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Conference of Regulators
c/o Medienrat (CRC)
Gospertstraße, 42
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For the attention of
Mr Robert Queck
President

Fax: + 32 2 226 88 41

Dear Mr Queck,

Subject: **Commission Decision concerning:**

Case BE/2018/2073: Wholesale local access provided at a fixed location in Belgium
Case BE/2018/2074: Wholesale central access provided at a fixed location for mass-market products in Belgium
Case BE/2018/2075: Wholesale TV broadcasting in Belgium

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

1. PROCEDURE

On 27 April 2018, the Commission registered a notification[1] from the Belgian national regulatory authority, the Conference of Regulators of the electronic communications sector (CRC)[2], concerning the markets for wholesale local access provided at a fixed location[3], wholesale central access provided at a fixed location for mass-market products[4] and wholesale TV broadcasting[5] in Belgium.

[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] 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).

[3] Corresponding to market 3a in Commission Recommendation 2014/710/EU of 9 October 2014 on

The national consultation[6] ran from 7 July to 29 September 2017.

On 2 May and 4 May 2018, two requests for information (RFI)[7] were sent to CRC. The responses to both RFIs were received on 7 May 2018.

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 markets for wholesale (physical) network infrastructure access at a fixed location and wholesale broadband access in Belgium were previously notified to and assessed by the Commission under cases BE/2011/1227-1228[8].

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[9].

2.1.1. Wholesale local access provided at a fixed location

The notifying authority, CRC, included in the market for wholesale physical network access at a fixed location shared and fully unbundled access to local loops and sub-loops. The provision of bitstream services, FttH-based access and access to cable networks were excluded from the defined market. The defined geographic market was national in scope. CRC designated Belgacom (now Proximus) as the operator with significant market power (SMP) in the market and imposed the following obligations: (i) access to network elements and associated facilities, (ii) non-discrimination, (iii) transparency, (iv) price control and cost accounting and (v) accounting separation.

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 (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

4 Corresponding to market 3b in the Recommendation on Relevant Markets.

5 Corresponding to market 18 of the 2003 Recommendation on Relevant Markets (OJ L 114, 8.05.2003, p. 45). This market has been removed from the list of the relevant markets that may warrant *ex ante* regulation which is contained in the 2014 Recommendation on Relevant Markets.

6 In accordance with Article 6 of the Framework Directive.

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

8 C(2011) 4535.

9 C(2011) 4534.

2.1.2. *Wholesale central access provided at a fixed location for mass-market products*

The wholesale broadband access market included bitstream access provided through ADSL, SDSL and VDSL. CRC excluded resale products, leased lines services and cable-based access from the relevant market. The defined geographic market was national in scope. CRC designated Belgacom as the SMP operator and imposed the following obligations: (i) access to broadband services, (ii) non-discrimination, (iii) transparency, (iv) price control and cost accounting and (v) accounting separation.

In its decision concerning cases BE/2011/1227-1228, the Commission invited CRC to monitor the market to safeguard competition in the transition to NGA networks. The Commission also drew CRC's attention to the potentially varying levels of competitive pressure exercised at retail level by cable operators in different areas of the Belgian market, which could potentially warrant reducing the intensity of downstream regulation in certain areas.

2.1.3. *Wholesale TV broadcasting*

CRC defined the relevant market as the market for the delivery of analogue and digital TV signals delivered over cable, and DSL broadcasting signals delivered over copper (IPTV). Satellite TV and digital terrestrial television (DTT) were excluded from the market. CRC defined geographically distinct markets, corresponding to the coverage areas of individual cable operators in Belgium.[10]

CRC found every cable operator to have SMP in its respective coverage area and imposed the obligation to provide an analogue-TV resale offer 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. CRC proposed that all three regulated access products be subject to a retail-minus price-cap regulation, the exact method of which would be the subject of a decision at a later stage.

The Commission, in its comments, raised *inter alia* concerns regarding the proportionality of the proposed access remedies and asked CRC to monitor closely the relevant market and re-assess the developments on the markets in terms of infrastructure and services competition.

In October 2013 the CRC notified a proposal for an implementation decision setting wholesale access prices based on the retail-minus methodology imposed in 2011. This case was registered by the Commission under case

[10] 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 (which merged with SFR in November 2014 and was then acquired by Telenet in 2017) 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.

number BE/2013/1511[11]. The Commission questioned the appropriateness of certain assumptions in the proposed methodology.

The retail-minus methodology was further defined in case BE/2016/1829[12], notably with regards to the exact valuation of value added services, the treatment of promotions and subscriber acquisition costs, and the determination of a transitory period during which discounted access prices apply for new entrants, in order to facilitate market entry. The Commission commented on the appropriateness of several assumptions in the proposed methodology.

2.2. Market definition

The current draft measures by the Belgian regulator target both the broadband and broadcasting markets. The regulator argues that the joint analysis of these markets is justified by their increasing convergence, both in technical terms (it is today possible to convey any type of data, voice or images on the same network) and commercial terms (the main operators propose bundled offers including broadband and television, potentially with other services such as fixed and mobile telephony).

2.2.1. Retail markets

The regulator begins its analysis by assessing the competitive conditions at retail level. It defines the following retail markets:

- The retail market of broadband over fixed networks for residential customers (potentially extended to businesses with less than ten employees), without distinction as to technologies or speed;

- The retail market of broadband over fixed networks for non-residential customers (potentially reduced by exclusion of businesses with ten or more employees);

- The retail market for the provision of a television signal.

The regulator identifies high entry barriers (notably the difficulty to duplicate the historical operators' networks or their significant economies of scale) which restrict the development of competition at retail level. The regulator also underlines that market shares are distributed among a limited number of players[13] and that the evolution of prices is detrimental to retail customers.[14]

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11 C(2013) 8287.

12 C(2016) 795.

13 In any part of the country, the combined market share of Proximus and of the regional cable operator is higher than 95%.

14 The regulator shows that the price of standalone and bundled (multi-play) broadband and TV offers, regardless of the operator, has generally increased more than the Belgian Consumer Price Index (CPI) over the past years. It also points out that prices in Belgium are generally much higher compared to the EU average and higher compared to neighbouring countries and that operators are enjoying relatively high profitability margins.

The regulator concludes that, without wholesale regulation, competition at retail level would worsen further. There is a serious risk that retail markets become more concentrated and that the offers available on the broadband and broadcasting retail markets would be limited to the offers of network operators (Proximus and the cable operators Telenet, Brutélé and Nethys[15]). In the absence of wholesale regulation, these operators would likely refuse commercial access to competitors such as Orange[16], or propose insufficiently attractive offers. Moreover, the incentive to compete on price could be even lower than its current level. Due to the above, the regulator concludes that residential and non-residential user welfare would decrease in terms of choice and price if wholesale regulation was removed.

2.2.2. Wholesale local access provided at a fixed location

The regulator then proceeds to analyse the wholesale markets which are linked to the retail markets outlined above.

CRC defines the market for wholesale local access provided at a fixed location as the market for passive physical and virtual (VULA) access to copper and fibre networks at a local level. Access to cable networks and to Fibre-to-the-Office (FttO) are excluded from the market definition.[17] The geographic market covers the whole national territory of Belgium.

2.2.3. Wholesale central access provided at a fixed location for mass-market products

The regulator identifies two separate wholesale central access markets according to the underlying network type:

- ***The market for central access over copper and fibre networks*** (***Market '3b-1)'*** ('ITU SG15' standardisation) for residential and non-residential end-customers, with a national geographic dimension.
- ***The market for central access over cable networks*** (***Market '3b-2")*** ('CableLabs' standardisation) for residential and non-residential end-customers, with a geographic dimension matching the coverage area of each cable operator (Brutélé, Nethys, and Telenet).

The regulator explains that the distinction between central access over copper/fibre (Proximus' network) and central access over the network of the cable operators is due to the use of different protocols, which leads to the

[15] Brutélé and Nethys operate at retail level under the common brand 'VOO' in different parts of the country – Brutélé mainly in Brussels and Nethys mainly in Wallonia.

[16] Orange, the main contender to Proximus and the cable operators in the market, started providing fixed broadband and TV offers (coupled with its own mobile services) in 2016 using the regulated cable access. It currently has more than 100,000 customers in Belgium.

[17] CRC finds that wholesale local access over cable is not technologically feasible in Belgium at the moment. As for FttO access, CRC does not consider it a demand substitute for unbundled copper access, mainly due to its very limited coverage.

absence of substitutability between them. Any operator would, in order to switch platform, need to exchange the retail customer's equipment and the retail products may have to be modified. The regulator argues further that, on the demand side, the migration of an access-seeker between products under different types of standardisation would generate considerable costs and delays, which would make the switch unprofitable.[18] On the supply side, the regulator argues that the provider of wholesale central access under a particular type of standardisation would not be able to adapt its means of production to the other type of wholesale central access without facing considerable costs and delays. Finally, the regulator concludes that there are also no sufficient indirect constraints to justify including these two products together in the same market. CRC does not consider possible new entrants when assessing the boundaries of the wholesale market[19], but maintains instead that the demand-side substitutability analysis should be based on the switching costs of an existing operator.[20]

2.2.4. Wholesale TV broadcasting

The wholesale TV broadcasting market includes wholesale access to broadcasting over cable networks, with a geographical dimension matching the coverage area of each cable operator. Wholesale broadcast access over alternative platforms such as satellite, IPTV and digital terrestrial television is not included in the defined market.[21]

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18 The SSNIP test evaluates the impact on costs and benefits of an access-seeker - which in turn determine its switching behaviour - in case of a permanent 5-10% increase in the price of the regulated access offer, over a period of one year.

19 CRC accepts that the SMP Guidelines, C(2018)2374; OJ C 159, 7.5.2018, p. 1–15, state that NRAs should consider potential access seekers who are not yet providing access-based services. However such assessment should address, on a case-by-case basis the significance of such entry (2018 SMP Guidelines, paragraphs 39-40). CRC considers that as regards Belgium, there was no significant entry in the market in recent years, with the biggest alternative operator reaching a market share in the range of 0-5%. Taking into account the scarcity of recent market entry and, on the contrary, various market exits, CRC considers future significant entry as unlikely.

20 CRC further argues that the substitutability analysis cannot be based on the specific situation of the largest access seeker in Belgium (Orange). Orange switched platforms for most parts of its retail operations from wholesale copper access (from Proximus) to cable access. In its response to the RFI, CRC clarifies that Orange's switching of platforms involved considerable difficulties and the implementation of access over the cable network took more than two years.

21 CRC finds that neither from a demand-side perspective, nor from a supply-side perspective, substitutability would be present. All alternative platforms would require the operator to incur significant costs and to change the customer equipment. Furthermore, for the operator to compete on bundled services, it would be necessary to provide the customer with a broadband connection (provided over coax cable) on top of the broadcasting service (hypothetically provided over an alternative platform), hence requiring the access seeker to acquire wholesale inputs for broadband and broadcasting from two different suppliers.

2.3. The three criteria test for the wholesale TV broadcasting market

As the wholesale TV broadcasting market is not listed in the Recommendation on Relevant Markets, the regulator carries out the three criteria test[22].

2.3.1. The first criterion: high and non-transitory barriers to entry

The regulator concludes that the respective markets of each cable operator are characterised by high barriers to entry due to the non-replicable nature of their networks and that this competitive issue will remain in the future.

2.3.2. The second criterion: no tendency towards effective competition

The regulator finds that the market does not tend towards effective competition due to the fact that i) analogue TV (which still plays a relevant role in Belgium) can only be provided by the cable operators, and ii) that cable operators will maintain a 100% market share in the provision of digital TV.

2.3.3. The third criterion: insufficiency of competition law alone

The regulator concludes that competition law is not able to tackle the retail competition issues highlighted above.

Since the three criteria are fulfilled, the regulator concludes that the wholesale TV broadcasting market is susceptible to *ex ante* regulation and proceeds to assess the existence of SMP on this market.

2.4. Finding of significant market power

2.4.1. Wholesale local access provided at a fixed location

Proximus is the only provider of wholesale local access services and therefore holds a market share of 100%.[23] Additionally, Proximus owns an infrastructure which is difficult to replicate, it enjoys economies of scale and scope and there is no countervailing buyer power. Given that the situation is unlikely to change during the upcoming regulatory period, Proximus is designated with SMP in this market.

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[22] In accordance with Point 2 in conjunction with Recital 5 of the 2014 Recommendation on Relevant Markets, when identifying markets other than those mentioned in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

[23] While the number of unbundled lines sold by Proximus to access-seekers was close to 100,000 in early-2012, it stood at less than 10,000 at the end of 2017.

2.4.2. *Wholesale central access provided at a fixed location for mass-market products*

Market '3b-1' - central access over copper and fibre networks

Proximus is the only provider of wholesale central access services over copper and fibre networks and therefore holds a market share of 100%.[24] As in the local access market, the regulator finds that Proximus owns an infrastructure which is difficult to replicate, it enjoys economies of scale and scope and there is no countervailing buyer power. Therefore, Proximus is designated with SMP.

Market '3b-2' - central access over cable networks

Brutélé, Nethys, and Telenet are the only providers of wholesale central access over their respective networks and therefore they each hold a market share of 100%. As in the case of Proximus, the regulator finds that the cable operators own an infrastructure which is difficult to replicate, they enjoy economies of scale and scope and there is no countervailing buyer power. Telenet, Brutélé and Nethys are all designated with SMP in their respective coverage areas.

Alternative finding of joint SMP

On top of its main conclusion that the provision of wholesale central access should be split into separate markets depending on the underlying network type, CRC also proposes a subsidiary analysis of whether a possible unified market including both networks is conducive to tacit collusion, and whether Proximus and cable operators hold a position of joint SMP.

The analysis is based on the Airtours[25] criteria as further clarified by the Court of Justice of the EU in the Impala I/II judgements[26] as well as market characteristics as set out in Annex II of the Framework Directive that can be used, among others, to underpin a finding that a particular market is prone to tacit collusion. Accordingly, CRC finds that the retail broadband access market is, *inter alia*, concentrated, mature, has relatively homogeneous products and inelastic demand. The market is further characterised by high barriers to entry, stable market shares, similar cost structures of the main operators and investment decisions by operators are transparent. In addition, CRC supports its analysis with figures on return on capital employed (ROCE), and return on total assets (ROA) of Proximus and cable operators. It also compares profitability parameters such as EBIT and EBITDA margins of the Belgian operators, which show that they are generally more profitable than other major EU telecoms operators.

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[24] The number of lines sold in the wholesale central access market by Proximus has also decreased steadily over the last years, albeit not as much as in the case of the local access market. The number of bitstream lines decreased from around 155,000 in early-2012 to around 60,000 in late-2017.

[25] Case T-342/99, Airtours plc v Commission EU:T:2002:146, paragraph 62.

[26] Impala I: Case T-464/04, EU:T:2006:216; Impala II: Case C-413/06 EU:C:2008:392.

The regulator concludes that a (constructive) refusal of access is a wholesale focal point (i.e. a common policy on which to align future behaviour) of tacitly collusive behaviour between Proximus and a cable operator in the latter's coverage area. CRC provided examples of pent-up demand for wholesale access. In addition, it claims that the few commercial agreements that were reached on the market in recent years were concluded under the threat of regulation and would need to be disregarded for the purpose of a modified greenfield assessment.[27]

CRC considers that there are retail focal points that are strictly linked with the wholesale focal point forming part of an overall economic mechanism of tacit coordination. The regulator highlights, in particular, the maintenance of retail market shares and a policy of the tacitly colluding operators to encourage their customers to migrate to multi-play offers. According to CRC, the latter strategy can result in marginalisation of mobile-only operators, lowering churn and increasing average revenue per user (ARPU). CRC considers that if Proximus and cable operators refuse access to their fixed infrastructures (or give access under disadvantageous conditions) while subsidising their revenues from fixed services, the position of mobile-only operators would be further weakened.

Moreover, CRC finds that both retail and wholesale markets are sufficiently transparent, enabling parties to observe each other's behaviour. This is based, *inter alia*, on frequent and repetitive interactions, a limited number of offers actively marketed and public statements. If one of the operators would deviate from the focal point by granting access to its network, CRC believes that this deviation would be immediately visible by other players, which could decide to retaliate.

As regards retaliation, CRC considers that it can take place on the retail as well as on the wholesale markets. Credible threats are, at retail level, a return to normal competition conditions and, at wholesale level, granting advantageous network access.[28]

Finally, CRC concludes that countervailing buyer power of three categories of actors - alternative operators, residential and non-residential customers – which would allow jeopardising the collusive mechanism, does not exist to a sufficient extent.

Given the above, the regulator concludes that the alternative finding of joint dominance between Proximus and the cable operators can justify the imposition of a similar set of regulatory obligations as in the case of single dominance on markets 3b-1 and 3b-2.

[27] On the modified greenfield assessment, see also the SMP Guidelines, C(2018)2374; OJ C 159, 7.5.2018, p. 1–15, paragraphs 17 and following.

[28] The former is considered easier and faster to implement than any action at wholesale level since it can be implemented in a targeted way (e.g. aiming at a certain consumer segment).

2.4.3. *Wholesale TV broadcasting*

The same considerations highlighted above in the SMP assessment of the cable central access market are also valid for the wholesale TV broadcasting market. Therefore, Telenet, Brutélé and Nethys are all designated with SMP in their respective coverage areas.

Table 1: Summary of SMP assessment

	Wholesale local access (3a)	Wholesale central access over copper/fibre (3b-1)	Wholesale central access over cable (3b-2)	Wholesale TV broadcasting
SMP operator	Proximus	Proximus	Telenet, Brutélé, Nethys	Telenet, Brutélé, Nethys

2.5. Regulatory remedies

The regulator proposes to continue to impose a set of regulatory obligations on the SMP operators, while also putting forward a number of new remedies. Notably, the regulator proposes to reconcile the price control remedies applicable to Proximus, on the one hand, and to cable operators, on the other hand. Up to now, Proximus' (copper) wholesale prices were regulated on the basis of cost orientation, while the regulated wholesale prices of the cable operators were calculated on the basis of a 'retail-minus' methodology. For the upcoming regulatory period, the regulator proposes to drop the retail-minus approach and put in place an approach for price regulation which is based on costs for both types of SMP operators.

2.5.1. *Wholesale local access provided at a fixed location*

The regulator proposes to impose the following regulatory obligations on Proximus:

(i) Access and interconnection: obligation to provide physical and virtual (VULA)[29] access to its copper and fibre[30] networks. Additionally, Proximus must provide access to its end-to-end fibre ducts, allowing other operators to roll-out their own fibres in these ducts. Finally it will be obliged to provide unbundled access based on wavelengths to its fibre network.[31]

[29] This virtual access must be provided at the level of the local Ethernet switch, it must allow access-seekers to replicate Proximus' offers but also to differentiate their services, and must offer a Multicast functionality at local level.

[30] In December 2016, Proximus announced a 3 billion euro fibre investment in a PON fibre network which will allow the operator to reach 85% of businesses and 50% of households over the next ten years. According to the regulator, it is necessary to also impose access to Proximus' fibre network, as it is destined to eventually replace Proximus' copper network.

[31] Although this obligation is imposed, the regulator admits that the technology that would allow providing wavelength unbundling on the Proximus PON fibre network is not yet available on the

(ii) Non-discrimination: Equivalence of Outputs (EoO)[32], ensure technical replicability of Proximus' offers, structural dividing walls ("Chinese walls") between the wholesale and the commercial departments of the SMP operator, allow alternative operators to use the Customer Premises Equipment (CPE) of their choice.

(iii) Transparency: obligation to publish a Reference Offer, to respect a set of Key Performance Indicators (KPIs), and to publish information on long-term network evolutions.

(iv) Cost accounting

(v) Price control: obligation to set cost oriented prices[33] for access to Proximus' copper network and ancillary services (such as colocation and installation fees). As for access to Proximus' fibre network, the regulator imposes the obligation to charge "fair"[34] prices, to be set using a BU-LRIC cost model.[35] The regulator argues that Proximus' investments in a risky asset such as fibre justify a looser price control obligation for fibre access compared to copper access. The price control will be complemented by a margin squeeze test.

2.5.2. Wholesale central access provided at a fixed location for mass-market products

Market '3b-1' - central access over copper and fibre networks

The regulator proposes to impose the following regulatory obligations on Proximus:

(i) Access and interconnection: obligation for Proximus to provide bitstream access to its copper and fibre networks, including the obligation to provide a multicast functionality.

(ii) Non-discrimination: EoO, ensure technical replicability of Proximus' offers, "Chinese walls" between the wholesale and the commercial

market. The NG-PON2 technology, which is expected to enable wavelength unbundling, will likely not be available until 2019-2020.

32 CRC argues that the imposition of Equivalence of Inputs (EoI) would be disproportionate, as it would require significant investment and changes of administrative and IT processes.

33 The current regulated rates (EUR 8.03 for LLU raw copper and EUR 0.56 for LLU shared pair) will remain in force until further notice.

34 By "fair", the CRC means a price which allows a reasonable margin between the cost of the product and the wholesale price.

35 The regulator explains that it is in the process of developing a BU-LRIC cost model which will allow verifying if the access prices are indeed "fair". The model, which is expected to be finalised by the end of 2018/beginning 2019, will be used for the regulation of both Proximus and the cable operators. The regulator proposes not to set any interim price for access to Proximus' LLU/VULA fibre products because there is currently no demand or offer for this. However, if a commercial agreement is reached between operators, the CRC proposes to validate the tariffs resulting from this agreement.

departments of the SMP operator, allow alternative operators to use the CPE of their choice.

(iii) Transparency: obligation to publish a Reference Offer, to respect a set of KPIs and to publish information on long-term network evolutions.

(iv) Cost accounting

(v) Price control: obligation to set cost oriented prices for access to Proximus' copper network and ancillary services. The regulator imposes the obligation to charge "fair" prices for bitstream over fibre, to be set using the BU-LRIC cost model.[36] As in the case of the local access market, the regulator argues that the additional riskiness of Proximus' fibre investments justify a looser price control obligation for fibre access compared to copper access. The price control will be complemented by a margin squeeze test.

Market '3b-2' - central access over cable networks

The regulator proposes to impose the following regulatory obligations on Telenet, Brutélé and Nethys, which according to CRC will allow access-seekers to more effectively differentiate their retail offers from the cable SMP operator:

(i) Access and interconnection: obligation to provide bitstream access to the cable network and access to the QoS mechanism in the EuroDOCSIS protocol[37].

(ii) Non-discrimination: EoO, ensure technical replicability of the cable operators' offers, "Chinese walls" between the wholesale and the commercial departments of the SMP operators, allow alternative operators to use the CPE of their choice.

(iii) Transparency: obligation to publish a Reference Offer, to respect a set of KPIs and to publish information on long-term network evolutions.

(iv) Cost accounting

(v) Price control: obligation to charge "fair" prices, to be set using the BU-LRIC cost model.[38] Similarly to the case of the price control obligations for

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36 In the interim period until a BU-LRIC cost model allowing to determine "fair" prices for fibre bitstream is developed, the regulator proposes to set a temporary rate on the base of the price agreed in a commercial deal between Proximus and access-seeker EDPNet (EUR 23/line/month for a 110 Mbps/10 Mbps/unlimited volume profile, and EUR 28/line/month for a 250 Mbps/50 Mbps/unlimited volume profile, excluding Ethernet transport). Proximus must offer this interim price, transparently and without discrimination, to all other access-seekers. The regulator might assess and accept other prices for different types of bitstream profiles if new commercial deals are concluded. The current pricing structure for bitstream over copper will remain unchanged.

37 This is a type of managed VoIP service which will allow access-seekers to provide fixed telephony services via the cable network. This will enable them to effectively compete with the SMP operators in the provision of multiple-play bundles.

access to Proximus' fibre above, the regulator proposes to allow cable operators to charge prices which might be higher than strictly cost oriented prices, due to the relatively higher risk of upgrading cable networks compared to the access services provided over copper. The price control will be complemented by a margin squeeze test.

2.5.3. Wholesale TV broadcasting

The regulator proposes to impose the following regulatory obligations on Telenet, Brutélé and Nethys:

(i) Access and interconnection: Access to the digital television platform (with resale of analogue television services).[39]

(ii) Non-discrimination: EoO, ensure technical replicability of the cable operators' offers, "Chinese walls" between the wholesale and the commercial departments of the SMP operators, allow alternative operators to use the CPE of their choice.

(iii) Transparency: obligation to publish a Reference Offer, to respect a set of KPIs and to publish information on long-term network evolutions.

(iv) Cost accounting

(v) Price control: obligation to charge "fair" prices, for the same reasons as explained above, to be set using the BU-LRIC cost model.[40] The price control will be complemented by a margin squeeze test.

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[38] In the interim period until a BU-LRIC cost model allowing determining "fair" prices for cable bitstream is developed, the regulator proposes to set a temporary rate equivalent to the current regulated price of Brutélé (EUR 20.29/line/month for profiles with download capacity less than 150 Mbps and EUR 30.12/line/month for profiles with higher capacity). This price was set under the current 'retail-minus' regime. The regulator assessed a number of national and international cable access prices and established that the Brutélé regulated rate was the one which is likely to be the closest to a "fair" price for a Belgian cable operator. The related retail price development in the Brutélé area, however, was found to be indicative of a retail market failure. The "fair" price for the QoS mechanism in the EuroDOCSIS protocol would come on top of this interim price. This interim price will oblige Telenet to reduce its wholesale price by approximately EUR [redacted]/line/month for the lower quality product, while Nethys' tariff will increase slightly from the current EUR 20/line/month.

[39] The CRC explains that the remedies imposed on the wholesale TV broadcasting market are essential to allow access-seekers to provide retail products which are of equal quality to the ones offered by the SMP cable operators. Without this access obligation, the quality of broadband and broadcasting services that can be provided by acquiring only the central access product over cable would be lower due to the capacity characteristics of the cable network. The wholesale offer must allow access-seekers who do not own their own broadcasting platform to provide these services. It must also enable access-seekers to commercialise a diversified offer, with at least 2 extra channels, and using their own modem, decoders, interfaces and systems.

[40] In the interim period until a BU-LRIC cost model allowing to determine "fair" prices for wholesale TV broadcasting over cable is developed, the regulator proposes to set a temporary rate of EUR 8.83/line/month for analogue and EUR 8.92/line/month for digital TV. Both tariffs are based on the currently applied wholesale tariffs for wholesale TV access of Brutélé, which were calculated in accordance with the retail-minus methodology.

2.5.4. *Weighted Average Cost of Capital (WACC)*

The determination of the WACC is not part of the notified documents. The CRC explains in the response to the RFI that it is in the process of calculating a new WACC level which will be notified to the Commission in Q4 2018.

2.5.5. *Geographic differentiation of remedies*

Within the framework of this decision, the CRC has identified particular circumstances where remedies are reduced:

- Areas where <u>at least three sufficiently independent NGA operators</u>[41] are present[42] (including covered by co-investment arrangements between operators, open access networks, etc.). In these areas, the CRC proposes to lift many of the obligations imposed on the SMP operators[43], except when access is intended to serve multi-site non-residential customers. The reduction of remedies is scheduled to take effect one year after the coverage threshold is reached.

- Areas covered by <u>maximum one NGA infrastructure</u>.[44] CRC argues that in these areas, the service quality and/or the users' choice are currently limited and could remain so during the period of the present analysis. The first priority must be to stimulate investments to try to resolve this situation. The CRC proposes therefore to reduce the obligations for any new NGA infrastructure rolled out in these areas.[45]

2.5.6. *Reasonableness of access demands*

CRC proposes a specific methodology to determine whether the access request of another network operator (i.e. Proximus, Telenet, Nethys and Brutélé) is reasonable or not.[46] This will effectively limit the possibilities for

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41 Meaning the operators providing services over an infrastructure offering speeds of 30 Mbps and above.

42 A statistical sector is considered to be covered by three NGA networks if 50% of households can access services from three different NGA operators.

43 When a third NGA infrastructure is deployed in said areas, regulatory obligations are lifted on all operators except for (i) the obligation to bargain in good faith, (ii) access to splice, splint or failing this, dark fibre, (iii) access intended to serve non-residential multi-site customers, (iv) transparency measures related to the evolution of the network and (v) access to copper unbundling in the areas where fibre is not yet present. As of now there is no zone covered by three NGA networks. By way of this exception CRC intends to stimulate co-investments and network rollout.

44 In total, there are 299,000 households or 6.2% of Belgian households in areas currently covered by maximum one NGA infrastructure.

45 For any new NGA infrastructure deployed in said areas, regulatory obligations are lifted except for (i) the obligation to bargain in good faith, (ii) access to splice, splint or failing this, dark fibre, (iii) access intended to serve non-residential multi-site customers and (iv) transparency measures related to the evolution of the network. Remedies would however be maintained on the incumbent operator.

46 The reasonableness of an access request should be assessed based on the net present value (NPV) of the required investment to be made by the access-requesting operator. The analysis should specifically examine whether the access seeker can efficiently invest in their own networks to self-supply the

regulated access within the operators' respective coverage areas. A potential denial of an access request will be subject to a final decision of the regulator.

3. COMMENTS

The Commission has examined the notification and the additional information provided by the CRC and has the following comments:[47]

Market definition and SMP assessment

The Commission notes that CRC concludes on the definition of network specific wholesale markets 3b-1 (Proximus) and 3b-2 (cable operators) which have a 100% market share on their respective networks.

The Commission observes in this regard that in line with paragraph 33 of the SMP Guidelines[48], the NRA should define the relevant product market by grouping together products or services that are used by consumers for the same purpose. The Commission further points out that at retail level, technological developments have generally led to inter-platform competition, as the retail services provided over different platforms have been found equivalent and increasingly interchangeable. Since wholesale inputs over different platforms serve an identical retail market they can *prima facie* be considered substitutable and therefore part of the same wholesale access market, most notably in those instances where wholesale access products are technically feasible and readily available, such as in a – usually uniform - wholesale central access market 3b.

In this regard, CRC appears not to give due weight to the most concrete evidence of substitutability, i.e. the fact that the principal access seeker Orange has in the past switched wholesale access provider, from the copper to the cable platform. This behaviour is arguably a strong indicator of demand substitution between the two types of wholesale access products and of the fact that the switching cost of an existing operator are not as high and insurmountable as argued by CRC in the draft measure. It would appear that, from Orange's perspective, the decisive consideration for switching platforms was rather whether in a forward-looking manner – besides the switching costs incurred – it could better compete for new customers at retail level. In particular, the cost of switching must be assessed together with the future benefits, such as technological advantages of a chosen platform and/or the need to be able to supply multi-play packages to sustainably compete on the retail market.

In any case, in order to determine whether different wholesale platforms such as copper, fibre and cable should be included in a single wholesale market, NRAs will normally apply the so-called 'SSNIP' test, which CRC also does in the present case.

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requested service. If that would be the case, the access request is seen, *a priori*, as unreasonable. Furthermore, CRC clarified in its response to the RFI that there is a presumption that the NPV-calculation of investments outside the network coverage area of an operator will be negative and thus access requests outside the coverage area are considered reasonable.

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

48 Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications network and services (2018 SMP Guidelines), OJ C 159, 7.5.2018, p. 1.

The SSNIP test as proposed by CRC raises, however, a number of methodological concerns. First of all, CRC considers only the profitability of switching of a single operator (Orange) and its conclusion on network-specific central access markets rests entirely on the fact that Orange is locked into cable platform access due to its insurmountable switching costs.

Given the forward-looking assessment of the analysis the Commission points out that a SSNIP test should also take into account potential new entrants which do not have to consider switching costs when choosing their access platform. From a new entrants' perspective, wholesale central access platforms may look substitutable because they serve the same retail markets. CRC's focus on Orange's business case introduces a potential bias towards a finding of network-specific markets which may not accurately reflect the substitutability of network access at wholesale level.

Further to that, the Commission notes in paragraph 40 of the SMP Guidelines that when considering the likelihood and impact of potential access seekers, the regulator should assume a hypothetically competitive access regime imposed by the NRA, where an NRA ensures the technical feasibility and economic viability of the access products that would exist in a competitive market, and which may in fact encourage future entry also in the present case.

The last point leads to a methodological concern regarding both Orange and potential future access seekers. The Commission understands that in order to carry out the SSNIP test, the regulator used the existing access products offered by Proximus and the ones currently purchased by Orange from the cable operators. The wholesale products used by Orange are supplied on a basis of 'retail-minus' tariffs imposed on the wholesale broadcasting market. In line with paragraph 31 of the SMP Guidelines, only a regulated cost oriented price can create an assumption of being set at a competitive level, and should be taken as a starting point for the SSNIP test. The Commission therefore considers that CRC's use of prices which are in its own admission above competitive levels in all coverage areas, is likely to distort the outcome of the SSNIP exercise.

In fact, the Commission considers the supplementary analysis and the related finding of joint SMP a more appropriate and plausible approach to analysing the wholesale central access market.

The Commission recognises that the joint SMP assessment has been carried out in line with the Commission's SMP Guidelines. The Commission notes that the analysis is based on interactions at both retail and wholesale level. A plausible theory of tacit collusion in line with the legal test set out in the Airtours and Impala I and II judgments is proposed. CRC provides evidence of market structures and behaviour suggesting the market's conduciveness to tacit collusion, in particular as regards the wholesale focal point of (constructive) refusal of supply and the retail focal point of *supra*-competitive price levels. This analysis includes an assessment under a modified greenfield approach.

In the Commission's view the outcome of both approaches to market definition (single as well as jointly dominant platform owners) will – absent regulatory intervention - lead to comparable wholesale and retail market outcomes, in terms of lack of wholesale access and retail prices above competitive level. From an economic perspective this is not surprising as the behaviour of tacitly colluding market players is normally aligned in order to substantially replicate that of a single dominant player.

In that regard, CRC is right to conclude that in both variants of market definition (cable and copper included in the same or separate broadband markets) and the resulting analyses of significant market power, it would be called upon to consider the appropriateness of the same type of regulatory obligations referred to in Articles 9 to 13 of the Access Directive.

In line with previous Article 7 decisions[49] the Commission will, therefore, not object to the market definitions proposed by CRC, as a broader definition of market 3b (including the jointly dominant Proximus and cable operators) would, in the above described circumstances of the present case, not lead to a different regulatory outcome.

Nonetheless, in order to strengthen its joint SMP analysis, the Commission asks CRC to further substantiate certain elements which could make the market conducive to tacit coordination, specifically with regard to product homogeneity, commonality of network elements, similarity of cost structures, and the observed degree of network innovation.

Long-term dynamics of the Belgian broadband and broadcasting markets

The Commission acknowledges that imposing appropriate *ex ante* access obligations on both Proximus and cable operators, in the particular circumstances of the Belgian broadband and broadcasting markets, will allow, in the short-term, access-seekers such as Orange to effectively compete by being able to offer multi-play retail bundles.

However, apart from the above consideration concerning the forthcoming regulatory review period, the Commission highlights the importance of putting in place a regulatory landscape that leads towards a structural improvement in competitive conditions in the country in the medium to longer term.

In line with Recital 19 of the Access Directive, the Commission notes that the imposition by an NRA of regulated access that incentivises competition in the short-term should not reduce incentives for competitors to invest in alternative networks that will secure effective competition in the long-term. Accordingly, in the longer term it may be more appropriate to put in place a regulatory environment that facilitates more structural competition on the market, i.e. which incentivises network investments by the current access-seekers, or co-investments with existing network operators in very high capacity networks on the basis of long-term risk sharing rather than the reliance on wholesale access regulation. In this regard the Commission is concerned that the maintenance of a network-specific market definition may signal to potential future infrastructure investors that these may automatically fall under a SMP regime of regulated network access at conditions which are not finally determined.

49 See, for example, cases HR/2014/1545, EE/2010/1038, DE/2015/1735.

Against this background, the Commission invites the regulators to continue to closely follow the business development of access-seekers, switching behaviour, new entry, as well as the potential signing of commercial access or co-investment agreements.

The Commission further asks CRC to implement regulation in a way that facilitates new entry, reduces barriers to switching, and at the occasion of the next market review revisit their approach to defining the relevant broadband markets based on the methodological guidance contained in the Commission's SMP guidelines as well as the Commission's above considerations concerning the SSNIP test.

Appropriateness of the pricing methodology for access to fibre and cable on market 3a, 3b and the broadcasting market

CRC considers that a cost-oriented wholesale access price based on a BU-LRIC model should be imposed in markets 3a and 3b given the lack of a copper anchor from either market 3a or 3b, or a demonstrable retail price constraint. This is consistent with the provisions of the 2013 Commission recommendation on costing and non-discrimination[50] since only these conditions, together with the imposition of EoI and quality of service indicators would, in the Commission's view, have called for a more flexible price control by way of an economic replicability test (ERT).

The Commission notes, however, that CRC also intends to impose "fair" prices, which allow for an extra margin on top of the strictly cost oriented rates, in order to encourage NGA deployment.

As regards the additional margin on top of the cost oriented prices, the Commission notes that according to Article 13(1) of the Access Directive, NRAs shall allow a reasonable rate of return on adequate capital employed in order to encourage investments by operators, including in NGA networks. Moreover, under Annex I of the NGA Recommendation[51], the price of access to the terminating segments of FttH networks could include, where appropriate, a higher risk premium to reflect any additional and quantifiable risk incurred by the SMP operator.

The Commission suggests that it might be more appropriate for CRC to take account of the investment risk in its calculation of the cost of capital[52], instead of an additional mark-up to the cost oriented prices resulting from the cost model. This should be considered in particular with regards to the objectives of Article 8(5) of the Framework Directive, notably the promotion of efficient investment in new and enhanced infrastructures.

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[50] Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761 (in particular point 48and following)

[51] 2010/572/EU: Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA).

[52] As recommended for fibre networks by the NGA recommendation (point 25 and Annex I).

Appropriateness of the transitory price for wholesale cable access

As an interim solution while the BU-LRIC cost model for cable and fibre access is being developed, CRC proposes to regulate the price of the wholesale central access product provided by cable operators at the level currently charged by Brutélé (EUR 20.29/30.12 per line per month)[53]. These prices were determined on the basis of the "retail-minus" price methodology imposed during the previous regulatory period.

However, CRC refers to flaws in the currently imposed "retail-minus" price costing methodology. CRC concludes that competition is not fully functioning in all areas, including in the Brutélé coverage area, allowing for high profits and price increases, which are ultimately detrimental to consumers. It, therefore, appears counter-intuitive to rely on the continuous application of the current retail-minus wholesale price to remedy the identified competition problem, even for an interim period.

However, the Commission recognises the difficulties of setting benchmark prices in the present case since there are no comparable competitive cable access prices available in Belgium.

Given the transitory nature of the proposed price control until the BU-LRIC model is developed in late-2018/early-2019 and the substantial wholesale price reduction in the Telenet coverage area of around EUR [redacted]/line/month, the Commission does not object to the proposed interim price. The Commission, however, urges CRC to finalise the BU-LRIC cost model for fibre and cable access services without delay and to notify the new prices to the Commission accordingly.

Pursuant to Article 7(7) of the Framework Directive, the 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[54] 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[55] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential

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53 The EUR 20.29/line/month price is based on Brutélé's current Wahoo 125/6.5/unlimited volume retail product, while the EUR 30.12/line/month price is based on Brutélé's Tatoo 200/10/unlimited volume product.

54 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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information which you wish to have deleted prior to such publication.[56] You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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