



EUROPEAN COMMISSION

Brussels, 4.8.2006

**SG-Greffe (2006) D/204472**

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For the attention of:  
Mr. Eric Van Heesvelde  
Chairman of the Board  
Fax: 02 226 88 41

Dear Mr Van Heesvelde,

**Subject: Case BE/2006/0433: voice call termination on individual mobile networks in Belgium**

**Comments pursuant to article 7(3) of Directive 2002/21/EC<sup>1</sup>**

## **I. PROCEDURE**

On 7 July 2006, the Commission registered a notification from the national regulatory authority ("NRA") of Belgium, *Institut Belge des Postes et Télécommunications* (IBPT), covering the wholesale market<sup>2</sup> for voice call termination on individual mobile networks in Belgium under case number BE/2006/0433.

A national consultation<sup>3</sup> ran from 7 February to 16 March 2006. The deadline for the Community consultation is 7 August 2006. On 13 July 2006 a request for information was sent to IBPT. The reply was received on 18 July 2006.

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.

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<sup>1</sup> 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.

<sup>2</sup> To date, 23 other NRAs (over 25) have finalized their review of the market at hand: Austria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom. The market review from the Latvia was notified on 27 July 2006.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

## II. DESCRIPTION OF THE DRAFT MEASURES

### II.1. Market definition

There are three mobile network operators ("MNOs") in Belgium: Belgacom Mobile<sup>4</sup>, Mobistar and Base, respectively entered on the mobile market in January 1994, August 1996 and June 1999. At the end of 2005, the respective market shares of the three MNOs, both in terms of subscribers and revenues, were: Belgacom Mobile (48.3% / 52.4%), Mobistar (33.4% / 36.3%) and Base (18.3% / 11.3%).

The respective networks of Belgacom Mobile, Mobistar and Base cover 99% of the population.

Due to a lack of substitutability between termination services on the different networks, a distinct market is defined for voice call termination on the network of each MNO (including 3G). IBPT considers the termination of calls transmitted via "GSM gateways"<sup>5</sup> to be part of the product market.

This market definition is in line with the Recommendation on relevant markets.<sup>6</sup> SMS termination is excluded from the relevant product market.

The geographic scope of each product market coincides with the geographic coverage of the network concerned.

### II.2. Finding of significant market power ("SMP")

Based on its market analysis, IBPT intends to designate Belgacom Mobile, Mobistar and Base as having individual SMP on their respective markets.

When reaching its conclusion on SMP, IBPT considered three main criteria: (i) market shares (each MNO is a monopolist on its market) in combination with market concentration; (ii) the dynamic of competition; and (iii) the lack of countervailing buyer power.

In particular, IBPT concludes that none of the undertakings considered has a sufficiently strong countervailing buying power removing the alleged SMP of its counterpart. For instance, IBPT indicates that Base, despite its relative small size in comparison with Belgacom Mobile, succeeded to increase the average level of its termination charges over the period 2001-2004.

### II.3. Regulatory remedies

In order to remedy market power on the respective wholesale markets, IBPT proposes to impose the following set of obligations on each MNO:

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<sup>4</sup> Proximus.

<sup>5</sup> GSM gateways are devices used to enable fixed telephone networks to connect directly to mobile networks via a mobile telephony radio link. The purpose of such GSM gateways is to avoid fixed-to-mobile interconnection charges and to benefit from lower retail mobile-to-mobile charges.

<sup>6</sup> 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.

- Obligation to provide access and interconnection
- External non-discrimination
- Transparency (including the publication of a reference offer)
- Price control and cost accounting

IBPT proposes to impose only on Belgacom Mobile and Mobistar the following additional obligations:

- Internal non-discrimination
- Accounting separation

The proposed obligations only concern “direct” interconnection and are not intended to regulate the use of GSM gateways. The existing regulation imposed in relation to the use of GSM gateways<sup>7</sup> will be removed.

The obligation to provide access and interconnection aims at compelling each MNO to negotiate fairly with third parties wishing to terminate calls on its network. In particular, under this obligation, IBPT proposes to impose on each MNO a requirement to provide a co-location offer to any third party seeking access to their respective network.

The non-discrimination obligation requires that each MNO applies the same technical and economic conditions to its own subdivisions/subsidiaries and to third operators in the same situation, so that these conditions will not be different depending on the network originating the call. This remedy should prevent discriminatory practices and a market foreclosure to the detriment of third operators (and ultimately consumers). Internal non-discrimination required from Belgacom Mobile and Mobistar is considered necessary to avoid cross subsidization of downstream activities<sup>8</sup>. The obligation is coupled with the accounting separation obligation. BIPT considered that it would not be proportionate to impose both obligations on Base, due inter alia on its relatively small size.

IBPT intends to implement a price control obligation with a view to reduce mobile termination rates ("MTRs") to target prices in a timeframe of two years, starting on 1 November 2006. For that purpose, IBPT developed a cost model the outcome of which results in the following proposed glide path for each MNO:

	2005	01-Nov-06	01-May-07	01-Jan-08	01-Jul-08	Variation over 2006/2008 (relative)	Variation over 2006/2008 (absolute)
<b>PROXIMUS</b>	12,66 € ct	10,13 € ct	8,09 € ct	7,48 € ct	6,56 € ct	-48,2%	-6,10 € cts
<b>MOBISTAR</b>	15,98 € ct	12,75 € ct	10,16 € ct	9,38 € ct	8,21 € ct	-48,6%	-7,77 € cts
<b>BASE</b>	19,60 € ct	15,81 € ct	12,76 € ct	11,82 € ct	10,41 € ct	-46,9%	-9,19 € cts

<sup>7</sup> IBPT previously defined a framework for the use of GSM gateways requiring the prior approval of a GSM operator for the installation of such devices on its network.

<sup>8</sup> IBPT further states that the internal non-discrimination does not mean that retail "on-net" and "off net" tariffs should be identical but rather that the overall retail offers supplied by a mobile operator should not be provided at an overall cost which would not reflect the underlying level of the wholesale self-supplied termination inputs.

The cost model is based on Long Run Incremental Costs ("LRIC")<sup>9</sup> with a "top-down"<sup>10</sup> approach. Its architecture and principles are common to all operators and have been discussed with and substantiated by them.

The model is subtended by a sub-model that forecasts the evolution of market shares and of traffic of each MNO. All costs are annualised using economic depreciation to ensure that the model fully recovers all relevant incurred costs. Element-based costs are allocated to services on routing factors and mark-ups.

The model's main assumptions are: (i) the equivalence of market shares of the three MNOs by 2017; (ii) a life of assets of fifty<sup>11</sup> years; (iii) the exclusion of commercial costs; (iv) the exclusion of UMTS costs; (v) an Equal Proportion Mark-Up (EPMU) for the allocation of common costs; and (vi) an identical WACC<sup>12</sup> of 12.24% for all MNOs.

According to the sensitivity analysis provided by IBPT, the model appears to be robust and its outcomes do not vary significantly in relation to the underlying main assumptions. The model results in asymmetric MTR in the following relative and absolute proportions:

	2005	01-Nov-06	01-May-07	01-Jan-08	01-Jul-08
<b>Asymmetries (in relative terms)</b>					
Mobistar/Proximus	26,2%	25,9%	25,6%	25,4%	25,2%
Base/Proximus	54,8%	56,1%	57,7%	58,0%	58,7%
Base/Mobistar	22,7%	24,0%	25,6%	26,0%	26,8%
<b>Asymmetries (in absolute terms)</b>					
Mobistar/Proximus	3,32 € ct	2,62 € ct	2,07 € ct	1,90 € ct	1,65 € ct
Base/Proximus	6,94 € ct	5,68 € ct	4,67 € ct	4,34 € ct	3,85 € ct
Base/Mobistar	3,62 € ct	3,06 € ct	2,60 € ct	2,44 € ct	2,20 € ct

Base, Mobistar and Belgacom Mobile follow a MTR decrease, in absolute terms, of respectively 9.19, 7.77 and 6.10 €ct. Since Base' MTR decreases more, the asymmetry with Belgacom Mobile will be reduced in absolute terms from 6.94 to 3.85 €ct during the relevant period. In relative terms, however, the asymmetry slightly increases.

The asymmetry results particularly from the imbalance of incoming traffic between the three operators, while the relevant costs to be recovered tend to converge.

The National Competition Authority ("NCA") did not comment on the market definition and SMP findings but expressed particular concerns as to whether the asymmetries resulting from IBPT's cost model are justified and compatible with competition law.

IBPT considers that its proposed *ex-ante* obligations are based on the nature of the problem identified, proportionate and justified in the light of the policy objectives referred to in Article 8 of the Framework Directive.

In particular, IBPT indicated, in reply to the NCA's concerns, that the model reflects the fact that Belgacom Mobile, Mobistar and Base entered the market in 1994, 1996 and 1999. Moreover, the respective costs of the three SMP operators are different. This

<sup>9</sup> LRIC means that the model forecasts costs in the long run and allocates costs to services based on increments

<sup>10</sup> Top-down means that the model uses as costs inputs the historical audited costs of each operator.

<sup>11</sup> According to IBPT, such a period represents the perpetual investment, operation and demand of a GSM network.

<sup>12</sup> Weighted Average Cost of Capital.

situation requires a different treatment, in light of the principles of economic efficiency, sustainable competition and consumers' interests and protection.

In addition, IBPT underlines that a quicker reduction of MTR could have an overall negative impact on the development of competition on the mobile market, which would be detrimental to Belgian consumers.

### III. COMMENTS

The Commission has examined the notification and the additional information provided by IBPT and has the following comments:

#### (1) Price control obligation

IBPT proposes to implement the price control obligation on the basis of a LRIC cost model with a "top down" approach, i.e. taking into account each operator's audited historic costs for the determination of its MTRs. This implementation method leads to a result where a large asymmetry in MTRs between the three MNOs would continue to exist throughout and beyond the period of the review.

The Commission considers that termination rates should normally be symmetric and that asymmetry, acceptable in number of cases, requires an adequate justification. It recognizes that, in certain exceptional cases, an asymmetry might be justified by objective cost differences which are outside the control of the operators concerned. Possible justifications could be represented by the cost differences between the operation of a GSM900 network and a DCS1800 one or by substantial differences in the date of market entry.

The Commission expects the differences related to technology to be small and invites the IBPT to quantify them more precisely if they were to apply to this case. In addition, the fact that a MNO entered the market later and has therefore a smaller market share can only justify higher termination rates for a limited transitory period. The persistence of higher termination rate would not be justified after a period long enough for the operator to adapt to market conditions and become efficient and could even discourage smaller operators from seeking to expand their market share.

For these reasons, the Commission concurs with the IBPT's objective to eliminate the asymmetry in the MTRs over a reasonable timeframe, on the basis of the costs of an efficient operator.<sup>13</sup> The IBPT has a margin of discretion in applying the principles set out in Article 8(4) of the Access Directive<sup>14</sup> and therefore to set the timeframe, but the Commission has indicated in a number of cases that it is necessary to ensure that the asymmetries do not remain in force for too long<sup>15</sup> and

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<sup>13</sup> The Commission notes that IBPT will develop a "bottom-up" cost model for determining the costs of an efficient operator.

<sup>14</sup> Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7.

<sup>15</sup> See also the Commission's comments letter in case AT/2005/0256.

that the MTRs of each MNO should be brought down to the cost of an efficient operator as soon as possible<sup>16</sup>.

The Commission considers that the glide path proposed in the notified measures does not comply with these objectives. The Commission invites the IBPT to implement sooner than currently envisaged the principle of forward-looking economic efficiency and to reduce further the maximum MTRs to be applied by Mobistar and Base during the period of this review.

In this regard, the Commission invites the IBPT to determine the level of the MTRs of each operator:

- so as to reach symmetry between Proximus and Mobistar within the period of the current review (i.e. by 2008). This is justified by the consideration that these operators have been present in the Belgian market for more than ten years, use the same technology and their relevant costs structures are converging, as shown by the IBPT's own analysis. In addition, the Commission underlines that in the majority of Member States where cost oriented price regulation of MTRs is effectively in place (e.g. Austria, Italy, France, Sweden, UK and the Netherlands) NRAs imposed symmetric MTRs between the first and the second MNO;
- so as to reach symmetry between all operators shortly after the timeframe of this review, unless IBPT were of the view that objective cost differences outside the control of the operators as discussed in the previous paragraphs justified the maintenance of a small degree of asymmetry. This would in any case imply that the termination rates of Base would have to be reduced more steeply already during this period of review.

## (2) **Non-discrimination obligation**

Recital (17) of the Access Directive states that "*non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets*".

The Commission considers that the proposed internal non-discrimination obligation is not inconsistent with the above recital. Although the Commission does not exclude the possibility of unfair cross-subsidies in the mobile markets, IBPT is, nevertheless, invited to further substantiate the underlying risks of distortion of competition justifying the imposition of the proposed obligation, in particular in a situation where MTRs will be cost-oriented.<sup>17</sup>

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.

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<sup>16</sup> See Commission decision of 4 August 2004, case EL/2004/0078 (SG-Greffe (2004) D/203427) and Commission decision of 4 December 2005, case AT/2005/0256 (SG-Greffe (2005) D/206043).

<sup>17</sup> See also the revised ERG Common Position on the approach to appropriate remedies in the ECN's regulatory framework, final version May 2006, section 5.5.3.

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 12 of Recommendation 2003/561/EC<sup>18</sup> 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 Commission<sup>19</sup> 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 publication. You should give reasons for any such request.

Yours faithfully,  
For the Commission,  
Fabio Colasanti  
Director General

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<sup>18</sup> Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 190, 30.7.2003, p. 13.

<sup>19</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32.2.298.87.82.