319) In its comments to TP's Reply to the SO UKE confirmed that TP's negotiation teams lacked the power to take decisions in the negotiations. "TP used to send a reply to a proposal made in the negotiations by an AO after several months. Not only did it concern new proposals of AOs but also AO requests to introduce in the contracts stipulations directly from the ROs. Another example relates to situation in which TP withdrew its agreement on previously agreed contractual stipulations giving as a reason the absence of its legal representatives, at the same time TP the incumbent bore the sole responsibility for the absence of its lawyers in the negotiations."⁴⁹⁷
- (320) In its internal presentation of 4 October 2007 TP confirmed the existence of the "weaknesses and problems" in the negotiating process. TP itself recognised that [Information on the errors identified by TP in the process of provision of wholesale access services, including an inadequate organization of the negotiation process with AOs in terms of internal division of powers]. The result may be prolonging the process."⁴⁹⁸ TP also acknowledged that [Information on the errors identified by TP in the process of provision of wholesale access services, including inadequate organization of the negotiation process with AOs in terms of internal division of powers and responsibilities and various TP's units' opportunities to determine independently the content of agreements]".⁴⁹⁹
- (321) Also, TP's Division of Client-Operators, which dealt with AOs in the context of the provision of wholesale services recognised numerous failures on TP's side: "[its] responsibility only for a part of the clients/wholesale business [Information on the errors identified by TP in the process of provision of wholesale access services to AOs, including TP's internal organization in terms of the division of powers, adaptation to the prevailing business conditions (customers, competition, the regulator) and the employment of an appropriate amount of persons]."⁵⁰⁰
- (322) Finally, in the Agreement TP signed with UKE on 22 October 2010 (see chapter IX) TP committed itself to sending to negotiations people with the power to commit the company. This contradicts TP's arguments, dealt with in recitals (370) to (373), and clearly demonstrates that TP could have applied the same standard prior to the Agreement.

2.2.4. Unreasonably long procedure for signing the contracts

- (323) In addition to the lengthy negotiating process, TP also prolonged the approval procedure of the agreed contracts and their annexes.
- (324) Initially, TP's internal rules contained no provisions regarding the length of the signature process.⁵⁰¹ TP first set up such internal deadlines on 17 April 2007, introducing a process according to which the contract should be signed within 12

⁴⁹⁶ AO's reply to the RFI of 23 February 2009, page 6.

⁴⁹⁷ UKE comments to TP's reply to the SO, page 39.

⁴⁹⁸ Inspection document, TP's internal presentation of 4 October 2007, pages 202 and 252.

⁴⁹⁹ Idem, page 155.

⁵⁰⁰ Inspection document, TP's internal presentation of April 2007, page 74.

⁵⁰¹ Annexes to point 1 and 2 of TP's reply to q. 18 of RFI of 16 February 2009.

working days after the Sales unit of the Client-Operator's Division receives acceptance from the AO of the negotiated text and starts the signature process.⁵⁰² TP modified its internal signature rules first on 6 February 2008, *inter alia* extending the indicative deadline to 17 working days (and to 13 working days in 'emergency' cases)⁵⁰³, and then on 18 August 2008, *inter alia* modifying the indicative deadline to 15 working days (11 working days in 'emergency' cases).⁵⁰⁴ However, the evidence gathered in the Commission's file contains numerous indications of TP's failure to comply with its own internal deadlines, which led to delays of many weeks and even of more than 5 months in the case of Netia.

- (325) In this respect, GTS Energis stated that: "*among the different factors affecting the length of the process of obtaining access to wholesale broadband Internet access products (...) one should mention: (...) the long period - a period of many weeks - needed for TP's internal acceptance of the bilaterally negotiated agreement, its initialling and signing, which results in lack of possibility to implement it and to place any orders for the construction of access points.*"⁵⁰⁵ This has also been confirmed by Sferia, e-Telko and ESPOL.⁵⁰⁶
- (326) Similarly, Netia pointed out that "*the process of signing the Annexes to the BSA contract or the LLU contract was also extended. The lack of appropriate signatures by TP meant there was a lack of proper formal-legal grounds to apply the provisions of the Annexes and brought uncertainty as to whether the annex will be signed, in particular, in a case where the [time] difference in the signatures was about 5 months!*"⁵⁰⁷ (and not 17 working days as foreseen by TP's internal rules). TP corrected Netia's statement which, in TP's view, should refer to working and not calendar days but in any case TP admitted that "*TP signed [the contract] after 117 working days.*"⁵⁰⁸
- (327) The fact that AOs had to wait a long time before a mutually agreed contract was signed by TP had a negative effect on the AOs which, facing weeks or even months of uncertainty, were unable to start providing the retail broadband services based on LLU or BSA. Even in the few cases where the parties agreed that the contract would enter into force before being signed⁵⁰⁹, AOs could not be certain that the contract would eventually be approved by TP prior to the actual signature.

⁵⁰² Idem, Annex to point 3.

⁵⁰³ Annex to point 4 of TP's reply to q. 18 of RFI of 16 February 2009.

⁵⁰⁴ Annex to point 4 of TP's reply to q. 18 of RFI of 16 February 2009.

⁵⁰⁵ GTS Energis reply to the RFI of 23 February 2009, page 2.

⁵⁰⁶ Sferia's reply to the RFI of 23 February 2009, page 4, refers to "*a long process of acceptance of agreed in the negotiations contract by the organizational units of TP (from 12 March to 30 April [2008])*" and E-Telko's reply to the RFI of 23 February 2009, page 4, refers to: "*long time of initialling by the internal structures of TP SA (up to 3 months after the agreement was reached)*". See also TP's reply to the RFI of 22 December 2008, page 6: TP confirmed that that E-Telko concluded negotiations to modify its BSA contract in compliance with the RBO on 5 April 2007, yet the contract was signed by TP only on 7 September 2007, i.e. 3 months later and ESPOL's reply to the RFI of 23 February 2009, page 5; "*This period was largely dependent on (...) the time Telekomunikacja Polska SA. needed to sign the contract*"

⁵⁰⁷ Netia's reply to the RFI of 23 February 2009, page 4: "*V. The length of initialling the relevant Annexes to the Agreement by Telekomunikacji Polskiej S.A.*"

⁵⁰⁸ SO Reply, page 102. This is irrespective of the fact that the contract should be concluded within 90 calendar days.

⁵⁰⁹ This was the case of [AO, AO and AO] (see inspection document, TP's internal document, page 12-13).

- (328) In broader terms, deficiencies on TP's side with regard to lengthy proceedings were described by ATM S.A. in the following way: *"it took about one year to negotiate the contract, which is a period – in our view - too long, and results from the very detailed and time-consuming internal decision making procedures at TP S.A., i.e. before the final signing of the contract, it is necessary to obtain approval of all intermediate levels (individual departments of the Company)."*⁵¹⁰
- (329) TP itself admitted the following failures in this area: *"a long internal process of signing documents and (...) lengthy negotiations and the long period needed to sign the contract."*⁵¹¹

2.2.5. Overall negotiating strategy of TP

- (330) In addition to the problems the AOs were facing at the different stages of contract negotiations, there is evidence showing that there was limited room for negotiations as, in a number of cases, AOs had to either accept TP's proposals, refer the case to UKE (for instance, that is the case of Tele2, Supermedia, Telefonía Dialog, PTC, Długie Rozmowy and Multimedia) or abandon the idea of providing retail broadband services (such as in the cases of GH Net, Polkomtel, PHU Telsat).
- (331) The correspondence between the CEOs of TP and Tele2 about ongoing BSA and LLU negotiations is a good illustration of TP's approach to negotiations. In an email from Tele2's President to TP's President of 16 March 2007, Tele2 expressed its disappointment about TP's negotiating attitude: *"I appreciate all the declarations about the desire to build a partnership and avoid escalating matters to UKE, and I reiterate our willingness to such cooperation. Unfortunately, as I had signalled at our meeting on Monday, so far the reality has nothing to do with declarations"* as TP's answer is *"a very clear NO practically on each and every relevant proposal"* coming from Tele2.⁵¹² The AO further added that *"in [Tele2's] view this approach does not have anything to do with a will to have commercial co-operation."*

⁵¹⁰ ATM's reply to the RFI of 23 February 2009, page 5. The Commission notices that in some cases dates indicated by ATM are not consistent with the dates indicated by TP; yet they still indicate an extended negotiating process.

⁵¹¹ Inspection document, TP's internal document, pages 12 and 13.

⁵¹² Inspection document, email from Tele2's President to TP's President of 16 March 2007, pages 14-15. *"Bitstream Access (BSA) 1. The negotiation of an annex amending the contract to the binding RUO. Even at our meeting 4 weeks ago, you claimed that this issue would be solved quickly. Tele2 presented the proposal of the annex comprising the key open issues (e.g. so called "naked ADSL", forecasts and penalties, process of realisation of orders and discount). The answer from TP, which we received yesterday/today is a very clear NO practically on each and every relevant proposal (except proposals to change definitions etc). Notwithstanding the fact that such a proposal is contradictory to the binding RUO (as well as to the recent opinions of UKE issued in order to clarify the issues where the differences in interpretations appeared), in my opinion this approach does not have anything to do with a will to have commercial co-operation (...)? LLU: 1. Negotiation of the LLU contract: In practice TP rejects all key amendments in the draft contract proposed by TP – both concerning only changes that are in accordance with the TP model agreement, which UKE included in RUO, as well as changes in the process, which based on our experience on the local loop unbundling from across Europe are indispensable to avoid a catastrophe of proceedings. As always, we received just a negative response, with no will of discussion, explanation, or understanding or willingness to find a good solution. To sum up: I appreciate all declarations of desire to build a partnership relation avoid escalating the matters to UKE, and I reiterate our willingness to such cooperation. Unfortunately, as I had signalled at our meeting on Monday, so far the reality has nothing to do with declarations"*.

- (332) TP's explanations in this regard are vague.⁵¹³ While TP attempts to blame Tele2 for unsuccessful negotiations explaining that UKE did not accept particular contractual proposals of Tele2 in a decision issued on 8 August 2007⁵¹⁴, the incumbent does not explain its negotiating strategy whereby it *"was rejecting all key amendments in the draft contract (...) with no will of discussion, explanation, or understanding or willingness to find a good solution."*⁵¹⁵
- (333) Polkomtel is an example of an AO, which following lengthy BSA negotiations which lasted 190 days decided first to sign the agreement, despite the numerous disadvantageous stipulations, and later on referred the case to the NRA. The AO stated that it was *"forced"* to sign the agreement on the basis of the conditions proposed by TP.⁵¹⁶ In a letter of 22 May 2007 sent to TP Polkomtel also stressed it was *"interested in setting the conditions for cooperation through negotiation, bearing in mind that regulatory duties imposed on both parties must apply."*⁵¹⁷ Polkomtel added: *"we wish to present the position of Polkomtel S.A. on cooperation terms in negotiations, together with identifying instances in which TP had not been the regulatory obligations stemming from the Reference Offer and the rule of non-discrimination. Such attitude of TP forced Polkomtel to accept the draft contract, which deviated significantly from the conditions stipulated in the Reference Offer and TP's contracts with other operators."*⁵¹⁸
- (334) TP attempts to underestimate the evidence of Polkomtel by stating that *"the length of negotiations with Polkomtel did not diverge from the length of negotiations with other AOs"* and that *"an AO is not forced to accept all proposals of TP (particularly if they are not in line with the current RO)."*⁵¹⁹ While TP admits the delays in negotiations with Polkomtel, it does not comment on the fact the negotiations lacked genuine exchanges between the parties what in practical terms meant that the AO had to agree on the incumbent's unfavourable proposals.
- (335) Similarly, Netia explained it was in a situation where the lack of flexibility on TP's side meant it could either accept TP's conditions or refer the case to UKE. The latter solution however in view of the procedure meant further delay. *"Such [difficult] negotiating approach was presented [by TP] from the beginning of the negotiations. Netia then, given a choice: to provide services based on BSA or not, finally accepted the proposal of TP, despite being aware that such provision is incompatible with the RO. To illustrate, Tele2 asked the President of UKE to issue a decision replacing the contract but due to the long UKE procedure [Tele2] gave up and was forced to conclude the contract with TP. As a result, Tele2 was able to start BSA services much later."*⁵²⁰
- (336) Furthermore, a statement from Telefonía Dialog also gives a good picture of a lack of TP's constructive approach to negotiations. Telefonía Dialog indicated that despite the promising beginning of the negotiations *"TP changed the versions of the draft contract, introducing new stipulations, less and less advantageous to the*

⁵¹³ SO Reply, page 103-104.

⁵¹⁴ In fact TP blamed many operators in its reply to the SO for the failed negotiations. See recitals (357) - (365) .

⁵¹⁵ Inspection document, correspondence of 6 March 2008 between TP and Tele 2, page 15.

⁵¹⁶ Polkomtel's answer to the RFI of 23 February 2009, Annex 217, page 444.

⁵¹⁷ Idem.

⁵¹⁸ Idem.

⁵¹⁹ SO Reply, pages 94-95.

⁵²⁰ Netia's reply to the RFI of 2 December 2010, op. cit., pages 1-2.

Benefiting Operator. As a result of these actions, the positions of the parties, instead of drawing closer, became increasingly divergent."⁵²¹

- (337) There is evidence that TP refused to conduct negotiations on the basis of a draft contract compatible with the conditions of the RUO which an AO proposed. This was, for instance, in the case of negotiations with PTC. In an internal document TP recognised that PTC was: "*prepared to sign the draft agreement attached to the UKE decision of 3 April 2007 with any necessary, according to the Parties, amendments or additions*" but "*TP does not agree with PTC's proposal.*"⁵²²
- (338) In the SO Reply, TP attempts to mischaracterize the example PTC and purports that PTC's proposal was not in line with the RO.⁵²³ TP does so on the basis of the decision of UKE of 30 July 2007, which was issued in view of the failure of negotiations, yet TP's reading is selective. In the said decision, the President of UKE indeed refers to the changes in negotiation positions of both TP and PTC's, but concludes that the PTC's proposal of 23 April 2007, to which the reference is made in the TP's internal document above, "*was entirely based on the cooperation model contained in the President's decision [RUO] of 3 April 2007 on amendments to and approval of the TP Framework Offer, lying down framework conditions of agreements on access to the local subscriber loop.*"⁵²⁴ In addition, it is noted that that even before the final modification of PTC of 23 April 2007, the AO was suggesting to TP to introduce in its proposal: "*any necessary, according to the Parties, amendments or additions.*"⁵²⁵
- (339) Furthermore, the lack of good faith in negotiations is also visible in the negotiations with Telefonía Dialog (TD). In this case also, following TD's request of 12 October 2006, TP refused to sign a LLU contract fully compliant with the newly introduced RUO of 5 October 2006. TD repeated its request during a meeting of 30 November 2006. However, the draft LLU contract that TD received from TP on 8 January 2007 introduced terms in contradiction with the model contract annexed to the RUO. Therefore, TD sent to TP on 12 February 2007 a letter stating that TD "*the draft in very many elements differs from the stipulations set by the current Reference Offer on LLU (...) approved by the President of UKE on 5 October 2007 (...) and consequently significantly differs from the model contract enclosed as Annex 4 to the Reference Offer. The Reference Offer introduces for application between Telekomunikacja Polska S.A. (hereinafter: "TP") and other alternative operators model documents, in particular the model access and collocation contracts in form and content laid down in Appendixes nos. 4 and 7 of the LLU Reference Offer. At the same time, TP sent to Telefonía Dialog a draft access contract containing many essential provisions which*

⁵²¹ Telefonía Dialog's reply to the RFI of 23 February 2009, page 9.

⁵²² Inspection document, TP's report "*Forecast of the most important events and potential threats to TP*" of 25 May 2007, "*11. LLU - Full or shared access to the local loop: PTC refused to open negotiations, which would be based on TP's draft (TP's requirement). [PTC is] prepared to sign the draft agreement attached to the UKE decision of 3 April 2007 with any necessary, according to the Parties, amendments or additions, TP does not agree with PTC's proposal. In May 2006 PTC sent to UKE a motion seeking the definitions of conditions of cooperation for LLU and faced with no agreement in the LLU negotiations –is awaiting UKE's decision, which will guarantee the conditions of cooperation envisaged in the [LLU] Offer.*" , page 6.

⁵²³ SO Reply, paragraphs 477-478, page 106. See also TP's letter of 24 September 2010 addressed to the Hearing Officer, pages 1-3 where TP claims that in view of the changes introduced to the RUO on 3 April 2007 TP was not able to accept PTC's proposal.

⁵²⁴ Annex 16, SO Reply, page 44.

⁵²⁵ Inspection document, op. cit., page 6.

*diverge from the model access contract, regulating specific issues inconsistently with the rules set in the Reference Offer. (...) For obvious reasons Telefonía Dialog expects to conclude an access contract under conditions not worse than those stipulated in the Reference Offer. Our expectation is based on the legal norm set out in Art. 43(6) of the Telecommunication Law which does not leave any interpretation doubts as regards TP's implementing obligation of the Reference Offer. Considering that provision and the content of the Reference Offer, it is evident that TP is obliged to conclude an access contract with AOs based on the content of Annex 4 of the Reference Offer. Meanwhile, the project submitted makes clear that TP refuses to apply the approved Reference Offer and endeavours to impose on AOs unfavourable access conditions."*⁵²⁶ TD informed the Commission that it had not received a reply to this letter from TP. TP failed to explain why it did not reply to the letter of TD.

- (340) As TD considered that a number of conditions introduced by TP would significantly worsen its access conditions to the local loops as compared to the conditions set in the applicable RUO, it decided not to accept the terms offered by TP and turned to the President of UKE requesting the issuance of a decision replacing an inter-operator contract. The decision was issued on 31 July 2007.⁵²⁷
- (341) Moreover, TD also negotiated a BSA contract with TP. The initial draft of the BSA contract presented by TP to TD in reply to TD's motion of 10 July 2006 was not fully compliant with the terms of the RBO of 10 May 2006, applicable at that time. TP was only willing to sign with TD a contract containing the same conditions as the contracts it had signed with Netia and GTS Energis.⁵²⁸ This fact but also TP's statement on the "*lack of need to introduce for Telefonía Dialog other conditions than those binding other operators*"⁵²⁹ proves that TP did not negotiate but rather imposed its contractual conditions.
- (342) There are also AOs' statements in the Commission's file indicating instances in which TP further delayed the process of negotiations justifying it by the introduction of a new RO. For example, GTS Energis indicated that the access to a BSA service was lengthened *inter alia* due to "*a long time it took TP to prepare its position concerning changes introduced by the modification of the Reference Offer, which at the same time blocks the possibility to negotiate the specific contract provisions (although TP has claimed that it started the negotiations by stating that it does not have a ready made contract proposal)*."⁵³⁰
- (343) The existence of a delaying and blocking approach of the incumbent in negotiations is further confirmed by a statement of UKE. The President of the NRA stated that "*TP did not conduct negotiations in good faith at all. (...) The impass (...) was due to TP's rigid position which did not foresee the possibility to negotiate solutions beyond what was imposed by the President of UKE [the RO stipulations]. (...) However, when setting such disputes the President of UKE did*

⁵²⁶ Telefonía Dialog's reply to the RFI of 23 February 2009, page 7 with a letter sent to TP on 12 February 2007.

⁵²⁷ Telefonía Dialog's reply to the RFI of 23 February 2009, page 9.

⁵²⁸ Telefonía Dialog's submission of 13 March 2009, page 9-10: "*The draft agreement proposed by TP diverged significantly from the conditions of the Reference Offer of 10 May 2006. (...) During the negotiations TP informed Dialog that it is willing to sign the BSA agreement only on the conditions on which the BSA agreements between GTS Energis Sp z o.o. and TP, and between Netia SA and TP were signed.*"

⁵²⁹ SO Reply, paragraph 483, page 107.

⁵³⁰ GTS Energis' reply to the RFI of 23 February 2009, page 2; See also Telefonía Dialog's reply to the RFI of 23 February 2009, pages 9-11 and Sferia's reply to the RFI of 23 February 2009, page 4.

not introduce terms of cooperation not provided for in the Reference Offers. (...) *The number of interventions of the President of UKE (...) clearly indicates that there was no good will on TP's side in conducting the negotiations.*⁵³¹

2.2.6. Arguments of TP

90-day regulatory deadline

- (344) In the SO Reply⁵³² TP takes issue with the 90-day regulatory deadline for concluding negotiations used by the Commission as a benchmark in its assessment. TP alleges that the 90-day deadline is not binding as it is in contradiction with the Polish Telecommunications Law. TP goes on to say that *"the 90-day deadline for finalising negotiations provided for in the Telecommunications Act constitutes only a condition which opens up the possibility for the AO to demand the settlement of a pending dispute between the parties by the President of the NRA."*⁵³³
- (345) The reasoning put forward by TP is unconvincing. Firstly, the time framework for concluding access negotiations foreseen in the ROs stems directly from the Telecommunications Law (Art. 27) giving the parties a maximum of 90 days.⁵³⁴ Within this time TP is obliged to send a draft contract to an AO, set the date of the first negotiations, delegate representatives, agree on the text and sign the contract. All ROs are binding on TP from the moment of their imposition.⁵³⁵ In this respect, the Commission also notes that although TP has contested the validity of many ROs stipulations before Polish Courts, none of the ROs has been removed from the Polish legal order.⁵³⁶
- (346) Secondly, in addition to the fact that the deadline is well-established in the Polish legal order, the Commission used the 90-day regulatory deadline as a benchmark for its assessment as it has recognised its reasonableness. Indeed, certain examples in the file confirm that TP was able to conclude contracts, without delays. In particular, in 2010 TP needed only less than 38 working days on average to conclude contracts with AOs.⁵³⁷
- (347) Thirdly, as explained in the recital (722) the Commission is not finding the abuse on the basis of random or incidental instances where the deadline of 90-days was

⁵³¹ UKE comments to TP's Reply to the SO, page 38 and 42.

⁵³² SO Reply, paragraphs 382, 398.

⁵³³ SO Reply, paragraph 383.

⁵³⁴ Art. 27 states *inter alia*: in point 1 *"The President of UKE, on the basis of a written request of a party in the negotiations of an access contract to telecommunications network or ex officio, by way of a decision, may set the deadline for concluding the said contract, which will be not longer than 90 days (...)"* In point 2 *"In the case of failure to undertake negotiations concerning the the conclusion of an access contract to telecommunications network, refusal to connect to a network by the obliged entity to do so or failure to conclude the access contract within the deadline stipulated in point 1, or failure to conclude the access contract within 90 days from the day of the motion for concluding an access contract, each party can refer to the President of UKE to issue a decision making a judgment on the disputed matters or imposing the conditions of cooperation."*

⁵³⁵ See Art. 42 and 43 of the Polish Telecommunications Act.

⁵³⁶ UKE's comments to TP's reply to the SO, pages 1- 2.

⁵³⁷ TP's reply to the RFI of 25 November 2010, pages 67 – 75 and SO Reply paragraph 383, page 80. TP's data on concluded contracts in 2010 points to the following number of working days elapsed between the AO's motion and the conclusion of a contract: 18, 12, 15, 50, 93, 21, 38, 38, 24, 26. The average of this is less than 38 days.

not respected by TP, but because of a pattern of behaviour of TP that includes, among other practices, repeated and notorious delays well in excess of 90 days.

- (348) Finally, TP contradicts its own argument on the lack of the binding nature of the ROs in other points of its SO Reply. In § 412, for instance, TP recognises the binding nature of the ROs by stating: "[i]f TP continued the negotiations on the basis of the old motion of an AO and an old draft contract, it would expose TP to allegations of acting in breach of the binding [new] RO."⁵³⁸ Also in the reply to the letter of facts TP stated: "[i]n the case a new Reference Offer is approved a telecommunications undertaking is obliged to apply the offer and cannot conclude contracts containing conditions worse for the other party than those contained in the RO."⁵³⁹

Constant changes of relevant ROs and unclear provisions of ROs

- (349) TP attempts to put the blame for delays on the Regulator.⁵⁴⁰ TP alleges that the delays: "arose (...) from amendments to the BSA/LLU RO and the need to adjust the subject of the negotiations to the currently applicable RO"⁵⁴¹, "that many provisions of the BSA RO 2006 were unclear"⁵⁴² and that "[d]ue to a change of the LLU RO, the subject matter of the negotiations changed."⁵⁴³ In view of the alleged frequent changes in the regulatory framework TP further argues that: "if TP continued the negotiations on the basis of the old motion of an AO and an old draft contract, it would expose TP to allegations of acting in breach of the binding RO"⁵⁴⁴ and that "TP is not obliged to have a new draft contract ready at the moment of the beginning of the negotiations, especially in the situation where the RBO had just changed."⁵⁴⁵
- (350) The Commission cannot accept these arguments of TP. Firstly as a general point it should be noted that the regulatory mechanism foresees an involvement of the incumbent in the process leading to any changes to the ROs. It is in fact the incumbent that prepares a first draft of changes at the request of the Regulator (see recital (72)). This ensures that the incumbent is well informed about the context of RO changes and has the possibility to convince UKE of its proposals. Therefore, as an important participant of such a process TP could have been fully aware of all the changes that each new or amended RO was introducing, thus being capable of incorporating them in the draft contracts swiftly.
- (351) In this context, it should be noted however that for a long time TP chose to abstain from the preparations of the draft ROs. As UKE mentioned in a submission to the Commission; "[t]he introduction of the BSA and LLU Reference Offers was hampered by TP as inter alia the incumbent did not discharge, among

⁵³⁸ SO Reply, para 412, page 88.

⁵³⁹ TP's Reply to the letter of facts, paragraph 121, page 25.

⁵⁴⁰ SO Reply paragraphs 385, 407, 412, 420-422, 437, 443-444, 461-46. See also paragraphs 725 – 733 on the "Regulatory environment for TP activities in the years 2006-2007".

⁵⁴¹ Idem, paragraph 385.

⁵⁴² Idem, paragraph 437.

⁵⁴³ Idem, paragraph 444.

⁵⁴⁴ Idem, paragraph 412.

⁵⁴⁵ Idem, paragraph 438. TP presented the same reasoning in its written Reply to the Commission's questions from the Oral Hearing, see letter of TP dated 24 September 2010, page 3-5. TP justifies delays at the beginning of negotiations with Multimedia and GHNet by the fact that the ROs had just changed and that therefore TP needed time to prepare new draft contracts.

others, its duty to prepare the draft reference offer or proposed in the reference offers definitions and contractual clauses non-compliant with the Telecommunications Law and the SMP decision [imposed on an operator with a significant market power]"⁵⁴⁶ Therefore, TP's inability to swiftly reflect the changes to the ROs resulted only from TP's denial of its role in the regulatory process.

- (352) Moreover, while the need to reflect the market dynamics and developments in the amendment of the ROs appears legitimate, it is noted that in fact TP itself requested some of those changes.⁵⁴⁷ TP was therefore aware of the possible outcome of the process leading to the RO changes, being the initiator. That should have given TP the capability for a swift incorporation of new, changed or revised stipulations.
- (353) In this regard, it is also important to underline that the continuity of the core stipulations of the ROs has always been kept. TP seems to acknowledge that. In a reply to the letter of facts TP stated that "*The RO approved by way of administrative decision by the President of UKE does not change directly the conditions of cooperation between the incumbent obliged to apply the reference offer and other telecommunications undertakings.*"⁵⁴⁸
- (354) In practice, there are examples that point to such continuity of the main RO rules. One of them is UKE's decision of 1 August 2007.⁵⁴⁹ The NRA decided to base the said decision on the 2006 RUO, despite the fact that the RUO had already been revised by the Decision of 3 April 2007. Another one is TP's access contract with Polkomtel. TP began the BSA negotiations with Polkomtel under the RBO of 10 May 2006 (contract v. 9) and finished under a new RBO of 4 October 2006 (and after the introduction of the new version of TP's contract v. 15). TP explained in paragraph 436 of its SO Reply that "*the contract (...) was concluded on the basis on version 9 of TP's BSA standard contract with elements of [new TP's] version 15.*" This confirms that TP was able to make the necessary changes to its draft contracts swiftly and did not need to restart negotiations with AOs as the subject matter of the negotiations did not change.
- (355) As to TP's argument on unclear RO rules, the evidence in the file proves that either TP was not interested in obtaining a clarification from UKE or that the RO stipulations were in fact very clear. In the context of the matter discussed in this investigation – namely related to RBOs and RUOs, UKE informed the Commission that although "*TP has had the possibility to refer to UKE in case of unclear RO stipulations and a need for clarification*", TP referred to UKE with respect to BSA only once on 25 March 2009 where, as UKE stated, "*the stipulations of the decision left no interpretation doubts.*"⁵⁵⁰
- (356) Finally, it is incomprehensible to the Commission why TP needed months (see Table 1 and Table 3) to prepare a draft contract in line with the current RO and why TP refused to base the negotiations on the draft contract attached to the RO and prepared by UKE.⁵⁵¹ TP did not bring to the Commission's attention any convincing arguments in that respect. As UKE clearly stated: "*It is untrue that*

⁵⁴⁶ UKE's comments to TP's reply to the Statement of Objections, pages 1- 2.

⁵⁴⁷ BSA of 4 October 2006, BSA of 4 November 2008, LLU of 3 April 2007, LLU of 29 May 2009.

⁵⁴⁸ TP's reply to the letter of facts, paragraph 121, page 25.

⁵⁴⁹ Annex 22 to SO Reply. In particular see page 46 two last indents.

⁵⁵⁰ UKE comments to TP's Reply to the SO, op. cit., page 41.

⁵⁵¹ See Table 6.

changes in the RO caused delays in the negotiations. In fact TP reverted to delaying tactics even after the RO had been introduced."⁵⁵²

AOs' responsibility for delays

- (357) In a number of paragraphs of SO Reply, TP seems to claim that AOs bear the responsibility for the delays in negotiations.⁵⁵³ TP essentially alleges that some AOs started negotiations with TP without the intention of completing them as they were counting on more favourable solutions to be contained in UKE's decisions. According to TP, AOs would deliberately propose provisions which were unacceptable to TP in order to create a disagreement and immediately revert to the Regulator. In support of this claim TP cites the example of GTS that sent to TP the motion to change the BSA contract on 21 March 2007 and on the same day it requested UKE to decide on the termination date of the negotiations.⁵⁵⁴ In support of its contention that AOs demanded from TP provisions that were contrary to ROs TP quotes certain UKE decisions which allegedly confirm that practice.⁵⁵⁵ Finally, TP also asserts that delays resulted from the fact that AOs did not provide draft access contracts.⁵⁵⁶
- (358) The Commission considers that TP's contentions are without merit for a number of reasons. To begin with, as already stated many times in this decision, the provisions of the ROs contained only minimum standards, which TP was obliged to offer to AOs. Therefore, it cannot be questioned that during the negotiations AOs tried to convince TP of their proposals and obtained more favourable, tailored solutions. TP's statement that the "*Telecommunications Law does not prohibit TP from proposing in the negotiations solutions different to the ones contained in the RO*" shall apply *mutatis mutandis* to the right of the AOs to propose in the negotiations more advantageous, customized solutions from TP.⁵⁵⁷
- (359) Also in this regard, contrary to what TP argues⁵⁵⁸, the decisions of UKE do not show that AOs' claims were unjustified. As UKE explained to the Commission: "*It is unacceptable for TP to claim that the AOs' proposals in the negotiations diverging from the ROs aimed at sabotaging the process, while it was in the AO's interests to conclude contracts with TP. The negotiations deadlock was due to TP's rigid position which did not foresee the possibility to negotiate solutions beyond what was imposed by the President of UKE.*" UKE further explained that the NRA's assessment of the relevant AOs' proposals was entirely based on the provisions of RO: "*The President of UKE in the dispute resolutions did not introduce any access conditions going beyond the ROs.*"⁵⁵⁹
- (360) On the other hand, the extensive evidence in the case file outlined in section VIII.2.1 of the Decision illustrates that TP deprived the AOs even from the

⁵⁵² UKE comments to TP's Reply to the SO, op. cit., page 38.

⁵⁵³ SO Reply, paragraphs 386, 407, 397, 399, 401-402, 404, 406, 407, 431-432, 467-471, 475, 476, 478, 484-485.

⁵⁵⁴ SO Reply, paragraph 402.

⁵⁵⁵ SO Reply, paragraphs 404-406, 410, 412, 432-435.

⁵⁵⁶ SO Reply, paragraphs 410-412.

⁵⁵⁷ SO Reply, page 95.

⁵⁵⁸ See for instance arguments related to the negotiations with (i) Telefonía Dialog, paragraph 475-476, page 105, (ii) PTC, paragraph 478, page 106, (iii) Supermedia, paragraph 484-485, page 107, SO Reply.

⁵⁵⁹ UKE comments to the SO Reply of TP, page 38

minimum standards secured by the ROs and imposed less favourable solutions in their place, to the disadvantage of its competitors. AOs statements point out that "TP applies the RO stipulations rather selectively"⁵⁶⁰ and that "TP contested the stipulations [of the ROs] or interprets them differently,"⁵⁶¹ which had a serious impact on the length of negotiations. To this end, TP is right to claim that "an AO has no obligation to accept all proposals of TP at the stage of negotiations (in particular, if they are in contradiction with the content of an RO)."⁵⁶²

- (361) Furthermore, in its SO Reply TP provides a very illustrative example of TP's misinterpretation of RO's provisions. TP argues that Polkomtel misinterpreted RO's provisions on the burden of proof in case of TP's non-compliance with the contractual terms.⁵⁶³ In fact, Polkomtel was legitimate to request that its access contract with TP does not require that the AO proves TP's guilt in order to be able to claim contractual penalties. In this regard, UKE clearly stated that "from the point of view of evidence, it is much easier for TP to demonstrate the lack of guilt on its part than for an AO to prove TP's guilt."⁵⁶⁴ UKE added: "[c]onclusions a contrario drawn by TP led in this case to a completely mistaken statement, contrary to the literal wording of the interpreted comment made by the President of UKE (...) The essence of transferring the burden of proof is that a specific legal presumption is created, assuming a certain state of affairs (in this case TP's culpability). Thus, the AO does not have to prove anything and TP must rebut this presumption."⁵⁶⁵
- (362) The Commission cannot accept TP's argument on AOs' intentional delaying of the negotiations in order to obtain more favourable conditions in a decision by the Regulator. In particular, the Commission does not see any incentives for an AO to initiate long administrative procedures before UKE, which may well take longer than the 90-day deadline established in the RO for concluding contracts. Secondly, UKE informed the Commission that AOs could not count on more favourable treatment in the administrative proceedings before the Regulator as UKE's point of reference in these proceedings was the compliance of a disputed contract stipulation with the applicable RO.⁵⁶⁶ By means of administrative procedures before UKE an AO could only obtain the minimum guaranteed by ROs. Moreover, there were cases that prove that many AOs finally decided to sign unreasonable contracts just to be able to start providing services, as Netia's example shows: "Netia agreed to this disadvantageous, or in other words unrealistic, forecasting system [of TP] only to be able to start offering retail products."⁵⁶⁷
- (363) The specific example provided by TP to show that AOs intentionally delayed negotiations is based on the negotiations with GTS. TP reasoning is incorrect. On 21 March 2007 (the day when GTS submitted the motion to TP) GTS did not request UKE, as TP argues, to issue a decision establishing the rules governing

⁵⁶⁰ Exatel's reply to the RFI of 23 February 2009, page 6.

⁵⁶¹ GTS Energis's reply to the RFI of 23 February 2009, page 2.

⁵⁶² SO Reply, page 95.

⁵⁶³ SO Reply, paragraphs 431-434.

⁵⁶⁴ Annex 11 to SO Reply, page 34. See also UKE comments to TP's Reply to the SO, page 40.

⁵⁶⁵ Idem.

⁵⁶⁶ UKE comments to TP's Reply to the SO, page 38: "The president of UKE however when deciding on those conflicts [negotiating conflict between TP and an AO] did not introduce conditions which were not foreseen in the reference offers".

⁵⁶⁷ Netia's reply to the RFI of 2 December 2010, op.cit., page 5.

the provision of BSA services between TP and GTS but only requested UKE to specify the deadline for ending negotiations with TP.⁵⁶⁸ GTS is fully entitled to ask the Regulator to establish the end-date for negotiations, which might be even shorter than the regular 90 days. This specific request of GTS may have been triggered by the fact that in 2007 GTS had already been dealing with TP for 2 years and had already experienced significant delays in negotiating with TP.⁵⁶⁹

- (364) Furthermore, the Commission is aware that the Regulator intervened many times, in the majority of cases at the request of AOs. The Commission believes that this was triggered by TP's strategy to delay negotiations. Similarly, UKE remarked: "[t]he number of interventions of the President of UKE during the analysed period, despite the detailed reference offers, clearly confirms that there was no good faith on TP's side in conducting the negotiation."⁵⁷⁰
- (365) Finally, TP's argument that the delays resulted from the fact that AOs did not provide draft access contracts is wrong. Firstly, this argument of TP is neither supported by a reference to any particular RO obligation nor by any explanation of TP, which draft contract should have been provided by AOs. Secondly and more importantly, it was TP which was obliged to send AOs a draft access/collocation contract at the beginning of negotiations and not AOs.⁵⁷¹

TP contests the data used by the Commission

- (366) In several instances TP contests the data used by the Commission in its estimations of delays.⁵⁷² A careful reading of the decisions of UKE, which TP uses to back up its arguments, confirms however the findings of the Commission. This will be explained below.
- (367) In the case of Tele2, TP claims that the delay of 647 days did not occur as the Commission wrongly determined the beginning of the negotiations and because Tele2 stopped the negotiations at one point. The Decision of UKE dated 12 October 2007 clearly confirms however that the negotiations indeed began on 5 October 2005 and reaffirms their continuity.⁵⁷³
- (368) In the case of Supermedia, TP asserts among other things that the motion of the AO had formal deficiencies.⁵⁷⁴ Again, the decision of UKE of 21 February 2008 that TP referred to is clear in this context and says "*in relation to the allegations of TP (...) that Supermedia's motion of 4 June 2007 did not meet formal requirements, it must be indicated that such assertions are unjustified.*"⁵⁷⁵ The said decision confirms also that the parties did not reach an agreement, which is

⁵⁶⁸ As explained above (see recital (75)), UKE could shorten the negotiation perspective to a period of less than 90 days.

⁵⁶⁹ See Table 5; the LLU contract with GTS was concluded with over 600 days of delay.

⁵⁷⁰ UKE comments to TP's Reply to the SO, page 42.

⁵⁷¹ See recital (89) and (106); also see for example RUO of 9 August 2008, page 2.

⁵⁷² SO Reply, paragraphs 409, 410, 426-427, 457-458.

⁵⁷³ Annex 12 to SO Reply, page 45, Decision of UKE of 12 October 2007, DRHT-WWM-60600-107/06(31). UKE stated: "*It is uncontestable that the negotiations between the parties began on 5 October 2005. (...) following the introduction of a new offer [RO] the parties continued the negotiations which began on 5 October 2005 and did not restart new negotiations.*"

⁵⁷⁴ SO Reply, paragraph 410.

⁵⁷⁵ Annex 15, SO Reply, page 37, Decision of UKE of 21 February 2008, DRTH-WWM-60600-68/07 (28).

why Supermedia brought to UKE's attention the "*divergence of views*" and asked UKE to issue a decision.

- (369) TP also contests the evidence of GTS in which the AO draws a comprehensive list of TP's dilatory practices by pointing out that the BSA negotiations with GTS lasted only 43 days.⁵⁷⁶ This leads TP to the conclusion that "*the statements of GTS that TP delayed the negotiations are not evidenced in the facts.*" This is misleading. GTS is well placed to assess TP's approach to negotiations. As indicated in Table 5 based on TP's data, the LLU negotiations in the case of this AO were delayed by 608 days and the process of the modification of the BSA contract was completed with a huge delay of 821 days.

Lack of obligation to send persons with power to negotiate on behalf of the incumbent

- (370) TP also raised the argument that it was not obliged to send to negotiations people who would have a power to commit the incumbent to proposals of AOs.⁵⁷⁷ TP claims that the complexity of the content of each agreement required: a technician and a lawyer. They could not be present at every negotiation. TP is convinced that AOs were aware of the fact that their proposals could be changed at a later stage. TP argues also that if the AOs agreed with TP on a meeting date well in advance such authorised and competent representatives of the incumbent were always present. Finally, TP claims that the ROs did not require from TP that it establish any internal procedures for conducting the negotiations.⁵⁷⁸
- (371) The Commission does not find TP's arguments plausible particularly in view of TP's internal presentation in which TP admitted that it was unclear who was responsible for doing what inside the company.⁵⁷⁹ TP, as a dominant undertaking, has a special responsibility to organize its human resources in a proper way so as to ensure that the negotiation process was dealt with in a diligent way and by competent staff. UKE states: "[a]nother example was that *TP would refuse to sign a previously agreed contract giving as a reason the absence of its legal representative in the negotiations, while TP was the only one to be blamed for such an absence.*"⁵⁸⁰
- (372) Moreover, under the ROs' provisions the incumbent operator is obliged to indicate the TP representatives who were authorized to negotiate the terms and conditions of the contracts.⁵⁸¹ Unfortunately, during the negotiations AOs were faced with representatives of TP who could only "make notes" of the arguments of AOs and transmit them to their hierarchy.⁵⁸² AOs could only hope that what was agreed during the negotiations would be reflected later on in the signed contract. As indicated in recital (319), AOs were forced to return to negotiate terms which they believed had been already agreed on.
- (373) Finally, in the Agreement TP signed with UKE on 22 October 2010 (see recitals (567) to (571)) TP committed itself to sending to negotiations persons with the

⁵⁷⁶ SO Reply, paragraphs 426-427.

⁵⁷⁷ SO Reply, paragraphs 413-414, 422 and 439 – 442.

⁵⁷⁸ Idem, paragraph 445.

⁵⁷⁹ See recital (320) above.

⁵⁸⁰ UKE comments to TP's Reply to the SO, page 39.

⁵⁸¹ See RBO of 10 May 2006, section 3.1.1.3, point 4.

⁵⁸² UKE comments to TP's Reply to the SO, op.cit., page 39.

power to commit the company. This clearly demonstrates that TP could have applied the same standards prior to the Agreement.

2.2.7. Conclusion

(374) The evidence discussed in subsections 2.2.1 to 2.2.6 shows that TP significantly delayed the process of negotiations of access and collocation contracts with AOs. In particular TP delayed the beginning of negotiations by repeatedly and significantly surpassing the deadline to transmit a draft contract to an AO. Major delays resulted from the fact that TP's draft contracts did not safeguard sufficiently the interest of the AOs, as foreseen in the ROs, but contained unreasonable clauses that disadvantaged the AOs. The length of the negotiations was further impacted by the lack of TP's representatives possessing the power to commit the incumbent. Moreover, it took unreasonably long time to TP to sign the agreed contracts. Finally, TP's strategy in negotiations lacked good will and flexibility. Such behaviour of TP forms part of the incumbents strategy aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products

3. Limited access to TP's network

(375) As described in sections VI.1.2 and VI.2.2, once the contract for a wholesale broadband product is signed, an AO presents to TP an order for access to a SAN, in the case of BSA, or for a collocation/correspondence cable, in the case of LLU. Such an order undergoes a formal and a technical verification. If it is accepted, TP sends to the AO the technical conditions and costs estimates. Following the approval of TP's terms, an AO prepares a technical project, which the incumbent operator approves.

(376) The evidence in the Commission's file, reproduced in this section, illustrates that AOs encountered many problems while accessing TP's network. These impediments on TP's side related to:

- the high level of rejections of AOs' orders on formal and technical grounds both for BSA and LLU and
- the lengthy implementation of AOs' orders.

Noticeably, TP could have offered better conditions to AOs, as shown by the fact that its subsidiary PTK did not experience the same problems that AOs did in this context.

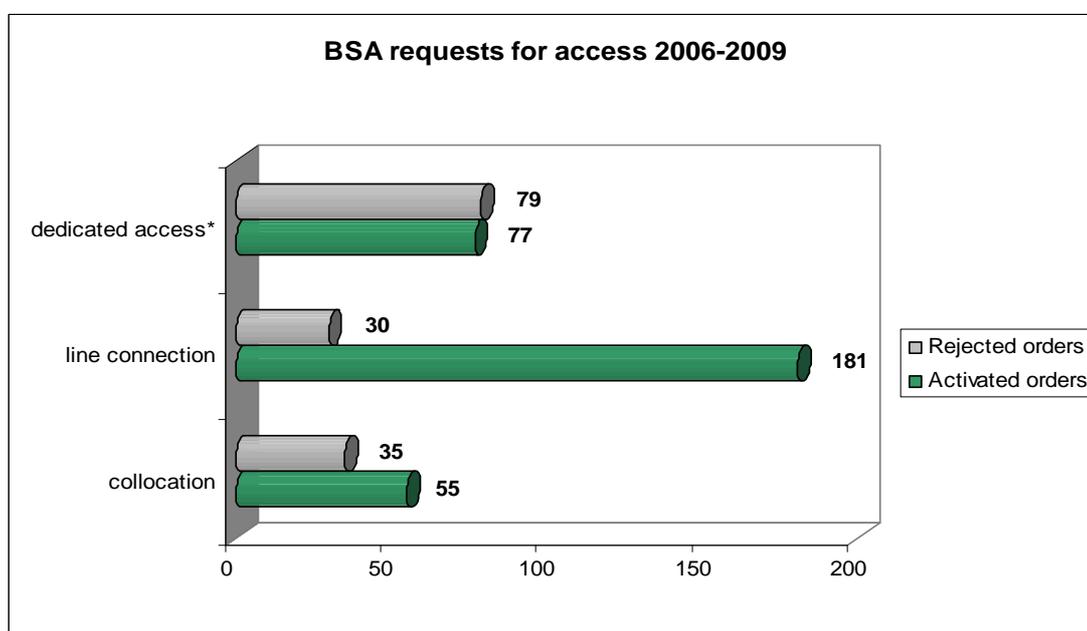
(377) The remainder of this section is structured as follows: subsection 3.1 deals with the problem of high rejection rates of BSA and LLU orders; subsection 3.2 is devoted to the issue of lengthy implementation of orders and subsection 3.3 illustrates PTK's facilitated access to TP's network. TP's arguments on the facts and the Commission's evaluation of those arguments are presented in subsection 3.4. Finally, subsection 3.5 concludes on the facts.

3.1 High level of rejections of AOs' orders on formal and technical grounds

(378) The evidence gathered by the Commission indicates that TP rejected a high proportion of AOs' orders for BSA and LLU access.

- (379) The importance of connection to SANs was highlighted by GTS Energis in the following way: *“the lack of access to particular SAN resulted and is resulting in a significant overloading of SANs, quality problems and problems concerning the availability of service to customers. In areas where access to a local loop is possible only at the level of regional SANs there is a limited possibility of provision of a big number of services with bigger bandwidth capacity.”*⁵⁸³
- (380) Furthermore, Netia explained that where access to SANs is denied by TP *“it directly influences a possibility of developing competitiveness at the level of the regions/cities covered by the scope of regional or local SANs (...). Therefore, motions [from subscribers] that an AO receives for a particular area can not be realised and a subscriber is deprived from using the services of AOs.”*⁵⁸⁴
- (381) The scale of rejection of AOs' orders for access to TP's network is illustrated below in Figure 4 for BSA and Figure 5 for LLU.

Figure 4 Rejections of AO's orders for access to SANs



* Different modes for accessing a SAN are described in recital (61) above

Source: European Commission figure based on TP's data (for years 2006-2008 and for year 2009).

- (382) Figure 4, prepared by the Commission on the basis of TP's data, shows that the rejections on formal and technical grounds constituted a considerable part of all AOs' orders for BSA access. The rejections accounted for over 31% (that is 144 out of 313) of all AOs' orders submitted between 2006 and 2009.
- (383) Furthermore, the level of TP's rejections of AOs' orders to access its network through the collocation mode was relatively high in 2006-2008 (about 44%) compared to a line connection. The updated information provided by TP shows that the situation improved in 2009, when the rejection rate for collocation orders was lower than in previous years.⁵⁸⁵ At the same time the rejections of orders for

⁵⁸³ GTS's reply from 18 March 2009 to the RFI, page 4.

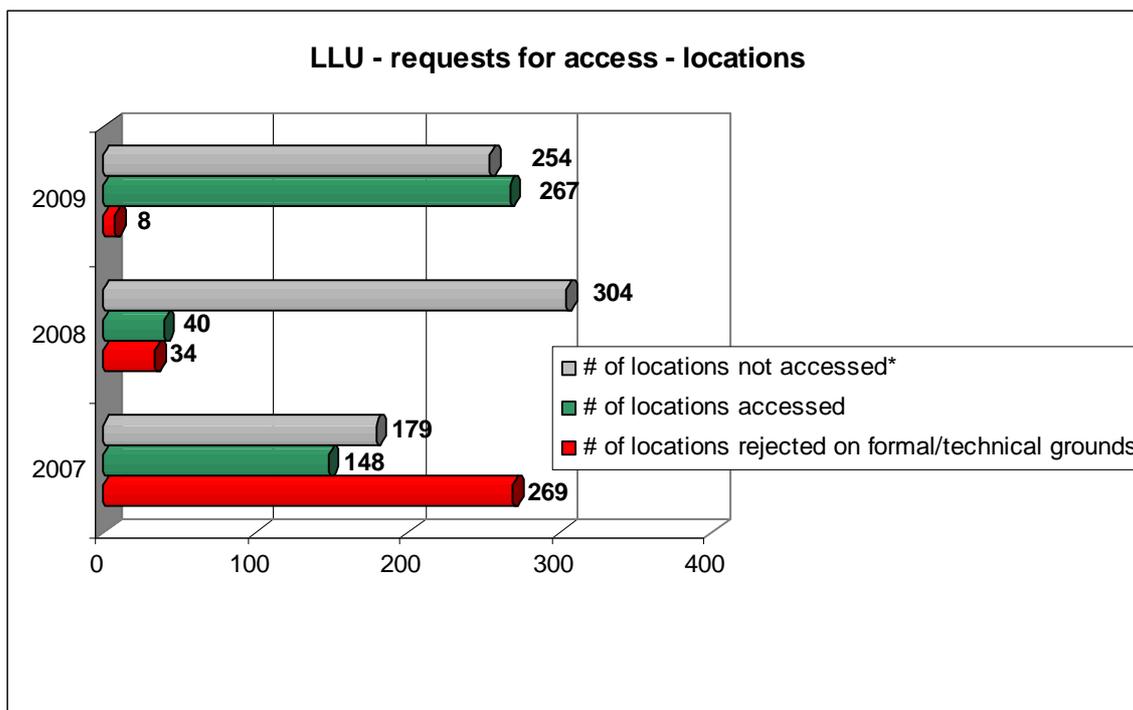
⁵⁸⁴ Netia's reply from 20 March 2009 to the RFI, page 1.

⁵⁸⁵ TP's reply to the RFI of 4 November 2010, table to question 7.1.

dedicated access remained at the same high level (around 51% in years 2006 – 2009).⁵⁸⁶

- (384) TP admits that in 2006-2008 it rejected 35% of AOs' orders for connection to SANs via collocation.⁵⁸⁷ Furthermore, TP does not contest the rejection levels presented in Figure 4 for line and dedicated access.⁵⁸⁸
- (385) Similarly, Figure 5 on LLU presents the information concerning the rejection levels of orders for access to TP's locations.

Figure 5 Rejections of LLU orders for access to locations



* refers to locations not accessed by AOs in spite of positive technical verification of TP

Source: The Commission's figure based on TP's data (for years 2006-2008 and for year 2009⁵⁸⁹)

- (386) Figure 5 shows that TP rejected a significant number of AOs orders in 2007, namely 269 out of 596 of submitted orders. The situation improved in 2008 (only 34 out of 378 orders were rejected). Together in 2007-2008 TP rejected 31% of orders. It is not clear how many orders were rejected on formal and technical grounds in 2009, as in the reply to the Commission's RFI TP provided conflicting figures.⁵⁹⁰ The rejection level on formal grounds in 2009 was probably also low.
- (387) The locations not accessed by AOs, as seen on Figure 5, despite the positive outcome of the technical verification, represented 49% of all the orders between 2007 and 2009 (30% in 2007, 80% in 2008 and 48% in 2009). In view of that the

⁵⁸⁶ Idem.

⁵⁸⁷ SO Reply, paragraph 492.

⁵⁸⁸ Idem.

⁵⁸⁹ The Commission assumes that the total amount of orders in 2009 should be 529 and not 521 as TP presented in the Document.

⁵⁹⁰ See TP's correspondence of 25 November 2010, 8 December 2010, 15 December 2010 and 17 December 2010. For example in correspondence of 25 November 2010 TP claims that none of the AO's orders in 2009 failed to meet formal requirements, whereas in the later document TP states that 8 orders were sent back to AOs. Furthermore, the total number of accessed locations in 2009 presented in the document does not correspond to the number of total received orders minus the number of rejected orders.

Commission enquired about the reasons that led some AOs to abandon the idea of accessing particular locations.

- (388) It stems from AOs' replies that in the case of LLU, TP's costs estimates for the purpose of collocation or the establishment of new elements of the network had a negative impact on AOs' decisions because they were sometimes overestimated. As stated by Netia, *“unfortunately in many instances an element which blocked the development of Netia's network was essentially the cost of a node extension for the purpose of a collocation [presented by TP] needed for LLU services. In many instances costs expertises made by Netia revealed that such costs were to a large extent unreasonable, Netia contested them requesting they be lowered. In the cases of TP's refusal the network investment did not materialise.”*⁵⁹¹
- (389) Novum also stated that it had not started to implement the signed LLU contract *inter alia* because *“as regards LLU service, the obstacle at the time of the signing of the LLU contract was a small number of points made available by TP to provide the service plus a high threshold for indispensable financial input needed for launching the service on particular nodes of TP (estimated at a level of several millions zloty).”*⁵⁹²
- (390) With regard to rejections, Netia stated that it *“received several dozens of such [negative] replies and was forced to abandon investment plans, while not being able, on the other hand, to verify in any way the soundness of the refusals.”*⁵⁹³ In the SO Reply, TP noted⁵⁹⁴ that it cannot comment on Netia's claims as the rejected orders were not sufficiently specified. This argument of TP cannot be accepted. In the SO the Commission provided a clear source of Netia's statement.⁵⁹⁵ In that document Netia listed the rejected LLU orders and therefore TP could have easily commented on those.
- (391) In 2008, the NRA inspected certain locations of TP where some AOs (Netia and Multimedia) were refused access on technical grounds. The control revealed that many LLU rejections were unjustified as there was additional space in TP's premises which could have been used by AOs.⁵⁹⁶
- (392) There is also an indication that TP did not collaborate with AOs in case of lack of alternative for the placement of the AO's cables leading to the collocation premise. This is illustrated by Netia's example: *“Netia submitted an appropriate request to TP for making sewage wells available for the purpose of data transmission. Unfortunately [number of cases] Netia received a negative reply from TP and the expansion by alternative means proved to be impossible or too costly.”*⁵⁹⁷ Netia stated also that: *“(…) Netia did not receive any alternative solutions, which according to Netia could propose such solutions as the extension of rented ducts lines between ordered points A and B or which would indicate a*

⁵⁹¹ Netia's reply from 20 March 2009 to the RFI, page 2.

⁵⁹² Novum's reply from 17 March 2009 to the RFI, page 2.

⁵⁹³ Netia's reply from 20 March 2009 to the RFI, op.cit., page 2.

⁵⁹⁴ SO Reply, paragraph 571.

⁵⁹⁵ SO, paragraph 218, Netia's reply from 20 March 2009 to the RFI, page 2 and Annex 9 to Netia's reply from 20 March 2009 to the RFI.

⁵⁹⁶ UKE's control report, 29 February 2008 – 30 April 2008.

⁵⁹⁷ Netia's reply from 16 March 2009 to the RFI, page 2.

need for departing from side wells to get to other free parts of ducts in order to avoid bottlenecks."⁵⁹⁸

3.2 Lengthy implementation of AOs' orders

- (393) Another instance of AOs' problems which is confirmed by the evidence in the file relates to TP's lengthy implementation of AOs' orders.
- (394) With regard to BSA, these problems related both to the practice of exceeding the regulatory deadlines for processing the orders during formal and technical verification and to the practice of deploying a SAN in timeframes which were not based on reasonable factors. In this latter context, GTS Energis pointed to "*TP's use in many cases of the maximum timeframes specified in the reference offer to execute the orders for connecting TP's network with GTS Energis network in SANs due to lack of technical possibilities on TP's side; the information sent officially stated that TP should carry out the "investment" works within, according to TP, several months, which for each AO are common exploitation works which are done within a day by a couple of technicians.*"⁵⁹⁹
- (395) Also UKE noted "*untimely execution of interconnection points by TP S.A.*"⁶⁰⁰ In its report from 2007 UKE confirmed that TP did not meet the deadlines for the deployment/modification of SANs as foreseen in the contracts.⁶⁰¹
- (396) With regard to LLU, TP hindered the access to its network by delaying the activation of nodes for the purpose of collocation and by conducting the collocation works in unreasonable timelines. Netia pointed out that "*discrepancies in time for activation of nodes [for the purpose of collocation by TP] oscillated within [duration], which prevented the process optimisation on Netia's side*".⁶⁰² Those delays were also noted by UKE. In its 2008 report UKE noted that in the case of Netia TP gave unreasonable time estimates for the collocation works (construction of collocation room and installation works), extending the period of 3 months needed for that simple investment into a period of 6 months.⁶⁰³

3.3 Better access conditions were possible

- (397) The evidence held in the Commission's file indicates that not all AOs encountered the same problems while accessing TP's network. PTK - TP's subsidiary benefitted from better access conditions mainly due to (i) PTK's access to TP's IT systems ("CHECK"), (ii) better rental conditions, (iii) PTK could use TP's network on conditions not available to other AOs, (iv) the management of TP had direct influence over the strategy of PTK through a formally organized

⁵⁹⁸ Netia's reply to the RFI of 2 December 2010, pages 4-5 and Annex I to Netia's reply to the RFI, pages 1-5.

⁵⁹⁹ GTS Energis's reply to the RFI of 23 February 2009, page 2.

⁶⁰⁰ UKE RBO Decision of 4 October 2006, page 80.

⁶⁰¹ UKE's control report, 25 October 2007 – 21 December 2007, pages 10 and 14. UKE stated for example that in the period of 25 October 2007 until 21 December 2007: [*Information on the results of UKE's control carried out between 25.10.2007-21.12.2007 the subject of which was inter alia the verification of the timeliness of implementation of orders for the construction/modification of SAN, including timeliness of sending to AOs information about rejections of orders on formal and technical grounds and the implementation of orders. Quotation shows cases of delays on TP's side*]

⁶⁰² Netia's reply from 16 March 2009 to the RFI, pages 2-3.

⁶⁰³ UKE's control report, 29 February 2008 – 30 April 2008, pages 42-43.

management committee called ExeCom.⁶⁰⁴ Also, in the reply to the Commission's RFI PTK did not point to any obstacles in accessing TP's network.

- (398) The cooperation between TP and PTK, within the TP Group, as regards network planning and development was also confirmed in the results of the control proceedings of the President of UKE, that revealed that one Department within TP's Group was responsible for developing the backbone network, *inter alia* the BRAS servers used not only by TP itself but also by PTK when using TP's BSA services.⁶⁰⁵ This cooperation placed PTK in a better situation than other AOs as regards access to TP's network.⁶⁰⁶
- (399) Moreover, TP signed a [name of the agreement] Rental Agreement with PTK,⁶⁰⁷ on the basis of which PTK rented from TP space used *inter alia* to access TP's BSA services. This [name of the agreement] Rental Agreement contained more advantageous conditions than those applicable to other AOs renting collocation space from TP. [Information describes the specific benefits of the contractual relations between TP and PTK related to the rental of premises, installation of equipment, providing information on this equipment and financial conditions].

3.4 Arguments of TP

Rejections of AOs' orders were justified

- (400) With regard to BSA rejections, TP claimed⁶⁰⁸ that the Commission did not analyse the reasons for the rejections and simply assumed that all rejections were attributable to TP's behaviour. Therefore, the Commission sent TP on 4 November 2010 a RFI⁶⁰⁹ and asked TP to describe for each year and connection mode the reasons for rejection of AOs' orders. TP was also asked to specify alternative solutions proposed in the case of lack of technical possibilities. In its reply to the RFI, TP was unable to provide a comprehensive list of the reasons for rejection and instead described them broadly, such as: "*lack of data in the order*" or "*lack of infrastructure*."⁶¹⁰ Therefore, because of TP's vagueness on this topic, the Commission could only assess the rejection reasons indicated by TP in its SO Reply (paragraphs 493 - 494) for a collocation mode. The Commission's assessment points to two main reasons for the high formal and technical rejection rate of AOs' orders for BSA connection to SANs: (i) unnecessary formal requirements for completing the orders imposed by TP; and (ii) unjustified

⁶⁰⁴ UKE's control report, 1 September 2008 -31 October 2008, page 28. In its earlier control report UKE pointed out to the accelerated procedures for PTK, see UKE's control report, 25 September 2007 - 9 October 2007, pages 4-5.

⁶⁰⁵ UKE's control report, 5 March 2009 - 30 April 2009, page 5; as well as regards e.g. preparing the sales strategy to retail clients. See TP's reply to the RFI of 16 February 2009 - question 21.

⁶⁰⁶ UKE's control report, 5 March 2009 - 30 April 2009, page 5 [*Information on the results of UKE's control carried out between 05.09.2009-30.04.2009 referring to the relationship between TP and PTK, including issues related to the deployment of the network and its use in the TP's Group joint planning and exchange of information*].

⁶⁰⁷ q. 3.4.2, TP's reply from 20 January 2009 to the RFI. The Agreement was signed in 2004 for a 6-year period, automatically prolonged for the next 6 years unless one of the parties wished to terminate it.

⁶⁰⁸ SO Reply, paragraph 487.

⁶⁰⁹ RFI to TP of 4 November 2010, question 7, pages 9-10.

⁶¹⁰ TP's reply to the RFI of 4 November 2010, table with answer to question 7.

technical rejections and, at least until 2007, a lack of alternative solutions (see recitals (401) to (406) below).

- (401) TP argues⁶¹¹ that in many instances it had to reject the access to a SAN because orders contained formal mistakes, or because it was not possible to connect in the mode chosen by an AO. Furthermore, TP points out that it has never rejected the access to a SAN for all possible connection modes and that it always proposed an alternative solution in another connection mode or indicated that the connection in the requested mode is possible only after finalising the necessary investments on TP's side.⁶¹² TP also asserts⁶¹³ that it had justified reasons to reject AOs' orders for access in collocation mode, and in order to prove it, TP provided a list of reasons for rejection, such as: AOs' mistakes in SAN's addresses (3 rejections), lack of position of the signal on the ODF (16 rejections), lack of infrastructure (4 rejections) surpassing the limits of orders within 3 months (3 rejections), surpassing the limits of possible interfaces in a SAN (5 rejections) and others.⁶¹⁴ Moreover, according to TP⁶¹⁵, the higher rejection rate of collocation orders could have been also linked to the fact that AOs had to provide more detailed information while completing orders for this mode.
- (402) Having looked into TP's list of reasons for rejections, it is clear that in many cases formal rejections of AOs' orders were caused by unnecessary additional requirements for completing the orders, imposed by TP on AOs. For instance, TP obliged AOs to include the information on the position of the received signal in the ODF although the RBO⁶¹⁶ did not foresee such a requirement. SO Reply of TP confirms that⁶¹⁷ TP rejected a big proportion of orders on this ground.⁶¹⁸
- (403) UKE confirmed that TP should require a minimum set of data to avoid unnecessary AOs' mistakes while completing the orders. For example, the BSA Decision of 6 May 2008 introduced Annex 8 which specified the scope of the information that has to be included in the orders. The model introduced by UKE as a reaction to TP's practice of rejecting high number of orders is very simple and does not require any information on "*a position of signal on ODF*".⁶¹⁹ UKE recently confirmed once more that the requirement of an ODF position is not indispensable to process AOs' orders.⁶²⁰

611 SO Reply, paragraph 487.

612 SO Reply, paragraph 489.

613 SO Reply, paragraphs 493-494.

614 The Commission notes that TP also used justified reasons for rejection, i.e. an AO already ordered a SAN in the last three months (see the RBO of 4, section 3.1.1.4.2. point 3) however this constitutes a small percentage of rejections.

615 SO Reply, paragraph 495.

616 The RBO of 10 May 2006 and 04 October 2006 did not provide for the exact sample of the order for a SAN but they clearly stated that in the scope not regulated by these ROs the parties should use the provisions of the Reference Interconnection Offer (RIO) which did not require such detailed information (see the RBO of 04 October 2006, section 3.1.1.4.1 point 4).

617 SO Reply, paragraph 494.

618 Although the RBOs of 2006 did not provide for the exact sample of an order for connection to a SAN they clearly stated that in the scope not regulated by the ROs, the parties should use the provisions of the Reference Interconnection Offer (RIO) which provided for a very simple model of order (see the RBO of 04 October 2006, section 3.1.1.4.1 point 4).

619 Annex 8 to the RBO of 6 May 2008, available at: <http://www.bip.uke.gov.pl/gallery/63/75/6375.pdf>.

620 UKE's comments to SO Reply of TP, page 42.

- (404) The above also explains a difference in the rejection rate for the collocation mode between the estimates of TP and the Commission. In the Commission's view the rejection level was higher and in the years 2006-2008 reached a ratio of 44% (and not 35% as TP assumes). TP wrongly excluded from the rejection rate the orders that were rejected, or as TP claims⁶²¹ "returned" due to the lack of the "*position of signal on ODF*". The Commission's reasoning is further strengthened by the evidence from TP which shows that when TP's subsidiary PTK sent orders which lacked the data on ODF TP instructed PTK to add missing information by simply stating "*ODF is being deployed.*"⁶²² Therefore, no exact ODF position is required to accept the order. Even if, as TP stated in the reply to the letter of facts,⁶²³ the ODF position was essential for the fast activation of orders, the lack of it should not constitute a rejection reason. The ODF position can be specified, if needed, at a later stage, for example at the stage of the preparation of technical conditions.⁶²⁴ It is clear from the above that, in the period when the RBO did not regulate in detail the formal requirements for orders, TP abused its margin of discretion and required from AOs information which was not necessary to process their orders.
- (405) Additionally, in the Commission's view rejections on technical grounds were often not justified. For example, in paragraph 488 of the SO Reply TP admits that it rejected 8 orders of GTS due to "*the lack of technical possibilities*" originating from the insufficient infrastructure of the AO. In this regard, it is underlined that under the RBO procedures, the lack of technical possibilities should not result in the rejection of an order. In this case the implementation process is postponed in order to carry out by TP or by an AO (depending on the connection mode) the appropriate purchases of equipment or to make investments in a specific SAN.⁶²⁵
- (406) The Commission has grounds to believe that, contrary to what TP claims⁶²⁶, TP did not provide AOs with alternative solutions at least until 25 January 2007 (when a new version of the standard contract was proposed). TP's standard contract v. 9 (art. 19) which was in use until 25 January 2007 excluded TP's obligation to propose alternative solutions. Moreover, TP even deleted the said obligation to provide alternative solutions from the contract concluded with Netia on 15 September 2006.⁶²⁷
- (407) It follows from the above that none of TP's arguments disproves the Commission's findings on a high level of rejections of BSA orders on formal and technical grounds.

⁶²¹ SO Reply, paragraph 492.

⁶²² Inspection document, page 10 and pages 6-7.

⁶²³ TP's reply to the letter of facts, paragraph 152.

⁶²⁴ TP claims in paragraphs 154-157 of the reply to the letter of facts that PTK could complete the position on ODF during the stage of issuing technical conditions, which was not possible in case of AOs since the RBO of 2006 did not foresee a stage of preparation of technical conditions. Although indeed the RBO of 10 May 2006 did not foresee that stage, TP should have been processing AOs' orders in the same way, thus asking AOs to clarify the position on ODF at a later stage. Furthermore, the process of preparation of technical conditions as an obligatory stage of processing AOs' orders was already included in the RBO on 4 October 2006.

⁶²⁵ See for example the RBO of 10 May 2006, section 2.2.1. point 4 or the RBO of 4 October 2006, section 3.1.1.4.3. point 3b).

⁶²⁶ SO Reply, paragraph 489.

⁶²⁷ the list of documents submitted by Netia, Annex 1A, the signed contract between Netia and TP, Art.19 (6), page 21.

- (408) With regard to LLU rejections, TP admits⁶²⁸ the level of rejected orders in years 2007 and 2008 as presented in Figure 5. However, TP underlines that there was a significant improvement in the rate of acceptance. In 2008, only 9% of orders were rejected.⁶²⁹ The number of collocation rooms also increased significantly (from 6 or 7 rooms in 2007 up to 181 in 2008).⁶³⁰ In addition, TP emphasizes that it systematically unbundled a significant number of lines.⁶³¹
- (409) It is true that the level of acceptance of LLU orders improved significantly in 2008, however the first RUO was introduced on 28 February 2005, this is nearly 2 years after the SMP decision was issued. Therefore, TP had significant time to ensure a mechanism of proper implementation of the orders. As shown in Figure 5, 2 years after the introduction of the RUO the rejection level of AOs' orders was still very high. The same concerns the number of collocation rooms. In 2007, 2 years after the entry into force of the RUO TP was able to prepare only a small number of collocation rooms which TP even could not clearly specify.⁶³² Secondly, TP's argument on a significant increase of unbundled lines is also not meritorious. As demonstrated in section X.4.3, despite positive trends in the last two years, Poland remains amongst the countries with the lowest LLU penetration rate in the EU.
- (410) TP also extensively contests⁶³³ UKE's control report from 2008 on the unjustified rejection reasons for collocation (see recital (391) of the Decision).⁶³⁴ TP claims that the above mentioned report of UKE contains significant mistakes, for example that AOs could not use the free space in collocation rooms as that space has been already blocked for TP's own investments.⁶³⁵ Furthermore, TP claims that UKE, in its "assessment", erroneously encompassed locations with fiber lines, even if those were excluded from the scope of the RUO.⁶³⁶ In turn, TP relies on UKE's report from 2007⁶³⁷ which did not reveal any irregularities on TP's side. Lastly, TP purports⁶³⁸ that a high ratio of locations not accessed stems from AOs' own decisions.
- (411) TP's arguments contesting the results of UKE's investigation from 2008 are not convincing. Firstly, TP did not submit any satisfactory evidence that could rebut UKE's findings from 2008. Secondly, in the report from 2008 UKE explained the reasons for the differences in investigation results between 2007 and 2008, confirming that free space for collocation should have been used for Netia's needs, as "*Netia S.A. sent its collocation request to TP 5 months before TP had actually planned investments for its own needs*".⁶³⁹ Thirdly, in the comments to SO Reply

⁶²⁸ SO Reply, paragraph 566.

⁶²⁹ SO Reply, paragraphs 566-567.

⁶³⁰ SO Reply, paragraph 568. TP's data is not consistent; paragraph 568 of SO Reply states that 7 collocation rooms were prepared in 2007, whereas the figure presented by TP on the same page (page 133) shows that 6 collocation rooms were prepared in that year.

⁶³¹ SO Reply, paragraph 569.

⁶³² See footnote 630.

⁶³³ SO Reply, paragraphs 572-613. See also TP's reply to the letter of facts, paragraphs 201-203.

⁶³⁴ UKE's control report, 29 February 2008 – 30 April 2008.

⁶³⁵ SO Reply, paragraphs 580-584.

⁶³⁶ TP's reply to the letter of facts, paragraph 201.

⁶³⁷ UKE's control report, 29 October 2007 – 12 December 2007.

⁶³⁸ SO Reply, paragraph 614.

⁶³⁹ UKE's control report, 29 February 2008 – 30 April 2008, page 38. Also SO Reply, paragraph 581 confirms this fact - TP refers to internal letters of 28 June and 13 July 2007 confirming the investment plans whereas Netia submitted its motion earlier, that is on 30 May 2007.

of TP, UKE demonstrated that its findings from 2008 were based on sound and reasonable factors.⁶⁴⁰ Also, TP's allegations on the unjustified inclusion of locations with fiber in the control of UKE are highly questionable since UKE's report clearly states that the control was done on the basis of the RUO of 5 October 2006 as modified by the RUO of 3 April 2007. According to the provisions of those RUOs, locations with fiber fell outside the regulatory scope. Finally, TP followed UKE's recommendations and was able to implement AOs' orders, which shows that its previous claims of lack of technical possibilities were unjustified.⁶⁴¹

(412) It should be noted here that Netia, still in 2010, reported to the Commission on the difficulties in accessing the collocation rooms. Netia says that "*in [percentage] of cases TP does not provide the access to collocation rooms/space based on positive terms. [Number of cases affected by the practice] TP proposes an alternative solution (...) Unfortunately in [number of cases] Netia was forced to abandon the investment due to the high costs of preparation of collocation room/space.*"⁶⁴²

(413) With regard to the overestimation of costs for collocation, TP underlines⁶⁴³ that:

(a) costs for collocation were estimated on the basis of technical conditions accepted by AOs and on the basis of costs established by independent data sources and stem from the agreements signed by TP with its contractors⁶⁴⁴;

(b) since mid 2007 TP was in the first place verifying whether it is possible to connect AOs by using "*dedicated area*" instead of collocation⁶⁴⁵;

(c) high costs of collocation were often due to the costs of the air conditioning ordered by AOs. To alleviate this problem, TP ensured, when it was possible, climatic conditions without establishing the air conditioning system and distributed the air conditioning costs amongst AOs who ordered collocation (including also potential AOs)⁶⁴⁶;

(d) even if in some cases TP overestimated some costs, this could not have had any real impact on AOs, as according to the RUO an AO pays only the real, final cost of an investment (section 3.1.9.8a of the RUO).⁶⁴⁷

(414) In this regard the Commission notes the following:

(a) UKE's 2008 report revealed that TP proposed to AOs (i.e. Multimedia) higher costs than necessary.⁶⁴⁸ UKE noted that "*the estimation of costs should have been based on prices foreseen in TP's agreements with contractors. Those prices are usually much lower than average market prices because TP orders a significant number of equipment and services*".⁶⁴⁹

⁶⁴⁰ UKE's comments to the SO Reply of TP, pages 43-45.

⁶⁴¹ This is also confirmed by TP's statement in the SO Reply where TP admits that it implemented the 2008 control report's recommendations (see paragraph 650 and onwards).

⁶⁴² Netia's reply to the RFI of 2 August 2010, page 9.

⁶⁴³ SO Reply, paragraphs 616-654.

⁶⁴⁴ SO Reply, paragraphs 622 and 631.

⁶⁴⁵ SO Reply, paragraph 621. "*Dedicated area*" is an area belonging to TP and used for TP's own purposes which can be used also by AOs for the collocation purposes.

⁶⁴⁶ SO Reply, paragraphs 618-620 and 623.

⁶⁴⁷ SO Reply, paragraph 629.

⁶⁴⁸ UKE's control report, 29 February 2008 – 30 April 2008, page 36.

⁶⁴⁹ Idem, page 42.

- (b) In principle, the Commission agrees with TP's remark that the final costs of collocation for AOs are those actually incurred by TP. However, it must be noted that when TP costs estimations are too high, an AO has justified reasons to believe that those estimates will result in high investment costs, and thus that finally an AO will have to cover them. For these reasons, [number] AOs resigned from collocation even before an investment started.⁶⁵⁰
- (c) In addition, TP's arguments on the practice of proposing a "dedicated area" instead of collocation are not convincing, since this solution was proposed late and only after UKE's and AOs' interventions.⁶⁵¹
- (d) Furthermore, [AO] indicated that in case of "dedicated areas" or "quasi virtual collocation" TP wrongly imposes on [AO] 100% of costs for air-conditioning, as those costs should be shared amongst all actual and potential users of that location⁶⁵²
- (415) With regard to Netia's statement on TP's lack of cooperation in case of accessing the collocation premises via sewage wells (see recital (401) above) TP claimed⁶⁵³ that it cannot identify those cases as Netia's statement is too broad and does not name any specific location. Following TP's comment on the difficulty to identify rejections of Netia's orders for access to sewage wells the Commission sent to Netia a RFI and requested that Netia be more specific about those instances⁶⁵⁴. In its reply⁶⁵⁵, Netia identified clearly those examples. TP's reply to the letter of facts only confirms the Commission's objections given that TP itself admitted that it rejected Netia's orders instead of proposing alternative solutions (i.e. a different route for connection).⁶⁵⁶ The RO⁶⁵⁷ allows the rejection of an order only if there is absolutely no technical possibility to connect. This means that TP is obliged to offer partial connection or an alternative connection if there are at least some parts of sewage that make connection possible by an AO.
- (416) Lastly, TP notes that it undertook a series of actions aimed at improving conditions for LLU access (i.e. LLU Task Force, JDF project, investments in collocation rooms).⁶⁵⁸
- (417) This argument of TP is not convincing. Since October 2003, TP was obliged to comply with the obligations imposed on it as a SMP operator and it was up to TP to choose the best actions and conditions in order to meet those obligations. As it was proved above, the actions undertaken by TP were not sufficient or came to late, as in 2007, 2 years after introduction of the first RUO, the rejection level of

⁶⁵⁰ See example of [AO]. [AO's] reply to the RFI of [*], page [*].

⁶⁵¹ It was only after a series of meetings with UKE and AOs in March and April 2008 during which TP finally agreed with AOs' approach. See info published on UKE's website: http://www.uke.gov.pl/uke/index.jsp?news_cat_id=328&news_id=3005&layout=1&page=text&place=Lead01.

⁶⁵² [AO's] reply to the RFI of [*], page [*].

⁶⁵³ SO Reply, paragraph 637.

⁶⁵⁴ RFI sent to Netia on 2 December 2010, question 5.

⁶⁵⁵ Netia's reply to the RFI of 2 December 2010, pages 4-5 and with Annex I to Netia's reply to the RFI of 2 December 2010.

⁶⁵⁶ TP's reply to the letter of facts, paragraphs 204-230.

⁶⁵⁷ See art. 1.1.2 point b of the reference offer of 30 June 2006 on the telecommunication access in part of the telecommunication infrastructure concerning sewage cable, published on UKE's website: http://www.bip.uke.gov.pl/bipurtip/index.jsp?place=Lead07&news_cat_id=28&news_id=177&layout=11&page=text

⁶⁵⁸ SO Reply, paragraphs 646-654.

LLU orders was very high, and only 6 or 7 collocation rooms were provided.⁶⁵⁹ To this day Poland remains the country with one of the lowest LLU penetration rates (see section X.4.3).

- (418) It follows from the above that none of TP's arguments disproves the Commission's findings on a high level of rejections of LLU orders on formal and technical grounds.

AOs' orders were implemented timely

- (419) With regard to BSA, TP claims that in a number of cases it implemented orders timely. In the case of GTS, it did not exceed any deadlines for implementation of orders foreseen by the RBO of 10 May 2006 and that the average execution time was shorter by 1/4th from the deadlines.⁶⁶⁰ To support its claim, TP presented tables showing deadlines of implementation of GTS orders for SAN deployment.⁶⁶¹ In addition, TP points out that Netia's⁶⁶², Tele2's and TK's orders were implemented within the relevant deadlines.⁶⁶³ In the reply to the letter of facts TP claims that the delays described by UKE in its control report from 2007 (see recital (395) above) were insignificant (both with regard to deadlines for submitting technical conditions and in deploying SANs) and could not have any negative influence on AOs.
- (420) The Commission cannot accept the above arguments of TP in view of the reasons explained below.
- (421) First of all, it must be underlined that GTS Energis' statement refers to TP's practice of using the regulatory deadlines to their maximum with no reasonable grounds and not to TP's practice of exceeding the deadlines. As GTS Energis stated "*TP in many cases used the maximum time frame specified in the RBO*"⁶⁶⁴, meaning that TP estimated unreasonably long deadlines for simple installation works needed for the deployment of SANs.
- (422) Secondly, the practice of exceeding deadlines was confirmed by UKE in the RBO Decision of 4 October 2006, where it stated that "*TP's problems in the timely implementation of AOs' connections to SANs had often created obstacles to implement AOs' rights to connect to TP's network.*"⁶⁶⁵ Also, UKE's control report (2007) confirms that TP did not meet deadlines for the realisation/construction of SANs as foreseen in the contracts.⁶⁶⁶
- (423) Thirdly, as demonstrated in recitals (230) to (231) above TP extended the regulatory deadlines for the SANs deployment in its standard contracts. For

⁶⁵⁹ See footnote 630.

⁶⁶⁰ SO Reply, paragraph 535.

⁶⁶¹ Idem, paragraphs 536-541.

⁶⁶² Idem, paragraphs 542-544 referring to UKE's control report from 2007.

⁶⁶³ Idem, paragraphs 496 and 545.

⁶⁶⁴ GTS Energis reply to the RFI of 23 February 2009, page 2.

⁶⁶⁵ UKE RBO decision of 4 October 2006, page 80.

⁶⁶⁶ See footnote 601.

example, TP in [AO's] contract⁶⁶⁷, to the detriment of the AO, inserted an additional 11-month period for SAN deployment.⁶⁶⁸

- (424) With regard to LLU, TP claims that it constructed collocation spaces within 6-8 months. The construction time always depends on the scope of the necessary works and TP points out that there were cases where works finished after 2.5 months (Warsaw, Piękna 17 Street) or 13 months (Ostróda, Czarneckiego street). Therefore, according to TP, Netia is wrong to claim that TP constructed collocation spaces within [duration]⁶⁶⁹ Furthermore, TP claims that a comparison of construction periods as presented by UKE in the control report of 2008 (see recital (396)) is implausible since UKE compared “*different locations and different investments.*”⁶⁷⁰
- (425) The above arguments of TP are contradicted by several pieces of evidence held on the file, which are referred to below.
- (426) Firstly, the provisions of the RUO obliged TP to deliver a collocation room or a correspondence cable within defined deadlines, namely 30 days for a collocation room for network interconnection or other regulated services (or 2 months for a collocation room with access to the local loop), 30 days for a correspondence cable at TP's facilities and 4 months for a correspondence cable in the remote location.⁶⁷¹ The deadline of 4 months for a correspondence cable in a remote location could have been prolonged only in exceptional situations by the period needed for all necessary administrative permissions.⁶⁷² While establishing the deadlines in the RUOs, UKE took utmost account of the comments of market players and established reasonable regulatory deadlines depending on the scope of the necessary works (for example shorter deadlines for the installation of a correspondence cable in TP's facilities than in remote locations). The examples presented by TP in the SO Reply clearly show that TP exceeded those deadlines, since by TP's own admission, the works took up to 6, 8 or even 13 months.
- (427) Secondly, as TP itself rightly pointed out in the SO Reply,⁶⁷³ initially there were not many AOs interested in buying the LLU product. Therefore, the number of necessary construction works for the purpose of LLU could not have been an impediment to be able to conduct them on time.
- (428) Thirdly, UKE was correct to compare construction periods for similar works, even if investments concerned different locations. UKE in its report from 2008 also provided other examples where TP estimated the time needed for the deployment of one ODF for few months, although one month should have been sufficient.⁶⁷⁴

⁶⁶⁷ [AO's] reply on [*], pages 7-8.

⁶⁶⁸ This practice was also confirmed by UKE, see UKE's control report, 25 January - 31 January 2007, page 7 which states that in the contract signed with Polkomtel TP extended the possibility to prolong the construction of SANs by 2 months (against 1 month foreseen in the RBO).

⁶⁶⁹ SO Reply, paragraph 642-643.

⁶⁷⁰ TP's reply to the letter of facts, paragraph 198.

⁶⁷¹ See section VI.2.2 above. See also section 1.1.4 point 24, 25 and 1.1.5.2. point 2 of the RUO of 3 April 2007. As from the RUO of 28 November 2008 the deadline for installation of a correspondence cable in a remote location was shortened to 2 months.

⁶⁷² See RUO of 3 April 2007, section 1.1.5.2. point 2 concerning the possibility to extend the deadline for the installation of correspondence cable in a remote location.

⁶⁷³ SO Reply, paragraph 621.

⁶⁷⁴ UKE's control report, 29 February 2008 – 30 April 2008, page 43.

- (429) Furthermore, still in 2010, [AO] encountered problems with the timely installation of correspondence cables, which [AO] found highly incomprehensible since the AO has to submit to TP forecasts concerning the number of correspondence cables to be deployed within the next 12 months.⁶⁷⁵
- (430) In view of these facts, it is clear that TP impeded AOs' access to its network by exceeding regulatory deadlines for processing the orders and by proposing unreasonably long investment periods.

TP did not offer better access conditions to PTK

- (431) Firstly, TP claims⁶⁷⁶ that the UKE control report from 2007 on a better treatment of PTK⁶⁷⁷ was contested by TP and as a result UKE notified TP on 18 February 2008 that it closed the investigation without finding infringements.
- (432) Secondly, TP claims⁶⁷⁸ that to align Netia's contract to the conditions offered to PTK TP offered Netia a new standard contract based on the new RBO of 4 October 2006, however Netia rejected the offer to renegotiate the contract in place.
- (433) Thirdly, TP points out to pieces of evidence which it claims demonstrate that TP did not give PTK better access conditions.⁶⁷⁹ This concerns a note from a meeting which shows that some orders of PTK were rejected by TP as they were contrary to the provisions of the contract signed with PTK.⁶⁸⁰
- (434) Fourthly, TP underlines⁶⁸¹ that PTK is not using the same BRAS servers, that TP and PTK have separate investment budgets, separate departments dealing with infrastructure investments, and finally that there is no flow of information in favour of PTK.
- (435) Finally, TP points out⁶⁸² that the [name of the agreement] Rental Agreement with PTK referred to in recital (399) was signed in [date], that is, before the first RBO was issued. Immediately after the identification of this problem, TP undertook steps to terminate the [name of the agreement] Rental Agreement with PTK and replaced it with new agreements for [number] different localizations based on the provisions of the "Telehousing PRO Offer" which was being used with all other AOs.
- (436) This interpretation of the facts put forward by TP is, however, contradicted by several items held in the file. In this regard the Commission notes the following.
- (437) Firstly, even if it is true that UKE's investigation of 2007 was later on closed without ruling on the existence of infringements it must be noted that UKE's findings on a better treatment of PTK were confirmed by other inspections for example in UKE's control report from 26 November 2008 (see recital (397))⁶⁸³ In that report UKE noted that "*they do not show [PTK orders] any significant*

⁶⁷⁵ [AO's] reply to the RFI of 2 August 2010, page 10.

⁶⁷⁶ SO Reply, paragraphs 546-549.

⁶⁷⁷ UKE's control report, 25 September 2007 – 9 October 2007.

⁶⁷⁸ SO Reply, paragraphs 550-551.

⁶⁷⁹ Idem, paragraphs 553-554.

⁶⁸⁰ PTK's reply to the RFI of 23 February 2009, page 2.

⁶⁸¹ SO Reply, paragraphs 555-562.

⁶⁸² Idem, paragraphs 563-565.

⁶⁸³ UKE's control report, 1 September 2008 – 31 October 2008, page 28.

characteristics which would differentiate the procedure for dealing with them in comparison to orders for SANs coming from other operators". However, UKE points out that *"both the Department sending an order and the Department processing it are subject to the same [Information on the results of UKE's control conducted in the period of 01.09.2008-31.10.2008 describing the relationship between TP and PTK in terms of organization and division of powers between various units of the companies]."*⁶⁸⁴ Additionally, TP itself confirmed in an internal exchange of e-mails that there is a very advanced formal cooperation between TP and PTK [*Information on the business relationship of dependence of TP and PTK employees*].⁶⁸⁵

- (438) Secondly, a better treatment of PTK is confirmed by an inspection document in which TP discusses the implementation of a new, better procedure for PTK but is concerned of its consequences on relations with other AOs, UKE and UOKiK.⁶⁸⁶
- (439) Thirdly, contrary to TP's claims,⁶⁸⁷ Netia did not refuse to sign the new BSA contract, aligning it with the new RBO of 4 October 2006 and thus ensuring the same access conditions as for PTK. In fact, it was TP that delayed the signature. UKE's control report reveals that *"despite Netia's request in October 2006 to adjust the contract to the conditions foreseen in the RBO of 4 October 2006 and submitting to TP the agreed version of Annex to the contract on 7 March 2007, TP did not sign it until 3 April 2007."*⁶⁸⁸
- (440) Fourthly, TP's argument⁶⁸⁹ on the BRAS server is not substantiated by any evidence. In view of this the Commission bases itself on the results of UKE's inspection which confirmed that one of the TP's departments responsible for BRAS servers was used by TP itself and by PTK.⁶⁹⁰
- (441) Lastly, TP's argument⁶⁹¹ that it *"immediately"* changed the [*name of the agreement*] Rental Agreement with PTK is plainly unconvincing in view of the fact that it was changed only on 13 March 2009⁶⁹² which is nearly 3 years after the entry into force of the first RBO of May 2006.⁶⁹³ Noticeably, the modification was only done when TP and PTK received the Commission's RFI asking both companies to provide the content of the [*name of the agreement*] Rental Agreement.
- (442) For these reasons, TP's arguments on the provision of the same access conditions for PTK as for other AOs are unfounded.

3.5 Conclusion

- (443) The evidence outlined in subsections 3.1 to 3.4 shows that TP created numerous obstacles to AOs at the stage of accessing its network. In particular, TP rejected a

⁶⁸⁴ Idem.

⁶⁸⁵ Inspection document, page 7.

⁶⁸⁶ Inspection document, page 3.

⁶⁸⁷ SO Reply, paragraph 551.

⁶⁸⁸ UKE's control report, 8 March 2007 – 3 April 2007, page 21. TP signed the annex on 10 May 2007, TP's reply to the RFI of 22 December 2008, page 8.

⁶⁸⁹ SO Reply, paragraphs 555-562.

⁶⁹⁰ UKE's control report, 5 March 2009 – 30 April 2009, page 5.

⁶⁹¹ SO Reply, paragraph 565.

⁶⁹² Annex to PTK's reply to the RFI of 23 February 2009.

⁶⁹³ UKE's control report, 5 March 2009 – 30 April 2009, page 16.

high number of AOs' orders, delayed the orders' implementation, proposed overestimated cost estimates and executed collocation works with delays. The example of PTK shows that TP could have offered better conditions to AOs. These impediments on TP's side form part of TP's pattern of abusive conduct aimed at hindering AOs from efficiently accessing the incumbent operator's network and using its wholesale broadband products.

4. Connection to subscribers

(444) As indicated in sections VI.1.3 and VI.2.3 following a connection to a SAN (for BSA) or once an AO has received access to a collocation room or a dedicated space or has installed a correspondence cable (for LLU), an AO can theoretically start to acquire customers. However, before a subscriber can use the AO's broadband services, a new subscriber's line needs to be activated by TP. Therefore, the AO needs to submit to TP an order, which undergoes formal and technical verification and, if accepted by TP, is implemented by the incumbent.

(445) The evidence gathered during the Commission's investigation shows that AOs encountered significant problems at this stage of the process. Such obstacles, , relate to:

- the high number of rejections of AOs' orders on formal and technical grounds,
- a problem of limited availability of subscriber lines linked to the failure to provide BSA services on WLR lines ("Wholesale Line Rental") and to delays in the reparation of faulty lines,
- delays in implementing AOs' orders.

(446) Noticeably, TP could have offered better conditions to AOs, as shown by the fact that PTK did not experience the same problems that AOs did in this context. Furthermore, TP favoured its own retail product Neostrada and as explained in recitals (465) to (467) below there were cases where TP first rejected AOs' orders and then started delivering its own retail product Neostrada to the same subscribers who previously wished to use AOs' services.

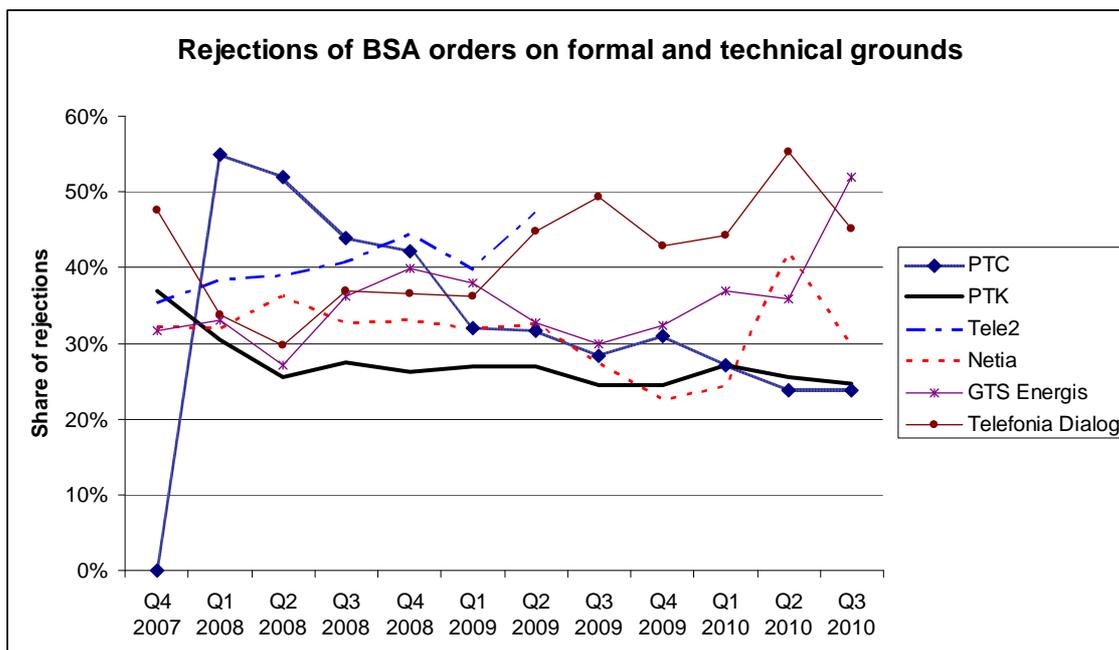
(447) The remainder of this section is structured as follows: subsection 4.1 deals with the problem of high rejection of BSA and LLU orders; subsection 4.2 illustrates the problem of the limited availability of subscriber lines and subsection 4.3 is devoted to the issue of lengthy implementation of orders. TP's arguments and the Commission's evaluation of those arguments are presented in subsection 4.4. Finally, subsection 4.5 concludes on the facts.

4.1 High number of rejections of AOs' orders on formal and technical grounds

(448) The process of formal and technical verification of AOs' orders is characterised by a significant number of rejected orders on formal and on technical grounds. As a result, AOs cannot provide the service to a large number of customers that signed up for it.

(449) The scale of rejections of AOs orders covering the period between 2007 and 2010 is presented below in Figure 6⁶⁹⁴ for BSA and Figure 7⁶⁹⁵ for LLU orders.

Figure 6 Rejections of BSA orders for the activation of subscriber lines



Source: Commission figure based on TP's data .

(450) In the case of BSA, only the data on AOs who submitted at least 1000 orders was included. Figure 6 shows that TP rejected on average, with an exception of PTK, between 30% and 50% of AOs' orders.⁶⁹⁶ Although rejection rates in case of Netia, submitting the majority of all AOs' orders slightly dropped from 3rd Quarter of 2009 to below 30%, it again raised in 2nd Quarter 2010 surpassing a 40% level of rejections.

(451) Also in case of Telefonica Dialog and GTS, high rejection levels surpassing even 50% were present.⁶⁹⁷ The latter AO stated: "*GTS Energis hasn't noticed any decrease in the number of rejected orders on the formal and technical grounds - for nearly two years the percentage of rejections does not alter, and there are only changes of rejection reasons (e.g. increasingly more common reasons for technical rejections are overloaded DSLAM and lack of investment in additional shelves / subscriber ports).*"⁶⁹⁸

(452) Additionally, the rejection of PTK's BSA orders was in most of the quarters lower than the rejection rate of any other AOs. The importance of this regularity is even stronger if one notices that PTK submitted nearly 30% of all orders in the observed period In fact, TP feared that better indicators of sales of PTK in

⁶⁹⁴ The data has been aggregated into quarters, starting from W40 of 2007 and ending with W40 of 2010.

⁶⁹⁵ TP's data encompasses all AOs' orders for activation of subscriber lines from W36 of 2007 until W46 of 2010.

⁶⁹⁶ Following TP's comments in the reply to the letter of facts (paragraph 296) the Commission excluded from the rejection rates the orders that were cancelled due to the resignation of a client or an operator.

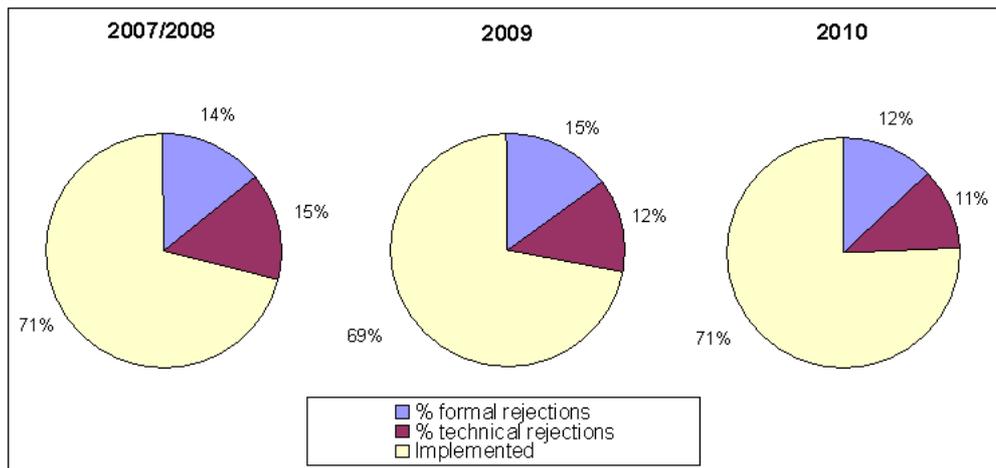
⁶⁹⁷ The problem of rejections of orders for connection to subscribers was noted by GTS in its reply to the RFI of 2 August 2010, page 3.

⁶⁹⁸ GTS's reply to the RFI of 2 August 2010, page 3.

comparison with indicators of other AOs might lead to problems with the NRA and the NCA. In an internal document TP acknowledged that that [*Information on TP's own assessment of some consequences of the cooperation between TP and PTK in the sale process of products of both companies*]⁶⁹⁹

- (453) Figure 7 illustrates levels of formal and technical rejections of AOs' LLU orders between 2007 and 2010. The Commission notes that TP rejected an important portion of LLU orders for the activation of subscriber lines (between 23% and 29%) in each year of the observed period.

Figure 7 Rejections of LLU orders for the activation of subscriber lines⁷⁰⁰



Source: Commission figure based on TP's data.

- (454) In view of the fact, that the access to subscribers is only one of the steps in the process of accessing TP's wholesale products, the significance of the rejection rates presented in Figure 6 and Figure 7 must be interpreted jointly with other elements of the abusive conduct (i.e. unreasonable conditions, delays in the negotiation process, difficulties in accessing TP's SANs and locations).
- (455) The evidence in the Commission's file, which is outlined in recitals (456) to (467) points to two main reasons for the formal and technical rejections of AOs' orders for subscriber's lines:
- (i) TP's outdated data used to verify AOs' orders;
 - (ii) faulty verification mechanisms on TP's side.

(i) TP's outdated data

- (456) In a number of cases, inconsistent and outdated data in possession of TP led to subsequent rejections of AOs' activation orders on formal grounds. It happened that subscribers' data (e.g. name and/or address) presented in AOs' orders for the activation of BSA services was not consistent with the data in TP's systems used to verify the orders (the problem of low quality of TP's data is also described in

⁶⁹⁹ Inspection document, TP's email of 26 August 2008, page 3.

⁷⁰⁰ Figure 7 covers data for W36 of 2007 until W46 of 2010. First pie marked as 2007/2008 covers weeks 36 until week 51 of 2007 on the top of the data for 2008. Pies for years 2007/2008 and 2010 do not include orders for which TP did not specify the result of the verification process (respectively 580 and 5844 orders). In line with TP's comments in the reply to the letter of facts (paragraph 295) the Commission excluded from the rejection rates the orders that were cancelled due to the resignation of a client or an operator.

section 5). As a result, some AOs' orders containing correct information did not match TP's database and were rejected. This problem was for example confirmed by a statement of eTOP that pointed out to "*unsubstantiated rejections on formal grounds (resulting from human error on TP' side or errors in TP databases)*."⁷⁰¹

- (457) TP was aware of this problem already in 2007. One of TP's internal document entitled "*Implementation of BSA services*", among other problems in the implementation of BSA, mentions in the first place: "*unclear rules on formal and legal verification of the BSA orders*."⁷⁰² Another document of TP gives an overview of the number and reasons of TP's rejections of Netia's orders: "*Between 17.09. [2007] -16.10. [2007] Netia received 5,148 formal rejections, of which more than 45.5% due to address errors. Discrepancies in the address data are mostly caused by the lack of updated address data of a subscriber in TP systems. This discrepancy does not constitute a material barrier to the implementation of the service - a correct TP line number and the subscriber's name are in this case sufficient for correct activation of the [BSA or LLU] service*."⁷⁰³ This extract illustrates well the scale of the difficulty and the fact that at the origin of the problem was TP's outdated data on subscribers.
- (458) Despite being aware of such inconsistencies in TP's database and unclear verification mechanisms inside TP, the incumbent nevertheless executed the formal check of AOs' orders in a very rigid and formalistic way. The list of rejection reasons that TP used is long and contains 33 reasons, for instance: lack of or unclear first name of the subscriber, lack of or unclear house number, lack of or unclear street name, lack of or unclear AO's ID or expired validity of subscriber's statement. The Commission notes that despite the long list of rejection reasons TP classified a big number of rejections under "*other*". In Netia's case, rejections classified as "*other*" amounted to over 5400 cases between 2007 and 2010.
- (459) According to Tele2, TP used formal verification to inhibit the provision by AOs of retail broadband services based on TP's wholesale broadband products. In this respect the AO stated: "*TP used formal verification process to limit the ability of AOs to quickly start providing retail services. Out of c. 21.300 orders sent to TP in the first 4 months of 2008, 3.300 (15%) were rejected on formal grounds, and 4.700. (approx. 22%) on technical grounds. This means that Tele2 was able to start the service for only c. 63% of customers who had expressed an interest in its services. Although some of the orders could have been incorrect due to Tele 2's fault, in most cases it resulted from obstruction on TP's side*."⁷⁰⁴
- (460) Tele2 further indicated that the order rejection rate for a wholesale narrowband product with similar verification procedures - Wholesale Line Rental ("WLR") - was only of about 10% and that TP rejected some BSA orders while accepting WLR orders containing the same data.⁷⁰⁵ In Tele2's opinion, TP has shown extreme formalism and required that AOs provide unjustifiably extensive

701 eTOP's reply to the RFI of 23 February 2009, page 3.

702 Inspection document, TP's internal presentation "*Implementation of BSA services*", page 26.

703 Inspection document, page 93.

704 Tele2's reply to the RFI of 23 February 2009, page 23.

705 The lower rejection rate for WLR than for BSA and LLU is confirmed by TP's document, page 4, which indicates that 23% of BSA orders, 19% of LLU orders and 12% of WLR orders were rejected until W28 of 2008.

information, which led to a high rejection rate on formal grounds.⁷⁰⁶ Also UKE confirmed that the problem with the verification of orders was linked to the outdated TP's database and that this problem did not concern WLR orders: "*TP compares the address from the [WLR] order with another database than for the BSA service, whereas in the latter case the database used is outdated and often contains spelling errors and others.*"⁷⁰⁷

- (461) Tele2 indicated the following examples of TP's reasons for rejections of orders on formal grounds: "*the lack of customer's resignation from the actual broadband contract - 29%; lack of house number -19%; lack of city name - 11%; lack of flat number - 8%; lack of street name - 4%; orders currently processed for another operator - 3%*".⁷⁰⁸ With regard to the first category - the lack of ADSL service termination form – the AO explained that: "*this resulted from the fact that TP required that the customer's statement form on the termination, signed by the customer, indicates the old contract number (usually signed by the client a few years earlier, and which could be obtained often only by calling TP), the name of the service which the terminated agreement concerned, as well as a readable signature. In fact, TP treated any error in this above mentioned data information, as a reason for rejection. As a result, such specific requirements allow TP to reject unduly most statements.*"⁷⁰⁹ Tele2 stressed that "*even the smallest inconsistency of data, such as e.g. placing "street" instead of "avenue" resulted in the rejection, even though TP has a possibility to identify the subscriber with such an insignificant mistake in the address.*"⁷¹⁰
- (462) As from August 2009, TP ceased to reject AO's orders⁷¹¹ due to incorrect information about subscribers' addresses, what proves that such data was not indispensable for the activation of orders.
- (463) In addition, AO's orders were rejected on technical grounds because the data on the capacity (in terms of number of lines) in a specific SAN was not updated properly in TP's databases, which led to the erroneous conclusion that there was no spare capacity to execute the order.⁷¹² TP itself recognised the problem. In an internal email correspondence of TP, regarding questions from Tele2's on TP's rejections on the basis of "*overloaded SANs*", TP admitted: [*Information concerns the relationships of TP with an AO in case of possible negative technical verification by TP of an AO's orders*]⁷¹³ Furthermore, Netia stated that there were cases where, contrary to the information provided by TP to AOs, a particular SAN was not serving particular subscriber lines.⁷¹⁴

⁷⁰⁶ Tele2's reply to the RFI of 23 February 2009, page 23: "*What proves that is e.g. the fact that for WLR, where the process of submitting orders is similar, the level of rejections does not surpass 10%; and what more, many times there were cases where an order with the same data was implemented for WLR but not for BSA where it was rejected on the basis of improper data.*"

⁷⁰⁷ UKE's comments to SO Reply of TP, page 48.

⁷⁰⁸ Tele2's reply to the RFI of 23 February 2009, page 23. The examples provided by Tele2 for the purpose of the Decision concern the period between January until June 2008.

⁷⁰⁹ Tele2's reply to the RFI of 23 February 2009, page 23.

⁷¹⁰ Idem.

⁷¹¹ SO Reply, paragraph 662. TP's reply to the letter of facts, paragraph 269.

⁷¹² Inspection document, TP and Tele2's correspondence of 6 March 2008, page 11.

⁷¹³ Inspection document, TP and Tele2's correspondence of 7 February 2008, pages 2-5.

⁷¹⁴ Netia's reply to the RFI of 23 February 2009, page 4.

(ii) Faulty verification mechanisms

- (464) In a number of cases, the orders presented by AOs for the activation of BSA lines were rejected by TP on technical grounds despite the fact that it was technically possible to implement the orders. E-mail correspondence from Tele2 to TP with the title: "*Rejections: Overloaded SANs*" illustrates that problem: "*We have been fighting with this problem for the last 3 months. Overall, you have rejected 800-1000 customers for these reasons, although both sides have confirmed to each other that the problem of overloaded SANs DOES NOT EXIST!!! Lately the number of such rejections has decreased, but they still appear and nobody knows why (...) What this means in practical terms: due to mistakes on IT TP side, Tele2 has lost several hundreds of customers (and TP has admitted it during meetings, exchanging emails with us).*"⁷¹⁵
- (465) Another type of unjustified rejections on technical grounds was pointed out by Netia. The AO puts forward evidence on "*unequal verification procedures of BSA and Neostrada orders*" leading to high rejections of AOs' orders in comparison to orders for TP's own broadband product.⁷¹⁶ Netia's document based on the results of an audit report of November 2010 ("*AT Kearney Report*")⁷¹⁷ confirms also that: "*for 8,6% of BSA orders rejected on technical grounds (excluding lack of copper, lack of DSLAM or lack of ports) TP within 20 days signed contracts for its own services for the same or better than rejected AO's orders technical parameters.*"⁷¹⁸ Another Netia's document illustrates that TP rejected the AO's order for the activation of a subscriber line of high speed (10 Mbit) claiming "*lack of technical possibilities*", yet the incumbent was soon after capable to connect the said subscriber at the requested speed for its own retail product *Neostrada*.⁷¹⁹ The same practice of TP is also confirmed by PTC.⁷²⁰
- (466) In this context, a recent control report of UKE⁷²¹ confirms weaknesses in the verification procedures of TP and reaffirms that it is highly probable that many rejections based on technical grounds are unjustified. UKE found out⁷²² that TP omits the technical verification stage for its retail product *Neostrada* and sends orders directly for implementation.
- (467) In the reply to the letter of facts TP admits⁷²³ that problems with unequal verification procedures occurred and informs that, after these irregularities were revealed, TP implemented necessary procedures in order to eliminate these instances.⁷²⁴

⁷¹⁵ Inspection document, TP and Tele2's correspondence of 6 March 2008, page 9.

⁷¹⁶ Netia's letter of 17 December 2010, pages 2-4.

⁷¹⁷ AT Kearney, Report from the implementation of the Agreement in relation to organisational, processing and legal requirements 30 November 2010 ("*AT Kearney Report*")

⁷¹⁸ Netia's letter of 17 December 2010, pages 3-4.

⁷¹⁹ Netia's letter of 15 December 2010, pages 2-3 and pages 5-7.

⁷²⁰ PTC's reply to the RFI of 2 August 2010, page 5 with annex 2 and annex 3

⁷²¹ UKE's control report, 18 February 2010 – 31 March 2010, pages 1-28; see also UKE's comments to the SO Reply of TP, pages 10-11.

⁷²² UKE's control report, 18 February 2010 – 31 March 2010, pages 22-23.

⁷²³ TP's reply to the letter of facts, paragraphs 232-248 and 293-294. In particular paragraph 235: [*Information on the IT systems used by the TP and the internal procedures of implementing AO orders related to the access to information about TP's network and infrastructure*]

⁷²⁴ TP's reply to the letter of facts, paragraph 237: For example TP informs that: "*Currently it conducts works on the modification of a document "Methods of Modelling of Processes within TP Group"*

4.2 Limited availability of subscriber lines

(468) The formal and technical approval of an order by TP did not mean that an AO would get access to subscriber lines. In fact, AOs were faced with another problem on TP's side – the limited availability of subscriber lines, which is outlined in this section.

(i) Lack of provision of BSA services on the WLR lines

(469) Despite the minimum obligation in the RBO to provide BSA services on subscriber lines on which AOs were providing voice services to end-users using WLR (Wholesale Line Rental), at least until October 2007⁷²⁵ TP refused to do it. This further limited the pool of potential customers available to AOs and decreased their ability to expand on the retail broadband market.

(470) The limited availability of subscriber lines was, according to Tele2, an important constraint in implementing its strategy of entering the retail broadband market on the basis of TP's wholesale broadband product. Tele2 explained that *"in the first period of BSA-related cooperation, TP prevented the provision of BSA services on these lines on which WLR services were provided, denying to Tele 2 the possibility to sell bundled services (phone + Internet package) (...) It should be added that, despite the official line of TP that such a constraint was a result of TP's technical inability, a limited number of Tele2's orders was implemented. (...) it was a very big constraint for Tele2 not to be able to sell simultaneously services based on BSA and WLR. Its sale strategy was based on the sale of Internet access services primarily to those customers who already use Tele2's voice services."*⁷²⁶

(471) This issue was raised during bilateral contacts between the Presidents of TP and Tele2. Tele2 complained to TP that *"TP refuses to implement BSA orders for customers who purchase services based on WLR from Tele2, despite the fact that the current contract does not contain such exclusion and UKE recently made the official interpretation of the RBO, indicating that this is contrary to the RBO. (...) Once again this means that TP ignores the contract stipulations, RBO and the official UKE interpretation."*⁷²⁷ The exchange of emails shows that the incumbent operator was not making it possible for AOs to obtain BSA efficiently.⁷²⁸

(...) *Changes in this document are to lead to the elimination of potential risks of introduction of a new or pilot procedure, which could be assessed as not guaranteeing the equal treatment."* TP signalled also other undertaken initiatives, see paragraphs 244, 248 and 261.

⁷²⁵ UKE comments to the SO, page 6 and UKE's control report, 23 January 2008 – 15 February 2008, page 4.

⁷²⁶ Tele2's reply to the RFI of 23 February 2009, pages 23-25.

⁷²⁷ Inspection document, email of 16 March 2007 from Tele2 President to TP President, page 15.

⁷²⁸ Inspection document, email of 16 March 2007 from Tele2 President to TP President, page 15, *"Preparing for the implementation of a bulk of BSA orders. Already in the course of our common meeting with [TP's Director] in which he participated, as well as in our operational discussions, and during our joint meeting in UKE regarding implementation of the WLR we agreed it would be worthwhile in preparation for handling of bulk BSA orders to have a similar approach to cooperation between TP and Tele2 which had worked in WLR implementation. Thus we agreed with [TP's Director] that the current "joint" team which had worked on the WLR implementation, will begin working on the ADSL implementation. Yesterday the first meeting took place, which in our view was very positive – (...). However, at the same time we get information from representatives of the Division for Servicing Operators that it is "the first time they hear" about this type of works and that they will "block any changes going beyond the current contract." By the way, the negative response to our proposed amendments to the Annex blocks the possibility of improving the process and simply leads to the repetition of problems which had place e.g. in cooperation with Netia.*

(472) TP also acknowledged weaknesses on its side in this respect. An internal presentation of 4 October 2007 mentions, among TP's weaknesses and problems, that "[t]he number of orders received by [name of TP's department], and then sent for implementation to the [name of TP's department] [Information on the errors identified by TP in the process of provision of wholesale access services related to TP's specific departments' capacities to implement AO's orders] may impact the completeness and timeliness of sending the information about the implemented orders by the [name of TP's department] (...) to the operator."⁷²⁹

(ii) *Reparation of faulty BSA lines*

(473) In addition, AOs could not count on TP's prompt reparation of faulty BSA lines, which had an impact on AOs' customers' satisfaction.⁷³⁰ The non-existence of efficient solutions on TP's side in this respect is confirmed by an internal TP email exchange from the Director of TP Sales and Service Division to the Director of Client-Operators Department of [date of correspondance]. [Information on the errors identified by TP in the reparation of breakdowns in the process of provision of wholesale access services to AOs, including the lack of implementation of automatic functionalities allowing timely reparation of breakdowns]⁷³¹ This problem was also confirmed by a control of UKE from 2007 which highlighted that in the period of 1 April 2007 until 31 October 2007 42.37% of technical failures were removed with delays.⁷³²

4.3 Delays in implementing orders

(474) In addition to the difficulties that AOs were faced with at the stage of formal and technical verification of the orders for access to subscriber lines and to the limited availability of these lines, significant delays at the stage of the implementation of orders occurred on TP's side. An internal presentation of TP from 2008 reveals that such delays were caused by: (i) the lack of resources dedicated to the regulated services on TP's side, (ii) the lack of experience, (iii) lack of clear interpretation of how the process should be implemented, (iv) an unclear division of competences between TP's internal units, and (v) insufficient IT support including flawed changes introduced in TP's IT systems. This resulted in the insufficient preparation of TP to process a large scale of orders and led to a manual, lengthy processing of BSA orders.⁷³³

Frankly speaking, this situation is very frustrating – what are our meetings and discussion with [TP's Director] for?"

⁷²⁹ Inspection document, TP's internal presentation of 4 October 2007, pages 220 and 254.

⁷³⁰ The deadline for repairing the BSA lines was stipulated in the RBO; see section 3.2.3, point 5 of the RBO of 10 May 2006 and 4 October 2006.

⁷³¹ Inspection document, email of 21 December 2007 from TP Director of TP Sales and Service Division to the Director of Client-Operators Department, page 23.

⁷³² UKE's control report, 25 October 2007 – 21 December 2007, pages 13-14.

⁷³³ Inspection document, TP's internal presentation of 4 March 2008, page 46: *"The main reason for delays in the implementation of orders was a lack of experience, a necessity to modify the IT systems and to provide for a clear interpretation on how the process should be implemented. The modifications introduced facilitated the process. We are currently working on improving the process of delivery."*

- (475) The data provided by TP⁷³⁴ demonstrates the existence of delays only in the initial period of implementation of orders both for BSA and LLU. In the case of BSA, in the period of Quarter 4 of 2006 to Quarter 3 of 2007 TP activated with a delay on average 31% of orders but the situation improved since Quarter 4 of 2007 and the share of delays fell to 4% on average until the end of 2008.⁷³⁵ As for LLU, significant delays occurred in Quarter 4 of 2007 and in Quarter 1 of 2008 when respectively 63% and 25% of orders were implemented with delays.⁷³⁶
- (476) There are numerous documents of TP which report on the lack of timely realisation of orders:
- (a) One of them, from August 2007, mentions "*a low punctuality of BSA order implementation as compared to the orders for Neotrada [TP's broadband product for end users]*" and "*delays in execution of damage notifications.*"⁷³⁷ This also shows that TP treats more favourably its own subscribers from AOs' customers. A confirmation of this approach can be found in another document of TP, which mentions the [*conditions taken into account during service implementation*].⁷³⁸
 - (b) An internal TP document with the title [*problems associated with BSA launch*] also acknowledges the existence of delays. In the section "*Delays in response to technical faults requests*", it reports that "*although confirmed to be active, some lines do [not] function properly.[AO/AO] raised big number of technical interventions that remained open for several weeks.*" In the same document, under the heading "*Open orders backlog*" it is stated that "*Due to high number of orders delivered by [AO/AO](process supported by IT systems only partially) some orders still await execution.*"⁷³⁹
 - (c) TP's internal presentation from 2007 states: "*The promptness of processing BSA orders: - presently (as a result of [changes] introduced into the [name of the TP's system] less than 50% of orders is processed in time; - this results from [Information on the changes in IT systems and on the low quality of software influencing the timely implementation of orders]*"⁷⁴⁰
 - (d) Another internal TP's presentation from 2007 indicates in the table title: "*BSA on LAN [Non-Active Subscriber Lines] and LAA [Active Subscriber Lines]* the following was stated in the column "*Status of implementation*"[:] *none*, in the column: "*Planned date of implementation*" – "*August 2007*", in the column: "*Reason for delay: [*]*"; The table "*BSA on WLR lines*" indicates in the column "*Status of implementation*[:] *none*", in the column: "*Planned date of implementation*" – *August 2007*, in the column: - "*reason for delay: [*]*"; The table "*continuing of BSA services on lines in which WLR is ordered*" indicates in the column "*Status of implementation: no implementation*", in the column: "*Planned date of implementation [:]August 2007*", in the column – "*reason for delay:[*] (...)(...)[Information on the lack of implementation of BSA services*

⁷³⁴ TP's reply to the RFI of 4 February 2009 and Annex 9.1. to TP's reply to the RFI of 25 November 2010 for BSA, and Annex 23 to TP's reply to the letter of facts for LLU.

⁷³⁵ On the basis of TP data TP's reply to the RFI of 4 February 2009 ..

⁷³⁶ Annex 23 to TP's reply to the letter of facts.

⁷³⁷ Inspection document, TP's presentation "*Implementation of the BSA service*", page 26.

⁷³⁸ Inspection document, page 31, see also Inspection document, page 12 and Inspection document, page 18.

⁷³⁹ Inspection document, pages 20 and 21 [Note: EN in original].

⁷⁴⁰ Inspection document, internal TP presentation of 17 August 2007, page 13; see also Inspection document, Internal TP presentation of 8 August 2007, page 332.

*on non-active subscriber lines in one of the units of TP and on the lack of implementation of appropriate functionalities in TP's systems]*⁷⁴¹

- (477) The mistakes which occurred on TP's side while verifying automatically the activation orders led to the need to have recourse to manual verification. As a result, many orders were not processed timely. This is summarised in an internal TP's email: *"The lasting high volume of BSA orders activated with delay refers primarily to orders implemented by the emergency path, to which approx. 150 orders is directed daily. Almost 100% of the orders from the emergency path refers to cases where the technical exam [Information on the internal organization of the verification process] had a negative result, yet as a result of a manual verification it was found that there were technical possibilities to carry out these orders."*⁷⁴² In addition, manual verification processes have the potential to generate a large amount of errors, as TP also acknowledges.⁷⁴³
- (478) A similar message comes from another internal email of TP with the title: *"BSA TP [for week 37 in 2008]"*, which reads: *"the sustained high volume of BSA [orders] activated with delay (381) concerns mostly orders processed in emergency path, of which on average 150 orders are treated per day [*] – [Information on the errors identified by TP in the process of the provision of wholesale access services to AOs in terms of internal organization and functioning of the verification process resulting in the delays in the orders' implementation]."*⁷⁴⁴
- (479) As to LLU orders, TP confirmed in the internal presentation that it had not ensured appropriate IT systems.⁷⁴⁵ This led to delays in the implementation of significant number of. For instance, TP's internal documents indicate that none of the LLU orders of October and November 2007 were executed within the deadline; the percentage of LLU orders implemented on time was of only 24.5% in December 2007 and 28.6% in January 2008.⁷⁴⁶

⁷⁴¹ Inspection document, pages 4 and 9.

⁷⁴² Inspection document, internal TP's report on W 37.2008, page 69.

⁷⁴³ Inspection document, internal TP's presentation of 8 August 2007, page 324.

⁷⁴⁴ Inspection document, page 16.

⁷⁴⁵ Inspection document, TP's internal presentation of 26 November 2007, page 23: *"LLU (...) – service implemented manually in significant part without IT support"*; *idem* page 30: *"Process of unbundling individual subscriber lines: low timeliness of implementing orders [reasons for delays]."* Inspection document, internal presentation of 8 August 2007, page 324: *"Status of implementing of the PK-O regulatory initiatives"* – in the subtitle: *"LLU – list of problems in the functioning of the service"* in item *"PI – IT servicing of the LLU service in the IE [Integrated Environment]"* in the first subpoint *"[*]"*, in the second subpoint *"[*]"*: *[Information on the errors identified by TP in the process of the provision of wholesale access services to AOs in terms of internal organization of the orders' verification process and the implementation of the orders resulting in the delays in their implementation on TP's side]."*

⁷⁴⁶ Inspection document, TP's internal presentation of 8 July 2008, page 207: *"KPIs comparison - current integrated environment vs. target split architecture with partner relationship management system for LLU"* in the first row of the table: *"Order execution (execution of the accepted order) – execution time is calculated from the order registration in the ArchiDoc until sending out parameters to the operator (connection acceptance) - Deadline= indicated in the offer/ decision/ contract"*, - *[Information on the division of tasks, time and TP's systems used for the process of implementation of AOs' orders]*; in the second column of this row: *[percentage number]* ; in the second row of the table: *"Formal verification – [Information on the division of tasks, time and TP's systems used for the process of implementation of AOs' orders]"*; , in the second column of this row: *"Current target of the [*]Process: [percentage]* ; in the third row of the table: *"Technical verification – [Information on the division of tasks, time and TP's systems used for the process of implementation of AOs' orders]"*; , in the second column of that row: *"Current target of the [*]"*

4.4 Arguments of TP

Rejection of AOs' orders was justified

- (480) In the SO Reply, TP admits⁷⁴⁷ that in 2008 the total rejection level of BSA orders accounted for around 18% on formal grounds and 14% on technical grounds. TP however underlines⁷⁴⁸ that from Quarter 3 of 2009 there was a considerable drop in the ratio of rejected orders on formal grounds resulting from TP's decision to abandon the verification of data on subscribers' addresses. Similarly, TP points out⁷⁴⁹ that at the end of 2009 also the ratio for rejections on technical grounds dropped.
- (481) Furthermore, TP claims⁷⁵⁰ that the Commission did not include in its analysis the fact that all AOs had the possibility to resubmit corrected orders within 3 working days. Moreover, according to TP⁷⁵¹ the statistics of rejections of orders should be seen in relation to each individual case. In PTC's case, for example, a high level of rejection of BSA orders in the first period of implementation of BSA orders is linked to the fact that PTC sent only few orders and that at the very beginning of cooperation both TP and the AO had to establish their bilateral relations.⁷⁵²
- (482) With regard to the LLU, TP claims⁷⁵³ that the rejection rate of LLU orders accounted respectively in 2008 and 2009 for 14% and 15% in case of formal rejections and 15% and 12% in case of technical rejections.
- (483) Furthermore, TP underlines⁷⁵⁴ that rejections on formal grounds were linked to a poor quality of AOs orders and were not caused by TP's database. In this regard, TP points out⁷⁵⁵ that AOs' orders were always accepted if data included in them corresponded to at least one of TP's IT systems. In addition, TP outlines⁷⁵⁶ that it introduced in October 2008 a possibility of sending "a *Statement on the correctness of data*". In such a case the data on the order was compared only with the *Statement* and accepted by TP even if there were some discrepancies with data in TP's systems. As from August 2009, TP ceased to reject AOs' orders⁷⁵⁷ due to incorrect information about subscribers' addresses. TP also argues⁷⁵⁸ that the high

Process:[percentage]; in the fourth row of the table: "time is calculated from the receipt of the case by TP until the problem solving - deadline= 24h; in the second column of this row: "Current target of the[] Process: [percentage]"; "; in the fifth row of the table: "Cases and intervention acceptance - the execution time is calculated from the reception of the case by TP until sending out the request confirmation -deadline = 30 minutes", in the second column of this row: "Current target of the [*] Process: [percentage] (...)."*

⁷⁴⁷ SO Reply, paragraphs 699-700. In the reply to the letter of facts, paragraph 296, TP claims that orders that were annulled following the resignation of a client or an operator shouldn't have been qualified as rejected orders. TP recognises that the ratio of "annulled" orders was very small and concerned only 1.5% of all BSA orders and 28% of LLU orders rejected on formal grounds. TP's remark was taken into account by the Commission while preparing Figure 6 and Figure 7 above.

⁷⁴⁸ SO Reply, paragraph 700.

⁷⁴⁹ Idem, paragraph 701.

⁷⁵⁰ Idem, paragraph 703.

⁷⁵¹ Idem, paragraphs 704-705.

⁷⁵² Idem, paragraph 704.

⁷⁵³ Idem, paragraph 720.

⁷⁵⁴ SO Reply, paragraphs 655-674, 712. See also TP's reply to the letter of facts, paragraph 298.

⁷⁵⁵ paragraph 657. See also TP's reply to the letter of facts, paragraph 268.

⁷⁵⁶ SO Reply, paragraph 660.

⁷⁵⁷ SO Reply, paragraph 662. See also TP's reply to the letter of facts, paragraph 269.

⁷⁵⁸ SO Reply, paragraphs 670-673. See also TP's reply to the letter of facts, paragraph 268.

rejection rate of AOs orders cannot be linked to a faulty TP's database, because the same database was used for WLR orders for which a refusal rate was lower. According to TP⁷⁵⁹, the high rate of refusal of BSA orders is linked to the issue of technical requirements which for BSA are more important than for WLR services.

- (484) Finally, TP contests⁷⁶⁰ the Commission conclusions on the internal documents of TP which according to the Commission (see recital (457) of the Decision) confirm that TP was aware about the problems related to the verification process of BSA orders. TP underlines that those internal documents indicate also that TP proposed changes in order to improve the verification process. Furthermore, TP argues⁷⁶¹ that in order to avoid allegations of faulty verification of AOs orders TP outsourced this activity in April 2008 to an independent contractor.
- (485) The above arguments put forward by TP are not plausible for a number of reasons which are explained below.
- (486) Firstly, TP admits⁷⁶² that the rejection rate of AOs' orders for BSA and LLU, both on formal and technical grounds, was relatively high and that in the case of BSA orders the improvement occurred only in Quarter 3 of 2009 for rejections on formal grounds and in Quarter 4 of 2009 with regard to rejections on technical grounds. This indicates that changes in the verification process introduced by TP in October 2008 and in August 2009, as well as investments in IT systems finally led to relatively lower rejection rates. It is therefore unfounded to claim that AOs were to be blamed for rejections. As proved above, TP's outdated databases and faulty verification mechanism were at the origin of high rejection rates of AOs' orders. This also explains why TP finally started the process of improving its own procedures and IT systems.⁷⁶³
- (487) Secondly, even if some AOs' orders were of poor quality this was also related to and even caused by TP's procedures and requirements.⁷⁶⁴ Importantly, UKE noticed that "*the uniform IT interface provided by TP to AOs does not allow the proper and effective submission of requests and orders for BSA services.*"⁷⁶⁵ According to President of UKE "*order should include a minimum scope of data which allows for identification of a subscriber line, on which the service has to be provided, what will allow to reduce AOs' mistakes and at the same time TP's possibilities for orders' rejections.*"⁷⁶⁶ Moreover, the fact that from August 2009 TP ceased to verify subscribers' addresses⁷⁶⁷ proves that until then TP requested from AOs information that in fact was not indispensable for providing the service.
- (488) Thirdly, in view of the unnecessary information required by TP, the lack of updated data bases and the formalistic approach of the incumbent the Commission does not accept TP's argument that the possibility to resubmit the completed orders to TP within 3 working days improved the situation. In any case

⁷⁵⁹ SO Reply, paragraph 672.

⁷⁶⁰ Idem, paragraphs 664-667.

⁷⁶¹ Idem, paragraphs 713, 776.

⁷⁶² Idem, paragraphs 699-700 and 720.

⁷⁶³ Also Netia points out that: "*LLU: the ratio of NWF [negative formal verification] rejections and NWT [negative technical verification] rejections is systematically decreasing from the beginning of 2010. The solutions adopted in the first half of 2009 turn out to be effective*", Netia's reply to the RFI of 2 August 2010, page 11.

⁷⁶⁴ UKE RBO Decision of 6 May 2008, pages 39-40.

⁷⁶⁵ UKE's control report, 25 October 2007 – 21 December 2007, page 14.

⁷⁶⁶ UKE RBO Decision of 6 May 2008, page 39.

⁷⁶⁷ SO Reply, paragraph 662.

that mechanism should only be used occasionally, i.e. only in situations where the orders are of such a poor quality that it make them impossible to implement.

- (489) Lastly, although the internal documents of TP quoted in recital (457) above confirm that at certain point TP started to implement changes in its procedures, this was only done after the complains of alternative operators were supported by UKE. Already in 2007 Netia pointed out to TP that "*the discrepancy does not constitute a serious impediment in the implementation of the service – a correct number of TP's line and the name of the subscriber are in this case sufficient for the proper activation of the service.*"⁷⁶⁸ Until August 2009 TP nevertheless rigidly insisted on the need to provide correct subscribers' addresses and rejected to continue the line activation process in case of address discrepancies.⁷⁶⁹

TP did not treat PTK's orders more favourably

- (490) With regard to the lower ratio of rejections of PTK's orders, although TP admits⁷⁷⁰ the differences, it points out that they do not result from a discriminatory treatment of AOs. To support its view, TP quotes UKE's control report from 2008⁷⁷¹, according to which the differences in rejection rates could have been related to either (i) a better knowledge of TP's broadband services by PTK sales personnel (some of PTK's sales persons sold also TP's Neotrada service) or (ii) a privileged verification of PTK's orders by TP's employees. TP claims⁷⁷² that in comparison with other AOs, PTK adopted better organisational solutions, such as a preliminary revision of orders before sending them to TP. Thus, according to TP, a better quality of PTK's orders led to a lower rejection rate.
- (491) The above arguments of TP are not convincing for the following reasons. Firstly, indeed the UKE report confirms that it cannot be excluded that at the origin of lower rejections of PTK orders might be better competences of PTK sales staff.⁷⁷³ However, UKE does not exclude that a [*Information concerns UKE's control conducted between 01.09.2008 and 21.10.2008 verifying the timeliness of orders' implementation by TP, where the President of UKE indicates possible reasons for better results of PTK*] could led to lower rejection rates of PTK's orders.⁷⁷⁴ Secondly, as indicated in recital (536) during some periods (e.g. from 1 January 2008 until 30 May 2008) TP's Mass Client Sales Division verified for PTK the address information of PTK's new clients.⁷⁷⁵ Thirdly, PTK salespersons had the opportunity to check immediately whether the information provided by the clients was consistent with data in TP's databases: [*Information concerns contractual relations between TP and PTK and preferential access of PTK's employees to certain data*]⁷⁷⁶ Fourthly, PTK's access to the CHECK application (since 7 July

⁷⁶⁸ Inspection document, page 93.

⁷⁶⁹ Inspection document, page 94, where TP says "*However we do not agree to continue the process despite the [address data] discrepancy*".

⁷⁷⁰ SO Reply, paragraphs 707-715.

⁷⁷¹ UKE's control report, 1 September 2008 – 31 October 2008, page 22.

⁷⁷² SO Reply, paragraph 709.

⁷⁷³ UKE control report, 1 September 2008 – 31 October 2008, page 22.

⁷⁷⁴ Idem, page 21, 22.

⁷⁷⁵ TP's reply to q. 3.5 of the RFI of 22 December 2008, page 1; TP's reply to q. 22 of the RFI of 16 February 2009, pages 106-107.

⁷⁷⁶ Inspection document, internal TP's email, page 15.

2007 until 6 December 2008)⁷⁷⁷ and the [name of the system] program⁷⁷⁸, not available to other AOs, might have also contributed to lower rates of rejections on technical grounds. As indicated in recitals (537) and (540) below PTK had access to TP's CHECK application and [name of the system] used to verify technical possibilities of the service together with possible service options (speeds). For other AOs the only source of information about technical possibilities was the General Information, which only "*contains only theoretical information about availability of broadband service on the subscriber line.*"⁷⁷⁹ As proved in section 5 of the Decision, the GI was often incomplete, misleading and contained errors.

- (492) Finally, TP's assertion that PTK has better organizational solutions than other AOs is speculative as TP is not aware of and indeed does not refer to the AOs' respective internal procedures. The email exchange between TP's employees warning about [*Information on TP's assessment of certain effects of cooperation between TP and PTK in sales of products of both companies*]⁷⁸⁰ confirms that the issue of better treatment of PTK was widely known inside TP.

Problems with verification mechanisms existed but were systematically eliminated

- (493) TP admits⁷⁸¹ that the problem of rejections of AOs orders due to the lack of space in SANs existed. According to TP⁷⁸², this problem was signalled by [AO] in the first half of 2008 after which a series of actions followed. *Inter alia*, TP introduced a manual process of monitoring the subscribers who released DSLAMs in order to free the occupied VP paths.⁷⁸³ TP adds that the problem occurred for the last time in April 2009 and was solved immediately.⁷⁸⁴
- (494) These claims of TP are not accurate. Firstly, it is noted that the problem of technical rejections of [AO's] orders due to the overloaded SANs existed already in the autumn of 2007. In an email to TP of 6 February 2008, [AO] stated: "*Obviously you are aware that the VPI case [Virtual Path Identifier]*⁷⁸⁵ *has been there since November 2007 (...).*"⁷⁸⁶ Secondly, based on the RBOs of 10 May 2006 and 4 October 2006, TP could reject orders only in limited cases or based on the RBO of 6 May 2008 "*TP should not reject the implementation of services due to the lack of technical possibilities. (...) Problems in the cooperation with TP often result from a lack of technical possibilities on TP's side (...) TP is obliged to present to the Benefiting Operator an alternative solution.*"⁷⁸⁷ Thirdly, the

⁷⁷⁷ TP's reply to the RFI of 22 December 2008, question 3.5, page 1-2; containing TP's reply to q. 23 of the RFI of 16 February 2009, page 108; Annex to TP's reply to q. 23.2 of the RFI of 16 February 2009 which presents the additional information made available *via* CHECK to PTK.

⁷⁷⁸ UKE's control report, 1 September 2008 – 31 October 2008, pages 32-33.

⁷⁷⁹ *Idem*, page 33.

⁷⁸⁰ Inspection document, page 3.

⁷⁸¹ SO Reply, paragraphs 675-684.

⁷⁸² *Idem*, paragraph 675.

⁷⁸³ *Idem*, paragraphs 680-683.

⁷⁸⁴ *Idem*, paragraph 684.

⁷⁸⁵ VPI refers to an 8-bit (user-to-network packets) or 12-bit (network-network packets) field within the header of an ATM packet.

⁷⁸⁶ Inspection document, page 5.

⁷⁸⁷ UKE RBO Decision of 6 May 2008, page 30.

RBOs of 10 May 2006 and 4 October 2006 specified reasons⁷⁸⁸ under which TP could refuse orders for activation of a subscriber line. Although TP was obliged to present a detailed description of the reasons for the negative technical verification TP did not follow this obligation.⁷⁸⁹ Furthermore, an internal email of TP confirms that the technical rejections were often unjustified as the "*subject is not technical*" and that TP could "*operate interfaces overloaded in 100%*."⁷⁹⁰

- (495) With regard to the examples given by Netia on unequal verification procedure (see recital (465) above) TP admits that AOs' orders were not executed for AOs due to "*a non-compliance with procedures by Retail TP*", carrying out the verification "*based on information from different systems*" and due to "*poor quality work of monters*" and then they were taken over by TP and implemented for *Neostrada* clients.⁷⁹¹ TP admitted that, after these irregularities were revealed, relevant corrective actions were undertaken.⁷⁹²
- (496) TP contests however the examples given by PTC concerning the orders previously rejected for PTC and then implemented for TP's own retail product *Neostrada* (see recital (465) above).⁷⁹³ TP states that UKE's control report from August 2010⁷⁹⁴ did not confirm any irregularities in this respect. Furthermore, TP points out that the execution of the previously rejected orders of AOs for TP's own retail product is a normal practice on the market where undertakings actively look for clients.⁷⁹⁵
- (497) In this regard, the Commission notes that UKE in its control report from August 2010 confirmed the differences in verification procedures of AOs' and TP's retail orders. UKE could not confirm whether that difference could have negative impact on the implementation of AOs' orders only due to the difficulties in establishing a right methodology of technical possibilities specification.⁷⁹⁶ To this end, it is however noted that the AT Kaerney Report (November 2010) confirmed that TP applied better procedures for its own product *Neostrada*. This resulted in the favourable implementation of *Neostrada* orders against the AOs' orders (see recital (465) above). The results of that audit report were confirmed by TP in the reply to the letter of facts.⁷⁹⁷

⁷⁸⁸ See art. 3.1.2.1 point 9; i.e. an order concerns a line which is excluded from the scope of the RO, there is no technical possibilities for the implementation of the ordered service option, or there is a threat for the network integrity.

⁷⁸⁹ Inspection document, page 11, where the TP's model of data exchanges does not require sending to AOs any detailed description of refusal reasons.

⁷⁹⁰ Inspection document, page 3.

⁷⁹¹ TP's reply to the letter of facts, paragraphs 257-259: "*In summary, a detailed analysis of the 165 outstanding, not implemented by TP orders of AOs revealed: in 71 cases it resulted from the poor quality of work fitters, 61 cases of non-compliance with procedures by Retail TP, 19 cases of negative technical verification has been made by the consultants based on data from Inventory and other systems, for 14 cases there were changes in the network allowing the connection of service*" .

⁷⁹² TP's reply to the letter of facts, paragraph 261, see also paragraphs 232-248 and 293-294, in particular paragraph 235: [*]and paragraph 237: "*Currently it conducts works on the modification of a document "Methods of Modelling of Processes within TP Group" (...) Changes in this document are to lead to the elimination of potential risks of introduction of a new or pilot procedure, which could be assessed as not guaranteeing the equal treatment.*" And paragraph 244:[*]

⁷⁹³ TP's reply to the letter of facts, paragraphs 263-266.

⁷⁹⁴ UKE's control report, 18 February 2010 – 31 March 2010.

⁷⁹⁵ Document TP's reply to the letter of facts, paragraph 255.

⁷⁹⁶ See UKE comments on the control to the SO Reply

⁷⁹⁷ TP's reply to the letter of facts, paragraphs 256-262.

- (498) Finally, TP's assessment that it is normal that as a result of its marketing policy TP finally gains clients for its own product *Neostrada* (to the detriment of AOs), although correct in broad terms, misses an important point. As UKE noted in its market 5 consultation decision, TP's actions of "win back" type, were based on using by TP's retail division the information in possession of TP's wholesale division about the subscribers who expressed their wish to use AOs' offers. By soliciting actively clients interested in using AOs' services and by discouraging them from using AOs' products, TP retail division managed to regain their interest and provide them again with its services.⁷⁹⁸

Problems with limited availability of subscriber lines were justified by technical difficulties

- (499) TP admits⁷⁹⁹ that the problem with the provision of BSA services on WLR lines occurred and explains it had difficulty in adjusting properly its IT systems. TP outlines⁸⁰⁰ that it had carried out the necessary works to adjust the IT systems, and upon the completion of the works, in October 2007, the problem was eliminated.
- (500) Furthermore, TP underlines that it made best efforts in order to implement BSA services effectively and to improve its IT system. These efforts were however disrupted by factors independent of TP such as high level of activity of the Polish regulator,⁸⁰¹ a need to redefine complicated requirements for IT systems arising from the changed BSA, LLU and WLR ROs⁸⁰² and TP's impossibility to assess the technical and organisational infrastructure resulting from the underestimated forecasts delivered by AOs.⁸⁰³
- (501) The above arguments of TP are unfounded on four counts. Firstly, already since 28 April 2004, when a Regulation of the Minister of Infrastructure was issued⁸⁰⁴, TP was aware that its IT systems would need to be tailored to the needs of upcoming wholesale reference offers. That regulation already pointed out that a new RO will establish conditions for an IT system needed for processing AOs requests for access. In addition, in its RUO Decision of 9 August 2005⁸⁰⁵ the NRA foresaw that the implementation of AOs' orders would require from TP the establishment of a proper database with detailed information about its network. As shown in section 1, instead of preparing for the forthcoming regulatory obligations, TP chose "*the creation of the LLU process based on the [alternative] operators' maximal impediment in obtaining information on TP's network.*"⁸⁰⁶ As for BSA, TP was obliged to introduce an IT system for exchange of data 6 months after the introduction of the first RBO, this is in November 2006 the latest.

⁷⁹⁸ Annex 020 to TP's reply to the letter of facts including the draft Consultation Decision of UKE on market 5, 21 February 2011, page 1292.

⁷⁹⁹ SO Reply, paragraphs 721-787. TP's reply to the letter of facts, paragraph 303.

⁸⁰⁰ SO Reply, paragraph 722.

⁸⁰¹ Idem, paragraphs 725-733.

⁸⁰² Idem, paragraphs 734-784.

⁸⁰³ Idem, paragraph 771.

⁸⁰⁴ Regulation of the Minister of Infrastructure of 29 April 2004 on the detailed conditions concerning the access to local loop, published in Dz.U No 118, pos. 1235.

⁸⁰⁵ UKE RUO Decision of 9 August 2005, page 26.

⁸⁰⁶ Inspection document, page 12.

- (502) Secondly, the UKE Control Report⁸⁰⁷ reveals that TP neither informed Netia about its internal problems with implementation of BSA services on WLR lines nor signalled a planned date for launching this service.
- (503) Thirdly, a high regulatory activity of UKE cannot serve as a justification for TP's difficulties in adjusting its IT systems for the following reasons:
- (a) from the beginning of the process, TP caused obstacles and did not cooperate with UKE and AOs in order to prepare the first BSA offer (see recitals (150) to (151) above);⁸⁰⁸
 - (b) some amendments to ROswere necessary due to dynamic changes on the market;⁸⁰⁹
 - (c) many ROs were changed by UKE at TP's request.⁸¹⁰
- (504) Finally, TP cannot justify the lack of sufficient resources dedicated to the provision of BSA services with the fact that it received from AOs underestimated forecasts.⁸¹¹ As it is clearly mentioned in recital (472) above TP knew that organisational and technical weaknesses on TP's side were at the origin of the lack of the implementation of BSA services.⁸¹² TP did not provide general information enabling AOs to prepare the correct forecast, and was aware that in certain periods it will receive more orders (see recital (509) below).
- (505) With regard to faulty BSA lines, TP admits⁸¹³ that in 2007 there were problems with the late reparation of lines. However, TP notes⁸¹⁴ that at that time the level of service provided by TP to AOs was even higher than the level provided for its own retail subscribers. In TP's view the problem with late reparation of faulty lines was also linked to the lack of appropriate IT infrastructure. TP highlights that it was successfully removed in 2008.⁸¹⁵ In this regards, TP's problems with adjustments of its own IT systems can not be accepted as explained in recitals (501) and (504) above.

Delays in implementing AOs' orders occurred only at the beginning and were justified

- (506) With regard to BSA delays, TP points out⁸¹⁶ that delays occurred because TP was finalising the preparations for full BSA order service by updating its IT system and that the external contractors delivered new software of poor quality. Furthermore, TP notices⁸¹⁷ that delays were also caused by the fact that Netia submitted 3 times more orders than in the forecasts foreseen in the contract.

⁸⁰⁷ UKE control report, 23 January 2008 – 15 February 2008, page 4.

⁸⁰⁸ See circumstances of introducing RBOs, UKE RBO Decision of 4 October 2006, page 47-48 and last paragraph on page 49.

⁸⁰⁹ UKE RBO Decision of 4 October 2006, page 48.

⁸¹⁰ RBO of 4 October 2006, RBO of 4 November 2008, RUO of 3 April 2007, RUO of 29 May 2009.

⁸¹¹ SO Reply, paragraph 771.

⁸¹² See also the Commission's counterarguments on the issue of exceeded forecasts in recital (509) of the Decision.

⁸¹³ SO Reply, paragraphs 788-791.

⁸¹⁴ SO Reply, paragraphs 788-789.

⁸¹⁵ SO Reply, paragraphs 790.

⁸¹⁶ SO Reply, paragraphs 792-800.

⁸¹⁷ SO Reply, paragraph 797-798. See also TP's presentation at the Oral Hearing, page 31 and document TP's reply to the letter of facts, paragraph 330.

Furthermore, according to TP⁸¹⁸, due to TP's constant efforts to improve timely implementation of orders in 2008-2009, the ratio of orders implemented on time was close to 100%. At the same time, the worse results of implementation of *Neostrada* prove that TP gave a priority to AOs' orders.⁸¹⁹

- (507) With regard to LLU delays, TP outlines that delays occurred only in Quarter 4 2007 and Quarter 1 2008 and that since Quarter 2 of 2008 on average 99.7% of orders is implemented timely.⁸²⁰
- (508) In this regard, the Commission acknowledges that indeed the delays in the implementation of orders for the activation of subscribers' lines occurred mainly in the last quarter of 2007 and at the beginning of 2008. However, the Commission underlines that from the point of view of AOs, such delays at the initial stage of providing the service to new clients had a detrimental effect on AOs' image. An AO has a legitimate right to expect that its orders would be implemented timely from the early beginning of the process of accessing the incumbent's network. As already pointed out in recital (501) and (503) above TP is wrong to justify delays by the fact that its IT system was not prepared on time.
- (509) Furthermore, the fact that some AOs exceeded forecasts is not sufficient to justify the delays. According to the provisions of the RBO,⁸²¹ the first four forecasts were not binding upon the parties. This regulatory approach is fully understandable especially because wrong forecasts were often caused by the weak quality of General Information, which is indispensable for AOs to prepare correct estimates of orders.⁸²² In this context, Netia stated that "[it] *did not receive from TP any basic information allowing the preparation of forecasts: number of lines in local SANs, number of DSLAM, number of DSL ports in the RSO area,*"⁸²³ that "*it accepted the unfavourable, and unrealistic system of forecasting only for the purpose of launching its retail services*" and that "*the RBO of 2006 did not define i.e. the deviation levels.*"⁸²⁴ Moreover, TP did not prepare satisfactory IT solutions for the procurement of AOs' orders.⁸²⁵ In this context, Netia stated during the Oral Hearing that TP was not able to procure timely the AOs' orders in 2006 and backlogged them. Netia raised, and the incumbent admitted during the Oral Hearing, that TP committed itself in the contract signed with [*content of the agreement*].⁸²⁶ Also, TP's policy with regard to its own retail subscribers had an influence on the preparation of forecasts by AOs. For instance, while preparing the forecasts, Netia could not take into account the fact that TP later on would allow its customers to change freely an operator. This change distorted the previous Netia's previous analysis and the submitted forecasts.⁸²⁷

818 SO Reply, paragraph 800.

819 Idem.

820 TP's reply to the letter of facts, paragraph 316.

821 RBO of 10 May 2006, art. 2.1.3 point 3.

822 UKE RBO Decision of 6 May 2008, page 37.

823 Netia's reply to the RFI of 2 December 2010, page 6.

824 Idem, page 5.

825 The fact that TP proceeded orders manually in the first periods of implementation of AOs; orders confirms that TP did not prepare accordingly the internal systems to process AO's orders. See: Inspection document, page 106.

826 Concerns WLR orders, see TP's presentation at the hearing, page 31. The contract was signed as a result of TP's failure to process since September 2006 the AO's orders.

827 Netia's reply to the RFI of 2 December 2010, page 6.

4.5 Conclusion

- (510) TP created numerous obstacles to AOs at the stage of accessing subscriber lines. In particular, TP rejected a high number of AOs' orders on unreasonable grounds, until October 2007 refused to provide BSA services on WLR lines, did not repair faulty lines in a timely manner and in the initial period of implementation of AOs' orders it delayed the process of their implementation. On the basis of contemporaneous evidence of TP collected during inspections in TP's premises it is clear that TP did not introduce on time measures necessary for AOs to effectively access the subscriber lines. In addition, the examples of PTK and TP's retail product *Neostrada* show that TP could have offered better conditions to AOs. These impediments on TP's side form part of TP's pattern of abusive conduct aimed at hindering AOs from efficiently accessing the incumbent operator's network and using its wholesale broadband products.

5. TP did not provide reliable and accurate General Information to AOs

- (511) As described in sections VI.1.4 and VI.2.4 the ROs require TP to make accessible the information which is necessary for AOs to make a sound decision regarding access to TP's wholesale broadband products at specific locations (the so-called General Information or "GI").⁸²⁸ Such reliable and accurate GI shall also include an interface to TP's IT system, enabling *"access to databases containing the information envisaged under General Information and permitting the correct and effective submission of requests and orders concerning the service of Access to the local subscriber loop, billing, and the determination of the possibility to provide the Access to local subscriber loop service."*⁸²⁹
- (512) Comprehensive and unfailing GI is of paramount importance for AOs. In this respect, Tele2 for instance stated that *"having a reliable and complete GI is a basic condition for the sale of services based on LLU and BSA - without which it cannot be determined whether and what service could be sold to the customer. Without access to a reliable GI database, it does not make sense to start the sales process in individual cases, nor further unbundling of local loops."*⁸³⁰
- (513) To this end, in the SO Reply TP rightly pointed out that the access to GI precedes the conclusion of an access contract and stated that *"it is surely on the basis of*

⁸²⁸ The GI covers *inter alia* details on: location (of addresses) of TP's MDF, the geographic area serviced by the given MDF, the numbering range of the requested access node at the MDF's level, localization of collocation sites, the number of main cables ending within the MDF and the number of pairs (capacity) of each cable, the number of taken pairs in the main cable, technical parameters of copper pairs, the location (the address) of the main rank for every main cable, the geographic area serviced by a given main rank, the numbering range of the requested access node at the main rank level, the number of distributive cables ending in a given main rank, the number of pairs ending in a given main rank for every distributive cable, the technical parameters of copper pairs for a given distributive cable, the location (address) in which the distributive rank is located for every distributive cable, the technical possibilities for connecting a correspondence cable, the geographic area serviced by a given distributive rank, the number of subscriber connections ending in the distributive rank, the number of subscriber connections engaged in a given distributive rank and the technical parameters of subscriber connections in a given distributive rank. See the definition of the GI on page 4 of the RUO of 5 October 2006 and of 3 April 2007

⁸²⁹ See e.g. document point 1.1.1. of the RUO. The functionality of the interface for GI changed over time.

⁸³⁰ Tele2's reply to the RFI of 23 February 2009, page 29.

information [GI] obtained [from TP] that an AO will be able to determine if and on what terms it will decide to conclude an LLU contract with TP."⁸³¹

- (514) An internal memo of TP collected during the inspection at TP's premises reveals that TP was aware of the vital importance of consistent and complete data. TP's aim was not however to improve the quality of information and prepare the exchange platforms for the purpose of information provision, but rather to block the access of AOs to data on its network, on which they were dependent in their planning of a market strategy. The said memo places *"the creation of the LLU process from a perspective of maximising [alternative] operators' difficulties in obtaining information on the structure of TP's network"* amongst the objectives of so-called *"LLU project"* which TP envisaged at an early stage of the introduction of LLU in Poland.⁸³²
- (515) Also, as stated in recitals (242) in the draft access contracts that TP sent to AOs at the beginning of the access negotiations, TP did not initially include the definition of GI and, at a later stage in 2007, included a definition with a scope which did not correspond to the actual RUO obligation. TP also excluded the provision of an IT interface from its standard contract (see recitals (176) and (248)).
- (516) In the following recitals the Commission will demonstrate, by reference to the evidence in the file, that there were problems with the quality and completeness of GI, the data format - often difficult to process and the lack of an appropriate IT interface. Furthermore, the Commission will demonstrate that TP could have improved the quality of data and provide better channels of information as it did in the case of its subsidiary – PTK.

5.1 Quality and completeness of GI

- (517) With regard to the quality of information a number of AOs drew the Commission's attention to the fact that the information received from TP *"is of very poor quality."*⁸³³ Among the most important errors in the GI provided by TP Netia listed: *"a) the correctness of addresses covered by a node - the areas provided by TP are inaccurate and expose alternative operators to incurring significant costs associated with routers, commissions for the sale of services. b) Incorrect telephone numbers; c) Practically no data available for [percentage] of buildings concerning the copper loop length, which is of considerable importance for sale."*⁸³⁴
- (518) Netia indicated also that *"the scope of general information provided [by TP] is different from the one envisaged in the reference offer and in Netia's contract."*⁸³⁵ The AO further explained that although it should have been receiving information about the number of active and non-active subscriber lines within the scope of Regional and Local SANs, TP has been providing this information only for Regional SANs, what *"represents a significant obstacle in the planning of sales*

⁸³¹ SO Reply, paragraph 287, page 59.

⁸³² Inspection document, page 12.

⁸³³ Netia's reply to the RFI of 23 February 2009, page 2. *"Information is of such a poor quality that as a result [percentage] of sales is not activated due to the lack of technical possibilities"*

⁸³⁴ Idem, page 4-5.

⁸³⁵ Netia's reply to the RFI of 23 February 2009, page 3.

and thus in submitting to TP the forecasts required under the contract, providing for, inter alia, the number of orders assigned to PDUs."⁸³⁶

- (519) Netia stated that it *"provided TP with remarks as to data on numerous occasions, indicating the need for its improvement, and the extra costs an alternative operator incurs by in relation to the data; unfortunately, without any result. In conclusion, it took TP two years to provide more or less exact list of nodes which may be unbundled, and it's been a year and a half that TP has been providing the information on the range of individual nodes, whereas the provided data still has over 13% of errors.*"⁸³⁷ Netia's example shows that TP did not identify and eliminate the persisting obstacles in the provision of GI.
- (520) Tele2 also brought to the Commission's attention difficulties with the quality and content of the GI. Tele2 remarked that in general terms *"the quality of the information provided should be raised to the level defined in the Reference Offers, and the data provided should reflect the reality – otherwise, an alternative operator will not be able to effectively compete with TP on the basis of BSA/LLU."*⁸³⁸ In this regard, Tele2 stated that *"TP has entirely failed to meet the obligation to provide complete and reliable General Information, the scope of the data provided was much narrower than specified in the [LLU] Reference Offer."*⁸³⁹ In some instances *"Tele2 received completely useless data (...) [e.g.] the data provided by TP also indicated locations which are not available for unbundling such as wireless loops."*⁸⁴⁰
- (521) Tele2 evoked a concrete example explaining that *"after several months of discussions and exerting pressure, TP began submitting data on the addresses and the numbering ranges. The last General Information provided by TP, before Tele2 had withdrawn from the LLU project, pointed to the following: in 5320 files regarding locations of TP switches there were 6.6 million subscriber numbers. After reviewing the data provided by TP with the database of active ADSL users (at that time about 30 thousand lines), it turned out that only 62% of our active users could be found in the LLU General Information database. This means that the database is incomplete and unreliable."*⁸⁴¹
- (522) Telekomunikacja Kolejowa also indicated that *"[t]he reliability of the received data often misleads us because many times we received negative technical verification on account of the SAN overload, yet after a few months it became clear that the actual cause of the negative verification was that particular SANs*

⁸³⁶ Idem, page 3: *"In addition, the scope of transmitted general information is different from the scope envisaged in the reference offer and in Netia's contract. Netia's agreement foresees the provision of general information such as – the number of subscriber lines activated on regional and local Service Access Nodes, the number of subscriber lines non-active on regional and local Service Access Nodes together with the reasons of deactivation. At the same time, the definition of the Service Access Node is the following – "Service Access Node (SAN) - a place identified by a postal address, where the alternative operator obtains access to TP's network for the purpose of service performance, including TP's infrastructure between ATM node in TP's network and the physical connection node." This means that TP should provide the above mentioned data also on the level of 72 local Service Access Nodes (SANs), whereas from the early beginning of co-operation TP provides only information concerning regional SANs which are only 12. The above represents a significant obstacle in the planning of sales and thus in submitting to TP the forecasts required under the contract, including, inter alia, the number of orders for each SAN" [emphasis added].*

⁸³⁷ Idem, page 5.

⁸³⁸ Tele2's reply to the RFI of 23 February 2009, page 29.

⁸³⁹ Idem, page 28.

⁸⁴⁰ Idem.

⁸⁴¹ Idem.

were not launched. There are cases that call into question the credibility [of the information] (e.g., the service has been launched for testing purposes and operated for 4 months, yet when the customer ordered it commercially TP replied that there was no copper)."⁸⁴²

- (523) Recitals (524) to (526) below illustrate serious and concrete problems Netia encountered when obtaining information from TP regarding the MDFs. This information is necessary to start providing services based on LLU and the absence of it makes any viable business planning impossible. The evidence referred to below shows that the incompleteness and unreliability of the GI that Netia was provided with by the incumbent operator, led the AOs to incur increased costs and to the inability to implement its business plan.
- (524) In this respect, Netia stated that "[a]t the beginning of Netia's works on LLU project (in 2006), TP provided a list of nodes containing 5.615 records (...) On the basis of this information, Netia made preparations for the implementation of the LLU project, adopted a strategy and set criteria for the selection of a particular group of nodes. Unfortunately, as late as February 2007 TP sent to Netia list of nodes completely different from the previous one, i.e. a list of 11.225 nodes. According to Netia, such action was intended to disorganise Netia's activities, through the preparation of Netia's investment in 2006 on data containing 99% of errors (the number of nodes doubled), and at the same time making it necessary to re-do all the analyses. [type of information] are the fundamental input parameters for the preparation of the market entry strategy of each operator."⁸⁴³
- (525) Netia further indicated that this problem persisted in 2008 and 2009: "In August 2008 the next list of available LLU nodes appeared on TP's website. This time it contained valuable information about the owner of the facility in which the node is located, the legal status of the facility and the possibility of leasing the space by Netia for LLU purposes. However this information, for reasons unknown to Netia, has been limited to 5.331 nodes (a reduction from 11.225) which again resulted in the need to conduct the necessary studies and assess the impact of these changes on Netia's strategy. However, one should bear in mind that any change of input parameters delayed the Netia's work and significantly hampered the implementation of the previously agreed investment strategy. In February 2009 another list of nodes was presented, this time with 5.415 locations, with the same structure of data, which may be considered a minor modification of the August 2008 data; however, in Netia's assessment this should not have taken place. To conclude, it took TP over two years to provide [indication of the importance of information for the AO] information as to the number of nodes,[indication of the importance of information for the AO], which moreover generated significant costs for Netia related to the analysis of the data (limiting the number of nodes from 11 225 to 5 331)."⁸⁴⁴
- (526) In addition, Netia explained that [indication of the use of information at the stage of accessing TP's network]. In line with the contract, Netia began to request GI including, inter alia, the above-mentioned data in mid-2007 (...) Netia examined this data in order to prepare for[stage of accessing TP's network]. The analysis of the [localization] node showed that: (a) TP gave a total of 238 600 numbers. Which is surprising given that the node had only 15 500 lines , i.e. we received

⁸⁴² TK's reply to the RFI of 23 February 2009, page 9.

⁸⁴³ Netia's reply to the RFI of 23 February 2009, page 3.

⁸⁴⁴ Idem.

about 15 times more potential lines actually operating in this node. (b) TP provided Netia with some 43 000 addresses of the locations (approximately 860 multi-family buildings) within the range of the [localization] node. That is 3 times more than the active lines connected to the node (15 500). The data covered nearly the whole scope of the area of another node. According to Netia, that is the best example of the special techniques used by TP, i.e. to delay as much as possible Netia's [stage of using TP's network]. It is impossible to start [stage of using TP's network] with such data quality because it would mean that out of [number of potential activations – Netia's data].⁸⁴⁵ TP confirmed that the problem existed and that, with regard to this particular node, it was remedied in March 2009.⁸⁴⁶ In this regard, the Commission notes that it took a long time for TP to remedy the situation, since Netia had already requested the data on the [localization of the node] node in the second half of 2007.⁸⁴⁷

- (527) An internal email of TP of 17 March 2008 confirms that TP was aware that its databases "are sometimes outdated."⁸⁴⁸
- (528) Although TP engaged in projects to improve the quality of the data on its network, such data still remains to a relatively large extent unreliable. For instance, TP stated that as a result of investments undertaken in 2008, the quality of the incumbent operator's data overall in Poland increased from 44% in June 2008 to 51% by the end of February 2009 and to about 80% in 2010.⁸⁴⁹

5.2 Format of GI

- (529) Not only did TP provide inaccurate information to AOs, in some instances it also provided GI in a format that was difficult to process. In this respect, PTC claimed that "on 9 February 2006, in accordance with then applicable reference offer [it] presented to TP a request for GI on LLU (...) In the first half of April 2006, TP provided PTC with the data in a .pdf file. The analysis of the data provided in such format was obstructed, because this format was not suitable to analytical processing (the files provided contained scans of pages with a large amount of data)."⁸⁵⁰ PTC further emphasized that "the General Information obtained did not allow it to take a decision on its involvement in the provision of retail services based on the LLU. PTC has not undertaken another attempt to access General Information."⁸⁵¹ PTC encountered similar problems regarding information on BSA.⁸⁵²
- (530) Similarly to the issues raised by PTC, Tele2 is also of the opinion that TP provided information in paper format or scanned .pdf files, including information which Tele2 did not request, making it even more difficult to process the obtained data. Tele2 stated: "Tele2 submitted, in accordance with the LLU offer, a request

⁸⁴⁵ Idem, page 4.

⁸⁴⁶ SO Reply, paragraph 839, page 194.

⁸⁴⁷ Netia's reply to the RFI of 23 February 2009, page 4.

⁸⁴⁸ Inspection document, TP's internal email, page 15.

⁸⁴⁹ TP's reply to q. 33 to the RFI of 16 February 2009, page 122 and document TP's reply to q. 14 to the RFI of 4 November 2010, page 88.

⁸⁵⁰ PTC's reply to the RFI of 23 February 2009, page 12.

⁸⁵¹ PTC's reply to the RFI of 23 February 2009, page 12.

⁸⁵² Idem, "On 13 July 2006, PTC presented to TP a request for access to General Information related to BSA service. On 28 July 2006, TP provided the data covered by the General Information. The data had a similar form as in the case of General Information for LLU services, making the analysis of the information difficult".

for General Information concerning the entire network. In its reply, TP submitted a list of TP's distribution frames, but only in paper form, not being appropriate neither for scanning nor for counting how many of those distribution frames actually exist. When Tele2 asked for an electronic version, TP sent the same list scanned in .pdf format!!!"⁸⁵³ These problems were also experienced by other AOs.⁸⁵⁴

5.3 Provision of IT interface

- (531) Additionally, despite its obligation to provide an interface to an IT system enabling an efficient access to databases containing GI and providing other functionalities such as the correct and effective presentation of requests and orders, TP initially did not make available such a system and a full functionality was not provided until 2010.⁸⁵⁵ The IT system enabling access to GI on BSA should have been made available 6 months after the introduction of the first RBO offer (e.g. in November 2006 the latest) and for LLU by the end of 2007. TP itself recognised certain shortcomings in its IT systems and even expected a fine from the NRA for non-compliance with regulatory obligations.⁸⁵⁶ In an internal presentation from August 2007 TP acknowledged that the *"functionality [of the interface for BSA] was delivered in limited (insufficient for operators) scope"* and that in the case of the interface for LLU *"provision of this functionality is planned for November this year (E1107) but there is a real risk of PRT not meeting this deadline."*⁸⁵⁷
- (532) PTC indicated that following its request from 31 October 2008 TP failed to provide an IT system enabling efficient access to the GI even though TP was obliged to do so under both the ROs and the bilateral contracts concluded: *"In PTC's view this proves that the [BSA] Reference Offer, as well as the contract signed between TP and PTC, have been infringed."*⁸⁵⁸ PTC concluded that *"the lack of access to an interface to TP's IT system is a crucial obstacle for providing retail services by an AO, in particular in developing mass sale activity."*⁸⁵⁹ The only IT system prepared by TP had limited effectiveness.⁸⁶⁰

853 Tele2's reply to the RFI of 23 February 2009, page 28:

854 eTOP's reply to the RFI of 23 February 2009, page 7.

855 See recital (533).

856 Inspection document, TP's internal presentation of 17 September 2007, page 372.

857 page 13, internal presentation of TP of 17 August 2007 also page 320, internal presentation of 8 August 2007; also page 19, internal presentation of 23 August 2007: *"BSA implementation status – service implementation- most important problems: WWW interface and electronic data exchange channel: - in line with the RIO decision and the UOKiK requirements, TP is obliged to make available to operators an electronic interface enabling (mass) servicing of BSA orders. – Due to restrictions in PRT resources, this functionality was delivered in limited (insufficient for operators) scope; - provision of this functionality is planned for November this year (E1107) but there is a real risk of PRT not meeting this deadline"*. page 324, internal presentation of 8 August 2007: *"Status of PK-O regulatory initiatives implementation: LLU – list of problems in the service functioning: - WWW interface and electronic data exchange channel: - in line with RIO decision and the UOKiK requirements, TP is obliged to make available to operators an electronic interface enabling (mass) servicing of LLU orders. – Due to restrictions in PRT resources, this functionality was delivered in limited (insufficient for operators) scope; - provision of this functionality is planned for November this year (E1107) but there is a real risk of PRT not meeting this deadline"*.

858 PTC's reply to the RFI of 23 February 2009, page 13.

859 PTC's reply to the RFI of 23 February 2009, page 6.

860 PTC's reply to the RFI of 23 February 2009, page 13: *"Currently, the Information System operates between PTC and TP as regards servicing orders for access to subscriber lines. However, the*

- (533) In the SO Reply TP admitted that the interface allowing access to GI both for BSA and LLU was made available to AOs only on 1 April 2010.⁸⁶¹ This was a result of the Agreement of 22 October 2009 signed with UKE on the basis of which TP committed itself to make available an IT system allowing access to GI on 31 March 2010 the latest, a system allowing the processing of orders by 30 June 2010 and a full functional IT system by 31 December 2010.⁸⁶²
- (534) Netia also brought to the Commission's attention the fact that TP made available to its own retail clients purchasing TP's retail products more reliable and detailed data than it was providing to AOs. Netia found out that TP's database confirming the service availability contained more consistent data than the data available via the channels foreseen for AOs. Therefore, although it was time consuming, Netia used the database to verify the data of Netia's orders. In this respect, the AO stated that "*On account of lack of any restrictions for incorrect data Telekomunikacja Polska does not seek to diminish this problem and the data subsequently provided in the General Information do not improve the bad situation. Furthermore, TP has not made available to Netia an operator's application enabling it to check the [service] availability at a level equal to a retail customer purchasing TP services (via a WWW website). As a result Netia, wishing to improve the quality of the data, [submission of] the same query on TP's web site as queries made by TP's retail clients.*" In Netia's view, "*it clearly shows that TP shows maximum of ill will in cooperation otherwise how could it be explained that TP has a better database but only makes it available exclusively to its retail customers?*"⁸⁶³

5.4 Access to data of a better quality was possible

- (535) The evidence in the Commission's file indicates that TP could have improved the quality of the GI. TP provided PTK with supplementary channels of information as well as with additional information which was not made available to other AOs. In this way, the process of obtaining the GI was quicker and cheaper for PTK and led for example to a reduced number of BSA order rejections.
- (536) Firstly, from 1 January 2008 until 30 May 2008 TP's Mass Client Sales Division verified for PTK the address information of PTK's new clients.⁸⁶⁴ Thus, PTK salespersons had the opportunity to immediately check whether the information provided by the clients was consistent with data in TP's databases: [*Information concerns contractual relations between TP and PTK and a preferential access of PTK's employees to certain data*]⁸⁶⁵ This reduced the number of PTK's orders

efficiency of the system is assessed to be at a very low level. TP has still not made available an Information System for accessing the GI. On 31 October 2008, PTC sent a letter to TP, asking for access to the interface of such a system (...). In response, PTC received information that TP does not make such a system available."

⁸⁶¹ SO Reply, paragraph 964.

⁸⁶² Annex 10 to the Agreement of 22 October 2009 with UKE, pages 97-100.

⁸⁶³ Netia's reply to the RFI of 23 February 2009, page 2-3.

⁸⁶⁴ TP's reply to q. 22 to the RFI of 16 February 2009, page 106-107. TP claims that the service was provided on the basis of the contract of [*date of signing the contract and terminating factors*]. However, the Commission notes that the service was provided before the contract was concluded and the service provision was stopped due to the fact that TP's Director of Client-Operators Division found out about the practice and realised its negative consequences with regard to the principle of non-discriminatory treatment of AOs (see inspection document, TP's internal emails, page 14-24).

⁸⁶⁵ Inspection document, TP's internal email, page 15. See also pages 14-24.

rejected on formal grounds (see recital (452)). That possibility was not made accessible to other AOs.

- (537) Secondly, since [date] until [date], PTK, via a common Intranet site with TP, had access to TP's CHECK application used to verify the technical possibilities of providing broadband services on specific subscriber lines and to verify the possible service option (e.g. 1 Mbit/s download service).⁸⁶⁶ Other AOs could obtain similar information only by ordering an additional technical exam from TP. This meant waiting up to 5 working days⁸⁶⁷ and incurring additional costs as TP charged for each such exam; i.e.: under the 2006 RBOs 153,16 PLN per order [= c. 43.61 EUR] and under the 2008 RBOs 130,60 PLN [=c. 37,19 EUR].⁸⁶⁸ The fact that TP provided PTK with additional information via the CHECK application has also been established by the President of UKE as a result of controls conducted in September – October 2008 and in March-April 2009.⁸⁶⁹
- (538) This constitutes clear evidence that there was a margin for improving the quality of GI and information channels and that TP refused to exploit such a possibility vis-à-vis AOs other than its subsidiary, PTK. TP failed to explain in the SO Reply why it did not provide equal access to CHECK for other operators which had to incur costs for information which PTK could access for free. In a merely factual way TP informs only that it made CHECK available on 30 June 2009 for testing purposes and commercially as of 1 January 2010.⁸⁷⁰
- (539) TP also informed the Commission that "*TP does not guarantee that the information obtained [via CHECK] will guarantee the effective provision of broadband services*" and that "*in view of the technical specificity of the tool, the outcome of the prequalification can only be treated as a guideline for the implementation of the order*".⁸⁷¹ TP also added that in 2010 the quality of the information transferred via CHECK to AOs was at a level of 90,95%. This might explain the problems of Netia with the reliability of information available via CHECK. Netia informed the Commission in 2010 that [*Information concerning the functionality of the CHECK system*]."⁸⁷² [*]"⁸⁷³
- (540) Moreover, UKE found another way of exchange of information between TP and PTK which was not available to other AOs and was not indicated by TP in the reply to the Commission's RFI.⁸⁷⁴ TP's sales points and the joint TP/PTK retail sales points had access to the so-called [*name of TP's system*] application, enabling access to additional technical information (namely verification of service

⁸⁶⁶ TP's reply to the RFI of 22 December 2008, question 3.5, page 1-2; TP's reply to q. 23 of the RFI of 16 February 2009, page 108; Annex to TP's reply to q. 23.2 of the RFI of 16 February 2009 which presents the additional information made available via CHECK to PTK.

⁸⁶⁷ 5 working days is the deadline stipulated in the RBOs.

⁸⁶⁸ See section 4.2.6.4. of the RBO of 4 October 2006 and section 8.2 of the RBO of 6 May 2008 ; TP's internal presentation of 30 August 2007 (inspection document ,page 31) shows that TP verified its cost of providing a technical exam and assessed that it was 80,02 PLN [c. 22.78 EUR]. TP considered offering this lower price to AOs; however, the prices TP actually charged did not decrease (see: TP's reply to RFI on 10 January 2009, page 20, 26, 29 and 32; TP's reply to RFI on 3 March 2009, page 17).

⁸⁶⁹ UKE's control report, 1 September 2008 – 31 October 2008, pages 21- 22 and UKE's control report, 5 March 2009 – 30 April 2009.

⁸⁷⁰ SO Reply, paragraph 843.

⁸⁷¹ TP's reply to the letter of facts, paragraphs 369-372.

⁸⁷² Netia's reply to the RFI of 2 August 2010, page 3.

⁸⁷³ Netia's reply to the RFI of 2 August 2010, page 3.

⁸⁷⁴ TP's reply to q. 3.5 to the RFI of 22 December 2008, pages 1-3.

options available on a given subscriber line). TP informed UKE that on 13 February 2009 it had instructed its sales staff not to use TP's applications when selling PTK's products and also informed UKE that PTK employees working in joint TP/PTK retail sales points should have no access to [name of TP's system]application.⁸⁷⁵ This instruction however might not have been an efficient solution in view of TP's statement in the reply to the letter of facts concerning the recurrent problems in stopping the additional flow of information to PTK.⁸⁷⁶

- (541) In the SO Reply TP did not comment on the Commission's finding with regard to better access to information provided to PTK.

5.5 Arguments of TP

Commission's reliance of AOs' statements

- (542) TP argues that the reasoning of the Commission is based on AOs' statements which lack evidence.⁸⁷⁷ This argument is misleading and the following observations must be made.
- (543) Firstly, AOs are well placed to assess the quality of the data TP has been providing. Secondly, the evidence provided by AOs is very coherent and leaves no doubt that TP's data has been of low quality. Moreover, AOs' statements are supported by concrete examples of TP's non-provision of GI or provision of inaccurate information (see recitals (524) and (526)). In fact, in the SO Reply TP chose not to comment on a number of such specific issues raised by AOs.⁸⁷⁸ Finally, TP did not provide any examples of reliable general information it had delivered to AOs which could have undermined their statements.

The ROs did not specify the format of GI

- (544) With regard to the inconvenient format in which the GI was provided, TP argues⁸⁷⁹ that the ROs did not specify in which format the information should be provided.
- (545) In this regard, as a general remark it is noted that the question of the format in which the general information is provided, while not being as central as TP's lack of compliance with the obligation to provide accurate and complete data, is an issue of some practical importance. TP must have been aware that a large amount of data in scanned .pdf format is difficult to process. Furthermore, in some cases TP was able to transmit data in .xls format which is easier to process. Therefore, if it was technically possible to transmit data in .xls format it is more dubious why TP in the case of PTC and Tele2 decided to use a format which was inconvenient to process. Furthermore, according to the RBO and RUO provisions AOs should have been provided with an option to access the GI via an interface. As proved above (see recitals (531) to (534)) this possibility was however not available, and the only way to access GI was in writing or by email. Moreover, in view of the lack of an IT interface, TP should have provided AOs with the GI in a user-

⁸⁷⁵ UKE's control report, op. cit., pages 8 and 11.

⁸⁷⁶ TP's reply to the letter of facts, paragraphs 376-382, page 73. See also other examples of the additional flow of information to PTK presented by TP in paragraph 257 of the same letter.

⁸⁷⁷ SO Reply, paragraphs 811-816.

⁸⁷⁸ TP did not comment on the following paragraphs of the SO: 270-272, 275b, 276, 278-279.

⁸⁷⁹ SO Reply, paragraphs 818-821.

friendly format. However, even if data was received in a format easy to process as in the case of TK Telekom, that AO contested its accuracy: "[t]he reliability of the data often misleads us (...). There are cases that put into question the credibility of the information (...)." ⁸⁸⁰

TP contests the evidence concerning PTC and Tele2 and blames the Regulator

- (546) TP then refers to the example of PTC concerning the format of GI (see recital (529) above) and attempts to minimize the problem outlined by the AO by stating that "*TP when implementing the request of that AO for GI, TP provided it with the indispensable data but in pdf files*". ⁸⁸¹ This is a misinterpretation of the statement of the AO. PTC remarked that "the analysis of the data included in the file [provided by TP] was hindered as the format if the data was *not suitable for the analytical processing (the files provided contained scans of pages with a large amount of data)*" and "*the General Information did not allow to make a decision on the launch of retail services based on LLU*". ⁸⁸² The AO did not comment on receiving "*indispensable data*". Furthermore, PTC points out that TP did not make an IT interface available and thus created "*a serious obstacle for providing retail services by an Alternative Operator, in particular in developing the sale activities on the mass market*". ⁸⁸³
- (547) Similarly, TP mischaracterised the statement of Tele2 (see recital (530) above). Contrary to what TP claims ⁸⁸⁴ the AO did not affirm that "*it received from TP the requested information*." As demonstrated in recitals (520) to (521) above, Tele2 was faced with a number of problems related to the incompleteness of the GI provided by TP.
- (548) The incumbent also attempts to put the blame on the Regulator for the unreliable data on the MDFs, which Netia was receiving from TP between 2006 and 2009. ⁸⁸⁵ TP states that "*at the same time, it is clear that the problems identified by Netia resulted, to a major extent, from the activities of the President of URTiP and UKE, who made frequent changes in the LLU RO*". ⁸⁸⁶ Those changes of UKE concerned, in view of TP, the modified catalogue of subscriber lines which were outside of the obligation to unbundle. TP admits only that "*[t]he single change in the number of the nodes which was not affected by the decisions of the regulatory body entailed the number of nodes between the data passed to Netia in 2006 (5,615 nodes), and the number of nodes listed in August 2008 (5,331 nodes). The discussed change resulted from the works TP is carrying out all the time with regard to the improvement of the quality of the provided data*". ⁸⁸⁷ and concludes that "*TP took no action aimed at preventing Netia from planning the strategy of entering the LLU market*". ⁸⁸⁸
- (549) The reasoning put forward by TP is incorrect.

⁸⁸⁰ See TK reply to the RFI of 16 March 2009, page 9. In addition the AO stated that the GI was also transferred in a paper of electronic format.

⁸⁸¹ SO Reply, paragraph 818.

⁸⁸² PTC reply to the RFI of 23 February 2009, page 12.

⁸⁸³ Idem, page 6.

⁸⁸⁴ SO Reply, paragraph 821

⁸⁸⁵ SO Reply, paragraphs 824 to 837.

⁸⁸⁶ SO Reply, paragraph 836.

⁸⁸⁷ SO Reply, paragraph 837.

⁸⁸⁸ SO Reply, paragraph 836, page 194.

- (550) Firstly, although it is true that UKE in its subsequent LLU Decisions introducing the RUOs changed the scope of the subscriber lines subject to unbundling, contrary to what TP claims,⁸⁸⁹ the RUO of 5 October 2006 did not require that the fiber lines (FITL) be unbundled. In fact, sections 2.1.2 and 2.2.2 of the RUO of 5 October 2006 clearly read that: "*The subscribers lines not susceptible for unbundling: (...) lines containing fiber sections.*"⁸⁹⁰ Later on, also TP confirmed that fiber lines were excluded from the scope of the RUO of 5 October 2006.⁸⁹¹ Therefore, TP fails to explain the difference in the number of nodes (from 5615 in 2006 to 11225 nodes in February 2007) resulting from the changes in the RUOs, because the regulatory scope of the lines for unbundling remained unchanged during that period.⁸⁹²
- (551) Secondly, TP admitted in the SO Reply that the exclusion of a certain type of lines from the regulatory scope "*does not lead to the elimination of the whole location from the scope of the General Information*".⁸⁹³ Therefore, it is even more unclear why TP provided Netia with varied numbers of MDFs if, in TP's view, the scope of the lines subject to unbundling does not affect the scope of GI.
- (552) Thirdly, Netia pointed out that "*TP should have only included within the general Information information on those MDFs, to which subscriber lines subject to be unbundled are connected. Now, TP informs us that the list of [indication of the importance of the information for the AO] included not the nodes to unbundle but all nodes, and not the potential of a given node (active lines) but the occupancy of MDF.*"⁸⁹⁴ It is therefore clear from Netia's statement that the AO, on the basis of the information received from TP, could not easily distinguish MDFs serviced by fiber lines from those without such lines.
- (553) Lastly, TP's provision to Netia of the misleading data on MDFs, can be seen as a part of TP's strategy to inhibit AOs' access to information on TP's network as referred to in recital (149). In this context, it is important to note that Netia underlined that the information TP provided was the only GI available for the purpose of establishing a business strategy of the AO for the LLU market and that therefore it had to be precise to allow proper planning. However, as Netia pointed out: "*the data was internally inconsistent and encompassed FITL lines, or the capacity of other SANs (same addresses, numbers were repeated for different SANs) (...).*"⁸⁹⁵ The data on TP's network that Netia had been receiving from the incumbent was misleading and aimed at "*disinformation intended to constant delaying and to make business planning impossible.*"⁸⁹⁶

TP's arguments on the implementation of the so-called "LLU project"

⁸⁸⁹ SO Reply, paragraph 828.

⁸⁹⁰ RUO of 5 October 2006, pages 39-41.

⁸⁹¹ TP's reply to the letter of facts, paragraph 201.

⁸⁹² This is also confirmed by UKE in its Comments to the SO Reply of TP, page 47. Although UKE in the Decision imposing the RUO of 5 October 2006 stated that certain parts of FITL lines should be unbundled, this concept was however legally introduced by UKE only in the RUOs of 3 April 2007, 28 November 2008 and 29 May 2009.

⁸⁹³ SO Reply, paragraph 814.

⁸⁹⁴ Netia's submission of 7 December 2010, page 6.

⁸⁹⁵ Netia's submission of 7 December 2010, pages 6 -7.

⁸⁹⁶ Idem, pages 6 - 7.

- (554) In the reply to the letter of facts TP denies that it implemented the so-called "*LLU project*" which aimed at creating impediments to AOs' access to information concerning the development of LLU services as referred to in recital (514) above. TP essentially argues that "*the project was never implemented as the rules governing the cooperation between TP and AOs in this respect were established by the Reference Offers.*"⁸⁹⁷ TP also believes that "*an intermediate proof confirming that the project was never implemented is the fact that there is no other documents concerning this project.*"⁸⁹⁸ Finally, TP claims that the Commission is not allowed to use pre-accession documents in its proceedings, an issue which was tackled in recitals (161) to (163) above. These arguments of TP are not plausible for the reasons explained below.
- (555) To begin with, TP's statement that the said project was never implemented is flawed. The document in question, which is an e-mail exchange between TP's Senior management dated 10 October 2003, clearly shows that the "*LLU project*" launched by TP "*was being implemented.*"⁸⁹⁹ Furthermore the e-mail shows that the Wholesale division of TP requested more money for the project and the involvement of an external consultancy group due to "*project complexity, its novelty and very difficult and negative approach of the NRA.*"⁹⁰⁰ Finally, the e-mail refers to potential risks for the project implementation and finds solutions; among them "*the creation of LLU process from a perspective of maximising AOs' difficulties in obtaining the information on the structure of TP's network.*"⁹⁰¹ To this end, it is noted that TP could have provided the answer of the Vice CEO, the addressee of the letter, to prove at least that the additional financial support was not granted, but TP did not do it.
- (556) Secondly, although TP did not elaborate in its submissions on the context and aims of the "*LLU project*" apart from a very general statement that it concerned "*implementing by TP of an unregulated version of the LLU service, which was to anticipate the regulatory actions*"⁹⁰² it is obvious that the project did not aim at facilitating AOs' access to the LLU. Among the objectives of the project, which are mentioned in the said e-mail are: "*an impeded access to the LLU for AOs.*" Therefore claiming that "*the project was never implemented as the rules governing the cooperation between TP and AOs in this respect were established by the Reference Offers*"⁹⁰³ is misleading.
- (557) Thirdly, TP's argument concerning the use of the document in relation to the fact that it comes from the pre-accession period is dealt with in recitals (161) to (163).

Reference to the measures undertaken by TP

- (558) With regard to all TP's arguments concerning the provision to GI, the Commission notes TP's information about the actions it undertook in order to

⁸⁹⁷ TP's reply to the letter of facts, paragraph 354.

⁸⁹⁸ TP's reply to the letter of facts, paragraph 354.

⁸⁹⁹ Letter from [*] Director of PKO [wholesale] Division to [*]CEO of TP of 10 October 2003, pages 11-12.

⁹⁰⁰ Idem.

⁹⁰¹ Idem.

⁹⁰² TP's reply to the letter of facts, paragraph 354.

⁹⁰³ Idem.

improve the data available to AOs, most of which followed the Agreement with UKE of 22 October 2009.⁹⁰⁴ TP informed *inter alia* that:

- (a) the GI for LLU and BSA is available via the interface ISI since 1 April 2010,
 - (b) the data available *via* CHECK, which allows verifying the possibility of providing a particular speed on a given line, is identical for the AOs and TP's retail division,
 - (c) to improve the quality of data on the network TP has run the Quality Physical Data project (divided in three stages: 2008, 2010 and 2011) which increased the data's correctness level to at least 82% in 2010,
 - (d) to improve as of 3rd quarter 2010, the format of the data exchanges TP undertook to implement the interface to its network, allowing the transmission, modification and implementation of AOs' orders with the envisaged implementation date in.⁹⁰⁵
- (559) TP argues that the quality of GI provided to AOs *via* the interface in the period April 2010 – January 2011 is of very high quality.⁹⁰⁶ Moreover, TP argues that the quality of the information provided via CHECK reached the level of 92.5% in December 2010 and that currently CHECK provides information on about 90% of active lines.⁹⁰⁷
- (560) The Commission notes that TP has been implementing the following projects: the "*Quality of Physical Data*", ("JDF project"⁹⁰⁸) and "*Scanning and Pre-qualifying*", ("PIS project"⁹⁰⁹). However, it is noted that, unlike TP claims, the indicators of these projects show only the completeness of the data in TP's internal systems but not their correctness. With regard to CHECK application, TP states that "*thanks to PIS and JDF projects that indicator [i.e. the data quality in the CHECK application] should increase to 95% in 2011.*"⁹¹⁰ Therefore, the improvement TP refers to, concerns the completeness of the data, but not to their correctness.
- (561) Furthermore, the majority of the above-mentioned actions were undertaken late that is only after the signature of the Agreement in October 2009. In addition, the remaining large scope of actions for implementation in the years 2010-2011 confirms the need for improvement and for the elimination of mistakes in data which existed prior to the Agreement and which had a negative impact on AOs. TP's provision of GI therefore had a negative impact on the AOs' ability to adopt a business strategy with regard to the retail broadband market and ultimately to actually offer retail broadband services on the basis of wholesale products.
- (562) In concrete terms Netia stated: "*Information is of such poor quality that as a result [percentage] of sales are not activated due to the lack of technical possibilities. (...) Maintaining this erroneous data has had a considerable impact*

⁹⁰⁴ SO Reply, paragraphs 964-1009.

⁹⁰⁵ SO Reply, paragraphs 963-1005.

⁹⁰⁶ TP's reply to the letter of facts, paragraph 363.

⁹⁰⁷ *Idem*, paragraph 371.

⁹⁰⁸ TP's reply to the RFI of 22 December 2008, page 121-122 and TP's reply to the RFI on 16 January 2009, slide 4 and 5.

⁹⁰⁹ The project aims at updating the logical data about the network in TP's systems taking into account the real situation of the resources and also intends at checking whether a subscriber line could be used for BSA services. See: TP's reply to the RFI on 16 January 2009, slide 10.

⁹¹⁰ TP's reply to the letter of facts, paragraph 458.

*on the development of the telecommunications market in Poland and translates into poor competition on the regulated services' market."*⁹¹¹ Netia concluded that *"such high level of technical rejections means for an alternative operator: a) [effects of TP's infringements]; b) loss of alternative operators' image [effects of TP's infringements]"* The AO further added that the *"lack of this data and its quality certainly impacts significantly the market in Poland: - Delays the investment process (selecting nodes); - Reduces the cost-effectiveness of investments for potential new investors, implicitly raising the fees related to the acquisition of new customers."*⁹¹² In a similar vein Tele2 stated: *"the poor quality of GI means that a significant proportion of acquired customers cannot receive the purchased service, which not only generates a loss for the alternative operator, but also damages its brand image in the view of clients and potential clients. The provision of inconsistent information generates considerable costs for the alternative operator, which has to repeatedly process a request and spend a considerable amount of time on it (...) [and] also damages its brand image in the view of clients and potential clients"*⁹¹³

- (563) It is noted that even in 2010, Netia raised that: *"unchangeably, both in 2009 and in 2010, mistakes in the GI caused [percentage] of technical rejections."*⁹¹⁴
- (564) As indicated in previous sections 3 and 4 a poor quality data influenced AOs' ability to prepare correct forecasts⁹¹⁵, caused higher rejection rates both on formal and technical grounds and finally deteriorated AOs' image towards their customers.

5.6 Conclusion

- (565) The evidence discussed in sections 5.1 to 5.5 shows that TP did not provide reliable and complete GI. In particular, AOs were often provided with data of low quality and in a format not suitable to process. While TP did not provide to AOs IT interface functionalities in the scope required by the ROs, it made available to its subsidiary additional information channels. TP was aware of the problems with the provision of GI. Such behaviour of TP forms part of the incumbent's strategy aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products.

6. Conclusion on facts

- (566) The evidence outlined in sections 2 to 5 shows that TP created serious impediments to AOs during the process of accessing TP's wholesale products. Such obstacles were present at each stage of the process, namely negotiations of access contracts, accessing TP's network, accessing subscriber lines and accessing GI. Such actions on TP's side form part of the strategy to limit competition, as described in section 1.

⁹¹¹ Netia's reply the RFI of 23 February 2009, page 2.

⁹¹² Idem, page 4-5.

⁹¹³ Tele2's reply to the RFI of 23 February 2009, page 29.

⁹¹⁴ Netia's reply to the RFI of 2 August 2010, page 16.

⁹¹⁵ UKE RBO Decision of 6 May 2008, page 37. In this context Netia stated that "[it] did not receive from TP any basic information allowing preparation of forecasts: number of lines in local SANs, number of DSLAM, number of DSL ports in the RSO area", see Netia's reply to the RFI of 2 December 2010, page 6.

IX. THE AGREEMENT BETWEEN TP AND UKE OF 22 OCTOBER 2009⁹¹⁶ AND THE MARKET SITUATION FOLLOWING THE AGREEMENT

1. The content of the Agreement

- (567) On 22 October 2009 UKE and TP signed an Agreement pursuant to which TP committed to a series of actions aimed at properly fulfilling all its regulatory obligations on the relevant markets on which TP has significant market power, including the BSA and LLU markets ("the Agreement").
- (568) The Agreement is the outcome of a process launched by UKE in 2007⁹¹⁷ to impose functional separation⁹¹⁸ on TP after having observed that, as a result of TP's practices, the regulatory obligations on access to telecommunications networks did not ensure effective competition on the relevant markets.
- (569) In order to avoid the imposition of functional separation, the incumbent started negotiations with AOs to determine the rules for cooperation⁹¹⁹, which, according to TP, would guarantee the conditions for a competitive market. UKE, contrary to TP's view, found that proposal not effective to resolve market problems and launched the consultation process inviting all market players, as a result of which UKE and TP signed the Agreement.
- (570) Pursuant to the Agreement TP committed, *inter alia*, to:
- (a) create separate divisions within TP, respectively competent for the wholesale and retail businesses, as well as an infrastructure division in charge of technical infrastructure;⁹²⁰
 - (b) respect and fulfil all the regulatory obligations imposed on it on the relevant markets;⁹²¹
 - (c) conclude contracts pursuant to the ROs and in accordance with the templates included in the Annexes to the ROs;⁹²²
 - (d) apply a non-discrimination principle (that is, not to discriminate between TP retail, companies from the TP Group and AOs);⁹²³
 - (e) provide an IT application enabling AOs to have access to the general information under the terms and conditions specified in the Agreement;⁹²⁴
 - (f) implement a system of good practices (such as procedures for employees' accessing and exchanging the protected data, rules for the employment)⁹²⁵ and

⁹¹⁶ UKE Agreement with TP of 22 October 2009 with annexes.

⁹¹⁷ UKE's study – July 2009, pages 4-12 and 101-107.

⁹¹⁸ According to the new article 13a in the revised Access Directive 2002/19/EC functional separation consists in "*an obligation imposed on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescale, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.*"

⁹¹⁹ As a result the "Charter of Equivalence" was proposed by TP on 30 March 2009, Annex to SO Reply.

⁹²⁰ *Idem*, paragraph 4 points 3-10.

⁹²¹ *Idem*, paragraph 2 point 1a.

⁹²² *Idem*, paragraph 3.

⁹²³ *Idem*, paragraph 4.

⁹²⁴ *Idem*, paragraph 2 point 11 and Annex 7 to the Agreement.

⁹²⁵ *Idem*, paragraph 6 of the Agreement.

of incentives for TP's employees (such as salaries and bonuses tied with the profits of the newly separated wholesale division and a new corporate culture for the wholesale division)⁹²⁶,

(g) apply a "Model of Cooperation between Operators" and specific rules for fixing wholesale and retail prices.⁹²⁷

(571) The Agreement provides that all actions specified therein are undertaken voluntarily by TP. The provisions contained therein do not constitute an enforceable resolution of the President of UKE and are not subject to execution in civil or administrative law proceedings.⁹²⁸ At the same time UKE retained the possibility to impose functional separation should the Agreement prove insufficient.⁹²⁹

2. The Commission's analysis of the market situation following the Agreement

(572) In view of TP's commitments proposal⁹³⁰ and the Agreement between TP and UKE, the Commission engaged in market fact-finding to assess the potential market evolution following the Agreement.⁹³¹ In August 2010, the Commission asked all major AOs⁹³² their views about the market situation and whether the Agreement with UKE had led to substantive changes in TP's behaviour in particular in the problematic areas identified in the SO, i.e. negotiations with AOs, access to TP's network, connection to subscribers, access to GI, respect of deadlines.

(573) The statements obtained from all major market players and their assessment point to a number of positive changes. They related to all areas of competition problems as identified in the Commission's SO.⁹³³

(a) PTC listed a number of improvements on TP's side related to negotiations and access to GI. The AO stated:

– *"the ongoing operational inter-operators' cooperation improved through the presentation of substantive positions in the negotiation process"*

⁹²⁶ Idem, paragraph 2 point 1d and paragraph 5 of the Agreement.

⁹²⁷ Idem, paragraph 2 point 1f and Annex 2 to the Agreement.

⁹²⁸ Idem, paragraph 18 point 2 of the Agreement.

⁹²⁹ The Agreement foresees in paragraph 13 TP's monthly reporting to UKE, on the basis of which UKE makes a constant assessment of the Agreement's implementation. Failure to perform or inadequate performance of the provisions of the Agreement by TP constitute the basis for the President of UKE to continue its works aimed at imposing on TP the regulatory obligation of functional separation. With regard to LLU the relevant provisions of the Agreement were rendered legally binding via the UKE Decision of 30 December 2010, directly available on UKE's website: http://www.uke.gov.pl/gALLERY/37/02/37023/Deczyzja_TP_2_10.pdf.

⁹³⁰ See recital (12) of this Decision.

⁹³¹ The market assessment was also related to TP's claim that the abusive practices identified in the SO ceased at the latest on the day of the signature of the Agreement that is on 22 October 2010.

⁹³² Request for information of 2 August 2010 sent to ATM, Długie Rozmowy, ESPOL, E-Telko, eTOP, Exatel, GH Net, GTS Energis, Intertele, Kompex, Lupro, Mediatel, MNI, Multimedia, Nask, Netia, Novum, PHU Telsat, Polkomtel, PTC, Sferia, Supermedia, Telefonía Dialog, TK Telekom, WDM Computers.

⁹³³ It should be noted that only a limited number of AOs were able to reply on the substance to all questions. In view of this but also taking account of the scale of business of the 25 AOs to whom the RFIs were addressed the Commission's analysis focused on the biggest xDSL competitors of TP; that is: Netia, GTS Energis, PTC, Telekomunikacja Kolejowa and Telefonía Dialog.

- *The access to information on TP's telecommunications infrastructure was facilitated*
 - *a new template of the user statement was introduced which decreased the level of formal rejections in the process of migrations of users from one operator to another*
 - *TP undertook actions to implement new IT solutions allowing an increase in the effectiveness of processing the mass-orders from AOs (...).*"⁹³⁴
- (b) With regard to the negotiation of access and collocation contracts GTS stated that "*TP signs the contracts (annexes, agreements) in line with the reference offers (BSA, LLU).*"⁹³⁵
- (c) In a general statement TK noticed different attitude of TP "*In TK Telekom's opinion, the Agreement UKE-TP considerably facilitated the cooperation with TP, both at the level of business negotiations but also at the stage of implementation of services based on BSA.*"⁹³⁶
- (d) Moreover, Netia stated that "*at this moment, cooperation with TP on solving operational problems significantly improved.*"⁹³⁷ As regards the access to subscribers the AO remarked that "*another change that de facto was achieved before the signature of the Agreement is that TP stopped rejecting orders on formal grounds, such as spelling mistakes in addresses.*"⁹³⁸
- (574) The above-mentioned statements do not imply the elimination of all problematic issues. In fact each AO noticed specific issues where it perceived that a further improvement was needed. For example:
- (a) GTS Energis "*does not notice any significant improvements regarding the resolution of current problems with regard to the implementation of contracts. Noticeably, the Agreement provisions started to be used as a reason to undertake or not to undertake particular actions. The negative aspect is TP's actions consisting in detailed and literal interpretation of the contents Agreement, which leads to the lengthening of negotiations.*"⁹³⁹
- (b) With regard to negotiations Netia stated that "*the negotiation process does not run correctly – people responsible for a certain part of the contract come to the meetings with Netia, which, regardless the level of problem resolution, they leave, with not-solved issues open. TP's negotiating team does not ensure a knowledgeable and decisive representation of TP. TP's internal decisions on the modifications proposed by Netia to the negotiated contract provisions take many weeks. The result is often «we do not agree» without providing any arguments on the substance.*"⁹⁴⁰
- (c) [OA] also stated that in the case of lack of technical possibilities to access TP's network "*[number of cases] TP proposes an alternative solution indicating the time and the implementation costs. The average deadline for*

⁹³⁴ PTC reply to the RFI of 2 August 2010, pages 8-9.

⁹³⁵ GTS's reply to the RFI of 2 August 2010, page 1.

⁹³⁶ TK's reply to the RFI of 2 August 2010, page 2.

⁹³⁷ Netia's reply to the RFI of 2 August 2010, page 5.

⁹³⁸ Idem.

⁹³⁹ GTS reply to the RFI of 2 August 2010, op. cit., page 1

⁹⁴⁰ Netia's reply to the RFI of 2 August 2010, op. cit., page 7.

accessing the collocation room/area is [deadline applied towards AOs]. Unfortunately, [number of cases] [OA] was forced to resign from the investment due to the high costs of the preparation of the collocation room/area. A real problem in the cooperation with TP is transferring to [OA] [*]% of costs of preparing power supply for order implementation (...) or for a quasi virtual collocation."⁹⁴¹

- (d) GTS noticed that "problems with availability of subscriber lines still persist. However, it should be underlined that the expected considerable decrease or increase in the quality level of the subscriber lines availability has not taken place although it is assumed as an objective of the Agreement."⁹⁴²
 - (e) Information provided by [AO] not only indicate persisting delays in the activation of [type of service] orders, but also the practice of unjustified technical rejections of BSA orders, which allows TP to take over customers of AOs.⁹⁴³
 - (f) There is also evidence confirming problems with the accuracy of the GI provided by TP. Netia says that there is still a need for improvement of LLU data. [Information on the functionality of CHECK application]⁹⁴⁴ Moreover, Netia remarks that AOs are not given access to the same data, as for instance PTK.⁹⁴⁵
- (575) In the reply to the letter of facts TP comments on the AO's statements referred to above in the following way.

- (a) Firstly, with regard to GTS statement on the operational problems of the implementation of the contract and the delays in negotiations due to TP's practice of literal interpretation of the Agreement (see recital (574)(a) above) TP argues that the AO's statement is too general and is not supported by any evidence. TP notes that GTS is the only AO that noticed the operational problems. Other AOs, such as TK, admitted that there was an improvement in solving the operational problems. TP argues also that after the signature of the Agreement with UKE the negotiations on LLU and BSA services with GTS were concluded on time.⁹⁴⁶
- (b) Secondly, with regard to Netia's statement on the lack of TP's "knowledgeable and decisive representation" and long internal process of taking decisions by TP on the proposed modifications during the negotiations (see recital (574)(b) above), TP argues that Netia's arguments are very generic and do not allow a concrete assessment of them. At the same time, TP underlines that other AOs (i.e. PTC and GTS) did not note any problems in this regard. In TP's view TP's representatives are competent and decisive with regards to most of the issues discussed during the negotiations. Furthermore, TP underlines that according to the agreement signed with Netia, in case some issues cannot be decided directly during negotiations, TP will present its views to Netia within 4

⁹⁴¹ [*]

⁹⁴² GTS reply to the RFI of 2 August 2010 op. cit., page 3. See also: TK Telkom's reply to the RFI of 2 August 2010, op. cit., page 3 and Netia's reply to the RFI of 2 August 2010, op. cit., page 16.

⁹⁴³ [*].

⁹⁴⁴ Netia's reply to the RFI of 2 August 2010, op. cit., pages 3, 12-13, 15-19.

⁹⁴⁵ Netia's letter from December 2010, op. cit., page 4.

⁹⁴⁶ TP's reply to the letter of facts, paragraphs 417-425.

working days. TP also states that Netia is a very demanding partner in the negotiations and often proposes non-standard solutions deviating from the provisions of the ROs. This requires from TP a more in-depth analysis of Netia's proposals and consultations within different TP's units.⁹⁴⁷

- (c) Thirdly, with regard to [AO's] statement on the problems in accessing locations for the purpose of LLU services (see recital (574)(c) above), TP argues that instead of a collocation room it had to propose alternative solutions (i.e. dedicated area or quasi-virtual collocation) because [AO's] orders for access concerned very small locations. These alternative solutions are fully compliant with the RUO of 2008. Furthermore, [AO's] concerns on the high costs of connection are according to TP unfounded. In TP's view, the incumbent is right to charge the AO with [percentage] of investments costs (i.e. modernization/change of power supply), since the said investments were conducted only as a result of that AO's order.⁹⁴⁸
 - (d) Fourthly, with regard to GTS's statement on the limited availability of subscribers' lines (see recital (574)(d) above) TP refers to its earlier arguments on the problems with verification process of orders and alleges that there are no delays in the implementation of orders for subscriber lines. In the period July 2009 to September 2010 the level of delays accounted for 0,19% of LLU and 0,01% of BSA services. This in TP's view proves that the problem with delays did not exist, even before the signature of the Agreement.⁹⁴⁹
 - (e) Finally, with regard to the problems with the provision of General Information (see recital (574)(f) above) TP underlines that it has been working on the improvement of data quality in its information systems since 2008. At present, TP is implementing several projects in this regard. With regard to the quality of data in the CHECK application, TP argues that the average quality of data in the CHECK application raised to 90.95% in the period March-December 2010, and to 92.5% in December 2010. TP estimates that in 2011, after the ongoing projects are accomplished, the quality of information in the CHECK application will raise to 95%.⁹⁵⁰
- (576) With regard to particular comments of TP presented in recitals (575)(a) to (575)(e) above the Commission notes the following:
- (a) Firstly, TP's arguments with regard to GTS's statement on the operational problems in the implementation of the contract and the delays in negotiations due to TP's practice of literal interpretation of the Agreement are not plausible. GTS is not the only AO that indicated operational problems in its cooperation with TP. Telefonía Dialog also states that "*TP, similar as for BSA, is not open to cooperate at the operational level.*"⁹⁵¹ In addition, TP's information on the timely completion of contracts' negotiations with GTS is not supported by any evidence. TP provided evidence only about negotiations of amendments to the BSA contract

⁹⁴⁷ Idem, TP's reply to the letter of facts, paragraphs 426-433.

⁹⁴⁸ Idem, paragraphs 434-440.

⁹⁴⁹ Idem, paragraphs 441-445.

⁹⁵⁰ Idem, paragraphs 446-459.

⁹⁵¹ TD's reply to the RFI of 2 August 2010, page 2.

which started on 2 June 2008 and ended on 17 September 2009 (that is, that lasted 479 days).⁹⁵²

- (b) Secondly, TP's arguments indicating that TP sends knowledgeable and decisive representation to the negotiations and submits an opinion on proposed complex modifications within 4 working days are not plausible. Firstly, Netia has the knowledge and is well placed to assess the significance of problems occurring during the negotiation. Secondly, TP's claim concerning a 4-day deadline for submitting an opinion on complex issues is contradicted by the AO's statement that "*TP's internal decisions (...) last many weeks*".⁹⁵³ In addition, TP's argument that Netia is a very demanding partner in the negotiations is not convincing. Netia, as the biggest xDSL competitor on the market, has a comprehensive know-how to negotiate detailed and technical provisions during the negotiations. TP, as the biggest telecom operator in Poland should be in a position to meet the demanding level of negotiations and in accordance to its regulatory obligations should negotiate access conditions efficiently.
- (c) Thirdly, the Commission does not find TP's justifications of [AO's] problems in accessing the locations for the purpose of LLU plausible. The fact is that the alternative solutions proposed by TP were not financially acceptable to the AO. In case of collocation space or dedicated area, TP should divide the incurred costs on power supply/air conditioning among all users of the spaces, including TP.⁹⁵⁴
- (d) Fourthly, the Commission does not accept TP's arguments on the lack of problems with accessing subscribers' lines. As the Commission presented in section VIII.4.1 TP rejected a significant number of BSA orders⁹⁵⁵ and LLU orders for the activation of subscriber lines also in 2010.
- (e) With regard to TP's arguments on the improvements in the quality of GI, the Commission notes that TP has been implementing the following projects on the quality of data: the "*Quality of Physical Data*", ("JDF project"⁹⁵⁶) and "*Network Logical Layer Prequalification and Scanning Project*"⁹⁵⁷). Contrary to TP's claim, the indicators of these projects show only the completeness of the data in TP's internal systems but not their correctness. With regard to CHECK application, TP states that "*thanks to PIS [Prequalification and Scanning Project] and JDF projects, as well as algorithm improvement, we estimate that in 2011 the quality level of CHECK information could increase to 95%*".⁹⁵⁸ The improvement TP refers to concerns the completeness of the data. In this context, Netia raised

⁹⁵² TP's reply to the RFI of 4 November 2010, pages 58 and 64.

⁹⁵³ Netia's reply to the RFI of 2 August 2010, page 7.

⁹⁵⁴ TP agreed during the discussions on the LLU collocation e.g to share costs of power supply/air conditioning between itself and AOs, the results are published at UKE's website: http://www.uke.gov.pl/uke/index.jsp?news_cat_id=328&news_id=3005&layout=1&page=text&place=Lead01

⁹⁵⁵ Examples of GTS Energis and Telefonía Dialog presented in recital (451) above.

⁹⁵⁶ TP's reply to the RFI of 22 December 2008, page 121-122 and TP's reply to the RFI of 22 December 2008, slide 4 and 5.

⁹⁵⁷ The project aims at updating the logical data about the network in TP's systems taking into account the real situation of the resources and also intends at checking whether a subscriber line could be used for BSA services. See: TP's reply to the RFI of 22 December 2008, slide 10.

⁹⁵⁸ TP's reply to the letter of facts, paragraph 458.

that: "*unchangeably, both in 2009 and in 2010, mistakes in the GI caused [percentage] of technical rejections.*"⁹⁵⁹

(577) In addition, the process of the implementation of the Agreement is subject to the monitoring by UKE and by an independent auditor (AT Kaerney). In this regard, the UKE's quarterly assessment of the implementation of the Agreement (16 March 2011) reveals under the Key Performance Indicators that TP did not comply with the non-discrimination rule. The comparison of the average indicators for the wholesale and retail division shows a discriminatory treatment of AOs against TP retail division in June, August, September, October, November and December 2010 (out of a reference period of 10 months). The problems with the compliance with the non-discrimination rule concerned mainly the BSA services, particularly BSA services with the highest speed rates (in which the discrimination appears in the last three quarters of 2010). The aggregated performance indicators for each operator show discriminatory treatment of Netia in relation to other AOs (PTK Centertel, PTC and Telefonía Dialog). Out of fourteen months of the measurement, during ten months Netia was serviced at a lower level than the other three operators. In contrast, UKE noticed that TP improved the processes for the LLU services.⁹⁶⁰ In parallel, the assessment of the implementation of the Agreement conducted by the auditor shows TP's compliance with the requirements on signing the contracts, conducting the negotiation or reacting to AO's motions, the proper implementation of foreseen IT tools, the interface to the IT systems and the provision of the necessary information for AOs. The auditor however noticed quality differences in the treatment of AOs as compared to TP's retail part.⁹⁶¹

3. Conclusion

(578) The above-referenced evidence shows that following the signature of the Agreement on 22 October 2009, TP ceased the majority of anticompetitive practices described in the present decision. The Commission notes however that there are still certain outstanding problems (referred to in recitals (574) and (577) above).

X. LEGAL AND ECONOMIC ASSESSMENT

1. Relevant Product Markets

(579) The identification of the relevant markets by the Commission in the present Decision, which is based on information covering the period 2005-2009, derives in particular from the existence of competitive constraints. Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for

⁹⁵⁹ Netia's reply to the RFI of 2 August 2010, page 16.

⁹⁶⁰ See UKE's press release published at UKE's website: http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=168&news_id=6528&layout=3&page=text .

⁹⁶¹ See the Audit of the implementation of the Agreement published at UKE's website: http://www.uke.gov.pl/_gAllery/36/74/36746/Zalacznik_A1_Streszczenie_Raportow_Audytu.pdf

the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product.⁹⁶²

- (580) However, supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. Supply-side substitution is particularly relevant for network industries, such as electronic communications, as the same network may be used to provide different types of services. There is supply-side substitution when suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved.⁹⁶³
- (581) The Commission has defined three product markets in broadband access which are closely linked to each other, namely one retail market and two wholesale markets:
- (a) the retail mass market, which is the downstream market of broadband access services offered at a fixed location by telecommunications operators to their own end-users (subsection 1.1)
 - (b) the market for wholesale broadband access (“the BSA market”) (subsection 1.2)
 - (c) the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (“the wholesale market for LLU”) (subsection 1.2).
- (582) In the SO Reply, TP did not contest the Commission's definition of the relevant product markets. The Commission maintains in the present Decision the definition of the wholesale and retail broadband markets provided for in the SO, which is as follows.

1.1 The relevant retail market

- (583) Broadband access products, as described in section IV.2, vary as a function of their connection speed, their technology (DSL, cable-modem, others) and prices.

1.1.1. Connection speed, technology and prices

Connection speed

- (584) There are indications based on supply and demand side substitution that all standard fixed broadband products, regardless of the speed, belong to the same product market. There is high demand side substitution as customers can switch between different offers with minimal switching costs. There is also supply-side substitution between all of them, the effect of which is equivalent to that of

⁹⁶² Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paragraph 13.

⁹⁶³ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paragraph 20.

demand substitution in terms of effectiveness and immediacy. There are strong indications of supply-side substitution since once an operator is able to provide fixed broadband services to a particular customer, whether using its own infrastructure or through a wholesale offer of another operator (in case of DSL), and is immediately capable of changing the characteristics of that product (speed, data transfer limits etc.) without any important further investment.

(585) The wide range of retail products with differing characteristics provided by most operators offering broadband internet services illustrates this supply-side substitutability. Retail customers in Poland in years 2009-2010 could choose between standard connection speeds of 512 kbit/s, 1 Mbit/s, 2 Mbit/s, 6 Mbit/s, 8 Mbit/s and 10 Mbit/s and even up to 20 Mbit/s. The cable operators offered speeds even above 20 Mbit/s (UPC or Vectra).⁹⁶⁴

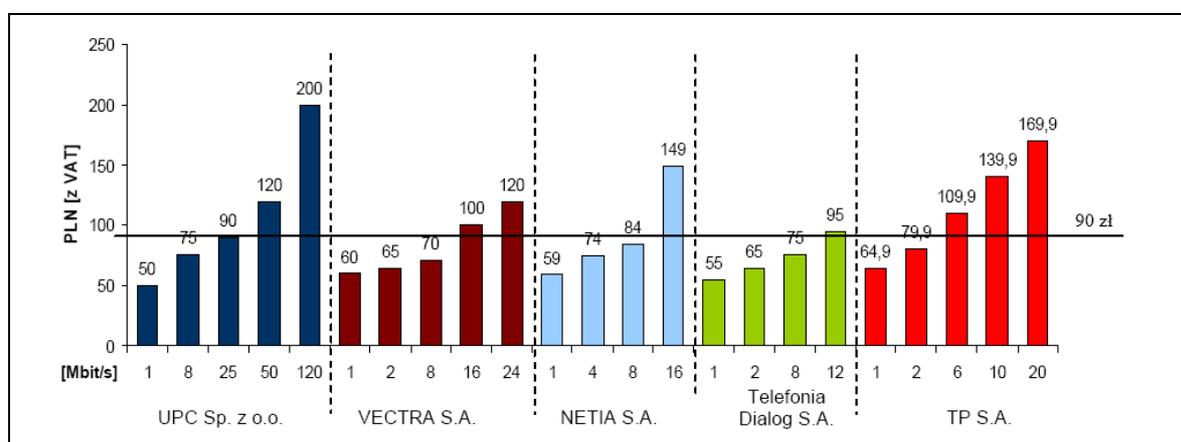
Technology and prices

(586) The different technology platforms used as means of broadband access at a fixed location in the "mass-market" (upgraded cable TV networks, DSL and others) are generally substitutable from the end users' perspective. On the demand side, DSL-based and cable-based retail products can be considered as substitutes since both technologies are able to provide standard broadband transmission services for the mass market and their prices and functionalities are similar.

(587) From the point of view of demand all fixed broadband technologies are substitutable. DSL and cable operators offer competing fixed retail broadband packages. Although standard, nominal prices of the main operators differ, once promotions and bundles are included, their offers, based on DSL and cable, are comparable.

(588) Most ISPs including TP, AOs using DSL and cable operators, in addition to competing on standard prices, attract customers by reducing activation fees, providing access services for free for a certain time or including free software in the offer. The competing offers of TP, Netia and Telefonía Dialog (DSL operators) and UPC and Vectra (cable operators) can serve as a good example (see **Figure 8**).

Figure 8 Comparison of retail prices of the biggest telecoms operators in Poland, 2009



⁹⁶⁴ UKE, Analiza cen usług dostępu szerokopasmowego świadczonych przez operatorów we własnych sieciach oraz w ramach umów BSA/LLU, April 2009, page 3; , Raport o stanie rynku telekomunikacyjnego w Polsce w 2009 roku, June 2010, page 16.

- (589) It stems from Figure 8 above that the offers of major operators in Poland are similar in terms of prices and broadband speeds offered. In 2009, TP decided to include the offer of broadband speed in the range of 10 Mbit/s and higher. AOs introduced similar offers.
- (590) Alongside DSL and cable modem, other technologies are currently used in Poland to market retail fixed broadband offers. They include LAN and WLAN connections used mainly by numerous local ISPs who also compete with cable and DSL providers on prices, promotions and bundles.
- (591) Although supply-side switching between DSL, cable modem and LAN/WLAN is not possible because each technology requires the deployment of a separate network, demand-side substitutability resulting from similar prices and features of broadband access is sufficient to justify the inclusion of cable modem and LAN/WLAN connections in the relevant retail market.
- (592) There are other emerging technologies which are used to provide fixed retail broadband services (WiMAX, CDMA, FWA, FTTx and satellite). Their deployment until the beginning of 2009 was still very limited and their market share in fixed broadband services was still low (4.3% at the end of 2009).⁹⁶⁶ However, their usage characteristics (broadband speeds of up to 2 Mbit/s for WiMAX and 120 Mbit/s for FTTH⁹⁶⁷) and prices are comparable or better than those offered by xDSL or cable operators. Retail products based on these technologies are also included in the relevant market to the extent that they are used to provide fixed retail broadband services in the mass market.
- (593) A new broadband technology which has gained popularity since 2008 is mobile broadband access. The number of new mobile broadband connections has increased from 0 in 2007 to 2.47 million in June 2010.⁹⁶⁸ This is due to the introduction by mobile operators of new broadband products, increased price competition following the entry of Play, a new mobile operator, into the mobile broadband market in 2008, high penetration of mobile phones which can be used to access the Internet, and the ability of customers to access the Internet in areas where other networks are not present.⁹⁶⁹
- (594) Although in 2009 and 2010 the mobile broadband segment belonged to the fastest growing segments of the retail market⁹⁷⁰, it cannot currently be considered, due to

⁹⁶⁵ Data for the end of 2009. UKE, Raport o stanie rynku telekomunikacyjnego w Polsce w 2009 roku, June 2010, page 15.

⁹⁶⁶ UKE's consultation decision on market 4, 2010, page 14.

⁹⁶⁷ In the course of 2009 Netia introduced an offer "Szybki Internet – WiMAX" and UPC, a cable operator introduced broadband offers with speeds of up to 120 Mbit/s based on fiber.

⁹⁶⁸ Annex 020 to TP's reply to the letter of facts, UKE consultation decision on market 5, 2011, page 21.

⁹⁶⁹ UKE, Market Report "Tempo wzrostu popytu na usługi szerokopasmowe", September 2009, page 4.

⁹⁷⁰ According to the 14th Implementation Report the mobile broadband penetration rate in Poland in January 2009 only reached 2.8% of the population, which was equal to the 2009 EU average. According to the 15th Implementation Report the mobile broadband penetration rate in Poland in January 2010 reached 4.3% which is below the EU average of 5.2%. One of the reasons of the popularity of this means of broadband access is the lack of possibility of a fixed broadband access. According to UKE mobile broadband penetration in Poland reached 6.5% of the population in June 2010 (see Annex 020 to TP's reply to the letter of facts, UKE's consultation decision on market 5, 2011, page 21).

a number of important limitations, as a full substitute for fixed broadband in Poland on a national level:

- (a) The speed and quality of mobile broadband access is less predictable and reliable and largely dependent on the distance to the nearest network base station and on atmospheric conditions.⁹⁷¹ Customers are more often exposed to disconnection due to weak signals from a base station, jamming, network overloading or worse network security.
 - (b) The data transfer limits imposed by mobile operators prevent subscribers from using advanced multimedia services such as streaming media or downloading large files.⁹⁷²
 - (c) In addition, due to the limited capacity of the network, the coverage area of a base station becomes smaller ("shrinks") if many users connect to it at the same time.
- (595) The Polish telecoms regulator, UKE, has acknowledged in 2009 and confirmed in 2011 that mobile and fixed broadband in Poland are not substitutable.⁹⁷³ According to UKE, for the majority of Polish customers there is no sustained substitution relationship between fixed and mobile broadband. For mobile broadband users located in areas with developed DSL and cable infrastructure mobile broadband is often a complementary product. A sustained substitution relationship between fixed and mobile broadband exists only for a small group of customers. These customers live outside dense areas including smaller cities and rural regions, where technical limitations of existing DSL infrastructure allow access speeds below 1 Mbit/s.
- (596) In fact, the popularity of mobile broadband in Poland is largely the result of the limited availability of fixed broadband in some regions, which in turn is due to limited competition and infrastructure development.
- (597) The fact that two main mobile network operators, PTK and PTC, introduced their own fixed broadband offer based on a BSA contract with TP confirms the fact that mobile broadband and fixed broadband services provided by DSL or cable are complementary products from the consumer point of view.

1.1.2. Conclusion

- (598) The relevant retail market comprises all the standard broadband products offered at a fixed location, whether provided through DSL, cable, fixed wireless access (FWA), LAN/WLAN or any other technology marketed for both residential and

⁹⁷¹ UKE, Document konsultacyjny w sprawie zasadności przeprowadzenia rozdziału funkcjonalnego TP S.A., July 2009, pages 21, 22.

⁹⁷² Mobile broadband offers with larger data transfer limits (exceeding 8 GB) are much more expensive in relation to fixed broadband offers of comparable speeds. In March 2009 the monthly prices of mobile broadband subscriptions with transfer limits in excess of 8 GB averaged 100 PLN (23,72 EUR on 30 March 2009) compared to 60 PLN (13,60 EUR on 30 March 2009) for fixed broadband subscriptions with higher connection speeds (1 Mbit/s). Source: UKE, Document konsultacyjny w sprawie zasadności przeprowadzenia rozdziału funkcjonalnego TP S.A., July 2009, page 27 and UKE, Analiza cen usług dostępu do Internetu operatorów sieci ruchomych, March 2009, page 18. See also UKE, Raport o stanie rynku telekomunikacyjnego w Polsce w 2009 roku, June 2010, page 09.

⁹⁷³ UKE, Market study, July 2009, page 22. Annex 20 TP's reply to the letter of facts containing UKE consultation decision of market 5, 2011, page 1209.

non-residential users. The relevant retail market excludes mobile broadband services.

1.2 The relevant wholesale markets

- (599) Commission Recommendation No 2007/879/EC identifies separate wholesale markets: (i) the so called market 4 for unbundled access to the local loop (LLU) and (ii) the so called market 5 for wholesale broadband access (BSA).⁹⁷⁴ All the national regulators for electronic communications that analysed the wholesale broadband markets in their respective countries, including countries where local loop unbundling is far more advanced than in Poland, also considered that access to the local loop (LLU) and wholesale broadband access (BSA) constitute distinct relevant markets even on a prospective basis.⁹⁷⁵ Their conclusion has been based on reasons similar to those outlined below.
- (600) In its market analyses (case PL/2006/0418, PL/2006/0472, PL/2010/1137, PL/2011/1184) UKE identified also two separate wholesale relevant markets, namely wholesale unbundled access (including shared access, to copper local loops and sub-loop) and wholesale broadband access (BSA).
- (601) In *Wanadoo España vs. Telefonica*⁹⁷⁶, the Commission differentiated between LLU and BSA wholesale markets.⁹⁷⁷
- (602) To define the relevant wholesale market(s) in this case, it must be analysed whether the wholesale access products based on i) unbundled access to the local loop (LLU); and ii) broadband bitstream access (BSA)⁹⁷⁸ belong to the same relevant market, or whether they constitute separate markets. The Commission will therefore examine whether there is substitution on the demand and supply-sides between the two.
- (603) Clients on the wholesale broadband access markets are AOs interested in providing retail broadband services to end users, who due to the lack of their own nationwide networks, are dependent on the wholesale access products.
- (604) AOs entering into the market are likely to use the incumbent operator's network rather than construct a new alternative telecommunication infrastructure due to the significant risks involved in investments that entail high sunk costs. Therefore, AOs usually follow a step-by-step approach and continuously expand their customer base and infrastructure investments. When constructing a new alternative telecommunications infrastructure, it is of crucial importance to obtain

⁹⁷⁴ Commission Recommendation 2007/879/EC 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).

⁹⁷⁵ See Art. 7 cases: PL/2006/418, PL/2006/472, CY/2009/0869, CY/2009/0870, FI/2008/0839, FI/2009/0900, FR/2008/0780, FR/2008/0781, PL/2010/1137, PL/2011/1184.

⁹⁷⁶ Case *Wanadoo España vs. Telefonica*, Case No COMP/C-1/38.784, paragraph 3.1 and 3.2.

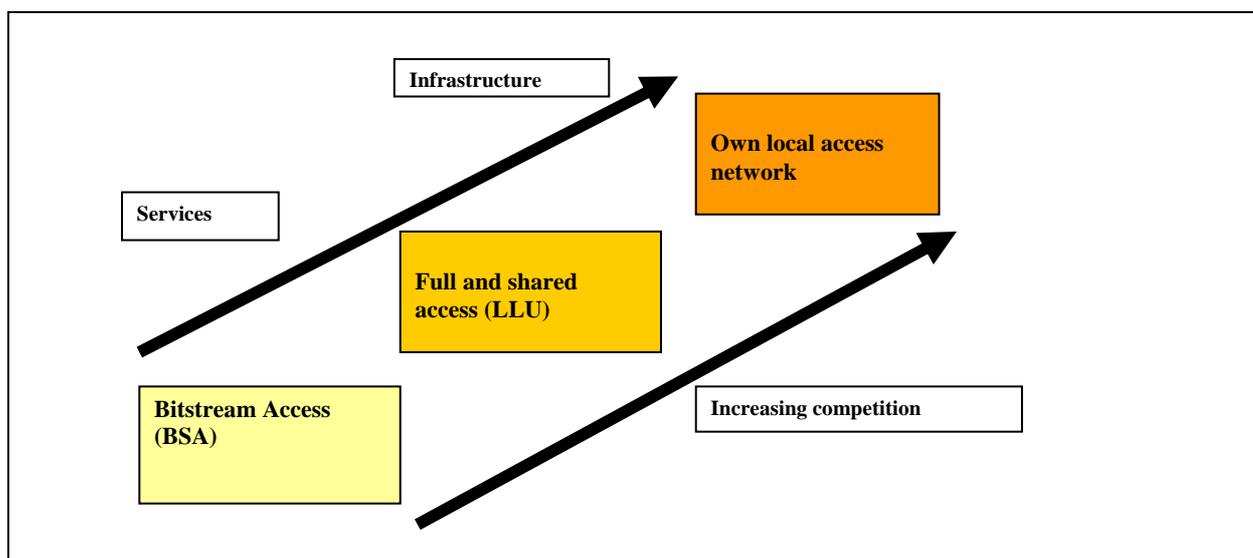
⁹⁷⁷ The Commission made a further distinction between the wholesale broadband access market for which traffic is delivered at the regional level and the wholesale broadband access market for which traffic is delivered at one national hand-over point. There was no sufficient demand-side substitutability between local loop unbundling and the regional wholesale offer as switching to local loop unbundling was extremely costly, time consuming and not economically viable for AOs in the whole the national territory.

⁹⁷⁸ The BSA product based on three access levels: DSLAM, ATM and IP (managed and unmanaged IP), however, by 6 May 2008 only ATM level was available to AOs. Therefore most data and evidence gathered in that case refers to that level.

a minimum “critical network size” in order to fully benefit from network effects and economies of scale and be able to make further investments. This phenomenon is commonly referred to as the ‘investment ladder’ by economists and regulators (see **Figure 9**).⁹⁷⁹ This pattern has prompted regulators in Europe to tackle established barriers to entry and expansion by mandating access at various levels of the incumbent operators’ infrastructure.⁹⁸⁰

- (605) The first step of the ‘investment ladder’ is occupied by an operator whose strategy consists in targeting a mass market (thus involving considerable marketing and advertising expenditure), but who is merely acting as a reseller of the xDSL access product of the incumbent operator. In the next step an operator uses Bitstream Access and as its customer base increases, the AO makes further investments in its network and connects to the incumbent’s network on the basis of local loop unbundling (full or shared access) which allows it to control larger traffic conveyance at national level. In a last step, it may even seek to invest in its access network and connect its customers directlyown local access network). Thus the progressive investments bring the AO closer to the customer, reduce the reliance on the wholesale products of the incumbent, and increasingly enable it to add more value to the products offered to the end-users and to differentiate its services from that of the incumbent. Accessing the incumbent operator’s infrastructure on the increasingly higher levels of network demands higher investments, but at the same time enables stronger control, better service quality and a higher profit margin.

Figure 9 The Investment Ladder Concept for DSL services



Source: ERG, Broadband Market Competition Report, Executive Summary, 25 May 2005, page 18

1.2.1. Substitutability between local loop unbundling and the BSA wholesale offer

- (606) The BSA access product is a wholesale product providing transmission capacity on the basis of the incumbent operator’s network to AOs, enabling them to adjust some technical features of bitstream transmission and to offer value-added

⁹⁷⁹ ERG, Broadband Market Competition Report, Executive Summary, 25 May 2005, pages 16-21.

⁹⁸⁰ ERG Common Position on Bitstream Access, adopted on 2 April 2004 and amended on 25 May 2005, page 2.

services to their clients.⁹⁸¹ BSA wholesale services consist in the transmission of data between the SAN accessible to an AO and an end-user connected to a telephone line. The BSA services offered on the Polish market enable AOs to purchase wholesale broadband services and resell them with some technical modifications to end-users and do not require AOs' investment in costly equipment such as DSLAM switches and ATM nodes.

- (607) Access to the local loop as defined by the RUOs contains a part of the access network between the MDF of the operator who owns the relevant infrastructure and the end user's premises. In addition, the access to a local subscriber sub-loop contains a part of the access network between a concentrator (or another indirect network access device which is placed closer to the end-user than the MDF) and the end user's premises.⁹⁸² LLU wholesale access services allow AOs to access higher bandwidth services. That grants AOs the broad control of the service range on the subscriber line, with the ability to adjust the service to specific end-users' needs and to offer them new and innovative services. On the other hand, it requires that AOs make significant investments in their infrastructure and equipment.
- (608) Both BSA and LLU services are usually provided by the incumbent operator that controls the DSL telecommunication networks used for providing broadband access. In Poland, TP is the only operator who owns a PSTN network covering practically the totality of the Polish territory. TP's network, including the backbone and access network, is very hard to duplicate both technically and economically. Thus, no AO is able to deploy its infrastructure to such an extent that it constitutes a viable alternative for TP's network.⁹⁸³ As a result, TP has been obliged by the NRA to provide AOs with wholesale broadband access both at BSA and LLU levels.⁹⁸⁴
- (609) There are indicators on the *demand substitutability* side that LLU and BSA wholesale access products are not substitutable. Switching between BSA and LLU is extremely complex, costly and time consuming. Compared to BSA, LLU will never be an economically viable option for AOs in the whole of the Polish territory due to the high investment costs and the limited possibility to recoup them. An AO wishing to switch from BSA wholesale access to LLU will have to incur high costs but will only reap the benefits of that switching after having achieved a sufficient customer base and ARPU⁹⁸⁵, which is neither certain nor immediate.
- (610) An AO's decision to request LLU services is preceded by a detailed analysis about the profitability of investment which mainly determines the AO's real costs of entering on that market. Switching from the BSA to LLU requires bearing financial and administrative costs related to:
- (a) signing LLU access and collocation contracts with TP,
 - (b) establishing a network's plan, preparing cost estimates,

⁹⁸¹ Idem, page 4.

⁹⁸² Under definitions identified by the RUOs.

⁹⁸³ UKE, Market study, July 2009, page 45.

⁹⁸⁴ UKE's decision No DRTD-SMP-6043-8/06(31) of 26 June 2007 and Document UKE's decision No DRT-SMP-6043-23/05 (33) of 14 February 2007; See also Document UKE's decision No DART-SMP-6040-2/10(52) of 30 December 2010.

⁹⁸⁵ ARPU – average revenue per end user; it is a measure of the revenue generated by end user to who the service is provided per unit time (usually per year).

- (c) planning and financing of investment,
 - (d) requesting and investing in collocation rooms or dedicated areas,
 - (e) installing access equipments (e.g. DSLAM switches, ATM nodes);
 - (f) fulfilling formal administrative requirements and deploying fiber cables between TP's MDF and the AO's network.⁹⁸⁶
- (611) The costs of network deployment constitute a crucial barrier to switching from products based on BSA to LLU. The difference between unbundling local loop and bitstream access is the level of deployment of the access network. An AO unbundling a local loop operates the DSLAM switch and further elements of access network; on the other hand, an AO accessing the BSA product deploys its network to the DSLAM switch (without operating the DSLAM switch and without the possibility to modify technically the xDSL line) or to the ATM or IP nodes.⁹⁸⁷ The costs of rolling out an own access network represent almost 70% of all expenditures for telecommunication infrastructure and are sunk.⁹⁸⁸ Therefore, the access infrastructure is difficult to duplicate and its costs are practically irretrievable. According to KIGEiT's document,⁹⁸⁹ the cost of a collocation room accounts to PLN 140 000 / \approx EUR 40 000⁹⁹⁰ (which is shared among all AOs placed in the premises); in addition, the cost of installation of a DSLAM switch amounts to PLN 200 000 / \approx EUR 57 000.⁹⁹¹
- (612) It is therefore unlikely, that even an AO that would have deployed a network that is sufficient to interconnect with TP's network at all the indirect access points of the BSA wholesale offer would switch to LLU before gaining the relevant amount of customers as it requires heavy investment in its access network terminated in numerous MDFs placed closer to an end-user.
- (613) In addition to the heavy investments required when switching from the BSA wholesale offer to LLU, there are clear functional differences between the two. An operator contracting TP's unbundled local loop has direct access to the twisted copper pair and can therefore technically alter the DSL line and control many aspects of its retail service such as the quality of services and transmission capacity. It can offer innovative services to its retail customers and differentiate its retail services from those provided by TP. It can provide such services (e.g. high speed Internet, voice, VoD), without interfering with other services provided in the same line.
- (614) Unbundled loops typically give greater flexibility and control over the retail broadband service offered to the end-users and have typically been supplied at the MDF level. In contrast, wholesale broadband access in the form of bitstream has typically much less flexibility over the retail service, and may be supplied at a higher point in the network: at the DSLAM switch (at a local point of connection), the ATM node (at regional points of interconnection and/or local points of interconnection) or the IP node (at a national point of interconnection).

⁹⁸⁶ The RUOs indicate the above process to unbundle a local loop.

⁹⁸⁷ ERG Common Position on Bitstream Access, adopted on 2 April 2004 and amended on 25 May 2005, page 5.

⁹⁸⁸ UKE, Market study, July 2009, page 76.

⁹⁸⁹ KIGEiT's opinion on migration models, published on 30 April 2008 on UKE's website, page 1.

⁹⁹⁰ See footnote 9.

⁹⁹¹ Netia's presentation, February 2009, page 21. See also Netia's presentation, May 2010, page 9.

- (615) Once an AO has invested in the LLU, its willingness to switch to BSA would be limited. Usually the investments that it has already made are sunk and cannot easily be adapted or reversed. Moreover, stepping back to the BSA product, when an AO has already invested in the local loop unbundling, is rather improbable due to the higher benefits an AO gains due to a greater flexibility and larger control over the retail broadband service.
- (616) The lack of supply-side substitution between the products can be also confirmed by the lack of economic viability of duplicating the local loop network of the incumbent operator in the Polish territory. As described in section 3.1 the duplication of TP's local access network is uneconomical.
- (617) The Commission therefore concludes that there is no demand or supply-side substitution between wholesale market for unbundled access to the local loop (LLU) and wholesale market for BSA.

1.2.2. Exclusion of other technologies from the relevant wholesale markets

- (618) Apart from xDSL, there are several other networks providing retail broadband access technologies on the Polish market: cable, mobile Internet, LAN/WLAN Ethernet, CDMA, WiMAX, fixed wireless access, fiber leased lines, FTTx and other technologies (e.g. radio network WIFI and HiS and satellite). Even though the relevant retail market comprises all the standard broadband products provided at a fixed location, whether provided through xDSL or cable (or any other technology marketed on the "mass market"), the Commission considers that that access to these other networks cannot be considered as substitutable at the wholesale level in Poland.
- (619) The operators providing retail broadband services based on their own infrastructure other than DSL technology are not at present obliged by regulation to offer any wholesale broadband access product, nor do they provide such product on their own initiative.
- (620) Existing cable technology is not substitutable for xDSL access technology. Demand-side substitution is constrained by the considerable costs that would need to be born in case of switching from an xDSL to a cable-modem technology, and by the low coverage and the fragmentation of cable networks in Poland.
- (a) Firstly, the costs associated with switching from one technological platform to another are very significant, because they entail rolling out another network reaching the nodes of the alternative network (TP's network and the cable networks do not have the same topology). It entails deploying additional equipment (for routing and switching), obtaining collocation space, and making AOs' equipment and network parameters compatible with cable technology, which would require significant time and investment. These considerable costs outbalance any incentive for switching even when there is a small but significant lasting increase in the price of the xDSL wholesale access products on the market. Therefore switching the clients' to the wholesale product based on a cable technology is highly improbable even if such product was made available on the market in the future.⁹⁹²
- (b) Secondly, demand-side substitution is constrained by the difference of geographical coverage of the available cable and xDSL networks in Poland. The

⁹⁹² See Commission Decision in case COMP/38.784, *Wandoo España v. Telefónica*, paragraph 226.

cable networks are limited to densely populated areas like big cities in Poland where cable operators could provide their service to a large number of customers. In 2009 only about 3.5 millions of households (with the coverage about 2.5 % of the territory of Poland (8 000 km²) could get the broadband access based on cable modem while TP's PSTN network covers nearly 99% of the territory (312 000 km²).⁹⁹³ This would not allow a purchaser of wholesale cable-modem access to offer broadband access services throughout the Polish territory. Not only is cable coverage much lower than xDSL coverage, but the cable networks in Poland are also fragmented which means that AOs would need to contract with several cable operators to serve about 3.5 million of the households, out of 13.337 million.⁹⁹⁴ Therefore, those characteristics related to the geographic coverage and fragmented market structure act as a significant constraint on demand-side substitution between cable modem and xDSL wholesale access.

- (c) Furthermore, there are no offers of cable operators similar to wholesale BSA and LLU products on the whole Polish market. Even where the provision of wholesale broadband access over cable is technologically feasible it requires additional investments to make AO's copper network accessible and compatible to cable infrastructure.
- (621) For the above reasons related to limited accessibility and to technical constraints, the present cable network does not constitute supply-side substitution to DSL.
- (622) The above considerations concerning the lack of substitutability between DSL wholesale access offers and cable modem based broadband access are applicable to the other broadband access technologies mentioned above, whose penetration rate is very low and accessible only to limited number of customers in the high density areas. These are costly networks to build, and their size is as yet reduced. It should be noted, in particular that:
- (a) LAN/ WLAN Ethernet technologies are not substitutable for DSL at the wholesale level. At the beginning of 2009 they accounted for around 12% of subscriber lines in Poland and were used by small operators mainly within small areas such as single buildings or streets with 10 – 200 subscriber lines.⁹⁹⁵ In view of the limited geographic coverage of LAN/WLAN Ethernet, an AO would never consider switching from DSL to LAN/WLAN. The LAN/WLAN technology would only allow it to connect to a small group of subscribers, which would not guarantee the revenues necessary to recoup the costs incurred in buying and installing the necessary equipment.
 - (b) As for radio technology there are a number of limitations which justify its exclusion from the relevant wholesale market. From the demand-side, an AO would not consider switching from a DSL-based wholesale product to a radio technology-based wholesale product because of its higher fallibility and disconnection due to the increasing number of end-users using the services at the same time. Moreover, there are limitations as to the speed capacity accessible for an end-user, the quality of the service depends on atmospheric conditions and the distance to radio base station, and those systems require the fulfillment of some technical conditions such as mutual visibility of base and subscriber station.⁹⁹⁶ These technologies represented in 2009 less than 1% of all

⁹⁹³ UKE, Market study, July 2009, page 23.

⁹⁹⁴ Concise Statistical Yearbook of Poland, 2009, page 119.

⁹⁹⁵ UKE, Market study, July 2009, page 23.

⁹⁹⁶ UKE, Market study, July 2009, op. cit., page 21.

subscriber broadband lines.⁹⁹⁷ These new networks remain fragmented and their roll-out is limited mostly to big cities.

- (623) In any case, as will be established below, independently of the inclusion of alternative technologies (including cable, mobile modems, LAN/WLAN, radio, and other technologies) in the wholesale markets, these technologies have not exercised a constraint on TP's ability to leverage its market power in the wholesale markets into the retail market.

1.2.3. Conclusion

- (624) Two relevant wholesale markets therefore have been identified for the purposes of this Decision:
- (i) wholesale market for BSA;
 - (ii) wholesale market for unbundled access to the local loop (LLU).
- (625) The reason for defining separate wholesale markets is that the different wholesale products require different levels of network roll-out on the part of an AO and allow different levels of differentiation of retail offers. Moreover, there are clear functional differences between them, as LLU allows AOs to control a substantial part of the overall value chain and differentiate their retail offers from those of the incumbent. The separation between these markets is also in line with the Commission approach as concerns the definition of markets susceptible to *ex ante* regulation.⁹⁹⁸

2. Relevant Geographic Market

- (626) The relevant geographic market at both retail and wholesale level covers the whole territory of Poland.
- (627) According to the case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.⁹⁹⁹ The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market.¹⁰⁰⁰

⁹⁹⁷ UKE, Market study, July 2009, page 13 and 20.

⁹⁹⁸ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communication sector susceptible to *ex ante* regulation /C(2007)5406/.

⁹⁹⁹ See Commission Decisions in case COMP/37451, *Deutsche Telekom AG*, paragraph 92-93; and case COMP/38.233, *Wanadoo Interactive*, paragraph 205. See also judgment in case Case C-27/76 *United Brands vs. Commission*, paragraph 44; judgment in Case 322/81, *Michelin v Commission*, paragraph 26, judgement in case 247/86, *Alsatel v Novasam*, paragraph 15.

¹⁰⁰⁰ See judgement in case T-229/94, *Deutsche Bahn v Commission*, , paragraph 92. See also judgement in case T-139/98, *AAMS v Commission*, paragraph 39.

- (628) In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria¹⁰⁰¹, namely the area covered by the network and the existence of legal and other regulatory instruments. In the present case TP's ubiquitous network has a national coverage and the regulatory obligations (wholesale access obligations) imposed on it have national application (i.e. they are homogeneous in all the territory).
- (629) In order to define relevant geographic market it is important to examine the competitive conditions at the different levels of the value chain.
- (630) At the retail level, TP competes with (i) cable operators whose area of operation is limited to specific regions and (ii) xDSL operators that establish their offers on the basis of the wholesale inputs incorporating access to TP's ubiquitous local network infrastructure. Thus, TP competes with AOs that construct their offers on the basis of their own network and on the basis of TP's national wholesale access inputs. The conditions concerning the main cost drivers (advertising, marketing, existence of wholesale products with national coverage and with nationally averaged prices) are homogeneous nationwide. Moreover, the national impact of advertising campaigns of all operators and the TP's retail prices, which are uniform nationwide and which AOs have to take into account when preparing their own retail offer, create a homogeneous constraint in the whole of Poland.
- (631) TP designs and advertises mass-market national retail broadband access offers and charges uniform prices throughout the territory. Its application of national tariffs has been based on its own commercial decision. TP's uniform pricing means that any response by TP to broadband access competition in a given area in the form of lower prices would apply throughout the whole territory of Poland. As a result, competing AOs (irrespective of the geographic size and scope of their operations) set their prices in line with TP national prices. AOs must therefore position their offerings to match or undercut TP's prices. Consequently, despite the existence of some sub-national "regionalising" factors on the supply-side (the fact that TP –network operator with national coverage – competes with alternative operators whose coverage is more limited) the commercial drivers for the provision of service create an environment in which the competitive conditions are nationally homogeneous.
- (632) At the wholesale level, TP is the sole provider of wholesale access and therefore largely determines the conditions of competition in the wholesale markets. The wholesale offers of TP are commercialised under homogeneous conditions nationwide. At wholesale level there are no differences in the monthly charges associated with each of the wholesale broadband access products provided by TP. Whether regulated or not, the wholesale offers of the latter are being commercialised under homogeneous conditions throughout the Polish territory.
- (633) TP is the sole provider of BSA and LLU wholesale offer and largely determines the conditions of competition in these markets. This is not undermined by regulation; in fact the regulation applicable so far has further contributed to making the conditions of competition of these offers homogeneous across the country.
- (634) TP did not contest this geographic market definition in its SO Reply. In the reply to the letter of facts TP points to the latest notification of the BSA market by the

¹⁰⁰¹ See for instance: *Telefónica* Decision (footnote 992) paragraph 211, Commission Decision in case IV/M.1025 *Mannesmann/Olivetti/Infostrada*, paragraph 17 and Commission Decision in COMP/JV.23 *Telefónica Portugal Telecom/Médi Telecom*, paragraph 18.

President of UKE (March 2011) and states that the Commission should reconsider the geographic definition of the wholesale BSA market. TP argues that in the notification of the wholesale BSA broadband market in March 2011 the President of UKE excluded from future regulation 20 communes in which UKE identified a high degree of competition. TP claims that *"the criteria set by the President of UKE for the exemption from the regulation of some areas appear to be extremely restrictive and therefore it may be that also in other areas than just the 20 designated by the President of UKE, TP does not have a dominant position."*¹⁰⁰² TP underlines that UKE based its analysis on the market data which were up to date at the end of December 2009. This in TP's view indicates that at least since 2009 there are important differences in the level of competition between different areas in Poland. TP underlines that this was the first such study and therefore it would be appropriate to *"determine from when actually the conditions for effective competition occurred in some local markets (i.e. TP did not have a dominant position)."*¹⁰⁰³

- (635) At the outset, the Commission notes that TP does not present any data in support of a wholesale BSA market definition narrower than national, nor does it contest the definition of the relevant geographic wholesale market for LLU access as national or the definition of the relevant geographic retail market as national. Secondly, contrary to what TP claims, UKE did not exclude 20 communes from regulation but merely excluded them for the purpose of the notification. UKE confirmed to the Commission that it will adopt a separate decision concerning those 20 communes and will notify a full market analysis. Thirdly, the above mentioned notification did not contain a thorough analysis of the market and therefore in its comments letter of 23 March 2011¹⁰⁰⁴ the Commission called on UKE to base its forthcoming market notification on a thorough analysis of all relevant structural elements (such as market shares and their evolution over time and entry barriers) as well as behavioural factors (in particular differences in prices, product/service functionalities and marketing strategies).¹⁰⁰⁵
- (636) Furthermore, the Commission underlines that UKE's definition is forward-looking and does not cover the period of abuse established in the current Decision.
- (637) For these reasons the Commission maintains its definition of the geographic market at both retail and wholesale level. In the Commission's view the relevant

¹⁰⁰² TP's reply to the letter of facts, 7 March 2011, paragraph 502.

¹⁰⁰³ TP's reply to the letter of facts, 7 March 2011, paragraphs 498-504.

¹⁰⁰⁴ The Commission's comments letter of 23 March 2011 available at: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/poland/registered_notifications/pl20111184/pl-2011-1184_endatenrpdf/EN_1.0_&a=d

¹⁰⁰⁵ In the comments letter of 23 March 2011 to UKE the Commission stated that: *"(...) in case the 20 communes in question are considered to form one single (subnational) geographic market, [the forthcoming notification should] show that (...) the differences in demand and supply conditions compared to the presently notified major part of the Polish territory are stable and significant enough to justify such definition of a separate market. The Commission's assessment of the present notification is without prejudice to any future position of the Commission with regard to either UKE's forthcoming market analysis for the remaining 20 communes or other measures taken at EU level relating to broadband services in Poland. This includes the question whether it is justified that these communes constitute a separate market from the rest of the Polish territory and whether the exact delineation of the currently notified market should be reassessed in the light of the market analysis to be carried out for the forthcoming notification. Furthermore, the Commission recalls that in the meantime the currently applicable SMP obligations in the 20 communes will remain in force until the relevant measure is consulted at national and EU levels and subsequently adopted"*.

geographic markets covered, at least until the end of 2009, the whole territory of Poland.

- (638) UKE's regulatory decisions enforced at the time of adoption of the present Decision also support the Commission's definition of the relevant geographic market.¹⁰⁰⁶
- (639) In view of the above, the relevant geographic market at both retail and wholesale level is the whole territory of Poland.

3. Dominance

- (640) According to settled case law, dominance is "*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.*"¹⁰⁰⁷
- (641) The notion of independence, which is a special feature of dominance¹⁰⁰⁸, is related to the level of competitive constraints facing the undertaking in question. It is not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition on the market.¹⁰⁰⁹ However, for dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop.¹⁰¹⁰
- (642) As the case law clearly confirms¹⁰¹¹, it is not necessary to demonstrate that TP is dominant in the retail market for proving the existence of an abusive refusal to supply at the wholesale level. Based on the information covering the period 2005-2009, the following subsections however demonstrate that TP has had a dominant position in the wholesale markets (subsection 3.1) and in the retail market (subsection 3.2).

3.1 Dominance in the wholesale markets (LLU and BSA)

3.1.1. Market shares

- (643) As described in subsection 1.2 above, the relevant wholesale markets are the LLU wholesale market and the BSA wholesale market. TP is the owner of the only nation-wide access network and is the only supplier of LLU and BSA in Poland. Therefore, in the wholesale markets, for both LLU and BSA, TP has a market share of 100%.

¹⁰⁰⁶ See PL/2006/418, PL/2006/472.

¹⁰⁰⁷ See *United Brands* judgement (footnote 999), paragraph 65.

¹⁰⁰⁸ See judgement in case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraphs 42-48.

¹⁰⁰⁹ See *United Brands* judgement (footnote 999) paragraph 113.

¹⁰¹⁰ See *Hoffmann-La Roche* judgement (footnote 1008), paragraph 39.

¹⁰¹¹ Judgment of the Court of 14 November 1996 in Case C-333/94 P *Tetra Pak v Commission* ("*Tetra Pak IP*") [1996] E.C.R. I-5951, at paragraph 25. See also Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, at paragraphs 19 to 22.

- (644) The elements of the network which are in the possession of AOs are fragmented and do not allow any AO to offer a wholesale service on a national level.
- (645) TP's dominance must also be assessed having regard to the distinctive features of the network services it provides. TP rolled out its copper access infrastructure over significant periods of time, protected by preferential government policy and exclusive rights, and was able to fund investment costs through monopoly rents from the provision of voice telephony infrastructure and services as well as from State subsidies.
- (646) As it is explained in the following subsections, TP's access network will remain a non replicable asset in the short-to-medium term and probably also in the longer term.

3.1.2. Barriers to expansion and entry

- (647) In the present case, in addition to TP's monopoly on the wholesale LLU and BSA markets, which indicate the lack of alternative providers, in terms of infrastructure, on the Polish market, the Commission has identified a number of barriers to entry and expansion in the relevant markets which will be outlined in subsection 3.1.2.1 for the wholesale market for LLU and in subsection 3.1.2.2 for the wholesale market for BSA.

3.1.2.1. LLU wholesale market

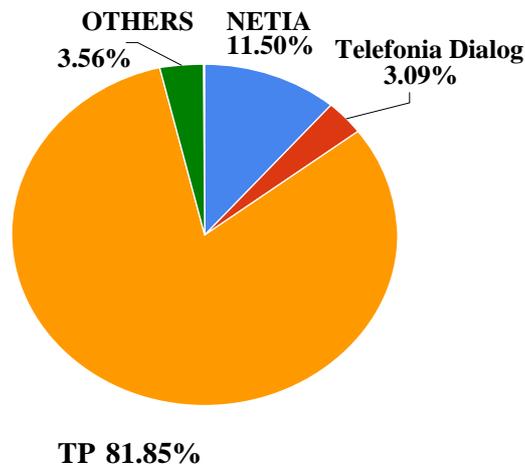
a) Investment and sunk costs

- (648) Through the relevant period, there is no economic alternative to TP's infrastructure. Entry into the market for wholesale unbundled access would require significant investment, involving high sunk costs. These high sunk costs, together with the economies of scale and high density requirements that characterise access networks, significantly increase the barriers to entry for entities considering constructing new access networks:
 - (a) The establishment of new wholesale infrastructure would entail very significant capital investments. In particular, it requires major investment in the provision of suitable ducting to house cables or wires, providing the cable or wire itself and also installing suitable equipment (e.g BRASes, ATM nodes, DSLAMs, MDFs). In addition, given the scale of work required to duplicate even a portion of TP's extensive local access network, deployment would take a considerable period of time.
 - (b) TP had to incur significant investments in order to enter the wholesale broadband market. But these investments were only related to the costs associated with enabling the existing network elements, built out to a greatest extent when TP was a State owned monopoly, to support broadband traffic. In comparison, operators considering building completely new infrastructure would face the above mentioned considerable investments which are much greater than the broadband enabling costs, rendering the duplication of TP's entire local access network uneconomical.
 - (c) The costs associated with investment in infrastructure are largely sunk, i.e. irreversible. They cannot be recovered if the access provider were to exit

the market. Such costs represent a significant barrier to entry. The presence of sunk costs is especially relevant where, as in this case, an existing operator has established a network offering plentiful capacity.

- (649) In view of the growing demand for voice services, some AOs invested in the 1990s in building traditional telecommunication lines. Netia and Telefonía Dialog built some 500 000 kilometres of such lines. However, due to the growing demand for mobile voice services and the decreasing revenues from fixed voice services, it became more difficult for these AOs to recoup the significant financial investments associated with rolling out their own networks. Today's limited share of AOs' investment in backbone telecommunication infrastructure illustrated in **Figure 10** confirms the lack of economic viability of such an investment.

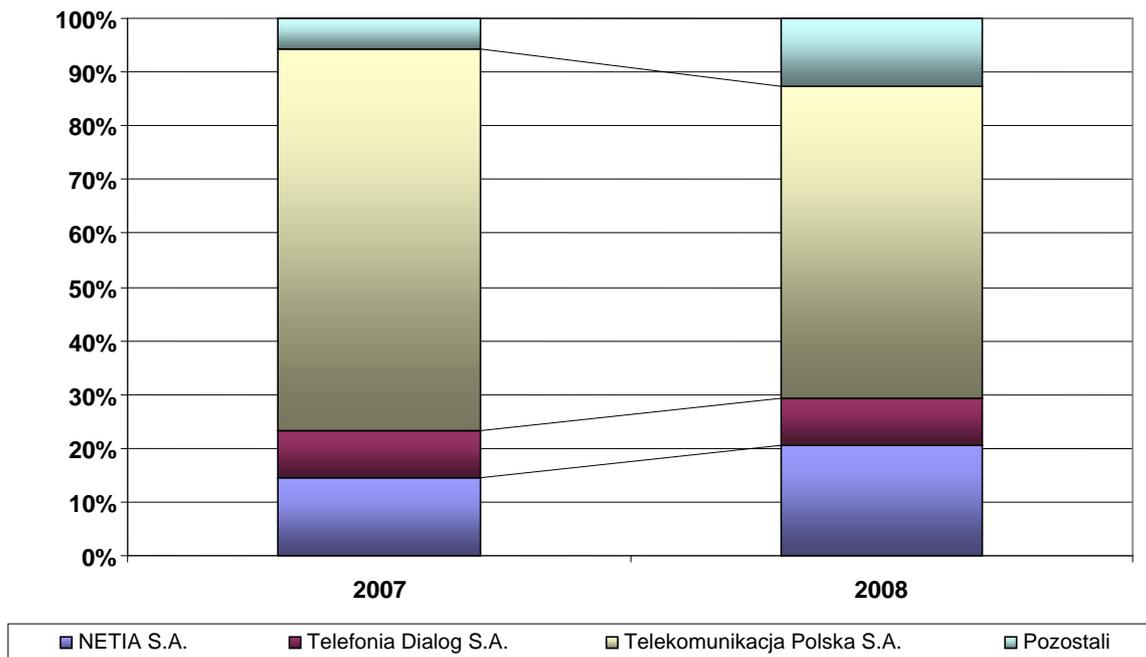
Figure 10 Investment in backbone infrastructure by operator



Source: UKE market study of July 2009

- (650) On the other hand, in order to take advantage of wholesale access services, AOs need to invest in the access network which links them with TP's infrastructure. The change in the share of AOs in these infrastructure investments is illustrated in **Figure 11** and also shows that the scale of the AOs' investments in this respect is limited.

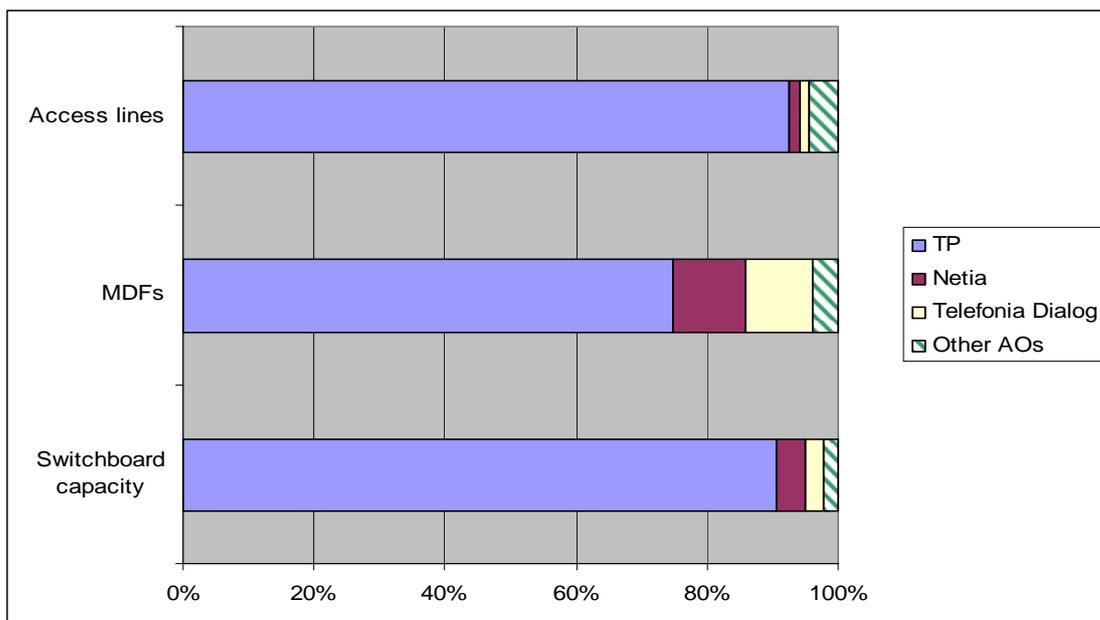
Figure 11 Investment in the access network by operator



Source: UKE notification decision of market 4, 2010, page 67.

(651) UKE analysed the possibility of independent telecommunications service provision by AOs on the basis of the ownership of three important elements of telecommunication infrastructure, namely: telecommunication access lines, the number of main distribution frames (MDFs) and the number and capacity of final switchboards. **Figure 12** illustrates the share of infrastructure owned by TP and AOs.

Figure 12 Ownership of elements of telecoms infrastructure



Source: UKE notification decision of market 4, 2010

- (652) **Figure 12** demonstrates that the incumbent operator controls the vast majority of access lines (92,45%). This confirms that AOs lack economic incentives to invest in new networks and to replicate TP's existing infrastructure.
- (653) In addition, main distribution frames (MDFs), which are a crucial element allowing access to infrastructure at the wholesale level,¹⁰¹² are also mostly owned by TP (74,81%). This reinforces TP's control over the LLU process and further weakens the economic rationale of duplicating TP's network.
- (654) Finally, the fact that TP owns 90,70% of the switchboard capacity strengthens the controlling position of TP and constitutes an additional barrier for the development of the LLU market.
- (655) It is this largely non replicable nature of the local loop that prompted the adoption of the Regulation 2887/2000/EC of the European Parliament and the Council on unbundled access to the local loop in December 2000. The Commission, in its Communication COM(2000)237 on unbundled access to the local loop of 26 April 2000, noted that "*given the size of investments required, the absolute cost of nation-wide duplication of the incumbent's network with similar population coverage is likely to be a barrier to entry for a competitor. This infrastructure appears to be with present technologies economically unfeasible or unreasonably difficult to duplicate at nation-wide level in a reasonable time period.*"¹⁰¹³

b) Economies of scale

- (656) There are economies of scale in provision of the loops themselves. The connection loops for several premises will share housing or ducting. Equally, economies of scale are critical to the economic provision of backhaul and establishing onward connection to a wider communications network. In addition, economies of scale in the provision of maintenance services also arise. Consequently, significant economies of density will operate in the establishment and operation of the LLU services. This means that the provision of a wholesale access service would need high penetration to be viable. Market entry is therefore much more difficult in the presence of an already established, ubiquitous operator.

c) Absence of countervailing buyer power

- (657) TP's ability to exploit its market position as a supplier of wholesale broadband access may be theoretically constrained by countervailing buyer power. However, for this to be the case, purchasers of the wholesale broadband product must be able to credibly threaten to switch their demand away from TP. As already stressed above, there is no alternative on a national level to TP's infrastructure and new entry into the market is highly unlikely. Therefore, no purchasers of wholesale broadband product can exert countervailing buyer power in the wholesale market.

¹⁰¹² AOs that wish to use the access network of TP connected to MDFs based on LLU services.

¹⁰¹³ Commission's Communication COM(2000)237 of 26 April 2000, page 8. Similar statement can also be found in recital 45 of the proposed Better Regulation Directive.

3.1.2.2. BSA wholesale market

a) Investment and sunk costs

- (658) TP has been and is the only operator providing wholesale BSA products in Poland. New operators seeking to offer BSA wholesale services would need to invest heavily in the establishment of a duplicated infrastructure, encompassing numerous network elements and equipment to support broadband traffic (e.g. ATM nodes, BRASes, access lines). The lack of economic viability of such an investment results from TP's monopolistic position on the supply side of the wholesale BSA market.¹⁰¹⁴
- (659) Similarly to LLU, costs associated with the investment in infrastructure are largely sunk, i.e. irreversible. They cannot be recovered if the access provider were to exit the market. Such costs represent a significant barrier to entry. The presence of sunk costs is especially relevant where an existing operator has established a network offering plentiful capacity.
- (660) Another argument against the duplication of TP's infrastructure is the long time horizon in which the AO could recoup its investments and the low probability of such a recoupment. This is a result of falling prices in fixed voice services and the still low demand for broadband services.

b) Economies of scale

- (661) Over the past decade TP has successively rolled out, amortised and enabled for broadband its access network. In addition, TP is able to benefit from considerable economies of scale and scope of a magnitude that are not available for AOs. These economies of scale stem from the nature of access network investments at ATM level: the greater number of end users at the concentrator level the lower the unit cost per line. An AO seeking to enter the relevant market and to compete efficiently with TP would need to secure a significant number of broadband customers in order to benefit from economies of scale – and as low and efficient unit cost per line as TP.

c) Absence of countervailing buyer power

- (662) Similarly to LLU, also the BSA wholesale market is characterized by the absence of countervailing buyer power. The purchasers of the BSA wholesale offer are unlikely to possess sufficient countervailing buyer power to undermine TP's market power. TP's customers will have countervailing buyer power only if they can exercise a credible threat of purchasing a competing wholesale product, but since no such product is available at present, TP in fact enjoys a monopoly in the relevant market.

¹⁰¹⁴ On the demand side of the BSA wholesale market at the end of 2008 there were 15 operators. Although some AOs, in particular Netia and Dialog, own their own elements of telecommunication networks which were built in the 1990s, this investment did not represent climbing of the investment ladder but was an outcome of an underdeveloped voice services in Poland which at that time were not endangered by GSM networks.

3.1.3. Conclusion

- (663) In conclusion, a potential entrant on the wholesale LLU and BSA markets would be faced with significant barriers to expansion and entry which deter any undertaking from entering the market. The fact that there is no actual or potential viable alternative to TP's input reinforces TP's dominant position on this market.
- (664) In light of the market share and barriers to expansion and entry outlined above, it can be concluded that TP holds a dominant position on both the LLU and BSA wholesale markets.
- (665) TP did not contest the existence of its dominance on the wholesale markets as defined by the Commission in the SO.

3.2 Dominance in the retail market

- (666) As stated above (recital 643), the case law clearly confirms¹⁰¹⁵ that it is not necessary to demonstrate that TP is dominant in the retail market for proving the existence of an abusive refusal to supply at the wholesale level.
- (667) In the present case the Commission will nevertheless establish, by reference to the retail market shares and barriers to expansion and entry, that TP has had a dominant position in the retail market. In addition, it will be demonstrated that TP's strong position stems also from its monopoly in the wholesale market.

3.2.1. Market shares

- (668) Table 7 and Table 8 below outline markets shares by number of lines and by revenues in the retail market as described in section [see chapter IV.1] and capture the period between 2005 and 2009.

¹⁰¹⁵ Judgment of the Court of 14 November 1996 in Case C-333/94 P *Tetra Pak v Commission* (“*Tetra Pak II*”) [1996] E.C.R. I-5951, at paragraph 25. See also Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, at paragraphs 19 to 22.

Table 7. Retail market shares - in terms of lines (in %)

Operator	2005	2006	2007	2008	2009
TP	57,80	49,57	48,45	43,84	40,0
PTK	0,00	0,00	0,14	2,01	2,5
TP + PTK	57,80	49,57	48,59	45,85	42,5
Netia ¹⁰¹⁶	3,19	2,10	4,73	6,39	8,7
Telefonia Dialog	1,77	2,07	2,56	2,90	2,6
UPC	6,07	5,97	7,12	8,11	9,0
Multimedia	4,38	3,77	4,47	5,81	5,6
Vectra	2,86	2,44	3,20	3,98	4,4
Remaining operators	23,93	34,08	29,33	26,96	27,2

Source: Commission table based on UKE's data and UKE Reply to the RFI, 2010, page 3

- (669) In terms of number of lines, TP's retail market share has been within the range of 58% to 40% in the period 2005 – 2009. In addition, the market presence of PTK, the mobile arm of TP Group, also active in the retail fixed broadband segment, adds to the overall market share of the TP Group in the retail market.
- (670) There is a significant gap between TP's retail market shares and the retail shares of TP's competitors. In terms of number of lines, the biggest cable operator – UPC – has had a market share between 6% and 9%, and the largest xDSL broadband competitor – Netia - between 2% and 9%. The large number of micro competitors that together have a share between 15% and 21% are dispersed.¹⁰¹⁷
- (671) The market shares of cable operators accounted for around 20 to 25% in the period of 2005 - 2009.¹⁰¹⁸ Moreover, according to UKE, while in Poland there are 13 337 040 households and cable operators can reach more than 7 million (52%) of them, only half of them (26%) could potentially have access to broadband Internet based on the cable network due to the lack of a return channel in some cable lines.¹⁰¹⁹

¹⁰¹⁶ Netia's share includes the share of Tele2. As a single entity until 2008, Tele2's market shares were: 2005 – 1,22%, 2006 – 0,36%, 2007 – 0,42%.

¹⁰¹⁷ Report on telecommunications market in 2009, page 10, and UKE data, page 2.

¹⁰¹⁸ UKE, Report on telecommunications market in 2009, June 2010, page 12.

¹⁰¹⁹ On the basis of UKE's data from UKE, Consultation document on market 4, 2010, page 14 and UKE, Dokument konsultacyjny w sprawie zasadności przeprowadzenia rozdziału funkcjonalnego TP, July 2009, pages 22-23.

Table 8 Retail market shares – revenues (in %)

Operator	2005	2006	2007	2008	2009
TP	56,99	49,89	49,98	52,60	45,80
PTK	0	0	no data	no data	1,9
TP + PTK	56,99	49,89	49,98	52,60	47,7
Netia	3,55	3,32	5,52	6,30	4,80
Telefonia Dialog	1,68	2,27	3,01	3,40	3,00
UPC	4,08	4,75	6,29	8,30	8,30
Aster	3,88	3,2	3,4	4,40	4,10
Multimedia	2,96	2,55	3,12	3,80	3,60
Remaining operators	27,58	35,18	30,5	21,20	28,50

Source: Commission table based on UKE's reply to the RFI of 4 December 2009 and UKE's reply to the RFI of 19 November 2010, page 3.

- (672) In revenue terms, TP's retail market share has been within the range of 57% to 46% in the period 2005 – 2009. The market presence of PTK, the mobile arm of TP Group, also active in the retail fixed broadband segment, adds to the overall market share of the TP Group in the retail market. There is also a big gap between TP and the largest xDSL broadband competitor – Netia in revenue terms. The AO has had market shares of 2% to 9% in 2005-2009.
- (673) As explained in recital (27) above, another feature of the retail market in Poland is the presence of a big number of micro, local ISPs, estimated by the NRA to be over 1430. Despite being numerous they are very small operators offering broadband services mainly on the basis of Ethernet technology in small towns, housing complexes or particular blocks of flats across the country. According to UKE, the majority of these micro ISPs offer services to less than 200 subscribers. Their limited resources and the fact that they were created for very specific purposes (e.g. providing broadband services to a housing complex) makes it highly unlikely that they will expand in the retail broadband market and exercise in the near future a competitive pressure on TP.

3.2.2. Barriers to expansion and entry

- (674) In the present case, the circumstances under which TP has rolled out its infrastructure are relevant. TP rolled out its local access infrastructure over a significant period of time protected by exclusive rights and was for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds.
- (675) Also, as described in subsection 1.2 there is no alternative infrastructure which would enable AOs to offer retail broadband services on a national scale in Poland and which is substitutable to TP's local access network.
- (676) AOs are therefore obliged to request access to TP's wholesale broadband products or to duplicate TP's infrastructure. The latter is not an economically viable option. The large costs of duplicating TP's local access network or of developing a

nationwide network, capable of providing broadband Internet access of similar characteristics to the services offered by TP, is a barrier to entry for any competitor, including the largest national competitors or incumbents from other neighbouring Member States. Moreover, there are additional constraints. The development of an electronic communications network requires overcoming numerous administrative obstacles, such as obtaining permits from local authorities, complying with local development plans, etc. This would make the network roll-out process even more costly, longer and difficult. Consequently, it is economically unfeasible and unreasonably difficult to duplicate TP's infrastructure in a reasonable time period, taking into account presently available technologies.

(677) Despite the fact that the retail broadband market in Poland has been developing over the last years, the pace of this development has been slow. This is due to the fact that TP's competitors face substantial barriers to entry and expansion which will be described in the following paragraphs.

a) Vertical and horizontal integration of TP

(678) The Court of Justice has held that vertical integration could be regarded as one of the factors contributing to the existence of a dominant position.¹⁰²⁰ Vertical integration is particularly important since TP is a multi-product group of firms present in many different electronic communications markets, holding a very strong position in most of them.

(679) In particular, as mentioned in subsection 3.1.1 due to TP's ownership of the only telecommunications network with national coverage the incumbent operator enjoys a monopoly on the wholesale market. This has given TP a competitive advantage in the retail market. It allows TP to forego the transaction costs incurred by its rivals when purchasing the wholesale inputs necessary for providing their services in the relevant retail market.

(680) The TP Group has a strong presence in the downstream retail market for broadband internet access through TP's retail arm and PTK Centertel, a subsidiary of TP, which in addition to being a significant player on the mobile telephony market in Poland is also an important provider of broadband mobile services in Poland.¹⁰²¹ In 2007 PTK entered the retail fixed broadband market using TP's wholesale BSA services. The fact that the TP Group is represented in the retail market by two brand names constitutes a competitive advantage for the incumbent operator.

(681) TP's downstream activities also benefit from the commercial co-operation of TP's retail arm and PTK, whose network of agencies gives the Group a comprehensive physical presence throughout the Polish territory. The density of the commercial network makes it easier to identify sales prospects and to guide customers interested in broadband services to TP's internet access offerings.

(682) In this respect, TP enjoys important economies of scope in its network of agencies which do not only commercialise retail broadband products but also fixed and mobile telephony services.

(683) In the *Michelin* case, the Court of Justice considered the question of commercial networks giving direct access to customers and the possibilities of commercial

¹⁰²⁰ *Hoffmann-La-Roche*, (see footnote 1008), paragraph 48.

¹⁰²¹ As regards both the voice GSM and the broadband mobile markets in Poland PTK has a stable position and a share of over 30%.

synergies with other elements in the product range of a company or of the group to which it belongs as factors contributing to the establishment of a dominant position.¹⁰²² In the case at hand, the wide distribution of TP's retail agencies and a wide range of complimentary products are important factors underpinning its dominant position. The cost and time required for a company to set up its own distribution network or a network involving an exclusive commercial relationship comparable to that enjoyed by TP must be regarded as an obstacle to market penetration by competitors and as an important factor strengthening TP's dominant position.

b) Investment and sunk costs

- (684) As already described in the section on dominance in the wholesale market (see recitals (648) to (655) and (658) to (660) above) new entrants have to face significant investment costs, often sunk costs. Additional sunk costs are related to the advertising and promotional expenditure needed to establish a brand and a reputation and eventually to build up trust with subscribers.
- (685) TP has benefited from brand recognition and reputation in Poland and has invested heavily in its brand image. Early entry in the market therefore conferred a major advantage on a firm which has been able to establish a significant preference for its brand in the eyes of the consumer, not necessarily by providing better service than its competitors, but simply because it has enjoyed a monopoly for many years. New entrants must make a much higher effort to acquire customers if they wish to make up for the lost time and bridge the resulting image gap and confer on their broadband service the same brand recognition as that of the dominant undertaking's flagship offering, particularly in case they seek to differentiate their offer from TP's retail product.

c) Economies of scale

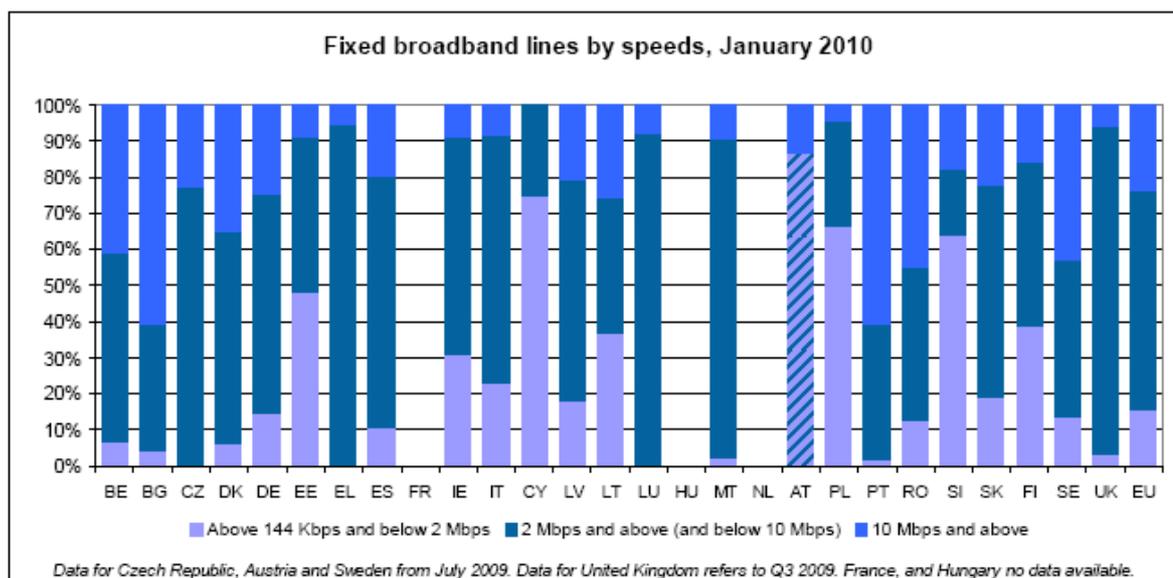
- (686) In the provision of retail broadband services economies of scale are present both at the technical and the commercial level. As operators add their own infrastructure and/or equipment to complement the wholesale service they contract, economies of scale play an important role (see recitals (656) and (661) above).
- (687) In terms of customer acquisition costs, there are also economies of scale, especially when considering the mass market, particularly where, as in the case at hand, costly advertising in mass media is needed to be able to compete.

d) Limited product and price differentiation

- (688) As explained above, apart from cable and LAN/WLAN operators, the remaining providers of broadband retail products compete in the relevant retail market using TP's wholesale product. The quality of the wholesale broadband products provided by TP is therefore a key factor for AOs. The low quality of such wholesale products in Poland, in particular the limited speed of the connections, as differentiated and presented in **Figure 13** below, has a negative influence on AOs' ability to offer innovative products.

¹⁰²² *Michelin*, paragraphs 55, 56 and 58.

Figure 13 Fixed broadband lines by speeds, January 2010



Source: 15th Implementation Report of the Telecommunications Regulatory package, 25 August 2010

- (689) From the perspective of TP's competitors on the retail market, the speed of the broadband product is a crucial issue, as speed and price are the two main factors that are taken into consideration by customers when purchasing a particular broadband product. As demonstrated in **Figure 13**, 66,37% of Internet access lines in Poland do not exceed the speed of 2Mbps.¹⁰²³ In comparison with the rest of the EU countries, only in Cyprus the share of speed of broadband lines below 2 Mbps is higher.
- (690) Moreover, as explained in chapter IV.2, there are clear functional differences between the wholesale access product at BSA level and LLU level. An operator contracting a local loop can control a substantial part of the overall value chain and many aspects of its retail service. On the contrary, there are limits to the extent that a purchaser of the BSA wholesale offer can produce innovative services for its own retail supply and depart significantly from the retail services provided by TP.¹⁰²⁴ This means that AOs have a limited ability to differentiate their products, especially since LLU is not developed in Poland.¹⁰²⁵ Therefore, the main element used by alternative ISPs to compete with TP has mainly been the price of their retail products.

e) Absence of countervailing buying power

¹⁰²³ See also 15th Implementation Report of the Telecommunications Regulatory package, page 93.

¹⁰²⁴ In its Communication on unbundled access to the local loop (COM(2000)237) of 26 April 2000 (page 18), the Commission noted in this regard that "A service of this type allows the incumbent to retain control of the rate of deployment of high speed access services, and the geographical regions in which these services are rolled out. The incumbent's priorities may not match those of the new entrants. Such services should therefore be seen as complementing the other forms of unbundled access described above (i.e. full unbundling of the local loop and shared access to the local loop), but not substituting them."

¹⁰²⁵ By the end of 2008 only 1632 lines had been unbundled in Poland, a number which increased to 51614 lines by the end of 2009. See UKE, Analiza rozwoju rynku uwalniania petli abonenckich (LLU), October 2010, page 4.

- (691) The large majority of customers in the retail market do not have sufficient buying power when contracting broadband access services. Operators design standard products for the mass-market, set prices and other usage characteristics, and there is no room for individual negotiations.

3.2.3. Conclusion

- (692) In view of the substantial market shares held by TP in particular, and the multiple effects of the vertical integration within the TP Group, including TP's monopoly in the wholesale markets, the barriers to entry and expansion in the relevant retail market and the lack of countervailing buyer power the Commission concludes that TP has a dominant position on the Polish retail broadband market.

3.3 Conclusion on dominance

- (693) In light of the analysis contained in subsections 3.1 to 3.2, that is to say, TP's very high market shares, the existence of barriers to expansion and entry and the lack of countervailing buyer power, it can be concluded that TP holds a dominant position on the wholesale LLU and BSA markets.
- (694) In addition, TP's dominance in the wholesale broadband market has an impact on the competitive process in the retail market, where the incumbent operator also has a dominant position. TP did not contest this finding.

4. Abuse of TP's Dominant Position

4.1 Introduction

- (695) The fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the internal market.¹⁰²⁶
- (696) Article 102 of the TFEU prohibits as incompatible with the internal market any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, insofar as it may affect trade between Member States.
- (697) The Court of Justice defined the concept of abuse under Article 102 of the TFEU in the following terms: *“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of*

¹⁰²⁶ See Judgment of the Court of 9 November 1983 in Case 322/81, *Michelin v Commission* [1983] ECR 3461, at paragraph 57, Judgment of the CFI of 9 September 2009 in Case T-301/04, *Clearstream*, at paragraph 132.

*hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”*¹⁰²⁷.

- (698) It follows from the nature of the obligations imposed by Article 102 of the TFEU that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.¹⁰²⁸ Similarly, the Court of Justice has held that the strengthening of the position of an undertaking may be an abuse and prohibited under Article 102 of the TFEU, "*regardless of the means and procedure by which it is achieved*", and even "*irrespective of any fault*".¹⁰²⁹ Furthermore Article 102 of the TFEU is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.¹⁰³⁰ The Court has held that "*competition rules laid down in the Treaty (...) aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such*".¹⁰³¹ According to consistent case-law, the list of abusive practices contained in Article 102 does not exhaust the methods of abusing a dominant position prohibited by the Treaty on the Functioning of the European Union (TFEU).¹⁰³²
- (699) In *Tetra Pak II*, the Court of Justice highlighted that the fact that a dominant Company's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 of the TFEU.¹⁰³³
- (700) Undertakings are, as a rule, free to choose their business partners.¹⁰³⁴ The Commission considers that intervention on competition law grounds requires

¹⁰²⁷ Judgment of the Court of 13 February 1979 in Case 85/76, *Hoffmann-La Roche* [1979] ECR 461, at paragraph 91.

¹⁰²⁸ See, to that effect, judgements in case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 57, and case T-111/96, *ITT Promedia v Commission* [1998] ECR II-2937, paragraph 139; Judgment of the CFI of 9 September 2009 in Case T-301/04, *Clearstream*, at paragraph 133.

¹⁰²⁹ See judgements in case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraphs 27 and 29; case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paragraph 170.

¹⁰³⁰ Judgments of the Court of 15 March 2007 in case C-95/04 *British Airways*, paragraphs 106-107 and in *Europemballage and Continental Can* (see footnote 1029), paragraph 26. Indeed Article 3 TFEU mentions now as one of the aims of the European Union only the achievement of the common market, however the achievement of the latter according to the Protocol 27 includes the protection of undistorted competition.

¹⁰³¹ See judgment of the Court of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and others / Commission and others GSK*, paragraph 63. See also judgment of the Court of 4 June 2009 in case C-8/08 *T-Mobile Netherlands and Others*, paragraphs 38 and 39.

¹⁰³² See judgements in footnote 451 and judgement of the Court in joined cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports a.o. v Commission* [2000] ECR I-1365, paragraph 112.

¹⁰³³ Judgment of the Court of 14 November 1996 in case C-333/94 P *Tetra Pak v Commission* ("*Tetra Pak II*") [1996] E.C.R. I-5951, at paragraph 25. In that regard, judgments of the Court in Joined cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 and in Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261 provide examples of abuses having effects on markets other than the dominated markets. In judgments in case C-62/86 *AKZO v Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 the Community judicature found certain conduct on markets other than the dominated markets and having effects on the dominated markets to be abusive.

¹⁰³⁴ Commission Decision of 24 March 2004 in case COMP/ 37.792 *Microsoft*, para.547.

careful consideration where the application of Article 102 would lead to the imposition of an obligation to supply on the dominant undertaking¹⁰³⁵. The existence of such an obligation may undermine undertakings' incentives to invest and innovate. The knowledge that they may have a duty to supply against their will may lead dominant undertakings not to invest, or to invest less, in the activity in question.

- (701) The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers,¹⁰³⁶ refusal to license intellectual property rights,¹⁰³⁷ including when the licence is necessary to provide interface information,¹⁰³⁸ or refusal to grant access to an essential facility or a network.¹⁰³⁹
- (702) In *Clearstream*,¹⁰⁴⁰ the Court of First Instance upheld a Commission Decision against Clearstream for having abused its dominant position by, inter alia, unlawfully refusing to supply primary clearing and settlement services to Euroclear Bank ("EB"), a high level intermediary (whose clients are banks) and a competitor downstream. In the judgement the Court stated that "*the Commission was correct in finding that the period of time required to obtain access considerably exceeded that which could be considered as reasonable and justified, thus amounting to an abusive refusal to provide the service in question, capable of causing EB a competitive disadvantage on the relevant market.*"¹⁰⁴¹ The Court of First Instance also held that in order to find the existence of an abuse within the meaning of Article 102 TFEU, the refusal of the service in question must be likely to eliminate all competition in the market on the part of the person requesting the service, such refusal must not be objectively justified, and the service must in itself be indispensable to carrying out that person's business. According to the Court, a product or service is considered necessary or essential if there is no real or potential substitute.¹⁰⁴²
- (703) The Commission in its Guidance on the enforcement priorities in applying Article 102 TFEU indicated that it will consider that cases of refusal to supply in the sense of Article 102 of the TFEU are an enforcement priority if the following circumstances are present: i) the refusal relates to a product or service which is objectively necessary to be able to compete effectively on a downstream market;

¹⁰³⁵ Judgement of the Court in joined cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)* [1995] ECR I-743, paragraph 50. See also judgement in case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, paragraph 35; case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 319, 330, 331, 332 and 336.

¹⁰³⁶ Judgement of the Court in joined cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223.

¹⁰³⁷ Judgement of the Court in *Magill* (footnote 1035); *IMS Health* (see footnote 1035). Those judgments show that in exceptional circumstances a refusal to license intellectual property rights is abusive.

¹⁰³⁸ See judgement in *Microsoft op. cit.*

¹⁰³⁹ See Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland v Aer Lingus* – (OJ L 96, 10.4.1992, p. 34).

¹⁰⁴⁰ Judgement of 9 September 2009 in case T 301/04, *Clearstream Banking AG and Clearstream International SA vs Commission*.

¹⁰⁴¹ *Clearstream op. cit.*, paragraph 151.

¹⁰⁴² *Idem*, paragraph 147.

(ii) the refusal is likely to lead to the elimination of effective competition on that downstream market and (iii) the refusal is likely to lead to consumer harm.¹⁰⁴³

(704) The Court of Justice further clarified that the conditions to be met in order to establish that a refusal to supply is abusive do not necessarily apply when assessing the nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser.¹⁰⁴⁴

(705) In the following subsections the Commission will establish that TP has been abusing its dominant position in the Polish broadband access markets by refusing to supply BSA and LLU services, examining *inter alia* the unreasonable and unjustified conditions under which such services were proposed. (section 4.2).

(706) The Commission will also examine the relevant circumstances under which TP's refusal to supply occurred (section 4.3). Finally, the Commission will establish that as a result of TP's abusive conduct competition in the retail market was likely to be restricted and that TP's refusal to supply was likely to lead to consumer harm (section 4.4).

4.2 TP's refusal to give access to its network

4.2.1. TP's strategy to limit competition

(707) As described in section VIII.1, there is evidence in the Commission's file illustrating that TP undertook actions aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products.

(708) The contemporaneous evidence collected at TP's premises indicates that even before the introduction of the ROs on the basis of which AOs could negotiate the conditions for accessing TP's wholesale products, TP's strategy aimed at creating "*impediments to [alternative] operators' access to the local loop*", "*maximal impediment in obtaining information on TP's network*", "*[l]imiting the wholesale offer for [LLU] products*" and "*delay the implementation of regulatory [BSA] offer.*"¹⁰⁴⁵ In another document, TP defined its strategy in the following terms "*to minimize PKO [TP's Wholesale Division] sales to protect retail revenues*".¹⁰⁴⁶

(709) Consequently, TP did not cooperate with the NRA and *inter alia* refused to prepare a draft RBO at the beginning of the process of the introduction of BSA services on the market.

(710) As will be explained below, TP's strategy to limit competition encompasses every stage of TP's provision of wholesale products to AOs. By hindering the process of AOs' accessing the local access network, TP forecloses their entry into and their expansion in the retail broadband market and, in turn, protects its own retail revenues. As a result of TP's strategy, AOs have had to undergo a lengthy and

¹⁰⁴³ See "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings*", Communication from the Commission C(2009) 864 final of 9 February 2009, OJ 2009/C 45/02.

¹⁰⁴⁴ Judgment of the Court of Justice of 17 February 2011 in Case C-52/09, *TeliaSonera Sverige* not yet reported, at paragraph 55.

¹⁰⁴⁵ Inspection document, page 11-12, Inspection document, page 17.

¹⁰⁴⁶ See page 4, internal TP's presentation of 15 April 2005 [Note: EN in original; emphasis in the original]

burdensome process in order to access TP's infrastructure, which has hindered the development of the broadband market in Poland.

(711) One of the AOs, PTC, summarised the situation on the market in the following way: *"In PTC's assessment, TP's strategy on the market of providing LLU and BSA services aims at limiting the development of the AOs' business as regards the provision of the broadband Internet access. In our view, the regulatory obligations imposed on TP should force this operator to act as if it functioned on the effectively competitive market. However, despite its regulatory obligations TP has not treated and does not treat the AOs as wholesale customers, whose needs should be identified and met (...), but only as companies whose market impact should be limited. The strategy of action adopted by TP with regard to AOs results in the fact that the operators face numerous problems in cooperation with TP, which pertain to current cooperation, as well as issues of a strategic nature"*¹⁰⁴⁷

(712) In the following subchapters by reference to the evidence presented in chapter VIII, the Commission will present the elements of TP's refusal to supply wholesale products at all stages of the process of accessing TP's network, that is:

- proposing unreasonable conditions governing AOs access to the wholesale broadband products (subsection 4.2.2);
- delaying the negotiation process at the different stages (subsection 4.2.3);
- limiting access to TP's network (subsection 4.2.4);
- limiting access to subscriber lines (subsection 4.2.5);
- refusal to provide the reliable and complete General Information (subsection 4.2.6).

(713) It is important to note, that all the above TP's practices have had a cumulative effect on the AOs. During the negotiations TP not only proposed to AOs unreasonable conditions but also they had to undergo lengthy negotiations during which for the scope for negotiations was limited, as in a number of cases AOs had to either accept TP's proposals, refer the case to UKE or abandon the idea of providing retail broadband services. Those AOs who managed to conclude an access contract had to deal with a number of additional difficulties (i.e. rejections of orders, delays, lack of or improper provision of GI) at the next stages of the process of accessing TP's network. Although separately, each of the difficulties might appear not that burdensome, taken all together they form the pattern of abusive behaviour aimed at foreclosing the AOs access to the market.

4.2.2. The proposal of unreasonable conditions governing the access of AOs to the wholesale broadband products

(714) The Commission has found that TP's draft access contracts, which served as a basis for BSA and LLU negotiations, contained in many instances provisions which were disadvantageous for AOs and which did not even meet the minimum standards set in the relevant ROs. As explained in section VIII.2.1 TP introduced in its standard contracts modified RO clauses while it excluded other RO stipulations to the detriment of AOs. Such modifications did not aim at proposing tailor-made conditions to AOs and were not objectively justified.

¹⁰⁴⁷ PTC reply to RFI of 26 March 2009, page 4.

- (715) Despite a number of revised draft contracts prepared by TP (see Table 1 and Table 3), TP's subsequent proposals still did not mirror the minimum RO rules. The case file contains numerous statements of AOs pointing to the regularity and consistency of TP's behaviour. For instance, in an email correspondence between Polkomtel to TP, the AO pointed to: *"(...) a failure to comply [ine the course of negotiations] by TP S.A. with the regulatory obligations imposed on it and stemming from the binding Reference Offer and the rule of non-discrimination."*¹⁰⁴⁸ Telefonía Dialog submitted that *"TP changed versions of the draft contract and suggested new stipulations, each time less advantageous to the Benefiting Operator [the AO]. As a result of these actions, the positions of the parties, instead of getting closer, deviated more and more from the terms and conditions specified in the Reference Offer."*¹⁰⁴⁹
- (716) The situation was aggravated by the fact that there was no room for negotiations and an AO had either to agree with TP's proposal, refer to UKE or abandon market entry. (see section VIII.2.2.5). In this context, Polkomtel explained that although it was *"interested in setting the conditions for cooperation through negotiations, however they are to take into account regulatory duties imposed on both parties"*. In that case, and in many others, *"[s]uch attitude of TP S.A. forced Polkomtel S.A. to accept the draft of the agreement which significantly deviated from the terms and conditions set out in the Reference Offer."*¹⁰⁵⁰ Similarly, in the evidence originating from the NRA it is stated that *"TP did not conduct negotiations with AOs in good faith."*¹⁰⁵¹
- (717) Despite the fact that -as of 2006 for LLU and 2008 for BSA- the NRA attached to each RO a sample contract which could serve as a basis for conducting negotiations, TP agreed to use them only in the Agreement with UKE of October 2009. Prior to this date, AOs' proposals to base the negotiations on such sample contracts were not successful. This is illustrated by an internal document of TP, which confirms that PTC was ready to: *"sign the draft of an agreement attached to the UKE decision of 3 April 2007 with possible and required, in the opinion of Parties, amendments and supplementations"* and in the same document it is stated that *"TP does not agree with PTC's proposals."*¹⁰⁵²
- (718) AOs were either forced to accept TP's proposals or to abandon the negotiations. One of the AOs states that *"this [TP's] approach has rather nothing to do with a will to take up a commercial cooperation, does it?"*¹⁰⁵³ The same AO explained that *"[in] Tele2's assessment, a significant part of TP's proposals was inconsistent with the Reference Offer. As a result, Tele2 asked the President of UKE to issue a decision to replace the contract. However, given its will to start providing the BSA service as soon as possible, Tele2 finally concluded a contract with TP, accepting clauses partially disadvantageous and inconsistent with the reference offer's provisions."*¹⁰⁵⁴ As an outcome of this situation, the NRA had to intervene on the AOs' side on a regular basis imposing on TP decisions which changed the conditions which were unfavourable to AOs.

1048 Polkomtel submission of 17 March 2009, page 1886.

1049 Telefonía Dialog's reply to the RFI of 23 February 2009, page 9.

1050 Idem.

1051 UKE's comments to the SO Reply of TP, page 38.

1052 TP's reply to the RFI of 22 December 2008, page 3.

1053 email from the President of Tele2 to the President of TP from 16 March 2007, page 17.

1054 Tele2's reply to the RFI of 22 February 2009, page 5.

- (719) The Commission recalls that TP has had the obligation to offer conditions not worse than the ones in the ROs.¹⁰⁵⁵ At the same time, TP has had a chance to be involved in the establishment of RO's rules although TP denied it for a long time.¹⁰⁵⁶
- (720) It is also noted that in the Agreement with UKE in October 2009 the incumbent committed itself *inter alia* to offer bilateral conditions in line with sample contracts attached to the RO.¹⁰⁵⁷ As a result, only following the Agreement did TP propose at the beginning of the negotiations a sample contract attached to the relevant RO.
- (721) On the basis of the analysis outlined above it is concluded that TP's proposal of unreasonable conditions in its draft contracts constitutes an element of the refusal to supply wholesale input.

4.2.3. Delaying tactics at the different stages of the negotiation process

- (722) The Commission has found that, in addition to the unreasonable conditions proposed by the incumbent, TP reverted to various delaying tactics throughout the negotiation process. The evidence stemming from TP reveals (see Table 5. Delays in the negotiation process) that such delaying practice concerned 70% of negotiations in which a 90-day deadline for concluding negotiations was not met.
- (723) As indicated in section VIII.2.2 the delaying tactics of TP include at least the following elements:
- delaying the start of the access negotiations,
 - further delays at the stage of negotiating contractual clauses,
 - lack of power of TP's representatives to commit the company and
 - delaying the signing of the contracts.

In addition, TP did not leave any room for the negotiation as an AO had to agree with TP's proposal, refer to UKE or abandon their negotiations, which is explained under the heading *Overall negotiating strategy of TP*.

Delaying the start of the access negotiations

- (724) As explained in sections VI.1.1 and VI.2.1, following an AO's motion meeting the formal requirements, TP is obliged to set the starting date of the negotiations and transmit to the AO a draft contract which will serve as a basis during such negotiations. In a number of instances, TP did not respect the deadlines and delayed the beginning of the negotiations.
- (725) Table 6 illustrates examples of negotiations which commenced with significant delays. For instance, GH Net submitted a motion for concluding a BSA access contract on 26 May 2008. TP had 3 days to send the draft contract but it did so after 226 days that is on 7 January 2009.

¹⁰⁵⁵ See for instance recitals (73) and (74).

¹⁰⁵⁶ See recital (150).

¹⁰⁵⁷ UKE- TP Agreement, 22 October 2009, paragraph 2, point 1 b), page 4.

- (726) Netia presented a motion to TP for concluding a LLU contract on 11 April 2005, yet it received TP's draft LLU contract only on 1 July 2005, *i.e.* 81 days later and just 9 days before the deadline for concluding the contract. This means that TP exceeded by 78 days the 3-day deadline established by the RUO for submitting a draft contract which would serve as a basis for the negotiations. Also, in this instance, 90% of the time foreseen to negotiate and conclude a contract had elapsed even before the AO had an opportunity to read TP's proposal. Netia received TP's draft collocation contract (for the purpose of accessing TP's local network) only on 7 September 2005, *i.e.* over 5 months after Netia's motion, despite the AO's repeated reminders.
- (727) The Commission reiterates that TP could have avoided such delays by using draft contracts fully in line with the ROs as prepared by UKE and attached to the ROs as of 2006 for LLU and 2008 for BSA. Despite TP's denial of such possibility¹⁰⁵⁸ TP finally committed itself in October 2009 vis-à-vis UKE to base negotiations with AOs on the draft contracts prepared by UKE.¹⁰⁵⁹ This demonstrates that TP could have applied the same standards prior to its Agreement with UKE.

Further delays at the stage of negotiating contractual clauses

- (728) The fact that at the beginning of the negotiations with AOs TP presents a draft contract which does not even mirror the minimum regulatory obligations has had severe consequences for the length of the negotiations. As illustrated in "Table 5. Delays in the negotiation process" TP rarely met the regulatory 90-day deadline for concluding access or collocation contracts.
- (729) Numerous statements in the Commission's file consistently underline the consequences in terms of additional time and effort for AOs to attempt to reverse TP's draft to bring it back to the minimum standards established in the ROs. For instance, in case of GTS Energis, the LLU access negotiations were concluded with a very significant delay of 698 days. The AO stated that *"among various factors affecting the length of the process of obtaining access to wholesale broadband products of access to Internet, in the opinion of GTS Energis, together with implementation of the amendments introduced by proper decisions of the President of UKE to cooperation with TP, one should mention (i) a long time of negotiating the conditions of the contract transferring the provisions of the [Reference] Offer, against which TP raises objections and interprets them differently, and which provisions are often key to the basic concepts of cooperation (...)."*¹⁰⁶⁰
- (730) Also, Polkomtel indicated that *"no consent of TP S.A. during the negotiations to apply vis-à-vis Polkomtel S.A. provisions corresponding to those of the BSA RO, and those offered to other market participants"*¹⁰⁶¹ had a negative impact on the length of the negotiations. Polkomtel finally decided not to provide broadband services on the basis of TP's wholesale product.
- (731) As already explained in recitals (364), as a result of TP's selective application of regulatory obligations and a tendency to misinterpret the stipulations of the ROs to the disadvantage of the AOs, the NRA had to intervene on the market issuing

¹⁰⁵⁸ See recital (337).

¹⁰⁵⁹ UKE- TP Agreement, 22 October 2009 paragraph 3, point 1, page 5.

¹⁰⁶⁰ GTS Energis's reply to the RFI of 23 February 2009, page 2.

¹⁰⁶¹ Polkomtel's reply to the RFI of 23 February 2009, page 2.

new decisions imposing bilateral cooperation conditions in particular cases.¹⁰⁶² TP took advantage of UKE's interventions, seeking to further delay the negotiation process. This is illustrated in a statement of GTS Energis which refers to the: "*long time it took TP to prepare its position concerning changes introduced by the modification of the Reference Offer, which at the same time blocks the possibility to negotiate the specific contract provisions.*"¹⁰⁶³

- (732) TP alleges that it prolonged the negotiation due to numerous modifications of the RO. The Commission reiterates that modifications in the RO should not lead to delays on TP's side. As explained in detail in recitals (350) to (356), while the ROs were modified due to the need to reflect the market dynamics and developments in the amendments, the continuity of core stipulations was kept. Also, a RO is fully valid and must be complied with until its replacement by a new one. In addition, the rules of administrative procedure leading to the RO modifications allowed TP to be fully informed in advance of all such modifications. *Nota bene*, TP was at the origin of many such changes.
- (733) It is also noted that the incumbent committed itself to respect the regulatory deadline of 90 days only in its Agreement with UKE of October 2009.¹⁰⁶⁴ Consequently, in 2010 TP needed only less than 38 working days on average to conclude contracts with AOs. This demonstrates that TP could have applied the same standards prior to the Agreement.

Lack of power of TP's representatives to commit the company

- (734) Another element of TP's delaying strategy in negotiations, as outlined in subsection VIII.2.2.3, is the fact that TP's representatives were not authorised to commit, on behalf of TP, to any agreed provisions. Netia indicated that "*in many situations the persons participating in the negotiation meetings were not authorised to amend the text of the agreement /annex, which prolonged the negotiation process due to the fact that every change had to be consulted internally in Telekomunikacja Polska which lasted a long period of time.*"¹⁰⁶⁵ Consequently, AOs could not be certain that the compromises negotiated would be reflected in the contract signed by TP.
- (735) TP's conduct created situations where, despite having reached prior agreement on the modifications, at the end of the negotiations TP returned to the conditions contained in its original draft contract. For instance, [AO] stated that: "*before the final acceptance, TP removed many of the previously approved changes that [AO] claimed, going back to TP's original proposal. [AO] was forced to either accept this or to resign from signing the contract.*"¹⁰⁶⁶
- (736) TP acknowledged that it was unclear who was responsible for doing what inside the company. Its wholesale division recognised that there was a [*Information concerns errors identified by TP in the process of provision of wholesale access services, including TP's internal organization in terms of the division of powers,*

¹⁰⁶² See also Table 5. Delays in the negotiation process (column 'NRA's decisions').

¹⁰⁶³ GTS Energis reply to the RFI of 23 February 2009, page 2: see also Telefonica Dialog's reply to the RFI of 23 February 2009, pages 9-11 and Sferia's reply to the RFI of 23 February 2009, page 4.

¹⁰⁶⁴ UKE- TP Agreement, 22 October 2009, paragraph 2, point 1 b), page 4.

¹⁰⁶⁵ Netia's submission, pages 3-4.

¹⁰⁶⁶ [AO's] reply to the RFI of 23 February 2009, page 6.

*adaptation to the prevailing business conditions (customers, competition, the regulator) and the employment of an appropriate amount of persons]*¹⁰⁶⁷

- (737) The Commission notes that although TP argued that the complexity of the negotiations did not allow the participation of representatives who could commit the incumbent, in the Agreement of October 2009 TP committed itself to send to negotiations persons with the power to commit the company.¹⁰⁶⁸ This demonstrates that TP could have applied the same standards prior to the Agreement.

Delaying the signature of the contracts

- (738) In addition to the lengthy negotiation process, TP was also prolonging the procedure for signing the approved contracts and their annexes. As indicated in subsection VIII.2.2.4, the final signature of a contract that has been negotiated and agreed upon by the parties, required the previous approval of all intermediate departments of TP. This internal procedure sometimes took up to 3 months from the date when the parties reached an agreement, a period which is manifestly longer than the internally established deadline¹⁰⁶⁹ for the signature of wholesale broadband contracts.
- (739) AOs had to wait a long time before a mutually agreed contract was signed by TP. This had a negative effect on the AOs which, facing weeks or even months of uncertainty, were unable to start providing the retail broadband services based on LLU or BSA. Even if in a few cases the parties agreed that the contract would enter into force before being signed¹⁰⁷⁰, an AO could not be certain that it would eventually be approved by TP prior to the actual signature.
- (740) The Commission notes that only in the Agreement of October 2009 TP committed itself to sign the agreed contracts within 15 calendar days.¹⁰⁷¹ This demonstrates that TP could have applied the same standards prior to the Agreement.

Overall negotiating strategy of TP

- (741) The Commission found that in addition to the problems the AOs were facing at the different stages of contract negotiations, TP did not reply to AOs proposals in the negotiations but rather tried to impose its own views. The evidence in the file reveals that there was limited room for negotiations as, in a number of cases, AOs had to either accept TP's proposals, refer the case to UKE or abandon the idea of providing retail broadband services.
- (742) Polkomtel is an example of an AO which following lengthy BSA negotiations which lasted 190 days decided first to sign the agreement, despite the numerous disadvantageous stipulations, and then to refer the case to the NRA. The AO

¹⁰⁶⁷ TP's internal presentation of [date], page 74.

¹⁰⁶⁸ UKE-TP Agreement, 22 October 2009, paragraph 3, point 5, page 5.

¹⁰⁶⁹ As explained in recital (324) TP's internal deadlines in this respect foresaw 12 working days (as of April 2007), 17 working days (as of February 2008) and 15 working days (as of August 2008). Such deadlines could be shortened in 'emergency' cases.

¹⁰⁷⁰ [AO, AO and AO](see TP's internal document, pages 12-13).

¹⁰⁷¹ UKE-TP Agreement, 22 October 2009, paragraph 3, point 4, page 5.

stated that it *"was practically "forced" to sign the contract with terms proposed by TP.*"¹⁰⁷²

- (743) Such difficulties were sometimes brought by AOs to the level of CEOs. An email exchange between the CEOs of TP and Tele2 shows that TP's answer is *"a very clear NO practically on each and every relevant proposal"*¹⁰⁷³. The AO explained to TP that although it *"appreciates all the declarations about the desire to build a partnership and avoid escalating matters to the UKE, (...) the reality has nothing to do with declarations."*¹⁰⁷⁴
- (744) The limited flexibility of the incumbent in the negotiations clashed with the AOs' wish to proceed to the next stages of the process and ultimately win customers. Netia explained that the lack of flexibility on TP's side meant that it could either accept TP's conditions or refer the case to UKE. The latter solution however meant further delays, in view of the length of the administrative procedure that would be triggered: *"Such a [difficult] negotiating approach was presented from the beginning of the negotiations. Netia then, given a choice: to provide BSA or not, finally accepted the proposal of TP, despite being aware that such provision is incompatible with the RO. To illustrate, Tele2 asked the President of UKE to issue a decision replacing the contract but due to the long UKE procedure [Tele2] gave up and was forced to conclude the contract with TP. As a result, Tele2 was able to start BSA services much later."*¹⁰⁷⁵
- (745) The Commission recalls that the fact that some AOs, confronted with TP's delaying tactics and negotiating strategy, reverted to the Regulator to seek a contract which would give them all rights guaranteed by the ROs is in itself not sufficient to put the blame on them for delaying the negotiations.¹⁰⁷⁶ In particular, AOs do not have any incentives to initiate long administrative procedures before UKE, which normally took longer than the 90-day deadline established in the RO for concluding the wholesale contracts.
- (746) Also, according to the President of the NRA, TP did not negotiate in good faith: *"TP did not conduct negotiations in good faith at all. It was a standard practice of TP to extend the negotiations indefinitely through continuously changing its negotiating position, absence of decision-making people in the negotiations meetings, extending to several months the internal process of approval not only of the entire contract, but also its individual provisions.(...) "[t]he number of interventions of the President of UKE in the analysed period, despite the detailed reference offers, clearly confirms that there was no good faith on TP's side in conducting the negotiation."*¹⁰⁷⁷
- (747) On the basis of the analysis outlined above it is concluded that TP's delaying tactics at the different stages of the negotiation process constitute an element of the refusal to supply the wholesale input.

¹⁰⁷² Polkomtel's reply to the RFI of 23 February 2009, page 188.

¹⁰⁷³ Inspection document, email from Tele2's President to TP's President of 16 March 2007, pages 14-15.

¹⁰⁷⁴ Idem.

¹⁰⁷⁵ Netia's reply to the RFI of 2 December 2010, op. cit., pages 1-2.

¹⁰⁷⁶ See Table 5 (column NRA's decisions).

¹⁰⁷⁷ UKE's comments to the SO Reply of TP, op. cit., page 38 and 42.

4.2.4. Limited access to TP's network

(748) The Commission found that TP created impediments to AOs at the stage of accessing TP's network for both BSA and LLU products. As specified in chapter VIII.3.1, TP rejected a high number of AOs' orders, delayed their implementation, proposed overestimated cost estimates and executed collocation works with delays. The evidence showing that TP applied better conditions to its subsidiary PTK than offered to AOs reveals that TP could have offered to AOs the same conditions it offered to PTK.

High rejections of BSA and LLU orders on formal and technical grounds

(749) The evidence in the possession of the Commission indicates that while accessing TP's network AOs were faced with a high rejection rate of BSA and LLU orders and with TP's lengthy implementation of orders.

(750) With regard to BSA, prompt access to SANs constitutes an important stage of accessing TP's network. Netia explained that TP's conduct undermined AOs' ability to offer competitive products. The AO explained that where the access to SANs is denied by TP *"it directly influences a possibility of developing competitiveness at the level of the regions/cities covered by the scope of regional or local SANs. (...) Therefore, motions [from subscribers] that an AO receives for a particular area cannot be realised and a subscriber is deprived from using the services of AOs."*¹⁰⁷⁸

(751) As illustrated by Figure 4, TP rejected on formal and technical grounds over 31% (144 out of 313) of AOs' orders between 2006 and 2009. In particular, in the case of dedicated access the level of rejection in the same period reached 51%. TP admitted that in 2006-2008 it rejected 35% of AOs' orders for connection to SANs via collocation¹⁰⁷⁹ and did not contest the rejection levels presented by the Commission in Figure 4 for line and dedicated access.

(752) The Commission's assessment of rejection reasons of AOs' orders for BSA connection to SANs points to two main reasons for the high rejection rates: (i) unnecessary formal requirements imposed by TP for completing the orders; and (ii) unjustified technical rejections and, at least until 2007, lack of proposals for alternative solutions (see recitals (400) to (406) above).

(753) With regard to LLU, as illustrated by Figure 5, TP rejected a significant number of AOs orders in 2007 (269 out of 596 orders submitted). Since 2008 the level of rejections dropped. Furthermore, despite positive verification by TP, a significant number of locations were in the end not accessed by AOs. In this context, AOs pointed out to (i) TP's high cost estimates for collocation, and (ii) to the fact that TP only made a small number of nodes available (see recitals (388) to (389) above).

(754) The Commission notes that the grounds for rejections presented by TP were not clear. For instance, with regard to LLU, Netia stated that it *"received several dozens of such [negative] replies and was forced to abandon investment plans, while not being able, on the other hand, to verify in any way the soundness of the refusals."*¹⁰⁸⁰ In 2008, the NRA inspected certain locations of TP where some

¹⁰⁷⁸ Netia's reply to the RFI of 23 February 2009, page 1.

¹⁰⁷⁹ SO Reply of TP, paragraph 492.

¹⁰⁸⁰ Netia's reply to the RFI of 23 February 2009, page 2.

AOs (Netia and Multimedia) were refused access on technical grounds. The control revealed that many LLU rejections were unjustified as there was additional space in TP's premises which could have been used by AOs.¹⁰⁸¹

Lengthy implementation of AOs' orders

- (755) With regard to BSA, the problems with lengthy implementation of AOs' orders related both to the practice of exceeding the RO's deadlines for processing the orders during formal and technical verification and to the practice of deploying a SAN in timeframes which were not based on reasonable factors.
- (756) GTS Energis explained that "*TP in many cases used the maximum time frame specified in the RBO to execute the orders for connecting TP's network with GTS Energis network in SANs and explained it was due to lack of technical possibilities on TP's side; the information sent officially stated that TP should carry out the "investment" works within, according to TP, several months, while for each AO these are common exploitation works which are done within a day by a couple of technicians.*"¹⁰⁸²
- (757) This evidence is in line with the Regulator's finding. In a control report of 2007 UKE noted that in some periods TP did not meet deadlines for the deployment/construction of SANs as foreseen in the contracts.¹⁰⁸³
- (758) With regard to LLU, TP hindered the access to its network by delaying the activation of nodes and by estimating an unreasonably long time for collocation works. In this regard Netia pointed out the "*discrepancies in time for activation of nodes [for the purpose of LLU] oscilated within [duration], which prevented the process optimisation on Netia's side*".¹⁰⁸⁴

Better access conditions were possible

- (759) Not all AOs experienced the same problems. TP's subsidiary, PTK, benefited from more favourable conditions in accessing the incumbent's network. TP cooperated closely with PTK in, *inter alia*, network planning and development (see recitals (397) to (399) above). One of TP's Departments was specifically responsible for developing the backbone network not only for TP but also for PTK. TP also signed a [*name of the agreement*] Rental Agreement with PTK granting it more convenient and quicker access to the rental space and installation of equipment (see recital (399) above).¹⁰⁸⁵
- (760) This is in line with the findings of the President of UKE who, in the inspection proceedings aimed at controlling the equality of the AOs' treatment and the

¹⁰⁸¹ UKE's control report, 29 February 2008 – 30 April 2008.

¹⁰⁸² GTS Energis's reply to the RFI of 23 February 2009, page 2.

¹⁰⁸³ UKE's control report of 2007. In the period of 25 October 2007 until 21 December 2007: "[*Information on the results of UKE's control carried out between 25.10.2007-21.12.2007 the subject of which was the verification of the timeliness of implementation of orders for the construction/modification of SAN, including timeliness of sending to AOs information about rejections of orders on formal and technical grounds and the implementation of orders. Quotation shows cases of delays on TP's side.*]"

¹⁰⁸⁴ Netia's reply to the RFI of 23 February 2009, pages 2-3.

¹⁰⁸⁵ TP's reply to the RFI of 22 December 2008, q. 3.4.2.

treatment of PTK by TP, pointed *inter alia* at accelerated procedures for PTK.¹⁰⁸⁶ In another control report (November 2008) UKE confirmed that (i) TP offered PTK access to its IT system ('CHECK') -which was not available for other AOs, (ii) PTK received better rental conditions, (iii) PTK could use TP's network on conditions not available to other AOs, and that (iv) the management of TP had direct influence over the strategy of PTK through a formally organized management committee called ExeCom. Furthermore, in the same report UKE notes that "*they do not show [PTK orders] any significant characteristics which would differentiate the procedure for dealing with them in comparison to orders for SANs coming from other operators*"; however, UKE points out that "*both the Department sending an order and the Department processing it are subject to the same [Information describes the results of UKE's control conducted in the period 01.09.2008-31.10.2008 on the relationships of TP and PTK in terms of organization and division of powers between various units of the companies]*"¹⁰⁸⁷ Additionally, TP itself confirmed in an internal exchange of e-mails that there is a very advanced formal cooperation between TP and PTK [*Information on the business relationship of dependence of TP and PTK employees*].¹⁰⁸⁸

- (761) The Commission notes that TP modified the [*name of the agreement*] Rental Agreement only after TP and PTK received the Commission's request for information asking both companies to provide the Rental Agreement. Furthermore, in the Agreement with UKE of October 2009 TP committed itself to apply a non-discrimination principle, that is, equal treatment of the retail part of TP, companies from the TP Group and AOs, which demonstrates that TP could have applied the same standards prior to the conclusion of the Agreement.¹⁰⁸⁹
- (762) On the basis of the analysis outlined above it is concluded that TP limited AOs access to its network, which constitutes an element of the refusal to supply wholesale broadband access products.

4.2.5. Limited access to subscriber lines

- (763) The Commission considers that TP also obstructed AOs' access to the end-users. As explained in chapter VIII.4, the limited access to subscriber lines was a result of TP's practices consisting in:
- rejecting a high number of AOs' orders on formal and technical grounds,
 - limiting availability of subscriber lines by not providing BSA services on WLR lines and delaying repairs of faulty lines,
 - delaying the implementation of orders.

High rejections of BSA and LLU orders on formal and technical grounds

- (764) The process of formal and technical verification of AOs' orders is characterised by a significant number of orders rejected both on formal and on technical grounds. As a result, AOs could not provide the services to a large number of customers that signed up for those services.

¹⁰⁸⁶ UKE's control report, 25 September 2007, op.cit., pages 4-5.

¹⁰⁸⁷ UKE's control report, 1 September 2008, op.cit., page 28.

¹⁰⁸⁸ Inspection document, page 7.

¹⁰⁸⁹ UKE-TP Agreement, 22 October 2009, op.cit, paragraph 4.

- (765) In the case of BSA, as illustrated by Figure 6, between Quarter 4 of 2007 and Quarter 3 of 2010, TP rejected on average - with an exception of its subsidiary PTK - between 30% and 50% of AOs' orders. In case of Telefonía Dialog and GTS, rejections were particularly high surpassing in some periods even 50%. The Commission notes that the rejection of PTK's BSA orders was in most quarters lower than the rejection rate of any other AOs. The importance of these observations is even stronger if one notices that PTK submitted nearly 30% of all orders in the observed period.
- (766) In the case of LLU, as illustrated by Figure 7, TP rejected between 23% and 29% of LLU orders for the activation of subscriber lines in each year of the observation period (i.e. from W36 of 2007 until W46 of 2010).
- (767) As specified in recitals (456) to (467), the process of formal and technical verifications of orders for subscriber lines by TP has been significantly influenced by two factors which resulted in rejections of AOs' orders: (i) the use of outdated TP's outdated data to verify AOs' orders and (ii) faulty verification mechanisms on TP's side.
- (768) In many cases, TP's databases contained subscriber' data (e.g. name and/or address) which was outdated. As a result, AOs' orders for the activation of a subscriber line which contained correct information on the subscribers' addresses were not consistent with the data in TP's systems used to verify the order. As a result, some AOs' orders were rejected on formal grounds. In this regard, one of TP's internal documents states that "*Between 17.10. [2007] -16.10 [2007] Netia received 5,148 formal rejections, of which more than 45.5% due to address errors. Discrepancies in the address data are mostly caused by the lack of updated address data of a subscriber in TP systems. This discrepancy does not constitute a material barrier to the implementation of the service - a correct TP line number and the subscriber's name are in this case sufficient for correct activation of the [BSA or LLU] service.*"¹⁰⁹⁰
- (769) Being aware of such inconsistencies in TP's database and of the unclear verification mechanisms inside TP, the incumbent executed the formal check of AOs' orders in a very rigid and formalistic way. The list of rejection reasons given by TP is long and contains 33 items. TP classified a large number of rejections under category "other". In Netia's case rejections classified as "other" amounted to over 5400 cases between 2007 and 2010.
- (770) Tele2 indicated that the order rejection rate for Wholesale Line Rental ("WLR") - with similar verification procedures as for BSA- was lower (at about 10%) than for BSA orders, and that TP rejected some BSA orders while accepting WLR orders containing the same data.
- (771) The Commission notes that TP's practice as of August 2009 not to reject AOs' orders due to incorrect information about subscribers' addresses¹⁰⁹¹ proves that such data was not indispensable for the activation of orders.
- (772) In addition, AO's orders were rejected on technical grounds because the data on the capacity (in terms of number of lines) in a specific SAN was not updated properly in TP's databases, which led to the erroneous conclusion that there was no spare capacity to execute the order.¹⁰⁹² TP itself recognised the problem. In an

¹⁰⁹⁰ Inspection document, page 93.

¹⁰⁹¹ SO Reply, paragraph 662. TP's reply to the letter of facts, paragraph 269.

¹⁰⁹² Inspection document, TP and Tele2's correspondence of 6 March 2008, page 11.

internal email correspondence of TP regarding questions from Tele2 on TP's rejections on the basis of "[*Information concerns the relationships of TP with an AO in case of possible negative technical verification by TP of an AO's orders resulting from errors in TP database*]"¹⁰⁹³. Furthermore, Netia stated that there were cases where, contrary to the information provided by TP to AOs, a particular SAN was not serving particular subscriber lines.¹⁰⁹⁴

- (773) Another problem was related to faulty verification mechanisms (see recitals (464) to (467)). In a number of cases the orders presented by AOs for the activation of BSA lines were rejected by TP on technical grounds despite the fact that it was technically possible to implement them. The e-mail correspondence from Tele2 to TP with the title: "*Rejections: Overloaded SANs*" illustrates that problem: "*We have been fighting with this problem for the last 3 months. Overall, you have rejected 800-1000 customers for these reasons, although both sides have confirmed to each other that the problem of overloaded SANs DOES NOT EXIST!!! Lately the number of such rejections has decreased, but they still appear and nobody knows why (...) What this means in practical terms: due to mistakes on IT TP side, Tele2 has lost several hundreds of customers (and TP has admitted it during meetings, exchanging emails with us)*"¹⁰⁹⁵
- (774) Other AOs (Netia, PTC) pointed to the unjustified rejections of their orders on technical grounds. Their claims are in line with the UKE report¹⁰⁹⁶ in which UKE confirmed weaknesses in the verification procedures of TP and stated that it is highly probable that many rejections based on technical grounds were unjustified. UKE found¹⁰⁹⁷ that TP omits the technical verification stage for its retail product *Neostrada* and sends the orders directly for implementation.
- (775) TP admitted¹⁰⁹⁸ that problems with unequal verification procedures occurred and informed the Commission that, after these irregularities were revealed, TP implemented the necessary procedures in order to eliminate them¹⁰⁹⁹. In this regard, the Commission notes that TP could have implemented the necessary procedures aimed at improving AOs' access to network earlier.

Limited availability of subscriber lines

- (776) Apart from data confirming the high number of rejections on formal and technical grounds, the Commission is also in the possession of evidence, outlined in section VIII.4.2, showing that until October 2007, TP refused to provide BSA services on subscriber lines on which AOs provided narrowband services to end-users using WLR. In practice, TP was preventing AOs to upgrade their narrowband clients to

¹⁰⁹³ Inspection document, TP and Tele2's correspondence of 7 February 2008, pages 2-5.

¹⁰⁹⁴ Netia's reply to the RFI of 23 February 2009, page 4.

¹⁰⁹⁵ Inspection document, page 9.

¹⁰⁹⁶ UKE's control report, op. cit., pages 1-28; see also UKE's comments to SO Reply of TP, pages 10-11.

¹⁰⁹⁷ UKE's control report, op. cit., page 22-23.

¹⁰⁹⁸ TP's reply to the letter of facts, paragraphs 232-248 and 293-294. In particular paragraph 235: [*Information on the IT systems used by the TP and the internal procedures of implementing AO orders related to the access to information about TP's network and infrastructure*].

¹⁰⁹⁹ TP's reply to the letter of facts, paragraph 237: For example TP informs that: "*Currently it conducts works on the modification of a document "Methods of Modelling of Processes within TP Group" (...) Changes in this document are to lead to the elimination of potential risks of introduction of a new or pilot procedure, which could be assessed as not guaranteeing the equal treatment.*" TP signalled also other undertaken initiatives, see paragraphs 244, 248 and 261.

broadband, thus limiting their ability to expand and grow on the retail broadband market. In turn, TP could reserve those potential customers for itself.

- (777) TP recognised shortcomings in this respect on its side. An internal presentation of 4 October 2007 mentions, among TP's weaknesses and problems, that "*The number of orders received by [Information on the errors identified by TP in the process of provision of wholesale access services related to TP's specific departments' capacities to implement AO's orders] may impact the completeness and timeliness of sending the information about the implemented orders by the Network Division (...) to the operator.*"¹¹⁰⁰
- (778) Furthermore, AOs could not count on TP's prompt reparation of faulty BSA lines, which had an impact on AOs' customers' satisfaction. The non-existence of efficient solutions on TP's side in this respect was confirmed by an internal TP email exchange¹¹⁰¹ and by a control of UKE from 2007 which highlighted that in the period of 1 April 2007 until 31 October 2007 42.37% of technical failures were removed with delays.¹¹⁰²

Delays in implementing orders

- (779) As illustrated in section VIII.4.3, significant delays at the initial stage of the implementation of orders occurred on TP's side. Such delays were mainly caused by the lack of resources dedicated to the regulated services on TP's side, lack of experience, lack of clear interpretation of how the process should be implemented, an unclear division of competences between TP's internal units, and insufficient IT support including flawed changes introduced in TP's IT systems.¹¹⁰³ There are numerous documents of TP which report on the lack of timely realisation of orders.
- (780) The data provided by TP itself¹¹⁰⁴ demonstrates the existence of delays in the initial period of implementation of orders both for BSA and LLU. In the case of BSA, in the period of Quarter 4 of 2006 to Quarter 3 of 2007 TP activated with a delay on average 31% of orders but the situation improved since Quarter 4 of 2007 and the share of delays fell to 4% on average until the end of 2008.¹¹⁰⁵ As for LLU, significant delays occurred in Quarter 4 of 2007 and in Quarter 1 of 2008 when respectively 63% and 25% of orders was implemented with delays.¹¹⁰⁶
- (781) The Commission notes that from the point of view of AOs, such delays at the initial stage of providing the service to new clients had a detrimental effect on the image of AOs. An AO has a legitimate right to expect that its orders would be

¹¹⁰⁰ Inspection document, TP's internal presentation of 4 October 2007, pages 220 and 254.

¹¹⁰¹ Inspection document, email from TP's Director of TP Sales and Service Division to the Director of the Client-Operators Department of 21 December 2007, page 23. The deadline for repairing the BSA lines was stipulated in the RBOs; see section 3.2.3, point 5 of the RBOs of 10 May 2006 and 4 October 2006.

¹¹⁰² UKE's control report, 25 October 2007-21 December 2007, op. cit., pages 13-14.

¹¹⁰³ Inspection document, TP's internal presentation of [date], page 46: [*Information on the errors identified by TP in the process of providing wholesale access services to AOs identifying possible reasons for delays in the implementation of AOs' orders in relation to the internal organisation of the implementation process and TP's systems*]

¹¹⁰⁴ In case of BSA; TP's reply to the RFI of 4 February 2009 and TP's reply to the RFI of 25 November 2010, in case of LLU Annex ID 23, TP's reply to the letter of facts for LLU.

¹¹⁰⁵ On the basis of TP's data, TP's reply to the RFI of 4 February 2009.

¹¹⁰⁶ Annex ID 23 to TP's reply to the letter of facts.

implemented timely from the beginning of the process of accessing the incumbent's network.

- (782) On the basis of the analysis outlined above it is concluded that TP created numerous obstacles hindering AOs' access to subscriber lines, which constitutes an element of the refusal to supply.

4.2.6. Refusal to provide reliable and complete General Information

- (783) AOs need reliable and accurate GI to make a sound decision regarding access to TP's wholesale broadband products at specific locations. The Commission has found that throughout the process of accessing wholesale products TP did not provide reliable GI or provided inaccurate information to AOs.

- (784) As explained in detail in chapter VIII.5, AOs were faced with the following impediments on TP's side :

- GI provided by TP was often incorrect and incomplete,
- TP provided the data in a format (such as paper or scanned pdf.) which was difficult to process,
- TP failed to provide an IT interface enabling AOs' efficient access to BSA and LLU-related information.

- (785) The Commission notes that the contemporaneous evidence of TP (see recital (149)(a)) reveals that impediments on TP's side in the GI provision are related to the incumbent's strategy to block AOs' access to information.

- (786) The difficulty with the lack of reliable and complete GI concerned both BSA and LLU and was brought to the Commission's attention by a number of AOs. Information provided by TP did not even meet the minimum requirements of the ROs. To this end, Tele2 rightly pointed out that "*the quality of the information provided should be raised to the level defined in the Reference Offers, and the data provided should be correct – otherwise, an alternative operator will not be able to effectively compete with TP on the basis of BSA / LLU.*"¹¹⁰⁷

- (787) The fact that TP made available to its own retail clients more detailed data than it provided to AOs is a clear indication that TP could have made improvements with regard to the quality of the GI it was providing to AOs. In this respect, Netia held that this "*clearly shows that TP shows maximum of ill will in cooperation, otherwise how could it be explained that TP has a better database but makes it available exclusively to its retail customers?*"¹¹⁰⁸

- (788) Moreover, the Commission is in possession of evidence showing that TP provided PTK with additional channels of information and additional information which were not made available to other AOs (see recitals (535) to (541)). This also indicates that TP could have improved the quality of GI and the information channels but that it refused to exploit such a possibility vis-à-vis AOs other than its subsidiary, PTK.

- (789) The incompleteness and unreliability of the GI provided by TP resulted in increased costs for AOs and the inability to implement their business plans. For example, Netia stated that "*Information is of such poor quality that as a result [*]% of sales are not activated due to the lack of technical possibilities. (...) In*

¹¹⁰⁷ Tele2's reply to the RFI of 23 February 2009, page 29.

¹¹⁰⁸ Netia's reply to the RFI of 23 February 2009, pages 2-3.

Netia's view maintaining this erroneous data has had a considerable impact on the development of the telecommunications market in Poland and translates into poor competitiveness on the regulated services' market."¹¹⁰⁹ Netia concluded that "[i]t is clear that the start of sales on the basis of these data would lead to incurring [level of costs] costs for Netia [effects of TP's infringements] . Moreover, such a conversion would be negatively received by customers and an opinion would appear on the market that alternative operators are in fact not serious as they offer cheaper services which they are not able to provide." The AO further added that *"the lack of this data and its quality certainly impacts significantly the market in Poland: - Delays the investment process (selecting nodes); - Reduces the cost-effectiveness of investments for potential new investors, raising implicitly the fees related to the acquisition of new customers."*¹¹¹⁰

- (790) An internal email of TP of 17 March 2008 confirms that TP was aware that its database *"is not always up-to-date."* ¹¹¹¹
- (791) The Commission notes also that actions undertaken by TP in relation to GI (see recitals (558) and next) as a result of the Agreement of October 2009¹¹¹² confirmed the need for improvement. It is further noted that the above actions could have been undertaken earlier.
- (792) On the basis of the analysis outlined above it is concluded that TP did not provide the AOs with reliable and complete GI, which constitutes an element of the refusal to supply the wholesale input.

4.2.7. Horizontal arguments of TP on the abuse

- (793) TP argues that the Commission did not prove the existence of an abuse.¹¹¹³ TP considers *"that the alleged practices put forward by the Commission to demonstrate a refusal to supply services are not proven or objectively justified and that there is no overall strategy put in place by TP to exclude its competitors from the Polish market for wholesale services."*¹¹¹⁴
- (794) In essence, TP questions the credibility of the Commission's evidence and alleges that the general nature of the evidence used by the Commission violates TP's rights of the defence. TP argues: *"the Commission is raising many objections against TP, which are mainly based on the declarations of competing entities, the credibility of which raises justified doubts. Evidence, which is to confirm the behaviour of TP constituting competition-limiting practices, is not persuasive, considering its level of generality. TP would like to clearly underline that the Commission, basing its objections on evidence of very high level of generality, is violating the right of defence, which constitutes a general principle of the European Union law."*¹¹¹⁵ To this end, TP refers to the principle of presumption of innocence to claim that *"the objections raised by the Commission are basically supported on general and often imprecise evidence, therefore in the opinion of TP they do not fulfil the standards elaborated by the ECHR [European Court of*

¹¹⁰⁹ Netia's reply to RFI on 20 March 2009, page 2.

¹¹¹⁰ Idem, pages 4-5.

¹¹¹¹ Inspection document, TP's internal email, page 15.

¹¹¹² UKE-TP Agreement, 22 October 2009, annex 7.

¹¹¹³ SO Reply, paragraphs 103-124.

¹¹¹⁴ Idem, paragraph 106.

¹¹¹⁵ Idem, paragraph 118.

Human Rights] *under of Art. 6 of ECHR* [European Convention of Human Rights].¹¹¹⁶

- (795) TP further claims that the Commission did not meet the burden of proof as it failed to draw conclusions from the presented evidence and did not show the causality between the alleged abuse and the potential impact of the alleged abuse on AO's access to the market.¹¹¹⁷
- (796) Finally, TP questions the legal test applied in the present case. TP argues that "[t]he Commission exercise was limited to the review of consistency [of the terms proposed by TP] with regulator's requests and does not provide for relevant own input in the assessment of TP's conduct and the effects it may (or does) produce under Art. 102 of the TFEU."¹¹¹⁸ TP argues also that the benchmark (i.e. the ROs) used by the Commission to assess TP's behaviour was incorrect, since UKE "*did not consult draft RO neither with TP not with other market players*" and "*did not consult the draft RO with the Commission*".¹¹¹⁹ Then TP refers to the Access Notice of 1998¹¹²⁰ and argues that the Commission should have included in its assessment a comparison of regulatory benchmarks from different EU countries.¹¹²¹ As an example, TP compares different deadlines in the Member States for connecting end-users, according to which in Poland the incumbent had only 2 days to execute such connections while in Denmark and Italy it had 20 days.¹¹²² In another example, concerning TP's refusal to provide GI, TP essentially alleges that the Commission did not demonstrate that the scope and the quality of GI TP made available to AOs was worse than the information provided by TP to its own services.¹¹²³
- (797) The Commission finds TP's arguments unfounded and will address them in turn.
- (798) In the first place, the findings in the present case are based on a large number of documents gathered in the Commission's file. They encompass contemporaneous documents of TP collected during the inspection at TP's premises, replies of TP and of all major market players to the Commission's requests for information as well as a number of submissions of UKE and KIGEiT. The evidence outlined in the present decision, which was already contained in the Statement of Objections and the letter of facts, leaves no doubts as to the fact that TP created a number of cumulative impediments in AOs' access to the wholesale products which together constitute a refusal to supply.
- (799) Secondly, with regard to the credibility and the level of detail of the evidence collected, the Commission obtained information from all major market players and analysed it. Such analysis was contained in the Statement of Objections and the letter of facts. In this regard, the AOs are well-placed to point at difficulties they faced from TP and to inform the Commission about the impact on their business resulting from TP's behaviour. Also TP had a number of opportunities to

¹¹¹⁶ Idem, paragraph 120.

¹¹¹⁷ Idem, paragraph 122. See also TP's presentation at the Oral Hearing, slides 9-12.

¹¹¹⁸ TP's presentation for the Oral Hearing, slide 24.

¹¹¹⁹ Idem, slide 25.

¹¹²⁰ Notice on the application of the competition rules to access agreements in the telecommunications sector, 22 August 1998, OJ C 265/2.

¹¹²¹ TP's presentation for the Oral Hearing, slide 26 and next.

¹¹²² Idem, slide 27. TP's example is based on the data of PricewaterhouseCoopers report: Analysis of the regulated issues in the context of Regulatory Strategy 2006-2007, page 37.

¹¹²³ Idem, slide 28.

present its point of view, in particular supply reliable evidence which would undermine statements of operators, UKE or KIGEiT. In instances where such evidence was provided by TP, the Commission took it into account in its analysis. From this point of view, TP's argument on the difficulty in exercising its rights of the defence cannot be accepted.

- (800) Thirdly, the Commission cannot accept TP's allegation that it did not meet the standard of proof, or TP's arguments on the lack of a casual link between TP's abusive conduct and the risk of elimination of competition. The extensive evidence described in chapter VIII illustrates that TP abused its dominant position by refusing to supply the wholesale input. As illustrated in section X.4.3, TP's abuse of dominant position delayed the development of competition in the relevant markets and was likely to have a negative impact on consumers.
- (801) Fourthly, to examine TP's abusive behaviour, the Commission referred to the ROs rules as minimum standards, based on the Commission's recognition of the reasonableness of the ROs' rules. Unlike TP claims, the ROs were established in a fair and open process giving all market players, including TP, an opportunity to present the arguments. In particular, market developments and the arguments raised by TP and AOs were taken into account while modifying the ROs' rules.¹¹²⁴ Furthermore, TP's argument that the benchmark (i.e. the ROs) used by the Commission to assess TP's behaviour was incorrect is unfounded. The lack of notification of the draft RO to the Commission does not render the ROs incorrect. As indicated in the Commission comments' letter of 30 July 2010¹¹²⁵ in the absence of such notification the Commission could use its powers in accordance with Article 258 TFEU with regard to misapplication of Article 7(3) of the Framework Directive. Moreover, until the entry into force of Directive 2009/140/EC of 25 November 2009, modifying the Framework Directive, the Commission did not have a right to open a second phase investigation¹¹²⁶ potentially leading to a Commission Recommendation on remedies notified by an NRA. Also, to this end, the Commission comments' letter of 30 July 2010¹¹²⁷ refers to UKE's obligation to consult at the EU level only new reference offers or amendments and modifications to the existing ones. Finally, TP is wrong to claim that the Commission did not demonstrate that TP made available to AOs worse information than the information TP provided to its own services. In recitals (535) to (541) the Commission points out to additional channels of information available to PTK - TP's subsidiary.
- (802) Fifthly, the Commission disagrees with TP's argument that the Commission limits itself to a review of consistency with the Regulator's request without conducting an own assessment under Art. 102 TFEU. The Commission is in the present case not qualifying as an abuse one or more individual breaches of a particular regulatory obligation vis-à-vis a given AO. What the Commission analyses in the present case is a consistent pattern of behaviour of TP vis-à-vis AOs, which taken as a whole qualifies as a refusal to supply wholesale inputs (BSA and LLU).

¹¹²⁴ See recitals (72) to (74).

¹¹²⁵ See case PL/2010/1098 published under: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/poland/registered_notifications/pl20101098/pl-2010-1098_endate/_EN_1.0_&a=d

¹¹²⁶ Art 7 of the Framework Directive.

¹¹²⁷ See footnote 1125.

Remarkably, in its reasoning TP fails to acknowledge that it was bound by regulatory obligations and not "*Regulator's requests*."¹¹²⁸

4.2.8. Conclusion

(803) In light of the analysis in sections 4.2.1 to 4.2.7 it is concluded that the impediments created by TP at each stage of AOs' access to TP's wholesale input constitute an abuse of a dominant position under Article 102 TFEU, in the form of refusal to supply. The abuse is composed of the following elements:

- (a) the proposal of unreasonable conditions in the draft BSA and LLU contracts governing AOs access to the wholesale broadband products,
- (b) delaying tactics at the different stages of the negotiation process,
- (c) limited access to TP's network,
- (d) limited access to subscriber lines, and
- (e) refusal to provide reliable and complete General Information.

TP's behaviour was part of a strategy of the incumbent aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products.

4.3 Access obligation and lack of alternative infrastructure

(804) As explained in section V, under the Polish Telecommunications Law¹¹²⁹ the incumbent operator has had an obligation to supply BSA and LLU access since 1 October 2003.

(805) The current national regulation which imposes on TP the obligation to supply wholesale access is based on and compatible with the EU regulatory framework adopted in 2002¹¹³⁰ and Regulation 2887/2000¹¹³¹, which were of application in Poland from 1 May 2004.

(806) The underlying principle of TP's duty to provide BSA and LLU access to its network is the promotion of competition and the protection of the consumer interest.¹¹³²

¹¹²⁸ See recital (796).

¹¹²⁹ See recital (80).

¹¹³⁰ The European regulatory framework for electronic communications networks and services consists of a series of Directives adopted in 2002. For instance, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ("Authorisation Directive"); 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"); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

¹¹³¹ Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ [2000] L 336/4.

¹¹³² Article 8 of the Framework Directive establishes that "*the national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated services by inter alia: (a) ensuring that users (...) derive maximum benefits in terms of choice, price and quality; (b) ensuring that there is no distortion or*

- (807) It is clear from the considerations underlying both the EU and Polish Telecommunications Law that TP's duty to supply the relevant upstream products results from a balancing by the public authorities of the incentives of TP and its competitors to invest and innovate. This is because the need to promote downstream competition in the long term by imposing access to TP's upstream inputs exceeds the need to preserve TP's *ex ante* incentives to invest in and exploit the upstream infrastructure in question for its own benefit.¹¹³³ On the basis of similar considerations, the Polish Telecommunication Law implemented obligations of access to and use of, specific network facilities (Art. 12 of Access Directive).¹¹³⁴
- (808) There is no alternative infrastructure which would enable AOs to offer retail broadband services on a national scale in Poland and which is substitutable to TP's local access network. AOs have to request access to TP's wholesale broadband products or to duplicate TP's infrastructure. The latter it is not an economically viable option. The large cost of duplicating TP's local access network or of developing a nationwide network capable of providing broadband Internet access of similar characteristics to the service offered by TP is an insurmountable barrier to entry for any competitor, including the largest national competitors or incumbents from neighbouring Member States. Moreover, there are additional constraints: the development of an electronic communications network requires overcoming numerous administrative obstacles, such as obtaining permits from local authorities, complying with local development plans etc. This would make the network roll-out process even more costly, longer and difficult. Consequently, it is economically unfeasible and unreasonably difficult to duplicate TP's infrastructure in a reasonable time period, taking into account presently available technologies.

restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure, and promoting innovation."

¹¹³³ Recital 19 of the Access Directive establishes that "*mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services.*" Also, Article 12 of the Access Directive establishes that "*A national regulatory authority may [...] impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest. Operators may be required inter alia: (a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop; [...] (c) not to withdraw access to facilities already granted; (d) to provide specified services on a wholesale basis for resale by third parties [...]. When national regulatory authorities are considering whether to impose [those] obligations referred, and in particular when assessing whether such obligations would be proportionate to the objectives set out in Article 8 of [the Framework Directive], they shall take account in particular of the following factors: (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved; [...] (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment; (d) the need to safeguard competition in the long term [...].*" See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings, paragraph 82.

¹¹³⁴ Namely the obligation to negotiate in good faith with undertakings requesting access (Art. 26 of the Polish Telecommunications Law), the obligations to give third parties access, to provide specified services on a wholesale basis for resale, to grant open access to technical interfaces, protocols and other key technologies, to provide co-location or other forms of facility sharing, to provide specified services needed to ensure interoperability of end-to-end services to users, to provide access to operational support system and to interconnect networks or network facilities (Art. 34 and Art. 35 of the Polish Telecommunications Law).

- (809) Furthermore, TP rolled out its local access infrastructure over a significant period of time protected by exclusive rights and was for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds.
- (810) Therefore, TP's duty to supply the upstream inputs (BSA and LLU access) under fair conditions is related to the fact that a denial of access to the upstream product or access on unreasonable terms and conditions having a similar effect would hinder the emergence and/or continuation of sustainable competition at the retail level.
- (811) The ROs reflect the terms and conditions which are considered as the minimum standards to foster fair and sustainable competition.¹¹³⁵ Several ROs and decisions adopted by UKE determine the minimum conditions and procedures under which TP should provide wholesale broadband products. As explained in section VI, the procedure for accessing wholesale broadband products comprises several stages (i.e. conclusion of contracts between TP and AOs for the provision of wholesale products, connecting to a SAN or obtaining collocation, and activation of end-users). Under the Polish Telecommunications law, TP proposes a RO to UKE, and if necessary UKE modifies the submitted draft by TP.¹¹³⁶ Then, UKE opens an administrative proceeding and informs association of undertakings which could be interested in participating in the proceeding (in particular: KIGEiT, PIKE, PIIT¹¹³⁷) and presenting their views. Only after having analysed all views presented during the proceeding, UKE introduces the necessary changes to the RO.¹¹³⁸ Once the RO is adopted by the NRA through a regulatory decision it becomes mandatory for TP.¹¹³⁹ This process ensures that the NRA takes into account the interests of all stakeholders before imposing any obligation.

4.4 Likely impact on competition and consumers

- (812) The Court of First Instance [now the General Court] has ruled that, "*for the purposes of establishing an infringement of Article 82 EC [now art. 102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.*"¹¹⁴⁰ Furthermore, the same Court ruled that "*where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not*

¹¹³⁵ Article 1.1 of Regulation 2887/2000. See also art. 4.1.

¹¹³⁶ Articles 3 and 4 of Regulation 2887/2000.

¹¹³⁷ KIGEiT- (Krajowa Izba Gospodarcza Elektroniki i Telekomunikacji) Polish Chamber of Commerce for Electronics and Telecommunication; PIKE (Polska Izba Komunikacji Elektornicznej) Polish Chamber for Electronic Communication; PIIT (Polska Izba Telekomunikacji i Informatyki) Polish Chamber of Information Technology and Telecommunications.

¹¹³⁸ See Art. 43(1) and 206 of Telecommunication Law of 16 July 2004 and Art. 138 (1), Art. 31(1) and 127(3) of Administrative proceedings code of 14 June 1960 (OJ No 98, item 1071).

¹¹³⁹ Telecom Law of 16 July 2004 (OJ No 171, item 1800) Article 42(1) (TP's obligation to prepare and submit the draft RO), Art. 43(1) (NRA's right to approve or modify the TP's draft RO or determine the RO by itself), Art. 43(4) (NRA's obligation to publish the RO), Art. 43(6) (TP's obligation to conclude access contracts with AOs under terms not worse than identified in the RO).

¹¹⁴⁰ Judgment of the Court of First Instance of 17 December 2003 in Case T-219/99 *British Airways plc vs. Commission of the European Communities*, paragraph 293; and Judgement of the CFI of 9 September 2009, *Clearstream v Commission*, paragraph 144.

sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82 EC [now art. 102 TFEU]."¹¹⁴¹ Finally, Article 102 TFEU is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.¹¹⁴² The Court of Justice has held that "*competition rules laid down in the Treaty (...) aim to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.*"¹¹⁴³ Consequently, Article 102 TFEU does not require the Commission to examine specifically whether the conduct of the dominant undertaking has actually caused prejudice to consumers.¹¹⁴⁴

(813) In the present case, the Commission will establish that TP's conduct was capable of restricting, or in other words, likely to restrict competition in the retail market (subsection 4.4.1). Moreover, despite this not being necessary in order to prove an abuse of dominant position it will also demonstrate that TP's conduct was likely to have detrimental effect for consumers (subsection 4.4.3-4.4.4.).

4.4.1. TP's conduct was likely to constrain the ability of DSL operators to compete effectively in the retail market

(814) To be able to plan investments and conclude contracts with end-users, AOs need to be certain at which conditions access to wholesale services will be granted. That is why the proper implementation of regulatory measures, which establish minimum access conditions and bring legal certainty, is essential. Where even such minimum conditions are not respected and AOs access to wholesale products is granted on unreasonable terms, AOs have limited opportunities to offer competitive products in the retail market efficiently. Access contracts that include burdensome obligations may diminish the quality of the product and/or increase the AOs' costs and/or limit their sales. This may prevent AOs from competing in the retail market on a lasting basis. In the worst case scenario, such behaviour may prevent competitors from entering the market or may force the established operators out of the market. Furthermore, delaying tactics of the incumbent may affect the entry of competitors in the relevant retail market and the provision of retail products by AOs. Lengthy negotiations will benefit the incumbent, especially when introducing new services. Delays after signing the access contract may lead to decrease in the quality of the retail product provided by the AOs and could be damaging for the image of the AOs in front of their customers. The dominant undertaking may gain a first mover advantage if the implementation of access obligations takes long enough and increases AOs' costs.

(815) The establishment of likely effects of a refusal to supply does not mean that rivals were actually forced to exit the market. It is sufficient that the rivals are disadvantaged and consequently compete less aggressively. In the case at hand,

¹¹⁴¹ Judgment of 30 January 2007 in case T-340/03, *France Télécom*, paragraph 196; Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others v Commission* [1996] ECR II-1201, paragraph 149, and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 191.

¹¹⁴² Judgment of 15 March 2007, Case C-95/04 P, *British Airways*, paragraphs 106-107; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 26.

¹¹⁴³ See judgment of the Court of Justice of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and others / Commission and others GSK*, paragraph 63. See also judgment of the Court of 4 June 2009 in case C-8/08 *T-Mobile Netherlands and Others*, paragraphs 38 and 39.

¹¹⁴⁴ Case C-95/04 P, *British Airways*, paragraph 107.

the foreclosure effect is likely since DSL competitors in the retail market could not avoid having recourse to the BSA and LLU wholesale inputs provided by TP by turning to an alternative (in terms of price, geographical coverage and capacity) wholesale input. TP is the only provider of BSA and LLU and therefore an unavoidable trading partner of AOs (see subsection X.1.2). As a result, the refusal to supply access to wholesale products of TP affected AOs' ability to enter the market, or to enter timely, and to effectively exert a competitive constraint on TP, or even forced some of the AOs out of the market.

(816) As expressed by several AOs, the delays in negotiations, the high rate of rejections and delays of activation of subscriber lines had a negative impact on their possibility to offer retail broadband services on the basis of BSA or LLU, deteriorating their images, increasing their costs and decreasing their customer base:

(a) Tele 2 stated that "*[r]ejections of orders, for example due to discrepancies in addresses is an attempt to leverage onto the alternative operators the effects and responsibility for inconsistencies of TP's data base. Unjustified rejection of orders results in that an AO: - can not implement its services to its customers (to the detriment, among others, to its image), - bears unnecessary costs, does not receive the subscriber revenue. Alternative operators, not having the possibility to check the service implementation phase, can not effectively manage communication with their customers. This leads to a situation in which the customers blame the alternative operator for procedural errors, whose image significantly deteriorates in their eyes. Alternative operators [consequences of orders' rejections in relations with end users] but bear all the consequences of [consequences of orders' rejections in relations with end users] in case of signing a binding contract, thereby exposing themselves to the financial losses,[consequences of orders' rejections in relations with end users] TP has shown no effort to improve the quality of launching wholesale services and, encountering any problem, states the lack of technical possibilities capacity thus blocking the operations of an alternative operator.*"¹¹⁴⁵

(b) [AO]stated that "*Such a high rejection rate on technical grounds means for the AO: (a) [effects of TP's infringement](b) loss of reputation of AOs [effects of TP's infringement]. (...) [amount] means that each activated BSA service costs an alternative BSA operator [amount] more only because of this category of rejection, which constitutes a de facto increase of installation charge by [percentage] Furthermore, a high rejection rate on technical grounds prevents AOs from obtaining higher efficiency by minimizing the operating costs related to the service activation process, [effect of a large number of rejections]. As a result, the cost of the customer installation is increased by further [amount]. This means that, in effect, despite the market installation charge equal to 40.98 PLN net an operator bears the cost of.[*]*"¹¹⁴⁶

(c) In some cases, when the contract was agreed but not signed, an AO could not be certain that it would eventually be signed by TP in the version agreed. In this context Netia stated that "*The lack of appropriate signatures by TP caused the lack of proper formal-legal grounds to apply the provisions of the Annexes and brought uncertainty as to whether the annex*

¹¹⁴⁵ Tele2's reply to the RFI of 23 February 2009, page 25.

¹¹⁴⁶ [AO's] reply to the RFI of [*] 2009, page 2.

will be signed, in particular, in a case where the [time] difference in the signatures was about 5 months!"¹¹⁴⁷

- (d) In other cases, some AOs reverted to the NRA to improve their disadvantageous positions versus TP seeking a contract which would give them all minimum rights guaranteed by the ROs.¹¹⁴⁸ Also, the NRA had to intervene *ex officio* on numerous occasions in order to establish the bilateral relations in line with the ROs. TP reported on at least 53 such *ex officio* decisions.¹¹⁴⁹
- (817) TP's conduct was likely to make the continued presence of AOs on the market difficult to sustain and by imposing on the latter additional constraints, which the downstream arm of the vertically integrated company did not have to support, TP was, to a certain extent, able to protect its own retail business from effective competition.¹¹⁵⁰ This put TP in a position to transfer market power from the wholesale markets to the related retail market by closing or delaying AOs access to that market and thus bringing benefit to TP's own retail business.
- (818) As already explained in subsection X.1.2, due to the risks involved in investments that entail high sunk costs, AOs are likely to follow a step-by-step approach to expand their customer base and infrastructure investments ("investment ladder" concept). It is of crucial importance for them to obtain a minimum "critical network size" in order to fully benefit from network effects and economies of scale and be able to make further investments. By preventing its competitors to enter and/or expand in the retail market, TP prevented its downstream competitors to reach rapidly a critical customer size that would have allowed them to climb earlier the investment ladder, have the possibility to differentiate themselves from TP by progressively building their own network, and to compete on costs.
- (819) Finally, as a result of TP's proposal of draft contracts containing unreasonable conditions, some AOs decided to quit the negotiations for an access contract, others signed the contract for BSA and/or LLU with unreasonable conditions, or did not even start providing retail broadband products:
- (a) As regards the abandoned negotiations, the evidence in the file confirms that only 103 out of 250 negotiations ended with a signed contract (see recital (300)). Telsat is an example of an AO which could not accept TP's interpretations of the ROs and consequently decided to leave the negotiations and abandoned the project of providing broadband services.¹¹⁵¹ TP admits that Telsat abandoned negotiations however purports that the AO's decision was not related to TP's behaviour.¹¹⁵² This argument of TP is plainly unconvincing in view of Telsat statement that "*Our company decided to discontinue the negotiations with TP aiming at obtaining access to wholesale broadband Internet products due to TP's policy of contacts*

¹¹⁴⁷ Netia's reply to the RFI, pages 4-5.

¹¹⁴⁸ E.g. Telefonía Dialog, Tele2, Supermedia and Netia's failed attempts to modify the disadvantageous provisions of their respective access contracts through negotiations with TP led these AOs to refer the case to the NRA. UKE intervened and adjusted the access contracts in line with the RO in force at the time; see Table 5.

¹¹⁴⁹ TP's reply to RFI on 4 February 2009.

¹¹⁵⁰ Case T-271/03, *Deutsche Telekom*, paragraphs 108 and 141.

¹¹⁵¹ Telsat's reply to the RFI of 23 February 2009, pages 2 - 3:

¹¹⁵² SO Reply, paragraphs 860-861.

with a client [AOs], not consistent with declarations [stipulations] included in the Reference Offer."¹¹⁵³

- (b) Novum is an example of an AO which, despite having signed BSA and LLU contracts with TP, does not offer broadband services in the retail market. The AO explained that it had conducted a business profitability analysis, that concluded, on the basis of the information obtained from other AOs, that there was only a "50% effectiveness in implementing services for acquired BSA customers (data from the year 2007/2008, obtained from other operators) and the fact that "a limited number of points prepared by TP for launching the service at the moment of conclusion of LLU agreement was a barrier."¹¹⁵⁴
- (c) Polkomtel is another operator which despite the access agreement concluded with TP did not start to provide broadband BSA services. The AO drew the Commission's attention to a number of discrepancies between the RBO and the BSA contract Polkomtel signed with TP¹¹⁵⁵ and explained that its analyses indicated that the investment would not generate adequate return.¹¹⁵⁶ This shows that the unfavourable access conditions TP dictated to the AO, which were contained in the signed contract had a serious impact on the AO's decision to offer retail broadband service based on TP's wholesale product. In this regard, TP argues that the sole reason for Polkomtel to abandon the provision of broadband services was a lack of financial feasibility and not TP's behaviour.¹¹⁵⁷ To this end, the Commission reiterates that the feasibility of provision of broadband retail services was done by Polkomtel on the basis of unreasonable conditions included in the signed BSA access contract. This is confirmed by correspondence between Polkomtel and TP in which, together with a signed BSA contract, the AO made the following remarks: "*the attitude of TP S.A. forced Polkomtel S.A. to accept the draft contract, which diverged significantly from the terms and conditions stipulated in the Reference Offer*" and that "*Polkomtel S.A. maintains its criticism towards the below-mentioned stipulations of the contract and we expect TP S.A. to change its position and adapt the*

¹¹⁵³ Telsat's reply to the RFI of 23 February 2009, page 3.

¹¹⁵⁴ Novum's reply to RFI on 17 March 2009, page 2. The Commission notices that the company stated on page 1 that "*these contracts are not implemented because of reasons being on the side of Telekomunikacja Novum.*"

¹¹⁵⁵ Polkomtel's reply to RFI on 17 March 2009, page 5-8; Polkomtel indicated a number of differences between the BSA RO and the BSA contract it signed with TP which impact the profitability of its venture, namely: the possibility to provide BSA also on non-active lines; the possibility to conduct an inspection by Polkomtel in order to verify the technical conditions of providing the service by TP; the point from which TP starts to charge for the BSA line, that is, the time when the service was launched as opposed to the time in which Polkomtel's customer registered and started to use the service, which also should serve as confirmation of the service's proper launch; TP's responsibility for faulty technical exam limited only to the fee charged to Polkomtel by the exam, not taking into account other costs of the AO; limiting data transfer, which may result in Polkomtel not being able to deliver the service to its customers; additional conditions introduced by TP which negatively influenced Polkomtel's ability to access BSA (possibility to refuse connection by dedicated line; ensuring migration between SANs in 60 days vs 30 days as specified in the RO; implementing the service in 7 and not in 5 working days as specified in the RO).

¹¹⁵⁶ Polkomtel's reply to RFI on 17 March 2009, page 2: "*Polkomtel carried out a series of financial analysis on the implementation of wholesale broadband access to Internet, based on different options available in the BSA offer, as well as on different ways of implementation. For the moment none of these analyses indicates that the investment would generate adequate return within the stipulated time.*"

¹¹⁵⁷ SO Reply, paragraphs 866-867.

*contract to the requirements of the Reference Offer.*¹¹⁵⁸ The case file indicates that TP did not change its position.

4.4.2. Quantitative assessment of the likely effects on the competitive structure of the market

- (820) Firstly, TP's high market shares on the retail market surpass by far that of its competitors. In terms of number of lines, TP's market share amounted to 57,8% in 2005 and 40% in 2009. There is a significant gap between TP's retail market shares and the retail shares of TP's competitors. The biggest cable operator – UPC – has had market share between 6% and 9% in the observed period. Although the market shares of TP within that time decreased, its subsidiary company PTK has gained market shares and thus the overall position of TP Group remains unthreatened. As UKE states *"TP's position on the retail broadband market is very strong and (...) the incumbent has no competitors who could individually pose threat to its market position in the territory of the entire country."*¹¹⁵⁹
- (821) Secondly, TP remains the largest xDSL based supplier on the retail market. Its largest xDSL competitor – Netia – had a market share of only between 2% and 9% in the years 2005-2009. The large number of micro competitors that together possessed a share between 15% and 21% of the market are dispersed.
- (822) Thirdly, TP's refusal to supply wholesale DSL services to new entrants reduced the rate of entry of competitors on the retail market for DSL services, what is reflected in the low penetration rate both for BSA (see Table 9) and LLU (see Figure 14).

Table 9 BSA Penetration in Poland¹¹⁶⁰

	2006	2007	2008	2009
BSA penetration ¹¹⁶¹	0%	6.89%	16.86%	19.18%

Source: Commission table on the basis of UKE and TP data

- (823) Although TP's obligation to supply BSA has been in place since 2003¹¹⁶², for more than 4 years, the BSA penetration rate in Poland remained low. As confirmed by the Polish NRA the low BSA penetration was an effect of the anti-competitive conduct of TP.¹¹⁶³ As explained in chapter VIII.1 TP's denial of its regulatory obligation to prepare the relevant RO led to a late introduction of the RBO in Poland (May 2006) and as a consequence to delays in the development of retail offers based on BSA. The growth in the take up of TP's lines on the basis of BSA is observed only as from late 2008.
- (824) TP claims that the BSA penetration rates presented by the Commission in the SO do not take into account the fact that the BSA obligation was introduced in

¹¹⁵⁸ Polkomtel's reply to RFI on 17 March 2009, page 444.

¹¹⁵⁹ Annex to TP's Reply to the SO, page 257.

¹¹⁶⁰ Commission's figure on the basis of UKE's data, UKE market study of July 2009, page 33 and document, Annex ID054 to the SO Reply of TP for 2009.

¹¹⁶¹ Share of DSL lines made available to AOs on the basis of BSA compared to number of DSL lines retailed by the incumbent operator.

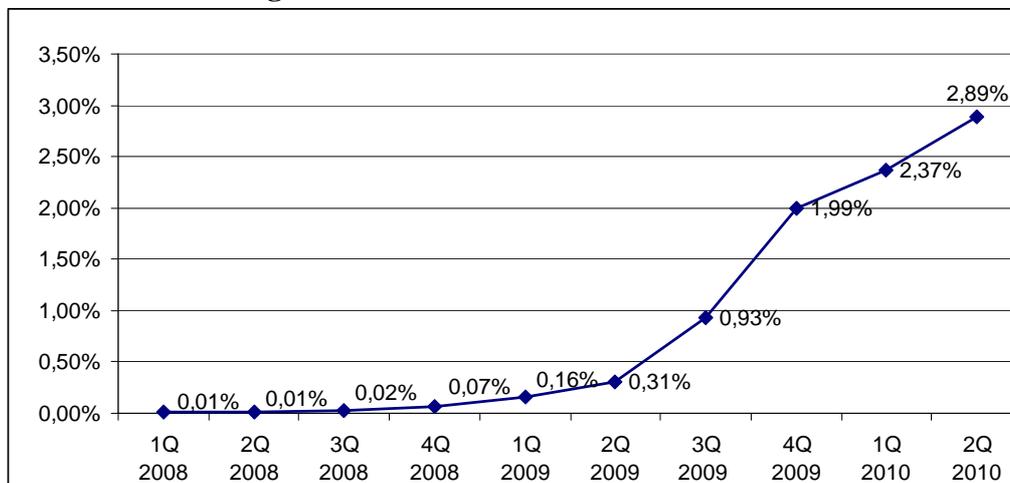
¹¹⁶² See section V. TP was designed as SMP operator and obliged to give access to its network in 2003.

¹¹⁶³ UKE, Document konsultacyjny w sprawie rozdziału funkcjonalnego TP SA, July 2009, page 33.

different EU countries at a different time (i.e. 5-6 years earlier than in Poland).¹¹⁶⁴ Therefore, in TP's view it is more appropriate to compare the BSA penetration in Poland with the performance of other countries in the equivalent years after the introduction of the BSA obligation. TP presented a comparison of BSA penetration rates between 8 Member States in the first years of the imposition of BSA obligations. The benchmark showed by TP uses 2006 as the reference year in which the RBO was introduced in Poland.¹¹⁶⁵ Furthermore, during the Oral Hearing TP claimed that access through BSA has been continuing to develop dynamically since the beginning of the provision of that service.¹¹⁶⁶ Finally, TP claims that new entrants in Poland currently use around 28% of all xDSL lines, which is a satisfactory achievement compared to the mature markets of the Netherlands and Denmark (respectively 60% and 62%).¹¹⁶⁷

- (825) With regard to the development of BSA penetration rate it is noted that TP slowed down the introduction of the first RBO by refusing to prepare the draft RBO as required by law (see recitals (150) to (151)). Furthermore, the data for July 2009 indicate that in comparison with other EU countries Poland has relatively low percentage of BSA lines in terms of the total xDSL lines of the incumbent.¹¹⁶⁸ Even if, as from 2008 there was a considerable growth in a take up of TP's lines on the basis of BSA, this was to a great extent triggered by AOs' difficulties in obtaining LLU access (see LLU penetration levels in Figure 14). It is symptomatic that countries with very low LLU penetration rates compensate with a relatively higher BSA penetration rates. In case of Poland however this "compensation ratio" is relatively low. In case of Hungary for example, although the LLU penetration in 2009 was low (2.3%) the BSA take up was much higher (around 30%).¹¹⁶⁹

Figure 14 LLU Penetration in Poland¹¹⁷⁰



Source: UKE Analysis on the development of local loop unbundling (LLU), October 2010

¹¹⁶⁴ SO Reply, paragraph 902.

¹¹⁶⁵ SO Reply, paragraphs 903-904

¹¹⁶⁶ TP's presentation for the Oral Hearing, slide 40, page 20.

¹¹⁶⁷ TP's reply to the letter of facts, paragraphs 391.

¹¹⁶⁸ COCOM, Broadband access in the EU: situation at 1 July 2009, page 29, available at: http://ec.europa.eu/information_society/europe/i2010/docs/interinstitutional/cocom_broadband_jul_y09.pdf. BSA penetration rates: 19,22% for Poland, as compared to 30% in Hungary, 24,74% in France.

¹¹⁶⁹ Idem.

¹¹⁷⁰ UKE Analysis on the development of local loop unbundling (LLU), October 2010, page 5.

- (826) LLU penetration in Poland is among the lowest in the EU. By the end of 2008 it reached only 0.07% of all active lines of the incumbent operator compared to the EU average of 15.7%, 7.2% in the Czech Republic and 2.34% in Hungary.¹¹⁷¹ LLU penetration slowly increased to reach the level of 2.89% in the second quarter of 2010, still far below the EU average.¹¹⁷²
- (827) With regard to LLU, TP does not contest the low LLU penetration rate in Poland; however, it attempts to justify it by factors independent from the company, namely that (i) in the countries where the BSA service is available simultaneously with LLU, the take up of LLU occurs only after obtaining a client base with the use of the solutions which are less capital-intensive (namely BSA and WLR) and that (ii) the regulatory choice to keep very low prices of BSA and WLR has resulted in the lack of price incentives for AOs to use the LLU offer.¹¹⁷³ Furthermore, by referring to UKE Report on the development of telecommunications market in 2009, TP argued during the Oral Hearing¹¹⁷⁴ that: *"A few year-long period (3-4 years) of the initial development of the market when the penetration was not higher than 1% is characteristic for each market that is compared with (...). In Poland, there are observed the first symptoms of revival of the dynamics of the LLU market increase, in analogy to 2002-2005 in the countries compared. If the Agreement concluded between TP and the President of UKE brings the assumed advantages then the increase shall have comparable tendency to Germany or France."*¹¹⁷⁵
- (828) As a preliminary remark, it must be noted that the price regulation of BSA, LLU and WLR falls outside the scope of the present case. In any case, the reasons given by TP for a low LLU penetration in Poland are questionable, as in any case the alleged "favourable" wholesale access price for BSA did not result in a relatively higher BSA penetration. Both LLU and BSA penetration remained relatively low, especially in years 2005-2008.¹¹⁷⁶ Secondly, as TP rightly points out the initial bigger interest in the take-up of BSA lines is a natural consequence of the concept of the investment ladder. Following this concept, at the initial stage of the introduction of BSA and LLU wholesale offers the Polish NRA decided to keep favourable prices for BSA. Therefore, it is not understandable why TP questions this regulatory choice of UKE. Thirdly, the initial high price levels for LLU access were re-examined by UKE soon after their introduction and already in October 2006 the LLU wholesale access prices were lowered by 38% in case of full local loop unbundling and 55% in case of shared access. UKE decided to adjust LLU access prices to levels comparable with other EU Member States since the costs' reports prepared by TP had received the negative opinion of an auditor.¹¹⁷⁷ Still, even after the access prices were lowered by UKE in 2006, TP argued at that time that they should be higher.¹¹⁷⁸ Fourthly, as UKE pointed out, LLU penetration in Poland in the fifth year of LLU obligation is slightly better

¹¹⁷¹ UKE market study of July 2009, page 56.

¹¹⁷² UKE Analysis on the development of local loop unbundling (LLU), October 2010, page 5, figure 3, http://www.uke.gov.pl/_gALLERY/34/10/34100/Analiza_rozwoju_LLU_10_2010.pdf, downloaded and printed on 9 December 2010.

¹¹⁷³ SO Reply, paragraphs 906-911. See also TP's presentation for the Oral Hearing, slide 39, page 20. TP's Reply to the Letter of Facts, paragraphs 393-395.

¹¹⁷⁴ TP's presentation for the Oral Hearing, slide 37 and 38, page 19.

¹¹⁷⁵ UKE, Raport o stanie rynku telekomunikacyjnego w Polsce w 2009 roku, June 2010, page 26.

¹¹⁷⁶ See Table 9 and Figure 14.

¹¹⁷⁷ UKE RUO Decision of 5 October 2006, pages 75-76.

¹¹⁷⁸ UKE RUO Decision of 3 April 2007, page 54 and 117.

(by more than 3%) than the one achieved in the UK at the same stage of LLU development and significantly worse (by 25%) than the French and German markets. UKE estimates that even if the positive trend in the growth of LLU penetration in Poland continues and reaches the expected level of 4.8% by the end of 2010 the penetration rate will be still 5 times lower from the average penetration rate (23.71%) in France, Germany and Spain achieved at the same stage of LLU development.¹¹⁷⁹ In fact, UKE forecast was confirmed.¹¹⁸⁰ Moreover, it should be noted that the comparison of the progress in LLU take up done by UKE in its document¹¹⁸¹ concerns the EU countries where the anticompetitive practices identified either by national authorities (in case of the UK) or by the Commission itself (in case of Spain and Germany) have had a negative impact on the LLU development. Therefore, even disregarding the fact that LLU development in those Member States took up earlier than in Poland, TP is wrong to justify the low LLU penetration rate in Poland with the fact that other EU countries have achieved a similar rate since in those countries AOs faced anticompetitive practices of the incumbents leading to a slower development of retail offers based on LLU.

4.4.3. TP's conduct was likely to negatively affect consumers

- (829) In the present case, the immediate harm to consumers was likely to be significant: if competition had not been restricted by means of the refusal to supply wholesale products, in all likelihood consumers' choice would have increased and retail prices would have been driven down.
- (830) As set out above, the competitiveness of the market was likely to be restricted relative to the situation that would have prevailed in the absence of the refusal to supply. This inevitably leads to likely harm to consumers. All else being equal, consumers will ultimately be worse off in a market in which the structure of competition is distorted, restricted or impaired. Absent the distortions resulting from TP's conduct in this case, the retail market for broadband services would have been likely to have witnessed more vigorous competition between AOs. Without such constraints on competing AOs, it is likely that the market would have delivered greater benefits to consumers as a whole, such as increased choice, innovation and lower retail prices.
- (831) TP benefited the most from the foreclosure of its retail DSL competitors. This is because neither cable operators nor the progressive development of other technologies could neutralise the likely effects of TP's conduct on end users (see recitals (833) to (834)).
- (832) As to TP's xDSL competitors, some of them have invested in their own infrastructure. However their infrastructure is of limited coverage since TP still owns 90.7% of the switchboard capacity and 74.81 % of MDFs in Poland.¹¹⁸² As it is highly unlikely that they build their own local access network, due to the huge financial efforts that such investment would require, TP's competitors continue to be dependent on TP for access to end-users.

¹¹⁷⁹ UKE Analiza rozwoju rynku uwalniania pętli abonenckich (LLU), October 2010, page 16.

¹¹⁸⁰ See information published by UKE http://www.uke.gov.pl/_gALLERY/40/81/40813/Podsumowanie_kadencji_telekomunikacja_2006_2011.pdf, p. 17-18

¹¹⁸¹ Figure 19 in UKE, Raport o stanie rynku telekomunikacyjnego w Polsce w 2009 roku, June 2010, page 26.

¹¹⁸² UKE consultation dokument on market 4 for LLU, 2010, page 69.

- (833) As to the cable operators, which are not affected by TP's refusal to supply, they are clearly not in a position to benefit from TP's foreclosure strategy by attracting the business of those affected by the refusal to supply or to mitigate the above described negative effects of the abuse. Indeed, the cable operators have not been in a position to challenge TP's position in the relevant market. Cable coverage is much lower than DSL coverage and the cable networks are fragmented. In Poland, only 26% of the households could potentially have access to broadband based on the cable network.¹¹⁸³
- (834) At the wholesale level, cable operators have never been in a position to counter the negative effects of TP's abuse on competition and consumers, because as explained in section (see subsection 1.2) there is no substitutability between cable and xDSL products, no cable wholesale product is available in Poland and the substitutability between cable and xDSL at the retail level has not exercised a significant indirect constraint at the wholesale level.
- (835) TP alleged¹¹⁸⁴ that cable networks do exert a significant competitive pressure on the broadband retail market in Poland. In support of its claim, TP referred to the following arguments. Firstly, the Polish incumbent put forward that city residents account for 72% of persons using the Internet, what may indicate that the competitive conditions are not homogenous on the whole territory of the country.¹¹⁸⁵ Secondly, on the basis of data provided by cable operators TP argued that cable operators cover about 1/3 of all households and that cable operators are particularly present in the big cities such as Warsaw.¹¹⁸⁶ Thirdly, TP asserted that the presence of cable operators on the market is expected to increase due to the development of DOCSIS technology, which allows offering retail Internet services of higher speed capacity than xDSL technology.¹¹⁸⁷
- (836) TP's arguments are not convincing. In the first instance, it is noted that the existence of cable operators does not influence TP's dominant position on the relevant wholesale markets as none of the cable operators provide a wholesale input. In fact TP does not contest that it holds a dominant position in the relevant markets and is the only owner of a nation wide DSL-network, not economically duplicable for other AOs. Secondly, contrary to the figures delivered by cable operators and presented by TP in the Reply to the SO, the NRA data demonstrates that cable operators held only 24.25% of fixed broadband lines by the end of 2009.¹¹⁸⁸ Moreover, only 26% of the households in Poland could potentially have access to broadband based on cable network.¹¹⁸⁹ The fact that cable operators are TP's main competitors in the big cities does not mean that they can exert a competitive constraint on TP in the whole territory of Poland – and even less that they did exert that constraint in the period 2005-2009. Geographically, the cable network in Poland covers only 8.000 km² (approximately 3% of the territory) compared to ubiquitous PSTN-network of TP covering nearly 312.000 km².¹¹⁹⁰

¹¹⁸³ On the basis of UKE's data from UKE, Consultation document on market 4, page 14 and UKE market study, pages 22-23.

¹¹⁸⁴ SO Reply, paragraph 869. TP's reply to the letter of facts, paragraph 389.

¹¹⁸⁵ SO Reply, paragraphs 869-870.

¹¹⁸⁶ SO Reply, paragraphs 871-874.

¹¹⁸⁷ SO Reply, paragraph 875.

¹¹⁸⁸ UKE consultation decision on market 4, 2010, page 14.

¹¹⁸⁹ On the basis of UKE's data from the UKE, consultation decision on market 4, page 14 and UKE market study of July 2009, pages 22-23.

¹¹⁹⁰ UKE consultation decision on market 5 for BSA, 2011, page 26.

As UKE states: "*despite the regular growth in market shares of broadband access to the Internet they [cable operators] were not able to threaten the position of TP S.A.*"¹¹⁹¹

- (837) The value of the Polish retail market for broadband Internet access was approximately 4.07 bln PLN in 2009.¹¹⁹² There were 4.7 million broadband subscribers, 2.7 million of which subscribed to DSL services.¹¹⁹³ Given the high proportion of DSL consumers in the retail market the negative effects of TP's conduct were likely to be significant.

4.4.4. Quantitative assessment of the likely effects on consumers

- (838) TP's refusal to supply wholesale DSL services to new entrants allowed it to maintain high retail prices and avoid investments in the upgrading and expansion of the network, which resulted in harm to consumers reflected in lower broadband penetration, higher broadband prices and lower average broadband connection speeds (see recitals (839) to (863)).

TP's conduct resulted in a low broadband penetration rate

- (839) The broadband penetration rate in Poland is amongst the lowest in the EU. According to the ECTA Regulatory Scoreboard Report 2009 (and the OECD Broadband Portal 2009) the broadband penetration per 100 of population increased in Poland from 9.6% in 2008 to 12.8% in September 2009.¹¹⁹⁴ Among the EU Member States only Bulgaria had a lower penetration rate, with a penetration rate of 11.9% in September 2009. In January 2010 the broadband penetration rate reached 13.5%, which was still one of the lowest results in Europe and significantly below the EU average of 24.88%.¹¹⁹⁵
- (840) There is a positive correlation between the level of competition in the market, as measured by the ECTA Regulatory Scorecard index and the investment per capita level in the telecommunications industry (see Figure 15). It can be concluded that an increased competition stimulates the investments in infrastructure which are necessary to improve broadband penetration.
- (841) TP's refusal to supply BSA and LLU services has slowed down the progress of AOs along the investment ladder as described in section 1.2. As a consequence, AOs were not able to build a customer base large enough to sustain considerable investments in their own infrastructure. This resulted in a limited development of alternative infrastructures, especially outside of big cities where TP's network is the only one available, and creates a serious obstacle to the growth of broadband penetration in Poland.

¹¹⁹¹ Idem.

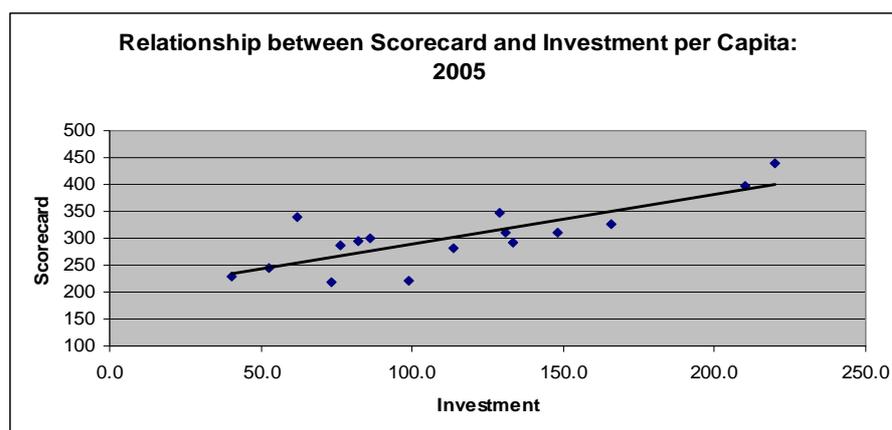
¹¹⁹² UKE, Raport o stanie rynku telekomunikacyjnego w 2009 roku, June 2010, page 4; This value comprises both fixed and mobile Internet access.

¹¹⁹³ Idem, page 7 and 9.

¹¹⁹⁴ ECTA Regulatory Scoreboard 2008, page 38 and ECTA Regulatory Scoreboard 2009, page 45.

¹¹⁹⁵ European Commission 15th Implementation Report, http://ec.europa.eu/information_society/policy/ecomms/doc/implementation_enforcement/annualreports/15threport/15report_part1.pdf, page 312.

Figure 15. Relationship between market competitiveness and telecommunications investment



Source: ECTA Regulatory Scorecard 2007, page 6.

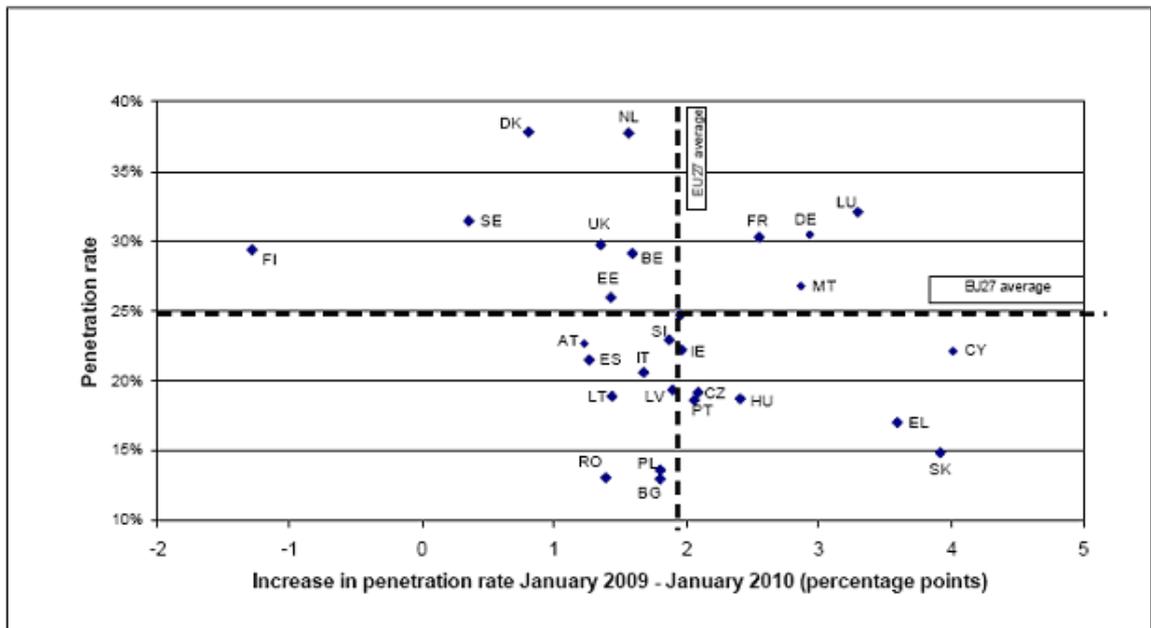
- (842) TP does not contest that the broadband penetration rate in Poland is amongst the lowest in the EU but attempts to explain this by the level of GDP per capita, the number of personal computers per 100 inhabitants¹¹⁹⁶ and by the level of development of xDSL lines.¹¹⁹⁷
- (843) The arguments put forward by TP cannot be accepted. It is misleading to try to explain the low broadband penetration in Poland on the basis of the GDP. Despite the fact that in 2009 Poland faced a lower GDP decline than other EU countries, as shown on Figure 16 Poland is still lagging behind the average growth in the broadband penetration. By January 2010 Poland had the third lowest penetration rate in the EU (13.5%) and had experienced an increase in the number of lines of around 2% only. One should expect that the growth in the penetration rate in Poland should be higher compared to the mature markets such as the Netherlands (with the second highest penetration rate in the EU and close to three times higher than the rate in Poland, but which still has experienced an increase in the number of broadband lines of 1.5%).¹¹⁹⁸ In this context, Greece, which encountered a decline in the GDP, has managed to achieve bigger than Poland growth in the broadband penetration (by almost 4%).

¹¹⁹⁶ SO Reply, paragraphs 896-900. TP's reply to the letter of facts, paragraphs 385-388.

¹¹⁹⁷ TP's presentation for the Oral Hearing, slide 36, page 18.

¹¹⁹⁸ European Commission, 15th Implementation Report, page 21.

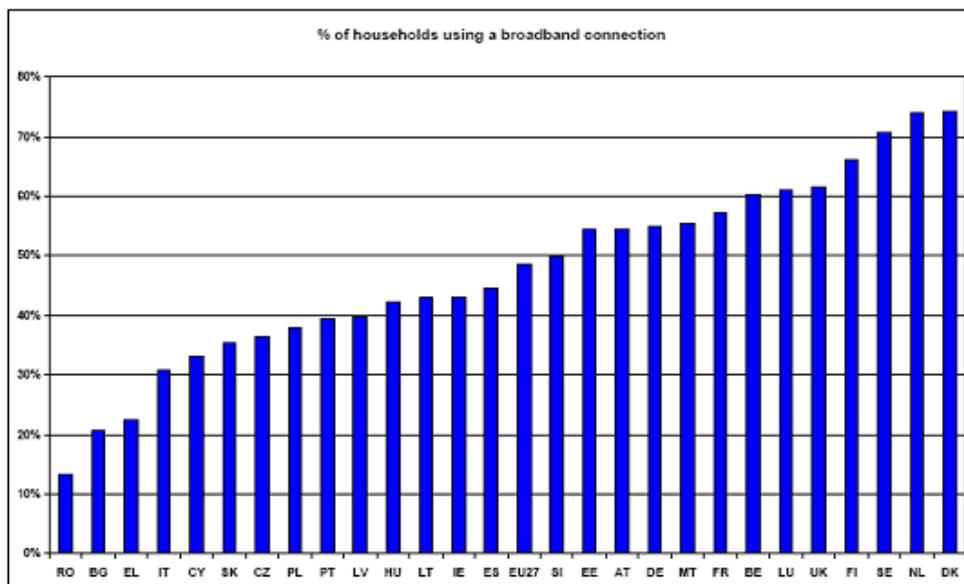
Figure 16 Penetration rate and speed of progress, January 2010



Source: Commission's 15th Progress Report, page 21.

- (844) Furthermore, data on household take up is a good proxy for the growth potential of broadband markets, and it suggests that there are still many Polish households (more than 60%) that do not have a broadband connection (see Figure 17). This should therefore naturally lead to a higher growth in the broadband penetration in Poland, which unfortunately is not a case.

Figure 17 Percentage of households using a broadband connection (2009)



Source: Eurostat Community Survey on ICT usage by Households and Individuals (2009)

- (845) As a recent consumer study demonstrates 28,6% of consumers do not use Internet due to financial reasons and 11,7% due to the lack of service in their area. Furthermore, 70% of respondents made a decision about buying a computer based

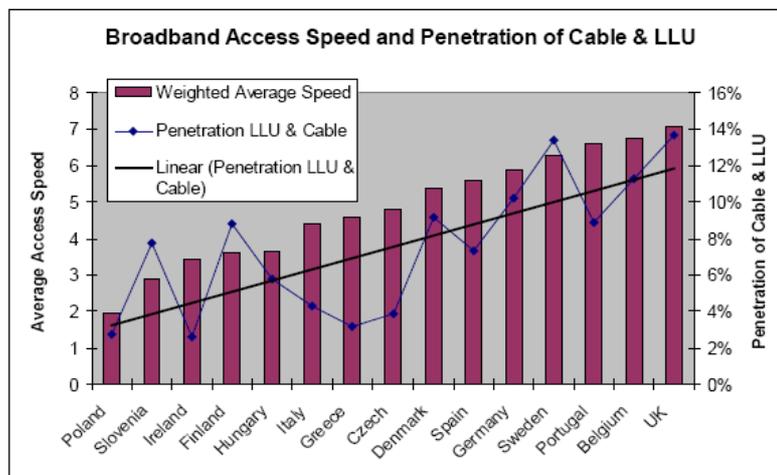
on the possibility to access the Internet.¹¹⁹⁹ Therefore, the low number of computers can be explained by the fact that consumers do not have access to a broadband connection which is reliable and reasonably priced. If Polish end-users had access to cheap and reliable broadband connections the penetration rate would increase. This further indicates that there is a large growth potential for development of the Polish broadband market.

- (846) With regard to TP's argument on the low number of xDSL lines, the Commission notes that as it was said in recital (840) there is a positive correlation between the level of competition in the market and the level of investments in the telecommunications industry. Since the weak broadband competition in Poland did not stimulate investments in infrastructure, broadband penetration remained low.

TP's conduct resulted in low average connection speeds

- (847) Low LLU penetration in Poland coincides with low average broadband access speeds. This can be explained by the limited ability of AOs to offer products on the retail broadband market based on LLU which would allow them to better compete with regard to connection speeds. Figure 18 below shows LLU and cable penetration and average broadband access speeds in countries examined by ECTA and demonstrates that Poland has the lowest average access speed.

Figure 18 Broadband Access Speed and Penetration of Cable and LLU

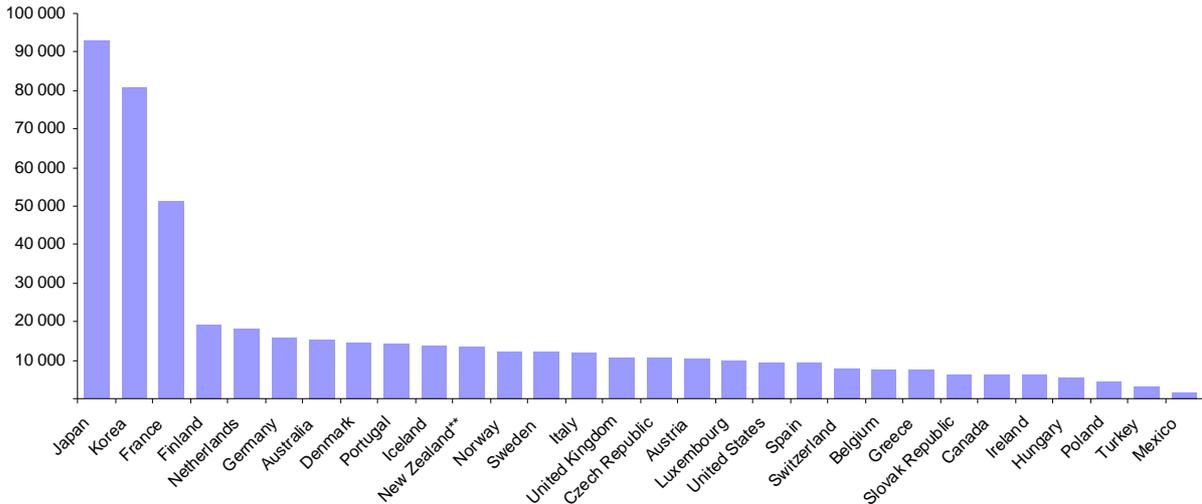


Source: ECTA, Regulatory Scorecard 2008, page 11.

- (848) Similarly, Poland has one of the lowest average advertised broadband access speeds in the OECD (Figure 19 below).

¹¹⁹⁹ See consumer study on the telecommunication market in Poland, 2010, ordered by UKE, http://www.uke.gov.pl/gallery/36/93/36938/Rynek_telekomunikacyjny_w_Polsce_2010_Klienci_i_ndywidualni_27.12.2010.pdf, page 133 and 137. It is noted that 47% of respondents answered they do not need Internet access at all.

Figure 19. Average advertised broadband download speed, kbit/s, September 2008



Source: OECD Broadband Portal

- (849) In the same vein, the Commission 15th Implementation Report reveals that broadband speeds in Poland were amongst the lowest in Europe in 2009, with over 66% falling in the range of 144Kbps and 2Mbps compared to an EU average of 15.4% for this segment. Speeds up to 2 Mbps continued to be popular due to price and consumer preferences.¹²⁰⁰
- (850) In the SO Reply, TP claims that the regulation of prices in Poland (retail minus methodology) has influenced negatively the development of investments in the infrastructure and as a consequence resulted in lower speeds offered on the retail market.¹²⁰¹
- (851) These arguments of TP are not clear. As pointed out in the recitals (840) to (841) above the low level of investments in the telecommunications infrastructure is strongly correlated with the low broadband penetration rate resulting from TP's strategy to limit AOs' access to its network. As shown in sections VIII.3 and VIII.4, despite the strong interest of AOs only few of them managed to receive LLU or BSA access, yet many orders for access were refused or delayed in their implementation.

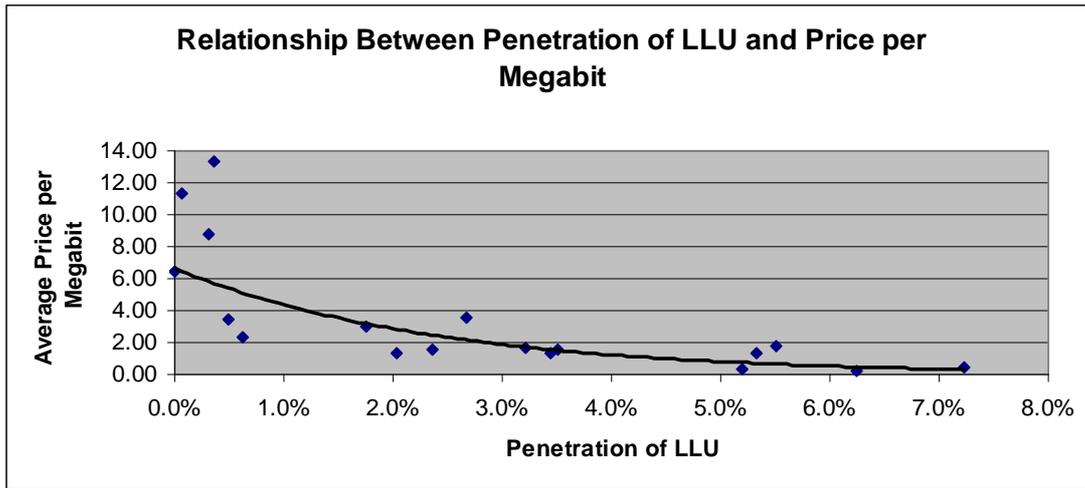
TP's conduct resulted in high retail broadband prices

- (852) There is a negative correlation between LLU penetration and the price per Megabit ("Mbit") of broadband access. This relationship is shown in Figure 20.

¹²⁰⁰ European Commission 15th Implementation Report, pages 312-313.

¹²⁰¹ SO Reply, paragraph 895.

Figure 20 Relationship Between Penetration of LLU and Price

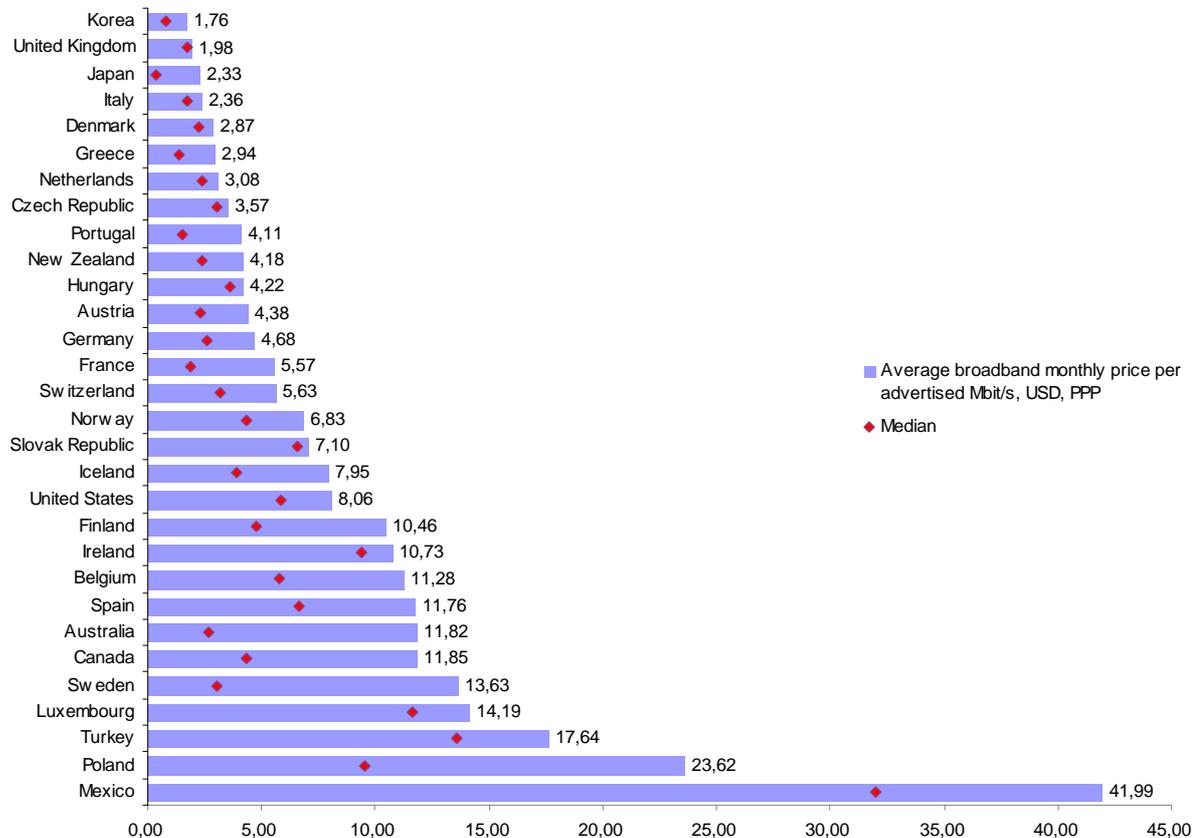


Source: ECTA Regulatory Scorecard 2007, page 6.

(853) The low LLU penetration rate in Poland coincides with high prices for broadband access. As it can be seen from Figure 21 the retail broadband monthly prices per advertised Mbit/s at purchasing power parity ("PPP") were the second highest in the OECD and much higher than the prices in other countries of the region (Czech Republic, Hungary). Broadband access in Poland was the second most expensive in the OECD in terms of the price and performance ratio.

Figure 21. Average broadband monthly price per Mbit/s, 10.2009, USD PPP

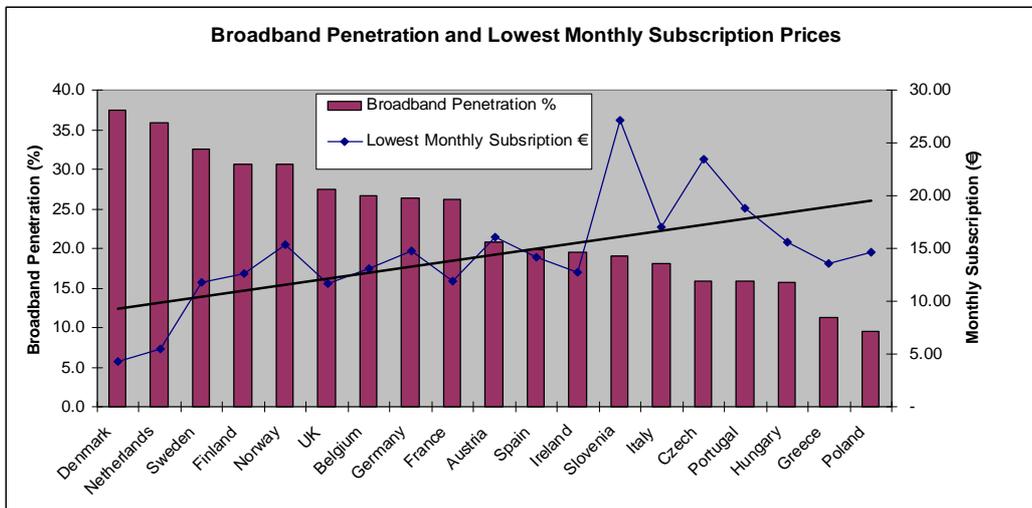
Average broadband monthly price per advertised Mbit/s, Oct 2009, USD PPP



Source: OECD, Broadband Portal, directly accessible at <http://www.oecd.org/sti/ict/broadband> (OECD Broadband statistics (4f))

(854) Furthermore, as pointed out in ECTA Regulatory Scoreboard 2008, countries with the lowest prices tend to have higher broadband penetration rates. As shown in Figure 22 it is symptomatic that Poland with its relatively high retail prices remains the country with the lowest broadband penetration rate.

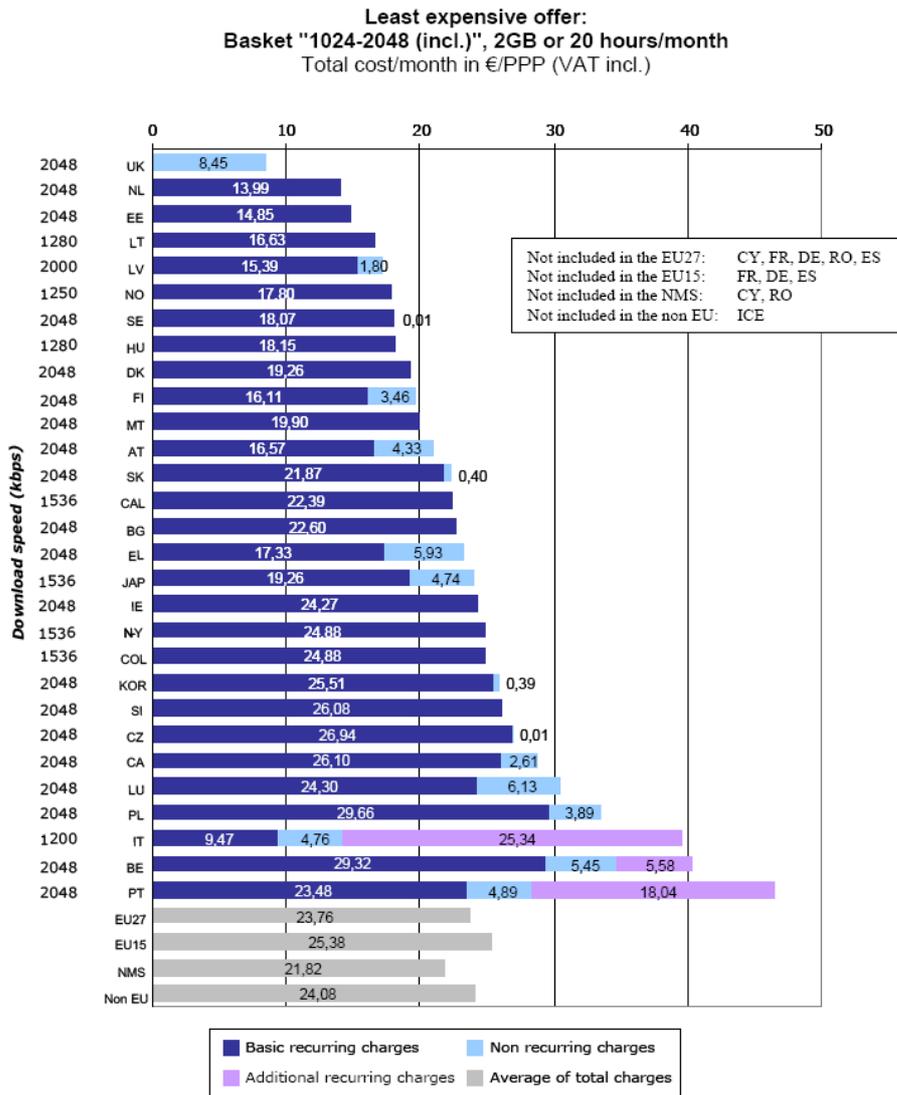
Figure 22 Relationship between price and broadband penetration



Source: ECTA Regulatory Scorecard 2008, page 39.

(855) Similarly, in the Van Dijk report prepared for the European Commission (Figure 23), Poland appears as one of the most expensive countries in Europe (especially in relation to broadband offers up to 2Mbit, which are the most popular in the country).

Figure 23 Prices for broadband offers up to 2 Mbit/s (non-bundled offers)



Source: Van Dijk Report on Broadband Internet Access Cost (BIAC), First half of 2008, page 52

(856) TP argues¹²⁰² that retail broadband prices in Poland are not high. Firstly, TP claims¹²⁰³ that a comparison of prices taking into account the purchasing power is not justified as the costs of providing services are based on the same elements in all networks and are not connected to the wealth of degree of the society (GDP). Secondly, to support its claims on low retail prices in Poland TP used some data from a UKE document¹²⁰⁴ and a PricewaterhouseCoopers Report showing that prices in Poland are low.¹²⁰⁵ Thirdly, TP argues¹²⁰⁶ that Poland deviates in positive terms from the correlation that "lower broadband penetration results in higher prices", since in Poland the prices are even lower than in many EU Member States characterised by higher broadband penetration rates. Lastly, TP

¹²⁰² SO Reply, paragraphs 877-894.

¹²⁰³ Idem, paragraph 877. See also TP's reply to the letter of facts, paragraphs 397-412.

¹²⁰⁴ SO Reply, paragraph 879. See also TP's presentation for the Oral Hearing, slide 33-34, page 17 quoting UKE's analysis of retail prices.

¹²⁰⁵ SO Reply, paragraph 880.

¹²⁰⁶ SO Reply, paragraph 878, by reference to SO Figure 21: Relationship between prices and broadband penetration.

considers¹²⁰⁷ that retail broadband prices in Poland could be lower if the NRA had replaced the retail minus price regulation of BSA by another methodology. According to TP, the retail minus methodology does not provide TP with incentives to lower the prices in the retail market.¹²⁰⁸

- (857) The Commission does not consider the arguments of TP well-founded and reiterates that retail broadband prices in Poland are without doubt amongst the highest in the EU (see Figure 21 and Figure 23).
- (858) Firstly, as to TP's comment that the purchasing power value should not be taken into account when comparing prices, it should be noted that lots of studies comparing broadband retail prices often use the purchasing power parity in order to ensure uniformity in financial terms. This comprises the Report of van Dijk for the European Commission on Broadband Internet Access Costs¹²⁰⁹ and all benchmarks of broadband prices of the OECD Broadband portal. This approach is also confirmed by the ERG in its Report of 2008 on the methodology for comparison of Broadband Retail prices.¹²¹⁰ Contrary to TP's arguments¹²¹¹ the use of this methodology is thoroughly justified: "*[r]egarding the currency, in the case of European countries the use of separate comparisons for the Euro and the Euro adjusted by Purchasing Power Parity (PPP), according to the differences in the level of purchasing power across Member States, is the rule. The use of PPP is justified by the fact that the differences in values of GDP among countries are related, to a considerable extent, to the level of prices. This correction therefore ensures avoidance of any impact from factors beyond the service providers for comparable purposes.*"¹²¹² Although there are reports where the ERG or the Commission does not use this methodology, it is always justified by "*the specific objective of the Report.*"¹²¹³ The Commission in the present Decision refers to retail prices in Poland as compared with prices in other Member States. Such comparison is only plausible when taking into account the PPP methodology.
- (859) TP also argues¹²¹⁴, as alleged shortcomings of the PPP methodology, that (i) the calculations are based on estimated data about prices in Europe which might be outdated and take into account different consumption patterns and different basket offers, and that (ii) the use of the PPP methodology is justified only in countries with high inflation rates and that in Europe due to the currency integration price differences are insignificant. The Commission notes that TP did not present any solid arguments to support its allegations that data used by OECD, BEREK or the Commission are outdated or inappropriate. Such reports always show the relevant date of the collected data and moreover take into account such issues as consumption patterns or different baskets of services (see for example the Van Dijk Report referred to in recital (855) above). Finally, TP's

¹²⁰⁷ SO Reply, paragraphs 882-894.

¹²⁰⁸ Idem, paragraphs 893-894

¹²⁰⁹ Report of Van Dijk for the European Commission on Broadband Internet Access Costs, http://ec.europa.eu/information_society/eeurope/i2010/docs/benchmarking/broadband_access_costs_1st_half_2008.pdf.

¹²¹⁰ ERG 2008 Report on the methodology for comparison of Broadband Retail Prices, ERG(08) 44 final, BB Retail Prices Methodology, 081017, page 43, http://berec.europa.eu/doc/publications/erg_08_44_final_bb_retail_prices_methodology_081017.pdf

¹²¹¹ TP's reply to the letter of facts, paragraph 399.

¹²¹² ERG 2008 Report on the methodology for comparison of Broadband Retail Prices, ERG(08) 44 final, BB Retail Prices Methodology, 081017, page 24.

¹²¹³ See for example 15th Implementation Report.

¹²¹⁴ TP's reply to the letter of facts, paragraphs 400-412.

argument on the currency integration in Europe resulting in a small price differences is far reaching as currently only 17 countries belong to euro zone and Poland is outside of it.

- (860) Secondly, the figures of UKE and PriceWaterhouseCoopers used by TP to support its claims about low retail prices in Poland¹²¹⁵ do not fully reflect the price levels in Poland as they (i) compare prices in absolute terms or (ii) present the prices offered by the incumbent only without reflecting the AOs prices. The UKE Report on retail prices quoted by TP during the Oral Hearing¹²¹⁶ compares the prices in Poland with the EU and US in absolute terms, thus does not reflect the real price level of incumbent and AOs' offers. As UKE pointed out only the figures based on OECD data reflect the welfare of society and are presented in terms of PPP.¹²¹⁷ TP is also not correct to limit the analysis of retail prices only to a simple comparison of the incumbents' offers. On the contrary, at the early stage of development of alternative offers based on the access to the incumbent's network, low retail prices of the incumbent may limit the competition by leaving a small margin for AOs to propose competitive offers in order to gain market shares. It is important therefore that in situations, such as in the case of Poland, where the incumbent's retail prices are low, the costs of accessing the incumbent's network are reasonable for AOs. However, as proved in chapter VIII the AOs faced high costs of accessing TP's network resulting *inter alia* from the delays, unreasonable conditions, difficulties in accessing SANs or collocation rooms, overestimated collocation costs, unjustified rejections of orders and the low quality of the general information received from TP.
- (861) In this regard, the Commission reiterates that the OECD broadband statistics of 2009 continue to show Poland as the most expensive country in Europe. Figure 21 above for 2009 shows a positive trend compared to the equivalent OECD figure for 2008 - the average broadband monthly price per advertised Mbit/s dropped from 32.59 in October 2008 to 23.62 (€ per month) in October 2009 (a decrease in the average monthly price of 8.97€). Still, however, prices in Poland are the highest in Europe and clearly above the EU average. The drop in prices is most likely a positive result of the Agreement signed between TP and the Polish NRA.
- (862) Thirdly, TP is mistaken in claiming that Poland deviates in positive terms from the correlation that "*lower broadband penetration results in higher prices*" and that prices in Poland are even lower than in many EU countries characterised by a higher broadband penetration rate (based on Figure 22). The Commission acknowledges that this is true in relation to three countries (namely Norway, Germany and Spain), and not to "*many EU countries*" as TP purports. In the majority of cases countries with high broadband penetration rates are characterised by lower retail prices (Denmark, Netherlands, Sweden, Finland, UK, France), and countries with low broadband penetration rate encounter high retail prices (see Slovenia, Italy, Czech Republic, Portugal, Greece, Poland).
- (863) Lastly, the methodology chosen by UKE to regulate BSA broadband prices in Poland (i.e. retail minus) is outside the scope of the current investigation. Irrespective of the retail minus methodology (which only applies to one of the wholesale products available in Poland, BSA), retail prices in Poland could have

¹²¹⁵ SO Reply, paragraphs 879-880.

¹²¹⁶ UKE, Analysis of the fixed broadband Internet access prices in Poland and in the EU, June 2010.

¹²¹⁷ UKE, Analysis of the fixed broadband Internet access prices in Poland and in the EU, June 2010, page 7 and pages 17-18.

been easily lowered if xDSL alternative operators/or competitors could have entered the market and exerted a real competitive restraint on TP.

4.4.5. Input foreclosure has been a rational, profitable strategy for TP

- (864) In the preceding recitals, it has been explained that the refusal to supply imposed by TP on its competitors was likely to restrict competition by creating barriers to entry and expansion to its competitors, with the above-described likely adverse effects on consumers in terms of high prices, low broadband penetration rate and limited product differentiation (in terms of low average speed).
- (865) TP's strategy has been profitable for TP itself in two ways. Firstly, by delaying profitability and imposing high financial costs on its competitors, TP has prevented these competitors from entering and expanding in the retail market and consequently reserved to itself a large share of the profits in this market. Also, TP has artificially reserved to itself a first mover advantage in the retail broadband market by delaying its competitors' entrance on the market. TP's first mover advantage has increased rivals' costs relative to TP because TP has benefited as a first mover from network externalities, learning by doing cost reduction or customer lock-in effects.
- (866) The incumbent's strategy to keep competitors out of the market for infrastructure (the wholesale market for local loop access and the BSA wholesale market) prevented network competition which would have threatened the incumbent's core services. TP has put obstacles to its competitors which have prevented them from reaching a critical size, thus making it riskier and less attractive for them to rapidly climb the ladder of investment and thereby challenge TP's upstream position. In this respect, Netia stated that "*it treats [actions of TP] as an attempt to impede the extension of the network by new locations, what obviously has a direct impact on competitiveness of Netia as an alternative operator but also on the pace of development of services based on LLU technology in Poland. Apart from the above, such actions of TP have also a very detrimental effect both on the pace of the digital development of the regions as well as a range of services which Netia could offer thanks to such technologies as LLU, and which are not offered by TP.*"¹²¹⁸
- (867) Even though a low level of sales at the wholesale level (due to the refusal to supply) may affect TP's revenues at this level, by reducing the competitive constraints at the retail level TP is able to sustain a high level of retail prices. It is likely that the profits extracted from the high level of retail prices that TP is able to impose surpasses by far the predicted profits related to the forsaken wholesale sales.

4.4.6. Conclusion

- (868) The Commission demonstrated that TP's conduct was likely to constrain the ability of DSL operators to compete effectively in the retail market. Access contracts that include burdensome obligations may diminish the quality of the product and/or increase AOs's costs and/or limit their sales. Lengthy negotiations may benefit the incumbent, especially when introducing new services (i.e. first mover advantage)

¹²¹⁸ Netia's reply to the RFI of 23 February 2009, page 2.

- (869) It was also observed that there was a low take up of BSA and LLU lines, and that TP remains the largest xDSL supplier on the retail market. The low number of unbundled local loops is a revealing indicator of the likely effect of TP's refusal to supply access to its wholesale products, delaying the growth of competition and thereby the development of alternative infrastructures.
- (870) It is also symptomatic that the broadband penetration rate in Poland is among the lowest in the EU and that Polish broadband prices are among the highest. The Polish market remains far behind in the EU in terms of network deployment: the total number of unbundled lines remains still very low compared to other EU Member States.
- (871) Furthermore, since the implementation of TP's Agreement with the Polish NRA the likely negative effects previously felt on retail markets started to diminish. As showed above on the basis of recent data (i.e. 15th Implementation Report, OECD data and UKE reports) the number of unbundled lines has increased recently and as a result, the broadband penetration rate in Poland has started to grow and retail prices dropped. Poland however still remains the country with one of the worst indicators in terms of broadband penetration, speeds and prices in Europe.
- (872) In view of the evidence outlined in subsections 4.4.1 to 4.4.4 it is clear that TP's conduct was likely to restrict competition in the relevant markets and was likely to have a negative impact on end-users.

4.5 Objective justifications and efficiencies

- (873) Exclusionary conduct may escape the prohibition of Article 102 TFEU if the dominant undertaking can provide an objective justification for its behaviour or if it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant company.¹²¹⁹ It is for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.¹²²⁰
- (874) A given conduct is objectively necessary where the dominant undertaking is able to show that the alleged abusive conduct is actually necessary on the basis of objective factors external to the dominant undertaking and is proportionate (*'objective necessity defence'*). The dominant undertaking may also justify its conduct leading to a foreclosure of competitors on the ground of substantial efficiencies (*'efficiency defence'*).¹²²¹

4.5.1. TP's arguments

- (875) In the present case, TP did not dedicate a separate chapter in its SO Reply or in its reply to the letter of facts to possible objective justifications. TP however noted in

¹²¹⁹ See Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* (Michelin II) [2003] ECR II-4071, paragraphs 107-109.

¹²²⁰ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Article 101 and 102 TFEU], OJ L 1, 4 January 2003, recital 5 and article 2.

¹²²¹ Guidance on the Commission's enforcement priorities in applying Article 102 TFEU, paragraphs 28-30.

a general way that "all alleged anticompetitive TP's behaviour resulting in limitation of competition (...) either have not taken place at all or they can be objectively justified."¹²²² In a similar way TP stated that "[f]undamentally, TP firmly objects to all allegations (...). They are either groundless or TP's actions described therein have objective justification."¹²²³ TP argued also that the difficulties the AOs were facing "were not linked to a strategy but can be explained by the technical works and internal reorganization which TP had to undergo in a very short period of time to adjust to the new regulatory environment."¹²²⁴ Also, TP drew the Commission's attention to "the necessity to simultaneously manage several projects on many various wholesale services"¹²²⁵ and to the difficulties in developing proper IT systems which would support the new processes for the wholesale services and in finding human resources to perform certain projects.¹²²⁶

- (876) Following a careful analysis of TP's arguments, the Commission notes that TP nevertheless intended to justify its actions on objective grounds with regard to the specific objections of the SO; in particular, TP alleged that:
- (a) TP changed some contractual clauses due to the lack of technical possibilities¹²²⁷ or due to the external factors independent from TP,¹²²⁸
 - (b) constant changes in the ROs required the adaptation of draft agreements and therefore resulted in the prolongation of the negotiations conducted¹²²⁹ and due to the fact that many contracts were being negotiated (149 on BSA/LLU conditions and also other regulated services), at the same time, TP was unable to send to negotiations with AOs representatives with a power to commit the incumbent on all issues¹²³⁰,
 - (c) the refusal of the implementation or the prolonged implementation of AO's orders was objectively justified by the high amount of AOs' orders placed in some periods, which did not correspond to the AOs' forecasts submitted earlier,¹²³¹

¹²²² TP's Reply to the SO, paragraph 3 and 9.

¹²²³ Idem, paragraph 106, 124 and 1011.

¹²²⁴ TP's presentation during the Oral Hearing, slide 6, page 3; see also slide 8, page 37 and slide 12 page 41; TP's Reply to the SO, paragraph 6 and 7 and TP's reply to the letter of facts, paragraph 485.

¹²²⁵ SO Reply, paragraph 6.

¹²²⁶ Idem, paragraphs 5-6.

¹²²⁷ Idem, paragraphs 153-160, 161-165, 197-198, 200-202, 246.

¹²²⁸ Idem, paragraphs 167-170, 175.

¹²²⁹ Idem, paragraphs 6 and 122, 385, 407, 412, 420-422, 437, 443-444, 464; see also TP's presentation for the Oral Hearing, slide 8, page 30 and TP's reply to the letter of facts, paragraph 21.

¹²³⁰ Idem, paragraphs 414 and 422.

¹²³¹ TP's presentation during the Oral Hearing, Implementation of BSA and LLU services in 2006-2008, slide 9, page 38; see also TP's Reply to the SO, paragraphs 186-188, 797-798 and TP's reply to the letter of facts, paragraph 24, 346-348 and 480. In this regard TP stated in paragraph 338 of the reply to the letter of facts that "a preparation of resources enabling the timely activation of orders cannot refer to the undefined amount of orders (i.e. notwithstanding the data presented in the forecasts) as this would be economically irrational and would result in TP's incurring high and unreasonable costs, which as a consequence would result in the increase of AOs' costs accessing TP's network."

- (d) delays in the implementation of AOs' orders or refusal to provide the services on non-active lines were also caused by the necessity to adjust internal IT systems in a short time due to the changing regulatory environment,¹²³²
- (e) delays in the development of LLU in Poland resulted from the regulatory policy of UKE, mainly the "*inconvenient relationship of WLR and BSA prices to the LLU price*".¹²³³

(877) It appears from the above that TP raised only the '*objective necessity defence*'.

4.5.2. Commission's assessment

- (878) The question of whether a given conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking¹²³⁴. Such necessity must be based on objective factors that apply in general for all undertakings on the market and the dominant undertaking, based on those factors, must be able to justify that without the conduct the products concerned can not or will not be produced or distributed on that market. Thus, the condition of indispensability¹²³⁵ and the principle of proportionality¹²³⁶ should be also complied with in these situations. Even when a dominant undertaking has identified a justification for its conduct, it must not restrict competition more than it is necessary and appropriate to achieve that legitimate objective.
- (879) Although the Commission has already examined TP's justifications referred to in recital (876) in the respective sections concerning each element of TP's abusive behaviour¹²³⁷, the Commission will nevertheless shortly recall the most important elements of its reasoning. In addition it will also be assessed whether TP's behaviour was objectively necessary, proportionate and indispensable.
- (880) Firstly, TP's argument on the difficulties in the compliance with regulatory obligations due to the high activity of NRA cannot be accepted as objectively justified. The regulations which *inter alia* introduced the ROs into the Polish market were imposed after administrative proceedings including consultation of all interested parties, and particularly TP as a SMP operator. TP was also required under legal binding provisions to propose the first draft ROs and had a key role in the discussion with UKE of the ROs' future specific requirements. However, TP chose to abstain from the preparations of the draft ROs and always challenged them when they were introduced, requesting the withdrawal of the ROs or their modifications (see recital (150)).
- (881) Secondly, TP as a party to all administrative proceedings was well-placed to know the possible solutions and modifications of the future regulations and could have prepared its resources and its systems for applying such specific solutions on time. Those actions are entirely dependent on TP's side and therefore the lack of action by TP cannot be considered as an objective justification. Therefore difficulties as lack of human resources and lack of IT systems could have also

¹²³² TP's Reply to the SO, paragraphs 199-202, 724-733.

¹²³³ TP's presentation during the Oral Hearing, Implementation of BSA and LLU services in 2006-2008, slide 5, page 34 and TP's Reply to the SO, paragraphs 908-909.

¹²³⁴ Guidance on the Commission's enforcement priorities in applying Article 102 TFEU, paragraph 29.

¹²³⁵ Case T-30/89 *Hilti*, paragraph, 118; Case T-83/91 *Tetra Pak II*, paragraphs 83-84 and 138.

¹²³⁶ *Case BBI/Boosey and Hawkes*, paragraph 19, opinion of AG Kirschner in Case T-51/89 *Tetra Pak v Commission*, paragraph 67-69.

¹²³⁷ See recitals (291) - (294), (349) - (365), (506) - (509).

been avoided by TP. In addition, some regulatory obligations inserted in the ROs were even defined earlier than the ROs as they stemmed from the TL, its secondary legislation and the SMP decisions. TP was also aware about its obligation to give access to its network and to the relevant wholesale products from the moment the TL entered into force, already in 2003¹²³⁸. The Commission does therefore not find TP's arguments acceptable. Although the "*high regulatory activity of UKE*" could be considered as an external factor to TP, it was however demonstrated by the Commission that TP influenced UKE's regulatory activities by either not complying with previous regulations, by misinterpreting the rules or by systematically challenging all ROs.

- (882) Finally, TP underlined that it needed to simultaneously manage several projects on various wholesale services. The introduction of new regulation in various wholesale services could in fact have resulted in TP's implementation of many projects but it could not be objectively justified as TP was aware of these requirements and should have planned and prepared itself to comply with its regulatory obligations on time. On contrary, TP challenged the regulation and impeded the provision of the wholesale products. The evidence in the file confirms that TP also implemented projects aimed at impeding AO's access to TP's network and the LLU and BSA wholesale products (see recital (149), points (a) and (d)).
- (883) TP's justifications with regard to some specific objections raised in the SO (recital (876)) cannot be accepted. For the sake of clarity the Commission reiterates the following:
- (a) Firstly, TP's calling on the lack of technical possibilities or on external independent factors to justify the unreasonable contractual proposals (such as additional time needed for commissioned external works and administrative permits) cannot be accepted on objective grounds. In the first place, it is recalled that TP, as one of the largest companies in Poland, has a significant bargaining power and freedom to choose solid contractors able to meet even tight deadlines (see recital (294)). Also, as stated above in recital (293), the procedure leading to the introduction of a RO foresees TP's central role in preparations of the ROs and therefore, TP should have been aware of all technical requirements introduced by each updated or new RO. Furthermore, while establishing the ROs' regulatory deadlines the NRA took into consideration the time needed for administrative permissions and other time-related arrangements necessary for the completion of the investment process.
- (b) Secondly, TP's reference to the constant changes of the ROs requiring the adaptation of TP's draft agreements cannot be accepted as an objective justification of the fact that TP significantly and notoriously prolonged the negotiations with the AOs. The process of RO's modification always involved TP. It was in fact at the incumbent's requests that a number of ROs' revisions or modifications took place. TP, as a party to the proceedings was always aware of the scope and nature of any modification in advance. Therefore, TP could have incorporated all necessary changes smoothly. In addition, TP could have made use of the sample contracts attached to the ROs (see recitals (307) and (356)).

¹²³⁸ The Act of 22 May 2003 on amending the Telecommunications Act (OJ No 113, item 1070) entered into force on 1 October 2003; Furthermore, the obligation of providing access to the incumbent's network to provide BSA and LLU services was already defined in the Regulation 2887/2000 applicable in all Member States of the UE, so in Polish case, applicable after the Poland's accession to the EU, namely after 1 May 2004.

Also, TP was responsible itself for preparing its resources and ensuring that the negotiations were dealt with by competent staff (see recital (371) - (373)).

- (c) Thirdly, AOs' underestimated forecasts of orders can not constitute an objective justification of TP's problems with the timely implementation of AOs' orders.¹²³⁹ The evidence shows that the problems with timely implementation of orders lied on TP's side (see recitals (474) - (479)). In addition, TP did not provide GI enabling AOs to prepare correct forecasts, and failed to provide AOs with IT solutions for the implementation of orders (see recitals (511) - (515) and (531) - (532)).
- (d) Fourthly, TP's reference to the necessity to adjust its internal IT systems in a short time to justify the delays in the implementation of AOs' orders cannot be accepted as objectively justified. TP was aware of the future obligation to provide the BSA and LLU wholesale products already before the introduction of relevant ROs (i.e. from October 2003) and therefore could have prepared its IT systems on time (see recital (293) and (501)). Instead, as shown in section VIII.1, TP focused on preparing impediments to the development of competition.
- (e) Finally, TP's allegations that the delays in the development of LLU in Poland resulted from the regulatory policy of UKE, mainly due to the "*inconvenient relationship of WLR and BSA prices to the LLU price*" cannot be accepted as objective reasons either. Firstly, it is noted that prices for LLU and BSA wholesale products were established by UKE, taking into account the concept of investment ladder, precisely with a view to allowing the development of competition infrastructure (see recitals (604) - (605)). Secondly, the initial price levels for LLU access, were re-examined by UKE soon after their introduction in 2005, and in October 2006 the LLU wholesale access prices were lowered and adjusted to the LLU access prices in other EU countries (see recital (828)).

4.5.3. Conclusion

- (884) In conclusion, it follows from the above that TP's conduct is not objectively justified.

XI. EFFECT ON TRADE BETWEEN MEMBER STATES

- (885) The Court of Justice held that "*Article 82 [now 102 TFEU] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*".¹²⁴⁰ The Court has also clarified that it follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 101 and 102 TFEU must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by EU law and the law of the Member States. Thus, EU law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market

¹²³⁹ TP's reply to the letter of facts, paragraph 480.

¹²⁴⁰ Case 3222/81 *Michelin v Commission* [1983] ECR 3461, paragraph 104. See also Joined Cases *RTE and ITP v. Commission* ECR I-743, paragraphs 69-70.

between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market.¹²⁴¹

- (886) Trade between Member States is generally affected by the conditions governing access to the telecommunications infrastructure and the wholesale services of the dominant network operators, in particular those of the historical operators of fixed and mobile networks, who formerly enjoyed a State monopoly in national markets that were defined geographically and segregated. This is because the conditions governing access to infrastructure and wholesale services determine the capabilities of competitors, including new entrants from other Member States, who require such access in order to offer their own services.¹²⁴²
- (887) In the present case, trade between Member States is affected because the abusive conduct described above relates to the access services of the dominant operator, which extend over the entire territory of Poland, and that territory constitutes a substantial part of the common market. These practices affect the market structure by raising barriers to entry to telecommunications operators in Poland. By definition, restricting the possibility for companies active in other Member States to establish themselves in Poland affects trade between Member States.¹²⁴³

XII. REMEDIES AND FINES

1. Article 7(1) of Regulation No 1/2003

- (888) In accordance with Article 7 (1) of Regulation No 1/2003, where the Commission finds that there is an infringement of Article 102 TFEU, it may require by decision that the undertaking concerned brings such an infringement to an end.¹²⁴⁴
- (889) To the extent that any of the identified abusive practices are still ongoing, TP is required to bring such infringement to an end, and henceforth to refrain from any practices which would have the same or similar object or effect as described in this Decision.

2. Article 23(2) of Regulation No 1/2003

- (890) Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 102 TFEU. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

¹²⁴¹ Case 22/78 *Hugin/Commissione* [1979] ECR. 1869, paragraph 17; Case C-475/99 *Ambulanz Glöckner* [2001] ECR. I-8089, paragraph 47; Case C-407/04 P *Dalmine/Commissione* [2007] ECR. I-829, paragraph 89.

¹²⁴² Access Notice, paragraphs 144 to 148.

¹²⁴³ See Judgement of the Court of Justice in case no 45/85, *Verband der Sachversicherer vs. Commission*, ECR [1985], page 405, paragraphs 48-49. The requirement that trade between Member States must be affected should be interpreted uniformly for Articles 81 and 82 [now 101 and 102 TFEU]. See judgement of the Court of Justice in case 22/78, *Hugin vs. Commission*, ECR [1978] page 1869, paragraph 17.

¹²⁴⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 of 4 January 2003.

- (891) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the "Guidelines").¹²⁴⁵
- (892) The Commission considers that, based on the facts described in the present Decision, the infringement has been committed intentionally. The Commission's investigation file contains *inter alia* internal documents of TP showing that TP was aware of the illegality of its refusal to supply and was fully conscious that its behaviour could have the effect of distorting competition in the internal market.¹²⁴⁶ In addition, in view of the fact that similar practices have been condemned on several occasions by the European Courts and the Commission, TP could not have been unaware that its practices violated Article 102 TFEU. In the alternative, the Commission considers on the basis of the evidence referred to above that the infringement has at least been committed by negligence.

3. The basic amount of the fine

3.1 Calculation of the value of sales

- (893) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales¹²⁴⁷, that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market.
- (894) The products to which the infringement relates are: (i) wholesale broadband Internet access products (wholesale broadband access - BSA and local loop unbundling - LLU) and (ii) retail broadband Internet access products (xDSL, cable modem, Ethernet LAN and Wireless LAN, other technologies such as FTTH, WiMAX and satellite) as described in sections IV.1 and IV.2.
- (895) The present case concerns an infringement in the form of a refusal to supply where the abuse took place in one market (wholesale) with the objective to protect sales in a second market (retail). Therefore, the Commission considers that both TP's wholesale and retail sales are directly related to the infringement. At the very least, the retail sales are indirectly related to the infringement. In accordance with the Guidelines on fines, the Commission takes into account for the calculation of the fine both the value of wholesale and retail sales of TP in Poland.
- (896) The Commission normally takes into account the sales made by an undertaking during the last full business year of its participation in the infringement.¹²⁴⁸ In this case, however, the Commission has regard to the significant sales' growth during the period in question in the relevant market, in particular as regards wholesale sales and the fact that the market was still developing and hence growing beyond normal market growth rates at the time of the infringement. It is therefore

¹²⁴⁵ OJ C 210, 1.9.2006, p. 2.

¹²⁴⁶ Case T-66/01, *Imperial Chemicals Industries Ltd/Commission*, judgment of 25 June 2010 para. 412. Case C-280/08P, *Deutsche Telekom v. Commission*, para 124.

¹²⁴⁷ Guidelines, point 12.

¹²⁴⁸ Guidelines, point 13.

appropriate, although not legally required, to take the average annual sales. This is also in line with what TP claimed.¹²⁴⁹

- (897) TP provided the Commission with the yearly value of sales of broadband products (wholesale and retail) in Poland in years between 2005 and 2009¹²⁵⁰ on the basis of which the Commission established the average value of sales during the period of the infringement: EUR [*] (PLN [*]).¹²⁵¹

3.2 *Determination of the basic amount of the fine*

- (898) In order to determine the proportion of the value of sales to be considered as the basic amount (up to 30%, according to the Guidelines on fines), the Commission will have regard under the Guidelines to a number of factors to assess the gravity of the infringement, such as the nature, the geographic scope of the infringement, the market share and whether or not the infringement has been implemented.¹²⁵² These will be analysed in sections 3.2.1.1 to 3.2.1.4.

3.2.1. Gravity

3.2.1.1. Nature of the infringement

- (899) The infringement concerns an abuse of a dominant position in the form of a refusal to supply. A refusal to supply by undertakings in a dominant position has already been condemned on several occasions by the Commission and the European Courts.¹²⁵³
- (900) The relevant markets for the purposes of this Decision are markets of considerable economic importance, which play a crucial role in the creation of the information society. Broadband connections are a prerequisite for the provision of a variety of digital services to end-users.
- (901) As has been mentioned in several instances in this Decision, TP is the only owner of a nation wide telecommunications network. In order to provide Internet services on the basis of xDSL technology, the AOs are entirely dependent on TP.
- (902) It has also been outlined in section VIII.1 that TP's practices form part of an abusive behaviour aimed at excluding competitors from the retail market or at least delaying their entry and/or expansion in this market. Also as it was stated in

¹²⁴⁹ TP's reply to the letter of facts, paragraph 495, p. 91.

¹²⁵⁰ TP's reply to the RFI of 6 January 2011.

¹²⁵¹ The average annual sales were established by first calculating a daily average for the exact period in question and then multiplying this amount by 365.

¹²⁵² Guidelines, point 20.

¹²⁵³ See in particular Judgment of 6 March 1974 in Joined Cases 6/73 and 7/73 *Istituto Chimioterapico and Commercial Solvents v Commission* [1974] ECR 223, Judgment of 26 November 1998 in Case 7/97 *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, Judgement of 9 September 2009 in case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission*, Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, Joined Cases 6/73 and 7/73 *Istituto Chimioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR 743, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland/Air Lingus* – (OJ L 96, 10.4.1992, p. 34)

recital (892) TP was aware of illegality of its conduct. This impacts negatively the competition and consumers, who have suffered from higher prices, less choice and reduced availability of innovative broadband products.

- (903) In the reply to the letter of facts, by reference to the *Intel* decision¹²⁵⁴ TP claimed that the Commission in establishing the duration period of the infringement should take into consideration the fact that some practices had a shorter duration than the infringement period.¹²⁵⁵ In this regard it is noted that although the intensity of TP's behaviour differs across the period of the infringement, the abusive conduct is visible throughout the whole period of abuse.

3.2.1.2. Market share

- (904) During the entire infringement period, TP held a dominant position, not only in the wholesale broadband market in Poland, where it enjoys a monopoly, but also in the retail markets where TP's market shares in revenue terms have ranged between 57% and 46%. In addition, the retail market shares of TP's next competitor have trailed that of TP by a significant distance¹²⁵⁶

3.2.1.3. Geographic scope

- (905) TP's anticompetitive conduct covered the whole territory of Poland.¹²⁵⁷

3.2.1.4. Conclusion on the gravity of the infringement

- (906) When determining the proportion of the value of sales to be used to establish the basic amount of the fine, the Commission took into account the factors set out above, in particular: the nature of the infringement, the geographic scope, the market shares and the fact that the infringement has been implemented.
- (907) In assessing the gravity of the infringement the Commission has also taken into account the fact that not all elements of TP's conduct were in place at the same time as the process of obtaining access to TP's wholesale broadband products has several, distinct, consecutive stages.¹²⁵⁸
- (908) In view of the above, the proportion of the value of sales to be used to establish the basic amount of the fine to be imposed on TP should be [*]%.

¹²⁵⁴ COMP/C-3/37.990 Intel, decision of 13 May 2009.

¹²⁵⁵ TP's reply to the letter of facts, paragraph 462-463.

¹²⁵⁶ See section X.3.

¹²⁵⁷ See section X.2.

¹²⁵⁸ These steps include: negotiating access and collocation contracts, accessing TP's network, activating subscriber lines and obtaining the General Information. Thus, for instance, an AO could not experience problems at the stage of accessing TP's network prior to signing the access contract with TP. At the same time, AOs' problems at the stage of accessing TP's network or activating the subscribers lines commenced after the lengthy negotiations of access and collocation contracts were concluded. Also, the planning of business strategies of AOs was impeded by TP's provision of low quality and incomplete GI, both prior to the signature of access contracts and after.

3.2.2. Duration

- (909) TP's abuse of its dominant position commenced on 3 August 2005.¹²⁵⁹ On the basis of the available evidence referred to in sections IX.2 and IX.3 the Commission concludes that the infringement continued at least until 22 October 2009.
- (910) Therefore, the overall duration of TP's infringement to be taken into account for the calculation of the fine to be imposed amounts to 4 years and 2 months.
- (911) Therefore, for the purposes of the calculation of the fine, the amount determined in recitals (897) and (908) above should be multiplied by 4,16 to take account of its duration.

3.2.3. Conclusion on the basic amount of the fine

- (912) On the basis of the above, the basic amount of the fine to be imposed on TP should be EUR 136 000 000.

4. Adjustments to the basic amount

- (913) According to the Guidelines, the basic amount of the fine may be reduced where the Commission finds mitigating circumstances.
- (914) In the reply to the letter of facts and submission of 6 June 2011 TP argues that the following factors are relevant mitigating circumstances: (i) TP undertook measures aimed at enhancing cooperation with AOs, (ii) the activities of the NRA had a considerable impact on TP's behaviour and that (iii) TP undertook significant investments following the Agreement with UKE, mainly in broadband networks.¹²⁶⁰
- (915) TP's arguments are not convincing. Firstly, the Commission reiterates that the nature of the abuse should have been known to TP throughout the relevant period, especially because the abuse in the form of a refusal to supply has already been subject of Commission's decisions and the European Courts' judgments. Secondly, TP failed to undertake immediate measures aimed at removing AOs' obstacles in accessing TP's wholesale products. To this end, TP's commitment to respect the provisions contained in the Agreement of 22 October 2009 demonstrates TP capability to provide unimpeded AOs access to its wholesale products, which should have taken place earlier. TP's argument according to which the NRA had a negative impact on TP's behaviour has already been addressed in a number of sections in this Decision.¹²⁶¹ It suffices to add at this point that TP chose not to cooperate with the NRA.¹²⁶² Finally, the Commission considers that the investments TP undertook following the Agreement with UKE

¹²⁵⁹ This is the day of the beginning of the first access negotiations with AOs. See TP's reply to the RFI of 22 December 2008.

¹²⁶⁰ TP's reply to the letter of facts, para. 474-492, p. 87 – 90, spontaneous submission of TP of 6 June 2011. TP states that it invested EUR 168,3 million in broadband infrastructure modernisation and construction until the end of 2010 and an additional EUR 49 million until March 2011 to implement the Agreement.

¹²⁶¹ See recitals (286) - (290).

¹²⁶² See recital (150).

cannot be qualified as a mitigating factor as they do not, in any case, alter the character of TP's behaviour in the period 3 August 2005 – 22 October 2009.

- (916) In the light of the above analysis concerning mitigating circumstances, the Commission considers that there is no justification for reducing the amount of the fine to be imposed on TP.

5. Conclusion

- (917) According to Article 23(2) of Regulation No 1/2003, the final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the undertaking participating in the infringement.¹²⁶³ The total turnover of TP amounted in 2010 to PLN 15 715 000 000, that is, EUR 3 933 962 500.¹²⁶⁴ Therefore, the total amount of fine should not exceed PLN 1 571 500 000 (EUR 393 396 250).
- (918) However, TP argues that fines already paid by TP to the Polish authorities for the same type of behaviour should be taken into account.¹²⁶⁵
- (919) As noted in the section VII.2 of the present decision, UKE imposed the following fines on TP in relation to conduct in violation of its regulatory obligations which partially overlaps with the facts described in the present decision:
- UKE decision of 3 April 2007 (DKE-SSE-029-5/06(43)) imposing a fine of PLN 1.000.000 for not respecting the minimum standards of BSA offers in the draft contracts by imposing data transfer limits; the final judgement of the Court of Protection of Competition and Consumers of 26 June 2008 lowered the fine to PLN 800 000 paid by TP on 6 August 2009;
 - UKE decision of 17 August 2007 (ORZ-WE-029-2/07(39)) imposing a fine of PLN 33 000 000 for offering AOs worse contractual conditions than foreseen in the OR LLU; the decision was confirmed by the final judgment of the Court of Appeal of 9 April 2010 and the fine was paid by TP on 20 April 2010.
- (920) Having regard to the above-mentioned fines imposed by UKE on TP for conduct in violation of regulatory obligations which partially overlaps with the facts described in the present decision, the Commission has decided to deduct from the final amount of the fine the sum of all fines paid by TP referred to in the previous recital. To that effect, the total amount of PLN 33 800 000, that is EUR 8 450 000, is to be deducted from the final amount of the fine.¹²⁶⁶
- (921) The final amount of the fine to be imposed on Telekomunikacja Polska S.A. should therefore be EUR 127 554 194.

¹²⁶³ Paragraph 32 of the Guidelines.

¹²⁶⁴ TP Group Annual Report , page 38.

¹²⁶⁵ TP's reply to the letter of facts, paragraphs 464-471 and SO Reply of TP, paragraphs 86-102.

¹²⁶⁶ See fn 9.

HAS ADOPTED THIS DECISION:

Article 1

Telekomunikacja Polska S.A. has committed a single and continuous infringement of Article 102 TFEU from 3 August 2005 until at least 22 October 2009 by refusing access to its wholesale broadband products which consisted of the following elements:

- a) Proposing unreasonable conditions in the draft contracts,
- b) Delaying the negotiations,
- c) Refusing access to its network,
- d) Refusing access to subscriber lines;
- e) Refusing access to General Information;

Article 2

For the infringement referred to in Article 1, a fine of EUR 127 554 194 is imposed on Telekomunikacja Polska S.A.

The fine shall be paid in euro, within three months of the date of the notification of this Decision, to the following account held in the name of the European Commission:

Banque et Caisse d'Epargne de l'Etat
1–2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI / COMP/39.525.

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1 lodges an appeal, it shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002¹²⁶⁷

Article 3

¹²⁶⁷ OJ L 357, 31.12.2002, p. 1.

Telekomunikacja Polska S.A. shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so.

Telekomunikacja Polska S.A. shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 4

This Decision is addressed to Telekomunikacja Polska S.A.

This Decision shall be enforceable pursuant to Article 299 of the TFEU.

Done at Brussels,

For the Commission