



Brussels, 19.7.2013
C(2013) 4816 final

Institut belge des services postaux et
des télécommunications (IBPT)

35 Boulevard du Roi Albert II
1030 Bruxelles

For the attention of:
Mr A. Desmedt
Membre du Conseil

Fax: 32 2 226 88 41

Dear Mr Desmedt,

Subject: Commission Decision concerning Case BE/2013/1474: Retail leased lines and wholesale terminating segments of leased lines in Belgium
Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 19 June 2013, the Commission registered a notification from the Belgian national regulatory authority, *Institut belge des services postaux et des télécommunications* (IBPT)¹, concerning the market for the minimum set of leased lines² and the market for wholesale terminating segments of leased lines³ in Belgium.

The national consultation⁴ ran from 16 July 2012 to 14 September 2012.

On 28 June 2013 a request for information⁵ was sent to the IBPT and a response was received on 3 July 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities

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 7 in Commission Recommendation 2003/311/EC of 11 February 2003 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, OJ L 114, 8.5.2003, p. 45.

³ Corresponding to market 6 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.

⁴ In accordance with Article 6 of the Framework Directive.

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

(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

The retail market for the minimum set of leased lines and the wholesale markets for terminating and trunk segments of leased lines⁶ in Belgium were previously notified to and assessed by the Commission under case BE/2006/0551-0553⁷. The IBPT found the national retail market to include analogue, digital and galvanic lines up to and including 2Mbps. The corresponding national wholesale market for terminating segments of leased lines instead includes all bandwidths, backhaul lines, interconnection (or partial circuit) leased lines, and traditional as well as alternative⁸ interfaces providing a dedicated point to point transmission capacity. Belgacom was designated with significant market power (SMP) on the relevant retail market and on the wholesale market for terminating segments of leased lines. A full set of obligations except accounting separation was imposed on the SMP operator. The wholesale market for trunk segments of leased lines was found to be effectively competitive. The Commission invited the IBPT to elaborate, notify and implement its cost accounting system in a shorter time frame than proposed.⁹

II.2. Market definition

In the present notification, the IBPT again defines on the basis of a substitutability analysis the retail market for the minimum set of leased lines as including analogue, digital and galvanic lines but this time it includes all bandwidths. It furthermore includes, transparent data network services, i.e. AAL1 ATM and T-Line Ethernet circuit emulation services, as well as "Ethernet E-Line"¹⁰ P-Bit 5".

The wholesale market for terminating segments of leased lines reflects the retail product market definition and includes partial circuit terminating segments and backhaul terminating segments, irrespective of bandwidth and either with traditional interface¹¹ or next generation leased line (NGLL)¹² interface, both of which use the same optical infrastructure (fibre or wavelength).

The IBPT explains that the traditional interface terminating segments of leased lines are being dismantled and replaced by services based on Carrier Ethernet technology by 2015 at retail level and by 2018 at wholesale level.

The IBPT finds that leased lines of different bandwidths are substitutable as they are all delivered over one integrated infrastructure.¹³ No significant or long-term investments

⁶ Corresponding to respectively markets 13 and 14 in the superseded Commission Recommendation on Relevant Markets of 2003 (see footnotes 2 and 3).

⁷ SG-Greffe (2007) D/200026 and SG-Greffe (2007) D/200118.

⁸ i.e. using Ethernet technology.

⁹ The Commission did not have comments on IBPT's draft remedy (notified to and assessed by the Commission under case BE/2009/0882) on key performance indicators for the wholesale market for terminating segments of leased lines. Cf. SG-Greffe (2009) D/1405.

¹⁰ i.e. the transport section of an NGLL

¹¹ i.e. made up of (plesio-) synchronous digital hierarchy (P/SDH) transport with two hierarchical levels, Ethernet over SDH and Ethernet over wavelength division multiplexing (WDM).

¹² i.e. E-Line type Carrier Ethernet services, made up of an Ethernet multi-protocol label switching (MPLS) transport with only one hierarchical level.

¹³ Ethernet-based lines are provided over WDM/SDH infrastructure; non-Ethernet ≥ 2 Mbps leased lines are provided over SDH infrastructure; < 2 Mbps leased lines (incl. analogue) are multiplexed via PDH

are required for a potential supplier to broaden its range of bandwidths on offer. This substitutability is strengthened, according to the IBPT, by the fact that a significant number of retail contracts include lines of various bandwidths.

As to the geographic scope of the retail and wholesale markets, the IBPT recognises that the optical fibre lines deployed by alternative operators may introduce some difference in competitive conditions at local level, but finds the overall competitive dynamics sufficiently homogenous to confirm that the markets are national. The circumstantial and potentially rapidly variable geographical differences in competitive conditions which the IBPT has noticed in some areas, is reflected by means of a differentiation in remedies (see section II.4 below).

II.3. Three criteria test and finding of significant market power

Given that the retail market for the minimum set of leased lines is no longer included in the Recommendation on Relevant Markets, the IBPT carries out the three criteria test and finds that the market is not characterised by high, non-transitory barriers to entry, thus not meeting the first criteria. In its response to the request for information, the IBPT explains that Belgacom's vertical integration is limited by the upstream wholesale regulation and that barriers to enter the retail market are low. Belgacom's market shares have declined from ca. 85% in 2007 to ca. 65% in 2012 in terms of the total number of retail leased lines, and are as low as 10-20% for >2Mbps leased lines in 2012.

Instead, the IBPT finds Belgacom to have SMP on the wholesale market for terminating segments of leased lines on the basis of: market shares, difficult to duplicate infrastructure (at least in areas with little or no economic density) which is important for multi-site projects¹⁴, high sunk costs, economies of scale and scope, significant vertical integration, barriers to switching linked to installation costs, limited countervailing buyer power even in areas with high economic density given the limited scope of alternative networks.

As to market shares, the IBPT finds that Belgacom's total market share comprising all bandwidths has decreased from 75% in 2009 to 55% in 2012 in terms of revenues and excluding NGLL. Belgacom has a market share of 65% on the market for terminating segments of less than 10 Mbps including NGLL. On the market for terminating segments between 10 Mbps and more than 100 Mbps, including NGLL, Belgacom has a market share that varies between 25% and less than 40%. In terms of volume, the terminating segments of leased lines of 10 Mbps and higher are less taken-up than those below 10 Mbps. The IBPT considers that on a forward looking basis, Belgacom is likely to maintain a relatively high overall market share (over 40%).¹⁵

II.4. Regulatory remedies

With regard to the relevant wholesale market for terminating segments of leased lines, the IBPT proposes to maintain the following obligations on Belgacom: access and interconnection (for all bandwidths provided by Belgacom and including backhaul and partial circuit services), non-discrimination (internal and external, same conditions and delays, and including service level agreements), transparency (including the publication of a reference offer with key performance indicators and provision of information on

equipment over SDH infrastructure.

¹⁴ The IBPT illustrates this in its response to the request for information pointing to Tele2, operator with the largest alternative infrastructure, who can connect less than [...] % of its business customers with its own infrastructure.

¹⁵ i.e. excluding self-supply. An approximation including self-supply results in 80% and 58% market share for bandwidths of respectively ≤ 10 Mbps and > 10 Mbps.

future network developments), accounting separation (although the division according to bandwidths is withdrawn), price control and cost accounting.

With regard to the access remedy, the IBPT proposes to add to the existing requirements the obligation to provide *inter alia*: (i) access to NGLL¹⁶ with the technology¹⁷ chosen by the alternative operator as long as the traditional infrastructure is operational; (ii) upon request, and within a reasonable period before the order, a cost estimate of the installation of a very high speed line when the building of the potential customer of the alternative operator is not connected to Belgacom's fibre access network; and (iii) access to the manhole in such a way that the alternative operator may lay its own access infrastructure to the final customer.

Furthermore, the regulated BROTSOLL offer must be completed with a section on NGLL. The IBPT considers this justified in the light of the evolution towards next generation networks. It will allow alternative operators to reduce the connection costs of their end-customers, just like Belgacom, by replacing the traditional architecture with Ethernet architecture.¹⁸ Belgacom currently already promotes this type of service for its own end-customers to replace the leased lines. According to the IBPT the obligation entails neither a disproportionate cost for Belgacom nor an unreasonable investment for alternative operators. Belgacom will also have to allow for migrations between regulated contracts, between a commercial contract and a regulated offer, and between configurations within a regulated contract.

As to the price control obligation, the IBPT proposes to mandate cost oriented tariffs for (i) the transport segment of traditional leased lines and NGLL and (ii) the local copper section of traditional leased lines¹⁹ and NGLL²⁰, as well as for auxiliary services such as collocation. Instead, the local optical fibre section of the traditional leased lines and NGLL will only be made subject to a margin squeeze test. According to the IBPT this will stimulate the already existing economic and commercial interest for the incumbent and alternative operators to invest in the deployment of the local fibre section (i.e. fibre to the business customer premises). Also, while the margin squeeze test will be applied to representative baskets of traditional leased lines (SDH/PDH and Ethernet) and NGLL vis-à-vis the downstream markets, the retail services provided in areas where at least two optical fibre lines are deployed by operators other than Belgacom will not be taken into account for the margin squeeze test. The IBPT has made up a list of local exchanges where these lines end. This list will be completed by the IBPT as competing fibre infrastructures are deployed.

III. COMMENTS

The Commission has examined the notification and the additional information provided

¹⁶ i.e. comprising the local section and the section relating to NGLL Ethernet transport.

¹⁷ i.e. traditional; NGLL; dense wavelength-division multiplexing (DWDM) for ≥ 1 Giga Ethernet lines.

¹⁸ The IBPT indicates that market players find it difficult to replicate Belgacom's professional offers (in particular Explore type) which use NGLL. NGLLs make greater use of network elements shared by all services and result in scale effects allowing Belgacom to market its offer at a lower price than alternative operators, who use traditional leased lines, can offer.

¹⁹ In line with the bottom-up cost model set out in IBPT's decision of 3/09/2008 which determines the regulated tariffs for SDH and PDH leased lines. This decision has not been made subject to EU consultation as became clear from the IBPT's response to the request for information.

²⁰ Reflecting the costs of an efficient operator using an NGA network. This NGN/NGA model and its annexes were published for national consultation on 4 January 2012.

by the IBPT and has the following comments.²¹

Need to monitor competitive conditions in the wholesale market for terminating segments of leased lines

The Commission notes that the IBPT defines one wholesale product market for terminating segments of leased lines, i.e. irrespective of bandwidth on the basis of substitutability, stating that all bandwidths are delivered over one integrated infrastructure and that retail contracts often include services of several bandwidths. The Commission also notes that the IBPT considers a national market definition appropriate in the light of *inter alia* the demand for the relevant services to cover different regions within the national territory. The IBPT considers a geographic delineation inappropriate to reflect limited differences in competitive conditions given that the boundaries of areas concerned are not stable. The regulator thus proposes to rather reflect differences in competitive conditions at the remedies stage, in line with the explanatory memorandum to the Recommendation on Relevant Markets.

At the same time, however, the Commission notes that the technological and competitive conditions in the Belgian wholesale market for terminating segments of leased lines are not stable. In particular, Belgacom has announced that it will dismantle services based on traditional SDH/PDH technologies and replace them by services based on Carrier Ethernet technology in the retail and wholesale markets in 2015 and 2018 respectively. The IBPT recognises at the same time that the optical fibre lines deployed by alternative operators locally introduce some differences in competitive conditions and that these conditions may potentially alter geographical competitive differences rapidly. To illustrate this, the Commission refers to the fact that Belgacom's retail shares are between 10 and 20% for >2Mbps leased lines in 2012, and that its wholesale shares lay between 25% and less than 40% for terminating segments between 10 Mbps and more than 100 Mbps. The HHI index on the wholesale market has furthermore decreased by ca. 50% between 2009 and 2011, and while the IBPT considers that also on a forward looking basis Belgacom is likely to maintain a relatively high wholesale market share (over 40%), this has to be seen in continuity of an overall decreasing trend in wholesale market shares (from 75% in 2009 to 55% in 2012).

In particular in light of the fact that the IBPT foresees a migration towards NGLL and an increase in the use of Ethernet leased lines as well as of high bandwidths in the next two to five years, together with an increase in the roll-out of fibre lines also by alternative operators, the Commission considers that the lower bandwidth leased lines services on which (as opposed to the higher bandwidths segments) Belgacom still detains a very high market share, will lose importance on the market. Against this background, the Commission urges the IBPT to closely monitor technological developments, investments by the alternative and incumbent operators, competitive conditions, and uptake of lower bandwidth services vis-à-vis higher bandwidth services, and to review the assessment of the wholesale terminating segments of leased lines market accordingly and as soon as national circumstances warrant this.

Need for transparency and coherence in the notification of draft measures under the Community consultation procedure

The Commission notes that the IBPT's draft measure notified to and assessed by

²¹ In accordance with Article 7(3) of the Framework Directive.

the Commission under case BE/2006/0551-0553 has been superseded by a corrective regulatory measure dated 14 September 2010 following a court ruling. This corrective measure was not notified to the Commission under the Article 7 procedure. In its response to the request for information, the IBPT explains that the content of this latter decision was not modified in any substantial way. The Commission, however, points out to the IBPT that 3.5 years have elapsed between the time of the original measure notified to the Commission on 5 December 2006 and the adoption of the non-notified corrective measure. Technological and competitive conditions may change quickly and substantially in a three year period. Article 16(6)(a) of the Framework Directive requires that NRAs carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7 of the same Directive within three years from the adoption of the previous measure relating to that market.

The Commission also notes that there are other decisions that have supplemented, amended or clarified the provisions adopted in the initial decision of 17 January 2007 and the corrective measure of 14 September 2010, including a decision on SDH/PDH lines tariffs which has also not been made subject to EU consultation as required by Article 7 of the Framework Directive. The Commission, while assessing regulatory decisions notified under Article 7 of the Framework Directive, has on several occasions expressed its view that draft measures setting or having an impact on price levels, constitute regulatory obligations referred to in Article 16 of the Framework Directive and have an effect on trade between Member States.²² Therefore, such draft measures are required to be notified under Article 7(3) in conjunction with Recital 15 of the Framework Directive. It should be recalled that also under the Commission Recommendation 2008/850/EC²³, price levels, amendments to the methodologies used to calculate costs or prices as well as the determination of glide-paths 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 by the standard notification procedure.

Against this legal background, the Commission underlines the obligation of the IBPT to notify any future draft measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which may create a barrier to the single market, under Article 7(3) of the Framework Directive. The Commission points out that such notifiable measures would include, *inter alia*, cost methodologies related to the relevant wholesale market at hand as well as adjustments thereto as referred to by the IBPT in section 4.9.3.2 of its notified draft measure. It would also include the update of the list of local exchanges referred to in section 4.3.9.3 of the notified draft measure with the corresponding communes and towns as currently provided by the IBPT in the response to the request for information. As to the latter, the Commission recalls the possibility for regulators to notify changes or updates of details which do not change the nature or the scope of the remedies, by means of a short notification form as set out in the Procedural Recommendation²⁴.

²² See for example IE/2005/0216 (SG-Greffe(2005)D/206081), DE/2008/0813 (SG-Greffe (2008)207093), PL/2009/0904 (SG-Greffe (2009) D/2752).

²³ See recital 14 of the Commission Recommendation 2008/850/EC of 15.10.2008 on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, OJ L 301, 12.11.2008, p. 23.

²⁴ 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

Pursuant to Article 7(7) of the Framework Directive, the 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/EC²⁵ 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 Commission²⁶ 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.²⁷ You should give reasons for any such request.

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

Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²⁵ 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.

²⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.



EUROPEAN COMMISSION

Brussels, 29.7.2013
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35 Boulevard du Roi Albert II
1030 Bruxelles

For the attention of:
Mr A. Desmedt
Membre du Conseil

Fax: 32 2 226 88 41

Dear Mr Desmedt,

**Subject: CORRIGENDUM of Commission Decision SG-Greffe (2013) D/11297
of 22/07/2013 C(2013) 4816 concerning Case BE/2013/1474: Retail
leased lines and wholesale terminating segments of leased lines in
Belgium**

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

Please note that the above decision is amended as follows:

(1) **Footnote 14** is amended and now reads as follows:

"The IBPT illustrates this in its response to the request for information pointing to Telenet, operator with the largest alternative infrastructure, who can connect less than [...] of its business customers with its own infrastructure."

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