

Telenet and Fluvius submit a package of measures to the Belgian competition authority with a view to addressing concerns relating to fibre network rollout in Flanders

In June 2022, the Belgian Competition Authority (BCA) opened an ex-officio investigation into possible distortions of competition in the roll-out of fibre networks in Flanders. The investigation focused on alleged conflicts of interest arising from the setting up of a joint venture between telecommunications operator Telenet and public utilities company Fluvius, currently known as NetCo. After the BCA carried out a number of investigative steps and presented Telenet and Fluvius with the concerns raised by various stakeholders, Telenet and Fluvius submitted a package of binding measures aimed to meet these concerns. The BCA considers that these measures constitute a significant step towards reducing the risks of conflicts of interest in the roll-out of fiber networks in Flanders and has decided today to close its investigations into these matters. The BCA will nonetheless continue to monitor the sector closely, alongside the implementation of the measures undertaken by Telenet and Fluvius, and will cooperate with the European Commission in the merger control review of the setting up of NetCo.

In its press release of 17 June 2022 following the opening of the investigation, the BCA referred to the great importance of fair competition between the various telecommunications network operators and the existence and respect of a level-playing field for an efficient roll-out of fibre networks. The BCA stressed the important role of cities and municipalities in enabling the rolling out fibre networks as they are the authority empowered to grant the necessary public work permits. It is therefore important that cities and municipalities correctly apply the existing regulations and take decisions in full compliance with non-discrimination and fair competition principles.

In this context, concerns were specifically raised by third parties over the course of the BCA investigation in relation to the creation by Telenet and Fluvius of a joint venture company (NetCo) aimed to (i) combine all relevant fixed electronic communications network infrastructure currently owned or operated by each of them, and (ii) deploy and operate a mixed hybrid fibre-coaxial (HFC)-/Fiber-to-the-Premises (FttP) network within Telenet's current geographic footprint (i.e., mainly Flanders).

The implementation of this proposed transaction is subject to prior clearance by the European Commission pursuant to EU Regulation 129/2004 on the control of concentrations between undertakings ("EU Merger Regulation"). The European Commission has thus asserted jurisdiction to assess NetCo's impact on competition under the EU Merger Regulation.

According to various stakeholders, the setting up of NetCo would give rise to various conflicts of interests distorting competition in the roll-out of fiber networks, notably due to the indirect ownership of Fluvius by Flemish cities and municipalities responsible for the grant of public works permits, the unique position of Fluvius as network operator in the fields of energy, heating and water, and the interaction between Fluvius and telecommunications network operators in the framework of public work synergies.

After having been presented with the concerns in question, Telenet and Fluvius undertook a number of measures to address these concerns. While these measures have been adopted by Telenet and Fluvius on their own and are not subject to any formal approval by the BCA, they constitute relevant facts that have been carefully assessed and as a result of which the BCA has now concluded that the case does not constitute an enforcement priority anymore.

Consequently, 10 months after the opening of the investigation, the Investigation and Prosecution Service of the BCA has decided to discontinue the investigation on the basis of Art. 45, paragraph 1, 3° of the Code of Economic Law. However, the BCA will carefully monitor the implementation of the measures in question and will continue to follow closely the fibre network roll-out process as it unfolds on the ground.

In today's decision, the BCA has not taken a position as to whether or not Telenet and Fluvius have infringed competition law. Conversely, the measures undertaken by Telenet and Fluvius to address concerns raised in this matter, including any associated assumptions, statements and formulations, cannot be construed as binding on the BCA. The decision to discontinue the investigation also does not prevent the BCA prosecutor general from opening a new formal investigation in case of serious indications of possible competition law infringements, including in case of non-compliance with the measures taken by Telenet and Fluvius or in relation to similar or related issues. Likewise, concerns raised by third parties that are unrelated to the setting up of NetCo and thus falling outside of the scope of the present investigation, will remain under investigation. To that end, the BCA will continue to work closely with the BIPT (Belgian Institute for Postal Services and Telecommunications) as the competent sector regulator.

The binding measures undertaken by Telenet and Fluvius, valid for a seven year period, contain a number of amendments to the contractual arrangements entered into in connection with the establishment of NetCo, as well as obligations regarding the operation of NetCo and the interactions between Fluvius, NetCo, the relevant public authorities and other utilities. They consist, inter alia, in guaranteeing the operation of NetCo as an autonomous entity with related assurances that NetCo itself, independently of Fluvius and Telenet, will apply to cities and municipalities for the necessary public work permits and other regulatory approvals for the deployment of its HFC and/or FttP network. NetCo will also bear itself the costs of the rollout of its networks, including its own costs arising in the context of public work synergies. Fluvius will also refrain from interacting with cities and municipalities for or on behalf of NetCo and will explicitly and regularly communicate to cities and municipalities about the importance of maintaining a level playing field when granting permits for fibre deployment.

At the same time, a number of safeguards have been put in place with regard to information sharing between NetCo and Fluvius. Specific internal safeguards and firewall processes will be developed to prevent information on network deployment activities from being shared between NetCo and Fluvius, and vice-versa, subject to a number of exceptions such as, for example, information shared on non-discriminatory terms with other utilities for the purpose of coordinating civil engineering works. In addition, NetCo and Fluvius undertake to apply the GIPOD Decree and the Nuts Code in good faith and in accordance with applicable competition law principles. Fluvius and NetCo will further designate a central contact point for questions, comments or problems regarding the application of existing regulations. Generally, the implementation of the package of measures is also subject to an annual reporting to the BCA.

Today's decision will be available on the website of the Belgian Competition Authority.

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The Belgian Competition Authority (BCA) is an independent administrative authority that contributes to the definition and implementation of competition policy in Belgium. Concretely, the BCA pursues anti-competitive practices, such as cartels and abuses of a dominant position, and reviews the main merger operations. The BCA cooperates with the other competition authorities of the member states of the European Union and the European Commission within the European Competition Network (ECN)