Cable Europe Comments on the Review by Belgian NRAs in relation to the Belgian Broadband & Broadcasting Markets

29 September 2017

Introduction

The Belgian regulators (NRAs) have launched a public consultation on their draft decision covering the analysis of the wholesale central access broadband market\(^1\) and the wholesale broadcasting market\(^2\) in the various regions of Belgium. This is a requirement under the EU regulatory framework for electronic communications.

Their market analyses aims to evaluate the level of competition in the respective markets and concludes with the imposition of ex-ante regulatory measures on a number of operators deemed to have significant market power.

Cable Europe wishes to contribute to this Belgian public consultation given the nature and scope of the regulatory intervention being proposed by the NRA’s and its impact on future market analysis in other Member States of the European Union.

Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union. The European cable industry provides high speed broadband internet, TV services, and telephony to more than 63 million homes in the European Union. The aim of Cable Europe is to promote the industry’s interests at a trans-national level, and the advocacy of appropriate regulatory policies to foster economic growth is an important aspect of its activities.

A consistent application of the regulatory framework across Europe is key to the delivery of the objectives of the regulatory framework – in particular the promotion of competition and investment. Cable Europe believes the proposed regulatory measures would have the opposite effect.

The proposed regulatory measures are also at odds with the European Commission’s Digital Single Market Strategy and its ambitions towards a Gigabit Society. These ambitions are totally dependent on a new wave of investment by incumbents and cable operators which in turn are dependent on a stable and predictable regulatory environment.

The Belgian NRAs are applying a static approach – not forward looking as is required under an ex-ante analysis. They also propose to deviate from the cornerstone of technology neutrality, creating an anomaly in Europe by defining wholesale markets based on technology. The

\(^1\) Wholesale central access provided at a fixed location for mass-market products

\(^2\) The expression "wholesale broadcasting market" refers to the market for the transmission of radio and television signals and for the provision of connections, to a broadcasting transmission platform at the wholesale level
consequence of this could be perpetual regulation which is clearly in contrast with the transitional nature of the regulatory framework – gradually phasing out ex ante regulation and replacing it with ex post competition law. Moreover, the Belgium NRAs don’t apply the modified greenfield approach, mandating regulators to assess markets in the absence of existing regulation.

Based on these facts, Cable Europe believes the draft measures to be unwarranted. They are unsupported by existing administrative practice of the European Commission and best regulatory practices across the European Union and are ultimately in conflict with the objectives and principles set forth under the current EU Regulatory Framework for electronic communications services and the Digital Single Market Strategy.

The negative impact of the draft measures would be felt potentially across many Member States of the EU, in which the individual members of Cable Europe are engaging in considerable investment decisions while facing significant competitors from both the telecommunications and media sectors. Competitive pressures are certainly keenly felt in a Member State such as Belgium, which heightens the concerns of our members.

Accordingly, Cable Europe is also committed to expressing its views to the Commission on the proposed measures published by the Belgian NRAs.

1. There is no evidence of market failure

Wholesale access regulation was originally intended to address a monopoly situation – a situation that European telecoms markets, including Belgium, have evolved away from over the past 20 years. In the regulatory framework, the number of relevant markets susceptible to ex ante regulation has fallen from 18 in 2002 to 7 in 2007 and 4 in 2014, all of them wholesale markets. Regulators have deregulated many relevant markets, in whole or in part. Retail price regulation has been withdrawn in most of Europe, with regulation focusing instead on upstream bottlenecks. If ever there was a time for Belgium NRAs to deliver on the promise of stepping back and relying on competition law, it is now.

The starting point under the regulatory framework is that ex ante regulation at the wholesale level should only be imposed where NRAs can identify a possible market failure at the related retail level. This prospective assessment requires NRAs to take into account market developments in at least the next regulatory period, and beyond. The Belgian NRAs however performed a static review ignoring clear evidence that the Belgian markets are already vibrant today and will become even more so over the next 3-5 years. This is especially relevant to the Belgium markets as today’s regulation has only been in operation for the past two years.
2. The Belgian market is a success story

The present market situation in Belgium is, in fact, a success story. Infrastructure based competition is now a reality. This drives greater investment, which has led to greater broadband coverage and penetration, higher speeds and lower retail prices, increased consumer choice, and wider economic benefits.

Belgium scores high in many benchmarks conducted by the European Commission (see Annex1).

In summary:

- **Prices for broadband services** in Belgium are low compared to its neighbours. Also prices per GB have dropped dramatically providing consumers with more value for money.

4

Fixed broadband price per GB and GB usage per broadband subscriber in Belgium, 2012 -2016

• **Substantial investments** have been made by Belgian cable operators in the recent past, leapfrogging the incumbent operator Proximus. The capital expenditure per capita is actually higher than in many other countries. This has significantly increased the cost base of Belgian cable operators.

![Investment by Belgian broadband infrastructure operators, 2012–16](chart1.png)

Source: Liberty Global

• **Belgium enjoys the highest service levels in Europe**, with virtually all Belgian households having a choice between two (2) infrastructures and five (5) competing digital TV platforms (cable, IPTV, satellite, online OTT platforms and the emerging digital terrestrial (DTT) platform). A wave of innovation is creating consumer benefit. This is in marked contrast to the position in most EU Member States.

• **NGA coverage & take-up figures** suggest that Belgium is in the forefront of investments in this area, compared to other European countries. In addition the penetration rates of NGA broadband services in Belgium is amongst the highest in the EU.
Regulating oligopolies in electronic communications markets; Discussion paper prepared by Oxera for Liberty Global

Broadband and broadcasting market dynamics can clearly be seen based on the strong decrease of analogue TV and falling CATV market shares in Belgium. Also apparent is the take-up of OTT services such as Stievie Premium and 4G/4.5G, as well as the deployment of 5G and mobile networks in full swing, capable of delivering speeds comparable to fixed broadband networks. The switching of customers between broadband operators also remains important.

Based on the many indicators above and in comparison with other markets, it is very clear that competition at the retail level in Belgium is effective and that there is no market failure which needs to be addressed by ex ante intervention.

Cable Europe considers that there are no “exceptional” circumstances which justify the adoption of ex ante intervention. Despite the Belgian regulator’s assertion in this sense, there is neither evidence of market failure nor of consumer harm that could justify the imposition of ex ante regulation in this case.

On the contrary, as is demonstrated, Belgian consumers are among the best served in Europe. In this sense, the only thing that appears to be “exceptional” about Belgium is its outstanding delivery of retail level key performance indicators.

Cable Europe therefore does not understand what could motivate the various Belgian NRAs to propose the measures which are the subject of Public Consultation.

3. How does the draft NRAs decision relate to established practice under the EU regulatory framework?

3.1 The separation of wholesale central access markets for cable technology is neither based on regulatory nor sound economic grounds

The Belgian NRAs are proposing the creation of a technological difference between copper based networks and cable networks. This way the Belgian NRAs aim to get both cable operators and incumbent Proximus in the scope of regulation. Cable Europe believes the Belgian NRAs are misusing the indirect constraint methodology to live up to their objective of regulating cable operators and incumbent Proximus.

The Relevant Markets Recommendation defines market 3b susceptible for ex-ante regulation as “Wholesale central access provided at a fixed location for mass-market products”. Consequently, this market definition does not refer to any specific technology. The Belgian NRAs, however, propose to define two wholesale central access markets: a) one that only includes the incumbent Proximus based on ITU SG15 standardisation and b) a second wholesale market that includes cable operators based on Cable Labs standardisation.

This is not only contrary to Belgian NRAs current decisions but also to standing practice across Europe. The European Commission’s Article 7 market review process shows that in all Member States where cable operators have gained market share in the retail broadband market, they are considered part of the single wholesale central access market – not a separate,

---

7 Annex 2 – analogue TV evolution in Belgium. TV distribution market shares evolution in Belgium
technology based market. The fact that cable is included in the wholesale central access market is then only because of the self-supply of wholesale inputs.

<table>
<thead>
<tr>
<th>Country</th>
<th>Cable WCA included in the market?</th>
<th>Cable WCA regulated?</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>BE</td>
<td>☒</td>
<td>☒ 8</td>
</tr>
<tr>
<td>BG</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>CY</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>CZ</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>DK</td>
<td>☑</td>
<td>☒ 9</td>
</tr>
<tr>
<td>DE</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>EE</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>IE</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>EL</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>ES</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>FI</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>FR</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>HR</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>HU</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>IT</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>LV</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>LT</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>LU</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>MT</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>NL</td>
<td>☑ 10</td>
<td>☒</td>
</tr>
<tr>
<td>PL</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>PT</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>RO</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>SI</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>SK</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>SE</td>
<td>☑</td>
<td>☒</td>
</tr>
<tr>
<td>UK</td>
<td>☑</td>
<td>☒</td>
</tr>
</tbody>
</table>

8 Except as an ancillary obligation to the obligation to provide access to the digital cable TV platform, in the context of the analysis of the broadcasting markets.
9 The NRA imposed access obligations on TDC’s CATV network in the context of the previous market review, see case DK/2012/1339-1340. However, the new market analysis adopted on 17 August 2017 lifts these obligations, see case DK/2017/1994.
10 Low-quality wholesale broadband access market and only through internal supply.
The Belgian NRAs come to their conclusion by identifying separate wholesale markets based on flawed analysis of direct substitution, and an incorrect indirect constraint analysis.

While the Belgian NRAs assume that copper and cable WCA are functionally equivalent, which would rather suggest that both belong to the same market, its direct substitutability analysis wrongly focuses exclusively on the situation of an existing beneficiary of regulated access. This is in contradiction to the modified greenfield approach – assessing a market in the absence of wholesale regulation – which regulators have to apply when performing a market analysis.

Furthermore, the European Commission consistently stated that the indirect constraint analysis should serve to assess whether or not the incumbent’s market position is constrained by cable. If applied differently it would result in more – not less – regulation which conflicts with the objectives of the regulatory framework. The indirect constraint methodology should not be used to create separate wholesale markets as the Belgium NRAs are now trying. As an example of this, the European Commission stated the following in a letter to Ofcom:

“When indirect constraints are found to exist but are not strong enough to constrain the price of other WLA or WBA products, they should be taken into account when assessing whether the incumbent operator has SMP on the relevant market, as well as alternatively in the assessment of the appropriate remedies.”

The indirect constraints analysis is also methodologically deficient and underestimates the competitive pressure stemming from the cable operators’ retail offers. The Belgian NRAs analysis of indirect constraints is flawed because, first, it is not clear how the cost share of the access seeker is calculated. Second, the analysis by Tera and Analysys Mason fails to differentiate between consumers that are more price elastic and others that are more elastic to non-price elements. All in all, the studies do not examine the market segment that (possible) entrants would target, nor start their reasoning from ‘real life’ findings.

Cable Europe believes that the assessment of direct substitution and indirect constraints is not compliant with the regulatory framework.

3.2 There are many flaws with the market definition

IPTV, satellite, DTT and Internet TV (“OTT”) have been excluded from the relevant broadcasting product market. This is totally incorrect as all the indicators show that these products are substitutable and that competition on the market is dynamic and effective. In addition, some of the Commission’s decisions like C-34/2006 relating to state aid support this position as it reads “There is also empirical evidence of the substitutability between the different transmission platforms at retail level and, more particularly, of the competitive effect of DVB-T launches on cable operators.”

---

11 EC comments to Ofcom’s WLA and WBA notifications, 19 June 2014, C(2014) 4296 final
12 Consultants to the BIPT who analysed the indirect pricing constraint between cable and DSL in Belgium.
13 State aid — Germany C 34/2006 — Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia
The on-going transition from analogue to digital has encouraged widespread and successful entry from IPTV, satellite and OTT.

Moreover, a wholesale central access market specifically designed for cable is not defined in the EU Relevant Markets Recommendation. This means that by identifying such an out-of-recommendation market, Belgium NRAs have to demonstrate that the three criteria test is met. The wholesale markets analysis is an iterative process whereby, following a finding that the retail market is not effectively competitive, the wholesale market situated highest on the ladder of investment is analysed first. Before the analysis can move down to the next rung, the NRA should every time check whether the remedies already imposed are not sufficient to address the market failure at the retail level. This means that the Belgium NRAs would have to show that the regulation already imposed on markets 3a and 3b still does not suffice to address the competitive issues identified at the retail level. The Belgian NRAs have not conducted such an analysis.

In the light of these errors and omissions, it is difficult for Cable Europe to conclude anything other than the market definition adopted by the Belgian NRAs is highly problematic.

### 3.3 The ex-ante remedies proposed are not fit for purpose

There are many aspects of the remedies proposed by the Belgian NRAs which sit uncomfortably with the concepts of “reasonableness”, “appropriateness” and “proportionality” as those concepts appear in the Access Directive, and applied and interpreted by NRAs and the European Commission. In summary, the remedies prescribed are largely at odds with the pro-competitive situation of the Belgian markets.

With respect to the access remedy in the wholesale central access market imposed on cable operators, for example, the greatest beneficiaries of the access remedy will be precisely those parties which do not need it because they could, in fact, replicate the very access product in question (e.g., a vertically integrated operator such as Proximus and a mature 4G mobile data player such as Orange). Similarly, the remainder of the market is already serviced by unbundled local loops and bitstream products. Cable Europe questions whether adequate assessment of the impact of the proposed measures on the investment incentives at play amongst the existing transmission platforms has been undertaken by the Belgian NRAs.

The Belgian NRAs also propose to include “EuroPacketCable” in the regulated access package, citing a purported necessity of including a voice component in the bundle. This justification does not withstand scrutiny. Virtually all Belgians have a mobile phone, and can adequately use it for all their needs, including indoors. In addition, VoIP solutions are available on the market.

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.

It should also be noted that voice is not part of the wholesale central access market. The Belgian NRAs are repeating their action of regulating BB/TV bundles in the broadcasting market – a remedy in the fixed voice market on the basis of an SMP finding in another market (wholesale cable central access market). Imposing remedies outside the market analysed is only permissible in relation to ancillary technical facilities relating to access obligations, which is clearly not the case in the specific circumstances.
3.4 The draft decision is at odds with the European ambitions of a Gigabit Society and a Digital Single Market

There is very large support from Member States and stakeholders for the Commission’s ambitions towards a Gigabit Society in the European Union\(^\text{14}\) and the Digital Single Market Strategy\(^\text{15}\). And both these policy goals rely heavily on a new cycle of investments in broadband infrastructures.

Cable operators in Belgium and elsewhere are making a considerable contribution towards achieving the policy objectives through both substantially increasing broadband penetration and speed. They invest heavily in upgrading and extending their broadband networks. By doing so, they play a key role in stimulating the investment by the incumbent telecom operators. This infrastructure based competition is widely recognised as the most effective type of competition.

The European cable industry has helped to promote considerable innovation and has brought advantages to the economies of the European Union as a whole. For example, cable operators on average continually reinvest between 20% and 25% of their revenues back into their networks\(^\text{16}\).

Compared to other technologies, Cable has the highest coverage of Next Generation Access (NGA; \( \geq 30 \text{ Mbps} \)) in Europe. 53% of EU 28 households passed by cable NGA (63% when excluding Italy & Greece) - 41% for VDSL 21% for Fiber To The Property (including FTTH and FTTB)\(^\text{17}\).

The European cable industry’s commitment to the aims of the Digital Single Market is also confirmed by the fact that broadband penetration in markets propelled by cable is not only higher than in markets with limited infrastructure competition, but it also reaches a higher level of penetration within a significantly shorter timeframe.

Data collected by Arthur D Little for Cable Europe\(^\text{18}\) proves beyond doubt that when cable is present, this pushes telcos incumbents to deploy their own next generation technology. There is a strong correlation between cable coverage and VDSL/FTTP coverage. There is also evidence that incumbents invest more per household in cable markets.

\(^\text{15}\) Communication from the Commission: A Digital Single Market Strategy for Europe - COM/2015/0192
\(^\text{16}\) Cable Operators’ Contribution to the European Digital Landscape, Arthur D. Little, 2016
\(^\text{17}\) Id.
\(^\text{18}\) Id.
The ultimate question is whether the European Commission's "Digital Single Market" goals can ever be realised if one of the main generators of investment - the European cable industry - and other competing infrastructures risk being regulated through this distorted market definition approach by the Belgian NRAs.

Cable Europe would like to reiterate that imposing ex-ante access remedies has chilling effects on cable operators' investments and at the same time limits the desire of alternative operators to climb the ladder of investment.
In light of these European level policy goals and the cable sector's pro-active role in fulfilling them, is it worth jeopardising those goals by burdening the cable sector and other infrastructure investors with unnecessary and disproportionate regulation? Cable Europe thinks that this is a risk not worth taking.

Conclusions

In summary, there is no justification - by reference to legal, economic or European policy criteria - for the measures proposed by the Belgian NRAs on Belgian cable operators.

Cable Europe is concerned that all the positive efforts being made by the cable industry in line with the European connectivity ambitions will be seriously compromised not just in Belgium but also throughout Europe by the types of regulatory intervention currently foreseen in the draft decision of the Belgian NRAs.

The present market situation in Belgium is, in fact, a success story. Infrastructure based competition is now a reality. This drives greater investment, which has led to greater broadband coverage and penetration, higher speeds and lower retail prices, increased consumer choice, and wider economic benefits. It seems that the relative competitive importance that cable has gained in Belgium is in fact being confused by NRAs as somehow being problematic from a regulatory perspective.

The position of the Belgian NRAs would create a barrier to the single market and would not be compatible with Community law and in particular the objectives referred to in Article 8.
Annex 1: Belgium outperforms most of the EU Member States
Annex 2

Evolution of traditional TV distribution in Belgium

TV distribution market shares evolution in Belgium