

The design of judicial review in electronic communications

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National appeal systems

Case Study: Belgium

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Introduction

1. European Community law allows Member States a wide margin of discretion in the designation of national authorities for the enforcement of competition law or for the enforcement of the rules in the electronic communications sector. The precise organisation of appeals against the decisions of these national authorities is also to a great extent left to the discretion of Member States.

Belgium like many other Member States has taken advantage of this freedom. The Belgian mode, though still evolving, is an interesting patchwork of institutions and procedures that require a certain imaginative virtuosity of the interpreter.

More than in other areas, a judge that rules on appeals against the decisions of the IPBT or other regulators must situate his or her intervention in relation to the competences devolved to the different regulators and jurisdictions and must also confront the difficulty of having to analyse the dispute that is before him or her in the light of rules and principles that have emerged from European Community law and or those that are derived from the European Convention of Human Rights, of national law, both administrative and judicial, while not losing sight of the substantive law and its objectives.

Attempting an assessment of the recent reforms from an institutional perspective would seem to me to be premature. Experience will show if the choices made by the legislator are sound.

I will attempt therefore in the course of this paper to provide a brief account of the Belgian model and illustrate, with a few examples drawn from experience, the questions that are raised by what one might describe as a sort of criss crossing of relations between the Competition Council, the IBPT and the Brussels Court of Appeal.

I will also attempt to provide a non exhaustive account of the approach followed by the Brussels Court of Appeal as the jurisdiction charged with hearing appeals against the decisions of the IBPT. In doing so, I will focus on a number of specific questions.

The Belgian Institutional Model

2. The Brussels Court of Appeal has been is charged with hearing appeals against the decisions of the IBPT¹.

Even though the law does not specify in a precise manner, the jurisdiction of the Brussels Court of Appeal covers only those decisions of the IBPT adopted on matters of regulation in the sectors of post and telecommunications. Appeals against other decisions of the IBPT lie with the Council of State².

There exists therefore a clear separation of tasks between the Council of State and the Brussels Court of Appeal. Nonetheless, the case law of the Brussels Court of Appeal remains hesitant on this point. If certain judgements stress that only appeals relating to decisions likely to affect the interests of users or those of operators, may be brought before the Brussels Court of Appeal³, other judgements have not applied this criteria, which is in the event not easy to apply. The Court thus declared itself competent to hear an appeal against the refusal of the IBPT to allow access to certain confidential documents⁴ or an appeal against a decision of the IBPT to designate, in the context of a call for tenders for assistance on the issue of the obligation to orient on costs, a specialist consultancy that could have already adopted a public position on the question of the reciprocity of interconnection charges⁵.

3. The choice of the Brussels Court of Appeal as the court with jurisdiction to hear appeals is based on the decision of the Legislator, expressed when a number of laws were adopted in the area of economic competition or the regulated sectors, to turn the Brussels Court of Appeal into a jurisdiction specialised in the areas of regulation and to encourage the uniformity of the jurisprudence. This choice is also the result of the obligation placed on Member States, notably in the electronic communications sector, to provide for appeals before a court that is deals with the material facts.
4. The Brussels Court of Appeal has also been designated to hear appeals against the decisions of the Competition Council. As indicated earlier, one of the difficulties that the Court must deal with, on the occasion of each appeal, is to decide the scope and limits of its own jurisdiction by taking into account the relationship between the IBPT and the Competition Council, authorities who could have to deal with the same practices.

Relations between the IBPT and the Competition Council are firstly horizontal.

European Community law conceives them in this way in order to avoid conflicts over decisional powers by putting in place mechanisms to facilitate cooperation and by giving the Commission the power to coordinate and oversee the activities of the NCA's and NRA's with a view to ensuring coherence. The law of 13 June 2005 relating to electronic communications provides for a series of cases in which the Competition Council is able to issue

opinions to the IBPT, notably on the subject of draft decisions on the analysis and regulation of markets. These opinions are in certain cases binding.

The existence of horizontal relationships is easily understandable given the complementary nature of the two bodies of rules concerned, competition law on the one hand, and sectoral regulation to encourage the operation of competitive markets on the other.

These two body of rules are applied in a cumulative fashion: a practice which is in conformity with sector regulation may be susceptible to being contested on the basis of competition law and vice-versa⁶.

The Competition Council is charged with ensuring that competition law is not infringed in all sectors of the economy including of course electronic communications. The IBPT is charged with the application of sector regulations that contain precise and specific provisions that are nevertheless seeking to achieve the same general objectives as the rules on competition.

The IBPT and the Competition Council may therefore have to deal with the same behaviour or the same problem in the context of procedures conducted in parallel but under different headings. At the present time, the decisions taken by these two authorities may be the subject of an appeal before the Brussels Court of Appeal which has to guarantee, under the control of the Court of Cassation, the coherence of the operation of rules applicable to operators and providers of services in the electronic communications sector.

At this stage, the module is clear. It provides for the avoidance of contradictory decisions if our starting premise is that the interventions of the Competition Council tend to ensure respect for competition law and those of the IBPT to control respect for sector rules.

5. This reasonably clear picture was abandoned in 2003 when the law was changed.

Disputes relating to interconnection, leased lines, special access, unbundled access to the local loop and shared lines now go before the Competition Council. The IBPT was given the role of seeking or if all else fails imposing an agreement between the parties to the dispute⁷. The new law also provides that when a dispute on these matters is examined by the Competition Council the IBPT provides one of its representatives to investigate the case with a Council rapporteur.

Taken in isolation, this division of competences does not pose any problems. The interventions of the IBPT and the Council during the settling of disputes are different in nature and successive.

Similarly, the division of competences between the Competition Council and the IBPT in relation to the legal provisions to apply do not raise in principle any insurmountable difficulties.

However, questions marks do emerge when we examine this division of competences if we take into account all the overall competences of these two authorities as evidenced by the pleadings before the Brussels Court of Appeal in the context of appeals against the decisions of the IBPT, or before the IBPT and the Competition Council.

6. I would like to illustrate this proposition with the help of two concrete examples, without of course, expressing any view on the appropriateness of the solutions that were adopted in the rulings to which I will refer.

- The “GSM Gateway” Case

In its ruling of the 7th April 2006⁸, the Court stated that the competence of the Council to decide these dispute did not create an obstacle, in itself, to the exercise by the IBPT of its power to adopt interim measures⁹. It also does not create an obstacle for the exercise by the IBPT of its power to commence a procedure in order to determine that an operator is in breach of its obligations¹⁰ or further to the exercise by the IBPT of its power to control reference offers relating to the conditions to which the provisions of these services is subordinated.

The Court therefore recognised that the IBPT had the power to adopt interim measures against Belgacom Mobile, notwithstanding the existence of a dispute that was susceptible to be sent before the Council. The dispute was between Belgacom Mobile and The Phone Company on the issue of the use of the latter of Simbox and the so-called special access offer that Belgacom communicated to the IBPT for the termination of voice calls on its network via the GSM Gateway. The dispute had in the mean time been brought before the Brussels Commercial Court.

The Competition Council had the dispute brought before it on the basis of Article 4 of the law on appeals of the 17 January 2003, and took a decision on the 1 September 2006¹¹.

What is striking when reading this decision is that the solution adopted by the Council requires the intervention of the IBPT to effect its implementation. The IBPT is in effect invited by the Council to assess if the new tariff offer that Belgacom must establish, respects the principle of the orientation towards costs, and the Council recognises in this regard the power of the IBPT to depart from the position the IBPT itself had previously adopted on this point. The decision further indicates that Belgacom must adapt or modify its offer to the point where it the IBPT will find it acceptable.

This example illustrates that the division of powers between the IBPT and the Council is like to result in very complex outcomes where the solution depends on the intervention of two authorities, each able to adopt decisions that may be the object of an appeal. In this example, the failure of the attempt by the IBPT to get the two parties to reach agreement saw the referral of the parties before the Council which makes the final solution of the dispute dependent on the

decision that the IBPT must take at the end of the control it must exercise over the reference offer.

- *The “Happy Time” Case.*

The recent ‘Happy Time case’ concerning the launch by Belgacom of a new tariff plan for calls to fixed lines, offers another example of the complexity of the Belgian model and of the need to coordinate the actions of authorities and jurisdictions who could be called to deal with the behaviour of operators active in the electronic communications sector.

A number of operators complained before the IBPT requesting that it adopt urgent measures and to launch against Belgacom the procedure to determine an breach of the obligation to orient price on the basis of costs. It was also argued that the offer is discriminatory.

At the same time, the President of the Competition Council was seized of a request for urgent and provisional measures and an action to cease was introduced before the President of the Brussels Commercial Court.

The IBPT took a decision on the 17 October 2005 which has been the object of two appeals, one brought by Base, the other by Belgacom. This decision imposes on Belgacom the obligation to invoice the calls towards Telenet and Versatel in a way that reflects the termination costs of these calls and the obligation to inform on a monthly basis the IBPT the data relating to the profile of the average consumer and this taking into account the sensitivity of the margin of the profile of average consumption. By this decision, the IBPT did not pronounce itself on the legality of the complained of practice and on the effects of the practice on the position of mobile operators. The IBPT decided on the other hand to communicate its decision to the Competition Council ‘in order to contribute to the investigation opened by this authority’.

In its decision of the 22 June 2006¹², ruling on the of the appeal admissibility of the appeal by Base, the Court concluded that Base could not claim to be affected by the decision of the IBPT. The Court added *‘that nothing forbids Base from going before the Commercial Court or the Competition Council –as had done Tele 2 –if it judges that the ‘Happy Time’ tariff constitutes an abuse of a dominant position or an act contrary to honest practices in commercial matters.’* This time it was the Court that referred the litigants to other authorities or court, by apparently implicitly deciding that it was not fit to intervene on the basis of competition law in the context of an appeal against a decision of the IBPT or that the complained of practice does not fall within the sector regulatory framework, or further that the IBPT does not draw from sector regulations the power, or the duty, to examine the practice in the light of competition law.

7. There is a possibility in the future of giving the Competition Council, in cases to be determined by law, the power to hear appeals against the decisions of the IBPT¹³. According to the explanatory provisions of the new law of the 10 June 2006, ‘we will thus avoid that there are more than three levels in the appeals

procedure (that is the sector regulator, the Competition Council and the Court of Cassation)', a explanation that does not really shine in terms of its clarity.

To the horizontal relations between the IBPT and the Competition Council, would be added relations of a vertical and hierarchical nature with the consequence that the Council could be required in its role as an appeals authority from decisions of the IBPT to have to deal with a situation which it had already examined in its role as an NCA, and this in the context of its powers to give opinions, or in the context of its powers to issue decisions, either in its role as a designated authority to settle disputes or vice versa.

The Table below outlines the different procedures to which the same practice in the electronic communications sector may give rise.

(Table)

The model may undoubtedly work if the Council does not rule until after the IPBT or after having made itself aware of the position of the IBPT as expressed by the IBPT during its investigation.

Nevertheless, in a good number of cases, it is possible that this order will be reversed, depending on the circumstances, or –as illustrated by the 'Phone Company' case, that the intervention of the Council does not absolve the IBPT of its duty to intervene.

Any national rule that stopped the NCA from intervening before the NRA would undoubtedly conflict with European Community rules.

The extension to various jurisdictional levels, the criss-crossing of decision issuing powers, matched in certain cases with the power to issue opinions, is likely to raise new questions. There is also the risk of not facilitating one approach by the competent appeals authority, consisting of not isolating one type of intervention from the general context and by placing it in the general judicial framework that determines the powers of intervention of the authorities in an effort to avoid the stumbling blocks that the multiplication of potential actors could bring.

8. The multiplication of potential actors is a phenomenon that is not new. You might say to me that this phenomenon is that common in our judicial landscape that it has become unexceptional, almost normal or even banal.

It presents, nevertheless risks and dangers. First, the risk of diverging decisions. Secondly, the risk of a failure to intervene, if certain actors, through fear of encroaching on the powers of others, remain passive or inactive. Thirdly, the risk that an authority does not empty the dispute, leaving it to the other, either in part or completely, the responsibility of finally settling a contested situation. Finally, the failure of appeals procedures if they are not appropriate at restoring peace.

9. The risk of contradictory decisions can be avoided if the division of powers in relation to the type of procedure is accompanied by a clear definition of the field of action of the authorities and their missions, because of the two bodies of rules established to govern the conduct of operators, it will be the most serve that will prevail.

But on the point, the silence of the Legislature is heavy.

As an example, we may note that national law is not clear as to which body of rules the Competition Council must enforce when it settles disputes between operators and providers of services.

Two reasons would suggest that it would be best if the Council apply exclusively sector regulatory norms when it had to settle a dispute on the basis of Article 4 of the 'appeal' law of 17 January 2003.

First, this law transposes into national law Article 20 of Directive 2002/21 EC. Second, the application of competition law in disputes between private parties is a competence of national jurisdictions and not the Competition Council and nothing would lead to the conclusion that the law of 17 January derogates from this rule.

There remains the question of knowing if the general obligation that rests with the Competition Council, as with all other authorities, to not adopt measures which would put in danger the realization of the goals of Article 81EC and Article 82EC, confers on it powers to apply these provisions when it acts not as an NCS but as an authority designated to apply sector legislation to settle disputes between operators and providers of services of electronic communications relating to interconnection, leased lines, special access, unbundled access to the local loop and shared lines.

The Brussels Court of Appeal has not had the opportunity to rule on this subject. On the other hand, the Court has had the opportunity to deal with the question of if the IBPT may base a decision on provisional measures solely on the basis of stating that the measures that it adopts against an operator are designed to maintain or promote healthy competition. In its ruling of 7 April 2006¹⁴, the Court indicated that when the IBPT adopts urgent and provisional measures, it cannot limit itself in justifying its intervention solely on the ground that it is designed to maintain or promote healthy competition. Following this ruling, the IBPT must also examine the legality of the conduct of undertakings with under its regulatory control in the light of the legislation that it must ensure is respected.

The Court has not yet had the opportunity to rule on the question of if the IBPT may base the provisional measures it adopts solely on a prima facie finding of an infringement relating to competition law, without encroaching on the powers of the President of the Competition Council. The Court only considered that the IBPT by simply stating that the it was charged with

ensuring the respect for healthy competition and the interests of final users, had failed to adequately provide legal reasons its decision.

The Exercise by the Brussels Court of Appeal of powers of full jurisdiction relating to appeals against the decisions of the IBPT.

10. The Brussels Court of Appeal is endowed with the power of unlimited jurisdiction which also implies, in certain cases, the power to confirm or replace with its own decision the appealed decision.

The way in which it exercises this power when dealing with appeals against the Competition Council, the IBPT, CBFA, and other regulators has been of interest to doctrinal writers¹⁵.

Some commentators are sorry that the Court has been prudent in the way it has interpreted its power of unlimited jurisdiction. Other regard the Court has having demonstrated a great deal of wisdom. All agree that there remain questions relating notably to the uncertain scope of the concept itself of unlimited or full jurisdiction and the lacuna that the present organization of jurisdictional appeals available against the decisions of independent administrative authorities.

In any event, the Court has found that by conferring on it such a power, the Legislator did not intend denying it the possibility of the power of annulment in the event where the Court arrives at the conclusion of the impossibility, in fact and in law, of substituting its own decision in the place of a decision tainted with illegality¹⁶.

The Court has found, notably, that the principle of the separation powers as determined by the Court of Cassation¹⁷, can limit the exercise of the power to revise and that the freedom that it has depends on the freedom of appreciation available to the IBPT (discretionary or bound power). In its ruling of the 12 May 2006 the Court found that it was for it to determine, for each of the grievances considered separately, if it should confine itself when reviewing its legality or if it was empowered to substitute its own appreciation to that of the IBPT¹⁸.

This ruling which concerned the decision of the IBPT to impose on Belgacom modifications of its reference offer for unbundled access to the local loop demonstrated that the Court regards itself as having the broad power to review the material accuracy of facts and the appreciation by the IBPT of data of an economic nature.

The Court also indicated that the power to revise required the prior annulment of the contested decision, thus setting aside from the litigation arena the decisions of the IBPT, the private law concept, of the double degree of jurisdiction.

11. The powers to review and revise the decisions of the regulatory authorities granted to the Brussels Court of Appeal require the Court to have adequate human and organizational resources to for their effective exercise and more importantly to acquire in these areas of the law, the requisite degree of specialization. When designating the Brussels Court of Appeal as the central appeals authority, the Legislator left to the Court the task of organizing the way it would manage litigation arising in these new areas. Today litigation involving the decisions of the regulators is not handled in a distinct or separate manner in relation to ordinary litigation (which also includes disputes from the regulated sectors). The principle explanation of this situation is the fact that the Court could not have anticipated such a high number of appeals in these new and complex areas, and in particular in the area of electronic communications. Since 2003, more than 50 appeals have been introduced against decisions of the IBPT.

The composition of Chambers of Court dealing with these cases is not stable. It tends to differ depending on the time and the needs of the institution in general. Their composition also differs depending on the language of the procedure. These are all factors that may lead to diverging or conflicting decisions and inefficiencies of which the Court is well aware.

12. Ordinary litigation in the area of telecommunications is remains important and should not be underestimated or regarded as of minor significance. The ordinary courts have a steady stream of telecommunications litigation to handle.

In its ruling of the 29 June 2006, the Court had the opportunity to consider questions relating to the conditions for the establishment and exploitation of mobile telephone networks in the road tunnels of the Brussels Capital Region and on the nature of the financial charges that the Region required in return for the use of public space. The Court found that the charges were of a fiscal nature and in fact constituted a tax, principally because they were set by the authority on the basis of factors that were not linked to the service rendered¹⁹.

The Telecom Austria case concerned the provision of directory services. It involved complex questions relating to the powers of the Belgian jurisdiction under international conventions to assess an offer made by the traditional Austrian operator. The Court acknowledged its competence after having found that the contested act, which consisted of blocking the offer of directory services by an undertaking established in Belgium, that restricted competition was implemented in Belgium²⁰.

13. The Brussels Court of Appeal must have knowledge of the substance. That is a requirement of European Community law.

This means that it must have at its disposal all documents that were the basis upon which the IBPT takes a decision.

In the absence of clear provisions regulating the communication of the file and the protection of business secrets in the context of appeals, the IBPT felt that it was not required to provide the Court with all the elements that were the basis of a decision it adopted and which was the subject of an appeal, though it made clear that it would make available the said documents to the Court if the Court demanded their production.

Prior to sending the Court documents that it had not produced, the IBPT invites operators, parties to the procedures or third parties from whom it has obtained information, to inform it if the said documents contain confidential information.

According to the IBPT, these precautions are taken by virtue of the general its' obligation to protect the confidentiality of information provided by undertakings provided for in Article 23(3) of the law of 17 January 2003 relating to the status of the IBPT.

When questioned by the Court, the European Court of Justice answered by its ruling of 13 July 2006²¹:

"Article 4 of 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) must be interpreted as meaning that the body responsible for hearing an appeal against a decision of the national regulatory authority must have at its disposal all the information necessary in order to decide on the merits of the appeal, including, if necessary, confidential information which that authority has taken into account in reaching the decision which is the subject of the appeal. However, that body must guarantee the confidentiality of the information in question whilst complying with the requirements of effective legal protection and ensuring protection of the rights of defence of the parties to the dispute. "

It emerges from this interpretation of the European Court, that the Brussels Court of Appeal must guarantee the confidentiality of the information which is communicated to it, which of course raises new questions for the Court. In order to resolve them, it could, I believe, take some inspiration or be guided by the rules contained in the rules of procedure of the European Court of Justice and the Court of First Instance.

Procedural acts are susceptible to determine the status of business secrets if a way that in the absence of specific rules, for example, that access to these documents is free, except when justified by a derogation, access to the items of the procedure must also be reviewed and checked.

14. Whatever the precise content and meaning to be given to the notion of full jurisdiction, the Court regards itself as bound by the grievances raised before it by the parties who introduce the appeal.

As a result of course, the addressee of the contested decision who introduces an appeal simply seeks the annulment of the decision.

The IBPT –which can intervene at any time to put an end to the conduct that infringes the rules, by adopting if necessary a new decision, does not have the status of plaintiff/ appellant/ petitioner before the court when it defends the

position it has adopted. To my knowledge, the IPPT has never seized the court of a request or question during an appeal, unless of course is a request seeking to have the contested decision upheld.

In practice and as a general rule, the power of substitution cannot be exercised if the persons who are not addressees of the decision form an appeal against it, either by complaining that the authority has not taken the appropriate measures, or of not having acted at all. The rejection of the intervention of a third party for example, on the grounds that it has not demonstrated a sufficient interest, has de facto important consequences for the scope or breadth of the review that the Court is able to exercise in certain cases.

If I may permit myself the liberty for this slight detour, it is simply to underline the obvious interaction of successive stages that the judge must follow in order to elaborate a final decision and the necessity to not isolate the approaches inspired by different branches of the law, provisions of substantive law and the objectives that they seek to achieve. In the end, it is above all the provisions of the substantive law and the objectives that these provisions seek to achieve that allow, in my view, the fixing of criteria to take into account when it is a case of resolving questions relating to the power to recognize in an appeal or the admissibility of an appeal.

Litigation of decisions relations relating to reference offers.

15. Many of the appeals against the decisions of the IBPT relate to it's key role in the review and verification of reference offers.

It emerges from the case law of the Court on these matters that the interest of an operator subjected to the obligation of publishing a reference offer, is to argue that the national legislator expected that reference offers had a time limited duration and that it granted the NRA the power to approve reference offers, that is to say, the power to find *erga omnes*, in a definitive and irrevocable manner, the conformity of the reference offer with the law, in a way that aside from complaints on time limits, the offer could no longer be contested.

Concerning reference offers for access to bit stream, the Court partially followed this line of reasoning by basing its ruling on national provisions on the matter, after having found the absence of provisions in Community law imposing the publication of reference offers²².

On the issue of reference offers for access to the unbundled local loop and interconnection, the Court did not follow this line of reasoning which it judged to be contrary to the provisions of Community law on the matter. It found that this incompatibility without seeking from the European Court of Justice an interpretation to give to the provisions of the Directives and Regulations which provided for an obligation to publish a reference offer under the control of the NRA.

Following the case law of the Brussels Court of Appeal, the absence of objections on the part of the IBPT does not mean that the conditions contained in the reference offer are lawful, and it follows that in the light of Community provisions, the IBPT has the power to demand at any time the modification of a reference offer and to third parties the right to dispute the conditions offered in the course of negotiations leading to the conclusion of contracts or their modification.

The Court therefore set aside the application of Article 108bis of the law of 21 March 1991 and provisions of the AR of 22 June 1998 because these provisions were judged to be contrary to Regulation No2887/2000 on unbundled access to the local loop²³.

The Court also set aside the application of provisions of the AR of 20 April 1999 which governed the modalities of intervention by the IBPT concerning the control of reference offers for interconnection²⁴.

The position adopted by the Court the basis of reasoning that it has followed to resolve a series of questions.

The Court therefore considered that it followed from this position that the beneficiary of the reference offer was not empowered to lay an appeal for inadequacy nor intervene in the context of an appeal introduced by the addressee of the decision of the IBPT including an injunction to modify the reference offer on certain points, except if the third party is able to demonstrate particular circumstances that would allow him to argue that the disputed decision has affected him in a manner different from other beneficiaries or that the inability to intervene could affect him in a manner different from other beneficiaries²⁵.

The Court has also deduced that the author of the reference offer could not ask the Court that it confirms, in the event of the annulment of the decision by the Court, the initial reference offer.

Always in the same line of reasoning, the Court considered that the obligations that are placed on powerful operators flow directly from the rules and that it could find neither their cause nor their limits in the published reference offer, which constitutes a way of encouraging commercial negotiations and not the means to set them aside.

The debate remains open. The Court of Cassation has yet to rule on the matter. The Competition Council has apparently departed from the position adopted by the Brussels Court of Appeal because in its decision of the of the 1 September 2006 which we mentioned above, it makes dependent the solution of the litigation that it had decided of a condition that resides in the acceptance by the IBPT of the tariff offer that Belgacom Mobile must submit, demanding thus more than an absence of objections. Finally the law of 13 June 2005 on electronic communications provides in Article 59(6) that all reference offers must be submitted for prior approval by the IBPT.

16. In its ruling of the 12 May 2006, cited above, The Brussels Court of Appeal had the opportunity to rule on the scope of the power of the IBPT to require modifications to the reference offer.

It found that this power was determined by the objective of the reference offer and that consequently, it could not be used to impose obligations that were not susceptible to be the object of individual contracts. In the same ruling, it nevertheless highlighted that the fact that although unbundled access to the local loop and the provision of leased lines were considered by distinct legal provisions, this did not limit the power of the IBPT to require that a reference offer for unbundled access defined the conditions for the provision of leased lines necessary for unbundled access.

The Court once again indicated another limit to the intervention of the IBPT by censuring the imposition of modifications inspired by the sole wish of anticipating any risk of abuse of a dominant position. The generality of the terms used by the Court could create the impression that it has lost sight of that the mission of the NRA when it controls reference offers is precisely based on the anticipation of abusive conduct. This is why I invite you to appreciate the limits that the Court has defined by bringing your attention to the type of conduct that the IBPT sought to avoid.

The litigation of decisions of the IBPT other than those relating to reference offers.

17. The Brussels Court of Appeal, has had to rule on very few decisions of the IBPT that did not concern reference offers, at least on the substance.
18. The Court found that it was competent to hear an appeal against the decision of the IBPT to set the costs of establishment by mobile number carried, that applies in all cases for mobile number portability, even though it had found that it was not an individual decision and that the complained of decision was normative in nature²⁶.

The Court equally declared itself competent to hear an appeal against the decision of the IBPT to attribute a public market to a particular tender and rejecting the argument according to which the appeal should have gone before the Council of State²⁷.

19. The Court has had the opportunity, on two occasions, to rule on the interest to act in support of operators other than the addressee against a decision of the IBPT taken on the basis of provisions other than those which control ex ante reference offers.

Thus in its ruling of 16 June 2006, the Court found that Base and Mobistar could not justify an interest in contesting the designation by the IBPT of an expert charged with helping it elaborate a generic model for termination costs of mobile operators.

In its ruling of the 22 June 2006, it declared inadmissible the appeal of Base directed against the decision of the IBPT of 17 October 2005 relating to Belgacom's tariff offer 'HappyTime' which was addressed to Belgacom clients.

This ruling which suggests to Base that it should address itself to the Competition Council or the ordinary courts, found that the IBPT decision did not concern the mobile telephone market and adds, always in the context of an appreciation of the interest of a mobile operator to contest an offer relating to the retail price of fixed telephony, 'that it does not emerge from any of the evidence produced that the fixed telephone market and the market for mobile telephony have become at this stage so close that an offer in one market would have a significant influence on the other', reasoning that touches the substance.

The Court found an absence of interest in an appeal after having considered that 'the decision taken by the IBPT did not constitute an authorization to apply a tariff or the its approval, and leaves complete the rights that other operators may invoke against Belgacom.

The Court has thus (apparently) with the aim of determining the interest of operators to act, transposed in a case that concerns a decision through which the IBPT intervene ex post to assess the conduct of an operator on a market likely to have by itself effects –that is to say without the intervention of an other cause, a similar reasoning to that which it had followed to assess the interests to act of beneficiaries of reference offers, in other words in situations which concerned the decision through which the IBPT intervenes ext ante, in the context of the control of reference offers.

This ruling raises the question of if the notion of interest covers different realities depending on the authority to which the undertaking addresses itself to which regards itself as a victim of a practice, because it finds on the one hand the absence of interest to appeal in the case of third parties, while at the same time it suggests that it should refer the matter to the Competition Council.

This question equally merits the attention of 'la doctrine'. Which are the criteria for assessing the existence of an interest in the case of an operator who claims that his interests are affected by a practice or by a decision relating to the practice, to use a particular appeals route given that so many possibilities are open to him to invoke and assert his rights ?

Conclusion

The Belgian model is much more complex than the models which have been preferred in other Member States, notably the United Kingdom and the Netherlands.

It is characterized by a multiplicity of competent authorities that we find at different levels and by the diversity of procedures which are on offer to actors in the sector. The future will say if the choice made by the Legislator is capable of providing an sufficient level of protection for the rights of litigants or if on the contrary, to some the means to delay the outcome of procedures.

At the Community level, the organization of appeals is of limited interest. The recent communication dealing with the reform of the regulatory framework in the field of electronic communications does include some discussion of the organization of appeals, but it appears to focus principally on finding solutions to the avoidance of suspending the decisions adopted by regulators when their decisions are the subject of an appeal.

Now, in this field as in others, the parallel application by several authorities and appeal jurisdictions of the same rules of Community law (competition law and sectoral law) but according to different rules of procedure and criteria for the division of different cases results in other risks, such as the significant risk of divergent interpretations of the level of protection that operators and users could hope and expect from appeals mechanisms.

National appeal systems – Case study: Belgium

COMPETITION LAW

SECTOR SPECIFIC REGULATION

COMPETITION LAW

SECTOR SPEC REGULATION

Dispute resolution

Other interventions

Art. 4, Law 17.01.2003

Decision

Cour de Cassation (Supreme Court)

Brussels Court of Appeal

Brussels Court of Appeal

Brussels Court of Appeal/ Courts of Appeal

Competition Council

Competition Council

Competition Council

BIPT

National Courts

or Chairman

Conciliation

Opinion

BIPT

Competition Council

¹ Loi (recours), 17 janvier 2003, article 2

² Cour d'Arbitrage, arrêt n°131/2004 du 14 juillet 2004

³ Bruxelles, 14 octobre 2004 (2003/AR/2463)

⁴ Bruxelles, 25 octobre 2005 (2004/AR/668)

⁵ Bruxelles, 16 juin 2006 (2005/AR/707&756)

⁶ Commission, 21 mai 2003 COMP/C-1/37.451 Deutsche Telekom AG

⁷ Loi (recours), 17 janvier 2003, article 4

⁸ Bruxelles, 7 avril 2006 (2005/AR 296&588)

⁹ Loi (statut) 17 janvier 2003, article 20

¹⁰ Loi (statut) 17 janvier 2003, article 14.3 et 21

¹¹ Conseil de la concurrence belge, décision n°2006-P/K-14 du 1er septembre 2006

¹² Bruxelles, 22 juin 2006 (2005/AR/3300)

¹³ Loi du 10 juin 2006 instituant le Conseil de la concurrence, article 32

¹⁴ Bruxelles, 7 avril 2006 (2005/AR/296&588)

¹⁵ X.Taton, « La nature des nouvelles compétences de la cour d'appel de Bruxelles en matière d'offre publiques d'acquisition », *R.D.C.*, 2003, p.816 ; « Les recours objectifs de pleine juridiction et les pouvoirs limités du juge judiciaire », *R.D.C.*, 2005, p.800 ; David De Roy, « Le pouvoir réglementaire des autorités administratives indépendantes en droit belge », *Rapports belges au congrès de l'académie internationale de droit comparé à Utrecht, Bruylant 2006* et « Le contrôle des amendes infligées par la Commission bancaire, financière et des assurances et les pouvoirs de la cour d'appel de Bruxelles », *R.D.C.* 2006; J.F. Bellis et M.Favart, « Le contrôle juridictionnel sur les décisions d'admissibilité d'une concentration par le conseil de la concurrence après l'arrêt Editeco », *J.T.* 2005, page 765.

¹⁶ Bruxelles, 18 juin 2004 (2003/AR/2249); 14 octobre 2004 (3003/AR/2463)

¹⁷ Cass., 10 juin 1996, R.C.J.B., 1997, p.447

¹⁸ Bruxelles, 12 mai 2006 (2004/AR/174)

¹⁹ Bruxelles, 29 juin 2006 (2002/AR/1059)

²⁰ Bruxelles, 21 novembre 2003 (2002/AR/1723) et Cass. 23 juin 2005, n°C.04.0186.F.

²¹ CJCE, 13 juillet 2006, C-438/04

²² Bruxelles, 15 octobre 2004 (2003/AR/1664), 14 octobre 2005 (2005/AR/6540), 16 mars 2006 (2004/AR/738)

²³ Bruxelles, 12 mai 2006 (2004/AR/174), 15 juin 2006 (2004/AR/2657)

²⁴ Bruxelles, 16 juin 2006 (2004/AR/1777)

²⁵ Bruxelles, 9 décembre 2005 (2004/AR/174)

²⁶ Bruxelles, 14 octobre 2004 (2003/AR/2463)

²⁷ Bruxelles, 16 juin 2006 (2005/AR/707&756)