



Brussels, 15.4.2013  
C(2013) 2270

Comisión del Mercado de las  
Telecomunicaciones (CMT)

Carrer de Bolivia, 56  
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Spain

For the attention of:  
Mr Bernardo Lorenzo  
Presidente

Fax: +34 93 603 63 20

Dear Mr Lorenzo,

**Subject: Commission Decision concerning:**

**Case ES/2013/1432: Market for access to the public telephone network at a fixed location (market 1) in Spain – modification of remedies**

**Case ES/2013/1433: Wholesale broadband access market (market 5) in Spain – modification of remedies**

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

## **I. PROCEDURE**

On 15 March 2013, the Commission registered a notification from the Spanish national regulatory authority, Comisión del Mercado de las Telecomunicaciones (CMT)<sup>1</sup>, concerning the modification of remedies on the market for access to the public telephone network at a fixed location and the wholesale broadband access market<sup>2</sup> in Spain.

The national consultation<sup>3</sup> ran from 8 November 2012 to 17 December 2012.

On 22 March 2013, a request for information<sup>4</sup> was sent to CMT and a response was

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<sup>1</sup> 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.

<sup>2</sup> Corresponding to markets 1 and 5 in 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.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

received on 26 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.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Background**

The methodology for the *ex ante* assessment of Telefónica de España, S.A.U.'s (TESAU's) retail offers was previously notified under cases ES/2007/620 and ES/2007/626<sup>5</sup>. The markets for access to the public telephone network at a fixed location (market 1) and wholesale broadband access (market 5) in Spain were previously notified to and assessed by the Commission under, respectively, cases ES/2012/1380 and ES/2008/0805<sup>6</sup>.

On the methodology for *ex ante* assessment, the Commission expressed concern that the prohibition of retail offers in case the replicability test would indicate a margin squeeze could result in de facto regulation of retail products. Further, the Commission invited CMT to complement its analysis with future demand developments in order to be able to get the right mix of wholesale products to be included in the test and incentivise alternative operators to offer broadband products in the whole territory. Finally, the Commission invited CMT to ensure that if the NRA would apply a Discounted Cash Flow (DCF) methodology, it would not lead to a "false" positive margin resulting from future profits incompatible with a competitive environment.

Concerning market 1, CMT found that TESAU had SMP. Within its market definition, it made a distinction between "mass" and "business" market, including only the first one in the market definition. Furthermore, it based its market definition on two criteria: (i) the adoption of a business plan; (ii) the nature of the customers. CMT imposed remedies related to the provision of retail services, transparency and cost accounting obligations and accounting separation, withdrawing the previously imposed price control obligations. The Commission commented on the need for a parallel analysis of all parts of the market and as a consequence of the partial market analysis, the need for maintaining previously imposed remedies in the market section excluded from the notified draft measure until a market review has been conducted also for this remaining part of the market.

Concerning market 5, CMT found that TESAU had SMP. The notification was subject to serious doubts by the Commission since it considered that CMT did not provide sufficient evidence as to: (i) the exclusion of speeds above 30 Mb/s from the market definition; (ii) the inclusion of LLU and cable in the market definition in view of the weakness of the indirect constraints exercised by these products on TESAU at wholesale level; (iii) the extent to which the competitive conditions identified by CMT in the different geographic areas would point towards a national or rather towards sub-national markets. During the phase II investigation, CMT amended its proposal by removing the limitation of 30 Mb/s,<sup>7</sup> recognising the weakness of the indirect constraints exercised by

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<sup>5</sup> SG Greffe (2007) D/202782.

<sup>6</sup> SG Greffe (2008) D/206852, SG Greffe (2008) D/208672 for market 5 and C(2012) 8866 for market 1. Market 5 was also subject to a remedies modification in 2011 (ES/2011/1194).

<sup>7</sup> It did so because it concluded that there was no clear indication of a break in the chain of substitution between speeds below and above 30 Mb/s, and that services provided over NGA networks (at higher speeds) should be considered as incremental upgrades of services provided over lower speeds, and therefore should not be treated as a different market.

cable and LLU and reinforcing the conclusion that the relevant geographic market was national. In the amended proposal, the remedies were limited to speeds up to 30 Mb/s which made the Commission maintain its concerns<sup>8</sup> and urge CMT to reconsider imposing remedies for wholesale access products in excess of 30 Mb/s while withdrawing its serious doubts due to the change in market definition.

## **II.2. Description of proposed measures**

### *The methodology for ex ante analysis of commercial offers*

CMT proposes a revised methodology for the *ex ante* analysis of commercial offers of TESAU, as well as of certain communication obligations imposed in the framework of markets 1 and 5. Concerning the methodological review, CMT offers a set of seven different reasons to conduct it.<sup>9</sup> The reviewed methodology includes three different elements: (a) replicability test of individual offers (individual test);<sup>10</sup> (b) aggregate replicability test at the level of relevant analysis segment (aggregate test);<sup>11</sup> (c) actions in case a situation of lack of economic replicability is detected.

The individual test applies only to new and modified permanent offers in the residential sector in a pre-launching period.<sup>12</sup> If the offers pass the individual test, they are launched and submitted to new aggregate tests every six months.<sup>13</sup> The aggregate test, which is new, is complementary to the individual one and it applies to all offers. In practice, this means that new temporary offers and promotions would also be subject to an aggregate test. In case the individual test detects a lack of replicability of the offer, its launch will be blocked insofar as the SMP operator does not adjust the wholesale tariffs so as to allow replicating the offer in question. In case the lack of replicability is detected in the aggregate test, wholesale prices of the relevant services will be temporarily adjusted by CMT in order to re-establish the replicability of the SMP operator's offers.

Regarding the individual test, CMT made some modifications concerning its previous test in terms of methodological bases in order to align it with the aggregate test. These modifications concerned: (i) the definition of the reference operator; (ii) costs standards; (iii) useful lifetime of the customer; (iv) determination of the reference operator's costs.

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<sup>8</sup> The Commission considered that the prospect for enhanced infrastructure competition was not particularly strong in Spain, due to: (i) lack of reference offer or price obligation for access to the physical network infrastructure in place; (ii) rolling-out of alternative networks would take considerable time; (iii) alternative operators still had a weak position in the Spanish retail broadband market. Furthermore, the Commission considered that there was a risk that, with a fibre-based wholesale broadband access product which is limited in speed, TESAU could pre-empt the market for retail broadband services during the period in which the deployment of fibre would be taking up in Spain.

<sup>9</sup> (i) market competitiveness changed in the past five years; (ii) TESAU's market share decreased in both markets; (iii) the role of wholesale services and encouragement of competition was consolidated during this period; (iv) the competitive pressure stemming from fixed access networks alternative to those owned by TESAU has not increased significantly during this period; (v) the bundling of services has increased; (vi) mobile broadband experiences a strong growth during this period; (vii) the competitive situation in the fixed broadband internet telephone access markets was substantially modified since the methodology was approved.

<sup>10</sup> The individual test consists of an analysis on an offer by offer basis made prior to the launch.

<sup>11</sup> The aggregate test promotes the verification, at aggregate level, that all offers of the SMP operator with some defined common features do not generate anti-competitive effects.

<sup>12</sup> It applies to permanent price plans, both new and modified and to new forms of bundling not used before by the SMP operator, provided these include certain services subject to an *ex ante* obligation.

<sup>13</sup> The reference periods are between January-June and July-December each year.

Concerning the reference operator, the individual test will be based on the same methodological principles as the aggregate test, applying the Equally Efficient Operator (EEO) principle and being based on a LRIC<sup>14</sup> standard. Regarding the aggregated test, the draft measure proposes to define relevant analysis segments, notably the general public segment<sup>15</sup> and the non-residential segment.<sup>16</sup> It applies to residential and business customers that have a company tax code and have contracted 5 or less fixed or mobile phone lines. CMT thus proposes four different segments: (i) only phone; (ii) phone and broadband; (iii) phone, broadband, IPTV; (iv) fixed and mobile (bundled offers).

#### *Obligations of information and prior communication of retail offers*

CMT proposes to impose an obligation of information by the SMP operator (TESAU) regarding each of the analysis segments. Further, CMT proposes to modify obligations previously imposed for prior communication of retail offers.

In market 1, TESAU shall notify any modification of the available prices and conditions to its services of fixed telephone access at least 21 days prior to its effective application/marketing. Within the framework of market 5 with regard to its retail offers, TESAU should give: a) 3 months advance notice of any offer of new services of broadband that include technical parameters not included in the reference offer; b) 1 month advance notice for any new price structure; c) 15 days advance notice for any bonus, promotion, discount, etc. on the existing services. TESAU shall present its offers to CMT according to the previous definition at least 21 days prior to its effective marketing.

### **III. COMMENTS**

The Commission has examined the notification and the additional information provided by CMT and has the following comments:<sup>17</sup>

#### **The need for conducting a new market review for market 5**

Pursuant to Article 8(4) of the Access Directive<sup>18</sup>, obligations shall be based on the nature of the problem identified, be proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. According to the Framework Directive, NRAs shall decide on whether to maintain, amend or withdraw obligations on undertakings on the basis of a market analysis<sup>19</sup>. Pursuant to paragraph 6 of Article 16 of the Framework Directive, regulators should carry out their market reviews within three years from the adoption of the previous measure. In that respect, the Commission notes that CMT carried out the

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<sup>14</sup> In case of the aggregated test, it will be the analysis segment constituting the increment. Furthermore, the incremental costs by service of the network itself will be determined based on a pure LRIC of the service, calculated according to Cost Accounting System principles, criteria and conditions.

<sup>15</sup> Including strictly residential clients and independent clients.

<sup>16</sup> SME clients are included, but not enterprise clients, due to the complexity and customisation of services provided to enterprises, as well as the use of access products that technically do not match the wholesale services considered in the test.

<sup>17</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>18</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the 'Access Directive'), OJ L 108, 24.4.2002, p.14.

<sup>19</sup> Article 16(3) of the Framework Directive.

last market review for market 5 in 2008. In the notified draft measure CMT specifically refers to, inter alia, the changing conditions in the retail broadband market and development of alternative operator's market shares as reasons for reviewing the methodology for *ex ante* assessment of retail offers. In the view of the Commission, these developments in the retail market may be signs of corresponding developments in the wholesale market. In the light of this, and in particular the on-going development of NGA, and the need for regulation to be technology-neutral in line with Article 8 of the Framework Directive, the Commission urges CMT to conclude a market review for market 5 without further delay.

### **The methodology for *ex ante* assessment of commercial offers**

The Commission welcomes the fact that CMT in its revised methodology for *ex ante* assessment of commercial offers reduces the number of offers that will be subject to the individual test and focuses the individual test on new and modified permanent offers. Yet, the Commission urges CMT to reassess the proportionality of the aggregate test which in addition to testing new and modified permanent offers will monitor all temporary offers and promotional activities by the SMP operator after their launch. Stability and predictability of legacy wholesale access prices is key to provide a clear framework for investment and to drive competition. A recurrent test as the aggregate test, which includes all relevant offers by the SMP operator, is performed every six months and the failure of which leads to the temporary adjustment of wholesale tariffs by CMT, risks generating legal and economic uncertainty which may negatively affect investments and innovation.

Further, the Commission highlights that the Commission is working towards the adoption of a Recommendation on the consistent application of non-discrimination obligations and cost methodologies to promote competition and enhance the broadband investment environment, which will give some guidance on the design of an *ex ante* economic replicability test for NGA-based services. This test should be used in case pricing flexibility is granted to the SMP operator for NGA wholesale inputs in the presence of other competitive safeguards. In particular, the Commission points out that the recommended test could be carried out at any time but no later than three months after the launch of the relevant retail product and the NRA should conclude it within the shortest possible time and in any case within four months. Accordingly, the Commission urges CMT to revisit the proposed methodology for *ex ante* tests of commercial offers along the lines of the forthcoming Recommendation once adopted if CMT were to extend the assessment to include NGA-based services.

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/EC<sup>20</sup> the Commission will publish this

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<sup>20</sup> 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.

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

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<sup>21</sup> Your request should be sent either by email: [CNECT-ARTICLE7@ec.europa.eu](mailto:CNECT-ARTICLE7@ec.europa.eu) or by fax: +32 2 298 87 82.

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