Cable Europe Comments on the Proposed Measures by Belgian NRAs in Relation to "Market 18"

18 February 2011

I. EXECUTIVE SUMMARY

The industry association representing the cable TV industry in Europe, *Cable Europe*, wishes to express its concerns regarding the proposed parallel Decisions set forth in the Public consultation documents of the various Belgian sector-specific regulators responsible for electronic communications and audiovisual policy matters (namely, the BIPT, the VRM, the CSA and the Medienrat; collectively, "the NRAs") published in December 2010.[1]

According to these proposals, three sets of regulatory obligations will be imposed on cable operators such as Telenet, Voo, Brutele, and AIESH, in relation to regional wholesale broadcasting transmission markets in Belgium, namely:

1. An obligation to provide Access to the Capacity of the Digital TV Platform.
2. An obligation to provide Resale Analogue TV services.
3. An obligation to provide "Resale" Broadband Internet Access.

These proposed regulatory obligations pose a real challenge to local cable TV operators, who face a twofold test, namely: (1) striving in a recession to maintain their existing and projected levels of investment in providing innovative products and services to the Belgian public; and (2) maintaining their competitiveness against the full range of media players, on the one hand (made up of terrestrial and satellite broadcasters, IP TV providers, and powerful international content rights holders), and electronic communications providers, on the other (a powerful fixed incumbent operator in the form of Belgacom, a number of LLU-based operators and highly effective mobile operators increasingly providing fixed/mobile broadband services), at either end of the multimedia value chain.

In the view of *Cable Europe*, the proposed Decision of the Belgian NRAs does not satisfy any of the traditional economic policy rationale otherwise used to justify a

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[1] Vlaamse Regulator voor de Media, "Ontwerpbeslissing met betrekking tot de analyse van de markt voor televisieomroep," 21 December 2010; Belgian Institute for Postal Services and Telecommunications, "Draft decision of the BIPT Council on the analysis of the television broadcasting market," 21 December 2010; Conseil Superieur de l'Audiovisuel, "Projet de decision du collège d'autorisation de contrôle du conseil superieur de l'audiovisuel concernant l'analyse du marché de la radiodiffusion télévisuelle," 21 December 2010. Medienrat, "Projet de decision de la chamber decisionnelle du Medienrat concernant l'analyse du marché de la radiodiffusion télévisuelle," 21 December 2010.

regulatory intervention of such significance and novelty. Not only do the various Belgian NRAs fail to identify a discernible market failure in any relevant national or sub-national market in Belgium in which *Cable Europe* members are operating (refer to discussion in Section 2 below), the proposals lack the necessary high quality reasoning on the part of those NRAs to identify the types of "exceptional" circumstances that might otherwise justify the type of regulatory intervention that has been proposed (see discussion in Section 3 below). Moreover, in fashioning the measures proposed by the Belgian NRAs, not only are the remedies disproportionate in and of themselves, but there seems to be a complete absence of any consideration that the by-products of such intervention are likely to be at odds with important established and emerging EU policy directions (see discussion at Section 5 below).

Finally, from an analytical point of view, the Belgian NRAs' proposed Decisions are prone to a number of serious analytical errors (see discussion at Section 4 below), insofar as:

- The NRAs have sought to rely on a very tenuous interpretation and application of the concept of "leveraged dominance" as the basis upon which their regulatory intervention is based, especially as regards their appraisal of the Broadband Internet Access market. The approach adopted is neither supported by administrative precedent, sound principles of regulatory economics, nor sound policy. By doing so, all the Belgian NRAs have succeeded to do is to not be able to draw a causal link between any perceived market failures and the proposed remedies that have supposedly been designed to address those market failures. The need for an NRA to be able to forge the nexus between market failure and prescribed *ex ante* obligation lies at the heart of what is required under the EU Regulatory Framework.

- In conducting the market definition exercise, the NRAs have excluded viable substitutes in the eyes of consumers and operators alike, thereby artificially narrowing the scope of the relevant product market and failing to identify real competitive constraints on cable TV operators. The strength of competitive constraints on cable TV operators has also been inappropriately diluted as a result of an analysis by the NRAs which seems to exaggerate both the height of barriers to entry in practice and the scale of switching costs in the industry in Belgium.[2]

- As regards the NRAs' proposed imposition of obligations on cable operators with respect to Broadband Internet Access, given that this has already been the subject of recently completed and entirely separate market review by the Belgian NRAs,[3] the proposed measures

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[2] We have declined to comment on the issue of geographic market definition because, as a trade association, we believe that this is very much a local issue. Having said that, we do feel very strongly that an NRA is obliged to take into account all material competitive restraints in determining the scope of a relevant geographic market. In this respect, it is worth noting that the Dutch appeal court in 2010 overturned the comparable Decision of OPTA in the Netherlands for its failure to have correctly determined the scope of the relevant geographic market.

[3] Belgian Institute for Postal Services and Telecommunications, "La décision d"analyse du marché 11 et marché 12 du 10 janvier 2008"; Belgian Institute for Postal Services and Telecommunications "L' addendum NGN / NGA du 12 novembre 2008."; and Belgian Institute for Postal Services and Telecommunications "La décision de réfection du 2 septembre 2009."

in this case are: superfluous, insofar as the market failure in question, should it exist, has already been addressed; contradict any notion of sound administration and legal certainty, insofar as decisions have already been adopted in relation to the same subject-matter and access relationships forged in response thereto; and wholly undermine the results of the previous market review, insofar as the working assumptions on dominance and market failure which underpin that earlier market review cannot logically be maintained. The approach undertaken also runs completely counter to the established European Commission practice of insisting that a "modified greenfield approach"[4] be undertaken by an NRA when considering whether or not to impose *ex ante* regulation.

- The proposed remedies are themselves disproportionate on their own terms, but especially when measured against the various statutory criteria set forth in the EU Regulatory Framework with respect to which NRAs must take the "utmost account".

- Finally, the Decision arguably falls at the very first hurdle of not being able to satisfy the European Commission's preliminary threshold "three criteria" test, which *must* be satisfied in order for *ex ante* regulation to be justified.

In conclusion, the view of *Cable Europe* is that the Belgian NRAs' proposed Decisions cannot satisfy the legal, economic and policy standards that have been consistently applied under the EU Regulatory Framework which our members have seen enacted across the European Union, the basis of which underpin substantial historical and on-going investment in modern, fibre based cable networks. Moreover, the remedies which have been proposed are likely to do more than good, insofar as they will have a tendency to undermine the competitive nature of infrastructure competition in the Belgian electronic communications sector and will in all likelihood slow down the development of future innovative products in that sector.

Accordingly, *Cable Europe* believes that this is therefore an appropriate case where the Belgian NRAs should seriously consider withdrawing their proposed Decisions.

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II. SUBMISSION

1. Introduction

The cable industry services more than 67 million customers in the EU. That industry is represented by *Cable Europe*, the European Cable Communications Association, which brings together all the leading broadband cable communications

[4] This means that the analysis proceeds under the premise that those regulatory obligations that could realistically be expected to be in effect, and which affect the marketplace, but which are not SMP remedies, are assumed to be in place.

operators and their national trade associations throughout Europe. 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.

It is not usual for *Cable Europe* to comment upon individual *ex ante* regulatory Decisions of NRAs taken in the context of their implementation of Community law obligations. However, given the nature and the scope of the regulatory intervention being proposed by Belgium's NRAs in relation to the retail broadcasting market in the various regions of Belgium[5] (inspired by ex-Market 18 of the original *Relevant Markets Recommendation*,[6] eliminated from the revised version[7] of that *Recommendation*), *Cable Europe* feels that it is important for it, as a representative of the cable TV investment community throughout Europe, to voice its concerns about proposed regulatory measures which it considers to be: unwarranted on the facts; unsupported by existing administrative practice of the European Commission and best regulatory practices across the European Union; and disproportionate in terms of their severity and compliance costs under all the relevant impact analysis criteria set forth under the EU Regulatory Framework for electronic communications services.

The negative impact of such a Decision 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. [8]

2. There is No Discernible Market Failure That Needs to be Addressed by *Ex Ante* Regulation

The starting point under the EU Regulatory Framework for Electronic Communications is that, unless a relevant product market is expressly listed as a candidate market under the *Relevant Markets Recommendation*, *ex ante* regulation at the wholesale level should only be imposed where NRAs can identify that a market failure exists at the related retail level. Yet, in comparing the evidence gleaned from other jurisdictions, the evidence does not suggest that the

5 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.

6 OJ L114/45 of 8.5.2003.

7 OJ L344/65 of 28.12.2007.

8 Under Article 7 of the *Framework Directive* (Directive 2002/21/EC, OJ L108/33 of 24.04.2002), National Regulatory Authorities (NRAs) are obliged to notify to the European Commission any intended draft measures designed to apply on operators designated with Significant Market Power (SMP) in defined relevant markets. In the absence of the relevant market in question not being listed in the current *Relevant Markets Recommendation*, the NRA in question needs to satisfy the so-called "three criteria" test in order to be able to justify *ex ante* regulatory intervention (see discussion in Section 4 of this Paper).

Belgian markets in which cable TV operators compete is anything other than vibrant.

2.1 The cable industry in Europe in general

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 28% of their revenues back into their networks.[9] In this regard, it is particularly instructive to compare this average level of investment of around 25% with that of fixed incumbent operators, which lies at only 15%.[10] The cable industry has also created 53,000 additional jobs in Europe since 2003.[11]

In Western Europe, in those markets characterised by strong infrastructure competition from cable operators (*e.g.*, the Netherlands and Belgium), the evidence is clear that broadband penetration is at its highest. The average broadband penetration level in countries with a significant share of cable Internet connections is 59%; this figure close to 30% higher than those markets with a relatively low involvement of cable operators in the broadband market (average broadband penetration of 46%).[12] As such, broadband-related growth in Europe is estimated to support the creation of at least 345,000 jobs between 2006 and 2015, and €636 billion of economic activity.[13] In the best case, greater broadband uptake could even result in 2,112,000 additional jobs and €1,080 billion of economic activities.[14]

In its 2008 Report on Broadband Access, the Commission found that the growth in Belgium of broadband connections through cable was such that broadband providers had grown their share of the market to 41%, compared to other means of accessing the Internet.[15] In its 2009 XVth Progress Report on the Single European Electronic Communications Market, the Commission also reported that the speed of fixed broadband connections in Belgium was quite high (41% of all retail lines offer 10 Mbps and more, and 52% offer speeds between 2 and 10 Mbps) in Belgium.[16]

2.2 Key performance indicators

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9 Solon Management Consulting, "Cable in Europe: Delivering the Future Today" (2008), p.5.

10 Solon Management Consulting, "Cable in Europe: Delivering the Future Today" (2009), September 2009, p.35.

11 *Ibid*, p.6.

12 *Ibid*, p.25.

13 *Ibid*, p.25.

14 *Ibid*, p.25.

15 Commission Communication, "Broadband access in the EU: situation at 1 July 2008" COM (2008) 41 final, p.47.

16 Commission Communication, "15th Progress Report on the Single European Electronic Communications Market", COM(2010) 253 final, p.98.

When measured against a range of competitive parameters, the role played by cable in Belgium is a very positive one when set against other EU Member States. In summary:

- ***Prices for basic TV subscription services*** in Belgium are among the lowest in the EU. They are also less than half the level of prices found in Finland, the UK, Greece, Spain, Italy, Norway, Ireland, Denmark, Portugal and France.

- ***Existing price regulation*** imposed by the Belgian Federal Government in relation to the basic services (which includes digital services) of cable TV offerings in Belgium already guarantees that any price increases must be notified to the relevant authorities and will only be approved if justified on the basis of an increase in costs. Prices since 2005 have, accordingly, risen only in response to inflation and in accordance with regulatory supervision.

- ***Substantial investments*** have been made by Belgian cable TV operators in the recent past which are directly linked to the roll-out of digital TV. This has resulted in an increase in cable industry sector investments by 55% in the period between 2003 and 2008,[17]while at the same time significantly increasing the cost base of Belgian cable TV operators.

- ***Belgium enjoys the highest service levels in*** **Europe**, with virtually all Belgian households having a choice between four (4) competing digital TV platforms (cable, IPTV, satellite and the emerging digital terrestrial (DTT) platform). This is in marked contrast to the position in most EU Member States.[18]

- ***Digital roll-out figures*** suggest that Belgium is in the forefront of, investments in this area, compared to other European countries. Despite its already high pre-existing levels of premium TV penetration prior to digital roll-out, Belgium achieved a 59% digital penetration rate by the end of 2009. Between mid-2009 and mid-2010, the number of digital pay TV households in Belgium grew by 34%.[19] Moreover, Belgium has the second highest rate of digital growth in Europe, second behind only Portugal. IN addition the penetration rates in the Belgian cable TV market are among the highest in the EU.

- ***Evidence of market entry is widespread*** across all delivery platforms. Up to ten (10) new entrants providing TV services have gained market entry since 2005. Among these is the highly successful Belgacom TV, which has already achieved a national market share of between 18% and 20% in terms of digital subscriptions. The figures

[17] Solon Management Consulting, "Cable in Europe: Delivering the Future Today" (2009), September 2009, p. 35.
[18] Bain & Company, "Next generation competition: Driving innovation in telecommunications" Bain digital broadband infrastructure study (2009), 10 December 2009.
[19] According to Telenet figures.

suggest that the national market share for non-cable operators almost doubled between January 2006 and July 2010 from 15% to 28%.

The above data alone confirms that all the key performance indicators at retail level are consistent with the view that competition is effective and that there is no market failure which needs to be addressed by *ex ante* intervention under the EU Regulatory Framework***.*** In such an environment, the members of Cable Europe are perplexed by what could motivate the various Belgian NRAs to propose the measures which are the subject of Public Consultation.

3. There Are No "Exceptional" Circumstances Which Justify *Ex Ante* Intervention

By proposing *ex ante* intervention in relation to the ex-Market 18 of the Commission's *Relevant Markets Recommendation*, Belgian NRAs are in effect taking the view that there are "exceptional" national or sub-national circumstances which justify such an 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 above, 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. This level of consumer choice that is available to Belgian consumers is of particular importance as "*the number of alternative transmission channels from the point of view of households*" was a key tenet in the decision of the European Commission in its last review of the *Relevant Markets Recommendation* in 2007 not to nominate a market for broadcast transmission services as being a candidate market for *ex ante* review under the Recommendation.[20]

If one looks more recently at European Commission precedent under the Article 7 market review process, it also becomes clear that the circumstances which led the Commission to declare that the Danish and Netherlands NRAs' *ex ante* interventions were justified have no parallel in Belgium. In the *Danish Case*, for example, a unique situation existed insofar as the ownership of the PSTN network and the cable networks in question lay in common ownership; by contrast, Belgium's cable operators are independently owned and operated and are engaged in head-to-head competition with a range of competing delivery platforms (digital satellite, an emerging digital terrestrial platform, and a majority state owned incumbent operator).

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20 Commission Explanatory Note, p. 49.

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In the case of the Netherlands, OPTA made a case for ex ante regulatory intervention in the wholesale broadcast transmission services market based on the following market place conditions[21]:

- There was a lack of real competitive impact from the fixed incumbent's IP TV services.
- Dutch cable operators were said to play a relatively unique role in the provision of analogue broadcasting services.
- Analogue TV played a unique role in Dutch social life, especially regards its use in second homes and as second TV outlet in first residences.

With respect, *none* of these conditions applies directly or by analogy in Belgium. In fact, the converse situation arguably applies in Belgium with respect to the above factors. In addition, Belgian cable operators are subject to strict "must carry" rules and are subject to cross-border competitive pressures from contiguously situated content providers in the Netherlands, France and Germany, given the linguistic divisions in Belgium. Moreover, the Dutch NRA, in its comparable analysis, conducted a review of the related relevant wholesale market, rather than relying merely on a retail market analysis – as has occurred in the case of the Belgian NRAs. These are important considerations, given that the two countries are arguably the most comparable in Europe in all other respects as regards their respective cable TV industries.

In any event, even in the case of the Netherlands, it must not be overlooked that the current Commissioner for DG Information Society (and Commissioner for Competition when the OPTA measures were notified to the European Commission), Neelie Kroes, gave only conditional approval that an analogue resale remedy was proportionate and indispensable to the desired outcome in her directive to OPTA to rescind the measure as soon as possible so as not to delay the move to digitalisation[22]. In addition, on appeal, the Decision was struck down by the Dutch courts on the grounds that OPTA had, *inter alia*, adopted the wrong geographic market definition[23].

4. The Proposed NRA Decisions Are Contrary To Established Practice under the EU Regulatory Framework

4.1. Misapplication of the concept of "leveraged dominance" in the *ex ante* context

[21] The market analysis and remedies were only conditionally approved by the European Commission in 2009 and subsequently struck down by the Netherlands highest administrative court the College van Beroep voor het bedrijfsleven (CBd) in August 2010.

[22] "Regulating analogue RTV should not have the effect of postponing the move towards digitalisation. For that reason, the Dutch regulator should ensure that the resale obligation of analogue RTV programmes is removed as soon as possible". Competition Commissioner Neelie Kroes, Brussels, 11 February 2009, IP/09/245, *'Commission clears Dutch regulator OPTA's proposal to enhance competition in the broadcasting markets'.*

[23] The College van Beroep voor het bedrijfsleven (CBb) – the highest Administrative Dutch Court – annulled OPTA's broadcast decision on 18 August 2010.

Through their proposed measures, the Belgian NRAs are proposing to establish a regulatory obligation in the broadband market on the basis of an SMP finding in another market (retail broadcasting transmission). Such an approach would be completely contrary to the plain meaning of EU legislation and the underlying philosophy of the *Relevant Markets Recommendation*, insofar as it is clear that remedies should relate directly to the relevant markets in which a market failure has been identified. Imposing remedies outside the market analyzed is only permissible in relation to *ancillary technical facilities* relating to access obligations, which is clearly not the case in the specific circumstances.

The approach adopted by the Belgian NRAs cannot be supported, either under: (1) a most expansive view of "leverage" theory; or (2) the rationale that the remedy is in some way ancillary to a principal access obligation.

Traditional leverage theory in competition law is used to address the abusive behavior of a dominant firm in Market A by extending its market dominance from Market B. In an *ex ante* context, it has never been applied in practice because it is felt that the "leverage" at issue is inevitably from a wholesale market into a retail market or, one imagines, from the PSTN to an NGA environment. Thus far, however, the power that exists under Article 14(3) of the *Framework Directive* has never been used, even after well over 1,000 market reviews have been conducted across the European Union. Nor is there anything to suggest that the markets in question are "closely related" nor that the links between than facilitate the type of leverage that would "strengthen the market power" of the dominant firm.

Similarly, there is nothing at the level of the European Regulators Group (the "ERG", now re-named "BEREC") which is supportive of the NRAs' position. According to the ERG's 2006 Common Position on Remedies, at para. 5.6.3:

"*In principle, an NRA may impose obligations in an area outside but closely related to the relevant market under review, provided such imposition constitutes (i) an essential element in support of obligation(s) imposed on the relevant SMP market without which these obligations would be ineffective and (ii) in combination the most appropriate, proportionate and efficient means of remedying the lack of effective competition found on the relevant market."*

However, it is highly unlikely that the ERG could have had in mind a case similar to the one under review. As a sole example for a related remedy "*outside the market*", the ERG refers to the need to impose an obligation "*to provide a tie-cable to link the main distribution frame to the entrant's premises"* in support of an obligation of local loop unbundling. The ERG is thus in effect referring to an ancillary or associated service without which an access obligation could not be effectively implemented. Such an obligation, would indeed, satisfy the "essential", "proportionate" and "efficient" criteria established by the ERG.

An approach which somehow treats a broadband remedy as amounting to the prescription of an "associated facility" to an upstream access product is similarly without any foundation in the circumstances. The combined effect of the definition of "access" and the elaboration of the concept of "associated facilities" in the *Access Directive* (Article 2 and 12(1) respectively) leave little doubt that the position espoused by the Belgian NRAs goes well beyond the meaning of the legislation.

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Accordingly, Cable Europe can identify nothing in existing precedent or in any articulated policy that would justify the approach taken by the Belgian NRAs to mandate resale broadband Internet access.

4.2. The market definition exercise has been incorrectly performed

Belgian NRAs have wrongly excluded satellite, DTT and Internet TV ("OTT") from the relevant product market. This might stem in part from the fact that Belgian NRAs have failed to define the scope of, or to assess the market for, wholesale broadcast transmission (ex-Market 18) in Belgium. Any proper assessment of this relevant market would have concluded inevitably that competition on it is dynamic and effective. The accelerating transition from analogue to digital currently taking place has encouraged widespread and successful entry across a range of platforms – IPTV, satellite and DTT – and intense competition driven in part by heavily discounted 'multi-play' bundles.

Cable Europe's understanding of the Belgian market is that cable services may be considered to be substitutable as regards other existing infrastructures, including:

- **Satellite TV** is substitutable with cable TV in terms of quality and access to 'must-have' content. It also has advantages in terms of the number of channels available. Importantly, there are no significant planning restrictions in relation to the installation of satellite dishes, there is strong commercial evidence that there are no commercial barriers to the provision of multilingual services, specialist ethnic channels proliferate in large urban centres of Belgium (especially with Middle Eastern populations), the use of hybrid decoders allows a broadband Internet connection to be used as a return channel (a solution that has in fact been adopted by Mobistar in its satellite offer).
- **Digital Terrestrial Television**, which is a relatively new technology to be introduced imminently into Belgium, it promises to offer sufficient capacity to allow the launch of a typical basic service comprising 10 to 15 channels, even if offering more limited capacity than alternative infrastructures.
- **"Over the top" TV** (OTT TV is a new technology supported by multinationals such as Google, Amazon and the Hollywood studios, which are investing heavily in its development).

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.

4.3. Inappropriateness of "double jeopardy" in regulating a market that has already been the subject of separate market review

Cable Europe is particularly perplexed by the approach of the Belgian NRAs to seek remedies in relation to a broadband market, based on the dominance of cable TV operators in the wholesale broadcast transmission services market (ex-Market 18 in the EU list of relevant markets). Such an approach cannot be tenable in light of the requirements of the EU Regulatory Framework, which insist upon the proof of a causal nexus between the existence of dominance (SMP) and a finding of market failure. As explained above, it would be stretching "leverage" *theory* to the limit to do so.

Moreover, it would wholly undermine the legal certainty associated with findings in market reviews if remedies could stretch across markets and platforms which have already been the subject of a separate public consultation process and separate findings regarding the existence of dominance (SMP) on those markets. This is especially the case where a fixed incumbent operator such as Belgacom has already been found to be dominant with respect to broadband access and already made the subject of mandated access obligations. In such a situation, there is little point in the European Commission insisting on enforcement of the transparency measures contained in the EU Regulatory Framework if an NRA can choose to ignore them completely by subjecting someone to a remedy in a market which is not the subject of its market review.

Neither the ERG nor the Commission in any of their precedents allude to the possibility of SMP being found in a relevant product market that could directly trigger an obligation in another relevant market, yet alone one that is the subject of a parallel market review. Moreover, the natural implication of permitting such an approach would be to ignore the appropriateness of the "modified greenfield approach", because it would result in an NRA completely ignoring the effects of existing upstream *ex ante* regulation, which has been the hallmark of European Commission practice under the Article 7 review process. Had the Belgian NRAs embarked upon a full modified greenfield analysis of the relevant market in their market review, they would have invariably concluded that the remedy is unnecessary and unjustified.

Finally, the net result of mandating access to both the PSTN and the cable TV infrastructures would lead to a loss of incentives to invest in either SMP assigned infrastructure. Equally, the incentives of competitors to invest in alternative technologies will be compromised if they can instead rely on access to all existing infrastructures (*i.e.*, for both IPTV and cable). As such, it would contradict European Commission policy to promote infrastructure development.[24]

4.4. The remedies proposed are disproportionate

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 alike. As a trade association, Cable Europe wishes to discuss only those elements of the proposed remedies

[24] *'..the EU broadband market is moving towards higher speeds because of fibre and cable..'*
Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda The right regulatory environment for rolling out Next Generation Networks Fibre to the Home Council Europe Conference, Milan, 10 February 2011, SPEECH/11/93.

which raise fundamental issues regarding effects on industry structure, investment incentives and innovation.

With respect to the access remedy prescribed to cable operators' DTV platform, 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 (*eg.*, a vertically integrated operator such as Belgacom and a cross-platform player such as Mobistar). Similarly, the remainder of the market is already serviced by unbundled local loops and multicast bitstream products.

In light of the foregoing, Cable Europe questions whether adequate assessment of the impact of the proposed measures on the investment incentives at play amongst the four existing transmission platforms has been undertaken by the Belgian NRAs.

As regards the resale access to cable TV operators' analogue services remedy, it is disappointing that this measure is being prescribed to address a marginal technology which, by the end of the life of this market review, will be completely superseded by the advent of the digital switchover that will take place in Belgium. We would respectfully submit that all such a measure can achieve is to divert the ongoing investments of cable TV operators into digital platforms, while at the same time artificially maintaining in the market a handful of operators that are either not inclined nor interested in investing in new technology and innovation.

With respect to the proposed access obligations on cable TV operators' broadband Internet services, this measure appears to address a competition problem that is entirely absent from both the market place context and the regulators' own market analysis accompanying the remedy proposal. If a problem does in fact exist, then surely the Belgian NRAs are best advised to ensure that the efficacy of the remedies imposed on Belgacom is optimal, rather than searching for new remedies. All the proposed remedy will do is to lessen the investment incentives of smaller operators who would otherwise be climbing the investment ladder, or who should in principle be working with an existing access remedy from Belgacom available across the whole territory of Belgium. The fact that this remedy should not even be considered in light of the parallel market review taking place for broadband access is a matter upon which Cable Europe has already commented extensively.

In summary, the remedies prescribed are largely at odds with the pro-competitive investment signals that one usually associates with a Regulator overseeing a market place as competitively robust as the broadcasting sector.

4.5 The threshold "three criteria" test has not been satisfied

In the absence of the market in question being listed in the European Commission's *Relevant Markets Recommendation*, *ex ante* regulation is not warranted unless all the elements of the so-called three-criteria test are satisfied.

While Belgian members of *Cable Europe* are undoubtedly better placed than a pan-European trade association to argue the precise details of whether the three-criteria test has been satisfied, Cable Europe takes the view that even a high level overview of the regulatory and market situation in Belgium reveals that the various NRAs cannot be in a position to assert that all three of the relevant threshold criteria have been cumulatively (yet alone individually) satisfied on the facts.

Thus, we find it highly unlikely that the NRAs in question have evidence that there exist high and non-transitory barriers to entry (Criterion No.1). Not only are entry barriers relatively low compared to other markets that are regulated *ex ante,* but they are being further eroded through the advent of technology. There are four (4) platforms vying for the delivering of broadcasting, there is evidence of market entry through LLU-based operators and mobile operators, Belgacom has arguably Europe's largest share of IPTV for a fixed incumbent operator, barriers to switching are not high, and digital decoders can be rented (rather than bought).

Most compellingly, Belgian NRAs have not even come close to proving that the relevant market has a tendency over time not to be effectively competitive (Criterion No.2). As indicated in our discussion above in Section 2, market evidence suggests that retail pricing is competitive, service bundles proliferate, levels of service innovation are increasing, and broadband speeds are high. When one combines this with the fact that there are a number of different delivery platform alternatives (including that of the PSTN incumbent, a number of LLU-base operators, and successful mobile operators investing in the provision of fixed/mobile converged broadband services), one cannot escape the inevitable conclusion that the competitive landscape in Belgium is vibrant, not static.

Finally, there must exist serious doubt as to whether the Belgian NRAs can be correct in concluding that *ex post* competition rules cannot adequately address the alleged market failures identified in their market reviews (Criterion No. 3). Given that the market failures allegedly relate to potential retail price increases and the lessening of choice for retail customers, it is difficult to imagine why *ex post* competition rules could not address such issues, at least if the market definition process and the assessment of market power were to be determined on similar principles. Insofar as the argument of the NRAs is that the access-based remedies they propose are best addressed under *ex ante* regulation, there is only merit in such an argument in the abstract; practice suggest that there is no underlying market failure at retail level which requires en access remedy being prescribed at the wholesale level in the first place.

Accordingly, even in the absence of the detailed analysis that is usually required to apply the three-criteria test in practice, it appears to be clear that this is not – in the absence of extraordinary circumstances – a case where the cumulative conditions of the three-criteria test are capable of being satisfied.

5. The Proposed Decisions Distort the EU Market Review Process and Harm the Effectiveness of Other EU Policies

A final set of observations needs to be made, both of which relate to the difficulties created by the remedies prescribed in terms of cable operators playing their role in the fulfilment of Community policy goals.

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For example, Cable Europe has major concerns that the measures proposed will serve to undermine infrastructure competition and investment in NGAs through a policy of pursuing a two player infrastructure operator market. In our view, these measures will have a chilling effect on investment by alternative operators and the dampening of any desire on their part to climb the ladder of investment will have been dealt a sever blow by the proposed measures of the Belgian NRAs.

A not unrelated question is whether the European Commission's "Digital Agenda" goals can ever be realised if one of the main generators of investment - the European cable industry - is saddled with unnecessary compliance costs, and is pressed into diverting valuable resources into the establishment and maintenance of wholesale access management processes.

Among the many objectives of the 2010 *A Digital Agenda for Europe*, the Commission has set out the following goals to be achieved by 2020: (i) that all Europeans have access to much higher Internet speeds of above 30 Mbps; and (ii) that 50% or more of European households subscribe to internet connections above 100 Mbps.[25] As has been demonstrated above, cable TV operators have made a considerable contribution towards achieving this objective through both substantially increasing broadband penetration and speed. Whilst the *Digital Agenda* makes reference to the reliance of cable TV operators on legacy telephone copper,[26] in Belgium the commitment to fibre deployment has been unequivocal.

The European cable industry’s commitment to the aims of the *Digital Agenda* 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. Whilst in 2008 almost 90% of Western European markets with strong cable broadband activity already reached penetration rates of at least 40%, only 63% of DSL-focused markets had surpassed this mark.[27] In Central and Eastern European, markets 40% penetration has so far only been achievable where there has been high parallel Cable broadband activity.[28] Cable-driven broadband markets are at minimum two years further advanced than their DSL/LLU driven counterparts. Markets dominated by DSL have only recently attained comparable penetration to cable-driven markets after Local Loop Unbundling (LLU) regulation and ULL pricing was stengthened. Due to these factors, cable-driven broadband markets are approximately two (2) years further advanced in broadband penetration than their DSL/ULL driven counterparts.

Furthermore, in terms of speed, cable operators consistently offer greater band-width than fixed incumbent competitors. In Belgium, for example, bandwidth offered by cable operators is, on average, one third greater than the fixed incumbent operator, Belgacom.[29] The greater bandwidth offered by cable

25 Commission Communication, “A Digital Agenda for Europe”, COM(2010) 24, p.19.
26 *Ibid,* p.20.
27 Solon Management Consulting, “Cable in Europe: Delivering the Future Today” (2009), September 2009, p.26.
28 *Ibid*, p.27.
29 *Ibid,* p.28.

operators therefore makes an important contribution towards meeting the broadband targets set out in *A Digital Agenda for Europe*.

In light of these European level policy goals and the cable TV sector's pro-active role in fulfilling them, is the risk of jeopardising those goals worth the risk of burdening the cable TV sector with unnecessary and disproportionate regulation? Cable Europe thinks that this is a risk not worth taking.

6. Conclusions

In summary, Cable Europe takes the view that the proposed measures sought to be imposed by the Belgian NRAs on Belgian cable TV operators do not appear to be justified by reference to legal, economic or European policy criteria. Moreover, we are concerned that all the positive developments being made by the cable industry in terms of investment and innovation not just in Belgium but also throughout Europe will be seriously compromised by the types of regulatory intervention currently foreseen in the Public Consultation documents of the various Belgian NRAs.

The association and its members find it somewhat perplexing that the relative competitive importance of cable in Belgium is being confused by NRAs in as somehow being problematic from a regulatory perspective. This is despite the fact that the key performance indicators at retail level suggest that *ex ante* intervention is wholly unjustified, and possibly even counter-productive. On this basis, we sincerely hope that the Belgian NRAs will reconsider their positions during its assessment of the responses to the public consultation.

Our organisation would be only too happy to have the opportunity to elaborate our views further on the points raised in this submission.

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