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COMISIÓN DEL MERCADO DE LAS TELECOMUNICACIONES

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IGNACIO REDONDO ANDREU, Board Secretary for the Comisión del Mercado de las Telecomunicaciones, by means of those capacities bestowed on him by article 40 of the Regulations of the Comisión del Mercado de las Telecomunicaciones , approved by Spanish Royal Decree 1994/1996 of 6 September,

**HEREBY CERTIFIES**

That the Board Meeting No. 19/10 of the Telecommunications Market Commission held on 15 June 2010, did adopt the following

**AGREEMENT**

which approves

**Circular 1/2010 of the Comisión del Mercado de las Telecomunicaciones, regulating the conditions for operation of networks and the provision of electronic communications services by Public Administrations (MTZ 2010/203).**



**Circular 1/2010 of the Comisión del Mercado de las Telecomunicaciones, which regulates the conditions for operation of networks and the provision of electronic communications services by Public Administrations.**

(1) The General Telecommunications Law 32/2003, of 3 November states in article 48.3 that one of the functions of the Comisión del Mercado de las Telecomunicaciones within its scope and purpose, is to adopt the necessary measures for ensuring a varied service offer and safeguarding operators' access to electronic communications networks, the interconnection of networks, the operation of the network under open network conditions, and service providers' pricing and marketing policies. Similarly its functions include the establishment and monitoring of specific obligations to be met by the operators in the telecommunications markets (Art. 48.2 of the General Telecommunications Law 32/2003, of 3 November) and the imposition on Public Administrations of special conditions to ensure undistorted free competition (Art. 8.4 of the General Telecommunications Law 32/2003, of 3 November, ).

For this purpose, and regarding the indicated topics, the Commission may dictate instructions directed to operators acting in the electronic communications sector, which will be binding once they are announced, or, where applicable, published in the Spanish Official Gazette.

(2) In the exercise of the powers that existing legislation has bestowed on it regarding the protection of competition in the markets and the imposition of conditions to the Public Administrations, on 25 June 2009 this Commission adopted an agreement approving the submittal to public consultation of the *"Report on certain regulatory proposals concerning the operation of public wireless networks based on using public domain radio spectrum via common use (WiFi) frequencies and the provision of electronic communications services on them by the Public Administrations."*

The aim of this Consultation was to state different solutions allowing for the clarification of the scenarios in which Public Administrations operate in a way that would not only not discourage the demand, but would provide a gateway to new users in order to boost the performance of the private operators.

Responses received to the consultation revealed the need for a more defined regulatory framework that would allow for the various actors to know the specific area where they could develop their activities without affecting competition in the market. Via Resolution of 25 March 2010, the Comisión del Mercado de las Telecomunicaciones approved the findings of this consultation (hereinafter, the Conclusions), proposing the elaboration of a Circular affirming the various forms of participation by the Public Administrations in the market and its regulatory regime.

(3) Article 6.2 of the General Telecommunications Law 32/2003 of 3 November, requires a notification to the Comisión del Mercado de las Telecomunicaciones to be made by natural or legal persons seeking to exploit public networks or electronic communications services available to the public, about their intention to carry out these activities and provides an exception to the overall reporting system for the operators; it deals with those entities that carry out activities on a self-supply basis.

(4) This requirement is also imposed on Public Administrations and the entities they directly or indirectly control. In fact, when a Public Administration plans to provide an electronic communications service to the general public it should report this fact in compliance with Article 6.2 of the General Telecommunications Law 32/2003, of 3 November, accompanied by the documents specified in Article 5.5 of the Regulation on



the conditions for the provision of electronic communications services, universal service and protection to users, approved by Royal Decree 424/2005, of 15 April. As for the rest of the operators, electronic communications services to be made under self-supply basis are excluded from the notification requirement.

Among the information that must accompany the notification, section 5 of Article 5.5.d) of the Regulations on the conditions for the provision of electronic communications services, universal service and protection to users, approved by Royal Decree 424/2005, of 15 April, is the *"offer for services and its commercial description."*

(5) The concept of self-supply is not defined in any standard; the previous decisions of the Comisión del Mercado de las Telecomunicaciones have helped to make a profile for it.

This Circular adopts the definition of the understanding of the Comisión del Mercado de las Telecomunicaciones on the operation of networks and the provision of electronic communications services on a self-supply basis. In these cases, it will not be necessary to notify the activity for inclusion in the Operators Registry, not being subject to the provisions of Article 8.4 of the General Telecommunications Law 32/2003, of 3 November .

(6) Notwithstanding the provisioning to third parties, the regime of self-supply is considered as applicable and, therefore, the obligation to notify the Comisión del Mercado de las Telecomunicaciones and to register in the Operators Registry of the general Internet access service in libraries is excluded. And given i) the clear link between the Internet access service provided in libraries with the purpose of promoting culture and knowledge associated to it, with libraries having the specific legal obligation to provide access services to information through the Internet, Article 13, section 4 of Law 10/2007, of 22 June, on reading, books and the libraries provides: *"4. The following services are considered basic for any public library: (...) d) Access to digital information via the Internet or similar networks which can be developed, along with the training for better handling them"*, ii) the service is essential to achieve its aims and provided that the users can prove their connection to the service through a document allowing their identification; iii) the internet access service provided from the libraries therefore has no impact on the market.

(7) Public Administrations, when acting as network operators and/or providers of electronic communications services, are subject to all the obligations required in general by the operators exploiting public networks and provide services available to the public and reflected in different standards on issues such as the protection and preservation of data, interception of calls and communications security, among others.

(8) Unlike other operators, Article 8.4 of the General Telecommunications Law 32/2003, of 3 November specifically subjects the operation of networks or the provision of electronic communications services by the Public Administrations, either directly or through companies where they are mainly involved in the capital, to the provisions of this Law and its rules for implementation. These activities will be carried out with the appropriate separation of accounts and in accordance with the principles of neutrality, transparency and non-discrimination. It also provides that the Comisión del Mercado de las Telecomunicaciones may impose special conditions to ensure undistorted free competition.

(9) Since 1998, telecommunications have ceased to be public services and are now qualified as general interest services and, therefore, Public Administrations must carry



out their activities in this field on the same basis as other operators, i.e. following the principle of the market economy private investor.

The elements of this principle have been defined by community practice; however there is no rule defining what is meant by that. Given the criteria decided by the Court of Justice of the European Union<sup>1</sup>, a market economy private investor could be defined as one who performs an economic activity<sup>2</sup> within the parameters of any operator with business interests, i.e. financing its activities through its own income. It must have a business plan in which the revenues cover the costs, and obtaining reasonable profit as a typical undertaking well run and adequately provided would do.

In order for the Public Administrations to be able to easily determine when their action does not affect free competition by respecting the principle of the market economy private investor, this Circular specifies the criteria which the Comisión del Mercado de las Telecomunicaciones will apply for verification. The business plan is particularly relevant for these purposes. It must incorporate all the costs (recurring and non-recurring) which the operator will incur for the provision of services, with the expected sizing and revenues must meet those proper to the competitive provision of the services in question. The performance of a telecommunications activity in line with these criteria means it will be subjected to the private investor principle. Otherwise, the provided processes must be fulfilled for the cases for exploitation of networks and provision of electronic communications service not subject to this principle.

(10) The revenues to be obtained must be compatible with those usually existing in a market economy and, as a priority, must arise from the existence of a price to be paid by the users. However, this may coexist with other forms of financing, such as advertising or sponsorship, modalities for which this Commission has expressed its agreement under certain conditions. This Circular reports, without limitation, the basic conditions for its implementation so this route that is not used for the diversion of public funds through advertising by entities which benefit from public funding, or institutional advertising or sponsorship from the Administration exercising control over the corresponding operator. In any case, the price of advertising or sponsorship must be market-oriented so that the price paid for them in other equivalent platforms is comparable.

(11) If Public Administrations provide services or operate networks not subject to the private investor principle, the project will be notified to the European Commission if that service implies State aid. Given that, in these cases, both powers of the European Commission and the Comisión del Mercado de las Telecomunicaciones concur, a process must be devised to ensure that this Commission can meet its obligation to exercise the inalienable jurisdiction conferred, ex Article 8 of the General Telecommunications Law 32/2003, of 3 November and 4 of Regulation on conditions for the provision of electronic communications services, universal service and protection of users, without interfering with those corresponding to the European Commission on state aid, all of this being to the benefit of legal certainty for operators; to this end, this Circular articulates a procedure similar to that specified by the European Commission in its *"Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks"* so that when notice to the European Commission is compulsory, it is required to be reported in advance to this

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<sup>1</sup> Calafiori Ruling of 30 March 2006 (C-451/03).

<sup>2</sup> "In this respect, case law indicates that any activity consisting of offering goods and services in a given market is an economic activity (case law of the Court of Justice of 16 June 1987, Commission/Italy, 118/85, Rec. p. 2599, section 7, and Aéroports de Paris/Commission ruling, mentioned in section 66 above, section 107)."



Commission in order for the Commission to determine the conditions necessary to impose for ensuring the non distortion of free competition pursuant to the provisions of that Article 8 of the General Telecommunications Law 32/2003, of 3 November.

(12) The European Commission has considered whether the provision of Internet access service is limited to websites of the Public Administrations constituted State aid. Thus, in the decision on the Prague WiFi project<sup>3</sup> the European Commission did not appreciate the existence of State aid because, inter alia, it considered the fact that the network only provided broadband access to non-commercial services and contents and, therefore, that Public Administration was not considered by the European Commission as an undertaking within the meaning of Article 107 of the Treaty on the Functioning of the European Union (TFUE<sup>4</sup>) and the activity was not qualified as State aid.

Following the guidelines set by the European Commission, the Comisión del Mercado de las Telecomunicaciones has analyzed the possible impact of the Internet access service being limited to municipal websites and it has considered that the provisioning may be indefinitely made free of charge for the users and without being subject to special conditions.

(13) Beyond the above exception, to determine the potential effects on the market for the services intended to be provided, it is necessary to determine, among others, the existence or not in the market of competitive offerings of alternative services, currently or in the near future. For this purpose, this Commission has conducted an analysis on the degree of substitutability of electronic communications services available to the public that may potentially be delivered via a wireless network which uses unlicensed bands with the broadband and telephony retail services, both mobile and land lines now being provided by private operators, since they are the ones that require more actions on the part of the Comisión del Mercado de las Telecomunicaciones, in relation to the intervention of Public Administrations in the telecommunications activity. This analysis establishes the constraints the operation of networks or the provision of electronic communications services must meet, without being subject to the private investor principle, in order for them not to affect free competition.

(14) In the cases mentioned in the previous paragraph, it seems inappropriate to set a time limit for the provision of those activities in such conditions. However, their impact on the market must be monitored regularly so that if there is a change in the conditions of provision and/or market situation which amend the substitutability of these services, this Commission can adopt the pertinent measures.

(15) Based on the above assumptions, the provision of electronic communications services without regard for the private investor principle can drastically reduce the revenues of private operators, discouraging investment and innovation in networks and, consequently, consumers would see a reduction in their long-term capacity to enjoy better service and prices. Therefore, if the intention is to provide other services, they would be evaluated case by case, performing specific substitutability analysis and, only if the result is not detrimental to competition will the provision of the service be accepted without being subject to any conditions. To carry out this analysis it is crucial to seek the opinion of the operators who provide or could provide similar services in the area the Public Administration intends to cover, for which purpose the Administrations

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<sup>3</sup> NN 24/2007.

<sup>4</sup> After the enforcement of the Lisbon Treaty of 1 December 2009, Articles 87 and 88 of the TCE became Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU).



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will have to organise a public consultation to allow all parties to voice their opinions about how the project will affect the market, prior to notifying the Comisión del Mercado de las Telecomunicaciones.

(16) Through this Circular, the Comisión del Mercado de las Telecomunicaciones issues specific conditions for the provision of services or the operation of networks by Public Administrations, to which Articles 8.4 of the General Telecommunications Law 32/2003, of 3 November and 4.1 of the Regulation on conditions for the provision of electronic communications services, universal service and protection of users, approved by Royal Decree 424/2005, of 15 April, refer to in general. Therefore, their default is described by the General Telecommunications Law 32/2003 of 3 November, whose infringement system is directly applicable to it.

(17) The Public Administrations may also distort competition, thereby harming the plurality of offers in the medium term, in cases when, while not providing direct services, they grant public aid to operators to do so. In these cases, approval by the European Commission becomes necessary, in principle. Notwithstanding the foregoing, the Comisión del Mercado de las Telecomunicaciones may, in accordance with the provisions of Article 48.3 e) of the General Telecommunications Law 32/2003, of 3 November take the necessary measures to safeguard plurality in offering the service, which could include the imposition of obligations on recipients of aid if it is understood that they distort competition, thus harming the plurality in the service provisioning. To avoid legal uncertainty which could result from an "a posteriori" hypothetical imposition of such obligations and obtain the fullest possible coordination with the European Commission in cases where that action is mandatory, it is more proportionate to require that, prior to the notification, if applicable, to the European Commission and in any case, the granting of aid, the project be notified to the Comisión del Mercado de las Telecomunicaciones to enable it to issue a report on the distortions to competition that the aid could generate and the conditions, if any, which would prevent it. Should the circumstances later change, this is without prejudice to the Comisión del Mercado de las Telecomunicaciones being able to always adopt mandatory measures that are in compliance with Article 48.3 e) of the General Telecommunications Law 32/2003 of 3 November.

(18) Given the above, on 8 April 2010 the President of the Comisión del Mercado de las Telecomunicaciones issued an Order to initiate a procedure for drafting a Circular aimed at establishing the conditions for operating public electronic communications networks and the provision of electronic communications services by Public Administrations.

(19) Under the above, after hearing the European Commission, the Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información and the Comisión Nacional de la Competencia, in accordance with the authorization of powers under Articles 8.4 and 48.3. e) of the General Telecommunications Law 32/2003, of 3 November 2003, under Article 20 of the Regulations of the Comisión del Mercado de las Telecomunicaciones, approved by Royal Decree 1994/1996 of 6 September and under Article 26 of the Consolidated Text of the Internal System Regulations of the Comisión del Mercado de las Telecomunicaciones approved by Decision from its Board of 20 December 2007 (Spanish Official Gazette of 31 January 2008) and subsequently amended by Resolution on 29 April 2008 (Spanish Official Gazette of 12 June 2008),

This Commission has set forth,



**Circular 1/2010 establishing the conditions for operation of networks and the provision of electronic communications services by the Public Administrations.**

**Primero.** *Object*

1. This Circular establishes the conditions for the operation of networks and the provision of electronic communications services by Public Administrations and institutions over which public authorities may directly or indirectly exercise a dominant influence or effective control by virtue of their ownership of it, their financial participation or the rules which govern them, in accordance with the provisions of Article 42.1 of the Commercial Code and in Article 2.b) of European Commission Directive 2006/111/EC of 16 November 2006, following the provisions of Articles 8.4 of the General Telecommunications Law 32/2003, of 3 November and 4.1 of the Regulation on the conditions for the provision of electronic communications services, universal service and protection of users, approved by Royal Decree 424/2005, of 15 April.

2. For the purposes of this Circular, the institutions over which the public authorities may directly or indirectly exercise a dominant influence by virtue of ownership, financial participation or the rules which govern them are included in the Public Administrations denomination.

3. The ground stations of the single frequency network for broadcasting to the citizens the digital terrestrial television service, which meet the conditions set forth in the Twelfth Additional Provision of Royal Decree 944/2005, of July 29, approving the national technical Plan for digital terrestrial television, are excluded from the scope of this Circular.

**Segundo.** *Requirement for registration of Public Administrations for the operation of public networks and provision of publicly available electronic communications services*

The exploitation of public networks or the provision of electronic communications services made available to the public by Public Administrations must be notified to the Comisión del Mercado de las Telecomunicaciones in accordance with the provisions of Article 6.2 of the General Telecommunications Law 32/2003, of 3 November, as provided in this Circular, with the exception of the cases of self-supply considered in Article Third and Item 2 of the Annex.

**Tercero.** *Self-supply*

1. The operation of networks and the provision of electronic communications services by a Public Administration for satisfying its needs, that is, those related to the performance of the functions proper to the staff of the Public Administration concerned and contributing to achieving the objectives of its own, are considered as self-supply and, therefore, there is no need to make the notification to the Comisión del Mercado de las Telecomunicaciones foreseen under Article 6.2 of the General Telecommunications Law 32/2003, of 3 November.



2. This assumption includes the educational or training centres of the educational system provided under the Organic Law 2/2006, of 3 May, on Education and the Organic Law 6/2001 of 21 December, on Universities and, among others, schools, institutes, colleges and universities as well as their campus areas, meaning that both the teachers and the students are part of the necessary personnel to perform the functions of both teachers and learners. It is understood that the services are related to the satisfaction of their own needs when the networks and/or services are used to serve interpersonal communications between teachers and students and for content (servers) specific to these activities.

3. In cases where, using the same infrastructure through which the Public Administration provides services to itself, wholesale or retail services are provided to third parties, the Public Administration will be considered, as for the latter, as an operator of networks or a provider of electronic communications service to others, thus remaining subject to the provisions of this Circular.

#### **Cuarto.** *General principles of operation*

1. Subject to the exceptions stated in this Circular, a Public Administration that seeks to operate public networks or offer electronic communications services available to the public shall act in accordance with the principle of the market economy private investor.

2. The Public Administrations shall operate networks and provide electronic communications services with the appropriate separation of accounts and in accordance with the principles of neutrality, transparency and non discrimination.

3. Whether Public Administrations, who either regulate or are holders of the public domain, own or exercise direct or indirect control on operators exploiting public electronic communications networks, they shall maintain a structural separation between those operators and the bodies responsible for regulation and management of these rights.

4. Notwithstanding the above, when developing their business as operators of electronic communications Public Administrations shall be subject to compliance with the same obligations as for the private network operators and electronic communications services. For that purpose they shall ensure, inter alia, compliance with their obligations regarding the protection of personal data and privacy of individuals, users rights, interoperability of services, obligations regarding quality of service, secrecy of communications and the interception of electronic communications in the cases legally established, as well as those related to data storage provided under Law 25/2007 of 18 October, on the storage of data relating to the electronic communications and the public communications networks.

#### **Quinto.** *Concept of market economy private investor*

1. For the purposes of this Circular, the market economy private investor is assumed as one that performs an economic activity within the parameters of any operator with business interests, financing its activities in market conditions such that revenues exceed costs that are incurred for their provision, taking into account a reasonable profit from the activity.





2. A Public Administration complies with the principle of the market economy private investor when it acts in accordance with the following criteria:

a) If the activity is aimed at obtaining a positive return that covers, through related revenues that are consistent with those commonly available on the market, all the provisioning costs, recurring and non-recurring, plus an adequate return on capital, taking into account the investment risk assumed. To verify this aspect a solid business plan must be in place, that is coherent and involved plausible hypotheses.

b) The project must generate a positive cash flow during the relevant period. In the event the horizon of generating positive net cash flow is delayed, this fact must be reflected in the project risk and in the profitability required from it.

3. The presence of private investors in a significant percentage of the capital of the company performing the service, provided that the public participation takes the same risks as the private one and this is done on a well-based business plan, is an indicator of the expected positive profitability of a project, and therefore, its consistency with the principle of market economy private investor.

4. For the accreditation of compliance with the principle of market economy private investor, the Public Administration must submit to the Comisión del Mercado de las Telecomunicaciones a business plan containing detailed information, among others, on the dimensioning of the network and/or service, the revenue and cost projections and the funding sources.

**Sexto.** *Financing via advertising or sponsorship*

It also means that a Public Administration operates on the principle of the market economy private investor when it finances its activity of operating public networks or provisioning electronic communications services available to the public through resources obtained through advertising or sponsorship, provided that their price is market-oriented in such a manner that it is comparable to the price payable in other equivalent platforms. For this purpose:

a) The Public Administration shall notify the Comisión del Mercado de las Telecomunicaciones of those situations when it finances electronic communications activities through resources obtained through advertising or sponsorship, and the identity of the companies that advertise on or promote the activity. To this end, in the first half of each year it will forward to the Comisión del Mercado de las Telecomunicaciones a list of the firms that have sponsored or advertised during the past year.

b) Entities that receive some form of subsidy from the Public Administration whose telecommunications activities are to be financed through advertising or sponsorship may not act as sponsors. Similarly, the public operator's activities shall not be financed by advertising or institutional sponsorship of the Public Administrations that exercise control over the corresponding operator.

c) In the event that the advertising commercial companies or private foundations receive funds from other Public Administrations other than the owner of the network or the provider of the electronic communications service, the link between the resources and the purpose for which they were granted should be respected so that they are in no case applied to activities that somehow entail their transfer to the financing of telecommunications activity of Public Administrations.



d) The Public Administration conducting electronic communications activities should identify all the entities funding them via their advertising or sponsorship.

e) Publicly owned corporations and public foundations may in no case act as sponsors of the network or the electronic communications services available to the general public from Public Administrations.

f) Savings Banks over which the pertinent Public Administration exercises a controlling influence over its governing bodies, may not develop the business funding through advertising or sponsorship of public network or publicly available electronic communications services of the mentioned Public Administration. Therefore in these cases their funding will be excluded, with it being possible to have funds put up by entities in which it does not have the mentioned control, provided that the necessary guarantees of transparency are given. It also excludes the possibility of developing advertising and sponsorship activities for those Savings Banks receiving any funds, including grants, from the Public Administration concerned.

**Séptimo.** *Separation of accounts*

For the purpose of verifying compliance with the requirement to keep separate accounts, during the first quarter of each year the Public Administrations must submit to the Comisión del Mercado de las Telecomunicaciones the separate accounts corresponding to their telecommunications activities available to the public performed in the previous year, except those relating to the activities listed in the Annex to this Circular, which should be submitted only at the request of the Comisión del Mercado de las Telecomunicaciones.

**Octavo.** *Conditions for the operation of networks or the provision of services with economic compensation below cost on a temporary basis in projects developed under the principle of private investor*

1. When a Public Administration intending to operate a network or to provide electronic communications services under the principle of private investor, temporarily wants to carry out any of these activities free of charge or for a fee that is less than the cost, it must notify it, with the pertinent reasons related to business objectives, to the Comisión del Mercado de las Telecomunicaciones so that the latter can specify the period within which the operation or provision may be carried out and the conditions based on which its activities must be adapted during that period.

2. Public Administrations engaged in electronic communications activity under the conditions described in this Article shall inform users about the duration of the period in which the compensation for the service will be less than the cost and the price to be requested from them once this period is over.

**Noveno.** *Communication to the European Commission when the Public Administration does not intend to act as a private investor*

When a Public Administration is seeking the operation of networks or the provision of electronic communications services to third parties without being subject to the principle of private investor, it must notify its project to the European Commission



unless there is no State aid or, if, in accordance with what is established in the European Commission *Regulation 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid*, it is exempted from that notification.

**Décimo.** *Notification and communication to the Comisión del Mercado de las Telecomunicaciones about the operation of public networks and provision of publicly available electronic communications by the Public Administrations when not acting as a private investor*

1. Prior to the notification to the European Commission or when such notification is not mandatory, before commencing the provision of services, a Public Administration seeking to exploit networks or provide services that is not subject to the private investor principle, unless considered in any the conditions indicated in the following Article, as well as the necessary registration in accordance with the provisions of Article 6.2 of the General Telecommunications Law 32/2003, of 3 November, must notify this to the Comisión del Mercado de las Telecomunicaciones, who will to for it consider whether the imposition of conditions is in order, as provided in 8.4 of the General Telecommunications Law 32/2003, of 3 November. The following shall be indicated in or attached to such notification:

- a) The technical conditions of the network or the provisioning of the service. In the case of Internet access services, this will include, inter alia, the network technology, the upstream and downstream bitrates, the duration of the connection per user per day, the hours of delivery and the accessible content.
- b) The coverage area of the service or network, indicating whether there are other operators providing similar services in the affected areas; a detailed map must be provided. For the provision of Internet access service it must indicate the locations where such service is provided and their characteristics (if they are outdoors or indoors and in the latter the type of activities carried out in the same).
- c) The requirements established by the Administration for becoming a beneficiary of the service.
- d) A Business Plan, which amplifies, inter alia, the projected income and the sources of funding.
- e) A competition assessment report including an assessment and weighted opinion about whether the measure is justified and is proportionate to the end to be achieved, taking into account the potential impact on competition. To this end, the "*Guide for the preparation of competition assessment reports of the regulatory projects*", published by the Comisión Nacional de la Competencia is available to Public Administrations.
- f) The results of a public consultation that they are required to perform, as provided in the next section, to obtain the views of industry on the mentioned project.

2. In the public consultation, which will be provided prior to the notification to the European Commission when the latter is applicable, the Public Administrations shall make available to the operators all the information provided in letters a) and f) of the preceding section and request information from the operators about which similar networks or services they provide or plan to provide in the affected territory now or in the next three years and how they understand the effect of the project on the competition.



3. Without prejudice to the notification of the public consultation to those interested in the manner prescribed in the pertinent rules, the Public Administration must submit it to the Comisión del Mercado de las Telecomunicaciones for it to post it on its Website.

4. Upon receipt of the above information, the Comisión del Mercado de las Telecomunicaciones will conduct a substitutability analysis on the services intended to be provided in order to study how the project might affect the free competition. If it understands that it could adversely affect it, it will issue a decision within three months after all required information has been submitted, establishing the conditions the Public Administration is subject to in order to ensure that there is no distortion of free competition.

5. Once the resolution has been issued or three months after the Comisión del Mercado de las Telecomunicaciones has received all the necessary information, the Public Administration, once its project has been adapted under that resolution, may give notice about its project to the European Commission or, should this not be mandatory, start providing the notified services.

**Undécimo.** *Operation of networks and provision of electronic communications services available to the public that do not affect free competition*

1. It is understood that the operation of networks or the provision of electronic communications services does not affect competition, and can therefore be carried out for an indefinite period, even if it is not subject to the private investor principle, when performed under any of the modalities provided in the Annex to this Circular.

2. In such cases the detailed communication provided in the previous article does not need to be made, it being sufficient that, at the time of registration in the Operators Registry, or later for its inclusion in the same, it is stated that the service to provide is one of those provided in the Annex to the Circular. This communication is not required when the registration in the Operators Registry is not compulsory in accordance with the provisions of Article 2 of this Circular.

3. The Annex to the Circular may be amended by a Decision of the Comisión del Mercado de las Telecomunicaciones after the relevant substitutability analysis and a public consultation. The adopted Decision will be published in the Spanish Official Gazette.

**Duodécimo.** *Infringement regime*

Failure to comply with the provisions of this Circular shall be punished in accordance with the provisions of the General Telecommunications Law 32/2003, of 3 November and other applicable legislation on matters having to do with sanctioning.

**First additional provision.** *Granting of public aid*

1. Public Administrations planning to grant State aid for the operation of networks or the provision of electronic communications services, prior to their notification to the European Commission in accordance with the provisions of Articles 107 and 108 of the Treaty on the Functioning of the European Union, or to its granting if it is not mandatory, must receive the report from the Comisión del Mercado de las



Telecomunicaciones on how the concession may affect the free competition and what conditions should be imposed, as applicable, to the beneficiary of the same in order to avoid such distortion.

2. To obtain the report they must forward the following to the Comisión del Mercado de las Telecomunicaciones, in addition to all the information contained in the project:

- a) The technical conditions of the network or service provision, including a justification of how it safeguards the principle of technological neutrality.
- b) The geographical area affected by the network or services for whose construction or provision the aid is to be granted, and whether there are any other operators providing similar services in the affected areas; a detailed map must be provided.
- c) The conditions to be imposed on the beneficiary of the aid.
- d) The competition assessment report in the terms provided in the tenth Article.
- e) The results of the public consultation they must undertake as provided in the next section.

3. In the public consultation, the Public Administrations will make available to the operators all the information provided in the preceding section and will request information from the operators about which similar services they provide or plan to provide in the affected territory now or in the next three years and how they understand the effect of the project on the competition.

4. Without prejudice to the notification of the public consultation to those interested in the manner prescribed in the pertinent rules, the Public Administration must submit it to the Comisión del Mercado de las Telecomunicaciones for it to be posted on its Website.

5. The report will be issued within two months after the receipt of all the information. Once the report is issued, or even if after that period it has not yet been issued, the Public Administrations may notify the project to the European Commission, attaching the issued report or proceed with the granting of the aid if the notification is not mandatory.

6. The Comisión del Mercado de las Telecomunicaciones shall monitor compliance with the conditions set out in the State Aid adopted by the European Commission.

Notwithstanding the provisions of this Article, if after granting the aid, the Comisión del Mercado de las Telecomunicaciones detects that, either due to a change of circumstances, or lack of compliance with the conditions imposed in this case, the granted aid is distorting the free competition, it will take the appropriate action in accordance with what is stated in Article 48.3 e) of the General Telecommunications Law 32/2003, of 3 November.

**Second additional provision. *Revision of the Annex and the conditions of the tenth Article***

The Annex to this Circular and the conditions provided in the tenth Article shall be reviewed periodically and, in any case, when the revision of the relevant affected electronic communications markets proceeds.



**First temporary provision.**

Within six months after the enforcement date of this Circular, all Public Administrations registered as exploiting public networks or providing electronic communications services available to the public, acting subject to the principle of the market economy private investor shall submit the information specified in Article Fifth, section 4 of this Circular.

**Second transitional provision.**

Within six months after the enforcement date of this Circular, all Public Administrations registered as exploiting public networks or providing electronic communications services available to the public, acting without being subject to the principle of the market economy private investor that are not included in the exemptions set out in Article II and in the Annex of the Circular, must submit the information set out in letters d) and e) of section 1 of the tenth Article of this Circular.

**Final provision.** *Enforcement date*

The present Circular shall take effect from the day after its publication in the Spanish Official Gazette.



## **ANNEX**

### **Operation of networks and provision of electronic communications services that do not affect competition**

The following services are understood as not affecting the competition:

- 1 .- Internet access services limited to the websites of the Administrations which are responsible for the geographical areas where this service is provided.
- 2 .- General Internet access services in libraries that are essential for them to fulfil their purposes and provided that the users can prove their connection to the service through a document allowing their identification.
- 3 .- General Internet access services in centres promoting teaching and cultural/educational activities not included in the third Article of this Circular, as long as they are essential to allow them to meet their goals and as long as users can prove their connection with the service using any document allowing their identification.
- 4 .- The exploitation of wireless networks that use unlicensed bands and the provision of electronic communications services available to the public through the same, provided that the network coverage excludes buildings and building complexes for residential or mixed use<sup>5</sup> and the network-user bitrate is limited to 256 Kbps.

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<sup>5</sup> Generally speaking, the term building or house for residential use is applied to one that is specifically intended to house people and a combined-use building is one that is used for various purposes, such as offices, shops or housing.