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Institut Belge des Poste et
Télécommunications (IBPT)

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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/2010/1086: voice call termination on individual mobile networks in Belgium

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

I. PROCEDURE

On 28 May 2010, the Commission registered a notification from the Institut Belge des Postes et Télécommunications (IBPT) concerning the second review of the market for voice call termination on individual mobile networks in Belgium².

A request for information (RFI) was sent³ to IBPT on 8 June 2010 and the reply was received on 11 June 2010. A national consultation⁴ ran from 1 February to 12 March 2010. The deadline for the Community consultation under Article 7 of the Framework

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

² Listed as market 7 in the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and services 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 (the Recommendation), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 5(2) of the Framework Directive.

⁴ In accordance with Article 6 of Directive of the Framework Directive.

Directive is 28 June 2010.

Under 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

II.1. Background

The first review of this market was carried out in 2006⁵ and IBPT adopted a decision on 11 August 2006 in which it regulated the market for voice call termination on individual mobile networks in Belgium. On 18 December 2007, IBPT adopted a complementary decision amending the adopted final measure relating to the price control obligation and the internal non-discrimination remedy.⁶ On 4 April 2008, the Appeal Court of Brussels (ACB) suspended IBPT's complementary decision of 18 December 2007 on mobile termination rates (MTRs) and in June 2009 it annulled IBPT's MTRs decision of August 2006. In order to avoid any legal vacuum, IBPT adopted a second complementary decision on 29 April 2008, which set the current MTRs for the three mobile operators Base (KPN Belgium), Belgacom Mobile (Proximus) and Mobistar⁷. In its comments letter in case BE/2006/0433 the Commission considered that the glide path proposed in the notified measure did not fully meet the objective of reducing MTRs to the cost-level of an efficient operator and invited IBPT to determine the level of MTRs of each operator so as to reach symmetry (i) between Mobistar and Proximus already by 2008 and (ii) for all operators shortly after 2008, unless IBPT were of the view that objective cost differences outside the control of the operators justified the maintenance of a small degree of asymmetry. Furthermore, the Commission commented on the internal non-discrimination obligation imposed on Belgacom Mobile and Mobistar and invited IBPT to further substantiate the need for and proportionality of such an obligation. The Commission reiterated the latter comment in its subsequent decision in case BE/2007/0665.

II.2. Market definition

IBPT identifies three relevant wholesale markets for mobile call termination corresponding to the mobile networks (2G and 3G) of the three mobile network operators (MNOs) Proximus, Mobistar and Base⁸. IBPT points to the possibility of further defining a new market if appropriate, i.e. for a "full MNVO"⁹ or for a 4th MNO¹⁰. The geographic

⁵ CaseBE/2006/0433.

⁶ This measure has been notified and assessed by the Commission under case BE/2007/0665.

⁷ This Decision has however not been notified to the Commission. In its reply to the Commission's request for information, IBPT explains that the 2008 decision had to be adopted in urgency and that the latter did not introduce amendments to the market definition or the SMP analysis but simply confirmed the level of MTRs already set in the 2006 measure.

⁸ SMS termination and termination via GSM gateways are excluded from each of the relevant markets.

⁹ IBPT explains that the obligations imposed on the mobile virtual network operators (MVNOs) should normally be the same as those imposed on their host networks. The regulator further states that another consultation would be launched in that respect, with a view to analysing the MVNO's position in the market. Telenet, which is a light MVNO on the network of Mobistar, has clearly expressed its intention to launch activities as a full MVNO, or even as an MNO.

scope of each product market corresponds to the national coverage of each mobile network concerned.

II.3. Finding of significant market power

Proximus, Mobistar and Base are designated with SMP for wholesale voice call termination on their respective mobile networks.

II.4. Regulatory remedies

IBPT proposes to impose the following set of obligations¹¹ on each MNO: (i) access, (ii) transparency, (iii) external non-discrimination, (iv) internal non-discrimination regarding quality of service and (v) price control.

IBPT proposes to impose only on Proximus a non-discrimination obligation as regards the internal tariffs applied and an accounting separation obligation.¹² Both obligations are to be withdrawn once MTRs are based on pure LRIC costs, *i.e.* as from 1 January 2013.

As for the price-control obligation, the following tariff evolution is foreseen:

€cents/min ¹³	Current	2010 ¹⁴	1/1/2011	1/1/2012	1/1/2013
Proximus	7.20	4.52	3.83	2.46	1.08
Mobistar	9,02	4,94	4,17	2,62	1,08
KPN/Base	11,43	5,68	4,76	2,92	1,08

IBPT proposes to implement a BU-LRIC¹⁵ based on a hypothetical (reasonably) efficient

¹⁰ IBPT refers to the intention of the Belgian Federal Government to issue a 4th mobile license. However, according to IBPT, the licence will be issued not before end 2010 for a commercial launch forecasted in 2012.

¹¹ The draft measure foresees their application as of 1 July 2010. However, IBPT specifies in its reply to the request for information that to fulfil some procedural legal requirements, the decision would be applicable as of August 2010.

¹² Under this obligation Proximus is required to charge termination rates to both its own retail arm and third party operators under equivalent conditions and is forbidden to implement transfer prices (between its retail and wholesale arms) that would entail a discriminatory effect. IBPT explains that such a remedy would avoid any discriminatory pricing and anti-competitive cross-subsidization whilst the mobile unit of Belgacom (Proximus) has been fully integrated in 2010 into the Belgacom group which, contrary to other MNOs, has SMP on a large array of markets. IBPT explains also that such obligation would address the risk of cross-subsidization arising from bundle offers.

¹³ Tariffs are indicated in real terms, *i.e.* the rates should be inflation-adjusted for each of the periods.

¹⁴ The prices for 2010 are set on the basis of the LRAIC+ actual costs of each of the operators and not on those of the hypothetical efficient operator (HEO). A LRAIC+ model based on the HEO would result in a higher rate (5.31 €cents/min) compared with the actual costs of Proximus (4.52 €cents/min) and Mobistar (4.94 €cents/min). In that respect, IBPT refers to the ACB rulings of 2008 and of 2009 according to which the regulated tariff should not be set at a level of costs which is higher than the actual cost level incurred by one of the SMP operators when providing the relevant service. The Court considered this cost setting method to be in breach of the cost-orientation obligation imposed on the SMP operators in 2006. Also, IBPT considers the possibility to set a unique (for all SMP operators) MTR based on the lowest cost-level (*i.e.* that of Proximus). IBPT concludes that such a solution would be inappropriate because it would be (i) less coherent compared to a HEO and (ii) possible only in case Mobistar and Base were inefficient (otherwise bringing their MTRs to a lower level would be contradictory to the opinion of the Court), while Mobistar's costs are even below those of the HEO.

¹⁵ IBPT specifies that the bottom-up (BU) approach may be qualified as hybrid because the model is calibrated with data from the SMP operators. The forward-looking LRIC model is based on a 33% market share, foresees the economic depreciation of assets over a period of 50 years and the cost

operator (HEO)¹⁶, allowing for the calculation of costs according either to the LRAIC+ or the pure LRIC model. A two-stage implementation is foreseen:

In the first step starting in August 2010, IBPT proposes to implement a LRAIC+ model in order to decrease both the level of MTRs (IBPT foresees a 50% drop in prices) and the current asymmetry between MNOs (expected to be reduced by approximately 75%). In the second step from 2011-2013, IBPT proposes to implement a glide path towards a pure LRIC model in order to reach complete symmetry as of 1 January 2013. According to IBPT, an intermediary step is necessary towards the implementation of an LRIC *HEO-based* model in order to avoid a too abrupt decrease towards very low MTRs (i.e. 1.08eurocents/min).

III. COMMENTS

On the basis of the present notifications and the additional information provided by IBPT, the Commission has the following comments¹⁷:

Symmetry of Termination Rates

The Commission welcomes IBPT's proposal to set a glide-path towards a unique (i.e. applicable to all SMP operators) LRIC-based price cap by the end of 2012, in line with the Termination Rates Recommendation. Setting mobile termination rates in Belgium at the level of costs of an efficient operator will foster competition and increase end-users' benefits. Furthermore, a substantial reduction of the level of asymmetry of the termination fees that MNOs charge each other will be achieved already with the first step of the proposed glide-path.

The Commission notes that MTRs will remain asymmetric until January 2013 and invites IBPT to consider accelerating the implementation of the above costing model.

Internal non-discrimination Obligation with regard to price

In accordance with Article 8(4) of the access Directive, the obligations imposed on SMP operators shall be based on the nature of the problem identified, proportionate and justified in the light of the regulatory objective laid down in Article 8 of the Framework Directive.

The Commission notes that IBPT proposes to maintain the internal non-discrimination obligation only on one SMP operator and until MTRs are based on pure LRIC costs. However, the Commission has repeatedly commented that NRAs must properly justify the imposition of such an obligation, in particular in a situation where the problem of tariff differentiation between on-net and off-net calls appears, in IBPT's own view, to become less important and where MTRs are on a downward path towards full cost-orientation. In view of these developments,

annualisation is based on a weighted average cost of capital (WACC) of 10.05% nominal value (and 9.50% real value).

¹⁶ The HEO: (i) is an average operator (of the three MNOs present on the market), (ii) started its business activities in 1999 ; (iii) the growth of its market shares is evaluated at 17.9% in a four years time period ; (iv) has a 2G/3G network and (v) its core network is expected to be migrated to NGN by 2010-2011.

¹⁷ In accordance with Article 7(3) of the Framework Directive.

the Commission invites IBPT to further explain in its final measure the risks of anticompetitive discrimination in the Belgian mobile market. Furthermore, the Commission invites IBPT to explain in more detail why such an obligation is appropriate to address the risk of anticompetitive bundling, keeping in mind that the MTRs' immediate reduction flowing from the proposed regulation (already in the first step) will significantly reduce incentives to discriminate and to cross-subsidize. Therefore, the Commission invites IBPT to re-assess the risk of discriminatory pricing and cross-subsidisation at different steps of the glide path, as appropriate.

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 measures and, where it does so, shall communicate them 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/EC¹⁸ 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 Commission¹⁹ 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 publication²⁰. You should give reasons for any such request.

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

¹⁸ 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.

¹⁹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁰ The Commission may inform the public of the result of its assessment before the end of this three-day period.