



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

HEREBY CERTIFIES:

That Board Meeting No. 32/09 of the Comisión del Mercado de las Telecomunicaciones held on 1 October 2009, did adopt the following

AGREEMENT

By which the following was approved

Resolution by which the public network fixed-line telephony transit services market review is approved, as well as the designation of an operator with significant market power; and the imposition of specific obligations, and agreed to notify the European Commission of the same (MTZ 2009/184).

I FACTUAL BACKGROUND

FIRST.-New telecommunications regulatory framework

The General Telecommunications Law 32/2003 of 3 November (hereinafter LGTel) becoming effective brought the new telecommunications regulatory framework into Spanish law. Spanish Royal Decree 2296/2004 of 10 December, which approves the Regulation on electronic communications markets, access and numbering (hereinafter the Market Regulation), states what procedure is to be followed when defining and analysing the different electronic communications markets according to the new regulatory framework.

This law states that the National Regulatory Authorities (NRAs) must periodically define and analyse the different markets in the electronic communications sector in order to determine if those markets are developing within a context of effective competition; if this is not the case, they must impose such specific obligations as are necessary.

SECOND.- Initiation of Procedure

On 26 February 2009, the designation of an operator with significant market power and the imposition of specific obligations, as well as the initiation of the public information period and the request for a report to the *Comisión Nacional de la Competencia* (Spanish Competition Commission, *CNC*) were agreed upon.

Notification of that act was published in Spanish Official Journal (BOE) No. 56 on 6 March 2009.



THIRD.- Report by the Comisión Nacional de la Competencia

The report drafted by the Comisión Nacional de la Competencia relative to the procedure for the definition and analysis of the public network fixed-line telephony transit services market has been sent to the Comisión del Mercado de las Telecomunicaciones.

FOURTH.- Allegations in the public inquiry

The following operators presented allegations in the public inquiry: Asociación de Empresas Operadoras y de Servicios de Telecomunicaciones (hereinafter ASTEL), Telefónica de España (hereinafter, TESAU) and Vodafone España (hereinafter, VODAFONE).

FIFTH.- Extension of the procedure deadline

Due to the complexity of the current procedure, on 21 April 2009, in accordance with article 42.6 of Law 30/1992 dated 26 November 2006, of the Legal System for Government Bodies and the Common Administrative Procedure (herein referred to as LRJPAC), the Secretary of the CMT agreed in writing the extension of the maximum resolution period and notification of same by a further three months.

This extension of the deadline was published in BOE No. 105 of 30 April 2009.

SIXTH.- Notice of the Draft Measure

By means of a written submission on 29 July 2009, the notification of the Draft Project relative to the review of the public network fixed-line telephony transit services market was agreed, as well as the designation of an operator with significant market power; and the imposition of specific obligations to the Spanish Ministry of Industry, Tourism and Commerce, the Spanish Ministry of Economy and the Treasury, and the European Commission and National Regulatory Authorities of the European Union member states so that, they could submit their comments in a maximum period of time of a month.

The European Commission was informed of the Draft Measure on 17 August 2009.

SEVENTH.- Requests for information

On 27 August 2009, the CMT received the European Commission's request for information relating to the Draft Measure about which they had been notified. Said requirement was complied with by the CMT on 31 August 2009.

EIGHTH.- Comments by the Spanish Ministry of Economy and the Treasury

The Spanish Secretary of State for Economy of the Spanish Ministry of Economy and the Treasury drafted a report which did not include any comments with regards to the notified Draft Project.

NINTH.- Remarks by the European Commission

On 17 September 2009, the European Commission written documentation was entered into the CMT's Register which did not contain observations of the notified Draft Measure.



II LEGAL BASIS

FIRST.- Authorisation for Competition

Articles 10, 48.2 and 48.3.g of General Telecommunications Law 32/2003 of 3 November (hereinafter known as LGTel), states that the Comisión del Mercado de las Telecomunicaciones has the capacity to: (i) define and analyse markets of reference, (ii) determine which operators have significant market power, and (iii) impose, hold, modify or suppress operators' specific obligations.

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

Articles 2 to 5 of the Market Regulation describe the procedure that the Comisión del Mercado de las Telecomunicaciones must follow in order to identify and analyse the relevant markets for operating networks and supplying e-communications services, and also describe its capacity to impose specific and appropriate obligations upon those operators holding significant power within each market being examined.

This Commission will direct its actions according to that stated in the dispositions of the LRJPAC. That legal text regulates the practice of those public functions that are entrusted to the CMT by virtue of that stated in article 48 of the LGTel and article 2 of the Comisión del Mercado de las Telecomunicaciones's Regulations.

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

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

Amongst the markets which, in accordance with the mentioned Recommendations, can be subject to *ex ante* regulation, the public network fixed-line telephony transit services market is not included.¹

Whilst keeping in mind the declarations presented by operators in the Public Inquiry, and the Report by the Comisión Nacional de la Competencia, the CMT elaborated a Draft Measure relating to this market.

In accordance with article 7 of EC Directive 2002/21 of the European Parliament and Council (Framework Directive) and article 5 of the Market Regulation, the Draft Measure in question was reported to the European Commission, the Spanish Ministry of Industry, Tourism and

¹ Markets 10 through 6 mentioned in EC Commission Recommendation of 11 February 2003 regarding those product and service markets within the e-communication sector that may be susceptible to *ex ante* regulation in accordance with the Framework Directive.



Commerce, the Spanish Ministry of Economy and the Treasury, and to the National Regulatory Authorities from other European Union member states.

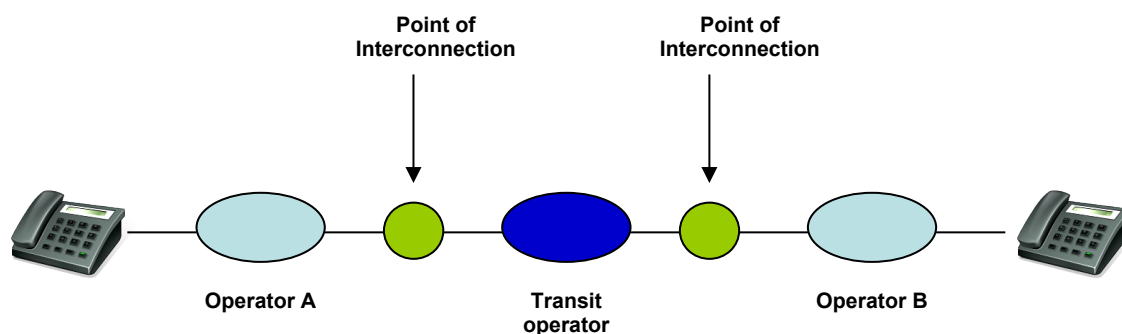
The European Commission did not make any comments on the Draft Measure subject of the present procedure.

THIRD.- Definition and analysis of the public network fixed-line telephony transit services market, the designation of operators with significant market power and the enforcement of specific obligations

I DESCRIPTION OF THE PUBLIC NETWORK FIXED-LINE TELEPHONY TRANSIT SERVICE

In order to complete a telephone call the following wholesale services are necessary: the origin services, the termination services, and in the event that the origin and destination operators are not interconnected, the call transit services.

In fact, transit services are necessary in those cases where two operators are not directly interconnected and require a third operator in order to achieve interconnectivity between them.



In general, and as long as the transit operator is the only one with relation with the other two operators, the transit services are not invoiced independently but together with the origination and termination services. In this way, although the transit operator does not directly render the origination or termination services, it will be the one invoicing them to the operator originating the call, together with the transit service.

In any event, the transit service identified is consistent with the limits laid down for the origination and termination of calls services,² that is to say, that there is an independent non-replaceable transit service with that of the origination or termination although it is not invoiced independently.

² Resolution of 12 December 2008, by which the definition and analysis of the wholesale access market and origination of calls in the public network from a fixed-line location, and the designation of an operator with significant market power, and to enforce specific obligations was approved and agreed for notification of the same to the European Commission (MTZ 2008/447).

Resolution of 18 December 2008, by which the definition and analysis of the markets of termination of calls in the individual public networks of each fixed-line telephone operator and the designation of an operator with significant market power; and the imposition of specific obligations was approved and agreed for notification of the same to the European Commission (MTZ 2008/1192).



II DESCRIPTION OF THE RELEVANT MARKET

II.1 Consideration of the public network fixed-line telephony transit services market (Resolution dated 29 June 2006)

II.1.1 Definition of the relevant market

According to the definition that was included in the Resolution dated 29 June 2006, the public network fixed-line telephony transit services are defined as those that allow an operator A to forward calls to an Operator B using the network of a third party, operator C, which is interconnected to both operator A and operator B. The transit service is usually contracted by the operator originating the call (A), as it requires this service in order to complete it.³

Following the terminology of the Reference Interconnection Offer (hereinafter, RIO) of Telefónica de España, S.A.U. (hereinafter, TESAU) the transit services are considered included in the reference market regardless of the destination of the numbering and interconnection level. In this way, the switched traffic interconnection transit services, for transit to Intelligent Network numbers and to short numbers, in their various levels (unicentral, national, intra-nodal and national with local extension) are part of the same reference market.⁴

These services corresponded to the TESAU network architecture, thus in the case of the alternative operators, the transit services would be analogous to those offered by this operator in accordance with its networks.

The transit services that were defined in the first market revision were consistent with the limits laid down by the wholesale services of origination and termination. Likewise, within the same reference market the transit services to fixed-line and mobile networks were included as both services are substitutable from the point of view of the offer.

Meanwhile, the international transit service was excluded from the reference market as, from the point of view of the demand, there cannot be a substitution between both types of services as this type of transit requires different network elements than the national transit.

In addition, it was considered that the direct interconnection was not included in the reference market as, from the demand point of view, it did not seem reasonable for the operators to start to directly interconnect instead of contracting the transit service in reply to a small but significant non-temporary increase in price (hereinafter, SSNIP) of the prices of the same.

Lastly, it was considered that the geographical dimension of the reference market was the entire national territory as the competition conditions were homogeneous throughout the territory considered.

³ In the call origination services, it is the destination operator who contracts the transit service to receive the calls originated in those access operators with which there is no direct interconnection.

⁴ Unicentral transit: allows routing traffic between two operators by means of the same TESAU transit exchange open to interconnection, with which each of the operators has a point of interconnection established.

National transit: service provided between the transit exchanges open to interconnection.

Intranodal transit: service provided in the provinces in which there is more than one transit border exchange by means of which the traffic between two operators connected to different border centrales within a same province is enabled.

National transit with local extension: consists of the carriage of the call between the local exchange to which the operator is connected and the transit exchange of that on which it depends or viceversa.



II.1.2 Analysis of market structure and determining if significant market power is present

The analysis of the market structure defined in the Resolution previously mentioned gave rise to the conclusion that this was not carried out in an environment with effective competition, thus TESAU was identified as the operator with significant power in an individual market.

The indications that caused the CMT to declare TESAU as the sole operator with significant market power were as follows:

- Its market share was higher than 50% in terms of income;
- There were access barriers derived from the scale economy and above all from the scope economies, that prevented the existence of potential competition that may instil discipline in TESAU's actions;
- The business group to which TESAU belongs was the most important in the electronic communications sector; likewise, TESAU was the only operator that did not have the need to demand transit services from another operator, while practically all the other operators required demanding its transit services in order to obtain interoperability of their services;
- The demand power was reduced and did not instil discipline in any way in TESAU.

The identification of TESAU as the operator with SMP, in accordance with the previous reasons, had as its objective to guarantee that this operator would not use its market weight to restrict or falsify the competition in the relevant markets nor support said weight in the adjacent markets.

II.1.3 Competition problems and obligations to impose

In the reference market defined, potential competition problems were detected such as the negative to supply/access, excessive prices, delaying tactics, excessive or undue requirements and discriminatory prices, TESAU was imposed with a series of specific obligations such as meeting any reasonable requests for access to resources, price orientation depending on the costs, separation of accounts, non-discrimination and transparency (publication of a Reference Offer).

II.2 Consideration of the public network fixed-line telephony transit services in accordance with Recommendation 2007

In the current Recommendation,⁵ the CE has considered that the public network fixed-line telephony transit services no longer have the necessary characteristics to be *ex ante* regulated.

In accordance with the "*Explanatory Note*"⁶ attached to the Recommendation, the provision of the transit services can be carried out by means of self-provision or by means of third operators.

⁵ Recommendation of the Commission of 17 December 2007, relative to the relevant markets of products and services within the electronic communication sector that can be subject to *ex ante* regulation, OJEU L344/65 of 28 December 2007.

⁶ Explanatory Note – Accompanying document to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with EC Directive 2002/21 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SEC (2007) 1483 final.



In accordance with the CE, the competitive environment is changing given the development of infrastructures by the alternative operators and improvement of the trunk network of the incumbent operators. Therefore, the incumbent operators can still have scale advantages that allow them to optimise the costs of their large network deployment, and on the other hand, as there is evidence that the alternative operators are investing in order to develop their own network, the access barriers cannot be considered as high and long-lasting.

The CE indicates another two factors that affect the current or potential level of competition in this market. The first one of them is that the transit services market is supplementary to those of origination and termination of calls. In fact, the competition level of the transit services will depend on where the limit between one and the other market has been established. The second factor to be taken into account is that most operators that have accessed this market have done so by means of self-provision, thus there has been hardly any development in the market for the transit services.

Given the previous considerations, the CE considers that the public network fixed-line telephony transit services market cannot be *ex ante* regulated. Regardless of the above, NRAs can identify markets that do not appear on the Recommendation list provided that those markets have the requisite characteristics to be susceptible to *ex ante* regulation.

Previous to said analysis, the CMT considers it appropriate to analyse the most relevant evolution with regards to the public network fixed-line telephony transit services. In the event there were substantial differences with regards to the market definition included in the Resolution dated 29 June 2006, the analysis of the criteria to consider a market as being susceptible to *ex ante* regulation should be carried out on the basis of the newly defined market.

II.3 Evolution of the public network fixed-line telephony transit services

In accordance with the Resolution dated 29 June 2006, by means of the call transit service, an operator A can direct telephone calls to an operator B using the network of a third party, operator C, to which both operators A and B are interconnected. The transit service is usually contracted by operator A which is the one originating the call and needing this service in order to complete it.⁷

As indicated in the previous section, the section below analyses if there have been any significant changes with regards to the definition of the reference market and that are taken to the CMT to modify the conclusions reached in the first market revision.

At the same time we should take into account, that, although the Recommendation only refers to public telephone networks, a neutral analysis should be carried out from the point of view of the technology that is used to supply the service, that is to say, regardless of whether the signal is sent by means of the traditional switched network or IP based networks. The different ERG documents say so, where an expansive interpretation of the definitions included in the current regulatory framework is appealed.⁸

II.3.1 Definition for the relevant product market

⁷ See footnote 3.

⁸ Document ERG (07) 56 rev2 ERG Common Position on VoIP: "According to I/ERG Response to EU Commission call for input there is a need for the review of a range of definitions currently contained in the Regulatory Framework to address imperfections in definitions and to ensure that articles in the Framework are sufficient to ensure and support future developments in electronic communications markets."



II.3.1.1 Transit services to national mobiles, geographical numbers, Intelligent Network numbers and short numbers

Given the definition made in the first market revision, the present analysis will have to analyse whether the transit services to mobiles, geographical numbers, Intelligent Network numbers and short numbers continue being part of the same reference market.

From the demand point of view it is obvious that there is no type of substitutability in this respect as in the event of an SSNIP in the price of the transit services to national fixed-line geographical numbers, the demand for these services would not substitute the demand for transit to a mobile number or vice versa, as the range of telephone numbers reachable in each case is different. The same would happen with the transit services to Intelligent Network numbers and short numbers.

Meanwhile, and in relation with the substitutability from the point of view of the offer, an operator providing transit services could start providing this type of services to different types of numbers in the event of an SSNIP at the price of anyone of them. A transit operator interconnected with a mobile operator could provide the transit services to mobile networks without incurring in additional significant costs as, in general, the transit operators are interconnected with both fixed-line operators and mobile operators, and do not incur in significant costs when providing one or another type of transit. The same would occur in those cases where an operator with transit services to mobiles decided to provide transit to geographical numbers in the event of an SSNIP of the latter.

II.3.1.2 Transit service of other operators

At the same time there is a regulated service in the RIO called transit service of other operators (also called interconnection traffic re-sale) according to which TESAU is obliged to deliver the origination traffic to an operator different from that of destination.

As indicated in said revision, the transit service of other RIO operators is in fact an origination service, provided by the incumbent operator, which is provided together with a transit service provided by the operator interconnected with TESAU to another alternative operator. The transit operator takes advantage of the interconnections established with the incumbent operator at the lower levels of the network architecture of the latter (or the free capacity) to provide this service to operators interconnected with TESAU at a higher level. In this way the transit operators can provide a more attractive price than direct interconnection when paying an origination at a lower level or when optimising the interconnection resources.

Given that the previous situation is included in the reference market only the transit service provided by the alternative operator and not the origination service provided by TESAU, which would already be included in the market defined in the Resolution of 12 December 2008 relative to the definition and analysis of the access wholesale market and origination of calls in the public telephone network in a fixed-line location.

II.3.1.3 National transit and international transit

In the first market revision it was concluded that the international transit service was not included in the reference market. The following section will analyse whether said circumstance is still kept, that is to say, if in the event of an SSNIP in the prices of the national transit the operators that demand this service would start to purchase the international transit services.

It seems clear that an operator demanding national transit services does so in order to complete calls from a point in the national geography to another, very different to the



international transit service that it would be contracted by an operator in order to route calls from a point in the national geography to a location in another country. Therefore, the national transit services and the international transit services are not considered as substitutable from the point of view of the demand.

From the point of view of the offer we should consider whether in the event of an SSNIP in the price of the international transit services, the operators currently providing national transit would start to offer this type of service. The answer to this is again negative, as in order to provide an international transit service important investment is required, as well as a high degree of specialisation in the international market, with some characteristics and bidders who are very different from those of the national scope.

The same would happen in the event that an international transit operator wishes to provide national transit services, as they are two activities for which very different production elements are required and for which a high degree of specialisation is required.

To sum up the conclusions reached in the first market revision are maintained, that is, the national transit services cannot be considered to be substitutive of the international transit services, thus they are not included in a same reference market.

II.3.1.4 Direct interconnection

In the event of an SSNIP in the price of the transit services, the operators demanding this service could substitute it for direct interconnection establishing a PoI with the operator with which they want to interconnect.

This situation would be more probable in the case of alternative operators that have their own infrastructure deployed and route a considerable volume of minutes towards certain operators, which would compensate the necessary investment to establish a PoI.

For the smaller alternative operators this substitution could not take place as it would not be economically viable to establish a PoI with all the market operators taking into account the low volume of minutes handled, having to use the transit services that provide the main sector operators.

In view of the above, we can conclude that the direct and transit interconnections do not belong to the same relevant market, although the competitive pressure that this possibility may have on the reference market should not be ruled out.

II.3.1.5 Transit by means of alternative interfaces (IP)

In a prospective way we can state that an increasingly growing number of users will only have an access to bandwidth to receive all the electronic communication services. Furthermore, the "core" networks of the operators will also migrate towards an IP transmission environment. In this way, it is necessary to consider whether an operator would substitute the transit of calls by means of the traditional or switched interconnection for another with a different interface (generally IP). Meanwhile, the CMT has already completed the second round of the analysis of the fixed-line origination and termination markets.⁹ In both markets both the origination and termination by means of IP interfaces has been included.

Therefore, taking into account that the transit market is defined as having limited the origination and termination markets, it would not be logical not to include the services

⁹ See footnote 1.



provided by means of IP interfaces in the transit market. In addition, the CMT refers to the reasoning carried out in the analysis of substitutability of both markets, especially in that of terminations they are applicable to the transit market.

For all the above, we can conclude that the new transit services based on IP techniques are, in a prospective way, substitutes of those supported on the switched telephone network and are included in the reference markets.

II.3.2 Definition of the relevant geographic market

In the first market revision carried out by the CMT in 2006 it was concluded that the scope of the market defined was national, as lower scopes to the national in which the competition conditions were sufficiently different from the rest of the national territory were not detected.

In accordance with paragraph 59 of the Guidelines, the geographical scope of a market in the electronic communications sector has been traditionally limited using the following criteria:

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

From the point of view of substitutability of the demand, an operator requesting the transit service would not mind the geographical point by means of which it accesses the service, that is to say, finds substitution of some points of interconnection with others providing this does not imply an additional deployment of the network.

From the point of view of substitutability of the offer, in the event of an SSNIP in the price of the transit service in a determined area of the national territory, an operator providing this service and having its own infrastructure in the area would not face significant costs to supply the reference service. In addition, we should take into account that there are no legal or regulatory restrictions to provide services in the entire scope.

In conclusion, there are no different competition conditions in scopes lower than the national, thus the geographical dimension of the transit market in fixed-line telephone public networks is the entire national territory.

II.3.3 Conclusion regarding the market definition

This Commission defines the public network fixed-line telephony transit services market as that including the services provided by a certain operator to another operator with which it is interconnected, in order to carry out the transport along its network to deliver the call to a third national operator of the telephone public network. It is considered a sole market that includes both the transit services to national geographical numbers and mobiles, Intelligent Network numbers and short numbers, regardless of the technique used to provide the reference service.

We consider the market's geographical level to be national.

III ANALYSIS OF THE CRITERIA ESTABLISHED BY THE EUROPEAN COMMISSION FOR IDENTIFYING MARKETS SUSCEPTIBLE TO EX ANTE REGULATION

According to article 10.1 of the LGTel, *“The Comisión del Mercado de las Telecomunicaciones, taking into account the European Commission Guidelines for the analysis of the markets and determination of the operators with significant weight in the*



market, as well as the Recommendation of Relevant markets, by means of the resolution published in the 'Spanish Official Journal' shall define the reference markets relative to the electronic communications networks and services, amongst which the corresponding retail and wholesale reference markets and the geographical scope of the same will be included, whose characteristics can justify the imposition of specific obligations". In addition, the Recommendation of the Commission dated 17 December 2007 establishes that, when identifying the markets different from those included in the Annex, the NRA have to ensure that the three criteria pre-established to determine whether a market can be *ex ante* regulated are accumulatively met.¹⁰

According to the European Commission, "[T]he application of the three criteria should limit the number of markets within the electronic communications sector where *ex ante* regulatory obligations are imposed and thereby contribute to the aim of the regulatory framework to reduce *ex ante* sector-specific rules progressively as competition in the markets develops. These criteria should be applied cumulatively, so that failure to meet any one of them would indicate that a market should not be identified as susceptible to *ex ante* regulation" (section 14).

Therefore a market identified by an NRA at national level cannot be susceptible to *ex ante* in the event of accumulative non-compliance with the three criteria established by the European Commission in their Recommendation.

In accordance with section 17 of the same, the "markets listed in the annex have been identified on the basis of these three accumulative criteria". Therefore, NRAs may assume that they meet the criteria.¹¹ On the other hand, "[F]or markets not listed in this Recommendation national regulatory authorities should apply the three-criterion test to the market concerned".

In addition, the public network fixed-line telephony transit services market is not included in the Recommendation Annex, thus, previous to the analysis of the same, it is necessary to determine whether it is a market that can be *ex ante* regulated in accordance with the previous criteria.

The following section analyses whether the public network fixed-line telephony transit services market in Spain meets the three criteria defined by the CE in the Recommendation. Said analysis is carried out in accordance with the ERG document "*Guidance on the application of the three criteria test*".¹²

¹⁰ Section 5 of the Recommendation: In order to identify markets that are susceptible to *ex ante* regulation, it is appropriate to apply the following cumulative criteria. The first criterion is the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature. Nevertheless, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation. Therefore the second criterion admits only those markets whose structure does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned.

¹¹ See Explanatory Note point 2.2: "For those markets listed, the Recommendation creates a presumption for the NRA that the three criteria are met and therefore NRAs do not need to reconsider the three criteria. However, it is open to a NRA to assess the three criteria in terms of whether they are satisfied for their specific market if the NRA believes that this would be appropriate. The results of any such analysis should follow the normal market notification procedure".

¹² ERG (08) 21 ERG Report on 3 criteria test final 080604.



III.1 Presence of non-transitory entry barriers to market access

The objective of this first criterion is to analyse those structural elements and legal barriers that can affect the entry of other operators or the expansion of those already existing in the public network fixed-line telephony transit services market. As stated in the Recommendation, “*structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry for the latter*”.

When analysing barriers to entry on the market, we must consider whether or not they are susceptible to being transitory using the “*modified Greenfield approach*”, that is, taking current obligations on related wholesale markets into account, but not the asymmetric regulations imposed on the services being analysed.

III.1.1 Structural obstacles

With respect to the existence of structural barriers to entry, electronic communications markets are characterised by their important economies of scale, scope and density, and for their high sunk costs.

With the aim of assessing the magnitude of the structural obstacles, we will now analyse a series of variables permitting us to evaluate whether or not high, non-transitory barriers to entry exist in the relevant market.

III.1.1.1 Sunk costs level

The sunk costs are defined as being those required by the operator to enter the market and which cannot be recuperated when the company exits the market.

Although the sunk costs are especially relevant in the electronic communications sector, we should take into consideration that an operator deploys its own network in order not to provide transit services, as these are supplementary to the operator’s main activity in the decreasing markets relative to fixed-line telephone traffic. Because of this, the CMT does not consider that the entry to the transit market requires additional investment to those necessary to provide the retail services, thus the rejection of the operator to provide transit services would not involve the loss of the investment made.

III.1.1.2 Scale and scope economies

Another type of obstacle is the existence of substantial scale and/or scope economies. Scale economies are defined as the advantage in costs obtained by a company as its production increases, while scope economies refer to the efficiencies achieved by a company when it supplies a range of services using, for example, a same infrastructure.

In this last case it is especially relevant in the transit services market given that, as indicated previously, the operators do not deploy their own network in order to make the provision of the transit services their main activity, but it is a supplementary service. In fact, it has been demonstrated that the reference services are provided on the free capacity deployed for other electronic communication services. This is to say that scope economies are essential for the operators, that is to say, that no operator will enter the reference market to just provide the transit services.

Given the situation above, the operators that have invested in the establishment of Poles with different operators will attempt to make it profitable by routing the highest number of minutes possible by means of the same. In addition, we should indicate that the average costs faced



by both the small and the large operators are similar as the scale economies to establish Pols are reduced, and thus, any operator is able to establish at least one Pol.

III.1.1.3 Control over an infrastructure that cannot be easily duplicated

In the first market revision it was concluded that *“the competitive pressure faced by an operator in the reference market will depend on the existence of alternative to the supply of the transit service provided by TESAU”*, thus in order for there to be alternatives to the supply, the necessary infrastructure to provide the reference services should be easily reproduced.

For the provision of the transit service there is a need for mainly network trunk stages, that is to say, points of interconnection, transit exchanges and transmission links, not requiring the most expensive part of a telecommunications network which would be the access network. This means to say that for the provision of the reference service a network capillarity comparable to that of the incumbent operator is not necessary.

In accordance with the information inquiry carried out by the CMT, those operators that have their own network infrastructure deployed are those who are providing the reference service, which clearly demonstrates that the incumbent operator does not have an infrastructure which cannot be easily reproduced.

The following table shows the number of Pols established between each other by the main operators in the electronic communications sector.

[CONFIDENTIAL] Table III.1.1 Map of the Pols established between the main operators with other operators in 2007¹³

(*)ONO includes the former operators Auna Telecomunicaciones and Tenaria.

(**) Tele2's data includes minutes for Comunitel Global. Furthermore, the Vodafone data only refers to their mobile activity.

Source: Prepared by the CMT based on the specific request for information.

As can be seen, TESAU continues being the operator that provides transit services to the largest number of operators, followed by Ono thanks the purchase of the operator Auna Telecomunicaciones (Retevisión) which was the main alternative to the wholesale services provided by TESAU.

The previous table shows how the main operators with their own infrastructure deployed provide transit services, thus it can be concluded that there are real supply alternatives and that not only the incumbent operator is the supplier for this type of services. Furthermore, and as previously mentioned, once an operator has established a Pol it does not incur in significant additional costs if it desires to provide the reference services.

With regards to the provision of transit services to smaller operators, Annex 1 **[CONFIDENTIAL]** of the present document shows a matrix with the number of Pols that the main operators have established and the demand of transit services by these smaller operators. Two significant situations may be seen in said matrix: (i) there is a small group of operators that, having Pols established with TESAU, do not demand transit services from the latter and (ii) there is another group of operators that do not have Pols established with TESAU and the transit services they require are provided by alternative operators, mainly

¹³ The shaded box indicates that the operator column obtained income for providing transit services to the operator row during 2007.



Jazztel and FTES. In fact, of the 98 smaller operators included in the sample, 17% are only interconnected with TESAU, 59%¹⁴ are only with alternative operators to the incumbent and the remaining 24% is interconnected both with TESAU and with the main alternative operators.

This situation is a significant difference with regards to the competitive situation the market reflected in its first revision. In fact, the number of operators that are interconnected only with alternative operators to the incumbent has increased and the number of operators of a certain size that only had Pols with TESAU has decreased.

In conclusion, and considering the analysis of the data provided by the main operators in the specific inquiry for information, the CMT considers that the provision of the transit service requires an infrastructure that can be reproduced and depending on which there is a diversity of real supply alternatives.

II.1.1.4 Switching costs

One of the barriers to entry that may be present in the relevant market is the existence of switching costs.

In the case of the reference market we cannot conclude that there are significant switching costs for the operator demanding the service as, once the operator has established a Pol with various operators, this can easily choose with whom to transit without this involving a significant increase in cost.

III.1.2 Legal or regulatory obstacles

With regards to the existence of this type of obstacles, the Recommendation indicates that these *“are not based on the economic situation, but are derived from legislative or public measures that directly affect the entry conditions and/or the positioning of the operators in the relevant market”*.

The main legal obstacles that can arise in the electronic communications market are as follows:

- The need to obtain administrative authorisation or a license for operating in the market
- Having radio spectrum license agreements.

No specific legal obstacles have been detected in the reference market that prevent the provision of the reference service, with exception of those the operator can encounter in the occupation of the public domain when deploying its own infrastructure. In addition, the license regime has been removed and instead there is a more flexible system of authorisations that involve fewer administrative tasks for the operator. With regards to the second type of obstacle, a radio spectrum is not needed for providing the services included in the relevant market.

III.1.3 Conclusion

From the previous analysis we can reach the conclusion that there are no high and non-transitory obstacles to entry in the transit market. As it is considered as a supplementary service to other connected services, the exit of an operator from the reference market does not involve incurring in unrecoverable costs as the investments are mainly used for the

¹⁴ Although it is true that most of these operators provide additional cost services.



provision of the fixed-line telephone traffic retail services. Likewise, the operators can achieve significant scope economies and the existence of real supply alternatives have been demonstrated, thus, in this way, the investment of said Pols can be amortised. Lastly, it is considered that there are no significant switching costs.

To sum up, the CMT concludes that the first criterion is not met in order to consider the fixed-line telephone public network transit services as being susceptible to *ex ante* regulation.

In accordance with the Recommendation, the compliance of the three criteria should be accumulative, that is, if one of them is not met, the market cannot be regulated. Nevertheless, and in order to carry out the analysis as exhaustively possible, the following section will analyse whether the market meets the other two additional criteria indicated by the CE in its Recommendation.

III.2 Tendency towards effective competition

As stated in the Recommendation, *“even when a market is characterised by high barriers to entry, other structural factors in that market may mean that the market tends towards an effectively competitive outcome within the relevant time horizon”*.

The application of this criterion involves examining the competition situation that exists behind the entry barriers; even in markets that are characterised by high entry barriers, there may be enough operators to guarantee that the market tends towards effective competition.

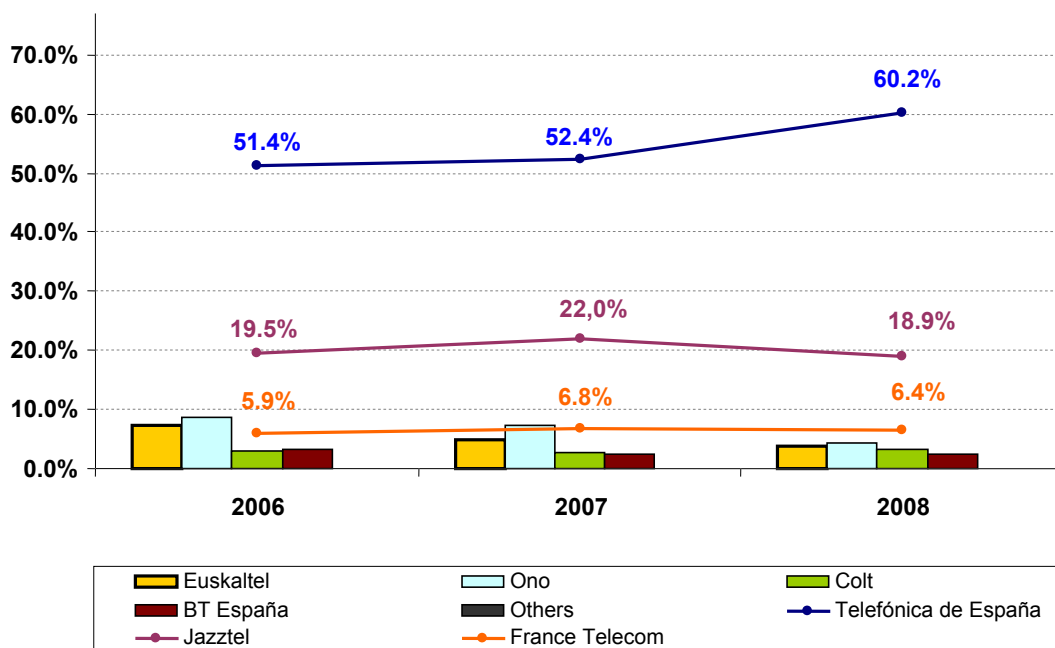
In order to assess the possibility that a market tends to a situation of effective competition indicators such as the market shares, the existing competition, the price evolution or the potential competition should be assessed.

III.2.1 Market shares

The following graphic shows the evolution of the market shares by minutes in the transit services market.



Figure III.2.1 Evolution of market shares by minutes¹⁵



Source: Prepared by the CMT based on the Annual and Quarterly Reports 2008.

During the period included in the sample, the market share by minutes of TESAU was about 55%, although the data corresponding to the Annual report 2008 increase said figure to 60.2%.

When assessing the evolution of the market shares we should highlight two relevant facts: on the one hand, the performance of the alternative operators during 2008, and on the other, the existence of interconnection by capacity.

With regards to the performance of the alternative operators, it has been checked by the CMT that the significant increase in TESAU's market share between 2007 and 2008 is due to the difficulties of some alternative operators to negotiate the termination prices between them.¹⁶ This situation has led to that in spite of the fact that these operators have direct interconnection with a wide range of operators, they prefer to exchange their transit traffic via TESAU.

Therefore, the growth of TESAU's market share during the last period does not seem to be related with the fact that the incumbent operator has exercised market power on the alternative operators, but that the latter are the ones using the TESAU regulated offer in spite of being directly interconnected with third operators.

¹⁵ The Telefónica de España market share has diminished with respect to the data shown in the Public Inquiry, due to the fact that the inter-company sales of transit minutes by Telefónica de España to Telefónica Móviles España have been eliminated.

¹⁶ In accordance with the Resolution dated 18 December 2008, by which the definition and analysis of the call termination markets in the individual public networks of each fixed-line telephone operator is approved, as well as the designation of an operator with significant market power; and the imposition of specific obligations. It is also agreed to notify the European Commission of the same. The alternative operators to TESAU, and which were declared with SMP, had, amongst their obligations, that of offering reasonable prices for the provision of the call termination services.



With regards to the interconnection by capacity, and as already mentioned before, this is a wholesale service provided by TESAU to the alternative operators consisting of the renting of a determined capacity at a regulated price, regardless of the traffic minutes transported by the circuit. In this way, the more a circuit is used, the lower would be the unit cost of the interconnection minute.

The existence of interconnection by capacity has facilitated the development of transit services with origin or destination in TESAU. The transit operator takes advantage of the interconnections established with TESAU in the low levels of the network architecture of the latter with free capacity to order transit services from operators that do not have these interconnections with TESAU given their network deployment, in this way being able to provide a more attractive price when paying an origination and/or termination at a lower level or when optimising the interconnection resources.

Many alternative operators contract transit services to other alternative operators in order to reduce their interconnection costs with origin or destination in the TESAU network. The use of the transit services and the origination or termination in TESAU by capacity can imply a significant decrease in costs when compared with the direct interconnection with TESAU. In this case, the contracting of transit services is given by the possibility of obtaining the same at lower prices to those that would be obtained with direct interconnection. The consequence of this practice is that the alternative operators to TESAU have a relevant part of the transit services market.

We should highlight that the alternative operators that have interconnection by capacity agreements with TESAU will have numerous incentives to optimise the contracted capacity and fill up their circuits to a maximum. In fact, every additional minute they provide to third operators by means of the transit offers will imply additional income.

III.2. Evolution of competition in the relevant market

As indicated in the previous graphic, the market share of TESAU in the reference market is below 65%. The main competitors in the defined market are Jazztel and France Telecom, that is to say, operators that supply transit services to limited-sized operators and for which, in many cases, they are their only supplier.

The CMT considers that, prospectively, the reference market structure will be modified as many of the operators that currently demand transit services change to direct interconnections between each other. Thus, a loss in the importance of the transit services between the main operators is expected, as the traffic volumes they have will recommend the establishment of Pols between each other, supplying the reference service only to those limited-sized operators for which, considering their volume of traffic, it is not economically viable to establish a Pol with all the sector operators.

III.2.3 Price evolution

The analysis of the price evolution in the transit services market in fixed-line telephone public networks is complicated as most of the operators that have been required this information market the reference services together with call termination services. Given this situation, the operators have been required to estimate, as best as possible, the income attributable to the transit service.

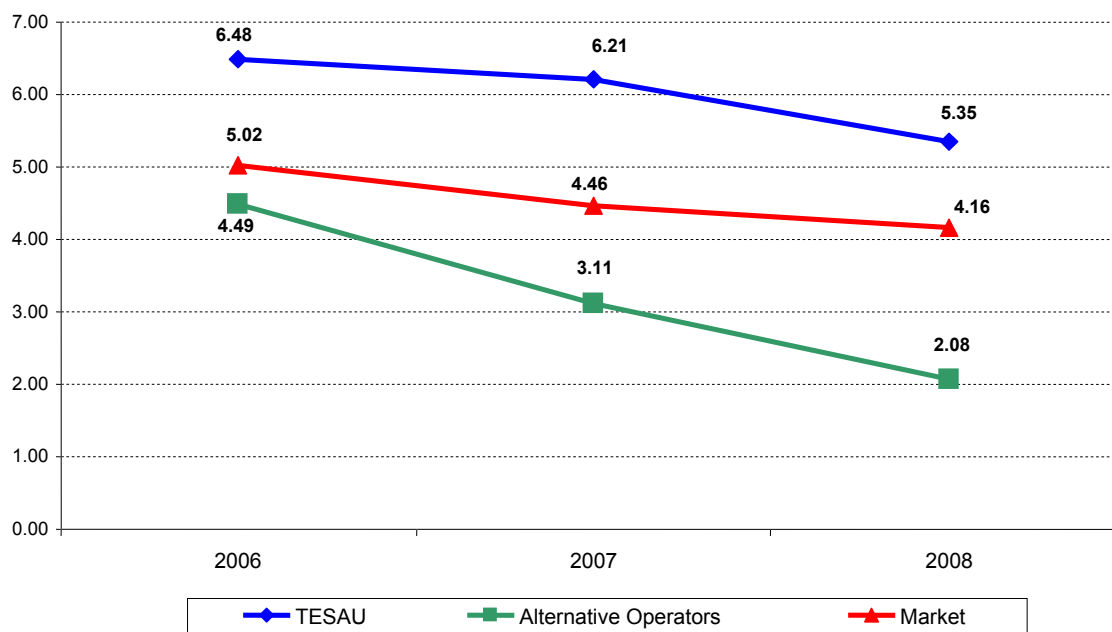
A second aspect to be taken into account is the existence of different interconnection levels and timetables with higher prices than in those levels that require a lower deployment of their own infrastructure.



Furthermore, the prices of the main supplier of these services, TESAU, are regulated in accordance with the *ex ante* regulation valid depending on its costs.

Given the previous premises, the following graphic shows an estimated evolution of the prices for the reference service, both for TESAU as well as for the entire transit services market.

Graphic III.2.2 Evolution of the average price of the transit services (euro cents/minute)



Source: Prepared by the CMT based on the requirements for the drafting of Annual Reports, CMT.

It can be seen how the transit services prices have decreased for all the market 17.0% with regards to the last revision. The average TESAU price decreased by 17.4%, in spite of the fact that the regulated prices were not modified in the RIO 2005 with regards to the RIO 2003, which indicates that the alternative operators that demand this service from TESAU have been interconnected at lower network levels.

In turn, the main alternative operators that provide transit services do so at lower prices than those of TESAU, there being an average price at the end of 2008 of 2.08 euro cents/minute, that is to say, 53.7% less than those recorded in 2006. It can therefore be concluded that the alternative operators have been able to capture an important volume of small operators to provide the transit services to with more attractive economic conditions than those of the regulated services. In fact, and as indicated before, 59% of the smaller-sized operators are only interconnected with alternative operators to the incumbent.

To sum up the evolution of the prices shows how the main alternative operators are able to compete in the reference market, which demonstrates that the market shows symptoms of tending towards effective competition.

III.2.4 Potential competition



The main competitive pressure being faced by the operators providing public network fixed-line telephony transit services is direct interconnection. Thus, those operators that currently demand transit services can, in keeping with the increase in their traffic volume being sent to a third operator, establish a Pol with said operator.

In the particular case of transit services to mobile networks, it has been seen that the main fixed-line network operators have set up Pols with the three main mobile network operators. The same as happened with the transit services to fixed-line networks, once the Pols were set up, there is an incentive to use the circuits to a maximum since additional income is obtained without incurring any significant additional cost.

Additionally it should be taken into account that the CMT, in its market analysis 7 of the Recommendation,¹⁷ imposed a series of obligations that prevented the mobile operators with SMP from abusing their market dominance, and facilitated the reaching of interconnection agreements with the mobile networks. In this way, and taking into account both the economic incentives for the operators to reduce the unused capacity of their networks, and also the obligations regulating the termination services in mobile networks, an alternative fixed-line network operator having a Pol established with a mobile operator can offer transit services to mobile networks almost immediately. On the other hand, if a considerable percentage of the minutes of a fixed-line operator terminate in mobile networks, it could possibly be to their advantage to set up a Pol for direct interconnection in detriment to the transit services provided by the rest of the fixed-line telephony operators.

Thus it has been shown as being in agreement with the data available to the CMT. In 2007, 9.4% of the total minutes invoiced by the fixed-line operators were for calls to mobiles.

Additionally it should be mentioned that thanks to the current regulations and the great capillarity of the mobile networks, the fixed-line telephony operators can easily and quickly set up a Pol without incurring significant additional costs.

In conclusion, the CMT considers that direct interconnection puts significant competitive pressure on transit services. Other NRAs who consider that the increase in direct interconnection is one of the main changes that have taken place in the market of reference share this opinion.¹⁸

III.2.5 Conclusion

From the analysis of the second criterion, we can conclude that the relevant market possesses the appropriate indications of a tendency toward effective competition. The average transit services prices are below those recorded in the first market review, and even the alternative operators have prices lower than those regulated by TESAU. Lastly, those operators that are providing the service of reference are facing considerable competitive pressure arising from direct interconnection.

¹⁷ Resolución dated 18 December 2008, by means of which the definition and the analysis of the voice call termination markets in individual mobile networks, and the designation of an operator with significant market power were approved; and the imposition of specific obligations, and agreed to notify the European Commission of the same (MTZ 2008/1193).

¹⁸ Case FI/2007/0705: Transit services in the public telephone fixed-line networks in Finland.



III.3 Sufficiency of Competition Law

According to the Commission Recommendation, the third requirement that a market must meet in order to be susceptible to *ex ante* regulation is "*if competition law is sufficient to address the market failures that result from the first two criteria being met*". The European Commission states that "[C]ompetition law interventions are unlikely to be sufficient where the compliance requirements of an intervention to redress a market failure are extensive or where frequent and/or timely intervention is indispensable".

Below an analysis is made of whether the Right to compete can avoid certain anti-competitive behaviour in the market of reference, that is, if said Right is an efficient tool to resolve the same. This assessment, in line with the ERG document "*Guidance on the application of the three criteria test*", should take into account the aspects detailed below.

According to article 24 of Law 15/2007 of 3 July on the Defence of Competition (hereinafter LCD), "*the Comisión Nacional de la Competencia (CNC) is the body charged with ruling over and resolving matters corresponding to it by this law, namely (a) applying that stated in the current Law regarding competition-restricting behaviour [...]; (c) applying articles 81 and 82 of the European Community Treaty and laws derived from it [...]*".

Therefore, according to article 48.2 from the LGTel, "*the Comisión del Mercado de las Telecomunicaciones must establish and supervise the specific obligations that market operators have to comply with, boost competition in the audiovisual services market in accordance with its regulatory rules, resolve conflicts between operators and where necessary, act as arbitration body for any disputes between them*". Likewise, according to article 48.3 of the LGTel, the CMT exercises the following functions: "*e) Adopt those measures necessary for safeguarding service offer plurality, operator access to electronic communications networks, network connection and operation under open network conditions, and service providers' price and marketing policies. [...]*".¹⁹

As mentioned above, we will now analyse whether *ex post* intervention carried out by the competent authorities for that sector can end certain anticompetitive behaviours in the market of reference.²⁰ The evaluation of whether or not the third criterion is sufficient, according to the ERG document "*Guidance on the application of the three criteria test*", must take the factors explained below into account.

III.3.1 Insidiousness of competition-restricting behaviours

Ex post intervention will be more effective in scenarios in which practices restricting competition are not widespread, and intervention by authorities does not have to be frequent.

¹⁹ As indicated by the Spanish Supreme Court in its sentence dated 17 December 2008, (rec. N. 2530/2006), the Comisión del Mercado de las Telecomunicaciones "maintains the generic objective of encouraging competition in the audiovisual services market" (section 2) and the most specific is adopting ways and means to ensure the objective laid down in section 3.e) [of the LGTel]. [...] In this way, [the CMT is able] to detect whether this contact can presumably have a negative effect on free competition or abuses due to a dominant position, and this assessment is additionally configured as an absolutely necessary supposal in order to establish grounds for the adoption of preventive and corrective measures [...]. The regulator has authority to decide upon whether or not this may have an adverse effect on competition, but it is not in a position to formally declare an offence of those types defined by the Law on the Defence of Competition, which only corresponds to the competition defence organisms [...]. All this without prejudice to being able to adopt, if necessary, corrective measures in the terms already seen, which necessarily involve an assessment of said conduct from the point of view of the conservation of competition and requires due justification of the potentially negative affects on competition in the event of the case of continuity of the same".

²⁰ To this end it is of interest to make reference to the General Procedure Protocol between the Comisión Nacional de la Competencia and the Comisión del Mercado de las Telecomunicaciones signed on 18 June 2008.



In the first market review it was considered that the main competition problems that could arise in the public fixed-line telephony network transit market would be refusal to supply, the establishment of excessive prices, delaying tactics in the providing of the service, the existence of undue or excessive requirements and price discrimination.

At the present time the CMT does not foresee any generalisation of an anti-competition conduct scenario, since alternative supply services are available apart from those on offer from the incumbent operator. Furthermore, the conflicts relative to transit services are not directly related to the refusal to supply the same, but in fact due to the repercussion of the taxation cascade for non-payment to additional tariff numbering services.

Notwithstanding the above, the CMT could intervene in keeping with the authorisation conferred upon the same by the LGTel for the resolution of any conflicts arising between operators on the subject of interconnection and access obligations.

III.3.2 Difficulty of detecting or demonstrating the existence of competition-restricting practices

With respect to the competition problems mentioned, the degree of difficulty involved in detecting the same is relatively low since the operators demanding the services will have incentives to report the carrying out of any practices contrary to competition by any of the operators providing the service.

The competent authorities avail of the necessary resources and skills for testing the existence of competition-restricting practices in an *ex post* context in the case that a formal complaint were to be submitted by an alternative operator.

III.3.3 Possibility that the restrictive behaviour of competitors may cause an irreparable prejudice in the market subject to analysis, or in connected markets

As has been demonstrated throughout the length of this document, the fixed-line telephony public network transit services market is currently in a situation of a tendency towards effective competition.

In this respect it is interesting to note that –as reflected in the present document– transit services have a certain weighting compared with combined wholesale and retail services related with the supply of telephonic traffic from a fixed location. On the other hand, there are sufficient supply alternatives to the service contemplated by TESAÚ which limits the possibilities of this operator to cause irreparable prejudice to the market, and the alternative operators of a larger size have the possibility of self-provision of the service of reference by means of direct interconnection.

III.3.4 Conclusion

On the basis of the previous considerations, the CMT considers that *ex post* intervention is sufficient enough to resolve any market failure that may arise in the fixed-line telephony public network transit services market.

IV CONCLUSIONS REGARDING THE PRESENCE OF THE THREE CRITERIA SET FORTH IN THE EUROPEAN COMMISSION MARKET RECOMMENDATION

Exhaustive analysis has been carried out in this document into the criteria that a market should meet with to be susceptible to *ex ante* regulation in accordance with the European Commission market Recommendation.

Our Commission has come to the following conclusions:



- No great or transitory entry barriers exist since leaving the market of reference does not involve incurring in non-recoverable sunk costs. Likewise, alternative sources of supply exist and the operators can obtain significant economies.
- The average prices of the services included in the market of reference have come down compared with the first market review, and direct interconnection has become a considerable competition pressure for the operators providing transit services.
- Anti-competition practices can be resolved by means of *ex post* intervention (sufficiency of the legislation on competition).

In keeping with the previous conclusions, and in view of the fact that the criteria which allow identifying a market as being susceptible to being *ex ante* regulated are not complied with, it is concluded that the fixed-line telephony public network transit services market is not susceptible to being *ex ante* regulated.

V SUPPRESSION OF EXISTING OBLIGATIONS IN RELEVANT MARKETS

Article 10.1 in the LGTel states that "*the Comisión del Mercado de las Telecomunicaciones will define, by means of a resolution published in the Spanish Official Journal, the relevant markets for e-communications networks and services, including the corresponding wholesale and retail markets, and their geographical scope, whose characteristics offer a rationale for imposing specific obligations. To do so, it must take into account the European Commission's Guidelines for analysing markets and determining what operators have significant market power, and its Relevant Market Recommendation.*"²¹

On the other hand, LGTel Article 10.5 establishes that "*in those markets where effective competition exists, the Comisión del Mercado de las Telecomunicaciones will abolish those specific obligations that, in effect, are imposed on operators for having been declared as having significant power in said markets*".

In the same sense, according to Article 4.3 of the Market Regulation, "*when having carried out an analysis of the market the Comisión del Mercado de las Telecomunicaciones determines that a market is operating with an effective competition environment, it will abolish those obligations, that, in accordance with section 1, may have been imposed on those operators that had been declared as having significant power in said market, and will inform all interested parties of the abolition with at least two months notice of its coming into force*".

The fixed-line telephony public network transit services market has been defined and analysed in the present Resolution to see whether the same might be subject to *ex ante* regulation, in keeping with that laid down in the Framework Directive and in LGTel Article 10. In line with the conclusions reached by the European Commission in its markets Recommendation in 2007, the CMT is of the opinion that the market of reference is not susceptible to *ex ante* regulation on not meeting the three accumulative criteria required by the Community instructions for proceeding with market regulation.

From the analysis carried out, a conclusion can be reached on the advisability of proceeding with the lifting of the previously imposed obligations on TESAÚ, by virtue of Annex 1 of the CMT's Resolution dated 29 June 2006 in which the definition and analysis of the fixed-line telephony public network transit services market, the designation of operators with significant

²¹ See also article 2.1 in the Market Regulation.



market power and the enforcement of specific obligations was approved. Specifically and exclusively for fixed-line telephony public network transit services market, the following TESAU obligations should be abolished:

- Meet the reasonable applications for access to specific resources in their networks and usage (LGTel Article 13.1 d) and Article 10 of Market Regulation; Article 12 of the Access Directive).
- Offer transit services at prices based on production costs (LGTel Article 13.1 e) and Article 11 of the Market Regulation; Article 13 of the Access Directive).
- Keep separate accounts with respect to access and interconnection activities (LGTel Article 13.1 c) and Article 9 of the Market Regulation; Article 11 of the Access Directive).
- Non-discrimination in access conditions obligation (LGTel Article 13.1 b) and Article 8 of the Market Regulation; Article 10 of the Access Directive).
- Obligation to publish an Offer Reference for the rendering of transit services in sufficient detail to guarantee that no payment is being required for resources that are not necessary for the required service (LGTel Article 13.1 a) and Article 7 of the Market Regulation; Article 9 of the Access Directive).

Therefore, in keeping with that contemplated in the LGTel and in the Market Regulation, the CMT hereby abolishes the obligations previously imposed upon TESAU subject to a period of time of 6 months subsequent to the publication of the definite Resolution in the Spanish Official Journal. Said period of time is considered to be reasonable taking into account the fact that the measures established directly affect third party operators with transit services contracted with TESAU.

This period of time, therefore, ensures the existence of a prudential interval in which to freely negotiate commercial conditions with TESAU during which the services rendered will be continued, or to contemplate alternative solutions for example by means of agreements reached with other operators able to provide the same service.

In any event, the Commission will carry out a very close and detailed monitoring of the evolution of the market of reference, and will intervene in keeping with the authorisation conferred upon the same by the LGTel for the resolution of any conflicts arising between operators on the subject of interconnection and access obligations.

FOURTH.-Notification and publication of the Measure

According to that stated in article 7.5 of the Framework Directive and article 5.4 of the Market Regulation, the Comisión del Mercado de las Telecomunicaciones will endeavour to the best of its ability to consider the remarks made by the European Commission and the NRAs, and will adopt the resulting Draft Measure, at which time the European Commission will be notified of the same.

Another operator, article 10.1 in the LGTel states that the Comisión del Mercado de las Telecomunicaciones will define *"the markets of reference for electronic networks and communication services (...) and the geographic scope for each of the above, the characteristics of which may justify imposing specific obligations, according to the resolution published in the Spanish Official Journal."*



By virtue of the stated factual and legal considerations, the Comisión del Mercado de las Telecomunicaciones

RESOLVES

FIRST.- To approve the definition and analysis of the public network fixed-line telephony transit services, the designation of an operator with significant market power; and the imposition of specific obligations as indicated in the Third Legal Basis included in the present Resolution.

SECOND.- To consider that the public network fixed-line telephony transit services market does not constitute a market whose characteristics justify the imposition of specific obligations, and is not, therefore, susceptible to *ex ante* regulation in keeping with that laid down in the Framework Directive and Article 10 of the General Telecommunications Law.

THIRD.- To abolish the obligations that are currently applicable to Telefónica de España, S.A.U. by virtue of the Resolution of the CMT dated 29 June 2006, in which the definition of the public network fixed-line telephony transit services market, the analysis of the same, the designation of an operator with significant market power, and the imposition of specific obligations were approved. This will take place three months after publication of the present resolution in the Spanish Official Journal.

FOURTH.- To inform the European Commission of the definition and analysis of the public network fixed-line telephony transit services, the designation of operators with significant market power and the enforcement of specific obligations.

FIFTH.- To agree to the publication of the present Act in the Spanish Official Journal, in keeping with that laid down in Article 10.1 of the General Communications Law 32/2003, dated 3 November.

SIXTH.- That the present Resolution will be effective on the day after its publication in the Spanish Official Journal.

This certificate is issued under the provisions of article 27.5 of Law 30/1992, dated 26 November, and article 23.2 of the Consolidated Version of the Internal System Regulations approved by the Commission Board Resolution of 20 December 2007 (Spanish Official Journal of 31 January 2008), prior to the approval of the Minutes of the corresponding session.

Furthermore, it is hereby stated that a voluntary appeal for review may be lodged against this deed with this Commission within one month from the day following its notification or, directly, an Administrative-Contentious appeal before the Administrative-Contentious Division of the Spanish National Court, within two months as of the day following its notification, in accordance with the provisions of article 48.17 of Law 32/2003, dated 3 November, the General Telecommunications Law, the fourth additional Disposition, paragraph 5, of Law 29/1998, of 13 July, governing the Administrative-Contentious Jurisdiction, and Article 116 of Law 30/1992 of 26 November, of Legal Regime of Public Administration and of Common



Administrative Procedure, and without prejudice to the provisions of number 2 of Article 58 of the same Law.

The present document bears the electronic signature of Secretary Ignacio Redondo Andreu with the approval of the President, Reinaldo Rodríguez Illera.



ANNEX 1

[CONFIDENTIAL: Continuation of the Pols Map established by the main operators with other operators in 2007²²

Source: Prepared by the CMT based on specific information requests, CMT.]

²² The box shaded in grey indicates that the operator column obtained income for transit services rendered to the operator file during the course of 2007.



ANNEX 2:

Summary of allegations

The main allegations submitted by the operators, the CNC comments, and the replies from the CMT are summarised in this annex.

I DESCRIPTION OF THE PUBLIC NETWORK FIXED-LINE TELEPHONY TRANSIT SERVICE

I.1 Summary of obligations

TESAU is in full agreement with the description made by the CMT of the public network fixed-line telephony transit services.

ASTEL and VODAFONE have made no comments insofar as the description of the service of reference is concerned.

I.2 Response to the Public Inquiry allegations

This Commission maintains the description included in the document submitted to public inquiry on the subject of public network fixed-line telephony transit services.

II DESCRIPTION OF THE RELEVANT MARKET

II.1 Summary of allegations

TESAU is in full agreement with the definition of the market for the product made by the CMT. Although it is also in agreement with the definition of the geographical market at a national level, in its allegations it indicates that various regulation authorities have taken into account the fact that differences do exist insofar as the number of offers for these services in various parts of the country is concerned.

The CNC agrees with the market delimitation made by the CMT on the basis of the technological neutrality principle, and, in particular, the inclusion of transit services by means of IP interfaces. Nevertheless, as indicated in its report relative to the termination market for public network fixed-line telephony calls, the current ambiguity between the terminology used in the National Numbering Plan and that used in the definition of the relevant market should be eliminated, above all the terminology used with respect to the intelligent network services.

ASTEL and VODAFONE have made no comments relative to the description of the relevant market.

II.2 Response to the Public Inquiry allegations

In response to the CNC comments, the CMT is of the opinion, as already stated within the framework of market 3, that the non-use of the National Numbering Plan concepts for the definition of the transit services does not prevent the consistent characterisation of the market with that used by the majority of the European regulators in their market analyses. Additionally it must be highlighted that the operators have not submitted any allegations – neither in this case nor in that of said market 3 – against said definition.



In conclusion, the CMT maintains the product and geographical market definition made in the public inquiry document.

III ANALYSIS OF THE CRITERIA ESTABLISHED BY THE EUROPEAN COMMISSION FOR IDENTIFYING MARKETS SUSCEPTIBLE TO *EX ANTE* REGULATION

III.1 Presence of non-transitory entry barriers to market access

III.1.1 Sunk costs level

III.1.1.1 Summary of allegations

VODAFONE considers that the structural elements have not changed sufficiently over the past two years to reach the conclusions indicated in the public inquiry document. In addition, they indicate that the CMT, without submitting any new data or argument, concludes exactly the opposite to that which was stated in the previous market analysis. In VODAFONE's opinion, the sunk costs in the transit market for the alternative operators to TESAU still have the same relative importance for said operators, and, therefore, continue to be a considerable entry barrier to this market.

The CNC considers that the degree to which the level of the points of interconnection to be established to be able to render retail transit services efficiently can be the same as that which has to be established to render wholesale transit services efficiently has not been analysed. According to the CNC, when an operator has to opt for carrying out a determined number of points of interconnection with other networks compared with the option of contracting a wholesale transit service, generally two considerations arise: on the one hand, the needs for routing its own interconnection traffic, and on the other, the income that can be obtained by offering a wholesale transit service to third party operators. Therefore, in order to determine to what degree the establishment of Pols for offering transit services to alternative operators who offer retail services is a sunk cost, it would be recommendable to make an analysis of what the average pay-back time is for investments in Pols for the various operators who offer both retail and wholesale transit services, and how much this average pay-back time might change if the transit income was left aside.

Insofar as they are concerned TESAU confirm their agreement with the reasoning of the CMT. TESAU adds that interconnection by capacity exists in the Spanish market, which has offered business opportunities and allowed increasing the efficiency of the transit operator infrastructures when TESAU is the originating and destination operator for the call.

III.1.1.2 Response to the Public Inquiry allegations

This Commission continues to maintain that the sunk costs are not a significant entry barrier to the market of reference. This type of cost is relevant however in the case of an operator who wishes to offer access services by means of their own infrastructure, but, once established, the providing of transit services gives additional income with which to amortise their network. The fact that an operator discontinues offering transit services does not mean that non-recoverable sunk costs have been incurred, since income will continue to be obtained from providing other fixed-line communication services (retail access service, telephone traffic, termination etc.) that use the same infrastructure as the transit services. Furthermore, it must be taken into account that all operators wish to optimise their network as much as ever possible and consequently improved use of the same does not involve significant marginal costs for the operator.



Due to the above, and contrary to that indicated by the CNC in their report, an alternative operator does not contemplate how to establish their Pols to maximise income for the rendering of transit services, since these services are considered to be additional to the main activity of the operator, and these will only be offered in the event of having free capacity. In fact, the alternative operators will decide upon interconnection with those operators who have their own higher level of traffic, and opt for transit with those destinations with a lower volume of minutes. This would be the most efficient way of rendering transit services, with which the pay-back time of the investment would be identical with the two situations put forward by the CNC.

III.1.2 Scale and scope economies

III.1.2.1 Summary of allegations

VODAFONE alleges that the conclusions reached in the first market review continue to be valid currently, and that it is not right to argue the contrary on the basis that transit services are offered by using the free capacity available to render other electronic communications services. It is not true that scale economies for establishing Pols are low, since the average costs being faced by the alternative operators are far higher than those assumed by TESAU, by means of which scale and scope economies constitute an entry barrier to the transit market.

The CNC considers that as it is an additional market to the operator direct interconnection requirements, the effect of scope economy is especially relevant. Furthermore, the degree of the establishment of Pols is very relevant when having to determine the cost of transit services. In fact, the number of Pols that makes it profitable for an operator to establish greatly depends upon the total interconnection traffic of said operator. It is quite evident that the average cost per minute of transit interconnection greatly depends upon the size of the operator and the degree of presence of the same in the connected markets.

According to the CNC, these factors affect the market in two ways. Firstly, they affect the possibility of establishing Pols with the smaller size operators, and consequently only the larger size operators can establish Pols with the smaller operators. Secondly, they affect the average cost per minute of interconnected traffic which allows the larger operators to access the lower interconnection levels, and consequently offer lower wholesale prices for the service.

To sum up the CNC does not consider that the non-existence of effects derived from the scale and scope economies in the market analysed have been appropriately justified.

On the other hand, TESAU considers that the shared use of infrastructures by the alternative operators is encouraging the elimination of determined elements that could be susceptible to being considered to be an entry barrier, also guaranteeing scale and scope economies that are far more favourable for them. Furthermore, TESAU alleges that the services of reference are rendered on the free capacity established to offer other electronic communications services.

Likewise, TESAU states in their allegations that the alternative operators are vertically integrated groups, which is what allows them to enjoy considerable scale and scope economies. In fact during the course of 2007 acquisitions took place²³ between operators

²³ Acquisition of Ya.com by France Telecom and Tele2-Comunitel by Vodafone.



that have allowed these to increase their scale and scope economies, and also their capacity to invest and develop an intelligent network and also more effective competition.

These merger, acquisition and operator integration processes also affect the interconnection between themselves when they were still independent economic entities, since said interconnection disappears as a market transaction once the companies have merged.

III.1.2.2 Response to the Public Inquiry allegations

In reply to the VODAFONE allegations and the comments made by the CNC, although it is true to say that initially the average costs faced by an alternative operator when establishing a Pol are higher than those of TESAU, it is also true that in the medium term the operators are able to optimise the use of their points of interconnection, which finally results in a decrease in their average costs. It would not be economically logical for an operator to establish Pols and not to attempt to optimise their use to a maximum volume of minutes possible and thus benefit from the scale economy generated by its use.

Furthermore, the alternative operators have no type of obligation whatsoever with respect to the number of Pols that they have to establish between themselves. In other words, two alternative operators always have the possibility of setting up a minimum of Pols for interconnection, (the minimum is obviously one), which mitigates the great difference in size to a great degree, (and consequently scale economies), between the alternative operators and TESAU.

Additionally, in line with that expressed by TESAU in its allegations, the company merger processes that have taken place in the sector over the past few years has encouraged an increase in scale and scope economies enjoyed by the operators, which gives them a higher degree of efficiency.

In view of the previous arguments, it cannot be considered that the importance of the scale and scope economies is a great entry barrier to the transit services market.

III.1.3 Control over an infrastructure that cannot be easily duplicated

III.1.3.1 Summary of allegations

ASTEL and VODAFONE believe that the assumption made by the CMT that the smaller operators assimilated as alternative operators which have traditionally ordered general transit services between any origin and destination from TESAU is erroneous, and leads to obtaining mistaken conclusions. In general, for these operators offering Additional Cost Services (hereinafter, ACS) and indirect access telephony traffic (Carrier Selection Codes, hereinafter, CSC), it is necessary to have a sole interconnection services supplier through whom, with a minimum level of interconnection infrastructure, can make its final services accessible from any origin. Therefore, they order transit services from other alternative operators to cover their access traffic, mainly originating in the TESAU network.

According to ASTEL, what really happens is that the alternative operators are offering services to cover traffic to customers who are ACS or CSC suppliers, who solely require a concentration of their traffic at a centralised point, not being able to compare the situation of an operator demanding a general transit service from TESAU with that of a “ACS or CSC operator” who contracts the same with an alternative operator.

ASTEL also considers that TESAU is the only operator that has set up Pols with practically all the operators, its transit services being vital for all the alternative operators who do not have an extensive network and that wish to interconnect their networks with other operators. Furthermore, no alternative operators exist being able to effectively compete with TESAU in



“general” transit services to other alternative operators. Those alternative operators that offer transit services normally sell the transit service together with termination in TESAU or originating reselling.

VODAFONE indicates that the situation of an operator asking TESAU for a purely transit service cannot be compared with that of an operator that provides the same in packet form with the termination service. No alternative operators exist who are able to effectively compete with TESAU in “pure” transit services to third party operators, understanding as such the service for the transport of calls between two operators who are not directly interconnected, since the alternative operators who offer transit services normally sell the transit services with termination at TESAU or at their own network. Neither can it be said that a real alternative supply exists as a consequence of there being operators that supply ACS, since in spite of the fact that they are only interconnected with alternative operators TESAU, they do not do this for provision of a pure transit service.

Meanwhile, ASTEL considers that the availability of a transit service with the network capillarity enjoyed with TESAU is absolutely essential in order for the operators to be able to comply with their inter-operability obligations. The fact that practically all the operators have established Pols with TESAU determines that the transit services are produced via the TESAU network, and consequently the inter-operability between operators, especially between those with hardly any network infrastructure, depend completely upon the TESAU transit services.

The CNC considers that from the data given on the total number of Pols established between the main operators, one cannot immediately reach the conclusion that the alternative operators have been able to counter the interconnection network of the incumbent operator. In fact, the interconnection of the TESAU network with the rest of the main operators multiplies the number of Pols of the operator who has the second widest Pols network by two and a half.

Additionally, the CNC indicates that it is essential to demonstrate, both in the case of interconnection between the main operators and, especially in the analysis of the existing Pols belonging to the smaller operators, that the mere numeric computation of existing Pols is insufficient for an adequate analysis, it being absolutely essential, in keeping with their opinion, to complete this analysis with data on the traffic interchanged and the income obtained.

The CNC also indicates that the existence of a considerable number of additional cost services suppliers solely connected with operators alternative to TESAU could, if necessary, justify the existence of a competitive situation in the segment of the market corresponding to the transit of traffic routed to intelligent network numbers, but cannot be used as a justification for the overall market.

In conclusion, and in keeping with the CNC criteria, it has not been clearly demonstrated that the infrastructure of the incumbent operator’s interconnection network constitutes an infrastructure that can be easily reproduced by the rest of the operators. In the same way it is considered to be recommendable that the CMT should evaluate the singularities of the transit services market segment for traffic routed to the intelligent network and short numbers, given that these can present differentiating characteristics with respect to the traffic of other services.

TESAU states that for the rendering of the service of reference, network capillarity comparable to that of the incumbent is not necessary. According to this operator, the presence of alternative platforms such as cable and subscriber disaggregation loops have



allowed the alternative operators to establish Pols with practically all the significant operators, and consequently TESAU is no longer an essential operator for those operators with a limited network extension since a significant alternative supply of transit networks exists in the market.

Furthermore, and in line with that indicated by the CMT, those operators that have an established network infrastructure are those that are rendering the service of reference. The number of operators that are competing in the transit market in Spain is one of the highest in all the neighbouring European countries, in which the present market has already been liberalised.

In relation to the rendering of transit services to the bigger operators, TESAU considers that the number of operators who are interconnected only with alternative operators the incumbent have increased, and the number of operators of a limited size who only have Pols with TESAU has gone down. Furthermore, there is a new modality for the rendering of services in the market (*carrier house*) where a large number of operators are concentrated, that can easily reach agreements to connect their links directly and in this line facilitate transit to other operators or make up service packets by one or several of the agents.

III.1.3.2 Response to the Public Inquiry allegations

In response to the ASTEL and VODAFONE allegations, it is not true that the smaller operators are those that only offer ACS or CSC. In the table contained in Annex 1, both those operators that only require the use of one Pol to supply these services, and those that have more than one Pol with alternative operators (in some cases with more than ten) that offer complete electronic communications services with their own network are included. This Commission has considered the data included in this table to be confidential, since they are very delicate for the operators included in the same. This fact has possibly made both ASTEL and VODAFONE assume that almost the entire number of operators present in the table offer ACS or CSC, but this is not the case.

With regards to the fact that the alternative operators do not provide “pure” transit services, the CMT does not share the statement made by VODAFONE. It is true that many operators, taking advantage of the fact that they have an interconnection capacity contracted with TESAU, provide transit services when the origin or destination is TESAU, as well as those alternative operators that have their own network have capacity to provide “pure” transit services, as the provision of the same does not imply a significant increase in the costs of an operator. Furthermore, the alternative operators would have incentives to increase their sources of income, so the refusal to provide “pure” transit services would not be logical.

With regards to the comments of the CNC, the CMT considers that the traffic effectively handled does not have to be the relevant indicator to determine the competitive situation in the transit market. We should not forget that the transit conditions are currently strongly regulated depending on the provision costs of the historical operator. Given that the market is currently working in this environment, we have opted to ensure the existence of supply alternatives as the source of potential competition. In the same way, the analysis of the existing interconnections has not been limited to the additional tariffication operators, but it has been demonstrated that most of the operators have direct interconnection with a large number of operators, in such a way that they could provide transit services with a high capillarity.

To sum up we do not consider that TESAU controls an infrastructure which is difficult to be reproduced.



III.1.4 Switching costs

III.1.4.1 Summary of allegations

ASTEL and VODAFONE consider that the important diversification of the supplier costs that would be produced in the absence of a regulated obligation of the transit services should not be underestimated. Amongst these costs we would have those for the modification of the traffic routing in the affected exchanges, the implementation of agreed tariffs in the invoicing systems, costs derived from the management, administration, supervision and execution of the agreements, etc.

The CNC considers that there is still a significant number of operators in the market with Pols having only one operator, so the switching costs can become significant depending on the wholesale prices established by the different operators.

On the other hand, TESAU considers that the switching costs are not significant for the operator demanding the services as, once the operator has established a Pol with various operators, it can easily chose with whom to transit without this involving a significant increase in costs.

III.1.4.2 Response to the Public Inquiry allegations

This Commission does not share the allegations of ASTEL and VODAFONE on the cost to change the transit operator. As previously mentioned, the merger processes that have taken place in the sector have caused a duplicity of Pols of the concentrated operators, so they have had to carry out different procedures to redirect their traffic and optimise the infrastructures available, concentrating the traffic in some Pols and eliminating those through which no minutes are sent. This adjustment process would have implied costs for the operator, however, said management, administration etc. costs will have been compensated by the increase in efficiency caused by the reorganisation of the Pols of the concentrated operator.

This situation can be extrapolated to the change of transit services supplier, for example, from TESAU to an alternative operator. In fact, the costs in which they would incur initially would be compensated by the lower price, facilities or advantages provided by the new operator.

In fact, operators have not had any great problems in modifying the routings when they have found more advantageous conditions. A relevant example is, again, the transit with origin or destination in the TESAU network caused by the attractive offers that the alternative operators have been able to provide thanks to interconnection by capacity.

III.2 Tendency towards effective competition

III.2.1 Market shares

III.2.1.1 Summary of allegations

In their comments, ASTEL and VODAFONE consider that TESAU high market shares cannot be ignored. Furthermore, said figure has undergone an important and sustained increase in time, and the competition faced by TESAU is weaker, in such a way that the power of TESAU to perform independently from its competitors increases.

ASTEL and VODAFONE add that the existence of interconnection by capacity is not sufficient reason to believe that there is effective competition in the market, as in spite of the fact that it can make the interconnection costs cheaper for some operators demanding the transit service, it is not a real supply alternative as the transit services are only offered in the



case of calls originated or terminated in TESAU, that is, in no case the operators alternative to TESAU will offer a universal transit service to that offered by TESAU.

The CNC in its report considers that there is an outstanding stability in the TESAU quotas in terms of income which is maintained above 50%. On the other hand, it is deduced that TESAU has increased its market share by almost 7 percent between 2006 and the third quarter of 2008. Additionally, the report includes that a decrease in the importance of the reference market is expected, but no data is provided supporting this statement. In accordance with the CNC, it would have been necessary to establish an assessment on the evolution of the transit services demand in the reference market. In this respect, we can refer to the report of the CMT corresponding to the 3rd Quarter 2008, where it can be seen that in a period of time of less than 2 years, the market has grown 110% in terms of income.

On the other hand, TESAU considers that the existence of the interconnection by capacity has encouraged the development of the transit services with origin and destination in TESAU. The transit operator takes advantage of the interconnections established with TESAU to provide transit services to operators who do not have these interconnections, being able to provide a more attractive price it pays an origination and/or termination at a lower level or when optimising the interconnection resources.

III.2.1.2 Response to the Public Inquiry allegations

In response to the allegations by VODAFONE and the CNC relative to the market shares, although the quota of TESAU is higher than 50%, this does not automatically mean that it is considered as operator with SMP, as there are other circumstances, (such as those described in the present document), that justify the enforcement of the obligations on the incumbent operator. Furthermore, and as an example, in the telephone traffic markets the obligations on TESAU were lifted in spite of the fact that its market share was also higher than 60%. This was so because the analysis of the remaining parameters indicated that the market tended towards effective competition, thus the withdrawal of the obligations on TESAU was coherent. In particular, we should not forget that currently the transit services are regulated, thus the development of the market is marked by the *ex ante* limitations of the operator.

With regards to the provision of the “pure” transit services, and as previously commented, it does not have to be true, from an economic point of view, that the alternative operators do not have incentives to provide this type of service. In any event, ASTEL and VODAFONE pretend that the transit services with origin or destination in TESAU should be disregarded when, as previously indicated by ASTEL, it is the priority destination of the alternative operator traffic. In fact, the CMT believes that by applying a “*Greenfield*” approach, the obligations imposed on the origination and termination services on the network of the historical operator have increased competition in the transit services. From this fact we cannot conclude that the transit services provided by these operators are not transit.

III.2.2 Price evolution

III.2.2.1 Summary of allegations

The CNC notices a considerable stability in the average prices of the transit services since 2006, which is contradictory to the conclusions indicated in the report.

In accordance with TESAU, the different policy followed by the agents to fill up their network makes their commercial strategy with regards to prices different with the subsequent impact on the market, preventing independence by TESAU in its market dynamics.



TESAU considers that the price evolution shows how the main alternative operators are able to compete in the reference market providing transit services at lower prices than those of the regulated operator, evidencing that the market shows symptoms of tending towards effective competition.

III.2.2.2 Response to the Public Inquiry allegations

This Commission has updated the data on the average prices in accordance with the latest information available in the requirements for the drafting of the Annual Reports. In accordance with these data, the transit services prices have decreased since the first revision, which leads to believe that the market tends towards an effective competition.

The allegations presented by TESAU are in line with that indicated by the CMT, thus the conclusions reached are not modified.

III.2.3 Potential competition

III.2.3.1 Summary of allegations

ASTEL and VODAFONE state that direct interconnection cannot be considered an alternative to the transit service as it would only be viable when the traffic handled by the operator demanding the transit services is large. Furthermore, there is a considerable volume of services routed to numbers that do not involve massive traffic (short numbers) and in these cases there are no real transit services supply alternatives, being TESAU's regulated transit service the only which can ensure that the alternative operators can meet the principle of services interoperability.

Likewise, both entities indicate that the multiplication of direct or crossed of "all with all" points of interconnection is not a serious alternative, and cannot be considered to place competitive pressure on TESAU for a large number of services.

Meanwhile, ASTEL considers that more than 95% of the minutes handled by a fixed-line telephone alternative operator have the TESAU network as their destination; therefore, the operators do not have a great incentive to migrate their transit services to a direct interconnection "*all with all*". Given this situation, the position of dominance of TESAU in the access and termination market is taken to the position of dominance in the transit market, making its service privileged when compared to those that may be provided by the competitors.

According to the CNC, certain data on the evolution of the number of operators interconnected between each other directly from the previous market analysis should be assessed, as well as study the evolution of the direct interconnection traffic compared with the transit traffic.

Another operator, TESAU, considers that the main competitive pressure faced by the operators that provide public network fixed-line telephony transit services is direct interconnection. After ten years of liberalisation, there are numerous operators with extensive transport networks, what makes many of them not to need transit services (self-provision) as they use their own network, and, at the same time, make the transit offer of other operators very complete also.

Another threat comes from companies that have deployed telecommunication networks and have free capacity. In addition, an operator providing the telephone service or the data transport service and with capacity in its network, may decide to make this capacity profitable by offering the telephone transit service to other operators.



III.2.3.2 Response to the Public Inquiry allegations

This Commission does not share the statement made by ASTEL and VODAFONE that there are no real supply alternatives to certain numbers. In accordance with the Quarterly Report data corresponding to the months of October to December 2008, more than 50% of the total of the minutes with destination to intelligent network numbers and other numbers was handled by alternative operators, what allows concluding that there are supply alternatives for this type of numbers.

With regards to the ASTEL allegations on the traffic handled by the alternative operators (which includes *on-net* calls, calls to other alternative operators, calls to mobiles, calls to TESAU, etc.), it is not true that 95% of this traffic has the TESAU network as its destination, as this percentage only refers to the total of termination minutes in the market and not to the total of minutes of traffic handled by the final clients of the alternative operators. In any event, as stated previously, this data submitted by ASTEL cannot but only confirm that the greater part of the alternative operator traffic is currently covered by the obligations in other connecting markets, which has facilitated the trend toward competition in transit services.

Furthermore, it is not possible for TESAU to transfer this position of domain from the access and termination markets to the transit market, as it has been detected that in the former there is no effective competition and obligations have been imposed on TESAU²⁴ to prevent the development of anti-competition practices or the extension of its market power.

Lastly, the CMT is aware that it is not realistic to wait for all the operators to be directly interconnected with each other. Nevertheless, certain alternative operators have set up direct interconnections with a very high number of competitors. These operators can carry out complete transit offers and represent an alternative to TESAU. In this scenario, the direct interconnection places competitive pressure in the market since the moment an operator (even if it is small), when negotiating the transit services with TESAU or another alternative operator, always has the option of directly interconnecting with a third operator providing better conditions.

III.3 Sufficiency of Competition Law

III.3.1 Summary of allegations

VODAFONE considers that it is not true that currently alternative operators provide a substitution transit service to that provided by the incumbent operator. Furthermore, VODAFONE continues identifying the same competition problems and failures that were detected by the CMT in its first analysis of the reference market.

According to VODAFONE, if TESAU were exonerated of its obligation to provide the transit services, this operator may impose entry barriers to third operators in order to provide its retail services with reduced traffic volume and which lack the direct points of interconnection with most of the networks.

ASTEL and VODAFONE consider that the disappearance of the obligations imposed on TESAU on the provision of the regulated traffic service can cause risks of refusal to supply of

²⁴ Resolution dated 12 December 2008, by which the definition and analysis of the market of wholesale access and origination of calls in the public telephone network at a fixed-line location is approved, as well as to designate an operator with significant market power and to enforce specific obligations, agreeing to notify it to the European Commission (MTZ 2008/447).

Resolution dated 18 December 2008, by which the definition and analysis of the market of call termination in the individual public networks of each fixed-line telephone operator is approved, as well as the designation of an operator with significant market power; and the imposition of specific obligations., agreeing to notify it to the European Commission (MTZ 2008/1192).



these services by TESAU. This negative to supply is especially probable in the ACS about which TESAU has repeatedly requested the elimination from the RIO the obligation to provide transit services citing non-payment and bad debt problems, which, according to TESAU, originate this type of services.

Given this situation, ASTEL states that the first consequence of the elimination of the transit obligation will be the refusal by TESAU to provide transit services to the intelligent network or, alternatively, the setting of abusive commercial conditions for the alternative operators.

On the other hand, TESAU considers that the conflicts that may exist in relation with the transit service are not related with the refusal to supply, but with the repercussion in cascade of the non-payment for the numbering services to additional cost services.

ASTEL believes that there should be an analysis of the effects that the withdrawal of this essential obligation in the RIO may have on the possibilities that the operators may guarantee the users the inter-operability of the services and the combined effect with the suppressions of obligations to TESAU in the traffic markets. Likewise, it considers that the elimination of the regulation imposed on TESAU with regards to transit would imply requiring capillarity from all the operators in their interconnection network exactly the same to that of the incumbent, in order to compete with the same in the wholesale services between operators.

VODAFONE considers that the competition problems that have been detected in this market cannot be resolved *ex post*, via conflict before the CMT, since its resolution would not be operative for not arriving at the right time. Furthermore, a liberalisation of the same would have the consequence of an increase in conflict between the operators. These conflicts would arise both between the alternative operators and TESAU, and also between the alternative operators themselves.

The CNC believes that no data on the number of conflicts that have arisen in the past has been provided and that neither has any estimate been made to what extent the existence of *ex ante* obligations have warned of the presence of the same, particularly taking into account the degree of regulation existing in a market up to the moment deriving from the existence of a reference offer and other relevant factors. Consequently, no information is available necessary for determining whether the mere application of the competition Law by the CNC would be efficient.

TESAU also indicated that the possibility and easiness with which the demanding operators are able to report any possible anti-competition practices guarantee the possibility of detecting, and if necessary evaluating, the existence of said type of restrictive practices by the competitors.

ASTEL considers that the deregulation of the TESAU transit services could result in an increase in their prices, with the associated risk that the alternative operators would be obliged to pass on said costs to the final customers, or to apply different tariffs, depending upon the way that they reach the destination operator network.

TESAU alleges, with respect to the possibility that potential restrictive behaviour of the competitors could cause irreparable harm that sufficient alternative supplies exist to the service rendered by TESAU that would limit the possibility that this operator could cause this type of harm to the market. Furthermore, they indicate that the alternative operators have the possibility of providing themselves with the service of reference by means of direct interconnection.



Lastly, TESAU considers it necessary to highlight, at least from the previous market analysis, that the CMT has not had to carry out any intervention nor has had to resolve any conflict in this market, which is a clear demonstration of the low level of conflict in the same. The competent authorities avail of the necessary resources and skills for testing the existence of competition-restricting practices in an *ex post* context in the case that a formal complaint were to be submitted by an alternative operator.

III.3.2 Response to the Public Inquiry allegations

This Commission does not share either the VODAFONE comments relative to the lifting of entry barriers to third party operators by TESAU or to the ASTEL allegations on the potential refusal to supply additional cost services.

The main problem to the services is the way in which the non-payments are handled, since these are produced in cascade.²⁵ In other words, the problem is not in the transit of the services, but rather the discrepancies that arise between the access operator and the destination operator when adjudicating the non-payments associated with the ACS's. It should be mentioned that said discrepancies are generally the consequence of a "relaxed" attitude of both the access operator and the ACS operator. The transit operators are affected by this problem without being directly involved, and consequently the CMT does not consider that this can be used as an argument to maintain the TESAU obligations in the transit market.

Furthermore, in the event of TESAU not providing the service of reference, and as has already been mentioned previously in the present document, alternative supplies do exist, both for the supply of transit services to geographical and mobile numbers, and also to additional tarification numbers and others. In fact, more than 50% of the transit minutes to these special numbers are handled by the alternative operators.

Insofar as the comments made by the CNC are concerned, the CMT considers that the fact that the market is highly regulated does not mean to say that conflicts do not arise between operators. The broadband Internet wholesale access market is an example where there is a very detailed supply of reference and other relevant elements, as indicated by the CNC, and which is where the interventions of the CMT have been centred on to resolve conflicts and apply penalties.

With respect to the ASTEL allegations on the effect that the removal of obligations could have, the CMT does not believe that the removal of the same requires the alternative operators to have the same network capillarity as TESAU. In fact, and once the obligations on the incumbent operator have been lifted, the alternative operators can maintain the transit services that they currently have contracted with TESAU or look for offers from other operators.

These operators can combine the transit supply that is available in the market and optimise their interconnections to reach the cover that they previously enjoyed with TESAU. Furthermore, an ever-increasing percentage of operators is reducing their transit services demand as and when they interconnect directly.

Insofar as the ASTEL comments on the risk of deregulating the transit service are concerned, the CMT does not share the view that incentives exist for the alternative

²⁵ An example is Resolution dated 13 July 2006, relative to the effect of non-payments of transit interconnection services rendered on intelligent network calls coming from the Euskaltel network and finalising in the Comunitel network (RO 2005/960).



operators to pass on the increased costs to the final customers in keeping with destination network of the call. In fact, an asymmetric price situation exists in the public network fixed-line telephony termination markets between TESAU and the alternative operators, and this has not had a differentiation in the retails prices of calls to the alternative operators originating both from TESAU and the rest of the alternative operators as a result.

IV SUPPRESSION OF EXISTING OBLIGATIONS IN RELEVANT MARKETS

IV.1 Summary of allegations

The CNC considers that the CMT has not sufficiently justified that the transit services market has the characteristics necessary to determine that it is not susceptible to *ex ante* regulation, and that the obligations imposed on TESAU should be lifted.

Another operator, TESAU, has agreed with the Report published by the CMT on considering that the only proposal possible is that of lifting the obligations currently applicable to the same. Notwithstanding the foregoing, and being in agreement with the lifting of the obligations, TESAU considers that the timescale for the elimination of the obligations to be effective should be as short as ever possible, and should never be more than three months as from the publication of the Resolution, since this could have a braking effect on one of the operators present in the market, and, in short, a burden for its commercial capacity and competitiveness with the rest of the players.

TESAU considers that there is no reason for establishing such a long period of time, it has been demonstrated that, to date, competition exists in the market of reference and the *ex ante* imposition of obligations is unnecessary, and that appreciable change costs do not exist.

IV.2 Response to the Public Inquiry allegations

In spite of the comments made by the CNC, the CMT considers that the market complies with the requirements for the lifting of the current obligations on TESAU. In fact, from the market analysis it can be seen that:

1. More than ten years after having entered the market, the electronic communications operators have established their own infrastructures, attaining a joint capillarity making the TESAU network not irreplaceable. In fact, operators exist who are not directly interconnected with TESAU, but have done this with an alternative operator placing its inter-operability in their hands;
2. The transit services which are considered as being an additional source of income to those of the operator retail services do not have high sunk costs or scale or scope economies that are not replaceable by third party operators. Therefore, the TESAU advantages in the rendering of these services are not relevant. A prototype of this tendency are the transit services offered by those operators that contract interconnection by capacity with TESAU and who resell their free capacity to third parties in the form of transit services;
3. Lastly, the CMT considers that the obligations imposed on TESAU in the origin and termination market have a relevant impact, which encourages the competitiveness of the third party operators.

Insofar as the date for the lifting of the obligations, it is considered wise to maintain the six month period, since, in this way, it will allow the operators to negotiate alternatives to TESAU and to migrate to a new operator if necessary.



Furthermore, and although the costs of changing operator are not excessive, the alternative operators need a reasonable period of time to be able to negotiate new transit services contracts, and also for handling the re-directioning of their traffic to the new Pols.