CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

SUMMARY OF RESOLUTION S/0207/09 TRANSPORTE TELEVISIÓN

On 30 November 2009 the National Competition Commission (Comisión Nacional de la Competencia — CNC) received a complaint from SES ASTRA IBÉRICA S.A. (ASTRA) against ABERTIS TELECOM S.A.U. (ABERTIS) for an alleged constructive refusal of access —by means, amongst other practices, of a margin squeeze— to its national terrestrial network centres which are essential for being able to provide satellite distribution transport service to national and regional private TV broadcasters, as well as for participating in the tenders called by national and regional public TV operators for the provision of said transport services.

On 8 April 2010 the Investigations Division opened an infringement proceeding against ABERTIS on finding prima facie evidence of infringement of article 2 of the Spanish Competition Act (LDC) and article 102 of the Treaty on the Functioning of the European Union (TFEU).

On 8 February 2012 the CNC Council resolved that ABERTIS had abused its dominant position in the markets for wholesale services of access to broadcasting centres for transmission of DTT signals in Spain and for the retail services of transporting DTT signals in Spain by squeezing the margin between its wholesale and retail prices. It therefore levied a fine of 13,755,000 euros on ABERTIS.

I. RELEVANT MARKETS

The value chain that allows television signals to be carried from where they are produced to the end viewer has two main differentiated segments:

- **Transport** of the Digital Terrestrial Television (DTT) signal to the transmission centres, with the satellite as the indispensable element for provision of this service.
- **Broadcasting** of the DTT signal from the transmission and retransmission centres to the home receivers.

The two services must, in theory, be provided by different operators. In practice, however, the broadcast operators normally also transport the signal to their distribution network, because their control of the broadcasting centres makes it easier to select the type of transport and adapt the broadcasting centres to it. A transport operator, on the other hand, cannot provide broadcast services without having access to the broadcasting network of the operator who provides those services.

ABERTIS has a nationwide transport and broadcasting network for audiovisual signals that allows it to provide the audiovisual signal transport and broadcasting service with digital technology to national, regional and local radio and television stations.

ASTRA offers a complete array of satellite broadband and broadcasting services for its customers in Europe and other continents. In Spain, ASTRA is the main provider of satellite services for the Digital+ pay-TV platform.

ABERTIS'S national network of transmission centres cannot be replicated, mainly due, amongst other factors, to the number of centres, their geographical location, the orientation of home antennae to those centres and the sunk costs associated with this infrastructure. Consequently, another operator can only provide transport services by requesting access to its broadcasting network. That is why the wholesale service of access to ABERTIS transmission centres for delivery of DTT signals is essential for being able to provide the DTT signal transport service for national and regional TV operators.

As a result, the relevant product markets at the national level are:

- **The DTT signal transport retail services market**.
- **The market of wholesale services of access to ABERTIS transmission centres for broadcast of DTT signals**.

ABERTIS'S vertical integration gives it a dominant position both in the upstream market for wholesale services of access to the ABERTIS transmission centres for broadcasting DTT signals in Spain, and in the downstream market of transporting DTT signals in Spain.

As a consequence of its dominant position, according to the regulations established by the Spanish Telecommunications Market Commission (CMT), ABERTIS is obliged to publish a Base Offer for provision of the wholesale service for access to its broadcasting centres (ORAC).

II. MARGIN SQUEEZE

The investigation examined the issue of whether ABERTIS'S application of certain wholesale prices for colocation of equipment at its DTT signal broadcast transmission centres, combined with the setting of certain levels of retail prices in its contracts with national television operators and certain regional television operators for the DTT signal transport services provided by ABERTIS, could give rise to abuse of dominant position.

According to the case-law of the Court of Justice of the European Union (CJEU) established in its judgment of 17 February 2011 in the case Telia-Sonera, a margin squeeze exists when the different between the retail price and the wholesale cost of an indispensable input of the dominant operator does not cover the costs of providing the retail service, so that its competitors cannot effectively compete with it on a lasting basis, even where those competitors are as efficient as the dominant operator.

The CNC has analysed the revenues, costs and margins obtained by ABERTIS in the following contracts:

- **Contracts with all national televisions** for the provision of the transport services and broadcasting service for all national DTT channels.
- **Contracts with regional operators** in Extremadura and Asturias for the satellite transport service in relation to the respective public tenders called there.

The key questions raised in the analysis conducted in this case are:

1. Standard of efficiency

To demonstrate a margin squeeze authorities have adopted the **"equally efficient competitor"** test. That is, it must be shown that the wholesale and retail prices are such as make it economically unviable for an operator as equally efficient as the dominant operator to operate in the market.

The standard of efficiency must be preserved and this requires having regard to the costs of the dominant operator and assuming comparable, though not necessarily identical, demand.

On the cost side, the basic measure is the ***Long-Run Average Incremental Costs* (LRAIC)**, which includes both the fixed and variable costs that must be incurred for proper pursuit of the activity.

As for demand, ABERTIS accounts for 100% of the demand. And this demand is stable, as new entrants can only carve out market share by winning it away from the dominant operator. Also, many elements of the distribution transport network are modular so that when analysing the costs that must be borne by a new entrant, consideration must be given to a certain **efficient minimum scale** that makes entry feasible and with which the possible existence of a margin squeeze can be analysed.

In relation to the **time horizon**, the CNC has analysed whether a positive return can be made in five years, except in the regional scenarios, where contracts are awarded by the respective regional governments in tenders for periods of less than five years.

Lastly, taking into account that relevant market is a mature market, and in line with the relevant EU precedents, the **period-by-period approach** has been considered appropriate.

2. Estimation of revenues

The revenue estimates have been obtained from the contracts signed by national TV operators with ABERTIS, as well as from estimates based on that information.

3. Costs of providing the retail service

The following groups of costs, on which ABERTIS has provided information, have been considered:

- Capital expenditure (CAPEX) associated with the investments made in the network infrastructure (**transport service CAPEX**).
- Recurring operating costs (OPEX) attributable to the functioning of the DTT signal transport service (**annual OPEX attributable to the transport service**).

4. Costs of colocation wholesale services

To determine the wholesale costs of access for an alternative operator to provide DTT signal transport services in the different geographical areas considered, we must know the prices of the wholesale services provided by ABERTIS to the operators who so request.

Specifically:

- The **recurring costs of access (colocation) and maintenance.**
- The **non-recurring costs associated with the viability studies**.

The access prices have been used as basis for estimating the cost of the colocation wholesale service for the transport services in the different geographical areas and for the different time horizons considered.

5. Margin squeeze

In view of all of the above, the CNC has found that in the DTT signal transport services provided to national televisions, in the different scenarios considered (offer made to ASTRA in April 2009, ORAC 2010 and ORAC 2011) ABERTIS engaged in a margin squeeze between the wholesale prices for access to its facilities and the retail price applied in the contracts with the national televisions for the DTT signal transport service. The same practice has also been shown to have occurred in the provision of DTT signal transport services to the regional televisions of Asturias and Extremadura. Margin squeezing is an abusive practice within the meaning of article 2 of the LDC and article 102 of the TFEU.

In relation to the effect of driving operators out of the retail market for DTT signal transport, in view of the objective fact that entry is technically viable and economically possible and that windows of opportunity were opened by the analogue switch-off and plans to expand network coverage, the absence of genuine competitors can only be the product of the pricing policy applied by ABERTIS, which has blocked entry by those alternative operators.

ABERTIS'S conduct has been considered abusive because it deprives customers of real options to compare and prevents competitive pressure from forcing it to offer better prices.

In this case it has been concluded that the characteristics of the service are such that the demand-side power is not a sufficient counterbalance. In fact, practices of this kind, to the extent that they prevent the existence of effective alternative supply sources, weakens the bargaining position of television operators versus ABERTIS even more.

As for the objective justification of ABERTIS'S conduct, the CNC cannot accept the argument that ABERTIS did not have manoeuvring room in these actions and, hence, that it was not responsible for the commercial policy applied. In particular, the CNC believes that ABERTIS has leeway to modify its retail and wholesale prices. Thus, ABERTIS freely set the retail prices and, in relation to its wholesale prices, prior to the approval of the ORAC those prices were not regulated and ABERTIS freely fixed and offered them to third parties, including to ASTRA, resulting in the margin squeeze analysed here.

Furthermore, the CMT did not set the colocation wholesale prices until its ORAC Resolution of 7 October 2010, and those prices were, in any event, maximums, so ABERTIS was free to lower the wholesale prices at its own initiative.

In this regard, the diligent behaviour incumbent on ABERTIS as dominant operator with a special responsibility not to hinder competition should have allowed it to observe the

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effects of its pricing policies on the markets and adopt the appropriate measures, something it failed to do.