



Brussels, 8.8.2013
C(2013) 5384 final

Conference of Regulators
c/o Vlaamse Regulator voor de
Media (CRC)

Koning Albert II-laan 20 - bus 21
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Belgium

For the attention of:
Mr Carlo Adams
Head of Authority

Fax: +32 2 234 95 52

Dear Mr Adams,

Subject: Commission Decision concerning Case BE/2013/1485: Retail markets for the delivery of broadcasting signals and access to broadcast networks in Belgium

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 09 July 2013, the Commission registered a notification from the Conference of Electronic Communications Sector Regulators (CRC)¹, concerning the retail markets for the delivery of broadcasting signals and access to broadcast networks² in Belgium.

A national consultation³ has been carried out individually by each of the regulators in their respective regions⁴.

¹ Under Article 7 of 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), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² This market is not listed in the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with 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 (Recommendation on relevant markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

⁴ CRC explains that in Belgium four regulators have competences in regulation of the retail market for the delivery of broadcasting signals and access to broadcasting networks, each of them for a specific part of the national territory (linguistic territory), i.e. the Belgian Institute for Postal services and Telecommunication (BIPT), for the bilingual region Brussels-Capital; the Conseil supérieur de l'audiovisuel (CSA), for the French linguistic region; The Vlaamse regulator voor de media (VRM), for the Dutch linguistic region and the Medienrat, for the German linguistic region.

On 24 July 2013, a request for information⁵ (RFI) was sent to CRC and a response was received on 29 July 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II.1. Background

The retail market for the delivery of broadcasting signals and access to broadcast networks in Belgium was previously notified to and assessed by the Commission under case BE/2011/1229⁶. At the time CRC defined the relevant market as the retail market for the delivery of analogue and digital TV signals delivered over cable (CATV) and DSL broadcasting signals delivered over copper (IPTV). Satellite TV as well as digital terrestrial television (DTT) were excluded from the market. CRC did not identify a separate market for bundles but took account of the importance of bundled offers in its significant market power (SMP) and remedies assessment. CRC defined geographically separate markets corresponding to the coverage areas of individual cable operators in Belgium, i.e. (i) Telenet in parts of the bilingual region of Brussels-Capital, in nearly all of the Dutch-speaking region of Belgium, and in one commune of the French-speaking region of Belgium; (ii) Brutélé in parts of the bilingual region of Brussels-Capital and in some parts of the French-speaking region of Belgium; (iii) Numéricable in parts of the bilingual region Brussels-Capital and very limitedly the Dutch-speaking region of Belgium; (iv) Tecteo in one commune in the Dutch-speaking region, in nearly all of the French-speaking region, and in parts of the German-speaking region of Belgium; and (v) AIESH in the French-speaking region of Belgium.

CRC found Telenet, Brutélé, Numéricable, Tecteo and AIESH to have SMP in their respective coverage areas and imposed on all of the SMP cable operators the obligation to provide an analogue-TV resale offer, i.e. analogue radio and TV-signals and the connection to the customer network for as long as the SMP operator provides analogue TV. In addition Telenet, Brutélé, Numéricable and Tecteo have been obliged to provide access to their digital TV platform. CRC stated further that, in order to be able to benefit from access to the digital-TV platform alternative operators must also use the analogue TV resale offer. Furthermore Telenet, Brutélé, Numéricable and Tecteo are obliged to provide a broadband Internet resale offer. However, an alternative operator may only resell the broadband Internet offer of an SMP operator if it also uses the digital TV-platform access offer of the same SMP operator. All three access products will be subject to a retail-minus price-cap regulation. The exact method will be made subject to a national consultation and an implementation decision. CRC furthermore imposed non-discrimination and transparency (including the publication of a reference offer and key performance indicators) obligations with regard to the provision of the regulated access products.

The Commission, in its comments, pointed to the lack of a related wholesale market analysis and invited CRC to provide sufficient evidence in its final measure in order to support CRC's statement that if it had carried out a review of the relevant upstream wholesale market(s) the regulatory outcome would not have been different. Moreover CRC was instructed to closely monitor the market and re-assess the developments on the market in terms of infrastructure and services competition and, if necessary, revise its notified market review without delay. Furthermore, the Commission invited CRC to

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ C(2011) 4534.

justify further in its final measure the proportionality of the broadband Internet resale offer obligation in light of the access and the multicasting obligation imposed on Belgacom on the wholesale broadband access market. The Commission was also of the opinion that CRC should reassess in its final measure the proportionality of imposing the analogue TV resale obligation in light of the limited importance of the ability to broadcast to multiple TV-sets for end-users. The Commission concluded that, if the vast majority of end-users can watch TV on multiple TV-sets via IPTV and via CATV, then imposing analogue TV resale as a stand-alone obligation for as long as cable operators provide analogue TV may, potentially, be disproportionate with regard to the objective of evolving to full digital-TV provision. Finally the Commission asked CRC to monitor the impact of the present obligation on the beneficiaries of the analogue resale obligation and their actual parallel investments in, and development of digital innovative services and infrastructures and withdraw the analogue resale obligation as soon as the market structure has become more prone to competitive dynamics.

II.2. Current draft measure

The currently notified draft measure refers to the technical implementation of the decisions of the CRC of 1 July 2011 (case BE/2011/1229⁷). As a result of the transparency obligation imposed on the SMP operators at the time, all SMP operators were obliged to present to the regulators a reference offer⁸ for approval. The CRC submitted ten draft implementation decisions with respect to reference offers proposed by Telenet, Brutélé, Coditel (Numéricable) and Tecteo. A draft decision on AIESH's reference offer will be subject to a notification at a later stage. CRC explains that all draft decisions impose on the SMP operators a common set of specifications with regard to notification of modifications, Video on Demand, Interactivity, Conditional Access System, Service Level Agreements and Key Performance indicators etc, as well as technical options⁹.

According to data provided by CRC the percentage of the analogue-only households decreased by almost half from around 41% in 2010 to 23% in 2012. In the same time the percentage of analogue & digital TV households increased by 10%. However, CRC is of the view that despite its decreasing presence analogue TV still plays an important role in delivering bundled services. Analogue plus digital TV together with analogue TV-only households still amount to nearly three quarter (i.e. 73%) of all households. The majority of the analogue-only clients switch to analogue plus digital subscriptions¹⁰. The continued availability of analogue TV is still attractive for the customers due to the possibility to connect multiple TV settop box within the same household without additional costs. Therefore the CRC considers that even despite the decrease in analogue-only television the resale obligation concerning analogue TV remains proportionate.

In response to the Commission's RFI, CRC confirmed that a draft implementation

⁷ C(2011) 4534.

⁸ The CRC further explains that relevant regulators have notified the draft decisions to each other in accordance with the Cooperation Agreement. Following the notifications, similar to what happened for the draft market analyses in 2011, it was decided to empower the CRC for all draft decisions, which implies that the draft decisions of the respective NRA's are all becoming draft decisions of the CRC.

⁹ There can be some differences in technical aspects based on the different network characteristics of the SMP operators.

¹⁰ The CRC confirmed that Belgacom communicated that it is no longer interested in the analogue-only TV. This however does not have any impact on the appropriateness or proportionality of the analogue resale obligation.

decision relating to multicast and Ethernet pricing¹¹ (as regards access to the SMP operator's network) will be notified to the Commission at a later stage.

CRC estimates that the overall implementation costs for all of the SMP operators will amount to around [...] over the next three years. CRC claims that the benefits of the proposed implementation exceed not only the estimated implementation costs¹² but that, in addition, the possibility to provide broadcasting services and multiple play services will have a positive impact on the overall market situation and will be in line with the objectives of Article 8 of the Framework Directive. Furthermore, CRC stresses that in the absence of actual demand materialising, the SMP operator has no obligation to implement the analogue TV resale remedy at all. In this respect, an alternative operator who wishes to obtain analogue TV access has to prove its commitment by signing a contract or providing a letter of intent in combination with a payment of an upfront fee. In CRC's view this mechanism further ensures the proportionality of the remedy.

Lastly, CRC confirmed, in response to the Commission's RFI that a new market analysis will be carried out in 2014.

III. COMMENTS

The Commission has examined the notification and the additional information provided by CRC and has the following comment:¹³

Proportionality of the analogue TV resale obligation

The Commission notes, as already stated in the 2011 notification of the retail market for the delivery of broadcasting signals and access to broadcast networks in Belgium, that pursuant to Article 8 (4) of the Access Directive all obligations imposed by NRAs shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

The Commission would like to reiterate, in line with the Commission's comment in BE/2011/1229 that digital broadcasting is gaining ground in Belgium, whereas analogue-only TV significantly decreases in both use and importance. This trend has been confirmed over the past two years since the adoption of CRC's final measure in July 2011. In the view of the Commission, a continuation of this trend may no longer render appropriate the regulatory constraints imposed on the SMP cable operators, which were justified, predominantly, by the competitive advantage gained through those operators' ability to provide analogue TV. This advantage was largely routed in the fact that analogue TV can be viewed on multiple TV-sets simultaneously without additional costs, and that the provision of analogue TV allowed cable operators to migrate their analogue customers to their own digital platform without entailing considerable migration costs. Given the increasing ability of IPTV to support broadcasting to multiple TV sets, the importance of access to analogue TV is likely to decrease further.

CRC explains that the analogue resale obligation will allow alternative operators to increase their customer base. The Commission notes that one of the operators,

¹¹ This decision will implement the pricing remedy (retail minus) imposed on the SMP operators by the CRC's decision of 1 July 2011.

¹² The CRC estimates that the benefits of the implementation of the decision would amount to €15.2 million over a three year period.

¹³ In accordance with Article 7(3) of the Framework Directive.

which was envisaged originally to benefit most from this obligation, Belgacom, has now publicly indicated that it does not intend to do so. At the same time, the Commission takes note of CRC's confirmation that the analogue resale obligation does not oblige the SMP operators to provide a retail analogue TV offer in the absence of actual demand.

The Commission, however, cannot fully exclude, on the basis of the information provided and the uncertainty over market developments in the medium term, that such obligation may prolong the provision of analogue broadcasting services, potentially hampering efficient investments in digital infrastructures and the development of innovative services. The Commission, therefore, strongly urges CRC to monitor the proportionality of the analogue TV resale obligation, the impact of the present obligation both on the SMP operators and on its beneficiaries as well as their actual (parallel) investments in, and development of digital innovative services and infrastructures. The Commission would also like to urge CRC to withdraw the analogue resale obligation as soon as the market structure has become more prone to competitive dynamics, to ensure that regulatory intervention remains proportionate and the provision of analogue broadcasting in Belgium is not unduly prolonged. Therefore the Commission would like to urge CRC to conduct a new market review as soon as possible.

Pursuant to Article 7(7) of the Framework Directive, CRC shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁴ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁵ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.¹⁶ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹⁴ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

¹⁵ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁶ The Commission may inform the public of the result of its assessment before the end of this three-day period.