



EUROPEAN COMMISSION

Brussels, 20/06/2007

SG-Greffe (2007) D/ 203669

Institut Belge des Services Postaux et des
Télécommunications (IBPT)
Avenue de l'Astronomie 14 Bte. 21
B-1210 Bruxelles
For the attention of:
Mr Eric Van Heesvelde
Chairman of the Board

Fax: +32 2 226 88 41

Dear Mr Van Heesvelde,

**Subject: Case BE/2007/0640: Details of remedies related to cases BE/2006/0400,
BE/2006/0401, BE/2006/0435, BE/2006/0437 and BE/2006/0551**

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

I. PROCEDURE

On 21 May 2007 the Commission registered a notification by the Belgian national regulatory authority, the "Institut Belge des Services Postaux et de Télécommunications", ("IBPT"). The notification concerns details of remedies related to the review of the markets for access to the public telephone network at a fixed location for residential and non-residential customers, publicly available local and/or national telephone services provided at a fixed location for

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 (the "Framework Directive"), OJ L 108, 24.04.2002. p.33.

residential and non-residential customers and the minimum set of leased lines, previously notified to and assessed by the Commission².

The national consultation³ took place between 6 December 2006 and 12 January 2007.

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.

II. DESCRIPTION OF THE DRAFT MEASURE

The present notification relates to the methodology developed by IBPT to detect eventual price squeeze in the context of the implementation of the obligations imposed on Belgacom as the operator designated as having significant market power ("SMP") on markets 1, 2, 3, 5 and 7 and in particular the obligation not to apply predatory prices.

IBPT does not exclude the possibility to apply a margin squeeze test in markets where only wholesale obligations have been or will be imposed on an operator with SMP, in particular in the markets for wholesale broadband access and wholesale unbundled access to the local loop⁴. The objective of the test in those cases will be to verify the appropriateness of the wholesale tariffs and to evaluate the necessity of informing the National Competition Authority ("NCA") about some pricing practices on a retail market not susceptible of ex ante regulation.

IBPT considers that the margin squeeze test should normally be applied to specific retail offers. However, it does not exclude the application of the margin squeeze test at other levels (such as a specific service, market or segment of a market), depending on the circumstances of the case.

The margin squeeze methodology proposed by IBPT provides for a "equally efficient operator test" ("EEO"). This test is based on the costs of an operator designated as having SMP and tries to assess whether Belgacom's wholesale and retail prices allow alternative operators ("AO") to replicate Belgacom's offers. The test takes into account non-avoidable costs supported by AOs and the economies of scale of the operator with SMP. According to the test, there is a margin squeeze when the difference between the SMP operator's retail and wholesale prices is below its retail costs⁵.

The margin squeeze test developed by IBPT is based on LRIC costs. Current Cost Accounting - Fully Allocated Costs ("CCA FCA costs") will only be taken into account

² Cases BE/2006/0400, BE/2006/0401, BE/2006/0435, BE/2006/437 and BE/2006/0551 corresponding markets 1, 2, 3, 5 and 7 of the Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive (the "Recommendation"), OJ L 114, 8.05.2003, p. 45.

³ In accordance with Article 6 of Directive 2002/21/EC of the Framework Directive.

⁴ Markets 11 and 12 of the Recommendation on relevant markets not yet notified by the Belgian regulator.

⁵ The following elements are taken into account in the test: Wholesale prices paid to the operator with SMP, charges paid to other operators (i.e. termination charges), possible network costs for the provision of the retail services and costs of the provision of the retail services.

when the operator with SMP can not provide LRIC costs. The test takes into account also whether common costs are appropriately attributed to the retail offer. A Discounted Cash Flow (DCF) methodology will be applied to calculate the net value for assessing offers with a duration longer than one year.

III. COMMENTS

The Commission examined the notification and has the following comments⁶:

(1) Application of the margin squeeze test to markets non-regulated at the retail level

As described above, IBPT does not exclude the possibility to apply the margin squeeze test in markets where only wholesale obligations have been imposed on an operator with SMP. If the application of the test in these markets indicates a margin squeeze, the Commission invites IBPT either (i) to modify the wholesale prices accordingly, or (ii) to ensure that action is taken under competition law against the operator with SMP. However, the Commission reminds IBPT of the importance of finalizing its analyses of all wholesale markets within the shortest possible timeframe. To this end the Commission emphasizes that in the presence of effective regulation of wholesale inputs all potential margin squeezes would be a result of pricing at the retail level.

(2) Application of a Discounted Cash Flow (DCF) methodology

Moreover, when the margin squeeze test is applied to offers with a duration longer than one year, the IBPT's draft measure proposes to impose a test based on the Discounted Cash Flow ("DCF"). The Commission would like to point out the following shortcomings in the DCF methodology to detect a potential margin squeeze:

- Firstly, the outcome of the test risks relying on unreasonable forecasts about the ability of a new entrant to benefit from an increasing margin over time, thus leading to a “false positive” result.
- Secondly, the DCF method would only show whether the SMP operator is expected to earn a positive net present value ("NPV") over the period employed for the analysis, but it would not specify how costs should be recovered in distinct sub-periods. Consequently, a positive NPV could be interpreted not as evidence of absence of an anticompetitive price squeeze but, quite on the contrary, as an evidence of a successful exclusion making possible the recoupment of the initial losses.
- The use of the DCF method to detect a possible margin squeeze would allow a dominant firm to incur substantial initial losses (that would be compensated for in the future) while its competitors may not be able to absorb losses during several years.

Therefore, the Commission invites IBPT to ensure that the margin squeeze test does not lead to a "false" positive margin resulting, inter alia, from future profits that are

⁶ Pursuant to Article 7(3) of the Framework Directive.

incompatible with a competitive environment (e.g. constant future prices in a growing market).

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 measure and, 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 12 of Recommendation 2003/561/EC⁷ 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 Commission⁸ within three working days following receipt whether you consider, in accordance with Community and national rules on business confidentiality, that 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,
Philip Lowe
Director General

⁷ 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.

⁸ Your request should be sent Esther by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.