



Brussels, 8.4.2013
C(2013) 2070

Comisión del Mercado de las
Telecomunicaciones (CMT)

Carrer de Bolivia, 56
E-08018 Barcelona
Spain

For the attention of:
Mr Bernardo Lorenzo
President

Fax: +34 93 603 63 20

Dear Mr Lorenzo,

Subject: Commission Decision concerning Case ES/2013/1431: Wholesale market for broadcasting transmission services, to deliver broadcast content to end users in Spain

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

I. PROCEDURE

On 8 March 2013, the Commission registered a notification from the Spanish national regulatory authority, *Comisión del Mercado de las Telecomunicaciones* (CMT)¹, concerning the wholesale market for broadcasting transmission services, to deliver broadcast content to end users² in Spain.

The national consultation³ ran between 19 July and 19 September 2012.

On the 15 of March 2013, a request for information⁴ was sent to CMT and a response was received on 20 March 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

¹ Under Article 7 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), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 18 in the previous Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45.

³ In accordance with Article 6 of the Framework Directive.

⁴ In accordance with Article 5(2) of the Framework Directive.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The first review of this market was carried out in 2005.⁵ At that time, Abertis Telecom, S.A. (Abertis) was designated as an undertaking with significant market power (SMP) in the national wholesale market for terrestrial analogue and digital television broadcasting transmission services. CMT imposed the following obligations on Abertis: (i) to meet reasonable requests for access; (ii) to charge reasonable prices; (iii) not to discriminate.

The Commission in its comments letter invited CMT to consider the imposition of a cost-orientation obligation, taking the view that the obligation to charge reasonable prices would not be effective. The Commission also invited CMT to consider the imposition of a transparency obligation in order to make the overall access remedy more effective.

The second review of the market was carried out in 2009.⁶ Since the market is no longer listed in the Recommendation on relevant markets, CMT carried out the three criteria test and concluded that the market still warrants *ex ante* regulation. CMT designated Abertis as the SMP operator and imposed the following obligations: (i) access to, and use of, network facilities; (ii) price control (cost-orientation) and cost accounting; (iii) accounting separation; (iv) prohibition of anticompetitive practices (e.g. margin squeeze and predatory prices) and of anticompetitive bundled offers; (v) notification by Abertis of the offers made to national and regional TV channels prior to the signing of the contracts; (vi) transparency (including publication of a reference offer) and (vii) non-discrimination.

The Commission in its comments letter invited CMT to assess the effectiveness of the access remedy, by closely monitoring market entry via co-location, and to consider the imposition of a general interconnection obligation if needed to allow market entry. It further invited CMT to monitor the level of competitiveness in the regional markets.⁷

In 2010⁸ CMT notified a draft measure concerning the implementation of remedies in the market. CMT considered that the reference offer presented by Abertis, which stipulated the technical and economic conditions/procedures governing access by alternative operators to the broadcasting sites/stations of Abertis, was not in line with the requirements set by CMT in its market review decision adopted in 2009. CMT therefore proposed a number of modifications to the reference offer which concerned: (i) procedures for service provision; (ii) prices; (iii) access to information; and (iv) service level agreement/ penalties. The Commission did not make any comment on CMT's draft measure.

II.2. Market definition

CMT considers that the relevant market is the market for terrestrial transmission services, to deliver broadcast content to end users. Similarly to the previous rounds of market analyses, CMT comes to the conclusion that other platforms (satellite, cable, IPTV) are not considered to be part of the relevant product market⁹.

⁵ Case ES/2005/0252.

⁶ Case ES/2009/0905.

⁷ The regional markets were considered not to warrant *ex ante* regulation.

⁸ Case ES/2010/1085.

⁹ CMT explains that due to regulatory requirements, TV channels cannot in practice choose means of transmission alternative to terrestrial transmission. CMT explains that licensees of both public and private television in Spain are obliged to provide the service of audio-visual communication via

CMT explains that end users in Spain do not consider that terrestrial digital transmission (TDT) should be replaced by audio-visual services transmitted by means of alternative technologies. In CMT's view, the coverage of TDT is not comparable with any other existing platform in Spain¹⁰. Thus, the level of platform competition in Spain does not seem to justify the inclusion of other platforms into the relevant product market¹¹.

The product market definition includes both analogue and digital transmission on the basis of supply side substitution.¹²

From a geographic viewpoint, CMT delineates different markets at national, regional and local levels.¹³ However, concerning the regional and local markets, CMT states that entry barriers are low, and therefore no *ex ante* regulation is warranted. Consequently the relevant geographic market which is subject to *ex ante* regulation is the whole territory of Spain.

II.3. Three Criteria Test

As the market is no longer listed in the Recommendation on Relevant Markets¹⁴ CMT carries out the three criteria test¹⁵ with regard to the notified market in order to assess its susceptibility to *ex ante* regulation.

With regard to the first criterion, CMT finds that the market is subject to high and non-transitory entry barriers, due *inter alia* to the existence of structural and regulatory

terrestrial radio waves.

¹⁰ CMT explains that TDT has practically total population coverage and a territorial coverage greater than 98%. According to the available data, the totality of the cable networks had installed, by the end of 2011, 8.9 million access points, which represent 52 % household coverage. Moreover, the Telefónica audio-visual platform (Imagenio), the largest IPTV in Spain, has access to less than 40 % of households. Finally, while satellite covers potentially the whole national territory, households that have the necessary infrastructures, such as the satellite signal reception dish to receive services, represent a much smaller percentage. In addition, in Spain, open or non-conditional access television is transmitted almost exclusively via TDT. The remainder of platforms give access to pay TV. Due to the differences in price and content, open and paid television services are not considered as substitutes by end-users in Spain.

¹¹ A general regulation applied in Spain creating private television in 1988 established that the television broadcasting should be done via terrestrial radio waves. CMT also explains in the answer to the RFI that despite the liberalisation of audio-visual communication services, the license obligations of the then existing operators were not modified, and their licences oblige them to provide the service through terrestrial radio waves. Coupled with the fact that television broadcasting via radio waves is the most widespread due to historical reasons, this has led to the situation that other alternatives of broadcasting (cable, satellite, IPTV) have not spread significantly in Spain.

¹² However, CMT explains that since April 2010 broadcasting services are only provided through digital technology and analogue technology is no longer used.

¹³ According to CMT, there are 19 regional markets and 308 local markets in addition to the national market.

¹⁴ Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

¹⁵ In accordance with Point 2 in conjunction with Recital 5 of the Recommendation on Relevant Markets, when identifying markets other than those mentioned in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

barriers to entry arising from coverage requirements and the need to develop network infrastructure as well as high sunk and fixed costs.

Concerning the second criterion, CMT explains that the market is characterized by high market shares, no countervailing buyer power, high switching costs and limited prospects of potential competition.

With regard to the insufficiency of competition law (third criterion), CMT explains that Abertis could prevent market entry in various ways, making it difficult to address potential issues exclusively on an *ex post* basis. Moreover, anticompetitive behaviour could bring about irreparable damage, *de facto* leading to foreclosure of the market. CMT, therefore, considers that the application of competition law is not sufficient to solve the market failures in the relevant market.

II.4. Finding of significant market power

CMT intends to designate Abertis as having SMP in the relevant market. The main criteria considered by CMT when reaching its conclusion on SMP include: market share¹⁶, barriers to entry (including control of a non-replicable infrastructure and importance of economies of scale and scope), lack of potential competition, and absence of countervailing buyer power.

CMT adds that Abertis is the only operator currently active in the relevant market throughout the entire Spanish territory. Axi3n is the most active alternative operator at a regional level (Andaluc3a).

II.5 Regulatory remedies

CMT proposes to impose the following regulatory obligations on Abertis:

- (i) access to, and use of, network facilities (via co-location and, in some specific cases via interconnection¹⁷);
- (ii) price control and cost accounting obligations (co-location, interconnection and other accessory services are subject to cost orientation¹⁸);
- (iii) accounting separation;
- (iv) prohibition of anticompetitive practices such as margin squeeze and predatory prices, or anticompetitive bundled offers;
- (v) notification by Abertis of the offers made to national TV channels 10 days after being signed;
- (vi) transparency (including publication of a reference offer);
- (vii) non discrimination.

¹⁶ Abertis has a 100% market share at national level and a market share above 80% if national, regional and local services are considered jointly.

¹⁷ Interconnection services are offered with co-location only in case of i) irreplaceable nature of the site, ii) saturation of available space and iii) centres of Abertis' national network designed to satisfy the criteria of population coverage greater than 93 % as described in the sectorial standards.

¹⁸ The cost orientation methodology imposed on Abertis is based on a top-down fully distributed cost model.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the CMT and has the following comment:¹⁹

Effectiveness of the access remedy

The Commission noticed that despite the regulatory obligations imposed in the previous rounds of market analyses, there was little development towards effective competition in the relevant market. Concerning the access obligation, the Commission notes that CMT proposes again to impose a general co-location obligation on Abertis as a main obligation and an interconnection obligation as an alternative remedy only in cases where due to technical and/or economical reasons co-location is not feasible. As in the previous market review, the Commission notes that there appears to be no real demand for co-location in Spain. The Commission therefore requests CMT to consider the imposition of a general interconnection obligation in its final measure. Alternatively CMT should monitor market entry via co-location very closely and later impose a general interconnection obligation if needed to allow market entry. The Commission notes that such a general interconnection obligation could be limited in time in order to maintain new entrants' incentives to roll-out their own infrastructure over time.

Pursuant to Article 7(7) of the Framework Directive, CMT shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁰ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²¹ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²² You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹⁹ In accordance with Article 7(3) of the Framework Directive.

²⁰ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²¹ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²² The Commission may inform the public of the result of its assessment before the end of this three-day period.