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Conference of Regulators (CRC)
c/o Conseil Supérieur de
l'Audiovisuel (CSA)
Boulevard de l'Impératrice 13
1000 Bruxelles
Belgium

For the attention of
Mr. Dominique Vosters

Fax: +32 2 349 58 83

Dear Mr Vosters,

Subject: Commission Decision concerning Case BE/2016/1829: 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

1. PROCEDURE

On 5 January 2016, the Commission registered a notification from the Conference of Regulators in the electronic communications sector (CRC)[1], concerning remedies for the retail markets for the delivery of broadcasting signals and access to broadcast networks[2] in Belgium.

A national consultation[3] has been carried out individually by each of the regulators in their respective regions[4].

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 2014/710/EU of 9 October 2014 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, OJ L 295, 11.10.2014, p. 79 ("Recommendation on Relevant Markets") or any of its predecessors of 2003 and 2007.

3 In accordance with Article 6 of the Framework Directive.

4 In Belgium four regulators have competences in the regulation of the retail market for the delivery of

On 15 January 2016, a request for information[5] was sent to CRC and a response was received on 21 January 2016.

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The analysis of 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/2011/1229[6]. 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 and 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) Numéricable[7] 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. At the time CRC proposed that all three regulated access

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.

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.

products will be subject to a retail-minus price-cap regulation, the exact method of which would be subject of a further decision at a later stage.

The Commission, in its comments, raised *inter alia* concerns regarding the proportionality of the proposed access remedies[8] and instructed CRC to monitor closely the relevant market[9] 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.

In July 2013 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[10]. In this measure CRC underlined that, to ensure the proportionality of the measure, the SMP operator had no obligation to implement the analogue TV resale remedy at all in the absence of actual demand materialising.

In October 2013 the CRC then notified a proposal for an implementation decision setting wholesale access prices for the relevant market based on the retail-minus methodology imposed in 2011. This case was registered by the Commission under case number BE/2013/1511[11]. In summary, CRC proposed 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. CRC suggested deducting from the retail price 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 costs for installation and repair at the customer premises.

CRC implemented the following formula to calculate the minus percentage to be used for the calculation of the wholesale prices of the SMP operators' regulated access services:

$$retail\ minus = \frac{total\ avoidable\ costs}{total\ turnover - promotions}$$

At the time CRC expressly stated that in the context of a new market analysis (announced in case BE/2013/1485 to take place in 2014) it would also take

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 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 C(2013) 8287

into consideration bringing the costing methodology applied for this market in line with that applied for the wholesale broadband access market.

In both cases in 2013 the Commission reiterated its concerns regarding the proportionality of the relevant access obligation. In addition, in BE/2013/1511 the Commission further questioned the appropriateness of certain assumptions in the proposed methodology, in particular the approach to determine the relevant up-front costs and the calculation of the relevant retail reference price through the use of an average ARPU.

2.2. Current draft measure

The currently notified draft measure sets out further detail concerning the methodology for calculating access prices on the basis of a "retail-minus" methodology, in particular with regards to (i) the exact valuation of services, which are included in relevant retail offers but are not part of the scope of the relevant wholesale offer (value added services, or VAS), (ii) the treatment of the costs and revenues regarding modems and set-top boxes, (iii) the treatment of promotions and subscriber acquisition costs, (iv) the determination of wholesale prices for broadband profiles that are specific to a particular access seeker[12], and (v) the determination of a transitory period during which discounted access prices apply for new entrants, in order to facilitate market entry.

Whilst CRC notified distinct draft decisions with respect to the proposals for the individual SMP operators, i.e. Telenet, Brutélé, and Nethys[13], the methodologies proposed are the same.

Valuation of value added services

In order to determine an appropriate wholesale access price CRC suggests to deduct from the actual retail price of a given service (or bundle) certain costs, that are not part of the relevant wholesale access product, i.e. the so-called valued added services (VAS), in order to determine the reference price on which the minus percentage will then be applied. Examples of such VAS are WiFi-access at home- and hotspots, a 2nd-screen solution, email and web hosting services for personal pages, provision of content free of charge or at a reduced price and cloud-based storage services.

For each of these services CRC proposes to subtract their value from the retail price before applying the minus to the reference price. In order to determine the value of each service, the CRC proposes to opt for a benchmarking approach rather than basing its assessment on the incremental costs generated by the provision of such services. Whilst the CRC recognises that these types

[12] The resale of the broadband Internet offer allows access seekers to define the technical profile of the service they are purchasing in terms of upload/download capacity and of total authorised downloading volume.

[13] In response to the Commission's request for information, CRC confirmed that the minus and methodology applicable to determine Coditel/Numericable's wholesale prices will remain for the moment unchanged, i.e. those set by the 2013 decision of CRC. A new minus calculation will require further analysis and will be assessed in a later decision.

of services are most commonly sold as part of a bundle, it argues that an approach oriented at "real prices" rather than production or incremental costs reflects more accurately the actual value the operator and its customers attribute to this particular service. CRC argues further that benchmarking is an accepted approach in order to assess the "real price" of a particular service, thus countering criticism voiced in the national consultation that a benchmarking approach trying to isolate a stand-alone "real price" of the VAS inflates the value attributed to it and thus inappropriately reduces the relevant wholesale price. The values for VAS determined in the proposed way are then "frozen" for a minimum period of one year.

In summary, CRC propose to attribute the following values to the individual VAS:

VAT included	Telenet	Brutélé	Nethys	Numericable
Wi-fi homespots & hotspots	2,00 €	1,00 €	1,00 €	Not applicable
Second screen	4,75 €	4,00 €	4,00 €	Not applicable
e-mail & webhosting	0,50 €	Not applicable	Not applicable	0,50 €
Voofoot (*)	Not applicable	9,90 €	9,90 €	Not applicable
Play Sports (*)	27,45 €	Not applicable	Not applicable	Not applicable
Mini premium	Not applicable	Not applicable	Not applicable	5,10 €
Bouquet Panorama	Not applicable	9,99 €	9,99 €	Not applicable
Modem	2,50 €	2,50 €	2,50 €	Not applicable
Set-top-box	8,70 €	8,95 €[13] 12,95 €[14]	8,95 € 12,95 €	10,00 €

Calculation of the minus (changes in the model compared with the 2013 decision)

The general functions of the 2013 model remain unchanged, although the formula for determining the 'minus' is updated. The new formula proposed by CRC is the following[14]:

$$retail\ minus = \frac{total\ avoidable\ costs + promotions}{total\ turnover}.$$

CRC did not consider it appropriate or justified to re-visit at this stage, over 4 years after the imposition of the original pricing obligation, the question about the most appropriate choice of cost model for the market in question, although it admitted in its response to the Commission's request for information that, generally speaking, a cost-based approach would be more favourable to foster competition.

However, CRC proposes to adapt the model in a few respects, *inter alia* by (i) updating the input data, (ii) excluding the costs of decoders and modems from avoidable costs, (iii) allocating a portion of avoidable costs to the sale of

14 Promotions are now considered as an "avoided cost", rather than as foregone revenue.

decoders, (iv) only considering "client side" (and not "network side") installation costs as inevitable costs. As a result of the above the minus applied decreases considerably (see also table below).

Transitory period

In addition, in order to facilitate and foster market entry, CRC proposes to apply a discounted access price during a transitory period of two years for access seekers newly entering the retail market for TV broadcasting in Belgium. During the transitory period CRC proposes to determine the minus as follows:

$$retail\ minus = \frac{share\ of\ avoided\ costs\ attributed\ to\ new\ customers + promotions}{share\ of\ turnover\ related\ to\ new\ customers}$$

By considering only the avoided costs and turnover of new customers, rather than the whole customer base of the cable operator as in the formula set out in 2013, the effect of promotions is considerably bigger during the transitory period, which leads to a discount in the wholesale price[15]. As a result, for some of the services in the relevant market the minus applied is more than double during the transitory period (see table below). CRC justifies the proposed discount with the fact that the relevant market is characterised by high entry barriers (e.g. an infrastructure which is difficult to duplicate, bundling strategies of the incumbents, resulting in low churn rates, acquisition of content rights with high up-front costs). At the same time, the actual size of the operator, the pre-existence of a well-developed distribution network and the size of the customer base in adjacent communications markets appear not to be taken into consideration by CRC when assessing whether or not an operator qualifies for the proposed entry assistance.

The CRC clarifies in its draft measure that Proximus, the former incumbent, is not considered to be a new entrant in the TV broadcasting market, given its significant and increasing market share generated through its IPTV offer. On the other hand, the CRC states that Mobistar, one of the largest mobile operators in Belgium, fulfils the criteria, as its activities in the TV broadcasting market are currently very limited[16].

Summary

As a result of the above, CRC proposes to apply the following minus-values in its retail-minus approach for the SMP operators concerned:

[15] This discount applies only to operators newly entering the TV broadcasting market who have signed a letter of intent or entered into an access agreement with a cable operator before the adoption of this decision or to an operator who applies for access to one or more SMP operators in the six months following the entry into force of the proposed measure.

[16] In 2014, Mobistar purchased wholesale access to a limited number of cable lines in order to begin the technical testing ahead of the formal launch of its retail offer.

Operator	Product	2013	2016 (during transition)	2016 (after transition)
Telenet	Analogue TV	30%	26%	15%
	Digital TV	30%	25%	15%
	Digital TV + broadband	23%	18%	7%
Brutélé & Nethys	Analogue TV	30%	29%	13%
	Digital TV	30%	29%	13%
	Digital TV + broadband	23%	26%	10%
Numericable	Analogue TV	20%	(*)	(*)
	Digital TV	20%	(*)	(*)
	Digital TV + broadband	20%	(*)	(*)

(*) Minus for Numericable to be determined in a forthcoming decision.

As one can see from the table above, for most of the regulated access services imposed on SMP operators, the CRC is proposing to reduce the level of the 'minus' compared to the 2013 decision. The reduction is significantly more prominent after the 2-year transitory period. The reduction of the minus has the effect of increasing the wholesale access prices. However, the deduction of the value of the VAS from the retail price, which was not applied in previous calculations, has an opposite effect on wholesale tariffs. In other words, a lower minus is applied to a lower reference price compared to the approach used in the 2013 decision and the two effects should at least in part counter-balance each other.

3. COMMENTS

The Commission has examined the notification and the additional information provided by CRC and has the following comments:[17]

Appropriateness of several assumptions in the proposed methodology

The Commission takes note of CRC's attempt to ensure that the reference retail price to which the minus is applied does not contain costs which can be attributed to services that are not part of or supported by the relevant wholesale service. However, the Commission further notes that, in doing so, CRC does not appear to base its assumption on the real or incremental costs of the provision of such services, but relies on a benchmark approach in order to determine the value of such value added services (VAS). Even if a discount on the estimated benchmark value of the individual VAS is applied when these are provided as part of a bundle, this approach appears to neglect the fact that the real value of VAS as part of a bigger package cannot be equated with the individual stand-alone price (although discounted) an operator may charge for the delivery of the service over and above what is included in the package, in particular where the actual take up of the VAS is on average significantly below what is included in the bundle. For example, it appears that the average customer uses only 2 email addresses as part of the bundle, where often up to 10 addresses are offered free of charge. The fact that any

[17] In accordance with Article 7(3) of the Framework Directive.

additional address (beyond the 10 addresses offered) is charged at a price in excess of the incremental costs of providing the additional email addresses is unlikely to quantify appropriately the value customers attribute to this service. On the contrary, the likelihood is that such an approach overestimates the value and, thus, inappropriately decreases the relevant reference price.

At the same time, the approach used by CRC to evaluate avoidable costs and promotions, which are then used to determine the relevant minus, appears to lead to a significantly lower minus if compared with the approach taken in 2013[18], with the risk of resulting in a potential margin squeeze for alternative operators.

Furthermore, the Commission takes note of CRC's attempt to ease market entry by applying a transitory period of discounted wholesale rates for new market entrants. These discounted rates are reached through a greater impact of promotion-values on the minus. However, based on the information available to the Commission the only realistic beneficiary of this market entry assistance is Mobistar. In this respect the Commission notes, that – whilst Mobistar has not successfully entered the market for TV broadcasting – it has a well-developed retail distribution network and a large customer base for mobile services in Belgium, which in combination is likely to reduce entry barriers in adjacent markets. In addition, since Mobistar is part of a larger pan-European group, it is difficult to see that it would have particular difficulties in accessing the capital needed to facilitate market entrance, further questioning the merit of such market entry assistance. It appears, thus, questionable to the Commission that the market entry assistance is appropriate and objectively justified. The Commission is also concerned that the methodology used in the transitory period that enhances the impact of promotions on the reduction of the wholesale price, could discourage promotions and may therefore harm platform competition of broadcasting services.

As a result of all of the above, the Commission is concerned that the methodology proposed by CRC does not set an appropriate wholesale access price. Whilst the Commission recognises that the various flaws in the model may in effect counter-balance each other, potentially reducing the overall impact on wholesale prices, the Commission urges CRC nevertheless to re-visit the various parameters of the retail-minus methodology set out above (i.e. the valuation of VAS, the setting of the correct minus and the use of a transitory period) in order to ensure that the final measure accurately reflects market circumstances and appropriately sets the correct build-or-buy signals.

Appropriateness and proportionality of the proposed regulatory approach

The Commission highlights – as already stated several times – first, in the Commission's comments to the 2011 notification of the full analysis of the retail market for the delivery of broadcasting signals and access to broadcast networks in Belgium[19], and then, subsequently, in the two notifications concerning

[18] The proposed minus after the transitory period of 7 – 15 % (depending on product and respective SMP provider) also appears to be significantly below the average minus in similar cases in other Member States, which is closer to 30%.

[19] BE/2011/1229.

modifications of remedies in 2013[20], 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 strongly underlines and reiterates its previous comment concerning the relevant market, namely that digital broadcasting seems to be gaining ground in Belgium, whereas analogue-only TV is significantly decreasing in both use and importance. This trend has been confirmed since the adoption of CRC's final measure in July 2011. In response to the Commission's request for information, CRC provided the Commission with market share data, which appears to suggest a constant and, in some regions, significant gain in market shares of alternative operators at the expense of the respective SMP operator[21].

The Commission is of the view that the market trends witnessed over the past few years 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. In any case, the current justification for regulatory intervention is based on an outdated market analysis. In light of the above, the Commission questions whether the continued application of regulatory remedies in general, and a retail-minus based price control in particular, remain appropriate, proportionate and objectively justified for the relevant market.

In addition, whilst the Commission notes that the present notification only sets out proposals as to the exact design of the retail-minus methodology for access to the cable networks, thus implementing CRC's 2011 decision concerning the retail markets for the delivery of broadcasting signals and access to broadcast networks in Belgium, it 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 seems more appropriate to align the costing methodologies used for both markets.

In light of the above, the Commission, urges CRC, to revisit without further delay its general approach to regulation of the market for the delivery of broadcasting signals and access to broadcast networks in Belgium, in order (a) to reassess whether continued regulation of cable access is, indeed, still justified and, (b) should this still be the case, whether an alignment of the current cable access price regulation with the wholesale broadband costing methodology would not be more appropriate.

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20 BE/2013/1485 and BE/2013/1511 respectively.

21 In the respective territories, the respective SMP operators have all continuously lost market shares at the retail level in ranges well above 10% over the past five years. In particular in the network area of Nethys and Brutele, the SMP operator's (VOO) market share dropped since 2010 from close to 80% to around or below 60%, whilst the challenger, Proximus could achieve significant gains almost doubling its share in the broadcasting market (now reaching numbers of up to 40%).

In this respect the Commission reminds the CRC of its obligations under Article 16(6) (a) of the Framework Directive and again urges CRC to carry out a new market analysis without further delay. The Commission further draws the attention of CRC to the Commission's powers of ensuring compliance with this provision by initiating proceedings under Article 258 TFEU.

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/EC[22] 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 Commission[23] 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.[24] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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[22] 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.

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

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