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Comisión Nacional de los Mercados  
y de la Competencia (CNMC)  
Bolivia, 56  
E-08018 Barcelona  
Spain

For the attention of:  
Mr. Jose Maria Marín Quemada  
President

Dear Mr. Quemada

**Subject: Commission Decision concerning Case ES/2017/1965: Market for access and call origination on public mobile telephone networks in Spain**

**Article 7(3) of Directive 2002/21/EC: No comments**

## 1. PROCEDURE

On 17 February 2017, the Commission registered a notification from the Spanish national regulatory authority, Comisión Nacional de los Mercados y de la Competencia (CNMC)<sup>1</sup>, concerning the market for access and call origination on public mobile telephone networks<sup>2</sup> in Spain.

The national consultation<sup>3</sup> ran from 1 July 2016 to 8 August 2016.

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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 market 15 of 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 the Framework Directive, OJ L 114, 8.05.2003, p. 45. This market has been removed from the list of the relevant markets that may warrant *ex ante* regulation which is contained in the currently applicable Commission Recommendation 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

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

On 27 February 2017, a request for information<sup>4</sup> was sent to CNMC and a response was received on 2 March 2017.

## 2. DESCRIPTION OF THE DRAFT MEASURE

### 2.1. Background

The market for access and call origination on public mobile telephone networks in Spain was previously notified to and assessed by the Commission under case ES/2005/0330<sup>5</sup>.

CMT<sup>6</sup> defined the relevant market as the supply of access and origination services by the mobile network operators to operators without spectrum resources, allowing the latter to supply voice and data services (such as SMS) at the retail level. The geographical market was defined as national.

CMT first analysed the retail market and found that, even though there were competition problems and deficiencies, neither single, nor collective dominance at the retail level existed.

CMT then found that the three mobile network operators –Telefónica, Vodafone and Amena – held a position of collective dominance on the wholesale market for access and call origination on public mobile telephone networks in Spain. It therefore intended to designate Telefónica, Vodafone and Amena as having joint SMP and imposed on all three mobile network operators (“MNOs”) the obligation to provide third parties, so-called mobile virtual network operators (“MVNO”), i) access when receiving a reasonable request and ii) to charge reasonable prices.

In order to verify the existence of collective dominance on the wholesale market, CMT analyzed a number of structural characteristics of the Spanish market which were considered conducive to coordinated behaviour, most notably: i) the structure of the market (degree of market concentration, barriers to entry), ii) the transparency of the wholesale market (ability to detect any deviation from the common conduct), iii) the symmetry of the cost structure of the MNOs and iv) lack of actual and/or potential market constraints (actions of outsiders which could jeopardise results from coordination).

CMT found that MNOs at the time had strong incentives to deny wholesale access to third parties with the aim to reserve to themselves the retail market at high levels of profitability. CMT considered that: i) they had adopted the tacit common policy to persistently refuse to grant network access, ii) this strategy was sustainable over time and iii) the retaliation mechanism represented an adequate deterrent to depart from the tacit common policy.

The Commission commented on the draft measure and invited CMT to monitor the further evolution of the retail market. The Commission further stressed the

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

<sup>5</sup> SG-Greffe (2006) D/200402.

<sup>6</sup> Comisión del Mercado de las telecomunicaciones” (“CMT”). CMT was a sectorial regulator, later integrated into the current CNMC.

importance of the Airtours-criteria<sup>7</sup> but ultimately agreed with the findings of CMT. The Commission invited the Spanish authorities to explore appropriate measures in order to ensure efficient use of the available spectrum with a view to enhance competition in the retail market. Finally, the Commission asked CMT to base its final measure on the most recent available information.

## **2.2. Market definition**

In the current draft measure, CNMC continues to define the relevant product market for mobile access and call origination as including all necessary services for a MVNO to be able to provide retail mobile services, including voice, messaging and data. According to CNMC, the market includes all MNO's with the capacity to provide such services.

The relevant geographic market is national.

## **2.3. Three Criteria Test**

As the market for access and call origination on public mobile telephone networks is no longer listed in the Recommendation on Relevant Markets as susceptible to ex ante regulation, CNMC carried out the three criteria test in order to assess if ex-ante regulation of the market should be continued.

### *2.3.1. High non-transitory barriers to entry*

According to CNMC, the first criterion is still met, as the access to the necessary radio spectrum poses barriers to entry into the wholesale market for access and call origination on mobile networks to potential new operators. The current radio spectrum distribution constitutes a market structure in which the three main MNOs, Telefónica, Vodafone and Orange, have the only available frequencies at the national level.

### *2.3.2. Tendency towards effective competition*

CNMC found that the second criterion is not met and that the market tends towards effective competition.

CNMC explained that wholesale regulation allowed the entrance in the retail market of a large number of MVNOs. Currently, there are 33 MVNOs (13 of which are Full MVNOs) active in the market which have a joint market share of 10.7%. Traditional MNOs have the following retail market shares: Telefónica 30.2%, Vodafone 25.5% and Orange 27.2%. Since the last market review, a fourth MNO, Yoigo, which is part of the Masmóvil group, has been established. Yoigo holds a retail market share of approximately 6.4%.<sup>8</sup> CNMC observed that, between 2011 and 2016, retail prices significantly decreased.<sup>9</sup>

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<sup>7</sup> Case T-342/99 *Airtours* [2002] ECR II-2585

<sup>8</sup> Those market shares refer to 2016 and to mobile connections. Between 2011 and 2016, the retail market share of Telefónica dropped by 10 percentage points (p.p.) in terms of volumes and by 13 p.p. in terms of revenues. In the same period Vodafone's market share in terms of revenues remained relatively stable while the market share in terms of volumes slightly decreased. The market share of Orange grew by 7 p.p. in terms of volumes and 3 p.p. in terms of revenues. Yoigo's market share in

In the wholesale market, Telefónica, Vodafone and Orange have, respectively, a market share of approximately 60%, 19% and 22%.<sup>10</sup> Yoigo has a geographically limited network and a roaming agreement for the remaining part of the territory of Spain. CNMC believes that Yoigo will compete (directly and indirectly) with the other three MNOs for the provision of access/origination services to mobile networks. The MVNOs IOS and Euskalter resell mobile access provided by Orange to third parties, thus they also compete with MNOs in the wholesale market.

Between 2011 and 2016, CNMC observed a significant decrease of wholesale prices. The average revenue per minute of the wholesale voice call origination service dropped by more than 75 % between 2011 and 2016. The commercial agreements between MNOs and MVNOs have, according to CNMC, resulted in prices near the termination prices which are subject to BU pure-LRIC price regulation.

CNMC further observed that MVNOs were able to switch their host MNOs. Furthermore, contracts of MVNOs with MNOs have been renegotiated and renewed without CNMC's intervention and access to 4G networks has been obtained by MVNOs.

CNMC could not find sufficient indications that the described market developments are not sustainable over time and that there is an evident risk that the traditional MNOs could, in a generalized and collective manner, reverse the current tendency mainly by way of denial of access absent of ex ante regulation. Considering the high number of agreements with different expiry dates, CNMC deems it unlikely that, absent regulation, MNOs will refuse to sign agreements with MVNOs. Further, Orange is obliged to provide access to Yoigo until 2022 due to a commitment imposed by the Commission to authorize the merger of Orange and Jazztel.<sup>11</sup> Therefore CNMC did not find indications that the market developments would not be sustainable over time or that the traditional MNOs would be in a position to reverse the observed trends towards competition.

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revenues doubled from 3.5% in 2011 to approximately 7% while its market share in volume increased by only 1 p.p. The remaining MVNO's currently hold a market share of 8.5 % in terms of revenues.

<sup>9</sup> CNMC explained that there is a clear increase in the level of competition at retail level as proved by the fact that the average retail revenues per user dropped more than 35% between December 2011 and March 2016 and the average consumption per user in terms of voice has increased significantly and exponentially in the case of mobile broadband. CNMC also pointed out that, in addition to the price reduction, the retail market has evolved: i) the off-net/on-net price differentiation at retail level has almost disappeared; ii) mobile voice flat rates and bundles of minutes are now widespread in the market; iii) simplification of retail tariffs and hence an increase of the transparency for the end user; and iv) exponential growth of mobile broadband.

<sup>10</sup> Those market shares refer to revenues in 2016. From 2011 to 2016, Telefónica 's market share has increased by almost 12 p.p. while Vodafone's dropped by 28 p.p. and Orange's market share remained stable. By 2017 CNMC expects a significant drop of Telefónica's market share, when Yoigo will have switched its host MNO from Telefónica to Orange.

<sup>11</sup> It is CNMC's view that the new agreement between Orange and Masmóvil (including Yoigo) even goes beyond the commitments of Orange, especially due to Masmóvil's right to unilaterally terminate the contract with no penalization in the event that Orange would not guarantee immediate access to 5 G.

### 2.3.3. *Insufficiency of competition law*

CNMC complements its analysis of the second criterion and verified whether the unlikely practices of MNO's that could aim at restricting competition could sufficiently be tackled with the tools of competition law. CNMC concludes that also the third criterion is not met and hence that competition law is sufficient to tackle the competition problems that might arise.

CNMC assumes that possible anti-competitive behaviour will not be widespread as there have been a limited number of conflicts arising over the last few years. Furthermore some of the main issues that remained unclear in the contractual relations between the MNOs and the MVNOs have been clarified.

CNMC is further confident that the national competition law has the necessary tools to intervene immediately in the event of anti-competitive behaviour.

### 2.4. **Regulatory remedies**

As CNMC finds the market to be effectively competitive, it proposes to withdraw regulation after a transitory period of six months after publication of the final measure.

## 3. **NO COMMENTS**

The Commission has examined the notifications and the additional information provided by CNMC and has no comments.<sup>12</sup>

Pursuant to Article 7(7) of the Framework Directive, CNMC may adopt the draft measure and, 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>13</sup> 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 Commission<sup>14</sup> 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.<sup>15</sup> You should give reasons for any such request.

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<sup>12</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>13</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.

<sup>14</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>15</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.

Yours sincerely,

For the Commission,  
Roberto Viola  
Director-General