



B I P T

**BELGIAN INSTITUTE FOR POSTAL SERVICES
AND TELECOMMUNICATIONS**

DECISION BY THE BIPT COUNCIL

OF 3 OCTOBER 2011

ON

**THE START OF THE PERIOD OF VALIDITY OF THE USER RIGHTS IN THE
2500-2690 MHz FREQUENCY BAND (4G LICENCE) FOR THE PROVISION OF
ELECTRONIC COMMUNICATIONS SERVICES ON THE BELGIAN TERRITORY**

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1. Background.

It is the first time that radio frequency user rights are put up for auction in the 2.6 GHz band (4G radio frequency user rights). Up to now, no operator has radio frequency user rights in the 2500-2690 MHz band in Belgium.

On 18 May 2011 the BIPT Council decided to invite applications.

The frequency blocks referred to both in Article 4, § 1 and in Article 4, § 4 of the Royal Decree of 22 December 2010 regarding radio access in the 2500-2690 MHz frequency band (hereafter the “4G Decree”) are put up for auction. If there are less than four candidates for the auction, the FDD blocks will be assigned in accordance with Article 4, § 2.

Already last year, it became clear that compatibility problems will occur between the LTE/WiMax networks in the 2500-2690 MHz band and the aeronautical radars in the 2700-2900 MHz band.

Following a study performed by Intersoft Electronics NV BIPT decided to publish a draft decision containing measures that have to be imposed in order to ensure coexistence between these radars and the LTE/WiMax networks. BIPT attached a great deal of importance to the practical feasibility of these conditions, both in technical and financial terms.

This is an indicative timetable for the approval process of the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz-band (hereafter the “4G radar decision”):

Consultation of a draft decision	1 July 2011
Answers to the consultation	5 August 2011
Publication final decision	1 October
Submission of the applications for the 4G auction	14 October 2011
Notification of the results of the 4G auction	22 December 2011

2. Problem definition.

The radars in the 2700-2900 MHz band will be adapted in order to comply with the conditions imposed in the BIPT decision (installation of filters, change of frequency). These adaptations require some time: it will take until the middle of 2013 before all radars will have been adapted.

The response to the draft 4G radar decision shows that without bearing excessive expenses specifically relating to this transition period, the 2500-2690 MHz band will be nearly unusable in certain parts of the country during that time.

Therefore, the operators are faced with an auction of bands that will not become fully available until quite some time after the auction has ended.

BIPT proposes to counter these drawbacks by postponing the start of the user rights’ period of validity until 1 July 2012. For the operators this measure means a saving of the unique fee for a period of about six months and gives them a little more breathing space to take the necessary measures to implement the 4G radar decision. In addition, this measure has no effect on the total proceeds of the auction.

3. Legal analysis.

- (1) Article 35, §§ 1-2 of the 4G Decree stipulates that BIPT grants user rights and at the same time notifies the balance due.

Article 36 of the 4G Decree stipulates that the terms of payment correspond with the provisions of Article 30 of the Act on electronic communications.

Article 3 of the 4G Decree also needs to be mentioned. This article stipulates that the user rights are valid for a maximum of 15 years starting from the date of their notification.

These provisions say nothing about the starting date of the user rights' period of validity. In the memorandum nothing is mentioned about this either.

Therefore, nothing seems to prevent BIPT from granting user rights that are not immediately valid and regarding which it motivates such a decision. BIPT is allowed to have the period of validity start a few months after the end of the auction.

A difficulty might arise from Article 3 of the 4G Decree. A literal reading of the text implies that the 15 years' period starts from the date of notification of the rights, even if the rights cannot be exercised yet. This is a very formalistic approach, but anyhow, that is what the text says. It is correct, however, that in the report to the King a user rights' period of 15 years is mentioned.

- (2) Article 30, § 1/1 of the Act on electronic communications stipulates that upon the start of the user rights' period of validity operators need to pay a fee among other things. § 1/3 lays down that payment is made within 15 days following the start of the period of validity.

Payment cannot be required before the period of validity has started.

Taking account of the elements above, nothing seems to stand in the way of BIPT deciding that the user rights' period of validity does not start immediately at the time of granting the rights, but 6 months later. BIPT feels that this 6 month period meets the objections made by a number of operators, which were sent to BIPT in answer to the consultation on the 4G radar decision.

Delaying the starting point any longer than that would raise too many problems. Indeed, the operators need to be able to carry out tests and any operators wishing nonetheless to roll out the network in areas that are unconcerned (such as the cities of Antwerp or Ghent, or the province of Hainaut) should have the possibility of putting the frequencies acquired into operation. In addition this would also mean a de facto delay of the development of the mobile 4G broadband networks on the market (for which Belgium already does not score too well in Europe). Moreover, Belgium is already too late in implementing Commission Decision 2008/477/EC of 13 June 2008 on the harmonisation of the 2 500-2 690 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Community.

Also the payment will then be postponed until the start of the user rights' period of validity. Moreover, Article 3 of the 4G Decree calls for prudence. For safety's sake it is preferable not to notify the rights immediately after the auction, but to wait for 6 months before notifying them (which would not prevent a publication of the auction results). Indeed, according to Article 3 of the 4G Decree, it is this notification that makes the 15 year period start.

It should be pointed out that this is not really the solution as proposed in the draft decision of 1 July 2011. That draft says that the 4G operators can exercise their rights until 1 July 2013. Yet,

when exercising these rights they have to make sure not to exceed a maximum radiation level. What is suggested now, however, is the total absence of exercising the rights during a specific period. BIPT does not think this is contradictory, as the rights cannot be exercised until the start of the period of validity.

BIPT attaches great importance to ensuring that the market is well informed about the solution chosen. If it is decided that the start of the rights' period of validity (and the payment) is postponed for 6 months, the market has to be informed, and in such a way that the candidates can participate in the auction with perfect knowledge of the situation.

4. Cooperation agreement.

In accordance with the procedure described in Sections 1 and 2 of Article 3 of the Cooperation agreement of 17 November 2006 a draft decision is sent to the community regulators:

"Art. 3. Each draft decision of a regulatory body relating to electronic communications networks shall be sent by that body to the other regulatory bodies, listed in Article 2, 2°, of this Cooperation agreement.

The regulatory bodies that are consulted, shall send their comments to the regulatory body that has sent the draft decision within fourteen calendar days. (...)"

BIPT has received a response from the VRM and the Medienrat which have no objection against the decision. No response was received from the CSA.

5. Public consultation

5.1 Telenet's contribution of 12 September 2011

[confidential]

5.2 Mobistar's contribution of 12 September 2011

Mobistar casts doubt on the measure proposed by BIPT, considering that it will not offer a solution to the technical and financial uncertainties concerning the evolution of the 4G network, and it bases itself specifically on its contribution of 5 August 2011 regarding BIPT's draft decision on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.

In the table below BIPT summarises Mobistar's arguments and its own reactions to them.

<u>Issues raised by Mobistar</u>	<u>Reaction from BIPT</u>
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<p>BIPT has failed to carry out an impact study about a possible degradation of the 4G networks due to the radars.</p>	<p>This is an argument that has already come up within the framework of the public consultation about the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.</p> <p>Therefore, BIPT refers to that decision.</p>
<p>BIPT has failed to transmit the data asked to the operators, in order to carry out such a study.</p>	<p>This is an argument that has already come up within the framework of the public consultation about the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.</p> <p>Therefore, BIPT refers to that decision.</p>
<p>The measures proposed by BIPT in the decision mentioned above are inadequate: indeed, they are proposed following a study performed by Intersoft Electronic, which is incomplete, even incorrect, according to the majority of players involved in these two bands.</p>	<p>This is an argument that has already come up within the framework of the public consultation about the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.</p> <p>Therefore, BIPT refers to that decision.</p>
<p>The measures proposed by BIPT in the decision mentioned above are inadequate: there is no guarantee whatsoever about the effectiveness of the measures proposed in that decision. Indeed, Mobistar claims that BIPT does not have the means, nor the authority to impose those measures on Belgocontrol or the Ministry of Defence, nor to take punitive action. Mobistar is also worried that Belgocontrol or the Ministry of Defence do not comply with the decision mentioned above as far as radars are concerned installed before 1 January 2006 as to the relevant international standards, which only apply to radars installed after that date.</p>	<p>As to BIPT's means and authority the relevant BIPT decisions are applicable to all players involved, as is the case in any matters where BIPT intervenes by virtue of the law or on behalf of the King.</p> <p>BIPT has all usefull legal means to guarantee the effective implementation of its decisions and it will not hesitate to use them when necessary.</p> <p>As to the radars installed before 1 January 2006 this is an argument that has already come up within the framework of the public consultation about the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.</p> <p>Therefore, BIPT refers to that decision.</p>
<p>The measures proposed by BIPT in the decision mentioned above are inadequate: Mobistar is of the opinion that also the efficiency of the measures mentioned in the decision above is uncertain, mainly because of the inadequacy of the Intersoft Electronic study, but it also bases itself on the fact that in the BIPT draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band BIPT stated that interference</p>	<p>This is an argument that has already come up within the framework of the public consultation about the draft decision of 1 July 2011 on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.</p> <p>Therefore, BIPT refers to that decision.</p>

could not be excluded despite the measures imposed.	
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Mobistar draws the following conclusions from the arguments summarised above:

- a. The impossibility for Mobistar to determine the value of the radio frequency user rights in the 2500-2690 MHz band, constituting a breach of Article 13 of the Authorisation Directive.
- b. The fact that Mobistar is unable to use the rights to be acquired before 1 July 2013, whereas the unique fee will be due as from 1 July 2012.
- c. The obligation to pay the annual fees for use of the spectrum for the entire country, whereas the frequencies will be usable for only a small geographic area of the country.
- d. The user rights' period of validity (or at least the starting date) cannot be defined validly with respect to Article 5 of the Authorisation Directive.

Mobistar therefore asks to postpone the date of submission of the bids for the 4G licences, in order to be able to amend the 4G Royal Decree relating to the use of the bands put up for auction (based on reliable studies), the user rights' maximum period of validity (determined in accordance with the depreciation of the investment) and the amount of the annual fees for the provision (which will have to allow for an economic value of these frequencies, adapted to the operational limitations and possibilities resulting from the requirements regarding prevention of interference).

Mobistar also takes the view that this postponement asked will enable it to obtain the sufficient information needed to make a bid in a proportionate and objective manner with a view to optimum use of the spectrum.

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Considering the reaction given above to Mobistar's arguments, either in this decision or in the decision on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band, BIPT cannot agree with the conclusions drawn by Mobistar:

- a. At the time of the auction the operators will have all useful elements at their disposal to determine the value of the user rights for the radio frequencies in the 2500-2690 MHz band.
- b. Contrary to what Mobistar claims, this decision combined with the decision on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band will definitely allow effective use of the spectrum as soon as the 4G network is developed.
- c. This obligation is a direct consequence of the 4G Royal Decree, which stipulates that the annual fees are due as soon as a station has been put into use. BIPT is under an obligation to apply the prevailing laws and regulations.
- d. On the contrary, the 4G Royal Decree and this decision make it possible to determine the user rights' period of validity exactly.

BIPT cannot agree with Mobistar's arguments, conclusions and requests, and therefore, postponing the auction of the 4G licences is not being considered.

Additionally, as to a postponement beyond July 2012, the fact that within a large area the frequencies will not be usable for a year, by no means prevents the start of the roll-out, in order to be operational in July 2013. In other words, it is normal and common that one starts to pay

the fees for the frequencies, even if they are not “operational” yet. BIPT will not submit a proposal to the King to amend the 4G Royal Decree. Apart from the fact that it does not see the use thereof, considering the reaction given to Mobistar’s arguments, BIPT does not have the authority.

That is why BIPT maintains its proposals regarding the postponement of the date of notification and use of the spectrum that will be allocated through the auction of the 4G licences until 1 July 2012.

5.3 Belgacom’s contribution of 12 September 2011

Belgacom refers to its contribution of 5 August 2011 regarding BIPT’s draft decision on the coexistence between 4G operators in the 2500-2690 MHz band and radars in the 2700-2900 MHz band.

Based on analyses made Belgacom claims that the use of the 2.6 GHz spectrum will be very limited until the radars will have been adapted.

Therefore, Belgacom has no objections to make against the BIPT proposal to postpone the starting date for the use of the 2.6 GHz spectrum until 1 July 2012, provided that also the BIPT proposal to postpone the notification of these user rights until that same date is accepted.

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BIPT takes note of Belgacom’s acceptance of these proposals.

6. Decision.

In accordance with the 4G Decree, BIPT decides that:

- 1) the results of the auction of the 4G user rights will be notified immediately after the end of the auction;
- 2) the notification of the 4G user rights will take place on 1 July 2012;
- 3) as a consequence, the user rights’ 15 year period of validity is to start on 1 July 2012;
- 4) in accordance with Article 30 of the ECA the operators have to pay a unique fee before 16 July 2012.

7. Appeal procedures.

According to the Act of 17 January 2003 on the appeals and the settling of lawsuits following the Act of 17 January 2003 on the status of the regulator of the Belgian postal and

telecommunications sectors you have the possibility to lodge an appeal with the Brussels Court of Appeal, Poelaertplein 1, 1000 Brussels. Under penalty of nullity pronounced ex officio the appeal shall be lodged by means of a signed application filed with the court registry of the Brussels Court of Appeal within sixty days following the notification of the decision or in the absence of a notification, following the publication of the decision or in the absence of a publication, following the inspection of the decision.

The application shall be filed with the court registry of the Court of Appeal in as many copies as there are parties involved. Under penalty of nullity the appeal shall contain the statements of Article 2, § 2, of the Act of 17 January 2003 on the appeals and the settling of lawsuits following the Act of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors.

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