

CLIENT ALERT

Electronic Communications & IT

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The draft act containing several provisions regarding electronic communications intends to reinforce the role of the national regulator, restore investors' faith and stimulate the information society to the benefit of consumers and undertakings. With the new act, the Government intends to achieve the goals of Lisbon and i2010, which is to increase broadband penetration from 25,7% of the population at the end of 2007 to 30% in 2010.

Introduction

In order to modernize the current Belgian legislation regarding electronic communications and to better implement the provisions of the European Telecom Directives of 2002, the draft act modifies several provisions of (i) the act of 17 January 2003 regarding the statute of the Belgian postal and telecom sector's regulator ("BIPT") and (ii) the act of 13 June 2005 regarding electronic communications.

Main provisions of the draft act

Article 2 of the draft act provides that the BIPT can adopt decisions with retroactive effect if a previous decision is annulled by a judiciary body. Until now, if a decision of the BIPT was annulled, the temporary effects of the annulment were not specified. As a result, a legal vacuum existed between the date on which the decision was taken and the date it was annulled.

In order to remedy this problem, the BIPT would now be entitled to replace its annulled decision with retroactive effect, if (i) the annulment creates a period during which one or more of the goals of article 8 of the Framework Directive (Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services) are no longer guaranteed, and (ii) the new decision respects the annulment and the reasons thereof, as well as its scope.

According to **article 3** of the draft act, the period during which a former member of the BIPT would be prohibited from taking a position in an undertaking active in the electronic communications sector, would be reduced from 2 years to 1 year.

Article 4 provides that preliminary measures, taken by the BIPT in case of urgency, could be adopted for a period of maximum 4 months, therefore exceeding the current 2 months limit, provided that the BIPT's council justifies the necessity of such an extension.

Articles 5 and 6 introduce a new, faster procedure to sanction violations of the telecom legislation. For minor violations, the BIPT would inform the infringer of its complaints, the possible administrative fine and the deadline for the infringer's written remarks.

The infringer would then be invited to appear before the BIPT, who would take its decision within 60 days after the closing of the oral proceedings. For more severe violations, the BIPT would immediately order a delay to stop the infringement, after which an administrative fine would be imposed if the violation continues. Should the violation continue further, the BIPT could order the complete or partial discontinuation of the infringer's network or service.

Article 7 of the draft act intends to prevent operators from abusing the confidentiality principle. Indeed, operators sometimes refuse to take a position because of confidentiality reasons or even claim that an entire file is confidential. If the BIPT has the impression that operators unjustly qualify data as confidential, under the draft act, it would have the legal authority to request them to justify this classification. If they do not reply or continue to consider the data as confidential, the BIPT would be entitled to distribute the data if it considers it as non-confidential.

The articles following article 7 clarify several articles of the act of 13 June 2005 on electronic communications. For example, in article 52 of the said act, which obliges operators to negotiate interconnection agreements in good faith, the new draft replaces the word "access" by the word "interconnection" in order to avoid uncertainties between the 2 concepts.

Furthermore, **article 23** of the draft act suspends article 64, §2, 2nd sentence of the act of 13 June 2005. According to this article, operators with significant market power are under no circumstances obliged to present their retail tariffs for prior approval to the BIPT. This limitation to BIPT's authorities is however not foreseen in the European Directives, and resulted in the fact that manifestly unauthorized end user tariffs had to be implemented on the market before they could be forbidden by the BIPT. This would now be remedied by the draft act lifting the limitation.

Finally, it is interesting to note that **article 30** of the draft act confirms that operators have to cooperate with investigations concerning possible infringements on the Ethical Code for Telecommunications, for example in discovering which service provider is responsible for the a specific service, and cooperate in the implementation of a decision of the Ethical Committee, for example by disconnecting a service provider from the network.

New legislation

The draft act was filed by the Belgian Government on 13 February 2009. On 26 March 2009, the Parliament approved the text and sent it to the Senate. Once the Senate and the Parliament agree on the text of the draft act, it can become law.

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