Dear Sir,

Subject:  Case BE/2007/0735: Wholesale unbundled access (including shared access) to local loops and sub-loops for the purpose of providing broadband and voice services;

Case BE/2007/0736: Wholesale broadband access

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

I. PROCEDURE

On 26 November 2007, the Commission registered under the cases BE/2007/0725 - 736 notifications from the Belgian regulatory authority, l'Institut Belge des services postaux et des télécommunications (“IBPT”), relating to the markets for wholesale unbundled access to local loops and sub-loops and for wholesale broadband access.


On 5 December 2007 a request for information was sent to IBPT. The reply from IBPT was received on 10 December 2007 and additional information was submitted on 13 December 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 Regulatory Authority concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Market definition

The notification concerns the market for wholesale unbundled access (including shared access) to local loops and sub-loops, and the market for wholesale broadband access which correspond, respectively, to markets 11 and 12 of the Recommendation on relevant markets ("the Recommendation")\(^2\).

**Wholesale unbundled access (including shared access) to metallic loops and sub-loops**

IBPT finds that this market includes full unbundled and shared access to local loops and sub-loops. In the case of full unbundled access, alternative operators have access to all the spectrum frequencies of the local loops and sub-loops. In case of shared access, alternative operators have access to high frequencies of the local loop and sub-loop in order to provide broadband services whilst it is possible that Belgacom provides the end user with voice services (shared access "with voice") or that it does not (shared access "without voice"). In the latter case, the alternative operator has to pay a tariff equivalent to full unbundled access.

Optical fibre networks (FTTH/FTTB) are excluded by IBPT from the product market definition due to the fact that these networks are not based on metallic technologies and to their current limited coverage in the Belgian market.

IBPT considers that the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops is national in scope.

**Wholesale broadband access**

IBPT has considered that on the basis of a substitutability analysis, bitstream access at DSLAM level and at ATM switch level are not part of the same relevant product market. In this respect, access at DSLAM level requires significant network capillarity from the alternative operator which makes this product more similar to local loop unbundling than to bitstream.

IBPT finds that the relevant market includes ADSL, SDSL and VDSL\(^3\) since despite differences on the demand side, in particular with regard to the level of prices, there is a significant supply-side substitutability between those products. Further, the relevant

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\(^3\) ADSL (Asymmetric Digital Subscriber Line), SDSL (Symmetric Digital Subscriber Line), and VDSL (Very High Speed Digital Subscriber Line).
market includes bitstream ADSL access in cases where Belgacom is providing the end user with voice services (ADSL "with voice") or not (ADSL "without voice").

On the basis of demand-side and supply-side substitutability analysis, IBPT considers that resale products and leased lines are not included in the market for wholesale broadband access.

Further, IBPT finds that cable networks are not included either in the relevant market for wholesale broadband access. According to IBPT, there is no direct substitutability between DSL and cable networks, because there are technical and economical considerations that would prevent wholesale clients (such as ISPs) to use a wholesale offer from a cable network operator, as well as cable network operators to offer a product equivalent to bitstream. However, IBPT finds that there is an indirect pricing constraint on wholesale broadband access from the presence of cable in the retail market for broadband Internet access. This indirect pricing constraint should be taken into account at the SMP assessment stage and does not alter, according to IBPT, the conclusions on the product market definition.

IBPT finds that the market for wholesale broadband access is national in scope, since the incumbent operator's network has a national coverage and no regional differentiation of prices at wholesale or retail level has been observed. However, from the notification and the additional information provided by IBPT on the level of retail competition, it can be observed that the relevance of cable operators in their respective area of coverage varies significantly across the country.

II.2. Finding of significant market power ("SMP")

IBPT finds that Belgacom has a 100% share in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops.

Also, IBPT finds that Belgacom has a 100% share in the market for wholesale broadband access. For the purposes of market analysis, IBPT does not take into account self supply since cable networks are not included in the market definition and local loop unbundling is still very limited in Belgium.

IBPT has analysed the indirect pricing constraint stemming from the cable-based services in the retail market at the SMP assessment stage in the wholesale broadband access market. In its reply to request for information IBPT subsequently argued that this indirect pricing constraint is not sufficiently strong as to affect the behaviour of Belgacom. This is because the cost of the wholesale input does not represent a significant proportion of the price of the relevant retail product (around […]%) and, therefore, any increase in the price of the wholesale input is likely to be absorbed by Belgacom and ISPs and not to be passed through to the retail level.

Other criteria examined by IBPT are the high barriers to entry, such as the level of sunk costs and economies of scale and scope, the control of an infrastructure not easily duplicated, vertical integration of Belgacom and lack of countervailing buyer power.

Accordingly, IBPT finds that Belgacom has significant market power in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops and in the market for wholesale broadband access in Belgium.
II.3. Regulatory Remedies

IBPT proposes to impose on Belgacom the following obligations in both markets:

(i) Access

Belgacom will be obliged to grant unbundled access (including shared access) to metallic loops and sub-loops to alternative operators. Further, the RUO should allow the deployment of all the different technologies, in particular, ADSL2+, (E)SDSL and VDSL2 could be deployed on the local loop.

Belgacom will be obliged to grant wholesale broadband access to alternative operators in order to allow the replicability of Belgacom's retail offers. This access should be granted at ATM switch as well as on IP level; however the obligation to grant access at DSLAM level will no longer be imposed on the market for wholesale broadband access.

Belgacom will also be obliged to grant access at agreed service levels, allow co-location and to grant access to other associated facilities.

(ii) Non discrimination

Belgacom will be obliged to apply equivalent economic and technological conditions to equivalent transactions with third-party operators and to provide the latter with services under the same conditions to the ones applied to their vertically integrated company. IBPT states that it will follow closely the respect of the non discrimination obligation with regard to the development of new broadband retail offers, in particular VDSL, VDSL2, (E)SDSL, ADSL2 and ADSL2+.

(iii) Transparency, including the publication of a Reference Offer

Belgacom will be obliged to publish a Reference Unbundled Offer and a Reference Offer for wholesale broadband access. The Reference Offers shall include the economic and technical conditions for unbundled access to the local loop and for wholesale broadband access respectively, the co-location services available, information systems and conditions for the provision of these services.

Further, Belgacom will be obliged to publish quality of service indicators (key performance indicators) on a monthly basis.

(iv) Accounting separation, and

(v) Price control and cost accounting

IBPT proposes to impose on Belgacom an obligation to apply cost oriented prices on the basis of a "bottom up" methodology for wholesale unbundled access (including shared access) to the local loops and sub-loops. IBPT proposes to impose on Belgacom an obligation to apply cost oriented prices for wholesale broadband access on the basis of the costs of an efficient operator.
With regard to VDSL and VDSL2, IBPT intends to impose a wholesale broadband access price on the basis of reasonable costs in combination with an eviction test, in order to encourage investment⁴.

Further, IBPT will apply a margin squeeze test on the prices for wholesale unbundled access and wholesale broadband access, and the relevant retail services provided by Belgacom.

IBPT states that the next review of the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops and for wholesale broadband access is foreseen in 18 months and, following a request made by the Vlaamse Regulator voor de Media (VRM) the obligations imposed under the present market review will expire on 15 May 2009.

III. COMMENTS

The Commission has examined the notification and additional information provided by IBPT and has the following comments⁵:

**Promotion of investment on infrastructure in relation to wholesale unbundled access (including shared access) to the local loop and competition at the retail level**

The Commission acknowledges that in the Belgian retail broadband market the relevance of cable operators in the respective areas of coverage varies across the country. Nevertheless, the competitive structure at the retail level has remained rather stable over the last years, which is also reflected in a high degree of stability of retail prices over time. This phenomenon is also supported by IBPT's finding that the cost of the wholesale input represents about […]% of the retail price which would point to the existence of significant margins and comparatively high retail prices in comparison to other EU Member States⁶. Consequently, the market data at the moment do not point towards differentiated competitive conditions to an extent that would justify a delineation of sub-national markets. However, the Commission invites IBPT to examine in the national context the reasons for the high retail prices for broadband services in Belgium especially in relation to the significant margins existing between the wholesale inputs and the relevant retail products.

One reason for the rather stagnant retail competition could be the fact that the Belgian market is characterised by a low presence of operators relying on local loop unbundling. In this respect, it is worth noting that the growth of local loop unbundling only started to show some developments in 2006 and remains significantly low at a level of around 1% of unbundled lines⁷. IBPT believes that

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⁴ IBPT proposes to orient the prices for VDSL and VDSL2 towards the costs of an hypothetically reasonable efficient operator which uses LLU as an input to build its access network in order to stimulate investment in infrastructure while still allowing alternative operators to replicate and compete with the incumbent's offers on the retail market.

⁵ Pursuant to Article 7(3) of the Framework Directive.

⁶ As indicated by IBPT in page 72 of the notification document and in the additional information submitted in the response to the request for information.

⁷ As represented in figure 3.7 of the notification document (page 102).
this is due to the economic and technical conditions of the existing bitstream offer which enable operators to differentiate appreciably from Belgacom's retail offers. Also, until the recent reductions the price for full local loop unbundling remained higher than the EU average.

Against this background, the Commission, while noting that IBPT has recently reduced the level of the prices for local loop unbundling, invites IBPT to ensure effective implementation of remedies to further enhance the provision of local loop unbundling and, in particular, to ensure that the level of local loop unbundling and bitstream prices create the appropriate incentives for alternative operators to switch from the bitstream offer to the local loop unbundling offer.

Furthermore, the Commission invites IBPT to assess the impact of the regulation of LLU and Wholesale Broadband Access in its subsequent analysis, in particular by monitoring the developments of the competitive conditions in the retail market, including to check whether the future market development may justify a more restricted geographical market definition.

**Access to fibre infrastructure**

IBPT excluded optical fibre connections (FTTH/FTTB) from the scope of the relevant market for wholesale unbundled access (including shared access) to local loops and sub-loops (and thus from the market analysis) without supporting this conclusion with an appropriate substitutability analysis.

The Commission notes that in its reply to the request for information, IBPT argued that the architecture of Belgacom's network is not currently adapted for FTTH/FTTB and existing copper cables are not installed in ducts but are buried cables so the installation of FTTH requires costly engineering works. There is at present no retail or wholesale offer for broadband products through FTTH or FTTB and this situation is likely to remain over the time period of the market review. The Commission also notes that the evolution of next generation networks ("NGN") is currently subject to further analysis by IBPT in order to assess whether the currently proposed draft measures need to be adapted to new market conditions.

Therefore, the Commission does not object at this stage to IBPT's assertion that access to the NGN access network is not part of the market for wholesale unbundled access to the local loop. Nevertheless, the Commission, whilst acknowledging that the remedies proposed by IBPT in the wholesale broadband access market guarantee access to high speed broadband technologies (including VDSL), invites IBPT to reassess the market conditions in view of guaranteeing a level playing field in the future NGN environment.

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8 According to Figure 75 in the Commission Staff Working Document Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on European Electronic Communications Regulation and Markets of 2006 (12th Implementation Report).
Timeframe for the market review and efficient enforcement of regulatory obligations

The Commission notes that IBPT intends to carry out the next market review for wholesale unbundled access (including shared access) to metallic loops and sub-loops and wholesale broadband access in 18 months. The regulatory obligations imposed in the draft decision currently notified to the Commission, will however expire on 15 May 2009. In its reply to the request for information, IBPT stated that it cannot guarantee that a new decision concerning these markets will be adopted and operational on 16 May 2009 and it further confirmed that if the currently proposed decision expires before a new decision is adopted, there will be no *ex ante* regulation on the markets concerned.

The Commission recalls that regulatory obligations imposed on an SMP operator shall remain in force until the next market analysis review is adopted. The Commission therefore invites IBPT to reconsider the determination of an expiration date for the obligations currently imposed in order to ensure that these obligations are not elapsing before the next market review is carried out, in order to ensure regulatory certainty to the 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.

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Yours faithfully,
For the Commission,
Fabio Colasanti
Director General

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