

**CABLE BELGIUM RESPONSE TO THE BELGIAN NRAS MARKET CONSULTATION REGARDING  
THE REGULATION OF BROADBAND AND BROADCASTING MARKETS**

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**EXECUTIVE SUMMARY**

1. Cable Belgium hereby submits a single response to all four Belgian NRAs which have launched a market consultation on the regulation of broadband and broadcasting markets in Belgium. This response complements the cable operators' individual responses which will be submitted as part of this consultation. The response has been submitted in English for convenience reasons but Cable Belgium can of course submit Dutch and French translations, if necessary.
2. Cable Belgium cannot sufficiently emphasize the importance of the draft decision and the risks associated to the regulatory overreach which is being proposed. There is no EU Member State which has considered such a heavy-handed interventionist and duplicative regulation since the adoption of the new regulatory framework in 2002 even though the competitive market conditions prevailing at that time were significantly less developed. In short:
  - Not a single NRA has duplicated the regulation of market 3(b) (or market 5/11 in the previous Commission Recommendations) when they considered that cable (or an alternative network for that purpose) would not be part of this market. The Commission has over time, broadened the scope of the market in its Recommendation so as to allow for a broader market as local access infrastructures were being rolled-out. This allowed for a progressive de-regulation assuming no single or collective dominance could be established. The reasons why the Commission (followed in that respect by the previous BIPT market analyses) has historically been critical of including cable was because of the absence of wholesale access, cable fragmentation and technical characteristics.

- Not a single NRA has imposed a double set of regulatory requirements on fixed networks for wholesale access for broadband and broadcasting services. This approach is all the more remarkable that the NRAs recognize that end users are increasingly relying on mobile access or have the ability to rely on OTT-based services (“cord-cutters”).
  - Not a single NRA has imposed a regulation that would fundamentally undermine the ladder of investment and infrastructure-based competition as it is being considered here. What is being proposed in the draft decision boils down to sanctioning operators which have been investing in the acquisition, deployment and upgrade of fixed networks, particularly cable operators, and reward Orange Belgium for its risk-adverse, cream skimming strategy during the extended period of time its mobile services were being subsidized by fixed operators. The subsidized access regime will affect any business plan to pursue network deployments and upgrades. If Belgium opts for a perpetual (and even duplication of) access model, it should recognize that the deployment of alternative networks makes no economic sense.
3. Cable Belgium calls upon the NRAs to review the overall architecture of the draft decision and bring it into line with fundamental legal and policy principles of the framework. These policies include of course promoting competition but are not narrowly confined to this (and certainly not in respect of a service-based competition)– a point which is regrettably overlooked in the draft decision which, despite its length contains in reality no overall impact assessment which is essential to make well-founded policy choices.
  4. NRAs should start by recognizing that the Belgian market is performing well in terms of achieving the regulatory framework’s objectives and this to the benefit of consumers and other stakeholders of the wider digital economy. The infrastructure part (particularly fixed) is the dimension in which Belgium is doing much better compared to other aspects of the Digital Agenda.
  5. In the event NRAs would persist in their misguided belief that the conditions on the retail markets justify a regulation of the cable networks, Cable Belgium calls upon the NRAs to consider a framework which would at least offer a better regulatory stability and be more proportionate in its overall impact. The current approach which consists in retaining isolated, network specific wholesale markets leads to a rigid duplication of regulation which is necessarily, taken in its entirety, disproportionate. It is also conceptually a methodology which paves the way for perpetual wholesale regulation. Methodological errors in the forward-looking assessment of the competitive conditions and proportionality assessment of the remedies would allow NRAs to correct this. Stability of regulatory framework which is, as such, another important policy consideration that should guide NRAs in their reviews, pleads for an approach whereby the existing regulation would be taken as a starting point.
  6. This submission provides a more detailed exposé of Cable Belgium’s position and is structured as follows:
    - Cable operator’s key role in achieving the framework’s objective;
    - The draft decision runs afoul fundamental regulatory principles;

- NRAs should ensure a harmonized framework at EU level and achieve regulatory stability and predictability;
  - The remedies are disproportionate in terms of scope as well as pricing and operational requirements.
7. These observations are not exhaustive of all the comments and criticisms which cable operators have in relation to the analysis. For efficiency reasons, cable operators have however, preferred to focus this submission on the main points which they have in common and on strategic policy/legal issues. Cable Belgium thanks the Belgian NRAs for considering these observations.

## 1. CABLE OPERATORS' KEY ROLE IN ACHIEVING FRAMEWORK'S OBJECTIVES

8. Promoting efficient investment and innovation in new and enhanced infrastructures has been one of the objectives as of the adoption of the framework in 2002.<sup>1</sup> The importance of incentivizing investments in networks gained significant further weight in the 2009 amendments of the Framework Directive<sup>2</sup>. The CJEU confirmed that NRAs are to promote competition in the telecoms sector inter alia by “*encouraging efficient investment in infrastructure*”.<sup>3</sup>
9. Striking the correct balance between promoting competition and stimulating investment in telecoms networks has been a constant concern for the Commission. The Commission stressed that *ex ante* regulatory obligations should level the playing field without removing incentives for new infrastructure investment.<sup>4</sup> An excessive regulatory burden on operators would stifle investment and innovation.<sup>5</sup> In order to allow and enhance the deployment of NGA networks and achieve the objectives of the Digital Agenda, the Commission has recognized the need to reduce regulatory pressure.<sup>6</sup>

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<sup>1</sup> Article 8(5)(d) of the Framework Directive. The preparatory work relating to the 2009 review indicates that new investment into competitive infrastructure is needed (IP/07/1677, 13 November 2007, ‘Commission proposes a single European Telecoms Market for 500 million consumers’). See in particular references to enhancing investment to build a market-oriented framework [COM (2007) 697: Proposal {SEC(2007) 1472} {SEC(2007) 1473}. 1. Context of the Proposal] and the need for regulators to take into account the risks involved in making investments in high-speed networks in order to permit returns on investments [Impact Assessment, {COM(2007) 697 final} {COM(2007) 698 final} {COM(2007) 699 final} {SEC(2007) 1473} /\* SEC/2007/1472 final \*/ , 5.1.5. Summarising the problem and 7.1.5. Summarising the problem: the internal market is not yet a reality in the sector].

<sup>2</sup> Recital 8 to Directive 2009/140 (OJ L 337, 18.12.2009, p.37) particularly emphasizes the need to promote investment in “*new high-speed networks that will support innovation in content-rich Internet services and strengthen the international competitiveness of the European Union*”. See also Recitals 53 to 55 and Recital 61 of Directive 2009/140.

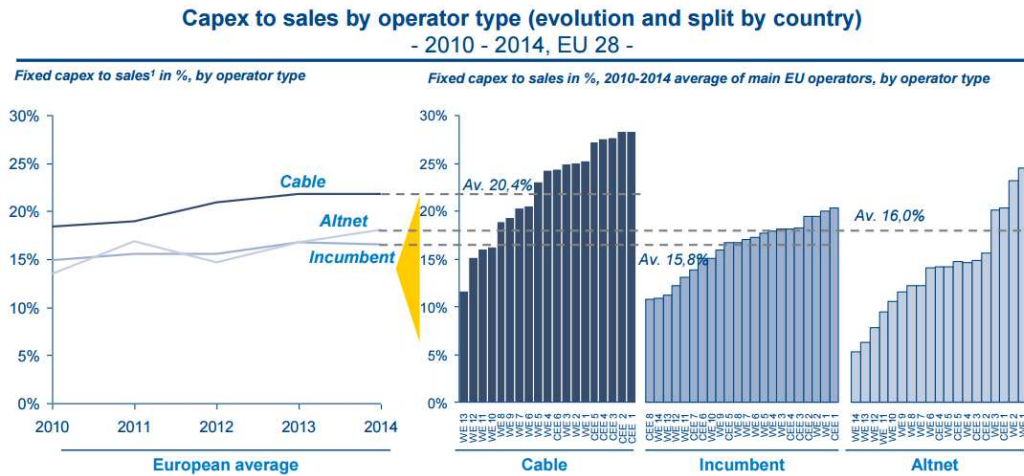
<sup>3</sup> Judgment of 3 December 2009, *European Commission v Federal Republic of Germany*, C-424/07, EU:C:2009:749, paragraph 88.

<sup>4</sup> Commission SWD (2014) 298 Explanatory Note accompanying the 2014 Commission Recommendation, 1.2, p. 5.

<sup>5</sup> Commission SWD (2014) 298 Explanatory Note accompanying the 2014 Commission Recommendation, 2.2, p. 8 and 4, p. 9.

<sup>6</sup> See Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) paragraph 2 and 3: “*The present Recommendation, which is to be seen in [the] context [of NGA roll-out], aims at promoting efficient investment and innovation in new and enhanced infrastructure, taking due account of the risks incurred by all investing undertakings and the need to maintain effective competition, which is an important driver of investment over time.*”

10. Cable operators have played a key role in deploying broadband networks in Belgium and allowed it to become best in class on many fronts. The figure below shows that cable operators have spent a significantly higher amount of CAPEX to upgrade their networks compared to other operators.



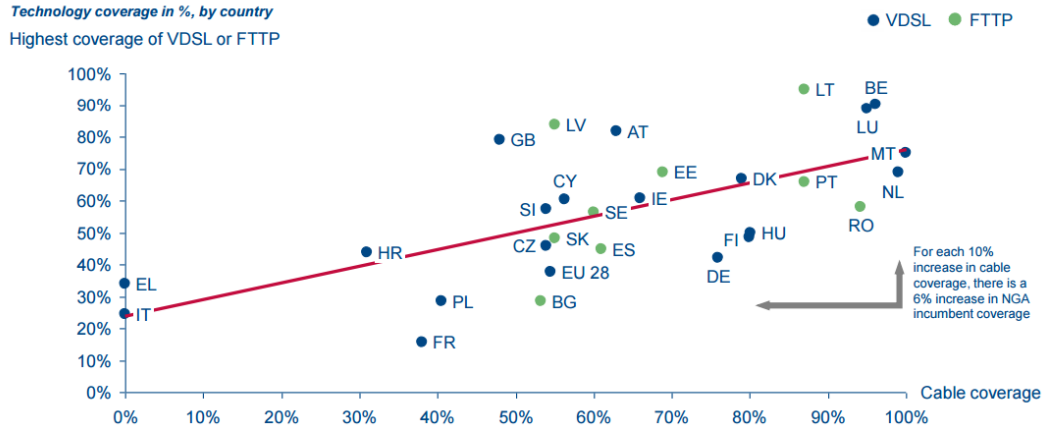
*Source: Cable Europe, Arthur D. Little*

11. Research also shows that investment in cable networks spurs investment in DSL/FTTP networks. As cable networks deliver increasingly high speeds, thanks to higher than average investments, owners of DSL/FTTP networks are under pressure to roll-out their fibre footprint at a faster speed. The figure below shows that countries with high cable coverage, on the horizontal axis, always tend to also have high coverage of DSL/FTTP networks. The access regulation on cable proposed by the draft decision risks limiting that healthy network competition.

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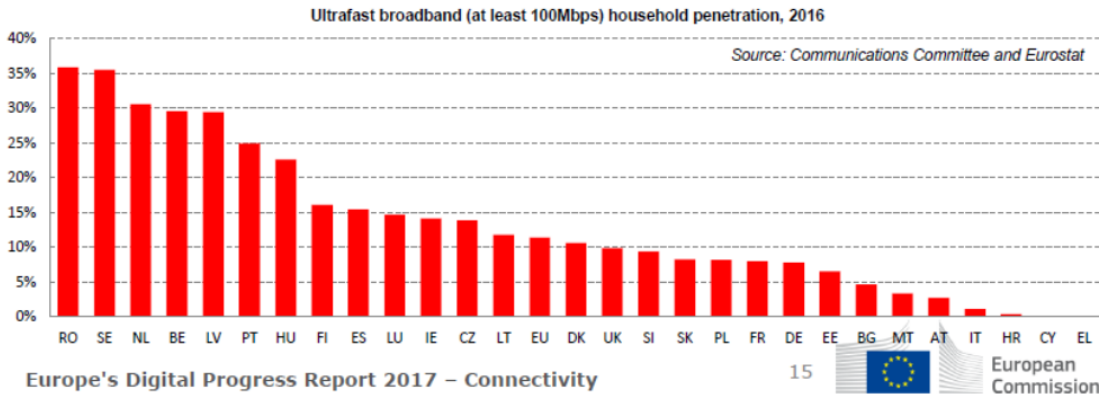
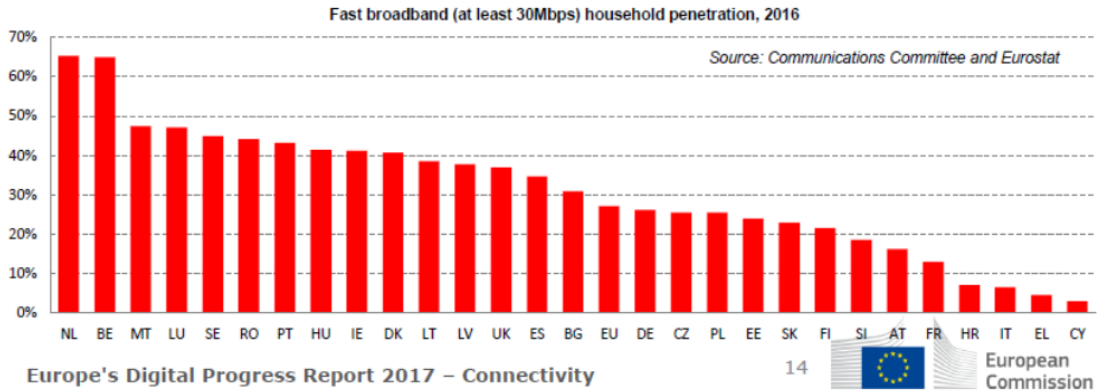
*National Regulatory Authorities (NRAs) under Article 16(4) of Directive 2002/21/EC are developing regulatory responses to the challenges raised by the transition from copper to fibre-based networks. (...) Consistency of regulatory approaches taken by NRAs is of fundamental importance to avoiding distortions of the single market and to creating legal certainty for all investing undertakings. (...) The appropriate array of remedies imposed by an NRA should reflect a proportionate application of the ladder of investment principle."*

**Correlation between Cable coverage and VDSL / FTTP coverage**  
- 2014, EU 28 -



Source: Arthur D. Little analysis, European Commission - Study on broadband coverage in Europe in 2014. Note: The VDSL/FTTP coverage per country is that of the technology (VDSL or FTTP) that has the highest coverage

12. The investments in fixed networks, led by cable operators, have allowed Belgium to achieve one of the best fixed networks in Europe with penetration levels that are consistently at the very top of Europe, both for fast and very fast broadband.



13. As the Belgian NRAs are well aware there are still areas, particularly in Wallonia, where cable (or even Proximus' network) should be upgraded and where, as a consequence, there is either no NGA network at all (white areas) or only one NGA network (grey areas). These white/grey areas have been mapped in BIPT's Project Atlas initiative.

14. The proposed regulation will inevitably affect any business plan to extend the network reach to these areas. The draft decision disqualifies this concern referring to the fact that the 2011 cable regulation (and the regulation imposed on Proximus) did not affect investments. This simplistic statement is not only factually erroneous but also defies economic logic. If NRAs objectively want to measure the impact of the proposed regulation on the network investments, they should conduct an impact assessment which has regrettably not been done.
15. Cable Belgium calls on such an impact assessment. NRAs (and particularly the CSA and Medienrat) should recognize that no further significant upgrades were made in Wallonia since 2011 particularly as regards the white and grey areas. Cable upgrades which were made in areas with higher density and better business prospects [REDACTED], were made in a regulatory environment which was less intrusive than the current proposal. The single SMP on the (artificial) cable network-specific wholesale broadband access market and the envisaged pricing regulation with a LRIC-based pricing verification are concepts which will affect investor confidence and inevitably lead to value destruction. Furthermore, even though the draft decision proposes not to regulate new NGA infrastructure in white and grey areas, this does not remove the fact that the operator investing in such new NGA infrastructure will be subject to regulation in other areas. On balance, this creates an unfavorable context for investment across the entire territory.
16. Investments made by cable operator contrasts with Orange Belgium's poor commitment to Belgium for whom the regulation seems to be tailored. Orange Belgium (previously Mobistar) has benefited and continues to benefit from a number of significant advantages including:
- Special rights at a crucial period in the development of the (then booming) mobile market allowing it to apply high tariffs and build-up an important customer base which was subsequently protected by on-net pricing practices;
  - Year-long subsidies for the roll-out of its mobile network through the application of beneficial asymmetrical MTRs. BIPT itself recognized this in its tariff regulation.<sup>7</sup>
  - The advantages above allowed Orange Belgium to be a very profitable operator for a long period of time.<sup>8</sup> Instead of investing further in the deployment of its

<sup>7</sup> BIPT, *Besluit van 29 juni 2010 betreffende de definitie van de markten, de analyse van de concurrentievoorwaarden, de identificatie van de operatoren met een sterke machtspositie en de bepaling van de passende verplichtingen voor markt/Décision du 29 juin 2010 relative à la définition des marchés, l'analyse des conditions de concurrence, l'identification des opérateurs puissants et la détermination des obligations appropriées pour le marché* 7, paragraphs 197-200. Prior to this, BIPT already confirmed in its decision of 23 September 2003 regarding the first regulation of MTRs Mobistar's rates were also covering commercial costs.

<sup>8</sup> See in particular the detailed financial results for the financial years 2006-2011:

FY 2006 [https://corporate.orange.be/sites/default/files/financial\\_results/analystpres\\_feb2007\\_EN.pdf](https://corporate.orange.be/sites/default/files/financial_results/analystpres_feb2007_EN.pdf) (6.6% increase in turnover, p. 22)

FY 2007 [https://corporate.orange.be/sites/default/files/financial\\_results/analystpres\\_feb2008\\_EN.pdf](https://corporate.orange.be/sites/default/files/financial_results/analystpres_feb2008_EN.pdf)

FY 2008 [https://corporate.orange.be/sites/default/files/financial\\_results/Mobistar\\_FY08%20results\\_en.pdf](https://corporate.orange.be/sites/default/files/financial_results/Mobistar_FY08%20results_en.pdf) "The consolidated turnover of Mobistar rose by 1.5 % over one year and performed thus better than the initial forecast" (p. 4).

fixed activities, profits were used to pay-out shareholder dividends.<sup>9</sup> Orange Belgium is being rewarded for its late arrival in the fixed market as it is allowed to benefit from artificially beneficial wholesale access conditions on fixed networks during the so-called “ramp-up period” that was deemed to stop in 1<sup>st</sup> May 2018 and that the regulator now proposes to make permanent and other methodological advantages granted to it in the wholesale pricing<sup>10</sup>;

– These advantages of Orange contrast strongly with the position of Telenet and Nethys and Brutélé:

(i) no cable operator benefited from subsidized wholesale access (even Telenet’s asymmetric FTRs were subject to a strict cost orientation obligation and this even before Mobistar’s MTR were subject to it);

(ii) Nethys and Brutélé have even been faced with an access regulation to the benefit of their competitors almost as of the start of their full product offering. Their broadband and digital TV bundle was launched in 2009 and access regulation on the wholesale equivalent was imposed as early as July 2011.

Orange  
invested less than all other operators.

(continued...)

FY 2009 [https://corporate.orange.be/sites/default/files/financial\\_results/Mobistar\\_FY09\\_results\\_EN.pdf](https://corporate.orange.be/sites/default/files/financial_results/Mobistar_FY09_results_EN.pdf)

FY 2010 [https://corporate.orange.be/sites/default/files/financial\\_results/FY\\_Q4\\_2010\\_EN.pdf](https://corporate.orange.be/sites/default/files/financial_results/FY_Q4_2010_EN.pdf) “*The consolidated turnover of the Mobistar group, including the consolidation of MES S.A. (Mobistar Enterprise Services) for 9 months, rose by 6.2 % (+2.2 % excl. MES S.A.) and amounted to 1,664.6 million euros at the end of 2010. This put the Mobistar group over its increased turnover forecasts*” (p. 4).

FY 2011 [https://corporate.orange.be/sites/default/files/financial\\_results/results\\_fy\\_2011\\_en\\_0.pdf](https://corporate.orange.be/sites/default/files/financial_results/results_fy_2011_en_0.pdf) “*At the end of the financial year 2011, the Mobistar group achieved a total consolidated turnover, including the consolidation of MES S.A. (Mobistar Enterprise Services) for 12 months, of 1,657.6 million euros, 0.4 % less than the 1,664.6 million euros at the end of December 2010 (-1.1 % excl. MES S.A.). This result corresponds to the Mobistar group’s forecasts with regard to the turnover (a level of turnover similar to that of 2010). Without the impact of the regulations (74 million euros), the total consolidated turnover would amount to 1,731.6 million euros*” (p. 4).

(all links accessed on 11/08/2017).

<sup>9</sup> During the years 2009-2011, during which the MTR regulation in its favor was in force, Orange Belgium (then Mobistar) paid out large dividends to its shareholders. “*Mobistar is de absolute kampioen in het verwennen van zijn aandeelhouders. Op basis van de dividenden die de mobiele operator in 2011 toekende, biedt het aandeel een brutorendement van liefst 19,08 procent. Op plek twee staat het Belgacom-aandeel, met 9,80 procent. De telecomoperator stond lange tijd op nummer één, maar biedt toch nog altijd een erg aantrekkelijk rendement. Iets lager treffen we GDF Suez met 9,63 procent, Befimmo met 9,15 procent en Cofinimmo met 7,65 procent. Delhaize Group biedt een brutorendement van 5,8 procent, Elia van 4,4 procent.*” See <http://www.tijd.be/netto/beleggen/Laat-u-niet-misleiden-door-aandelen-met-royale-dividenden/9290716>

Another press article explained that Orange Belgium is a “cash cow” for its shareholders. An analyst highlighted that: “*Telenet/Base gaat in investeringsmodus, terwijl Orange een cash cow is*”. <http://www.tijd.be/ondernemen/telecom/Vaarwel-Mobistar-welkom-Orange/9728711>.

<sup>10</sup> Orange’s own mobile network is only regulated as regards the reciprocal termination service (which therefore also procures a benefit to it as it conveys traffic to the other mobile networks).

[REDACTED]

18. By imposing wholesale access on cable, NRAs are not only undermining the cable operators' investments but also opting for a regulatory approach which breaks the investment ladder. The investment ladder has been guiding the European and Belgian wholesale access regime until now. The logic of the investment ladder is that an access seeker on market 3b (central access) is incentivized to make its own investments and move to wholesale local access on market 3a. In the case of cable, this logic does not work, since wholesale access on market 3a on cable is not possible. The wholesale access taker on cable will be a perpetual and artificially beneficial wholesale access with no ability to move-up to the next rung. If this is the model the NRAs have in mind for the years to come, it is logical to question the economic efficiency of investments in alternative networks. This fundamental policy choice does not only apply for fixed but also for mobile as it would otherwise raise evident discrimination issues.

## **2. PROPOSED REGULATION RUNS AFOUL REGULATORY PRINCIPLES**

19. No EU Member State has duplicated wholesale broadband regulation on separate, network-specific, wholesale markets. The approach cannot be reconciled with fundamental principles of the regulatory framework for the following reasons which are being examined in more detail below.

- The overall proposed regulation is disproportionate;
- BIPT's assessment of the product market definition is methodologically flawed, particularly where it focuses on switching costs that an existing access user would face if it were to migrate its entire customer base to the other platform, which is not in line with the modified greenfield approach as well as an unrealistic scenario in practice; and



- The proposed regulation is based on an artificial and isolated analysis of an alleged, stand-alone, wholesale market for cable.

## 2.1 *Disproportionality of the proposed regulation*

20. The Access Directive provides that obligations imposed by NRAs on operators shall be proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.<sup>11</sup> The principle of proportionality is a general principle of EU law with particular constitutional relevance in the regulatory framework of telecommunications. The CJEU consistently and invariably held that *ex ante* regulatory obligations must be objective, transparent, proportionate, non-discriminatory, based on the nature of the problem identified and justified in the light of those objectives.<sup>12</sup>
21. The Commission requires that NRAs decisions imposing obligations on SMP operators include a justification of the proposed measure as well as an explanation of why their decision should be considered proportionate.<sup>13</sup> National courts have already annulled NRA decisions because they failed the proportionality test<sup>14</sup> or even because the reasoning of the decision was insufficient to allow the court to properly assess the proportionality of the obligations.<sup>15</sup>
22. As regards the proposed regulation, Cable Belgium notes that:
- No overall proportionality assessment or impact assessment of the duplication of the regulations is being made nor is there an assessment of the impact of the regulation and remedies on the regulatory objectives, including in particular the objectives of promoting infrastructure investments and harmonization.<sup>16</sup>

<sup>11</sup> Articles 5(3) and 8(4) of the Access Directive.

<sup>12</sup> Judgment of 3 December 2009, *European Commission v Federal Republic of Germany*, Case C-424/07, EU:C:2009:749; paragraphs 60 and 90; Judgment of 19 June 2014, *TDC A/S v Teleklagenævnet*, Case C-556/12, EU:C:2014:2009, paragraphs 39-45 and 53; Judgment of 14 April 2016, *Polkomtel sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*, Case C-397/14, EU:C:2016:256

<sup>13</sup> Commission Guidelines on market analysis and the assessment of SMP under the Community regulatory framework for electronic communications networks and services, paragraphs 114 to 118. See in particular paragraph 118, which provides a definition of the principle of proportionality: “*The principle of proportionality is well-established in Community law. In essence, the principle of proportionality requires that the means used to attain a given end should be no more than what is appropriate and necessary to attain that end. In order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim*”.

<sup>14</sup> See *College van beroep voor het bedrijfsleven*, 3 September 2005, *Tele2 et al. v. ACM*, ECLI:NL:CBB:2015:280 (annulment of a “near-network” obligation imposed on KPN)

<sup>15</sup> Brussels Court of Appeal, 3 December 2014, *Belgacom v. CRC*, case 2011/AR/2421 (partial annulment of the Belgian NRA’s 2011 analysis of the broadband markets).

<sup>16</sup> The Commission’s better regulation guidelines require to carry out an Impact Assessment when preparing new initiatives and proposals and when managing and evaluating existing legislation, available at [https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en).

International Telecommunications Union, “Using RIA to improve decision making in the ICT sector” (2014), available at [https://www.itu.int/dms\\_pub/itu-d/opb/pref/D-PREF-BB.RPT5-2014-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-BB.RPT5-2014-PDF-E.pdf).

Using RIA as a Tool in Regulatory Consultations and Communications, available at <https://www.oecd.org/gov/regulatory-policy/2494614.pdf>.

- Artificial (notional) network-specific wholesale markets are being defined and SMP is found without taking adequate account of the competitive pressures on the retail markets (a point which is further commented in Section 2.3 in more detail below);
- The assessment of the wholesale markets and remedies does not take account of the regulation imposed on higher upstream markets which is an important methodological guarantee to ensure proportionality.
- The draft regulation mimics the regulatory analysis (including in particular remedies imposed on Proximus and cable) without taking account of the fact that (i) cable was never a monopoly network, (ii) cable operators had to acquire and upgrade the (analogue) cable TV networks, and (iii) cable is technically different.

2.2 *The definition of a separate wholesale market for bitstream access on cable (“market 3(b)2”) is flawed*

23. BIPT concludes that wholesale central access (WCA) on cable networks is not substitutable with WCA on Proximus’ network. This conclusion is not based on an assessment of the functional substitutability of the two forms of wholesale access (in fact, BIPT assumes that they are functionally equivalent), but on the switching costs that an *existing* beneficiary of WCA on Proximus’ network would face if it decided to migrate its entire customer base to WCA on cable. Not only is such a scenario unrealistic, but more importantly it is not in line with the modified greenfield approach, because it starts from the regulated situation. The proper test is to assess the substitutability of both WCA products from the point of view of a potential entrant, for whom switching costs are irrelevant.

24. In its 2014 Recommendation, the Commission has defined market 3b broadly as including all types of wholesale broadband access provided at a central network layer and on a best-efforts basis. This technologically neutral definition is broad enough to encompass cable WCA, which fulfils these conditions. Moreover, the analysis of indirect constraints by Analysys Mason and Tera, on which BIPT relies, fails among other to properly deal with the fact that some customers are more price elastic than others and therefore underestimates the competitive pressure exercised by the cable networks. In sum, BIPT fails to make a convincing case that cable WCA should not be included in the same relevant product market as WCA on Proximus’ network based on direct and/or indirect constraints.

25. In any event, the question of whether or not WCA on the cable network is substitutable with WCA on Proximus’ network can only lead to two conclusions:

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(continued...)

See also more generally, D. Geradin, ‘Ensuring Sound Regulatory Processes: For a Principled Approach’ TILEC Discussion Paper No. 2017-030, August 2017, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3011188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011188).

- i. Either WCA on cable belongs to the same relevant wholesale market as WCA on Proximus' network based on direct substitution and/or indirect constraints, in which case the cable operators are unlikely to have SMP ; or
  - ii. Cable WCA does not belong to the same product market as WCA on Proximus' network. In that case, it would not make economic sense to regulate both inputs, as this would lead to a situation in which competition between alternative networks leads to *more* instead of *less* regulation.
26. Even assuming that, as BIPT claims, cable WCA does not belong to the same product market (a finding which is called into question by the above-mentioned flaws in its market definition assessment), this does not mean that BIPT should define a separate wholesale market for cable WCA and carry out an SMP assessment on such market. Many NRAs have already excluded cable from the relevant wholesale market without defining a separate (notional) wholesale to which cable would then belong, and the European Commission has never objected to this. Rather, cable should in this case be taken into account (to the extent appropriate) as a competitive constraint in the SMP analysis and the determination of appropriate remedies.
27. In any event, even assuming it is appropriate to define and analyze a separate cable WCA market, such market should not be analyzed at the same level as market 3b making abstraction of the remedies that are imposed on market 3b. Such an approach would entail that more infrastructure-based competition would always lead to more regulation, which runs clearly counter to the regulatory framework's objective of gradual deregulation. First of all, the cable WCA market should be considered as a new market which is not listed in the Recommendation on relevant markets. Such market can therefore be analyzed only *after* market 3b (which the NRA must in any event analyze) and only to the extent that the remedies that may have been imposed on market 3b are insufficient to address the competitive issues identified on the corresponding retail market *and* the wholesale market meets the three criteria test.
28. Had the Regulators made such an analysis, they would have found that there would be no justification to proceed with an analysis of the (notional) stand-alone wholesale cable markets. The remedies imposed on Promimus would be sufficient as they would offer a one-stop-shop solution for alternative operators to cover the entire Belgian territory, a guaranteed quality of service, and a possibility to move-up on the ladder of investments. Doubling the access remedies with an acces on the cable infrastructures is disproportionate and only creates unnecessary costs for the cable operators.
29. In any case, the proportionality of WCA remedies imposed on the cable cannot be assessed without taking into account the WCA remedies imposed on Proximus.

### 2.3 *Disconnect between wholesale analysis and retail market conditions*

30. The wholesale approach adopted in the draft decision leads the NRAs to make a competitive analysis which is artificial as it finds that each network is, in fact, a monopoly network. This approach ignores the developments on the retail markets and affects the credibility of the SMP finding as well as the proportionality of the remedies.
31. On the overall Belgian market and a large number of segments considered in the draft decision, Proximus is the strongest operator and cable operators are commercially and

economically (much) weaker. Yet, the regulation imposed on cable network is mimicking the remedies on Proximus on segments on which Proximus is much stronger than cable operators, *i.e.*:

- National broadband, both for residential and business customers;
  - Broadband in Brutélé, Nethys and SFR coverage areas;
  - Digital TV in Brutélé, Nethys and SFR coverage areas;
  - Proximus’ leading position for 3P at national level and in coverage area of Brutélé, Nethys and SFR.
  - Proximus’ dominant position on the retail market for B2B broadband services.
32. The pricing analysis also confirms that cable operators are losing share and/or apply lower tariffs compared to Proximus.
33. Cable Belgium calls upon the NRAs to consider the downstream market conditions in its assessment of SMP and remedies. This assessment should not only recognize the weaker position cable operators have on the overall Belgian market and the segments above, but also take account of the remedies which the NRAs can and should impose in the regulated (upstream) markets, including in particular 3(a) and (potentially) 3(b) with the DSL-based access.

### **3. THE DRAFT DECISION UNDERMINES PRINCIPLES OF HARMONIZATION, REGULATORY PREDICTABILITY AND STABILITY**

34. The main aim of the common regulatory framework is to establish a harmonised basis for the regulation of telecommunications, which promotes efficient investments in networks.<sup>17</sup>
35. The EU legislature has put great emphasis on the importance of a harmonized and consistent regulatory framework<sup>18</sup>. The Commission insisted that regulation must promote *inter alia* a consistent approach to regulation throughout the Union.<sup>19</sup> When the Commission recently launched the review of the regulatory framework, the Commission declared that, in line with the Digital Single Market Strategy, the Proposal for a Directive

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<sup>17</sup> Articles 1(1) and 8(5)(a) of the Framework Directive. Consequently, the Commission set up BEREC with a view to achieving consistent application, in all Member States, of the regulatory framework in particular in areas where national law implementing EU law gives NRAs considerable discretionary powers (Recitals 36 and 37 of the Framework Directive). Moving along the same lines, Recital 18 of Directive 2009/140 states that “[t]he discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework”.

<sup>18</sup> The European Parliament noted that “*the regulatory framework should be maintained as a coherent whole*” [EP resolution of 24 October 2013 on Implementation report on the regulatory framework for electronic communications (2013/2080(INI)), recital HJ]. The EP further underlines that “*the regulatory framework must remain coherent, relevant and effective*” (Recital AA(8)).

<sup>19</sup> Commission SWD (2014) 298 Explanatory Note accompanying the 2014 Commission Recommendation, 2.2, p. 8

establishing the European Electronic Communications Code would focus on ensuring a level playing field for market players and a consistent application of the rules.<sup>20</sup>

36. The criticisms above confirm that the harmonization objective which the Commission seeks to achieve is being undermined in significant aspects. The broadening of the wholesale access markets and reduction of regulated markets which is being advocated by the Commission are opposite to the approach taken in the draft decision. All infrastructures which would fall outside of the product scope of the regulated markets would risk of being regulated on a separate basis as parallel stand-alone markets which are not included in the Commission's Recommendation (without applying the three criteria test). The disconnect between the retail and wholesale market conditions is equally in blatant contradiction with the regulatory framework's attempt to ensure that the regulatory conditions are proportionate and reflect the prevailing competitive conditions.

Even if the Belgian NRAs would maintain that a regulatory intervention would be necessary on the basis of a more complete, forward looking and objective assessment of the retail markets (which Cable Belgium contests), they should also have had more consideration for the principles of regulatory stability and consistency.

38. Maintaining consistency of the regulatory approach would also offer more predictability and stability. As set out in the Framework Directive, NRAs shall promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods.<sup>21</sup> The Commission stresses that regulatory predictability and stability are crucial to give investors the confidence needed to design sustainable business plans. In particular, "[i]n order to provide the necessary predictability over a longer time period, i.e. beyond the lifetime of an individual market review"<sup>22</sup>, NRAs should take into account the principle of regulatory predictability and stability.<sup>23</sup> In September 2016 and the review of the framework, the Commission specifically identified as a problem driver the suboptimal design of market review cycles.<sup>24</sup> If these reviews can lead such fundamental changes as

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<sup>20</sup> Proposal for a Directive establishing the European Electronic Communications Code (Recast), 12 October 2016, COM/2016/0590 final - 2016/0288 (COD), 1. Context of the Proposal.

The Commission confirmed the public consultation conducted prior to the publication of the Proposal covered "*the governance pillar, with the aim to ensure that markets are regulated in a consistent manner across the EU*" (Background to the Public Consultation on the evaluation of the regulatory framework for electronic communications and on its review).

<sup>21</sup> Article 8(5)(a) of the Framework Directive

<sup>22</sup> Recommendation 2013/466 of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, recital 4

<sup>23</sup> *Ibid.*, paragraph 38

<sup>24</sup> *Ibid.*, 1.3 What are the main drivers? "*This driver covers the insufficient legal certainty and regulatory predictability regarding access obligations on NGA networks due to short market review cycles, lack of sufficient focus on retail markets and the difficulty of enforcing consistency on the basis of non-binding recommendations, impacting network roll-out*".

the one being proposed here there is an even stronger concern of stability and predictability.

#### **4. ILLEGALITY OF THE REMEDIES**

39. Cable Belgium challenges the remedies imposed in the Draft Decision on a number of grounds. They are disproportionate as no cost/benefit assessment is made. In these comments, Cable Belgium contests:

- The inclusion of a voice remedy;
- The pricing remedy;
- Operational aspects of the imposed remedies.

##### *4.1 The voice remedy*

40. The Draft Decision proposes to include “EuroPacketCable” in the regulated access package, citing a purported necessity of including a voice component in the bundle as a reason for this additional regulatory measure. This justification does not withstand scrutiny. Virtually all Belgians have a mobile phone, and can adequately use it for all their needs, including indoors. A Profacts study for BIPT shows that only 8% only uses a fixed phone; 66% use both and 26% use only a mobile phone. In addition, VoIP solutions are available on the market.

41. Orange offers bundles without a fixed line, but with a mobile plan and there is no indication that the absence of a fixed line in these bundles limits its attractiveness.

42. The Draft Decision also fails to note that providing wholesale access for fixed lines comes at a cost for cable providers and requires technical adaptations that are not part of the DOCSIS standard. Using EuroPacketCable in a wholesale setting is untested to date. Implementing such a remedy would therefore likely require extensive testing and architecture modification, which impose a burden on cable operators. In the absence of a clear need for it, such a remedy is unnecessary and disproportional.

43. Cable Belgium also underlines that fixed voice telephony is no longer on the list of recommended markets and was deregulated in Belgium. In light of this, it is all the more surprising that the Draft Decision considers imposing this remedy.

##### *4.2 Pricing remedies*

44. For local and central access to the fibre network and for central access to the cable network, the draft decision proposes to impose “reasonable prices” as opposed to strictly cost oriented-prices. Cable Belgium agrees that the availability of wholesale access to the copper network at cost-oriented prices and the need to maintain investment incentives for NGA justify lighter-touch regulation for NGA inputs, including cable networks. However, based on the description of “reasonable prices” in the Draft Decision, it would appear that what BIPT has in mind is little more than a slightly less restrictive form of cost orientation, i.e. an obligation to apply cost-oriented prices based on a bottom-up LRIC cost model, but with a risk premium. This approach is not in line with the European

Commission's 2013 Recommendation on consistent non-discrimination obligations and costing methodologies.<sup>25</sup>

45. The 2013 Recommendation provides that NRAs should not impose regulated wholesale prices for NGA inputs where there is a “demonstrable retail price constraint” resulting from infrastructure competition, a “copper anchor” (i.e., a cost oriented copper wholesale access product) or, for active NGA inputs, the availability of passive or virtual wholesale access products upstream. In these circumstances, it suffices to impose a non-discrimination obligation (equivalence of inputs or equivalence of output) in combination with an “economic replicability test” (ERT) in order to ensure both the technical/functional and the economic replicability of the SMP operator's retail offers. In the present case, the infrastructure-based competition by the cable networks, the availability of a “copper anchor” (cost-oriented local and central access to Proximus' copper network) and the availability upstream of passive or virtual inputs (LLU and, potentially, VULA), all justify the non-imposition of regulated wholesale prices.
46. Finally, the Regulators propose to impose strict cost accounting rules on the cable operators. So far cable operators have been providing cost information to the Regulators in the context of the retail minus price control remedy since 2011. The Regulators fail to explain why this method would be insufficient in the present context.
47. Cable Belgium considers that the conditions for not imposing regulated wholesale prices are met for fibre WCA and cable WCA (to the extent that it is even justified to regulate cable WCA, which Cable Belgium contests) and possibly even for fibre WLA.
48. The “reasonable pricing” remedy proposed in the draft decision, which is essentially a slightly less restrictive cost orientation obligation (with a “reasonable margin” including a risk premium), is in any event too restrictive. It is also worth pointing out that, besides several NRAs that have already completely deregulated the WCA market thanks to infrastructure-based competition, several other NRAs have already applied the approach recommended by the 2013 Recommendation and have not imposed wholesale price regulation, subject to prices complying with a non-discrimination requirement and an ERT.<sup>26</sup> An ERT is an adequate and proportionate measure, because it ensures that the SMP operator cannot create a price squeeze, which is the main objective of price regulation.<sup>27</sup>
49. In any event, BIPT's reliance on the 2013 Recommendation to justify its approach to the price control for cable WCA is inappropriate, as this Recommendation does not consider the cable networks in any other way than as potential sources of infrastructure-based competition for the incumbent operator. Just as the 2010 NGA Recommendation, which BIPT also refers to, the 2013 Recommendation deals with the impact of the roll-out of NGA on SMP regulation of *incumbents*, and do not envisage wholesale (price) regulation

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<sup>25</sup> Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU), [2013] OJ L 251, p. 13, hereafter the “**2013 Recommendation**”.

<sup>26</sup> For fibre LLU and/or VULA in market 3a (Austria, Germany, Luxembourg, Slovakia, Sweden and UK) ; for fibre WCA in market 3b (Austria, Germany, Luxembourg, Slovakia and Spain).

<sup>27</sup> See revised ERG Common Position on the Approach to Appropriate Remedies in the ECNS Regulatory Framework, ERG(06)33, May 2006, p. 47.

of the networks of alternative operators, including cable operators. In particular, both Recommendations provide guidance to NRAs in order to ensure the consistency of their responses to the challenges arising from the transition from copper-based to fibre-based networks. It is in this context that the Commission recommends basing price regulation on a BU-LRIC cost model while maintaining the incumbent's investment incentives in NGA (*i.e.* fibre-based network infrastructure) by including a risk premium in the wholesale prices. As this approach is tailored to the situation of incumbents, it is not appropriate to extend it to infrastructure-based alternative operators, such as the cable operators. In particular, BU-LRIC is not an appropriate cost methodology for the pricing of cable wholesale inputs.

#### 4.3 *Operational aspects*

50. The Draft Decision mirrors the remedies imposed on Proximus' network to the cable networks, without taking into account the technical and economic differences between these networks. This shows, as such, the disproportionality of the imposed measures.

51. In addition, the implementation of the proposed remedies would raise a number of operational issues for cable networks. Cable Belgium provides below a non-exhaustive list of such issues that are common to all the cable operators in Belgium.

- **Transparency measures.** The Draft Decision proposes a number of transparency measures which go beyond what is necessary, create an additional burden and have the potential to harm competition. The requirement to disclose a “Network Transformation Outlook” for the next five years raises concerns for the development of competition. The deployment and upgrade of networks is a key competitive factor and any forward-looking information in this regard needs to be protected as highly confidential.
- **The publication of KPIs.** The Draft Decision proposes to create an obligation to periodically (every two months) publish and communicate wholesale KPIs. This creates an additional work burden for the operators, with no or little benefit for access seekers. Cable Belgium calls upon the Regulators to devise more practical and proportional ways to monitor the implementation of any remedies.
- **Process and deadlines for access.** The Draft Decision deviates from the access process and deadlines foreseen in the 2011 CRC decision, which provided for a proportional and proven solution (Orange successfully used that procedure). As such, there is no reason to deviate from that process. Creating a new type of wholesale access requires far-reaching changes in IT, billing and operational workflows. Cable operators typically only roll out important updates a few times a year, so that mandating too short deadlines carries operational risks for operators.
- **Technical access.** The Draft Decision envisages far-reaching access by the access seeker to the cable networks and its IT systems, including the NIU or wall outlet, the “tap” and the operational support systems (OSS) or similar software systems. These intrusive measures are unnecessary and will create operational issues for the network as a whole.



## **5. CONCLUSION**

52. The Draft Decision is resolutely going for a heavy handed regulatory intervention. Cable operators in Belgium are being penalized for having invested heavily in their networks, in favour of chronically underinvesting alternative operators.
53. The Regulators' retail analysis start from a preconceived idea that the Belgian markets lack competition. Yet, telecommunication markets in Belgium offer among the best performers in Europe and the prices are entirely in line with comparator countries, as shown in the Regulators' own data. The Regulators fail to clearly identify retail market failures (let alone dominance) which would warrant regulation at the wholesale level.
54. The Regulators are proposing to regulate in parallel two alternative, competing, types of networks. To reach this result, they defined wholesale markets in an unprecedented, and flawed, manner which departs from established practices across Europe. The imposition of remedies is also disproportionate and fails to safeguard investments in the Belgian networks. Cable Belgium calls upon a withdrawal of the Draft Decision and is of course keen to engage into a dialogue with the Regulators to explore all potential options so as to maximize opportunities and ensure Belgium remains a digital leader in Europe to the benefit of consumers.