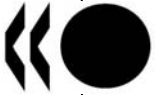


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English - Or. English

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

## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN REGULATED SECTORS**

**Case submitted by Peru**

-- Session III --

*This case is submitted by Peru in view of its discussion in Sub-Session 3 on Friday 18 February 2005 (from 9.30 am).*

**JT00176943**

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English - Or. English

**TELE 2000 VS. TELEFONICA DEL PERÚ  
TELECOMS OPERATOR APPLYING AUTOMATIC NATIONAL ROAMING**

1. In Peru in 1995, TELEFONICA had a monopoly in fixed telephony (national and international calls). This monopoly had been established in the agreement between Peruvian government and TELEFONICA when TELEFONICA won the public concession offered by the Peruvian government in 1993. Besides that, Telefonica had the concession to operate the mobile telephony net in Lima – first concession acquired when it bought CPT – and in the rest of the country – second concession acquired when it bought ENTEL.

**1. Roaming**

2. Roaming is the attribute of mobile telephony systems that allows clients of one operator-undertaking to make and receive calls on their mobile phone using the net of another operator-undertaking. There are two kinds of roaming, manual and automatic. Manual is when one client communicates to his operator that he wants this facility in a specific place for a specific time, so his operator communicates to the other operator (the operator in the other place) in order that this operator includes in his system the client in the same way as it would include a client of its own. Automatic is permanent, the information of all clients who have this facility is in a centralized system and the mobile telephony systems of each operator connect to this centralized system to get the information.

3. In practical terms, roaming allows the clients of mobile telephony undertaking A to use their apparatus outside their service area by connecting to the net of another undertaking B. For this process to work, it is necessary for there to be a relationship between undertakings A and B.

**2. Market structure**

4. In 1971, the telecom market in Peru was divided into two government undertakings: CPT who provided fixed telephony services in Lima and ENTEL who provided fixed telephony services in the rest of the country, besides long distances calls, national and international.

5. When mobile telephony arrived, the Peruvian government gave concessions: two in Lima for TELE 2000 (A band) and CPT (B band) and one outside Lima for ENTEL (A band), however the government reserved B band outside Lima for being conferred in the future. So two undertakings competed in Lima (TELE 2000 and CPT) and only one—a different undertaking--outside Lima. In 1993 TELEFONICA bought CPT and ENTEL and in 1994 these two undertakings merged. So we have TELEFONICA and TELE 2000 with concessions in Lima competing and only TELEFONICA outside Lima.

6. In this scenario, TELEFONICA began to develop the ANR (Automatic National Roaming) and began to offer to his clients this facility, establishing an important difference in the market between the services provided by the two undertakings in Lima.

**3 The case**

7. In 1995 when TELEFONICA began to operate the ANR, his clients could move to any place in the country served by TELEFONICA's mobile telephony net and make and receive calls. TELE 2000, on the basis of the agreement on Manual National Roaming entered into with ENTEL in 1991 asked for TELEFONICA to allow TELE 2000's clients to accede to this facility. TELEFONICA communicated to TELE 2000 his decision to terminate unilaterally that agreement.

8. TELE 2000 sued TELEFONICA saying that the ANR was a telecommunication public service and therefore it should be available to the general public in exchange for a non-discriminatory monetary compensation and taking into consideration the operator's technical capabilities. TELE 2000 also said that competition law indicated that network and service interconnection is obligatory when there is a public and social interest; that TELEFONICA had a dominant position outside Lima because it was the only undertaking that provided mobile telephony service and denying this service to TELE 2000's clients was a violation of competition principles and it would constitute an abuse of his dominant position. TELE 2000 asked OSIPTEL (regulator and competition authority) to order TELEFONICA to grant access to the ANR's installation for his clients.

9. TELEFONICA answered the suit by saying that ANR was not a public service, the ANR was not an interconnection issue and TELE 2000 really wanted to enlarge the coverage of his concession and gain indirect benefits. TELEFONICA said that it had won the concession for mobile telephony service outside Lima and it had the privilege to exploit that right alone, and that that was not an abuse of his dominant position. TELEFONICA said that its refusal to deal with TELE 2000 was justified because to do so was opposed to its commercial interests and only TELE 2000 and TELE 2000's clients would be the beneficiaries if TELEFONICA provided the ANR services to them, besides, TELEFONICA would have to invest in its nets outside Lima to provide services to TELE 2000's clients.

#### **4. Competition Authority**

10. In Peru, OSIPTEL, Telecommunications Regulator, is also the authority who solves the competition cases in this sector. OSIPTEL has as its objectives to promote the development, modernisation and improvement of the quality of the telecommunications public services on the basis of the principles of non-discrimination, equity and neutrality. So, to solve this kind of case OSIPTEL has two perspectives, one with matters linked to obligations and rights of telecommunication sectoral regulations and the other with matters linked to competition rules and markets.

#### **5. Telecommunications sectorial regulations**

11. First it was necessary to determine if the ANR was an interconnection issue (regulatory matter) because the law says that interconnection is mandatory, so the case would be very clear. OSIPTEL said that ANR was not an interconnection issue because roaming is not assimilable to the interconnection concept; a network or service interconnection never occurs. Roaming really is a temporal integration of a client in the network of an undertaking with which this client does not have a contractual relationship. OSIPTEL also said that, contrary to what applies to interconnection, there are no laws that indicate the obligation to provide manual or automatic roaming.

12. So, considering that roaming is not interconnection and there is no law that says roaming is mandatory, OSIPTEL said that it is necessary to determine if it is possible to establish its obligation by the competition rules.

#### **6. Competition rules**

13. OSIPTEL should decide if TELEFONICA's conduct was an abuse of dominant position and a violation of the neutrality principle. First, the relevant market was defined. Geographically the relevant market was only Lima, because that market was the market where these undertakings compete. With respect to the services market, OSIPTEL said that this market was the mobile telephony in Lima because both undertakings offered that service in contrast to fixed telephony that does not allow mobility. So the relevant market was the market of mobile telephony service in Lima.

14. After that OSIPTEL had to decide if TELEFONICA had a dominant position. The competition law says what a dominant position is: “Dominant position in the market. It is understood that one or several companies are in a dominant position in the market when they can act independently regardless of their competitors, buyers, clients or suppliers because of such factors as a significant market share in the corresponding markets, the characteristics of supply and demand of products or services, the technological development and involved services, competitors’ access to sources of funds or supply as well as distribution systems.”

15. OSIPTEL said that TELEFONICA did not have a dominant position because the automatic national coverage, although it was an important advantage, would not seem by itself to be an element of TELEFONICA’s offer which allows TELEFONICA to act independently of his competitors; there are other elements such as personal service, price, commercialisation net, complementary services, international roaming, which influence customers’ decisions.

16. Having said that TELEFONICA did not have a dominant position, OSIPTEL proceeded to analyze whether TELEFONICA violated the neutrality principle. The telecommunications law says, “Because of the neutrality principle the operator of a telecommunications services which is in support of others’ telecommunications services, or who has a dominant position cannot use these situations to provide simultaneously other telecommunications services with major advantages and with detriment to his competitors, using practices restrictive of free and fair competition, such as limiting interconnection or damaging services’ quality.

17 In this case, OSIPTEL indicated that even if TELEFONICA did not have a dominant position in the relevant market, TELEFONICA had a dominant position in the market outside Lima; so OSIPTEL said that TELEFONICA transgressed the neutrality principle because it used its dominant position in the market outside Lima to generate advantages in the relevant market (Lima), TELEFONICA transferred his advantage to the relevant market. TELEFONICA, as the operator outside Lima, provided TELEFONICA’s clients in Lima access to ANR while it gave TELE 2000’s clients access to manual roaming. TELE 2000 could not compete with this offer because only TELEFONICA could provide it.

18. So OSIPTEL said that there was an objective situation which transgressed the neutrality principle and which was engendered by a dominant position.

## **7. Authority decision to solve the case**

### **7.1 OSIPTEL ordered**

19. TELEFONICA gives TELE 2000’s clients access to ANR under the followed conditions:

- TELEFONICA and TELE 2000 would begin negotiations about the commercial, economic, technical and operative terms to give access to ANR to TELE 2000’s clients. This negotiation would be completed within 7 days.
- To use TELEFONICA’s net, the compensation would be established considering the magnitude of the ANR coverage; the installation cost; the traffic; the additional investment made by TELEFONICA to be able to provide ANR to TELE 2000’s clients
- After 7 days, if TELEFONICA and TELE 2000 are not in agreement with all the terms, OSIPTEL would impose mandatory terms and conditions.