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Conference of Electronic
Communications Sector Regulators
(CRC)

c/o Vlaamse Regulator voor de
Media
Koning Albert II-laan 20, bus 21
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Belgium

For the attention of
Messrs Adams, Janssen, Derwahl
and Hindryckx

Fax: +32 2 226 88 41

Dear Mr Adams,

**Subject: Commission decision concerning Case BE/2011/1227: Wholesale physical network infrastructure access at a fixed location**

**Commission decision concerning Case BE/2011/1228: Wholesale broadband access**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC[1]**

## I. PROCEDURE

On 20 May 2011, the Commission registered a notification from the Conference of Electronic Communications Sector Regulators (CRC)[2] concerning the second review of the markets for wholesale physical network infrastructure access at a fixed location and

1 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.

2 In Belgium, competencies related to electronic communications are shared between the Federal State and the Communities. The CRC was established by the 2006 Cooperation Agreement as the body for cooperation between IBPT (Federal State), Conseil Supérieur de l'Audiovisuel (CSA – French speaking Community), Vlaamse Regulator voor de Media (VRM – Flemish Community) and the Medienrat (German speaking Community).

wholesale broadband access in Belgium[3].

The national consultation[4] ran from 21 December 2010 to 18 February 2011. The deadline for the EU consultation is 20 June 2011.

On 1 June 2011 a request for information (RFI)[5] was sent to CRC and a response was received on 8 June 2011.

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

## II. DESCRIPTION OF THE DRAFT MEASURES

### II.1. Background

The first review of the markets for wholesale physical network infrastructure access at a fixed location (WPNIA) and wholesale broadband access (WBA)[6] was notified to the Commission in 2007.[7] The Belgian national regulatory authority, *Institut Belge des Services Postaux et des Télécommunications* (IBPT), defined national markets, excluded fibre based access from the relevant WPNIA product market and cable based access from both markets, and imposed the full set of remedies on Belgacom.

In its comments, the Commission pointed, *inter alia*, to the relatively stagnant competitive situation of the retail broadband market and invited IBPT (i) to ensure that the appropriate incentives are granted for access seekers to climb the ladder of investment, (ii) to monitor the impact of local loop unbundling (LLU) and WBA regulation on the level of competition at retail level, and (iii) to assess whether a more granular geographic market definition would be justified.

IBPT's final decision concerning the referred market review, adopted in January 2008, was annulled by the Belgian Court of Appeal on 7 May 2009, for insufficient justification. IBPT issued a new decision with retroactive effect, which was notified to the Commission in 2009[8]. The Commission mainly restated the comments put forward at

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[3] Corresponding to markets 4 and 5 of 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 (the Recommendation), OJ L 344, 28.12.2007, p. 65.

[4] In accordance with Article 6 of the Framework Directive.

[5] Pursuant to Article 5(2) of the Framework Directive.

[6] At the time listed as markets 11 and 12 of the Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for *ex ante* regulation in accordance with the Framework Directive, OJ L 114, 8.5.2003, p. 45 and identified as the markets for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services and wholesale broadband access.

[7] Notified under cases BE/2007/0735-36, SG-Greffe (2008) D/200001. These notifications were amended by a subsequent notification, assessed under case BE/2008/0801, which aimed at addressing the problems raised by the planned replacement of the incumbent's ATM/xDSL network by a next generation network (NGN)/NGA (VDSL) network. This measure only concerns remedies.

[8] Cases BE/2009/0949-50, SG-Greffe (2009) D/5047.

the time of the first market review.

## II.2. Market definition

### *II.2.1. Retail broadband market*

CRC starts by analysing the retail market. Broadband services provided over xDSL, radio (e.g. Wimax), cable and fibre networks are included in the relevant product market[9], while those provided over mobile networks and fixed wireless connections (Wi-FI hotspots) are excluded[10]. Broadband services of all speeds, including very high speed services provided over Next Generation Access (NGA) networks [VDSL[11], Eurodocsis 3 and Fibre-to-the-home (FTTH) networks], are included in the relevant market. CRC considers that the services provided to residential and non-residential customers are not substitutable and segments the product market accordingly. CRC refrains from defining the exact geographic scope of the market at retail level.[12]

In light of the evolution towards multiple play offers in Belgium[13], CRC also assesses the adequacy of defining a separate market for bundled offers, yet it concludes that there is currently insufficient evidence to sustain the finding that a separate market for bundled offers will develop during the period of the current market review. CRC sustains, in this regard, that although operators selling bundles benefit from economic advantages *vis-à-vis* operators who offer individual products (bundles are sold at a lower price than if the individual products were sold separately, which could thus limit the pressure exercised by individual products on the pricing of the bundle), there are elements which indicate that a separate market for bundled offers cannot be currently defined (e.g. the fact that consumers can obtain better pricing conditions than the bundled ones if they combine offers of several operators, the lack of migration costs specifically associated with churn from bundled to unbundled products, and the asymmetry regarding the development of the operators´ market shares as to the individual products provided in a bundle).[14]

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9 Although the coverage of DSL and cable networks is more extensive than the coverage of radio and fibre networks, there are no relevant retail migration costs between platforms and the services offered and prices charged are similar.

10 Due to a lack of substitutability stemming from the different geographic coverage and the characteristics, usage and pricing of the services.

11 Very High Speed Digital Subscriber Line.

12 Despite not defining the exact scope of the market, CRC acknowledges that the market is characterised by different competitive conditions at regional level, but also points to evidence sustaining the definition of a national market (e.g. Belgacom applies nationwide retail prices and the coverage of the DSL and cable networks is comparable and very high – covering 99% and 88% of the population, respectively).

13 Bundled offers are increasing in popularity in Belgium, namely those comprising the subscription of TV services. Belgacom, the cable operators and alternative DSL operators (Alpha and Mobistar) currently provide double and triple play offers. At the beginning of 2010, 54% of the Internet users subscribed to a broadband service within a bundled offer (compared to 22% in 2007), 44% of internet users subscribed to a bundled internet offer with digital TV (compared to 12% in 2007) and only 45% subscribed to an internet-only offer (compared to 78% in 2007). Every second customer subscribes to an internet offer in a triple play bundle.

14 If in case of a small but significant non transitory increase in prices (SSNIP), customers of a bundle would shift to bundles offered by other operators instead of buying the products separately, a trend towards symmetric market shares should be found, which is currently not the case. E.g. in 2009 Belgacom held a higher market share with regard to the telephony service ([CONFIDENTIAL]%) *vis-à-vis* the internet broadband provision ([CONFIDENTIAL]%) and IPTV service

*II.2.2. Wholesale (physical) network infrastructure access*

CRC includes in the relevant product market shared and fully unbundled access to local loops and sub-loops. CRC excludes from the relevant market the provision of Bitstream services and regards as premature to consider the inclusion of FTTH based access in the relevant market due to the lack of existing and foreseeable deployment of FTTH networks in Belgium.[15]

Access to cable based networks is excluded from the relevant market on the basis of a *lack of demand and supply side substitutability*. CRC points, in particular, to the lack of direct constraints evidenced by: the technical limitations and deterioration of services associated with the unbundling of cable spectrum; the inexistence of a cable unbundling wholesale product; the lack of nationwide coverage by any of the existing cable operators (although the aggregated coverage of all cable operators amounts to 88% of the Belgian population); and the migration costs associated with the transition from a DSL offer to a cable unbundling offer. The analysis of the *indirect constraints* also sustains, in CRC´s view, the lack of substitutability.

CRC considers the competitive conditions to remain rather homogeneous throughout the Belgian territory and thus defines a national wholesale market. CRC points to the fact that Belgacom owns a nationwide network and is the sole provider of the wholesale service (BRUO offer). CRC also notes, in particular, the lack of FTTH deployment, the non inclusion by CRC of cable based access in the relevant market, the overall lack of development of LLU[16] and the assumption that even if the wholesale offer was not regulated, the offer would remain homogeneous throughout the Belgian territory. CRC further sustains that defining sub-national markets, with stable borders which would differentiate local exchange areas where unbundling is economically feasible from areas where it is not it, would be extremely complex and prone to error.

*II.2.3. Wholesale broadband access*

CRC includes in the relevant product market Bitstream access provided through ADSL, SDSL[17] and VDSL.[18] The market includes Bitstream access irrespective of whether Belgacom provides the end customer with voice services (ADSL/VDSL "with voice" or "without voice"). On the basis of the lack of demand and supply side substitutability,

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([CONFIDENTIAL]%) while the cable operators held a higher market share in the broadcasting market when compared with the markets for fixed telephony and internet access (Telenet – [CONFIDENTIAL]%, [CONFIDENTIAL]% and [CONFIDENTIAL]% respectively; Numéricable – [CONFIDENTIAL]%, [CONFIDENTIAL]% and [CONFIDENTIAL]%, respectively; Voo – [CONFIDENTIAL]%, [CONFIDENTIAL]% and [CONFIDENTIAL]%, respectively).

15 There is currently no effective deployment of FTTH in Belgium. Belgacom has so far only carried out trials in Rochefort, Saint-Trond and La Louviére. Belgacom´s NGA strategy is based on the deployment of FTTC/VDSL2. At the end of 2010, Belgacom had equipped 76% of the Belgian households with VDSL2, which allow for the provision of services with speeds of up to 30Mbps. Belgacom expects to reach 85% households by 2013.

16 Despite the regional differences in terms of LLU penetration (10% in Brussels, 2% in Flandres and 0.1% in Wallonia).

17 ADSL (Asymmetric Digital Subscriber Line) and SDSL (Symmetric Digital Subscriber Line). Interconnection is provided at local or regional level.

18 Belgacom currently provides two Bitstream offers – BROBA II and WBA VDSL2. BROBA II enables access at ATM or Ethernet level, through ADSL or SDSL. WBA VDSL2 enables access at Ethernet level.

CRC excludes resale products[19] and leased lines services[20] from the relevant product market.

Cable based access is also excluded from the relevant market. CRC maintains, in this regard, that there is a *lack of demand side substitutability* since there is currently no alternative cable-based Bitstream offer and in case of a SSNIP of the BROBA/WBA Bitstream services, alternative operators would not migrate to a hypothetical wholesale offer due *inter alia* to the associated migration costs and the limited coverage of the networks of each cable operator (i.e. access to several cable networks, with different technical performances and specifications, would be necessary in order for an operator to achieve a nationwide operational scale). As to the *lack of supply-side substitutability*, CRC sustains that there is currently no cable Bitstream offer in the market and in case of a SSNIP, cable operators would not start providing the service due, in particular, to the operational and implementation hurdle. Finally CRC assesses the *indirect constraints* stemming from cable, namely whether the conditions established by the Commission[21] would be satisfied in order for cable retail indirect pricing constraints to prevent an SMP operator from increasing its wholesale prices, concluding that this is not the case. CRC considers that in case of a SSNIP, the "Actual Loss" would be lower than the "Critical Loss"[22], with regard to both the BROBA and WBA offers. CRC further sustains that (i) the ISPs could absorb part of the wholesale price increase, (ii) the customers of the ISPs would be likely to switch, to a significant extent, to the retail arm of the integrated hypothetical monopolist[23], and (iii) given that the elasticity in the retail market is rather weak, the wholesale price increase would be profitable for Belgacom.

In light of the product market definition, CRC defines the relevant geographical market by taking into consideration solely the services provided in the merchant market. CRC considers the competitive conditions to be rather homogeneous at national level and thus defines a national market. CRC points, in this regard, to the fact that: (i) Belgacom, the sole provider, offers nationwide services[24]; (ii) even if the wholesale offer was not regulated, the offer would remain homogeneous throughout the Belgian territory, since access seekers demand services with nationwide coverage; (iii) if alternative wholesale

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19 Substitutability is assessed between BROBA services and resale services.

20 Substitutability is assessed between BROBA SDSL and leased lines services.

21 In case UK/2007/0733 the Commission determined that when assessing the effect of indirect substitution through a SSNIP test, it has to be demonstrated that (i) ISPs would be forced to pass a hypothetical wholesale price increase on to their consumers at the retail level based on the wholesale/retail price ratio; (ii) there would be sufficient demand substitution at the retail level, to retail services based on indirect constraints, such as to render the wholesale price increase unprofitable; and (iii) the customers of the ISPs would not switch, to a significant extent, to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices.

22 The "Critical Loss" reflects the maximum loss which an SMP operator can incur in the wholesale market following an increase in the wholesale price, without the price increase becoming unprofitable. The "Actual Loss" is the effective loss incurred due to the increase in the wholesale price.

23 In light of the fact that in a modified Greenfield approach Belgacom would not be subject to a non-discrimination obligation in the WBA market and would thus not raise its internal wholesale pricing and consequently its own retail prices. Moreover, for operational/migration reasons, a DSL customer would more easily switch to a service offered by Belgacom than by a cable operator.

24 The BROBA II offer is provided over a nationwide network while the WBA VDSL2 offer is provided over a network which currently covers 76% of the Belgian households.

DSL Bitstream services came to exist, they would most likely be priced on a national basis (due to the national pricing of the underlying LLU offer and the constraints stemming from the SMP operator's pricing strategy).

## II.3. Finding of significant market power

CRC proposes to designate Belgacom as the SMP operator in both relevant markets. The main criteria considered by CRC, when reaching its SMP conclusion, include:

*II.3.1. Wholesale (physical) network infrastructure access*

(i) Belgacom's 100% market share[25], (ii) barriers to entry or to expansion, including sunk costs, economies of scale and scope, control of infrastructure not easily duplicated, easy or privileged access to capital markets/financial resources, regulatory or juridical constraints[26], technological advantages or superiority; vertical integration, and (iii) low countervailing buyer power.

*II.3.2. Wholesale broadband access*

(i) Belgacom's 100% market share[27], (ii) barriers to entry or to expansion, including: sunk costs, economies of scale and scope, control of infrastructure not easily duplicated, easy or privileged access to capital markets/financial resources, vertical integration, barriers to change, (iii) absence of potential competition[28], and (iv) low countervailing buyer power.

## II.4. Regulatory Remedies

CRC proposes to impose on Belgacom the following main obligations:

*II.4.1. Wholesale (physical) network infrastructure access*

(i) Access to network elements and associated facilities;

Belgacom shall, in particular, provide shared or fully unbundled access to local loops[29] and collocation services (including backhaul). Moreover, Belgacom shall

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[25] The number of LLU lines in Belgium is still very limited (6% of all DSL lines), a fact which can be explained by the weak position of alternative DSL operators in the retail market, operational problems, and the high LLU prices offered until 2006. Belgacom announced, in 2008, that it would dismantle 65 local exchanges, a number which, although corresponding to only 10% to 15% of the total number of local exchanges, will have an impact on 40% of the total lines currently unbundled (the local exchanges to be dismantled are the most profitable ones to unbundle). This is likely to further forestall investments in LLU.

[26] In order to duplicate Belgacom´s network, operators would have to obtain permits for laying infrastructure or, in case of wireless technologies, obtain radio licences.

[27] Even if self-supplied LLU-based Bitstream had been taken into consideration, Belgacom´s market share in the Brussels region, where alternative operators have the greatest LLU share, would still be 86.57%.

[28] There is currently no alternative Bitstream offer and alternative operators are not expected, during the current review period, to start providing Bitstream services on the basis of LLU due to the low development of LLU, the economic viability of LLU being limited to specific geographic areas, and the expected lower uptake of LLU due to the deployment of VDSL2 and the foreseen dismantling of local exchanges. Even if alternative operators did start providing Bitstream services on the basis of LLU, CRC would expect Belgacom to retain a market share higher than 50%.

[29] Enabling the provision of retail services through any type of technology (namely ADSL2 and VDSL2).

not withdraw access previously granted to facilities thus having, in particular, (a) to inform CRC and access seekers of network adaptations and the discontinuation of certain services, and (b) in case access points used by alternative operators are to be dismantled, to maintain access to the unbundling services for a period of 5 years after communication to CRC of the intention to dismantle them, unless agreement is reached with access seekers. Belgacom shall also establish migration arrangements.

CRC proposes to withdraw the *sub-loop unbundling (SLU) obligation* in those cases where VDSL2 technology is deployed. CRC sustains, in this regard, that Belgacom has been upgrading its VDSL technology and achieving higher speeds through vectoring[30], a technology which is rendered ineffective by SLU.[31] Moreover, according to a study by Analysis Mason, the economic viability of SLU is extremely limited and CRC is not aware of any concrete plans, by alternative operators, to subscribe to SLU services.[32] CRC thus concludes that it would neither be justified nor proportionate to maintain the obligation to provide SLU.[33] CRC will nevertheless monitor the appropriateness of the withdrawal of the SLU remedy, namely whether new DSL technologies, which are not incompatible with vectored VDSL2, can be used in the sub-loop, and whether Belgacom effectively implements vectoring within a reasonable period following its commercial availability in the market. CRC will eventually re-introduce SLU should technological evolutions solve the incompatibility between vectoring and VDSL2 SLU.

CRC also proposes to withdraw the obligation to ensure that, in case of partial closing down of a given exchange, a minimum of 20% of lines of each street cabinet, which depended on the dismantled MDF, remain accessible from a mini-MDF.[34]

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[30] Based on the information available to the Commission, vectoring is not yet an operational technology ready for commercial use and is still being tested. However, according to CRC, roll-out in Belgium by Belgacom is expected within the timeframe covered by the current market analysis.

[31] CRC explained, in the reply to the RFI, that the limitations connected with the imposition of SLU whenever vectoring is implemented cannot be remedied by the central management of the shared sub-loop, since the latter is neither foreseen in the technical standards nor being tested by the different vendors.

[32] In the reply to the RFI, CRC states that although the SLU remedy has been in place since 2001, no access seeker has so far invested or is planning to invest in SLU. The withdrawal of the SLU obligation does therefore not lead to stranded investments.

[33] According to CRC, mandating the SLU remedy would prevent the evolution towards higher bandwidths, by preventing Belgacom from investing in the vectoring technology, and would thus hamper broadband competition. CRC also points to the fact that access seekers will benefit from the increased performance of vectoring.

[34] There are currently no mini-MDFs deployed since no MDF has so far been dismantled by Belgacom. CRC explained that the obligation to maintain 20% of lines accessible in a mini-MDF had been imposed in 2008 and that Belgacom had now provided sufficient evidence sustaining the lack of proportionality of such remedy, i.e. in the mini-MDF, a very limited percentage of the copper lines of the dismantled MDF would be available and the mini-MDF would grow in size to a point where maintaining the copper network would be too costly and annul the economic benefits of closing down the MDFs. The withdrawal of such obligation means that LLU will no longer be available after the MDF is closed down. Belgacom will, in any case, always be obliged to provide migration services in case it dismantles an MDF.

CRC does not impose on Belgacom the obligation to grant access to ducts. CRC explained, in its reply to the RFI, that duct sharing had been previously imposed as an ancillary remedy (backhaul) to the SLU obligation. The withdrawal of the SLU remedy renders unjustified the maintenance of a duct sharing obligation[35]. Moreover, FTTH is not expected to be deployed in the current market review period.

(ii) Non-discrimination;

(iii) Transparency;

Belgacom shall publish a reference offer and Key Performance Indicators (KPIs).[36] Belgacom will also be obliged to inform CRC and alternative operators, on an annual basis, of its network modification plans, per region, for the following 5 years.[37]

(iv) Price control and cost accounting;

Belgacom will be subject to a cost-orientation obligation. Prices shall be determined on the basis of a bottom-up model which reflects the costs incurred by an efficient operator, and the charges will be approved *a priori* by CRC. The latter will also apply a margin squeeze test in order to ensure a sufficient margin between LLU prices and the prices of services provided in downstream markets (wholesale Bitstream, resale products and retail services).[38]

During the transition period towards NGA, Belgacom shall charge the same fees for access points that are no longer used by Belgacom retail, as for those that it is operating for its own retail services. In addition, in case local exchanges are closed before the 5 year notice period has elapsed, Belgacom will cover part of the associated migration costs.

(v) Accounting separation.

### *II.4.2. Wholesale broadband access*

(i) Access to broadband services;

Belgacom will be obliged to provide wholesale broadband access, collocation

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35 Cables rolled out between the street cabinet and the end-customer are currently buried in the ground.

36 KPIs concerning the provision of LLU services are to be published every 2 months. Belgacom shall communicate to CRC, every 2 months, KPIs concerning the provision of services to the retail arm. The latter information will be treated by CRC as confidential.

37 E.g. adaptations to or closing down of access points and calendar for the expected modifications. In 2009 CRC and Belgacom concluded an agreement in which the latter engaged to publish, on an early basis, a list of the available access points - Local Exchange (LEX), Local Distribution Centre or Sub-splitter (LDC) and Street cabinet (SC) – and to inform CRC of the existing Remote Optical Platforms (ROP) which are equipped with VDSL2. With regard to fibre deployment, Belgacom shall inform CRC and the alternative operators of any commercial development regarding an FTTH offer at least one year before the retail offer is launched.

38 The pricing of the services and modelling of the costs is based on the decisions adopted by CRC in November 2010. The methodology, imputation test, parameters and remedial mechanisms concerning the margin squeeze test are detailed in BE/2007/0640. A new costing model is currently being developed in order to take into consideration the on-going deployment of NGA/NGN. CRC confirmed, in the reply to the RFI, that the adoption of the new model and pricing decision will be notified to the Commission under the Article 7 procedure.

services (including backhaul) and backhaul *inter alia* by means of GigaEthernet.[39] Belgacom shall provide a fully fledged Bitstream access based on Ethernet.[40] In the reply to the RFI, CRC confirmed that the Bitstream remedy currently imposed provides access seekers with a fully fledged active product which allows alternative operators sufficient possibilities to differentiate their products at retail level.[41]

Belgacom will also be obliged to provide a Bitstream product which includes a *multicast functionality*.[42] CRC considers the imposition of such obligation as justified and proportional and points, in this regard, to the trend verified in Belgium towards the provision of multiple play offers,[43] with the capacity to offer TV services constituting an essential element in the provision of competitive bundled offers. CRC further maintains that the Bitstream services currently offered do not allow alternative operators to offer competitive multiple play offers and that in a scenario where LLU services - which enable the use of the multicast functionality - are developed to a very limited extent and where there are no prospects of further LLU deployment due to the on-going dismantling of local exchanges, the imposition of a multicast functionality is essential in order to ensure that alternative DSL operators can effectively compete in the retail broadband market.[44]

In addition, Belgacom shall not withdraw access previously granted to facilities. In case of network modifications and discontinuation of services, Belgacom shall inform alternative operators and CRC one year before services are discontinued.

The obligation to provide a Bitstream offer with VDSL1 functionality[45] and an IP-managed connection[46] are withdrawn.

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39 The backhaul shall enable the connection of Belgacom´s buildings and shall consist of a link between e.g. the equipment of the alternative operator collocated in a LEX and the Ethernet node of Belgacom in a nearby LEX (MDF or mini-MDF). It serves the purpose of enabling the collection of traffic in a single MDFs, in a scenario where due to the transition to NGA, the intermediary ATM collection point (parent node) is suppressed.

40 The obligation is imposed in light of the on-going dismantling of the ATM transport network and the transition to an Ethernet network. Alternative operators shall be able to demand the use, through the Bitstream offer, of all the functionalities of the DSLAM which are currently enabled through the BRUO offer and allow for more diversified offers at retail level. CRC shall assess the proportionality of the request.

41 The WBA VDSL2 offer allows *inter alia* for (i) interconnection at different levels (local and regional), (ii) flexible allocation of virtual local access networks, (iii) ability to differentiate quality of service levels, service speeds and service symmetry, (iv) control of customer premises equipment, and (v) support for the multicast functionality.

42 Belgacom may, within one month from the publication of the final decision, propose a wholesale service constituting an alternative to the multicast functionality, which CRC will assess.

43 The demand for bundled offers comprising broadband and digital TV services is growing exponentially. See, in this regard, footnote 11.

44 According to CRC, there is demand for the provision of the multicast functionality by alternative operators (e.g. KPN, Mobistar and EDPnet).

45 The VDSL1 technology will be phased out – since 2008, there are no more new VDSL1 deployments. The VDSL2 technology is present in all ROP where VDSL1 is installed.

46 There is no demand for an IP or ATM interface type.

(ii) Non-discrimination;

(iii) Transparency;

The same obligations proposed for the WPNIA market are, *mutatis mutandis*, applied in the WBA market.

Belgacom will also be obliged to submit to CRC, for approval, modifications of the wholesale offer concerning e.g. new parameters, functions, network elements, technology. Retail products based on such new configurations shall only be commercialised by Belgacom 6 months after publication of the updated wholesale offer.

(iv) Price control and cost accounting obligations;

The same obligations proposed for the WPNIA market are, *mutatis mutandis*, applied in the WBA market. CRC will ensure that Bitstream prices do not create a price squeeze or eviction effect with respect to LLU prices.

With respect specifically to WBAVDSL2 offers – including the provision of the multicast functionality -, Belgacom is now subject to the obligation to charge cost-oriented prices.[47]

(v) Accounting separation.

## III. COMMENTS

On the basis of the present notification and the additional information provided by CRC, the Commission has the following comments[48]:

**Withdrawal of the SLU obligation**

CRC proposes to withdraw the SLU obligation. It maintains, in this regard, that Belgacom has been upgrading its VDSL technology and achieving higher speeds through vectoring, a technology which is rendered ineffective by SLU. CRC sustains, moreover, that the economic viability of SLU is extremely limited and that there is neither current nor prospective demand for SLU.

In a scenario where FTTC is being actively rolled out - 76% of the Belgian households have already been equipped with VDSL2 and 85% are expected to be so by 2013 -, and where the dismantling of local exchanges is expected to have an impact on 40% of the current LLU lines, the withdrawal of the SLU obligation will lead to a situation where, as long as FTTH networks are not rolled out, access seekers will not be able to unbundle the local loop or sub-loop and will be, to a great extent, fully dependant on the Bitstream product made available by Belgacom and thus stranded in a lower rung of the ladder of investment.

This is all the most important in a scenario where retail prices in Belgium remain distinctively higher than those of its neighbouring countries and where competition by alternative DSL operators remains rather weak.[49]

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[47] In order to encourage investment, CRC had previously imposed on Belgacom the obligation to set access prices on the basis of reasonable costs, in combination with the application of an eviction test.

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

[49] Evidenced inter *alia* by the low retail market shares of alternative DSL operators in the different

The Commission recalls, in this regard, that in accordance with the principles established in the NGA Recommendation[50], whenever SMP is found in the WPNIA market, NRAs should, as a matter of principle, impose an appropriate set of remedies which includes, in case of FTTC deployment, unbundled access to the copper sub-loop.

The Commission acknowledges, however, that *in casu* there appears to be sufficient evidence to sustain that it is neither justified nor proportional to impose such remedy, since there is currently a lack of demand for SLU products and the imposition of such remedy could hamper the NGA investment strategy of Belgacom and thus run counter to the need to promote and ensure sustainable investment in the development of high-speed networks. The Commission also acknowledges CRC´s assertion that LLU is not likely to become unavailable during the period of the current market review and that access seekers will, in any case, when provided with Bitstream services, also benefit from the increased performances delivered by vectoring. Furthermore, according to CRC, Belgacom must offer a fully fledged Bitstream product which allows alternative operators to effectively differentiate their products at retail level. Finally, the Commission also recognises that CRC is committed to monitor technological and market evolution in order to continuously assess the appropriateness of the withdrawal of the SLU remedy.

The Commission nevertheless invites CRC to monitor the market, namely the evolution on the dismantling of LEXs by Belgacom and the implementation of VDSL2, and also the array of remedies imposed, in order to ensure that in the current transition to NGA competition is safeguarded and new bottlenecks are avoided in the broadband markets.

**Competitive pressure by cable operators**

Even if cable networks are not part of the relevant WBA market, the Commission notes that cable operators exert, at retail level, a certain degree of competitive pressure. Such competitive pressure may vary over different areas of the Belgian market. The Commission invites CRC to consider whether such competitive pressure, in conjunction with the proposed physical access remedies, could warrant reducing the intensity of downstream regulation in certain areas.

Pursuant to Article 7(5) of the Framework Directive, CRC shall take the utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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[51] the Commission will publish this

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regions in Belgium (12% in Brussels, 5% in the Flemish region, 14% in Wallonia, 8.6% in Belgium) and by the very low percentage of new customers captured between 2005 and 2010.

50 See Recommends 12 and 29-30.

51 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.

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

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

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