

# ACTIVE NETWORK SHARING IN BELGIUM: WHERE DO WE STAND?



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## I. INTRODUCTION

The two biggest Belgian mobile network operators (“MNOs”), historic operator Proximus and Orange, are joining forces on mobile telecoms infrastructure deployment by actively sharing their nationwide mobile networks.

On November 22, 2019, they signed a Multiple Operator Radio Access Network (MORAN) sharing agreement and a shareholder’s agreement creating a 50/50 joint venture (named MWingz) that will be in charge of planning, construction, and management of the parties’ radio access sites.

Proximus and Orange are therefore going beyond the regulatory obligation for Belgian MNOs to share passive infrastructure, such as mast sites, power or cooling systems, etc.

In addition, the cooperation not only aims at optimizing the parties’ current 2G, 3G, and 4G mobile networks, but also to jointly develop their future 5G infrastructures in Belgium.

Near the end of October 2019, after unsuccessful discussions on how to join the project, the third and smallest MNO, Telenet (a subsidiary of cable giant Liberty Global), filed a formal complaint with the Belgian Competition Authority (“BCA”).

Telenet argued that Proximus and Orange’s network sharing agreement infringes Article 101 of the Treaty on the Functioning of the European Union and Article IV.1 of the Belgian Code of Economic Law, which prohibit anticompetitive agreements.

According to Telenet, the network sharing agreement may negatively impact Belgium’s upcoming spectrum auction, as well as, more generally, competition on the Belgian mobile market.

Together with the formal complaint, Telenet filed a request for interim measures, demanding for the cooperation agreements between Proximus and Orange to be suspended pending the results of the BCA’s investigation. For this Telenet needed to convince the BCA that there was a *prima facie* case, i.e. a sufficiently plausible infringement to competition law (the exact expression in Belgian case law is “*not manifestly unreasonable*”), and that there was an urgent need to prevent its harmful consequences.

On January 8, 2020, the Competition College of the BCA (the deciding body of the BCA, as opposed to the Investigation and Prosecution Service, the investigative body of the BCA) ordered Proximus and Orange to suspend their cooperation for two months. This would allow Belgian telecoms regulator BIPT to provide a confidential and non-binding opinion on the case and tackle the most pressing concerns. The public version of the decision is heavily redacted.

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CPI Antitrust Chronicle January 2021

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Proximus and Orange have since moved forward with their cooperation.

The Investigation and Prosecution Service's investigation on the merits continues under strict confidentiality rules and no strict time limit. Its scope may exceed that of Telenet's complaint.

Proximus and Orange's public statements and the interim measures decision by the BCA, are the only publicly available documents to describe the project and the competition law issues that it may raise.

## II. THE PARTIES ENGAGED WITH PUBLIC AUTHORITIES AT AN EARLY STAGE

Proximus and Orange announced their plans in July 2019 when signing the term sheet for their cooperation.

They had engaged with the BCA and the BIPT shortly before to present their project.

The BCA has (*ex post*) jurisdiction on the agreements to investigate infringements to antitrust rules. BIPT was also involved because it is in charge of sector-specific (*ex ante*) regulation on the telecoms market and oversees spectrum auctions.

Proximus and Orange defended their project before BIPT and the BCA, in particular claiming that they would remain competitors with their own core networks and spectrum. They explained how they intended to fully comply with competition law. In particular, M'Wingz acts as an "*operational black box*" while the parties remain competitors in the Belgian mobile market. Safeguards are in place to prevent breaches of competition law in the context of the cooperation.

Proximus and Orange pointed at already existing network sharing agreements in Poland, the United Kingdom, and Greece.

They also emphasized the differences between their case and the active network sharing agreement between T-Mobile CZ, O2 CZ, and CETIN in the Czech Republic which is being challenged by European Commission's Directorate General for Competition ("DG COMP"). T-Mobile CZ, O2 CZ, and CETIN received DG COMP's statement of objections in August 2019.

A common feature between the two network sharing agreements is the substantial combined market share of the parties concerned (T-Mobile CZ, O2 CZ, and CETIN's have around three quarters of the Czech mobile market by subscribers).

However, Proximus and Orange claimed that the Czech and Belgian cases cannot be compared. The legal and regulatory framework in the Czech Republic is different from the one in Belgium, prices for mobile services in Belgium are relatively lower, which suggests a higher level of competition, and, contrary to Telenet, the third and smallest Czech MNO is not a strong fixed telecoms player.

Both the Investigation and Prosecution Service of the BCA and BIPT questioned the parties on their cooperation.

The Investigation and Prosecution Service also contacted the case team at DG COMP in charge of investigating the network sharing agreement in the Czech Republic.

In its written comments on the request for interim measures, BIPT explains that it expressed concerns regarding the effect of the cooperation and the governance of the JV, and that Proximus and Orange undertook to address these.



### III. THE COMPETITION COLLEGE OF THE BCA DISAGREED THAT THE NETWORK SHARING *PRIMA FACIE* LED PROXIMUS AND ORANGE TO COORDINATE ON THEIR FUTURE BIDS FOR SPECTRUM

Belgium is preparing for the auctioning of expiring 2G, 3G, and 4G spectrum rights in the 900 MHz, 1800 MHz and 2 GHz bands and for new usage rights for 5G spectrum in the 700 MHz, 1400 MHz and 3.6 GHz bands. The timing of the auction is still to be determined.

Telenet argued before the Competition College of the BCA that Proximus and Orange's cooperation should be suspended because the network sharing would inevitably result in Proximus and Orange aligning their future bidding behavior. In particular, in order to reduce costs, the parties would have an incentive to coordinate so that they would eventually hold contiguous frequency blocks to be used in the same radio units.

BIPT expressed concerns that certain clauses in the term sheet might impact Proximus and Orange's behavior during the auction.

Proximus and Orange maintained that their cooperation does not concern spectrum usage and that they remain fully independent in this respect. Their cooperation agreement sought to guarantee this independence. In particular, the agreements in place provide that no board meeting will be held during the course of an auction or bidding process.

The Investigation and Prosecution Service intervened to explain that at this preliminary stage (the investigation could take years) its findings did not confirm that only contiguous blocks of network could be used in a single radio unit. In addition, while recognizing the benefits of contiguous frequency blocks, there are technical solutions to circumvent the challenges posed by non-consecutive blocks of spectrum. Moreover, there are numerous parameters other than contiguousness that are at play for an optimized network.

The Competition College concluded that Telenet has not sufficiently substantiated its claim that it was "*not be manifestly unreasonable*" that the cooperation would lead the parties to coordinate during the spectrum auction.

For the Competition College it was not obvious that the parties' bidding decisions would be led by anything else than their own strategy, given that they would remain competitors in the Belgian mobile market.

The Competition College noted that in any case, if such collusion would result in the parties bidding less aggressively, this would benefit other bidders, while Telenet had not provided any indication that the parties could bid higher in an attempt to push Telenet out of the market.

Telenet also argued that the network sharing agreement between Proximus and Orange could pave the way for sharing spectrum in the future, or encourage reciprocal roaming. The prospective of such *fall back option* would allow Proximus and Orange to refrain from bidding aggressively during the upcoming spectrum auction.

However, the Competition College found that Telenet's claim was not substantiated. Nothing in the network sharing agreement encouraged such cooperation, nor did it seem to make it more likely compared to a situation in which the parties did not actively share their networks.

## IV. THE COMPETITION COLLEGE OF THE BCA AGREED THAT THERE IS A *PRIMA FACIE* CONCERN ON COMPETITION IN THE BELGIAN MOBILE MARKET

Telenet argued before the Competition College that Proximus and Orange's cooperation agreement should be suspended because it would inevitably lead to reduced competition on the Belgian mobile telecoms market.

The Competition College agreed that it was "*not manifestly unreasonable*" that the cooperation would result in a competitively sensitive information exchange and reduced competition in the Belgian mobile market.

### ***A. Doubts Remain on Possible Information Exchanges***

For Telenet, competitively sensitive information being exchanged between the parties could in particular affect the future spectrum auction, even if Orange and Proximus would not actually coordinate their bids. As spectrum planning is closely linked to network configuration, the parties would necessarily adapt their bidding behavior based on the information received while cooperating and maximize the synergies derived from the cooperation. The network sharing agreement would therefore increase the information asymmetry between Proximus and Orange on the one hand, and other bidders on the other hand.

Proximus and Orange maintained that their cooperation includes the necessary safeguards. In particular, a clean team was created which members have signed a non-disclosure agreement and have been given the choice, afterwards, to stay with Mwingz or work on activities unrelated to the network sharing agreement. The parties have also set up Chinese walls and prepared guidelines on information exchange. Mwingz will operate from a separate building, have a separate IT system, and will be regularly audited by an external lawyer.

The Investigation and Prosecution Service explained to the Competition College that it deemed these safeguards to be sufficient. It also noted that Mwingz would process the information on network deployment provided by the parties and only circulate it amongst the parties in the form of an operational plan. Therefore, the parties would not receive highly sensitive information on each other's future behavior, which could be problematic.

However, BIPT maintained its concerns regarding the governance of Mwingz and possible information exchanges. It had not been able to confirm that Proximus and Orange made all necessary modifications to their agreements in order to alleviate these concerns. This is because the shareholding and the network sharing agreement were signed just days before the hearing before the Competition College.

Although largely redacted, the Collège's decision on interim measures shows that it analyzed the final versions of the agreement and concluded that Proximus and Orange had not addressed all of BIPT's comments on their agreements.

### ***B. The Cooperation May Excessively Restrict Competition***

Proximus and Orange maintained that they will remain competitors despite their cooperation, keeping full ownership of their equipment, while remaining free to unilaterally invest in their infrastructure in order to differentiate, notably with regard to coverage and capacity.

Both parties also claimed to remain completely independent to determine their commercial strategy towards both their retail and wholesale customers. Each operator would continue to provide specific offers in terms of service and quality levels.

Without challenging these arguments, the Competition College concluded that it was "*not manifestly unreasonable*" to consider that the implementation of the cooperation might appreciably restrict competition between Proximus and Orange in the Belgian mobile market.

Firstly, the parties jointly account for a large part of the retail mobile market in Belgium i.e. 75 percent by revenue, of which 40-50 percent for Proximus. Market share considerations also played an important role in the European Commission's reasoning in the Czech case. The Competition College agreed that this made it likely that the cooperation would have anticompetitive effects.

Secondly, the cooperation has a wide scope in terms of technologies involved. BIPT expressed doubts on the necessity for Proximus and Orange to cooperate on their already fully rolled out 2G, 3G and 4G networks, and on their future 5G networks. Telenet argued that actively sharing networks with regard to these (legacy) technologies would significantly reduce competition on infrastructure between the parties. By contrast, the active network sharing agreement in the Czech Republic that DG COMP is challenging is “*without any prejudice to any future assessment of network agreements involving emerging technologies such as 5G, which may have very different characteristics [than current and legacy technologies]*” (DG COMP press release of August 7, 2019).

Thirdly, the Competition College acknowledged the argument that the cooperation raises prima facie concerns because it covers the whole territory of Belgium without differentiating between densely and less-densely populated areas. As also recognized by DG COMP in the Czech case, infrastructure-based competition is more feasible in densely populated areas, and network sharing harder to justify.

The Competition College also explained that, for the same reasons, the cooperation could restrict competition between Proximus and Orange on the one hand and between parties and third parties such as Telenet on the other hand. It also pointed to “*the uncertainty on the effect of decommissioning of sites and infrastructure pooling for third parties already on the market or wishing to enter the market.*”

The Competition College further held that it was “*not manifestly unreasonable*” to consider that MWingz’ management would try to steer the parties’ requirements to promote an optimal construction of the consolidated networks. The reasons for this remark are confidential.

Finally, the Competition College considered that it was impossible at this early stage to evaluate the possibility that the cooperation could benefit from an exemption based on efficiencies despite its anticompetitive effect. The Competition College nevertheless recognized that the cooperation between Proximus and Orange did not go as far as sharing core network or backhaul, and could allow for a faster roll out of 5G technology and better mobile coverage in rural areas.

### ***C. A Two-Month Suspension is Urgent, Necessary and Proportionate to Avoid Damage to the General Economic Interest***

Interim measures can only be granted if there is an urgent need. This can either be due to the risk of serious, immediate and hardly repairable damage to the complainant or to the risk of an important harm to the general economic interest. In addition, interim measures must be adequate to prevent the damage, and must not go beyond what is strictly necessary for this purpose.

After characterizing a prima facie case that Proximus and Orange’s network sharing agreement restricts competition, the Competition College established that the general economic interest argument was sufficiently important and seriously threatened by Proximus and Orange’s cooperation to justify imposing interim measures.

The Competition College also recognized that preserving infrastructure competition may also protect competition in the wholesale market and eventually MVNO’s abilities to compete. It further noted that it could not be excluded that the cooperation might raise barriers to entry on the Belgian mobile market while the entry of a fourth MNO to increase competition remains a sensitive issue in Belgium.

However, the Competition College considered that it would not be proportionate to suspend the cooperation until the BCA decides on the case, which could take years (as is the case for DG COMP’s investigation in the Czech case).

In order to strike a balance between the need to preserve competition and Proximus and Orange’s interest to move forward with their cooperation, the Competition College welcomed BIPT’s suggestion to suspend Proximus and Orange’s cooperation for two months during which period BIPT would finish reviewing the terms of the cooperation agreement and tackle the most pressing points of contention.

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