Belgium finally adopts the Electronic Communications Act transposing the EU Telecom Package

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Introduction

Until recently, Belgian telecommunications were mainly regulated by the Act of 21 March 1991 on the reform of certain autonomous public enterprises, as modified (the "1991 Act").

On 13 June 2005, the Electronic Communications Act (the "eCommunications Act") was adopted bringing major modifications to the legal regime put in place by the 1991 Act. The eCommunications Act was published in the Belgian State Gazette on 20 June 2005 and entered into force on 30 June. It abrogates and replaces certain provisions of the 1991 Act as well as the entire Act of 30 July 1979 on radio communications. Certain implementing Royal and Ministerial Decrees adopted under the 1991 Act that are not in contradiction with the eCommunications Act will remain in force. However, a number of new Decrees must still be adopted to implement certain provisions of the eCommunications Act[1].

The eCommunications Act implements the EU Directives forming the EU Telecom Package, i.e. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), Directive 2002/20/EC on the authorisation of electronic communications networks and services (the "Authorisation Directive"), Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive"), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the "Universal Service Directive"), Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the "Privacy Directive") and Directive 2002/77/EC on competition in the markets for electronic communications networks and services (the "Competition Directive").

The deadline for transposition of the EU Telecom Package by the Member States was 24 July 2003 (or 31 October 2003 for the Privacy Directive). Belgium is therefore almost two years late in adopting the eCommunications Act. Part of the delay was due to conflicts of competence between the Federal State and the Communities. The substantial delay in the adoption of the eCommunications Act will shorten its lifespan since the review of the EU electronic communications regulatory framework will already take place in 2006.

Scope of application and competence

The scope of the eCommunications Act is limited to electronic communications services and networks. It does not include the content of those communications, information society services as defined by the Act of 11 March 2003 that do not consist exclusively or primarily in transmission of signals on electronic communication networks as well as radio and television broadcasting (Articles 2, 3° and 5°).

Under Belgian constitutional law, telecommunications falls within the competence of the Federal State while matters related to broadcasting are considered cultural matters falling under the competence of the Communities (*i.e.* the Flemish, French-speaking and German-speaking

[1] Additional Royal Decrees may also be adopted to set forth the conditions applicable to the offering of activities related to electronic communications other than those covered under the eCommunications Act (Article 49). Such Royal Decrees will be abrogated if they are not confirmed by a law within 15 months after their publication in the Belgian State Gazette.

Communities[2]). When a network or service relates to telecommunications and broadcasting, both the Federal State and the relevant Communities are competent[3].

In its advice of 28 June 2004 regarding the draft eCommunications Act, the Belgian Council of State considered that the EU Telecom Package could only be validly implemented once consultation and cooperation procedures had been put in place between the Federal State and the Communities. The need for such cooperation was confirmed by the Belgian Constitutional Court in its decision of 14 July 2004 (No. 132/2004) on two federal Acts of 17 January 2003 regarding the federal regulator, the Belgian Institute for Postal services and Telecommunications ("BIPT"), and its recent decision of 13 July 2005 (No. 128/2005) on the Decree of the Flemish Community of 7 May 2004 regarding radio and TV broadcasting.

The eCommunications Act expressly states that the coordination of radio frequencies for broadcasting must take place through a cooperation agreement between the Federal State and the Communities (Article 17).

While the eCommunications Act was amended to take into account recommendations of the Council of State, the adoption of the Act nevertheless preceded the conclusion of a cooperation agreement which has not yet been entered into between the Federal State and the Communities.

Structure of the eCommunications Act and main principles

The structure of the eCommunications Act, which is over 60 pages long, largely mirrors the EU Telecom Package. It is divided into six titles,

- definitions and general principles (Title I),
- establishment of electronic communications (Title II),
- provisions guaranteeing fair competition (Title III),
- protection of the interests of society and of users (Title IV),
- procedural and criminal provisions (Title V) and
- modifying, transitory and final provisions (Title VI).

The main principles of the eCommunications Act include:

- the simplification of access to the sector, including the removal of individual licensing,
- the optimisation of competition by a more flexible regulatory system,
- the guarantee of an adequate universal service and
- the protection of end-users.

Notification regime

The eCommunications Act sets forth the principle of free provision of electronic communications networks and services, subject to certain conditions and with certain exceptions (Articles 3 and 4).

[2] The EU Telecom Package has been transposed at Community level by the French-speaking Community (Decree of 27 February 2003), the Flemish Community (Decree of 7 May 2004 coordinated on 4 March 2005, of which Article 18 has been annulled by the Constitutional Court pursuant to its recent decision of 13 July 2005) and the German-speaking Community (recent Decree of 27 June 2005).

[3] The Federal State remains solely competent with respect to radio or television broadcasting networks and companies established in the bilingual Region of Brussels-Capital which cannot be considered as belonging exclusively to one Community. The eCommunications Act does not implement the EU Telecom Package regarding such radio or television broadcasting networks and companies. Another federal legislation should be adopted in that respect.

One of the main modifications resulting from the EU Telecom Package is that an individual licence or authorisation from the BIPT is no longer necessary to provide electronic communications services or networks, except in respect of the allocation of numbers or radio frequencies.

Under the eCommunications Act, the supply or reselling in own name and for own account of electronic communications services or networks is only subject to a notification to the BIPT. This notification requires a much more limited submission of data compared to the old regime of individual licences (Article 9). Once the notification is made, both suppliers and resellers are considered to be electronic communications operators (Article 2, 11°).

All operators are granted the right to provide electronic communications services or networks, negotiate and obtain access to other electronic communications services or networks and submit applications for site sharing (Article 9). Operators providing such services or networks to the public are granted the following additional rights: (i) to negotiate access to any other provider of publicly available communications services or networks in the EU; and (ii) to be designated to provide elements of the universal service on all or part of the Belgian territory. Pending a notification in Belgium, an operator which has been authorised in another Member State may require an operator in Belgium to provide it with access to its electronic communications service or network (Article 10).

The eCommunications Act provides for a transitory regime for operators who hold an individual licence on the day of its entry into force. They are deemed to have already made a notification to the BIPT (Article 161). Operators who merely made a notification under the old regime (e.g. for the supply of leased lines pursuant to Article 88 of the 1991 Act) should still be able to rely on that notification.

Allocation of numbers

The eCommunications Act sets out the rules for number administration. The BIPT will be in charge of the administration of the national numbering space, the establishment, modification and publication of the national numbering plans and the allocation and withdrawal of the rights to use numbers (Article 11). A Ministerial Decree up will issued setting out the conditions for the allocation and exercise of the rights to use numbers. These conditions will include an obligation on operators of public telephone services to provide number portability to their customers.

The numbering allocation procedure may take up to three weeks from the lodging of a complete application. However, the BIPT may set up a comparative or competitive selection procedure that may take up to six weeks for the allocation of certain numbers with a special economic value.

Allocation of radio frequencies

The BIPT is in charge of the administration of the radio frequency spectrum, including the review of requests to use the spectrum (except with respect to radio and television broadcasting), the coordination of radio frequencies at both national and international levels and the monitoring of the use of radio frequencies (Article 13). This latest competence of the BIPT also covers radio and television broadcasting frequencies since the Constitutional Court ruled (Decision No. 7/90 of 25 January 1990) that, despite the fact that the Communities are competent for matters related to broadcasting, the Federal State remains competent to manage the radio frequency spectrum nationally to avoid interference. The technical specifications relating to the use and allocation of radio frequencies will be determined by Royal Decree (Article 14). The BIPT is also competent to combat harmful interference in general (Article 15).

As indicated above, the coordination of radio frequencies regarding broadcasting still requires a cooperation agreement to be entered into between the Federal State and the Communities (Article 17).

The BIPT must be informed if an operator wishes to transfer its rights of use for a radio frequencies used for services offered to the public. The BIPT must allow such transfer provided that it does not cause unfair competition and conforms an efficient administration of the radio frequency spectrum (Article 19). The transfer of such rights may not lead to a modification in the use of the transferred radio frequency.

The BIPT may not limit the number of rights of use for radio frequencies, except in order to ensure an efficient administration of the spectrum and prevent harmful interferences (Article 20). When such number must be limited, the BIPT must attribute these rights on the basis of objective, transparent, non-discriminatory and proportionate selection criteria (Article 21).

When the BIPT decides that additional rights of use of radio frequencies can be allocated, it must make this decision public and call for tenders (Article 23).

Rights of way and shared use of sites

The regime under the 1991 Act controlling rights of way has been largely preserved (Articles 97 to 104 of the 1991 Act). Accordingly, any operator of a public telecommunications network is entitled to access rights in compliance with the regulatory framework (e.g. environmental and building permits) enabling the use of any property in Belgium to set up cables, overhead lines and related equipment and carry out related tasks.

The eCommunications Act largely takes over the content of the provisions in the 1991 Act relating to the shared use of antenna sites, including the general requirement to use existing supports as much as possible and to share sites under certain conditions (Article 25). It also provides for a possible extension by Royal Decree of the types of sites to be shared (Article 28).

Administrative charges

Administrative charges will be imposed upon operators to cover the costs related to the management of the new legal framework, certain duties of the BIPT (including with respect to the universal service) and international cooperation (Article 29). A Royal Decree will be issued to determine how they will be calculated with a view to establishing an objective, transparent and proportionate allocation. In addition, the rights to use numbers or frequencies for services offered to the public may also be subject to an administrative fee to be determined by Royal Decree (Article 30).

Under the Authorisation Directive, Member States may also allow the national regulatory authority to impose fees for the rights to install facilities on, over or under public or private property, with a view to ensuring the optimal use of these resources. Belgium did not make use of such an option and maintained the relevant provision of the 1991 Act, which provides that the authority may not impose on operators any tax, remuneration, compensation or indemnity for the right to use public or private property (Article 98 § 2 of the 1991 Act).

Competition

The eCommunications Act sets out the procedure the BIPT must use to carry out an analysis of the relevant markets for electronic communications networks and services in order to determine whether these markets are effectively competitive.

The BIPT must analyse the relevant markets defined by the EU Commission's Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector, including their geographical spread, with the exception of market 18 relating to broadcasting transmission services for which, as indicated above, the Federal State is not competent. Such analysis of the relevant markets must take place after each revision of the EU Commission's Recommendation and on a regular basis (Article 54).

If the BIPT concludes that a relevant market is not effectively competitive, it must identify the operator(s) having significant market power ("SMP") and may impose on them any of the obligations listed in the eCommunications Act, as it deems appropriate (Article 55, §3).

Alternatively, if the BIPT concludes that a market is effectively competitive, it may not impose or maintain any of the obligations enumerated in the eCommunications Act (Article 55, §2).

Under the eCommunications Act, an operator is to be considered as having SMP "*if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers*" (Article 55, §3, al. 2). The definition of SMP is linked with the concept of dominance as defined in the case law of the European Court of Justice. This alignment with the concept of dominance has been justified by the fact that the previous definition of SMP needed to be adapted to suit more complex and dynamic markets.

In the past, an undertaking was considered as having significant market power "*when it [had] a share of more than 25% of a particular telecommunications market in the geographical area within which it [was] authorised to operate*". However, the BIPT had room for manoeuvre since it could designate an undertaking with a market share of less than 25% as an operator with SMP by, for example, considering its ability to influence market conditions or its turnover in comparison with the size of the market. The BIPT could also decide that an undertaking with a market share of more than 25% of the relevant market did not have SMP.

The eCommunications Act sets out the obligations that the BIPT may impose on an operator that it has designated as having SMP in one or more relevant markets[4]. It must be stressed that these obligations may differ from one SMP operator to the other depending on the circumstances, although they should obviously not lead to discrimination.

The BIPT may impose obligations of non-discrimination (Article 58). It may also impose transparency obligations, requiring SMP operators to make public certain information (Article 59).

As was already the case in the past, the BIPT may impose non-discrimination obligations on operators with SMP and require them to publish a reference offer. This reference offer should ensure that operators are not required to pay for facilities not necessary for the service requested (Article 59, §2). This reference offer must contain a description of the relevant offerings split into components according to market needs, together with associated terms and conditions, including prices. Reference offers must be approved by the BIPT and must be made available electronically free of charge. The BIPT may impose changes on reference offers to give effect to measures imposed in accordance with the eCommunications Act.

Furthermore, the BIPT may impose certain accounting separation obligations on vertically integrated companies related to access, including transparency obligations for their wholesale and

[4] The eCommunications Act provides that, where an operator has SMP on a specific market, it may also be deemed to have SMP on a closely related market, where the links between the two markets are such as to allow the operator to leverage the power held on one market to the other.

internal transfer prices (Article 60)[5]. The form of these obligations will be determined by Royal Decree. SMP operators with accounting separation obligations must submit their accounts to an auditor for review.

SMP operators may also be obliged to meet reasonable requests for access to their network and associated facilities (Article 61). In that respect, the BIPT must take into account a number of criteria linked to the viability of the project proposed by the person requesting access and the need to preserve competition.

The BIPT may impose cost-orientation and price control obligations on SMP operators (Article 62). The costs for those obligations are those incurred in supplying the particular service including a reasonable rate of return on investment.

The eCommunications Act provides that operators with SMP on public telephone networks must allow their subscribers to use carrier selection and pre-selection codes (Article 63). The BIPT may extend this obligation to other electronic communications networks if the interests of end-users justify it.

If the BIPT concludes that the above remedies are not sufficient to ensure competition, the eCommunications Act allows the BIPT to impose other measures on the retail market, including the prohibition of excessive and squeeze-out pricing, unjustified preferences for certain end-users, blocking of access to the market and unjustified grouping of services (Article 64).

If effective competition is lacking in the market for leased lines, the BIPT may also impose on certain operators with SMP to supply the minimum set of leased lines required by the European regulatory framework. In that case, the operator must ensure compliance with the cost-orientation and non-discrimination principles.

In exceptional circumstances, a Royal Decree may impose on SMP operators obligations relating to access that are not listed in the eCommunications Act. Such additional obligations are subject to the European Commission's prior approval (Article 56, §2).

Universal service

The eCommunications Act establishes the provision of a universal service. This is the service that must be made available to all end-users in Belgium independently of their geographical location and at an affordable price.

The operation of the universal service under the eCommunications Act, which is the subject of a detailed annex, is similar to the old regime under the 1991 Act. However, there are some notable differences.

The universal service is divided into the following five components (Article 68):

(i) the geographical component. This is the provision to anyone in Belgium of a basic public telephone service and a connection to a public telephone network allowing to make and receive local, national and international telephone calls, to exchange faxes and data, to access the internet in a functional way, to continue receiving calls and calling emergency numbers even in case of failure to pay invoices and to benefit from technical assistance services (Article 70); at present, this service does not extend to broadband and mobile services;

[5] The eCommunications Act also requires separate accounting or structural separation for operators providing public electronic communications networks or services with special or exclusive rights for the provision of services in other sectors in order to identify all elements of costs and revenue related to their activities in the field of electronic communications (Article 66).

(ii) the social component. This is the supply of special rates to certain categories of beneficiaries as detailed in the annex to the eCommunications Act, including elderly and handicapped persons; a specific fund managed by the BIPT shall take care of indemnifying the operators, the mechanism of compensation being subject to a Royal Decree (Article 74);

(iii) the provision and operation of public pay phones (Articles 75 to 78);

(iv) the telephone enquiry service (Articles 79 to 85); and

(v) the provision of a directory of subscribers (Articles 86 to 91).

Data related to subscribers for both the operation of the telephone enquiry service and the universal directory under (iv) and (v) must be provided by the providers of public telephone services at a cost-oriented rate. For these two components, specific rules also apply for subscribers who are not willing to have their data disclosed or published.

With the exception of the social component under (ii) which must be provided by all operators, each of these components may be operated by a different service provider. So far, only the incumbent operator had been designated to provide the universal service in its entirety (with the provision of a directory of subscribers being subcontracted).

Furthermore, the provision of the universal service is subject to an open selection procedure with a call for tender, the form of which will be determined by a Royal Decree. Only if no offer is made or retained, the universal service provider will be designated *ex officio*, i.e. it will be designated by Royal Decree.

Providers of all components of the universal service (except for the social component which is remunerated separately) are remunerated by the fund for the universal service, either on the basis of the amount agreed when selected through a tender procedure or pursuant to the mechanisms set forth in the eCommunications Act.

This fund must still be activated and is to be financed by contributions from all operators based on their retail turnover, before taxes, from the supply of telephony available to the public on the Belgian territory (Articles 94 to 99).

If an operator has been designated *ex officio*, it must report the net costs covering such services during the year considered at the latest on 1 September of the year following the year during which it performed the relevant services. The costs must be calculated pursuant to the method set forth in the Annex to the eCommunications Act (Article 100). Such net cost is subject to the BIPT's approval and serves as the basis for the amount of remuneration attributed by the fund to the relevant operator. The BIPT, which is in charge of monitoring the performance of the universal service obligations[6], must calculate and publish the yearly remuneration due by the fund to each provider. For that purpose, it may appoint an auditor (Articles 102 and 103).

In addition to the universal service, a Royal Decree may also be adopted to require other services from operators. These may include the provision of leased lines for certain public security and assistance services, internet access to schools, public libraries and hospitals, special telephone rates for daily newspapers and weekly magazines providing political or general information (Articles 105 to 107).

[6] In case of default identified by the BIPT, the competent Minister may order the payment by the defaulting provider of an administrative fine of up to one per cent of its annual turnover (Article 104).

Protection of end-users

The eCommunications Act contains a number of rules aimed at protecting end-users, mainly by ensuring more transparency.

All contracts concluded between an operator and end-user regarding connection or access to the public telephone network must be provided to the customer and must include specific information related to the operator, its services and rates, the duration of the contract, any indemnification or reimbursement scheme as well any dispute resolution mechanisms offered (Article 108).

End-users must be notified of any change affecting the terms of their contracts. Such notification must be made individually and at least one month before the entry into force of the change. The notification must inform the end-users they have the right to terminate the contract at once and without penalty as result of the change. This termination occurs at the latest on the last day of the month following the entry into effect of the change that has not been accepted.

The operators must also publish on their internet site their terms and conditions and standard contracts for the provision of electronic communication services after advice of the Mediation Service and the Telecommunications Consultative Committee.

The component elements of the price must be set out for consumers (Article 109) who may request detailed invoices free of charge. At least once a year, the operators must indicate on the consumer's invoice the most favourable tariff plan based on his/her profile (Article 110). The BIPT must also publish on its internet site data enabling consumers to assess the most advantageous offer for them (Article 111).

Providers must publish on their Internet site adequate and up-to-date information on the quality and security of their services (Article 113) and the BIPT must provide comparable information on its Internet site regarding security of services provided by internet services providers, network security and services as well as software that may be used to block spam.

In addition to the information obligations above, the eCommunications Act provides that telephony, internet, television and interactive intermediary services may be offered jointly at a lower combined rate under certain conditions directly inspired from the Trade Practice Act of 14 July 1991 (Article 112).

Operators and providers of electronic communications software must also take appropriate technical and organisational measures to ensure the security of their services. The rules go as far as requesting them to provide end-users, free of charge, with adequate security measures to prevent unsolicited electronic communications which may include anti-spam software (Article 114).

The eCommunications Act contains specific rules on payment facilities. These enable the competent Minister to set out measures to deal with non-payment by end-users, including designating operators providing components of the universal service to enable a system of prepayment or payment by instalments (Articles 117 and 118), notification to end-users before suspension or disconnection of the services, provision of a minimum services free of charge prior to termination (i.e. receiving calls and making emergency calls) and, when technically feasible, suspension of unpaid services only (except in case of fraud or persistent default of payment) (Article 119).

Privacy and confidentiality rules

The eCommunications Act provides for detailed rules transposing the Privacy Directive with respect to data processing and protection of privacy as well as rules on the confidentiality of communications.

In principle, operators must erase or render anonymous all traffic data concerning subscribers as soon as they are no longer necessary for the transmission of the communication. However, the eCommunications Act sets out several situations where the processing and storing of traffic data are allowed (Article 122). This includes situations where operators are obliged to cooperate with the authorities for the investigation of criminal offences and with the telecommunications mediation service to identify wrongdoers, for billing and interconnection payment purposes (the data being kept only until the end of the period during which the bill may be challenged or the payment pursued), for fraud detection and for marketing purposes.

Where traffic data is processed or stored for marketing purposes, end-users must be informed and consent prior to such processing, and their consent may be withdrawn at any time and without cost. The eCommunications Act also provides for specific rules in connection with location data (Article 123).

The eCommunications Act further prohibits interception of electronic communications unless all persons directly or indirectly involved in the communication have agreed thereto (Article 124). Interception of electronic communications is widely defined as covering the intentional taking of knowledge of information transmitted by, or data related to, electronic communications, intentional identification of those concerned by such transmission, and the modification, deletion, disclosure or use of information, identification or data obtained deliberately or not. The eCommunications Act provides for a number of exceptions to the confidentiality of communications. They mirror former Article 109*ter*E of the 1991 Act, with two additions in relation to investigations conducted or requested by the mediation service for telecommunications and actions aimed at preventing end-users (with their consent) from receiving unsolicited communications (Article 125).

In addition, a Royal Decree will be issued to determine the conditions under which the identification, localisation, listening or recording of electronic communications may take place and the conditions under which traffic and location data may be recorded for prosecution purposes. Such data must be retained for between 12 and 36 months (Article 126).

The recording of electronic communications in the course of commercial transactions for the purpose of providing evidence of such transactions is also authorised provided the parties involved are informed prior to the recording (Article 128). Data must be erased at the latest by the end of the period during which the transaction could be disputed in courts. A similar rule applies for recordings by call centres for the purpose of monitoring the quality of services, provided the staff is informed beforehand. Data may be kept for up to one month.

Specific rules apply to mechanisms (such as cookies) used to store, or gain access to, information stored in the terminal equipment of a end-user. They require clear and precise information regarding their processing purpose and end-users must be informed that they may refuse such processing, unless the sole purpose is to facilitate transmission or to provide an information society service expressly requested by the end-user (Article 129).

The eCommunications Act also sets forth certain rules governing calling line identification (Article 130) and protecting end-users in relation to their use of certain special numbers with paid services (Article 134).

Conclusion

The transposition of the EU Telecoms Package at federal level through the adoption of the eCommunications Act is an important milestone. Although not exhaustive, the summary above highlights some of the main features of this new legislation.

However, the substantial delay in the adoption of the eCommunications Act will shorten its lifespan since the review of the EU electronic communications regulatory framework will already take place in 2006.

In addition, the Federal State adopted the eCommunications Act without entering into a cooperation agreement with the Communities and left a number of implementing issues to be resolved by subsequent Royal or Ministerial Decrees.