



**Formulier dat als voorpagina dient te worden gebruikt
bij het antwoord op een door het BIPT georganiseerde openbare
raadpleging**

ALGEMENE INFORMATIE

Titel en datum van de raadpleging: Ontwerpbesluit toegangs- en gespreksopbouwmarkt vaste telefonie,
21.02.2018
Aan (natuurlijke persoon die werd aangeduid als contactpersoon binnen het BIPT in het document dat ter
raadpleging werd voorgelegd): Maarten JOSSON
Naam van de rechtspersoon die antwoordt: Platform Alternative Business Operators
Natuurlijke persoon die als contactpersoon fungeert voor de respondent: Koen Vandenweyer

VERTROUWELIJKHEID VAN DE GEGEVENS

De volgende informatie wordt als vertrouwelijk beschouwd door de respondent (aanvinken wat van
toepassing is):

- Niets
- De identiteit van de rechtspersoon die antwoordt
- De identiteit van de natuurlijke persoon die als contactpersoon fungeert
voor de respondent
- Bepaalde delen van het antwoord

In dat laatste geval dient de respondent een openbare en een vertrouwelijke versie van zijn bijdrage te
verschaffen. In de vertrouwelijke versie worden de vertrouwelijke delen duidelijk geïdentificeerd in de
body van de tekst.

In geval van tegenstrijdigheid tussen dit formulier en een vermelding in het antwoord (in het bijzonder de
standaardvermelding betreffende de vertrouwelijkheid in de e-mails), erkent de respondent dat het BIPT
enkel rekening dient te houden met dit formulier.

WAARSCHUWING

Conform artikel 140 van de wet van 13 juni 2005 betreffende de elektronische communicatie, worden de ontwerpbesluiten van het
BIPT die aanzienlijke gevolgen zouden kunnen hebben voor een relevante markt, ter openbare raadpleging voorgelegd. De resultaten
daarvan dienen te worden bekendgemaakt, in overeenstemming met de regels inzake vertrouwelijkheid van de bedrijfsgegevens.
Het is bijgevolg in het belang van de respondent om een exhaustieve en nauwkeurige lijst mee te geven van de vertrouwelijke
informatie om te vermijden dat die informatie openbaar wordt gemaakt in het kader van de publicatie van de resultaten van de
openbare raadpleging.

De respondenten mogen echter uitsluitend die informatie als vertrouwelijk bestempelen die werkelijk vertrouwelijk zijn aangezien
het BIPT de mogelijkheid heeft om de vertrouwelijke aard van de informatie te betwisten krachtens artikel 23, § 3, van de wet van
17 januari 2003 met betrekking tot het statuut van de regulator van de Belgische post- en telecommunicatiesector.

NAAM, DATUM EN HANDTEKENING

Koen Vandenweyer, 21.02.2018

**PLATFORM
FOR ALTERNATIVE
BUSINESS OPERATORS**

**Consultation regarding the draft
decision fixed telephony access and
call origination markets**

Platform Alternative Business Operator is the association of alternative telecom operators active on the business market in Belgium. Its members are: BT, Colt, Eurofiber, Orange Belgium, Telenet, Verizon and VOO-WIN. The Platform focusses mainly – but not exclusively – on market access-related issues on the Belgian business market.

This is a Platform reply, without participation of Brut  l  , Eurofiber, Nethys and Telenet, who are not implicated by the BIPT’s draft decision related to the retail market for fixed telephony access (market 1/2007) and to the wholesale market for call origination (market 2/2007).

1. Access to the public telephone network at a fixed location for residential and non-residential customers (market 1/2007)

The Platform considers that a premature removal of the current regulatory remedies on the Carrier Selection (CS) and Carrier Pre-Selection (CPS) services - especially without any transition period and only based on a Proximus’ voluntary code - will be very detrimental to the end-users (be they consumers or business customers) and the sector in general.

First, the Platform considers that the costs for CS/CPS related services must be reviewed based on the updated FTR LRIC cost-model. It would be indeed very detrimental for the market that the collection costs for CS/CPS traffic remain at their historical level while the FTR has been reviewed.

Secondly, the Platform considers that a transition period should be included.

For that purpose, the Platform would like to suggest the following options to the BIPT’s Council:

- a) maintain until the next forthcoming regulatory period (2017-2020), the current regulatory remedies as imposed in its decision dated 31 January 2013 (CS/CPS) with an addendum to the Proximus Reference Interconnect Offer (BRIO) for CS/CPS services as transparency’s remedy;
- b) follow the approach of the ARCEP by imposing obligations only for non-residential services on the retail market for fixed telephony access (market 1/2007) during the next forthcoming regulatory period (2017-2020).

We hereafter provide some additional comments on the BIPT’s market analysis and its conclusions.

With regard to the substitutability test of the relevant market on the retail market for fixed telephony access, the Platform disagrees with the BIPT’s conclusion (paragraph 175) considering that the Voice over Broadband (VoB) is a full substitute for traditional telephony (PSTN/ISDN lines), especially if we are considering the specific requirements of the non-residential customers (e.g. quality of services, resilience, security, services available 24/7 with helpdesk,...). The non-residential customers have invested considerably into PABX devices that continue to serve their needs and they do not want to invest in IPBX

prior to the full depreciation of their current devices as well as to pay considerable migration costs¹. For that purpose, non-residential customers are reluctant to move from traditional telephony (PSTN/ISDN lines) in favour of VoB.

For that purpose, the Platform disagrees with the BIPT's conclusion that there is no more barrier to enter for the alternative operators based on the conclusion that notably VoB is a substitute for the traditional telephony (PSTN/ISDN lines) for end-users and would encourage the BIPT to test the other criteria.

On the geographic market, the Platform would suggest the BIPT to consider the geographic market as national, which is in line with the BIPT's assumption (paragraph 109) that (i) Proximus has a network coverage on the national territory, (ii) Proximus is offering the access to its telephony network and (iii) Proximus has a commercial strategy at a national level. We also need to bear in mind that Proximus still has a high level of market shares on the non-residential market.

The Platform would like to highlight that in several European countries, the access to the CS/CPS services remains regulated as considered as a vital alternative to the end-users enabling them to choose another operator for the provision of their voice telephony services than the national dominant operator. Removing the access to the CS/CPS services without any transition period and without any other appropriate alternatives could be very detrimental to the free choice of the end-users and the market's competition.

In France, the ARCEP concluded in its decision n° 2017-1568 dated 21 December 2017² that regulation of the residential market is not justified anymore since most users benefit from fixed voice services based on multiple play IP offers. On the other hand, 75% of business users' telephone lines are still based on PSTN.

In addition to what has been said above, the Platform would like to remind the BIPT that on several occasions, end-users and mainly non-residential customers stated that they prefer to negotiate and receive a global invoice for their services from only one supplier. The CS/CPS service is providing this solution to the end-users and enables them to benefit from competitively priced access to national and/or international voice calls.

The Platform also wants to raise its concern on the Proximus voluntary offer and would consider that it is not appropriate for the moment, especially when the BIPT does not foresee any review of the prices nor

¹ Statement which is also shared by the ARCEP in its *Décision n° 2017-1568 (pg 21)*: « « Les clients non résidentiels des offres principalement téléphoniques conservent des équipements qui s'appuient sur des caractéristiques physiques spécifiques aux accès principalement téléphoniques du réseau téléphonique commuté, notamment les standards téléphoniques traditionnels (PABX), des fax, ou des machines à affranchir. Parmi ces caractéristiques, la télé-alimentation de la ligne est particulièrement utile pour la sécurisation des ascenseurs, des alarmes et des équipements de gestion des bâtiments. L'investissement des entreprises pour ce type d'équipements est généralement significatif. La durée de vie de ces équipements est longue et leur renouvellement peut prendre plusieurs années. »

² Statement which is also shared by the ARCEP in its *Décision n° 2017-1568 (pg 21)*: « Les clients non résidentiels continuent à dupliquer leurs abonnements VLB par un accès RTC pour des questions de sécurisation de l'accès et l'utilisation d'équipements uniquement compatibles avec le RTC. Un grand nombre de clients non résidentiels conservent des équipements qui s'appuient sur des caractéristiques physiques spécifiques au RTC, notamment les standards téléphoniques traditionnels (PABX), des fax, ou des machines à affranchir. La durée de vie de ces équipements est longue et leur renouvellement peut prendre plusieurs d'années.

Aussi, certains clients non résidentiels bénéficiant d'offres sur RTC demeurent attachés à la technologie RTC, notamment du fait de l'absence de solution de contournement disponible à un coût raisonnable ou de délais non négligeables de déploiement de la solution de remplacement. Les coûts de migration vers une autre technologie pour ces acteurs peuvent ainsi être élevés. Les clients non résidentiels sont également structurellement plus réticents au changement que les clients résidentiels, car ils perçoivent le changement comme porteur de risques. Les risques perçus sont notamment les risques de déconnexion potentielle, de moindre joignabilité, une baisse de la qualité de service et des risques sur la sécurité, en particulier le risque d'intrusions malveillantes. »

any transition period before removing the current regulatory obligation (including the transparency obligation). In case Proximus' voluntary offer and the deregulation of this market are the preferred choice of the BIPT, we would need count on ex-post remedies in case of anti-competitive or discriminatory behaviors on this market. The Platform wants to remind the BIPT that court proceedings are overwhelming and that it takes a considerable amount of time to reach a decision, which implies legal and financial uncertainty for both: the alternative operators and the end-users.

For those reasons, the Platform considers that a premature removal of the current regulatory remedies (CS/CPS) without any review of the prices nor any transition period will be very detrimental to the market competition and to the end-users (be they consumers or business customers). The Platform would therefore strongly recommend the BIPT to reconsider its draft decision and look at the alternatives proposed by the Platform in the beginning of this response.

2. Call origination on the public telephone network provided at a fixed location (Market 2/2007)

The Platform disagrees with the analysis of the BIPT with respect to call origination services for non-geographic numbers ("gespreksopbouwdiensten voor niet-geografische nummers (VAS-diensten)") which leads to full relief of the regulation that was applicable to these call origination services. The Platform argues that Proximus still has dominance in the 0800/090x/070x call origination market as it has 44% market share, which might even increase. In addition to that, the Platform providers and service providers have no countervailing buying power. The BIPT has not considered any potential detrimental effect on the VAS market before deregulating, nor considered any measures to address such potential detrimental effects. Therefore, Platform requests BIPT to reconsider its analysis and proposes continued regulation.

The BIPT explains the market parties on the VAS services market in the following paragraphs:

- *235.3 De toegangsoperatoren maken het voor hun eindgebruikers mogelijk om de diensten met toegevoegde waarde te bereiken die via het netwerk van andere operatoren beschikbaar zijn. Daarbij verstrekken de deze operatoren een dienst voor het ophalen van oproepen (of ook gespreksopbouw of collecting) voor die andere operatoren. Alle operatoren verstrekken hierbij dus gespreksopbouw-diensten. [underlining by the Platform]*
- *235.4. De operatoren, (hierboven in de schematische voorstelling 'Platform providers' genoemd) die een service provider op hun netwerk hosten, geven de oproepen af. Deze platform providers beconcurreren elkaar om op hun netwerk service providers te hosten.*
- *235.5. De Service Providers zijn de verstrekkers van de diensten met toegevoegde waarde. Deze hebben een telefonie-abonnement met de Platform provider en hebben met deze laatste een contract afgesloten over de verdeling van de inkomsten.*

The Platform providers and service providers are dependent upon the originating operators to receive traffic from the end-users of the originating operators. In fact, the Platform providers and service providers do not have any buying power. This was found by the SEO research carried out in 2011 for ACM³:

"Het kiezen van een andere connectieroute levert geen onderhandelingsmacht op, omdat voor elke route gespreksopbouw van het opbouwend netwerk dient te worden afgenomen. Het multi-market contract levert in de praktijk waarschijnlijk geen onderhandelingsmacht op, omdat bij zowel de nummergebruiker

³ SEO economisch onderzoek, *Kopersmacht bij afname gespreksopbouw naar 0800-nummers*, maart 2011, pages 18, 19-24, 24-25.

als de telecomaandieder de afname van verschillende diensten los van elkaar staan. Het uitlokken van concurrentie tussen de netwerken door niet aankiesbaar te zijn voor de minst gunstige netwerken levert praktische bezwaren op en doet geen recht aan de doelstelling om voor het algemeen publiek toegankelijk te zijn.”

In paragraph 277, the BIPT mentions that Proximus has a market share of 44% in the origination market to VAS services and that the BIPT expects this market share to decrease. However, the BIPT does not substantiate a further decrease and Proximus' market share of 44% lies above the 40% threshold which is used as a criteria for dominance in European competition law (TFEU Article 102). The BIPT also does not analyse how the proposed deregulation could affect the development of the market share of Proximus and the market share of other operators, not only the access operators (as described in paragraph 235.3), but particularly also the Platform providers (paragraph 235.4) and service providers (paragraph 235.5).

Furthermore, The Platform questions the BIPT's statement that on the downstream retail market there are enough alternatives such as smartphone applications and SMS premium (paragraph 278) and the BIPT's conclusion that the call origination offers on the fixed networks are not integrated in the same market that the call origination offers on the mobile networks (paragraph 255). Because if BIPT is considering that the fixed and mobile call origination markets are two different markets, why then compare the services provided on those networks?

As the analysis is made without correctly acknowledging the dominance of Proximus and the absence of any countervailing buying power at the platform providers and service providers' side, the Platform also disagrees with the further analysis by BIPT and finds that the 3 criteria-test will need to be redone.

The BIPT also argues that there will be no effect of deregulation on the consumers (paragraph 236), or end-users (paragraph 280) as at the retail level a ceiling has been set:

- *236. De serviceproviders bepalen de retailprijs overeenkomstig het Koninklijk Besluit van 27 april 2007. Dit KB voorziet in prijsplafonds om de consument te beschermen die naar diensten met toegevoegde waarde belt. Die prijs wordt “below the line” vermeld op de factuur die de operatoren voor gespreksopbouw aan de eindgebruikers sturen. De operatoren voor gespreksopbouw houden een deel van de ontvangen retailprijs in terwijl het saldo moet worden verdeeld onder de overige spelers in de waardeketen (Proximus, gespreksafgifteoperator, service provider).*
- *280. Bovendien wordt de eindgebruiker niet benadeeld dankzij het Koninklijk Besluit van 24 maart 2009 tot wijziging van het koninklijk besluit van 27 april 2007 betreffende het beheer van de nationale nummeringsruimte tariefplafonds heeft vastgelegd.*

However, neither the consumer, nor the platform provider or service provider, is protected if in the wholesale market for call origination there is no regulation or if the only “regulation” is the retail tariff ceiling. If Proximus will be allowed to set its tariffs as it sees fit (perhaps at the retail level?), where can the platform providers and service provider go? Also, given the fact that the retail tariff is a “ceiling,” would Proximus be free to set tariffs to different platform and service providers in a discriminatory manner? For instance, could it have a low internal to Proximus tariff and a high tariff towards other operators?

The BIPT is proposing to annul the earlier obligations as in Table 2 : “obligations imposed according to the decision dated 11 August 2006 (i.e. access & interconnection for call origination, non-discrimination,

transparency, accounting separation, price control and cost-orientation)” on Proximus. However, the BIPT does not analyze whether annulment can or will lead to any detrimental effects on the market. It simply states in paragraph 287 that the market tends towards competition and takes into consideration that Proximus makes a statement on continuance of the service:

12.2. INTREKKING VAN DE VERPLICHTINGEN

- 284. *Het BIPT heeft hoger in dit besluit geconcludeerd dat de relevante markt voor gespreksopbouwdiensten voor het leveren van diensten met toegevoegde waarde op het telefoonnet niet langer voldoet aan alle drie criteria waaruit volgt dat deze markt niet langer in aanmerking komt voor ex-anteregulering. Bijgevolg worden de verplichtingen die eerder werden opgelegd aan Proximus als operator met een sterke machtspositie op de voormelde markt krachtens het besluit van het BIPT van 11 augustus 2006 opgeheven.*

12.3. OVERGANG VAN DE SECTORSPECIFIEKE REGULERING NAAR HET MEDEDINGINGSRECHT

- 285. *Artikel 16.3 van de Kaderrichtlijn bepaalt dat “Wanneer een nationale regelgevende instantie concludeert dat de markt daadwerkelijk concurrerend is, mag zij niet een van de specifieke wettelijke verplichtingen als beschreven in lid 2 opleggen of handhaven. Wanneer er reeds sectorspecifieke verplichtingen bestaan, trekt zij die verplichtingen van ondernemingen op die relevante markt in. Partijen die gevolgen ondervinden van het intrekken van die verplichtingen worden tijdig in kennis gesteld.”*
- 286. *De Groep van Europese Regulators (ERG), nu BEREC¹⁴⁴, opgericht krachtens de beschikking van de Europese Commissie van 22 juli 2007, heeft in mei 2009 een gemeenschappelijk standpunt gepubliceerd met betrekking tot de bepaling van de gepaste remedies¹⁴⁵. Dat document stelt dat “Wanneer wordt overwogen om een verplichting op te heffen, is het uiteraard nodig om er rekening mee te houden of de opheffing een materieel ongewenst effect kan hebben op de concurrentie op de relevante markt. Het is evenzeer nodig om het effect van die verplichting op verwante markten, voornamelijk stroomafwaarts, te bekijken. Het zou niet gepast zijn om verplichtingen op te heffen die een voorvereiste waren voor daadwerkelijke concurrentie op de verwante markt.”(underlying of the Platform]*
- 287. *Aangezien het BIPT vindt dat de markt neigt naar daadwerkelijke mededinging, acht het BIPT het niet nodig om een overgangsperiode op te leggen na de intrekking van de regulering. Er zou een addendum¹⁴⁶ aan het referentie-aanbod van Proximus worden toegevoegd waarin Proximus verklaart dat zij tot 31 december 2019 op vrijwillige basis de gespreksopbouw-diensten voor diensten met toegevoegde waarde aan dezelfde voorwaarden zal blijven uitvoeren, welke kan gelden als een overgangsperiode.*

The Platform finds that the BIPT has not considered the possible scenario’s in which access, non-discrimination and cost-orientation are annulled and the potential detrimental effect on platform providers, service providers and end-users (be they consumers or business customers). The analysis has simply not been done. In paragraph 286, the BIPT references to BEREC’s position that certain obligations cannot be annulled if they are specifically required to ensure competition on the market. However, the BIPT does not perform this required analysis. The Platform finds that such an analysis – if it were to be

carried out – would conclude to detrimental effects on platform providers, service providers and end-users, specifically with the annulment of access, cost-orientation and non-discrimination.

In paragraph 277, the market shares of the originating operators are shown. It is the smaller originating operators (acting also as operators or platform providers) that will have to buy a lot of originating calls from Proximus in order to serve the service-providers. These smaller operators (with less originating traffic or smaller market share) will have a lot of out-of-pocket costs since they have to buy origination from Proximus, as opposed to Proximus itself – having very little out-of-pocket costs. In a fully deregulated situation where Proximus is neither bound by cost-orientation, nor by non-discrimination, the smaller operators will be pushed out of the market if the Proximus tariff is high towards the smaller ones and low towards itself and/or operators with similar network size or symmetrical position.

The “guarantee” of Proximus can be read as a rather empty statement with all rights reserved:

The present addendum is valid until 31/12/2019 unless the market conditions change before. In that case Proximus reserves its right to review the present voluntary offer to take into account the new market conditions.

As the modelling for Fixed Termination Rates has just been finalized, with a one level tariff of Eurocent/minute of 0,103, it is unclear why origination FOA (Fixed Originating Access) (very similar network elements) is to be 10 times as expensive.

It must be noted that in other countries in the European Union, regulators have dealt with origination services in a way that guaranteed a form of cost-orientation and non-discrimination. An exception is the Netherlands, where the deregulation has led to a discriminatory situation that is in essence ending competition on the market for the platform providers and service providers.

Finally, the Platform considers that the BIPT’s conclusion that it is now in line with the EU Recommendation of 9 October 2014 on the relevant market (paragraph 283) is not appropriate as the market is not yet competitive. On the contrary, the Platform would refer to the footnote 37 (page 27) of the same EU Recommendation which clearly states that: *“The same logic could apply to wholesale remedies which are currently imposed in Market 1. As there may be a degree of variation across Member States in the pace of the expected or foreseeable market developments which underlie this finding at Union level, specific national circumstances may justify that an NRA could find that market 1 of the 2007 Recommendation or other retail markets related to market 2 of the 2007 Recommendation are not yet effectively competitive from a forward-looking perspective absent appropriate and proportionate wholesale remedies. NRAs could thus justify continuing ex ante regulatory intervention at wholesale level provided that the three-criteria test is satisfied in the national circumstances for the subsequent review period.”* The Platform considers that the 1st criteria is still met and suggests the BIPT to proceed to the analysis of the 2nd and 3rd criteria and to continue to impose the ex-ante remedies.

Conclusion

If BIPT were not to adjust its draft decision, the operators in Belgium will be left with complete regulatory and financial uncertainty as to the continuity of origination as a service, the height of the tariffs, possibilities for interoperability, competitive position (if non-discrimination is annulled). We thus urge BIPT to reconsider its decision. The Platform would also strongly recommend the BIPT to monitor very closely the evolution of the tariffs in this market and to take immediate action to avoid any re-monopolization of this market.