



EUROPEAN COMMISSION

Brussels, 20/10/2008

**SG-Greffe (2008) D/206380**

Institut Belge des Services Postaux et  
des Télécommunications (IBPT)  
Avenue de l'Astronomie 14, Bte. 21  
B-1210 Bruxelles.

For the attention of:  
M. Eric Van Heesvelde  
Président du Conseil

Fax: +32 2 226 88 41

Dear Sir,

**Subject: Case BE/2008/0798: Publicly available local and/or national telephone services provided at a fixed location for residential customers in Belgium.**

**Case BE/2008/0799: Publicly available local and/or national telephone services provided at a fixed location for non-residential customers in Belgium.**

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

## **I. PROCEDURE**

On 19 September 2008 the Commission registered notifications by the Belgisch Instituut voor Postdiensten en Telekommunikatie/Institut Belge des Services Postaux et des Télécommunications ("IBPT"), concerning the markets for publicly available local and/or national fixed telephone services provided for a) residential and b) non-residential customers in Belgium under case numbers BE/2008/0798-0799.

---

<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 (the "Framework Directive"), OJ L 108, 24.4.2002, p. 33.

The national consultation<sup>2</sup> started on 8 May 2008 and ended on 9 June 2008.

Requests for information were sent to IBPT on 30 September 2008 and 13 October 2008 and the replies were received on 3 October and 14 October 2008 respectively.

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 MEASURES**

### **II.1. First round notification**

The first review of these markets was previously notified to and assessed by the Commission under cases BE/2006/0435 and 0437. IBPT identified neither a distinction between local and national calls nor between residential and non-residential markets. On the basis of its analysis, IBPT designated Belgacom as undertaking with significant market power ("SMP") on the notified markets and consequently imposed on it an obligation of non-discrimination, transparency<sup>3</sup>, reporting<sup>4</sup>, cost accounting, accounting separation<sup>5</sup> and a prohibition to charge excessive or predatory prices.

### **II.2. Market definition**

In the current notification, IBPT identifies two separate markets, i.e. one for residential and one for non-residential customers, because of the existence of different operators providing services to both groups of customers and various subscription policies applied by these operators. IBPT includes the following services in the retail fixed calls markets: fixed-to-fixed telephony, fixed-to-mobile telephony, calls over PSTN and cable-TV networks, post-paid and pre-paid services, calls through carrier (pre) selection ("CS/CPS") and VoIP telephony<sup>6</sup>.

IBPT considers that the geographic scope of the relevant markets is national.

### **II.3. The three criteria test**

As these markets have been removed from the Recommendation on relevant markets<sup>7</sup>, IBPT carries out the three criteria test (i.e. (1) there must be high and non-transitory entry barriers,

---

<sup>2</sup> In accordance with Article 6 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 (the "Framework Directive"), OJ L 108, 24.4.2002, p. 33.

<sup>3</sup> Obligation to publish information about the methodology used for cost accounting and separation of accounts.

<sup>4</sup> Obligation to report to IBPT at least 30 days before entry into force of the following measures: new or amended retail offers, tariff changes, rebate schemes for combined offers including national fixed calls. Obligation to submit, upon request, additional information to IBPT, including information about individual offers.

<sup>5</sup> Obligation to keep separate accounts for wholesale and retail activities.

<sup>6</sup> IBPT proposes to include Voice over Broadband ("VoB") where an operator provide its terminal equipment and which is fully substitutable to PSTN telephony and the "unmanaged VoIP" where an end user uses its own terminal equipment. In order to make the "unmanaged VoIP" compatible with a telephone line it is required to have an adapter. So called "peer to peer" services are not included in the market as not substitutable products.

<sup>7</sup> 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

(2) the structure of the market must not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned<sup>8</sup> with regard to the notified markets.

In its notification, IBPT explains that, as far as the first criterion is concerned, the wholesale obligations which have been put in place (such as CS/CPS) have initially lowered the entry barriers to this market. However, IBPT is of the view that calls through CS/CPS are losing their position in the analyzed markets and that wholesale line rental ("WLR"), although imposed on Belgacom, has never been implemented, as operators are in general not interested in a product which would enable them to provide only voice services. As a result, in the absence of resale offers, Belgacom maintains commercial relationships with retail customers. While unmanaged VoIP providers can easily enter the market, their services are, according to IBPT still underdeveloped and, in order to be considered as a fully substitutable product, VoIP has to be accompanied by PSTN or VoB subscription which gives access to emergency numbers.

As far as the second criterion is concerned, IBPT refers to Belgacom's high and recently increasing market shares.<sup>9</sup> Moreover, because of lack of competitive pressure, it observes no or limited price reductions. In particular, fixed to mobile calls are deemed expensive despite significant price reductions at the wholesale level.

As regards the third criterion, IBPT points out that ex-post intervention undertaken by the Competition Authority would be time consuming and therefore not sufficient enough. Moreover IBPT has tools which may quickly remedy potential competition problems on the market.

On that basis, IBPT considers that the three criteria are cumulatively met and the national calls markets remain susceptible to ex ante regulation.

#### II.4. Finding of SMP

IBPT intends, on the basis of its market analysis, to designate Belgacom as having SMP on the notified markets.

Belgacom's market share on markets for national calls services	2003	2004	2005	2006	2007
Residential – in volume	89 %	76 %	67 %	69 %	65 %
Residential – in value	87 %	73 %	65 %	66 %	66 %
Business – in volume	73 %	68 %	71 %	74 %	75 %
Business – in value	70 %	71 %	75 %	78 %	80 %

As shown in the table above, in the market for publicly available local and/or national fixed telephone services provided for residential customers Belgacom had market shares of 67%

---

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 344, 28.12.2007, p. 65.

<sup>8</sup> Recital 5 of the Recommendation .

<sup>9</sup> See section II.4. below.

in terms of volume and 65% in terms of value in 2005 and 65% and 66% respectively in 2007. As regards non residential customers, market shares went up from 71% in terms of volume in 2005 to 75% in 2007 and in terms of value from 75% to 80%. Apart from high market shares IBPT also observes increasing market concentration.

Additionally, when reaching its conclusion on SMP, IBPT examined inter alia the following criteria: control of infrastructure not easily duplicated, economies of scale and scope, vertical integration, lack of potential competition and countervailing buying power.

## **II.5. Regulatory Remedies**

IBPT intends to impose on Belgacom a transparency obligation and a retail price control in the form of preventing it from charging excessive or predatory prices.

## **III. COMMENTS**

On the basis of the notification and the additional information provided by IBPT, the Commission has the following comments<sup>10</sup>:

### **Assessment of the three criteria test**

In accordance with Article 15(3) and 16(1) of the Framework Directive, NRAs shall, taking utmost account of the Recommendation and the Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services (2002/C 165/03) define and analyse relevant markets in accordance with the principles of competition law. Any market identified by NRAs should satisfy the three cumulative criteria set out in the Recommendation,<sup>11</sup> namely 1) the presence of high and non-transitory barriers to enter, which may be of a structural, legal or regulatory nature; 2) a market structure which does not tend towards effective competition within the relevant time horizon; and 3) the insufficiency of competition law alone to adequately address the market failure(s).

The Commission recalls that, in order to establish that the first criterion is met, NRAs should demonstrate that, within the period of the review, entry barriers are high and non-transitory such that they prevent entry capable of limiting market power. In the Belgian market, whilst C(P)S has been in place since 2000 and at least 5 operators are today offering calls services based on C(P)S, their market shares are constantly decreasing since 2005. Wholesale line rental ("WLR"), although imposed on Belgacom, has not been implemented thus far. As a result, in the absence of resale offers, it is Belgacom which maintains commercial relationships with retail customers. Despite a relatively high broadband penetration<sup>12</sup>, providers of VoB services, although having entered the calls markets, have not yet achieved significant market shares.

Against this background no definitive conclusions can be drawn at this stage on whether or not wholesale regulation together with current VoB offers had lowered entry barriers in the Belgian market to an extent that the first criterion would not be met.

---

<sup>10</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>11</sup> Recital 9 of the Recommendation.

<sup>12</sup> In July 2007, broadband penetration in Belgium reached around 24%, being the 6th highest in all 27 EU Member States.

The ease of market entry determines also the tendency towards effective competition, i.e. whether the second criterion is met. As indicated in the Commission guidelines on market analysis and the assessment of significant market power<sup>13</sup> the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant share. Under these circumstances any attempt by an undertaking to increase prices above the competitive level would attract expansion or new entry by rivals thereby undermining the price increase. Indeed, the information provided by IBPT suggests that Belgacom has been able to charge high retail prices. Thus, potential competition could not exert a sufficient competitive check on the incumbent. The Commission also notes that alternative operators, i.e. actual competitors, rather seem to follow Belgacom's retail prices than compete with the incumbent, trying to attract end users with lower rates. The non-existent or only limited price reductions, and in particular the absence of pass-through to retail customers of reductions in wholesale call termination charges, may also indicate that the market does, at least in the short term, not tend towards effective competition.

Given the seemingly inefficient enforcement of wholesale remedies and the lack of positive market trends as regards price competition, the Commission invites IBPT to strengthen its efforts to ensure full compliance with wholesale remedies, and if found to be insufficient or ineffective, to review them without delay. Furthermore, IBPT is also invited to rigorously monitor the market developments, in particular to ensure whether the first and second criteria continue to be met in the near future. Consequently the Commission invites IBPT to undertake a new market analysis at the latest within one year following adoption of the final measures.

### **Proportionality of the retail regulation as proposed by IBPT**

The Commission would like to remind IBPT that, in accordance with the Universal Service Directive<sup>14</sup>, NRAs should intervene at retail level only if remedies imposed at the wholesale level -together with the obligations to provide carrier selection/carrier pre-selection- do not render the relevant retail markets competitive, and would, on a prospective basis, taking into account all means of enforcement available to the NRA, not result in achieving the regulatory objectives set out in Article 8 of the Framework Directive. The Commission notes that as a result of the regulatory obligations imposed at wholesale level (in particular CS/CPS) combined with the high broadband penetration in Belgium, retail fixed calls markets in Belgium should normally tend towards effective competition.

The price control obligation, proposed by IBPT in the notified draft measure, had already been imposed during the first market review and appears to be ineffective, resulting in an overall retail price level in Belgium which is one of the highest in the EU<sup>15</sup>.

---

<sup>13</sup> Point 80 of Commission guidelines on market analysis and the assessment of significant market power under the Community framework for electronic communications networks and services, and footnote 77 of it. OJ C 165, 11.7.2002, p.6.

<sup>14</sup> Article 17 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the "Universal Service Directive").

<sup>15</sup> 13th Report on the Implementation of the Telecommunications Regulatory Package – 2007, Staff working document, Volume 2, p.74-75.

In this respect, the Commission underlines the need for IBPT to ensure that all relevant wholesale remedies including those imposed in the wholesale infrastructure access market and the wholesale broadband access market contribute effectively to sustainable retail competition. In the meantime, before wholesale regulation results in effective competition at retail level, IBPT is invited to modify the current retail remedies in a way that would address the current level of high prices. In particular, the remedies should ensure that the end-users benefit from cost reductions resulting from the decrease of wholesale interconnection charges.

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/EC<sup>16</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>17</sup> within three working days following receipt whether you consider that, in accordance with Community and other 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

---

<sup>16</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>17</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.