

**TELENET REPLY TO THE REGULATORS' (BIPT, CSA, VRM) CONSULTATION
DOCUMENT ON THE REVISION OF RETAIL MINUS**

Telenet thanks BIPT, CSA and VRM (hereafter, “the Regulator”) for the public consultation on their respective Draft Decisions proposing to review the retail minus methodology (the “Draft Decision”) and has set out its comments below. Based on these comments, Telenet requests the Regulator to withdraw its proposed methodology or at least to substantially reassess it as it is an unprecedented and isolated form of regulatory overreach without legal justification. Consumers will not benefit from the proposed revision but will, on the contrary, be worse-off as product innovation, network investments and structurally viable competition will be stifled.

Telenet acknowledges that the validity of the regulation of broadcasting services foreseen in the CRC decision of 1 July 2011 (the “Framework Decision”) has been upheld by the Court of Appeal of Brussels and that this regulation remains in force until the revision of the market analysis (which we understand is underway) will be concluded. Telenet’s intention is not to undermine the effectiveness of this regulation but to ensure that its implementation complies with the fundamental principles of access regulation and of the retail minus methodology. Our contribution shows that the objective of market entry can be achieved with a less intrusive wholesale pricing regulation based on efficient market performance. The current regulation artificially facilitates market entry of one or more specific third parties at the cost of undermining the entire retail strategy of the cable operators. It also shows that the methodological principles of pricing regulation retained in the Commission’s 2013 Recommendation on Cost Methodologies and Non-Discrimination would allow the Regulator to achieve the objectives of the regulation and align itself with the harmonized approach which the Commission is seeking to secure to achieve the objectives of the Digital Agenda for Europe, which extend far beyond the users of electronic communications services.

For the sake of completeness, Telenet also refers to its previous submissions regarding the wholesale pricing regulation which is currently being appealed before the Court of Appeal of Brussels. In an effort of concision, Telenet has not reiterated these considerations in this submission and focuses only on the changes foreseen in the Draft Decision.

This submission is structured as follows:

- Section I sets out certain procedural considerations.
- Section II examines the substantive legal principles which the proposed tariff regulation is violating.
- Section III examines the factual errors and arbitrary factual assessments contained in the Draft Decision.
- Section IV sets out the reasons why the tariff regulation will undermine the objectives of the regulatory framework.

I. PROCEDURAL CONSIDERATIONS

The European and national regulatory framework require NRAs to review the market analyses every three years.¹ This obligation ensures that the SMP regulation reflects the prevailing market conditions and is, more generally, proportionate to address the potential market failures. In 2014, the Commission has adopted a revised list of markets which can be subject to *ex ante* regulation (the 2014 Recommendation²) following which NRAs have to proceed as soon as possible with a review of their market analysis.³

The Regulator's decision to proceed with a substantial overhaul of the tariff regulation for wholesale access on cable networks is difficult to reconcile with these principles and the priority which should be given to a reassessment of competitive conditions. The market analysis set out in the Framework Decision of 2011 is based on data that is four to five years old and ignores a number of important developments which are changing the prevailing market dynamics. The development of OTT-based services and the further decline of analog TV affects the analysis set out in the 2011 Framework Decision. Telenet invites the Regulator to proceed with the periodic market assessment and considers that it is problematic to justify the steep decline in wholesale rates foreseen in the Draft Decision (as well as its methodological underpinnings) on the basis of a Framework Decision whose review is overdue.

Telenet further recalls that, irrespective of its objections against the initial Framework Decision, it complies with the requirements contained therein. It implemented operational access to the cable for Mobistar, in line with its obligations pursuant to the Framework Decision, and within the strict time limits imposed by that Decision. In addition, Telenet has made some amendments to its original Reference Offer following some suggestions from BIPT and/or Mobistar, in order to further improve render the wholesale access conditions. Telenet would therefore like to emphasize that effective access regulation should not only be approached from the angle of ensuring low wholesale prices, but rather as a combination of reasonable wholesale prices with an effective and efficient implementation of the operational access.

The Draft Decision indicates that the final decision is due to enter into force 1 month from its publication. This implementation period is far too short. For Telenet, 4 months is the minimum time required to implement the pricing changes in its IT systems, as this is dependent on IT release schedules. This should also be considered for any subsequent pricing change (and retroactive reductions should be excluded as set out in more detail in Section II.B below).

¹ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, Article 16 § 6, a. Article 40/11 of the Law of 30 March 1995 on Broadcasting Services for the Brussels Capital Region.

² Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ("2014 Recommendation").

³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for electronic communications networks and services ("Framework Directive").

In the context of the current consultation process, Telenet has requested an oral hearing and full access to the retail minus model. This oral hearing has taken place on 15 June and an extension for the reply to the consultation was granted until 15 July 2015. Telenet thanks the Regulator for its positive response to this request and hopes that the Regulator will take due account of Telenet's comments below.

Finally, Telenet refers to the pending legal proceedings (i.e. the pending appeal against the previous tariff regulation decision) and the arguments that are made in these proceedings which may also affect the Draft Decision. These arguments are, however, not reiterated here.

- **The Framework Decision dates back to 2011 and is based on market data of 2010 and older. It is problematic to justify a steep reduction of the wholesale prices on the basis of a Framework Decision that is overdue for review.**
- **Telenet has complied with its regulatory obligations and implemented operational access within the strict time limits imposed by the Framework Decision.**
- **The implementation period of 1 month is too short.**

II. VIOLATION OF TARIFF REGULATION PRINCIPLES

The methodology set out in the Draft Decision violates the following fundamental principles of tariff regulation, (i) the principles of proportionality, objectivity, duty of care and motivation and (ii) the principles of non-retroactivity and legal certainty.

A. Violation of principles of proportionality, objectivity, duty of care and motivation

The principle of proportionality is an essential principle of the regulatory framework. Article 8(1) of the Framework Directive provides that: “*Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.*” As regards the imposition of remedies in particular, Article 8(4) of the Access Directive provides that “[o]bligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.” In the *Food Supplements* case, the Court of Justice confirmed that this principle is the boundary to the principle of freedom of trade and the right to individual property, which are not unlimited but can be restricted through regulatory interventions, provided that the proportionality principle is complied with:

“[I]t is clear from settled case-law that the right to property, [...] and likewise the freedom to pursue an economic activity, form part of the general principles of Community law. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue an economic activity may be

restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed [...].⁴ (emphasis added)

The principle of objectivity has been recognized in established case law of the Court of Appeal and directly follows from the obligation to duly motivate decisions and ensure that the regulatory obligations are proportionate. In an appeal regarding cost modeling of Proximus' wholesale tariffs, the Court of Appeal of Brussels recognized that even if the Regulator may regulate tariffs on the basis of a cost model of a hypothetical efficient operator, it had to ensure that this model remains as close as possible to the reality of Proximus' operations and costs. In its judgment of 29 June 2011, the Court of Appeal stated that: “[...] *il appartient à [l’IBPT] de construire son modèle de la façon la plus réaliste possible, en tenant dûment compte du contexte et des faits et circonstances pertinents reflétant la réalité dans laquelle un opérateur hypothétique efficace devrait fonctionner pour éviter des écarts trop importants avec la situation de l’opérateur historique. [...] Un tel modèle doit donc être le plus possible fondé sur des principes et des paramètres reflétant cette réalité de façon fiable.*”⁵ The Court of Appeal of Brussels further insisted on the fact that the model would have to reflect effective demand for the service in order to ensure that it would be a viable and realistic model: “[l]’*un des éléments essentiels permettant de garantir le caractère réaliste et fiable d’un modèle ascendant est que le réseau modélisé à partir duquel les coûts sont calculés doit être dimensionné en fonction de la demande comme le confirme l’IBPT lui-même dans la Décision Attaquée (page 8).*”⁶

In the Netherlands, the *College van Beroep voor het Bedrijfsleven* has recognized the requirement for NRAs adequately motivate their decisions and ensure they have taken all necessary measures of investigation and fact-finding to assess that the tariff regulation imposed is proportionate and does not overreach by imposing an excessive burden. Tariff regulation is recognized as a particularly intrusive form of intervention which should only be imposed if it is necessary to achieve the regulatory objectives. There is a particular burden on the NRA to scrutinize the proportionality of any measure which would imply that the SMP operator is burdened with additional cost to assist competitors.⁷ The assessment of the

⁴ Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health e.a. v. Secretary of State for Health*, 12 July 2005, § 126 (emphasis added).

⁵ R.G. N°:2010/AR/2695, 29 June 2011, at § 28 al. 3.

⁶ *Ibidem*, at § 29.

⁷ “9.2.2 *De grieven 2.2 en volgende van KPN klagen er kort samengevat over dat OPTA bij het opleggen van de verplichting tot proportionele doorrekening van wholesalespecifieke kosten verder is gegaan dan noodzakelijk en niet heeft voldaan aan de op haar rustende onderzoeks- en motiveringsverplichtingen. [...] Het College overweegt hieromtrent het volgende. De in artikel 6a.7 Tw genoemde verplichtingen met betrekking tot kosten en kostenoriëntatie hebben een ingrijpend karakter. Prijsregulering is een vergaande vorm van regulering van de markt. Dit geldt in het bijzonder voor de hier aan de orde zijnde proportionele toerekening, die er op neerkomt dat de gereguleerde onderneming een – aanzienlijk – deel van de kosten die moeten worden gemaakt om anderen met haar te kunnen laten concurreren, zelf moet dragen. OPTA dient bij het opleggen van een dergelijke verplichting te onderzoeken of deze geschikt is voor het bereiken van het doel en of deze niet verder gaat dan voor het bereiken van dit doel noodzakelijk is. Gelet op de in artikel 1.3, eerste lid, onder c, Tw, genoemde doelstelling van het bevorderen van belangen van eindgebruikers wat betreft keuze, prijs en kwaliteit, dient OPTA hierbij mede in ogenschouw te nemen in hoeverre de proportioneel toegerekende wholesalespecifieke kosten door de gereguleerde partij aan*

possibility for competitors to effectively compete on the market with a lighter form of intervention therefore has to be examined by the NRA.⁸

As regards the remedies set out in the Framework Decision, the Court of Appeal has confirmed that the objective of the wholesale access regulation is to reduce barriers to entry and enable potential entrants and operators in the relevant retail market to provide an offer that is fully competitive with the cable operators, allowing them to build a lasting business relationship with the end customer. This access regulation should allow beneficiaries to invest in their own infrastructure and offer competitive multiplay offers by using their own infrastructure.⁹

In conclusion, the regulation needs to respect the principle of “minimum intervention”, which implies that the imposed regulation should be limited to what is appropriate and necessary to attain its objective. In accordance with the Commission Guidelines, a proposed measure is compatible with the principle of proportionality if it pursues a legitimate aim and if the means employed to achieve that aim are both necessary and the least burdensome (i.e. the minimum necessary to achieve the aim).¹⁰ In order to do so, the Regulator must take into account the relation between the costs and benefits of the contested regulation to justify why a certain regulatory measure is necessary and effective, indicating how the cumbersome effect of the reasonable measures was impossible to avoid.¹¹

The proposed tariff regulation is violating the above principles for the following reasons which are set out below:

- The regulator does not retain the bundle which is the closest to the regulated market and regulated wholesale access.

(continued...)

eindgebruikers worden doorberekend. Bovendien dient OPTA de aan haar beslissing ten grondslag liggende overwegingen – inclusief berekeningen – zoveel als mogelijk inzichtelijk te maken. Aan deze verplichtingen heeft OPTA in het Tariefbesluit niet voldaan.” College van Beroep voor het Bedrijfsleven, AWB 07/36, 07/68 en 07/69, 12 September 2007.

⁸ “Indien het een bestuursorgaan is toegestaan om een ingrijpende maatregel op te leggen, zal zij immers in de regel ook de bevoegdheid hebben om een minder ingrijpende maatregel op te leggen en op basis van overwegingen van proportionaliteit hiertoe zelfs gehouden zijn indien ook deze minder ingrijpende maatregel effectief is. Uit het bovenstaande volgt dat beroepsgrond 3 van KPN gegrond is. OPTA heeft het zorgvuldigheidsbeginsel van artikel 3:2 Awb en het motiveringsbeginsel van artikel 3:46 Awb geschonden. OPTA dient eigen onderzoek te verrichten teneinde na te gaan welke mate van proportionele toerekening van WSK is vereist om voor WLR-afnemers een business case te bieden voor het bedienen van hun klanten via WLR HC.” College van Beroep voor het Bedrijfsleven, AWB 10/85 en 10/86, 9 November 2012.

⁹ Brussels, 12 November 2014, R.G. 2011/AR/2289 et al., § 123-125, p. 69-70.

¹⁰ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002/C 165/03, 11 July 2002, point 118, p. 22.

¹¹ Brussels, 12 November 2014, R.G. 2011/AR/2289 et al., § 123-125, p. 69-70.

- The methodological approach values additional services (which are independent from the regulated input) on the basis of the retail reference price (instead of avoidable cost) and does not take account of effective usage.
 - The methodology does not exclude legacy offerings.
 - The assessment of promotions is arbitrary and contrary to accounting principles.
 - The methodology grants an excessive and generic market entry assistance.
 - The accompanying transparency measures imposed in the Draft Decision are unclear and create an excessive burden.
 - There is no impact assessment.
1. The Regulator should retain the reference prices of the bundles which are closest to the regulated wholesale access

At § 140 of the Draft Decision, the Regulator decides that when the methodology yields a lower price for a 3P bundle (compared to a 2P bundle), it will consider the price for the 3P bundle as reference price. Although it recognizes that the pricing strategy which consists of increasing the attractiveness of a 3P bundle is legitimate, it refers to this practice as a form of internal discrimination pursuant to which the cable operator would be applying a lower access price for a 3P offering compared to a 2P offering.

This approach contains a fundamental methodological error. According to the principle of proportionality, the methodology should give preference to the retail service offer which is closest to the wholesale service that it wants to insulate (i.e. prefer double-play over triple play where both are available). By using the triple-play offer for its calculation, the Regulator penalizes SMP operators for broadening their bundles to include voice telephony (or potentially other components such as mobile) which are generally pro-competitive as they concern services on which Proximus generally has the incumbent leading market position and for which cable operators will seek to aggressively profile themselves. By applying such methodology, the relevant weight of the regulated products in the bundle is reduced even below a certain acceptable minimum value for these services. The regulated television and broadband components combined should represent at least 75% of the total value of the products in the relevant bundle. If this is not the case, it should be concluded that the television and broadband component in the bundle cannot be considered a relevant point of reference within the scope of the Framework Decision.

If the cable operators would launch quadruple play offers, this logic would lead the Regulator to use quadruple play bundles as a basis for its wholesale price calculations, i.e. to take the retail pricing of mobile telephony into account to determine the wholesale price of television and broadband. Telenet notes in this respect that the Regulator has decided not to include the Numericable 4P offering in its assessment and therefore assumes that this implies that the Regulator recognizes that it does not consider it appropriate to consider the mobile component in a 4P offering as an “additional service” but leave such offers unaffected. Telenet would appreciate it if the Regulator would make this explicit in its final decision.

Finally, in selecting a reference product, the Regulator should take into account the relevance of the product. Products with a limited number of subscribers (e.g., less than 10%

of the total installed customer base) cannot be considered as a relevant reference product and should be excluded.

2. “Avoidable costs” and usage cannot be ignored to assess the economic value of the services

In its methodology, the Regulator considers “costs” for additional services only to be the “third alternative” method for assessing value without providing any justification to this effect (Draft Decision, § 49¹²).

In the retail minus methodology, additional services should in principle be considered as avoidable costs which have to be assessed on a cost-based methodology as this is the less intrusive (and therefore more proportionate) methodology. This approach implies that the non-regulated service elements are assessed on the basis of the SMP operators’ own costs. The table below compares the impact of the proposed retail benchmark method compared to a cost-based approach for each additional service. The costs were assessed on the basis of the incremental costs associated to the provision of the service which have been allocated to the entire relevant subscriber base (i.e., all subscribers that are entitled to use the service even if they do not actually use it). Given the short consultation period, the cost analysis is provisional and only provided for illustrative purposes. Telenet has already provided the Regulator with cost information that can serve as a basis for a cost-based methodology.

Another fundamental methodological failure in the approach is that the Regulator is not consistent in taking into account the actual usage of the offers upon which it relies for benchmarking purposes: actual usage is taken into account for content (Sporting Telenet), but not for the other “additional services”. Telenet does not have access to all relevant information (particularly insofar as it concerns offerings of other operators) but has compared in the chart below the benchmark values used by the Regulator with these values adjusted for the effective usage of the additional services concerned. The case law referred to above regarding cost modeling principles confirms that the price regulation should stay as close as possible to the underlying reality of the regulated operator. By relying on offerings which are of marginal commercial relevance, the Regulator is violating this requirement. To the extent the retail values are being considered, the methodology should ensure that effective usage is taken into account when assessing the relevance of the service as it otherwise adopts a methodology which is completely theoretical and grants excessive economic weight to these services. Telenet is willing to provide monthly updates to the Regulator of effective usage figures of the relevant services.

The charts below confirm that the method retained in the Draft Decision is far more intrusive and implies that SMP operators suffer from a more rigorous wholesale price regulation as they expand their bundled offerings with the inclusion of additional services.

¹² “Zonder gepaste referentieprijzen (bijvoorbeeld omdat de dienst in kwestie nooit los van andere diensten wordt verkocht en het niet mogelijk is geweest om bij andere operatoren referentieprijzen te vinden) vindt het BIPT dat het beste alternatief erin bestaat de productiekosten per eenheid te gebruiken (d.w.z. de kosten per gebruiker) als benadering van de marktwaarde. De productiekosten van de diensten kunnen ook als nuttige referentie dienen in de gevallen waarin de effectieve prijs nul bedraagt of erg laag is: blijkt de voor een dienst gehanteerde prijs lager te zijn dan de productiekosten, dan vormt deze laatste een betere indicator van de marktwaarde.” Draft Decision, § 49.

[confidential chart: benchmark values vs. actual usage]

[confidential chart: valuation of additional services - Whop]

[confidential chart: valuation of additional services - Whoppa]

The regulatory approach which consists in allocating a “nominal value” in excess of production costs is an approach which is disproportionate insofar as the retail pricing for these other services is determined by competitive dynamics which can be different from costs. Stating that nominal prices are the best estimate of the value (Draft Decision, § 46) is wrong insofar as products are generally more expensive when sold separately (as opposed to a bundle). Separate sales create additional costs and change common costs and margin allocation.

Furthermore, cable operators have no SMP for the provision of these additional services and the beneficiaries of the regulation have the ability to add the same or similar services to the bundle. There is no indication whatsoever that the beneficiaries of the regulation could not compete with the SMP operator if the avoidable costs associated to the provision of these additional services would be deducted in the “minus”.

In its Draft Decision, the Regulator refers itself to potential distortions which may be observed in retail price setting which may stem from cross-subsidization between various retail services. The Regulator recognizes that certain stand-alone services could be priced at abnormally low tariffs as a result of which the retail price may not be the adequate basis for assessing their value.¹³ In reality, the opposite concern often applies, i.e., standalone offerings are offered at premium prices in order to increase the attractiveness of bundles. The table above has demonstrated that the retail pricing for the single play products is often significantly higher than the corresponding production costs.

The Regulator further states in the Draft Decision (§ 49) that the production cost of the additional services would only be a useful reference in cases where the price charged is zero (or very low). According to the Regulator, if the applicable price for a service turns out to be less than the cost of production, the production cost is a better indicator of the market value. As production costs are the only objective point of reference available, they should, as indicated above, always be the preferred basis for assessing the value of the services. In order to be consistent, the Regulator must therefore also rely on the cost of production where the applicable price for an additional service exceeds the production cost.

The inconsistency in the approach is also confirmed in the Draft Decision itself as regards the proposed calculation for the decoder. The Regulator emphasizes at § 87 the disadvantage of making the wholesale price dependent on a service (in this case the decoder) which is not part of the wholesale offer.¹⁴ The Regulator points out that the beneficiaries of

¹³ Draft Decision, § 46.

¹⁴ “87. Deze aanpak heeft als nadeel dat ze de wholesaleprijs laat afhangen van de huurprijs van de decoder op de retailmarkt, terwijl de decoder geen deel uitmaakt van het wholesaleaanbod (de begunstigde van het wholesaleaanbod levert zijn eigen decoder en koopt dus niet die van de kabeloperator). Wanneer een kabeloperator dus beslist om de huurprijs van zijn decoder te verhogen, en al de rest blijft gelijk, dan zal de wholesaleprijs stijgen als gevolg van een verhoging van de retailprijs (terwijl de wholesaleverrichting niet wordt gewijzigd).”

the wholesale offer will provide their own decoders, which they do not buy from the cable operators. This reasoning undermines the entire methodology which is relied upon for assessing the value of the additional services which is also made dependent on retail pricing of the SMP operator (or other operators retained in the benchmark).

The most proportionate and objective methodology to determine the value of these additional services is to consider their incremental costs or, if the retail value is considered, an adequate account of the usage of the service is considered. This ensures that cable operators do not suffer from an artificial competitive handicap by including these services in their bundles as opposed to the provision of these services on a standalone basis. The CRC has itself recognized the need to avoid a regulatory overreach regarding costs which the beneficiary of the access has to control and which concern services for which the cable operators do not have SMP.¹⁵

A methodology which deducts additional services included in a bundle as an avoidable cost is also consistent with the price squeeze and replicability analysis which has been relied upon in *ex ante* and *ex post* enforcement cases. These methods are particularly relevant given that the Commission has conceived such a replicability test in its 2013 Recommendation on Costs Methods and Non-Discrimination, of which the Regulator is required to take the “utmost account”.¹⁶ It confirms that a “cost-based” approach for the additional services allows the development of efficient market entry.

In the 2013 Recommendation on Cost Methods and Non-Discrimination, the Commission has indicated that “(64) NRAs should ensure that the margin between the retail price of the SMP operator and the price of the NGA wholesale input covers the incremental downstream costs and a reasonable percentage of common costs. [...] The use of the EEO standard enables NRAs to support the SMP operators’ investments in NGA networks and provides incentives for innovation in NGA-based services”. The Recommendation further specifies at § 67 that “the economic replicability test set out by the NRA in advance should be adequately detailed and should include as a minimum a set of relevant parameters in order to ensure predictability and the necessary transparency for operators. NRAs should apply a LRIC+ model while taking into account the SMP operator’s audited downstream costs and assess the margin earned between the most relevant retail products including broadband services (flagship products) and the regulated NGA access input most used, or identified, under a forward-looking approach, as the most relevant for delivering the retail products for the market review period in question. The design of the test applying to the SMP operator’s audited downstream costs and only for flagship products, aims to ensure that NGA investments and the effect of the recommended pricing flexibility are not hindered by this safeguard.” (emphasis added)

¹⁵ “Alors si, effectivement la CRC doit veiller, par le prix qu’elle fixe, à faciliter l’entrée d’acteurs efficaces sur le marché de la télédistribution et ainsi promouvoir le développement d’une concurrence effective, il ne lui revient pas de faire peser sur les opérateurs régulés le coût des éléments qui sont sous contrôle de Mobistar ni celui d’éléments qui ne relèvent pas de la saisine de la CRC en l’espèce [...]”. Trial pleadings of the CRC of 11 May 2015 before the Court of Appeal in Case 2014/AR/328 e.a., § 53.

¹⁶ Commission staff working document impact assessment accompanying the document Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, 11 September 2013, p. 6.

Annex 2 of the Recommendation on Cost Methods and Non-Discrimination also confirms that relevant downstream costs (which correspond to the avoidable costs to be deducted from the minus) include “*the SMP operator’s own downstream businesses (EEO test). NRAs should use the SMP operator’s audited downstream costs, provided they are sufficiently disaggregated*”.

A concrete application of this methodology can be found in the Commission’s Article 7 comments letter regarding Ofcom’s proposed margin squeeze analysis for BT’s bundle including broadband and premium sport content. In the proposed methodology, Ofcom did not go as far as the Regulator in retaining the retail pricing (for the standalone content offering) to reduce the relevant retail revenues, but proposed a cost-accounting methodology for the associated costs which would be more favorable to market entrants. Following its review, the Commission warned Ofcom that the

“proposed approach lacks the necessary flexibility in particular with regards to the treatment of costs for BT Sports. The Commission considers that the proposed static approach unduly limits BT’s commercial activity with regards to a market in which it does not have SMP. Indeed, Ofcom’s purpose in designing the test is to address a competitive concern in relation to pricing of a regulated product, i.e. VULA, for which it does not propose a charge control. However, the design of the test proposed by Ofcom may result in BT choosing to address a failed test by changing its behaviour on a market other than the regulated market, for example by increasing retail prices or reducing costs for BT Sports. Given the magnitude of the costs involved, and the uncertainty of future costs and revenues of BT Sports as new rights auctions approach, there is a risk that Ofcom’s regulatory intervention would have a significant impact on non-regulated markets, without necessarily affecting the price of the VULA input. Ofcom will therefore have to remain vigilant that the application of the test does not have unintended consequences in markets where the application of ex post competition law would be sufficient, or where BT’s SMP in the WLA market does not necessarily play a role. [...]”¹⁷ (emphasis added).

The table above comparing the impact of a cost-based and a retail benchmark approach shows that the methodology foreseen in the Draft Decision is even much more distortive than Ofcom’s proposed methodology in affecting the SMP operator’s incentives to compete more aggressively on the retail market by expanding its bundle to non-regulated additional services for which it may be confronted with strong competitors.

The BEREC Guidance of 5 December 2014 on the Regulatory Accounting Approach to the Economic Replicability Test (i.e. *ex-ante*/sector specific margin squeeze tests) provides further guidance on the margin squeeze assessment.¹⁸

It recognizes the elements that should be part of a margin squeeze test and states that non-regulated products are assessed on the basis of their input costs (including own network costs):

¹⁷ Commission Decision concerning Case UK/2015/1692: Wholesale local access at a fixed location in the United Kingdom – Remedies Comments pursuant to Article 7(3) of Directive 2002/21/EC, 13 February 2014, p. 6-7.

¹⁸ BoR (14) 190.

“Regarding the general formula for the margin squeeze test nearly all NRAs take into account the following items:

- Retail price of the SMP’s downstream service,*
- Regulated wholesale costs needed to provide the downstream service charged by the SMP’s upstream division,*
- Non-regulated input costs (incl. own network costs),*
- Retail costs.”*

This Report also explains the cost/revenue elements that need to be taken into consideration when applying an *ex ante* margin squeeze test to IPTV service.

“Bundles including IPTV service

The following revenues and costs are typically relevant for margin squeeze testing:

Revenues:

- o TV package revenues;*
- o TV service set-up fees;*
- o All TV related revenues such as subscriptions to VOD services (film, sports events), or pay per use charges;*

Costs:

- o TV platform costs;*
- o Program content costs (live TV, Video on demand etc.);*
- o Set Top box (STB) costs;*
- o Installation cost;*
- o Transaction costs (ordering, jumpering, completion costs, etc.).”*

BEREC further recommends that, even in a REO (“reasonable efficient operator”) approach, the calculation should be based on costs when available, rather than retail prices:

“In the context of a REO/adjusted EEO approach, where information is available on the network costs of the alternative operator, the calculation could be based on these costs. Alternatively and in cases where these costs are not readily available, the prices commercially agreed on the carrier market could be used as a first proxy for cost.”

Calculating the value of additional services on the basis of the standalone retail price is contrary to the approach followed in *ex-post* price squeeze cases. In *Telefonica*, the Commission favored an aggregated retail service/cost analysis approach based on the

objective that margin squeeze should allow competitors to replicate the product pattern of the dominant undertaking.

*“In the case at hand, the margin squeeze test has been conducted on the basis of an aggregated approach, i.e. on the basis of the mix of services marketed by Telefónica on the relevant retail market. This approach (referred as to the “aggregated approach”) is based on the principle that competitors must at least be able to profitably replicate Telefónica’s product pattern. This is the approach most favourable to Telefónica, since it gives it maximal flexibility to spread the costs which are common to its retail products (provided that the margin squeeze test yields a positive result with the aggregated approach). The aggregated approach is consistent with a new entrant’s internal decision making process in that it assesses the profitability of its investment in a network by considering the complete range of products that it is able to offer in the relevant downstream market”.*¹⁹

In *TeliaSonera*, the Court of Justice also held that pricing practices should be assessed on the basis of costs of the dominant undertaking.²⁰

In conclusion, pursuant to the proportionality and objectivity principle, the Regulator should rely on the costs associated to the provision of the additional services. It cannot consider this as the third best alternative without any motivation to that effect. The cost-based approach is a more reliable and less intrusive form of assessing the value of the additional services and should therefore be the preferred approach. Telenet has provided initial cost information to that effect.

If the Regulator retains the retail tariffs, it should, as it did for the content component, at least apply a correction factor to take account of the effective usage of the service.

3. Legacy offerings should be excluded

The Regulator’s approach could result in excessively low wholesale tariffs when applied to some of Telenet’s legacy offers (i.e. retail offers that are no longer actively offered but still have subscribers and are covered by the resale remedy). As mentioned above, when selecting a reference product, it is important to take into account the relevance of the product,

¹⁹ Decision of the Commission, *Telefonica*, Case COMP/38.784, § 388.

²⁰ Case C-52/09, *TeliaSonera Sverige* ECR, 2011 , p. I-00527:

“In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (see, to that effect, Case C -62/86 AKZO v Commission [1991] ECR I -3359, § 74, and France Télécom v Commission, § 108).

42 In particular, as regards a pricing practice which causes margin squeeze, the use of such analytical criteria can establish whether that undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services (see, to that effect, Deutsche Telekom v Commission, § 201).

43 If that undertaking would have been unable to offer its retail services otherwise than at a loss, that would mean that competitors who might be excluded by the application of the pricing practice in question could not be considered to be less efficient than the dominant undertaking and, consequently, that the risk of their exclusion was due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned.”

i.e. a product with a limited number of subscribers (e.g., less than 10% of the total installed customer base) cannot be considered as a relevant reference product.

The Regulator should thus exclude all offerings which are not relevant or no longer being commercialized (at the very least those which were launched prior to the implementation of the retail minus methodology) and which are therefore not relevant for the prevailing competitive dynamics. The Regulator should also provide for a or an absolute price “floor” to ensure that the regulated wholesale prices do reach pricing levels which would be below costs.

4. The treatment of promotions

The Regulator is treating “promotions” as avoidable costs instead of considering them as a reduction of the ARPU (Draft Decision, § 109). This is inconsistent with the CRC’s framework decision and decisional practice on price squeeze.

Furthermore, Telenet has provided the Regulator with its promotion costs demonstrating that all (or almost all) these costs are related to the promotion of triple-play offers including broadband, television and fixed telephony. However, the Regulator allocated those costs only to the broadband and television services instead of applying a pro rata allocation to all three services.

In the CRC Decision of 11 December 2013, promotions were taken into account via the ARPU, i.e. on the income side of the calculation of the minus (the denominator of the fraction). In the Draft Decision, promotions are added to the avoided costs, on the cost side of the calculation of the minus (the numerator of the fraction). In a standard cost minus methodology, where the avoided costs are deducted as an absolute amount from the retail revenues, it is neutral whether promotions are added to the avoided costs or deducted from the revenues. Because of the Regulator’s methodological choice to apply the minus as a percentage, this is no longer the case and adding promotions to the avoided costs or deducting them from the revenues has a different impact.

The only motivation provided in the Draft Decision for moving the promotions from the denominator to the numerator of the fraction is to correct for the “dilution effect” due to Telenet’s large existing customer base. However, Telenet fails to see the logical connection between this operation and the so-called “dilution effect”. Moreover, this “dilution effect” is already being spreading promotion costs on gross adds only (instead of the entire customer base) for a transitional period. Telenet fails to see, and the Regulator fails to explain, why an additional correction by moving the promotions from the denominator to the numerator is necessary. To the extent that there is any logical connection between this change and the “dilution effect”, it can only be concluded that the Regulator corrects for this effect twice, without any justification or assessment of the envisaged impact (and efficient scale retained).

Moreover, the Regulator does not make any distinction between promotions in the form of one-off advantages for new customers (e.g., free installation and activation, free gift...) and discounts on the subscription price. Even if we accept, for the sake of argument, that it is “necessary” to make an additional adjustment to the minus calculation to correct for the “dilution effect”, it is simply wrong to treat discounts on the subscription fees as “avoided costs”. So while there is some logic to treating one-off advantages such as free installation and activation as costs, discounts on the subscription fees should be treated as “revenues foregone” and should therefore be deducted from the ARPU. As further explained in the

attached paper by RBB, it is contrary to basic accounting rules to book the discounted subscriptions as if the customer paid the undiscounted price (i.e. to book a fictitious income) and then to amortize the discount as a cost.

5. Excessive market entry assistance

The Draft Decision claims that wholesale tariffs should temporarily facilitate market entry and foresees a calculation method for promotions which limits the allocation of these costs to a smaller customer base (i.e. the “gross adds” of the SMP operator, instead of taking the entire SMP operator customer base). The Regulator is claiming that the beneficiaries do not have an installed client base and suffer from the fact that the current methodology determines the minus on the basis of the totality of the cable operators’ client base (Draft Decision, § 111).

Telenet contests the proposed methodology on the basis of the following grounds:

- Inconsistency with the allocation methodology of the wholesale costs;
- No individualized analysis of the beneficiaries of the regulation;
- Promotion of inefficient and excessive market entry.

a) Inconsistency with allocation method of wholesale cost

Granting temporary market entry assistance by calculating the impact of promotions on a smaller subscriber base is methodologically inconsistent with the fact that wholesale costs were allocated over the total subscriber base of the cable operators. This inconsistency shows that the regulatory approach is not objective but geared towards promoting an artificial and inefficient market entry. In the appeal procedure regarding the first tariff regulation, the CRC itself rejected Mobistar’s claim to calculate the promotion impact on a smaller subscriber base (in order to favor its market “entry”), emphasizing the need to ensure a methodological consistency with the wholesale cost allocation.²¹

b) No individualized analysis

So far, only two operators have expressed interest in the regulated wholesale access: Proximus and Mobistar. Both operators have the necessary scale, customer base and financial means, which they have established with the protection of exclusive (or special) rights and years of high mobile pricing. Both have extensive distribution networks.²² Their ability to bundle various products gives them unique leveraging opportunities. Neither operator can reasonably claim to be sub-scale or suffer from entry disadvantages.

²¹ “La CRC observera que quand il s’est agi de déterminer les coûts d’investissements non récurrents à charge des bénéficiaires, Mobistar s’est réjouie de la prise en compte par la CRC des clients existants des câblo-opérateurs. Cette approche a en effet permis de diluer, c’est-à-dire diminuer sensiblement, les coûts à charge de Mobistar”, cf. § 112.

²² For instance, Mobistar has over 154 Mobistar Centers all over the country, usually in prime retail locations, as well as a well-developed online distribution channel.

As far as Proximus is concerned, it suffices to note that the Regulator considered that Proximus should not be entitled to benefit from the wholesale access all together.²³ The proposed tariff revision should in any event also foresee a carve-out for Proximus insofar as most components of the bundle are offered by Proximus in its own bundle. Proximus is even market leader for most of these components.

As far as Mobistar is concerned, this operator has almost 3,8 million mobile subscribers. CRC and Mobistar have recognized the relevance of this subscriber base indicating that the wholesale cable access would allow it to engage in cross-selling activities and reduce its churn rate for its mobile subscribers by migrating them to multiplay offers.²⁴

Mobistar has also benefited from unparalleled market assistance (which was significantly financed by Telenet). As second mobile entrant it enjoyed special rights and advantages in the inherently oligopolistic mobile telecommunications market. Moreover, due to a favorable regulatory regime, Mobistar was able to charge termination rates (MTR) that were well above the rates of a competitive market²⁵ and allowed it to subsidize the commercialization of its services.²⁶ Subsequently, with the installment of a glide path by the Regulator in 2006, Mobistar continued to enjoy a special regime²⁷ despite the European Commission opposition.²⁸ The Commission considered that Mobistar's MTRs had to be brought down to reflect the cost of an efficient operator as soon as possible.²⁹ Overall, Mobistar benefitted from positive discrimination for almost 17 years, while the European Commission in 2009 recommended that termination rate asymmetry benefiting new entrants should be limited to a transition period not exceeding four years after market entry.³⁰

Mobistar has also been able to deploy fixed services and roll-out a network on the basis of regulated access products since the full liberalization of the sector in 1998. It can therefore no longer be considered as a "new entrant" under any circumstances. Its failure to

²³ Telenet refers to the access dispute which is currently ongoing following Belgacom's request for access in this respect.

²⁴ Cf. Mobistar "2013 Analyst & Investor Presentation", p. 42 which is also referred to by the CRC in its trial pleadings of 11 May 2015 before the Court of Appeal in Case 2014/AR/328 e.a., where CRC states "[c]ontrairement à ce qu'elle présente dans sa requête, il convient en effet dans une telle analyse, de tenir compte de l'impact des services TV et Internet sur la rentabilité future de tous les autres services que Mobistar commercialise sur son réseau mobile. Au moyen de l'accès au câble, Mobistar pourra ainsi s'engager dans des stratégies de cross-selling, limiter le taux d'attrition (churn) de sa clientèle mobile et participer pleinement à l'essor des offres multiplays", cf. p. 23.

²⁵ BIPT Decision of 23 September 2003 regarding termination costs of Mobistar, § 5.8; Decision of the BIPT Council of 11 August 2006 regarding market definitions, analysis of competitive conditions, identification of SMP operators and determining appropriate obligations for market 16: mobile termination on individual mobile networks, § 2.2.6.

²⁶ BIPT Decision of 23 September 2003 regarding termination costs of Mobistar, § 5.8.

²⁷ BIPT Decision of 11 August 2006 regarding market definitions, analysis of competitive conditions, identification of SMP operators and determining appropriate obligations for market 16: mobile termination on individual mobile networks, § 2.2.6.

²⁸ Letter from the European Commission, Case BE/2006/0433 Voice Call Termination on Individual Mobile Networks in Belgium, Comments pursuant to Article 7(3) of Directive 2002/21/EC, p. 5-6.

²⁹ *Ibidem*.

³⁰ European Commission Recommendation of 7 May 2009, Recital 17, p. 6.

achieve a significant size and network for fixed services is largely attributable to France Télécom's disinterest in investing in fixed networks notwithstanding Mobistar's record financial performances over the years. Its incoherent commercial strategy, recognized by the CRC, also certainly played a role but is no ground for assistance.³¹ This is particularly as, its fixed activities have already benefitted from assistance. Mobistar's network was acquired by KPN, which had, in turn, purchased the Tele2/Versatel network which was (along with Telenet) the only fixed alternative operator to have benefited from entry assistance through asymmetric FTRs. Back in 2006, however, the Regulator already indicated that this regime had to be phased out and that the mark-up on Versatel's FTRs in comparison with Proximus' (Belgacom at the time) cost-oriented FTRs had to be capped at 15%.³² In 2012, BIPT imposed symmetric FTRs on all operators.³³

Telenet estimates that the market entry assistance it would be forced to provide to Mobistar during the three-year transition period would amount to over € 62 million, including € 13,6 million in respect of promotions, € 17 million in respect of implementation costs, € 12,6 million in respect of additional services and € 19 million in respect of the deduction of fixed telephony. Nothing justifies Telenet being forced to provide such a large subsidy to a well-established competitor.

If the Regulator is considering a regulation which aims at offering an extra entry assistance, it should ensure that this regulation is sufficiently individualized and effectively granted to a real hypothetical "new entrant". The Court of Appeal has recognized that remedies should be based on such an individualized analysis, insisting on the fact that:

*"Le régulateur doit rechercher, au cas par cas, les remèdes appropriés pour rencontrer de la façon la plus adéquate tous ses objectifs qu'il doit tenter de concilier entre eux. Cette appréciation faite in concreto, est susceptible de varier dans le temps."*³⁴

*"L'IBPT doit donc apprécier, sous sa seule responsabilité, les remèdes qu'il décide d'imposer dans le cadre de ses compétences territoriales et il ne doit s'aligner sur une position commune des ARN – si elle existe – ou sur une 'jurisprudence d'avis' suffisamment claire, précise et stable de la Commission européenne – si elle existe – que dans la mesure et pour autant qu'il puisse raisonnablement considérer, au terme d'une analyse sérieuse menée in concreto, qu'il n'y a pas lieu de s'en écarter au vu des circonstances nationales qu'il est le plus apte à apprécier."*³⁵ (emphasis added)

The *in concreto*/individualized approach is confirmed by the case law of the Constitutional Court³⁶ and the Court of Justice of the EU.³⁷

³¹ [confidential].

³² BIPT decision of 11 August 2006 concerning the cluster "fixed telephony", pp. 225-227.

³³ BIPT decision of 2 March 2012 concerning the analysis of the market for call termination at a fixed location, pp. 117-123.

³⁴ Brussels, 30 June 2009, R.G. 2006/AR/2332 et al., p. 48-49.

³⁵ Brussels, 30 June 2009, R.G. 2006/AR/2332 et al., p. 48.

³⁶ *"En ce que le législateur belge traite en l'espèce tous les opérateurs de manière identique, alors que les articles 12 et 13 de la Directive sur le service universel exigent un traitement différencié de tous les*

Such an individualized approach has also been emphasized in the context of the regulation of MTRs in Belgium. In the regulation of MTR of 2006, the Regulator has applied an analysis that takes into consideration the situation of each operator on the market, by allowing different termination rates for BASE, Mobistar and Proximus. The Court of Appeal of Brussels specifically criticized the Regulator for not explaining further the different situations of Mobistar and Proximus:

“La cour ne peut que s’étonner de la justification avancée selon laquelle Mobistar doit bénéficier de l’asymétrie parce que Base en bénéficie. En effet, la Décision n’indique pas comment ni pourquoi Mobistar et Base se trouvaient dans des situations objectivement comparables au moment de l’analyse ; bien plus l’IBPT indique dans ses conclusions qu’ils ne l’étaient pas!”³⁸

Similarly, in setting glide paths, the Commission has insisted on the need to assess the excessive gain of “each” operator.

“TKK did not provide any specific justification for the necessity to allow MNOs to achieve the cost-oriented level only after more than six years. In particular, TKK did not give particular reasons showing the necessity to allow the MNOs substantial gains in order to obtain a more competitive market in the long term, or showing that a faster reduction would lead to negative effects in competition in the given circumstances. Given that TKK did not provide any reasons showing that achieving cost orientation within a substantially shorter time frame would be disproportionate the proposed glidepath of more than six years appears to be excessively long and does not seem to be the appropriate measure to tackle the competitive problem identified. [...] the Commission services are of the view that an estimation of the excessive gains of each operator is useful in order to decide about the appropriateness of the length of the glide path. In any case, at least establishing the information about the evolution of overall excessive gains could be a valid tool in order to appreciate the length of the glide path envisaged.”³⁹ (emphasis added)

It follows from the above that, with regard to the current Draft Decision, the impact of the regulatory regime should be assessed depending on the beneficiary of the regulation and take into account the principle of forward-looking economic efficiency. Proximus nor Mobistar cannot claim entry assistance, as they does not suffer from entry disadvantages.

(continued...)

opérateurs in concreto, il a également violé le principe d’égalité et de non-discrimination garanti par les articles 10 et 11 de la Constitution”. C. Const., Arrêt n°7/2011 du 27 janvier 2011.

³⁷ “The unfair burden which must be found to exist by the national regulatory authority before any compensation is paid [for universal service provision] is a burden which, for each undertaking concerned, is excessive in view of the undertaking’s ability to bear it, account being taken of all the undertaking’s own characteristics, in particular the quality of its equipment, its economic and financial situation and its market share”. Case C-222/08, Commission v. Belgium, ECR, 2010, p. I-09017, §49.

³⁸ Brussels, 30 June 2009, R.G. 2006/AR/2332 et al., p. 43, § 100.

³⁹ Case AT/2005/0256, 4 November 2005, SG-Greffe (2005 D/206043).

c) *Promotion of inefficient market entry*

Even if the Regulator were to consider a hypothetical new entrant (i.e. not Proximus or Mobistar), it should not promote inefficient market entry and should verify if there are any economies of scale associated to the avoidable costs which efficient new entrants cannot replicate. Here again, reference can be made to the Court of Appeal's judgment of 7 May 2009:

“[...] Cette absence quasi-totale de données actuelles sur l'état de la concurrence potentielle au moment de l'adoption de la décision en 2008 n'est pas justifiée par l'IBPT [...]. Il résulte d'un défaut manifeste d'investigation et d'analyse et s'avère inacceptable au regard du comportement que l'on pouvait raisonnablement attendre de la part de l'IBPT en sa qualité d'autorité administrative [...]. [...] [L]'IBPT devait rechercher, analyser et décrire dans sa décision, les capacités et les plans des acteurs lui permettant d'établir des prévisions réalistes relatives à leur entrée sur le marché et d'évaluer la réalisation progressive de leurs plans.

Les motifs de la décision sont donc incomplets et de surcroît, contradictoires sur la question de l'analyse de la concurrence potentielle.”⁴⁰ (emphasis added)

Such a thorough investigation of the existence of economies of scale is all the more necessary as all precedents in which entry assistance was provided concerned cases with roll-out obligations or at least extensive network roll-outs for which there were significant economies of scale.

The Regulator considers that market entry assistance would be justified by Recital 20 of the Access Directive which states that *“the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximize consumer benefits”*. This is, however, not a valid basis for a regulatory approach seeking to promote extensive market entry assistance. Market entry assistance is not mentioned as an objective of the EU regulatory framework. This reference also ignores that the regulatory framework has been modified in 2009 and that such modification made clear what needs to be understood by promoting efficiency and competition. Article 8 (5) of the Framework Directive, which sets out the regulatory principles that must be pursued by NRAs, states that the regulatory framework seeks to achieve infrastructure-based competition: *“safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition”*.

The Regulator also erroneously refers to the European Commission's 2009 Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU to justify its decision to grant the beneficiaries of the wholesale obligations a transitional period of three years to facilitate entry. The Regulator cites a passage from the Recommendation where the European Commission considers that *“it can be expected to take three to four years after entry to reach a market share of between 15 and 20%, thereby approaching the level of minimum efficient scale”*. The Regulator omits the following, crucial, sentence: *“This is distinct to the situation for new entrants in fixed markets which have the opportunity to achieve low unit costs by focusing their networks on high-density*

⁴⁰ Brussels, 7 May 2009, R.G. 2008/AR/787, § 246.

routes in particular geographic areas and/or by renting relevant network inputs from the incumbents”.⁴¹ By selectively quoting the Recommendation, the Regulator thus fails to recognize that the mobile and fixed markets are not comparable in this respect, as stressed by the Commission. It has in any event, also been demonstrated above that Mobistar has already benefited from the entry assistance referred to in the recommendation and BIPT itself has considered that such assistance was no longer justified.

Regulators have also generally opposed favoring inefficient entry as a policy objective. In its Guidelines on price squeeze, the Regulator itself recognized that a price squeeze test should be based on the costs of the SMP operator because it would “avoid to stimulate entry of less efficient operators”. The Regulator’s position regarding Telenet’s entry as full MVNO in the mobile market is also relevant in this context as the Regulator refused to allow Telenet to apply asymmetric termination rates. In a Draft Decision concerning the mobile termination rate of Telenet, the Regulator clearly distinguished an MVNO from the network operators, stating that:

“[D]e economische efficiëntie van de investeringen wordt geoptimaliseerd door een virtuele mobielnetwerkoperator aan te sporen om het bewijs te leveren van een efficiëntie die ten minste vergelijkbaar is met die van zijn host-MNO-operator. Het toestaan van een stelsel van asymmetrische regulering aan MVNO-operatoren ten opzichte van de tarieven van de host-operator zou dergelijke operatoren kunnen afraden om hun eventuele inefficiënties weg te werken, terwijl niets zou kunnen rechtvaardigen dat een dergelijke speler, die voor het grootste deel van zijn mobiele netwerk, een beroep doet op de middelen van een reeds goed gevestigde MNOoperator, economisch minder efficiënt kan zijn dan zijn host.

86 Zoals voordien is uitgelegd, zet een virtuele mobielnetwerkoperator of MVNO zoals Telenet zelf slechts enkele specifieke elementen van het kernnetwerk in (schakelaars en databanken) en steunt hij voor de grote meerderheid van de middelen die nodig zijn voor de levering van mobiele diensten, op de wholesaleverrichtingen die eraan worden verstrekt door een MNO-operator van een echt mobiel netwerk (in casu Mobistar in het geval van Telenet). De verrichtingen die aldus worden verstrekt aan de MVNO door zijn host-operator omvatten het grootste deel van de kosten die inherent zijn aan de mobiele diensten (in het bijzonder het radiotoegangsnetwerk, waaronder ook de kosten van de vergunningen voor de radiofrequenties, alsook de talrijke bijbehorende transmissiemiddelen).

87 In het specifieke geval van Telenet zijn, buiten de vergoeding van zijn host-operator voor het gebruik van het radionetwerk, de kosten die dit bedrijf oploopt om mobiele diensten in een kader van full MVNO te verstrekken des te meer beperkt, aangezien deze operator reeds actief is op het stuk van diensten voor vaste telefonie en omdat er dus synergieën en besparingen mogelijk zijn, rekening houdende met de middelen waarover deze operator reeds beschikt voor de levering van deze andere diensten.

⁴¹ Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L 124/67, para. 17.

88 *Het BULRIC-kostenmodel van het bottom-up type dat in 2009 door het BIPT ontwikkeld is met de assistentie van een externe consultant met het oog op de regulering van de MTR-tarieven voor mobielgespreksafgifte in België en dat de grondslag vormt voor het price cap-mechanisme dat vastgesteld is in het basisbesluit, heeft het mogelijk gemaakt om het relatief beperkte aandeel (ongeveer 15%) naar voren te brengen van de elementen van het kernnetwerk in het totaal van de kosten die verband houden met een mobiel netwerk.*

89 *Vanuit economisch standpunt zou daarom niets kunnen rechtvaardigen dat een virtuele mobielnetwerkoperator een MTR-afgiftetarief mag toepassen dat hoger zou zijn dan datgene wat door het BIPT reeds wordt opgelegd aan zijn host-operator. Het MTR-afgiftetarief van Telenet moet dus worden geplafonneerd op het MTR-afgiftetarief van Mobistar, zoals dit wordt gereguleerd door het basisbesluit.*” (emphasis added)

The Commission has confirmed in its Article 7 practice that no entry assistance is needed when the infrastructure used is composed of inputs from established players:

*“The Commission recognizes that new entrants to the mobile market may initially incur higher per-unit costs before having reached the minimum efficient scale, however, in case of MVNOs due account should be given to the fact that such operators may have the opportunity to achieve low unit costs irrespective of their actual market shares by renting relevant network inputs from more established MNOs thereby benefiting from their economies of scale and/or scope”.*⁴²

The methodology further fails to take account of the fact that the wholesale regulation already integrates a number of measures which are aimed at favoring entry. The distribution of wholesale costs and the determination of the value of the “retail” revenues considered for the methodology are all measures which favor the beneficiaries.⁴³ No assessment whatsoever is made on the effective proportionality of the combination of all these measures seeking to promote market entry.

RBB Economics has examined the entry assistance considered in the Draft Decision in more detail and confirms the excessive and unjustified nature of the methodology. This report is attached as an annex. The main findings can be summarized as follows:

- Adjusting the retail minus methodology would only be acceptable insofar as the entrant would suffer from diseconomies of scale.

⁴² Decision of the Commission in Case DK/2009/1013.

⁴³ CRC's previous decision of 11 December 2013 already contained several measures to facilitate new entry: (1) deviating from the principle of cost causality, which would have commanded that the wholesale implementation costs be borne entirely by the beneficiaries of the wholesale services, CRC distributed those implementation costs over *all* active lines (“aansluitingen”), including those of the regulated operators, as a result of which the regulated operators end up financing the vast majority of those costs (CRC Decision of 11 December 2013, section 7.3.2); (2) CRC already ensured that the beneficiaries of the wholesale services could achieve a minimum level of profitability, by including a return on sales (RoS) percentage in the calculation of the minus (CRC Decision of 11 December 2013, section 7.5). In combination with the entry assistance measures contained in the new Draft Decision, these measures lead to excessive entry assistance which could facilitate inefficient entry.

- The regulatory regime should only facilitate efficient new entrants which have similar avoidable costs – a (temporary) additional discount to the wholesale price due to diseconomies of scale runs contrary to the Regulator’s retail minus regulation.
- The most probable entrant, Mobistar, is an established mobile operator, which already has scale advantages and would not suffer from entry disadvantages.
- Giving entrants a significant advantage should depend upon the specific characteristics of the entrant.

The Regulator does not demonstrate that (i) an additional discount is necessary to facilitate entrance, or (ii) the absence of such a discount would constitute a real obstacle to use Telenet’s wholesale offer.

d) Duration of the transition period

The transition period for market entry is currently not clearly defined, as the Draft Decision only indicates that “a period of two to three years is appropriate”⁴⁴. The Draft Decision announces that the exact duration will be set by the final decision, which implies that stakeholders will not have been consulted on this important aspect of the draft measure.

Telenet understands that the transition period will only start as of the date of entry into force of the final decision. However, the Regulator should take into account that Telenet has had to comply with an implementation period of six months for the previous tariff decision of 11 December 2013 so as to ensure that access seekers could already get started while the Regulator worked out the final details of the regulation. This means that six following the access request of Mobistar, everything was in place to allow access seekers (and in particular Mobistar) to launch a commercial offer. The fact that Mobistar has not yet proceeded to a commercial launch, whereas Telenet has complied with all its obligations under the regulation also entails an important opportunity cost for Telenet and Mobistar should not be encouraged for its own delays which cast doubts on its commitment to effectively launch a retail offer on the basis of cable access. Mobistar’s claim to rely on cable may only have been a strategic behavior to position itself in the ongoing consolidation wave.⁴⁵ The date of implementation should thus logically be the starting date of the transitional period.

The duration of any entry assistance should be set based on an adequate motivation and also have a clearly defined cut-off moment. The duration of the entry assistance should not be longer than reasonably necessary to allow new entrants to achieve minimum efficient scale. In the past, when the Regulator imposed a decrease of the mobile termination rate (MTR), the Court of Appeal has also insisted on the need to ensure that if the Regulator grants an “inefficient” market entry assistance, it should be duly motivated and restricted in time so as to reach as soon as possible the efficient tariff level.⁴⁶ This reasoning should

⁴⁴ See § 112 of the Draft Decision.

⁴⁵ Currently this opportunity cost is estimated to amount to €[confidential] million.

⁴⁶ Court of Appeal, Brussels, 2006/AR/2332, 2006/AR/2628, 2006/AR/2629, 227/AR/3394, 2008/AR/425, 2008/AR/427, 30 June 2009, §95-98.

equally be observed here as the regulation is granting an extra promotion margin for new entrants (at the expense of the cable operator) in order to allow these operators to build-up a client base.

Also, Telenet would like to remind the Regulator that retail promotions are only granted to clients during acquisition phase and for a limited time (i.e. for one year maximum). Even assuming that the application of reduced wholesale tariffs reflecting such retail promotions would be justified, this should in any case be limited in time, i.e. maximum one year on a client per client basis.

6. Transparency measures imposed on SMP-operators

Because of the links which the methodology makes between the retail and wholesale tariffs, the Draft Decision also foresees an obligation for the SMP-operator to communicate the future evolutions of its commercial conditions regarding the bundles including TV.⁴⁷ This communication is a cumbersome process which affects the flexibility and swiftness of Telenet's ability to respond on a commercial basis. The scope of the prior notification obligation also lacks precision [**confidential**].

It should also be noted that because of the methodological links between retail and wholesale pricing, there is a risk that such notifications (which are of course highly sensitive from a competition law point of view) may in some form also be communicated to the beneficiaries of the regulation which would raise competitive concerns and also affects the ability for Telenet to innovate.

7. No impact assessment

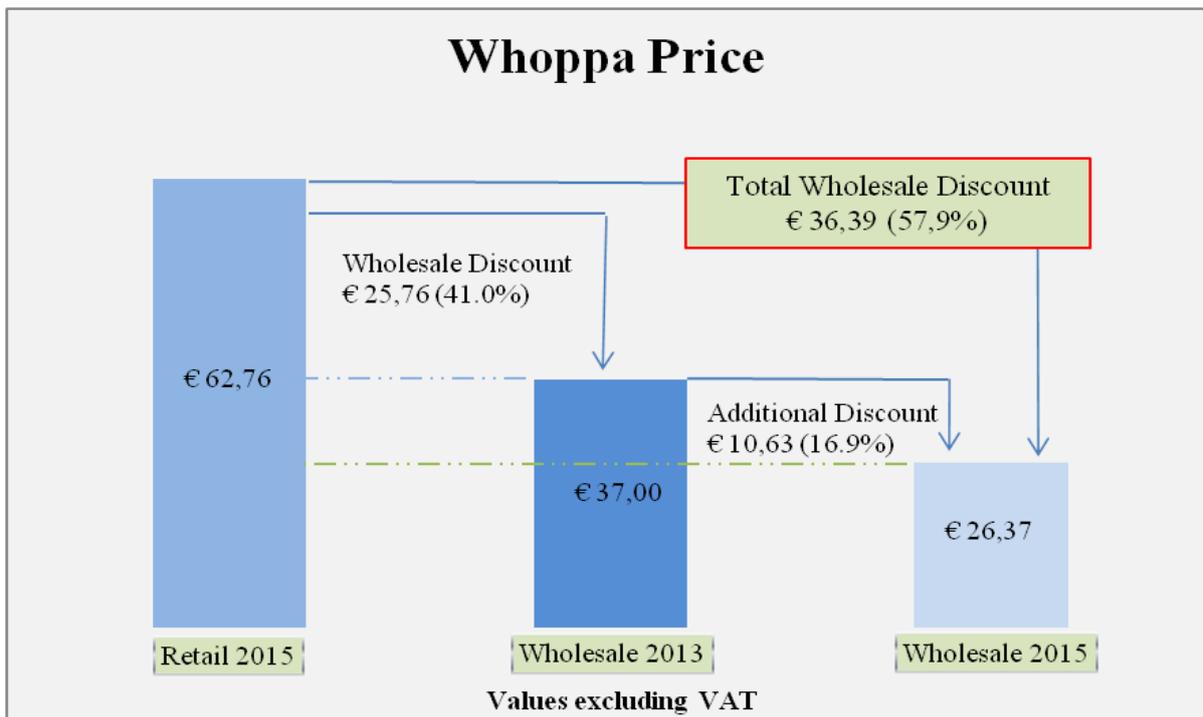
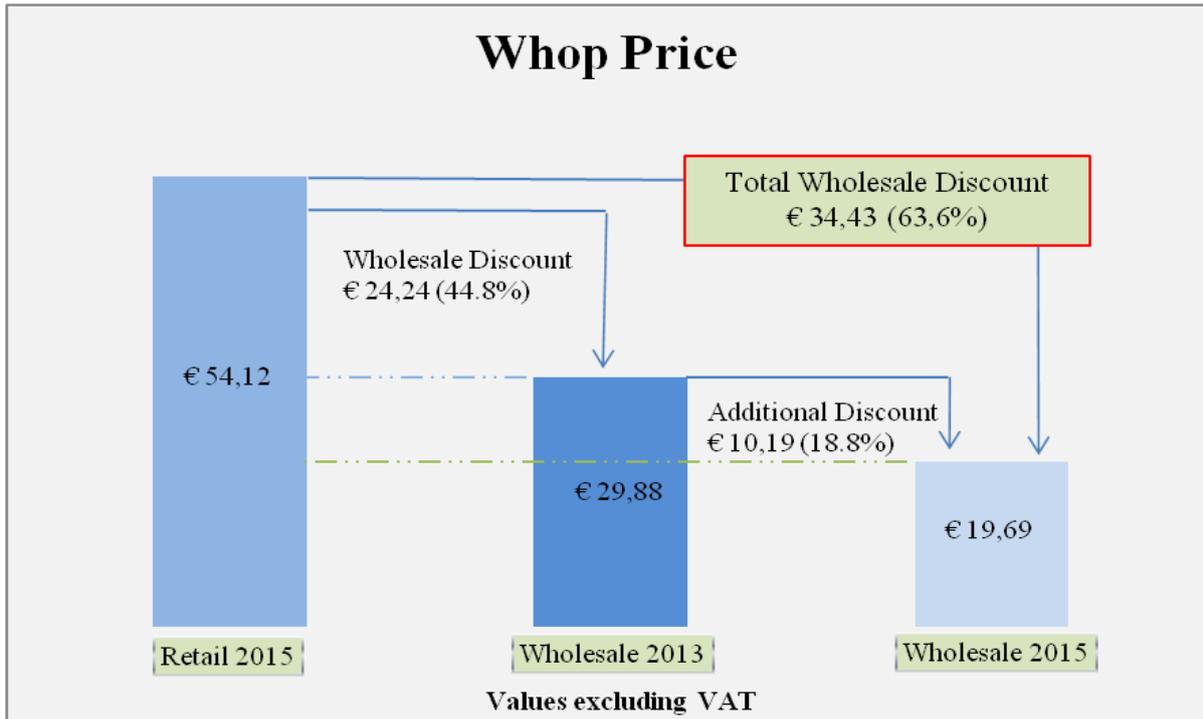
The Regulator does not make an overall assessment of the impact of the further price reduction weighing "benefits" against "costs". Although Telenet realizes that this analysis cannot be done in a mathematical fashion, it has been demonstrated above that the regulation will have far-reaching effects as it drastically further reduces the level of the wholesale rates and also relies on a number of assumptions which are solely targeted at promoting entry. The tables below shows how significant the wholesale reduction is compared the prevailing reference retail tariffs for WHOP and WHOPPA. Imposing such wholesale conditions can lead to a complete overhaul of the market and should therefore, in any event, be introduced with the necessary accompanying measures to ensure the stability of the SMP-operators.

⁴⁷ Draft Decision, § 135 ("135. Daartoe moeten Brutélé, Numericable en Telenet aan het BIPT hun voornemen meedelen om extra diensten of voordelen op te nemen in hun retailaanbiedingen. Deze kennisgeving zal:

- een beschrijving van de dienst, een voorstel voor waardebeoordeling, de retailtarieven van de aanbiedingen waarin deze moet worden opgenomen, bevatten, alsook de wholesaletarieven die daaruit voortvloeien;

- moeten vergezeld gaan van alle nuttige informatie om de marktwaarde van de betrokken dienst of het betrokken voordeel te beoordelen (in het bijzonder, verwijzingen naar de tarieven die worden gehanteerd door andere operatoren en de productiekosten);

- moeten plaatsvinden binnen een termijn van twee maanden voordat de diensten of voordelen in kwestie beschikbaar zijn voor de operatoren.”).



It has also been demonstrated above that the way in which the regulation is conceived creates links between retail and wholesale pricing which are going to inherently affect the commercial practice of cable operators in their marketing and innovation strategy, including in a number of service segments for which they have no dominant position whatsoever.

Regulators should assess whether the extreme scenario which results from the methodology is necessary for the short-term objective of market entry and consumer choice

which the regulation seeks to achieve, or whether a smaller reduction and a more refined/segmented approach (e.g., carving out Proximus and Mobistar) could not achieve said objectives.

- **The reference price should be based on the retail offers that most closely correspond to the wholesale offer (i.e., in principle, dual play bundles where available).**
- **The additional services should be included in the minus as avoided costs. This is not the “third-best” approach but the approach that is most consistent with the retail minus methodology and the objectives of the regulatory framework. If retail values are retained, a correction based on usage should be applied.**
- **The application of the Regulator’s methodology to legacy offers could result in a disproportionate impact or even wholesale prices below cost.**
- **The methodological adjustment with respect to promotions is not duly motivated, there is no logical link with the “dilution effect” (which is already being corrected by taking into account only gross adds during a transition period).**
- **The Draft Decision provides excessive entry assistance to the beneficiaries of the wholesale access obligations, without taking into account the fact that the only operators that have requested access so far are already established operators. At the very least, entry assistance measures should be individualized, taking into account the actual scale disadvantage (if any) of each beneficiary.**
- **The obligation of prior notification stifles price competition and innovation at the retail level.**
- **The Regulator fails to make a proper assessment of the cumulative impact of the adjustments contained in the Draft Decision.**

B. Violation of the principle of legal certainty and non-retroactivity

The principles of non-retroactivity and legal certainty are well-established principles of administrative law. The Regulator's methodology runs counter to the principle of legal certainty which implies that the regulation should allow legal subjects to reasonably foresee the effects of their actions in advance and to confide in the reliability of governance.⁴⁸

The Court of Appeal of Brussels recognized these principles in its case law.⁴⁹ In its judgment of 7 May 2009, the Court of Appeal referred to the restrictive case law of the Council of State stating that:

*“L'autorité administrative, dont une décision individuelle a été annulée peut, dans certains cas, remédier au vide créé par le caractère rétroactif de l'annulation lorsqu'elle adopte une nouvelle décision à laquelle elle peut légalement conférer un effet rétroactif. Cependant, la jurisprudence du Conseil d'Etat n'admet qu'il soit dérogé au principe général de la non-rétroactivité des actes administratifs que dans certains cas, qui sont fonction notamment de la nature ou de l'objet de l'acte à refaire ou de la compétence mise en œuvre.”*⁵⁰

The European Commission has also criticized retroactive measures proposed by NRAs. In Case PT/2010/1077, the Commission stated for example that:

“Retroactive effect of the proposed price levels

*Whilst the Commission notes that provisions of the Portuguese Telecommunications Law explicitly allow for the imposition of retroactive remedies, it invites ANACOM to consider whether an imposition of prices with retroactive effect might lead to legal uncertainty for market players. Against this background, ANACOM is invited to ensure that the proposed prices, applicable with retroactive effect, do not impinge on legal certainty for operators currently providing services on the basis of previously imposed regulation.”*⁵¹

In the Draft Decision, the Regulator is foreseeing a tariff regulation which would be contrary to these general principles insofar the SMP operators' wholesale pricing could potentially be reviewed with retroactive effect⁵² depending on:

⁴⁸ M. Van Damme, A. Wirtgen, “Het rechtszekerheids- en vertrouwensbeginsel” in I. Opdebeek a.o., *Beginselen van Behoorlijk Bestuur*, Bruges, die Keure, 2006, 315; RvS 22 February 2010, nr. 201.138; RvS 21 February 2011, nr. 211.392.

⁴⁹ See for example the reference made to the principle of non-retroactivity in the appeal regarding VAS numbers. “*Dès lors que l'IBPT n'a pas fait rétroagir les adaptations requises par lui, à l'offre tarifaire de Belgacom par la décision attaquée en ce qui concerne les numéros VAS, Belgacom ne pourrait se plaindre d'une atteinte au principe de non-rétroactivité et/ou d'une atteinte à la sécurité juridique qui serait la conséquence de son intervention en dehors du délai prévu par l'article 16 du même arrêté royal.*” Court of Appeal of Brussels, R.G. 2004/AR/1777, 16 June 2006, § 33, al. 4.

⁵⁰ Brussels, 7 May 2009, 2008/AR/787.

⁵¹ Decision of 25 April 2010, Case PT/2010/1077.

⁵² Draft Decision, § 135-137.

(i) the potential future inclusion of other additional services included in the bundle (currently excluded from the calculation);

(ii) the potential evolution of changes in pricing (including pricing changes made by third parties) which have been retained in the calculation.

When retail prices of other operators are used to determine the market value of the additional services, this creates a situation whereby Telenet's wholesale prices become dependent upon retail price decisions of other operators, which may even be potential buyers of the wholesale service (e.g., Proximus). The situation is further exacerbated by the fact that the Regulator reserves the right to retrospectively adjust prices when additional services are added (Draft Decision, § 136) or currently excluded services would all of a sudden be considered "relevant".

Such an uncertainty about future wholesale prices and expected wholesale revenues creates an environment in which informed commercial and investment decisions are rendered impossible. This therefore creates a risk which hampers efficient investment and innovation, disregarding the dynamics of the digital economy, ultimately leading to stagnation, and runs counter to the objectives of the regulatory framework.⁵³

Moreover, the retroactive corrections provided in the Draft Decision (§ 135-136) are constructed in a way that negatively impacts the SMP operators. The retroactive effect on Telenet's wholesale prices only seems to benefit the beneficiaries of the regulation. After a freeze of one year (Draft Decision, § 133), the prices can only be adjust downward, not upward which constitutes a discriminatory assessment given that the Draft Decision acknowledges the need for pricing stability a concern which applies both the beneficiaries and the SMP-operators.

Telenet further refers to its previous observation according to which the proposed pricing modification could only be implemented within four months because of IT requirements and that any future pricing modifications should also need to take account of potential IT constraints.

It will also be demonstrated in Section III.D below that the formula relied upon for the calculation of the wholesale prices for the broadband profiles is unreliable and is excessively sensitive to changes making unfit for purpose and contrary to the above principles of legal certainty and predictability.

During the Q&A session of 15 June 2015, BIPT confirmed that the "normal principles" of a retail minus methodology would continue to apply, in the sense that every change to the retail tariffs would trigger an adaptation of the corresponding wholesale tariffs. With the retained methodology and the potential retroactive adaptations this basically means that each attempt of Telenet change the retail price of its bundled offers will (retroactively) benefit Mobistar in the form of a wholesale tariff reduction, even if the discounted pricing concerns an unregulated component of the bundle. This constitutes a major competitive handicap for the regulated operators. It also means that the more competitive the market gets,

⁵³ Framework Directive, Article 8 (5), d).

the more the wholesale tariff will decrease, creating further disincentives for Mobistar to roll out its own network.

- **By reserving the right to retroactively adjust wholesale prices when additional prices are added or currently excluded services are brought into scope, the Regulator creates an environment of legal uncertainty, hampering efficient investment and innovation.**
- **The retroactivity is a one-way street, since wholesale prices can only be adjusted downward, which is discriminatory.**

III. FACTUAL ARGUMENTS

The Draft Decision's benchmarking methodology (set out in § 37-81) is subjective and arbitrary.

The value of additional services included in a bundle are (i) the standalone prices of Telenet's services, or (ii) the standalone prices of services of other domestic and foreign operators. As indicated above, production costs are only considered a third best alternative.

The Regulator's benchmarking methodology looks at operators which, in exceptional circumstances and for commercial reasons which do not accord with those of Telenet, offer an additional service on a standalone basis.

The Regulators also ignores that the additional services considered have a relatively low penetration rate compared to the core bundle services and in particular when offered on a standalone basis. However, the same high tariffs are now being applied to Telenet's services, under the assumption that 100% of Telenet's installed customer base would be willing to pay such tariffs, whereas Telenet can provide concrete figures showing that the additional services have a very low adoption rate even when offered for free as part of a bundle (e.g., [confidential]% adoption rate for webhosting services). These usage rates are of course relevant when setting the pricing for bundles.

The detailed critique set out below will demonstrate that the Regulator's analysis factually fails for the following reasons:

- The methodology contains elements of double-counting as it deducts certain elements twice leading to an artificially low wholesale value;
- The benchmarking analysis for the individual additional services is unfounded;
- The methodology relied upon to deduct modems is unfounded;
- The methodology relied upon to assess the wholesale pricing for broadband profiles is unfounded.

A. Double-counting

Telenet has identified three problems of double counting, i.e. errors whereby certain costs are being deducted twice from the retail tariff to calculate the relevant wholesale tariff.

1. Double counting of avoidable costs

The avoidable costs (i.e. the costs which the cable operator avoids by providing a wholesale service instead of a retail service and should be deducted from the retail price to determine the minus) are not necessarily specific to each considered retail service. The standalone price for the additional services will generally also cover these avoidable costs. Conversely, when additional services are offered as part of a bundle, common retail costs are only incurred once. The proposed methodology ignores this which leads to a double deduction of avoidable costs: (i) once as a part of the standalone price of the additional services which is deducted from the reference price; and (ii) subsequently as part of the “avoidable costs” included in the minus.

The bundle discount which is taken into account as a correction factor to assess the relevant value of the service in the bundle does not fully or necessarily address this double counting issue as the bundle discount may also be driven by other considerations than cost-savings.

2. Double-counting of copyrights

It is not clear from the Draft Decision (§ 60-64) whether the additional services used by the Regulator in the benchmark include copyright costs. For instance, the benchmarks used to determine the value of the 2nd screen service appear to also include copyright costs. By deducting from the reference retail price values that are based on benchmark prices which include copyright costs, the Regulator deducts copyright costs twice (as it also subtracts copyright costs separately from the reference price).

3. Double-counting of the modem

The Regulator makes a double-counting error by deducting from the hypothetical reference retail price both a value for the Wi-Free service and a value for the modem, while Wi-Free is in fact a functionality of the modem.

B. Erroneous assessment of individual services

The Regulator establishes a reference price for the following services:

- Wi-Fi access (homespots and hotspots);
- 2nd screen;
- E-mail;
- Webhosting for personal web pages;
- Content (Sporting Telenet);

- Fixed telephony.

As a general preliminary remark, Telenet notes that the methodology followed by the Regulator gives a lot of weight to additional services such as e-mail and webhosting in the determination of the wholesale prices, even though BIPT has removed these services from the retail price comparator tool bestetarief.be / meilleurtarif.be because they were deemed to lack relevance.⁵⁴ BIPT is thus on record acknowledging that these additional services are of little importance for end users. This confirms that these services are overvalued in the calculation of the wholesale tariffs.

1. Wi-Fi access

The benchmark estimates the value of the Wi-Fi access offered via homespots (“Wi-Free”) and hotspots at € 2. This is based on the combination of the Telenet retail tariff for the hotspot service (€ 1/month) and a benchmark for the homespot service offered by third parties (€ 1/month).

Wi-Free uses the Telenet users’ modem network to create a service that is available for all Telenet broadband customers. Wi-Free is therefore already included in the current model as part of the avoidable costs related to the modem (in the old methodology) or as an additional value for the modem to be deducted from the retail base (under the new methodology). Adding Wi-Free to the additional services implies a double-counting, as the same element is subtracted twice. As Wi-Free is a functionality of the modem, it is not possible to detach it and value it as a standalone service.

It should be stressed that Wi-Free is not really a “free” service, since the related data usage is counted and imputed to the customers’ monthly download allowance. The Wi-Free service is in fact a form of network sharing, whereby Telenet’s broadband customers can make use of the wireless modem of other Telenet customers on a reciprocal basis. As the network only exists due to participation of individual broadband customers who share their installed modem, Wi-Free connectivity is dependent on the amount of homespots that are connected to the network at a certain point in time and at a certain location. As a consequence, Wi-Free provides only fragmented and non-homogenous connectivity. This makes Wi-Free a complementary service for its users, rather than a standalone wireless broadband service. Beneficiaries of the regulation, such as Mobistar, will dispose of the same network bandwidth as Telenet. and will therefore be able to offer the same homespot service to their customers as Telenet without incurring an extra costs to that effect. Mobistar will in fact have the ability to offer a much more performing mobile broadband connectivity on the basis of its 3G/4G network.

The geographic markets used in the benchmark and their corresponding geographic hotspot and homespot/modem network coverage differ considerably from the service that Telenet provides. For instance, FON, which is also offered in Belgium by Proximus, provides worldwide coverage, integrating more than 16 million hotspots.

⁵⁴ BIPT, Consultatie betreffende aanpassingen aan de tariefsimulator, 10 oktober 2014, p. 3: “*Schrapping van de vragen in verband met de gewenste functionaliteiten: de vragen die bitter weinig relevantie hadden inzake de e-mailadressen, antivirusprogramma's, antispamprogramma's en de persoonlijke gebruikte zullen worden geschrapt om de gebruikersinterface te verlichten*”.

The Regulator's methodology also presupposes an adoption rate of Wi-Free of 100%. This does not correspond to the market reality as Telenet's Wi-Free only has an adoption rate of [confidential]% for the homespot and [confidential]% for hotspots customers (as regards login rate), which amounts to [confidential] customers of which [confidential] also use the Telenet hotspots. This amount is in fact not even a good proxy for calculating the value of the service as it does not accurately reflect the users that would actually be willing to pay € 2 for Telenet's Wi-Free service. Therefore, the adoption rate of the service would be even lower if Wi-Free would only be offered as a standalone paying service.

2. 2nd screen

Telenet offers a 2nd screen service under the name "Yelo TV". This service is always included in a bundle. The Regulator's benchmark analysis (Draft Decision, § 60-64) values a standalone 2nd screen service at € 5. Yelo TV is a service that users can only use at home, via their home Wi-Fi network. It allows them to watch a limited TV content offer on a tablet, a PC, or other Wi-Fi-enabled device.

As for Wi-Free, Yelo TV is not really a "free" service: the related data usage is counted and imputed to the customers' monthly download allowance. The Draft Decision fails to distinguish this service from other types of Yelo TV (Yelo Play, Yelo Play More), which are richer in terms of features. In the Draft Decision, 2nd screen service is analyzed as a generic service irrespective of its specific features and geographic coverage.

The services which the Regulator uses as a benchmark for Yelo TV are not comparable:

- In Belgium, Proximus' "TV Overal" (€ 4,99) is only a paying service for Proximus' legacy packs. It is currently included for free in all Proximus "packs" with TV and internet.⁵⁵ Using "TV Overal" as a benchmark is completely arbitrary and damaging for Telenet, because if Proximus would decide to increase the retail standalone price of its TV Overal offer, this would have a direct negative effect on the wholesale tariff applicable to Telenet. Moreover, "TV Overal" differs substantially from Yelo TV as it can not only be used via the customer's home Wi-Fi network, but also be used on Proximus' mobile 3G and 4G network. This has an impact on the copyright costs, as there is an additional charge for "out-of-home" rights. Moreover, TV Overal also includes 1 GB of mobile data, which should also be taken into account in the valuation of this service.
- In Belgium, Numericable's "ON Multiscreen" (€ 5) was launched only recently. As the number of customers using this service is likely to be marginal, this service is not an appropriate benchmark. Moreover, this service is not offered on a standalone basis but is only available to triple play customers. The pricing structure of Numericable's triple play bundles and additional services also differs significantly from Telenet's and therefore does not offer a comparable basis. ON

⁵⁵ All of Proximus' current "Start", "Comfort" and "Maxi" packs include "TV Overal" without extra charge ("Gratis TV Overal"). For Proximus' product information fiches see https://www.proximus.be/nl/id_cr_infofich/particulieren/onze-producten/r-orphans/product-informatie-fiches.html.

Multiscreen is only included for free in Numericable's "Triple Play Max" bundle, and is a paying service for "Triple Play Start" and "Triple Play Extra" subscribers.

- In Germany, Deutsche Telekom's standalone "Entertain to go" service (€ 6,95) includes a much richer offer than Yelo TV that can also be used out of home (e.g., 40 channels, 10 hours of cloud recording, access to sport channels, shift to TV, Mobile options, etc.). The inclusion of cloud recording functionality has an impact on the related copyright costs. As Deutsche Telekom offers add-on cloud recording at €4,95 for 20 additional hours of recording, the included 10 hours of cloud recording alone could be valued at €2,475.⁵⁶
- In Luxemburg, "Zattoo" (€ 2,99) is not a product by Post Luxemburg, but an a service with a coverage in six countries. Besides in Luxemburg, Zattoo users can use this service in five other countries, which results in additional copyright costs.⁵⁷ This is the only real standalone product in the benchmark that is not used as an upselling incentive. However, contrary to Yelo, "Zattoo" can also be used over mobile data connections, which as noted above also has an impact on the copyright costs.
- In Poland, operator UPC provides a 2nd screen service which the Regulator has ignored in its benchmarking exercise. "TV Horizon GO" is offered as an additional service by for € 1,20⁵⁸, which is far below the Regulator's 2nd screen price of € 5.

It follows from the above that the services that are being used in the benchmark differ considerably from a service and costs perspective with Yelo TV.

Moreover, it is inappropriate to include offers from potential access seekers (such as Proximus and Numericable) in the benchmark, let alone to base the value of the 2nd screen service on the pricing of such potential access seekers, given the distortive effect on competition of such an approach. The limited significance of Telenet's 2nd screen in the bundle is evidenced by its low adoption rate (only [confidential] customers used the Basic Yelo functionality during the month of January 2015 out of a total broadband customer base of 1.544.000, which amounts to an adoption rate of only [confidential]%). The amount of customers that uses the service is even an overestimation as it does not accurately reflect the amount of users that would actually be willing to pay € 5 for Telenet's Yelo service assuming it would be charged on a separate basis.

Because of the above, Telenet considers that it would be more accurate and representative to take into account the actual costs related to the provision of the additional services. Taking into account the amount of customers that can use the basic functionalities of Yelo TV, the actual value of the service amounts to €[confidential] per customer per year, or €[confidential] per customer per month.

⁵⁶ For more information, see <http://www.entertain.de/startseite/funktionen/entertain-to-go.html#esr=&stagetab=1>.

⁵⁷ Zattoo Live TV is available in Germany, Switzerland, Spain, Denmark, Luxemburg, and the UK, see <http://zattoo.com/int/>.

⁵⁸ For more information, please refer to http://www.upc.pl/pdf/upc_cennik_uslug_dodatkowych_dtv.pdf.

3. E-mail

The Regulator's benchmark analysis (Draft Decision, § 65-68) attributes a value of € 0,05 per e-mail address, based on the price charged by Telenet for additional e-mail addresses outside of the bundle (i.e. in addition to the 10 e-mail addresses already included in all of Telenet's offers with broadband). For 10 mail boxes included in the Telenet bundle, a value of € 0,50 is retained.

This approach grossly overestimates the value of this service and is arbitrary. The Regulator does not explain why Telenet's retail price outside of the bundle is an appropriate benchmark, while Numericable's retail price outside of the bundle (€ 7,44/month) is not. The Numericable example shows that basing the value of the mail boxes included in the bundle on the price outside of the bundle is absurd and invites the Regulator to request the usage made of Numericable's stand-alone email box offering.

The Regulator recognizes that its benchmark confirms that e-mail services are "usually" either included in an internet subscription or not offered to the customers at all. The Regulator could not provide a single example where this service was offered only on a standalone basis for an additional charge. The Regulator also fails to present any evidence that it has investigated the actual cost and profit margin in relation to the e-mail services.

Customers are not willing to pay for e-mail services, which is evidenced by the high adoption rates of free e-mail service providers, such as Google or Yahoo and the low adoption rate of Telenet's own/additional e-mail services. On average, less than [confidential] e-mail addresses per Telenet customer are actually used, i.e. approximately [confidential] million e-mail addresses for a total broadband customer base of about 1,5 million. Taking into account this actual usage rate, Telenet has provisioned only [confidential] million mail boxes ([confidential]%). The Regulator's valuation is therefore totally unrealistic because it assumes an adoption rate of 100% (i.e. all 1,5 million broadband customers of Telenet using all 10 included e-mail addresses, or 15 million mail boxes in total).

This adoption rate of the service would also be much lower if the e-mail service would not be included in the bundle. There are internet service providers (e.g., Tiscali⁵⁹ and Libero Infostrada⁶⁰ in Italy) that offer their e-mail services for free also to non-customers. The fact that Telenet uses its e-mail services as means to advertize, as the Regulator points out, shows that Telenet's service model can also be compared to that of free service providers such as Google or Yahoo. In any case, this cannot justify attributing a high retail value to the e-mail service, since this is an advantage for the provider and not for the customer (who pays the free email providers in "data currency").

Moreover, e-mail services that are offered on the market are priced much lower than the Regulator's benchmark. For example, internet service provider "OneCom" provides unlimited e-mail accounts for € 1,50/month. This package also includes many other services such as advanced calendar and contact functions, web hosting, web editor, traffic statistics, a domain name, etc. As explained below, many web hosting providers include a large number

⁵⁹ For more information, please refer to <https://mail.tiscali.it/>.

⁶⁰ For more information, please refer to <https://registrazione.libero.it/>.

or unlimited e-mail addresses in web hosting subscriptions that cost far less per MB of web space than the retail price retained by the Regulator (see point 4 hereafter).

Because of the above, Telenet considers that it would be more accurate and representative to take into account the actual costs related to the provision of the e-mail addresses. The production cost per e-mail box for Telenet amounts to €[confidential] per month.⁶¹

4. Web hosting

With regard to web hosting for personal web pages, the Regulator's benchmark analysis (Draft Decision, § 69-70) retains a retail value of € 1 for 50 MB of web space, i.e. 2 cent per MB per month.

The Regulator's tariff is based on Telenet's retail price of € 2,05 to extend the standard 50 MB of web space, which is included in the broadband subscription or bundle, with 100 Mb.

Webhosting services that are offered on the market on a standalone basis are much cheaper per MB than the Regulator's benchmark. For example, Versio offers 1.5 GB (1500 MB) of storage and unlimited e-mail addresses for € 0,5 per month, and 7,5 GB (7500 MB) of storage with unlimited e-mail addresses for € 2,25 per month.⁶² Both offers work out to 0,03 cent per MB per month. Another Belgian provider, Easyhost, offers 5 GB (5000 MB) of storage with unlimited e-mail addresses for € 3,99 per month (which works out to 0,08 cent per MB per month).⁶³ Moreover, service provider One.com, which is mentioned as an example in the Draft Decision (§ 67), offers 15 GB of storage with unlimited e-mail addresses for € 1,5/month, which is equivalent to € 0.005 for 50 MB per month, or 0,01 cent per MB per month.⁶⁴ This package also includes many other services such as advanced calendar and contact functions, web hosting, web editor, traffic statistics, a domain name, etc.

The Regulator fails to take into account the low adoption rate of the web hosting services. The adoption rate of Telenet's webhosting service is only 8%, with only 124.000 customers using the free web space out of an broadband customer base of 1,5 million.

In view of the above, Telenet considers that it would be more accurate and representative to take into account the actual costs related to the provision of additional services. The production costs for webspace for Telenet amounts to € [confidential] per month per user. This amount covers total CAPEX investments of € [confidential]. These investments relate to the last 3 years and are amortized over a period of 3 years.

⁶¹ This amount includes (i) the yearly maintenance costs for the platform (€[confidential] per mailbox per month) and (ii) the one-time license costs (amortized over a period of 3 years, which amounts to €[confidential] per month per mailbox). When determining the production cost, the amount of provisioned e-mailboxes is taken into account, being [confidential] million, regardless of whether they are effectively used or not.

⁶² For more information, please refer to <http://www.versio.be/webhosting>.

⁶³ For more information, please refer to <http://www.easyhost.be/en/shared-hosting/>.

⁶⁴ For more information, please refer to <http://www.one.com/be>.

5. Premium content

With regard to Telenet's premium content offer "Sporting Telenet", the Draft Decision (§ 71-77) notes that this is a paying service for all customers, but that subscribers to "Internet en TV", "Whop" and "Whoppa" receive a discount. For this component, the Regulator took into account usage, which it ignored for the other "additional services". This confirms the artificial approach for the other services.

Telenet notes that the benchmarking for other cable operators such as Numericable seem to be inconsistent and arbitrary. For Numericable, for example, the Regulator considers the increment price charged to end users with an existing content package to take an additional content package. No justification is provided for this approach. It shows that the comparison between the bundle components cannot be made and confirms that the objectivity which the Regulator has sought to achieve through the benchmarking analysis is a purely facial exercise.

Premium content is not a regulated product, but is nevertheless taken into account in the calculation of the wholesale price. This will have a negative impact on retail price competition and product innovation.

Moreover, if this precedent is also followed for other non-regulated components that may be added to the bundle in the future, this will eventually deprive the regulated operators of their retail pricing freedom.

6. Fixed telephony

Before entering into detail on other elements regarding the Fixed Telephony component, Telenet would like to refer to the meeting held on 15 June 2015. During the meeting Telenet mentioned that the installation costs that were reported during the update exercise did not take into account the fact that part of the installation costs should also be allocated to fixed telephony. In its current product portfolio Telenet only offers standalone products (TV, Internet and Fixed Telephony) or "triple play" offers (TV, Internet and Fixed Telephony combined with a bundle discount). As Telenet does not have a "dual play" offer, the Regulator took into account a combination of standalone products TV and Internet and the triple play offers to cover all broadband profiles that Telenet currently offers to clients. In order to determine the wholesale price of dual play wholesale offer including one of the broadband profiles that Telenet offers as part of its triple play bundles, the Regulator had to construct reference retail prices excluding the fixed voice telephony component of those triple play bundles. The wholesale price is then determined by applying the minus to these fictive reference retail prices (excl. VAT).

The Draft Decision does not explicitly deal with the way in which the fixed voice component of the bundles is deducted from the reference retail price. However, it appears from Analysys Mason's "Rekenmodule", which is attached to the Draft Decision, that the approach which the Regulator followed to construct a reference retail price without the fixed voice component is as follows. As a starting point, the Regulator took the retail price excl. VAT of Telenet's standalone fixed telephony offer, FreePhone Europe, i.e. € 17,93. Then,

the Regulator applied the inflated bundle discount⁶⁵ to this standalone price (e.g. for “Whop”, € 17,93 – 40% = € 10,75⁶⁶) and deducted the resulting value from the retail price of the triple play offer. In other words, the Regulator followed essentially the same approach for fixed telephony as for the “additional services” or “value-added services”.

The Regulator’s methodology based on the standalone retail price of fixed telephony leads to a gross overestimation of the economic value of the fixed telephony component of the bundle.

First, the Regulator disregards the fact that the standalone retail price of the fixed voice subscription includes an access line component. In the triple-play bundles, this is a common component to all three services. It is incorrect to impute the access line component entirely to the fixed voice service. This leads to an excessive deduction from the retail price and means that this cost should not be recovered at wholesale level from the access seekers.

Second, the Regulator does not take into account the limited commercial relevance of the fixed voice component as compared to the other components in an age of universal mobile phone ownership, low mobile rates and the availability of OTT voice telephony services (e.g., Skype). The Regulator did not take into account (i) the low standalone telephony subscriber base on cable; i.e. [confidential] stand-alone fixed telephony subscribers, (ii) the low overall voice telephony usage among 3P customers and (iii) the fact that nearly [confidential]% of Telenet’s 3P customers have no inbound or outbound calls at all. In this respect Telenet can confirm that the use of fixed telephony has dropped with approximately [confidential]% since 2011 (from an average of more than [confidential] minutes per month in 2011 to less than [confidential] minutes per month in 2015), and this irrespective of the additional functionalities and value that Telenet has brought to its fixed telephony offer (unlimited calling fixed numbers in Belgium, 2000 free minutes for mobile numbers or calls within Europe, etc).

[confidential chart: call minutes to domestic geographical numbers per subscriber per month]

This also shows that there is hardly any price elasticity left for this product, meaning that even if Telenet would lower its prices for fixed telephony, it is expected that the usage of the service will not increase. When benchmarking this average usage of the Telenet Freephone Europe with other OTT providers such as Skype, it appears that the value of the Telenet fixed telephony service can be compared with a offer of 3,50 EUR (incl. VAT) of Skype.⁶⁷ In other words, by focusing on the standalone retail price of fixed telephony to

⁶⁵ I.e., the difference in percent between the sum of the prices excl. VAT (or benchmark values) of the standalone components of the bundle (TV, internet, 2nd screen, etc.) on the one hand, and the bundle price excl. VAT on the other hand.

⁶⁶ As the bundle discount is not the same for “Whop” (-40%) as for “Whoppa” (-42%), the Regulator’s methodology also leads to the illogical result that exactly the same service (FreePhone Europe) is valued differently depending on the broadband profile it is combined with (€ 10,75 as part of “Whop” and € 10,38 as part of “Whoppa”).

⁶⁷ [confidential] the use can be compared with the Skype offer of “120 minutes mobile + fixed numbers” of €3,50 per month, incl. VAT.

assess the value of the “voice component” in the bundle, the Regulator overblows its value leading to an artificial reduction of the wholesale price.

The Framework Decision did not consider that the regulation of the voice component of the bundle was necessary (but limited itself to the resale of broadband). The Court of Appeal retained this analysis, insisting, however, on the fact that the regulation of such connected services was subject to strict conditions given the principle of proportionality and the fact that only those services for which SMP is found can be regulated⁶⁸. This concern confirms the excessive nature of the proposed methodology which artificially reduces the value of wholesale prices because the SMP-operator includes voice telephony in the bundle. This is precisely the concern expressed in Commission’s Revised Recommendation on Relevant Markets regarding potential regulatory spill-over in assessing the replicability of bundles:

“What is important in this respect is that NRAs are able to ensure that the vertically integrated SMP operator’s regulated elements of the bundle can be effectively replicated (in terms of both technical and economic replicability) at the retail level, without an implicit extension of regulation to other components which are available under competitive conditions. Moreover, it has been argued that, in cases of the provision of the fixed voice service with broadband access and/or IPTV, bundling at the retail level is rather a phenomenon of continued provision of a declining fixed voice service alongside broadband access and/or IPTV, rather than an economically significant offer that alters the competitive dynamics over a longer period.”⁶⁹

The regulation seeks to enable alternative operators relying on the cable operators’ wholesale inputs to compete effectively on the retail market. To achieve this, it is proportionate and sufficient to take into account the production cost of the fixed voice service as an avoided cost. Telenet estimates its own production cost for the fixed telephony component of its bundles at € [confidential].⁷⁰ This is enough to enable an equally efficient operator to add its own fixed telephony service to the bundle using VoB/VoIP technology.

Telenet recalls that it has no SMP for fixed telephony and that its fixed telephony pricing is not regulated. There is therefore no objective reason why its pricing for fixed telephony should result in a reduction of its wholesale margin for television and broadband services. This is all the more so in a context where Proximus, the incumbent provider of fixed telephony services, does not have a similar constraint on its retail fixed telephony pricing (since Proximus’ wholesale margin on its BRUO and BROBA offers is wholly independent from its retail pricing for standalone fixed telephony) and, in addition, is a potential beneficiary of Telenet’s wholesale services (or at least claims to be so).

It is important to keep in mind that the only two operators who have requested access to Telenet’s wholesale services – Mobistar and Proximus – do not suffer from any significant competitive handicap compared to Telenet with respect to telephony services. This is

⁶⁸ Brussels Court of Appeal, 2011/AR/2289, 14 November 2014, § 155-156.

⁶⁹ COM(2015) 192 final, p. 18.

⁷⁰ This includes the share of telephony in the cost of the modem (assumption: 50%), interconnection costs and the cost of the network proxy.

obvious in the case of Proximus, which benefited from monopoly rights and has an inherited customer base for these services. Mobistar too can not only bundle its television and broadband services (provided on the basis of the cable operators' wholesale inputs) with mobile services that it provides using its own network infrastructure, but it is also able to implement a VoB/VoIP solution on the back of its broadband access at limited cost. Mobistar can also play the fixed-mobile convergence card by providing users with an app on their mobile phones allowing them to make VoIP calls over their home Wi-Fi network (cf. Telenet's own Triing app) and by implementing EAP-SIM technology (allowing users to switch seamlessly between mobile and fixed networks). None of this requires high investments. It should also be noted that Mobistar reports an existing customer base for fixed telephony of over 200.000 subscribers.⁷¹

C. Modem

In accordance with the CRC Decision of 1 July 2011, the modem is not part of the regulated wholesale offer and the beneficiaries of the wholesale remedies have to supply their own modems.

Telenet does not charge its broadband customers for the modem, regardless of whether the broadband service is purchased as part of a (triple play) bundle or not. In the CRC Decision of 11 December 2013, the costs related to the modems and set-top-boxes (STB) were factored into the minus as avoidable costs, whereas the revenues related to the modems and STB were factored into the ARPU.⁷² This approach was based on the assumption that the modem-related costs were implicitly covered by subscription revenues.

In the Draft Decision, the Regulator abandons this approach. It excludes the modem and STB from the calculation of the minus, both on the costs side and on the revenues side, but deducts the "value" of the modem and STB from the retail reference price to which the minus is applied.

As none of the three regulated operators charges extra for the modem and there is no observable retail price for the modem, the Regulator uses a benchmark to determine the "value" of the modem. Telenet understands that the Regulator has determined the monthly "rental value" of the modem by multiplying the price Telenet charges to customers who request a new modem (€ 75) with the ratio between the monthly rental price of the STB (€ 8,7) and the purchase price of the STB (€ 249), expressed as a fraction. This method of determining the rental value of the modem is arbitrary.

First, the Regulator mentions four different possible benchmarks (Kabel Deutschland, Orange France,⁷³ Proximus and the above-mentioned benchmark), without explaining in any way how it chose among these possible benchmarks. This shows that the Regulator is cherry-picking among the listed benchmarks.

⁷¹ Mobistar First Quarter 2015 Results – Analysts & Investors Presentation, slide 47, available at <http://corporate.mobistar.be/documents/Mobistar%20-%20Q1%202015%20Results%20-%20Analysts%20%20Investors%20Presentation%20FINAL%20Roadshows1.pdf>.

⁷² CRC Decision of 11 December 2013 concerning the Dutch language region, § 72-73.

⁷³ These foreign benchmarks.

Second, the price of € 75 is not representative. Telenet charges this only to customers who request a new modem even though they do not need it to use the services they subscribe to. In all other cases, the modem is provided free of charge. For instance, if a customer's modem does not support Docsis 3.0 and the customer upgrades to a product that requires a Docsis 3.0-enabled modem (e.g., Whop or Whoppa), Telenet replaces the modem free of charge. The € 75 is the price of the replacement of the modem including installation by a Telenet technician. It is therefore wrong to use this amount as representing the value of the modem as such.

Third, the Regulator's choice to use the ratio between the monthly rental price and the purchase price of the STB (i.e. of a *different product*) is wholly arbitrary and not justified in any way. The Regulator does not explain why it chose this novel method rather than simply amortizing the value over a period of 36 months (as it does in the preceding example concerning Proximus' modem). The fact that the newly proposed method yields a higher value (€ 2,08), is another illustration of the goal-oriented nature of the Regulator's analysis.

Fourth, the foreign benchmarks mentioned in the Draft Decision are not representative. To Telenet's knowledge, all national operators and nearly all operators in neighboring countries do not charge anything extra for the modem. This explains why the Regulator found only a few examples to use as a benchmark. Telenet has carried out its own survey of offers by operators in France, Germany, the Netherlands and the United Kingdom and found that all broadband subscriptions (single play or in a bundle) include at least a basic modem (see table in Annex I). The price of € 2/month for Kabel Deutschland, mentioned in the Draft Decision, concerns a modem with wireless functionality ("WLAN Kabelrouter"). All Kabel Deutschland subscriptions include at least a basic free modem without wireless functionality ("Kabelrouter"). Moreover, even the wireless modem is included for free in most of Kabel Deutschland's subscriptions (Internet & Phone 25, 50 and 100 and Internet Business Kabel 50 and 100). The price of € 3/month mentioned in the Draft Decision for Orange France also includes the rental of the STB (decoder) and one could therefore just as well consider that the modem is included for free and the customer only pays for the STB. Only Orange Luxembourg charges € 3/month for the modem as indicated in the Draft Decision (for subscribers with a 24-month contract), but the wireless modem in question ("Fritzbox") includes advanced voice telephony functionality⁷⁴ and is therefore not comparable to standard internet modems.

Once again, rather than deducting an arbitrary value from the reference retail price, a far more objective and proportionate way to take into account the modem would be to include the cost of the modem as an avoided cost in the calculation of the minus. This is sufficient to ensure that an efficient alternative operator can compete with the cable operators on the retail market, even though it has to procure its own modems. Telenet estimates the monthly production cost of the modem at € [confidential] (i.e. [confidential] € purchase price amortized over 5 years⁷⁵). It must, however, be emphasized that this is a conservative

⁷⁴ Fritzbox modems are not only wireless cable/xDSL modems but also DECT base stations supporting multiple ISDN/analog phones and/or VoIP phones.

⁷⁵ It is incorrect to use the same depreciation period for the STB and the modem. Modems are much more robust equipment than STB and do not need to be replaced so often. A five-year amortization period is therefore more appropriate than the three-year depreciation period which the Regulator applies to Proximus' b-box.

approach (and therefore an overestimation) as it disregards the fact that the modem also includes a fixed voice service component. Therefore, for the purpose of estimating the production cost of the modem, a part of these costs should be allocated to the fixed telephony service on a RGU basis (in the charts above, Telenet has allocated [confidential]% of the cost of the modem to telephony).

Finally, as already mentioned, the Regulator also makes a double-counting error by deducting from the reference retail price both a value for the Wi-Free service and a value for the modem, since Wi-Free is a functionality of the modem.

D. Broadband profiles

The Draft Decision includes a formula to compute the applicable price for specific broadband profiles requested by the beneficiary. The formula is based on an intrapolation method seeking to correlate (i) download speed, upload speed, volume and (ii) the wholesale price.

For Telenet, this results in a formula only bearing in mind the download speed and volume of a specific profile. Based on the detailed calculation sheet Telenet concludes that the formula is not fit for purpose and relies on erroneous factual data:

- There are factual errors in the measuring points included in the calculation sheet. For instance the upstream speed for the Telenet Fibernet XL product is currently set at [confidential] (and not [confidential] as included in the calculation sheet).
- Correcting the values for the upstream speed significantly impacts the outcome of the formula.

The initial values of the formula for Telenet are the following:

[confidential table]

When adjusting the values of the measuring points with the correct upstream value for Fibernet XL to [confidential], the values of the formula change to:

[confidential table]

By correcting the values for Fibernet XL the volume characteristic appears to be no longer relevant for determining the price for specific broadband profiles. This finding undermines the formula as such given the importance of volume both from a commercial perspective and from a pure network management perspective.

- The input is limited to [confidential] Telenet broadband profiles of which [confidential] profiles have nearly similar characteristics. A limited number of measuring points entails that any change to the measuring points will have an important impact on the outcome of the exercise and change the formula.

For instance, when correcting the upload speed of the Fibernet XL (see our comment above), the formula for Telenet is no longer based on download speed and volume, but rather on upload speed and volume.

Competition requires Telenet to constantly monitor its product offerings and regularly change product specifications and pricing. A formula which is so sensitive to changes and relies on limited and isolated measuring points runs against the general principles of access regulation.

- The calculation sheet includes wholesale prices which the Regulator has computed based on Telenet 3P legacy tariffs which it has updated with inflation percentages, etc. Telenet cannot align these tariffs with the tariffs it applies. The tariffs should be replaced with the tariffs effectively applied.

Also for computing the wholesale price, the Regulator has taken into account certain elements of its revised methodology, such as 3P legacy tariffs as reference tariffs (even if a 2P reference tariff is available), adjustments for additional services, etc. Telenet refers to its argumentation set out above on these points.

Furthermore, since the Regulator uses the wholesale prices following the adjusted retail minus methodology, this also impacts the outcome of the calculation for the formula. A possible pricing strategy (included in the retail prices) will be undermined by the corrections of the Regulator when determining the wholesale prices. Therefore it is possible that there is no link between measuring points due to the wholesale prices determined by the Regulator. This will thus result in a formula where certain characteristics (download speed, upload speed, volume) will not be taken into account.

Telenet agrees that there should be a methodology in place to determine an adequate pricing for specific broadband profiles requested by the Beneficiary, but finds that the formula is inadequate, unreliable and unpredictable.

As an alternative, Telenet proposes that a specific process be established for determining the price with a central role for the Regulator to confirm the pricing proposition made by Telenet. In order to suggest a specific price, Telenet will need to map the specific profile requested by the Beneficiary against its own product offering (active and legacy offerings) and will subsequently suggest a wholesale price to the Regulator bearing in mind all other aspects of the retail minus methodology. The Regulator will review the price proposition of Telenet and will subsequently confirm whether the price can be considered as adequate for the Beneficiary or not.

- **Using standalone prices as a benchmark for additional services included in a bundle is generally not appropriate.**
- **The national and foreign offers against which the Regulator has benchmarked the value of the additional services are not comparable in terms of features and underlying costs.**
- **The choice of benchmarks is arbitrary (cherry-picking) and the methodology used inconsistent.**
- **The fixed telephony component is grossly overvalued, inter alia because the Regulator disregards that the retail price of the standalone fixed telephony service includes an access line component which should be allocated to all three components**

of the bundle.

- **A cost-based approach to the additional services leads to much more proportionate results.**
- **The proposed broadband pricing formula contains factual errors and is unreliable. It should be replaced by a procedure whereby Telenet's would be proposing a wholesale tariff based on its product offering to be validated by the Regulator.**

IV. THE DRAFT DECISION FRUSTRATES THE POLICY OBJECTIVES OF THE REGULATORY FRAMEWORK

The Draft Decision goes against the policy objectives of the EU regulatory framework for electronic communications (as enshrined inter alia in Article 8 of the Framework Directive) in several ways:

- First, it distorts competition by promoting inefficient market entry;
- Second, it frustrates consumer interests by stifling product innovation (particularly through bundling of services) and discouraging retail promotions and discounts;
- Third, it favors service competition over infrastructure competition and undermines cable operators' ability to continue to invest in their networks;
- Fourth, it negatively affects regulatory predictability by failing to ensure a consistent regulatory approach over an appropriate review period.

A. The Draft Decision promotes inefficient market entry

As detailed above, the Draft Decision provides excessive entry assistance to the beneficiaries of the wholesale obligations. The only two operators that have manifested their intention to make use of these obligations – Mobistar and Proximus – have a sufficient critical mass and do not require any special entry assistance. This is more than obvious in the case of Proximus, the incumbent fixed line operator, with a 45% market share for broadband and a 34% market share in the digital television market (corresponding to over 1,6 million customers).⁷⁶ Mobistar too is an established operator in the Belgian market, with an installed base of nearly 3,8 million mobile customers to which it can cross-sell its fixed-line offers.

By overcompensating for the supposed scale disadvantage of the beneficiaries of the wholesale measures, the Regulator risks promoting inefficient entry, which may seem beneficial for consumers in the short run but is detrimental for consumer welfare in the long run. Only efficient entry can benefit consumer welfare in the long run. As the Belgian Competition Authority has stressed in relation to the regulation of MTR:

⁷⁶ Proximus Q1 2015 presentation, slide 20.

“[h]et positief effect van een systeem waarbij (het cliënteel van) een operator met aanmerkelijke marktmacht (het cliënteel van) andere operatoren met een zwaardere kostenstructuur als het ware “subsidieert”, ligt zacht uitgedrukt niet voor de hand en vereist dus minstens een uitvoerige en op de specifieke nationale context toegespitste motivering. De Raad wil geenszins bij voorbaat uitsluiten dat dergelijk positief effect zou kunnen bestaan en dus valt af te wegen tegen andere evenmin uit te sluiten negatieve effecten, maar mist in het document waarover advies wordt uitgebracht een afdoende motivering voor de omstandigheid dat het door het BIPT gehanteerde model België binnen Europa in een unieke, geheel tegen de Europese tendens ingaande, situatie zou brengen qua tariefverschillen voor interconnectie tussen operatoren.”

The European Commission has also considered that MTRs “*should normally be symmetric*” and that asymmetry might be justified “*in exceptional cases by objective cost differences which are outside the control of the operators concerned*”, but that this should then be duly motivated in the Regulator’s decision.⁷⁷ We can infer from this that any obligation for SMP operators to subsidize specific entry assistance for new market entrants, as an exception to the rule, should be supported by circumstantial reasoning. Such reasoning is lacking in the Draft Decision.

B. The Draft Decision does not serve consumer interests

The Draft Decision stifles retail product innovation by discouraging cable operators to enrich their offers with additional services. Each time a cable operator adds an additional service to the bundle, this may have an immediate (and, due to the calculation method applied, disproportionate and unforeseeable) impact on the wholesale prices. The Draft Decision even creates a strong economic incentive for cable operators to remove value-adding services from their offerings and to offer only “bare-bones” internet and television services, which would actually lead to a reduction in consumer welfare. In a converging environment, there is, however, a strong interest in bundling services and consumers can benefit from increased and potentially disruptive competition when operators seek to broaden their services by engaging into cross-selling which was acknowledged for example by BEREK in its Report on Convergent Services.⁷⁸ Telenet’s Wi-Free service is a good example of a converged service which is disruptive for mobile broadband services (which are generally considered expensive in Belgium). The methodology is penalizing Telenet for offering this service in its bundle disregarding the evident pro-consumer benefits resulting from this practice.

⁷⁷ Letter from the European Commission, Case BE/2006/0433 Voice Call Termination on Individual Mobile Networks in Belgium, Comments pursuant to Article 7(3) of Directive 2002/21/EC, p. 5.

⁷⁸ “§ 45. *Convergence underpins more efficient and economic bundling of products and services, although convergence could also arise in a standalone service offer. A common trend in Member States, as identified in the 2009 ERG Report on the discussion of the application of margin squeeze tests to bundles, is the increasing preference of consumers for buying products in bundles which convergence makes more economical and easier. As consumers buy multiple offerings from one provider, the number of services required to compete effectively in retail markets increases. On the other hand, as described above, convergence could lead to enhanced products which could easily replace traditional ones.*”

Likewise, the Draft Decision stifles retail price competition by discouraging discounts and promotional offers, which are reflected in the wholesale prices, in some cases even with retroactive effect. The retail price competition will be paralyzed as a result of the burdensome notification procedure, the “freezing” of the retail pricing for certain components of the bundles (additional services, decoders and modems), and the uncertainty created by potential retroactive adjustments of the wholesale prices. These factors will severely impair the ability of cable operators to react swiftly to pricing decisions by competitors, and in particular by Proximus, which is not hampered by the same handicaps. Rather than promoting price competition, the proposed regulation may therefore paralyze it. It could also undermine the cable operators’ competitive position, not to the benefit of new players, but to that of Proximus. Such developments would obviously not contribute to consumer welfare.

C. The Draft Decision undermines network investments and infrastructure-based competition

By eroding the cable operators’ wholesale margins, the Regulator undermines the cable operators’ ability to continue investing in their network infrastructure. The cable operators are forced to sacrifice wholesale margin to subsidize (excessive) entry assistance by new service-based competitors which will create a temporary but potentially destructive aggressive price competition. The Regulator thus promotes service-based competition over infrastructure-based competition, which runs counter to the objectives of the EU regulatory framework for electronic communications (see Article 8(5)(c) of the Framework Directive).

The regulation not only risks promoting inefficient new entry, but it also does not include any incentives for the beneficiaries to become more efficient or to move from service-based competition to infrastructure-based competition. Instead, the regulation will most likely be self-perpetuating as the beneficiaries are far better off remaining dependent on the cable operators’ wholesale inputs than becoming infrastructure-based operators in their own right. As the Commission notes in its explanatory document accompanying the Communication on a Digital Single Market Strategy for Europe, regulation may reduce the investment incentives of alternative operators “*if regulated wholesale access is made disproportionately attractive, i.e. access seekers’ build-or-buy decisions rendered economically inefficient*”.⁷⁹ In this context it is also noteworthy that Belgium leads in high-speed fixed broadband access, but lags behind in mobile broadband.⁸⁰

The best regulatory outcomes are to be expected from spurring competition between existing network infrastructures, rather than weakening it for the benefit of mere service-based competition. Any regulatory intervention that discourages or slows down investments in NGA networks, even if it is designed to promote additional service-based competition (the success of which is uncertain), is likely to result in a net loss of social welfare. As the

⁷⁹ Commission staff working document, A Digital Single Market Strategy for Europe - Analysis and Evidence, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, 6 May 2015, SWD(2015) 100 final, p. 36-37.

⁸⁰ Digital Economy and Society Index (DESI) 2015, Country Profile Belgium, p.2

European Commission notes, “*the social return from investment in higher quality networks tends to be greater than for the individual operator*”.⁸¹

The Regulator also failed to consider whether it would not be desirable to modulate the intensity of the regulation in function of the intensity of infrastructure-competition that is already present. As the European Commission observes, “*little full "infrastructure competition" has emerged in fixed-line networks, except in very densely populated areas, where cable networks were already present, or where local authorities have been active. There is a need for simpler and more proportionate regulation in those areas where infrastructure competition has emerged at regional or national scale. The deployment of very high capacity networks needs to be encouraged while maintaining effective competition and adequate returns relative to risks*”.⁸² In the case of Belgium, intense infrastructure-based competition already exists at the national level, since both the DSL network and the cable networks (combined) cover more than 80% of the population, and there is therefore “full infrastructure competition” in most of the country (and certainly in practically the entire Flemish and Brussels regions). The Regulator should therefore reassess whether the proposed, heavy-handed, regulation in support of service-based competition is a desirable and proportionate means to achieve the objectives of the regulatory framework.

D. The Draft Decision undermines regulatory predictability

Article 8(5)(a) of the Framework Directive provides that NRAs shall promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods. Regulatory stability is also one of the main objectives of the Commission Recommendation on relevant markets susceptible to ex ante regulation.⁸³ The CRC framework decision also emphasizes that, when making any adjustments to the regulation, “*BIPT shall take into account the need for stability on the market for electronic communications*”. Regulatory predictability and regulatory certainty are especially important at a time when network operators are expected to make important investments in NGN to meet the needs of consumers and businesses. Regulatory predictability is a crucial consideration in operators’ investment decisions and the lack thereof seriously hampers investment and innovation.

The Draft Decision tries to ensure wholesale price stability for the beneficiaries of the obligations by imposing a “freeze” on the additional services and on the pricing for modems and STB. However, this does not work both ways as the Regulator reserves the right to impose retroactive wholesale price adjustments or to bring components into the calculation of

⁸¹ *Ibidem*, p. 36.

⁸² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, 6 May 2015, COM(2015) 192 final, p. 10.

⁸³ Commission staff working document – Explanatory note, accompanying document to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 9 October 2014, SWD(2014) 298, p. 5: “[The Recommendation] *seeks to ensure that broadly the same product and services markets will be subject to a market analysis in all Member States and that market players will be aware in advance of the markets to be analysed, in line with the principles of regulatory predictability and legal certainty*”.

the wholesale prices that have not so far been considered relevant. Hence, there is a lack of predictability with respect to the wholesale prices that the cable operators can expect to receive, which further undermines their incentives to invest and innovate.

- **By overcompensating the supposed scale disadvantage of the beneficiaries (disregarding the actual situation of the operators that have so far sought access), the Regulator distorts competition and promotes inefficient entry.**
- **The Draft Decision frustrates consumer interests by discouraging price competition, pro-competitive bundling practices and other forms of product innovation.**
- **The Draft Decision promotes service-based competition over infrastructure-based competition and risks discouraging NGN investments.**
- **The regulatory unpredictability created by the Draft Decision will further undermine incentives to invest and innovate.**

ANNEX I

MONTHLY RETAIL VALUE OF THE MODEM – INTERNATIONAL COMPARISON

Country	Operator	Device	Price (monthly rental fee)	Source
Netherlands	KPN	Wireless modem	Included in subscriptions (+ includes access to FON network)	https://bestellen.kpn.com/
Netherlands	Tele2	Wireless modem	Included in subscriptions	https://www.tele2.nl/thuis/tarieven/
Netherlands	UPC	-	See Ziggo	-
Netherlands	Ziggo	Wireless modem	Included in subscriptions (+ includes access to 2 million “WifiSpots”)	https://www.ziggo.nl/alles-in-1/
France	Bouygues	Bbox	Wireless modem and decoder (2 separate devices) included in subscriptions	https://www.bouyguetelecom.fr/offres-internet/bbox
		Bbox Miami	Wireless modem and decoder (1 device) included in subscription	https://www.bouyguetelecom.fr/offres-internet/bbox-miami
France	Free	Freebox	Wireless modem, decoder, Blue-Ray player, game console and Femto-cell (all-in-one device) included in subscriptions	http://www.free.fr/adsl/index.html
France	SFR	Box Fibre	Wireless modem and decoder with hard disk (all-in-one device) included in subscriptions	http://static.sfr.fr/media/brochure_box.pdf

Country	Operator	Device	Price (monthly rental fee)	Source
France	Orange	Livebox Play	€ 3/month for wireless modem and decoder	http://abonnez-vous.orange.fr/residentiel/offres-internet-ADSL-VDSL2.aspx
Germany	1&1	1&1 WLAN Modem, 1&1 HomeServer	Included in subscriptions	http://dsl.1und1.de/?linkId=hd.subnav.dslflatratesuebersicht&ucuoId=PUAC:default.EUE.DE-20150702113100-768B986642FD30003853C058E0B9CDF1.TCpfix114b&ac=OM.BR.BRd09K41503T7073a#pakete
Germany	Deutsche Telekom	Magenta Zuhause	Included in subscriptions	http://www.telekom.de/privatkunden/zuhause/internet-und-fernsehen/magenta-zuhause-s
Germany	O2	HomeBox 2	Included in subscriptions	http://dsl.o2online.de/provider/content/segment/anbieter/produkte/dsl-home/?exclusivId=epo2p_3x3-w_home-dsl-vdsl
Germany	Kabel Deutschland (Vodafone)	Kabelrouter	Included in subscriptions	http://www.kabeldeutschland.de/internet-telefon/kabelrouter.html

Country	Operator	Device	Price (monthly rental fee)	Source
		WLAN Kabelrouter	Wireless modem € 2/month but included in Internet & Phone 25, 50 and 100 subscriptions as well as in Internet Business Kabel 50 and 100 subscriptions	http://www.kabeldeutschland.de/internet-telefon/wlan-kabelrouter.html
Germany	Unity Media	Highspeed modem	Included in subscriptions	http://www.unitymedia.de/privatkunden/internet/basis-internetzugang/
United Kingdom	BT	BT Home Hub	Included in subscriptions	http://www.productsandservices.bt.com/products/broadband-packages/?s_intcid=con_fly_pns_bbpkgs
United Kingdom	Sky	Router	Included in subscriptions	http://www.sky.com/shop/broadband-talk/broadband-unlimited/
United Kingdom	TalkTalk	Advanced Technology Router	Included in subscriptions	https://sales.talktalk.co.uk/product/broadband/simplybb
United Kingdom	Virgin Media	Super Hub	Included in subscriptions	http://store.virginmedia.com/big-bundles.html