



# ***Merger control through the backdoor(s): the ex post review of non-notifiable transactions in the EU***

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***Views are strictly personal***

# Art. 22 EUMR

*- NCA perspective -*

## Art. 22 EUMR – *NCA perspective*

- Most referral requests based on information from Commission
  - BCA joined most Article 22 referral requests so far (since Illumina/Grail)
  - BCA considered taking the initiative in two cases but eventually refrained
    - In one case following separate exchanges with complainant, notifying party and Commission – unclear substantive test fulfilled, and access issue settled
    - One case based on information from ACM, dropped after exchange with Belgian target
- “Preliminary” market investigation/screening to support fulfilment of substantive criteria
  - Get a sense of the market dynamics, effects on domestic territory, effects on trade between Member States
  - Facilitated by documents submitted by the MS that initiated the referral, preliminary Commission’s analysis, availability of Commission for informal exchanges
  - Collects information about relevant domestic entities, competitors, customers, trade associations, both orally and in writing
  - Swift but informative screening of relevant parameters

# Towercast

***- Main takeaways -***

# Towercast – *principles*

- Article 102 TFUE is applicable to non-notifiable concentrations - “continuation” of *Continental Can* case law (6/72)
  - Non-notifiable at EU and national level, and not referred to under Art. 22 EUMR
  - Article 102 TFUE is primary law vs. Article 21(1) EUMR (governs scope of 2<sup>ary</sup> law)
  - Article 102 has direct effect – application not conditional on prior adoption of a procedural regulation – EUMR no impact on control at national level
  - EUMR implements 101 and 102 TFEU (through 103 TFEU) + recital 7 EUMR
- Concentrations may *as such* amount to an abuse of dominance
  - No separation requirement (i.e., abuse separate from the operation in question)
  - “*Any abuse*” by a dominant company is prohibited by Article 102 TFEU
  - List of practices and types of conduct “not exhaustive”
  - Conditions for an abuse of dominance need to be satisfied

# Towercast – *procedure*

- Procedural law of the Member States is applicable to concentrations with a non-EU dimension
- Regulation 1/2003 is not applicable to “concentrations”
  - Impact on Commission’s ability to run ex-post assessment under 102? → 105 TFEU?
  - Application of rules on cooperation?
- Priority to *ex ante* control for reasons of legal certainty
  - AG Kokott: *ex-ante* control as “special regime” of 101/102 implementation, *ex-post* control is “weaker” but valid instrument
  - AG Kokott: Article 102, like Article 22, aims to “*fill a gap in protection*” (‘killer acquisitions’ and ‘acquisitions in highly concentrated markets...where the aim...is to eliminate competitive pressure from an emerging competitor’)
- Risk of “double assessment”?
  - Not at issue – premise: “*no ex ante control...has been carried out*”
  - AG Kokott: legal certainty + legislative intent to exclude double assessment in principle

# Towercast – *substantive test*

- Concentrations abusive if “substantially impede competition”
  - “mere finding that...position has been strengthened” is not sufficient
  - “only undertakings whose behaviour depends on the dominant undertaking would remain on the market” (Continental Can, §26)

that market; and (iii) post-transaction, “only undertakings whose behavior depends on the dominant undertaking” must remain in the market. It is not clear, however, what this third condition means in practice and which legal test it applies.

- Continental Can (§§20, 21, 26, 29, 30):
  - Notion of abuse also refers to “changes in the structure of an undertaking” that are “detrimental...on an effective competition structure” - alteration of the supply structure “which seriously endangers the consumer’s freedom of action”
  - Not required that the transaction “eliminates all competition”
  - Relevant parameters: market share, relative position of competitors, buyer power, barriers to entry
- SIEC assessment (limited to strengthening of dominant position)
  - Theory of harm, counterfactual...
  - Closeness of competition, raises barriers to entry/expansion...

## Towercast – *remedies*

- No limitation in the scope of available remedies
- National law subject to the principles of equivalence and effectiveness
- AG Kokott: *“in views of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine”*
  - Context: dismisses undue encroachment over legal certainty – “the legal consequences resulting from the supplementary applicability of merger control law and Article 102 TFEU have far less impact on the implementation of concentrations and on legal certainty than what, for example, the Netherlands Government and TDF claim”
  - Context: Towercast complaint 13 months after TDF/Itas closing on 13 October 2016, SO 1.8 year after closing, still being litigated 7 years later



# Proximus/edpnet

***- Towercast in action -***

# Proximus/edpnet – *context* (1/4)

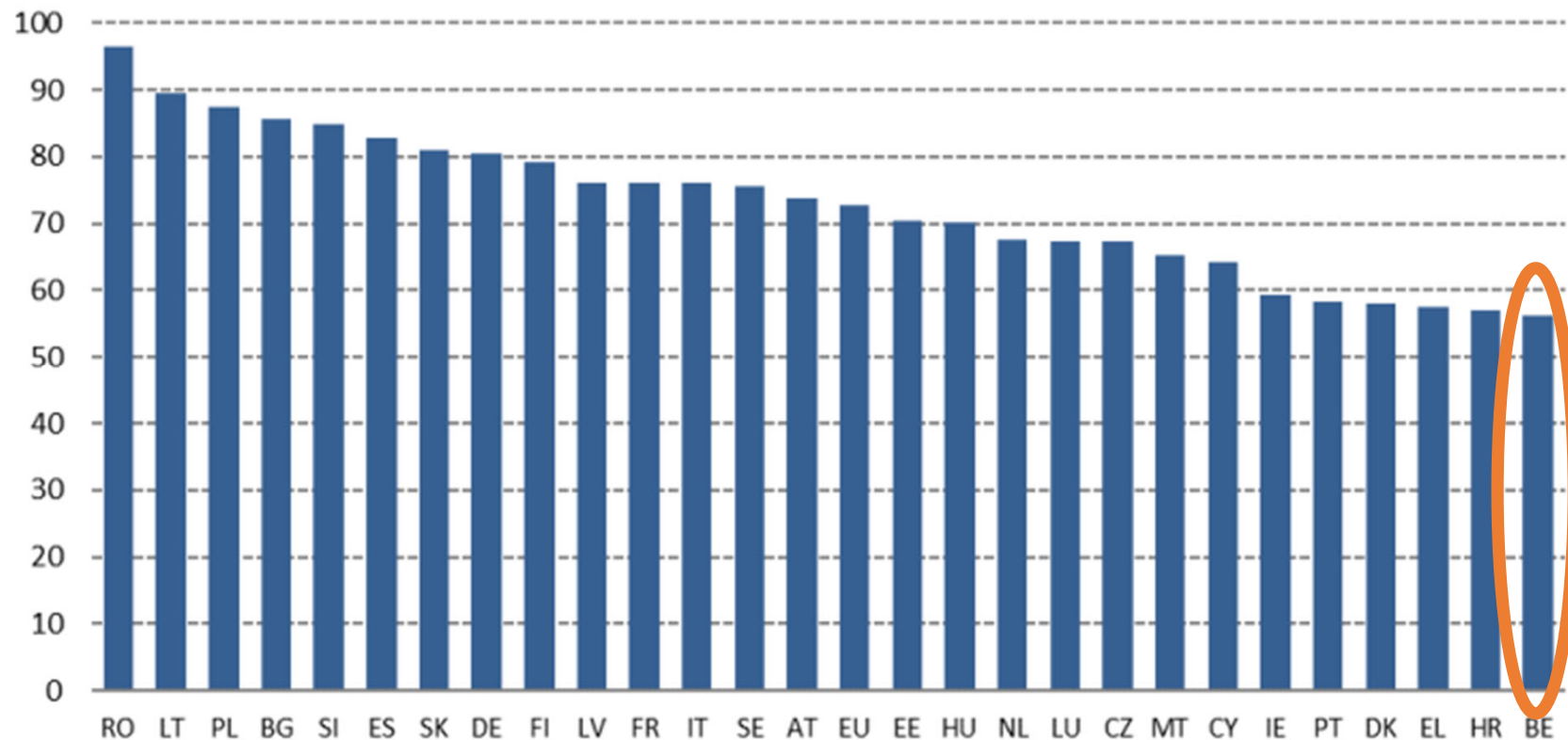
## **Takeover by incumbent telecommunications operator *Proximus* of assets of main/last alternative (non SMP) telecommunications operator *Edpnet***

- Edpnet is an operator active in the supply of broadband communications services in Belgium, which is currently undergoing a judicial reorganisation procedure
- Several offers for the assets of Edpnet have been submitted: the highest by the incumbent operator Proximus, the second one by new entrant Citymesh/DIGI
- The Belgian telecom regulator (BIPT) intervened before the insolvency court and shared concerns with the BCA that a takeover of Edpnet by Proximus would substantially impede competition in an already very concentrated market
- Given the limited size of Edpnet, national notification thresholds were not met
- By judgment of 21 March 2023, the Ghent Enterprise Court ordered in first instance the transfer of Edpnet's activities to Proximus
- The Court did not take into account the *Towercast* judgment (of 16 March 2023)

## Proximus/edpnet – *context* (2/4)

- Internet prices in Belgium: **the highest in Europe** (27th/27 in 2022)

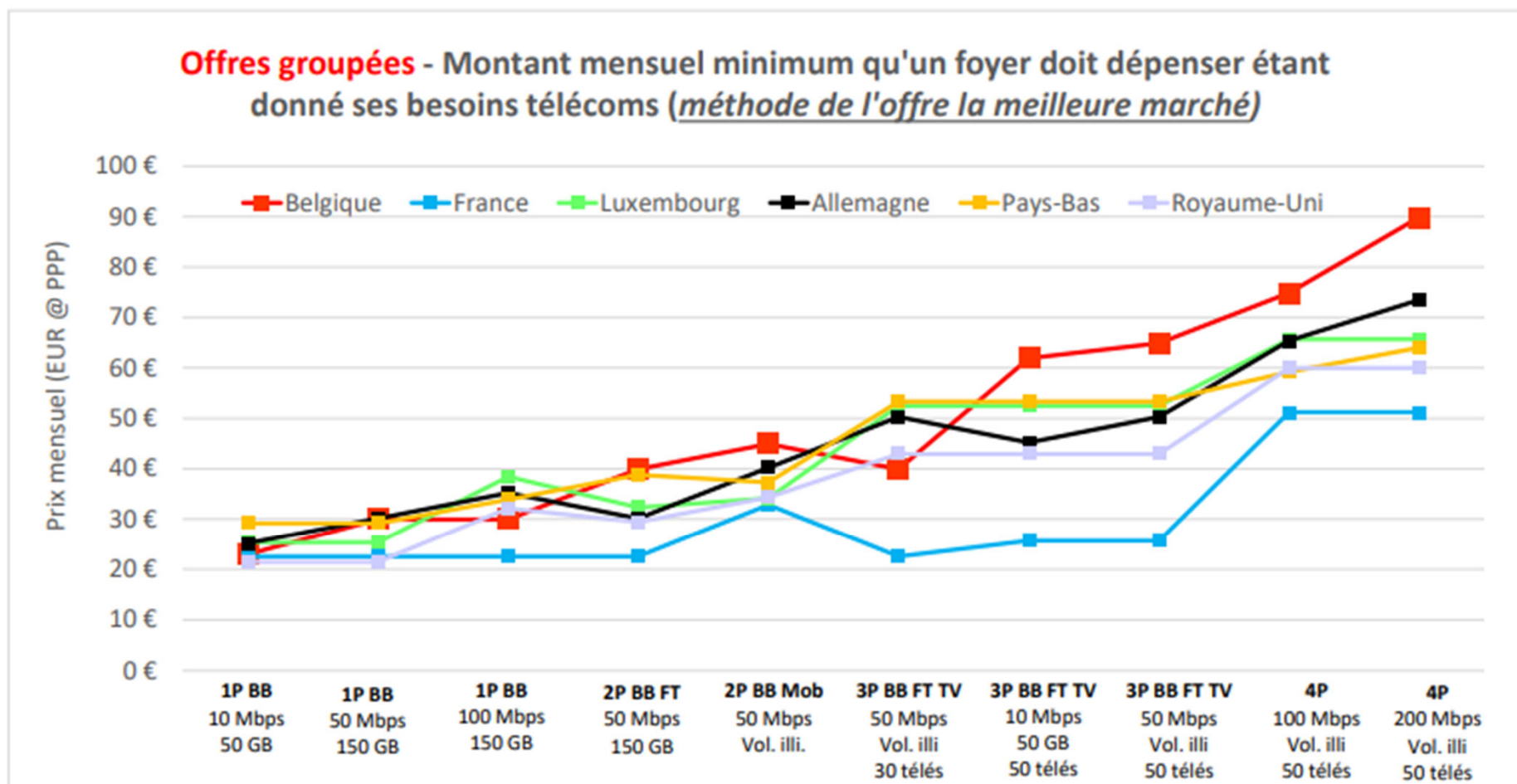
Figure 38 Broadband price index – all baskets (score 0-100, 100 meaning the lowest prices) 2021



Source: Commission, based on Empirica (Retail broadband prices study)

# Proximus/edpnet – *context* (3/4)

- Broadband prices in Belgium – spread with neighbouring countries:



# Proximus/edpnet – context (4/4)

In consumer, **our fiber commercialisation, pricing power, convergent strategy & premium content** drive growth



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## Fiber commercialization

- > +2pp market share gains in fiber zones after 12m<sup>1</sup>
- > >€7 ARPC uplift fiber vs. copper<sup>2</sup>



## Pricing power

- > Price indexations of €3-4 on internet in January '23



## Convergent strategy

**+60%**

Convergent customers in 22 Q3

- > >15% less churn across residential brands
- > >2X higher NPS for Proximus Brand



## Premium content to increase stickiness



Aggregated entertainment services



Aggregated relevant daily services

(1) Based on average market penetration difference between month 0 & month 12 after 2020 deployment, only considering digital customers; (2) RES + SE; Excluding impact of promotions

# Proximus/edpnet – *BCA procedure*

- 21 March 2023 (same day as judgment = existence of a “concentration”): opens proceedings based on serious indications of a possible breach of Article 102 TFEU and due to clarifications provided in Towercast judgment
- 22 March 2023: first request for information
- 22-31 March 2023: extensive engagement with Proximus
- 31 March 2023: closing of the concentration (effective transfer of assets)
- 12 April 2023: application for interim measures
- 11 May 2023: oral hearing in interim measures case
- 21 June 2023: decision granting interim measures based on *prima facie* finding of abuse of dominance on wholesale and retail broadband markets
  - Limited impact on legal certainty given timely intervention - willingness to carry out investigation under accelerated timetable

# Proximus/edpnet – *theory of harm* (WIP)

- Proximus dominant on broadband markets:
  - Wholesale market for fixed internet access on copper/fiber networks
  - Retail market – overall and/or possible segments (e.g., fiber)
- “Substantive impediment to competition”:
  - Removal of a significant competitive constraint:
    - Edpnet is (by far) the largest alternative operator providing fixed wholesale and fixed retail internet services based on copper/fiber networks (owned by Proximus), and a close competitor of Proximus' Scarlet and Mobile Viking brands
    - Edpnet offers fixed internet services at attractive prices, notably in the growing cord-cutting segment (single or double play with no TV) – favourite broadband supplier with best price/quality offerings based on consumers organization survey
  - Exclusion of new entrant Citymesh/DIGI:
    - Raise barriers to the entry and development of the fourth entrant, Citymesh/DIGI, in the provision of fixed internet and multiple play/convergence services

# Proximus/edpnet – *theory of harm* (WIP)

- Dependence of remaining competitors:
  - Edpnet as the largest/only effective alternative (non-SMP) supplier of broadband services, active at wholesale and retail level and on B2B and B2C segments
  - Remaining competitors:
    - Limited activity only at retail level on B2B segment
    - Relies on regulated access (no/limited added value)
- *Ex-post* merger control assessment:
  - Counterfactual : the most plausible counterfactual scenario is not an independent edpnet but an acquisition of edpnet by Citymesh/DIGI
    - Second highest bidder
    - Repayment of creditors, takeover of personnel
  - Possible outcome: possibility of structural remedy/divestiture preserved
  - Interim measures: closely modelled on the template divestiture remedies



## Proximus/edpnet – *interim findings*

- Proximus/edpnet transaction can be subject to ex-post review pursuant to Article 102 in accordance with *Towercast* judgment
  - Opening of proceedings was lawful
  - Request for interim measures was lawful
  - Interim measures can be imposed to prevent imminent and significant harm to effective competition & guarantee full effectiveness of Art. 102
- Situation amounts to *ex-post* merger control:
  - Supports similarity of situation with breach of standstill obligation
  - Supports reliance on counterfactual and Horizontal Merger Guidelines
  - Supports interim measures seeking to suspend operational integration pending review
- BCA not bound by insolvency court judgment and judicial reorganisation does not bar application of Article 102 TFEU

## Proximus/edpnet – *interim findings*

- Application of Article 102 TFUE to non-notifiable concentrations not necessarily limited to horizontal effects (non limitative character of notion of abuse)
  - *Obiter dictum*: “purchaser who is in a dominant position on a given market and who has acquired control of another undertaking on that market”
  - Continental Can, Towercast, Proximus/edpnet: horizontal situations
- Request for Article 22 referral not pre-requisite for application of Article 102 TFEU:
  - Margin of appreciation of NCA and Commission
  - Article 22 EUMR designed for cross-border/transnational concentrations vs domestic scope of Proximus/edpnet transaction
  - Complementarity of Article 102 and Article 22 EUMR
  - No breach of legal certainty given immediate intervention

# Proximus/edpnet – *interim findings*

- Interim measures: hold separate order
  - Designed on basis of EU “model divestiture commitments”
  - General obligations to preserve independence, viability and severability
  - Obligation not to seek confidential information
  - Appointment of hold separate manager
- Interim measures: supervision of monitoring trustee
  - Standard requirements of competence and independence
  - To be appointed within one month, subject to BCA approval
  - At the expenses of Proximus
  - General obligations of cooperation
- Interim measures: time limitation
  - 15 months, subject to reasoned request for extension
- Non-compliance: accelerated procedure and possible penalties

# Conclusions

- A more complex, or a more effective system?
- Ability to “*close gaps in the system of protection against distortions of competition which may result from corporate reorganisations*” based on existing law
- Focus on substantive effects rather than procedural/notification requirements
- Priority to *ex ante* over *ex post* review
- For a sub-set of cases involving the strengthening of a dominant position resulting in a substantial impediment to competition

**Questions?**