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Institut belge des services postaux et
des télécommunications (IBPT)
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Belgium

For the attention of:
Mr Jack Hamande
Président du Conseil

Fax: +32 2 226 88 41

Dear Mr Hamande,

Subject: Commission Decision concerning Case BE/2016/1875: Wholesale call termination on individual public telephone networks provided at a fixed location in Belgium - remedies

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

1. PROCEDURE

On 17 June 2016, the Commission registered a notification from the Belgian national regulatory authority, Institut belge des services postaux et des télécommunications (IBPT)¹, concerning the markets for wholesale call termination on individual public telephone networks provided at a fixed location² in Belgium.

The national consultation³ ran from 14 July 2015 to 15 September 2015.

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 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

³ In accordance with Article 6 of the Framework Directive.

On 22 June 2016, a request for information⁴ (RFI) was sent to IBPT and a response was received on 27 June 2016. IBPT provided additional information on 7 July 2016.

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The second review of the markets for wholesale call termination on individual public telephone networks provided at a fixed location in Belgium was previously notified to and assessed by the Commission under case BE/2012/1279⁵. The market definition⁶ covered termination on each public telephone network of 16 operators offering fixed termination in Belgium, irrespective of the origin of the call and the technology used (PSTN and VoB). IBPT designated all 16 undertakings as individually having SMP on their relevant markets. IBPT imposed the following obligations on all operators: (i) access to, and use of, certain network elements and associated infrastructure; (ii) transparency⁷; (iii) obligation of non-discrimination and (iv) price control based on cost orientation⁸. Regarding Belgacom, IBPT imposed in addition: (i) a transparency obligation requiring Belgacom to inform on future network evolutions five years in advance and a migration rule obliging Belgacom to send a formal closure notice one year in advance and (ii) an obligation of cost accounting. The Commission commented on the need to include in the final measure the timetable regarding the imposition of BU-LRIC based termination rates.

Additionally, the cost of capital for wholesale fixed call termination in Belgium was notified under case number BE/2015/1696⁹. This decision concerned the estimation of the weighted average cost of capital (WACC) for fixed (and mobile operators) for the period 2015-2017 in Belgium. IBPT estimated the pre-tax nominal WACC for both fixed (and mobile operators) at 8.13%. The Commission had no comments.

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

⁵ C(2012) 749

⁶ IBPT defined the relevant market as comprising call termination services provided at fixed locations to geographic numbers, emergency numbers and 078 numbers. Conveyance to non-geographic numbers used for value added services is outside the scope of the relevant market. IBPT defined the relevant product market as termination independent from the level of network at which the operators are interconnected, i.e. termination included conveyance from the local point of interconnection to the user's premise, but may also consist in regional and national termination. [...]. Finally, IBPT defined the relevant markets corresponding to the geographic coverage of each operator's network.

⁷ Only the incumbent operator Belgacom was obliged to publish a reference offer.

⁸ The Decision has set symmetrical rates based on a "top-down" model. They were not BU-LRIC based.

⁹ C(2015) 1347

2.2. Current measure

In the notified draft measure, IBPT (i) defines the pure LRIC methodology used for setting fixed termination rates (FTRs) in Belgium, and (ii) sets FTRs for the provision of termination at all three levels of interconnection, i.e. local, regional (intra-access area) and national (extra-access area), while national termination rates are not derived from the LRIC model.

IBPT's proposed approach results in a single price-cap of 0.092 €/minute for termination provided at local and regional interconnection points, and in a higher price-cap of 0.909 €/minute for termination provided at national level¹⁰. According to the draft measure, the newly proposed price-cap is flat, there is no longer a set-up fee and a distinction between "peak" and "off-peak" as in the current tariff structure.

With respect to the fact that termination at national level is not modelled, IBPT expresses the view that such modelling would be "unnecessarily complex" while the Ethernet transport costs (which IBPT qualifies as "almost negligible") are the sole cost difference for providing termination at national level as compared to providing termination at regional level. IBPT thus proposes to "temporarily" maintain the national price-cap at its current level, based on a top-down costing approach. However, on 7 July 2016 IBPT communicated to the Commission that it will align all interconnection tariffs (local, regional, and national) to the level of 0.092 €/minute on the same date, and that IBPT will amend its final measure accordingly.

IBPT models an existing efficient operator similar in scale and scope to Proximus but not reflecting its network architecture, costs or services offer. IBPT models a mixed TDM-IP network for 2015-2018 and a full IP network as of 2018. IP interconnection is not yet in place in Belgium. The operational costs have been adjusted for efficiency. The applicable WACC is 8.13% in nominal value, as notified in 2015¹¹.

All price-caps, i.e. for termination at local, regional and national level are applicable independently of the interconnection technology used (TDM or IP). The proposed FTR cap will be applicable until IBPT will have reviewed its market analysis decision and issued a decision with respect to IP interconnection. Discussions with market players are still ongoing as to whether IP interconnection will take place at regional or national level. IBPT plans to review its market analysis in the course of 2017.

IBPT recalls that according to the 2012 market analysis decision the termination of calls originated outside the EEA is not subject to regulation and can be set on the basis of bilateral commercial negotiations.

Finally, IBPT proposes that the currently notified decision shall enter into force on the first day of the third month following its publication on the website of the IBPT.

¹⁰ In its reply to a request for information, IBPT explained that the traffic terminated at the national level of interconnection represents only [...] % of the total terminated traffic, while [...] % of traffic is terminated at the regional level and [...] % of traffic is terminated at the local level.

¹¹ Case BE/2015/1696-1697, C(2015) 1347 final

3. COMMENTS

The Commission has examined the notification and the additional information provided by IBPT and has the following comments¹²:

Delay in the review of the relevant termination markets

The Commission notes that the notified draft measure concerns only the specification of the price control obligation imposed on the operators found with significant market power in the 2012 market analysis. Pursuant to Article 16(1) a) of the Framework Directive, NRAs shall carry out an analysis of a relevant market within three years from the adoption of a previous measure relating to that market. Exceptionally, that period may be extended for up to three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension. The Commission has not been notified of a reasoned proposed extension within the three years from the adoption of the previous measure on the wholesale call termination on individual public telephone networks provided at a fixed location in Belgium.

The Commission notes that IBPT plans to review its market analysis in the course of 2017, which implies that the relevant market review would be delayed by a minimum of two years.

The Commission would like to recall in this respect that the failure by a national regulatory authority to analyse a market at regular intervals may affect competition and reduce legal certainty for economic operators as to regulatory conditions. Against this background, the Commission urges IBPT to carry out a new market analysis and notify it under Article 7 as soon as possible in order to comply with the requirements under Article 16(1) a) of the Framework Directive.

Consistent implementation of fixed termination rates

The Commission welcomes that IBPT notified FTRs based on a pure LRIC model, but regrets that IBPT implements pure LRIC rates more than three years after the implementation date of 31 December 2012 as foreseen in the Termination Rates Recommendation¹³.

Moreover, in the originally notified draft measure, IBPT proposed to distinguish between a single rate for local and regional call termination on one hand, and a higher, national call termination rate on the other hand.

As stated in previous cases¹⁴, the Commission considers a single call termination rate based on the costs of a hypothetically efficient operator to be in line with the provisions of the Regulatory Framework as well as the Termination Rates Recommendation and therefore requests IBPT to amend its final measure

¹² In accordance with Article 7(3) of the Framework Directive.

¹³ Commission Recommendation 2009/396/EC on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation) (OJ L 124, 20.5.2009, p. 67).

¹⁴ See cases IT/2011/1196 (C (2011) 2478), and CZ/2012/1392 (C (2012) 9531).

accordingly. In this respect, the Commission takes note of IBPT's commitment to align the rate for national call termination with the rates of local and regional call termination and to adhere to the same implementation date for all three types of termination services, as IBPT stated in its communication to the Commission of 7 July 2016.

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/EC¹⁵ 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 Commission¹⁶ 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.¹⁷ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

¹⁵ 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.

¹⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.