

**BEREC Opinion on  
Phase II investigation  
pursuant to Article 33 of Directive (EU) 2018/1972**

**Cases PL/2022/2370-2371**

**Market 3a/2014 and Market 3b/2014 – update of WACC parameters  
in Poland**

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## 1. Executive summary

On 29 April 2022 and 2 May 2022, respectively, the Commission registered two notifications from the Polish national regulatory authority (NRA), Urząd Komunikacji Elektronicznej (UKE), concerning the update of the Weighted Average Cost of Capital (WACC) parameters for regulated products and services related to the market for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location for mass-market product market in Poland.

Each year, UKE issues a decision to set the value of the WACC, which it uses to set regulated rates. The currently notified Decision 1 (PL/2022/2370) is a re-notification of the previously notified measure, and Decision 2 (PL/2022/2371) is a new notification of WACC applicable as of 2023. Both draft measures calculate the WACC for the copper and fibre infrastructure of Orange Polska S.A. (OPL), the operator designated as having significant market power (SMP) on the markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location for the mass-market product market.

The determination of the WACC for regulated products and services related to both markets in Poland was previously notified to and assessed by the Commission in case PL/2021/2314. In this case, UKE notified the update of the WACC for OPL's copper and fibre-based infrastructure.

In its notifications and response to the RFI, UKE states that, under the provisions of the Polish law, a decision defining WACC is not a measure subject to consultation proceedings, such as a decision on the imposition/maintenance/change/withdrawal of regulatory obligations. For these reasons, UKE claims that the currently notified Decision 1 (PL/2022/2370) and Decision 2 (PL/2022/2371) have not been subject to national consultation proceedings.

The Commission has examined the notifications and the additional information provided by the NRA and considers that the notified draft measures affect trade between the Member States and fall within the scope of Article 33(1) of the Code.

The Commission has serious doubts as to the compatibility of the notified draft measures with Union law for the following reason: Non-compliance with Article 23 of the Code in connection with the Article 32(3) of the Code

Based on the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

## 2. Introduction

On 29 April 2022 and 2 May 2022, respectively, the Commission registered two notifications from the Polish national regulatory authority (NRA), Urząd Komunikacji Elektronicznej (UKE), concerning the update of the Weighted Average Cost of Capital (WACC) parameters for regulated products and services related to the market for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location for mass-market product market in Poland.

On 12 May 2022, the Commission sent a request for information (RFI) to UKE and received a reply on 16 May 2022. Pursuant to Article 33(1) of the Code, the Commission may notify the NRA concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the internal market or serious doubts regarding its compatibility with Union law.

The Commission initiated a phase II investigation, pursuant to Article 33 of Directive (EU) 2018/1972 (the Code), with a serious doubts on 30 May 2022. In accordance with Article 33 of Directive (EU) 2018/1972 and its rules of procedure, on 3 June 2022, BEREC established a dedicated Expert Working Group (EWG) with the mandate to prepare an Opinion concerning the justification of the Commission's reservations (hereinafter serious doubts) in the aforementioned case.

On 13 June 2022, the EWG held two virtual meetings. One meeting included interviews with relevant colleagues from UKE, and the other included interviews with relevant colleagues from the Commission. The objective of the EWG was to reach a clear conclusion on whether or not the Commission's serious doubts are justified.

The EWG finalized its draft Opinion on 17/6/2022, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 29 June 2022. BEREC now issues this Opinion in accordance with Article 33 (3) of Directive (EU) 2018/1972.

## 3. Background

Each year, UKE issues a decision to set the value of the WACC, which it uses to set regulated rates. The currently notified Decision 1 (PL/2022/2370) is a re-notification of the previously notified measure (described below), and Decision 2 (PL/2022/2371) is a new notification of WACC applicable as of 2023 (described below). Both draft measures calculate the WACC for the copper and fibre infrastructure of Orange Polska S.A. (OPL), the operator designated as having significant market power (SMP) on the markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location for the mass-market product market.

### Previous notifications

The Commission previously notified and assessed the markets for local and central access in Poland under cases PL/2019/2160 and PL/2019/2161.

UKE identified a lack of potential competition in both markets and imposed a set of regulatory obligations on OPL, including price control and regulatory accounting obligations.

The determination of the WACC for regulated products and services related to both markets in Poland was previously notified to and assessed by the Commission in case PL/2021/2314. UKE's notified the update of the WACC for OPL's copper and fibre-based infrastructure.

UKE's calculation of the WACC for the copper infrastructure followed the methodology set out in the 2019 'Commission Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector' (the WACC Notice). UKE used the input parameters calculated in the 2020 'BEREC Report on WACC parameter calculations according to the European Commission's WACC Notice'<sup>8</sup> (the BEREC Report).

Whereas the Commission did not have comments on the substance of the notified draft measure, the Commission issued a comment relating to the lack of public consultations in accordance with Article 23 of the Code. It urged UKE to adhere to the applicable EU regulatory framework in its decision-making procedures, in this case, the provisions of Article 23 of the Code. Pursuant to Article 23 (1) of the Code, Member States shall ensure that NRAs give interested parties the opportunity to comment on draft measures within a reasonable period of in any event not shorter than 30 days, in case they intend to take measures in accordance with the Directive. UKE indeed engaged some interested 3rd parties in its decision-making process, particularly by allowing their representative organizations to participate in the proceedings. However, that is not equivalent to a public consultation provided for in the above-mentioned Article 23.

## **Current notification and the Commission's serious doubts**

### *Current notification*

The two notified cases, PL/2022/2370 and PL/2022/2371 rely on the same BEREC Report and subsequently set identical values, with the latter setting the WACC rate for 2023. In reply to the RFI, UKE informs that it needs to adopt a WACC value by June in the given year in order for the accountant to estimate the rates applicable for the following year. For this reason, UKE must, in the present notification, rely on the currently available BEREC Report, i.e. the Report published in June 2021. Therefore, UKE is unable to wait for an updated BEREC report published each year, typically in mid-June, and must apply the values from the previous Report.

UKE states that when initiating the procedure for determining WACC, the President of UKE, in the letter of 4 November 2020, apart from the party to the proceedings (in this case OPL), also notified other organizations, namely telecommunications associations representing operators' active in Poland: KIGEiT, PIIT, PIKE, KIKE. As a result of this

notification, KIGEIT and PIIT submitted their admission requests to participate in the procedure and were given the right to stand in the procedure. UKE states that regardless of the previous, as long as the proceedings are not completed, other organizations may also participate in the procedure upon their request.

UKE in its notification emphasizes that Art. 15 of the Polish Telecommunication Act (TA) in conjunction with Art. 22 par. 2 TA indicates what kind of draft decisions are subject to the consultation proceedings, and what should be understood as a regulatory obligation. At the same time, the enumeration of the regulatory obligations referred to in Art. 22 par. 2 TA, is comprehensive, which means that any other obligations imposed by the President of UKE, referred to in the provisions of TA, are not regulatory obligations whose imposition/ maintenance/change/withdrawal would require consultation proceedings in accordance with Art. 15 TA.

As stated by UKE, the decision determining the WACC pursuant to Art. 53 TA is therefore not a decision subject to a consultation procedure, in particular, it is not a decision on the imposition/maintenance/amendment/withdrawal of regulatory obligations. It is for these reasons that the draft Decisions, which are currently the subject of notification, did not have to and have not been subject to national consultation procedure.

#### *Commission's serious doubts*

The Commission has serious doubts pursuant to Article 33(1) of the Code as to the compatibility of the notified draft measures with Union law for the following reason:

Non-compliance with Article 23 of the Code in connection with the Article 32(3) of the Code

## **4. Assessment of the serious doubts**

On 30 May 2022, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 33 (1) of Directive (EU) 2018/1972. The Commission's doubts concern non-compliance with Article 23 of the Code in connection with the Article 32(3) of the Code.

#### *Concerns of the Commission*

The Commission believes that UKE's reasoning and the procedure at hand are not equivalent to a public consultation provided for in Article 23. Participation of the parties in the administrative proceedings (by providing information and benefiting from the right to access files before the Decision is taken) is a separate legal concept from national consultations on the actual draft measure as envisaged under Article 23 of the Code.

The Commission particularly points to recital 67 of the Code, which states that in the context of a competitive environment, the views of interested parties, including users and consumers, should be taken into account. In order to appropriately address the interests of citizens, Member States should put in place an appropriate consultation mechanism.

The Procedural Recommendation also highlights the importance of public consultation and recommends that pre-notification contacts are particularly important where the draft measure is subject to significant changes following the public consultation. Additional pre-notification contacts are encouraged before the formal notification of such measures under Article 32(3) of the Code.

The Commission has serious doubts that the notified measures at hand fulfil UKE's obligation to adhere to the applicable EU regulatory framework in its decision-making procedures, in this case, the provisions of Article 23 of the Code. Pursuant to Article 23 (1) of the Code, Member States shall ensure that NRAs give interested parties the opportunity to comment on draft measures within a reasonable period if they intend to take measures in accordance with the Directive.

Therefore, the Commission has serious doubts whether UKE, based on Article 32(1) of the Code, is taking utmost account of the objectives set out in Article 3 of the Code. Namely, Article 3 (4) paragraph 2 of the Code clearly states that the Member States shall ensure that national regulatory authorities act transparently. Further, on, Article 6 (2) of the Code states that the Member States shall ensure that national regulatory and other competent authorities exercise their powers impartially, transparently and in a timely manner.

Finally, the Commission has serious doubts in the sense that the national procedure at hand is done in an arbitrary and selective way, non-compliant with the principle of transparency enshrined in Article 23 of the Code. Thus, the draft measures are not compatible with Union law.

#### *Views of UKE*

In its notification and the response to the RFI, UKE states that, under the provisions of the Polish law, a decision defining WACC is not a measure subject to consultation proceedings, such as a decision on the imposition/maintenance/change/withdrawal of regulatory obligations. For these reasons, UKE claims that the currently notified Decision 1 (PL/2022/2370) and Decision 2 (PL/2022/2371) have not been subject to national consultation proceedings.

Moreover, UKE claims that the WACC determined based on the Decision is an independent element and does not affect fees and prices in the market. According to UKE, the application of the WACC value only becomes relevant when used to set the respective fees to which it applies.

UKE also claims that the issuance of the WACC decision does not in itself affect the level of fees for regulated services and does not directly affect the scope of regulatory obligations and how they are set. On the other hand, UKE claims that these can only change in the Decision approving the fees in the reference offer.

Furthermore, UKE claims that the Decision specifying the amount of the WACC is issued as a result of administrative proceedings pursuant to which public administration bodies (in this case, the President of UKE) are obliged to ensure the parties' active participation in every stage of the proceedings, and before issuing the Decision, enable them to comment on the collected evidence and materials as well as on the requests submitted.

Moreover, UKE states that when initiating the procedure for determining WACC, the President of UKE, in the letter of 4 November 2020, apart from the party to the proceedings (in this case OPL), also notified other organizations, namely telecommunications associations representing operators active in Poland: KIGeIT, PIIT, PIKE, KIKE. As a result of this notification, KIGeIT and PIIT submitted their requests for admission to participate in the procedure and were given rights of standing in the procedure. UKE states that regardless of the previous, as long as the proceedings are not completed, other organizations may also participate in the procedure upon their request.

### *BEREC's Assessment*

BEREC notes that in the previous case PL/2021/2314, the Commission has issued a comment relating to the lack of public consultations in accordance with Article 23 of the Code and urged UKE to adhere to the applicable EU regulatory framework in its decision-making procedures, in this case, the provisions of Article 23 of the Code.

Article 32(3) of the Code states that the notification of draft regulatory measures to the Commission, BEREC, and the national regulatory authorities in the other Member States should take place "upon completion of the public consultation if required under Article 23". Article 23(1) of the Code states that "member states shall ensure that, where national regulatory or other competent authorities intend to take measures... which have a significant impact on the relevant market, they give the interested parties the opportunity to comment on the draft measure within a reasonable period..."

BEREC considers that the consultation procedure done by UKE, i.e. actively engaging some interested parties by allowing their representative associations to participate in the proceedings, and subsequent publishing of the draft measures does not meet all the requirements set by Articles 23 and 32(3) of the Code.

BEREC further notes the legal situation under which UKE elaborated the notifications, i.e. that under the currently applicable Polish law, a decision defining WACC is not a measure subject to consultation proceedings. However, considering the primacy of European Union law, this fact does not mean that UKE should not reflect the provisions



of the Code.

Regarding the second reason for the lack of public consultation, which is UKE's consideration that the WACC decision does not itself affect the level of fees for regulated services, BEREC considers the WACC has such an effect on the prices and all factors that may affect the price to any extent it can be considered a significant factor,<sup>1</sup> which requires transparency in decision-making.

BEREC believes that UKE needs to follow a public consultation procedure that ensures transparency and involves all interested parties as stipulated by the Code, even in the current unfortunate legal situation UKE is in.

## **5. Conclusions**

Based on the analysis set out in section 4 above, BEREC considers that the Commission's serious doubts, pursuant to Article 33(1) of the Code regarding the non-compliance with Article 23 of the Code in connection with the Article 32(3) of the Code regarding the draft decision of the Polish national regulatory authority, UKE, on the update of the Weighted Average Cost of Capital (WACC) parameters for regulated products and services related to the market for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location as expressed in the Commission's serious doubts on 30 May 2022, are justified.

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<sup>1</sup> BEREC report on WACC parameters BOR (22) 70 – Executive summary: “The cost of capital is the core element of any regulatory pricing decision NRAs take”