



Brussels, 7.3.2013
C(2013)1484

Comisión del Mercado de las
Telecomunicaciones (CMT)

Carrer de Bolivia, 56
E-08018 Barcelona
Spain

For the attention of:
Mr Bernardo Lorenzo
Presidente

Fax: +34 93 603 63 20

Dear Mr Lorenzo,

Subject: Commission Decision concerning:
Case ES/2013/1425: Wholesale terminating segments of leased lines in Spain
Case ES/2013/1426: Wholesale trunk segments of leased lines in Spain
Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 7 February 2013, the Commission registered a notification from the Spanish national regulatory authority, Comisión del Mercado de las Telecomunicaciones (CMT)¹, concerning the market for wholesale terminating segments of leased lines² and the wholesale market for trunk segments of leased lines in Spain.

The national consultation³ ran from 14 October 2012 to 14 November 2012.

On 18 February 2013, a request for information⁴ was sent to CMT and a response was received on 21 February 2013. Additional questions were sent on 22 February 2013 and CMT's response was received on the same day. Moreover a conference call with CMT was held on 25 February 2013. On 27 February 2013, CMT sent, by way of email,

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 6 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.

³ In accordance with Article 6 of the Framework Directive.

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

additional information regarding the proposed regulatory remedies.

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 market for wholesale terminating segments of leased lines and the wholesale market for trunk segments of leased lines in Spain were previously notified to, and assessed by the Commission under cases ES/2009/0930 and ES/2009/0922⁵. The market for terminating segments of leased lines was at the time found to be national and Telefónica was found to have SMP. CMT proposed to impose (i) access obligations, (ii) price regulation (including accounting separation) in the form of cost-orientation for leased lines over traditional interfaces and retail minus for leased lines using Ethernet interfaces, (iii) non-discrimination and (iv) a transparency obligation which materializes in the publication of a reference offer. The Commission had no comments.

In the market for trunk segments of leased lines, CMT identified different geographic markets: one single market for all wholesale trunk leased lines for terrestrial routes and several separate geographic markets corresponding to different wholesale trunk leased lines for submarine routes⁶. The market for terrestrial routes did not fulfil the three criteria test and was, as such, deregulated. The three criteria test was fulfilled for all submarine routes except *Península – Balearic Islands, Mallorca – Ibiza, and Gran Canaria – Tenerife*. Telefónica was designated as having SMP also on the 10 remaining submarine routes. The following obligations were proposed: (i) access, (ii) reasonable prices, (iii) non-discrimination and (iv) transparency, including the publication of a reference offer. The Commission commented on the need to further specify the pricing mechanism and notify the details.

Service conditions within the reference offer, together with prices for both terminating and trunk lines, were further specified and notified to the Commission in 2010⁷. The Commission had no comments.

II.2. Market definition

Terminating segments of leased lines

The product market definition in the present draft measure is in line with that of the two previous market reviews. CMT defines the market as the market in which fixed, symmetrical transmission capacity is provided, without switching functionalities which the user can verify and which will comprise part of the access network⁸ of the carrier requesting the service, regardless of the technology used to supply the capacity. As such, both traditional interfaces and Ethernet technologies are included.

⁵ C(2009)4735.

⁶ A separate geographic market were defined for each of the following routes; *Península – Baleares, Mallorca – Menorca, Mallorca – Ibiza, Ibiza – Formentera, Península – Canarias, Gran Canaria – Tenerife, Tenerife – Gomera, Tenerife – La Palma, Gomera – Hierro, Gran Canaria – Fuerteventura, Gran Canaria – Lanzarote, Península – Ceuta, Península – Melilla*.

⁷ ES/2010/1108.

⁸ Leased lines used by mobile carriers to connect their access networks are included, in line with the findings in the second round of market review.

The relevant geographic market is national.

Trunk segments of leased lines

CMT defines the market for wholesale trunk segments of leased lines as the market in which symmetric transmission capacity is provided between two nodes of the trunk network, regardless of the technology used to supply the capacity and without switching functionalities that can be controlled by the user. Corresponding to the last market review, CMT includes all trunk lines regardless of transmission capacity and provided on any type of medium: copper, coax, fibre optics, radio link, satellite. Ethernet interfaces are included and wavelengths (*lambdas*) are also considered to be in the relevant market, while dark fibre is considered to be an upstream market to the market for trunk segments of leased lines and is hence not included.

CMT identifies geographical markets corresponding to the following submarine routes:

- Mallorca – Menorca
- Ibiza – Formentera
- Peninsula – Canary Islands
- Tenerife – Gomera
- Tenerife – La Palma
- Gomera – Hierro
- Gran Canaria – Fuerteventura
- Gran Canaria – Lanzarote
- Peninsula – Ceuta
- Peninsula – Melilla

II.3. The three criteria test for the market for trunk segments of leased lines

CMT conducts the three criteria test and concludes that for all 10 geographic markets which remain regulated since the second round of market analysis in 2009⁹, the test is met. In particular, CMT points out that the initial investment necessary to deploy a submarine cable is significant and the regions connected with the cables are sparsely populated.

For the largest route, Peninsula-Canary Islands, there has recently been a market entry: Canalink established its cable in 2011.¹⁰ Still, CMT finds entry barriers to remain high¹¹ also in this route, noting that the demand for capacity is low. It concludes that it is too soon to determine that the market tends towards effective competition.

II.4. Finding of significant market power

Terminating segments of leased lines

CMT identifies Telefónica as having SMP based on a market share of 56% of revenues and 69% of lines. The SMP designation is further based on the following criteria: (i) significant structural barriers to entry, (ii) sunk costs (iii) economies of scale and scope and (iv) no foreseen market entry during the time horizon covered by the market review. Moreover, CMT states that the following factors increase the possibility of Telefónica to

⁹ ES/2009/0922.

¹⁰ Since 2012, there is also a third cable, which is used only for self-supply by Vodafone. The cable is part of the West Africa Cable System-consortium and as such Vodafone has limited possibilities due to the regulations of the consortium to increase capacity and start providing wholesale services.

¹¹ The Canalink cable is established as a joint venture with a public company from the Canary Islands Administration. Winning a tender to connect Spanish Universities and R&D centres helped the financial viability of the project. This, according to CMT, will not reoccur for many years.

behave independently of its customers and competitors: its network capillarity, its presence on adjacent markets as a vertically integrated operator and the absence of alternative suppliers.

Trunk segments of leased lines

For the 10 geographic markets identified, CMT designates Telefónica as having SMP, following the same analysis as when assessing the three criteria. In the Peninsula – Canary Islands route, the market share of Telefónica is 85%¹² including self-supply, while for the nine remaining routes it is practically 100%¹³.

II.5. Regulatory remedies

Terminating segments of leased lines

CMT intends to impose the following remedies:

- access¹⁴ to leased lines with traditional interfaces with the following capabilities: 64 kbit/s, n x 64 Kbit/s (n= 2,3,4,6,8,12,16,24 and 30), 2 Mbit/s structured and unstructured, 34 Mbit/s and 155 Mbit/s. Access to leased lines with Ethernet (10 Mbit/s), Fast Ethernet (100 Mbit/s) and Gigabit Ethernet (1000 Mbit/s);
- price regulation based on cost orientation for traditional leased lines and retail minus for Ethernet leased lines;
- accounting separation;
- non-discrimination; and
- transparency obligation including the publication of a reference offer.

CMT proposes not to regulate traditional leased lines of 622 Mbit/s and Gigabit Ethernet leased lines above 1 Gbit/s. With regard to traditional leased lines of 622 Mbit/s, CMT points to their low number and lack of demand at wholesale level. The absence of regulatory obligations for Ethernet leased lines above 1 Gbit/s is justified by CMT by the need to promote investments in alternative networks. The revenues associated with it are, according to CMT, high enough to justify an investment in direct access from alternative operators.

On 27 February 2013, CMT committed to modify the remedies originally proposed in order to properly cover the different underlying competitive conditions between the services up to and above 1 Gbit/s. In particular, in the final measure CMT committed to impose the following remedies for the capacities above 1 Gbit/s: an obligation to meet reasonable requests for access; and an obligation to charge reasonable prices. In the event that this proposed amendment to the original draft measure would not be endorsed by the CMT Board, CMT committed not to adopt the draft measure as notified and to re-notify an amended draft measure that addresses this issue at a later stage.

¹² In terms of both revenues and capacity, if excluding capacity of the IRIS Nova Network project.

¹³ In the Mallorca-Menorca route, Albertis provides some low capacity circuits using radio links, but the route is, according to CMT, still dominated by Telefónica.

¹⁴ For traditional lines, a reasonable request shall mean circuits with both ends in the same province regardless of distance or interprovincial circuits not exceeding 70 kilometres. For leased lines based on Ethernet interfaces, the reasonableness is based on the type of line and is spelled out in the reference offer. For Ethernet and Fast Ethernet, the distance limitation for dedicated fibre optics is 35 Km. For longer distances, Telefónica is not obliged to provide Ethernet and Fast Ethernet lines through end-to-end dedicated fibre, but it must offer one of two possibilities to the requesting operator: 1) Ethernet over SDH; or 2) Service Level 2 Ethernet.

Trunk segments of leased lines

For the trunk segments, CMT proposes to maintain the obligations set out in the previous market review, as further specified in the reference offer. These include:

- access to trunk segments of leased lines with the speeds of 2, 34, 155 and 622 Mbit/s, and in the case of the Peninsula-Canary Islands route also 2,5 Gbit/s. In addition, Telefónica must also address reasonable requests for speeds not included in the regulated offer;
- price regulation according to cost orientation for the nine minor routes and reasonable prices¹⁵ on the Peninsula-Canary Islands route;
- non-discrimination; and
- transparency obligation including the publication of a reference offer.

III. COMMENTS

The Commission has examined the notification and the additional information provided by CMT and has the following comments:¹⁶

CMT's commitment to impose regulation for terminating segments of Ethernet leased lines above 1 Gbit/s

In accordance with Article 8(4) of the Access Directive, obligations imposed shall be based on the nature of the problem identified, proportionate and justified in light of the objectives of Article 8 of the Framework Directive, including the need to comply with the principle of technological neutrality. If the competitive conditions vary between the provision of lower and higher leased lines capacities, but at the same time, the boundaries between different types of leased lines are not stable enough to identify separate relevant markets, CMT should consider imposing differentiated remedies. The Commission is of the view that there is a risk that imposing regulation only on lines based on Ethernet interfaces with a limited speed would lead to a foreclosure of alternative operators of important parts of the relevant market.

Against this background, the Commission welcomes CMT's commitment to amend the original draft measure and to impose appropriate obligations for leased lines with Ethernet interfaces above 1 Gbit/s, which are already provided by the SMP operator.

Accounting separation in the market for trunk segments of leased lines

The Commission recalls that, according to Article 8(4) of the Access Directive, obligations imposed shall be based on the nature of the problem identified and shall be proportionate and justified in light of the objectives of Article 8 of the Framework Directive (including the need to safeguard competition). In this respect, the Commission notes that CMT itself highlights the need for transparency and accounting data, especially on the Peninsula-Canary Islands route, as the SMP operator may cross-subsidize some of its services, thereby raising further barriers to entry and ultimately increasing the risk of market

¹⁵ Establishing the reasonable price, CMT takes into account among other references, existing prices in comparable competitive markets, a price that enables an efficient operator to enter the connected retail markets and the costs faced by an efficient operator deploying an alternative infrastructure on the route.

¹⁶ In accordance with Article 7(3) of the Framework Directive.

foreclosure. Therefore, the Commission invites CMT to consider the imposition of accounting separation in order to properly address the identified competition problem.

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/EC¹⁷ 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 Commission¹⁸ 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.¹⁹ You should give reasons for any such request.

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

¹⁷ 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.

¹⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.