



Brussels, 13.12.2012
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Institut Belge des Postes et
Télécommunications (IBPT)

35 Boulevard du Roi Albert II
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Belgium

For the attention of:
Mr. Luc Hindryckx
Président du Conseil

Fax: +32 2 226 88 41

Dear Mr. Hindryckx,

Subject: Commission Decision concerning Case BE/2012/1395: Access to the public telephone network at a fixed location for residential and non-residential customers in Belgium

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

I. PROCEDURE

On 14 November 2012, the Commission registered a notification from the Belgian national regulatory authority, Institut Belge des Postes et Télécommunications (IBPT)¹, concerning the market for access to the public telephone network at a fixed location for residential and non-residential customers² in Belgium.

The national consultation³ ran from 9 April 2009 to 8 May 2009, 16 June 2012 to 6 August 2012 and from 28 September 2012 to 19 October 2012.

On 27 November 2012, a request for information⁴ (RFI) was sent to IBPT and a response

¹ Under Article 7 of 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, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 1 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

was received on 30 November 2012. Additional information was received from IBPT on 4 December 2012.

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

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Two separate markets for access to the public telephone network at a fixed location for residential and non-residential customers, respectively, were previously notified to and assessed by the Commission under cases BE/2006/0400-0401⁵. At that time the access market for residential customers covered both analogue access and basic digital access. In the non-residential customers market IBPT included (i) analogue access, (ii) basic digital access (ISDN-2) and (iii) primary digital access (ISDN-30). IBPT designated Belgacom as having SMP in each of the relevant markets and imposed on it the following obligations: (i) carrier selection and pre-selection (CS/CPS) – except for Voice over Broadband (VoB), (ii) transparency including the publication of a reference offer, (iii) non-discrimination, (iv) price control and cost accounting, (v) accounting separation, (vi) wholesale line rental (WLR) and (vii) retail obligations including *inter alia* price control and cost accounting. Also, case BE/2008/0750⁶ complemented the above market decision by introducing more clarity with respect to key performance indicators (KPIs). The Commission did not comment on these notifications⁷.

II.2. Market definition

The relevant product market includes access to the public telephone network irrespective of whether the access is offered (i) on a traditional telephone network or on a cable network, (ii) separately or as a part of a bundle and (iii) to residential or non-residential customers.

In the current draft measure IBPT defines two separate markets for access to the public telephone network at a fixed location: the market for low capacity access and the market for high capacity access. The segment for low capacity access comprises PSTN, ISDN-2 and managed VoB connections whereas the segment for high capacity access includes ISDN-30 connections and IP Centrex⁸ irrespective of whether access is provided over copper or fibre. Further to this, access to the public telephone network offered as part of a bundle is considered part of the same market as individually purchased access (as a stand-alone product)⁹.

⁵ SG-Greffe (2006) D/203046.

⁶ SG-Greffe (2008) D/200659.

⁷ Also, notifications under Article 7 on price squeeze and on cost-allocation system have been respectively assessed under cases BE/2007/0640 (SG-Greffe (2007) D/203669), and BE/2007/0657 (SG-Greffe (2007) D/204774).

⁸ The IP Centrex service is designed for companies with a large number of telephone handsets requiring simultaneous external conversations, which explains IP Centrex pertaining to the high capacity segment.

⁹ In 2011 39% of users were still purchasing a telephone connection separately. IBPT states that the cheapest bundle with broadband access is still more expensive than any other stand-alone telephone connection, so bundles are more expensive than unbundled offers. The part of a bundle that concerns

IBPT underlines major differences between the two segments, i.e. low-capacity access is used by residential customers and small-enterprises (up to five employees) or companies of up to 50 employees which normally use ISDN-2 connections. Large/medium-sized enterprises use ISDN-30 connections (which requires a PABX automatic telephone switching system, and the price of which is almost 10 times higher than the ISDN-2 price).

The relevant geographic market is national.

II.3. Finding of significant market power

IBPT proposes to designate Belgacom as an undertaking having SMP on both relevant markets, i.e. on the market for low capacity access and on the market for high capacity access. The main criteria considered by IBPT when reaching its conclusion on SMP include: (i) market shares¹⁰, (ii) control over infrastructure difficult to duplicate, (iii) economies of scale, (iv) economies of scope, (v) vertical integration, (vi) absence of countervailing buyer power, (vii) product/services diversification, (viii) easy and privileged access to capital market/financial resources, (ix) overall size of the undertaking and (x) barriers to expansion.

IBPT underlines the need for careful monitoring of the evolution of bundled offers in order to determine whether the proposed market delineation will remain adequate in the future.

II.4. Regulatory remedies

On both markets IBPT intends to maintain the following remedies: (i) CS/CPS (no longer imposed on the fixed call origination market but only on the present relevant market), (ii) non-discrimination¹¹, (iii) transparency (including the publication of a reference offer, the obligation to supply IBPT and other operators with "on request" information, the publication of KPIs and the provision of information on the evolution of Belgacom's network), (iv) accounting separation for CS/CPS, (v) price control and cost accounting. In particular, IBPT obliges Belgacom to impose cost-oriented prices for operations related to CS/CPS¹² and with respect to the service for routing operations at A-AGE level for secure numbers. The rates Belgacom is allowed to charge for access and for CS/CPS activation result from IPBT's interconnection decision of 26 November 2008 for the

fixed line access is often not much cheaper than the price of a separate fixed line access offer. IBPT concludes that it is not yet appropriate to define a separate relevant bundle market, however as bundled offers clearly exert price pressure on the unbundled products, i.e. in case prices of bundles would fall significantly in compare to prices of separate fixed line access offers there is a risk that a number of clients would switch over to a bundled offer, IBPT decided to include the relevant part of the bundled product in the market definition and monitor the development of the bundles on the market.

¹⁰ Belgacom's market share on the high-capacity market has stabilised in the period 2008-2011 at around 60% whereas in the low-capacity market Belgacom's market shares are decreasing but still at 70%, and according to IBPT there are few indications that this will change during the review period of the market i.e. three years.

¹¹ The non-discrimination and transparency obligations apply also to services concerning routing activities at A-AGE level for secure numbers. In addition, the information received by Belgacom's wholesale departments when offering CS/CPS and routing at A-AGE level for secure numbers, must not be communicated to Belgacom's retail departments ("Chinese Wall" concept).

¹² In this respect, IBPT states that cost-oriented tariffs for CS/CPS will be based on a bottom-up model of an NGN/NGA efficient operator aimed at defining the tariffs for a number of products on different relevant markets (and not only for market 2 related products).

period 2008-2010 (not notified under Article 7)¹³.

Further to the obligations imposed already in the first round review IBPT proposes the imposition of a new routing obligation (at transit A-AGE level) for secure numbers¹⁴ as well as the withdrawal of the WLR obligation. IBPT clarifies in its reply to the RFI that WLR has never been implemented in Belgium for the following reasons: (i) significant adaptations to Belgacom's billing system were needed to allow customers to combine WLR and xDSL, (ii) the resulting adaptation costs (for modifying the retail invoice system) were higher than the WLR set-up costs; (iii) the growth of double and triple play offers (for which WLR is less suitable), and (iv) the closure of some main distribution frames would imply that costs for implementing WLR have to be recovered within a short period of time and in the context of a decreasing demand.

At retail level, IBPT proposes a number of measures¹⁵ aiming at preventing Belgacom from practicing (i) predatory pricing, (ii) preferential treatment of some end-users and (iii) unreasonable bundling; associated with requirements regarding (iv) notification and publication of rates (information which will be used for applying margin squeeze tests defined in IBPT's decision of 11 July 2007¹⁶) and (v) cost allocation¹⁷.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the IBPT and has the following comments:¹⁸

¹³ The above decision on interconnection rates as well as IBPT's decision of 3 September 2008 (determining the prices for terminating segments of leased lines) has not been notified under Art.7. These two decisions constitute implementation measures of IBPT's decisions notified under cases BE/2006/0400-0401 (retail markets for publicly available local and/or national telephone services provided at a fixed location for residential and non-residential customers), cases BE/2006/0435-0441 (retail markets for fixed voice call telephony), and cases BE/2006/0551-0552-0553 (retail leased lines including the minimum set of leased lines up to and including 2Mbit/s; wholesale terminating segments of leased lines, and wholesale trunk segments of leased lines in Belgium).

¹⁴ As a rule a selected number is analysed on the level of local telephone exchange (L-AGE), to which the number was assigned when it was assigned to Belgacom. However, there is a service of secure calls whereby the end-user is connected to two local telephone exchanges, so that the client can be reached by telephone even if one of the sites or the connection is down. This functionality can only work if the number is analysed on a higher tier control panel, and not locally. In this case it would have to occur at transit sites (A-AGE). So far Belgacom has provided this service for payment to its own clients. IBPT intends to impose on Belgacom the obligation to provide wholesale service where the analysis and consequently the router determination for numbers defined by the competitive operators take place at the A-AGE level. That service has to be qualitatively adequate to the services offered by Belgacom to its own retail clients, cost-oriented and integrated as a part of the interconnection offer.

¹⁵ Based on guidelines provided for in the ERG Common position on remedies, i.e. Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework, ERG (06) 33.

¹⁶ SG-Greffe (2007) D/203669, case BE/2007/0640. The margin squeeze test proposed at the time was intended to assess whether Belgacom's wholesale and retail tariffs allow alternative operators to replicate Belgacom's offers. The margin squeeze test is based on (i) an equally efficient operator (EEO), (ii) long run incremental costs (LRIC) except in cases where the SMP operator cannot provide LRIC data, then Current Cost Accounting – Fully Allocated Costs are used, and (iii) a discounted cash flow (DCF) model to calculate the net value for assessing multiannual offers

¹⁷ SG-Greffe (2007) D/204774, case BE/2007/0657.

¹⁸ In accordance with Article 7(3) of the Framework Directive.

Need to notify price control related obligations

The Commission notes that IBPT has not notified a number of regulatory measures related to costing/pricing issues, e.g. the 2008 implementation measures on *inter alia* interconnection rates.

In this respect it should be recalled that price control constitutes a regulatory obligation referred to in Article 16 of the Framework Directive and has an effect on trade between Member States. Price control related remedies are therefore required to be notified under Article 7(3) in conjunction with Recital 15 of the Framework Directive.

Also, according to the Commission Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive¹⁹, price levels and amendments to the methodologies used to calculate costs or prices are considered to be material changes to the nature or scope of a remedy that have an appreciable impact on the market and should therefore be notified under the EU consultation procedure. While acknowledging IBPT's intention to notify the pricing methodology which will apply to CS/CPS services according to the EU consultation procedure, the Commission calls upon IBPT to notify all future draft measures related to cost/price amendments.

Margin Squeeze Tests and need for a consistent European approach

The retail regulation proposed by IBPT will *inter alia* use a margin squeeze test defined in a 2007 regulatory decision, which aims at assessing whether Belgacom's wholesale and retail tariffs allow alternative operators to replicate Belgacom's offers.

Against this background, the Commission would like to point to its current work towards a Recommendation on non-discrimination obligations and cost methodologies to promote competition and enhance the broadband investment environment, which will include guidance on ex-ante technical and economic replicability tests. Accordingly, the Commission invites IBPT to review its margin squeeze methodology upon entry into force of any relevant recommendation.

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

¹⁹ See recital 14 of the Commission Recommendation of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, OJ L 301, 12.11.2008, p. 23.

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.

You are invited to inform the Commission²¹ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²² You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

²¹ Your request should be sent either by email: CNECT-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.