

B I P T

**BELGIAN INSTITUTE FOR POSTAL SERVICES
AND TELECOMMUNICATIONS**

**CONSULTATION OF 23 MAY 2014 REQUESTED BY BIPT COUNCIL
REGARDING ITS DRAFT COMMUNICATION ABOUT
THE OBLIGATION TO NOTIFY ONESELF AS AN OPERATOR TO BIPT**

TO RESPOND TO THIS DOCUMENT

Deadline: Until 25 June 2014
Method used to answer: Mail to: consult09@ibpt.be
Reference: "Consult-2014-E9"

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Answers can only be sent by e-mail.

BIPT also requests that the comments made refer to the paragraphs and/or parts they are dealing with. Confidential parts in the document should be indicated clearly.

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Purpose of the communication

The purpose of this communication is to explain the notion of "operator" as well as the hypotheses in which a person has to submit a notification to BIPT as an operator.

This communication is not exhaustive and will evolve according to the specific cases BIPT will be confronted with, the feedback from stakeholders and the need to study certain notions in depth.

This communication is based on the principles that apply. This does not exclude the fact that in some specific cases BIPT may still adopt ad hoc decisions.

Legal framework

Paragraphs 1, 5 and 6 of Article 9¹ of the Act of 13 June 2005 on electronic communications (hereafter "the Act") read as follows:

"§ 1. The provision or resale in one's proper name and on one's own behalf of electronic communications services or networks shall only be started, without prejudice to the provisions of Article 39, after notification submitted to the Institute [...]"

§ 5. The notification referred to in §1 is not required in case of provision or resale of electronic communications services or networks which are not in the public domain.

§ 6. The notification referred to in §1 is not required for provision or resale of electronic communications services or networks exclusively intended for a legal entity, in which the provider or the reseller has a majority shareholding, or intended for natural or legal persons in the framework of a convention according to which the electronic communications services or networks are available secondarily and only by way of assistance."

Article 2² of the Act includes, inter alia, the following definitions:

"3° "electronic communications network" means transmission systems and, where applicable, switching equipment or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed terrestrial networks (circuit- and packet-switched, including Internet), mobile terrestrial networks, and electricity cable systems, to the extent that they are used for the purpose of transmitting signals, other than signals for radio and television broadcasting;

4° "provision of an electronic communications network" means the construction, operation, control or availability of such an electronic communications network;

5° "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance, including switching and routing operations, of signals on electronic communications networks, but does not include (a) services providing, or exercising editorial control over, content transmitted using electronic communications networks and services and (b) information society services, as defined in Article 2 of the Act of 11 March 2003 regarding certain legal aspects of information society services, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks, and (c) radio and television broadcasting."

¹ It is the consolidated version of this Article which takes into account the successive modifications of this Article.

² Idem

Overview of the principles

In accordance with Article 9 of the Act, people providing or reselling in their proper names and on their own behalfs electronic communications services and/or networks have to submit a notification to BIPT as operators (first paragraph of Article 9), unless they can be exempted based on paragraphs 5 and 6 of Article 9.

Article 9, § 1 of the Act refers to:

- the provision or resale of electronic communications **networks**;
- the provision or resale of electronic communications **services**; or
- the provision or resale of electronic communications **networks and services**.

In certain cases, a notification to BIPT as an operator is required from several parties. For example, a person has to submit a notification to BIPT as an operator for the provision of an electronic communications network and another person for the provision of an electronic communications service based on the above-mentioned network.

A person who is exempted based on Article 9, §§ 5 and 6 of the Act is not obliged to submit a notification to BIPT as an operator. A notification can, however, be submitted on a voluntary basis to benefit from the rights the operators derive from the legislation. But it also entails that the obligations imposed to operators by the legislation have to be complied with.

BIPT only has competence for electronic communications networks established in Belgium and for electronic communications services provided or resold in Belgium.

Article 9 of the Act makes no provision for an exemption in case of occasional provision or resale of electronic communications services or networks (for example, the provision of Wi-Fi during major events), so that even in these cases, a notification to BIPT as an operator is required.

Analysis of the principles

On the basis of the principles set out in the previous section, BIPT has defined a series of questions thanks to which it is possible to determine whether a notification to BIPT as an operator is required.

Electronic communications networks

Figure 1 is a model of the questions regarding the notification obligation as an operator of an electronic communications network.

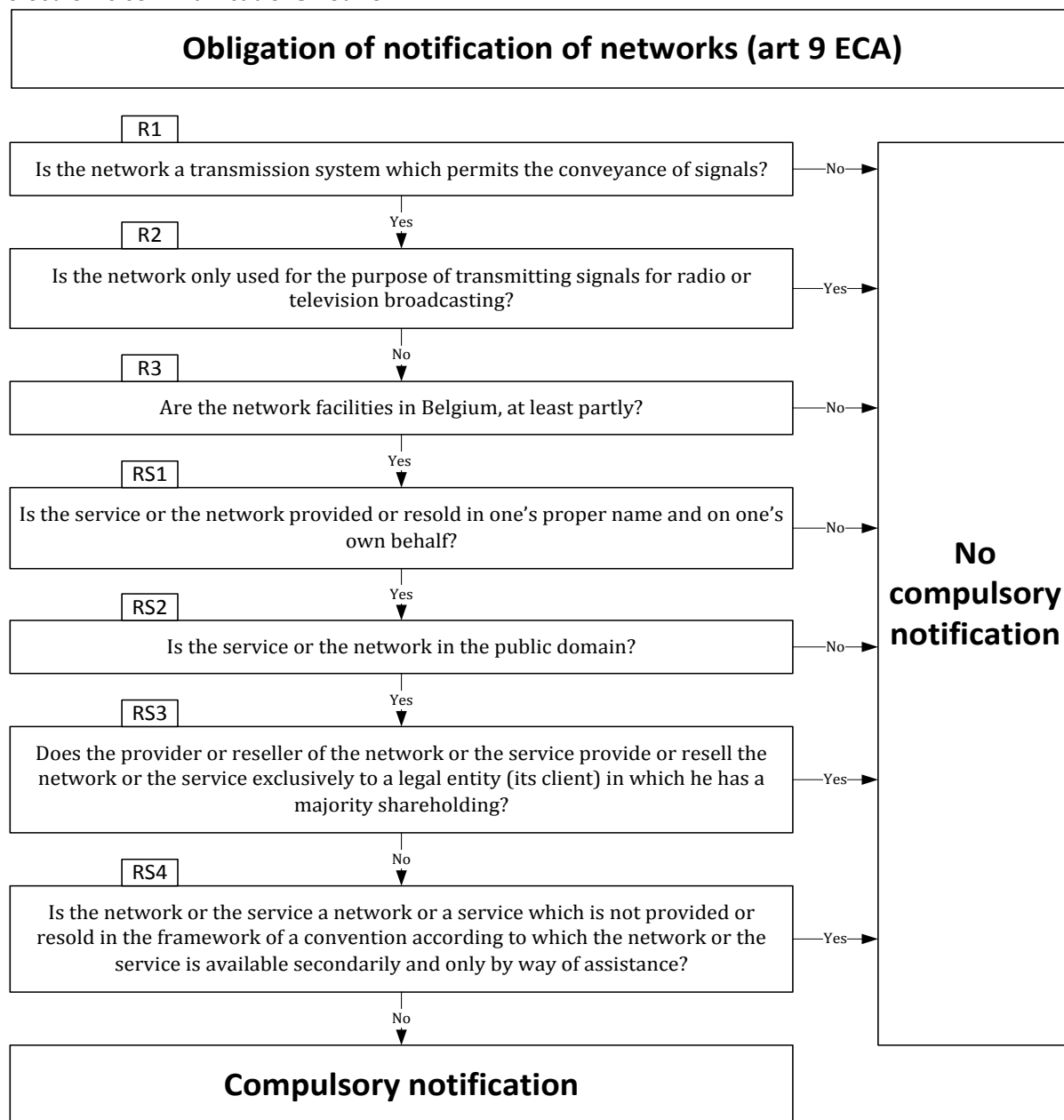


Figure 1 - Electronic communications networks notification

R stands for the abbreviation of a question specific to networks and RS stands for the abbreviation of a question that applies to electronic communications networks as well as to services.

Electronic communications services

Figure 2 is a model of the questions regarding the notification obligation as an operator of electronic communications services.

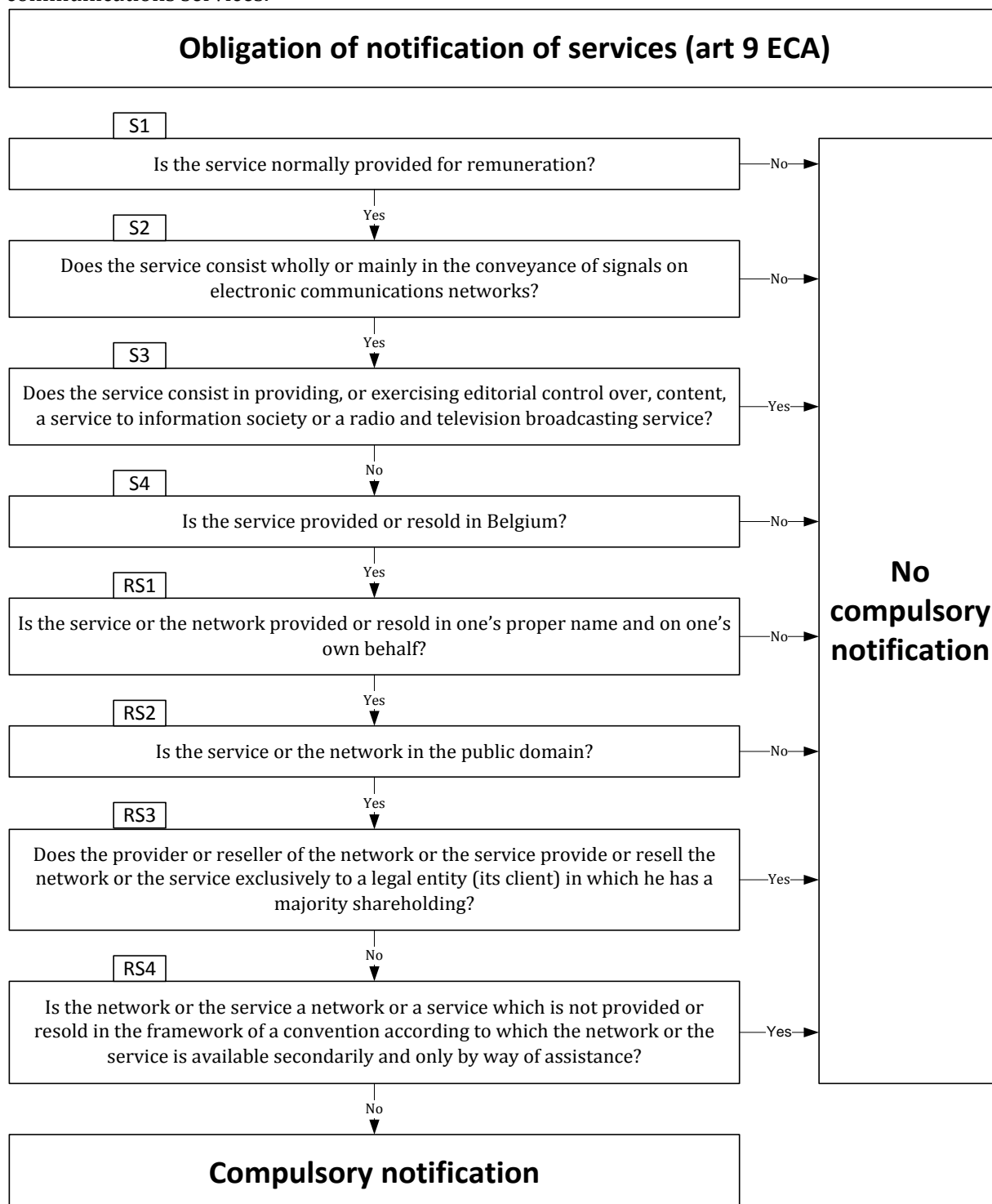


Figure 2 - Electronic communications services notification

S stands for the abbreviation of a question specific to services and RS stands for the abbreviation of a question that applies to electronic communications networks as well as to services.

Illustration of the principles

Examples of answers regarding the concept of "electronic communications network"

- R1. *Is the network a transmission system which permits the conveyance of signals?*
The architecture can be based on, for example, cables (copper or fibre), radio waves, optical means and other electromagnetic means, including satellite networks, fixed terrestrial networks (circuit- and packet-switched, including Internet), mobile terrestrial networks, and electricity cable systems.
- R2. *Is the network only used for the purpose of transmitting signals for radio or television broadcasting?*
As soon as a network is used for the purpose of transmitting signals other than signals for radio and television broadcasting, the answer to that question is no.
- R3. *Are the network facilities in Belgium, at least partly?*
An operator having its registered office in Belgium but no network, wholly or partly, on Belgian soil is not obliged to submit a notification as an operator. For instance, a satellite telephone service provider having no facilities (earth stations for instance) in Belgium is not obliged to submit a notification as a network operator because its network is in space, which is outside the scope of Belgian jurisdiction.

Examples of answers regarding the concept of "electronic communications service"

- S1. *Is the service normally provided for remuneration?*
The answer is yes as soon as a direct or indirect remuneration has been received for the service. For instance, it can be a drink in a café offering an Internet access (Wi-Fi), an advertising banner on a website, charges paid by the inhabitants of a city. Therefore, if a service is free of charge for the end-user, it does not necessarily mean that the electronic communications service is not remunerated.
- S2. *Does the service consist wholly or mainly in the conveyance of signals on electronic communications networks?*
Telephony and Internet access are typical examples of services based on the conveyance of signals.
- S3. *Does the service consist in providing, or exercising editorial control over, content, a service to information society or a radio and television broadcasting service?*
The person who provides website hosting is not obliged to submit a notification to BIPT as an operator.
- S4. *Is the service provided or resold in Belgium?*
An operator having its registered office in Belgium but providing no service on Belgian soil is not obliged to submit a notification as an operator. An operator having no registered office in Belgium and providing a service available on Belgian soil has to submit a notification as an operator, even if the contract with the end-user is concluded abroad (via Internet for instance).

Examples of answers regarding the concept of "electronic communications network and service"

RS1. *Is the service or the network provided or resold in one's proper name and on one's own behalf?*
One's proper name means name or brand.

RS2. *Is the service or the network in the public domain?*
The concept of public domain includes in any case the public road. Therefore, and for illustrative purposes, a municipality offering permanently or temporarily a wireless Internet access (Wi-Fi) on the public road has to submit a notification to BIPT as an operator.

Libraries, hotels, cafés, shopping centres are for instance not in the public domain. The concept of public domain will be explained in a later version of this communication.

Besides, the legislator did not want to exempt from the application of the Act the provision or resale by an operator of an electronic communications network or service in the private domain or in the private property of a third party (for instance the provision of Wi-Fi in a bank, an airport or a commercial complex).

RS3. *Does the provider or reseller of the network or the service provide or resell the network or the service exclusively to a legal entity (its client) in which he has a majority shareholding?*

The answer to this question is yes for instance for the electronic communications services and networks provided in the context of a financial group, namely a parent company to its subsidiary or subsidiaries³.

RS4. *Is the network or the service a network or a service which is not provided or resold in the framework of a convention according to which the network or the service is available secondarily and only by way of assistance?*

In this case, a convention where the main objective is not the provision of the electronic communications network or service is needed between the two parties

The answer to that question is yes for example for:

- *"the electronic communications services and networks offered in the context of a cooperation between independent people, for instance a group practice or an association of lawyers"*⁴.
- *"networks or services intended to be used by members of a group of companies or of a cooperative society, networks for handling insurance claims between (re)insurers, secured networks for exchanging financial information, a network of a university and associated organisations, a bank and its freelance agents, companies placing their IT activities in a separate company"*⁵

³ Parliamentary Documents, Chamber, Doc 51, 2518/007, p. 3-4

⁴ Parliamentary Documents, Chamber, Doc 51, 2518/007, p. 3-4

⁵ Parliamentary Documents, Chamber, Doc 51, 2873/002, p. 1-2