INFORMATION DOCUMENT BELGIAN INSTITUTE FOR POSTAL SERVICES AND TELECOMMUNICATIONS
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GENERAL RIGHTS AND OBLIGATIONS RELATING TO ACCESS AND INTERCONNECTION WITHIN THE FRAMEWORK OF THE BELGIAN FEDERAL TELECOMMUNICATIONS LAW

Introduction

- Objective of this document

The objective of this document is to describe the general rights and obligations relating to access and interconnection within the framework of the Belgian telecommunications law.

The main purpose of this document is to be an information document essentially meant for the new potential entrants on the Belgian telecommunications market who are not or not necessarily accustomed to the general rights relating to access and interconnection which they can assert towards the established Belgian operators and to the obligations that they can expect in this domain when they conclude an access or interconnection agreement. This document is not mandatory and does not necessarily reflect the way of thinking of the Council of the Belgian Institute for Postal Services and Telecommunications, which, for concrete files, is competent to take administrative binding decisions.

The provisions on access and interconnection in the Belgian federal law of telecommunications can essentially be found in the Act of 13 June 2005 on electronic communications and in the Act of 17 January 2003 on the appeals and dispute settlement arising from law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors.

This document does not deal with the obligations (and the rights resulting from it) on access and interconnection which, after a market analysis, carried out in accordance with Article 55 of the Act of 13 June 2005 on electronic communications, can be imposed on one or several operators who have significant market power on the relevant market.

In Belgium the rights and obligations of the operators regarding broadcast access are defined at Community level according to the decrees in force and are not the subject of this document.

There are domains that simultaneously fall under the competence of the federal State and the Communities. This is in particular the case of the regulation on the so-called mixed infrastructures, i.e. the electronic communications networks that can be used for the conveyance of both telecommunications and broadcasting signals. Broadband is a typical example of it. The Institute can only take the decisions concerning electronic communications networks falling within the scope of the Communities as well, after the coming into force of a cooperation agreement between the federal authority and the Communities regarding the exercise of powers related to these electronic communications networks. Such a cooperation agreement has not come into force yet.

- Summary

This document first explains which requirements must, if necessary, be met to assert the rights relating to access and interconnection (item 1: Preliminary conditions).

Then item 2 deals to some extent with the obligation of some operators to negotiate in good faith concerning interconnection (item 2: Negotiating in good faith concerning interconnection).

The third part explains what the possibilities of the applicant are, if the negotiations on access or interconnection have not led to the result searched for (item 3: Right to a regulatory intervention if the negotiations do not lead to an agreement or if there is a dispute)

Finally, item 4 explains a certain number of different provisions relating to access and interconnection (item 4: A.O.B.).

1. Preliminary conditions

According to Article 9 of the Act of 13 June 2005 on electronic communications, the provision (or resale) in proper name and on its own behalf of electronic communications services or networks is submitted to a notification to the Institute (the abridged designation given by the lawmaker to the "Belgian Institute for Postal Services and Telecommunications").

Article 9, §4 lays down that, after receipt of the notification, the Institute sends a standardised declaration to the operator confirming, besides the execution of the notification, that the operator concerned may, where applicable:

"[…]

2° negotiate access;

3° obtain access;

The explanations below will show that most of the rights and obligations relating to access and interconnection are linked to the status of the operator within the meaning of Article 9.

In order to let the negotiation process of the form of access and/or interconnection searched for take place smoothly and to benefit from all legal rights provided for as regards access and/or interconnection, it is thus advisable to submit a notification to the Institute, even if the operator is not ready to really start within a short period the provision (or resale) of electronic communications services and networks.

In accordance with Article 4.2.a) of Directive 2002/20/EC of the European Parliament and the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), Article 10, paragraph 2 of the Act of 13 June 2005 states that each operator who receives an access application (an interconnection access also belongs to this category; see 2,19° of the Act of 13 June 2005) cannot refuse it for the simple reason that the applicant has not submitted a notification in Belgium yet, when this applicant has already been authorised in another Member State of the European Union to provide electronic communications or networks.

This provision does not exempt the authorised operator from a notification in another Member State of the European Union: when the applicant really wants to start operating a network or providing services in Belgium, a notification is required. The article only aims at avoiding that the non execution of a notification hinders the EU operators from starting interconnection and/or access negotiations. In other words the access or interconnection negotiations can already be quite far or (nearly) finished when an authorised operator in another Member State of the European Union decides to submit a notification in Belgium.

The last paragraph of Article 10 lays down that : *« When the applicant of another Member State, who does not provide services and does not operate a network [in Belgium], requests access or interconnection, he does not need to be authorised to operate in Belgium."* The scope of this provision is limited: this provision is mainly, if not exclusively, applicable to transnational networks which in Belgium do not provide services or use of the network, for example the undersea cables arriving at the Belgian coast and going directly, without any connection point for the users in Belgium (because there are none), to France to send calls there.

2. Negotiating in good faith concerning interconnection

A minimum requirement for all the operators providing a public electronic communications network is the obligation to negotiate in good faith an interconnection agreement for the purpose of providing publicly available electronic communications services with every operator applying for it (Article 52, first paragraph of the Act of 13 June 2005).

Therefore the right of Article 52, first paragraph, of the Act of 13 June 2005 is not mandatory towards each operator but is however only mandatory towards the operators providing electronic

communications networks. The definition of a public electronic communications network is given under Article 2, 10° of the Act of 13 June 2005; what is considered as an electronic communications network is specified under Article 2, 3° of the same Act:

A comprehensive description of the scope of the notion of *"negotiating in good faith"* is not part of this document, all the more since this aspect must always be approached with a concrete case. For the purpose of this document the following general principles can suffice:

i. The operator submitted to the obligation of Article 52, first paragraph, must at least reply to the request of the applicant;
ii. In principle, negotiating implies the exchange of proposals and counterproposals;
iii. In principle, the exchange of proposals and counterproposals must be possible for all elements set by the King according to Article 53, first paragraph, of the Act of 13 June 2005 on electronic communications as the elements to be at least regulated in an interconnection agreement. Currently these minimum elements are defined by Article 21 of the Royal Decree of 20 April 1999 establishing the details and general principles governing the commercial negotiations conducted to conclude interconnection agreements and the modalities of publication of the reference interconnection offer and establishing the conditions to be laid down in the interconnection agreement.

3. Right to a regulatory intervention if the negotiations do not lead to an agreement or if a dispute arises

Without prejudice to the intervention of the courts or an arbitration in accordance with the applicable national or international law, the regulatory intervention in the Belgian federal telecommunications law can in principle be obtained from two specific authorities: the Belgian Institute for Postal Services and Telecommunications and the Competition Council. The following paragraphs examine more thoroughly the conditions under which this intervention can take place towards operators in general and this, according to the legislation and the regulations currently in force.

The Institute repeats that this document does not deal with the obligations (and the rights resulting from it) on access and interconnection which, after a market analysis, carried out in accordance with Article 55 of the Act of 13 June 2005 on electronic communications, can be imposed on one or several operators who have significant market power (or "SMP") on the relevant market. An operator who would like to buy access or interconnection from an SMP operator can assert towards this SMP operator specific rights corresponding to the obligations applicable to an SMP operator: among others obligations such as non discrimination and transparency, the obligation to formulate and respect a reference offer in principle approved by BIPT and the obligation to apply regulated prices which in principle must be cost-oriented. The Institute is in charge of monitoring the compliance with these obligations. The listing of these obligations can be found in BIPT decisions on market analyses [1] and, furthermore, does not fall within the scope of this document.

a. The Belgian Institute for postal services and telecommunications

1. Conciliation

Article 14, §1, 4°of the Act of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors lays down that in relation to (among others) the

[1] See www.bipt.be, heading Telecommunications, SMP Analyses, SMP Analyses Recommendation 1. During a transition period which lasts until the completion of a given market analysis and on the basis of Article 162 of the Act of 13 June 2005 on electronic communications, the obligations imposed on SMP operators by or in accordance with the Act of 21 March 1991 on the reform of certain economic public companies and the obligations of Carrier Selection and Carrier Preselection imposed by Article 105bis, paragraph 7 and 9 of the same act are in force. The obligations resting on notified operators under Regulation 2887/2000/EC of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop remain applicable as well until the market analysis on the market in question is completed.

electronic communications networks and electronic communications services, it is the task of the Institute, in case of a dispute between telecommunications networks or services providers, to formulate proposals aiming at reconciling the parties within a period of one month. This procedure takes place according to the Royal Decree of 5 May 2006 determining a conciliation procedure before the Belgian Institute for Postal Services and Telecommunications.

The conciliation procedure is a totally voluntary procedure. If the party invited to the conciliation does not wish to take part in the procedure, it does not take place. If one or several parties involved in the conciliation procedure do not agree with the conciliation proposals, the latter will remain non mandatory.

2. Intervention in order to guarantee the basic objectives set under Articles 6 to 8

Article 51, §1 of the Act of 13 June 2005 on electronic communications lays down that if parties do not reach an agreement during the negotiations on access, the Institute is empowered to intervene, either at its own initiative, or at the request of one of the parties involved in order to secure the policy objectives referred to in Articles 6 to 8.

These basic objectives are in broad outline:

- the promotion of competition in the provision of electronic communications networks, electronic communications services and associated facilities (Art.6), in particular by ensuring that there is no distortion or restriction of competition in the electronic communications sector, encouraging efficient investment in infrastructure, and by promoting innovation;

- the contribution to the development of an internal market in electronic communications networks and services (Art.7), by encouraging among others the provision of electronic communications networks and electronic communications services at European level, encouraging the establishment and development of trans-European networks and the interoperability of pan-European services and end-to-end connectivity, ensuring that there is no discrimination in the treatment of operators providing electronic communications networks and services;

- promoting the interests of users (Art. 8).

This article is considered as the transposition of Article 5.1. of the Access Directive, where the latter states that: " *National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, […] exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users. »*

Article 51, §1 is an open standard and can, according to the Institute, be used to a variety of purposes, for example to impose deadlines for completing negotiations, expressing guidelines for the issues on which there was no agreement, etc…

Article 51 is not limited to the negotiations on interconnection. Indeed it does concern the negotiations on "access" which is a larger concept than the concept of "interconnection" (see also above).

3. Imposition of obligations on interconnection

Article 52, paragraph 2, of the Act of 13 June 2005 on electronic communications lays down that if the Institute, in accordance with the procedure defined under Article 51, § 1, imposes obligations relating to interconnection, it can determine conditions concerning the access to be delivered, that it judges appropriate.

The context in which this paragraph is situated (i.e. after the paragraph obliging the operators providing a public electronic communications network to negotiate in good faith on

interconnection) and the introduction of this paragraph (*"when the Institute […] imposes obligations relating to interconnection")* lead to the conclusion that Article 52, paragraph 2, will be mainly used to impose the appropriate obligations relating to interconnection, when it is necessary and justified in the light of the basic objectives set under Articles 6 to 8.

4. Imposition of the obligations necessary to ensure end-to-end connectivity

Article 51, § 2, of the Act of 13 June 2005 lays down that the Institute may impose on the operators that control access to end-users the obligations necessary to ensure end-to-end connectivity. Moreover, the article specifies that the Institute may impose to that end the obligations that it deems necessary concerning the access to provide: *"including in justified cases the obligation to interconnect their networks where this is not already the case".*

b. The Competition Council

Article 4 of the Act of 17 January 2003 on the appeals and dispute settlement arising from the law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors lays down that the Competition Council, referred to in Articles 16 and following of the Act of 5 August 1991 on the protection of economic competition, within a period of four months resolves (among others) the disputes between telecommunications operators or telecommunications services providers concerning interconnection, leased lines, special access, unbundled access to the local loop and shared use.

The Competition Council has not yet established case law on how to define a dispute in the context of the above-mentioned Article 4.

The Chamber for interconnection, leased lines, special access, unbundled access to the loop and shared use which within the framework of a previous legislation – which has been abrogated in the meantime – was tasked to arbitrate the disputes related to access and interconnection, judged in a decision of 8 March 2000[2] that:

- a dispute is a disagreement between two (or several) parties on one or several specific subjects.
- the existence of a dispute must be provided in the file transmitted to the dispute settlment authority when introducing the intervention request of this authority;
- the holding of negotiations between the parties after the intervention request of the dispute settlement authority does not exclude the existence of a dispute;
- the fact that one of the parties does not consider its relationship with the other party(ies) as conflictual is absolutely not decisive.

The procedure before the Competition Council is suspended if it is resorted to the conciliation procedure laid down in Article 14, § 1, 4°, of the Act of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors (see below item 3.a.1).

During the examination of these disputes by the Competition Council, the Institute designates a representative who investigates the file in collaboration with the reporter of the Competition Service.

Finally the Institute sees to it that the decisions made by the Competition Council according to Article 4, first paragraph, of the above-mentioned Act of 17 January 2003, are being executed.

4. AOB

a. Confidentiality

[2] Affair *SA Mobistar against SA Belgacom,* see www.bipt.be, legal Actions, inferior link.

Article 50 of the Act of 13 June 2005 on electronic communications states that any information communicated from one operator towards another operator in the context of the negotiation procedure of an access agreement is confidential, without prejudice of the right of any interested party to communicate this confidential information to the Institute or to any other administrative or legal authority.

The exchange of information during the access negotiations is purposive. Article 50 stipulates indeed that: *"This information is exclusively treated for the purposes of the conclusion of this agreement."* Therefore, this information may on no account be transmitted to competing companies, subsidiary(ies) of one of the parties or to other sections of an operator than the section in charge of the negotiation of the access agreements.

b. **Sending to the Institute of the interconnection agreement in its entirety**

Article 53, paragraph 2, of the Act of 13 June 2005 lays down that the interconnection agreement, once it is concluded, is communicated to the Institute in its entirety. The requirement of communicating the interconnection agreement in its entirety also implies the communication of annexes, supplements and other addenda to the interconnection agreement. When modifications to the interconnection agreement are agreed, the requirement of communicating to the Institute the interconnection agreement in its entirety also implies the immediate communication of these changes to the Institute.