

BELGIUM

Note: This document is an excerpt from the Staff Working Document attached to the Communication 'Towards a Single European Telecoms Market – 13th Progress Report (COM (2008(153)). The Communication and the Staff Working Document, as well as the corrigendum of 28th May 2008 can be found on Europa at the following url address: http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/annualreports/13th/index_en.htm

INTRODUCTION

Despite some regulatory action and a slight uptake of unbundling, Belgium has not kept up with the top performers in the European ranking of broadband penetration. Retail prices for Internet access have remained relatively high. In contrast, the mobile market shows ongoing competition. Traffic is increasing and retail prices have fallen.

Some key regulatory moves have taken place in Belgium in 2007. In September the long-awaited cooperation agreement between the federal and the community regulators entered into force, and in November the federal regulatory authority notified to the Commission two key market analyses for broadband, i.e. unbundling and bitstream access. This should be followed by implementation measures, which should lead to more competition in the broadband market. Systematic appeals and lengthy proceedings, however, continue to cast uncertainty on the effectiveness of regulation.

REGULATORY ENVIRONMENT

Main regulatory developments

Despite some remaining gaps in the regulatory work, the Belgian legal framework for electronic communications is almost complete. Market reviews have almost been finalised, except for the markets for broadcasting transmission services. The federal regulatory authority, the Institut belge des services postaux et des télécommunications/Belgisch Instituut voor postdiensten en telecommunicatie (IBPT/BIPT), has submitted for the first time draft market analyses to the regional media regulators, following the entry into force of the cooperation agreement between the federal State and the (linguistic) communities. The draft measures — concerning unbundling and bitstream access — were subsequently notified to the Commission in November 2007.

The federal Electronic Communications Act was amended in April 2007 on universal service, as a reaction to the infringement proceedings in this respect, which are still ongoing. A specific federal act was adopted in March 2007 to deal with broadcasting transmissions in the bilingual region of Brussels-Capital. A considerable amount of secondary legislation was adopted, mainly concerning consumer protection, universal service and numbering.

In 2007, IBPT/BIPT imposed on the fixed incumbent an obligation to set up a cost accounting system. It has put in place a margin squeeze test for retail markets.

IBPT/BIPT also decided in January 2007 to regulate the markets of leased lines and a cost model is being developed (bottom-up) to that effect.

Organisation of the NRA

The newly concluded cooperation agreement allows the federal regulator and the community regulators to consult each other when they are exercising competences in the field of infrastructures common to telecommunications and broadcasting. In the event of disagreement between the federal and community regulators, draft decisions will be submitted to and possibly adopted by the Conference of Regulators or by the Interministerial Committee for Telecommunications and Broadcasting. It remains to be seen, however, how this cooperation will work in practice and whether it will enable Belgium to make up the delays.

In its reply to the Commission's infringement proceeding with respect to Belgium's rules for the costing and financing of universal service obligations, the Belgian authorities have stated that the Belgian Parliament is to be seen as the NRA competent for the assessment of any unfair burden in the context of the national universal service scheme. This was confirmed by the Act of 25 April 2007, amending and interpreting the Electronic Communications Act of June 2005.

There have been some minor changes to the enforcement powers of IBPT/BIPT. The NRA may impose a maximum fine of up to 5% of an undertaking's turnover (to a maximum of €2.5 million), but is no longer obliged to impose a minimum fine. So far IBPT-BIPT has not used its fining powers very often. Its legal power to serve notice in case of infringement of the telecom rules was used in February and October 2007 against the incumbent, which was ordered to reflect the lowering mobile termination charges in its retail tariffs.

While the NRA's financial resources have not changed significantly, operators have pointed again to the 2006 accounts, which show, unjustifiably in their view, a surplus of €3 million (which legally has to be returned to the State treasury), a structural financial reserve and specific provisions for other services. On the other hand, the NRA's human resources have been structurally reinforced with the staffing level increased by 20 persons.

Dispute-settlement procedures before the Competition Council are hardly used and the legal timeframe of four months is generally not respected. Operators doubt whether this body has sufficient expertise and staff to deal with specific telecommunication issues. As an illustration, they point to a case based on competition law concerning price squeeze and the lack of cost-orientation of the incumbent's retail tariffs, which has been pending since 2005.

Decision making

IBPT/BIPT has finally carried out the first round of analyses for all relevant markets within its remit (except for broadcasting transmission services in the bilingual Region of Brussels-Capital, attributed to the BIPT by law of March 2007). The market analyses related to the wholesale markets for unbundled access and bitstream access were notified to the Commission in November 2007. Some definitive measures are still missing, however, and specific implementation measures are needed for specific areas such as the

use of technologies in the new unbundling reference offers, the leased lines regulation (specific reference offer, cost model, qualitative aspects).

IBPT/BIPT has revisited the market for mobile termination, in order to introduce more symmetry in termination rates, on top of continued reduction of these rates according to a glide path.

This has been in contrast with the various markets for broadcasting transmission services, which are still subject to analysis. These markets are within the competence of the regional regulators (responsible for broadcasting in the linguistic communities) and of the IBPT/BIPT in Brussels-Capital. A first notification — by the French community regulator — was withdrawn in early 2007.

Market decisions have continued to be systematically appealed, and most cases are still pending. Lengthy procedures, combined with the possibility of retroactive annulment by the courts and the impossibility for the NRA to adopt retroactive decisions, have contributed to increasing legal uncertainty in Belgium. These elements also appear to weaken in practice the decision-making authority of the NRA.

The absence of a right for third operators to join an appeal procedure against an NRA decision was confirmed by the appeal court in late 2006 in a case concerning amendments to a reference offer. The court considered that the subjective rights of an LLU or bitstream operator vis-à-vis the incumbent cannot be derived from the reference offer but only from the individual access contract. The Commission services are looking into the matter.

MARKET AND REGULATORY DEVELOPMENTS

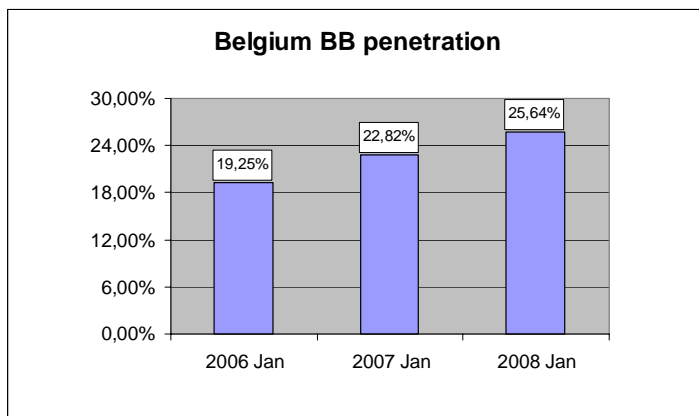
The total turnover of the Belgian telecommunications sector was €9.72 billion as at 31 December 2006, the revenue from fixed markets was €5.49 billion, and the one from mobile markets was €4.22 billion. The total value of tangible investments by alternative operators in fixed telephony networks was €0.25 billion. Mobile operators invested €0.41 billion. The incumbent fixed network operator invested €0.38 billion in its fixed infrastructure in 2006.

Generally speaking, there has not yet been much debate in Belgium about fibre networks and next generation networks. The incumbent has, however, made announcements about next generation access through VDSL2, which aim to withdraw certain regulated access products from 2009, replacing them by commercial products or new technologies. Based on these announcements, the regulator was expected to start a public consultation on Next Generation Networks and Next Generation Access in January 2008.

In the meantime, bundled services have continued to develop considerably in Belgium, both on the incumbent's network and on cable. This could have implied an increase in the value in the fixed markets, despite a constant decrease in volumes of traffic.

Broadband

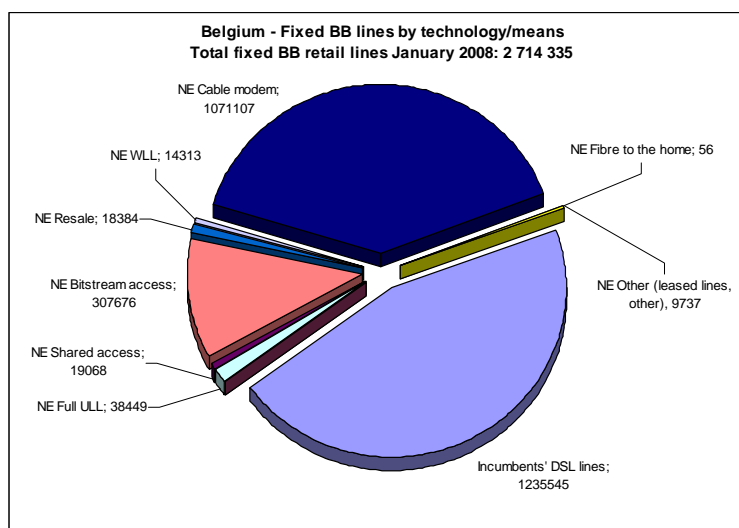
Market situation



The pace of growth (less than 3 percentage points) has stayed beneath the European average and behind numerous other fast-growing Member States. With 25.64% broadband penetration and in sixth place (as at January 2007), Belgium has begun lagging behind in comparison with the European best performers. However, it still maintains a position above the average in the ranking. The

new entrants' market share has slightly increased (+1 percentage point), mainly through cable connections. The market share of alternative DSL operators has slightly decreased (14%).

According to a study on retail tariffs carried out for the Belgian Ministry of Social Integration in January 2007, the prices of high speed broadband offers (>10Mb) were considerably higher than in neighbouring countries. Prices for medium speed offers (>4Mb and >2Mb) were slightly higher while the prices of the most used speed (the incumbent's ADSL offer of 4Mb) were slightly lower than the European average.



DSL rural coverage is 100%. For cable, however, rural coverage is still limited (30%) and the gap with respect to national coverage is significant (80% coverage)¹.

Regulatory issues

Market analyses related to the wholesale markets for unbundled access and bitstream access were notified to the Commission in November 2007. In the meantime, current measures and obligations imposed on the incumbent (reference offers for unbundling and

¹ IDATE report (October 2007): Broadband Coverage in Europe. The data used in the report refer to December 2006.

bitstream access, respectively BRUO and BROBA) are still based on the old telecommunications legislation. The NRA has been particularly active in developing new bottom-up cost models, which should lead to lower wholesale prices and a larger uptake of the existing regulated products.

Alternative operators have started migrating from bitstream to unbundling, although the percentage of the unbundled lines remains very modest in the overall picture (2% of all broadband lines): bitstream remains the most important access type (11.3%). Wholesale naked bitstream (BROBA without voice) has seen a large uptake in the last two years (from 17.6% to 43% of total bitstream lines). Most operators have welcomed the substantial price decreases for monthly rental fees (from €1.26 to €0.29 for full unbundling and from €1.61 to €0.52 for shared access) resulting from active NRA work on cost-orientation. This has brought them to the lower levels of Europe. The lower prices for bitstream access blocks and tie-cables adopted in November 2006 were followed in 2007 by price decreases for splitters and for one-off fees. Some prices, however, remain high in the view of alternative operators.

The incumbent was ordered by the NRA — back in 2006 — to include ADSL2+ in its bitstream reference offer. Its continued refusal, however, has not yet been subjected to sanctions. Such behaviour is seen as discriminatory by the alternative operators, as this technology is currently used at retail level (this dispute about ADSL2+ has been brought before the Competition Council). Operators complain about their impossibility to compete with the incumbent in terms of higher speed or new converged offers.

Alternative operators have continued to complain about unsatisfactory service level agreements (SLAs). As the incumbent seemed unable to meet the imposed short deadlines for provisioning and fault repairing in 2006, the NRA decided in April 2007 to increase these deadlines to a more realistic level. The NRA decided in November to reduce them again to former levels in 2008 using a glide path. On the other hand, alternative operators are requested to provide binding forecasts for installations and migrations. They do not accept, however, that minimal deviation from such forecasts from their side would be followed by the incumbent's denial to comply with SLAs. In the same decision of November 2007, the NRA also strengthened SLA requirements to be met by the incumbent on the basis of alternative operators' forecasts, and imposed the publication of a list of key performance indicators (KPIs).

Mobile markets

Market situation

The penetration rate in Belgium in terms of active mobile subscribers amounted to 93.86% as at July 2007, compared to an EU average at 109.37%. Market shares expressed in minutes of traffic have remained more or less stable: about 46% for the first, 32% for the second and 22% for the third operator (December 2006). Growth in minutes amounted to 21.4% in 2006, and prices have been decreasing substantially (by more than 5%). The number of post-paid customers increased from 37% to 40%. Mobile virtual network operators (MVNOs) represented a market share of less than 1% (in minutes).

The coverage of each of the 3G networks was estimated to exceed 40% of the population according to IBPT/BIPT, i.e. the minimum provided by law. The first operator, however, has claimed 80% coverage.

Regulatory issues

Mobile termination rates have continued decreasing throughout 2007. The national average rate fell indeed from €0.1553 in October 2006 to €0.0991 in October 2007, a level that is very close to the European average. Following Commission comments, the NRA revisited the market and notified a complementary decision with the view of reaching symmetry between the first and the second operator by mid-2008, and less asymmetry with the third operator. The measures were finally adopted in December 2007.

Roaming

After some early problems in the implementation of information obligations by one operator, which were noted by the Commission to the NRA, all Belgian mobile operators complied with the new European Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community. Prices have been set at the maximum level indicated by the Regulation. One operator is offering slightly lower tariffs.

Fixed

Market situation

Traffic volumes sharply decreased (-7.6%) and so did the number of active carrier pre-selection lines, which may be due *inter alia* to increasing fixed-to-mobile substitution. However, the market share of the incumbent rose again, both in volume (from 65% to 70% in 2006) and in value (from 66.6% up to 71.10%). As an example, the incumbent's market share for national fixed calls fell from 76% to 69% between 2004 and 2005 but rose again to 77% by the end of 2006. This might be explained by increasing offers of flat rate packages and bundles.

Only one competitor had a market share close to 10%, five others had a small share varying between 2 and 5% (in value).

Regulatory issues

As the fixed line incumbent is required not to charge excessive prices by virtue of the market decision on fixed telephony services, it has the obligation to reflect decreases of termination rates of third operators in its own retail prices. However, after having been served formal notice by the NRA, the incumbent applied the first reduction of mobile termination rates in May 2007, and after a second formal notice, was expected to adapt its prices to the second reduction in January 2008.

In June 2007, the Court of Appeal rendered its judgment on the appeal lodged by the incumbent against the IBPT/BIPT 2006 decision on the retail access markets (markets 1 and 2). The court dismissed most grounds for annulment and maintained almost all the obligations imposed upon the incumbent. The effective implementation of the obligation to provide wholesale line rental (WLR), also confirmed in court, has been delayed, reportedly following operational problems. Doubts have been raised by alternative operators with respect to the proportionality of the implementing costs and the very low level of retail minus (11%).

Broadcasting

Market situation

Most households are connected to the cable networks (more than 90%). Different types of digital platforms are rapidly emerging and are offering services to more than 14% of Belgian television households.

As to terrestrial networks, the analogue switch-off in the Flemish Community is expected to take place at the latest by the end of 2008. The French Community proposed in a July 2007 Strategic plan for transition to digital broadcasting to maintain a period of analogue-digital simulcast until the switch-off by the end of 2011.

Concentration of cable companies has taken place in the entire country, with the grouping in one consortium of the various local cable operators in the south. More recently, the main cable operator in the north of the country has also continued its consolidation efforts.

Regulatory issues

The regulator of the French Community (Conseil Supérieur de l'Audiovisuel) notified three draft decisions on the markets of broadcasting transmission services (local markets of cable operators, a market for xDSL television and a market of terrestrial television transmission), but withdrew them insofar as the regulator had lost its competence due to the annulment of the applicable legal provisions. The regulator of the Flemish Region has not notified any analysis so far, neither has IBPT/BIPT, which was entrusted with this task in the bilingual Region of Brussels-Capital.

Horizontal regulation

Spectrum management

By royal decree of 28 March 2007, GSM operators were given the possibility to offer 3G services on the GSM frequency bands 880-915 MHz and 925-960 MHz as from August 2008. This will allow them to meet their coverage obligations more easily (50% of the population by beginning 2008 and 85% from March 2009 with the 900 MHz and the 2 GHz band).

Implementation of spectrum decisions

Belgium has implemented the Commission spectrum harmonisation decisions, except Decision 2006/771/EC.

THE CONSUMER INTEREST

Tariff transparency and quality of service

The implementation of an electronic tool to compare customer tariffs, the so-called “tariff simulator”, has been delayed despite its announcement back in 2006. Other consumer protection provisions were implemented in 2007, such as the ministerial decree on mandatory information on customer invoices. Operators have expressed doubts whether the federal NRA is capable of enforcing the numerous consumer protection provisions, especially with respect to new operators in the market.

In May 2007, a new federal consumer protection act was adopted with respect to certain elements of broadcasting transmission services. It specifies the obligation for broadcasting operators to provide information concerning contractual terms and conditions, as well as quality and security of networks and services.

Universal Service

Since 2006, the Commission has been looking into the costing and financing of the Belgian universal service obligations by means of infringement proceedings. In April 2007, the Belgian authorities amended the Electronic Communications Act. Via an interpretative provision, the Belgian authorities have notably claimed that the Belgian Parliament was the competent NRA that had decided, by the adoption of the Act in June 2005, that any net cost incurred by any operator had to be considered as an unfair burden. Moreover, net costs have been calculated as any loss of revenue resulting from the granting of social discounts, specifically for the provision of the social tariffs (all operators that offer public telephony services are legally required to provide these discounts). A transitory regime has also been set up, by which the incumbent, which is still the main provider of these tariffs, will be granted reduced compensation during five years.

The Commission was not satisfied with these changes and has referred the Belgian State to the Court of Justice.

As to the general part of the universal service obligations (fixed telephony, directory enquiry services, directories and public payphones), the Belgian Government adopted the necessary secondary legislation in 2007 in order to proceed with the definitive designations (concerning the open designation mechanism, the procedure and the period of designation). The Commission services continue looking into the financing of this part of the universal service obligations.

Number Portability

The amount of both mobile and fixed numbers has considerably increased over the last year (nearly +500 000 for mobile ported numbers). 19% of the total mobile numbers are ported numbers.

By royal decree of 20 March 2007, the obligation to offer number portability was extended to MVNOs.

A new royal decree, adopted in April 2007, concerns the granting and withdrawing of rights of use for numbers (management of the national numbering space). It endorses the existing rules on rights and obligations for VoIP services, which are granted geographical numbers.

Consumer complaints

The field of action of the ombudsman for telecommunications was extended to the contracts and invoices related to broadcasting transmission services.

European emergency number 112

As caller location information for mobile calls is available in Belgium, the Commission closed the infringement proceeding related to this issue. A royal decree of 27 April 2007 imposed on Belgian mobile operators the obligation to provide, as from May 2008, location information in real time and by automatic electronic means to the emergency services.

Must-carry

The Commission sent Belgium a complementary letter of formal notice after legislation in the bilingual region of Brussels-Capital on the must-carry regime was amended. It considers that the new provisions do not yet conform to the requirements of the Universal Service Directive. At the same time, the must-carry case in the French-speaking Community was closed following annulment of the underlying decree providing for the must-carry regime.

With respect to the (former) Brussels must-carry rules the Court judged, in December 2007, that the freedom to provide services does not preclude a must-carry regime on the condition that such legislation pursues an aim in the general interest and is not disproportionate in relation to that objective (Case C-250/06, *United Pan-Europe Communications Belgium and Others*).

Data protection

Belgium has not yet transposed the Data Retention Directive, though some measures had already been put in place before.