



COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

IGNACIO REDONDO ANDREU, Board Secretary of the Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission, CMT), by means of those capacities bestowed on him by article 40 of that Commission's Regulations, approved by Spanish Royal Decree 1994/1996, of 6 September

HEREBY CERTIFIES:

That during Board Meeting No. 18/09 of the Telecommunications Market Commission held on 21 May 2009, it was resolved to adopt the following agreement.

AGREEMENT

By this, in file number MTZ 2009/195, we hereby approve the following

RESOLUTION APPROVING THE DEFINITION AND ANALYSIS OF THE WHOLESALE MARKET FOR THE CARRIER SERVICE FOR TELEVISION BROADCASTING SIGNALS, THE DESIGNATION OF AN OPERATOR WITH SIGNIFICANT MARKET POWER, AND THE ENFORCEMENT OF SPECIFIC OBLIGATIONS, AND THE AGREEMENT TO NOTIFY THE EUROPEAN COMMISSION OF THE SAME.

FACTUAL BACKGROUND

FIRST. Initiation of the procedure

On 10 February 2009, the initiation of the procedure for defining and analyzing the market for television broadcasting signals, the designation of an operator with significant market power, and the proposal for specific obligations were agreed upon. The notice of the aforementioned act was published in Spanish Official Journal (BOE) number 42 of 18 February 2009.

On 9 March 2009, the opening of the procedure for public inquiry and the request of a report from the Spanish Competition Commission (CNC) in the procedure for defining and analyzing the market of television broadcasting signals, the designation of an operator with significant market power and the enforcement of specific obligations. The same document describes the reasons why it is considered essential to apply the urgent handling provided for in article 50 of the LRJPAC (Spanish Legal System for Government Bodies and the Common Administrative Procedure). This would reduce the established time limits for the regular procedure by half.



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The notice of the aforementioned act was published in Spanish Official Journal number 63 of 14 March 2009.

SECOND. Report by the Spanish Competition Commission

The report made by the Spanish Competition Commission regarding the procedure for defining and analyzing the market for television broadcasting signals has been sent to the Telecommunications Market Commission.

THIRD. Allegations in the public inquiry

The following operators presented allegations during the previous public inquiry: Abertis Telecom, S.A.U., Assistència i Assessorament, Servei Integral de Telecomunicacions, S.L. (Aasit), Radiodifusión Digital, S.L., SES Astra and Telefónica de España, S.A.U.

The Secretariat of Telecommunications and the Information Society of the Catalanian Government (*Telecomunicacions i Societat de la Informació de la Generalitat de Catalunya*) also presented allegations during the public inquiry.

FOURTH. Extension of the procedure deadline

Due to the complex nature of the procedure, an agreement was reached to extend the deadline for the resolution and notice by three months, by means of a letter from the Secretary of the Telecommunications Market Commission dated 30 March 2009, and pursuant to that provided for by article 42.6 of Spanish Law 30/1992 of 26 November, regarding the Legal System for Government Bodies and the Common Administrative Procedure (hereinafter LRJPAC).

The aforementioned time limit extension was published in Spanish Official Journal number 83 of 6 April 2009.

FIFTH. Notice of the Draft Measure

By means of a document dated 16 April 2009 it was agreed that notice of the Draft Measure regarding the definition and analysis of the wholesale market for the carrier service for television broadcasting signals, the designation of an operator with significant market power, and the enforcement of specific obligations was sent to the Spanish Ministry of Industry, Tourism, and Commerce, the Spanish Ministry of Economy and the Treasury, as well as the European Commission and the National Regulatory Authorities of member states of the European Union in order for them to submit their observations within a maximum time limit of one month.

The European Commission was notified of the Draft Measure on 17 April 2009.



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SIXTH. Remarks by the European Commission

The document from the European Commission with observations regarding the announced Draft Measure was recorded in the Registry of this Commission on 18 May 2009.

LEGAL BASIS

FIRST. Authorisation for Competition

The General Telecommunications Law 32/2003 of November 3 (hereinafter LGTel) in articles 10, 48.2, and 48.3.g) recognises that the Telecommunications Market Commission has the capacity to: (i) define and analyse the markets of reference, (ii) determine which have a significant impact on the market, and (iii) impose, enforce, modify or suppress operators' specific obligations.

According to article 16.1 of EC Directive 2002/21 of 7 March 2002 regarding the common regulatory framework for networks and electronic communications services (hereinafter, Framework Directive), this procedure must be carried out as soon as possible following the Recommendation's adoption or modification, taking into account those Guidelines established by the European Commission. This provision became applicable in Spanish law by means of articles 10.2 and 3.1 of the LGTel and the Market Regulation respectively.

Spanish Royal Decree 2296/2004 of 10 December, which approves regulations concerning the electronic communications markets, and access to the networks and numbering (hereinafter Market Regulations) develops, through articles 2 and 5, the procedure to be followed by the Telecommunications Market Commission in order to identify and analyse the markets of reference for network operations and the supply of electronic communications services, and also describes its capacity to impose specific and appropriate obligations upon those operators that hold significant power within each market being examined.

This Commission will direct its actions according to that stated in the dispositions of the LRJPAC. That legal text regulates the practice of those public functions that are entrusted to this Commission by virtue of that stated in article 48 of the LGTel and article 2 of the Telecommunications Market Commission Regulations.



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SECOND. Regarding the procedure of defining the markets, analysing competition, identifying operators with significant market power, and imposing obligations on those principal operators within the market

On 17 December 2007, the European Commission adopted the Recommendation relating to the markets for electronic communications products and services that could be subject to ex ante regulation under the European Parliament and Council's EC Directive 2002/21 regarding a common regulatory framework for electronic communication services and networks (hereinafter, the Recommendation).

Taking into account the allegations to public inquiry presented by the operators and the CNC's report, the Telecommunications Market Commission prepared a Draft Measure regarding this market.

According to article 7 of the Framework Directive and article 5 of the Market Regulation, the Draft Measure in question was reported to the European Commission, the Spanish Ministry of Industry, Tourism and Commerce, the Spanish Ministry of Economy and the Treasury, and to the National Regulatory Authorities from other European Union member states.

The European Commission made observations on the Draft Measure. These have been taken into account in the definition and analysis of the wholesale market for the carrier service of television broadcast signals, the designation of an operator with significant market power, and the enforcement of specific obligations, which are the purpose of this procedure.

THIRD. Definition and analysis of the wholesale market for the carrier service of television broadcast signals, the designation of an operator with significant market power, and the enforcement of specific obligations

I DESCRIPTION OF THE AUDIOVISUAL SERVICES

I.1 Value chain of the audiovisual services

In accordance with the regulatory framework for electronic communications,¹ *"the services that supply content transmitted through networks and electronic communication services"* as well as *"the activities that consist in the exercise of editorial control over them"* are excluded from this sector. On the other hand, *"the transport of signals through the electronic communication networks"* shall be considered an electronic communications service. It should be noted that the audiovisual signal can be transmitted and broadcasted through telecommunications networks. The audiovisual services provided to the user who requests them are intimately related to telecommunications in a classic sense. They provide the channels necessary for the sale of these services.

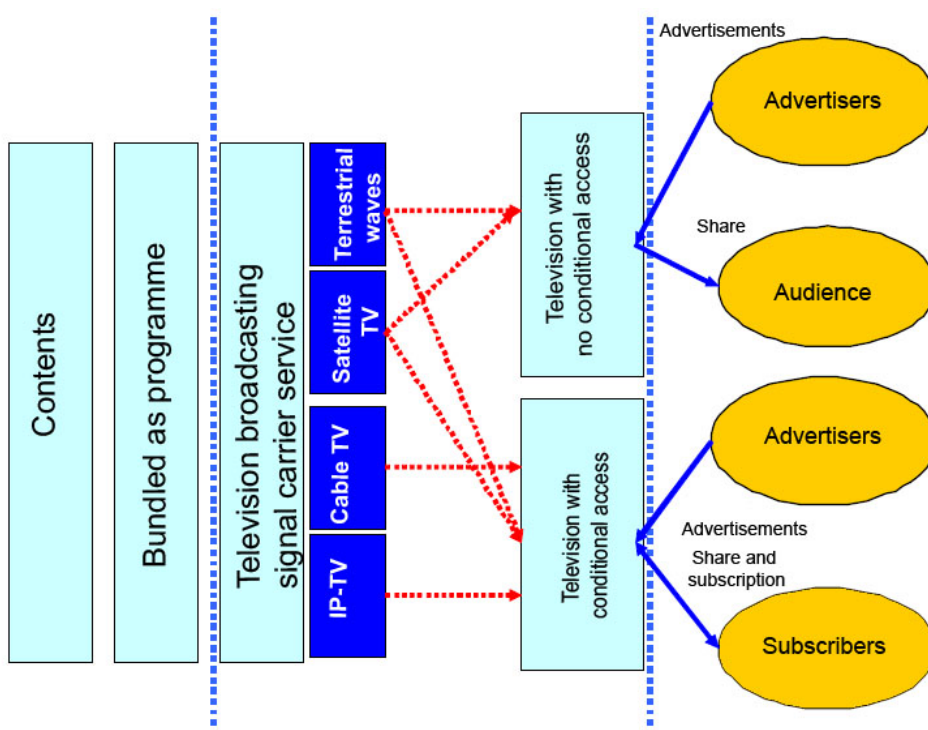
¹ Article 1.2 of the General Telecommunications Law 32/2003 of 3 November (hereinafter LGTel).



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On different occasions the CMT has characterized the audiovisual services; generally in the framework of Annual Reports. In the Annual Report for 2002 for example, audiovisual services were understood as “*everything that consists in placing audiovisual content at the disposal of the public through telecommunication services such as a distribution channel (movies shown in public theatres, for example, are excluded)*”. The chain of value for these services is as follows:

Illustration I.1.1 Chain of value for audiovisual services



Source: Prepared by the commission

Regarding audiovisual services for the end client (see right side of preceding illustration), there exists, in general terms, certain agreement concerning the existence of two separate markets: free-to-air and paid television. This has been the doctrine of both the CMT and the European Commission (MGS Media Service² and TPS³ cases) and the Defense Board for Competition

² “Paid television constitutes a market for a product independent from commercial television markets financed by publicity, and from public television financed through royalties and partially through advertising” (point 32) IV/M.469 – MSG Media Service.

³ “The paid television market constitutes a market with a product different from free access television, independently of whether it is financed totally or partially through advertising



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(currently Spanish Competition Commission, "CNC") in the CSD/VIA DIGITAL case. All of these decisions considered that paid television and free-to-air television constitute different markets. Indeed, while the first would obtain its revenue mainly from the payments made by clients, the second would obtain its revenue mainly from announcers, who would value the audience share from each of them.

Ascending in the chain of value, televisions require an electronic communications network that allows them to reach end users just as described in detail in section I.2 below.

The concessionaire companies that broadcast through terrestrial waves, whether at a national, regional or local level in Spain, face established regulations since the television broadcasting service that they provide is an essential public service. Agents of private and public ownership coexist in the provision of these services. The public broadcasting service is provided by means of direct management and with an administrative concession policy by means of indirect management.

Currently, within the national sphere there are six other companies that manage the public service of terrestrial television in addition to RTVE at the national level.⁴ They follow a model of free-to-air television exploitation in accordance with their respective concessions. For their part, the Autonomous Communities and the Local Entities are also assigned the multiplexes that the Spanish Technical Plan for Digital Terrestrial Television⁵ (hereinafter, PTNTDT) and the Spanish Technical Plan of the Local DTTV⁶ (hereinafter, PTNTDTL) granted them in a direct or indirect management policy, replicating the national broadcasting model described earlier.

These regulations will be covered in detail below in section II.

One step higher in the chain of value will include wholesale services that the operators broadcasting television signals will require in order to provide services to the television chains, or paid television operators. In the particular case of broadcasting through terrestrial waves, these wholesale services shall include the necessary supplies for establishing a terrestrial broadcasting network (sites,

revenues." (point 25) IV/36.237 – TPS.

⁴ Antena 3 de Televisión, S.A., Gestevisión Telecinco, S.A., Sogecable, S.A, Veo Televisión, S.A., Sociedad Gestora de Televisión Net TV, S.A. and Gestora de Inversiones Audiovisuales, La Sexta, S.A.

⁵ Spanish Royal Decree 944/2005 of 29 July, approving the Spanish Technical Plan for Digital Terrestrial Television.

⁶ Spanish Royal Decree 439/2004 of 12 March, approving the Spanish Technical Plan for Local Digital Terrestrial Television.



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transmitters...).

This level of audiovisual services in the value chain was the object of analysis by this Commission in the Resolution of 2 February 2006⁷ and it covered the services that operators use in order to access determined elements of the network that are necessary for providing the carrier service for television broadcasting signals that they emit by means of terrestrial waves (concessionaires of state owned television).

In conclusion it should be noted that the end users demand a determined type of content that the paid and free-to-air television must obtain from the providers. These contents vary, including movies or sports events with different types of marketing (individual content for creating a channel, content that is already structured around theme channels...) and value for the user (first window, second window...).

I.2 Audiovisual services' broadcasting means

Audiovisual services can be broadcasted by means of different telecommunications networks and associated infrastructures whose description and analysis are developed in the following paragraphs. The paragraphs present both the technologies generally associated to the broadcast of free-to-air television (DTTV and ATTV), as well as those traditionally employed for broadcasting paid services (satellite and cable). Furthermore the analysis is completed with the presentation of aspects relating to mobile television. This is a fledgling technology in Spain, but in a prospective manner it could suggest the appearance of new operators in the paid television market with a wide range of potential clients.

I.2.1 Satellite platforms

With a satellite system, first the signal is transported to the teleport uplink facility or communication centre so that it can be transmitted to the satellite and subsequently down linked to the satellite dishes located at the homes of the users.

One of the essential advantages of this technology is determined by its capability of covering the entire national territory with investment requirements that are comparatively lower than those necessary with other broadcasting technologies; even though it requires the installation of antennas oriented toward satellites, as well as the *ad hoc* reception equipment in all of the buildings. Furthermore it provides the advantage of a band width that is sufficient for offering high definition TV signals.

⁷ Resolution approving the definition and analysis of the television signal broadcasting market, the designation of operators with significant market power, and the enforcement of specific obligations (hereinafter "Market Resolution 18").



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The unidirectional characteristic of the technology is an inconvenience that limits the provision of interactive services. However, the connection of a decoder to the telephone line provides a return channel for access to services like electronic banking, TV shopping, or ordering paid channels and programs.

I.2.2 Cable platforms

The provision of services for television broadcasting by means of cable platforms requires the deployment of networks, which in Spain are hybrid fibre-coaxial technologies, to the homes of each of the users. These networks usually consist of a core portion of optical fibre, and an end or access portion based on coaxial cable. Therefore, deployment of these platforms carries with them the need of making important investments, and implies elevated fixed and sunk costs. This suggests that certain areas will not be able to have these types of infrastructures. Therefore the operator requires an elevated critical mass potential in order to obtain a return on the investment.

On the other hand, cable offers advantages compared to other technologies such as its elevated transmitting capacity which enables the offering of high definition TV for example. Furthermore, the bidirectional character feature facilitates the provision of electronic communication by means of the triple-play service packages (broadband, voice and TV), as well as interactive applications.

I.2.3. IP Television by means of copper pair (xDSL) or optical fibre (FTTx)

The access network based on copper pair enables the provision of voice and data transmission services, including broadband Internet access and television broadcasting by means of IP technology. The broadcasting of audiovisual services, as well as the rest of the services offered by the operator, is carried out by means of a conventional telephone line using the additional data transmitting capacity that ADSL technology allows for.

These technologies, similar to the ones in the previous case, enable other services, such as voice and data simultaneously, facilitating the offers of bundled services.

However, the broadband of copper pair is limited. This carries along with it certain restrictions regarding the provision of services characterized by their large network resource requirements, such as high definition television services. The provision of these services must pass through a reduction in the length of the subscriber loop in order to use VDSL2+ technologies, or through a deployment of access networks based on optical fibre (FTTH).

I.2.4 Terrestrial television platforms DTTV/ATTV

The broadcasting of audiovisual signals in Digital Terrestrial Television (DTTV) platforms, or Analogue Terrestrial Television (ATTV) is carried out by means of



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hertzian waves using the radio-electric spectrum found in the UHF band. Unlike satellite television, the provision of the DTTV or ATTV services, are carried out under a concession policy (state, regional, or local, according to their range of coverage), therefore the number of operators providing the service is predefined.

The broadcasting of the signal is carried out through the operation of a group of sites called broadcasting centres and relay transmitters. These sites are equipped with one or several towers that house the radiating systems of the operator, as well as a series of associated infrastructures and facilities: booths for housing the telecommunications equipment, access roads, electrical supply systems and conditioning, etc.

One of the current limitations of terrestrial television, just as in satellite platforms, is their unidirectional characteristic, and the restrictions they imply as far as the provision of interactive services, or other telecommunication services. Also, just as in the satellite platforms, this can only be solved by means of a decoder connected to the telephone line of the user, enabling the necessary return channel.

1.2.5 Mobile television platforms

The broadcasting of audiovisual signals is carried out through network resources with characteristics similar to those used for broadcasting DTTV, although the mobility characteristics of the terminals require a wider range presence. This can only be achieved by deploying a network with a higher number of broadcasting centres.

The mobile television broadcasting networks are unidirectional in character, which will initially present a limitation in the provision of services. However, the type of equipment used for reception facilitates the use of return channels based on mobile 2G/3G technologies, making it feasible to establish two-way hybrid networks for providing interactive or package services with the telecommunication services.

1.3 Audiovisual services in Spain

In spite of the existence of different means that make transmitting audiovisual services possible, according to the data published by this Commission in the 2007 Annual Report, in December of 2007 it was analogue television that gathered the largest audience;⁸ followed at great distance by the satellite and cable or IP TV platforms. However the evolution of digital terrestrial television should be noted. Even though at the end of 2007 it had only 9.5% of the audience, in February of 2009 it accounted for 26%. With the expected legal

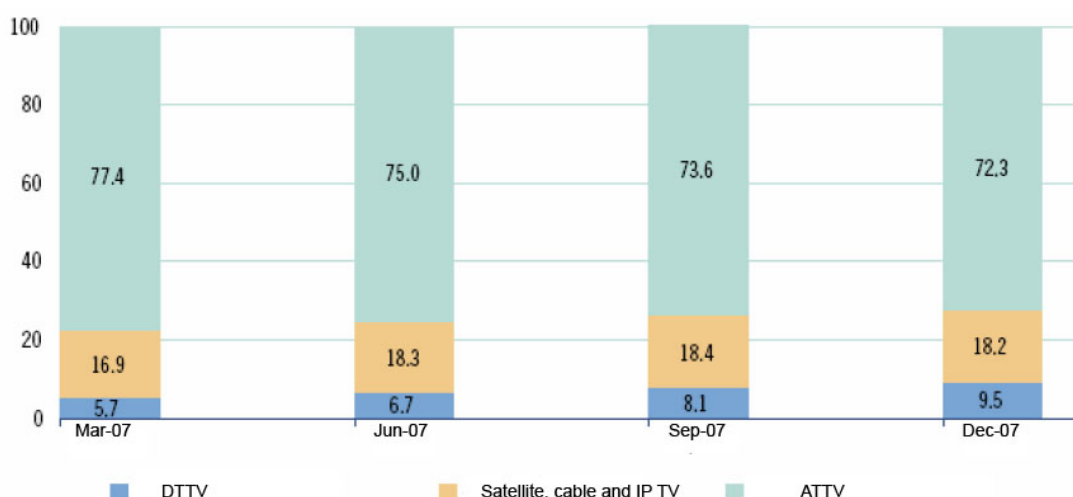
⁸ The audience expressed in the following graphic refers to the total audience of television services, free-to-air television as well as paid, regardless of the platform by which they are broadcasted.



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requirement, at the time of the “analogue shutdown” it should reach an equivalent of 100% of the audience reached by terrestrial waves (which according to the data of 2007 would represent 81.8% of the total).

Graphic I.3.1 Evolution of the Audience through transmission



Source: 2007 Annual Report

This make up of the audiences for the audiovisual sector in Spain differs from what is seen in other Member States where the penetration of the other platforms is much more extensive. The importance of satellite and cable networks is much higher than the average observed in Spain (66% of EC users accessed these audiovisual services by means of these two platforms), although there are also important differences between the different Member States as shown in the following table:

Table I.3.2 End user access platform for audiovisual services

	Terrestrial waves (analogue)	Cable	Satellite	Terrestrial waves (digital)	IP TV
Belgium	2%	87%	6%	10%	1%
Bulgaria	27%	63%	7%	3%	-
The Czech Republic	66%	17%	16%	6%	2%



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Denmark	28%	62%	14%	3%	1%
Germany	2%	55%	40%	4%	0%
Estonia	45%	40%	9%	5%	4%
Greece	98%	0%	5%	1%	-
Spain	77%	11%	7%	12%	3%
France	67%	8%	22%	21%	6%
Ireland	39%	31%	31%	5%	1%
Italy	79%	10%	18%	8%	0%
Cyprus	91%	7%	10%	7%	1%
Latvia	42%	47%	15%	1%	0%
Lithuania	59%	37%	4%	1%	1%
Luxembourg	6%	71%	25%	2%	1%
Hungary	25%	61%	12%	3%	0%
Malta	17%	70%	15%	9%	1%
Holland	-	83%	8%	12%	1%
Austria	6%	49%	42%	5%	1%
Poland	53%	33%	16%	1%	0%
Portugal	64%	33%	4%	1%	0%
Romania	14%	77%	2%	8%	-
Slovenia	36%	54%	12%	2%	5%
Slovakia	49%	41%	17%	5%	1%
Finland	43%	38%	4%	21%	1%
Sweden	14%	43%	19%	36%	5%
The United Kingdom	42%	16%	31%	31%	1%
EU 27	41%	34%	22%	12%	2%

Source: Prepared by the Commission based on data from the Eurobarometer

These differences between the general and Spanish average are justified by the different coverage of different networks, and by the fact that the satellite and cable platforms in Spain broadcast essentially paid television services. The penetration of these services is logically inferior to that of free-to-air television. It should also be noted that the DTTV platform is obligated to support the service of public television broadcasting by legal requirement.

II LEGAL FRAMEWORK

The entities that are providing the public service of television broadcasting are obligated to broadcast by means of terrestrial waves by virtue of both the specific regulations, as well as their respective concessions. Therefore, today there are two technologies which can be used for providing support service for public service television broadcasting: analogue and digital technology.



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The basic legal system for the public service of television broadcasting by analogue technology at the national level is gathered in Spanish Law 4/1980⁹ for the direct management of Radio Televisión Española corporation, and in Spanish Law 10/1988¹⁰ for the indirect management of the public television service concessions, as well as its respective concessions. At the regional level, Spanish Law 46/1983 of 26 December, which regulated the *Tercer Canal de Televisión* (Third Television Channel), implied the appearance of channels at a regional level.

The other technology by which this service is provided is digital technology. As developed in the following paragraph, due to the shift from analogue to digital technology, as of 3 April 2010 the public service of television broadcasting will only be provided by means of digital technology. In this sense, the analysis of the legal framework will be restricted to digital terrestrial television.

II.1 Digital Terrestrial Television in Spain at a National level

The regulation of the public service of television broadcasting has suffered important modifications over the years; however its essential configuration as a public service has been maintained. In fact, since Spanish Law 4/1980 of 10 January regarding the Statute for Radio and Television, up to the recent Spanish Law 17/2006 of 5 June regarding state ownership of radio and television, the legislators have been regulating television as a public service: *“radio and television are essential public services whose ownership corresponds to the State”*. This categorization is grounded in the array of constitutional rights that are related and affected by these services.

In this sense the legal system for the providing of terrestrial public service television with digital technology is governed in a general manner by the regulations of television broadcasting. This is because it constitutes a manner of providing the service, and not a new television system. It therefore is not altered in its nature, and maintains a public service configuration.¹¹

The transition to DTTV is framed within a community process that has established a set of key and binding decisions for all of the member countries. The European Union is committed to a process of ceasing terrestrial analogue broadcasts and substituting this with digital television. It has set the year 2010 as the date when the abandonment process of analogue broadcasting shall be advanced, and the beginning of the year 2012 as the date when the so called “analogue shutdown” shall be completed in all of the Member States of the European Union.

⁹ Spanish Law 4/1980 of 10 January, regarding the Radio and Television Statute, with its respective modifications.

¹⁰ Spanish Law 10/1988 of 3 May, regarding television, with its respective modifications.

¹¹ See Spanish Royal Decree 945/2005 of 29 July, approving the general Regulation for providing terrestrial digital television services.



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In the case of Spain, the PTNTDT implies a definitive stake for an effective shift to digital technology to the extent that it moved up the date for the analogue shutdown to 3 April 2010. In this manner the plan anticipates the deadline established by the European Commission for all of the countries set for the year 2012.

This Spanish Royal Decree pushes the development of DTTV forward in Spain, according to a demanding deployment plan that aims to guarantee the definitive implantation of DTTV in Spain in the shortest period possible. To these effects, article 6 of the mentioned PTNTDT sets a schedule that the concessionaire companies for public service television in the state sphere must follow; where they commit to guarantee the following coverage¹²:

Illustration II.1.1 National requirements for DTTV coverage

Coverage	Time limit
80%	31/12/2005
85%	31/07/2007
88%	31/07/2008
90%	31/12/2008
93%	31/07/2009
96%	Private televisions
98%	Public television

Source: Drafted by the Commission

Given this schedule, and in order to guarantee the shift to digital broadcasting, the Spanish Government approved, by means of an agreement of the Council of Ministers on 7 September 2007, the Spanish Plan for the Transition to Digital Terrestrial Television. The objective of this plan is to “*ensure the full cease in television broadcasting with analogue technology before 3 April 2010, and its total substitution by broadcasting based on digital technology.*”

In this way the regulations of the area impose a series of strict deadlines which must be fulfilled by the concessionaire companies for the public television service in the state sphere. These conditions imply a regulation that inevitably affects the operators in the market of television signal transmission services by terrestrial waves through which the broadcasters place audiovisual content at the disposal of the public.

Another condition that the concessionaires should keep in mind at the time of choosing the operator that will provide the carrier service for broadcasting is multiplex management.¹³ In fact, although there is no obligation that the figures

¹² To these effects, the PTNTDT is complemented by Royal Decree 920/2006, of July 28, approving the General Regulations for the Provision of Radio and Television Broadcasting Services by cable.

¹³ The digital multiplex management mode affects all levels: State, Regional and Local, as



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of the carrier service for broadcasting and the multiplex manager coincide, it is quite common that both entities coincide, and since the concessionaires must agree in order to choose the common multiplex manager, in the end this decision can affect the selection of the operator who provides the carrier service for broadcasting. In this respect it is necessary to indicate that the concession of the public broadcasting service of DTTV not only establishes the digital multiplex, but the channel within it as well. The change of said channel is subject to previous authorization by the Spanish Secretariat of Telecommunications and for the Information Society (SETSI).

DTTV Schedule

Currently the transition process toward DTTV is coming to a close. Each one of the concessionaire companies for public service television in the state sphere is combining both analogue and digital broadcasts. In this sense, the current stage of the concessionaire companies for public service television in the state sphere is as follows¹⁴:

Illustration II.1.2 Distribution for DTTV Multiplexes until 2010

Network with DTTV coverage in Spain	Channel SFN 66	Channel SFN 67	Channel SFN 68	Channel SFN 69
RTVE	RTVE	SOGECABLE	TELE 5	A3 TV
RTVE	VEO TV	SOGECABLE	TELE 5	A3 TV
RTVE	VEO TV	SOGECABLE	TELE 5	A3 TV
RTVE	NET TV	LA SEXTA	NET TV	LA SEXTA

In the same manner, since the market analysis should be done from a prospective point of view, it becomes necessary to take into account the stage that will occur in the sector after 3 April 2010 (the shutdown stage). In this way the current availability and location of the corresponding channels will not stay the same since each concessionaire company, as established in 3rd Additional provision of Spanish Royal Decree 944/2005, shall have access, on request and according to the terms established by the Council of Ministers agreement, to a digital multiplex of their own for state coverage. In this sense one possible scenario, but not necessarily the only one is as follows:

Illustration II.1.2 Distribution for DTTV multiplexes after 2010

Channel	Channel	Channel	Channel	Channel	Channel	Channel	Channel
RTVE	RTVE	SOGECABLE	TELE 5	A3 TV	LA SEXTA	NET TV	VEO TV

gathered in its corresponding regulations: Additional Provision 6 of the PTNTDT and third Additional Provision of the PTNTDTL.

¹⁴ Provision provided for by the Resolution of 29 November 2005 of the Spanish Secretariat of Telecommunications and for the Information Society.



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RTVE	RTVE	SOGECABLE	TELE 5	A3 TV	LA SEXTA	NET TV	VEO TV
RTVE	RTVE	SOGECABLE	TELE 5	A3 TV	LA SEXTA	NET TV	VEO TV
RTVE	RTVE	SOGECABLE	TELE 5	A3 TV	LA SEXTA	NET TV	VEO TV

Therefore, the possible windows of opportunity for the providers of the broadcasting support service, as established previously, are tied to the date of the analogue shutdown, 3 April 2010, the moment when the channels shall be reassigned so that each concessionary company shall have its own multiplex. They shall create at least three more multiplexes.

II.2 Regional Digital Terrestrial Television

Regional television begins with Spanish Law 46/1983, of 26 December, regulating the Third Television Channel (hereinafter Spanish Law 46/1983) which authorized the Spanish Government to take the necessary measures in order to put a third television channel owned by the state into operation. This was done in order to grant it, under concession, to the territorial sphere of each Autonomous Community.

Within the framework of digital terrestrial television in the regional sphere, the regulations are the same as for the state level. These regulations are gathered in the previously cited Spanish Royal Decree 944/2005.

Spanish Royal Decree 944/2005 establishes in its second Additional Provision, article 4, that each of the Autonomous Communities will have regional digital multiplex coverage with the capacity of carrying out disconnections in the provincial area before the analogue shutdown.

The Third Additional Provision, article 3, establishes that once the broadcast of terrestrial television with analogue technology has ceased, each Autonomous Community shall have two digital multiplexes with regional coverage at their disposal. One of these shall be the multiplex that is already in operation with the possibility of realizing disconnections, and the second multiplex shall be obtained after the shutdown under the condition that this second multiplex may carry out disconnections according to the availability of the radio electric spectrum.

Each Autonomous Community shall decide from the digital multiplex channels assigned, which shall be operated by public entities, and which shall be run by private companies via indirect management by means of public tender.

In all, Spanish Royal Decree 944/2005 establishes, at the regional level, a minimum of one digital multiplex in the transition process, as well as a second digital multiplex when the analogue broadcasts cease,¹⁵ therefore there shall



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be a minimum of 38 regional digital multiplexes once the shift to DTTV has been completed.

II.3 Local Digital Terrestrial Television

Spanish Law 41/1995 of 22 December, of the Spanish Legal System for local television service by terrestrial waves regulates local terrestrial wave television as a whole, i.e. direct management of the service by the city councils, and indirect management by individuals.

Spanish Law 53/2002 of 31 December for fiscal, administrative, and social order Measures, carried out substantial reform to that contained in Spanish Law 41/1995,¹⁶ affecting the most important modification to the purpose of this law. In fact, the reform of article 1,¹⁷ operated by Spanish Law 53/2002, with the addition to the original text of the paragraph “*with digital technology*” implies the modification of the purpose of Spanish Law 41/1995. The Law goes from regulating the legal system of local television by terrestrial waves with analogue technology, to become the governing rule for local wave television with digital technology.

Nevertheless, local wave television is still configured as a social means of communication with the nature of a public service, and whose management is subject to government concession.

The PTNTDTL means the practical application of the mandate provided for in Spanish Law 41/1995, by which the first distribution of national territory into demarcations was created. In each one of these demarcations a multiplex channel is framed with the capacity of broadcasting at least four digital television programs.

This PTNTDTL was modified by Spanish Royal Decree 2268/2004¹⁸ which redistributes the boundaries and establishes 1 January 2008 as the deadline

¹⁵ Furthermore, there are some Autonomous Communities that have been able to access a third digital multiplex channel, as in the case of Catalonia.

¹⁶ Spanish Law 41/1995 has also been modified by Spanish Law 62/2003 of 30 December for fiscal, administrative, and social order Measures.

¹⁷ Article 109 of Spanish Law 53/2002, which modifies Spanish Law 41/1995 of 22 December regarding Local Terrestrial Wave Television. 1. Purpose: “*This Law has the purpose of regulating the legal system for local terrestrial wave television. For the purposes of this Law this is understood exclusively as the manner of television that consistently emits or transmits, with **digital technology**, non-permanent digital images to the public, without direct economic compensation, by means of electromagnetic waves propagated by a terrestrial transmission station in the territorial area indicated in article 3 of this law.*”

¹⁸ Spanish Royal Decree 2268/2004 of 3 December, which modifies Spanish Royal Decree 439/2004 of 12 March, approving the Spanish Technical Plan for local digital television.



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for broadcasting local television with analogue technology. As of this date, all of the local television broadcasts shall be provided by digital technology.¹⁹

Regarding the broadcasting of the signal, article 1 of PTNTDTL limits the service area of each local digital television multiplex channel to the municipal terms of the localities that comprise their area of coverage, i.e. in each demarcation. Furthermore, article 5 requires that the local digital television stations be situated within the area of service.²⁰ Within each demarcation, the local digital television station shall not be able to surpass the maximum apparent radiated power established for each demarcation of the plan.

In this way the concessions for Local DTTV are limited by both the regulations, and their concessions for broadcasting the signal by means of terrestrial hertzian waves, within their demarcation, by centres that shall also be situated within the corresponding demarcation. They shall also take special care with the defined radiated power, in order to meet the regulations of radio electric public domain, as well as avoid interferences between concessionaires.

III DEFINITION OF THE RELEVANT MARKET

III.1 Definition of the market regarding the product

The transmission services for television were defined in the aforementioned Resolution for market 18. The services that include the set of technical activities consisting of placing audiovisual content elaborated by the broadcasters by means of telecommunications services, such as channel distribution, at the disposal of the public were also defined. In Annexes 3 and 4 both the components of the broadcasting chain and the wholesale services are described in more detail.

Below, the potential substitute products for the services of broadcasting will be analyzed with the purpose of determining up to what point the conclusions reached in the first analysis should be maintained.

III.1.1 Carrier service for the broadcasting of analogue television signals -Carrier service for broadcasting of digital television signals

This Commission concluded during the first market round that analogue and

¹⁹ However, in this respect the report by Impulsa DTTV on "The Local DTTV in Spain" of February 2008 made reference to the possible existence of illegal situations, given the continuity of local television broadcasts with analogue technology which should have ceased on 1 January 2008.

²⁰ As an exception, the State Agency of Radio Communications (the competent authority for approving the sites for transmission stations) could authorize the use of a nearby site situated outside of the service zone. This could be done if there is no other site within the service zone that allows for the provision of a technically satisfactory fixed reception, and only in the case that it does not cause comparative disturbances with other local television stations. Until they are completely established, the duties of the Spanish Agency of Radio Communications have been assumed by the Spanish Ministry of Industry, Tourism, and Commerce.



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digital broadcasting services should be included in the same reference market given the existing substitutability of supply.²¹ It is evident that the substitutability on the part of supply is currently still maintained.

However, a prospective analysis of the market consistent with the Guidelines of the Commission concerning the analysis of the market, and the evaluation of significant weight in the market within the general framework of the networks and electronic communication services (hereinafter “the Guidelines”²²) obligate the CMT to consider the foreseeable consequences of the analogue shutdown. As described earlier the shutdown shall occur in 2010. Effectively, once this moment has passed the radio broadcasters shall not require the analogue services.

In any case, it is necessary to indicate that currently all the radio broadcasters have contracted both analogue, as well as digital service, which is why there exists an important relation between both technologies. Therefore, in the case that the analogue shutdown does not occur, these relations could be relevant when it comes to analyze the situation of the competitive market. In the same sense, as a consequence of the substitutability on the part of supply, the actors are essentially the same (Abertis at the national level, and the regional operators in their respective Autonomous Communities).

Therefore, this Commission considers it appropriate to maintain both the analogue and digital broadcasting services in the reference market.

III.1.2 Transport service – Broadcasting service

In the first analysis this Commission concluded that the transport services, although usually marketed together with the broadcasting services, belong to a different market from the services of audiovisual broadcasting. Actually, the transport service can be provided in competitive conditions, since there are several telecommunications companies that can provide them by means of the infrastructures that they have already deployed throughout national territory. The point to point transport of the signal can be carried out by several means, such as cable, radio link, or satellite. Any operator that has the adequate networks according to the requirements of the broadcaster at their disposal could potentially provide the transport services.

On the other hand, the broadcasting service can only be provided by operators with a terrestrial network deployed with installations and infrastructures that are suitable for the design of a broadcasting network. This implies considerable

²¹ “Regarding the interchangeability of the aforementioned services, it should be mentioned that of all of the elements present in the broadcast centres and relay transmitters, the only specific one that depends on whether the technology is analogue or digital, according to transmission technology, is the transmitter. The booth, masts, auxiliary installations, RF multiplexers, and the radiating systems can be reused without any problems.”

²² TWELVE C165/6, 11 July 2002.



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investments, and at the same time explains the existence of a reduced number of specialized supply agents for the provision of these services. Therefore, it could be concluded that the transport service would be complementary to the service of broadcasting, but under no circumstances a substitute.

III.1.3 Sound broadcasting service - Television broadcasting service

From a demand point of view it is evident that radio and television broadcasting are clearly differentiated products, and are not substitutable for the end user,²³ or the concessionaire company.²⁴

From a supply point of view, if it is taken into account that there are differences as far as clients, technical requirements (size and power of the transmitters and antennas), and sites (due to the differences as far as coverage requirements) it seems that substitutability is imperfect.

Furthermore, although a television operator could provide radio broadcasting services with coverage in a territory through the use of its network for television broadcasting, the opposite would not be possible. This is because the broadcasting of television signals usually requires more specific locations due to the requirements imposed by the higher frequencies that are assigned for their broadcast. In some cases a higher number of sites are also necessary in order to avoid the losses caused by obstacles that could impede the broadcasting of the television signal.

III.1.4 Broadcasting service in terms of technology provided

As expressed earlier, the audiovisual signal can be broadcasted by terrestrial waves or by other technologies (see point 1.2). However, the broadcasters of the state owned television service, whether through direct or indirect management, have regulations for the manner in which they should broadcast these services. Spanish Royal Decree 945/2005²⁵ and Order ITC/2476/2005²⁶ specify in detail the technical manner of the service. In this way, for example, the technical specifications of the transmitters (article 2 of Order ITC/2476/2005), the coverage and quality commitments (article 2.b) and boundaries in the geographical area for the provision of service, time limit of the concession and indication of the resource for radio electric public domain, utilized as support for the exercise of the rights derived from the concession, (article 2.c)

²³ The television retail markets, whether free-to-air or paid, do not include sound broadcasting.

²⁴ The concessionaire companies face restrictions in their authorizations that impede the substitution of audiovisual broadcasting for sound.

²⁵ Spanish Royal Decree 945/2005 of 29 July, approving the general Regulation for providing terrestrial digital television services.

²⁶ Order of 29 July, approving the technical Regulations and the providing of terrestrial digital television services.



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are established.

Although the broadcasting of the audiovisual services is technically viable by means of different technologies, the current regulations determine that the concessionaires of state owned television have the obligation to emit by means of terrestrial waves using the frequencies that have been granted to them. This fact discarded any possibility of substitution, therefore the relevant market must limit itself to this technology.

III.2 Definition of the relevant geographical market

In the first review of the markets made by this Commission in 2006 it was concluded that in Spain the market exists in the national sphere. This is because no spheres inferior to the national one were detected where the conditions of competition were sufficiently distinct with respect to the rest of the national territory.

According to paragraph 59 of the Guidelines, the geographic scope of the market in the electronic communications sector has been traditionally determined by the following criteria:

- a) the area covered by the network
- (b) the existence of legal instruments and other regulatory instruments.

In this sense, with regard to the first parameter mentioned, it should be noted that in Spain there is the possibility, in terms of the coverage of the broadcasting networks for the existing television signals, of distinguishing three geographical spheres within the market of the product defined earlier: national, regional, and local.²⁷

Furthermore, keeping in mind the general legal sphere described in section II, it can be established that said regulation has boosted the development of television chains in said sphere with the consequent array of broadcasting networks in order to cover the demand in the regional sphere.

Furthermore, in reference to the local geographical sphere, it is necessary to point out that beginning with the approval of Law 41/1995 and the distribution of the territorial boundaries established by the PTNTDTL, different television licenses have been awarded in this geographical area. These licenses create room for an increase in the demand that must be covered by the broadcasting networks in said area.

²⁷ This geographical definition of the market has also been realized by the CNC in case file C/0110/08 regarding the concentration operation consisting of the acquisition of control of the Broadband Network of Andalucía S.A. (Axión) by Abertis.



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In this context, the CMT considers that, from the demand point of view, three types of demand are worth mentioning in terms of the DTTV concession at their disposal: national, regional, and local. The broadcasting services provided in these three levels cannot be substituted; therefore they would form part of three differentiated geographical markets. The reason for this is that there is not enough substitutability between the broadcasting services of national television and the services of regional/local television. The radio broadcasters in local and regional spheres cannot broadcast beyond the territorial limitation for which the concession has been awarded. Additionally, said concession is linked to a concrete geographical and population coverage.

Applying the hypothetical monopoly test, we could affirm that before a RNTSI (relevant, non transitional significant increase) of the prices of the carrier service for national broadcasting, the television operators that broadcast signals at a national level would not begin to acquire carrier services in regional or local areas, or vice versa.

On the other hand, the prices of the broadcasting services are fixed in terms of the extension of coverage. Therefore, the prices of the national broadcasting supply are superior to regional and local prices. This difference is above 5-10% established in the hypothetical monopolist test. Likewise, the prices of the regional broadcasting services are higher than those offered to the local chains.

From a supply point of view, the providers of regional or local broadcasting services shall not begin to provide national service for a reasonable period of time, and shall not incur excessive costs, and vice versa.

In order for an operator that provides regional or local broadcasting services to be able to provide national service, the necessary investments for building a network with coverage in all of the national territory would have to be made, along with the costs and temporary requirements of the deployment which would make these circumstances nonviable.

On the other hand, although it is true that from a technical (equipment) and national network infrastructure point of view, these elements could be used for providing regional or local services. Certain adaptations as far as power, coverage, and configuration of the networks for providing services for inferior territorial spheres would have to be made.

These differences in supply and demand, mostly derived from the regulatory framework established in Spain, make up markets structures that are quite different in terms of the considered area of broadcast.

The possibility that regional area operators can be considered as potential competitors in the national market for the providing of integral support services for television broadcasting, for example creating a second national operator by



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way of an association of regional broadcasters, has already been placed in doubt by the Spanish Competition Commission. This was expressed in their report on the matter of *Abertis Telecom/Retevisión I*,²⁸ where the concentration between Retevisión I, national operator, and Tradia, regional operator, was considered by some regional operators as a threat for constitution of a hypothetical national operator.

All in all, it should be noted that since there is no substitutability neither from the point of view of demand, or the point of view of supply of broadcasting services in the area of national, regional, and local territory, these constitute three geographically separate markets.

Therefore, below the following geographical markets are defined:

- 1 the national geographical market
- 19 regional geographical markets:

In the following table all the regional geographical markets existing in Spain are gathered, according to each of the territories that make up the Autonomous Communities, since Annexes I and II of the PTNTDT establish that each one of the Autonomous Communities shall have at least two regional multiplexes. In particular, the information gathered in the table identifies each one of the Autonomous Communities in terms of whether they have regional television or not (marked with a * in the table). Concerning the first ones, some have a regional operator, and others have contracted the broadcasting services with Abertis.

Table III.2.1 Regional geographic markets and carrier service providers

Regional Geographic markets	Carrier service provider
Andalusia	Axión
Aragon	Abertis
Asturias (Principality)	Abertis
Balearic (Islands)	Abertis
Canary Islands	Abertis
Cantabria	(*)
Castile and León	(*)
Castilla La Mancha	CLM
Catalonia	Abertis
Ceuta	Abertis
Valencian Community	Abertis

²⁸ Report of the Defense Tribunal of the Jurisdiction on 17 October 2003, in the matter of Abertis Telecom/Retevisión I, case file C81/03.



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Extremadura	Abertis
Galicia	Retegal
Madrid (Community)	Abertis
Melilla	(*)
Murcia (Community)	COTA
Navarra (Chartered Community)	Opnatel
Basque Country	Itelazpi
La Rioja	Abertis

Source: Drafted by the Commission

- 308 local geographical markets:

In accordance with PTNTDTL, national territory has been divided into a determined number of local boundaries established in article 8 of the aforementioned Plan, as well as in the First Final Provision of the PTNTDT. In turn, the Autonomous Communities shall designate, through public tender, the concessionaires authorized for local television broadcasting in each of the mentioned boundaries. In this manner, both the demand and the suppliers for each one of these boundaries have no reason to coincide with demand and suppliers of the neighbouring boundaries. In particular they shall establish in each one of them, the broadcasting stations (in accordance with article 5 of the PTNTDTL).

In this way there are as many geographic markets defined as there are boundaries for the mentioned area defined by each of the Autonomous Communities in national territory. This definition is without prejudice to possible additions, which could be made by virtue of the existence of sufficiently similar conditions of competition.

Annex 2 includes the number of local boundaries of each Autonomous Community and Spanish province.

III.3 Conclusion in relation to the definition of the market

This Commission agrees to define the market of the carrier service for the broadcasting of television by terrestrial waves as that which includes the consistent technical activities for placing audiovisual content, elaborated by the broadcasters, by means of telecommunication services such as a distribution channel using terrestrial waves.

At the geographical level they are defined as: (i) 1 national market, (ii) 19 regional markets corresponding to each one of the territories of the Autonomous Communities, and (iii) 308 local markets defined in terms of the boundaries gathered in the PTNTDTL.



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IV ANALYSIS, SMP IDENTIFICATION, AND DETERMINATION OF THE OBLIGATIONS IN THE CARRIER SERVICE FOR THE BROADCASTING OF TELEVISION SIGNALS IN THE NATIONAL SPHERE

IV.1 Analysis of the criteria established by the European Commission for the identification of markets that are susceptible to ex ante regulation

In accordance with article 10.1 of the General Telecommunications Law (LGTel), and *“keeping in mind the Guidelines of the European Commission for the analysis of markets and the determination of operators with significant market weight, as well as the Recommendation of Relevant Markets; the Telecommunications Market Commission shall define, by means of a resolution published in the ‘Spanish Official Journal’, the reference markets relating to electronic communications networks and services. Among these networks and services shall be included the corresponding wholesale and retail reference markets as well as their corresponding geographical areas whose characteristics can justify the enforcement of specific obligations”*. In this sense, the Commission Recommendation of 17 December 2007 establishes that, since it identified markets other than those gathered in the Annex, the NRAs (National Regulation Authorities) must ensure that the three pre-established criteria are satisfied cumulatively in order to determine whether a market is susceptible to ex ante regulation.²⁹

According to the European Commission, *“The application of the three criteria should limit the number of markets in the electronic communications sector where ex ante regulations are imposed, contributing in this way to the objective of the regulatory framework for progressively reducing the ex ante sector regulations as the competition of the market develops. These criteria should be applied cumulatively, i.e. failing to satisfy any of them would imply that that market should not be included among those that could be subject to ex ante regulation”* (section 14).

Therefore, a market identified by an NRA at the national level may not be

²⁹ Section 5 of the Recommendation: *“With the purpose of identifying the markets that could be the subject to ex ante regulation, the following cumulative criteria would be appropriate: The first criterion is the presence of strong obstacles that are not transitional for access to the market; whether structural, legal, or regulatory in nature. However, given the dynamic nature, and the performance of the electronic communications market, at the moment of carrying out a prospective analysis for identifying the relevant markets in view of possible ex ante regulation, it is also necessary to take into consideration the possibilities of overcoming these obstacles that impede access within the relevant temporal horizon. Therefore, the second criterion only selects those markets whose structure does not tend toward effective competition within the relevant temporal horizon. The application of these criteria implicates an examination of the competition situation behind these access obstacles. The third criterion is that the mere application of the legislation on competition does not adequately cope with the failures of the market in question.”*



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susceptible to ex ante regulation in the case of not fulfilling the three criteria, in a cumulative manner, established by the European Commission in its Recommendation.

According to paragraph 17 of the Recommendation, the *“markets listed in the annex have been identified on the basis of the three cumulative criteria”*. Therefore the NRAs can presuppose their enforcement.³⁰ On the other hand, *“In the case of the markets that do appear in the current Recommendation, the national regulatory authorities should apply the test of the three criteria to the market in question”*.

In this sense, the market of the carrier service of the television signal is not included in the Annex of the Recommendation. Therefore, before analyzing the recommendation, it is necessary to determine if a market susceptible to ex ante regulation according to the preceding criteria is being dealt with.

As a preliminary measure it would be appropriate to make a brief reference to the regulatory state of the market for the carrier service for the broadcasting of television signals at the community level. Market 18 was regulated almost entirely by the NRAs in the first market revision, since it was included in the 2003 market Recommendation of the European Commission. The differences in the provision of wholesale services related with broadcasting that take place at a European level were seen reflected in the regulation of sectors. For this reason there exists a highly dispersed regulatory framework in terms of the predominant platforms in each one of the Member States (for example terrestrial broadcasting, satellite, or cable).

Regarding the second review, according to that reflected in the Registry of the European Commission's Web page relating to the procedure provided for by article 7 of the Directive framework, the following NRAs have finalized, or are in the process of finalizing (after notification of the Draft Measure and the forwarding of the letter of comments by the European Commission) the corresponding market analysis:

Country	Definition of the market	SMP	Imposed obligations
Slovenia (SI/2007/0730)	Carrier service for the broadcasting of television signals	Yes	<ul style="list-style-type: none">- Access- Transparency- No discrimination- Price control- Accounting of costs

³⁰ See explanatory note, point 2.2: *“[F]or those markets listed, the Recommendation creates a presumption for the NRA that the three criteria are met and therefore NRAs do not need to reconsider the three criteria. However, it is open to an NRA to assess the three criteria in terms of whether they are satisfied for their specific market if the NRA believes that this would be appropriate. The results of any such analysis should follow the normal market notification procedure”*.



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			- Separation of accounts
Finland (FI/2008/0789)	Carrier service for the broadcast of television signals	Yes	<ul style="list-style-type: none"> - Access (including the rental of infrastructure and capacity) - Transparency - No discrimination - Price control - Accounting of costs - Separation of accounts
Netherlands (NL/2009/0873)	TV signal transmission through operators	Yes	<ul style="list-style-type: none"> - Access - Transparency - No discrimination - Price control
Malta (MT/2008/0810)	TV signal transmission	No	
Romania (RO/2009/0876)	TV signal transmission	Yes	<ul style="list-style-type: none"> - Price control - Accounting of costs

Additionally, France recently announced to the European Commission (7 May 2009) the Draft Measure relating to market 18. The French regulator, ARCEP, proposes to define the market as the one for carrier services for the broadcasting of television signals, and impose the following obligation on the TDF: access, transparency, non discrimination, price control, accounting of costs, and separate accounts.

As described earlier, three separate differentiated geographical areas can be defined: local, regional, and national. For this reason it is deemed necessary to proceed to the analysis of the three cumulative criteria in a separate manner for each of the spheres mentioned. Therefore, below follows an analysis of whether the carrier service market for television signals in the national geographic sphere fulfils the three criteria defined by the EC in the Recommendation. The aforementioned analysis shall be carried out according to the ERG document "Guidance on the application of the three criteria test".³¹

IV.1.1 Presence of non transitional entrance barriers for market access

The objective of this first criterion is to analyze those structural elements and

³¹ ERG (08) 21 ERG Report on 3 criteria test final 080604.



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legal obstacles that may affect the entrance of other operators, or the expansion of those already existing in the carrier service market for the broadcasting of television signals. According to the Recommendation, *“the structural obstacles derive from an original demand situation, or from the costs created by the asymmetric conditions between incumbent operators and the new operators that complicate or impede the entrance of new operators into the market”*.

When carrying out the analysis of the entrance barriers to the market, it must be kept in mind whether these are susceptible to being non transitional following a *“modified Greenfield approach”*, i.e. taking into consideration the current obligations in the wholesale markets that are related, but not the asymmetric regulation imposed on the services that are the object of the analysis.

IV.1.1.1 Structural obstacles

Regarding the existence of structural entry barriers, the electronic communications markets are characterized by economies that are important in scale, scope, density, and because of their elevated sunk costs.

With the purpose of evaluating the magnitude of the structural obstacles, the following is an analysis of a series of variables that will allow for the evaluation of whether elevated and non transitional entry barriers exist in the reference market.

IV.1.1.1.1 Level of sunk costs

The sunk costs are defined as those that are not necessary for the entry of the operator into the market, and that cannot be recovered when the company leaves the market.

From this point of view, the decision of a new operator to enter will be based on these costs, and the profitability that the company expects to receive from them. In conclusion, the evaluation of the importance of these costs is carried out in terms of two parameters: the magnitude of the costs, and the return expected from the investment in terms of the income and the variable costs of the activity, as well as the risk associated with the aforementioned investment.

In general, the sunk costs are especially relevant in the electronic communications sector, given that large investments are necessary in order to develop a telecommunications network. This is the case for a television broadcasting network at the national level, such as is required in Spain with coverage of over 95% of the population. This is exactly what will have to be reached by the principal national broadcasters in April of 2010 according to the PTNTDT schedule.



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Furthermore, the infrastructures that make up a broadcasting network do not have direct alternate use, although part of this infrastructure could be used (masts, equipment for supplying electricity, booths, lots) for providing other services (mobile communication services for a closed group of users [trunking], rental space for other operators...). However, the signal transmitting equipment is specific to the broadcasting service, and therefore makes up a sunk cost that cannot be recovered when leaving the reference market.

With the purpose of assessing the size of the sunk costs within the set of fixed costs that must be made by an operator entering the market, as well as the weight that these costs represent on retail income, an estimate of these costs has been made based on the data gathered in the model audited by this accounting Commission for the costs of Abertis in financial year 2006. The hypotheses used, and the results obtained are the following:

- The cost of broadcasting for 1 national DTTV channel with coverage of 96% of the population has been calculated.
- Of these costs, the total value of the equipment necessary for providing the broadcasting service have been considered as sunk costs, since this equipment cannot be reused in other activities, and therefore only their residual value could be recovered if the company leaves the market.³² Regarding the assets related to the infrastructures (masts, booths, lots, etc.) it has been considered that 50% of the value of these assets could be used in alternate activities such as those previously listed. The other 50% are considered as sunk costs.
- Based on the aforementioned hypotheses and estimations, the sunk costs would represent 61% of the retail price for the broadcasting of 1 national DTTV channel with coverage of 96% of the population.

Therefore, this CMT considers that the sunk costs necessary for accessing the reference market are high.

IV.1.1.1.2 Scale and scope economies

Another type of structural obstacles is the existence of scale economies, and/or substantial scope economies. Scale economies are defined by the advantage in costs that a company obtains as their production increases. Scope economies, on the other hand, refer to the efficiency achieved by a company when it supplies a range of services using, for example, only one infrastructure.

In this sense, a circumstance that in itself acts as a barrier to the entry of this market is the existence of notable scale economies derived from cost infrastructures with elevated weight relative to the fixed costs. The scale economies, which allow for achieving the reduction of unitary costs by elevating the volume of production, favour the operators that are already established, proposing a structural obstacle for new entries.

³² In this case the residual value is considered to be zero.



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Regarding the magnitude of the fixed costs,³³ it has been estimated that said costs represent 94% of the total costs of the service.

In addition to the above, in this market the consideration for scale economies is especially critical since the amount of demand is fixed and limited. The switching costs, as will be seen later, are high, and the contracts are long in duration. For these reasons, the incumbent operators, with a coverage network that is practically national, begin with an advantage over any operators entering the market. From the onset they can use their infrastructures for providing service in all of the territorial spheres, and a large number of multiplexes without the need of additional investments for providing these services. Also, in this way they achieve lower average costs than those faced by an operator who is entering the market.

As far as the scope or range economies, it should be noted that they are especially important in the market for the carrier service of television signals to the extent that the capillarity and extension of the established operator's network enable him to obtain cost efficiency derived from the sharing of infrastructures for the provision of support services for analogue and digital broadcasting. The established operator also obtains cost efficiency in other services such as those provided to the mobile communications operators of closed group users (trunking), the renting of space, etc.

IV.1.1.1.3 Control of an infrastructure that is not easily reproduced

In the first review of markets susceptible to *ex ante* regulation, in a generic manner it was concluded that the competitive pressure that an operator in the reference market faces depends on the existence of alternatives for the supply of services that it offers in the market. Therefore the infrastructure necessary for providing the reference services should be easy to reproduce.

Operating in the carrier service market for the broadcasting of terrestrial waves implies overcoming the entry barrier which consists in having access to the installations and infrastructures that are appropriate for the design of a broadcasting network.

In fact, just as has been gathered in the Resolutions of this Commission,³⁴ in order to reach coverage of 80% of the population in UHF, 150 broadcasting centres would be required. However, in order to reach a coverage of over 95%, which is what Abertis covers with analogue broadcasting as shown in the

³³ As in the previous section, this estimation has been made based on the accounting model for the costs of Abertis in financial year 2006, audited by this Commission based on the total cost of broadcasting for 1 national DTTV channel with coverage of 96%.

³⁴ Resolution of 12 June 2003 regarding the conflict lodged by VEO TELEVISIÓN, S.A. and SOCIEDAD GESTORA DE TELEVISIÓN NET TV, S.A., regarding the conditions for the rendering of the carrier services supporting the broadcasting service of the digital television signal provided by the RETEVISIÓN I, S.A.U. company.



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following tables, around 1,700 centres would be required in the case of public televisions, and around 1,300 in the case of private televisions. On the other hand, the PTNTDT, for the concessionaire companies for public service television at the state level, requires coverage of at least 96% of the population before 3 April 2010. In consequence, the marginal coverage over that 80% of the population is especially demanding. This makes it difficult for another operator besides Abertis to exist in the market.

[CONFIDENTIAL]

Table IV.1.1 Number of broadcasting centres for analogue television broadcasting

Table IV.1.2 Number of broadcasting centres expected for the broadcasting of DTTV in its different phases of coverage

END CONFIDENTIAL]

On the other hand, in addition to the number of locations, the difficulties of establishing the networks and infrastructures necessary for the reference services come from the need itself of establishing the broadcasting centres and relay transmitters. These must be replaced at determined altitudes (generally high) and specific points related to the area to be covered, given that the antenna infrastructure is oriented toward said points, and the cost of reorienting or installing other alternatives would be very high. Furthermore, in some cases the installation of other centres in these areas can collide with the operator's occupation rights limitations for public and/or private domain imposed by the regulations of these domains. These regulations may be for environmental reasons, public health, national defence, or urban and territorial planning.

In practice this implies that a determined number of broadcasting centres exist in the Abertis network that are impossible for alternative operators to replicate.

This makes it impossible for them to offer the reference services at a national level. In this scenario, Abertis is established as the only operator with its own infrastructure deployed for providing services at the national level. Therefore it can be concluded that there are no other real alternatives for supply, and that only the provider of these types of services is the established operator.

Another factor to be taken into account, and that has already been manifested in the first analysis, is that the manner of competition between the providers of the carrier services consists mainly in the capacity or coverage of the network that is offered for these services. In other words, the activity of the provider of carrier services is characterized not only by the provision of the service (the necessary connectivity for broadcasting), but also for establishing the broadcasting networks to be operated later on, in an attempt to make a profit by providing the service to the highest demand possible.



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Based on the above this Commission establishes that: *"in view of the structural problems explicitly identified in the document submitted for consultation, it is clear that this Commission is in effect trying to resolve the bottle neck detected in the rising level of the reference market. This problem is due to the difficulty of replicating the necessary infrastructures for the service of broadcasting at the national level, or of considerable coverage, in a reasonable time period."*

In conclusion, and in reference to the previous analysis, the CMT considers that the provision of the carrier service of television signals requires an infrastructure that is not easily reproduced, and for this reason there are no real supply alternatives.

IV.1.1.2 Legal obstacles or regulations

Regarding the existence of these types of obstacles, the Recommendation indicates that *"they are not based on the economic situation, but are derived from legislative measures or general public measures that have direct repercussions on the entry, and/or positioning of the operators in the relevant market"*.

The main legal obstacles that can be found in the electronic communications markets would be the following:

- The need of obtaining administrative authorization or a license for operating in the market.
- The need of obtaining a concession for the use of the radio electric spectrum.

Within the reference market the only the problems that the operator may find in order to occupy the public domain when deploying its own infrastructure have been identified as specific potential legal obstacles that could impede the provision of the reference service. On the other hand, the license policy has been revoked, and a more flexible authorization policy has been passed. This means less administrative responsibility for the operator. Regarding the second type of obstacle (having a concession for the use of the radio electric spectrum), its analysis does not continue in the case of the reference market.

The regulation described in point II above also imposes entry obstacles to the operators that intend to provide the carrier service of television signals in an indirect manner. In this way the sharing of the multiplex on the part of the different broadcasters increases the switching costs by requiring agreement among them. On the other hand, the DTTV coverage phases impose necessary coverage requirements and network capabilities.



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IV.1.1.3 Conclusion

From the foregoing analysis it can be concluded that there are elevated, non transitional barriers for entering the market for the carrier service of television signals since, (i) the sunk costs are especially relevant in the reference market, (ii) there are important scale and scope economies that allow the incumbent operator to obtain significant reductions in average unitary costs, and (iii) the providing of service requires an infrastructure that is not easily reproduced, and because of this there are no supply alternatives.

All in all, this Commission concludes that the first criterion for considering the susceptibility of ex ante regulation for the carrier service for broadcasting of the television signal to be fulfilled.

According to the Recommendation, the fulfilment of three criteria must be cumulative; therefore the following is an analysis of the fulfilment of the two additional criteria indicated by the EC in its recommendation.

IV.1.2 Effective competition trend

As indicated by the Recommendation, *“even when a market is characterized by strong obstacles upon entering, other structural factors may exist within the market that make it lean toward an effective competition situation within the relevant temporal horizon”*.

In this sense the EC, in its Explanatory Note³⁵ attached to the Recommendation, indicates that the fundamental reason by which withdrawing this market from the Recommendation was considered appropriate was the consideration of a higher level of competition between the platforms with the transition from analogue technology to digital, and the fact that in many Member States there are 3-4 platforms competing in digital technology, versus 2-3 platforms that existed in analogue technology.³⁶

³⁵ Explanatory Note - Accompanying document to the Commission Recommendation 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, SEC (2007) 1483 final.

³⁶ “There are a number of reasons why it is considered appropriate to remove the existing wholesale market from the recommended list. Many of the comments received during the consultation indicated that significant market changes are underway. There is evidence of greater platform competition as the transition from analogue to digital broadcasting platforms occurs. One implication is that there are likely to be fewer capacity constraints on any given platform. A second is that many Member States are likely to have 3-4 competing platforms (terrestrial, satellite, cable and telecom-based) in contrast to 2-3 analogue platforms, one of which, satellite, developed much later. The transition from analogue to digital provides an impetus for platforms to compete and attract end-users, which in a two-sided market context, also means obtaining content. These changes indicate that despite the market entry barriers that may exist, the market dynamics are such that the second criterion is not satisfied”.



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Therefore, the application of these criteria implies the examination of the state of the competition that lies behind the entrance barriers, i.e. if in those markets characterized by high entry barriers there can be a number of operators sufficient to guarantee that the market tends toward effective competition.

In order to evaluate the possibility that a market tends toward an effective competition situation within the considered period, indicators such as the market shares, the existing competition, the evolution of prices, or the potential competition should be evaluated.

Before beginning the analysis, the foregoing paragraph should be considered in relation with the existence of alternative platforms (see point III.1.4 above). Actually, in contrast to the situation in other European countries, in Spain broadcasting by terrestrial waves cannot be substituted by alternative broadcasting platforms. Therefore, the analysis of the competitive tendency should not be carried out by examining the competition between platforms, but in the heart of the terrestrial broadcasting platform which, in the considered period, could be acquired by the broadcasting companies.

IV.1.2.1 Market shares

First of all it should be noted that the broadcasting service of audiovisual signals is currently very concentrated. In order to illustrate this, the income for the different operators according to the coverage area for television services to their end clients is shown below:

Table IV.1.3 Revenue trends and clients for the broadcasting services of analogue and digital television signals³⁷ (Euros, percentage and number of clients)

[CONFIDENTIAL]

As the previous data show, the situation that was observed in the financial years referenced in the first analysis for market 18 has remained practically the same, since as can be appreciated in the table above, Retevisión, a company belonging to the Abertis Group, is the only provider of wholesale services for signal broadcasting at the national level. On the other hand there are many operators, most of whom are established with public capital, that provide their services to the regional television channels. Because of this circumstance the concessionaires of each Autonomous Community have contracted the operator that provides the services in that territory as their provider. These operators therefore have a company vocation that is clearly focused on the concrete territorial area of each Autonomous Community.

³⁷ COTA: Consorcio de Telecomunicaciones avanzadas (ATECO, Advanced Telecommunications Consortium) (Murcia).



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The following table shows the evolution of participation for each operator over the total of the services gathered in the product market of reference, i.e. national, regional, and local broadcasting, both in the analogue and digital manner (does not include self-provisioning).

Table IV.1.4 Share trend by revenue and clients of the broadcasting service for analogue and digital television signals

	2005		2006		2007		2008	
	REVENUE	CLIENTS	REVENUE	CLIENTS	REVENUE	CLIENTS	REVENUE	CLIENTS
ABERTIS GROUP	88.60%	95.74%	91.27%	92.98%	91.12%	94.18%	92.34%	94.37%
OTHERS	11.40%	4.26%	8.73%	7.02%	8.88%	5.82%	7.66%	5.63%
TOTAL	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%

Source: Drafted by the Commission based on information requirements that have been carried out

As it can be observed, Abertis is the main operator of broadcasting services for audiovisual signals. In this same sense, it is important to demonstrate that if we only look at the national broadcasting area, Abertis is the only operator on the market with a share of 100% in both the digital and analogue market.

IV.1.2.2 Trend for competition in the reference market

As could be observed in the table above, the market share of Abertis in the reference market is situated, in terms of income as well as clients, above 90%. Furthermore, this share has increased slightly since 2005 in terms of income, and has maintained more or less stable in terms of clients. Additionally, if the share is only considered at the national level, it is 100% of the market.

Therefore there is currently no competitor for Abertis in national territory. Abertis is the only provider of the reference service, since the rest of the agents that participate in the market have their coverage and performance areas limited to below national levels.

Furthermore, as indicated earlier, the CNC is currently analyzing that Abertis takes the company Axi3n, which, if successful, would mean the disappearance of the only operator that has competed with Abertis at a national level.

IV.1.2.3 Price trend

Keeping in mind the services in the national area, it should be noted that the prices of the broadcasting services for audiovisual signals were regulated until 31 December of 2002 by virtue of the Agreement of the Spanish Government Commission for Economic Affairs of 7 October 1999.

Abertis has been the only operator to offer these services since the deregulation of 3 April 2000. The only exception would have been the contracts signed by



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Axión for the extension of the digital television signal coverage for 80% to 85% of the population with Telecinco and Sogecable on 24 January 2007, and with Net TV on 31 July 2007. However, these contracts were void after new contracts were signed between these concessionaires and Abertis in 2008. It should be noted that in the last case Axión was an active supplier that presented proposals to the tenders called for contracting the extension of national DTTV coverage.

As far as the price trends gathered in the signed contracts for the analogue service with national broadcasters, great stability can be seen, producing only annual updates [**CONFIDENTIAL**].

In reference to the prices gathered in the signed contracts on service in digital technology, this Commission understands that the information concerning their trends is not significant in terms of evaluating whether the market tends toward effective competition because said prices are being adjusted to the modifications in the coverage percentages of DTTV, and its progressive extension throughout national territory. As in the foregoing case, the contracts provide for annual updates [**CONFIDENTIAL**].

IV.1.2.4 Compensatory power of demand

It is important to indicate that one of the main characteristics of the television markets is the elevated concentration of demand. In the particular case of the national market, as described earlier, demand concentrates around RTVE and the other six television concessionaires by means of terrestrial waves.³⁸ This makes demand power potentially high given the size of the companies in question, and the important proportion of demand that each one represents individually.

According to the Guidelines, the negotiating power of demand could limit the capability of the suppliers to exercise their market power. However it should be noted that in this market there exists a differential fact with respect to other electronic communications markets that limits these possibilities. Therefore, in the carrier service market for television signal broadcasting the demand is limited by the concessions of the television channels themselves, for the different concessionaire companies. Because of this, demand cannot limit the amount consumed and therefore, the market cannot grow beyond the limits imposed by the concessions.

Finally the proportion of the costs that represent broadcasting, along with the costs of demand (below [**CONFIDENTIAL**]) and the existing switching costs shown in the following paragraph, make the compensatory power of demand limited, even though it is strongly concentrated. In the same way, the variable

³⁸ See footnote 4. Private televisions are associated with the Union of Associated Commercial Television (UTECA) which grants them higher negotiating power.



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price factor that motivates demand loses relevance in the descending market. Therefore the potential allocative efficiencies that prices closer to costs could produce are restricted by the foregoing fact.

IV.1.2.5 Switching costs

Another reason for the limited possibilities of sustainable competition once the entry barriers have been overcome is the switching costs, which at the same time are also an entry barrier. Actually, operators could deploy their own infrastructures, or as in the case of Axión, have sharing agreements for the infrastructures, and not obtain any clients. This is due in part to the importance of the switching costs faced by the broadcasting companies. This Commission has been identifying the following types of switching costs:

- Redirecting antennas. In the case of national broadcasting service, as indicated in the Resolution of the first round for market 18, *"the sites are usually at high altitudes, close to the populations receiving the service. Also, the reception antennas of the end-users should be facing the broadcast centre that provides the television service"*.

The orientation of the antennas toward the broadcasting centres of a determined operator presents a very substantial switching cost which has led this Commission to consider it a standard in the reference market. Therefore, according to the Resolution mentioned earlier, *"in relation to the service area of the sites that form part of the initial phase of the coverage of 80%, the standard configured at that moment for the support service of ABERTIS is revealed as an essential element for the provision of services on the part of another operator. The substantial modification of the service area already covered in the case of a potential change of provider would generate significant costs for the concessionaire companies for television service, and could form an entry barrier for the provision of services on the part of an alternative operator. For a series of specific centres, those included in the coverage phase of 80%, it is necessary to have access to the technical information of ABERTIS in order to make a competitive offer to that of the incumbent operator at the national level. There is no possible manner of differentiating one centre from another from the point of view of their relevance for proper market development in competitive conditions."*

- Duration of the contracts. In this aspect it should be noted that the duration of the contracts is very long, and usually coincides with the duration of the concessions. Therefore, only certain windows of opportunity take place for entering the market. The anticipated cancellation of these contracts usually implies important costs for the client, due to the indemnities that are associated with unilateral cancellation.

In the case of contracts relating to national broadcasting service, the time limits



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are especially long (see illustration IV.4.1 above). The contracts reach durations of **[CONFIDENTIAL]**.

On the other hand, the elevated level of sunk costs associated with each client and the size of the market (clients and coverage) pre-defined by the regulations creates a market in which competition forces the loss of these costs in the case of losing the client. In this sense, it is reasonable that the contracts are of long duration, and include penalties with the purpose of guaranteeing the recovery of these costs, notwithstanding the proportionality both in the duration, as well as the amount of the penalties. The proportionality of these clauses and the determination of whether or not they form an entry barrier is currently the object of analysis by the CNC within the framework of file 646/08.

All in all, the switching costs faced by the concessionaire companies are considered high in the case of national broadcasting.

IV.1.2.6 Potential competition

The potential competition in the broadcasting market for television signals at the national level could originate, in a “Greenfield Approach” environment, mainly from operators that were present in the market of local and regional products, just as they were defined in the foregoing section. The only competition that has been seen within the reference market came from these markets.

However, as previously mentioned, entry is becoming more and more complicated due to the regulatory requirements in terms of infrastructures,³⁹ the switching costs for demand, and the consolidation and concentration process that it is suffering in the market⁴⁰ and that inevitably diminishes the number of potential entries.

IV.1.2.7 Conclusion

According to the analysis of market share trends, the existing competition, the price trends, the switching costs, and the potential competition, it can be concluded that in the reference market the conditions affirm that it does not tend toward effective competition, and therefore does not fulfil the second criterion established in the Recommendation.

³⁹ Although to reach coverage between 80% and 85% the volume of investments required is relatively accessible, the sites necessary for reaching the coverage levels that regulations already impose are most relevant.

⁴⁰ It should be reiterated that the Spanish Competition Commission is currently analyzing, according to Spanish regulations of concentration control, the proposal for acquisition of Axión by Abertis (File C/0110/08). In areas below the national level, the Spanish Competition Commission is also analyzing the concentration operation between Abertis and Teledifusión Madrid (File C/0084/08).



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IV.1.3 Adequacy of Competition Rights

According to the markets Recommendation, the third criterion that a market should fulfil in order to be susceptible to ex ante regulation consists of determining *"if the legislation on competition is sufficient in order to remedy the faults in the market resulting from the fulfilment of the first two criteria"*. According to the European Commission *"the legislation on competition is probably not sufficient if its intervention for remedying a fault of the market must fulfil multiple requirements, or when frequent and/or immediate intervention is indispensable"*.

The following analyzes a series of elements in order to determine if the right of competition can avoid non-competitive behaviour in the reference market, i.e. if such a right is an efficient tool for solving non-competitive behaviour.

IV.1.3.1 Level of generalization for restrictive behaviours in competition

The ex post intervention will be most efficient if the restrictive practices of competition are not generalized, that way recurrent intervention by the authorities will not be necessary.

In the first market review the main competition problems that were considered for the carrier service market for the broadcasting of television signals were the problems of supply/access, and the use of dilatory tactics.

Regarding the first problem, and given that this is a market in which the competition develops "by market," Abertis has high incentives for denying access of third parties to their broadcasting network. This is because the lack of entry guarantees that this operator will obtain the revenues derived from contracting the broadcasters in the descending market. Similar results could be obtained by means of dilatory tactics, given that the negotiations and contracts with the broadcasters only occur in specific temporary windows (generally at the time of initiating or renewing the concession). Therefore any delay in granting access could make it impossible to present a competitive proposal to that of Abertis.

The use of dilatory tactics would therefore be similar to a "constructive refusal" entry, and could be carried out in several manners, for example the refusal of the technical information for accessing the centres in an effective manner. Another tactic that is equally effective, and that could be implemented easily would be the improper delay of the access negotiations, or the invoking of inexistent technical problems. In this respect, this Commission has had to decide on a series of instances of possible non-compliance on the part of Abertis regarding its obligations as they are reflected in market 18. In particular, in the Resolution of 18 March 2008 concerning the conflict filed by the Red de Banda Ancha de Andalucía S.A. (Axión) company regarding Abertis's



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information responsibilities for access to its centres (MTZ 2007/952), it was verified that the information given by Abertis to third parties was insufficient to ensure access to its centres.

It is therefore verified that there are strong incentives on the part of the incumbent operator to engage in potentially non-competitive practices. Given that access is currently carried out centre by centre, the limitation or delay in the access of one or several of these centres that make up the Abertis network would mean the *de facto* closing of the market; due to the impossibility of presenting a technically comparable offer to that of the established operator.

IV.1.3.2 Level of difficulty involved in detecting or proving the existence of practices that are restrictive to competition

Regarding the competition problems indicated, the level of difficulty involved in detecting them is high. This is due to the variety of possible actions on the part of the incumbent operator (described above) and the fact that the refusal or delay of access to a reduced number of centres could give rise to the failure to acquire agreements, or the loss of the agreements with the broadcasters. In addition to the refusal of access, Abertis could achieve the same closing effect by means of “constructive refusals” that are difficult to detect or prove, for example the invoking of technical difficulties causing delays, or refusal to offer relevant information.

IV.1.3.3 Possibility that restrictive behaviours in competition could cause irreparable damage in the target market for this analysis and in related markets

As demonstrated throughout this document, the market for the carrier service broadcasting television signals is not in a situation that tends toward effective competition. In the current conditions, where the entry to the market should take place in an *ex novo* manner, given the current lack of alternatives to Abertis, at least at the national level, any of the practices described above could result in a failure of accessing the market.

In fact, as indicated, the competition is “by market,” which means that any refusal of access that complicates the presentation of competitive offers at the time that the contracts with the broadcasters are subject to renegotiation would, in practice, interfere with the development of competition. The failure on the part of an alternative operator to present an offer within the framework of the temporary opportunities when the contracts are renegotiated would also have permanent effects. This is due to the fact that the contracts between the operators and the television concessionaires tend to be long-term, usually for the duration of the concession.

On the other hand, given the reduced number of demand (the television



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concessionaire companies) and the strong technical component associated with this market, the requirement of the fulfilment of commitments made on the part of the broadcasters would be particularly demanding, in particular taking into account that in Spain the television concessionaire companies have taken on population coverage responsibilities for the implantation of DTTV. Under these circumstances, the existence of operative or technical problems would mean the loss or termination of the contracts for incoming operators with the broadcasters, who would not be in a position to determine if the causes of failure to fulfil commitments are the responsibility of the incumbent operator, or planning errors on the part of the new operator.

The intervention of competition rights would be revealed as insufficient for avoiding the risks derived from potential non competitive behaviours that require preventative control in order to avoid the damage that could be insurmountable for the market. In fact, it's necessary to remember that ex post intervention only occurs once the abusive behaviour has taken place; it takes place within the framework of an extensive procedure where burden of proof for the verification of the abuse is high; and it is only applicable case by case, therefore the competition problems are not treated in a global manner.

IV.1.3.4 Concentration operations

The lack of competition rights is manifested not only in ex post action, as it has just been demonstrated, but also when its intervention takes place in the area of control for concentration operations.

By means of the Council of Ministers Agreement of 14 November 2003 a series of concentration operation conditions consisting of the acquisition of Retevisión I, S.A.U. on the part of Abertis were subjected to observation. However, these conditions are restricted to a determined geographical area, the Autonomous Community of Catalonia, and do not affect the totality of the reference market defined in the current Resolution. Therefore the observations were seen as insufficient in order to cope with the problems detected in the concentration operation and they are mainly based on activities commissioned to the regulator of the sector, i.e. the CMT. Finally it should be noted that they lack the flexibility which the regulatory framework offers through its periodic review process of market situations.

IV.1.3.5 Conclusion

Based on the previous considerations, this CMT concludes that ex post intervention is not sufficient in order to solve the market faults that could occur in the carrier service market for the broadcasting of analogue television signals. According to the explanatory note,⁴¹ the *ex ante* regulation should be

⁴¹ Pages 10-11.



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considered a necessary complement to the competition right in those cases where the *ex post* terrestrial rules are not sufficient for solving the market failures detected, for example if (i) the necessary regulatory obligations for the development of competition cannot be initially imposed according to the competition right (e.g. entry obligations, or the availability of regulatory accounting), (ii) the availability of several analysis elements for oversight regarding the obligations shall be necessary (detailed regulatory accounting, cost analysis, monitoring of deadlines, and conditions including technical parameters), (iii) the appropriate obligations for resolving the failure of the market entail the necessity of frequent, and/or expeditious intervention, or (iv) said obligations must contribute to increasing legal safety.

Similarly, the intervention on the part of the National Competition Authority with regard to the aforementioned concentration operation has also revealed itself as insufficient for solving the problems detected in the market.

As explained in the following sections, this Commission believes that only the enforcement of the types of obligations mentioned in the Explanatory Note (access to the Abertis centres, transparency, regulatory accounting/separation of accounts) are susceptible to fomenting the development of competition in the reference market.

IV.2 Analysis of the market structure, assessment of the existence of effective competition in the market, and determination of operators with significant market power

IV.2.1 Description of the reference market structure

As already indicated in the previous point, the broadcasting market for the national television signal is currently monopolized by an incumbent operator. If all of the broadcasting services are considered, this share still remains above 90%.

On the other hand, the entry barriers for the market have also been indicated in the previous point, concluding that they are high, and non transitional.

IV.2.2 Potential competition in the reference market

Within the context of the second criterion established by the European Commission for considering a market susceptible to *ex ante* regulation, this Commission has considered that, given the current conditions, the entry of new operators would be improbable. In this manner, the threat of potential competition would not be sufficient for disciplining the behaviour of the operators already established in the reference market.

IV.2.3 Analysis of effective competition in the reference market

The CMT estimates that, according to the established criteria in the market



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analysis Guidelines,⁴² the reference market does not develop in an environment that is effective for competition:

- Abertis has a share at the national level of 100%, and well over 50% if all of the broadcasting services are considered;⁴³
- Abertis has a broadcasting network with highly relevant coverage deployed during a period of exclusive rights⁴⁴ which has been practically renewed in its entirety according to the requirements imposed by the broadcasting regulations;
- The fact that Abertis currently has 100% of the market, grants it important cost advantages with respect to a potential entry. This same reasoning applies when considering the economies of scope that the provision generates, on the part of this same operator, for the broadcasting services to regional (see Table III.2.1) and local concessionaires;
- The demand, although small in number, and supposing a relevant proportion of the market, cannot exercise sufficient compensatory power given the regulatory provisions, as well as the existing switching costs.

IV.3 Identification of the operator with significant market power

Abertis is identified as the operator with significant power in the wholesale market for the carrier service of broadcasting television signals.

It is considered necessary to designate the group of companies that Abertis belongs to as the operator with SMP. Therefore, for the purposes of this analysis it is understood that both the concrete company identified as the individual dominant operator, as well as all of the companies of each group that provides the services included in the respective reference markets are designated as operators with SMP. In this sense it should be noted that the CMT itself, interpreting repeated general case law, has already indicated that *“when a group of companies constitutes an ‘economic unit’ as far as how much they are lacking in the necessary autonomy of behaviour in the market regarding the parent company, there is only one company in terms of applying the provisions of competition rights”* (CMT Resolution of 8 November 2000, regarding the Flat Rate for Terra and the CMT Resolution of 20 May 1999).

⁴² Paragraphs 75 - 78 of the Guidelines.

⁴³ It is the constant doctrine of the European Commission and of the Court of Justice of the European Communities that *“extraordinarily high market shares, above 50%, testify in themselves, unless under exceptional circumstances, the existence of a dominant position”* (Guidelines section 75, see also case C-62/86, Akzo c. Commission, Court ruling of 3 July 1991, 1991 ECR I-3359).

⁴⁴ The number of broadcasting centres that Abertis uses for the provision of analogue broadcasting services to RTVE totals **[CONFIDENTIAL]**.



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On the other hand, this identification of SMP responds to the purpose of *ex ante* regulation, gathered in section 16 of the Guidelines, which consists of guaranteeing that the company cannot use its market weight for restricting or falsifying competition in the relevant market, nor use that weight as support in the adjacent markets.

IV.4 Trends in the television signal broadcasting market

IV.4.1 Ex ante obligations imposed on the wholesale market for broadcasting television signals

The broadcasting services for television signals were provided under a monopoly policy until they were liberated in 1998.⁴⁵ However, this liberalization was not effective because article 5 of Spanish Royal Decree-Law 16/1999 of 15 October and the provisions that it develops maintained the *de facto* monopoly in favour of Retevisión until 2002. In fact, all the private entities of the national area signed contracts in 2001, after having reached a previous agreement with Retevisión⁴⁶ in 2000, where the analogue provision services was renewed, and the provision of digital services was requested.⁴⁷

Given these starting conditions, the requirements of the broadcasting companies began in relation to DTTV (the first obligation for coverage of 80% of the population must be already complete by December 2005). At that moment the only existing competitor at the national level, Axió, required the intervention of this Commission which dictated cautionary measures imposing certain obligations on Abertis as early as 2005.⁴⁸

Thereafter, in the first analysis of market 18, the CMT identified the particular competitive conditions that converged in the carrier service market for the broadcasting of television signals that granted important advantages to the incumbent operator.

For these reasons, this Commission concluded⁴⁹ that Abertis, as the operator

⁴⁵ In fact, since the year 1988, when the Public Entity Red Técnica Española was created, the carrier service support for the broadcasting services has been provided by Retevisión which was given the exclusive management and operation of the public network of telecommunication for the transport and broadcasting of television signals.

⁴⁶ Retevisión I, S.A.U. was acquired by Tradia, whose main shareholder is Grupo Abertis Telecom, S.A.U.

⁴⁷ These contracts were examined at the time by this Commission, as certified by the Resolutions of 12 September 2002, and 12 June 2003, and suppose the long-term maintenance of the contractual relationships regarding the carrier services under the charge of Retevisión in relation to the national market environment for the broadcasting services of both analogue and digital television.

⁴⁸ Resolution of 20 September 2005.

⁴⁹ AEM Resolution 2005/1352 of 2 February 2006 approving the definition and analysis of the



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that owns the necessary infrastructures for providing these services, had the economic capacity in order to behave in an independent manner from its competitors and users, identifying it as an operator with SMP.

As a consequence to the foregoing, this Commission considered the imposing of access obligations, price control, transparency, separation of accounts, and non-discrimination on Abertis as justified, aiming at reducing the possibilities for Abertis to extend its position in the descending markets. It should be noted that the implementation of these obligations in the market have been prolonged during the prior review period given the initial regulatory situation of this market. In this way, for example, with the purpose of making the imposed obligations effective regarding price control and the separation of accounts, four Resolutions by this Commission approving the accounting format and method were necessary (1 June 2006⁵⁰), assessing the accounting model proposed by Abertis (14 June 2007), approving the WACC for 2006 (19 July 2007⁵¹) in order to finally approve the verification of the accounting by this operator on 20 November 2008.

These difficulties in implementation have generated the delay in getting the measures taken for the impulse of competition in the market into practice.

IV.4.2 Effectiveness of the wholesale measures for effective entry into the market

The measures imposed both in the interlocutory stage, as well as in the market 18 framework were intended to facilitate the entry of operators into the descending market of broadcasting television signals in a manner that could compete for provision and extension contracts in the broadcasting services related to DTTV. These measures contributed to the entry of Axión in the national market when it won the tender for expanding the digital television signal coverage from 80% to 85% of the population with Telecinco and Sogecable on 24 January 2007 and NET TV on 31 July 2007.⁵² However, when Axión lost the following tenders for the final extension of DTTV coverage, these contracts were void.

market for transmitting television signals, the designation of operators with significant power in the market, and the enforcement of specific obligations. Notification of this resolution to the European Commission has been agreed upon.

⁵⁰ AEM File 2006/649 regarding the Principles, Criteria, and Conditions of the Accounting models of national Costs for ABERTIS Telecom, S.A.U.

⁵¹ On July 19, 2007 the Resolution regarding the ABERTIS Telecom, S.A.U. proposal (AEM file 2007/600) was approved with an Annual Return rate to be applied to the calculation of the capital costs in the accounting costs of financial year 2006.

⁵² These contracts were void after the signing of new contracts for the extension of coverage on the part of the concessionaire television companies with Abertis.



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When the tender process for DTTV was concluded, where the competition of the new entry generated a reduction in the price which benefited the concessionaire companies, these companies finally decided to enter into a contract with Abertis for the supply of the carrier service for broadcasting digital television until year **[CONFIDENTIAL]** just as is shown in the following illustration⁵³:

Illustration IV.4.1 Duration of the broadcasting contracts

[CONFIDENTIAL]

From this it can be concluded that the delay in the implementation of the obligations imposed on Abertis, their lack of ex ante completion, along with the weak investment capabilities of the incoming company have meant that Axión was not sufficiently prepared at the moment that the final window of opportunity appeared in order to take part of the market share. In consequence the initial monopoly situation for Abertis has not changed.

However, as indicated earlier, this Commission has acquired certain experience in the implementation of obligations in the reference market which, in a prospective manner, shall help the operators to become aware of the access conditions that they are facing in a manner that is faster, and more precise. The wholesale obligations should ensure that the wholesale services are provided in foreseeable periods and conditions for the alternate operators. In this way, as it shall be justified further on, the enforcement of additional transparency obligations becomes necessary in order to avoid the conflictive situation detected in the application of the obligations imposed by the Resolution of 2 February 2006.

IV.4.3 Competitive perspectives for the temporal horizon of the 2nd analysis

The current review of the reference market should therefore consider that the entry opportunities of the existing markets at the time of realizing the first analysis of the reference market could not be taken advantage of. However, there was a new window of opportunity due to the analogue shutdown. On the other hand, as described in the following paragraphs, the entry costs are now higher given the coverage levels and the screen shares reached by DTTV, which increases the requirements of capital for the incoming operators, and more efficient, transparent, and predefined regulatory measures than those taken during the first review of the market.

IV.4.3.1 Potential entry given the demand conditions

- New assignation of multiplexes in 2010 ("post shutdown")

⁵³ The illustration shows, for each of the concessionaire companies, the first contract signed with Abertis (first line) as well as, in this case, its extension up to the maximum coverage imposed by regulations (second line).



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Regarding the possible entry into the market by alternate operators, it should be mentioned that one of the requirements is the existence of windows of opportunity on the part of the demand. Currently the transition process toward DTTV is coming to a close. Each concessionaire company for public service television in the state sphere is combining both analogue and digital.

As specified in section II.1, the possible windows of opportunity for the providers of broadcasting support services are tied to the date of the analogue shutdown, 3 April 2010, when the channels for each concessionaire company shall be reassigned so that they will have their own multiplex, and at least three more multiplexes must be created.

Regarding this window of opportunity, it should be stated that these new spectrum assignments will allow the alternate operators to offer their services without facing the switching costs described in section IV.1.2.4 for the RTVE multiplexes given that, as shown in illustration IV.4.1, the broadcasters have already entered into a contract with Abertis **[CONFIDENTIAL]**.

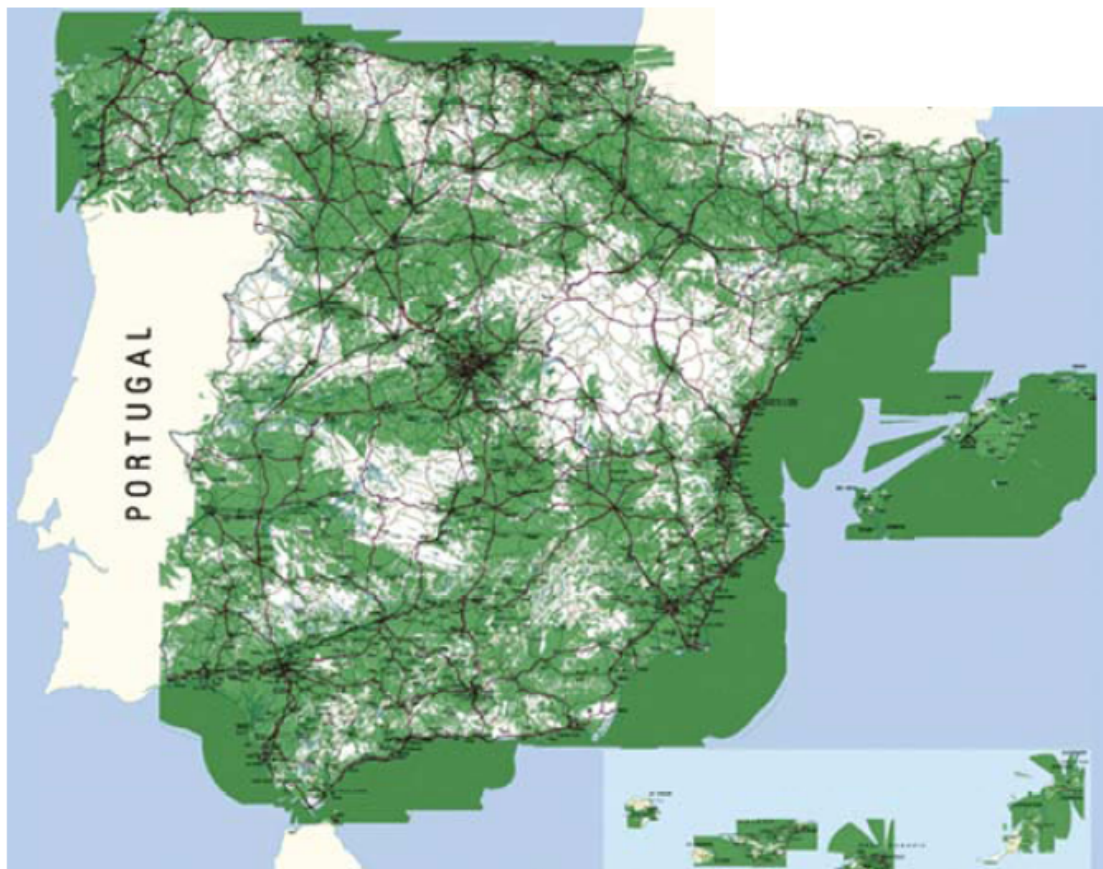
- Importance reached by DTTV

Another element that could limit the possibilities of change on the part of demand rests on the coverage that has already been reached by DTTV. Although in 2005 levels of coverage were nonexistent so that no operator had an advantage over another, the situation in 2009 has radically changed. According to the DTTV Observatory, in December of 2008 coverage of over 92% of the population was reached according to the following geographical distribution:



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Illustration IV.4.2 Geographical distribution of DTTV coverage



Source: Impulsa DTTV/Abertis.

Likewise, DTTV penetration has reached over 45% of the homes, and has achieved a screen share of over 23%.

In the case of a change in support service provider for broadcasting television signals, under these conditions it is probable that the broadcasters will demand that the migration not be perceived by the user, or that at least that this point is considered as one of the elements for deciding with whom they will enter into a contract. In the same manner, given that the DTTV has already gained an important demand, the continuity of service, and the solvency of the new supplier reach levels of importance that cannot be compared with those existing at the moment of the first review of more demanding markets.

IV.4.3.2 Potential entry given the supply conditions

On the other hand, the supply conditions are not similar to those existing in 2006 either, given that at the time the market was immersed in a process of



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concentration derived from the announced purchases by Abertis (Teledifusión de Madrid ["TDM"] and Axión). Even if the access conditions are adequate for the entry of efficient competitors, it is necessary to indicate that there are actors present in other electronic communication markets with sufficient potential for entering a market whose capital requirements are clearly lower than others that are more dynamic such as mobile telephones, or that of broadband or cable TV.

IV.4.3.3 Conclusions

All in all, although the obligations imposed in 2006 were weakened by the delay in their practical implementation, they have not allowed for the consolidation of the entry of alternate providers who can compete in an effective manner in the descending market of carrier services for broadcasting television signals. They have generated a credible competition which is manifested in the latest window of opportunity that benefited the broadcasters.

On the other hand, it should also be mentioned that although the market situation in 2009 increases the entry barriers due to the levels of coverage already reached by DTTV, as well as the levels of penetration and the screen share, this does not mean that it is impossible to enter the market as long as efficient potential entries exist. However, in order for this potential competition to be credible, the level of effectiveness, availability, and transparency of the regulatory measures needs to be increased.

IV.5 ANALYSIS OF THE OBLIGATIONS LIKELY TO BE IMPOSED ON OPERATORS WITH SMP

IV.5.1 Principles to be applied by the regulator in the choice of the most suitable obligations

At the time of decision on which obligations shall be applied to operators with SMP in a determined market, the policy establishes a series of principles that should guide the NRAs. As they do so, the NRAs must make transparent decisions which are respectful of the principle of proportionality and which are in line with the objectives as defined in the Framework Directive. The obligation chosen must be the least burdensome and must take into consideration any effect that it may have on related markets.

Article 10.4 of the LGTel (Article 8 of the Framework Directive) establishes that the obligations should be based on the nature of the problem that has been detected, keeping in proportion with same and justified in light of the objectives as outlined in Article 3 of the LGTel. These objectives are, among others:

- To encourage competition in the supply of electronic communications networks, electronic communications services and related resources and services:



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- a) Ensuring that there exists no distortion or restriction of competition in the electronic communications sector;
 - b) Encouraging efficient investment in infrastructure and promoting innovation;
 - c) Encouraging efficient use of and ensuring the effective management of the radiofrequencies and numbering resources.
- To contribute to the development of the interior market through, among other things, transparent mutual cooperation and transparent cooperation with the Commission, to ensure the development of consistent regulatory practice and consistent implementation of the Framework Directive and the Specific Directives.

Similarly, the NRAs must preferably impose obligations that affect the wholesale markets and, only when these measures fail to guarantee effective competition in same, should they impose measures on the retail markets such as is outlined in the Explanatory Note of the Recommendation.⁵⁴

Alongside these explicit principles, in the current legislation exist others that derive from it, without being explicitly enunciated, as reflected in the ERG document “Common position on the appropriate remedies in the new regulatory framework”⁵⁵ (hereinafter the Common Position). Thus, the NRAs must take into consideration the following assumptions in the choice of the obligations to be imposed on operators with SMP:

- In such cases where competition based on infrastructure is unlikely due to the persistent presence of economies of significant scale or scope, and other restrictions on entry, the NRAs must ensure sufficient access is allowed to the wholesale inputs.
- In such cases where duplication of the infrastructure of the incumbent provider appears possible, the obligations must generate incentives to assist the process of transition to a sustainable competitive market.
- Obligations are to be elected in such a manner that, for the regulated party, the benefit of compliance with the obligations is greater than that of non-compliance.

IV.5.2 Identification of problems relating to competition in the reference market and related markets

In the first review of the reference market, a series of possible problems relating to competition were identified that could possibly occur in the absence of

⁵⁴ Page 13 of the Explanatory Note of the Recommendation states: “a downstream market should only be subject to direct legislation if competition on that market still exhibits SMP in the presence of wholesale regulation on the related upstream market(s)”.

⁵⁵ ERG Common Position on the Approach to Appropriate Remedies in the New Regulatory Framework, approved in the Plenary Session ERG 8 of 1 April 2003 and revised in May, 2006 (ERG [06] Revised ERG Common Position on the approach to remedies in the ECNS regulatory framework).



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regulation, given the position that Abertis occupies in this market. In relation to the review of market regulation of the carrier service for the broadcasting of television signals, as indicated in the previous section, this Commission considers that there continue to persist therein problems relating to competition, similar to those identified in the first round, with the necessary clarifications in the following sections.

Accordingly, the principle competition problems detected are related to the vertical extension of the dominant position of the operator with SMP. This set of problems appears when a company controls an input that is considered necessary to provide a service in a retail market. The vertical extension of the dominant position gives place to restriction of competition in downstream retail markets where the operator declared to have SMP also provides services.

Problems that may appear in the reference market in relation to the vertical extension of the dominant position are as follows:

- Refusal to supply/allow access;
- Dilatory tactics;
- Quality discrimination, price discrimination;

As shall be discussed below, when considering problems that are not directly related to the vertical extension of the dominant position, it is necessary to emphasise that the main problems may arise from the possibility of Abertis to carry out cross-subsidies.

In relation to these problems, it can be stated that, although the market encompasses both analogue and digital broadcasting services, given the proximity of the analogue shutdown, there will be no incentive for new entrant operators to compete for these services. Moreover, the conditions of provision of analogue services, as they are contracted by the same distributors who demand the digital services, could distort the competitive conditions for the latter, where there is possible potential for new entry. Therefore, the principle problems that have been estimated regarding the analogue mode would be those derived from the horizontal extension of the dominant position, with which the obligations to be imposed must be related to this concrete problem.

- Refusal to supply/allow access

As explained when considering the application of the three criteria test to the reference market, Abertis has high incentives to deny third-party access to the broadcast network. If the alternative operator cannot access Abertis's broadcasting centres and relay transmitters, the only alternative to enable them to supply the services being discussed would be to use another site. However, if the site is located at a distance from that of Abertis, the antenna infrastructure that serves the households in the affected area would have to be reoriented in



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order to enable the households to capture the signal and so effectively use the site as a broadcasting centre. Even if the new entrant operator were willing to commit to this investment, and could do so in a short period of time, it is unlikely that the broadcaster would opt for a change of provider due to the costs that said change would incur (see point IV.1.2.5).

Therefore, in practice, by denying access Abertis would eliminate possible competitors in the geographic areas covered by the present installations, reserving these areas for itself. The limited number of access agreements that Abertis has reached in relation to the centres leads us to the conclusion that the denial of supply or access is a problem that could occur in the reference market.⁵⁶

- Dilatory tactics

Even without denying access to the broadcasting centres, Abertis could use dilatory tactics, offering access to a company within a timeframe but delivering it later, thereby hindering competition. These tactics can adopt various forms and can be carried out with great ease through, for example, the delaying of negotiations, refusing to provide the necessary technical information required to effectively gain access to the centres, or declaring technical difficulties that do not exist.

As demonstrated when considering the application of the three criteria test, as established in the Recommendation to the reference market, the use of these tactics could have results as effective as those of denial of access. Presently, the contracts established with clients tend to be long-term, usually covering the period of duration of the concession, without prejudice to possible renegotiations. Therefore, limited possibilities exist for entry into the market. If, at the precise time of negotiation or renegotiation, there is no alternative operator capable of compiling a competitive offer for a concessionaire, Abertis would be the only alternative, thus guaranteeing that the provision of these services during a relatively long period. Faced with this situation, Abertis has very high incentives to delay the access agreements for as long as possible, particularly if the request for access happens to take place in a time when a contract enters into negotiation or renegotiation.

- Quality discrimination, price discrimination

In such a case where an SMP operator could see its performance capacity limited through market regulation (for example, regarding the prohibition of denial of access to third parties), the operator could still make use of other strategies, such as quality discrimination or price discrimination.

⁵⁶ Abertis has signed only three individual access agreements, all with the main demanding operator of these services, Axión.



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Quality discrimination may be of particular importance in the Reference Market, given the importance of this type of commitment when it comes to negotiations with television concessionaires (taking into consideration that in Spain it is the concessionaires who have contracted population coverage obligations for the positioning of Digital Terrestrial Television). In these circumstances, the existence of operative or technical problems would normally signify the termination of the contract with a television concessionaire, who would be unable to determine if the cause of the problems is attributable to the previous operator or to errors in planning by the new entrant operator. Quality discrimination can also occur through, on the part of Abertis, the offering of space to the new entrant operator in locations or elevations that are not as good as those used by the SMP operator for the provision of determined services, and so resulting in poorer quality of the same.

- Cross-subsidies

This last tactic is particularly relevant given the established timeline for the transition from analogue broadcast mode to digital broadcast mode (the only mode available after the analogue shutdown in April 2010).

In this context, and given that Abertis currently holds all the national level contracts for analogue mode broadcasting of television signals, the SMP operator could use income obtained through the lending of services in analogue mode to finance activities related to the provision of the same service in digital mode.

As previously noted, Abertis is the only operator capable of offering national coverage. However, the regional operators could, in theory, offer national broadcasting services in those territories that have coverage. In these cases, a national broadcaster would find only the unbundled purchase of the services for different geographic zones (plaques) viable if the sum of the same represents a lesser price than at the national level. Given these determining factors, the SMP operator would have incentives to develop cross-subsidies between the most competitive zones and those plaques in which there is no existing alternative network – due to which the broadcaster must go to this operator – in order to ensure that the entry into partial zones in this manner is not viable.

IV.5.3 Obligations to be imposed

The following problems regarding competition have been identified in the Reference Market and also in relation to digital broadcasting services, and have been deemed as in need of regulatory treatment: (i) denial of supply/access; (ii) dilatory tactics; (iii) quality discrimination and price discrimination. The obligations that refer to these competition problems shall apply solely to digital technology. Moreover, given the links that exist between this technology and analogue broadcasting, potential risks of cross-subsidies have been identified



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that must be subjected to specific regulatory obligations and that, therefore, apply to the provision of services through both technologies.

Given the above stated problems, the following section details the obligations that, in accordance with the Access Directive and in accordance with the Common Position, could contribute to the resolution of said problems.

IV.5.3.1 Access obligation

In relation to the refusal to supply, in order to solve the problem it is necessary to:

- (i) Ensure access to associated resources; and
- (ii) Fix an adequate price and conditions for the resource being used.

Item (i) is resolved through the application of Article 10 of the Market Regulation (Article 12 of the Access Directive) which establishes that the Member States shall ensure that all reasonable requests for access to specific elements of networks and resources associated with the operators with SMP in the wholesale market are satisfied, as well as those requests related to the use of the same.

IV.5.3.1.1 Obligation to provide access to specific elements of the networks and associated resources

IV.5.3.1.1.1 The obligation of interconnection versus co-location: Advantages and disadvantages

- a) Improvements in efficiency of provision of the service

Prior to the election of the obligations to be imposed on the topic of access, it is necessary to determine their effectiveness in light of the objectives of Article 3 of the LGTel, relating to the binomial promotion of competition—promotion of efficient investment and innovation, objectives that have been mentioned before. Likewise the assessment can be guided by the Common Position of the ERG mentioned earlier.

From the description of the components of the transport and broadcast chain, contained in Annex 3, it is possible to draw conclusions about the potential for competition in relation to differentiation of offers and innovation associated with the control of the various elements that form said chain.

There is no doubt that the civil works resources, sites and towers, controlled by Abertis constitute an infrastructure that is difficult to replicate, especially when taking into consideration the factors of antennae orientation and the costs of change, as already mentioned.

In contrast, other network resources that are controlled by Abertis, such as the transmission systems and the equipment chain, are resources that are available



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in the market, whether referring to the equipment or the engineering design of the network. It is true that said investments are based on a dominant position in the market, but that does not imply that a more efficient new entrant with a reasonable capacity to invest could not enter successfully into said market.

As shown in Annex 4; there are two options in relation to the access obligations when considering the reference market: co-location and interconnection. With this and in view of the objectives stated in article 3 of the LGTel, the most justified and proportional option for the identified fault in the market must be analysed.

Thus, it is a fact that provision of the television broadcasting carrier service through the use of a wholesale interconnection service would leave the alternative operator practically without any ability to differentiate its offer with respect to the incumbent operator. This is because the alternative operator that achieves access to this wholesale mode is in a situation where its capacity to innovate and differentiate is greatly impaired due to lack of control over the technical elements of the network.

However, in the case of the television broadcasting carrier service market, there exist some characteristics that minimise said potentials for improvement of efficiency, detailed as follows:

- Improvements in the efficiency of commercialisation and in the level of service.

The clients in this market are radiobroadcasters, of which there are few (barely half a dozen) and they possess high-tech equipment and their own technical services. Their knowledge of their own necessities and technology is equal to or better than that of the broadcasting carrier service, for which reason, in this case, the added value associated with the commercialisation of mass services is practically non-existent.

Furthermore, as detailed in Annex 3, the level of quality of service in a network lies in the sizing and operation of said network, both aspects of which are found in the service provided by the incumbent when the alternative operator contracts the interconnection service. In this case the new competitor can do nothing more than transmit to its client the level of service as been previously agreed and contracted with Abertis. In this sense, intermediation leads to a decrease in efficiency of the service, since it extends the chain of interaction through the addition of an intermediary which, moreover, does not add any value, and which can be hardly compensated for by using earnings taken from the increase in the options for provision of the service that are generated by a new competitor.

- Improvements in price efficiency



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The alternative operator of a wholesale interconnection service could introduce greater efficiency by decreasing its own margins, reducing the difference between what it charges for its services to the radiobroadcaster and what it pays for the interconnection service.

Given that the incumbent is subject to the non-discrimination obligation, in accordance with the obligations imposed in the first round of the market review, the margin between its wholesale interconnection prices and retail prices must be such that they permit reasonable profit to downstream businesses involved in the provision of the service.

However, as we have seen above, the value added to the wholesale interconnection service is insignificant. So much so, that the most substantial difference is in the contribution of a transport network (for which the market is basically competitive). In fact, on the base of a regulated wholesale interconnection service, the radiobroadcasters themselves could find vertical integration attractive, buying on the one hand said wholesale service, and on the other a connection service to whichever transport network supplier (for example, an operator with satellite communications service).

To summarise, it is possible to conclude that the general utilization of an interconnection service does not introduce efficiency and does not allow differentiation in the market.

b) Application of the theory of the ladder of investment in this market in order to facilitate the introduction of efficient competitors

Nonetheless it may be considered that, in accordance with the theory of the ladder of investment used as a basic reference in the regulation of other electronic communications services, an interconnection service could be a useful instrument to an alternative operator in facilitating access to the market. This is because, without the need for high investment spending, the alternative operator could capture the market and income with which it could balance the economies of scale and scope of the incumbent operator. In this way, as the entrant captures its quote of the market (and the income and cash flow that come with it) it can put its own infrastructures in place of the wholesale services.

Even though this theory has served, although with difficulties, the gradual entry of alternative operators in the mass markets of fixed telephone services and access to broadband Internet, it does not produce the same effect in this market. This is due to the fact that, for its very nature, gradual entrance does not take place neither at the client or site level.

- Modulation of client attraction costs



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Given that we are discussing a market in which the demand is very concentrated (due to regulatory conditions that limit the number of radiobroadcasters), the steps of this “ladder of investment” are so high and the available cash flow so scarce (by cause of the low added value obtained through interconnection) that the effect of the correlation of the investments to the market quota is virtually inexistent.

- Modulation of investments in coverage corresponding to a client

A possible reduction of the barriers to entry through the interconnection service would result from the permitting of a lower initial investment, given that the alternative operator could choose the sites with interconnection and those with co-location. In this way the alternative operator could reduce the investment necessary to gain the market, in such a way that it would advance up the ladder of investment site by site inside the area of coverage of the same client. That is to say, initially the alternative operator would offer the service to its client through a greater use of the incumbents’ network, to afterwards substitute the interconnection service with the co-location service that would bring a greater margin.

However, it does not seem that this strategy, which has worked up to a certain point in the mass markets, will show results in the reference market.

This is because the reference market is a replacement market, defined as that in which competition does not generate market growth given that both the number of clients and the coverage of the same do not depend on the competitive situation but rather they are prefixed by the regulation of the public service.

In these circumstances, the proportionality of the obligations of access must be analysed given the existing risk that the incumbent operator may not be able to recover the investment made for the provision of the wholesale interconnection service.

In summary one can conclude that the application of the ladder of investment theory in the form of an interconnection service with the option of co-location would not be effective in a replacement market, such as is the reference market.

d) Interconnection as an optional access service to co-location

The previous analysis and evaluations of the interconnection service do not prejudice the fact that the existence of technical or economic conditions that make the broadcast of the service by an operator as efficient as the incumbent unfeasible and that uses the wholesale services of co-location.



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Based on this, in the Services Report submitted for public inquiry a series of criteria were established of technical and economic nature, and based on which it was estimated that it would result appropriate to supply a service of interconnection with option to co-location.

In this respect, Abertis affects a series of considerations in relation to the obligation to interconnection as defined in the CMT Report on Services.

In general, Abertis defends that it needs to maintain the principle proposed in the first round of market review, under which the main obligation is that of co-location, and only in a subsidiary manner should be interconnection.

In relation to the criteria set out in the Report given to public inquiry for the determination of the obligation to interconnection as an optional mode (and not simply subsidiary), Abertis recognises – in line with the criterion in the Report – that interconnection as a mode with option to co-location could result appropriate when based on the following: (i) non-substitutability of the sites; or (ii) saturation of the available space. However, in relation to the remaining criteria defined in the Report (existence of public finance; reasons of marginal coverage which *de facto* mean that the duplication of the equipment results inefficient) Abertis understands that there exists an unclear definition which leads to legal uncertainty and brings with it the risk that conflicts shall arise in relation to the mode of the access applicable.

Attending to the above allegations, it can be seen that there exist two assumptions, based on motives of a technical nature, where it undoubtedly results pertinent to establish an obligation to optional interconnection: (i) non-substitutable character of the site; or (ii) saturation of the available space. However, in relation to the remaining original criteria, it should be recognised that, in order to have the necessary legal security it is necessary to fix a more objective parameter, based on motives of an economic nature, so that on the one side the operator with SMP can know beforehand what is its obligation, and on the other, the alternative operators can anticipate their network planning and therefore their investment needs based on the existing regulation.

In this sense, on top of the two criteria of a technical nature that have already been discussed, the interconnection as an optional mode will be appropriate in relation to those centres of Abertis's national network destined to satisfy the criteria of population coverage superior to the 93% anticipated by the industry legislation.

The percentage established in the previous paragraph is justified by the unquestionable fact that the coverage requirements set out in the PTNTDT as well as the extensions of coverage not foreseen in same but that can be agreed with the television concessionaires, are such that the efficient duplication of said infrastructures is unfeasible.



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That is, even in a hypothetical situation in which the duplication was feasible from a technical point of view, such productive inefficiencies would be produced in the market at the economic level that they would rend ineffective any regulatory measures adopted with the objective of promoting sustainable competition that at the same time promote the encouragement of efficient investment and innovation. Said duplication would lead to a *de facto* disproportionate increase in the production costs without any type of positive correlation with the added value of the output generated by said increases in costs, being that they would produce neither significant increase in the population coverage nor increase in the demand.

The previous conclusions that result from an irreproducibility of economic nature of the potential coverage that the incumbent operator could reach (and therefore placed it in a competitive position against the radiobroadcasters, unreachable by any alternative operator) are determined by two key factors: (i) the number of incremental centres that are to be incorporated into the network and in which therefore should co-locate the alternative operator in order to achieve an increase in coverage which is almost negligible from a quantitative point of view, and (ii) the exponential growth in the cost of co-location that said operator would have to assume in order to have presence in said centres.

In this sense and in order to quantitatively value the increments in costs that the entrant operator must incur, as well as the increases in coverage that they would reach, an estimation of same is being calculated from the information collected in the model audited by this Commission of Abertis's cost accounting for 2006. The results obtained are as follows:

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In conclusion, the CMT understands that the additional cost of production that such a circumstance would incorporate into the market would provoke an inefficient duplication of infrastructures, a circumstance which is contrary to the objectives covered in Article 3 of the LGTel.

- e) Comments from the European Commission in relation to the effectiveness of the solution with regards to access

The European Commission noted in its written comments that *"it is not convinced by the information in its power that in Spain there is a true demand for co-location. For this reason the CMT is requested to supervise closely the entrance in the market via co-location and, as it is necessary to facilitate entry in the market, to consider the possibility of imposing a general obligation of interconnection. The Commission indicates that this general obligation to interconnection could be subject to time constraints with the goal of maintaining an incentive for new entrant operators to invest over time in the deployment of their own infrastructure ('ladder of investment')"*.



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This Commission considers that, in accordance with previous arguments, the current configuration of the obligations to access reach a fair balance between the regulatory objectives of promotion of effective investment in infrastructural materials (Article 3[a] of the LGTel) and the promotion of effective competition in the market being analysed.

Thus, the Commission has opted for a double modification in relation to the services of co-location and interconnection.

On the one hand, for those centres in which the entry of a third party operator results reasonable and technically feasible, this Commission has reinforced the obligations on Abertis with the objective of facilitating the co-location of its equipment (publication of an offer of detailed reference).

In regard to those centres in which coverage is much reduced, where the co-location of operators is very improbable, the present review of market 18 amplifies the possibilities of the provision of the broadcaster carrier service through the mode of the interconnection, establishing interconnection as an optional service rather than a subsidiary service for a significant number of centres.

This Commission believes that the limitation of the duration of the obligations to interconnection to promote the development of alternative networks, as proposed by the European Commission, may not be effective at this time due to the irreproducibility, even in the long term, of the smaller centres. For this reason, an extension without a limit on time for the obligation to interconnection combined with the obligation to co-locate in the more attractive centres of Abertis's network has been chosen.

On the other hand, the change in the regulatory model already provided for the interconnection in the first round of the markets (interconnection centre to centre, substituting this scheme with the interconnection to higher levels of the network) would result in the need to develop new control mechanisms, including the definition of the new service, or the preparation of the model of accounting of costs for the inclusion of said service, that could provoke further delays in the effective implementation of the obligations. The conclusion is, therefore, that the mode of optional interconnection, centre to centre, as reflected in this Resolution, is a suitable obligation in response to the problems detected in the market.

IV.5.3.1.1.2 Obligation to access in co-location and interconnection modes

The obligation to access shall be applied to the totality of the national network of Abertis's broadcasting centres. In this sense, all centres through which Abertis provides the television broadcasting support service are understood to be included, irrespective of the title held by Abertis over such infrastructure.⁵⁷



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This obligation to access shall consist of:

- Facilitating co-location⁵⁸ or other forms of sharing of installations, including buildings, towers/masts and other elements of infrastructure in the broadcasting and relay transmitters of Abertis;
- Offering interconnection⁵⁹ services as an option in place of the previous obligation to co-location in anticipation of the potential limitations that would make the implementation of an efficient co-location solution impossible. The generic criteria that determine the viability of the mode of co-location would be those of technical and economic in nature as detailed in the previous section.

The previous obligation to access seeks to limit the barriers to entry that are faced, in accordance with the previous points, by a potential entrant when it comes to offering broadcasting services. In this sense, the entire infrastructure to which Abertis gives access in virtue of the present obligation, being co-location or interconnection, must be sufficient to ensure, effectively, the reproducibility of the requirements of coverage that the broadcasters, applicants of the reference market, have imposed upon them. In particular, this Commission concludes that the co-location only ensures the technical reproducibility of the broadcasting services of Abertis if the entrant operator can reach levels of coverage similar or greater than those of this operator as much for the whole network (number of centres where Abertis has the obligation imposed) as for a particular centre.

Moreover, in order to limit possible conflicts of access and the period necessary for an alternative operator to effectively access the centres of access, it is sufficient to complement the obligation to access with sufficient information in relation to the same (in particular, feasibility of the co-location) and establish Standard procedures to facilitate requests on part of the alternative operator. In accordance with the experience accumulated in the first period described in the

⁵⁷ In particular and in accordance with the Resolution of the Commission of the Telecommunications Market (CMT) dated 25 October 2007, Abertis must include the rights to use and the network resources available in the space that corresponds to its position as Partner User in the Torre Collserola telecommunications infrastructure.

⁵⁸ Co-location is defined as the leasing of space for the physical placement of the equipment of the legally authorised operators in the available physical spaces within the infrastructure of the network operator with SMP, and is understood to include, in general terms, the provision of access to an energy point, secure conditions, and conditions suitable for the installation of the equipment employed by the operator applying for access. For a more detailed description see Annex 4.

⁵⁹ Interconnection is defined as the physical and logical linking of the networks of the alternative operator and those of the operator with SMP in those points of the television broadcasting network where same would be deemed viable. The interconnection of the network of the alternative operator is considered viable in the multiplexers and antennae for the diffusion of television signals, without prejudicing that the parties may freely and indiscriminately agree interconnection in other points of access. For a more detailed description, see Annex 4.



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previous point, when the Commission imposed similar obligations on access, the absence of these factors has hampered the effective entrance of the alternative operators to the market.

IV.5.3.1.1.3 Limitations to the obligation on access

In relation to the type of services that can be provided from Abertis's centres, the content of the obligation on access is generic (obligation to attend to the reasonable requests for access to the network), for which the access must be guaranteed regardless whether the range of coverage of the alternative operator be national, regional or local.

This means that Abertis cannot limit access based on the use that is going to be made of its centres or of the technology that is going to be used by the alternative operator, as long as the service to be provided consists of the diffusion of television signals. To establish limitations in relation to the range of coverage of the service implies denying entrant operators possible synergies derived from the economies of scale and scope that they could obtain through the provision of various services (for example, to local as well as regional concessionaires) and that could provide in the medium-term advances in the provisions package until accessing – if it is the case – higher levels of coverage (including the provision of higher level services).

Ultimately, any limitation in relation to the range of coverage of the service that the alternative operator is planning to provide (for example, the denial of access to levels inferior to the national) would be understood as a violation of the measures proposed in the present Resolution.

IV.5.3.2 Non-Discrimination Obligation

Furthermore, in the case of the obligation to give access to specific resources of the networks and their use, as has been indicated that they cover possible significant dilatory tactics such as the discrimination of quality and prices, for which the effectiveness of the obligation on access must be assured through the additional enforcement of the obligation to non discrimination (Article 8 of the Regulation; Article 10 of the Access Directive).

The non-discrimination obligation, as shown in the above rules, dictates that the operators with SMP in the wholesale market must apply equivalent conditions in similar circumstances to those operators that wish to provide equivalent services, and must provide services and information to third parties that is of the same quality to that which is provided to its own services or to its subsidiaries. In particular, non-discrimination must refer as much to the quality of the service as it does to the delivery deadlines and other conditions of the supply, regardless of the physical location from which the request originates.



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In line with the findings of the first round of the market review, in order to control the compliance with the Non-Discrimination Obligation, Abertis must make available to the CMT any agreements signed with third parties within 10 days from the formalization of any such agreement.

IV.5.3.3 Transparency Obligation

IV.5.3.3.1 Reference Offer

As the quality of the service is difficult to observe exclusively by the regulatory authority, and in order to enable that the negotiations of alternative operators with Abertis are completed as rapidly as possible and reducing potential conflicts of access, it is necessary to impose upon Abertis the Transparency Obligation in the provision of access services to its network. This obligation implies that Abertis is obliged to publish a Reference Offer for the provision of the wholesale access service sufficiently broken down to guarantee that they do not demand payment for resources that are not necessary for the required service.

Indeed, the implementation of the Transparency Obligation based solely on the referral of written agreements between Abertis and the third party operators, with the reduced possibility of intervention on part of the regulatory authority unless there is a conflict, brings with it the risk of infringement of the position and bargaining capacity of third party operators, in a market which is characterised by the presence of an operator with SMP on which is imposed the Access Obligation and where determined aspects of the offer could result crucial for the correct development of the market targeted for regulation. It cannot be forgotten that in every access relationship in which one of the parties holds SMP, the capacity in negotiations is clearly unequal, for which reason it will be necessary to impose upon the obligated a series of accessory obligations of the type that would ensure the effectiveness of the recognised rights of the operators applying for access. In this way, the enforcement on Abertis of the obligation to offer a Reference Offer shall become a key tool when it comes to solving the problems detected during the previous period, allowing not only the negotiation between Abertis and third party operators, and reducing potential conflicts of access, but also facilitating the work of the CMT in making whatever non-competitive behaviour on the part of Abertis more visible.

Article 7.2 of the Market Regulation establishes that the CMT “*could determine the concrete information that should be contained in said offers, the level of detail required and the method of publication or presentation to the interested parties, taking into account the nature and purpose of the information in question*”, while Article 7.3 states that the CMT could introduce changes in the offers and will establish for each type of offer “*the procedure for its application*”.



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In this context, the Transparency Obligation implies a guarantee that the operators can provide and demand all necessary information about the conditions of access to the centres of Abertis (including the prices, maximum apparent radiated power, software maps of coverage, etc.) through the open and, as much as possible, standardised information instruments.

Without prejudice to other relevant information that the CMT may require of Abertis, it is enough to say that the proposed Access Obligation implies that Abertis must facilitate the co-location of the necessary equipment in its centres and, as an option, offer the interconnection to third parties in accordance with the criteria established in point IV.5.3.1.1.1.

In accordance with the experience obtained since the first regulation of the reference market, the CMT considers that, in order to make this obligation more effective it is necessary that Abertis includes information in the Reference Offer regarding the centres in which, given the existing technical conditions and in accordance with the criteria established in the point mentioned before, it considers that the interconnection service is configured as the optional mode of access for those operators who request access to same. This information, which must be updated at least every four months, is essential for a potential entrant operator in the process of evaluation of the possibilities of accessing the market as well as its potential for profit.

The implementation of this mechanism could be developed in a relatively short period, taking into account the experience acquired in market regulation over previous years. The reference offer herein proposed would be developed by Abertis, and would serve as a basis for the implementation of the proposed obligation. In this sense, it is estimated that the enforcement of a period of four months in which Abertis can communicate the wholesale offer to the Commission and the interested parties is a reasonable period of time. Said offer would be available for the market, without prejudice that, at the time and if it is then deemed opportune, the CMT could proceed to adapt it with the goal of adjusting it to the imposed obligations.

IV.5.3.4 Obligation to the Control of Prices, Accountability of Costs and Separation of Accounts

According to point ii) of the Common Position, in those cases in which an access obligation is imposed it could result necessary to fix an adequate price for said access. In effect, before the sole enforcement of an Access Obligation, the operator with SMP may have incentives to fix some prices at excessively high levels and engage in practices of cross-subsidies and price discrimination with the goal of blocking the entrance of the competitors.

The fixing of prices by the regulator is therefore necessary, the enforcement of additional obligations also being appropriate, such as the accountability of costs



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with a sufficient grade of breakdown of services and elements of the network to allow the estimation of the costs of production for said services (Article 11 of the Market Regulation; Article 13 of the Access Directive), and the separation of accounts (Article 9 of the Market Regulation; Article 11 of the Access Directive). These obligations allow the CMT to require the operator designated with SMP the information of costs, sufficient in order to ensure the completion given that, in accordance with Article 13 of the Access Directive, *“the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie on the operator concerned”*.

In line with the previous market review, the price of co-location access oriented on the basis of production costs is justifiable; given that Abertis's national network is not considered an infrastructure that can be replicated by third parties. The obligation for orientation on prices on the basis of costs of production is seen as a proportional measure, taking into account that Abertis's centres are resources that essentially cannot be reproduced, and the fact that the enforcement of unfair prices could have effects similar to those of the denial of supply and delay or even impede the entry of competition in the reference market.

Regarding the mode of access for interconnection, as much for analogue television broadcasting as for digital, in the report submitted for public opinion the possibility was raised of imposing regulations on price in order to ensure they would be kept at a reasonable level. However, it must be noted that a series of criteria have been determined in the present Resolution, of technical and economic character, which determine the viability of access in the co-location mode for a series of centres and the need to impose an Access Obligation on these centres in the mode of optional interconnection. Given the difficulty of gaining access to these centres via co-location (being for technical or economic motives), it would not make sense to modify the prices for access to these centres, and impose less favourable conditions for the alternative operators than there are now for the co-location mode, when de facto for these designated centres the interconnection mode is practically the only mode of access that is viable.

Finally, in relation to the obligations in terms of prices, it is of interest to recall that an operator with SMP has many possibilities for increasing the costs of the entrant operator or of reducing its potential demand, hampering its consolidation in the market.

For these purposes, the NRAs have the possibility of acting at the wholesale level (Articles 9.2 and 12 of the Access Directive) or in the downstream level. Indeed, the simple fact that the alternative operators rely on wholesale elements in order to replicate Abertis's offers is not in itself sufficient to impede that this operator implements non-competitive practices that affect downstream markets. In particular, regardless of wholesale regulation of prices, the operator with



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SMP could use non-competitive pricing policies, such as the fixation of predatory prices, the narrowing of margins between the wholesale services and the downstream services offered to the television concessionaires, as well as creating unfair or unjustified packaging. It is therefore proportional to impose an obligation on Abertis to clarify that said practices shall be prohibited and that they shall be deemed as contrary to the measures herein dictated.

IV.5.3.5 Obligations relative to the downstream markets

As has been indicated, the main problems in relation to competition that could happen are derived from the extension of the dominant position of Abertis from the reference wholesale market to the downstream market (operator–concessionaire TV companies ratio).

To be effective, the obligation imposed on Abertis must therefore be completed with an additional obligation covering the downstream market. This Commission understands that it is proportional to impose on Abertis the obligation to communicate *ex ante* to the CMT the pre-agreements entered into with clients (the television concessionaires) as well as whatever modification of the contracts that are already signed as much for analogue broadcasting as for digital broadcasting, to the end that, before the contracts are signed, this Commission can supervise the correct functioning of the reference market and related markets.

In effect, the CMT must ensure that the wholesale conditions are such that they ensure the competitive equality between the operators in the downstream markets. In this respect, the immediate communication of the said pre-agreements with the television concessionaires shall permit the CMT to verify if these are compliant with the imposed obligations and proceed, in contrary, to the immediate modification of the wholesale conditions with the purpose of permitting the economic reproducibility of the offer presented by Abertis in terms of new prices for access.

Previously, links have been highlighted between the offers in relation to analogue and digital broadcasting services, bring to the fore potential risks of cross-subsidies between the two (Abertis turns out to be the only operator with prospect of providing the analogue services). It is therefore necessary to supervise not only the offers and modifications of the same that Abertis undertakes in relation to the digital services, but also to analyse that the modifications in the conditions of provision of the analogue services do not lead to an increase in the competitive pressure in the digital services.

The possibility of imposing obligations in related markets on operators with SMP in order to verify the correct compliance of the wholesale obligations is foreseen



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in the current legal community framework. Article 5.1 of the Framework Directive states that: *“Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. These undertakings shall provide such information promptly on request and to the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task [...]”*.

The obligation herein proposed is therefore fully compliant with the current regulation framework.

Without prejudice to the above, it is necessary to establish a mechanism that, as far as possible, shall be as little intrusive as possible in the normal evolution of negotiations between the providers and the requestors of the services subject to the reference market. Departing from the anterior, the negotiations would be hampered if Abertis were required to communicate to the CMT each and every one of the successive offers that could be produced through the same. In order to take this aspect into account, and without prejudice to the fact that Abertis could logically communicate its offers with greater time in advance, and could also communicate not only the pre-contracts but also any linked offers that are not yet accepted; it is deemed reasonable to impose on Abertis the obligation to communicate to this Commission any agreements (or more appropriately pre-agreements) to which it comes with the television concessionaires one month previous to the effective signing of the corresponding contracts, as much with a new contract as with a modification of an existing contract and as much in relation to analogue broadcasting as with digital broadcasting. This period is estimated to be sufficient to guarantee preventative action on part of the CMT in case that, after reviewing the communication, it is deemed necessary to proceed to the modification of the regulated wholesale prices.

In addition, with the goal of verifying that the final signed contract corresponds with what has been communicated, it is necessary that Abertis forwards the final contracts as signed as agreed with the television concessionaires with 10 days of their formalisation.

V WHOLESALE MARKETS OF THE CARRIER SERVICE OF TELEVISION SIGNAL BROADCASTING IN GEOGRAPHICAL AREAS INFERIOR TO THE NATIONAL LEVEL

In accordance with the definition of the reference market, the wholesale market for television signal broadcasting in Spain consists of three separate geographic markets. In the previous section it was demonstrated how the national market met the criteria established by the European Commission. It has also been



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established that the market did not develop in an effective competitive environment, identifying Abertis as the operator with SMP. Finally a series of specific obligations was proposed for this operator.

Given the above, it is necessary to determine if the rest of the defined geographical markets shall also meet the three criteria and therefore be object of *ex ante* regulation.

V.1 Wholesale market of the carrier service of the broadcasting of television signals in a regional level

V.1.1 Presence of non-transitory entry barriers to market access

The CMT believes that there exist elements that can lead to the conclusion that there is a presence of non-transitory barriers to entry in the reference market. Indeed, given the size of certain Autonomous Communities the stranded costs, the investments that must be made and the network necessary to cover said territories would be relevant. It should be taken into consideration that these variables depend on the area intended for coverage in accordance with the coverage objectives legally imposed upon the broadcasters. In fact, as can be observed from the following table, the area of some Autonomous Communities is notable, perfectly comparable to that of some of Member States that have identified this market and have had *ex ante* obligations imposed upon them.⁶⁰ Also, the population density of the Autonomous Communities with the largest land area is very low compared with the European Community average.

Illustration V.1.1 Comparative study of land area of the Spanish Autonomous Communities and certain Member States

Autonomous Community	Area (Km ²)	Area (Km ²)	Member State
Castilla y León	94.225	93.030	Hungary
Andalusia	87.598	92.391	Portugal
Castilla-La Mancha	79.462	83.870	Austria
Aragón	47.720	48.845	Slovakia
Extremadura	41.635	45.226	Estonia
Catalonia	32.113	41.526	The Netherlands
Galicia	29.574	20.253	Slovenia
Valencian Community	23.255		
Murcia (Community)	11.313		
Asturias (Principality)	10.604		
Navarre (Chartered Community)	10.390		
Madrid (Community)	8.028		
Canaries	7.447		
Basque Country	7.235		
Cantabria	5.321		

⁶⁰ These Member States have been chosen based on their total land area, similar to some Spanish Autonomous Communities.



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La Rioja	5.045	
Balearic (Islands)	4.992	
Autonomous City of Ceuta	19	
Autonomous City of Melilla	13	

Source: Prepared by the Commission based on data from INE and Eurostat

These elements lead to the conclusion that the existing barriers to entry against the provision of carrier television signal broadcasting services in the regional area are elevated. Additionally the operators that are providing the carrier broadcasting services in the regional area have done so at public initiative with the object of distributing the regional television signals in their area of coverage.

V.1.2 Persistence of barriers to entry given the obligations imposed in the national market

At the time of evaluating the structure of the reference market as well as whether regulation of a market is appropriate, the possible existence of competition problems must be evaluated in an environment where there are no existing regulatory measures in the reference market, but there are in other downstream or narrowly related markets that could be relevant at the time of execution the analysis (“modified Greenfield approach”).

In relation to the market being discussed, attention must be paid to the obligations that have been imposed upon Abertis as an operator with SMP at the national level. As detailed as follows, the existence of obligations in the national market permits us to conclude that the enforcement of additional measures at inferior levels (regional level) is unnecessary and would be disproportionate given the nature of the problems identified.

The main problems regarding competition that could occur at a regional level derive from the use of the centres that make up the national network of Abertis for the provision of services at the regional scale. Indeed, the barriers to entry that have been identified at the national level subsist firstly at the regional level, before the elevated number of centres that should be employed for the provision of the services in certain Autonomous Communities given the elements previously stated.

However, the centres necessary for the provision of the regional service are essentially the same ones that Abertis would be using for the provision of the service at the national level. So, given that the access obligation has been fixed in the previous section regardless of whether the area of coverage of the alternative operator is national, regional or local, said obligations solve the main



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problem detected in the regional areas (existence of barriers to entry derived from access to the necessary centre for the provision of the service).

Furthermore, given that the centres over which the access at regional level is structured will be the same that are used by Abertis, the same problems that were identified at national level in relation to the incentives of Abertis to carry out possible practices of margin squeezing arise. Again, these possible problems found solution through the measures imposed at a national level, where the obligation to the communication of prices and the applicable conditions to the offers made to the television concessionaires have already been imposed upon Abertis. Complying with the indicated in the Explanatory Note of the Recommendation of the markets, the NRAs are enabled to obtain all the information that they consider necessary in order to guarantee the compliance of the obligations⁶¹ (in particular, in case of potential narrowing/squeezing of prices and margins), which permits the conclusion that the pertinent obligations at the national level in relation with possible margin squeezing tactics are also apt to remedy potential problems relating to competition at the regional level.

In relation to the established obligation in relation to the control of prices, the access to the centres for the provision of the regional service must be guided by the same criteria as the national access, taking into consideration that, at least for the mode of co-location, the access that Abertis is offering is the same regardless of which service is going to be offered.

To conclude, this Commission believes that the obligations imposed on Abertis at the national level in relation to access to the national network (where the obligation exists regardless of the type of service that is to be provided from the centre) as well as in relation to the control of possible practices of margin squeezing (with the considerations dealt with in the present section) are sufficient to understand that, in a “modified Greenfield approach” environment, the problems regarding competition that could occur are not such that they justify possible *ex ante* regulation in the market of broadcasting at the regional level.

The European Commission in its commentaries stated that *“some autonomous communities are being attended to by operators other than Abertis, and that these operators have a market quote of 100% in their respective regional*

⁶¹ Explanatory Note, pages 18-19: *“When there is regulation at wholesale and/or retail level, the possibility of price or margin squeezes can result from regulatory intervention and it should be assessed in that context. That often involves checking the structure of regulated prices or the aggregate of services over which possible margin squeezes might arise. Article 5 of the Framework Directive provides NRAs with the legal basis to obtain any and all pertinent information, regardless of whether the market is identified in the annex to the Recommendation. This applies not only to costs but also to retail pricing in order to allow the NRA to establish and monitor justified and appropriate remedies with respect to wholesale access”.*



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markets, for the provision of regional television". In the same respect, we are reminded that the ability to access the reference market is essential to ensure the compliance with the second criteria, that is, the tendency towards effective competition. Finally, it is estimated that "in order to evaluate clearly to what extent the barriers to entry in these regional markets are reduced, the Commission invites the CMT to oversee the situation of the competition in these markets, most of all in the procedures of awarding of contracts, and, if necessary, to realise an analysis of the market with the objective of determining with precision the necessity for the enforcement of solutions".

This Commission considers it necessary to state that the enforcement of obligations in regional and local markets was not proposed in the market review. However, it is neither possible nor adequate to limit the wholesale services of co-location regarding the area of broadcasting for which the imposed obligations permit the requests for access for the provision of regional and local services.

This being said, in relation to the barriers in the regional market in which Abertis is not present, it is necessary to indicate that this does not limit the previous access obligations. Therefore, regardless of the situation in the regional market in as much as the presence (or lack) of alternative operators to Abertis that may provide the carrier service in said area, in such that the latter provides its support services at the national level, that is, possesses a network with sites in the entire territory, the obligations imposed in the framework of the present market ensure sufficient access for all of the operators that opt to provide their services regionally or locally.

All of this without prejudice to that, if it is estimated to be opportune, this Commission can make use of the faculties that are presently conferred by the regulatory framework (such as the possibility to obtain all of the information deemed pertinent, according to Article 5.1 of the Framework Directive or Article 9 of the LGTel) with the goal of ensuring the correct development of competition in the markets.

V.2 Wholesale market of the carrier service of television signal broadcasting in local areas

In relation to barriers to entry in the market of the carrier service of broadcasting in local areas, it can be stated that the requirements of digital local television are not comparable to the requirements in demand at the national or regional level. Therefore, it is possible to provide local services from low-altitude sites and with smaller ranges for broadcasting, something which enables the use of sites that would not be adequate for the services analysed previously.

On the other hand, as indicated previously, the regulation imposes that the broadcasting centre that the concessionaire uses be situated within the corresponding demarcation. This means that the centres of Abertis's national network may not be suitable for the provision of the carrier service in the local



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area. Additionally, given the technical characteristics before stated, the carrier service can be replicated in any case by an entrant operator.

In any case, the wholesale obligations imposed on the national market are not limited to operators that provide the carrier service at national level but that can also be used for the provision to local areas. For these motives, the CMT estimates that the wholesale market of the carrier broadcasting service does not have elevated non-transitory barriers to entry.

In this case, and in line with the predicted for the remaining geographic areas, Abertis must offer access in the mode of co-location and interconnection at prices based on the costs of production. Finally, if the potentially the margin-squeezing problems would be similar to those existing in the national and regional markets, the number of demarcations means that the previous communication of the offers would be disproportionate.

Fourth. Notification and publication of the Measure

According to Article 7.5 of the Framework Directive and Article 5.4 of the Market Regulation, the Telecommunications Market Commission would consider in the greatest possible manner the observations affected by the European Commission and for the National Regulatory Authorities, and could adopt the resulting Legislative Bill, in which case, it shall be communicated to the European Commission.

Article 10.1 of the LGTel establishes that the Telecommunications Market Commission shall define *“through Resolution published in the Spanish Official Journal, the reference markets regarding networks and electronic communications services (...) and the geographic area of same, whose characteristics can justify the enforcement of specific obligations”*

In virtue of the considerations of law and fact, this Commission of the Telecommunications Market

RESOLVES

First. To approve the definition and analysis of the wholesale market of the carrier service for the broadcasting of television signals, and the designation of the operator with significant market power and the enforcement of specific obligations, such as is detailed in the Fundamentals of Third party Rights in the present Resolution.

Second. To consider that the wholesale market of the carrier service for the broadcasting of television in Spain is a reference market that could be subject to *ex ante* regulation, conforming to the Framework Directive and Article 10 of the General Telecommunications Law.



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Third. To determine that said reference market is not truly competitive, in the sense of the discussed in Section 4, Article 16 of the states Framework Directive and in the Section 3 of Article 10 of the General Telecommunications Law.

Fourth. To consider that Abertis Telecom, S.A. in the terms of Section IV.3 of the Fundamentals of Third party Rights, has significant market power in the stated reference market, in the sense of the definition in Section 2, Article 14, of the Framework Directive and in Annex II, Section 8 of the General Telecommunications Law.

Fifth. To impose upon Abertis Telecom, S.A. the obligations covered in Annex 1 of the present Resolution.

Sixth. To communicate to the European Commission the definition and analysis of the wholesale market of the carrier service for the broadcasting of television signals, the designation of the operator with significant market power (SMP) and the enforcement of specific obligations.

Seventh. To agree the publication of the present act in the Spanish Official Journal, conforming to Article 10.1 of Law 32/2003, the General Telecommunications Law, of 3 November.

Eighth. The present Resolution shall be valid on the day following its publication in the Official State Bulletin.

The present certificate is issued under the protection of Article 27.5 of the Law 30/1992, of the 26 November, and in Article 23.2 of the Consolidated Text of the Domestic Rules of Procedure approved by Commission Council Resolution of the 20 December 2007 (Spanish Official Journal of 31 January 2008), previously to the approval of the Law in the corresponding session.

Likewise, it is noted that against the present Law, a motion to set aside may optionally be set against this Commission within the timeframe of one month from the day following the notification or, directly, Administrative-Contentious appeal before Administrative-Contentious Division of the Spanish National Court, within the time period of two months from the day following notification, in accordance with the established in Article 48.17 of Law 32/2003, the General Telecommunications Law of 3 November, the fourth additional Disposition, Section 5, of Law 29/1998, of 13 July, Regulator of the Administrative-Contentious Jurisdiction, and the Article 116 of Law 30/1992 of 26 November, Regulation on Public Administration and Common Administrative Procedure, and without prejudice to the provisions of number 2 of Article 58 of the same Law.



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The present document is electronically signed by the Secretary Ignacio Redondo Andreu, with the Approval of the President, Reinaldo Rogríguez Illera.



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ANNEX 1: OBLIGATIONS TO BE IMPOSED ON ABERTIS TELECOM, S.A.

All of the obligations that are detailed below shall be applied in relation to services of television broadcasting. In relation to the services of analogue broadcasting, only the obligations outlined in Section 1 shall apply (Obligation to enable third party access to the broadcasting centres of Abertis's network at regulated prices).

1.- Obligation to enable third party access to the broadcasting centres of Abertis's network at regulated prices

The effectiveness of this obligation requires the generic enforcement of the following obligations on the operator declared to have SMP:

- a) To attend the reasonable requests for access to specific resources of the national network and their use (Articles 13.1 d) of the LGTel and 10 of the Market Regulation; Article 12 of the Access Directive).

This obligation implies, among other aspects, that the operator designated with SMP must:

- a. Allow access to specific elements and resources of the network to third parties. This access obligation shall consist of:
- Facilitating co-location⁶² and other modes of sharing of installations, including buildings, masts and other elements of infrastructure in Abertis's broadcasting centres and relay transmitters;
 - Offering interconnection⁶³ services as an option to the previous obligation to co-location in foresight of potential limitations that could make the implementation of an efficient co-location impossible. The generic criteria that determine the viability of the co-location mode are detailed in Section IV.5.3.1.1.1 c) of the Resolution.
- b. Negotiate in good faith with those applying for access.
- c. Not revoke resource access authorizations already conceded.
- d. Concede free access to technical interfaces.
- e. Give third parties access to the operative support systems or to computer systems with similar functions.

⁶² Co-location is defined as the leasing of space in existing physical sites within the network infrastructure of the SMP operator for the physical placement of equipment belonging to legally enabled operators and shall include, in general terms, the provision of access to an energy point, security protection and the conditioning (cooling, etc.) necessary for the installation of the equipment used by the operator requesting access.

⁶³ Interconnection is defined as the physical and logical connection of the networks of the alternative operator and the SMP operator in those points of the television broadcasting network where same is viable. The interconnection of the alternative operators' network is considered viable in the multiplexers and antennae for broadcasting of the television signal, without prejudice that the parties can freely and indiscriminately agree interconnection in other points of access.



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With the objective of guaranteeing compliance with the obligation to attend to reasonable requests for access to specific resources to the networks and their use, Abertis must send all of the necessary information in order to guarantee said access to the third party operators who realise a request for access in co-location or interconnection.

Lastly, it must be stated that the previous access obligation must ensure technical reproducibility at least, being via either co-location or interconnection, of the coverage requirements that the broadcasters have imposed. In particular, the co-location shall ensure this reproducibility solely if the entrant operator can reach through said access the levels of coverage that are at least similar to those of Abertis as much for the entire network (number of centre where Abertis has this obligation imposed) as for a particular centre.

- b) To offer to those third party operators that so request them the services of access to Abertis's national network at regulated prices (Article 13.1 e) of the LGTel and 11 of the Market Regulation; Article 13 of the Access Directive).

Abertis must offer the services of access to its network to those third party operators who so request them at prices oriented in function of the costs of production, both for the modes of co-location and that of interconnection.

The CMT shall determine the system of cost accounting that should be applied, defining the format and the methods of accounting that must be used. This shall guarantee that Abertis makes public the description of the system for accountability of costs being used, therefore determining the form, sources and measures, conforming with Article 11 of the Market Regulation.

Referring to the model of costs, and in relation to the standards of historic and current costs, Abertis shall be obligated as established in the Resolution of 1 June 2006 about the format and method of accounting to be used by Abertis in its cost accounting systems;⁶⁴ as well as the Resolution of 14 June 2007 about the national cost accounting system of Abertis.⁶⁵

Given the position of Abertis and the business group in the reference market, the following practices, among others, are prohibited:

- Non-competitive reductions in price (margin squeezing or predatory prices);
- Abusive or unjustified bundling (enforcement of services that are not required, abusive pricing of the bundle, non-reproducibility on part of wholesale elements, etc.).

- c) To separate its accounts in relation to the activities of access (Articles 13.1 c) of the LGTel and 9 of the Market Regulation; Article 11 of the Access Directive).

⁶⁴ Procedure AEM 2006/649, on the accounting format and method to be used by Abertis Telecom, S.A.U., in its cost accounting systems

⁶⁵ Procedure MTZ 2007/298, on the national cost accounting system of Abertis Telecom, S.A.U.



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Abertis must separate its accounts in relation with the activities of access to the specific resources of its network. In particular, Abertis must be at the established in the AEM Resolution 2008/1230 of 20 November 2008 and successive reviews. The compliance with this obligation shall permit this CMT the control of compliance with obligation b) of the present Annex.

In as the operator integrated vertically, Abertis must manifest:

- The costs and margins of the different activities that it carries out and, in particular, ensure that those referring to wholesale access are clearly identified and separated from the costs of other services.
- The information necessary for this Commission to verify that Abertis does not carry out prohibited practices such as cross-subsidies between the reference services and other segments of Abertis's activities.

The CMT shall determine the format and methodology in which Abertis must comply with these obligations. In cases where the CMT does not determine said aspects, those established in the Resolutions cited in the previous section must then be used.

d) Communication from Abertis to the CMT of prices and conditions of the pre-agreements reached with television concessionaires in the national and regional areas and forwarding of the written contracts with cited television concessionaires (Article 13.1 e) of the LGTEL and 11 of the Market Regulation; Article 13 of the Access Directive).

The prices and conditions applied in relation to the services of analogue and digital broadcasting by Abertis or whichever company of the Group shall be understood as subject to the previous obligation. Furthermore this obligation shall apply over whatever modification in existing contracts.

This obligation implies that Abertis or whichever company of the Group shall be obliged to communicate to the CMT the agreements (or more appropriately the pre-agreements), reached with television concessionaires as much in the national area as in the regional areas with one month notification previous to the effective subscription of the corresponding contracts, and this as much when dealing with a new contract as with the modification of an existing contract and as much in relation to analogue broadcasting as with digital.

Abertis, must forward the contracts agreed with the television concessionaires in national and regional areas within 10 days of the formalization of the contracts.



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2.- Obligation to Transparency in the conditions of access

- a) Abertis is obliged to the publication of a Reference Offer for the provision of the wholesale service of access which is sufficiently broken down to guarantee that there is no demand to pay for resources that are not necessary for the required service (Articles 13.1 a) of the LGTel and 7 of the Market Regulation; Article 9 of the Access Directive).

Abertis must ensure that the Reference Offer that is available for the operators is coherent with the entire set of obligations detailed in this Annex. In relation with this obligation, Abertis must include, at least, the following elements:

- List of all of the broadcasting and relay transmitters of Abertis's national network, with specifications of the typology of the centre and its characteristics of power. Likewise, those centres in which, for the motives detailed and enumerated in Section IV.5.3.1.1.1 c), they must offer the service of interconnection as an option to co-location must be identified. Abertis must update this list within a time period of minimum every four months.
- Information regarding the area of service covered by Abertis in each one of the broadcasting centres, including software maps of coverage corresponding to the transmission systems, calculated for the high frequencies of the UHF band.⁶⁶ Abertis must specify the simulation software and the concrete parameters employed in the cited calculation.
- Maximum potential radiated power as has been fixed for each one of the centres by the Spanish Ministry of Industry, Tourism and Commerce.
- For those centres in which the mode of access is co-location:
 - The vertical plan of the tower (indicating the full height of the tower and the space offered for co-location) as well as the horizontal section showing the space offered for co-location. Only in cases where such information is not available, Abertis must supply a sketch to complement all of the accessory information available, with the following requirements:

⁶⁶ Coverage maps for at least one of the channels between 66 and 69, inclusive, shall be provided.



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a) Vertical sketch: must show graphically the available area for the co-location of equipment of the third party operator, explicitly indicating the dimensions of said space, its height in respect to the base of the tower and respecting the scale of the sketch.

b) Horizontal sketch: must show graphically the available area for the co-location of the transmission system of the third party operator, explicitly indicating the dimensions of said space, its height in respect of the base of the tower and respecting the scale of the sketch.

- Situation of the current legal viability of the site;
 - Information about the available surface in the shed, in a percentage over the total of the equipment room (this information must also be presented in absolute total values [available square metres] along with a plan of the floor);
 - Capacity of energy available;
- For those centres in which the access is realised through the mode of optional interconnection:
- Maximum potential supported by the multiplexer chain, lines of transmission, switch panel and transmission system;
 - Technical parameters for the delivery of the signal to the multiplexory chain (band of work frequencies for the equipment, separation of frequencies, potency of entry for each frequency);
 - Physical specifications for the multiplexer chain.
- Procedures and periods for the provision of the access services contemplated in the present measure.
- Economic conditions (reference tariffs for the access or use of the regulated services) including the indication of applicable prices for each one of the components of the offer in a sufficiently broken down manner.
- Service level agreements.
- Conditions with respect to the maintenance tasks of the systems or elements installed for the third party operator.



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In whichever case, the implementation of the previous parameters for Abertis do not necessarily suggest automatic compliance with the totality of the obligations established in the present Annex, and in particular with the non-discrimination obligation.

Abertis must make an offer available and communicate it to the CMT and to the interested parties in at least one of the central offices in Barcelona and in its Web page within the period of four months from the adoption of the present legislation.

Abertis must maintain the reference offer updated at least once yearly. If Abertis proceeds to make any modifications to the offer, this must also be communicated to the CMT.

In accordance with the established in Article 9.2 of the Access Directive and Article 7.3 of the Market Regulation, the CMT may issue a resolution motivated to urge the modification of the offer and also fixing the date from which it takes effect. In the case in which the Resolution does not expressly specify the period from which the modification comes into effect such shall take place two months from its adoption.

3.- Non-discrimination obligation in the access conditions

a) Non-discrimination in the conditions of access (Article 13.1 b] of the LGTel and 8 of the Market Regulation; Article 10 of the Access Directive)

Article 10 of the Access Directive details the scope of the application of this principle in the following terms: *“the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners”*.

Abertis shall implement the necessary means for the provision of the services contemplated in the present Proposal, supplying third parties with the resources equivalent to those it provides for its own services, or those of its subsidiaries or partner companies under the same conditions and within the same time frame.

In order to control the compliance with this obligation, Abertis must forward to the CMT within the timeframe of 10 days from its formalisation, the access agreements reached with third parties.

4.- Determination of the concrete access conditions

If the operators are unable to come to a voluntary agreement on access, the CMT shall make a decision based on the reasonability of the request for access, and, if so is the case, shall dictate the conditions of the agreement in order to guarantee adequate access, the interconnection and the



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interoperability of the services and the achieving of the objectives established in Article 3 of the LGTel (Articles 11.4 and 14 of the LGTel).

ANNEX 2. LOCAL GEOGRAPHIC MARKETS

Autonomous Community/Province	Number of demarcations/markets
Andalusia	60
Almería	4
Cádiz	8
Córdoba	10
Granada	6
Huelva	5
Jaén	8
Málaga	10
Seville	9
Aragón	17
Huesca	6
Teruel	5
Saragossa	6
Asturias (Principality)	9
Balearic Islands	8
Canary Islands	13
Palma (Las)	6
Santa Cruz de Tenerife	7
Cantabria	7
Castilla y León	30
Ávila	2
Burgos	6
León	4
Palencia	3
Salamanca	4
Segovia	2
Soria	3
Valladolid	3
Zamora	3
Castilla-La Mancha	30
Albacete	8
Ciudad Real	8
Cuenca	4
Guadalajara	3
Toledo	7
Catalonia	24
Barcelona	10
Gerona	5
Lérida	5
Tarragona	4
The Valencian Community	16
Alicante	7
Castellón	4
Valencia	5
Extremadura	19



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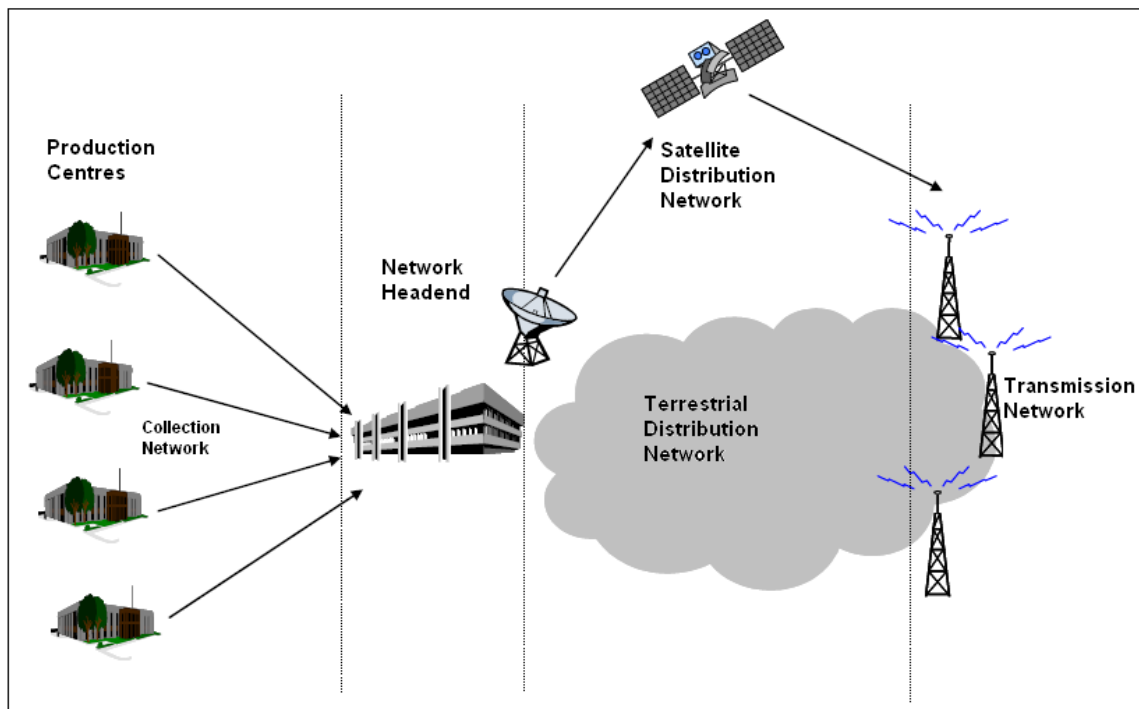
Badajoz	10
Cáceres	9
Galicia	24
La Coruña	7
Lugo	6
Orense	5
Pontevedra	6
Madrid (Community)	12
Murcia (Community)	9
Navarre (Chartered Community)	6
Basque Country	16
Álava	3
Guipúzcoa	7
Biscay	6
Rioja (La)	4
Ceuta (Autonomous city)	2
Melilla (Autonomous city)	2
TOTAL	308



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ANNEX 3. COMPONENTS OF THE TELEVISION TRANSPORT AND BROADCAST CHAIN

The following is a generic description of the components of the digital terrestrial television transport and broadcast chain, detailing the basic characteristics and parameters in which each section can be differentiated in the provision of the service.



1. Production centres

The compression and codification of video and audio signals according to the MPEG-2 standard are carried out in the studios of each enabled entity. Among the parameters that determine the quality of the service provided the following can be highlighted:

- Codification using next-generation systems (double pass, noise filtering, etc.), which optimise the quality perceived by the end user.
- Number and type of video and audio entry signals.
- Insertion of teletext.
- Establishment of optimizing conditions with the objective of maximizing the SLA's.

2. Collection Network

From the studios of the radiobroadcasters to the headend of the network there is an established link for the transport of video and audio signals and related information, as well as other information streams that make possible the



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management and monitoring of equipment from the headend. The most relevant characteristics are as follows:

- Reliability of the technology used; in general, fibre optic links are generally believed to be more reliable than radio links.
- Establishment of redundant transport links with the objective of maximising the SLA's.

3. Network Headend

The activities of multiplexation as well as the insertion of encoding and information applications are developed in the headend of the network.

Multiplexation

The multiplexation of the signals received from the studios of different radiobroadcasters is carried out, with the objective of composing a multiplexed (MPTS) signal ready to be transmitted to the broadcasting centres and later broadcasting. Amongst the parameters that determine the quality of the service provided the following can be highlighted:

- Adaptation of the multiplexed signal (MPTS) to the unique network frequency, if any.
- Statistical multiplexation of the different entries, with the objective of maximizing the quality of the broadcasts.
- Re-multiplexation of content in areas inferior to national or regional, in the case in which territorial disconnections must be seen through.
- Insertion of the service information with character common to the digital multiple, necessary for the correct broadcasting of same.
- Establishment of redundant configurations with the object of maximizing the SLA's.

Insertion of dynamic character service information

This consists of the generation and insertion of service information specific to the digital channels of each one of the radiobroadcasters into the digital multiple, with the objective of facilitating the visualization of the programming schedule, or the Electronic Programming Guide (EPG), in the end users' receivers.

The differential factor in the provision of this service consists of the placing of the necessary systems for the management of a programming schedule at the disposition of the enabled entity. This includes the functions of edition, modification, generation of registrations and deletions, and even automatic dumping from the programming systems usually used in the studios. Likewise,



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this should include the equipment that carries out the compilation of the aforementioned programming information as well as the generation of the carousel of information that contains the PSI-SI tables, ready for incorporation into the multiplexer.

Other relevant parameters in the provision of this service are as follows:

- Depth of the EPG in relation to the number of days whose events can be managed and published.
- Establishment of redundant configuration with the objective of maximising the SLA's.

Insertion of the interactive services

This consists of the generation and insertion in the digital multiple of the interactive applications of each radiobroadcaster.

Again the main differential factor in the provision of this service consists of the placing at the disposition of the enabled entity the necessary systems for the accommodation of the interactive applications of the enabled entity, which permits functions such as edition, modification, registrations and deletions, and the automatic incorporation of the updates.

They must also include the equipments that dynamically compile the corresponding files to the interactive applications and generate the carousel of objects prepared for incorporation into the multiplexer.

The characteristics that can be highlighted as determining the quality of the offered service:

- Maximum output bandwidth.
- Inclusion of a package of interactive applications (information, T-administration, games, launcher, etc.)
- Establishment of redundant configurations with the objective of maximizing the SLA's.

4. Distribution Network

From the headend of the network is established a transport chain (terrestrial, satellite or both) from the broadcasting centre or centres. The most relevant characteristics would be as follows:

- Reliability of the technology being used (fibre optic links versus radio links).
- Establishment of redundant transport links with the objective of maximizing the SLA's.



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5. Broadcasting Network

The support service of the television broadcasting service includes the broadcast from the broadcasting centres of the signal originating from the network headend. The broadcasting network includes also the relay transmitters which, differing from the first, do not receive the signal through the distribution network, rather they collect from the air the signal emitted by neighbouring centres, amplifying it and retransmitting it.

The following figures demonstrate the generic schemes of the broadcasting and relay transmitters.

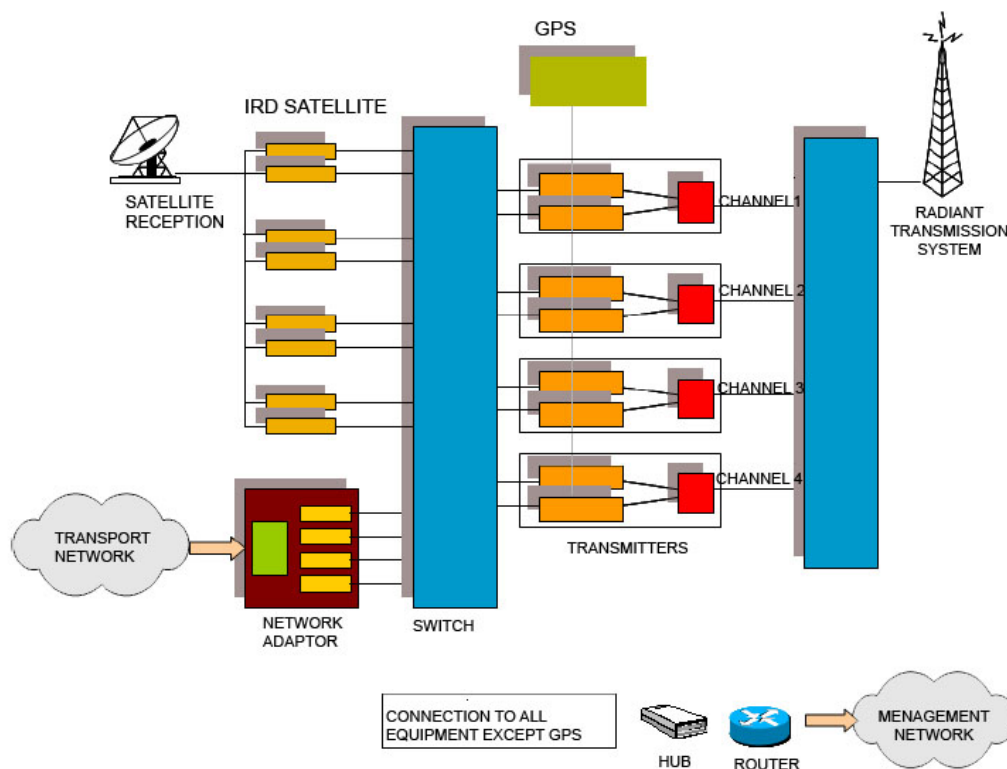


Figure 1. Broadcasting Centre



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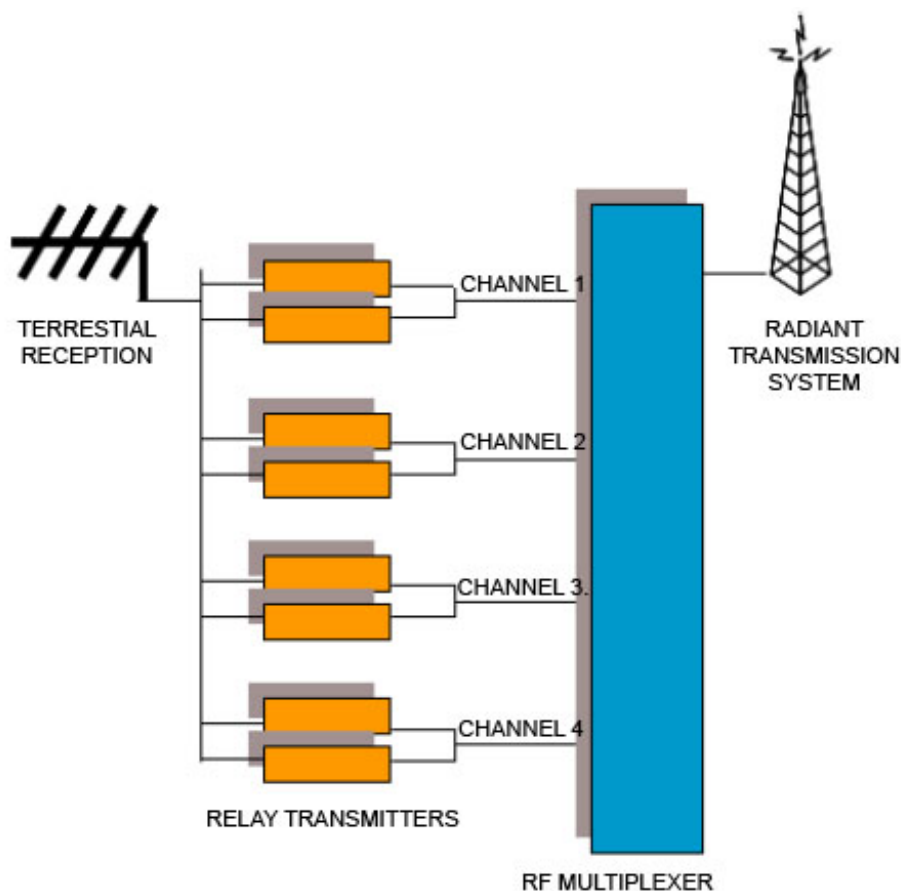


Figure 2. Broadcasting Centre

The following can be highlighted among the parameters that determine the quality of the service:

- Population coverage reached and deployment schedule, if applicable.
- Transparency to the user during the phase of deployment of the network, minimizing the necessities for intervention in the installations of reception in the housing.
- Establishment of redundant configurations with the objective of maximizing the SLA's as much at the level of transmitters as with the radiant systems.
- Binary system resulting from the established parameters of broadcast.

6. Monitoring

Include the control and detection of faults in the entirety of the chain of provision of the service, through the verification from a centralised point of the presence of alarms in each one of the codification teams, multiplexation, transport and insertion of information of the services and interactive services.



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This also includes the uninterrupted supervision of quality of the signal received from the studios, as well as was sent to the broadcasting centres, through the use of teams that analyse the integrity of the codified signals, this being either before or after the multiplexation process.

The parameters that come to determine the quality of the service offered are those related to the efficiency and clarity of the process of supervision of the alarms, as well as the effectiveness of the systems of analysis of integrity of the signal at the time of identifying the faults in the chain.

7. Commitment to quality service

The agreement of the level of service or SLA results to be one of the key parameters in whichever technical offer. To guarantee a good SLA implies the employment of quality equipment and especially of redundant configurations in the entirety of the chain from the first codifier to the last radiant system, something that invariably has repercussions on the price of the offer.

The SLA translates into a percentage of availability of the service, superior to 99% in the greater majority of the services related with the audiovisual chain, and very close to 100% when providing services of national level, regional or even local in demarcations with an elevated concentration of population. Likewise, they should include the penalties which would be applied before non-compliance of the acquired commitments.



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ANNEX 4. TECHNICAL DESCRIPTION OF THE CO-LOCATION AND INTERCONNECTION SERVICES OF THE TV TRANSMITTER AND RE-TRANSMITTER CENTRES

The wholesale access to the Abertis centres can be implemented by means of the co-location and interconnection modalities, as described in the following sections.

1. Co-location mode

The co-location consists of the renting of the physical space of the legally-enabled operators equipment at the physical locations of the Abertis infrastructures. Additionally in general terms it includes provision at the re-transmitter centre where the co-location is being produced, of the access to the energy point as well as the safety and fitting-out conditions and necessary for the installation of the equipment used by the operator requesting access.

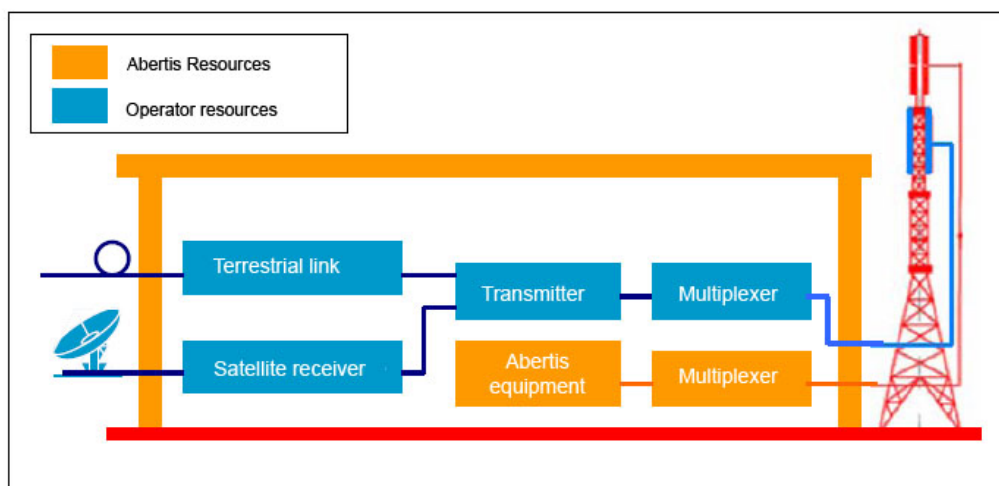


Figure 3. General diagram of the co-location mode

Consequently, the services required for the co-location of an alternative operator are the following:

i. Space service at the cubicle

Consists of the provision to the operator of a suitably prepared space for the installation of telecommunication equipment (transmitters, receivers, management systems, etc.) in a room in the corresponding site. At the same time the location of other different elements of the telecommunication equipment that the operator requires for the provision of the service (RF multiplexers, electricity, etc.) is also provided.



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The telecommunication equipment is usually located in standard housing, such as 600x600x2000, 600x800x2000, etc. (mm widthxdepthxheight). The areas provided shall allow the location of said elements, as well as additional right of way areas for the correct operation of the equipment installed.

ii. Space service at the tower

This consists of the provision of space in a suitably prepared tower for the installation of telecommunication antennas.

The spaces in towers provided will allow the installation of TV broadcasting panels or any other type of antennas that may be required, such as satellite dishes for satellite reception or yagi for terrestrial reception; both types can also be located in other points, such as the roof of the cubicle, depending on the availability of space.

iii. Access to electricity point service

Consists of the provision to the operator of a connection point to an AC electricity supply on an Abertis electricity board.

The electricity supply may be ordinary, when it exclusively depends on the fluid used by the connection, or guaranteed, when for a certain period of time a cut in the electricity supply at the site is kept, by means of UPS equipment and/or generator sets.

2. Interconnection mode

The interconnection refers to the physical connection of the networks of the alternative operator and of Abertis at those points in the TV distribution network where this is feasible. The interconnection of the alternative operator network is considered as being viable at the TV signal broadcasting multiplexers and antennas. Therefore, the common point for the interconnection of both networks is the input of the multiplexer set-radiant system.

A multiplexer is an element that allows filtering and adapting various television signals to broadcast them by a single radiant system. The multiplexer has a specific design which is the function of the technical characteristics of the programmes added: frequency or transmitting channel, power, number of programmes to multiplex and frequency separation between them. These characteristics may vary from one multiplexer to another, which implies that in each case the multiplexing should be analysed differently.

The interconnection of new transmission equipment to an already existing multiplexing chain may require the addition to the same of new combining elements or signal mixer. These elements include filters and interconnection elements, whose electromagnetic characteristics provide uncoupling or isolation



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between the signal inputs and outputs to the transmission line and finally to the antenna.

Consequently, the incorporation in the interconnection point of the signal provided by the operator requesting the interconnection service may require prior analysis.

On the other hand, the radiant system is made up by the mains power supply cable or cables which are connected to the multiplexer output by the distributor, the hoses and finally by the antennas or radiation panels. The radiating system is a series of elements that allows the configuration of the radiation diagram of a determined channel in order to adjust it to the technical characteristics of its administration concession.

The television radiating systems allow the radiation of simultaneous programmes that are within a determined frequency band, carrying out the transmitting with similar technical parameters (radiation diagrams). The fact of adding a new programme to the series of programmes broadcasted by a radiating system does not pose any problem, providing the radiation diagram is adapted to the needs of the new operator, there is a correct adaptation by the antennas for the frequencies required, and the maximum power allowed by the radiating system is not exceeded.

The following figures show the elements that make up the emitting centres; the equipment referred to can be identified in the same, as well as the mentioned interconnection point.

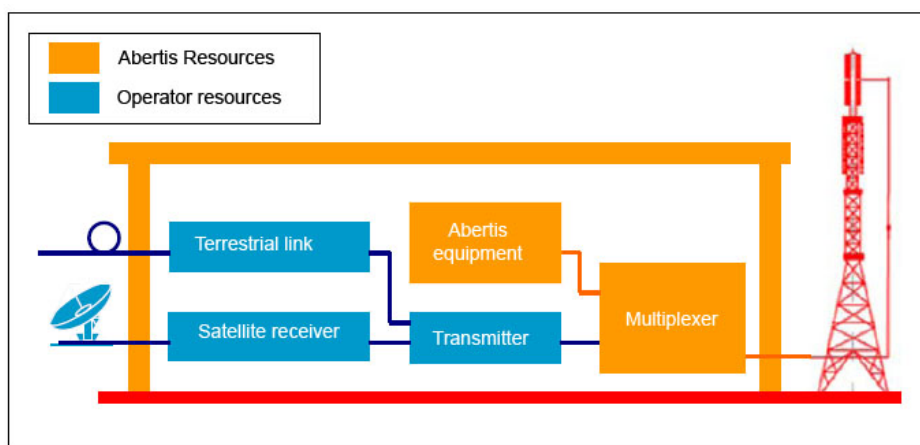


Figure 4. General diagram of the interconnection mode



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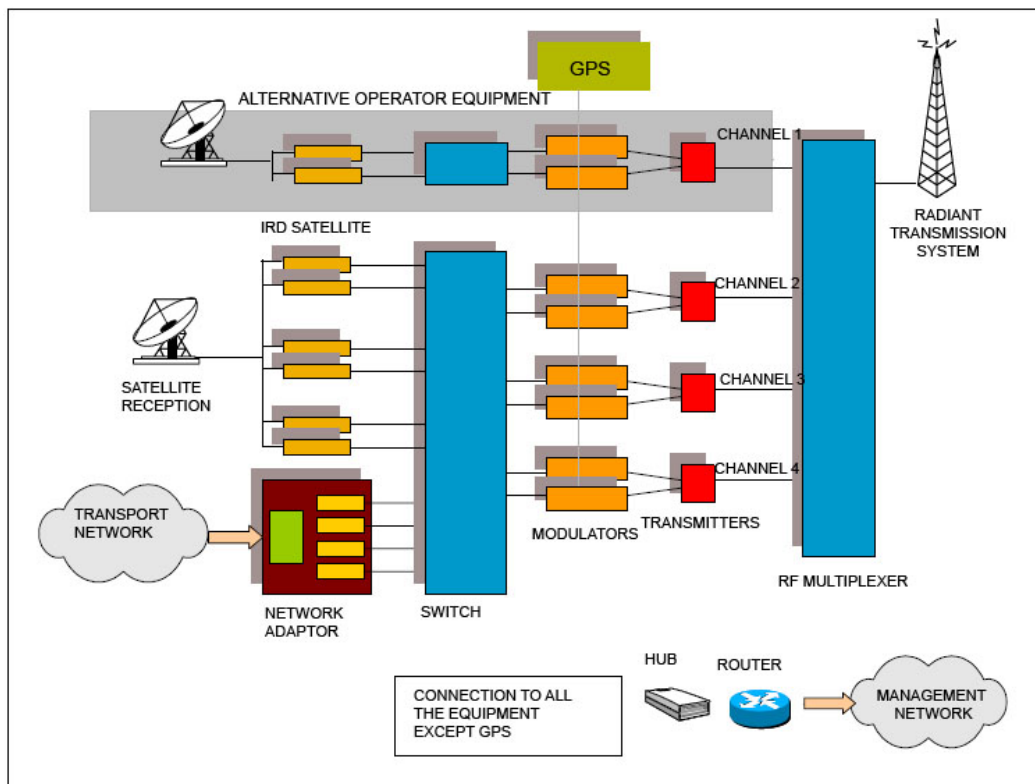


Figure 5. Detail of the interconnection mode

In short, the operator requesting access shall use the Abertis multiplexer and radiating systems, although it will require the use of a space inside the cubicle for the location of its own telecommunication equipment (transmitters, receivers, etc.) as well as its satellite, terrestrial or GPS signal reception systems for the synchronisation of the transmitters.



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ANNEX 5. SUMMARY OF ALLEGATIONS

I DEFINITION OF THE RELEVANT MARKET

I.1 Summary of allegations

Product market

With regards to the definition of the relevant market, the Spanish Competition Commission (CNC) shares the definition drafted by the CMT Services in general terms. However, it considers that there should be a more detailed analysis of some of the related markets vertically related with the television signal broadcasting market. Specifically, the CNC mentions the audiovisual signal transport markets and the multiplexing services of digital television signals.

Abertis, *ad cautelam*, proposes the need to exclude the figure of the multiple manager planned in the PTNTDT from the market definition scope.

On the other hand, the CNC indicates that the possibility of analysing the competitive structure of the related market of the radio broadcasting services should be proposed, coinciding, in any event, with the CMT Services, in the fact that it is a different market, given that the needs for radio broadcasting infrastructures are lower than those of television broadcasting and the possible viability of self-provision of these services is much greater, as evidenced by the market structure.

In any event, the CNC believes that it would be advisable to value whether the criteria for the enforcement of *ex ante* obligations in the radio broadcasting services market is being met.

Radiodifusión Digital considers the inclusion in the product market of both the broadcasting by terrestrial waves in both its analogical and digital mode advisable, but presents certain doubts on the exclusion of sound broadcasting services, since, according to this operator the operator's network with SMP results able to the transmission of sound signals and Abertis is an important operator in this segment.

Astra considers the CMT identification of pay television with satellite technology and free-to-air television with terrestrial technology to be an error, as it believes that such a difference is obsolete and does not reflect the real circumstances of the market. It also states that the CMT seems to forget that the market analysed is a dynamic market under constant evolution, in such a way that free-to-air television and pay television can be broadcasted by means of different technologies such as cable, satellite, ADSL and terrestrial.



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On the other hand, Astra indicates that the Spanish Royal Decree Law 1/2009, dated 23 February, on urgent measures with regards to telecommunications, expressly indicates - although clearly and concisely limiting the competition between platforms - that satellite technology is the most suitable transmission means to reach to 100% of the users with terrestrial digital television, and that therefore, in the Spanish case, the concept of the relevant television broadcasting market is not exclusively limited to terrestrial technology, but also to the satellite broadcasting market (DTH).

Neither does Astra share the market description drafted by the CMT Services with regards to transport services. Specifically, with regards to the distribution transport, Astra indicates that Abertis packages and vertically integrates the distribution transport with the terrestrial broadcasting service, taking advantage of its prominent position in the latter market. Abertis would be carrying out *“crossed subsidies between terrestrial broadcasting and distribution transport, in such a way of passing distribution costs on to broadcasting, in order to make distribution cheaper, making it less attractive for competitors, and making the terrestrial broadcasting more expensive, which is a market where it enjoys a de facto monopoly. That is to say, Abertis takes the dominating position it has in the terrestrial broadcasting market to the transport market and that of satellite distribution”* (as Abertis also uses this technology for the distribution transport).

On the other hand, Abertis coincides with the CMT Services with regards to the fact the product market cannot include the sound radio broadcasting carrier service or the transport activity. However, Abertis questions the inclusion of analogical and digital signals in the same market, taking into account the date for the analogue shutdown established by the Government (April 2010) and considering that there is no reason to believe that said date can be delayed. Abertis considers that given the market, analysis should be made from a “prospective” approach and the mentioned technology is doomed to disappear in the temporary horizon of the present review, it is not possible, *per se*, the existence of competition that would justify its elimination in the product market definition.

Telefónica considers the relevant market definition proposed by the CMT Services as suitable.

Geographical market

With regards to the geographical definition of the market, Abertis indicates that in the first review of market 18 this Commission considered there was homogeneity in the reference market, without considering necessary an analysis to check if there were geographical scopes inferior to the national on which there could exist heterogeneity in competition, therefore concluding that the market geographical dimension was national. It does not seem, according to the operator, that the competition conditions have changed substantially over



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two years as to identify 327 new geographical markets (19 regional markets and 308 local markets).

Radiodifusión Digital also questions the definition of geographical market carried out by the Services of this Commission, as it believes that it has been lead by the current market structure, which is in a bad habit partly by the inheritance of the exclusive rights for the provision of the service and partly by the non-competition strategy of the relevant operator. In this line, Radiodifusión Digital believes that the contracting in block of all the audiovisual signal broadcasting services by the radio broadcasters is not the only contracting model, and that it is perfectly viable to have a contracting model for levels of a smaller size (regional, provincial, local) or even the transmitting centre to transmitting centre contracting. It also indicates that the contracting of services with a single supplier is an enforcement of the traditional monopolistic model, this enforcement being based on loyalty discounts being very difficult to justify.

In conclusion, Radiodifusión Digital believes that the market is limited depending on the coverage areas of the transmitting centres of the traditional monopolistic system or, in a much simpler way, as a national market given the homogeneous contracting conditions in all the territory.

The Secretariat of Telecommunications and the Information Society of the Catalanian Government considers that each of the transmitting centres should be given a different treatment, being catalogued as black, grey or white areas, depending on the existence of effective competition or not.

With regards to the definition of the relevant geographical markets, the CNC coincides with the analysis carried out by the CMT Services indicating that initially different national, regional and local markets can be made.

I.2 Response to allegations

Product market

In response to the allegations regarding the inclusion in the product market of the transport activities, the radio and satellite, we should mention that as specified in section III.1 of the present Resolution, the potential products that would replace the broadcasting services have been analysed, in order not to repeat the analysis carried out in the first round but with the intention of determining up to what point the conclusions reached there shall be maintained nowadays.

In this respect, the Commission maintains that the analysis carried out in the first round continues being completely valid with regards to the services mentioned, as in the period between both analyses there has not been any relevant circumstance to modify the conclusions reached initially.



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Thus, the CNC considers that, with regards to the transport services and the radio broadcasting services, from a technical point of view the first is an activity completely different to the broadcasting activity and it would be justified to consider it as part of a different market, as it is more a supplementary product of the broadcasting services. With regards to the radio broadcasting services, the CNC concludes that *“the CNC coincides with the CMT in the fact that it is a different market, given that the needs for radio broadcasting infrastructures are lower than those of television broadcasting and the possible viability of self-provision of these services is much greater, as evidenced by the market structure”*.

With regards to the specific transport market, it is relevant to indicate that this Commission, in the first review of market 18, stated that the transport service was the answer to different competing conditions, as there are electronic communication companies that can provide the service by means of the infrastructures implemented in the national territory (cable, radio link or satellite). In this way, any operator with the suitable networks could potentially provide the transport services. This situation has not changed in the current review framework, and therefore we can conclude that the transport service is a different market to the carrier service of the broadcasting of television signal.

On the other hand, and with regards to the allegations formulated by Astra on the inclusion in the relevant market of the satellite services we should indicate, as already carried out by this Commission in the public Pre-consultation carried out in 2004,⁶⁷ that there is no substitutability to include said services in the same reference market as the carrier service of the television signal broadcasting by terrestrial waves. The European Commission and some National Regulatory Authorities have reached similar conclusions,⁶⁸ and have even indicated that this market could be subject to a transnational analysis.

With regards to the allegations of Abertis in which it indicates being opposed to the inclusion of the broadcasting services by means of analogical technology

⁶⁷ Public pre-consultation on the definition and analysis of the television and radio signal transmission services market. The public pre-consultation indicated that from the demand point of view, the television operators were legally able to transmit a type of signal, in a specific means, and exclusively, with the technology established in such administrative permission. Therefore, in any event of reduced but relevant, non transitional significant increase (RNTSI) of the price or any contingency, the broadcasting technology may not be changed automatically and without significant costs. From the supply point of view, an operator via satellite may not provide the service of terrestrial waves broadcasting within a reasonable period of time and without carrying out an important investment.

⁶⁸ Given the similarity with the Spanish market of the television signals carrier service, we should mention the analysis carried out by the French NRA (ARCEP) in the Public Consultation carried out on the wholesaler market of audiovisual broadcasting services between November 2008 and January 2009.



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within the reference market, arguing that after the analogue shutdown such services will disappear, we should repeat, as already indicated in the body of the present document that (i) there is an undeniable substitutability on the supply side between the services provided by means of analogical technology and those provided by means of digital technology, and therefore, following this criteria they should be part of the same reference market; (ii) a prospective analysis of the consisting market has been carried out with the Commission Guidelines on market analysis and the evaluation of the significant weight in the market, reaching the conclusion that even though there have been considerable increases in the terrestrial digital television audience, currently said audience has not reached percentages of more than 30%. This factor, together with the uncertainties of various natures associated with the implementation of TDT⁶⁹ as well as of the considerable interrelations between both technologies does not, for the moment, allow categorically concluding that said services will not be demanded for in the temporary period of time that would include the present market analysis.

With regards to multiplexing services this Commission considers, in accordance with the comments made by the CNC, that in spite of the conditionings that said selection could imply when choosing the operator provider of the carrier service of broadcasting of television, this is not sufficient to include the multiplexing services in the same reference market, as from a technical point of view said activities are differentiated from the broadcasting ones, not requiring a network of sites and being able, initially, to be provided by different operators. Therefore, it is concluded that there is no substitutability from the offer point of view understanding that said activities are supplementary and not substitutive.

With regards to the analysis that the CNC and Astra have put forward on the related markets of the multiplexing and transport services, and the possible risks derived from the joint provision of said services with those of broadcasting, we should indicate that these problems precisely stem from the competition problems indicated with regards to the carrier service market so they should be neutralised at the moment in which the wholesaler market of the broadcasting carrier service is regulated, ensuring the effective access by third parties to said services and imposing obligations such as the accountable separation or the price control on the operator with SMP. In addition with regards to multiplexing it should be taken into account that the multiple management mode is established for all the territorial scopes in the corresponding sector regulation,⁷⁰ not being treated in the present analysis.

⁶⁹ As an example we can mention that in spite of the current regulation (Spanish Royal Decree 2268/2004, is modified, which approves the Local Digital Television National technical Plan) prohibits the analogical television broadcasting at a local level from the 1 January 2008, there are still illegal situations, given the continuity of local television broadcasting with analogical television.

⁷⁰ See the Sixth additional disposition of the PTNTDT: *"the entities accessing the exploitation of*



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Finally, and with regards to the allegations made by Astra on the alleged error of Commission Services when identifying pay television with satellite technology and free-to-air television with the terrestrial technology (when both free-to-air and pay television can be broadcasted by means of different technologies such as cable, satellite, ADSL and terrestrial), we should indicate that in the description of the chain of value to the audiovisual services included in the Resolution the audiovisual services are analysed in detail, as indicated by Astra, can be transmitted and broadcasted by means of different telecommunication networks and associated infrastructures. A different thing is for the CMT to consider, based on the objective data collected in the Annual Reports of this Commission⁷¹ that the audiences of the audiovisual sector in Spain are very different to those in other Member States, as the importance of the satellite and cable in Spain is much lower than the average seen at a European Community level. In the same respect, and with regards to the Spanish Royal Decree Law 1/2009, we should highlight that according to that included in the same, the satellite technology will only be applied in those areas that are not covered with the terrestrial technology,⁷² as Astra itself recognises.

Geographical market

With regards to the allegations made by Abertis on the existence of different geographic markets, it is necessary to highlight that Abertis, in the public inquiry carried out in the first round expressly proposed the definition of geographical markets lower than the national.⁷³ In any event, in the first round or review of the market an in-depth analysis of possible markets lower than the national was not carried out, given that at that moment a differential fact such as the clear promotion for the transition to the DTTV in our country was not so clearly defined, at the same time, in a Community process of the same characteristics that has established a series of binding decisions for all the Member States.

As indicated in the body of the present document, the DTTV legal framework described in section II has contributed, given the temporary windows that have been opened since the last market analysis carried out, to the promotion of the development of television channels in different territorial scopes. The need to meet said demand has lead to the subsequent implementation of the necessary electronic communication networks to provide the carrier services of

channels within a same digital multiple, without prejudicing the exclusive right for its exploitation, shall be associated for the best management of all that affecting the digital multiple or establish the regulation for said purpose". At a local scope, see the third addition disposition of the PTNTDTL.

⁷¹ See graphic I.3.1

⁷² See article 1 of the mentioned Spanish Royal Decree Law.

⁷³ See Resolution dated 2 February 2006.



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broadcasting in said scopes. In coherence with paragraph 59 of the Guidelines, the geographical market has been limited from the criteria included in the same on the network coverage area. It is, consequently, the coverage of the different existing broadcasting networks what leads to distinguish three territorial scopes in the reference market.

With regards to the contracting model on levels of smaller size than the national scope or when applicable centre to centre by Radiodifusión Digital, it is necessary to indicate two circumstances that make said model not very probable: (i) in the first place the preference of the demand, as the concessionaire companies of the television service at a national level, the ones that demand a global service covering all the national territory to meet, in this way, with the obligations for population coverage established in the concessions⁷⁴ and (ii) the provision of the broadcasting service at a national level can generate certain cost savings related with the sharing of infrastructures and can allow the exploitation of certain scope economies. In addition, and from the technical and operational point of view, additional difficulties may exist in a level model derived from the necessary network optimisation works to achieve broadcast conditions suitable in the frontier areas between levels.

In response to the allegations made by the Secretariat of Telecommunications and the Information Society of the Catalanian Government, the body of this Resolution carries out the analysis and enforcement of the obligations that are deemed to be appropriate and provided to the different identified competition problems. From the identification and analysis of the three criteria carried out it is considered that the market of the carrier service of broadcasting of the national geographical scope is a market liable to *ex ante* regulation, and that on the contrary, applying a “modified Greenfield approach” the obligations imposed on the national geographical market are enough to understand that the competition problems in the rest of territorial scopes inferior to the national would be solved. The obligations imposed are therefore coherent with the definition reached with regards to the geographical scope of the market (at a national level) without therefore it being appropriate to carry out a differentiation centre by centre as indicated by these bodies, even more so when it is precisely the access obligation to all the centres of the national network of Abertis (whether in the mode of co-location or interconnection) which should allow the appearance of alternative offers in this market.

II ANALYSIS OF THE CRITERIA ESTABLISHED BY THE EUROPEAN COMMISSION FOR THE IDENTIFICATION OF MARKETS LIABLE TO BE *EX ANTE* REGULATED

⁷⁴ It is not a general fact but more an atypical and residual that a radio broadcaster calls for a tender of bids by territorial levels for the contracting of the carrier service for television signal broadcasting.



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II.1 Summary of allegations

With regards to the compensatory power of the demand (relevant factor when analysing the second criteria), Abertis indicates that this is an essential factor to understand the dynamics of the reference market. In this respect, it considers that its clients have a great negotiation power derived from its grouping for the negotiation with the wholesale operators on one side RTVE and on the other UTECA. Abertis thus considers that this joint negotiation capacity by the television concessionaire companies is a decisive element that would point to the inexistence of market power and that, in short, within the framework of the provision of its services at a national level, lacks the capacity to impose its commercial conditions, a logical consequence of facing a monopoly on the supply side and a monopsony (or where applicable, a duopsony) on the demand side.

On the other hand, according to Abertis the third criteria would not be met which in a cumulative way has to be accredited for the *ex ante* regulation of the electronic communication markets, that is to say, that the application of the competition right is not sufficient to correct the possible market errors that may take place. For this operator, the right to compete on its own would be enough to be able to redirect any alleged non-competitive behaviour. Abertis believes that the reduced conflicts produced in the market from the first review (two conflicts resolved by this Commission, as well as a claim from Axió which was filed as there were no signs with regards with possible non-competition practices by Abertis) confirm that an *ex ante* intervention of the NRA is not necessary, the *ex post* intervention being sufficient *“as there are no general restrictive competition practices in this market”*.

The CNC, Radiodifusión Digital and Telefónica, share, in general terms, the conclusions of the analysis of the three criteria carried out by the CMT Services.

II.2 Response to allegations

In response to the allegations relative to compliance with the second criteria, and specifically to the alleged compensatory power of the demand, we can reply that in spite of the high concentration of claimants, there are, however, certain factors that limit their negotiation power. Amongst these we can highlight factors such as the legal limitations that are imposed on the television concessionaire companies by means of their concessions (that cause, for example, that strategic variables such as a decrease in the consumption level depending on the price set for the consumed service cannot be used), or the considerable cost derived from a possible change of supplier.

In another sense, and in this “balance of power” indicated by Abertis between the supply and the demand, it is important to highlight that even although the only potential clients at a national level of Abertis are on the one hand RTVE



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and on the other the private radio broadcasters grouped together in UTECA, it is also true that the only supplier currently able to supply a broadcasting carrier service nationally is Abertis. On their part, the concessionaire companies that transmit by terrestrial waves have to face a certain regulation insofar as they provide a public service as the provision of television services, having to undertake certain commitments⁷⁵ of strict compliance whose operative viability is determined and controlled only by Abertis. The limited impact that the provision costs of the service dealt with here have on the total expenditure of a concessionaire television service company for the provision of said service, also contributes in favour of the conclusion that the compensatory power of the existing demand in this market would be in any case limited.

It should be remembered that the coverage obligations are imposed on the television concessionaire companies (as holders of the concession for the provision of the television service) and consequently these agents are directly responsible for strict compliance with the pre-established legal conditions.

In response to the allegations relative to the compliance with the third criteria, and as previously mentioned, Abertis has high incentives to deny the access to its centres as well as to use dilatory tactics. Furthermore, given that the opportunity windows in this market are reduced, the use of constructive supply negotiations (difficult to detect given their special technical complexity) can prevent the incoming operator from being in a suitable not to be in conditions to provide a competitive offer to the broadcasters during the negotiation period.

As pointed out by Abertis, it is true that this Commission has only intervened in two conflicts during the market 18 regulation⁷⁶, it should be indicated that precisely the problems raised at a critical moment of the negotiation of the incoming operator (Axión) with different television concessionaire companies. That is to say, the non-existence of general non-competitive behaviour can be due to the market dynamics with reduced opportunity windows rather to the lack of conflict of the same. In this respect, preventive and immediate action of the NRA is considered as essential, as in this way, it is ensured that an incoming operator is in a condition to be able to provide a competitive offer within the negotiation period itself.

⁷⁵ Given its high demands we should highlight the deadlines and population coverage included in Graphic II.1.1.

⁷⁶ On the other hand, within the framework of the regulation of market 18, the CMT also passed the Resolution RO 2007/356 dated 25 October 2007, by which the rights to use and the network resources of Abertis Telecom, S.A.U. in the Torre Collserola telecommunications complex in the television broadcasting infrastructures are included, Abertis Telecom S.A.U. having to guarantee access to the same by third parties at prices linked with the costs, in compliance with that laid down in the Resolution dated 2 February 2006.



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Furthermore, as included in the Explanatory Note, the *ex ante* regulation shall be considered as a complement necessary to the competitiveness right in those cases in which the *ex post* regulation is not sufficient to solve the detected market errors, for example if the regulatory obligations necessary for the development of the competition cannot be initially imposed in compliance with the competition right. In this respect the access obligation is of special importance, an essential obligation to promote competition in the market given the inherent difficulties in the replication of the national network of Abertis. In this respect, the Spanish Competition Commission shares the conclusions reached in the Report which was submitted for public inquiry with regards to the compliance of the test of the three criteria for the *ex ante* regulation of the markets.

III OBLIGATIONS TO IMPOSE

III.1 Summary of allegations

Abertis questions the new obligation imposed on the operator with SMP of supplying, with a preventive nature, information regarding the prices and conditions of the offers made to the television concessionaire companies. According to Abertis, the decreasing level of the market of the provision of the carrier broadcasting service is not a regulated market, and consequently the CMT has no right to require information on said market unless the need to *ex ante* regulate the market is previously determined. The regulatory texts adopted at a Community level (by the European Commission and the ERG) would confirm this interpretation, specifically when the regulatory objectives sought after the measure considered here can be achieved by means the enforcement of obligations at a wholesaler level.

In any event, according to Abertis, the enforcement of a deadline of one month for the communication of the offers before the signing of the corresponding contract is not in keeping with the commercial reality, given that the contracts cannot be terminated in a shorter period of time.

According to Abertis, an obligation of this type would only be logical in an *ex post* environment (once the contracts have been signed), under the exhaustive control of the only competent authority in this respect (the CMT). The obligation of notifying the offers would practically be equivalent to submit such offers for CMT authorisation.

On the other hand, according to Telefónica, it could be necessary to implement an additional measure, and not just a follow-up of the contracts, in order to ensure that the operator with SMP transfers its productivities in a more dynamic way to descending markets.



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Besides, the CNC shares the conclusions reached by CMT Services on the relevance of the obligations of *ex ante* communication, given that this measure can complement and facilitate the monitoring of the rest of the obligations imposed.

For the CNC, the introduction of a reference offer is a regulatory development that should be welcomed. With regards to the obligation of having a reference offer available, Abertis indicates on the contrary that such measure is disproportionate and excessive, being more efficient, in view of the lack of conflict that there has been and in the current situation of the market, provide the information collected in the public inquiry to each of the specific access requests and inform the subscription of the resulting agreements to the CMT.

Abertis also indicates that, in the event this obligation were maintained, the deadline fixed for drafting the offer in the terms established is not enough, and this based on (i) it is the first time Abertis has to prepare a reference offer, and by past experiences, taking into account the information requirements, it is very improbable to meet the deadline; (ii) a “new interconnection regulation” is included, that should be developed; (iii) the deadline is disproportionate considering the period given to the operator with SMP to draft the technical cards required as a result of the access conflict put forward by Axión in this respect.⁷⁷

Radiodifusión Digital believes that the new interconnection obligation modifies the existing co-location obligation very little. If the objective of the present regulation is to increase competition in the market, a new interconnection model should be adopted, based on the principles that configure the “ladder of investment” in which together with the construction by the incoming operator of own centres, in a growing proportion, there would be an obligation to provide access in the interconnection mode in the highest levels of Abertis network. The investment incentives by the incoming operators could be ensured by means of mechanisms such as the establishment of a “closing clause” depending on which, for example, after a certain period of time, the regulatory obligation of providing the interconnection service would disappear.

The CNC reaches similar conclusions, for which the interconnection should be of a general application and not with a subsidiary nature, at least during a period of time sufficient enough in order to allow the alternative operators to gradually undertake the implementation of their own infrastructures once they have had the opportunity (by means of the interconnection) to compete with Abertis in client attraction. The CNC questions the arguments used by the CMT Services to justify the general non-application of the interconnection obligation, to the extent that given the conditions of the contracts signed by Abertis with the

⁷⁷ Resolution MTZ 2007/952 dated 18 March 2008 relative to the Abertis information obligations for access to its centres (modified by AJ Resolution 2008/468 dated 19 June 2008).



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concessionaire companies of the television service, an important part of the DTTV could already be amortised or very close to their amortisation.

For Astra also, the possibility of interconnection with the Abertis network should also be open to third operators in all cases. On the contrary, according to the Secretariat of Telecommunications and the Information Society of the Catalanian Government, the market regulation should guarantee that the interconnection mode is not implemented as the primary method to access Abertis centres.

With regards to the obligations in price control, Radiodifusión Digital indicates that *“the obligation of access, both co-location and interconnection, must be completed with the obligation of setting prices depending on the service production costs. Only in this way the existence of abusive practises such as price clamping is effectively prevented”*. This entity, therefore criticises the proposal that was submitted for public inquiry, according to which the obligation to control the prices for the interconnection mode is specified by means of the establishment of reasonable prices. For CNC and Astra the regulated prices of the co-location and interconnection service should be linked to their costs. Aasit indicates that with the obligation of reasonable prices there are not sufficient guarantees for an operator other than Abertis to offer competitive prices.

The CNC considers that, with regards to the analogical mode, it would be relevant to extend the obligations included in sections 3 (non discrimination) and 4 (determination of the specific access conditions) to said mode also.

For the CNC, given the existing problems in related wholesale markets (transport, multiplexing) it could be planned to what extent the Abertis functional separation between the multiplexing, transport and management of broadcasting infrastructures, and the retail sales and marketing of the broadcasting services could be necessary.

Finally, Radiodifusión Digital indicates that the accounting obligation set in the first review of the market should be maintained, according to which Abertis *“should transparently express the internal transfer prices for the access and interconnection services, in such a way it allows this Commission to monitor compliance of the non-discrimination principle included in section b) of the present Annex”*.

III.2 Response to allegations

In response to the allegations of Abertis regarding the communication of descending offers, this type of obligation has been previously imposed by the CMT in other wholesale markets, such as the broadband access market (market 5 of the Recommendation).



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The possibility of imposing operators with SMP obligations in descending related markets in order to monitor the correct compliance with the wholesale obligations is included in the current Community legal framework (see article 5.1 of the framework Directive). In its Explanatory Note to the market Recommendation, the European Commission expressly indicates that said precept can be invoked by the NRAs in order to obtain all the information considered necessary in order to guarantee compliance with the obligations (specifically, in cases of potential price and margin squeezes), regardless of the fact that the information required affects a market included or not in the Recommendation.⁷⁸ This approach has been confirmed by the European Commission in the Dutch case for the wholesale broadband market⁷⁹ which precisely mentions the Measures Project notified by the CMT with regards to said market.

The ERG also reaches to the same conclusions as the CMT on the relevance of carrying out an *ex ante* analysis of the retail offers. Thus, with regards to another wholesale market subject to *ex ante* regulation, the ERG refers to its Common Position on good practices in the wholesale broadband access market⁸⁰ to the possibility of imposing suitable *ex ante* control ways (that may even lead to the drafting of a methodology for the analysis of the commercial offers) that

⁷⁸ Explanatory note, pages 18-19: *“When there is regulation at wholesale and/or retail level, the possibility of price or margin squeezes can result from regulatory intervention and it should be assessed in that context. That often involves checking the structure of regulated prices or the aggregate of services over which possible margin squeezes might arise. Article 5 of the Framework Directive provides NRAs with the legal basis to obtain any and all pertinent information, regardless of whether the market is identified in the annex to the Recommendation. This applies not only to costs but also to retail pricing in order to allow the NRA to establish and monitor justified and appropriate remedies with respect to wholesale access”.*

⁷⁹ NL 2008/0827: *“The Commission welcomes that OPTA envisages imposing in the framework of the non-discrimination obligations in market 5, a prohibition of any tariff differentiation which would allow KPN to charge a wholesale tariff to its downstream arm, leading to the fact that competing operators would no longer be able to provide their services under competitive conditions as a consequence of a margin squeeze on downstream markets. However, it appears to the Commission that the current wording of this prohibition will not completely address the competition problem concerned. Firstly, because the prohibition is not complemented with requirements to provide specific costing data allowing for own initiative ‘ex ante’ monitoring by OPTA. Such monitoring also implies defining the parameters to assess the costs of an efficient competitor. Other NRAs have also obliged the incumbent operator to inform the regulator ex ante of in particular the prices of new retail products to allow the NRA to verify that competitors can replicate the retail products of the SMP operator on the basis of WBA. Moreover, the prohibition does not specify the remedies – e.g. proportional retroactive reduction of wholesale prices. The Commission accordingly invites OPTA to further specify the margin squeeze prohibition when adopting its final decision”.*

⁸⁰ ERG Common Position on best practice in bit-stream access remedies imposed as a consequence of a position of significant market power in the market for Wholesale broadband access, ERG (06) 69 Rev1.



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allow watching over for the appropriate compliance with the obligations imposed at the wholesale level.⁸¹

Once the full coherence with the measure imposed with the regulatory frame is established, it should also be indicated that its enforcement results justified and proportionate to the failure of the identified market. In fact, the squeezing of margins and non-competition practices can become, *de facto*, a constructive supply negation that would make the imposed access obligations inefficient. For this reason, this Commission must guarantee that the prices of the retail offers do not become an entrance barrier for the alternative operators that demand the wholesale services necessary for the provision of the television signal broadcasting carrier service.

Given the difficulties indicated by Abertis with regards to the communication of descending offers, this Commission considers it recommendable to limit said prior communication to the pre-agreements reached. With regards to the deadline established by the CMT (a month) for the preventive control of the pre-agreements it is short enough as to understand that there are no delays that may affect the descending strategy of this operator. In any event, taking into consideration the Abertis indications, we should highlight that preventive control is not produced on the retail offers, but said pre-agreements will allow the CMT to compare the ability of the existing wholesaler obligations to ensure the development of the market, being able to proceed in the event that it is considered necessary to readjust the wholesaler prices in order to prevent the squeezing of margins or any other similar practice that may be detected by means of the analysis of pre-agreements. The posterior communication of the contracts signed with the television concessionaire companies – as proposed by Abertis – would not be sufficient as to prevent the damage to the market that this type of conduct could cause, specifically taking into account the reduced number of applicants of the services subject to the regulation and the fact that the contracts subscribed are usually long term.

In response to the Abertis allegations regarding the publication of a reference offer, the reasons that justify the enforcement of the same at the current moment should be remembered. With the enforcement of this obligation the attempt is to guarantee that the operators interested in requesting the access can have and require the information necessary for the assessment of the wholesale service to be provided by Abertis, including, for example, the economic or technical conditions or the applicable procedures. In this way, the negotiations between operators are speeded up, the possible conflicts that may be caused are reduced and the possible non-competition conducts that Abertis

⁸¹ “Where judged necessary to facilitate downstream entry, specific forms of ex ante margin control could be necessary. Suitable forms of control include advance publication of the methodology for assessment of margin squeeze (or eviction pricing)”.



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may carry out are made more visible. For all this, the enforcement of this obligation is considered as necessary and proportionate.

With regards to the deadline given to Abertis to draft the offer, the fact that the previous regulation did not impose the operator with SMP the obligation of having a reference offer does not imply such a difficulty to prevent Abertis from drafting said offer within the deadline indicated, as the information that the offer should include is essentially referred to elements which are already available for Abertis (such as the list of its centres) or that with respect to the same Abertis should have put into practice a procedure in the event of possible access requests within the framework of the first round of review (such as deadlines for the provision of services or economic conditions). However, the extension of said deadline to one more month is considered to be recommendable, thus the period of time of four months given for the drafting of the reference offer by Abertis is considered as suitable.

The allegations of CNC, Astra and Radiodifusión Digital regarding the possible extension of the obligation of providing the interconnection mode have been replied to in the body of the present Resolution together with the European Commission comments.

With regards to interconnection prices, as already indicated in the Report that was submitted for public inquiry, the appearance of alternative operators in this market involves the need for an investment effort in the network that allows reducing the dependence of the operator with SMP. However, as indicated in the body of the present measure, it is necessary to take into account that a series of objectives criteria or a technical and economic nature have been set, based on which it can be assumed that the co-location mode will not be a viable access mode for certain centres. Therefore, with regards to the interconnection obligation, it is also proportionate to establish a criterion depending on which the wholesale prices shall be set depending on the production costs.

On the other hand, that indicated by the CNC should be complied with, which states that the DTTV equipment could be recovered or very close to their recovery. In fact, from the results obtained from the Abertis cost model and verified by this Commission for 2006, we can state that said conclusion is in keeping with reality, as the percentage amortised at the end of the mentioned year of the radiant systems and multiplexer chains for the DTTV is already higher than **[CONFIDENTIAL]**. To this respect, the results are even more conclusive if we take as the basis for the calculation Abertis cost model for 2007 – currently being revised by this Commission-, as in this case the amortisation accumulated is higher than **[CONFIDENTIAL]**.

With regards to the extension of the obligations applicable to the analogical mode, the Report that was subjected to consultation already included the reasons for which, in view of the lack of incentives at the entrance in this market



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segment, the obligations are centred on the possible problems derived from the horizontal extension of Abertis position of domination. Therefore, it is believed that the obligations proposed are proportionate to the type of problem detected, without it being necessary to proceed with the extension of the obligations as proposed by the CNC.

With regards to the proposal of the CNC regarding the possible functional separation of Abertis between the activities of multiplexing, transport and management of the broadcasting infrastructures, it should be reminded that the functional separation has to be an exceptional measure in persistent cases of discrimination (an exceptional event that it has not arisen in the reference market up to the moment), and where it is sufficiently accredited that the measures available for the NRAs in compliance with the general procedure of review of markets are not sufficient to solve the competition problems detected (an event that is not applicable to the present case either). That is to say, this Commission believes that functional separation is an exceptional and extreme measure to be considered in the event of verifying the existence and persistence of discriminatory situations that may seriously degrade competition in the electronic communications markets, without those events being in fact applicable to the market analysed at the current moment.

Finally, with regards to the suppression of the obligation included in the first review of the market according to which Abertis “*shall transparently express the internal transfer prices for the access and interconnection services*”, it is important to indicate the fact that the elimination of this obligation does not involve, in fact, the suppression of the general obligation of accountable separation and costs accountability, measure that is maintained in the present market review. In addition to the above, as the CMT determines the format and methodology that the operator has to use in order to meet these obligations, this is being ensured by means of the establishment of a model based on causality of the cost for its attribution to a service.

IV WHOLESALE MARKETS OF THE CARRIER SERVICE OF BROADCASTING OF THE TELEVISION SIGNAL IN GEOGRAPHICAL SCOPES LOWER THAN THE NATIONAL

IV.1 Summary of allegations

According to Abertis, the alleged extension of the obligations imposed on the operator with SMP in the national market of the television signal transmission services to the relevant markets at a regional and local scope is inappropriate. Abertis states that in the Report that was subjected to public inquiry obligations are imposed without the prior definition and analysis of the relevant regional and local markets, without reaching any conclusion on the compliance of the test of the three criteria or on the existence of an operator with SMP in the core of each of those markets. In some Autonomous Communities, as well as at a local



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level, there are operators with the same or greater presence than Abertis, thus the enforcement of obligations in these markets would cause an unjustified prejudice to that operator.

In the opinion of the CNC, it could be appropriate to carry out a specific analysis of the sub-national markets in order to determine the degree of competition existing in the same.

On the other hand, according to Abertis, the obligation to *ex ante* provide information on their retail offers should be in any case - and without prejudicing their allegations regarding the existence of this general obligation- be limited to the national scope, and not extended to the regional scope.

Contrary to this, the CNC believes that the possibility of imposing *ex ante* communication obligations also in relation with the retail offers presented by Abertis at a local scope should be analysed more in detail.

IV.2 Response to allegations

With regards to the Abertis allegations, in the section relative to the television signal broadcasting carrier service wholesale markets, the reasons that lead to ruling out the application of *ex ante* regulation in the regional and local scopes are explained. From the analysis of the three criteria carried out we can reach the conclusion that, at least at a regional level, *a priori* the presence of barriers to the non transitory entrance to the market cannot be excluded. However, applying a “modified Greenfield approach” (where, as laid down by the Community doctrine, the existing obligations in ascending markets or those closely related to the same should be taken into account) we can reach to the conclusion that the obligations proposed in the national geographical market are enough to understand that the competition problems are not such that justify the preventive regulation of inferior geographical scopes. It should be reminded that the access obligation is of a generic content, and more in this case, as the co-location is the main access obligation and as specified in the rent of a physical area at Abertis premises, it is set up as a wholesale service completely neutral technologically and independent of the type of equipment or service that may be provided from the same, and consequently it would not be logical for Abertis to discriminate incoming operators based on the type of broadcasting service to be provided from the centre for which access is requested. A limitation of this type would also prevent the alternative operators to take advantage of the possible scope economies (derived from the provision of the broadcasting service to different claimants) which are enjoyed by Abertis.

On the other hand, CMT considers that the existence of the access obligation imposed at a national level – as hereby defined- leads to the application of the existing obligations with regards to price control (as the price offered for the access shall be the same, regardless of the service to be provided) and the need to proceed to a preventive control of the existing offers at a retail level at



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least in the regional field, with the purpose (as detailed when dealing with the ex ante control of said offers in the national scope) of being able to proceed with an adjustment of the wholesale prices applicable to the access in case that this action is considered necessary in order to prevent possible non-competition practices such as the squeezing of margins. In response to the comments to the CNC, the extension of the ex ante communication obligations at a local scope would be disproportionate, taking into account the number of boundaries (a maximum of 308) on which this obligation would be applicable and the existence of a series of differential factors such as the relevance of self-provision in this geographical market.