

Unclassified

DAF/COMP/LACF(2009)5

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

02-Sep-2009

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**LATIN AMERICAN COMPETITION FORUM**

**-- Session IV: Competition Issues in Telecommunications --**

**Contribution from Spain**

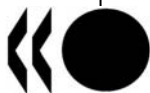
**9-10 September de 2009, Santiago, Chile**

*The attached document from Spain is circulated to the Latin American Competition Forum FOR DISCUSSION under session IV of its forthcoming meeting to be held in Chile on 9-10 September 2009.*

Contact: Ms. Hélène Chadzynska, Administrator, LACF Programme Manager  
Tel.: +33 (0)1 45 24 91 05; Fax: +33 (0)1 45 24 96 95  
Email: [helene.chadzynska@oecd.org](mailto:helene.chadzynska@oecd.org)

**JT03268988**

Document complet disponible sur OLIS dans son format d'origine  
Complete document available on OLIS in its original format



DAF/COMP/LACF(2009)5  
Unclassified

English - Or. English



**LATIN AMERICAN COMPETITION FORUM  
- 9-10 September 2009, Santiago, Chile -**

**Session IV: Competition Problems in the Telecommunications Sector**

**Contribution of Spain  
Clara Guzmán Zapater, Director of Investigation**

**1. In the context of technological convergence, what are the main consequences of the current competition/regulatory framework on the development of the telecommunications sector in your country?**

1. There are two broad channels of technological convergence in the telecoms sector in Spain.
2. Firstly, there is progressive convergence between fixed- and mobile-access technologies used to supply the various electronic communications services.
3. Secondly, electronic communication operators tend to allow their various services to be purchased in a single package, at lower prices than the sum of the individual prices for each service; and content is becoming increasingly important in those packages, having traditionally been considered outside the telecoms sector's remit. Accordingly, schemes are being developed in Spain involving *triple play* (fixed telephony + broadband access + pay-TV), *quadruple play* (fixed telephony + broadband access + pay-TV + mobile telephony) and mobile phone TV.
4. The current regulatory framework is aware of this technological convergence trend, and for that reason applies the principle of technological neutrality.
5. As convergence is still imperfect, the regulatory framework, particularly *ex-ante* regulation performed by the Telecommunications Market Commission (CMT, the sector regulator), continues to treat fixed- and mobile-access electronic communication services differently. Audiovisual contents are also outside the jurisdiction of the telecoms sector regulator.
6. Nonetheless, *ex-ante* CMT regulation is facilitating technological convergence by requiring operators with significant market power to provide wholesale access services for the supply of fixed- and

mobile-access electronic communications services. In particular, the appearance of virtual mobile operators (VMOs), encouraged by CMT *ex-ante* regulation, will facilitate such convergence, although at the moment VMOs are very small players in mobile-access electronic communications markets.

7. The competition authorities in Spain, and particularly the National Competition Commission (CNC), also play a key role in ensuring that this technological convergence does not impair competition in the various markets in the telecoms sector. Thus, CNC actions prioritize ensuring a “level playing field” in the different electronic communication markets, and giving the various operators objective and non-discriminatory access to audiovisual content, particularly content with greatest power to attract subscribers, such as football (soccer).

**2. Is the concept of technological convergence implicitly or explicitly included in the sector regulations and in the competition law of your jurisdiction?**

**(a) If so, how and since when has it been active?**

**(b) If not, do the regulators intend to alter the sector regulations to deal with convergence more effectively? If so, how?**

8. The concept of technological convergence is explicitly covered in the Spanish sector regulations, through the principle of technological neutrality, which should be promoted wherever possible. This was introduced by Law 32/2003, of 3 November (the General Telecommunications Act), which abolished technology permits to provide electronic communications services.

9. Nonetheless, technologies that make use of the electromagnetic spectrum, which is a scarce resource, continue to face access restrictions, since supplying electronic communication services with many of these technologies requires an electromagnetic spectrum concession, which represents a very significant entry barrier and obstructs technological convergence.

10. Nonetheless, the emergence of VMOs is helping to reduce this entry barrier in mobile-access electronic communication markets.

11. The sector regulator is also planning to provide easier access to the electromagnetic spectrum, by allowing transmission to third parties of all or part of the spectrum granted, thereby decoupling spectrum concessions from a specific technology, etc. No timetable has yet been set for this reform, however.

12. Spain's competition regulations do not refer explicitly to technological convergence.

**3. In the context of technological convergence, what are the main points of divergence between telecoms and competition regulators? Could you provide a recent case that illustrates the current divergences? Are there any problems of jurisdictional interference? How are they dealt with?**

13. The principles governing actions taken by sector regulators and, in particular, the CMT, in many cases are based on encouraging investment in electronic communication networks and the development of new technologies (albeit at the cost of sacrificing part of the pre-existing effective competition in markets), by relaxing the requirements imposed on operators with significant market power to provide wholesale access services to third parties, or allowing packaged products to be offered that are difficult for competitors to match.

14. In return, the CNC seeks to ensure that technological convergence does not damage the level playing field existing in electronic communication markets, nor obstruct the trend of effective competition in those markets. The CNC thus considers that "regulatory holidays" could encourage investment and technological convergence in the short run, but harm it in the medium/long term, by reducing competitive

pressures. It also sees the need for special vigilance to minimize the risks that a dominant operator in a market might use packaged offers to consolidate its position or extend its power to other markets.

15. A good example of such differences in criterion between the CNC and CMT is the reform of the *ex-ante* regulation introduced by the CMT in 2009 in the wholesale markets for direct and indirect access to broadband infrastructures (Markets 4 and 5 of the European Commission Recommendation).

16. In its initial proposal of October 2008,<sup>1</sup> the CMT proposed limiting obligations to provide direct access to the infrastructures of new-generation networks owned by the dominant operator, Telefónica, to its civil infrastructures. In the framework of indirect wholesale access obligations, the CMT also proposed differentiated obligations between competitive zones (reasonable prices and fewer obligations in relation to the transparency and replicability of retail offers), and non-competitive zones (cost-oriented pricing and greater obligations in terms of the transparency and replicability of retail offers); and it also limited the obligation to provide indirect access at speeds lower than 30 Mb/s.

17. In its November 2008 comments,<sup>2</sup> the CNC signalled its disagreement with the CMT proposal, because in practice the proposal involved deregulating wholesale access to Telefónica's new generation networks, in the roll-out of which Telefónica had a very significant initial advantage that could make a significant part of its offers non-replicable and thus reduce the effective competition existing in the telecoms sector.

18. In its final ruling of January 2009,<sup>3</sup> the CMT decided not to segment indirect wholesale access obligations between competitive and non-competitive zones, but it maintained the 30 Mb/s ceiling. It also maintained the core of its access obligations proposal in relation to Telefónica's new generation networks.

19. The CNC thus considers that there is a significant risk that *ex-ante* CMT regulation will be insufficient to ensure that the introduction of new-generation networks does not prove a retrograde step in terms of the effective competition existing in Spain's electronic communication markets. The CNC might need to intervene in this area in the future, should it detect signs of possible infringements of competition regulations.

20. There could also be problems of overlapping jurisdictions in relation to a given conduct. For example, in the *ex-ante* regulation framework, the CMT has jurisdiction to regulate and supervise the wholesale access conditions offered by an operator with significant market power. The wholesale access conditions offered by a dominant operator might also infringe the competition regulations, even if they had been authorized by the CMT in application of the sector regulation. An case in point is the punishment that the European Commission imposed on Telefónica for abusing its dominant position by squeezing its competitors' profit margins, having set wholesale prices that had not been discussed by the CMT (case COMP/38.784 - Telefonica S.A.).<sup>4</sup>

---

<sup>1</sup> See [http://www.cmt.es/es/documentacion\\_de\\_referencia/mercados\\_comunicaciones\\_electronicas/anexos/pm\\_m\\_4\\_5\\_.pdf](http://www.cmt.es/es/documentacion_de_referencia/mercados_comunicaciones_electronicas/anexos/pm_m_4_5_.pdf)

<sup>2</sup> See [http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=11349&Command=Core\\_Download&Method=attachment](http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=11349&Command=Core_Download&Method=attachment)

<sup>3</sup> See [http://www.cmt.es/es/documentacion\\_de\\_referencia/mercados\\_comunicaciones\\_electronicas/anexos/Resolucion\\_mercados\\_4\\_y\\_5.pdf](http://www.cmt.es/es/documentacion_de_referencia/mercados_comunicaciones_electronicas/anexos/Resolucion_mercados_4_y_5.pdf)

<sup>4</sup> See European Commission Decision of 4 July 2007

21. To resolve these overlap problems, use is made of the *non bis in idem* principle and the instruments that exist for coordination between the CNC and CMT.

22. In the first case, when prosecuting or sanctioning a conduct under the competition regulations, the CNC considers whether the CMT has sanctioned the conduct in question through the sector regulations. Secondly, it always requests a mandatory non-binding report from the CMT in cases involving sanction and oversight of mergers and acquisitions in the telecoms sector, to ascertain its point of view before taking a final decision.

**4. What tasks and objectives should the competition authority and the telecommunications regulator have in their different jurisdictions, to promote competition and thus take full advantage of the benefits of technology convergence?**

23. As noted above, these objectives should ensure a level playing field in the various telecoms sector markets, thereby allowing for a trend towards effective competition in those markets, and facilitating the existence of a gradual and undistorted ladder of investment that lowers market-entry barriers and thus encourages investments in networks and technological convergence.

**5. Does the telecoms sector suffer from its uncertain regulatory jurisdiction? If so, what are the sources of the uncertainty (e.g. the segment-to-segment focus, new services outside the regulatory spectrum, overlapping rules ...)?**

24. Yes there are a number of sources of regulatory uncertainty in Spain in the telecoms sector. The main ones are:

- Conflicts between the CMT and the European Commission in verifying the replicability of Telefónica's retail offers through its wholesale services (the Telefónica case)
- The restriction of access obligations imposed by the CMT in relation to new-generation networks, by forcing them to use Telefónica channels, and not extending indirect wholesale access to speeds above 30 Mb/s.
- Reform of the regulations governing access to the electromagnetic spectrum.
- The high prices currently prevailing in the wholesale end-user mobile telephony markets. There is a discrepancy here between the maximum price levels for calls and SMS under "roaming" imposed by the European Commission, and the end-user prices authorized by the CMT, although the latter has announced their gradual reduction. There is also uncertainty about the treatment to be given to *on-net / off-net* price discrimination offered by operators, made possible by high end-user prices.

**6. How is the conflict of objectives between sector return and competition being dealt with in your jurisdiction?**

25. The CNC considers that this trade-off is unnecessary. For the telecoms sector to be efficient there needs to be competition.

26. Another issue concerns the level of intervention by the regulator and the competition authorities to ensure the existence of competition, innovation and technological convergence.

---

[http://ec.europa.eu/competition/antitrust/cases/decisions/38784/dec\\_es.pdf](http://ec.europa.eu/competition/antitrust/cases/decisions/38784/dec_es.pdf)

27. Here, the best procedure would be to minimize intervention, while always ensuring a level playing field for all operators. This makes it possible to maintain effective competition, reduce entry barriers and promote the existence of reasonable ladders of investment that promote competition and do not provide disincentives for innovation and investments.

28. An example of this balance is the CNC's intervention in the merger operations involving ABERTIS / AXIÓN and TRADIA / TELEDIFUSIÓN MADRID. These involved the markets for transport and dissemination of audiovisual signals, within which the nationally dominant operator, ABERTIS, aimed to take over its main competitors in two regions of Spain, Andalusia and Madrid.

29. In this case, the CNC's obligation was to ensure the pre-existing level of effective competition was maintained after the merger operations.

30. In view of the entry barriers that exist in the markets in question, and given that the CNC considered CMT *ex-ante* regulation in those markets insufficient to permit the appearance or development of competitors to replicate the competitive pressure that the firms to be acquired exerted on ABERTIS, the CNC decided in July 2009 that authorization of the takeover should be made conditional on a number of behavioural constraints.

31. In this case, it wanted to prevent the potential economies of scale from the takeover from being obtained at the cost of a reduction in the level of effective pre-existing competition. Accordingly, the conditions imposed on ABERTIS included the obligation to provide indirect-access wholesale services from a single point to its infrastructures for broadcasting television signals in Andalusia and Madrid.

32. As a result of these conditions, ABERTIS decided to pull out of the takeover operations it had previously announced.