



Brussels, 7.11.2013
C(2013) 7694 final

Conference of Regulators (CRC)
c/o Vlaamse Regulator voor de
Media
Boulevard du Roi Albert II 20, B 21
1000 Brussels
Belgium

For the attention of:
Mr Carlo Adams

Fax: +32 2 553 45 06

Dear Mr Adams,

Subject: Commission Decision concerning Case BE/2013/1511: Retail markets for the delivery of broadcasting signals and access to broadcast networks in Belgium - Remedies

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

I. PROCEDURE

On 8 October 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 the 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 17 October 2013, a request for information⁵ (RFI) was sent to CRC and a response was received on 22 October 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. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The retail markets 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 distinct 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) Numéricable⁷ 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 the five 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. On the four largest SMP cable operators, i.e. not on AIESH, it also imposed the obligation to provide access to their digital TV platform as well as 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. CRC proposed that all three regulated access products will be subject to a retail-minus price-cap regulation, the exact method of which would be made subject to a national consultation and an implementation decision at a later stage. CRC also proposed to impose non-discrimination and transparency obligations with regard to the provision of the regulated access products, including the publication of a reference offer and key performance indicators. The Commission, in its comments, raised *inter alia* issues of proportionality of the proposed access remedies⁸ and instructed CRC to monitor closely the relevant market⁹ and re-assess the developments on the markets in terms of infrastructure and services competition and, if necessary, revise its notified market review without delay.

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

⁶ C(2011) 4534.

⁷ Numéricable is the brand name under which Coditel offers its services.

⁸ In particular, the Commission invited CRC to justify the proportionality of the broadband Internet resale offer obligation in light of the access and the multicasting obligation imposed on Belgacom on

In July this year, CRC notified a draft measure setting out the details of the Reference Offer which was registered by the Commission under case number BE/2013/1485. In this measure CRC underlined that, to ensure the proportionality of the measure, the SMP operator has no obligation to implement the analogue TV resale remedy at all in the absence of actual demand materialising. 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. The Commission reiterated its comment on the proportionality of the analogue TV resale obligation.¹⁰

II.2. Current draft measure

The currently notified draft measure sets out the detailed methodology for calculating access prices on the basis of a "retail-minus" methodology.

Whilst CRC notified distinct draft decisions with respect to the proposals for the individual SMP operators, i.e. Telenet, Brut  l  , Coditel (Num  ricable) and Tecteo¹¹, the methodologies proposed are the same. In summary, CRC sets out its proposal for the determination of a (percentage) minus to calculate wholesale prices for (i) the resale offer of analogue TV services, (ii) access to the digital TV platform and (iii) the resale offer of broadband services. In doing so, CRC suggests to base the upfront costs not on the actual costs of the individual SMP operator but on the costs of an efficient operator. As a proxy for such an efficient operator CRC proposes to use the actual costs of Coditel. CRC considers the cost estimates provided by Coditel to be closest to those of an efficient operator given that its costs are lower than those estimated by the other cable operators and that it is the only Belgian operator that has experience with the provision of wholesale services over the cable network via its mother company, Num  ricable France. Furthermore, CRC suggests deducting avoidable costs, such as content costs, billing and bad debt, marketing, sales and customer services but also the costs for modems and set-top-boxes as well as for installation and repair at the customer premises.

the wholesale broadband access market. In addition, the Commission was also of the opinion that CRC should reassess 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.

⁹ In doing so, CRC was also asked 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.

¹⁰ C(2013) 5384.

¹¹ Coditel and AIESH concluded an agreement in December 2012 whereby Coditel acquires the management and exploitation rights for the cable network of AIESH, i.e. the analogue TV resale obligation imposed on AIESH in 2011 will in practice be carried out by Coditel. Furthermore, Brut  l   and Tecteo are in the process of merging. The merger has been approved by the national competition authority. The two companies have an Economic Interest Grouping which lead CRC to consider Tecteo and Brut  l   together when setting the wholesale tariffs for cable network access services, i.e. the implementation costs are considered only once for Tecteo and Brut  l  .

The calculated value of the minus (in per cent) is proposed as follows:

	Coditel	Telenet	Brutélé	Tecteo
Analogue TV	20%	30%	30%	30%
Digital and Analogue TV ¹²	20%	30%	30%	30%
Dual Play (Analogue & Digital TV plus broadband) ¹³	20%	23%	23%	23%

As a reference for the relevant retail price, CRC proposes to use an average ARPU of each service component, i.e. operating revenues attributable to the selected relevant services. Any such operating revenues are net of VAT, content rights, promotions and discounts, and take into account all available tariff plans as well as tariff plans that are still in use by some retail customers but will eventually be discontinued. However, CRC did not consider also taking into account revenues generated by each category of triple or even quadruple play offers. In response to the Commission's request for information, CRC explains that given the wide range and frequent evolution of retail tariffs cable operators have not been able to provide separately the revenue generated by single play subscribers to each service and the revenue generated by each category of multi-play subscribers. This is why CRC has used the operators' ARPU of each service (instead of the retail tariffs) and worked out an ARPU for the bundle by adding the broadband and TV ARPU.

CRC also clarified in its response to the request for information that it will monitor the retail prices of the cable operators, to assess whether there are any "anti-competitive effects" (such as, for example, a potential price squeeze), and that it will take appropriate action should any such effects be detected.

In addition, CRC confirmed that in the context of a new market analysis (announced in case BE/2013/1485 to take place in 2014) it would also take into consideration bringing the costing methodology applied for this market in line with that applied for the wholesale broadband access market. In this context, CRC will also take into account the recently adopted Commission Recommendation on the consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment¹⁴.

¹² In response to the Commission's request for information, CRC confirmed that the regulated operators did not provide any revenue breakdowns for television services distinguishing between "analogue TV revenues" and "digital TV revenues", implying that it was not possible to differentiate retail reference prices between those two services. In addition, according to CRC the structure of the retail market in Belgium is such that monthly fees for analogue TV and digital TV are identical (or very close). As a result, CRC argues, it would be consistent also for wholesale prices to be identical.

¹³ Whilst the minus in percentage terms is lower for the Dual Play offer, CRC points out that in absolute terms the minus for Dual Play is reasonably higher given that the retail price for Dual Play offers is generally much higher (with a ratio of ca. 1 : 3) than the basic TV offer.

¹⁴ OJ L 251, 21.9.2013, p. 13.

III. COMMENTS

The Commission has examined the notification [and the additional information provided by CRC and has the following comments:¹⁵

Appropriateness of certain assumptions in the proposed methodology

The Commission notes that when attempting to determine the relevant upfront costs of an efficient operator, CRC does not propose a model to calculate any such costs on a bottom-up basis, but uses as a proxy the estimated costs of one operator, Coditel, which it deems to reflect most closely the costs specific to the wholesale provision of an efficient operator. CRC justifies this decision in the submitted notification with the fact (i) that the cost estimates provided by Coditel are the lowest (if compared with the estimates provided by the other operators) and (ii) that Coditel – due to the experience of its French mother company in a comparable scenario – is better placed (if compared with the other operators) to provide a realistic and credible estimate of the costs involved. CRC, however, does not seem to have questioned and assessed the actual efficiency of the figures provided by the operator concerned.

The Commission questions whether the reasons provided by CRC are sufficient to assume that the costs put forward by Coditel are a reliable and objectively justified proxy to reflect the true costs of an efficient operator. As a result, the Commission asks CRC to provide additional justifications, in its final measure, why it is reasonable to assume that the costs provided by Coditel, indeed, are the best proxy for the costs of an efficient operator and do not require further efficiency adjustments. In this context, the Commission emphasizes that the applied costing methodology should allow efficient alternative operators to enter the market in a profitable way.

In addition, the Commission notes that when calculating the relevant reference retail prices through the use of an average ARPU, CRC only refers to analogue TV, digital TV (with analogue TV) and Dual Play (TV plus broadband). Any additional bundles, based on triple (or even quadruple play) are not taken into account. In this respect, the Commission takes note of CRC's argument that due to the complexity of the data gathering exercise it was not in a position to collect reliable data on separate revenues generated by single play subscribers to each service or the revenue generated by each individual category of service of multiple play subscribers (be it dual play, triple play or quadruple play). It is not clear from the explanations provided by CRC, however, why it would be more difficult to gather data for triple and quadruple play than for dual play, therefore the Commission invites CRC to set out in more detail in its final measure why it considers it appropriate and justified not to have the same reference for multiple play as it has for Dual Play.

¹⁵ In accordance with Article 7(3) of the Framework Directive.

Future appropriateness and proportionality of the proposed regulatory approach

The Commission notes, as already stated in the Commission's comments to 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 reiterates the comment made in BE/2011/1229 and, more recently, in BE/2013/1485, that digital broadcasting seems to be 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 this regard, the Commission takes note of CRC's confirmation in case BE/2013/1485 that the analogue resale obligation does not oblige the SMP operators to provide a retail analogue TV offer in the absence of actual demand.

In addition, in the current draft measure CRC reconfirms that the list of potential beneficiaries of the proposed regulation has decreased since the adoption of the measures in 2011. CRC points out itself that Belgacom has publicly announced that it is no longer interested in the regulated analogue TV resale offer, i.e. the only regulated cable offer of which it was allowed to benefit, and that there is no longer reason to believe that cable operators will use the regulated wholesale offers to expand their footprint on the national territory. As a result and on the basis of the information available, Mobistar would be the only potentially interested beneficiary of the regulated cable offers.

In the view of the Commission, a continuation of current trends may no longer render appropriate at least some of 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. The Commission, therefore, urges CRC again to carry out as soon as possible and no later than in 2014, in line with Article 16 of the Framework Directive, a new market analysis.

In addition, whilst the Commission notes that the present notification only sets out proposals as to the exact design of the retail-minus methodology, thus implementing CRC's 2011 decision, the Commission draws the attention of CRC to the parallels and links between the regulation of the market for the delivery of broadcasting signals and access to broadcast networks with the market for wholesale broadband access in Belgium, in particular with regard to broadband related remedies. Similar investment decisions for infrastructure roll-out and maintenance have to be made in both markets and the buy-or-build signals sent through the use of a specific costing methodology are comparable. As a result, it may be more appropriate to align the costing methodologies used for both markets. The Commission, therefore, encourages CRC, when revisiting in 2014 its approach to regulation of the market for the delivery of broadcasting signals and access to broadcast networks in Belgium, to reassess – in the case continued regulation would be justified – whether an alignment of the current cable access price regulation with the wholesale broadband costing methodology would not be more appropriate. In this respect, the Commission welcomes CRC's commitment, expressed in the response to the Commission's request for information, that such an alignment, and, in particular, the recently adopted Commission

Recommendation on consistent non-discrimination obligations and costing methodologies will be taken into account.

Pursuant to Article 7(7) of the Framework Directive, [NRA] 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/EC¹⁶ 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 Commission¹⁷ 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.¹⁸ You should give reasons for any such request.

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

¹⁶ 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.

¹⁷ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁸ The Commission may inform the public of the result of its assessment before the end of this three-day period.



(1) EUROPEAN COMMISSION

Brussels, 19.11.2013

C(2013) 8287 final

Conference of Regulators (CRC)
c/o Medienrat

Gospertstraße 1
4700 Eupen
Belgium

For the attention of:
Mr Yves Derwahl

Fax: +32 87 55 28 91

Dear Mr Derwahl,

Subject: CORRIGENDUM of Commission Decision SG-Greffe (2013) D/18242 of 7/11/2013 C(2013) 7694 concerning Case BE/2013/1511: Retail markets for the delivery of broadcasting signals and access to broadcast networks in Belgium - Remedies
Comments pursuant to Article 7(3) of Directive 2002/21/EC

Please note that the above decision is amended as follows:

1) **In section II.2** on page 4 the following sentence is deleted without being replaced:

"However, CRC did not consider also taking into account revenues generated by each category of triple or even quadruple play offers."

2) **In section III** on page 5 under the heading "***Appropriateness of certain assumptions in the proposed methodology***" the following sentence is deleted without being replaced:

"Any additional bundles, based on triple (or even quadruple play) are not taken into account."

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