COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

IGNACIO REDONDO ANDREU, Board Secretary of the 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 Board Meeting No 24/09 of the Telecommunications Market Commission held on 2 July 2009, did adopt the following

AGREEMENT

By this we hereby approve the following

RESOLUTION ON THE MODIFICATION OF WHOLESALE OFFERS IN RELATION TO THE SYSTEM OF PENALTIES AND PAYMENT GUARANTEES (MTZ 2008/120).

I. FACTUAL BACKGROUND

One.- Communication to the interested parties of the ex-officio commencement of the procedure.

The Secretary of this Commission informed a number of interested parties in writing, on 21st February 2008, of the commencement of this administrative procedure for the review of existing wholesale offers with the reference MTZ 2008/120, granting them a period of ten days, in accordance with the provisions of article 76.1 of Act 30/1992, of 26th November, of the Legal System of the Public Administrations and of the Common Administrative Procedure (hereinafter, LRJPAC), following the notification of the commencement agreement, to allege whatever they considered appropriate.

Likewise, given the existence of an indefinite number of interested parties in the procedure, in accordance with the provisions of articles 59.6 a) and 86 of the LRJPAC, notice was given via the Official State Gazette of the commencement of the corresponding procedure on 14th March 2008.

Moreover, in the commencement agreements, it was communicated that the purpose of this procedure is to adopt a reasonable system with regard to penalties which, essentially, is useful for the operators and which is aimed at promoting the

development of effective and sustainable competitiveness in electronic communications markets.

This procedure is intended to ensure the effectiveness of penalties as an essential instrument for the due fulfilment of the Wholesale Offers of Telefónica de España, S.A.U. (hereinafter, Telefónica) approved by this Commission and will also act to try to settle the disputes which arise as a result of non-payment, of both penalties and services, by the operators. In order to achieve the latter, the possibility is considered of introducing measures to stimulate payment by operators of the services rendered by Telefónica, such as the modification of the guarantee requirements which may be demanded.

Two.- Writ presented by Telefónica de España, S.A.U.

On 18th March 2008, in the Telecommunications Market Commission Register, a writ was entered by Telefónica in which the following allegations were presented:

- *That the Commission is not empowered to pronounce on civil matters.*

According to Telefónica, Wholesale Offers do not in themselves constitute administrative resolutions, but rather what the administrative resolution in question does is to approve the corresponding offer of obligatory "contract" for Telefónica, without this affecting the private nature of the agreements signed in compliance with said resolutions.

Telefónica understands the contractual clauses enforcing the payment of penalties to be penal clauses and, in accordance with articles 1.152 and 1.153 of the Spanish Civil Code (hereinafter, C.c.) to fulfil two functions: the coercive function and the settlement of damages. Therefore, it is the judges and civil courts who must resolve the interpretation of these precepts.

In conclusion, according to Telefónica, the General Telecommunications Law 32/2003, of 3rd November, (hereinafter, LGTel) has not attributed to the Commission, either expressly or implicitly, the authority to (i) decide whether the operators have sufficient legal capacity or powers to sign the contracts corresponding to possible regulated wholesale offers which demand their subscription, (ii) determine the civil liability or damages compensation to which they would have a right as a result of presumed contractual non-fulfilment by Telefónica or (iii) pronounce on the demandability of a penalty, and even less, on the compensation of the same, which requires a prior pronouncement over its specific quantity.

- *That debts are not compensable because they do not satisfy the requirements of article 1.196 of the C.c.*

According to Telefónica, the amounts pending for the rendering of services and those pending for the accrual of penalties are not compensable because they do not satisfy the requirements established in article 1.196 C.c., specifically, that of the origin of the debt and that of the liquidity of the debt (it being impossible to consider definite or liquid an amount which is questioned by the debtor).

- *The Commission would incur in abuse of power if it made resolutions over penalties.*

Telefónica considers that if this Commission adopts a decision without the coverage of regulatory empowerment, or without acting within the purposes established in the legal system, it will be incurring in abuse of power and acting beyond its authority, in accordance with articles 106.1 of the Spanish Constitution and 53.2 of the LRJPAC.

Specifically, Telefónica declares that this Commission would be using a power which it effectively holds, as is the coactive imposition of measures to ensure effective competitiveness in the sector, to achieve the effective satisfaction of supposed credit rights (private) generated by third operators against Telefónica and not for the protection of general interest.

Along with the above, Telefónica affirms that the action of the Commission by which it imposed a procedure which prevented the resolution or suspension of the contracts which it is obliged to sign by current regulations, despite non-fulfilment by the contracting party of the essential obligation of payment, would enable Telefónica to demand capital liability of the Commission for the damage caused.

- *That the modification of the guarantee system is necessary.*

Telefónica considers that the fact that this Commission requires a persistence of non-payment in order to permit a request for guarantee encourages the reiterated non-payment of alternative operators. Therefore, Telefónica is in favour of the review of the guarantee system established in the wholesale offers.

Three.- Allegations presented by the alternative operators.

In the Register of this Commission, allegations were received from the following alternative operators interested in the proceedings of this procedure:

- Cableuropa, S.A.U. and Tenaria S.A. (hereinafter, ONO).
- France Telecom Internet Service Provider, S.A.U. (hereinafter, Ya.Com).
- France Telecom España, S.A.U. (hereinafter, Orange).
- Jazz Telecom, S.A.U. (hereinafter, Jazztel).

- Association of Telecommunications Operators and Services Companies (hereinafter, ASTEL).
- Catalana de Telecomunicaciones Societat Operadora de Xarxes, S.A. (hereinafter AL-PI).
- Euskaltel, S.A. (hereinafter Euskaltel).
- Independent Operators Group[1] (hereinafter, IOG).

All the operators agree on the need to carry out modifications to the existing system of penalties. Generally speaking, the operators proposed that penalties should be invoiced separately from the wholesale services rendered by Telefónica, and even that it should be them who drew the invoices. Likewise, the majority of operators proposed the need for some sort of mechanism of communication or information exchange for both the resolution of discrepancies arising in relation to the same and for settlement or possible compensation. Some operators proposed the modification of the Operator Management System (OMS) in this respect.

With regard to the possible modification of the system of guarantees included in the Offers, the majority of operators was in disagreement and advocated the continuance of the requirements of the current system.

Four.- Demand for information made to Telefónica.

By means of a writ by the Secretary, with date of issue from the Register of this Commission of 12th June 2008, due to the need for the same for the determination and knowledge of the specific circumstances of the issue in hand, Telefónica was demanded to provide the following information within a period of ten days, with the accrediting documentation in each case:

- *Total amount paid (or offered) to the alternative operators by way of penalties associated with delays in both the provision of regulated services and in the resolution of provision incidences, since January 2001. The information shall be provided unbundled according to each of the Wholesale Offers approved and each alternative operator.*

- *Modes of payment offered and accepted by Telefónica for the settlement of the penalties incurred.*

- *Total number of claims made by the alternative operators with regard to invoicing. List of the aspects of invoices issued by Telefónica receiving most claims by the alternative operators.*

- *Description of the procedure introduced at a retail level ("home") for the processing of claims presented by Telefónica users.*

[1] Association between World Wide Web Ibercom, S.L. and Desarrollo de la Tecnología de las Comunicaciones, S.C.A.

- *Description of the procedure introduced at a wholesale level regarding commercial services ("professionals and business") for the processing of claims regarding invoicing.*

- *Description of the procedure introduced at a wholesale level regarding regulated services for the processing of claims regarding invoicing.*

Five.- Writ presented by Telefónica in response to the demand.

On 18th July 2008, a writ by Telefónica was entered into the Register of the Commission responding to the aforementioned demand. In said writ, and in a preliminary way, Telefónica alleged that said demand had been issued within a procedure for whose processing and resolution the Commission was not empowered. Therefore, this "*ab initio*" lack of power would affect any action taken within said procedure, including said demand.

Moreover, in said writ, Telefónica requested the confidentiality of certain data provided in response to said demand. By means of a writ by the Secretary of this Commission, dated 9th September 2008, the confidentiality of part of the information provided was declared in the consideration that, otherwise, detriment might be caused to the secrecy and commercial interests of Telefónica.

Six.- Trial report.

By means of a writ by the Secretary, dated 30th October 2008, published in the BOE (Official State Gazette) of 8th November 2008, the interested parties were informed of the result of the proceedings of this procedure, the interested companies being summoned to trial.

The services report reached the following conclusions:

> ***"One.-*** *To determine the billable nature of penalties and approve the proposed settlement system.*
>
> ***Two.-*** *To modify the penalty systems included in all the Reference offers of Telefónica de España, S.A.U. in the way indicated in this proposal.*
>
> ***Three.-*** *To modify the payment assurance mechanisms included in all the Reference offers of Telefónica de España, S.A.U., eliminating the current debt requirement for their establishment.*
>
> ***Four.-*** *Urge Telefónica de España, S.A.U. to publish the consolidated text of the different Offers within a period of three working days following the notification of the Resolution, replacing it by the text published by this Commission.*

Telefónica de España, S.A.U. must publish the approved text in its hypertext server «http://www.telefonicaonline.es».”

Seven.- Allegations of the operators to the trial proceedings.

Allegations to the trial proceedings have been received by the following operators: Orange, ASTEL, Vodafone and Euskaltel.

They all agree on the need to introduce modifications to the OMS in order for the necessary information to be provided for the calculation of penalties, as well as the need to extend the periods proposed for the correct running of the procedure. Another aspect on which nearly all the operators agree is the need for the guarantee system to by reciprocal and for Telefónica to be obliged to establish the same.

Eight.- Allegations of Telefónica to the trial proceedings.

On 2nd November 2008, a writ by Telefónica was entered into the Register of the Commission presenting allegations to the trial proceedings. Generally speaking, Telefónica makes the following allegations:

- That the procedure proposed by the Commission is inadmissible from a legal and operative point of view since it contains various aspects which will make it difficult to put into practice, such as the invoicing cycles imposed, the periods, the interpretation of silence, the means of proof, etc.

- That the Commission lacks the power to pronounce on issues of a private nature. Telefónica alleges that contracts arising from Offers, and the penalties contained therein, are of a private nature.

- That the penal clauses perform a compensatory function and that the judges and civil courts perform a moderating function over the same.

- That this action by the Commission would clearly incur in abuse of power and capital liability.

- That there should be a technical baseline to the provision and maintenance of the access services included in the RUO.

- That the modification proposed in the trial report with regard to payment guarantee mechanisms is insufficient and, for that reason, Telefónica includes various modifications to be taken into account.

To the above factual background, the Services of this Commission consider applicable the following

II. LEGAL BASIS

One.- Object of the procedure.

The object of this procedure is the review of the Wholesale Offers of Telefónica approved by this Commission in order to assure the full effectiveness of their provisions in relation to the consequences arising from the non-fulfilment of the conditions of rendering of services, in particular, modifying the procedures for the settlement of the penalties associated with said non-fulfilment.

Likewise, the object of this procedure is to introduce measures which guarantee the payment by operators of the services rendered by Telefónica.

Two.- Current situation.

All current reference offers (RIO, RUO, RLO and WLR), arising from the obligations of transparency and non-discrimination imposed on Telefónica as dominant operator in the different markets, contain service level agreements and define penalties associated with possible non-fulfilment.

A. Reference Interconnection Offer (RIO)

The RIO contains the offer of services of generation, transit and termination of calls in the fixed network, markets in all of which Telefónica has been considered an operator with significant market power[2].

For all these services, the reference Interconnection Offer approved by the Resolution of 23rd November 2005, remains in force, with its successive modifications.

Specifically, for all these services, it is established that the service level agreements are the minimum contents of the Offer, that is to say, unavailable to Telefónica.

A.1 Contents

In the RIO, the most relevant penalties were those existing for delays in the provision and resolution of incidences in wholesale circuits. However, these

[2] A Resolution of the Commission, dated 12th December 2008 (MTZ 2008/447), approved the definition of the call origin market in the public telephone network provided in a fixed location, the analysis of the same, the designation of operators with significant market power and the imposition of obligations.
A Resolution of this Commission, dated 18th December 2008 (MTZ 2008/1192) approved the definition of the call termination market in the individual public networks of each landline telephone operator, the analysis of the same, the designation of operators with significant market power and the imposition of obligations.
A Resolution of this Commission, dated 29th June 2006 (AEM 2005/1453) approved the definition of the transit services market in the public landline telephone network, the analysis of the same, the designation of operators with significant market power and the imposition of obligations.

circuits are now included in the RLO, such that said penalties shall be analysed in the section corresponding to the RLO.

Additionally, in the RIO, penalties are included for other concepts related to interconnection such as:

- Delays in the establishment or extension of Interconnection Points. These penalties can be applicable to both Telefónica and the operator.
- The communication of non-existent faults. Can also be applicable to both Telefónica and the operator.
- Early deregistration of links in the capacity interconnection model, where penalties are applicable to the applicant operator.

Penalties for early deregistration of links are closely related to the capacity interconnection standard and are only applicable to the applicant operator in the case of early discharge of the agreement. For this reason, they are more similar to a damages compensation than to the penalties themselves, since they do not respond to an objective of guaranteeing the rendering of services in the obligatory conditions of quality and time established, but instead are the consequence of the discontinuance of said services.

Therefore, they are excluded from the object of these proceedings.

B. Reference Unbundling Offer (RUO3)

B.1 Services of unbundled access and indirect and bit-stream access to the loop

A Resolution of this Commission, dated 22nd January 2009 (MTZ 2008/626) approved the definition of the markets of wholesale unbundled access (including shared or fully unbundled access) to metal loops and sub-loops for the purposes of rendering broadband and vocal services and wholesale broadband access services, the analysis of the same, the designation of operators with significant market power and the imposition of obligations.

In said Resolution, it was concluded that the reference markets were not really competitive and Telefónica was identified as an operator with significant power, having the corresponding obligations imposed upon it, among which were included the obligation to provide wholesale unbundled access services to all operators at regulated prices, the obligation of transparency and that of non-discrimination.

With regard to the obligations of transparency and non-discrimination, it was considered that the offer of wholesale unbundled and indirect and bit-stream access services to the loop included in the Reference Unbundling Offer, whose

[3] Including the modifications introduced by the OIBA, approved through the Resolutions of 27th March 2008 and 22nd May 2008.

latest modification was approved by Resolution of the Commission dated 22nd May 2008, continued in force, including the subsequent modifications.

B.2 Contents

The penalty system of the RUO is essentially characterized by the application of automatic penalties for each non-fulfilment of the parameters included in the corresponding service level agreements. This system sets out from 100% fulfilment by the renderer of services (Telefónica).

The RUO includes three different types of penalty:

- Penalties applicable for delays in the provision of services.
- Penalties applicable for delays in the resolution of incidences occurring both in the provision of services and the resolution of faults[4].
- Penalties for undue clearances of incidences or notifications of non-existent faults.

The first are demandable when a delay occurs in the provision of an RUO service, bearing in mind the deadlines for the delivery of the service. For this purpose, the so-called “provision time” is defined in the RUO (Section A.1 of Appendix 1) as the time elapsing from an initial moment to the delivery of the service.

Moreover, the RUO includes other periods apart from the provision time for carrying out specific procedures. In the event of these deadlines failing to be met, a provision incidence would be opened but a penalty would not automatically be applied. However, once a provision incidence has been opened (whose resolution time is 2 working days), any delay in the resolution of the same determines the possibility of demanding the payment of a penalty.

According to the RUO, the penalty for delay in the provision of a particular service and the penalty for delay in the resolution of a provision incidence whose cause is the exceeding of the delivery time of said service, are mutually exclusive, the penalty associated with the delay in the provision of the service being applicable.

At the same time, there are also penalties associated with the non-fulfilment of maximum times for the resolution of faults.

The method for calculating penalties has been established as a percentage of the registration fee of the services affected, bearing in mind the period of delay incurred.

Finally, the penalties have been defined for undue clearances of incidence by Telefónica or notifications of non-existent faults (“false fault”) by the operator accessing the pairs.

[4] There is also a penalty for the unavailability of the pair accessed.

C. Reference Line Rental Offer (RLO)5

A Resolution of this Commission dated 23rd November 2006 (AEM 2005/1456) approved the definition and analysis of wholesale leased line termination segment markets and wholesale leased line trunk segments, the designation of operators with significant market power and the imposition of obligations. These markets correspond to numbers 13 and 14 of the first market Recommendation of 2005. In the new Recommendation of 2007, 13 corresponds to 7, whereas 14 has been excluded.

With regard to the terminal rented lines, in said Resolution, after defining and analysing the reference market, the conclusion was reached that it was not really competitive and Telefónica was identified as an operator with significant power in the same, having the corresponding obligations imposed upon it, among which were included the obligation of providing wholesale terminal rented line services to all operators at regulated prices and the obligation of transparency.

Telefónica is obliged to offer terminal rented line services rendered with traditional interfaces and rendered with Ethernet and FastEthernet interfaces. For traditional lines, the obligations imposed are specified in the application of the current RIO and, for Ethernet lines, Telefónica had to present an Offer jointly with the traditional rented line offer included in the RIO, that is to say, the RLO.

With regard to rented trunk lines, in said Resolution, the conclusion was reached that the reference market was not really competitive and Telefónica was identified as an operator with significant power in the same, having the obligations of access, non-discrimination and transparency imposed upon it.

In accordance with the obligation of transparency, Telefónica is obliged to publish a reference Offer for the rendering of wholesale rented trunk line services, including service level agreements as the minimum contents of the same. A Resolution dated 10th September 2008 approved the modification carried out to the Reference Offer of Telefónica for rented trunk lines in relation to the Mainland-Canaries route (MTZ 2008-516).

C.1 Contents

In the RLO, as in the RUO, there are penalties for delays in the provision of services and in the resolution of incidences. The scheme of penalties for delays in the resolution of incidences is identical to the RUO, that is to say, an automatic penalty is applied, the amount of which is calculated according to the delay with regard to the maximum period for resolving the incidence and the timetable during which it occurs.

[5] On 15th January 2009, the Commission announced the opening of the public inquiry proceeding related to the definition and analysis of the minimum rented line set market (market 7), the wholesale rented line termination segment market (market 13) and wholesale rented line trunk segment markets (Market 14), to designate an operator with significant market power and to enforce specific obligations.

On the other hand, the system of penalties for delay in provision is somewhat more complex than that of the RUO.

- There is an automatic penalty if Telefónica delays with regard to the agreed delivery date. This aspect is identical to the RUO. The agreed delivery date may be at most twice the standard delivery time for each circuit.

- In addition, Telefónica is obliged to meet the standard delivery time for 85% of requests. For this reason, the level of delays of Telefónica is measured on a quarterly basis and, if it over 15%, penalties are applied to those circuits which exceed said percentage.

This added complexity with regard to the RUO is because the provision of rented circuits can present a number of complications[6] which make it advisable to give a certain degree of flexibility to the combination of provision times and associated penalties.

At the same time, in the Offer of trunk lines covering the Mainland-Canaries route, a system of penalties inspired largely by the RLO has been established, but adapting it to trunk lines and the characteristics of undersea cables.

D. Reference Wholesale Line Rental (WLR) Offer

A Resolution of this Commission dated 12th December 2008 approved the imposition of specific obligations in the market of call origin in the public switch telephone network provided from a fixed location (market 2 of the Recommendation).

In said Resolution, Telefónica was given the wholesale obligation of rental of the telephone line or Wholesale Line Rental (WLR) related to the obligation of access and of transparency. Specifically, the corresponding service level agreements were established as minimum contents of the Offer.

D.1 Contents

The system of penalties included in the WLR is similar to that contained in the RUO. On the one hand, there are penalties arising from provision and penalties arising from incidences (which could, in turn, be of provision, of infrastructures and of invoicing). In some cases, the amount of the penalty is a fixed quantity to be paid and, in others, it has been established as a percentage of the registration fee of the service.

[6] For example, the extension of transmission equipment may be necessary, or the installation on customer premises may require unforeseen building work, etc.

Three.- Situation in European countries.

All the European countries (Portugal, France, Italy, Germany and United Kingdom) have implemented systems of penalties associated with non-fulfilments in the framework of the various Reference offers of the different regulated wholesale services.

In the case of United Kingdom, the level of penalty payment was very low, despite the increase in claims and disputes between the operators and the incumbent (Openreach). The system introduced through the service level agreements involved a certain degree of technical complexity and required the operator affected by the delay or non-fulfilment to bring a claim against Ofcom in order to demand fulfilment. For this reason, on 20th March 2008, Ofcom approved a proceeding aimed at the sector with the aim of incentivising fulfilment ("*Service level guarantees: incentivising performance. Statement and Directions*[7]"). A system was imposed based on the automatic proactive payment of penalties by the incumbent.

The regulatory system in Portugal and Italy is very similar. Both states have included the penalties in each of the Offers and in the corresponding service level agreements. The method of calculating the penalties varies according to the services affected. Thus, in the case of Italy, besides being associated with delays or incidences, they are also applied for disagreements with the general contractual obligations. In the specific case of Portugal, many disputes have been resolved[8] regarding the amounts accrued and the quantification of the penalties in the framework of the RUO and the RLO.

On the other hand, Germany does not have a great deal of experience on these matters, since it only included penalties in 2008. Its NRA, Bundesnetzagentur, has taken into account delays and non-fulfilment of service level agreements by the incumbent in order to adopt this regulatory measure in a similar way to the other NRAs and in accordance with European standards.

Within the *European Regulators Group for Electronic Communications Networks and Services* (hereinafter, ERG), of which the Telecommunications Market Commission is member, various common positions have been adopted and diverse reports approved which in some way pronounce on the subject of penalties.

In the Plenary held in May 2008, the ERG approved[9] a code of good practices ("*Report*[10] *on ERG best practices on regulatory regimes in wholesale unbundled access and bit-stream access*") applicable to reference markets 4 and 5, whose

[7] http://www.ofcom.org.uk/consult/condocs/slg/slg.pdf
[8] http://www.anacom.pt/render.jsp?contentId=595499
http://www.anacom.pt/template31.jsp?categoryId=275704
[9] http://www.erg.eu.int/doc/meeting/erg_08_34_plen_conc_080702.pdf
[10] ERG (07) 53 WLA WBA BP final 080604.

conclusions are transferable to the remaining markets whose services are rendered around service level agreements.

The ERG considers it beneficial for the NRAs, in order to guarantee the fulfilment of the SLAs, to include a system of penalties as part of the different Reference offers ([11]). It also acknowledges that, from the practical point of view, the application of penalties is a proportionate measure for cases of defective fulfilment of SLAs by operators with PSM ([12]).

In other documents[13], the ERG has defined penalties as a suitable mechanism to incentivising the fulfilment of service level agreements.

Four.- Empowerment of the Telecommunications Market Commission.

In accordance with article 48.2 of the LGTel, *"the object of the Telecommunications Market Commission shall be the establishment and supervision of the specific obligations to be fulfilled by operators in the telecommunications markets and the promotion of competitiveness in the audiovisual services markets, in accordance with the provisions of its regulatory standards, the resolution of disputes between operators and, where appropriate, the exercise as arbitrary body in controversies between the same."*

As indicated in the following Point of Law, Telefónica is obliged to publish the Reference offers of the various wholesale services as a result of the imposition of certain specific obligations in the corresponding market analyses.

With the purpose of making these obligations effective, this Commission is empowered to introduce changes in the reference offers in accordance with article 9.2 of Directive 2002/19/CE of the European Parliament and of the Council, of 7th March 2002, related to access to electronic communication networks and associated resources, and to their interconnection (Access Directive) and, at a national level, article 7.3 of the Markets Regulations.

At the same time, bearing in mind the current situation in the sector, in accordance with article 23 of the Markets Regulations, this Commission may intervene on its own initiative in the relations between operators when it is justified.

At the same time, the Telecommunications Market Commission, in the field of its respective powers, must promote and, where appropriate, guarantee the accomplishment of the objectives and principles established in article 3 of the LGTel.

[11] It is best practice for NRAs to subject to compensation payments by the SMP player all SLA indices/timers, including the ones mentioned before.
[12] Practical experience indicates that it is proportionate to apply compensation amounts for all cases where the SMP does not comply with the agreed service level
[13] ERG 06(33) Remedies Common Position (Posición Común sobre obligaciones) y ERG 06(70).

Telefónica contests this empowerment by alleging that relations with operators are implemented by means of private contracts whose contents are contractual and not regulatory obligations, including service level agreements, which are also of a private nature.

In this respect, it points out that wholesale Offers do not in themselves constitute administrative resolutions, but that administrative resolutions of approval of wholesale Offers approve the corresponding "contract" offer obligatory for Telefónica, without this affecting the private nature of the agreements signed in fulfilment of said resolutions. That is to say, Telefónica alleges that the powers of the Commission come to an end with the administrative act of approval of the Offers.

A. Regarding the legal nature of agreements.

It is necessary to start out from the fact that Royal Decree 2296/2004, of 10th December, which approves the Regulation on electronic communications markets, network access and numeration (hereinafter, Markets Regulation), proceeding from the LGTel, includes the capacity of the Telecommunications Market Commission to intervene in access contracts, pointing out, in relation to Reference Offers, that the TMC *"may introduce changes to reference offers in order to make effective the obligations referred to in this chapter and shall establish, for each kind of reference offer, the procedure for its application and, where appropriate, the periods for the negotiation and formalization of the corresponding access agreements; it shall also have jurisdiction over the disputes which arise between operators in relation to such access, both during the negotiation of the agreements and the execution of the same, in accordance with the provisions of article 23.3a)".*

Therefore, it is true that this Commission approves the contents of the different Offers of the various regulated services. At the present time, wholesale regulated service Offers are the result of the various market analyses carried out by this Commission, in which obligations and regulatory measures are imposed, such as, specifically, the publishing of Offers (issue which is analysed in depth in the following Point of Law).

Just as the Commission has declared on numerous occasions, the access agreement is a private contract, specifically, a service leasing contract, regulated in article 1544 of the Civil Code. However, there is a legal limit to the contractual freedom prevailing in the relations established between Telefónica and the third party operators that formalize this type of contract, which is none other than the power of the Commission to intervene administratively in said contractual relationship.

This empowerment is justified by the necessary protection of certain public interests such as the promotion of competitiveness or the safeguarding of the principle of transparency or of the principle of non-discrimination between operators.

For this reason, the power of the Commission is not limited to the simple approval of certain conditions, as alleged by Telefónica, but includes the intervention in all those aspects necessary to guarantee their effective fulfilment, in order to conserve competitive conditions in the different markets.

Consequently, it is the Commission's function to control and monitor the execution of any wholesale regulated services contracts concluded, in accordance with the provisions of the aforementioned Regulation.

This has been acknowledged by the Supreme Court, among others, in its Sentences dated 3rd December 2004 and 19th May 2005, when making reference to interconnection agreements, declaring the following:

> "*It is precisely administrative intervention in its various forms that which hinders the legal classification of the named party in the interconnection agreement act*[14]*, an agreement which can undoubtedly be affirmed to be of a contractual nature, although subject to considerable powers of intervention by the Administration, powers held in our Legal System by the TMC. It might even be affirmed that the prerogatives of the Administration in relation to these contracts, in principle of a private nature, are greater than those it holds in administrative contracts".*

In the exercise of its powers, this Commission has intervened in the modification of agreements of, for example, interconnection, with the aim of ensuring competitiveness in the sector, intervening for reasons of general interest or even adopting measures in those cases in which an imbalance arose in the contractual conditions between operators as a result of sector regulation, all this being endorsed by Sentences of the Supreme Court dated 17th November 2004, 25th April 2005 or 18th November 2005.

That is to say, contrary to the declarations of Telefónica, the empowerment of the Commission does not only extend to the possibility of intervening in the preparation of the standard contracts which form part of the Offer, by introducing clauses whose intention is to balance the unequal situation in which the alternative operators find themselves with regard to the operator with significant weight on the market, substituting the autonomy of will, but can also have authority over the disputes which may arise both within the framework of negotiation and in the execution of said contracts.

A consequence of this are the stipulations of the standard contracts attached to the RUO themselves, in which, when determining the criteria for the resolution of disputes between the parties to the agreement, it is established that *"in the event of discrepancy between the parties regarding the interpretation, modification or execution of this Contract, the parties undertake to use their best efforts to resolve said discrepancy (…). At all events, the parties may go directly to the*

[14] By analogy, applicable to the rest of the agreements signed in the framework of the different Offers.

Telecommunications Market Commission for the resolution of controversies, without the need to undergo the procedure established in this stipulation".

It is therefore obvious that the action of the regulator cannot only be limited, as Telefónica would have it, to the inclusion of certain clauses in the standard contracts, but must also include the possibility of interpreting, modifying or executing the agreements of the same.

Nonetheless, this Commission is aware that there are certain limits to administrative intervention in the legal relations between operators based on the principles of autonomy of will and of minimal intervention, among others. Therefore, the power of control held by the Commission is limited to all those situations in which public interests are involved which must be protected by the same.

In this respect, the Supreme Court, in its Sentence dated 27th December 2005, regarding interconnection agreements, affirms that "*it should be emphasised that only in those aspects of said agreements which affect principles of public legal importance may the regulating Authority intervene, private legal matters which fall outside said principles being beyond its jurisdiction."*

This doctrine has been fully ratified by the Supreme Court in its Sentences dated 8th July, 1st October and 18th November 2008.

As discussed below, penalties are not included in agreements by will of the parties, but arise from a legal mandate imposed on Telefónica and, contrary to the thesis defended by the operator, it should be pointed out that penalties possess an undoubtedly public character, which lies precisely in their very existence and the purpose for which they were created, that is, the rendering of the services in a framework of effective competitiveness.

B. Regarding the legal nature of penalties.

B.1 Regarding penalties as penal clauses.

Telefónica affirms that penalties are genuine compensatory penal clauses which form part of the agreements signed between operators and over which the Commission has no power whatsoever to intervene given their function of settling the damages inflicted.

Effectively, just as Telefónica alleges, penalties have been formally included in the various Offers, being comparable to penal clauses (a property acknowledged by the Resolution of 19th July 2007, by which the appeal for reversal regarding the Resolution of 14th September 2006 regarding the modification of the RUO is resolved). However, what Telefónica alleges appears to imply that, due to their similarity to penal clauses, this Commission may not pronounce on the same.

The penal clause, generally speaking, is included in articles 1152 and following of the Civil Code. It is a legal concept which has been developed by Jurisprudence. Article 1152 of the C.c. establishes that "*in obligations with a penal clause, the penalty shall replace the damages compensation and the payment of interests in the event of non-fulfilment, if nothing else has been agreed* (…)". In accordance with, among others, the Sentence of the Supreme Court dated 19th December 1991, the penal clause establishes "*by means of covenant, the compensatory quantum and its substitute effect with regard to damage compensation".*

This function means that one of the purposes or objectives possessed *per se* by the penal clause is accomplished, namely the non-necessity to prove the damage. The Supreme Court (for what it may be worth, SCS dated 20th May, 1986), affirms that "*the structure of the penal clause, in accordance with its purpose, is that of avoiding the need to demonstrate the existence and quantity of damages for the established cases of deficient or total non-fulfilment and, in this case, the only thing which had to be proven or was proven, is the fact of the delay",* when so agreed. Therefore, this type of penal clause is classified as superseding or settling.

Nonetheless, as opposed to this settling function indicated by Telefónica, penal clauses can exercise another type of function whose characteristics have been developed jurisprudentially.

It is necessary to start out from the premise that penalties have been included in the various Offers to incentivise the meeting of deadlines, that is, they are only applied in the event of there being a delay either in the provision of the different services or in the resolution of incidences related to the same. They are configured as a type of objective clause to be applied in the event of default or delay in fulfilment. Moreover, it should also be mentioned that in all Telefónica's regulated service Offers, a compensation is established.

In Jurisprudence, this type of clauses are called default clauses, which are those stipulated exclusively for the case of delay incurred in by the debtor in the fulfilment of the obligation (Sentences of the Supreme Court dated 29th November 1997 and 26th May 1980).

In its Sentence dated 29th November 1997, the Supreme Court distinguishes between superseding penal clauses and default penal clauses, in the following terms: *"In obligations with a penal clause, as a general rule, the stipulated penalty substitutes the compensation for damages and the payment of interests in the event of non-fulfilment of the obligation, if nothing else has been agreed (article 1152 of the Civil Code), in other words, the penalty is applied when the debtor completely fails to fulfil the obligation. (…)But along with said penal clause, whose application presupposes the (total or partial) non-fulfilment of the obligation, is the so-called default penal clause, which is stipulated exclusively for the case of the delay in which the debtor incurs in the fulfilment of the obligation."*

In the same way, the Provincial Court of Valencia, in its Sentence dated 15th January 2008, affirms that *"it is necessary to distinguish between the penal clause with a settling function, (that is the one agreed upon as a substitute penalty for possible damage compensation, included in article 1.152 of the Civil Code), and the default penal clause, established specifically for the case of delay in the fulfilment of the obligation of executing the work in the established period. (Sentences of the Supreme Court dated 3rd November 1999, 18th April 1986, 18th December 1996, 29th November 1997 and 12th January 1999)"*

In these Sentences, the Supreme Court and the Provincial Court of Valencia make a distinction between clauses which substitute damage compensation (established for cases of total or partial non-fulfilment of obligations) and default penal clauses (those applied in the case of delay), differentiating between two separate types of penalty.

In summary, the default penal clause forms a different kind of penalty, independent, at all events, from damage compensation and which is therefore subject to a different legal system.

Therefore, given that, as we said, in all the Reference offers of regulated services the existence of damage compensation is established independently of the penalties, in the field of Reference offers and SLAs, said penalty must be considered default and not superseding or settling.

This doctrine has been taken on by the Supreme Court which, in its Sentences dated 5th September and 10th October 2008, classified the penalty established in the RUO as "*a clause which by its nature and structure can be classified as a default penal clause". Likewise, it points out that "the argument of TESAU to defend the powerlessness of the TMC to enforce the payment of penalties, on the understanding that these are damage settlements between private persons over which the regulator has no authority, is flawed if we observe that the penalties established in the RUO have a simply coercive purpose, are calculated by virtue of an objective formula and do not seek the repair of any damage, but the fulfilment of the obligations taken on by TESAU in the RUO".*

Despite the clarity with which the Court has pronounced in favour of the Commission's powers in relation to penalties, Telefónica insists on declaring its powerlessness in its writ of allegations awaiting trial, affirming a supposed damage settling function. It mentions the Resolution of 31st March 2004 for the modification of the RUO, under which the amounts of the penalties are increased and in which the Commission "*considering that existing penalties are mostly associated with service delivery times and that any delay in the same implies damage to the image of the operators with regard to their customers, a situation which involves high costs for said operators, the quantities of the penalties defined in the SLAs shall be increased".* Telefónica considers that the association made by the Commission between effective damage to the image of the operators and the increase in

penalties to compensate them signifies, necessarily, that the penalty has a compensatory function.

However, Telefónica is confusing the criteria used to establish the amounts of the penalties with the function carried out by the latter. In order to establish the amount of the penalties, the Commission takes various elements into consideration, such as the real cost of the service, the cost of potential losses for each hour or day of delay incurred, the market value of the service, etc. The idea is to establish amounts in such a way as to dissuade non-fulfilment by Telefónica, such that it should not be more advantageous to fail to meet the regulated deadlines.

As established in the Resolution of 31st March 2004, delays with regard to regulated delivery times have a direct impact on the operators' final customers and cause damage to the operators' image. Taking this parameter into consideration in order to establish a really dissuasive penalty does not imply, in any way, a quantification of the possible damage suffered by the operator.

In conclusion, the penalties included in each of the wholesale Offers of Telefónica possess a different legal nature from damage compensation clauses.

B.2. Regarding concurrent public interest

In the trial proceeding, Telefónica alleges that the Commission's argument to justify the demand for penalties is based on the fact that "*they are intended to incentivise Telefónica*". However, it considers that both damage compensation and the default penal clause are incentives from the point of view of the parties and not from the point of view of public interest.

According to Telefónica, agreements can be reached over penalties which put an end to specific discrepancies, that is to say, that the regulatory principle and autonomy of will prevail. It affirms that if the general interest which is the basis of the administrative power which the system attributes to the Commission concurred in the same, these would be indisposable and unrenounceable. Telefónica believes that penalties must be considered elements of a private nature because they are open to agreements between the parties.

This idea clashes with regulatory reality (both internal and community) and with the jurisprudential interpretation.

Contrary to what Telefónica alleges, this Commission considers, as will be explained below, that the very existence and effectiveness of penalties, which serve as a guarantee and incentive for the fulfilment of the conditions of quality and delivery times established for wholesale services, responds strictly to essential reasons of public interest; these being, the maintenance of the capacity to compete of the operators which require the use of Telefónica's network to render their services in the end market, for which purpose it is essential for the

provision to be made under the conditions of time and quality included, obligatorily, in the reference offers for each of the wholesale services.

a) Regulation of Service Level Agreements.

Penalties form an essential and integral part of the obligations which arise for Telefónica from the reference offers on issues of quality and delivery times.

In fact, service level agreements, along with the associated penalties, have become an essential part of so-called technological contracts, which include contracts which articulate the rendering of wholesale electronic communications services, insofar as they are the representation of certain minimum parameters of quality obligatory for the party rendering the service (delivery times, incidence resolution times, etc.), established in an objective and specific way (hours, days, etc.). In order to encourage their observance by the service provider, the SLAs include penalties associated with the non-fulfilment of the objective parameters established in the agreement.

It should be remembered that in these markets the wholesale supplier, whose position is equivalent to that of a dominant operator, is at the same time a competitor with its wholesale customers in the end markets. Time and quality conditions are essential variables for competitiveness.

Being aware of this, both the community and the national legislator have established the quality and delivery time conditions, and the penalties associated with non-fulfilment of the same, as part of the essential contents of the offers which must be formulated by the dominant operators.

At a community level, on 29th June 2000, the European Union Recommendation on unbundled access to the local loop was published. In this text, the Commission recommended the Member States to adopt the necessary regulatory measure to oblige dominant operators to provide complete unbundled access to the local copper loop, in transparent, fair and non-discriminatory conditions, by December 2000.

Therefore, the Appendix to the Regulation CE 2887/2000, of 18th December 2000, on unbundled access to the local loop, contains a list of the minimum elements to be included in the reference offer for unbundled access to the local loop, published by the notified operators (RUO). Said conditions include that of establishing "*standard contractual conditions, including, where appropriate, compensation for failing to meet deadlines".*

As far as national regulations are concerned, in the Appendix of Royal Decree 3456/2000, of 22nd December, which approved the Regulation establishing the conditions for accessing the local loop of the public fixed telephone network of the dominant operators, currently repealed, minimum contents were established for the offer of access to the local loop; among the supply conditions was included the

existence of standard contracts, which "*shall include, at least, conditions related to deadlines for the provision of access, associated resources and repair of faults, with indication of the compensations existing for non-fulfilment (…)".*

These two Regulations established the minimum contents of the first offers of access to the loop (that is to say, of the first RUO).

Subsequently, in Appendix II of the markets Regulations currently in force, the minimum contents to be contained in the RUO are also established. In fact, with regard to "Supply Conditions", among other things, it indicates the need to establish standard contracts for the provision of access, associated resources and fault repairs, "*with an indication of the compensations existing for non-fulfilment*."

In this way, the various texts of the RUO which have been approved by this Commission over time have included penalties for delays in the meeting of deadlines by Telefónica, both in the provision of services and in the resolution of incidences. In an analogous way and in defence of the same interests, bearing in mind the same principles as with access, the following Offers, firstly for interconnection and later for other wholesale services, have included the corresponding penalties.

b) Regarding penalties as essential contents of reference offers.

As we have just mentioned, all the wholesale regulated services Offers approved to date by this Commission, include quality commitments, also called service level agreements (SLAs), and penalties associated with non-fulfilment of the same.

Therefore, any operator that contracts regulated services in the framework of any of the current wholesale Offers has the right to demand fulfilment of the established levels of quality and to demand payment of the corresponding penalties in the event of non-fulfilment.

It must be remembered that the basis of the existence of standardized wholesale offers lies in the need to solve the inequality in the negotiating capacity of the parties, one of which is the dominant operator, which controls an essential resource, namely, the network, and the other, the operators, which require the services which the former can provide in order, in turn, to be able to compete with the same in the end markets.

The existence of Reference offers provides the other operators with a necessary safety net, that is to say, a set of minimums for the supply of regulated services, under specific supply conditions, in order to prevent a refusal to supply or undue delays in the same, of which the mechanism of penalties forms and essential part.

Therefore, the contents of these standardized offers, in all their aspects, and their effective application, constitute an essential instrument for the correct development of competitiveness. That is to say, it is not enough for the operator

obliged to provide services just to provide said services, but it is necessary for it to provide them under certain technical, economic and quality conditions, without which it cannot be considered that the access which, by regulatory mandate, the dominant operator must provide, has effectively been granted.

In this respect, paragraphs 94 and 95 of the Communication on the application of competition standards to access agreements in the telecommunications sector, dated 22nd August 1998 (still in force), indicate that *"The time factor, the technical configuration and the price are three important elements in relation to access, which the supplier could manipulate in order to refuse to grant the same";* adding, in consequence, that *"telecommunications operators which hold a dominant position are obliged to process efficiently requests for access. Any undue, inexplicable or unjustified delay in reply to a request for access may constitute abuse".* Effectively, late or defective supply of services has an immediate impact on the alternative operators' capacity to compete.

Therefore, penalties, intended to incentivise the meeting of deadlines and with the required quality, form an integral part of the service itself and are therefore included as minimum and obligatory contents of the Offers which Telefónica, obligatorily, offers to the sector. And the fulfilment of the Offer itself is the main element of legal-public importance which, on the one hand, justifies its own existence and, on the other, is the basis for the Commission's intervention.

The unavailability of penalties by Telefónica arises from this eminently legal-public character, which does not disappear due to the fact that private interests also coexist, forming an incentive and a guarantee of fulfilment, and constituting an essential instrument for guaranteeing the adequate provision of wholesale services.

c) Regarding the coexistence of public and private interests.

Thus, it is common to find regulatory areas in which there is duplicity of regulations, with the existence of both public and private rules. In principle, in these matters there are public interests whose protection corresponds to the Public Administration and, at the same time, private interests whose defence corresponds to the participants in said market individually. Both sets or interests are normally closely linked.

In the specific case of the penalties included in the Reference offers approved by this Commission, there is effectively a close relationship between the public interests protected (the promotion of competitiveness through the incentivised fulfilment of the provision of regulated services) and the private interests of the operators (compensation for the possible delays suffered). With the payment of penalties, both objectives are accomplished.
The Supreme Court, in its Sentences dated 5th September 2008[15] and 10th October 2008[16], with regard to Telefónica's allegation about the lack of general

interests in the establishment of penalties, establishes that it is "*is a situation in which clear private interests, namely, business interests concur*" but that "*this is not incompatible with the concurrence of clear and important interests of a general nature which justify and empower the intervention of the TMC".*

This duplicity of interests also makes a double channel of claims possible. That is to say, on the one hand, the administrative channel can be used for the defence of certain rights when it comes to protecting a recognized public interest and, on the other, the ordinary channel can be used for claims related to private rights which lack a public aspect.

In this respect, the Supreme Court, in the aforementioned Sentences dated 5th September and 10th October 2008 (corroborating it in the Sentence dated 13th October 2008[17]) reasons it out in the following terms:

> *"…there is no doubt that in this case there is a clear general interest which justifies and is a basis for the intervention of the TMC, since even though Jazztel has effectively made use of the civil channel, performing the actions it deemed appropriate in defence of its interests and regardless of the fact that a partially reckoned compensatory pronouncement has been made, which I make firm, the fact is that said civil pronouncement does not imply the depletion of the concurrent interests since, along with the strictly business interests of a private nature, there is a general interest which is specifically that the announced Reference Unbundling Offer (RUO) which binds the dominant operator should be fulfilled and actually carried out, in such a way that the pre-established conditions be observed in practice in order to promote access and that competitiveness in the field of telecommunications be real and effective."*

For all these reasons, Telefónica's allegation based on the denial of the existence of a public interest in penalties is not admitted. Public interest does exist, and it is this that empowers any intervention of the Commission in this respect.

In conclusion, penalties have an eminently legal-public nature, although they also belong to the sphere of the operators' private interests. The concurrence of a clear general interest justifies the empowerment of the Telecommunications Market Commission.

d) Regarding the possibility of inter-party agreements.

[15] Sentence of 5th September dictated in the contentious-administrative action brought by Telefónica against the Resolution of this Commission dated 9th June 2005 and the Resolution of 4th November which resolved its request for review (regarding an access dispute between Telefónica and Jazz Telecom, S.A.U.)
[16] Sentence of 10th October 2008 dictated in the contentious-administrative action brought against Telefónica against the Resolution dated 21st December 2005 (regarding an access dispute between Telefónica and Jazz Telecom, S.A.U.)
[17] Sentence of 13th October 2008 dictated in the contentious-administrative action brought by Telefónica against the Resolution of 14th July 2005 (regarding an access dispute between Telefónica and Jazz Telecom, S.A.U.)

All this, without detriment to the possibility of operators reaching voluntary agreements regarding access or interconnection or any aspect related to these matters, including a different system of penalties.

In this respect, the Resolution of 22nd January 2009, which approves the definition and analysis of the wholesale market of (physical) access to the network infrastructure (including shared or fully unbundled access) in a fixed location and the wholesale broadband access market, the designation of the operator with significant market power and the imposition of specific obligations - markets 4 and 5 – specifies that in the event of operators reaching voluntary access agreements, apart from the conditions established in the RUO, the Commission will try to ensure that the conditions of said agreement guarantee the suitability of access and the interoperability of services, as well as the accomplishment of the objectives established in article 3 of the LGTel. For these purposes, and for the purposes of ensuring the fulfilment of the obligation of non-discrimination, Telefónica must communicate to this Commission the agreements it reaches with other operators.

e) Regarding public interest in the effectiveness of penalties.

The underlying public interest does not end with the inclusion of penalties in the various Offers, but it is also essential that these be made effective. This means that for the satisfaction of this interest it is necessary for the alternative operators to receive the amounts accrued once the service has been delivered or the incidence resolved.

It is necessary to point out that Telefónica's position of strength now not only affects the negotiation of access and interconnection agreements (existing, then, regulated standard contracts in the various Offers) but has a particular influence over the execution of the same. Thus, focussing on the subject of this proceeding, it is worthy of note, as will be shown later, that Telefónica includes penalties in its invoices when they are the liability of the other operator (for false faults, etc.), whereas there have been numerous disputes regarding the non-payment of penalties by Telefónica raised before this Commission and many more revealed before the diverse corresponding judicial channels. This high degree of dispute indicates the existence of some sort of failure in the current procedure, the resolution of which is proposed by this Commission.

It must be emphasised that the penalties' function of incentivising and guaranteeing the fulfilment of deadline and quality conditions becomes neutralized if its effectiveness is systematically delayed in time, as has been the case up to now.

Thus, all the operators agree on the need to make modifications in the existing system of penalties. The experience acquired in this respect has demonstrated the current system to be inefficient and to be associated with a high level of dispute. Each of the operators places stress on different aspects of the current system and,

nonetheless, agree on the fact that the only penalties existing in practice are those demanded by Telefónica.

Telefónica, in its response to the requirement dated 18th July 2008, indicated that since January 2001, the total sum paid to alternative operators as penalties amounted to [CONFIDENTIAL][18] . Likewise, it indicates that at the present time, within the framework of all the Reference offers, the alternative operators claim a total of [CONFIDENTIAL][19] in arrears.

One of the main problems which alternative operators have to face is the difficulty in determining the penalties. At the present time, Telefónica is the one which unilaterally calculates and settles penalties in accordance with its own data without giving the operators the chance to demonstrate their disagreement with the same.

This difficulty in the determination of penalties increases if other existing difficulties are taken into account, such as the defective function of the OMS, making it difficult, therefore, to keep a record of the delivery of the service and/or resolution of the incidence, or of the liability involved.

All this requires that the public interest existing in the fulfilment of penalties should be protected by means of a rapid procedure of executive determination of penalties in order to achieve the effectiveness of the same.

In conclusion, this Commission is empowered to pronounce on the same and enforce their payment, contrary to what Telefónica sustains. And this is so, taking into consideration the concurrence of public interests consisting of guaranteeing that Telefónica should place due diligence in the provision to competing operators of regulated services, essential for conserving competitive conditions in the end markets.

In consequence, this Commission, in accordance with the standard of the Supreme Court, maintained both in its Sentence dated 5th September 2008 and in that of 10th October 2008, must take the necessary measures to defend the public interests whose protection it is entrusted with.

Five.- Regarding the modifications to be made in the system of penalties.

Bearing in mind all the above considerations, specific modifications to be made in the system of penalties existing in each and every one of the Reference offers are proposed below. The modifications which are finally to be adopted must be taken into account by Telefónica with a view to the preparation of future Reference offers in order to achieve greater consistence.
The aim of this procedure is to introduce a useful and effective system for the payment of penalties, that is to say, a procedure which makes them effective.

[18],[19] Declared confidential by means of a writ of the Secretary dated 9th September 2008.

Telefónica, in its writ of allegations, stresses the legal inadmissibility and operative irrationality of the procedure proposed in the trial report. It considers that there are various operative aspects of the same which will impede its implementation, such as invoicing cycles, deadlines, the interpretation of silence, the means of proof, etc.

At all events, as has been demonstrated in the previous sections, it is necessary to adopt measure to modify the current system of penalties, this Commission having based its proposal on both legal reasons and reasons of opportunities, such that this allegation by Telefónica regarding the legal inadmissibility of the proposed procedure is not admitted.

On the other hand, it must be emphasised that all the operators mention different aspects of the procedure proposed in the trial procedure which they consider difficult to implement or which they disagree with. In order to make it easier to put the procedure which is finally to be adopted into practice, as far as possible, the justified and constructive contributions made by the operators within this procedure have been taken into account.

A. Penalties as a billable item.

Generally speaking, the operators have pointed out the need for a settlement procedure which allows them to bill Telefónica for the amounts accrued as penalties.

In connection with the modification made to the contents of the RUO in 2006, this Commission approved, through the Resolution dated 14th September 2006 (MTZ 2005/1054), the inclusion of penalties on invoices, expressly indicating the method to be used for their calculation. Likewise, it established that this settlement would be subject to compensation with the services billed to the operator creditor of the amount of the penalty, without detriment to the discrepancies which might arise in relation to the calculation of said penalties and, where appropriate, their subsequent regularization.

Subsequently, and in connection with the approval of the Resolution which resolved the request for review brought against the previous Resolution of 14th September 2006, this aspect of the contested Resolution was annulled, eliminating the inclusion of penalties as billable items and their possible compensation. Essentially, the allegation of Telefónica regarding the illiquidity of the debt due to its being a disputed quantity was taken into consideration.

From that time on, despite the automatic nature of penalties being reiterated, there was no alternative procedure for their management.

So, in order to decide over the establishment of a penalty management procedure, it is necessary to define, previously, whether or not these are a billable item.

Invoicing is a very important aspect of the commercial relations between operators. Specifically, the Spanish legal system[20] imposes on companies the general obligation of invoicing, that is to say, of issuing an invoice for each operation carried out. The importance of the invoice lies in the fact that it provides information to the Tax Administration, especially with regard to economic transactions arising from business or professional activities, while serving as proof of commercial relations.

The invoice is a mercantile document issued by a businessman or professional on the occasion of each of his mercantile activities. In this same respect, the Supreme Court, in its Sentence dated 22nd October 2002, which includes the consolidated doctrine expressed in Sentences such as that of 8th November 1990, 10th November 1992, 10th March 1999 and 6th November 2000, among others, establishes that *"... along with those expressly classified in the* Code of Commerce *or in Spanish Laws as mercantile documents -cheques, bills of exchange, promissory notes, letters of credit- documents such as delivery notes, invoices, etc. should also be considered as such. ».*

Mercantile documents, in accordance with the Supreme Court (Sentences dated 12th January 2004 and 7th February 2005), are those "*which express and include a commercial operation, representing the creation, alteration or discharge of obligations of a mercantile nature, or those which accredit or demonstrate operations or activities taking place in the environment pertaining to an enterprise or mercantile and extends to any incidence arising from said activities* (…)"

All this implies that the invoice may contain all those elements which, from the economic point of view, form part of the legal relationship of the two operators. The invoice responds to a contractual relationship and its cause is business related; therefore, any contractual obligation which implies payments of receipts arising from business activity may be included in the invoice.

Penalties associated with incidences and/or delays with regard to regulated deadlines arise from a contractual obligation and form part of the different ANSs involving cash flow between one operator and another. There is nothing, therefore, to prevent penalties being considered, for all purposes, as billable items. For all these reasons, penalties are included as billable items in all Reference offers.

Moreover, with regard to the billable nature of penalties, it is worth mentioning that Telefónica itself now includes penalties, *motu propio,* in its invoices when they are the liability of the other operator (for false faults, etc.) Therefore, as both types of penalty have the same legal nature, it would be incongruous for some to be billable and others not.

[20] Royal Decree 1496/2003, of 28th November, which approves the Regulations regulating invoicing obligations, and which modifies the Value Added Tax regulations.
With the approval of Council Directive 2001/115/CE, of 20th December 2001, a number of issues related to invoicing have been regulated at a community level, and the issue of invoices has been simplified and harmonized in the Value Added Tax sphere.

Once the billable nature of penalties has been defined, it is necessary to determine who the active subject of said charge is; namely, who should have the obligation of invoicing the amounts accrued as penalties.

All the operators, including Telefónica itself, agree that the inclusion of penalties on the same invoices on which Telefónica includes the services provided is not the most effective system and this has been demonstrated in practice.

It is worth noting that, in general, the obligation of issuing an invoice falls to the creditor party of the legal relationship. In other words, in those cases in which Telefónica provides the various services it undertakes in the framework of the various Offers, it is obliged to invoice the same in accordance with the legal terms and with the contents of the same.

In the specific case of penalties, a credit is generated in favour of the alternative operators which can and must be calculated by the latter, being the creditor party of the relationship. Therefore, it would seem reasonable for the obligation of issuing the invoice for these items to fall upon the alternative operators.

In the judgement of this Commission, the fact that the obligation of invoicing falls upon the alternative operators responds to different interests. On the one hand, the administrative load to be supported by Telefónica is decreased by not imposing upon the latter the unilateral processing of penalties. On the other hand, potential situations of non-payment would be reduced (this Commission has observed that some operators use the non-inclusion of penalties in the invoices issued by Telefónica to justify the non-payment of the same).

In its writ dated 2nd December 2008, Telefónica alleges that there are problems of tax related kind, pointing out that because penalties are default penal clauses, their invoicing should correspond to Telefónica.

However, Telefónica simply affirms that there are problems of a tax related kind in relation to the invoicing of penalties without specifying what said problems are or even mentioning the regulations which might be affected by said decision. This Commission has not observed the existence of tax problems for the mere fact of penalties being invoiced by the alternative operators, in the same way that Telefónica issues the invoices for the penalties corresponding to false faults which must be paid by the alternative operators.

Finally, it must be pointed out that the inclusion of penalties in invoices responds to the need to instrumentalize this procedure in an effective way. And, therefore, it is considered that its inclusion in ordinary, already established administrative tasks such as the invoicing procedure also makes its application easier. In its writ of allegations, Vodafone shows its agreement with this idea.

B. Field of application of the settlement procedure.

The proposed procedure sets out from the idea that the settlement of penalties has to be carried out by the alternative operator. This means that the active subject of the imposed obligation is the alternative operator, who will be the one to issue the penalties invoice.

Previously, it should be pointed out that although it is possible for penalties to refer both to services delivered (or incidences resolved) and to those pending delivery (or unresolved incidences), this procedure will be applied only to penalties associated with delays and/or non-fulfilments whose main service has already been delivered, or incidence resolved.

On the other hand, Telefónica considers that if there are no services pending delivery or services undertaken, the Commission has no power to intervene, due to the similarity with a damages claim. Therefore, by analogy, neither may it establish a procedure for their settlement.

However, it should be pointed out that penalties associated with undelivered services cannot be settled given that the essential element for their calculation is missing, that is, the time of delay incurred. For this reason, penalties associated with services undertaken (that is, undelivered) are not included in this procedure because they are not billable.

In the event of the services not having been delivered or the incidences not having been resolved, the alternative operators may approach the Commission to ensure the delivery of the service and the resolution of faults as soon as possible, this Commission being able to establish the days of delay to be used as a basis for the calculation of the penalties.

On the other hand, the penalties accrued for having delivered the service or solved the incidence are those which can be invoiced. As has been widely discussed in the second Point of Law, this Commission has the power to guarantee the complete fulfilment of Offers, including the penalties associated with delays and/or non-fulfilments of the regulated deadlines.

The Supreme Court, in its aforementioned Sentences dated 5th September and 10th October 2008, affirms that:

> *"Penalties are established in the RUO (see appendix 1 of the same). Therefore, when the TMC enforces TESAU to pay the penalties established in the RUO, it is simply enforcing the fulfilment of the same in an access dispute arising between two operators.*
>
> *TESAU's argument to defend the powerlessness of the TMC to enforce the payment of penalties, on the understanding that these are damages settlements between private persons over which the regulator has no authority, is undermined if we observe that the penalties established in the RUO have a simply coercive end, are calculated using an objective formula*

and do not seek the repair of any damage, but the fulfilment of the obligations assumed by TESAU in the RUO".

Therefore, and bearing in mind the powers held by this Commission to introduce modifications in Telefónica's Reference Offers, this Commission considers it appropriate to approve a penalty management procedure for those cases in which the services have been delivered or the incidences resolved.

Some operators, such as Vodafone, support this measure given that penalties are calculated according to the time of delay in the rendering of services, making it necessary for the proposed system to be applied only to services delivered and incidences resolved.

C. Procedure

The procedure is divided into different stages, which are set out below:

C.1 Invoicing

a) Payable items.

- **Dies ad quem**

Generally speaking, in access and interconnection services, two types of penalty can be distinguished: on the one hand, penalties arising from the provision of the service itself and, on the other hand, penalties arising during the maintenance of the same, namely, the faults and incidences which may arise. In both types, one of the main issues to be clarified is the *dies ad quem* of their calculation, that is, the matter of when penalties stop accruing.

There are two options in this respect for each type of penalty: in provision, to consider the delivery date of the service or the date of acceptance of delivery of the same; and in maintenance, to consider the date on which clearance occurs or the date on which said clearance is accepted. In short, the idea is to establish whether the simple affirmation of Telefónica that the work has been done is enough or whether it is necessary for this fact to be affirmed by the operator demanding the services.

When it comes to deciding on one or the other, it should be borne in mind that neither of the two references is free of complications. Thus, if delivery or clearance by Telefónica is taken as the final moment, mass clearances might take place and an increase in the rate of defective deliveries may occur. On the other hand, if acceptance of the delivery or clearance is taken as the final moment, it is possible that the alternative operator would have no real incentive, in the case of correct function, to close said delivery or incidence, as alleged by Telefónica in the trial proceeding.

In the face of the above dichotomy, this Commission believes it is more reasonable to choose acceptance as the moment for penalty accrual to end, for two reasons. Firstly, because this is the standard which exists today in all wholesale offers, such that following the proposal of Telefónica would mean changing the existing system without any reason for doing so. Thus, it is not true, contrary to the affirmation of Telefónica, that with the system created new incentives are being introduced for alternative operators to operate incorrectly, because nothing is going to change in relation to this issue: up to now, penalties accrued until the moment of acceptance, and that is how it will continue after this resolution (another matter is the fact that, as pointed out in a different part of this resolution, up to now Telefónica has failed to actually satisfy a great number of penalties and has not considered the *dies ad quem* to be any real problem).

Furthermore, considering the risks which may be involved in the choice of one or other deadline, it would seem more prudent to maintain the acceptance of delivery and clearance since, otherwise, the risks would directly affect the final users. In other words, the possibility of defective services being delivered or incidences failing to be resolved has a direct affect on the quality of the services received by the final users, which would not occur in the case of a failure to accept by the alternative operators.

In any case, it must be pointed out that the alternative operator is obliged to accept the delivery of the service or the clearance of the incidence in the terms of the contract of each of the Offers. Therefore, abuse by the alternative operator of its obligation of acceptance of delivery and/or incidence clearance when it receives services in a good state could lead to the opening of the corresponding sanctions in accordance with the terms of the LGTel.

In the trial report, different scenarios were considered in which discrepancies might arise with regard to the calculation of penalties, and a general system of proof based on the OMS was established. Nearly all operators, in their writs of allegations, showed their disagreement with both the solutions proposed and with the demandable proof requirements based on OMS data, etc.

However, the modifications to be introduced in each and every one of the Offers as a result of this procedure must be based on the principles of good faith and cooperation demandable of the operators. Therefore, at the present time, it is not possible to introduce dispositions or conditions to be applied in the case of possible discrepancies and/or disagreements between operators, since these will have to be resolved, at all events, bearing in mind the specific circumstances of each case and subject to the essential principles of hearing, contradiction and equality which govern the resolution of disputes by this Commission.

Without detriment to this, the main allegations are contested below according to the type of penalty in question, setting out the main discrepancies which may arise with regard to the same:

- **Penalties associated with the provision of the service.**

It should be pointed out the penalties operate in the event of delay with regard to the regulated deadline and not for the defective delivery of a service; this means that, if deliveries are main before the regulated deadline is reached, penalties will not be applied. Therefore, this measure should not encourage undue rejections.

On the other hand, this Commission does not agree with Telefónica's affirmation with regard to the incentive offered to alternative operators not to accept the service since, in the event of a false incorrect delivery occurring, as Telefónica is aware, it is not obliged to pay the associated penalties given that the service has effectively been delivered. Furthermore, as specified in the procedure to be followed, all claims for payment of penalties must be accompanied by sufficient proof to support said claim.

- **Penalties associated with provision incidences.**

Telefónica points out that it is normal for discrepancies to arise with regard to the date on which clearance takes place. However, with regard to the clearance of provision incidences, this Commission has pronounced on several occasions (Resolution of 22nd November 2007) in the following terms:

> *"(…) it must be remembered that the true meaning of incidences is knowing the state of the provision of services in order for the operators involved to be able to interact so as to rectify the deficiencies or discrepancies arising. Thus, if the service has been provided and this has been communicated, this communication is valid, since the incidence can be considered closed once the service has been provided."*

In this case, in which the service has already been provided and the provision incidence is still open, to establish the *dies ad quem,* the end date of the incidence for the calculation of penalties shall be taken as that on which clearance takes place (and not acceptance of the same) or the date of provision of the service.

Furthermore, when the cause of the incidence is the lack of acceptance by Telefónica of original requests or the meeting of intermediate deadlines (included in the provision process), the incidence will end for the purposes of penalties, at all events with clearance and, in the event of discrepancy, with the meeting of the following deadline of the provision process or with the express or tacit acceptance of the end of the incidence by the alternative operator (for example, if a provision incidence has been opened due to failure to accept a service request by Telefónica, this will accrue penalties until the sending of the technical project).

- **Penalties associated with incidences due to faults.**

Lastly, in incidences due to faults, the alternative operator, once it has been notified of the resolution of the same by Telefónica, shall proceed to accept the

clearance in accordance with the contents of the various Offers. In order to prevent faults from recurring, the Offers include the need to carry out tests before the faults are cleared by Telefónica. Occasionally, given the short incidence resolution times, tests are not carried out conclusively and the incidence either remains open or is reopened if it has been closed by Telefónica.

In this case, to establish the *dies ad quem,* it is proposed that, for the purposes of calculating penalties, Telefónica should exclude the period during which tests are carried out. However, if the alternative operator later discovers that the service is still faulty (for reasons attributable to Telefónica) once the incidence has been "resolved" by Telefónica, the period for the purposes of penalties shall be calculated without taking this interval into account, that is to say, it will include the test period.

Orange, in its writ of allegations dated 28th November 2008, shows its disagreement with this measure, considering that the tests which Telefónica has to carry out to verify that it has solved the fault incidence should form part of the work aimed at delivering the service correctly. It alleges that in the RUO "*The indicator called "Repair Time" is defined as the time elapsing from the opening of a fault incidence by the authorized operator to the time at which the fault has been rectified and the authorized operator informed of the fact (including acceptance by the same and closure or the incidence).*"

At the same time, Orange alleges that the alternative operator is not generally aware of the type of tests carried out by Telefónica and that these are not performed in a transparent way, the operator not knowing when these supposed tests are started and finished.

However, by excluding the test time from the calculation of penalties, the idea is to accomplish two goals: on the one hand, to decrease the rate of fault incidences delivered without having been solved and, therefore, increase the number of clearances accepted, and, on the other hand, give transparency to Telefónica's incidence resolution procedures in order to avoid the ignorance of the treatment given to the same alleged by Orange.

This measure does not contradict the text of the RUO, as alleged by Orange, simply that for the sole purposes of penalty calculation, an exceptional period is included during which tests for correct function take place and, therefore, for the disappearance of the fault before delivery. Nevertheless, repair time is still defined as the "*time elapsing from the opening of a fault incidence by the authorized operator to the time at which the fault has been rectified and the authorized operator informed of the fact",* including the acceptance and closure of the incidence.

- **Standards applicable to general settlement.**

In all cases, the settlement of penalties must be based on verifiable and observable data for the calculation of the delay time incurred, such as information

taken from the OMS, such that said settlement must be presented with sufficient detail to be able to clearly identify the service affected (administrative number of the claim, plant to which the affected service corresponds, etc.) and must include the penalties associated with delivered services in the corresponding invoicing cycle. In this respect, it should be pointed out that this procedure is not established for the settlement of more than one invoicing cycle.

Lastly, as has been widely discussed in the above Points of Law, the system of penalties included in the RLO contains certain characteristics which differentiate it from the other Offers. Specifically, a certain delay is permitted in a certain percentage of circuits and they are settled on a quarterly basis.

So, the implementation of the proposed modifications will take into account the specifications pertaining to the RLO. In this respect, settlements will be made on a quarterly basis rather than monthly and will include the services and incidences delivered and resolved during the quarter in question.

In this respect, in its writ dated 2nd November 2008, Telefónica alleges that the existence of technical baselines and their application for each of the operators is a variable which has to be introduced in all wholesale Offers, since they are normal aspects in commercial relations between economic agents. It considers that the existence of a limit to penalties is a commonly accepted matter in the sector and that no market exists in which excellence is demonstrated as the execution of 100% of the work.

It points out that, in the specific case of the RUO, the Commission is aware of the results of the Technical Centre of Wholesale Services Supervision from which the existence of technical baselines is demonstrated in diverse services such as provision, rejection of faults, etc. which not even a combined action between Telefónica and the operators can bring down.

Effectively, just as Telefónica alleges, so-called technical baselines or discretionary margins do exist in the provision of certain services and not only in the commercial sphere given that, as has just been discussed, they also exist in the framework of the regulated Offer of rented circuits. It is for this reason that, when the specific circumstances of the service have so demanded, as in the case of rented lines, this Commission has been in favour of the introduction of these margins.

However, in the specific case of the RUO, Telefónica has never justified the need or suitability of applying fulfilment percentages, nor the linking of penalties to these rates or to quality parameters. Moreover, in the specific case of the RUO, this Commission has taken into consideration the affect that these loop access services have on the final users and the rest of the electronic communications services for the establishment of both deadlines and of penalties associated with delays. In short, the RUO includes services which are particularly sensitive to delays and non-fulfilment, for which reason it has not been considered reasonable

to agree on discretionary margins. For this reason, this allegation of Telefónica is rejected.

All this, without detriment to the fact that operators can reach voluntary access agreements in order to improve the parameters of delivery and/or incidence resolution deadlines, by modifying the corresponding service level agreements to introduce fulfilment rates or technical baselines.

b) Invoicing cycles

In order for the management procedure to fulfil the objectives of speed and effectiveness established, in the trial report, the 19th of each month was proposed as the closure date for invoicing cycles, and the 20th of each month as the date of issue of the corresponding invoices. Just as has been shown in the de facto record, all the operators have shown their disagreement with the proposed cycle, considering it too brief and susceptible to disagreements.

Therefore, having analysed all the proposals made by the operators and without losing sight of the established objectives, this Commission considers it reasonable to accept the terms proposed by Euskaltel in its writ of allegations.

In this respect, the invoicing cycles shall close on the last day of each month. Therefore, invoices will include the payable penalties, in accordance with the previous rules, corresponding to delayed and delivered services and incidences resolved before said date, that is to say, during the month in question (month n). With regard to invoicing dates, it seems suitable to establish the 15th of the following month (month n+1) as the date of issue of invoices, taking in all the previous cycle.

A typical case would be that in which the delivery of the service in accordance with the regulated deadlines must take place on the 5th of month n, the delivery not occurring until the 10th of month n. In this case, the penalties corresponding to these 5 days of delay must be settled in the invoice with an issue date of the 15th of month+1. On the other hand, the regulated deadline might fall on the 25th of month n and the delivery of the service take place after the invoicing cycle of month n has closed (at the end of the month), for example on the 10th of month n+1. In this case, the associated penalties must be settled in the invoicing cycle of month n+1, whose invoice will be issued on the 15th of month n+2.

It should be pointed out that the established invoicing cycle will operate by default in the event that the affected operators do not establish different dates on which to carry out the monthly invoicing. In order to make the penalty settlement procedure effective and efficient, this Commission has to establish a calendar for the meeting of certain logical deadlines, such as the closure of invoicing, expiry, payment, etc. In other words, invoicing becomes a necessary and accessory instrument for ordering this procedure, without detriment to the fact that the operators may

decide to modify the established calendar in accordance with their internal procedures or in order to facilitate payment through the compensation of invoices.

Each invoice should include only the deliveries or incidences completed during the immediately preceding month. For this reason, the alternative operators may not issue invoices which contain penalties associated with services delivered and/or completed before the month corresponding to the invoicing cycle.

Likewise, it is considered reasonable to establish a margin of 8 working days between the date of issue and the date of expiry of the invoice. This period of 8 working days between one date and another is established, for the same purpose, in the invoicing procedure for Telefónica's wholesale services. Therefore, it is considered proportionate to give this invoicing procedure the same period for the verification of data.

Bearing in mind that Telefónica invoices penalties for false faults up to 6 months after the event, Euskaltel proposes that the same be permitted for the alternative operators, that is to say, that penalties may be invoiced during the six months after the event.

This proposal by Euskaltel is not admitted, since the idea is to establish a fast, effective and executive management procedure and this means that, without detriment to the fact that the right to credit persists, in this Resolution standard general procedure is being established which fulfils these requirements. For this reason, it is not considered reasonable to establish a procedure for the management of penalties with a time limit of 6 months since, in the opinion of this Commission, this measure would only increase the uncertainty of both the debtor and the creditor.

As for ASTEL, they consider it necessary to grant operators greater flexibility by including penalties which cover a longer period of time than that established, with the possibility of issuing invoices for services delivered and/or completed before the month corresponding to the invoicing cycle.

This Commission does not consider this proposal by ASTEL reasonable since, for the sake of giving greater flexibility to the operators by enabling them to invoice penalties over a longer period of time, part of the speed and efficiency necessary in the penalty settlement procedure would be lost. As has been discussed earlier, one of the main objectives of this modification is to achieve a fast settlement process which speeds up the flow of collections and payments between operators, avoiding the standstill that exists at present. There is no point in introducing a penalty settlement procedure if a programme of deadlines is not established. Without detriment to the regulated proposal, the parties may agree on the application of any other calendar in access and interconnection agreements by means of a modification to the same.

Likewise, ASTEL and Orange proposes the adoption of the RIO system which the possibility of regularizing invoicing every six months and annually.

However, as these companies are aware, many operators in the framework of the RIO also regularize on a quarterly and monthly basis. It must be remembered that, as has been discussed earlier, in the framework of the RIO, what is regularized is above all traffic, meaning that this consolidation is not the same as the proposal in this Resolution for the purpose of facilitating the payment of penalties. All this, without detriment to the fact that the operators may agree voluntarily on any other period of regularization of a specific nature.

In its writ dated 28th November 2008, Orange alleges that, with the limitations imposed on the settlement process, penalties would be being given an expiry date which they do not have.

With regard to this procedure, it should once more be stressed that the object of the same is the implementation of a procedure for the management of the penalties included in the Reference offers. This means that a universal procedure is being defined on the basis of general rules and principles of operation with a view to permanence. The idea is to establish a procedure in the framework of regulated services which has to meet certain deadlines and follow a logical and reasonable calendar in order to accomplish the regulatory objectives indicated, that is to say, greater transparency and definition, less complexity, greater speed and ease of execution and greater effectiveness. All this, without detriment to the fact that the right to credit remains and may be claimed through other channels different from the regulated procedure established for the purpose.

C.2 Settlement

a) Invoicing closure or consolidation committees

As a result of the modifications proposed in this Report, a substantial change is going to take place in the operators' system of invoicing and collection which involves the existence of invoiced quantities in both directions of the contractual relationship, that is to say, a two-way invoicing system in which Telefónica invoices the services rendered in the framework of the various Reference offers and the alternative operators invoice Telefónica for the penalties accrued as a result of delays and/or non-fulfilment of the regulated deadlines.

For this reason, it is considered appropriate to press the operators, in the framework of the various Offers (except in the RIO, in which this provision already exists), to create invoicing closure or consolidation Committees. The main object of these Committees shall be the resolution of the discrepancies which arise with regard to invoicing and, specifically, with regard to the amounts pending for penalties.

It must be pointed out that, unless the operators agree differently, the amounts established by the aforementioned Committee shall have the consideration, for all purposes, of due, liquid and payable debt, in the same way as the amounts established by the Telecommunications Market Commission, where appropriate.

b) Possible scenarios

The procedure to be applied to each of the possible scenarios is established below. Telefónica may be in agreement or disagreement with the invoicing/settlement effected.

- **If Telefónica shows its express agreement with the settlement.**

In the event that Telefónica is in agreement with the settlement effected, the payment of penalties must take place before the expiry of the invoice. This means that it must be paid within a maximum period of 8 working days after notification.

It is possible that, after expressly showing its agreement, Telefónica may then delay in the payment of the amounts in question. In this case, during the period of time in which Telefónica incurs in the non-payment of penalties to which it has shown its agreement, it may not press this Commission for a contractual termination procedure arising from non-payment by the alternative operator nor request the guarantee authorization for delay in payment by the same. At the same time, the alternative operator may approach this Commission in order for the latter to press Telefónica for the payment of the amounts pending payment. The amounts established by this Commission shall have the consideration, for all purposes, of due, liquid and payable debt.

- **If Telefónica shows its disagreement with the settlement.**

Once settlement by Telefónica has been verified, the latter may show its disagreement with the same within the period of 8 working days established between the date of issue and the date of expiry of the invoice.

In these cases, it may act in two ways:

Firstly, along with the opposition, it may send an alternative penalty settlement, express mention of the calculation method used, information from the OMS which accredits the days of delay and any other information which supports its proposed settlement.

ASTEL alleges that it should be obligatory for Telefónica to accompany its alternative settlement with the same means of proof as those to which the alternative operator is obliged.
In the opinion of this Commission, it is not possible to enforce the provision of certain means of proof or specific documents along with any of the settlements, since this remains at the discretion of each of the operators. Without detriment to

the fact that this Commission may indicate the suitability of supporting all the claims and settlements with the means of proof admitted by Law and as strong as possible to enforce their settlement. At all events, Telefónica must be aware that the idea is to invalidate the settlement previously effected by the alternative operator.

The alternative operator shall have a period of 8 working days to review the aforementioned settlement sent by Telefónica along with the accrediting documents.

In the trial report, a period of 5 days had been established for the review of this settlement by the alternative operator, ASTEL and Vodafone alleging their disagreement with said period and its inconsistence with the periods established for review by Telefónica. In the trial report, it was considered reasonable to grant a shorter period for its review bearing in mind that it started out from a first thorough analysis of the information to complete the first settlement and that there was a justified counter-analysis by Telefónica accompanied by accrediting documents.

Nevertheless, bearing in mind the allegations of ASTEL, it is considered proportionate to grant the same period of 8 working days to both parties in the procedure.

At the end of said period, in the event of the operator being in agreement with the alternative settlement, it must notify its acceptance to Telefónica in order for the latter to pay the invoice immediately.

In the event of the operator being in disagreement with the alternative settlement, before the end of said period, it must notify this fact to the Committee, which must make a pronouncement within a further 5 day period. It must be remembered that, there having already been an interchange of information between the operators, it is not necessary for the committee to have a longer period in which to make a pronouncement.

When the period in which the Committee has to pronounce has elapsed without the latter having reached an agreement or without an express pronouncement existing, either of the two operators may request the intervention of this Commission. The Telecommunications Market Commission shall specify the days of delay incurred in order to establish the amount to be paid and press Telefónica for payment. The amounts established by this Commission shall have the consideration, for all purposes, of liquid, due and requirable debt.

Finally, if, once the period of 5 working days has elapsed, the alternative operator should show neither its express acceptance nor its rejection of the alternative settlement, Telefónica shall understand said alternative settlement to be tacitly accepted through positive silence. Consequently, Telefónica must proceed to pay said amount in a maximum period of 2 working days.

Secondly, Telefónica may show its rejection of the settlement effected by the alternative operator by pressing the Committee directly without the need to effect an alternative settlement. In this case, the Committee shall have a period of 10 days in which to issue its decision, since there has been no prior interchange of information between the operators. When said period has elapsed without the Committee having adopted a decision or without any agreement having been reached, either of the two operators may approach the TMC in the aforementioned terms. The amounts established by this Commission shall have the consideration, for all purposes, of liquid, due and requirable debt.

- **If Telefónica fails to pronounce.**

If the period of 8 working days for the verification of the settlement by Telefónica elapses without the latter pronouncing, the alternative operator shall understand its settlement to be accepted (positive silence). This means that Telefónica must pay the result of the settlement in a maximum period of 2 working days.

It is possible that Telefónica may delay in the payment of these amounts. In this case, during the period of time in which Telefónica incurs in the non-payment of penalties to which it has shown its agreement, it may not press this Commission for a contractual termination procedure arising from non-payment by the alternative operator nor request the guarantee authorization for delay in payment by the same. At the same time, the alternative operator may approach this Commission in order for the latter to specify the days of delay incurred and press Telefónica for the payment of the amounts pending payment. The amounts established by this Commission shall have the consideration, for all purposes, of liquid, due and requirable debt.

Generally speaking, ASTEL points out the opportuneness of including some precautionary measure to dissuade Telefónica from using the channel of approaching the Committee and the Commission as a means of hindering the payment of penalties.

It should be pointed out that the figure of the Committee has been introduced to promote a climate of negotiation and effective collaboration between operators, whose main objective is to settle penalties and not to hinder the payment of penalties, as ASTEL alleges. As occurs in the framework of the RIO, it will be the operators themselves that decide what functions this Committee will carry out. Likewise, this Commission does not agree with ASTEL's statement that Telefónica may approach the Committee or this Commission in order to delay the payment of penalties, since both channels involve a waste of material and human resources which, in the opinion of this Commission, do not compensate the delay in payment of certain amounts due.

As for Euskaltel, they are also reticent about the idea of Committees, since they consider that, in practice, Telefónica will just reject any penalty settlement. They declare that this system is asymmetric, since it permits Telefónica to invoice

services without previously passing through any Committee. To avoid this situation, Euskaltel proposes the compensation of balances of the obligations pending payment of each of the parties once the corresponding invoices have been issued.

The compensation of debts is a form of payment which cancels debt obligation, in accordance with articles 1.156 and following of the Civil Code. In the opinion of this Commission, it does not seem reasonable to impose the form in which the operators must repay their debts. Therefore, this allegation by Euskaltel is rejected. Finally, Euskaltel should remember that this procedure does not limit the legal claim channels but offers an additional channel, different from the conventional one, which the operators can opt for on the basis of the agreements signed in the framework of the various regulated Offers. At all events, the operators may claim the amounts owed as penalties or other items through the legal channel.

D. Regarding the penalties to be invoiced by Telefónica.

As we have already mentioned, Telefónica includes the penalties it has the right to be paid in its invoices, in a general way in the framework of the RUO and of the RIO, without giving the alternative operator the chance to refute the amount of the penalties, as has been denounced on certain occasions.

Orange points out in its writ of allegations that this type of penalty has a specific treatment outside the RUO and is not subject to the same type of proof and procedure. Vodafone alleges that the procedure which Telefónica is going to apply should be identical to one applied to alternative operators and, therefore, have the same deadlines, since these are different at the present time.

In order to avoid this situation, it is proposed that, in the event of any discrepancy arising with regard to the penalties invoiced by Telefónica, either of the parties may approach the Committee under the same terms as those established for the penalties invoiced by the operators. If the period in which the Committee has to pronounce elapses without any agreement having been reached or without any express announcement being made, either of the two operators may request the intervention of this Commission. The Telecommunications Market Commission shall specify the days of delay incurred in order to establish the amount to be paid and shall press for the payment of the same. The amounts established by this Commission shall have the consideration, for all purposes, of liquid, due and requirable debt.

Six.- Regarding the guarantee system.

A. Current situation

At the present time, all wholesale offers establish additional payment assurance mechanisms such as the guarantee. Nevertheless, in the existing Reference offers, there is no homogeneous system of guarantees and each one regulates the latter in accordance with the wholesale service to which they refer; thus, the placement contract contained in the RUO includes the particular characteristics of this service and introduces two different types of guarantee depending on whether the idea is to assure the authorization costs to be effected or to assure the payment of recurrent fees arising from the rendering of the service.

Without losing sight of the particular characteristics of each of the regulated wholesale services, it is possible to say that, generally speaking, the Offers (both for access and interconnection) distinguish between two different moments in time: before the effective rendering of the service or after the effective rendering of the same.

With regard to guarantee imposition before the effective rendering of the service, all the Reference offers establish that it is possible to demand the operator to constitute the guarantee , when the operator is in any of the possible bankruptcy situations declared by the court or at least requested by the debtor, or when the parent companies, reference partners, merged and taken-over companies, or companies which have expressly taken on the rights and obligations of the previous company with regard to the object business of the same, of the operator wishing to be granted access, have incurred in non-payment with no legally justified cause, or default in the payment of at least two invoices issued by Telefónica and provided that the debt has not expired.

The second case consists of guarantees to be established once the rendering of the service has begun. Telefónica may demand their establishment when the operator is in any of the possible bankruptcy situations declared by the court or at least requested by the debtor and also when the existence of non-payment with no legally justified cause, or default in the payment of at least two invoices issued by Telefónica in relation to services rendered in the framework of this Offer or to different services is demonstrated, providing the debt has not expired.

In these cases, if there is no agreement between the operators, the Commission authorized Telefónica to impose the guarantee, being obliged to ensure, in the procedure opened for the purpose, that all the previous requirements are met, including the fact that the debt has not expired.

Nevertheless, this Commission has lately been observing the existence of a certain laxity in the fulfilment of obligations of payment of wholesale services by certain operators, delays in payment occurring continuously. Specifically, the defaulting operators use the unexpired debt requirement to get round the guarantee imposition. In this way, delays in payment take place continuously but without any definitive non-payments occurring.

To prevent this kind of ever more frequent situation, and given that it would not affect operators that fulfil their payment obligations punctually, in the commencement agreement of this procedure, this Commission announced that in order to encourage payment of services by operators it would propose the elimination of the unexpired debt requirement in order for the Commission to be able to authorize guarantee establishment.

Generally speaking, all the alternative operators agreed that this measure was unnecessary. On the other hand, showed its agreement with any modification whose aim was to reduce default rates in the sector or increase payment assurance mechanisms.

B. Trial report

In order to achieve a situation of security in the mercantile traffic between operators which tends to reduce situations of generalized non-payments or delays insofar as they affect the investment plans of the operators and, ultimately, the promotion of competitiveness, this Commission proposed the elimination only of the unexpired debt requirement for guarantee imposition, before and during the effective rendering of services, of all the Reference offers of Telefónica.

Therefore, this Commission would authorize guarantee imposition when the alternative operator is in a situation of bankruptcy declared by the court or requested by the debtor, when non-payment has occurred without legally justified cause or delays in the payment of at least two invoices issued by Telefónica in relation to services rendered in the framework of this Offer or different services, even if the debt has expired.

C. Allegations of the parties

Nearly all the operators are in disagreement with the changes proposed and declare the need for the guarantee system to be reciprocal; that is to say, for Telefónica to be obliged to establish some kind of guarantee.

On the other hand, Telefónica alleges that the modification proposed is, at all events, insufficient, given the present economic situation. It proposes an overall modification of the guarantee system included in all the Reference offers, with special reference to the quantity, duration, executability and establishment requirements which shall be discussed below. Specifically, it emphasises the importance of assuring the effectiveness of the guarantees imposed.

D. Modification adopted

As declared in the trial report, the aim of this Commission is to establish regulatory conditions capable of incentivising investment by operators, and promoting competitiveness, all this within a framework of legal security which tends to reduce situations of generalized non-payments or defaults insofar as they affect the investment plans of the operators.

To begin with, it is not considered reasonable to impose a system of sureties or guarantees on Telefónica, as demanded by nearly all the operators, bearing in mind that it is the party which renders the services to the alternative operators and not the other way round. At the same time, this measure is considered to be unrelated with the penalty system as some operators would appear to believe, since it is not possible to embrace a non-payment of services in the failure to collect penalties.

Likewise, the proposals of Telefónica regarding the introduction of modifications with regard to the duration and quantity of the guarantee are also considered unreasonable. Telefónica suggests that the guarantee should be of indefinite duration and its quantity depend upon the mean monthly turnover of the previous 6 months multiplied by 6. Nevertheless, in the opinion of this Commission, this proposal is completely disproportionate, since both the duration established, bearing in mind the possibility of extending the guarantee, and the quantities established, with the possibility of review for certain services, in each of the Offers are considered to be sufficient measures to guarantee payment.

On the basis of these considerations, the following modifications are adopted:

D.1 Establishment requirements: Unexpired debt

It is proposed to eliminate the unexpired debt requirement for guarantee imposition, before and during the effective rendering of services, in all the Reference offers of Telefónica.

Therefore, this Commission authorizes guarantee imposition when the alternative operator is in a situation of bankruptcy declared by the court or requested by the debtor, when non-payment has occurred without legally justified cause or delays in the payment of two invoices issued by Telefónica in relation to services rendered in the framework of this Offer or different services, even if the debt has expired.

In its reply to the requirement for information, Telefónica has acknowledged the existence of a fairly high number of claims made by alternative operators with regard to invoicing. Some operators declare that the possibility exists that Telefónica might consider invoices which have simply been refuted to be unpaid.

This possibility was already foreseen in all the Reference offers which consider there to be unexpired debt when invoices are issued and these are presented for collection in accordance with the rules established in each of the agreements, bearing in mind the established situations of refutation. In this case, these would

not by unpaid invoices but collection incidences. Therefore, from the conceptual viewpoint, it is important to distinguish between genuine non-payment or a blockage of payment ordered by the invoiced operator because of its disagreement with the invoice. In the latter case, not enough elements would exist to authorize guarantee establishment providing the claim were made in accordance with the agreements signed.

Vodafone and ASTEL allege that the wholesale offers establish a period of 3 days for the review of invoices and that, given the short time invoices and, where appropriate, show their disagreement with the same.

However, all the wholesale Offers establish a period of 8 working days between the date of issue and the date of expiry of the invoice, this being a long enough period for the review of the invoice, the extension of the period therefore not being necessary.

It is not possible to admit the remaining establishment requirements alleged by Telefónica in its writ of allegations dated 2nd December 2008, since this would involve conditioning the rendering of regulated services to the demand for a guarantee in the event of doubts existing with regard to the credit solvency of the operators, said reasonability being subject to the opinion of Telefónica.

The inclusion of the agreed payment assurance means in the various Offers should be established by creating a framework of legal and economic conditions that (i) do not permit the violation of the right to access and interconnection held by all public telecommunications network owners and service providers, (ii) ensure the rendering by Telefónica of wholesale access and interconnection services in regulated, non-discriminatory, transparent, proportionate conditions based on objective standards.

Therefore, the exclusion of the unexpired debt requirement for payment guarantee establishment is considered an adequate measure.

On the other hand, ASTEL and Vodafone allege that the elimination of this requirement is not justified, given that if there is no unexpired debt, there is no debt to be guaranteed, this being the ultimate justification for a guarantee.

However, the requirements for the establishment of a guarantee for the assurance of payment, after the modification adopted, in summary, would be the following:

- Prior to the effective rendering of the services: (i) In the event of bankruptcy and (ii) for non-payment or unjustified delays in the payment of 2 invoices issued by Telefónica.

- After the rendering of services has begun: (i) In the event of bankruptcy and (ii) for non-payment or unjustified delays in the payment of 2 invoices issued by Telefónica.

Therefore, contrary to the opinion held by the two companies, for the establishment of a guarantee it is necessary for non-payment or a delay in the payment of at least 2 invoices to have occurred, that is to say, evidence of the existence of the intention of non-payment or the risk of non-payment for Telefónica for the rendering of regulated services.

This Commission considers that the non-fulfilment of payment obligations by the alternative operators, regardless of the amount owed, creates an unjustified legal insecurity for Telefónica and would mean obliging it to finance or subsidise the services rendered by its competitors, something which is not reasonable in a market with a system of free competition, placing at risk the normal rendering of the service by the operator failing to receive payment.

D.2 Execution requirements

In the opinion of this Commission, and in view of the allegations presented by Telefónica in the trial proceeding, it is necessary to indicate in this point that, in order to give guarantees the necessary effectiveness, the alternative operators may not establish executability conditions different from those included in each of the contracts.

Specifically, any unilaterally adopted measure which limits the execution of guarantees included in the wholesale Offers shall have no validity whatsoever and shall be considered not to have been adopted. For example, the execution of the guarantee must not be linked to the existence of a prior legal or administrative pronouncement, nor to the existence of prior authorization by the alternative operator.

This Commission considers that the conditions of execution formalized in each of the contracts are sufficiently in accordance with the purpose which is intended to be accomplished, which is none other than to make the guarantees effective. Finally, it should be stressed that the execution of the guarantee is mainly linked to the payment of the wholesale services rendered by Telefónica.

Seven.- Regarding whether the requirement for information effected on Telefónica violates the legal system.

In its reply to the requirement dated 18th July 2008, Telefónica alleges that said requirement by which it is requested certain information regarding past payment of penalties, aspects related to invoicing and claim systems employed in Telefónica (Tenth Factual Background) violates the legal system due to the powerlessness of this Commission to require information of a private nature.
However, the fact that part of the information requested corresponds to internal processes of Telefónica (invoicing, fault management, etc.) does not imply *per se* that said information may not be required by the Commission.

This Commission may require information of any type, even of a private nature. Given the nature of said information, this Commission has considered it appropriate to declare the confidentiality of part of the information provided believing that, otherwise, it could cause detriment to the secrecy and commercial interests of Telefónica.

The purpose of the requirement for information formulated to Telefónica was, on the one hand, to obtain information regarding internal procedures in order to help with the implementation of any modification adopted and, on the other, to look into Telefónica's past fulfilment of its penalty payment obligations. Thus, said requirement was justified and motivated.

The obligation of providing information is acknowledged both in article 9 and the Fourth Additional Disposition of the LGTel a and in article 78 of the LRJPAC which, in a more general way establishes that "*the acts of investigation necessary for the establishment, knowledge and proof of the data by virtue of which the resolution must be pronounced, shall be carried by the authority processing the procedure on its own initiative […]*".

In short, the requirement of information has been effected on the basis of the principle of proportionality, bearing in mind all the interests involved and proceeding to declare the confidentiality of the data provided by Telefónica, such that the legal system in force has not been violated.

Eight.- Effectiveness of the proposed measures.

The proposed modifications basically affect the invoicing systems of the alternative operators, since an additional load is imposed upon them. For this reason, it is considered proportionate to establish a maximum period of 3 months for the operators to implement this new system and begin to issue invoices settling the corresponding penalties. Prior to the issue of the first invoice, they must notify this Commission about the implementation of said system and the commencement of its operation.

Attached to this Resolution is an Appendix, Appendix I, with the modifications to be included by Telefónica in each of the existing Offers and which will be taken into account in any future Reference offers to be published by Telefónica.

In view of the aforementioned background and legal points, this Commission,

COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

RESOLVES

First.- To modify the penalty systems included in all the Reference offers of Telefónica de España, S.A.U. in the way indicated in this Resolution.

Second.- To modify the payment assurance mechanisms included in all the Reference offers of Telefónica de España, S.A.U. in the way indicated in this Resolution.

Third.- To press Telefónica de España, S.A.U. to modify its wholesale regulated service Offers in the way indicated in this Resolution and, specifically, including the text included in Appendix I to this Resolution.

Fourth.- To press Telefónica de España, S.A.U. to publish the consolidated text of the different Offers within a period of five working days following notification of the Resolution, replacing it by the text published by this Commission.

Telefónica de España, S.A.U. must publish the text approved on its hypertext server «http://www.telefonicaonline.es».

This certificate is issued under the provisions of article 27.5 of Act 30/1992, of 26th November, and of article 23.2 of the Consolidated Text of the Internal Regulations approved by Commission Council Resolution on 20th December 2007 (B.O.E., 31st January 2008), prior to the approval of the Minutes of the corresponding session.

Likewise, it is hereby declared that a request for review of a discretional nature may be brought against the resolution to which this certificate refers, which brings an end to the administrative action, before this Commission within a period of one month from the day after its notification or a Contentious-Administrative Action directly before the Contentious-Administrative Chamber of the Supreme Court, within a period of two months from the day after its notification, in accordance with the provisions of article 48.17 of General Telecommunications Law 32/2003, of 3rd November, the Fourth Additional Disposition, section 5, of Contentious-Administrative Jurisdiction Regulatory Act 29/1998, of 13th July, and article 116 of Act 30/1992, of 26th November, on the Legal System of the Public Administrations and of the Common Administrative Procedure, and without detriment to the provisions of number 2 of article 58 of the same Act.

This document has been signed electronically by the Secretary, Ignacio Redondo Andreu with the approval of the Chairman, Reinaldo Rodríguez Illera

COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

APPENDIX I

Modification of the Reference Wholesale offers of Telefónica de España, S.A.U.

1.- Regarding the penalty settlement system.

Telefónica must include the following text in all the Reference offers within the indicated period:

"Penalty settlement procedure"

1. Invoicing

a) Payable items.

Penalties shall be settled once the service of clearance of the incidence has been accepted.

Said settlement must be presented with sufficient detail to be able to clearly identify the service affected (administrative number of the claim, plant to which the affected service corresponds, etc.) and must include the penalties associated with delivered services in the corresponding invoicing cycle. In this respect, it should be pointed out that this procedure is not established for the settlement of more than one invoicing cycle.

b) Invoicing cycles.

Invoicing cycles shall close on the last day of each month and the invoice shall be issued on the 15th of the following month (month n+1), taking in all the previous cycle. Moreover, between the invoice issue and expiry date there must be an interval of 8 working days.

2. Settlement.

Invoicing closure or consolidation committees

An invoicing closure or consolidation Committee is created. The main object of these Committees shall be the resolution of the discrepancies which arise with regard to invoicing and, specifically, with regard to the amounts pending for penalties.

(i) Telefónica must pay the penalties before the expiry of the invoice.

(ii) It may show its disagreement with the settlement effected within a period of 8 working days following notification of the same.

For this purpose, Telefónica may send, along with the opposition, an alternative penalty settlement, express mention of the method of calculation used, information from the OMS accrediting the days of delay and any other information supporting the settlement. The alternative operator shall have a period of 8 working days in which to review the settlement sent by Telefónica along with the accrediting documents.

At the end of said period, in the event of the operator being in agreement with the alternative settlement, it must notify its acceptance to Telefónica in order for the latter to pay the invoice immediately. In the event of the operator being in disagreement with the alternative settlement, before the end of said period, it must notify this fact to the Committee, which must make a pronouncement within a further 5 day period.

When the period in which the Committee has to pronounce has elapsed without the latter having reached an agreement or without an express pronouncement existing, either of the two operators may request the intervention of this Commission. The Telecommunications Market Commission shall specify the days of delay incurred and shall establish the amount to be paid executively.

If, once the period of 5 working days has elapsed, the alternative operator should show neither its express acceptance nor its rejection of the alternative settlement, Telefónica shall understand said alternative settlement to be tacitly accepted through positive silence. Consequently, Telefónica must proceed to pay said amount in a maximum period of 2 working days.

Telefónica may show its rejection of the settlement effected by the alternative operator by pressing the Committee directly without the need to effect an alternative settlement. In this case, the Committee shall have a period of 10 days in which to issue its decision. When said period has elapsed without the Committee having adopted a decision or without any agreement having been reached, either of the two operators may approach the TMC in the aforementioned terms.

(iii) If the period of 8 working days for the verification of the settlement by Telefónica elapses without the latter pronouncing, the alternative operator shall understand its settlement to be accepted (positive silence). This means that Telefónica must pay the result of the settlement in a maximum period of 2 working days.

Specifically, Telefónica shall modify the following sections:

a.-) Modification of the Reference Unbundling Offer (RUO)

Modifications will be made to point 5 “Invoicing Aspects” and, specifically, the section called “Aperiodical billable items” (page 5-1) which shall include the penalty settlement procedure described.

b.-) Modification of the Reference Interconnection Offer (RIO)

Modifications shall be made to point 8 “Invoicing Aspects” and, specifically, to the section called “8.3.2.3 Invoicing for other aperiodical items” (page 207) which shall include the penalty settlement procedure described.

c.-) Modification of the Rented Line Access Offer (RLO)

Modifications shall be made to section “7.2.2. Invoicing for other aperiodical items” (page 26)

d.-) Modification of the Wholesale Line Rental (WLR) Offer

Modifications shall be made to section “7.2 Aperiodical invoicing” and, specifically, to the section called 7.2.2 Invoicing for other aperiodical items” (page 27) which shall include the penalty settlement procedure described.

2.- Regarding the payment assurance mechanism.

Telefónica must eliminate the unexpired debt requirement in situations of guarantee establishment when appropriate.

Specifically, Telefónica shall modify:

a.-) Modification of the Reference Unbundling Offer (RUO)

Modifications shall be made to section “5.3 Payment assurance mechanisms” of standard fully unbundled and shared access contracts.

b.-) Modification of the Reference Interconnection Offer (RIO)

Modifications shall be made to section “11.14 Payment assurance mechanisms”.

c.-) Modification of the Reference Line Rental Offer (RLO)

Modifications shall be made to Appendix 2 regarding the standard contract for provision by Telefónica of the end line rental service, specifically, the thirteenth clause.

d.-) Modification of the Wholesale Line Rental (WLR) Offer

The unexpired debt requirement is eliminated from section 5.1 of the Offer regarding payment assurance mechanisms (page. 9).

3. Other modifications

In order to give consistence and congruence to the full contents of the Reference Offers, the following additional modifications are included:

a.-) Modification to the Reference Unbundling Offer (RUO):

Modifications are made to Appendix (page 1-4) regarding *"Service Level Agreements (SLA)"* changing the present paragraph:

"In accordance with the provisions of this section, TELEFÓNICA must automatically proceed to calculate the amount of the demandable penalties and effect the payment thereof."

For the following paragraph:

In accordance with the provisions of the Section regarding "Aperiodical billable items" included in section 5 regarding "Invoicing", the alternative operator shall be the active subject of the penalty settlement process, being the issuer of the penalty invoice, following the established procedure".

Likewise, modifications are made to the standard contracts of the fully unbundled and shared access service, introducing the following text in its first stipulation regarding the structure of the contract, including it in the Invoicing Appendix (III):

"Invoicing Appendix (III): Includes all aspects related to the invoicing of the different types of Services along with the procedure to be followed for the settlement of penalties incurred by TELEFÓNICA DE ESPAÑA".

b.-) Modification of the Reference Interconnection Offer (RIO):

Modifications are made to the First Stipulation regarding the structure of the contract, the following text being introduced:

"Technical Appendix (II): Includes the procedures, conditions and aspects related to the invoicing of the various services included in the WLR Offer along with the procedure to be followed for the settlement of penalties incurred by TELEFÓNICA DE ESPAÑA."

c.-) Modification of the Reference Line Rental Offer (RLO):

Modifications are made to section "7.1.1. Invoicing for use of the Customer Link Service" the following paragraph being eliminated:

> *"Telefónica must automatically proceed to calculate the amount of the demandable penalties and effect the payment thereof."*