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Institut Belge des services postaux
et des télécommunications (IBPT)

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1030 Bruxelles
Belgium

For the attention of:
Mr. Eric Van Heesvelde
Président du Conseil

Fax: +32 2 226 88 41

Dear Mr. Van Heesvelde,

Subject: Case BE/2009/0949: Wholesale Unbundled Access (Including Shared Access) to Metallic Loops and Sub-Loops for the Purpose of Providing Broadband and Voice Services

Case BE/2009/0950: Wholesale Broadband Access

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. PROCEDURE

On 24 July 2009, the Commission registered a notification from the Belgian regulatory authority, Institut Belge des services postaux et des télécommunications (IBPT), concerning the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops and the market for wholesale broadband access in Belgium.

The national public consultation² ran from 15 July 2009 to 6 August 2009.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs) and the Commission may make comments on notified draft measures to the NRA concerned.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

² In accordance with Article 6 of the Framework Directive.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

The market for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services and the market for wholesale broadband access in Belgium³ were previously analysed under case numbers BE/2007/0735-736⁴.

IBPT's decision of 10 January 2008 on Markets 11 and 12 (Cases BE/2007/735-736) was annulled by the Belgian Court of Appeal on 7 May 2009 for reason of insufficient motivation. Overall, the judgment qualified that decision as characterised by a "quasi-total lack of up-to-date facts on the state of potential competition at the moment IBPT took its decision in 2008" and a "manifest lack of investigation and analysis".

With regard to the market for the provision of unbundled access (Market 11), the Court approved IBPT's market definition and market analysis, but rejected a number of the imposed remedies for lack of justification, proportionality and motivation.

As to bitstream (Market 12), the Court approved the market definition but did not accept IBPT's analysis, specifically, on the grounds that the NRA had not made a proper analysis of the indirect constraints exerted by cable companies on Belgacom. The Court also criticised the fact that IBPT's analysis had not been based on a proper modified Greenfield approach, in the sense that it had not taken into account the impact of the regulation of ULL on the assessment of the competitive conditions prevailing in the bitstream market. The Court therefore found that IBPT had failed to provide a sound and reliable analysis demonstrating Belgacom's ability to behave independently from its wholesale clients and retail competitors. As a result, the Court annulled Belgacom's designation as an undertaking having a dominant position on the bitstream market. Consequently the imposed remedies were annulled as well.

The judgment has caused major legal and economic uncertainty for the alternative operators in the market, since the majority of the measures that ensure wholesale access have been annulled with retroactive effect. This is in particular the case for bitstream which is the key input for alternative operators in the Belgian market.

A recently adopted federal law allows IBPT, under exceptional circumstances, to issue new decisions with retroactive effects in case one of its previous decisions has been annulled. In order to restore economic and legal certainty for the alternative operators, IBPT has therefore produced a new decision that aims to remedy the lack of motivation in the market analysis and for the annulled remedies (hereinafter referred to as "New Decision"). The New Decision will have a retroactive effect up to 10 January 2008.

³ Listed as markets 11 and 12 of the Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for ex ante regulation in accordance with the Framework Directive, OJ L 114, 8.5.2003, p. 45. (the Recommendation)

⁴ These notifications were amended by a third notification assessed under reference number BE/2008/0801 which aimed at addressing the problems raised by the planned replacement of the incumbent's ATM/xDSL network by an NGN/NGA (VDSL) network. This measure concerns only the remedies.

II.2 Market definition

Wholesale unbundled access (including shared access) to metallic loops and sub-loops

As the Court did not contest the market definition, the changes are limited to an update of the market data relevant to this section. As such, the product market definition continues to exclude optical fibre networks (FTTH/FTTB)⁵ and the market is considered to be national in scope.

Wholesale broadband access

IBPT's conclusions remain unchanged and the relevant market thus includes ADSL, SDSL and VDSL. Cable networks, resale products and leased lines are not included in the market. The Court did also not challenge IBPT's finding that the market for wholesale broadband access is national in scope. IBPT has provided up-to-date factual evidence that supports its conclusions.

II.3 Finding of SMP

Wholesale unbundled access (including shared access) to metallic loops and sub-loops

IBPT confirms its (uncontested) finding that Belgacom has a 100% share in the unbundled access market, having provided an update of the market data.

Wholesale broadband access

IBPT maintains its finding that Belgacom has a 100% share in the market for wholesale broadband access. Self supply is not taken into account since cable networks are not included in the market definition and local loop unbundling remains very limited in Belgium.

The Court annulled the finding of SMP sustaining that IBPT had not applied a Greenfield-based analysis of market 12 and consequently had not sufficiently motivated the need for bitstream regulation. The Court found that IBPT should have investigated whether adapting the wholesale price of bitstream, in order to promote the uptake of LLU, would not have improved the market 12 conditions through new entry of LLU and backhaul-based players. IBPT has countered this criticism by referring to the concept of the ladder of investment. Given (i) the characteristics of demand in the retail market, (ii) the limited roll-out of LLU, (iii) Belgacom's move to an all-IP platform and (iv) the subsequent inability of alternative operators to recoup future LLU investments, IBPT concludes that unbundled access and bitstream access can and must coexist in the Belgian market and that it is inappropriate to rely on unbundled access as the sole wholesale remedy to increase competition in the downstream retail markets.

As to the Court's finding that IBPT's decision had failed to take into account the indirect pricing constraint that is exerted by cable on Belgacom in the bitstream market, IBPT improved its motivation in particular with regard to the methodology applied. Updated market data confirms that retail prices have remained stable over time and that the cost of the wholesale input remains a relatively limited part of the retail price, which confirms IBPT's position that the indirect pricing constraint that is exerted by cable on Belgacom cannot call into question the SMP finding.

⁵ In case BE/2007/0735 the Commission services did not object to IBPT's assertion that access to the NGN access network is not part of the market for wholesale unbundled access to the local loop. Nevertheless, the Commission invited IBPT to reassess the market conditions in view of guaranteeing a level playing field in the future NGN environment.

Accordingly, IBPT restates its finding that Belgacom has SMP in the market for wholesale broadband access in Belgium.

II.4 Regulatory Remedies

Wholesale unbundled access (including shared access) to metallic loops and sub-loops

Since the Court considered some regulatory obligations to be unjustified, the regulator focused on substantiating the following three issues: (i) geographic differentiation of the access remedy, (ii) prohibition to withdraw previously granted access without the prior consent of IBPT and (iii) sub-loop unbundling.

Following the criticism⁶ of the Brussels Court of Appeal in respect of the geographic non-differentiation of the access remedy, IBPT substantiates why it considers such a geographic differentiation to be unjustified. According to the regulator, it is impossible to choose valid criteria when defining unbundled and non-unbundled areas⁷. IBPT concludes that any non-unbundled area can become unbundled. IBPT also explains that the obligation to offer unbundling throughout the whole national territory, including local exchanges for which unbundling has not been demanded at this stage, does not have an impact on Belgacom's investments and operations⁸. The regulator therefore considers the access remedy with national coverage to be proportionate.

As to the previously imposed prohibition to withdraw previously granted access without the prior consent of IBPT, the regulator proposes to alter this remedy, in order to meet the Court's objections⁹. IBPT therefore distinguishes between (i) withdrawal of access due to the interruption of services and/or incumbent's network migration, and (ii) withdrawal of access due to non-respect of contractual terms by other operators. In the former case, IBPT's authorisation is still needed¹⁰, while in the latter the regulator should only be informed of the planned withdrawals¹¹.

Arguing that sub-loop unbundling was inefficient and unfeasible, the Court considered the obligation to provide it to be unjustified. Consequently, in the current notification, IBPT further substantiates this remedy. It explains that since sub-loop unbundling is the immediate step following LLU on the ladder of investment, the obligation of sub-loop

⁶ In its decision of 10 January 2008, IBPT imposed an access remedy on Belgacom's local loop that is applicable throughout Belgium without distinction between unbundled and non-unbundled areas.

⁷ Whether the purchase of an unbundling service will provide a viable business case in a specific area depends on various factors including population density, number of clients linked to LEX, interest of final users for specific services and type of services that might be offered through LLU.

⁸ This assumption is based on the fact that Belgacom i) provides the service once it has received a specific demand from an alternative operator and ii) charges costs-oriented tariffs to operators requesting unbundling.

⁹ According to the Court, this obligation is contrary to common law in that it infringes the incumbent's contractual rights.

¹⁰ IBPT specifies (p.132 of the New Decision) that Belgacom should not interrupt access without having previously informed both alternative operators and IBPT. IBPT further explains (p.140 of the same document) that consequences of access interruption are too important in order to allow the incumbent to take such decision without authorisation. It further details that it could authorise withdrawal of access under particular conditions, without hindering competition.

¹¹ Belgacom should in parallel notify alternative operators of the withdrawal of access at least 15 days before the planned day of interruption.

unbundling is an appropriate means for stimulating competition.¹² The regulator argues that without ensuring access to sub-loops, it would be difficult for alternative operators to achieve the critical number of clients permitting to cover their fixed costs. Furthermore, IBPT does not expect an increase in the number of sub-loop access points¹³. Finally, the NRA considers this remedy to be proportionate since while it does not imply preliminary costs for the incumbent, it prevents obstacles to new market entry.

Wholesale broadband access

As the Court had annulled the SMP analysis, it had consequently also annulled the imposed remedies. IBPT reintroduces the remedies and applies the same modifications to the modalities of the remedies as explained for market 11.

III. COMMENTS

The Commission has examined the notification and largely restates its previous¹⁴ comments¹⁵:

Promotion of investment on infrastructure in relation to wholesale unbundled access (including shared access) to the local loop and competition at the retail level

The Commission acknowledges that in the Belgian retail broadband market, the relevance of cable operators in the respective areas of coverage varies across the country. Nevertheless, the market structure at the retail level has remained rather stable over the last years, which is also reflected in a high degree of stability of retail prices over time. This phenomenon is also supported by IBPT's finding that the cost of the wholesale input represents about [...]% of the retail price which would point to the existence of significant margins and high retail prices in comparison to other EU Member States¹⁶. Consequently, the currently available market data does not point towards differentiated competitive conditions to an extent that would justify a delineation of sub-national markets. However, the Commission invites IBPT to examine in the national context the reasons for the high retail prices for broadband services in Belgium especially in relation to the significant margins existing between the wholesale inputs and the relevant retail products.

¹² IBPT bases its reasoning on the fact that the European regulatory framework promotes infrastructure competition as far as possible in the network and that it is the regulators' duty to stimulate such a competition by creating incentives for operators willing to invest in their own infrastructure and/or migrate from local exchange to street cabinet.

¹³ When making its assessment, IBPT, while foreseeing a reasonable growth for alternative operators, considers the current low number of sub-loop access points as well as the costs of equipments currently available in the market. IBPT also considers it inappropriate to identify those sites because of the fact that feasibility of unbundling depends on i) business plan elements that might differ from one operator to another, and ii) conditions that might change with the development of new business models and/or appearance of more adapted equipments in terms of capacity and costs.

¹⁴ Relating to BE/2007/0735- 0736.

¹⁵ In accordance with Article 7(3) of the Framework Directive.

¹⁶ As indicated by IBPT in page 72 of the notification document and in the additional information submitted in the response to the request for information.

One reason for the rather stagnant retail competition could be the fact that the Belgian market is characterised by a low presence of operators relying on local loop unbundling. In this respect, it is worth noting that although local loop unbundling has started to grow in 2006, it remained at a low level in 2007¹⁷, and has stagnated since then. IBPT believes that this is due to the economic and technical conditions of the existing bitstream offer which enable operators to differentiate their own retail offer – to some extent - from that of Belgacom. Also, the prices for full local loop unbundling remain higher than the EU average¹⁸.

While noting that the prices for local loop unbundling have followed a downward trend over the past three years¹⁹, the Commission invites IBPT to ensure effective implementation of the remedies to further enhance the provision of local loop unbundling and, in particular, to ensure that the respective price levels of local loop unbundling and bitstream create the appropriate incentives for alternative operators to switch from the bitstream offer to the local loop unbundling offer.

Furthermore, the Commission invites IBPT to assess the impact of the regulation of LLU and Wholesale Broadband Access in its subsequent analysis, in particular by monitoring the development of the competitive conditions in the retail market, including checking whether the future market development may justify a more refined geographical market definition.

Access to fibre infrastructure

IBPT excluded optical fibre connections (FTTH/FTTB) from the scope of the relevant market for wholesale unbundled access (including shared access) to local loops and sub-loops (and thus from the market analysis) without supporting this conclusion with an appropriate substitutability analysis.

The Commission takes note of IBPT's arguments that the architecture of Belgacom's network is not currently adapted for FTTH/FTTB and that existing copper cables are not installed in ducts but are buried cables leading to costly engineering works for the installation of FTTH. There is at present no retail or wholesale offer for broadband products through FTTH or FTTB and this situation is likely to remain over the time period of the market review. The Commission also notes that the evolution of next generation networks (NGN) is currently subject to further analysis by IBPT in order to assess whether the currently proposed draft measures need to be adapted to new market conditions.

Therefore, at this stage the Commission does not object to IBPT's assertion that access to the NGN access network is not part of the market for wholesale unbundled access to the local loop. Nevertheless, the Commission, whilst acknowledging that the remedies proposed by IBPT in the wholesale broadband access market guarantee access to high speed broadband technologies (including VDSL), invites IBPT to reassess the market conditions in view of guaranteeing a level playing field in the future NGN environment.

¹⁷ Nationally only 2.4% of lines are unbundled in 2007 (figure 3.5 of the notification document, p. 106).

¹⁸ According to Figure 113 of the 14th Report on the Implementation of the Telecommunications Regulatory Package 2008, the average price of a fully unbundled loop in Belgium (€1.10 in October 2008) is above the EU average (€1.088).

¹⁹ According to the 13th and 14th Reports on the Implementation of the Telecommunications Regulatory Package, the LLU prices were at a level of €2.69 in 2006, €1.34 in 2007 and €1.10 in 2008.

Pursuant to Article 7(5) of the Framework Directive, IBPT shall take the utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁰ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²¹ within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication²². You should give reasons for any such request.

Yours faithfully,
For the Commission
Fabio Colasanti
Director General

²⁰ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²¹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²² The Commission may inform the public of the result of its assessment before the end of this three-day period.