



The Director

Brussels,
CNECT.B.1.001

Dear Sir,

I refer to your letter of 18 August 2018 in which you voice concerns regarding the impartiality of the consortium of Bird & Bird and Ecorys, which has been assigned the contract to prepare a study on the implementation of the net neutrality provisions of the Telecoms Single Market Regulation (SMART 2017/0011).

While you acknowledge the legal expertise and experience of Bird & Bird, you express concerns about awarding the study to a consortium in which this law firm participates for the reason that it has represented telecom operators in net neutrality cases. The involvement of Bird & Bird in net neutrality litigation would in your view undermine its independence and impartiality in conducting the study and would cast doubt as to the credibility and the validity of its results. For this reason you request a written confirmation of the impartiality of the study including a list of all measures taken by the Commission and Bird & Bird to ensure the independence of the evaluators and the quality of the report. Moreover, you urge the Commission to include in its future tenders provisions regarding conflict of interest so as to prevent organisations representing the specific interests of parties directly affected by the legislation under evaluation or that are actively involved in a legal conflict about the interpretation of said legislation from being awarded studies evaluating EU legislation. Lastly, you urge the Commission to presents a balanced report based on the findings of Bird & Bird.

The European Commission carried out an open selection procedure in view of awarding a contract to prepare a study on the implementation of the net neutrality provisions of the Telecoms Single Market Regulation. The tender procedure followed the relevant practice for such contracts, under which there is no such clause regarding conflict of interest, which would prevent applicants having been or being involved in cases in the area of the

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study to apply for it. On the contrary, it would normally be considered an advantage that an applicant has relevant experience, which it could bring into the study. Furthermore, exclusion from the tender of applicants with involvement in the field would not only reduce the candidates for the study, but would also limit their profile, to applicants with only theoretical knowledge.

Nevertheless, Bird & Bird and Ecorys are subject to the provisions of the European Commission's General Conditions for the Service Contract of January 2016 (hereinafter, "*General Conditions*"), which form an integral part of the contract in question. These General Conditions are laid down in the model contract, which has been provided with the tendering documents, published in eTed. Article II.7. on Conflict of Interest and Professional Conflicting Interests is particularly pertinent to the concerns that you have raised. Under these provisions, the contractor is legally obliged to, *inter alia*, 'take all the necessary measures to prevent any situation of *conflict of interest* or *professional conflicting interest*' and 'notify the contracting authority in writing as soon as possible of any situation that could constitute a *conflict of interest* or a *professional conflicting interest* during the *perforce of the contract*. The contractor must immediately take action to rectify situation'. Should the contractor fail to honour to these contractual obligations, the European Commission may have the grounds to terminate the contract as stipulated in Article II.18.1.(h) of the General Conditions.

Bird & Bird and Ecorys (hereafter: the Consortium) are not part of a group of stakeholders subject to the net neutrality rules, but are experts in the field of legislation and regulation of the TMT sectors and provide policy research and advice in these sectors. They have made the Commission services aware that they both supported/advised or are still supporting/advising one or several stakeholder groups. However, the Consortium has taken the following measures to ensure that these relations do not influence the impartiality of those involved in the study in any way and the quality and objectivity of the analysis:

- (i) Lawyers/advisors from the Bird & Bird/Ecorys project team are not to be involved in any proceedings in relation to net neutrality disputes and not to be involved in such proceedings until a year after submission of the final report. All information and data in relation to the Study is to be kept in a secured file accessible only by the project team of lawyers/advisors from the Consortium that has been working on the Report.
- (ii) The Report is to be transparent about any reported cases in which other lawyers/advisors of the Bird & Bird/Ecorys Consortium have been or are involved.
- (iii) The Bird & Bird lawyers are bound by and should comply with, the professional rules on integrity, independence and client confidentiality applicable in the countries in which they practice and are regulated by the bar (or equivalent) in those countries. In addition Bird & Bird is subject to the Code of Conduct for European Lawyers. Ecorys is bound to quality standards specified in its quality handbook, which is monitored as part of its ISO 9001 certification.

In addition to these measures, the methodology for conducting the study should also ensure that its results are objective and verifiable:

- (i) The study report should be fact-based, drawing on public information, non-anonymous information that interviewees have shared with the contractor for inclusion in the Report and results from a survey. The Report of the Study should also be fully transparent, identifying the source of every statement and presenting all findings from all data sources. The contractors will have to make available to the Commission all data

from the data collection phase, including minutes of the interviews reviewed by the interviewees and the results of the surveys.

(ii) The NRAs of all EU Member States and of Norway should be given the opportunity to check that the facts and reported cases and case law in the relevant Member State section are correct and complete.

(iii) The contractors should hold interviews with representatives of all stakeholder groups, in particular umbrella organisations, reflecting as much as possible the various views and interests within these groups. The surveys should target all stakeholder groups, offering a balanced view of the stakeholder opinions.

(iv) The draft Report should be reviewed by three independent experts.

From the Commission side, the study is supervised by a team of four policy officers with many years of experience in managing studies. They have been instructed to pay particular attention to verifying the objectivity and impartiality of the study report. Their role is to ensure that the study meets the quality standards. Only in such a case will the final report be approved.

Furthermore, the study should not prejudge in any respect the outcome of the Commission's report. It should express the views of the contractors and report on the opinions of the stakeholders that have contributed to it, but should not reflect the opinion of the European Commission. It should be an important, but not the only input to the Commission report. As you know, BEREC is preparing its own report on the assessment of its Guidelines. The Commission services will also take into account relevant literature, administrative practice, case-law, and are also planning to carry out a public consultation after the holiday period.

I would like to reassure you that the Commission services take your concerns seriously. I trust that the information provided in this letter should help to alleviate your concerns.

Yours faithfully,

Anthony Whelan