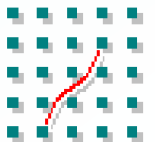


The test for economic regulation: three criteria and single or collective SMP

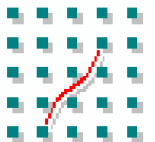
CLEC 9 December 2008

The Belgian NRA's experience



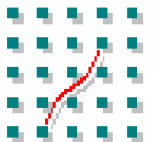
The three criteria test in BIPT decisions

- I. Problem of overlap between three criteria test and SMP assessment.**
- II. Sufficiency of three criteria test.**
- III. Market reviews where three criteria test was used**



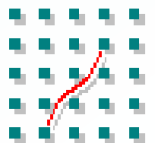
I. Problem of overlap between three criteria test and SMP assessment.⁽¹⁾

- In the first round of market analyses, the test was used:
 - to evaluate the need to regulate the retail Internet markets (outside the 2003 Recommendation)
 - for market 18 (cf. infra)
- The structure of the decisions:
 1. market definition;
 2. description and analysis of market situation and SMP assessment;
 3. definition of remedies (if market is found not to be competitive).



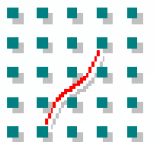
I. Problem of overlap between three criteria test and SMP assessment.(2)

- Second round : the BIPT has to review the retail telephony markets, outside the 2007 Recommendation.
- Where to insert the three criteria test ?
 - The most logical choice is after the market definition but
 - in order to ascertain whether the 1st and 2nd criterion are met, some indicators have to be investigated that are also needed when assessing whether there is an SMP on the market.
- Hence, the market reviews in question are structured as follows:
 1. market definition;
 2. description and analysis of market situation;
 3. three criteria test;
 4. SMP assessment (if three criteria are met);
 5. definition of remedies (if market is found not to be competitive).



II. Sufficiency of three criteria test.

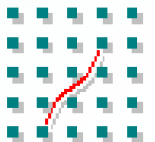
- For the time being, BIPT has not been carrying out a review of a market
 - that was found not to be competitive in the first round,
 - is not listed in the new Recommendation anymore
 - and for which BIPT envisages not to regulate it anymore and hence to lift all obligations.



III. Market reviews where three criteria test was used

1. Retail Internet Markets

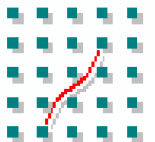
- Those markets were analysed:
 - as starting point of the analyse of the corresponding wholesale markets (11/03 and 12/03)
 - to evaluate the possible relevance of ex ante regulation
- 4 markets segments defined: narrowband residential & business, broadband residential & business
- Criteria considered: sunk costs, economies of scale & scope, control of infrastructure... = classical SMP criteria
- Conclusion:
 - no high and non-transitional entry barriers but high market shares of Belgacom and high retail prices
 - no ex ante regulation



III. Market reviews where three criteria test was used

2. Market 18

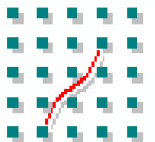
- Although the analysis of market 18 started before the 2007 Recommendation was adopted or even discussed, it would have to be notified to the European Commission after the publication of the 2007 Recommendation. Hence, it was decided to include the three criteria test in the draft decision.
- BIPT proved that the 4 market segments that it defined were not susceptible to ex ante regulation. They did not meet the 3rd criterion.



III. Market reviews where three criteria test was used

3. Second round Markets 3/03 and 5/03

- First round:
 - local and national telephone services on a fixed location (3/03 and 5/03) were found not to be competitive
 - international telephone services on a fixed location (4/03 and 6/03) were found competitive
- Therefore, markets 3 and 5 had to be reviewed again. Moreover, BIPT had to demonstrate that the three criteria were met if it thought that ex ante regulation was still needed on these markets.

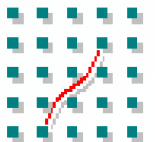


3. Markets 3/03 and 5/03 (1)

a) First criterion: high and non-transitory barriers to entry.

➤ What says the EC Recommendation ?

- European Commission Explanatory Note accompanying the 2007 Recommendation :
 - wholesale remedies like CS/CPS and WLR and the increasing availability of VoB has significantly lowered the barriers to entry and those that still exist, such as margin squeeze, could be tackled by competition law.
 - Only in new Member States where CS/CPS had been introduced recently or has remained ineffective so far, or where broadband penetration is low, it could still be acceptable to argue that wholesale remedies had not yet resulted in lowering the barriers to entry.

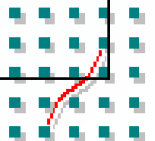


3. Markets 3/03 and 5/03 (2)

a) First criterion: high and non-transitory barriers to entry.

➤ The BIPT's approach

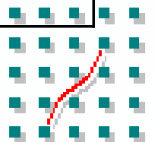
Indicator	Findings
legal and regulatory barriers	rights of way and procedures accompanying civil engineering, for operators deploying their own network
investments, economies of scale, sunk costs	investments are substantial for operators deploying their own network implying also large sunk costs
economies of scope	development of multiple play strategies makes it harder for a competitor that can only offer telephone services
vertical integration	<ul style="list-style-type: none">▪the growing success of unmetered services favours operators that can provide both telephone services and access to the detriment of operators offering CS/CPS, two stage dialling and VoIP unmanaged▪absence of WLR implies that incumbent retains a commercial influence on customers of CS/CPS providers and has lower acquisition costs
switching costs	<ul style="list-style-type: none">▪CS/CPS operators cannot offer a single bill to their customers;▪VoIP unmanaged providers cannot offer number portability or access to emergency services;▪business customers tend to be loyal to the incumbent (DataneWS)
declining market	bad perspectives for CS/CPS operators (declining number of activations, no recent entry)



3. Markets 3/03 and 5/03 (3)

➤ Overview barriers to entry

Types of entry barriers	Types of operators			
	Own access network	CSC/CPS	BRUO/BROBA	VoIP unmanaged
Legal or regulatory barriers	Yes – rights of way			Yes – limits in number portability
Investments, economies of scale, sunk costs	Yes		Yes	
Economies of scope				
Vertical Integration				
Switching costs		Yes – absence of single billing		Yes – limits in portability and access to emergency numbers
Others		Yes – declining market		

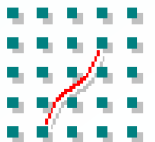


3. Markets 3/03 and 5/03 (4)

a) First criterion: high and non-transitory barriers to entry.

➤ Reaction of the NCA and the EC on the first criterion

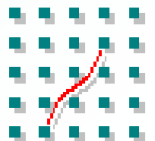
- The National Competition Council, submitted its Opinion on 8 September 2008:
 - in view of the narrow market definition (i.e. telephone services and access at a fixed location in distinct markets) it is unclear how BIPT reached the conclusion that the barriers to entry are high; although the NCA admits that the absence of WLR and the fact that alternative operators are unable to offer unmetered telephone services affect their attractiveness to consumers on a contracting market, it is still of the opinion that these arguments are not sufficient to conclude that there are high and non-transitory barriers to entry;
- The European Commission made the following comments in its letter of 20 October 2008:
 - against the background of decreasing market shares of the CS/CPS operators, the non-implementation of WLR and the low markets shares of VoB providers, no definite conclusion can be drawn whether or not wholesale regulation and VoB offers had lowered entry barriers to an extent that the first criterion is not met;



3. Markets 3/03 and 5/03 (5)

b) Second criterion: tendency toward effective competition.

Indicator	Findings
evolution of market concentration	<ul style="list-style-type: none">▪ number of operators is large, but many of them are small;▪ tendency to consolidation (Tele2/Versatel, Belgacom/Scarlet);▪ Herfindahl-Hirschman index increased between 2006 and 2007
evolution of market shares	<ul style="list-style-type: none">▪ telephone services by means of CS/CPS are on the decline;▪ Belgacom's market shares are stable on the residential market and increase on the business market
price evolution	<ul style="list-style-type: none">▪ the reduction of the MTR charges were not spontaneously and immediately passed through to the end user, even on the business market where countervailing buying power is deemed to be higher (see Beltug's barometer)▪ the retention margin on F2M calls grew from 2001 to 2008;

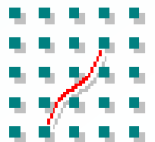


3. Markets 3/03 and 5/03 (6)

b) Second criterion: tendency toward effective competition.

➤ Reaction of the NCA and the EC on the second criterion

- The National Competition Council, submitted its Opinion on 8 September 2008:
 - No comments
- The European Commission made the following comments in its letter of 20 October 2008:
 - Neither the actual competition nor potential competition seemed able to exert a sufficient competitive check on the incumbent and price reductions were restricted or non existent in spite of reductions in wholesale call terminating charges and this may indicate that the market does not, at least in the short term, tend towards effective competition



3. Markets 3/03 and 5/03 (7)

c) Third criterion: relative effectiveness of competition law.

Indicator	Findings
timely intervention	The risk of excessive prices for F2M calls is real; an ex post intervention would be lengthy and is only possible after the finding of an infringement
price control	Sector regulator disposes of more appropriate means than the NCA, like ex ante tariff control. The continuous monitoring of retail tariffs falls outside the normal work of an NCA.

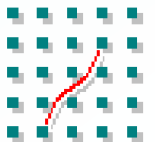


3. Markets 3/03 and 5/03 (8)

c) Third criterion: relative effectiveness of competition law.

➤ Reaction of the NCA and the EC on the second criterion

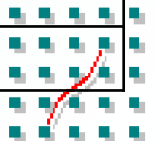
- The National Competition Council, submitted its Opinion on 8 September 2008:
 - No comments
- The European Commission made the following comments in its letter of 20 October 2008:
 - No comments



3. Markets 3/03 and 5/03 (9)

- The criteria used for the SMP-assessment were:

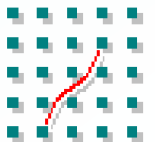
Criterion	Findings
market shares	Belgacom's market shares are stable or even increase
market concentration	Herfindahl-Hirschman Index rose on both markets in 2007
control of infrastructure	Belgacom has a capillar network that cannot be easily duplicated
economies of scale and scope	significant for Belgacom
vertical integration	Belgacom is a vertically integrated undertaking
Countervailing Buying Power	<ul style="list-style-type: none"> ▪residential and SOHO customers have virtually no bargaining power ▪the bargaining power of large companies, although stronger, still proved to be ineffective in lowering the F2M call rates
overall size of undertaking	Belgacom is a large company
easy or privileged access to capital and financial resources	Belgacom is an undertaking quoted at the stock exchange but so are many of its competitors
a highly developed distribution and sales network	Belgacom has an extended distribution and sales network on both the residential and business markets
product and services diversification	emergence of multiple play is an advantage for Belgacom against its competitors (except against cable operators)
barriers to expansion	the telephone service markets are shrinking



3. Markets 3/03 and 5/03 (10)

- The incumbent Belgacom was found to have SMP on both markets and the following remedies were imposed:

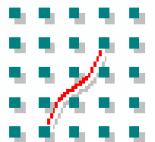
Remedy	Remarks
Retail price control	ban on: <ul style="list-style-type: none">▪ Excessive prices;▪ Predatory prices that restrict competition or inhibit market entry;▪ Undue preference to specific end-users.
Cost accounting	A cost accounting model to be approved by BIPT must be implemented by Belgacom
Transparency	<ul style="list-style-type: none">▪ Tariff plan modifications due to the change of fixed and mobile termination rates have to be submitted to BIPT one month in advance;▪ Monthly information on pass through of MTR reductions must be provided;▪ Other information has to be provided at BIPT's request.



3. Markets 3/03 and 5/03 (11)

- This is regulation with a lighter touch in comparison with the previous decision concerning these markets as the table below shows:

Remedy	Imposed in decision of		Remarks
	11/08/2006	06/11/2008	
Transparency	yes	yes	remedy lightened as not all information should be provided in advance, only changes due to FTR/MTR reductions
Accounting separation	yes	no	obligation withdrawn
Retail price control and cost accounting	yes	yes	remedy lightened as ban on bundled offers has been withdrawn



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