EUROPEAN COMMISSION
Competition DG

CASE AT.39839 – TELEFONICA/PORTUGAL TELECOM

(Only the English and Portuguese texts are authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 23/01/2013

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EUROPEAN
COMMISSION

Brussels, 23.1.2013
C(2013) 306 final

PUBLIC VERSION

COMMISSION DECISION

of 23.1.2013

addressed to
Telefónica, S.A. and
Portugal Telecom SGPS, S.A.
relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (TFEU)
(Case AT.39839 – Telefónica / Portugal Telecom)

(Only the English and Portuguese texts are authentic)

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CONFIDENTIAL ANNEX 115

COMMISSION DECISION

of 23.1.2013

addressed to
Telefónica, S.A. and
Portugal Telecom SGPS, S.A.
relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (TFEU)
(Case AT.39839 – Telefónica / Portugal Telecom)

(Only the English and Portuguese texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 19 January 2011 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 11(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2].

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case[3],

Whereas:

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1 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The two provisions are in substance identical. For the purposes of this Decision, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

2 OJ L 123, 27.4.2004, p. 18.

3 Not yet published.

1. INTRODUCTION

(1) This Decision refers to a "non-compete" agreement by Telefónica, S.A. ("Telefónica") and Portugal Telecom SGPS, S.A. ("PT"), included as clause nine of the Stock Purchase Agreement entered into by these companies[4] on 28 July 2010 in relation to the acquisition by Telefónica of sole control over the Brazilian mobile services operator, Vivo Participações, S.A. ("Vivo") (the "Agreement")[5]. This clause (the "clause") reads as follows:

"Ninth - Non-compete

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on [27 September 2010] *the date of Closing until December 31, 2011."*

(2) On 21 October 2011, the Commission adopted a Statement of Objections (the "Statement of Objections") laying down the preliminary conclusion that, in the light of the content of the clause and other circumstances, such as the economic and legal context of which it forms part and the actual conduct and behaviour of the parties, the clause amounts to a market-sharing agreement with the object of restricting competition in the internal market, thereby infringing Article 101 of the Treaty. This preliminary conclusion should be maintained and confirmed by this Decision. The Annex contains confidential information which is only accessible to each of the parties.

2. PROCEDURE

(3) The clause was detected in September 2010 by the Spanish Competition Authority, *Comisión Nacional de Competencia* ("CNC"), which informed the Commission and the Portuguese Competition Authority, *Autoridade da Concorrência* ("AdC"), of its existence. The Commission, CNC[6] and AdC[7] considered that the Commission should deal with the investigation.

(4) In accordance with Article 12 of Regulation (EC) No 1/2003, on 7 October 2010 and 13 October 2010 CNC submitted to the Commission all documents it had obtained

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4 PT Móveis Serviços de Telecomunicações SGPS S.A., a wholly owned subsidiary of the PT group (see PT 2011 Annual Accounts, Document ID 0951, p. 238), is also a party to the Stock Purchase Agreement of 28 July 2010.

5 Stock Purchase Agreement of 28 July 2010, Document ID 0028.

6 Letter from CNC to the Commission dated 7 October 2010, Document ID 0015.

7 Letter from AdC to the Commission dated 14 October 2010, Document ID 0045.

from Telefónica up to that date concerning potentially restrictive agreements between Telefónica and PT in connection with their cooperation and the Agreement.[8]

(5) On 19 January 2011, the Commission decided to initiate proceedings against Telefónica and PT in this case pursuant to Article 11(6) of Regulation (EC) No 1/2003 and Article 2(1) of Regulation (EC) No 773/2004.

(6) In the framework of the investigation, the Commission sent requests for information under Article 18(2) of Regulation (EC) No 1/2003 ("Requests for information ") to the parties to these proceedings on 5 January 2011, 1 April 2011, 25 May 2011, 10 June 2011, 24 June 2011, 5 September 2012 and 18 December 2012, as well as to certain multinational customers of the parties to these proceedings on 20 April 2011. In addition, state of play meetings were held with PT on 17 March 2011, 8 September 2011 and 27 September 2012 and with Telefónica on 21 March 2011, 7 September 2011 and 27 September 2012.

(7) On 21 October 2011, the Commission adopted the Statement of Objections mentioned in Recital (2).

(8) Following the Statement of Objections and as requested by the parties to these proceedings on 31 October 2011, access to the Commission's file was granted to them on 4 November 2011. They received the documents on 7 November 2011.

(9) Telefónica and PT submitted their respective replies to the Statement of Objections on 13 January 2012. They did not request an oral hearing.

3. THE ADDRESSEES OF THIS DECISION

3.1. Identification of the addressees

(10) Telefónica and PT are the addressees of this Decision and should bear responsibility for the infringement that is the subject of this Decision. They are parties to the Agreement which includes the clause and have directly participated in the infringement which is the subject of this Decision. They are the parent companies of their respective group of companies.

(11) In addition, the infringement also concerns PT Móveis Serviços de Telecomunicações SGPS S.A., which is also a party to the Agreement and is a wholly-owned subsidiary of Portugal Telecom SGPS, S.A.[9]

3.2. Telefónica

3.2.1. The Telefónica group and its international dimension

(12) Telefónica is Spain’s former state telecommunications monopoly, which was fully privatised in 1997. Telefónica has developed an international presence in several countries in the European Union, Latin America and Africa, as described in Recitals

[8] Documents ID 0017 to 0028 and 0039 to 0043.

[9] PT 2011 Annual Accounts, Document ID 0951, p. 238.

(13) and (14). It is currently one of the major European telecommunications groups, with worldwide revenues of EUR 62 837 million in 2011, 72.4% of which were generated outside Spain (revenues in Spain amounted to EUR 17 284 million).[10]

(13) In particular, Telefónica has a strong presence in Latin America, where it provides fixed telephony, mobile telephony, internet, broadband and pay TV services in various third countries including Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela.[11]

(14) Outside Spain, Telefónica also offers fixed, mobile or broadband services in other Member States, such as the Czech Republic, Germany, Ireland, Slovakia and the United Kingdom.[12] In addition, Telefónica has a minority stake in Telecom Italia S.p.A.[13]

(15) Telefónica International Wholesale Services, S.L. ("TIWS") is a fully-owned subsidiary of Telefónica. It offers wholesale services on a global scale, including voice, transmission capacity, satellite, corporate and mobile services. TIWS manages the international network of Telefónica in the countries where Telefónica does not have its own network, the "off-net" countries, through the fully-owned subsidiary Telefónica International Wholesale Services II, S.L. ("TIWS II"), which was incorporated in 2009 and which, in turn, had incorporated by 2011 five subsidiaries and eighteen branches in several countries.[14]

3.2.2. Telefónica in Spain

(16) Telefónica is the largest telecommunications operator in Spain, and a market leader in almost all telecommunications markets. The importance of Telefónica as a group is reflected by the fact that, in 2011, it accounted for 46.7 % of all revenue generated by the Spanish telecommunications sector.[15] In comparison, the next largest operator on the Spanish market, Vodafone España, generated 14.9 % of the total revenue. In addition, Telefónica has been designated the universal service provider in Spain for the period from 2012 to 2017.

(17) The market shares and presence of Telefónica in the Spanish telecommunications markets are described in detail in Section 5.5.

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10 Telefónica 2011 Annual Accounts, Document ID 0952, p. 32.

11 Telefónica 2011 Annual Accounts, Document ID 0952, pp. 34, 150 to 164 and 167.

12 Telefónica 2011 Annual Accounts, Document ID 0952, pp. 32, 154 and 155.

13 10.4% in 2011. Telefónica 2011 Annual Accounts, Document ID 0952, p. 121.

14 Reply of Telefónica to the request for information of 1 April 2011, Document ID 0214, pp. 5, 8 and 24.

15 CMTDATA, available from http://cmtdata.cmt.es/cmtdata/jsp/inf_anual.jsp?tipo=1 downloaded and printed on 17 July 2012, Document ID 0975, p. 4.

3.2.3. Telefónica's current presence in Portugal

(18) Telefónica currently holds approximately a 2 % stake in PT. The evolution of this participation is set out in Table 1:[16]

Table 1: Telefónica's stake in PT

Year	Participation in PT (%)	Year	Participation in PT (%)
1996	0	2004	9.58
1997	3.50	2005	9.84
1998	3.50	2006	9.85
1999	3.75	2007	9.16
2000	3.83	2008	9.85
2001	4.69	2009	9.86
2002	4.69	2010 (before 27/09)	9.86[17]
2003	4.70	2010 (after 27/09)	2.02

Source: Telefónica

(19) In addition, at the time of the infringement, Telefónica held a minority stake in ZON Multimedia - Serviços de Telecomunicações e Multimédia, SGPS, S.A. ("ZON"), which is active in the electronic communications sector:

(a) ZON is the result of the November 2007 spin-off of PT Multimedia from its parent company (PT). As a consequence of the spin-off, Telefónica entered the shareholding of ZON and held at the time of the infringement a 4.8 % direct minority share in that company (5.46 % including indirect participation).[18] Telefónica divested its stake in ZON in May 2012.[19]

(b) ZON is active in the provision of pay-TV, broadband, fixed telephony and mobile telephony services as a Mobile Virtual Network Operator – ("MVNO") in Portugal.[20] Telefónica submitted that, according to the Portuguese national regulatory authority *Autoridade Nacional de Comunicações* ("ANACOM"), in the third quarter of 2011 ZON was the second largest fixed telephony and broadband services provider in Portugal, one of the four main mobile telephony services providers in Portugal, the market leader in the audio-visual sector and

16 Reply of Telefónica to the request for information of 5 January 2011, Document ID 0489, p. 11.

17 However, according to Telefónica's 2011 Annual Accounts, in June 2010 the Telefónica group reduced its ownership interest in PT by 7.98%. In addition, Telefónica entered into three equity swap contracts for PT shares with a number of financial institutions. Telefónica 2011 Annual Accounts, Document ID 0952, p. 119. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 78, 79 and 80.

18 Reply of Telefónica to the request for information of 5 January 2011, Document ID 0489, p. 22. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 24.

19 Press release of ZON dated 9 May 2012, downloaded from ZON corporate website on 31 May 2012, Document ID 0953.

20 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 24. Reply of PT to the Statement of Objections, Document ID 0753, paragraph 183.

active in the provision of data transmission services to companies.[21] On the other hand, PT considers ZON its "main competitor" in the markets for pay-TV, broadband and voice services and, in particular, regarding triple play offers.[22]

(20) In addition to its holdings in the Portuguese companies mentioned in Recital (19), Telefónica started to develop a direct presence in Portugal through its subsidiaries TIWS and TIWS II, as well as through the Portuguese branch of TIWS II (Telefónica International Wholesale Services II, S.L. Unipersonal sucursal en Portugal –TIWS Portugal).[23] TIWS II provides data services for the benefit of [100 to 200] companies in Portugal[24], as well as fixed and mobile services. In order to carry out its activities in Portugal, TIWS II subcontracts the services of other operators, including PT Prime, a fully owned subsidiary of PT.[25]

3.3. Portugal Telecom

3.3.1. The PT group and its international dimension

(21) PT was founded on 23 June 1994 through the merger of three publicly-owned companies, namely Telefones de Lisboa e Porto S.A., Telecom Portugal S.A. and TeleDifusora de Portugal, S.A.

(22) After 1995, the former public monopoly was privatised in five successive phases. Following the fifth and last phase of privatisation, in 2000, the Portuguese State retained 500 class-A shares ("golden share") which conferred, amongst other special rights, a right of veto over amendments to the company's by-laws and other important corporate decisions.[26]

(23) On 12 December 2000, Portugal Telecom S.A. became a holding company and changed its denomination to Portugal Telecom, SGPS, S.A. In 2011, PT's worldwide turnover amounted to EUR 6 146.8 million.[27]

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21 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 24. ZON would have launched data transmission services addressed to large corporations in September 2010 (see reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 24 and 270, and the ZON 2010 Annual Accounts, Document ID 0767, pp. 19, 20 and 21). According to PT, ZON presence in the corporate segment would be limited to international large customers, SOHO (Small Office Home Office) and SMBs (Small and Medium Businesses) segments. Reply of PT to the Statement of Objections, Document ID0753, paragraphs 257 to 265. See recital (168).

22 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 154.

23 TIWS II has an office and employees in Portugal. Reply of Telefónica to the request for information of 1 April 2011, Document ID 0214, p. 24.

24 Reply of Telefónica to the request for information of 5 January 2011, List of customers, Document ID 0489, p. 25.

25 On PT Prime, see recital (25).

26 On 8 July 2010 the Court of Justice ruled that the Portuguese Republic failed to fulfil its obligations as regards the free movement of capital under Article 63 of the Treaty because of these special rights (see Judgment of the Court of 8 July 2010 in Case C-171/08, Commission v Portuguese Republic, [2010] ECR I-6817). On 26 July 2011 these special rights were eliminated following a General Meeting of Shareholders. See PT press release of 26 July 2011, Document ID 0656.

27 PT 2011 Annual Accounts, Document ID 0951, pp. 66 and 156.

(24) PT also has a strategic presence in third countries, namely in Brazil and in Sub-Saharan Africa. In Brazil, the 50% share in the joint venture controlling Vivo was PT's main asset until its acquisition by Telefónica in 2010. As referred to in Recital (62), following the sale of its stake in Vivo on 28 July 2010, PT entered into a strategic partnership regarding Oi S.A. and its group of companies (Oi), a leading provider of electronic communications services in Brazil. The international presence of PT also includes other third countries such as Cape Verde, Mozambique, Timor-Leste, Angola, Kenya, Macao, São Tomé and Príncipe and Namibia.

3.3.2. PT in Portugal

(25) PT is the largest telecommunications operator in Portugal. PT Comunicações, S.A. ("PT Comunicações"), PT Prime – Soluções Empresariais de Telecomunicações e Sistemas, S.A. ("PT Prime") and TMN – Telecomunicações Móveis Nacionais, S.A. ("TMN") are its main subsidiaries. PT Comunicações owns the largest fixed telecommunications infrastructure in Portugal and provides fixed telephony, broadband access and pay-TV services to a large residential customer base. PT Comunicações has been designated by the Portuguese national regulatory authority (NRA) Universal Service provider in Portugal.[28] PT Prime focuses on the provision of information and communication services to corporate customers. TMN is the leading operator in the Portuguese mobile market and operates both Global System for Mobile Communications (GSM) and Universal Mobile Telecommunications System (UMTS) networks. Finally, it should be noted that PT Móveis Serviços de Telecomunicações SGPS S.A., who is also a party to the Agreement[29], is a wholly-owned subsidiary of PT.[30]

(26) The Portuguese incumbent also owned the largest cable network in Portugal (PT Multimedia). However, in November 2007, after a failed hostile take-over of PT by Sonaecom - Serviços de Comunicações S.A. (Sonaecom), PT decided to spin-off PT Multimedia, by distributing its shares in the company amongst its shareholders in the context of a shareholder remuneration package.[31]

3.3.3. PT's current presence in Spain

(27) In 2010, PT sold its stake of 0.20% in Telefónica and did not control any Spanish company.[32]

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28 The Court of Justice ruled 7 October 2010 that the Portuguese Republic had failed to correctly transpose into national law the provisions of European Union law governing the designation of universal service provider(s) and to ensure that those provisions were applied in practice. See Judgment of the Court of 7 October 2010, Case C-154/09, Commission v Portuguese Republic, ECR [2010] I-00127.

29 See recital 1.

30 PT 2011 Annual Accounts, Document ID 0951, p. 238.

31 As result of the spin-off, Telefónica acquired a direct stake in PT Multimedia which was renamed Zon Multimedia ("ZON"). See recital (19).

32 Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 7. The 2011 Annual Accounts of PT mention a minority stake of PT in four Spanish companies, which are jointly owned with the Oi and Contax groups of companies. PT 2011 Annual Accounts, Document ID 0951, pp. 241 and 242.

(28) PT provides telecommunications services to its Portuguese multinational customers active in the Spanish market.[33] PT has recourse to other operators' networks in order to provide services to its multinational clients and, in particular, has recourse to Telefónica's network. PT's turnover in relation to the provision of services in Spain in 2010 was [between EUR 1 000 000 and EUR 2 000 000].[34]

4. THE CLAUSE

(29) As referred to in Recital 1, in the context of the acquisition by Telefónica of sole control over the Brazilian mobile services operator Vivo (the Vivo transaction), Telefónica and PT entered into the Agreement on 28 July 2010, which includes the following clause:

"*Ninth - Non-compete*

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of Closing until December 31, 2011."

(30) In their replies to the Statement of Objections, the parties to these proceedings have highlighted that a detailed description of the factual background of the negotiations of the clause is necessary in order to understand it fully. Accordingly, the parties have provided a detailed description, which is set out in Section 4. In particular, the parties have submitted that, taking into account the circumstances of the negotiations of the clause and other relevant circumstances (such as the parties' behaviour after the signature of the Agreement), the clause should be deemed to provide merely for an obligation on the parties to self-assess the validity and scope of a possible non-compete commitment covering the Iberian market which would be ancillary to the Vivo transaction.

(31) The purpose of Section 4 is to establish the factual background of the clause and its negotiations, as well as to describe the submissions of the parties in this regard. Section 4 indicates whether certain facts put forward by the parties are contradicted by other facts or are insufficiently evidenced. However, the legal assessment of these facts and, in particular, the issue of whether the clause provides for a non-compete obligation and should be considered a restriction by object is discussed in Section 6.3.

(32) The structure of this Section is as follows. First, Section 4.1 describes the negotiations of the Vivo transaction and the clause. Section 4.2 includes the submissions of the parties regarding the alleged purpose and meaning of the clause.

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[33] Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 13.

[34] Reply of PT to the request for information of 25 May 2011, Document ID 0465, p. 3. Of a total turnover in 2010 [between EUR 1 000 000 and EUR 2 000 000], [between EUR 1 500 000 and EUR 2 000 000] corresponded to services provided with the cooperation of Telefónica.

Section 4.3 discusses the self-assessment which the parties allegedly carried out in October 2010. Section 4.4 describes the termination of the clause on 4 February 2011. Finally, Section 4.5 describes the publicity given to the clause.

4.1. The Vivo transaction and the Agreement

4.1.1. Vivo

(33) Vivo is a major mobile operator in Brazil, with over 60 million users in 2010 and a 30% market share of Brazilian mobile markets.[35] At the time the Agreement was signed (28 July 2010), Vivo was jointly controlled by Telefónica and PT through Brasilcel NV, an investment vehicle company incorporated in the Netherlands ("Brasilcel").

(34) Telefónica submits that the acquisition of Vivo had an important strategic value for Telefónica.[36] PT points out that Telefónica tried to merge Vivo with Telefónica's fixed telephony subsidiary in Brazil, Telecomunicações de São Paulo S.A. (Telesp) but could not reach an agreement with PT on that merger. Therefore, Telefónica looked for the acquisition of sole control of Brasilcel.[37]

4.1.2. The offer dated 6 May 2010 ("the first offer")

(35) On 6 May 2010, Telefónica launched a hostile takeover offer for the 50% share owned by PT in Brasilcel (the holding company controlling Vivo referred to in Recital 33), by addressing a binding offer to PT's Board of Directors.[38] The first offer, for a price of EUR 5 700 million, was unanimously rejected by PT's board of directors as inadequate. According to PT, this rejection was mainly motivated by the importance of Vivo and of the Brazilian mobile telephony market in PT's market strategy.[39]

(36) Telefónica underlines that Clause 5 (iii) of the first offer expressly provided that "*Telefónica would not require any non-compete or non-solicitation commitment from Portugal Telecom*".[40] According to Telefónica, this meant that: (a) on the one hand, Telefónica agreed not to require PT to comply with the non-compete commitment covering Brazil which was provided for by the Shareholders Agreement dated 17 October 2002 in the event of PT leaving the Brasilcel shareholding[41]; and (b) on the other hand, Telefónica did not intend to include a non-compete commitment covering the Iberian market in the context of the Vivo transaction.

(37) According to PT, the circumstances following the rejection of the first offer by the PT board of directors led to a deterioration of the relationship between the parties to these proceedings.[42] In particular, PT submits that Telefónica suggested on 25 May

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35 Telefónica 2010 Annual Accounts, Document ID 0509, p. 24.

36 Reply of Telefónica to the request for information of 5 January 2011, Document ID 0489, pp. 6 and 7.

37 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 35 and 36.

38 Binding offer dated 6 May 2010, Document ID 0027.

39 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 38 to 41.

40 Clause 5(iii) of the Binding Offer dated 6 May 2010, Document ID 0027, p. 2. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 43 to 45.

41 Reply of Telefónica to the Statement of Objections , Document ID 0763, paragraph 44 and footnote 19.

42 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 47.

2010 that it did not exclude the possibility of a hostile take-over of PT in the event that PT failed to sell its stake in Brasilcel.[43] When the Portuguese Stock & Exchange authority (*Comissão do Mercado de Valores Mobiliários* –CMVM-) questioned Telefónica on this possibility, Telefónica's reply was interpreted by PT and the press in the sense that a take-over scenario was not excluded. PT submits that this was a source of concern for PT, in particular taking into account the previous attempt at a hostile take-over of PT by Sonaecom in 2006 and 2007, which would have seriously damaged PT's performance and financial situation. In addition, PT submits that Telefónica threatened to wind up Brasilcel and block the distribution of dividends from Vivo.[44]

4.1.3. The offer dated 1 June 2010 (the second offer)

(38) Telefónica and PT agree that the clause was introduced for the first time by PT in a draft of the second offer attached to an e-mail sent to Telefónica on 1 June 2010 at 02:53 am[45]. PT submitted that the clause introduced was the result of a meeting held on 31 May 2010 between top representatives of Telefónica and PT, including their Chief Executive Officers, and indicated that the fact that it was introduced in writing by PT does not entail that it was proposed by PT. This meeting of 31 May 2010 is also referred to in Telefónica's submissions.[46]

(39) The first draft of the clause reads as follows: [47]

"*Non-compete*

Each party shall refrain from engaging or investing, directly or indirectly through any Affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of Acceptance of the Offer until the latest of (i) 31st December 2011 or (ii) the date of consummation of the transfer of the last portion of Alternative B Put Shares."

(40) In an email sent by Telefónica to PT on 1 June 2010 at 12:21 pm, Telefónica suggested a first amendment to the first draft of the clause in order to exclude from its scope the existing activities of the parties in each other's national markets ("*excluding any investment or activity currently held or preformed as of the date*

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43 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 42 to 45.

44 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 46.

45 Reply of Telefónica to the request for information of 5 January 2011, Document ID 489, pp. 5-8. E-mail from PT to Telefónica of 1 June 2010, at 02:53 am, Documents ID 0104 and ID 0125. The sending times of the e-mails indicated in this Statement of Objections correspond to the ones submitted by PT (these times do not always correspond to the ones of the same e-mails as submitted by Telefónica, due to the time difference between Spain and Portugal and probably to transmission delays or the use by the parties of different IT systems). Reply of PT to the Statement of Objections, Document ID 0753, paragraph 53.

46 Reply of PT to the request for information of 5 January 2011, Document ID 0098, p. 4. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 52 and 119. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 54 and 55.

47 Draft binding offer of 1 June 2010, Document ID 0104.

hereof").[48] According to Telefónica, the amendment suggested was aimed at limiting the scope of the clause as much as possible without significantly changing its wording.[49] PT submitted that it did not oppose the limitation of the scope of the clause suggested by Telefónica.[50] The proposed amended clause was included in the second offer, dated 1 June 2010.[51]

(41) In addition to the first draft of the clause, the second offer provided for the following:

(a) an increased price of EUR 6 500 million,

(b) a call option in favour of PT to buy back the PT shares owned by Telefónica (Clause 7),

(c) a commitment by Telefónica to buy PT's shares in Dedic SA, a Brazilian call centre operator (Clause 8).

(42) The Commission notes that, despite introducing a non-compete clause covering the Iberian market, the second offer still included the commitment by Telefónica that it would not require any "*non-compete or non-solicitation commitments by Portugal Telecom*" that was already included in the first offer[52] (see Recital (36)).

(43) In order for the commitment by Telefónica that it would not require any "*non-compete or non-solicitation commitments by Portugal Telecom*" not to contradict the clause covering the Iberian market, it would have to cover a different territory than the Iberian Peninsula. Thus, a logical interpretation of the fact that both the first and the second offers include the same commitment by Telefónica not to require a non-compete or non-solicitation commitment by PT and the fact that the second offer introduced the non-compete clause covering the Iberian Peninsula would be that the commitment not to require a non-compete or non-solicitation commitment both in the first and second offer referred to Brazil and not to the Iberian Peninsula. This interpretation is supported by the reply of the parties to the request for information of 5 January 2011, according to which Clause 5(iii) of the first offer only excluded non-compete commitments referring to the Brazilian market, and not to the Iberian market.[53]

(44) The Commission therefore considers that Telefónica's argument that its first offer expressly excluded non-compete commitments covering the Iberian market is not supported by the facts in the Commission's file.

(45) On the evening of 1 June 2010, PT's board of directors announced that it did not believe that Telefónica's second offer reflected the real value of Vivo. However, it

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48 E-mail from Telefónica to PT of 1 June 2010 at 12:21 pm, Document ID 0105 and 0124.

49 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 63 to 70.

50 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 60.

51 Binding offer dated 1 June 2010, Document ID 0084.

52 Clause 3(iii) of the Binding offer dated 1 June 2010, Document ID 0084.

53 Reply of Telefónica to request for information of 5 January 2011, Document ID 489, p. 4 and reply of PT to request for information of 5 January 2011, Document ID 0078, p. 3.

decided to submit the decision to the general assembly of the company and a meeting was convened for 30 June 2010.[54]

4.1.4. The offer dated 29 June 2010 (the third offer)

(46) On 29 June 2010, one day before PT's general shareholders meeting, Telefónica presented a third revised offer of EUR 7 150 million.[55] The third offer was subject to the terms and conditions of the second offer, except for the price.

(47) On 30 June, the majority of the general assembly of PT (73.9% of the votes cast) voted in favour of the third offer presented by Telefónica. However, the Portuguese government used its "golden share" in PT to block the transaction (see section 4.1.7 on the alleged involvement of the Portuguese government in the negotiations).[56]

(48) The third offer was extended until 16 July 2010 by Telefónica. As alleged by Telefónica, the extension was due to the forthcoming judgment of the Court of Justice of the European Union on the legality of the "golden share".[57]

(49) Telefónica submitted that, in the meantime, it looked for alternatives to secure the Portuguese's government's support for the Vivo transaction. Telefónica provided in this regard some internal e-mails exchanged on 6 July 2010, which refer to an internal brainstorming exercise to explore alternatives to enable the transaction to proceed.[58]

(50) On 8 July 2010 the Court of Justice ruled that Portugal had failed to fulfil its obligations as regards the free movement of capital under Article 63 of the Treaty because of the special rights granted by the "golden share".[59] Telefónica submits that, despite that judgment, members of the Portuguese government made public statements that this government would not modify its position unless Telefónica submitted an amended offer.[60]

(51) On 16 July 2010, PT asked Telefónica to prolong its third offer until 28 July 2010.[61] However, Telefónica refused to do so and let the third offer expire.[62]

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54 Reply of Telefónica to the Statement of Objections , Document ID 0763, paragraphs 72 and 73. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 67 to 70.

55 Offer dated 29 June 2010, Document ID 0027.

56 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 75 to 78. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 84 and 85.

57 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 81.

58 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 86 to 91, and 308 and e-mails of Telefónica dated 6 July 2010, Document ID 0121.

59 Judgment of the Court (First Chamber) in Case C-171/08, European Commission v Portuguese Republic, [2010] ECR I-06817.

60 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 92. The special rights granted by the "golden share" were only eliminated on 26 July 2011 following a General Meeting of the Shareholders. See PT press release of 26 July 2011, Document ID 0656.

61 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 93 and 94. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 88 to 90.

62 According to PT, between, 17 July and 26 July 2010 there were no official contacts between the parties. Reply of PT to the Statement of Objections, Document ID 0753, paragraph 91. Telefónica mentions however informal contacts. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 95.

4.1.5. The Agreement

(52) On 27 July 2010, the day before the signature of the Agreement, Telefónica and PT met again in Lisbon. Telefónica submitted that by that time its bargaining position was stronger than before because: (a) the majority of the general shareholders meeting of PT had voted in favour of the third offer on 30 June 2010; (b) the golden share had been declared contrary to European Union law by the European Court of Justice on 8 July 2010, and (c) the chairman and a number of other members of the board of directors and the main shareholders of PT did not agree with the interpretation of the Portuguese government of the special rights granted by the "golden share".[63]

(53) After that meeting, on 27 July 2010, Telefónica suggested the two following final amendments to the clause:

(a) to add the wording "*To the extent permitted by law*" at the beginning of the clause. In its reply to the Statement of Objections, Telefónica submits that its aim when suggesting that amendment was to modify the nature of the clause, which would allegedly pass from establishing a non-compete obligation to establishing the obligation to carry out a self-assessment exercise to determine the lawfulness and scope of a non-compete commitment, which would be ancillary to the Vivo transaction (see Section 4.2);

(b) to set the duration of the clause from "*the date of Closing until 31 December 2011*".[64]

(54) Finally, on 28 July 2010 Telefónica and PT entered into the Agreement[65], which gave Telefónica sole control over Vivo[66], by acquiring the 50% of the share capital of Brasilcel owned by PT for EUR 7 500 million.

(55) As referred to in Recital 1, the Agreement included as clause nine the following clause:

" Ninth - Non-compete

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of Closing until December 31, 2011."

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63 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 99.

64 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 101.

65 Stock Purchase Agreement of 28 July 2010, Document ID 0028. PT Móveis Serviços de Telecomunicações SGPS S.A., a wholly owned subsidiary of the PT group, is also a party to the Stock Purchase Agreement.

66 The transaction was notified to the Brazilian competition authority (case number 53500.021373/2010), Document ID 700.

(56) Contrary to the second offer, the Agreement no longer included the call option in favour of PT to buy back the PT shares owned by Telefónica.

(57) In addition, the Agreement provided for a number of clauses, discussed in the following Recitals (58) to (61), which according to the parties are relevant for the assessment of the clause.

(a) The resignation of the members of PT's board of directors designated by Telefónica[67]

(58) Clause 3.6 of the Agreement provides for the resignation of the two members of PT's board of directors designated by Telefónica:

"*Telefónica shall procure that the two members of the board of directors of Portugal Telecom designated by Telefónica as from Closing resign from their offices, each delivering a letter on favour of Portugal Telecom acknowledging that he or she has no claim outstanding for compensation or otherwise*."

(b) The Industrial Partnership Programme

(59) Clause 6 of the Agreement establishes the obligation for the parties to start negotiations in January 2011 in good faith regarding the possible implementation of an "Industrial Partnership Programme" on several areas identified in Schedule 6 of the Agreement, namely, a joint Research and Development ("R&D") centre in Portugal, procurement, technology and operations, international business opportunities, know-how and best practices exchange, benchmarking, joint development of a business model for the Telco of the future, aligned regulatory strategy and broader opportunities for people and cultural development. Clause 6 reads as follows:

"*Telefónica and Portugal Telecom undertake to start, in January 2011, negotiations in good faith regarding the implementation of an industrial partnership programme between Telefónica and Portugal Telecom in order to generate synergies and costs savings for both companies on mutually acceptable terms, on a non-exclusive basis, which could cover different cooperation areas, such as the ones listed in Schedule Sixth.*"

(60) The Agreement establishes in Clause 7 that negotiations on the Industrial Partnership Programme should not start in the event that the parties commenced competing in

[67] Telefónica and PT signed several agreements providing for cross shareholding and board participation including: the cooperation agreement dated 16 April 1997 –Document ID 0019–, a framework agreement dated 15 December 1997 –Document ID 0048–, a memorandum of understanding dated 12 March 1998 –Document ID 0090– and a joint venture agreement dated 23 January 2001 –Document ID 0021–. Accordingly and as detailed in the reply of Telefónica to the request for information of 5 January 2011 –Document ID 0489, pp. 11, 12 and 18– and the reply of PT to the request for information of 5 January 2011 –Document ID 0078, pp. 8 to 12-, between 1998 and 2006 one member of Telefónica's board of directors was designated by PT. In addition, one or two members (depending on the date) of PT's board of directors were designated by Telefónica. On the date of the Closing of the Vivo transaction (namely, 27 September 2010), there were two members of PT's board of directors designated by Telefónica which resigned on that date (which is also the date when the clause entered into force). See Stock Purchase Agreement, Document ID 0028, p. 5. See also paragraph 62 of the reply of PT to the Statement of Objections, Document ID 0753.

Brazil. Clause 7 reads as follows:

"*In the event that Portugal Telecom engages in the future in any effective competing activity in Brazil with Telefónica or any of the companies controlled by Telefónica in the wireline, wireless, or internet access businesses, either directly, either indirectly through any affiliate of Portugal Telecom (and for this purpose, "affiliate" shall comprise any company in which Portugal Telecom owns an interest of 10% or more and/or appoints at least one board member, any company under common control with PT and/or any company belonging to a group of any company which owns an interest in Portugal Telecom): (…) negotiations regarding the industrial partnership programme referred to in Clause Sixth above shall not start of if started or already implemented shall be immediately suspended and each Party will have the right to terminate it*".

(c) Dedic

(61) Clause 10 of the Agreement refers to the possible acquisition by Telefónica of the Brazilian company Dedic, S.A., which provides call centre services. The main obligation undertaken by Telefónica in this regard in the Agreement is limited to "*use its best efforts to analyse the purchase*" of all shares in Dedic owned by PT, further to a due diligence process.

(62) On the date of signature of the Agreement, namely 28 July 2010, PT announced that it had entered into on the same date a Memorandum of Understanding ("the Memorandum of Understanding") that set out the principles for the development of a strategic partnership between PT and Oi, a leading operator in Brazil (the Oi transaction).[68] In the announcement, PT indicated that it expected to achieve a 22.38% ownership in Oi and to have a relevant role in its management, including the appointment of certain members of its board of directors. According to PT, the Oi transaction addressed the concern of the Portuguese Government regarding the sale of Vivo that PT should keep a presence on the Brazilian market and, on the other hand, removed the obligation for the parties to the Agreement to negotiate the Industrial Partnership Programme foreseen in the Agreement, as these negotiations were subject to the parties not competing in Brazil.[69]

4.1.6. The Closing and public deeds

(63) The Vivo transaction was finalised through the conclusion, on 27 September 2010, of a "Deed of Transfer of Shares" and a "Confirmatory Deed".[70]

(64) That Deed of Transfer of Shares establishes that: "*To the extent not expressly otherwise provided in this deed, the provisions of the Shares Purchase Agreement* [the Agreement] *remain in effect between the parties thereto*".

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68 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 92 to 96.

69 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 105 to 107.

70 Deed of Transfer of Shares and Confirmatory Deed of 27 September 2010, Documents ID 0040 and ID 0041, respectively.

4.1.7. The alleged involvement of the Portuguese government in the negotiations of the Vivo transaction

Arguments of the parties

(65) Telefónica submits that in order to assess the clause due account should be given to the continuous intervention and influence of the Portuguese government in the negotiations of the Vivo transaction and this government's interest in ensuring that the transaction would not put into question PT's dimension and Portuguese identity. According to Telefónica, such intervention led Telefónica to the reasonable belief that, in the absence of the clause, the Vivo transaction would be blocked by the Portuguese government, via the exercise of its special rights under the "golden share" that it held in PT.[71]

(66) To support that claim, Telefónica provided press articles on certain public statements made by members of the Portuguese government during the negotiations of the Vivo transaction, such as the following examples:[72]

(a) the statement made on 17 May 2010 by the Portuguese Prime Minister during a public event organised by the *ABC* newspaper. The statements of the Prime Minister included, for example, the following: "*the government's viewpoint is that Portugal has a strategic interest in PT*", "*the dimension of* [PT] (…) *is an asset for the country*", "*we want a company which is big in Portugal and in other countries*", "*we want a lot of innovation and only having a large scale it is possible to make more investments in innovation*…", "*one thing is clear: the development of Brazil. I hope that everybody understands how important this is for us*", and "*we are proud of expanding in Brazil*",[73]

(b) the statements made on 4 July 2010 by the Portuguese Prime Minister in an interview published by *El País* newspaper. These statements of the Prime Minister included, for example, the following: "*I never thought that I would use the special rights because I always trusted that Telefónica would have the common sense to consider the strategic interests and to negotiate with the board of directors of PT*", "*I am not going against the will of [PT's] shareholders, but these shareholders should not go against the State will*", "*Telefónica should listen to us. I think of the strategic interests of PT and of my country. My position refers to the analysis of the offers vis-à-vis the dimension and scale of the company, and also to the opportunities given by dimension regarding R&D, industrial projects and innovation*", "*the offer does not compensate the strategic decision of to sell Vivo*"[74], and

(c) the statement made on 8 July 2010 by Mr. Pedro Silva Pereira, Minister attached to the Prime Minister, who indicated that "*if the offer is not amended, the position of the Portuguese government cannot change*", "*the Portuguese*

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71 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 37, 38, and 303 to 312.

72 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 48 to 53, 82 to 85, 92, 93, 95 to 97 and 106.

73 Annex 5 of the reply of Telefónica to the Statement of Objections, Document ID 0771. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 50 and 51.

74 Annex 15 of the reply of Telefónica to the Statement of Objections, Document ID 0781.

State will look for solutions which would fully respect both EU law and its interests", the judgment of the Court on 6 July 2010 "*does not diminish in any manner the determination* [of the Portuguese government] *in safeguarding national strategic interests and the interests of PT*".[75]

(67) Telefónica submits that the public statements by members of the Portuguese government were generally interpreted by the press as threats to make use of the special rights granted by the "golden share" in order to block Telefónica's offer if Telefónica did not satisfy the Portuguese government's interests, even after the judgment of the Court of Justice of 8 July 2010 against the special rights granted by the "golden share". The Portuguese government made use of those rights regarding the third offer at the PT General Shareholders meeting of 30 June 2010.

(68) Telefónica also submits that its understanding at that time of what the Portuguese government's position was is further supported by its internal brainstorming session of 6 July 2010, which explored alternatives to allow the transaction to be completed without the opposition of the Portuguese Government (see Recital (49)).[76] According to Telefónica, the fact that "reinforcing" the clause was among the alternatives considered would show the importance afforded by Telefónica to ensuring the satisfaction of the Portuguese government and Telefónica's understanding of the kind of measures that the Portuguese government could request in order not to oppose the transaction.

(69) Telefónica submits that, while the intervention by the Portuguese government referred to in this Section may not exclude its liability for its conduct, it should be taken into account regarding the interpretation of the clause and as a mitigating circumstance in the event of a fine (see Section 10.4.2).[77]

(70) PT submits that the Portuguese government's public statements and position interfered with the Vivo transaction negotiations. According to PT, the statements of the Portuguese Prime Minister of 17 May 2010 proved that the Portuguese Government disapproved of the exit of the company from the Brazilian market and that it would therefore not have accepted the transaction without a suitable alternative for PT to remain present in Brazil.[78] PT submits that the opposition of the Portuguese government to the third offer by means of the "golden share" special rights was interpreted as a confirmation that the Portuguese Government was not ready to accept the sale of Vivo without PT first having a reasonable alternative to maintain a presence on the Brazilian market.[79] In this context, the transaction regarding Oi (see Recital (62)), whereby PT maintained significant investments and presence and Brazil, would have allowed the completion of the Vivo transaction.[80]

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75 Annex 17 of the reply of Telefónica to the Statement of Objections, Document ID 0783.
76 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 87.
77 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 553 to 555.
78 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 48 to 51.
79 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 85.
80 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 92 to 96 ("A soluçao Oi") and 105.

Assessment of the Commission

(71) This Decision does not dispute that the Portuguese government followed the negotiations of the Vivo transaction, made public statements such as the ones referred to in Recital (66) and blocked the third offer by exercising its special rights under the "golden share" that it held in PT. As submitted by the parties and shown in the extensive press articles submitted by them to the Commission's file, the Vivo transaction was quite sensitive from a political viewpoint in Portugal.

(72) However, the parties seem to have a different understanding of the Portuguese government's position during the negotiations. In Telefónica's understanding, the protection of PT, by means of the clause, would allow the Portuguese government not to oppose the Vivo transaction. According to PT, the Portuguese government was mostly concerned that PT would maintain its activities in Brazil. In this respect and according to PT, the conclusion by PT of the Memorandum of Understanding ensuring PT's presence in Brazil via Oi was crucial to remove the concerns of the Portuguese government and to allow the Vivo transaction.

(73) In that respect, it should be noted that Telefónica has not provided any statement of the Portuguese government referring to its desire or the need for having the clause in the context of the Vivo transaction, although the Portuguese government also suggested that it would oppose any take-over of PT by Telefónica to ensure PT's Portuguese dimension.[81] Also, as mentioned by Telefónica, the Brazilian President at the time publicly underlined the importance of PT's presence in the Brazilian market to guarantee the investments necessary for the development of the local broadband market. That public statement also referred to PT's maintaining its presence in Brazil.[82]

(74) To conclude, any possible belief of Telefónica that the clause was considered essential or even desired by the Portuguese government is not supported by any statement of the Portuguese government. Telefónica has not provided any evidence that the clause may have been requested by the Portuguese government in the context of the negotiations of the Vivo transaction.

(75) Even if the Commission accepted that Telefónica considered the clause indispensable for the approval of the Portuguese government, this would not be sufficient to consider the clause a restraint necessary and ancillary to the Vivo transaction (see Recital (379)).

4.2. The alleged purpose and meaning of the clause

(76) The parties submit that the circumstances of the negotiations and amendments to the wording of the clause referred to in Recitals (40) and (53) should be duly taken into account to assess the purpose and meaning of the clause and, in particular, of the wording "*to the extent permitted by law*". The parties submit in this regard that, instead of providing for a non-compete obligation, the clause would merely provide

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[81] For example, Press article "*El Gobierno luso respalda a PT frente a la oferta de Telefónica*", published in Expansión on 18 May 2010, Annex 5 to the reply of Telefónica to the Statement of Objections, Document ID 0771.

[82] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 52.

for an obligation to self-assess the legality and scope of a non-compete commitment, which would be ancillary to the Vivo transaction.

(77) Telefónica submits that it did not consider lawful nor necessary a non-compete commitment as regards the Vivo transaction. However, when the clause was introduced and Telefónica understood that it was impossible to remove it, it tried to minimise the impact of the inclusion of the clause by reducing its scope and duration in a manner which would lead to a clause potentially empty of content. After the judgement of the Court of Justice on the "golden share" held by the Portuguese government and the support of the majority of PT's shareholders and members of its board of directors, Telefónica's bargaining position was reinforced, and Telefónica succeeded in transforming the clause into a self-assessment clause.[83]

(78) In that respect, Telefónica submits that it had no plans to include a non-compete clause in the Vivo transaction, as evidenced by Section 5 (iii) of the first offer, which stated that *"…Telefónica would not require non-compete and non-solicitation commitments by Portugal Telecom*" and which would refer both to Brazil and the Iberian market.[84]

(79) As described in Recitals (42), (43) and (44), that submission of Telefónica on the meaning of Clause 5 (iii) of the first offer cannot be accepted.

(80) On the other hand, the Commission notes that the clause establishes a non-compete obligation on both Telefónica and PT. Telefónica's argument that it was opposed to including a non-compete clause in the context of the Vivo transaction and that it tried to limit as much as possible the scope of the clause does not accord with the bilateralism of the clause, which also includes a non-compete obligation in the favour of Telefónica.

(81) In that respect, Telefónica submits that: (a) the bilateralism of the clause derived from Telefónica's negotiation strategy since Telefónica considered that it would be easier to attempt during the negotiations to limit or remove the clause in the event that such limitation or removal would impact's both parties' rights rather than only PT's and; that (b) after Telefónica succeeded in substituting the non-compete obligation provided for by the clause by an obligation to carry out a self-assessment exercise (see Recital (53)), the bilateralism of the possible non-compete commitment would no longer have been an issue because the question of which party would be subject to a non-compete obligation would be determined during the self-assessment exercise, together with the scope of the non-compete commitment.[85]

(82) Those justifications provided by Telefónica for the bilateralism of the clause cannot be accepted. The first justification of Telefónica would apply only to the negotiation stage of the clause, not to the final agreement and the fact remains that the clause that was finally adopted was still bilateral. On the other hand and as discussed in Section 6.3, the Commission cannot accept that the non-compete obligation provided by the clause was substituted by a self-assessment obligation. Moreover, even if the clause was to be interpreted as a self-assessment clause, the bilateralism of the possible non-

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83 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 291 to 298.

84 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 43 to 45 and 291.

85 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 63 (footnote 29).

compete commitment would arguably still show an interest of Telefónica in benefiting from a non-compete obligation from PT in connection with the Iberian market.

(83) In addition, Telefónica submits that PT considered the clause admissible and necessary to conclude the Vivo transaction, despite Telefónica's alleged serious doubts that such a clause could be lawful.[86] In particular, Telefónica submits that the clause was introduced in connection with the call option in favour of PT on the PT shares owned by Telefónica. According to Telefónica, PT insisted on keeping the clause also when the call option was dropped, as the Vivo transaction entailed obligations in connection with the resignation from PT's board of Directors of Telefónica's representatives and with the possible negotiation of an industrial partnership.

(84) Also according to Telefónica, PT implicitly confirmed that the clause was an essential condition and a deal breaker regarding the Vivo transaction, as PT did not deny in the response to the request for information dated 5 January 2011 that the clause was a "*conditio sine qua non*" of the Vivo transaction.[87]

(85) On the other hand, Telefónica argues that it had the reasonable belief that the Portuguese government considered the clause essential to protect PT during the negotiations of the Vivo transaction and that without the clause the Vivo transaction would have been obstructed by the Portuguese government through the exercise of its "golden share" in PT (see Section 4.1.7).[88]

(86) However, the Commission notes that it cannot be assumed that PT regarded that the clause was a deal breaker from the following facts: (a) PT justified the inclusion of the clause in the Agreement (see Recitals (90) and (91)); (b) PT acknowledged Telefónica's attempts to reduce the scope of the clause (see Recital (159)); and (c) PT has not denied that the clause was a deal breaker. Moreover, PT indicates that the initiative regarding the bilateralism of the clause and the inclusion in its scope of the television services came from Telefónica.[89]

(87) Telefónica also submits that, by adding the wording "to the extent permitted by law", it managed to change the nature of the clause. Telefónica submits in this regard that the parties agreed to self-assess the compatibility with competition law of an ancillary restraint to the Vivo transaction consisting of a non-compete commitment with a scope to be determined in the context of the self-assessment exercise.

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86 Reply of Telefónica to the Statement of Objections Document ID 0763, paragraphs 299 to 302.

87 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 59, 60, 299, 300, 301 and 302. Telefónica submits that in its reply to the request for information of 5 January 2011 PT only denies that it did not want reciprocity to become a deal breaker, but not that the clause could not become a deal breaker and argues that this was misunderstood in recital 107 of the Statement of Objections. See paragraph 59 of the reply of Telefónica to the Statement of Objections (Document ID 0763) in connection with paragraphs 23 and 26 of the reply of PT to the request for information of 5 January 2011 (Document ID 0078). The Commission understands that the wording of the reply of PT to that request for information can be interpreted as indicated by Telefónica in the sense that PT did not want reciprocity to become a deal breaker. Likewise, the reply of PT to the Statement of Objections denies that the changes proposed by Telefónica regarding the clause could be considered a "deal breaker". See reply of PT to the Statement of Objections, Document ID 0753, paragraph 66.

88 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 303 to 312.

89 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 64, 66 and 164.

(88) In that respect, Telefónica submits that there were some reasonable grounds for admitting a possible ancillary clause to the Vivo transaction, in particular regarding the implementation of the provisions of the Agreement on: (a) the resignation of the Telefónica's representatives in PT's board of directors; (b) the development of an Industrial Partnership Programme; and (c) the commitment of Telefónica to negotiate the acquisition of Dedic S.A.[90] In particular, a non-compete commitment could have found justification in the protection of the information made available to the members of the PT's board of directors designated by Telefónica.[91]

(89) Section 6.5 discusses whether or not there could be reasonable doubt at the time of signature of the Agreement that the clause could be considered as a restraint ancillary to the Agreement.

(90) On the other hand, PT submits that the draft of the second offer circulated at 02:53 on 1 June 2010 was the result of the meeting held between the parties on 31 May 2010.[92] This draft introduced the call option granted by Telefónica to PT to buy back the PT shares held by Telefónica, as well as a first draft of the clause (quoted in Recital (39)), which was allegedly connected to the call option and aimed at protecting PT's interests.[93] PT submits that the limitation of the scope of the clause introduced by Telefónica in its comments to the draft of the second offer ("*excluding any investment or activity held or performed as of the date hereof*") was not opposed by PT.[94]

(91) PT submits that the clause was similar to the ones usually inserted in transactions involving the sale of assets, in particular in those concerning the acquisition or reinforcement of control and which are accompanied by the possibility for the seller to exploit the business which is sold and of which he has a good knowledge.[95] PT submits that the clause was justified because, thanks to its presence on PT's board of directors, Telefónica had a good knowledge of PT's weaknesses and of its short and medium term strategies and therefore could have taken unfair advantage of such knowledge.[96] PT also submits that the information made available to the members of its board of directors on large customers was sensitive, due to the limited number of such customers and their importance regarding the volume of revenues, and that the protection of that information was also a basis for the clause.[97]

(92) PT submits that it understood that Telefónica: (a) was not ready to accept any non-compete clause which would not be bilateral; and (b) wanted the clause to have a very narrow scope, without however identifying what the narrow scope requested by Telefónica would be. PT also submits that it did not consider the restrictions to the scope of the clause proposed by Telefónica critical and a "*deal breaker*".[98]

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90 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 101 and 102

91 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 206 to 214.

92 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 53

93 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 54.

94 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 60.

95 Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 6. Reply of PT to the Statement of Objections, Document ID 0753, paragraph 63.

96 Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 5.

97 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 265 and 424.

98 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 64 to 66.

(93) PT also submits that in the rush of concluding the deal, the parties focused on the main terms of the Vivo transaction rather than the clause, which was kept in the Agreement albeit with the caveat that it was valid only to the extent permitted by law. PT submits that, given the very tense relationship between the parties during the negotiations of the Vivo transaction, there was a concern to keep changes in the wording to a minimum and only include those corresponding to the essential terms and conditions of the Vivo transaction.[99] This could explain the fact that the clause was kept in the Agreement, but with an indication that an agreement between the parties on the lawfulness of the non-compete commitment was first needed.[100] According to PT, the clause would have required a clarification of its concrete scope and obligations, as well as of its justification, in view of the fact that the call option had been deleted. However, this exercise could not be carried out at the time the Agreement was being finalised, given the time pressure and the circumstances of the negotiations of the Vivo transaction.[101]

(94) PT confirms that the wording "to the extent permitted by law" was proposed by Telefónica[102] and argues that PT never discussed its specific meaning with Telefónica. However, PT also argues that the wording "to the extent permitted by the law" should be interpreted as requiring the parties to self-assess whether a non-compete commitment could be lawful in the context of the Vivo transaction. Furthermore, PT submits that the non-compete commitment would not enter into force until the parties assess the possibility and scope of that commitment.[103]

(95) Those arguments regarding the "self-assessment" nature of the clause are discussed in Section 6.3. In particular, the Commission concludes that the analysis of the wording of the clause as well as of other elements such as the circumstances of the negotiations of the Vivo transaction and the behaviour of the parties after the signature of the Agreement, confirm the non-compete rather than the "self-assessment" nature of the clause.

4.3. The alleged self-assessment exercise

4.3.1. The failure to perform a self-assessment exercise before Closing

(96) As referred to in Recitals (87) and (94), the parties argue that a self-assessment was mandated by the clause. However, they indicate that the exercise was not carried out before the date of Closing (that is to say, on 27 September 2010) for a number of reasons.

(97) Telefónica provides the following explanations for the fact that the self-assessment was not carried out before the date of Closing on 27 September 2010:[104]

(a) As the Agreement was signed on behalf of PT without the authorisation of PT's General Shareholders meeting, Telefónica submits that there was a risk that the Portuguese government could challenge it.

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99 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 101.
100 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 102.
101 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 103.
102 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 120.
103 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 127.
104 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 237.

That explanation is not supported by the facts in the Commission's file as Clause 4 of the Stock Purchase Agreement (in connection with Schedule 4.1) establishes that PT gives the warranty to Telefónica that:

"*The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly and validly authorised by the board of directors of PT and PT Movéis, and no other corporate proceedings on the part of each PT and PT Móveis are necessary to authorise the execution, delivery and performance of this Agreement or the consummation of the transaction contemplated hereby.*"

(b) The self-assessment and sharing of results between the parties would have required discussions on the scope and effects of the clause which allegedly could have endangered the "balance" found in the Agreement.

That argument is inconsistent. If the parties had agreed on an obligation to carry out a self-assessment exercise, compliance with such an obligation would have been part of the actions to be performed before Closing under the Agreement. As explained in Section 6.3 of this Decision, the Commission does not accept the argument that the clause should be considered to provide a self-assessment obligation.

(c) There would have been uncertainties regarding the Oi transaction and the development of the "Industrial Partnership Programme", whereas "a few weeks" after the Closing of the Vivo transaction, the press would have clarified that PT's renewed presence in Brazil was imminent.

As discussed in Recitals (106) and (107), the Commission believes that the passing from the stage of uncertainty to certainty regarding the Oi transaction in October 2010 has not been proved by Telefónica.

(d) The requests for information of 9 September 2010 and 30 September 2010 from CNC, which among other matters requested information in order to investigate possible anticompetitive agreements between the parties to these proceedings in the context of the Vivo transaction, would have allegedly reinforced the doubts on the admissibility of a non-compete commitment.

The Commission does not accept that argument. In particular, it should be noted that the first request for information of CNC dates back to 9 September 2010[105], approximately seven weeks before the date the alleged self-assessment exercise would have taken place (see Section 4.3.2 on the alleged conference calls of 26 October 2010 and 29 October 2010).

(98) Therefore, Telefónica's explanations regarding the delay in carrying out the alleged self-assessment exercise, are not supported by the facts in the Commission's file.

[105] Document ID 0017.

(99) For its part, PT submits that after the signature of the Agreement the clause was not a priority, for the following reasons: (a) PT was focusing on the closing of the Vivo and Oi transactions; (b) the non-compete commitment was subject to the confirmation of its lawfulness and scope; (c) it would not enter into force until the date of Closing (namely 27 September 2010; (d) PT had not been contacted by any competition authority; and (e) PT believed that the conclusion of the self-assessment would lead to the conclusion that there was little margin for implementing a non-compete commitment, irrespective of its scope.[106] According to PT, the press articles published at the end of August 2010 in the *Jornal de Negócios* and *Cinco Dias* on the clause entered into by the parties and on 19 October 2010 in *Diario Economico*[107] on the investigation of the Spanish NCA in connection with the clause triggered the need for the parties to contact each other.

(100) The explanations by PT referred to in Recital (99) are insufficient to explain why a binding contractual obligation, namely the alleged obligation to carry out a self-assessment exercise, would not have been complied with. In the event that the clause would have provided for an obligation to carry out a self-assessment exercise, compliance with such an obligation would have been part of the actions to be taken by the parties in connection with the Closing of the Vivo transaction, on which PT would have been allegedly focusing. Moreover, the fact that the entry into force of the clause would take place on the date of Closing namely, 27 September 2010, cannot justify delaying until October 2010 the completion of the alleged self-assessment exercise. On the contrary, the assessment of the lawfulness of the clause would have been expected to have taken place before its entry into force. Finally, the fact that there was little likelihood that a non-compete obligation could be justified would support the prompt termination of the clause instead of its maintenance.

(101) The parties' arguments regarding the "self-assessment" nature of the clause are discussed in Section 6.3.

4.3.2. The events that occurred following the Closing of the Agreement on 27 September and in particular the alleged conference calls of 26 October 2010 and 29 October 2010

(102) Telefónica submits that the following events, which occurred after the Closing on 27 September 2010, prompted the need to carry out the self-assessment exercise.

(103) First, Telefónica referred to a number of press articles published in August 2010 reporting that Telefónica and PT had concluded a non-compete agreement covering the Iberian market.[108] According to Telefónica, those press articles referred to a non-compete agreement between the parties, instead of an agreement to carry out a self-assessment exercise, as they were only based on the documents which were available to the public at that time, namely the text of the second offer and the informative brochure dated 9 June 2010, which did not include the final version of the clause and, in particular, the wording "to the extent permitted by the law" (see Section 4.5 of this

106 Reply of PT to the Statement of Objections Document ID 0753, paragraphs 143 to 147.

107 Annex 28 of the reply of Telefónica to the Statement of Objections, Document ID 0794.

108 Press article published by the Jornal de Negócios on 23 August 2010, Annex 28 of the reply of Telefónica to the Statement of Objections, Document ID 0794. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 117 to 119.

Decision on the publicity of the clause). However, contrary to Telefónica's submission, the press article published by the *Jornal de Negócios* on 23 August 2010 reports that Telefónica was consulted before the publication of that press article and that Telefónica confirmed that the final Agreement entered into by the parties included a non-compete agreement covering the Iberian market like the previous offers.[109]

(104) Second, the CNC sent two requests for information to Telefónica in September 2010 regarding the agreements that it might have entered into with PT, including those relating to the Vivo transaction.[110]

(105) Telefónica submits that the incorrect interpretation of the clause by the Press, as a non-compete agreement, instead of an agreement to carry out a self-assessment exercise, and the requests for information from CNC prompted the need for the parties to share the results of their self-assessment exercise.

(106) In addition, Telefónica submits that in October 2010, several press articles confirmed that, following the Memorandum of Understanding of 28 July 2010, PT and the Brazilian Oi group were close to signing the final agreement for their partnership, which would involve the acquisition by PT of a stake in Oi.[111] In that regard, Telefónica submits that: (a) certain articles of mid-October 2010 pointed out that the Oi transaction was solely awaiting a decision of the Brazilian electronic communications regulator, Agencia Nacional de Telecomunicaçoes (ANATEL) and the Brazilian general elections, the second round of which took place on 31 October 2010, and that therefore it was certain that the Oi transaction would be completed and; that (b) this was confirmed on 30 October 2010, when PT and Oi communicated the extension of their Memorandum of Understanding, which was taken to a definitive status on 26 January 2011.

(107) The Commission takes account of the fact that at the time of the alleged self-assessment exercise the Oi transaction was still at a Memorandum of Understanding stage and the final agreement was not signed until 26 January 2011. Thus, the passing from uncertainty regarding the Oi transaction to the certitude alleged by Telefónica for the date of the conference calls (26 and 29 October 2010), as a justification to delay the alleged self-assessment exercise, is not duly supported by the facts in the Commission's file.

(108) Telefónica submits that the alleged confirmation in October 2010 that the Industrial Partnership Programme was not going to be implemented removed the last doubts and permitted the conclusion to be drawn that it was not possible to have a non-compete agreement. Telefónica therefore would have instructed its lawyers to contact PT's lawyers to share and discuss with them the results of the self-assessment of the clause.

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[109] Press article published by the Jornal de Negócios on 23 August 2010, Annex 28 of the reply of Telefónica to the Statement of Objections, Document ID 0794: "*A informação foi confirmada pela Telefónica, que admitiu que "a cláusula de não concorrência não mudou no acordo final". Não foi possível até ao fecho, ter uma posição da PT*."

[110] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 120 to 122.

[111] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 123 to 127 and 237.

(109) According to Telefónica, on 26 October 2010 and 29 October 2010 the parties had a conference call in order to share and discuss their conclusions on the compatibility with competition law of a possible non-compete agreement. Telefónica submits that they both concluded after a careful evaluation and in the light of the recent events, there were no legal arguments to justify the legality of such an agreement. As a result, the parties allegedly agreed that the result of the self-assessment exercise was negative, that the obligation to carry out a self-assessment exercise under the clause had been duly complied with and that therefore the clause should be considered "exhausted", as no other obligations could derive from it.[112]

(110) For its part, PT submitted that, further to the signature of the Agreement, the clause was not considered an urgent matter to be dealt with (see Recital (99)).[113] According to PT, the press article published in August 2010 in the *Jornal de Negócios* and *Cinco Dias* newspapers, which referred to a non-compete agreement between the parties, was merely speculative and referred to the clause included in the second offer.[114] PT submits that it was only on 19 October 2010, via a press article published by the newspaper *Diario Economico*, that it learnt about a request for information sent by the CNC to Telefónica on the clause and of the possible interest of the Commission in the case. PT submits that this event prompted the re-establishment of the contacts between the parties regarding this matter.

(111) PT submits that, following a suggestion of Telefónica, PT organised two conference calls on 26 October 2010 and 29 October 2010.[115] PT alleges that during those conference calls, both parties concluded that it would be difficult to consider the non-compete commitment foreseen by the clause compatible with competition law and therefore that no non-compete obligation could be derived from the clause.

(112) PT submits that, the parties believed that, in view of the conference calls on 26 October 2010 and 29 October 2010 and the conclusion reached during those calls, it was possible to consider the issue of the possibility of having a non-compete commitment settled and the main obligation provided by the clause, namely to carry out a self-assessment exercise, fulfilled.[116] PT submits that the secondary obligation of the clause, namely, the non-compete commitment, accordingly remained without any legal effect.

4.3.3. Assessment of the evidence provided in connection with the conference calls of 26 October 2010 and 29 October 2010

(113) This subsection discusses the evidence submitted by the parties to prove that the alleged conference calls of 26 October 2010 and 29 October 2010 took place, their content and their results, in order to support their interpretation of the clause as merely providing for a self-assessment obligation, rather than a non-compete one, and also to limit the duration of the clause (see Section 9.2). In the Commission's view and as explained in this Section 4.3.3 there is evidence of two conference calls between Telefónica and PT representatives on 26 October 2010 and 29 October

112 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 128 to 131.
113 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 144 and 145.
114 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 146.
115 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 147 and 148.
116 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 149.

2010, but not of their content and, in particular, there is no evidence that the parties concluded in these calls that there was no room for a non-compete commitment and that therefore the clause was "exhausted".

(114) According to Telefónica, the existence of such conference calls has been accepted by PT in its reply to the request for information dated 5 January 2011, where PT states that it had instructed its lawyers to contact those of Telefónica and that two conference calls were held on 26 October 2010 and 29 October 2010 where it was concluded that there was no sufficient justification for the clause.[117]

(115) In that respect, PT's reply to the request for information dated 5 January 2011 does not mention that the clause should be interpreted as providing for an obligation to carry out a self-assessment exercise. It states that those conference calls were prompted by certain news that had appeared in the press and that it was concluded during those calls that there was no sufficient justification for the clause, which would serve no purpose although it would be advisable to remove it, in contrast with the alleged "exhaustion" of the clause or the "fulfilment" of the obligation provided by the clause.[118]

(116) For the purposes of proving that those two conference calls took place and their conclusions, Telefónica has submitted declarations made before public notaries in January 2012 by Telefónica's external counsels and [one individual from Telefónica]. In addition, Telefónica has produced a statement by a public notary who examined the outlook agenda and time sheets of Telefónica's external counsel, as well as a statement by the person in charge of the IT systems of that external counsel (according to which if the lawyers' time sheets had been modified, the modification would have appeared in the system).[119]

(117) Like Telefónica, PT submits statements made by PT's in-house counsel before a notary public in January 2012, whereby the in-house counsel indicates that: (a) she was instructed to contact Telefónica's counsel regarding the clause; (b) she participated in the conference calls of 26 October 2010 and 29 October 2010; and (c) the parties concluded during those conference calls that it would be difficult for the restriction of competition foreseen by the clause to be considered acceptable and that the clause should be considered fully complied with by means of the self-assessment exercise.[120] However, the Commission notes that this conclusion differs from the one put forward by PT in its reply to the request for information dated 5 January 2011, which is referred in Recital (115).

(118) The Commission notes that the extracts of the agenda and time sheets provided by Telefónica with its statements (see Recital (116)) refer to two conference calls regarding a non-compete clause held on 26 October 2010 and 29 October 2010 respectively.

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117 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 131 and 132, which refers to the reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraphs 31 and 32.

118 Reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraph 31.

119 Documents ID 0799, ID 0800, ID 0801, ID 0802 and ID 0803.

120 Affidavit dated 11 January 2012, Document ID 0912.

(119) On the other hand, the statements submitted by the parties (see Recitals (116) and (117)) include a reference to the conclusions of those conference calls, which would allegedly be that, in view of their negative conclusions of the self-assessment exercise, both parties agreed that the clause was "exhausted" or had been complied with by carrying out the self-assessment exercise.

(120) No contemporary written minutes or any written documents referring to the results of those conference calls have been provided by Telefónica or PT.

(121) The evidence referred to in the preceding Recitals should be weighted against the rest of the evidence available, such as the termination agreement dated 4 February 2011, described in Section 4.4.

(122) In considering the statements provided by the parties and referred to in Recitals (116) and (117), due account should be given to the fact that they have been produced by persons who may have a direct interest in this case, since they are employed by Telefónica or PT, or work for a law firm instructed by the parties to represent them in these proceedings.

(123) Although the parties submit that the self-assessment exercise was carried out in October 2010, and they provide several reasons discussed in Section 4.3.1 for not having carried out this exercise before the Closing, the fact is that they only deleted the clause in February 2011, after the opening of these proceedings and approximately six months after CNC sent the first request for information to Telefónica, and without making any reference to the alleged self-assessment exercise and the two October conference calls (see Section 4.4).

(124) To conclude, although there is some evidence of two conference calls between the parties on 26 October 2010 and 29 October 2012, the evidence provided by the parties to prove the content and the results of those conference calls is very weak and inconsistent with the agreement to delete the clause on 4 February 2011, described in Section 4.4. Therefore, the Commission considers that the "exhaustion" of the clause in October 2010 has not been proven and that any self-assessment which may have been carried out by the parties, individually or in cooperation with the other via the October conference calls, was not provided for by the clause and, in any event, did not lead to any result, as the clause was only deleted on 4 February 2011.

4.4. The termination of the clause

(125) Following the opening of these proceedings by the Commission on 19 January 2011, Telefónica and PT signed an agreement on 4 February 2011 deleting the clause (the termination agreement).[121] The termination agreement reads as follows:

"RECITALS:

WHEREAS each of PT, PT Móveis and Telefónica entered into an agreement (the "Agreement") on July 28, 2010 in relation to the sale from PT and PT Móveis to

[121] Agreement of 4 February 2011 deleting Section Nine of the Stock Purchase Agreement, Document ID 0128.

Telefónica of 50% (fifty) percent of the outstanding share capital of the Dutch company Brasilcel, N.V. ("Brasilcel" or the "Company").

WHEREAS Section Ninth of the Agreement included a Non-compete clause whereby, to the extent permitted by law, each Party would refrain from engaging in competition with the other in the Iberian market since Closing (as defined in the Agreement) until December 31, 2011.

WHEREAS Section Ninth of the Agreement was first discussed between the parties in relation to the PT's right to call the shares held by Telefónica in PT and eventually kept in the final agreement despite the fact that the said right was dropped, subject therefore to its conformity with law.

WHEREAS the Parties wish to confirm in writing their understanding that Section Ninth is not enforceable, and has not at any time been enforced, and therefore it has not affected their respective commercial decisions.

WHEREAS Telefónica and PT were notified on January 24 and 21, 2011 respectively of the opening by the European Commission of formal proceedings in relation to the aforesaid Section Ninth.

In light of the above, the Parties agree as follows:

First. Amendment of the Agreement and Withdrawal of Rights

The Agreement shall be amended by deleting Section Ninth in its entirety, which will be deemed not to have had content at any time.

The Parties irrevocably and definitively confirm that Section Ninth has not and may not have conferred any rights or imposed any obligations on them or on any third party.

Second. Governing Law

This Agreement, and any question or dispute related to it or to its performance or consequences of any breach of it, shall be governed by and construed in accordance with the laws of Portugal."

(126) Both parties argue that they had considered the clause to be exhausted as a result of their conference calls on 26 October 2010 and 29 October 2010. Therefore, according to the parties, the agreement of 4 February 2011 only had the effect of confirming the understanding reached during those calls.[122]

(127) That claim of the parties is assessed and dismissed in Section 6.3.4.4, which concludes that it is inconsistent with the wording of the agreement of 4 February 2011.

[122] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 137. Reply of PT to the Statement of Objections, Document ID 0753, paragraph 429.

4.5. The publicity of the clause

(128) The second offer (dated 1 June 2010) was made public by the parties by putting it on their company's website and by informing the Spanish and Portuguese Stock Exchange Authorities (*Comisión Nacional del Mercado de Valores* CNMV and CMVM respectively).[123]

(129) The content of the clause included in the second offer was also made publicly available by means of a brochure, which was distributed by PT's board of directors on 9 June 2010 to PT's shareholders in connection with the General Shareholders meeting scheduled for 30 June 2010.[124]

(130) The Vivo transaction was notified to ANATEL on 29 July 2010 and to the Brazilian competition authority, Conselho Administrativo de Defesa Econômica (CADE) and ANATEL on 18 August 2010.[125] These filings included a copy of the Agreement and therefore of the clause.

5. THE SCOPE OF THE CLAUSE AND RELEVANT MARKETS

5.1. The scope of the clause

(131) The clause agreed between Telefónica and PT refers to "*any project in the telecommunications business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market*". Accordingly, the scope of the non-compete may be defined as follows.

5.1.1. Products involved

5.1.1.1. The telecommunication business

(132) According to the wording of the clause, the services covered by the prohibition to compete are: "*any project in the telecommunication business (including fixed and mobile services, internet access and television services…) that can be deemed to be in competition with the other*".

(133) In view of that wording, the Commission considers that the clause covers any project regarding electronic communications services, provided that the other party renders or may render that service. Moreover, the clause expressly refers to fixed, mobile, internet access and television services, therefore making clear that those services are included within its scope.

(134) The Commission notes that broadcasting transmission services are considered to be electronic communications services under Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework

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123 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 72 and 74.
124 Document related to the Telefónica offer, Document ID 0624, p. 9.
125 Documents ID 700, ID 0790 and ID 0791.

for electronic communications networks and services[126] and therefore should be included as such within the scope of the clause. Furthermore, television services are expressly included within the scope of the clause.[127]

5.1.1.2. Activities and investments excluded

(135) The clause expressly excludes from its scope "*any investment or activity currently held or performed as of the date hereof*".

(136) Accordingly, provided that the parties developed an activity or made an investment before the date of signature of the Agreement (the "*date hereof*", that is 28 July 2010), they were not obliged to discontinue that activity or to divest that investment.

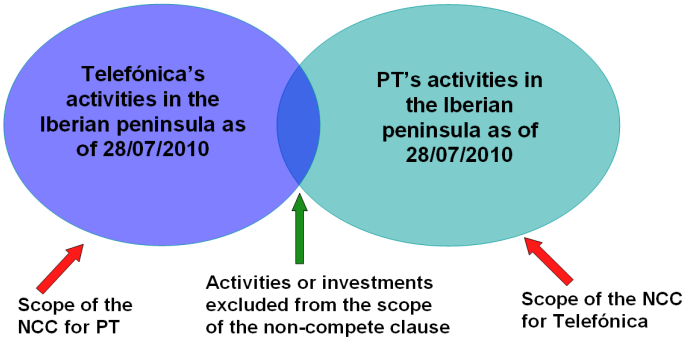
5.1.2. The geographic scope of the clause

(137) From a geographical perspective, the clause covers the "*Iberian market*". The Commission interprets this wording as referring to the markets within the Iberian Peninsula, that is to say, in Spain and Portugal.

5.1.3. Scope of the clause in view of the parties' activities

(138) The scope of the clause could be graphically described in the following manner:

Figure 1: Scope of the clause (in the figure, NCC refers to the clause)



(139) Therefore, the scope of the clause relates to the business of both Telefónica and PT in Spain and in Portugal, which are described in Sections 3.2, 3.3 and 5.5.

(140) Since the parties are present in most electronic communications markets in their own Member States of origin and have little or no presence in the other party's Member State of origin, the geographic scope of the clause corresponds to Portugal for Telefónica, and to Spain for PT.

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126 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), OJ L 108, 24.4.2002 p. 33.

127 Both Telefónica and PT provide pay-TV services in their Member States of origin (like many other electronic communications operators, for example, as part of a bundled offer).

(141) The scope of the clause is therefore very broad and encompasses all electronic communications services and markets in the Member State of origin of the other party. The broadness of the clause is reinforced by the express inclusion of fixed and mobile services, and internet access, as these services cover the vast majority of possible electronic communications services and markets, as well as television services.

(142) The scope of the clause includes both markets subject and markets not subject to *ex ante* regulation. In this respect, the Court of Justice has ruled that infringements of European Union competition rules can take place in markets subject to *ex ante* regulation, as "… *the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets*."[128]

(143) That interpretation of the scope of the clause derives from the wording of the clause, but also from the legal and economic context which the clause forms part of and, in particular, the possibility for the parties to enter electronic communications and television services markets in the Member State of origin of the other party, taking into account the fact that the parties are at least potential competitors in those markets (see Section 6.3.3).

5.2. The parties' submissions on the scope of the clause

(144) In their submissions both parties argue that the Commission makes in the Statement of Objections a disproportionate and extensive interpretation of the scope of the clause, which does not take sufficient account of the wording of the clause, of its economic and legal context and of the intention of the parties. The following Recitals refer to the submissions of the parties on the scope of the clause and their assessment by the Commission.

5.2.1. The vagueness of the wording

(145) Telefónica submits that the wording of the clause contains imprecise and vague terms which would require their interpretation and delimitation by the parties.[129] According to Telefónica, this would render impossible the direct application of the clause and would allegedly show that the non-compete commitments included in the clause could only be implemented further to a self-assessment exercise, where the scope of the commitment would be agreed by the parties.[130]

(146) The Commission considers, however, that the broadness of the potential scope of the clause and the reference in the clause to facts outside the Agreement, for example, the existing activities and investments of the parties, do not render the clause unclear nor deprive it from the possibility of having its scope determined without a new agreement. Thus, the direct application of the clause should be considered possible.

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[128] Judgment of the Court of Justice of the European Union of 14 October 2010, Case C-280/08 Deutsche Telekom AG v. Commission, ECR [2010] I-09555, paragraph 92.

[129] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 244.

[130] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 285.

(147) In addition, Telefónica argues in connection with the vagueness of the wording of the clause that the general principles of *in dubio pro reo* and of presumption of innocence should be applied in connection with the interpretation of the scope of the clause. This argument is discussed and rebutted in Section 6.3.6.

5.2.2. The telecommunication business

(148) Telefónica submits that the clause refers to projects in the telecommunication business and therefore would only cover electronic communication services.[131] Accordingly, although the clause expressly refers to "television services", this would refer solely to the electronic communications services related to television services, namely broadcasting transmission services, which PT provides in Portugal, but Telefónica does not provide in Spain. Any service other than electronic communications services, such as pay-TV services and the production and distribution of content over television[132] would therefore be excluded from the scope of the clause.

(149) Like Telefónica, PT submits that the clause only covers electronic communication services, as defined in Directive 2002/21/EC[133] and excluding, for example, information society services, IT services or any services providing or exercising editorial control over content.[134] However, PT submits that although television services do not fall within the definition laid down in Article 2 of that Directive, they should be included in the scope of the clause because they were expressly included by Telefónica.[135]

(150) The Commission considers that the clause covers electronic communication services as defined by Directive 2002/21/EC. In addition, it also includes television services as: (a) "television services" are expressly mentioned in the wording of the clause; (b) referring to broadcasting transmission services as "television services" appears quite artificial; and (c) PT has acknowledged that television services other than transmission services would be included in the scope of the clause.

5.2.3. The clause would only cover activities and investments in which the parties are actual or potential competitors

(151) Telefónica submits that the first condition to which the clause was subject was the existence of actual or potential competition between the parties.[136] It submits that only the activities where the parties could compete within the 15-month term of the clause, that is to say, the period from 27 September 2010 until 31 December 2011,

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131 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 254 to 257. In addition, Telefónica submits that the clause refers to "projects" and "telecommunication business", which would be narrower concepts than telecommunication services, but does not provide a proposed definition for "projects" and "telecommunication business".

132 Telefónica provides several examples in this regard, such as the sale, rent or maintenance of equipment and terminals, IT services, the sale of audiovisual content, the exploitation of intellectual property rights and call-centre services. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 433 to 506.

133 See footnote 178.

134 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 164 to 176.

135 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 164.

136 Reply of Telefónica to the Statement of Objections Document ID 0763, paragraph 258.

should be considered as covered by the scope of the clause. Wholesale telecommunication markets should, therefore, be excluded from the scope of the clause, given the investment and the time required for the full development of the infrastructure necessary to provide such services.[137]

(152) For its part, PT submits that the clause could not have produced any effects in most markets, taking into account barriers to entry, such as legal barriers or investments required, the short duration of the clause or the conditions of the markets such as, for example, revenue trends.[138] According to PT, that reasoning would support the submission that the scope of the clause would be at most limited to the corporate segment (see Recital (168)).[139]

(153) The Commission first notes that the clause prohibits the parties from engaging in activities and investments "*that can be deemed to be in competition with the other*". This means that, in the event of entry by one party in a market where the other would be present, this market will be 'caught' by the clause, as the entrant would "*be deemed to be in competition*" with the other party. Secondly, the Commission is of the view that the parties should, as a minimum, be considered potential competitors in all markets for electronic communication services and television services, as discussed in Section 6.3.3.2.

(154) Therefore, the argument of the parties that certain markets, such as wholesale markets, should be excluded from the scope of the clause on the basis that the parties cannot be considered potential competitors cannot be accepted.

(155) In addition, and as discussed in Section 6.3, the clause should be considered a restriction by object and therefore there is no need to show anticompetitive effects.

5.2.4. The activities and investments excluded

5.2.4.1. The meaning of the exclusion introduced into the wording the clause

(156) In the second offer of 1 June 2010, Telefónica redrafted the wording of the clause so as to exclude from its scope "*any investment or activity currently held or performed as of the date hereof*" (see Recital (40)).

(157) Telefónica submits that by introducing that exclusion in the wording of the clause, it aimed at reducing the broad scope of the original wording of the clause proposed by PT to the narrower scope of the clause included in the Agreement.[140] The wording of the exclusion ("*excluding any investment or activity currently held or performed as of the date hereof*") read in conjunction with the reference to "*Iberian market*" would allegedly mean that it was sufficient that Telefónica and PT competed in the provision of a specific telecommunication service in any part of the Iberian Peninsula to exclude such services from the scope of the clause in the whole Peninsula and that each party would therefore able to provide such services anywhere in the Iberian

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137 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 258 and 434.

138 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 281 to 286, and 394. PT analyses the Portuguese electronic communications markets from that perspective in paragraphs 288 to 392.

139 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 286.

140 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 64.

Peninsula.[141] In particular, despite the explicit reference in the clause to fixed and mobile telephony, internet and television services, Telefónica submits that, with the addition of that exclusion, it was confident that it would have strong arguments to justify an interpretation of the clause excluding such services.[142] Finally, Telefónica argues that in any event the clause did not prevent the parties from taking preparatory steps to start new activities once the clause had expired.[143]

(158) As regards the exclusion included in the clause referred to Recitals (156) and (157), PT generally observes that it does not include any specific reference to the kind or amount of investment necessary to fall within the scope of the exclusion, nor is there any indication as to the form in which the relevant telecommunications activities should be developed by the parties on the Iberian market.[144] Thus, PT submits that all activities directly or indirectly developed by one party at the time of the Agreement, regardless of their form could fall within the scope of the exclusion.

(159) PT confirms that that exclusion to the scope of the clause was proposed by Telefónica and submits that it understood that Telefónica's aim was to keep as much freedom of action as possible.[145] According to PT, the exclusion meant that Telefónica wanted to be free to carry on developing both old and new projects in the sectors where it was already present at the time of the Agreement. In PT's opinion, this last interpretation would be easier to defend than other possible interpretations, as it would follow from the wording of the exclusion and the supposed aim of Telefónica. In addition, it would avoid the "redundancy" of the clause (PT does not explain, however, what this "redundancy" is) and would not conflict with the interest of PT in having the clause (which PT appears to mainly connect with the protection of its confidential information, in particular regarding its corporate customers).[146] As a result, PT does not agree with the preliminary conclusion of the Statement of Objections that the clause was merely aimed at permitting the parties to maintain their existing investments, but understands that the clause also provided for the possibility to develop business in which the parties were already competing.

(160) The Commission does not agree with the interpretation of the parties of the scope and obligations provided for by the clause.

(161) The parties cannot be considered to perform the activities developed by companies which they do not control. Moreover, in the event that such activities would be relevant for the determination of the scope of the clause, they would also be relevant for the compliance with the clause. That is to say, the commencement of a prohibited activity by a participated company which is not controlled by one of the parties to these proceedings would constitute an infringement of the clause.

(162) In that regard, the Commission considers that the parties cannot claim to have assumed any obligation in the name and on behalf of companies in which they have a

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141 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 263 to 265.
142 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 266.
143 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 278.
144 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 188 and 189.
145 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 190.
146 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 190 to 192.

minority stake and that they do not control, as they would not be able to ensure compliance with such an obligation.

(163) Thus, the Commission considers that, in order for an activity to be excluded from the scope of the clause, it should be performed directly by the party or indirectly by a controlled company.

(164) Finally, the Commission considers that substantive modifications to activities or investments performed or held by the parties at the date of the Agreement (for example, acquiring a stake in a company whereby control would be acquired) would qualify as new project under the clause and therefore would be prohibited by it.

5.2.4.2. The minority stake in ZON

(165) Telefónica submits that, in view of its 5.46% minority shareholding in ZON, any activity performed by ZON at the date of the Agreement should be considered to be performed by Telefónica for the purposes of the clause and therefore be excluded from its scope. That submission is supported, in Telefónica's view, by: (a) the parties' responses to the request for information of 5 January 2011, which referred to Telefónica's stake in Portuguese companies when describing Telefónica's activities in Portugal; (b) the Commission's Statement of Objections which makes a cross-reference to a paragraph which refers to ZON in connection with Telefónica's activities in Portugal; and (c) the e-mail dated 6 July 2010 (see Recital (49)), which refers to the sale of Telefónica's stake in ZON as a way to reinforce the clause.[147] In addition, Telefónica submitted that its presence in the company shareholding was particularly relevant given that ZON's statute provides for a cap of 10% of shares for the calculation of the number of votes that can be expressed by a single shareholder of the company.[148]

(166) Therefore, Telefónica claims that fixed and mobile telephony services, Internet and broadband services, data transmission services and audio-visual services, such as pay-TV services, should be excluded from the scope of the clause, as ZON provides those services.[149]

(167) PT submits that the activities performed by ZON should be excluded from the scope of the clause as a consequence of the 5.46% stake in ZON held by Telefónica at the time of the Agreement and whereby Telefónica is one of the four most important shareholders of ZON.[150]As a result of that holding, the following markets in which ZON was active in Portugal should be excluded from the scope of the clause: (a) retail and wholesale fixed telephony markets; (b) retail market for the provision of

147 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 269 to 277. As regards the brainstorming exercise, see the recital (49).

148 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 24.

149 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 270. Telefónica also argues that in September 2010 ZON launched its data transmission services for large corporations. This would prove that Telefónica could continue to operate in the sector in which it was already present at the date of the Stock Purchase Agreement. Reply of Telefónica to the Statement of Objections, Document ID 0763, footnote 128.

150 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 197.

leased lines; (c) retail mobile telephony market; (d) retail market for access to broadband; and (e) retail market for the provision of pay-TV services.[151]

(168) With particular regard to the corporate sector, PT submits that Telefónica is active in Portugal, directly in the provision of access to the public network for international corporate customers, and indirectly through ZON in the provision of services to international corporate customers, small office home office (SOHO) and small medium businesses (SMB) enterprises. According to PT, those segments should therefore be excluded from the scope of application of the clause. On the other hand, PT submits that Telefónica is not directly or indirectly present in the market for the provision of telecommunications services to large national corporate customers. As a result, PT submits that this sector would be covered by the scope of the clause. Allegedly, this would be in line with the genesis and ratio of the clause.[152]

(169) PT also submits that as long as certain retail markets should be excluded from the scope of the clause, the corresponding wholesale markets should also be excluded given that they are normally complementary to the retail markets.[153]

(170) The Commission cannot accept the parties' submission that ZON's activities should be excluded from the scope of the clause. As referred to in Section 5.2.4.1, in order to consider that the parties were competing in Portugal via Telefónica's investment in ZON, they should have demonstrated that Telefónica controlled ZON's activities. However, as it appears from Telefónica's 2011 annual accounts, Telefónica does not have control over the Portuguese operator.[154]

(171) Moreover, it is not correct that, as alleged by Telefónica, the Statement of Objections may imply, via cross references or in any manner, that the ZON stake would entail that the activities performed by ZON should be excluded from the scope of the clause, nor that such a conclusion could be inferred from the parties' reply to the request for information[155] or from the internal brainstorming of 6 July 2010 (see Recital (49)), which considered the sale by Telefónica of its stake in ZON as a reinforcement of the clause.

(172) Finally, as regards PT's argument that the clause would only target the provision of telecommunications services to large national corporate customers, it is worth noting that the wording of the clause does not suggest that the clause should be limited to the corporate segment.

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151 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 196 to 256.

152 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 257 to 265. See also footnote 21.

153 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 187.

154 Telefónica 2011 Annual Accounts, Document ID 0952, p. 170.

155 In this respect, it should be noted that in the reply of Telefónica to the question of the request for information of 25 May 2011 relating to Telefónica's presence in Portugal, the company stated that, as regards retail markets, it was only present in the market for access to the public network at fixed location for non-residentail customers, via its wholly owned subsidiary TIWS Portugal. See reply of Telefónica to request for information of 25 May 2011, Document ID 0474, p. 6.

5.2.4.3. Markets for services in connection with multinational customers

(173) Both Telefónica and PT submit that, as accepted by the Statement of Objections, both parties were present on the markets for the provision of global telecommunication services and wholesale international carrier services. Those markets should, therefore, also be excluded from the scope of the clause.[156]

(174) The Commission agrees with the parties that, in light of the wording of the clause, the provision of global telecommunication services and wholesale international carrier services should be excluded from the scope of the clause given that both parties were present on these markets at the date of the Agreement.

5.2.5. The geographic scope of the clause

(175) Telefónica submits that the reference to the "*Iberian market*" in the clause was included by PT in the second offer of 1 June 2010 and had an unclear meaning and purpose. According to Telefónica, it was, however, clear that it does not refer to the geographic relevant market as understood by competition law, as it is not possible to define an "Iberian market" as such in the telecommunications sector.[157] Telefónica therefore submitted that the interpretation in the Statement of Objections of the geographic scope of the clause as covering Spain and Portugal was not supported by the wording of the clause.[158] According to Telefónica, there was no indication that Telefónica would not compete in Portugal or that PT would not compete in Spain. The Commission would be wrong in assuming that the wording "*Iberian market*" refers to the geographic scope of application of the possible non-compete agreement and not to the kind of services in which the parties would be competing and to which the agreement would be applicable.[159]

(176) On the other hand and as referred to in Recital (157), Telefónica submits that the reading of the exclusion ("*excluding any investment or activity currently held or performed as of the date hereof*") in conjunction with the reference to "*Iberian market*" would mean that it would be sufficient that Telefónica and PT competed in the provision of a specific telecommunication service in any part of the Iberian Peninsula to exclude such services from the scope of the clause in the whole Iberian Peninsula and that each party would therefore be able to provide such services anywhere in the Iberian Peninsula.

(177) Likewise, according to PT, the reference to the Iberian market was intended to guarantee the equivalence of obligations under the clause, meaning that whenever a party was competing on one relevant market in either Portugal or Spain, this market should be excluded from the scope of the clause in the whole Iberian Peninsula for both parties.[160]

(178) In the Commission's view, the reference in the clause to the "*Iberian market*" and the parties' stated interpretation of this wording is insufficient to conclude that the scope

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156 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 450 to 452, 467 to 468 and 481. Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 246 and 247.

157 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 259.

158 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 248.

159 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 248.

160 Reply of PT to the Statement of Objections, Document ID 0763, paragraph 177.

of the clause would be the same for both parties. The reference to the Iberian market should not be read as meaning that if any party competes with the other in one part of the Iberian Peninsula, that is to say, Spain or Portugal, any markets for the same services in the Iberian Peninsula should be excluded from the scope of the clause for both Spain and Portugal. As regards markets with a national scope, the fact that Telefónica and PT would compete in one of these markets, in Spain or in Portugal, cannot mean that they would be "*deemed in competition with the other*" in a different Member State. By definition, the presence of one party in a national market would not entail any competitive pressure in a different territory.

(179) In addition, although Telefónica mentions in its reply to the Statement of Objections the possibility that the clause may refer to "Iberian services", it does not identify those services in the reply to the Statement of Objections and, on the other hand, it also points out that there are no markets which would correspond to the Iberian Peninsula.

(180) If the parties' intention had been to provide for the equivalence of the scope of the clause for both parties, they could have clearly and expressly provided for it in the wording of the clause rather than relying on artificial interpretations of the clause.

(181) Moreover, such equivalence would only have a significant practical impact in the event that the argument of the parties in connection with the activities of ZON is accepted, as in that event the clause would not prevent competition in Spain regarding the electronic communications markets where ZON is present in Portugal. However, as explained in Recitals (165) to (172), the argument in relation to ZON cannot be accepted by the Commission.

(182) The Commission concludes that in the light of the matters referred to in Section 5.2.5 and, in particular, the wording of the clause, the clause refers to the markets in the Iberian Peninsula, that is to say Spain and Portugal.

5.2.6. Conclusion on the scope of the clause

(183) In their replies to the Statement of Objections Telefónica and PT reach different conclusions as to the scope of the clause. On the one hand, Telefónica essentially claims that the clause had no scope.[161] On the other hand, according to PT, the clause could only target the market for the provision of telecommunication services to large national customers.[162]

(184) The arguments of the parties concerning the scope of the clause cannot be accepted. On the contrary, the Commission considers that the non-compete clause applies to all markets covered by its wording, with the exception of the markets for global

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[161] Telefónica submits that the clause would have a "*very limited*" or "*almost empty*" scope (reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 101, 144, 249 and 284 and reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, paragraphs 11 to 34). The application of Telefónica's argument on ZON (together with its other reasoning on the scope of the clause, such as the clause being limited to electronic communications services, and the exclusion of markets in connection with services related to multinational customers) leads however to the practical result that, in Telefónica's view, the clause would have no scope (reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 437 to 506).

[162] See recital (168).

telecommunication services and wholesale international carrier services (see Section 5.2.4.3), where both parties were present in the Iberian Peninsula at the date of the Agreement. In addition, the exclusion provided in the clause should be read as giving the parties the rights not to discontinue the activities performed, directly or indirectly by means of a controlled company, at the date of the Agreement, and not to divest any investment held at the date of the Agreement.

(185) Therefore, the Commission takes the view that the definition of the scope as set out in Section 5.1 of this Decision should be maintained. Accordingly, the clause would cover all markets for electronic communications services and television in Spain and Portugal, with the exception of the markets for global telecommunication services and wholesale international carrier services.

5.3. Relevant product markets

(186) In this case the precise limits of the definition of each of the relevant markets may be left open given the broad scope of the clause. The Commission lists in Section 5.3 the different relevant markets in accordance with the lines identified in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services[163], and Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services[164] and in accordance with previous Commission's decisions and case-law. The list set out in Section 5.3 corresponds with the list of markets included in the Statement of Objections dated 21 October 2011.

5.3.1. Markets relating to fixed telephony

(187) The following retail and wholesale product markets have generally been identified by the Commission in connection with fixed telephony services[165]:

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163 OJ L 344, 28.12.2007, p. 65.

164 OJ L 114, 8.5.2003, p.45.

165 See, for example, Commission Decision of 13 October 1999 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case IV/M.1439 Telia/Telenor) according to Council Regulation (EEC) No 4064/89 (OJ L 40, 9.2.2001, p. 1); Commission decision of 10 July 2002 declaring a concentration to be compatible with the internal market (Case No COMP/M.2803 – Telia/Sonera) according to Council Regulation (EEC) No 4064/89 (OJ C 201, 24.8.2002, p. 19); Commission Decision of 10 June 2005 declaring a concentration to be compatible with the internal market (Case No COMP/M.3806 - Telefónica/Cesy Telecom) according to Council Regulation (EC) No 139/2004 (OJ C 156, 28.06.2005, p. 2); Commission Decision of 7 September 2005 declaring a concentration to be compatible with the internal market (Case No COMP/M.3914 – Tele2/Versatel) according to Council Regulation (EC) No 139/2004 (OJ C 236, 24.09.2005, p. 8); Commission Decision of 11 January 2006 declaring a concentration to be compatible with the internal market (Case No COMP/M.4035 - Telefónica/O2) according to Council Regulation (EC) No 139/2004 (OJ C 29, 20.04.2006, p. 14); Commission Decision of 21 September 2007 declaring a concentration to be compatible with the internal market (Case No COMP/M.4809 – France Telecom/ Mid Europa

(a) Access to the public telephone network at a fixed location for residential customers and non-residential customers: Access to the public telephone network at a fixed location includes the provision of a connection or access, at a fixed location or address, to the public telephone network for the purpose of making or receiving telephone calls and related services. This connection can be provided via traditional telephone networks using metallic twisted pairs, cable TV networks offering telephone service, mobile cellular networks that have been adapted to provide an equivalent service to fixed locations or which are confined to a limited radius around a fixed location, and other wireless-based networks.

(b) Publicly available local, national and international telephone services provided at a fixed location for residential and non-residential customers: Publicly available telephone services are usually supplied as overall packages of access and usage although some end-users choose alternative undertakings to the one providing access and the receipt of calls in order to make some or all of their outgoing calls. Fixed telephone services include fixed-to-fixed as well as fixed-to-mobile calls. Local and national calls, on the one hand, and international calls, on the other hand, usually belong to different relevant markets. Different market segments for residential and non-residential customers may also apply.

Wholesale markets

(c) Call origination on the public telephone network provided at a fixed location: Call origination on the public telephone network provided at a fixed location refers to the collecting of the calls initiated by a calling party on a telephone exchange of the public switched telephone network ("PSTN"), and to the handing off of the calls to a Voice over Internet Protocol ("VoIP") endpoint or to another exchange or telephone company for completion to a called party. This wholesale market comprises call origination for telephone calls and for the purposes of accessing dial-up Internet service provision.

(d) Call termination on individual public telephone networks provided at a fixed location: Call termination on individual public telephone networks provided at a fixed location is required in order to terminate fixed or mobile calls to called locations or subscribers. Since there is no substitute for call termination on each operator's network, each operator's network is a separate product market.

(e) Transit services in the fixed public telephone network: Transit services in the fixed public telephone network involve the transmission and switching or routing of calls and are complementary to wholesale call origination and call termination services. This market comprises conveyance both between

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Partners/One) according to Council Regulation (EC) No 139/2004 (OJ C 56, 29.2.2008, p. 2); Commission Decision of 29 June 2009 declaring a concentration to be compatible with the internal market (Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK) according to Council Regulation (EC) No 139/2004 (OJ C 170, 22.7.2009, p. 12); and Commission Decision of 29 January 2010 declaring a concentration to be compatible with the internal market (Case No COMP/M.5730 - Telefónica/Hansenet Telekommuniation) according to Council Regulation (EC) No 139/2004 (OJ C 57, 09.03.2010, p. 9).

switches on a given network and between switches on different networks, and includes pure conveyance across a third network.

(188) The markets referred to in Recital (187) were also identified by the Spanish and Portuguese NRAs in Spain and Portugal, respectively[166], in accordance with Directive 2002/21/EC.

5.3.2. Markets relating to leased lines

(189) The following retail and wholesale product markets have generally been identified by the Commission in connection with leased lines services[167]:

Retail market

(f) Retail leased lines market: A leased line provides for a permanent and defined transmission capacity between termination points in a communications network. At the retail level, dedicated capacity or leased lines may be required by end-users to construct networks or link locations or by undertakings that in turn provide services to end-users. The key elements in the demand for and supply of dedicated connections are service guarantees, bandwidth, distance and the location or locations to be served. There may also be qualitative characteristics as there could be differences between voice grade and data grade circuits.

Wholesale markets

(g) Wholesale terminating segments of leased lines: At wholesale level, the terminating segments of a leased circuit, sometimes called local tails or local

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166 CMT decisions of: (a) 12 December 2008 on the definition and analysis of the wholesale market for access and call origination on the public telephone network provided at a fixed location, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=cfdecd8c-11fd-451d-ba0f-3e6ff9de17e8&groupId=10138, (b) 18 December 2008 on the definition and analysis of the markets for call termination on individual public telephone networks provided at a fixed location, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=99fce230-26ba-4dd6-bd71-a3afa0258888&groupId=10138, (c) 13 December 2012 on the definition and analysis of the retail market for access to the public telephone network at a fixed location, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=8974af20-001d-4c58-a304-997f7599f055&groupId=10138 and (d) 1 October 2009 on the definition and analysis of the wholesale market for transit services in the fixed telephone network, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=11ca7314-11fe-44b3-a6fa-f83e4fc472d6&groupId=10138. ANACOM decisions of (a) 8 July 2004 on Definition of relevant markets for low bandwidth switched fixed services and SMP assessments, available at http://www.anacom.pt/render.jsp?contentId=409607&languageId=0 and of (b) 25 May 2005 on Market of transit services in the fixed public telephone network, available at http://www.anacom.pt/render.jsp?contentId=404834.

167 See for example Commission Decision of 27 July 2007 declaring a concentration to be compatible with the internal market (Case No COMP/M.4721 - AIG Capital Partners/ Bulgarian Telecommunications Company) according to Council Regulation (EC) No 139/2004 (OJ C 245, 19.10.2007, p. 6) and Commission Decision in Case No COMP/M.5730 - Telefónica/Hansenet Telekommuniation.

segments, usually connect the customer premises and the first network node. The relevant market for terminating segments of leased lines comprises all the connections capable of providing leased or dedicated capacity irrespective of the technology used.

(h) Wholesale trunk segments of leased lines: Wholesale trunk segments of leased lines are a complement to terminating segments, as both of them need to be purchased in order to provide an end-to-end leased line. A trunk segment is a high-capacity leased line which usually connects networks and does not include an end-user connection.

(190) The markets referred to in Recital (189) were also identified by the Spanish and Portuguese NRAs in Spain and Portugal, respectively, in accordance with Directive 2002/21/EC.[168]

5.3.3. Markets relating to mobile telephony

(191) The following retail and wholesale product markets have generally been identified by the Commission in connection with mobile telephony services[169]:

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[168] CMT decisions of: (a) 2 July 2009 on the definition and analysis of the market for wholesale trunk segments of leased lines, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=f6c94039-71ac-4779-9739-6436790d36d1&groupId=10138 and (b) 23 July 2009 on the definition and analysis of the markets for the minimum set of leased lines and for wholesale terminating segments of leased lines, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=50077647-5d61-4c17-ad5f-5f46fd7ba3f5&groupId=10138. ANACOM decision of 28 September 2010 on reanalysis of the retail and wholesale leased lines markets, available at http://www.anacom.pt/render.jsp?contentId=999392&languageId=0.

[169] See for example Case Commission Decision of 18 December 2000 declaring a concentration to be compatible with the internal market (Case COMP/M.1863 – Vodafone/BT/Airtel) according to Council Regulation (EEC) No 4064/89 (OJ C42, 08.02.2001, p. 11); Commission Decision of 26 June 2001 declaring a concentration to be compatible with the internal market (Case COMP/M.2469 – Vodafone/Airtel) according to Council Regulation (EEC) No 4064/89 (OJ C207, 25.07.2001, p. 9); Commission Decision of 7 March 2002 declaring a concentration to be compatible with the internal market (Case No COMP/M.2726 - KPN / E-Plus) according to Council Regulation (EEC) No 4064/89 (OJ C 79, 3.4.2002, p. 12)*;* Commission Decision in Case No COMP/M.2803 - Telia/Sonera; Commission Decision of 16 September 2003 declaring a concentration to be compatible with the internal market (Case No COMP/M.3245 - Vodafone/Singlepoint) according to Council Regulation (EEC) No 4064/89 (OJ C 242, 9.10.2003, p. 5); Commission Decision of 24 September 2004 declaring a concentration to be compatible with the internal market (Case No COMP/M.3530 - Teliasonera/ Orange DK) according to Council Regulation (EC) No 139/2004 (OJ C 263, 26.10.2004, p. 7); Commission Decision in Case No COMP/M.3806 – Telefónica/Cesky Telecom*;* Commission Decision of 26 April 2006 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.3916 — T-Mobile Austria/Tele.ring) according to Council Regulation (EC) No 139/2004 (OJ L 88, 29.3.2007, p. 44); Commission Decision of 22 December 2005 declaring a concentration to be compatible with the internal market (Case No COMP/M.4034 - Telenor/Vodafone Sverigz) according to Council Regulation (EC) No 139/2004 (OJ C 71, 23.03.2006, p. 13); Commission Decision in Case No COMP/M.4035 – Telefónica/O2; Commission Decision of 20 August 2007 declaring a concentration to be compatible with the internal market (Case No COMP/M.4748 - T-Mobile/Orange Netherlands) according to Council Regulation (EC) No 139/2004 (OJ C 243, 17.10.2007, p. 1*)*; Commission Decision of 27 November 2007 declaring a concentration to be compatible with the internal market (Case No COMP/M.4947 - Vodafone/Tele2 Italy/Tele2 Spain) according to Council Regulation (EC) No 139/2004 (OJ C 300, 12.12.2007, p. 4*);* Commission

Retail market

(i) Retail mobile market: The retail mobile market includes a "cluster" of services, such as local, national and international and roaming calls and short message service (SMS). All these services are generally included in the same market given that consumers usually buy a bundle of services from one mobile operator and not individual services from different operators. In previous Commission decisions, the Commission did not further subdivide the market by type of customer, that is to say, corporate or private, post-paid subscribers or pre-paid customers, or by type of network technology, that is to say, second generation (2G)/GSM or third generation (3G)/UMTS networks.

Wholesale markets

(j) Access and call origination on public mobile telephone networks: Access and call origination are key inputs to produce retail mobile services as they allow for third-party access to a given mobile network. These services are usually jointly supplied by network operators to mobile virtual network operators (MVNOs) and Service Providers. Hence, both services may be considered as part of the same relevant market.

(k) Voice call termination on individual mobile networks: Mobile call termination is an input both to the provision of mobile calls that terminate on other mobile networks, and to calls that are originated by callers on networks serving fixed locations that terminate on mobile networks. There is no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended addressee only through the operator of the network to which the addressee is connected "as a guest". Each individual network therefore constitutes a separate market for termination.

(l) Wholesale national market for international roaming on public mobile networks: International roaming is a service which allows mobile subscribers to use their mobile handsets and subscriber identity module (SIM) cards to make and receive calls, to send and receive text messages and to use other data services when abroad. In order to be able to offer this service to their customers, mobile network operators conclude wholesale agreements with one another providing access and capacity on mobile networks in foreign countries. International wholesale roaming services are thus provided by a domestic mobile network operator, that is to say, a visited network, to a mobile network operator in another country that is to say, a home network.

Decision of 2 October 2008 declaring a concentration to be compatible with the internal market (Case No COMP/M.5148 – Deutsche Telekom/OTE) according to Council Regulation (EC) No 139/2004 (OJ C 303, 26.11.2008, p. 1)*;* Commission Decision of 1 March 2010 declaring a concentration to be compatible with the internal market (Case No COMP/M.5650 - T-Mobile/Orange) according to Council Regulation (EC) No 139/2004 (OJ C 108, 28.4.2010, p. 4); and Commission Decision in Case No COMP/M.5730 – Telefónica/Hansenet Teleommunikation.

(192) The markets referred to in Recital (191) were also identified by the Spanish and Portuguese NRAs in Spain and Portugal, respectively, in accordance with Directive Directive 2002/21/EC.[170]

5.3.4. Markets relating to Internet access

(193) The following retail and wholesale product markets have usually been identified by the Commission in connection with Internet access services[171]:

Retail market

(m) Retail broadband internet access market: Internet access services consist of the provision of a telecommunications link enabling customers to access the internet. The relevant retail internet broadband access market comprises all the non-differentiated broadband products, whether provided through Asymmetric Digital Subscriber Line ("ADSL") or any other fixed technology (for example, cable TV networks, fixed wireless access, fibre and power line communications) marketed in the “mass market” for both residential and non-residential users. The relevant market for broadband internet access is generally considered separate from narrowband internet access, mobile access and tailor-made broadband solutions (the latter are mainly targeted at large corporations).

Wholesale markets

(n) Wholesale (physical) network infrastructure access, including shared or fully unbundled access, at a fixed location: Internet service providers which do not own local loop infrastructure have essentially two options to reach their retail customers: wholesale (physical) network infrastructure access and wholesale broadband access. Access to the wholesale (physical) network infrastructure

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170 CMT decisions of: (a) 2 February 2006 on the definition and analysis of the market for the access and call origination on public mobile telephone networks, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=e21f1b8c-5a5f-4aa0-82f5-a91f490f6cb5&groupId=10138 and (b) 10 May 2012 on the definition and analysis of the market for voice call termination on individual mobile networks, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=bd0a3696-8625-45d2-90dc-7c25a21459ea&groupId=10138. ANACOM decision of 18 May 2010 on wholesale markets for voice call termination on individual mobile networks, available at http://www.anacom.pt/render.jsp?contentId=1026366&languageId=0.

171 See, for example, Commission Decision of 16 July 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/38.233 - Wanadoo Interactive) (OJ C 289, 29.11.2003, p. 34); Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/38.784 — Wanadoo España v Telefónica) (OJ C 83, 2.4.2008, p. 6); Commission Decision of 28 November 2006 declaring a concentration to be compatible with the internal market (Case No COMP/M.4417 - Telecom Italia/AOL German Access Business) according to Council Regulation (EC) No 139/2004 (OJ C 21, 30.01.2007, p. 1); Commission Decision in Case No COMP/M.5532 - Carphone Warehouse/Tiscali UK) ; Commission Decision in Case No COMP/M.5730 – Telefónica/Hansenet Telekommunikation; and Commission Decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case COMP/39.525 — Telekomunikacja Polska) (OJ C 324, 9.11.2011, p. 7).

demands a higher level of network roll-out by alternative operators and allows for the provision of more differentiated retail offers. By using wholesale network infrastructure access, which includes local loop unbundling, alternative operators are able to control a substantial part of the overall value chain.

(o) Wholesale broadband access: Wholesale broadband access comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. The wholesale services included typically give less flexibility over the retail service than local loop unbundling.

(194) The markets referred to in Recital (193) were also identified by the Spanish and Portuguese NRAs in Spain and Portugal, respectively, in accordance with Directive 2002/21/EC.[172]

5.3.5. Markets relating to the provision of cross-border services

(195) The following retail and wholesale product markets have generally been identified by the Commission in connection with the provision of cross-border services[173]:

Retail market

(p) Global telecommunication services: The market for global telecommunications services includes the provision of value-added and enhanced services to multinational business customers. The characteristics of these services are in a state of constant evolution as a result of technological progress. Internet Protocol (IP) solutions, which allow for the transmission of data and voice at a lower cost and a higher quality standard, have been gradually replacing protocols such as X.25, Frame Relay and Asynchronous Transfer Mode **(**ATM). Amongst the most important features of the services provided to

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172 CMT decision of 22 January 2009 on the definition and analysis of the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and the market for wholesale broadband access, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=e64d16cf-e494-48e3-8cc7-d67e2f210db1&groupId=10138. ANACOM decision of 14 January 2009 on markets for wholesale network infrastructure access at a fixed location and broadband access, available at http://www.anacom.pt/render.jsp?contentId=812378.

173 See, for example, Commission Decision of 30 March 1999 in Case IV/JV.15 – BT/AT&T; Commission Decision of 21 March 2001 declaring a concentration to be compatible with the internal market (Case No COMP/M.2257 - France Telecom/Equant) according to Council Regulation (EEC) No 4064/89 (OJ C 187, 03.07.2001, p.8); Commission Decision of 16 January 2002 declaring a concentration to be compatible with the internal market (Case No COMP/M.2648 - Kpnqwest/Ebone/GTS) according to Council Regulation (EEC) No 4064/89 (OJ C34, 07.02.2002, p. 10); Commission decision of 2 September 2005 declaring a concentration to be compatible with the internal market (Case No COMP/M.3752 - Verizon/MCI) according to Council Regulation (EC) No 139/2004 (OJ C 309, 07.12.2005, p.10); Commission Decision of 19 May 2005 declaring a concentration to be compatible with the internal market (Case No COMP/M.3764 - Belgacom/Swisscom/JV) according to Council Regulation (EC) No 139/2004 (OJ C 181, 23.07.2001, p. 11); Commission Decision in Case No COMP/M.4809 – France Telecom/Mid Europa Partners/One; Commission Decision in Case No COMP/M.5148 – Deutsche Telekom/OTE; and Commission Decision of 26 October 2009 declaring a concentration to be compatible with the internal market (Case No COMP/M.5584 - Belgacom/Bics/MTN) according to Council Regulation (EC) No 139/2004 (OJ C 35, 12.2.2010, p. 1).

multinational customers are tailored capacity allocation, help-desk and technical assistance, end-to-end seamless provision, provision of these services over high-speed capacity leased lines, and full responsibility of the provider of such services for all the services contained in the package from "end to end".

Wholesale market

(q) Wholesale international carrier services: The market for international carrier services comprises the lease of capacity and the provision of related services to third-party telecommunications carriers and other service providers, for example switched transit, traffic hubbing, offerings and reseller services for service providers without their own international facilities.

5.3.6. Markets relating to TV services

(196) The following retail and wholesale product markets have usually been identified by the Commission in connection with television (TV) services[174]:

Retail market

(r) Retail pay-TV services: Retail pay-TV services correspond to the provision of TV programmes and channels, mainly through packaged offers, to the end-users, that is to say, the viewers. Free-To-Air ("FTA") television is usually considered a different product market, in particular, due to the fact that advertising income and State contribution is used to cover costs. Pay-TV services, on the other hand, rely mainly on viewers' monthly subscriptions. The relevant market for pay-TV services encompasses the distribution of TV services over all categories of means of transmission or infrastructure, for example, cable networks, satellite and digital subscriber lines (DSL).

Wholesale market

(s) Broadcasting transmission services: This wholesale market for broadcasting transmission services is the market where distributors (network operators) and broadcasters negotiate the terms and conditions for the distribution of TV and radio signals to end-users. Depending on the respective bargaining power, the outcome of the negotiation will be that either the broadcaster will pay a fee for the transmission of the signal ("a carriage fee") to the distributor, or

[174] See, for example, Commission Decision of 15 June 2004 declaring a concentration to be compatible with the internal market (Case No COMP/M.3355 - Apollo/JP Morgan/Primacom) according to Council Regulation (EC) No 139/2004 (OJ C 206, 14.8.2004, p. 5); Commission Decision of 13 July 2006 declaring a concentration to be compatible with the internal market (Case No COMP/M.4204 - Cinven/UPC France) according to Council Regulation (EC) No 139/2004 (OJ C 188, 11.08.2006, p. 3); Commission Decision of 18 July 2007 declaring a concentration to be compatible with the internal market and the functioning of the EEA Agreement (Case No COMP/M.4504 — SFR/Tele 2 France) according to Council Regulation (EC) No 139/2004 (OJ L 316, 4.12.2007, p. 57); Commission Decision of 26 February 2007 declaring a concentration to be compatible with the internal market (Case No COMP/M.4521 - LGI / Telenet) according to Council Regulation (EC) No 139/2004 (OJ C 99, 3.5.2007, p. 3); Commission Decision of 25 June 2008 declaring a concentration to be compatible with the internal market (Case No COMP/M.5121 - News COorp/Premiere) according to Council Regulation (EC) No 139/2004 (OJ C 219, 28.8.2008, p. 2); and Commission Decision of 11 March 2010 in Case NO COMP/M.5748 – Prisa/Telefónica/Telecinco/Digital +.

alternatively the distributor will pay royalties (or "licence fees") to the broadcaster. Several infrastructures can be used for the purpose of transmitting TV signals, for example cable, satellite, Digital Terrestrial Television ("DTT") and Internet Protocol Television ("IPTV") over DSL networks.

(197) The markets referred to in Recital (196) were also identified by the Spanish and Portuguese NRAs in Spain and Portugal, respectively, in accordance with Directive 2002/21/EC.[175]

5.4. Relevant geographic markets

(198) The relevant product markets referred to in Section 5.3 are generally considered by the Commission and NRAs to have a national dimension. However, in some instances a narrower market definition applies. Such a narrower geographic market definition is not relevant in this case given the geographic scope of the clause.

(199) The markets relating to cross-border services are the only two exceptions where the geographic market definition may be broader than national. The geographic scope of the global telecommunications services market was considered to be global in previous Commission decisions since the services in question, as well as the customers it intends to serve, are international or global.[176] The wholesale international carrier services market, by its very nature, is at least cross-border.

5.5. The parties' presence in the relevant markets

(200) In this Section, the Commission analyses the presence of Telefónica and PT in the relevant markets defined in Section 5.3. Both companies were designated by their NRAs as Significant Market Power ("SMP")[177] operators in a large number of the relevant markets in Spain and in Portugal, respectively, under the analyses carried out in accordance with the European regulatory framework for electronic communications.[178]

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175 CMT decision of 21 May 2009 on the definition and analysis of the market for television broadcasting transmission services, the designation of the SMP operator and imposition of specific obligations, available at http://www.cmt.es/c/document_library/get_file?uuid=b19daf0b-5e7f-4348-a0e6-c45865b9f566&groupId=10138. ANACOM decision of 2 August 2007 on wholesale market of broadcasting services for the delivery of content transmitted to final users, available at http://www.anacom.pt/render.jsp?contentId=507464&languageId=0.

176 See recital (195).

177 See footnote 180.

178 The European regulatory framework for electronic communications networks and services consists of a series of Directives adopted in 2002 including Directive 2002/21/ECDirective 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37). Under the European regulatory framework for electronic communications networks and services, NRAs are required to carry out periodic reviews of certain

(201) It should be recalled that no SMP or dominant position is required for a finding of infringement of Article 101(1) of the Treaty. The degree of market power normally required for the finding of an infringement under Article 101(1) of the Treaty in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 102 of the Treaty, as indicated in paragraph 26 of the Guidelines on the application of Article 81(3) of the Treaty (the "Article 101(3) Guidelines").[179] Moreover, the assessment of market power is less relevant in the case of infringements by object (see Section 6.3).

5.5.1. Telefónica

(202) Table 2, based on the results of the last round of market analyses undertaken by the Spanish NRA, *Comisión del Mercado de las Telecomunicaciones* ("CMT"), under the European regulatory framework for electronic communications[180], shows that Telefónica is present with high market shares in many electronic communications markets. In particular, CMT found that Telefónica holds SMP in the seven markets identified by Commission Recommendation 2007/879/EC as susceptible of *ex ante* regulation[181]. CMT is conducting a further round of market analysis at the time of this Decision, which includes the review of the market analysis of 2008 and 2009 identified in Table 2.

Table 2: CMT SMP Assessments

Market	Date of CMT decision	Telefónica's market share (%)	SMP
1. Retail access (fixed)	13 December 2012	56.1	Yes
2. Call origination (fixed)	12 December 2008	88.5	Yes
3. Call termination (fixed)	18 December 2008	100	Yes
4. Wholesale network infrastructure access	22 January 2009	100	Yes
5. Wholesale broadband access (bitstream)	22 January 2009	60.1*	Yes
6. Leased lines (wholesale terminating segments)	23 July 2009	70	Yes
7. Call termination (mobile)	10 May 2012	100	Yes
Retail markets for telephony services (fixed) (former markets 3-6)	18 December 2008	66.4	No[182]
Transit services (former	1 October 2009	60.2	No[183]

markets listed in Commission Recommendation 2007/879/EC. Those market analyses are required to be carried out on a prospective basis applying European Union competition law principles, and based on them, NRAs may designate undertakings with significant market power (SMP), if any, and establish the *ex ante* regulatory obligations to be placed on such undertakings. The NRA's draft measures are required to be notified to the European Commission under Article 7 of Directive 2002/21/EC.

179 OJ C 101, 27.4.2004, p. 97.

180 See footnote 178.

181 Commission Recommendation 2007/879/EC.

182 CMT considered this market as not susceptible to ex ante regulation.

Market	Date of CMT decision	Telefónica's market share (%)	SMP
market 10)			
Leased lines (wholesale trunk segments) (former market 14)	2 July 2009	39	Yes (regarding certain maritime lines)

* National market share for retail broadband services.

Source: Commission, based on the CMT decisions which are mentioned in the Table

5.5.1.1. Markets relating to fixed telephony

(203) Telefónica owns the only nationwide local access network in Spain. In 2011, the Spanish incumbent had a 63.9% market share in terms of volume in the retail market for access to the public telephone network at a fixed location.[184]

(204) At wholesale level, Telefónica's market share by revenue in the market for call origination on the public telephone network provided at a fixed location was 98.53% in 2011[185]. In the market for call termination on individual public telephone networks provided at a fixed location, Telefónica's market share corresponded to 100% regarding its network. Finally, Telefónica had a 42.33% market share by revenue in 2011 in the market for transit services in the fixed public telephone network.[186]

(205) In the market analyses carried out in 2012 and 2008, Telefónica was designated as an SMP operator by CMT in the markets for access to the public telephone network at a fixed location and in the wholesale markets for call origination and call termination.[187] The retail market for fixed telephony services and the wholesale transit services market were considered competitive by CMT.[188]

5.5.1.2. Markets related to Internet access

(206) In 2011, Telefónica was the main fixed internet provider in Spain with a 49.2% market share by revenue at the retail level.[189]

(207) At wholesale level, CMT designated Telefónica in 2009 as an SMP operator in both wholesale (physical) network infrastructure access and wholesale broadband access

183 CMT considered this market as not susceptible to ex ante regulation.

184 CMT 2011 Annual Report, Document ID 0974, p. 69.

185 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 15.

186 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 15.

187 CMT decision of 13 December 2012, 12 December 2008 and 18 December 2008 (see footnote 166).

188 CMT decision of 1 October 2009 (see footnote 166).

189 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 15.

markets.[190] In particular, in 2010, Telefónica was the sole operator providing wholesale network infrastructure access.[191]

5.5.1.3. Markets relating to leased lines

(208) In 2011, Telefónica had a 78.2% market share by revenue in the retail market for leased lines.[192] Telefónica's market share in the market for wholesale terminating segments of leased lines was 70% in 2008.[193] On the other hand, in 2008, Telefónica's market share was approximately 39% in the market for wholesale trunk segments of leased lines, although it was 100% regarding certain maritime lines.[194]

(209) CMT designated Telefónica as an SMP operator in the market for wholesale terminating segments of leased lines and regarding certain maritime lines in the market for wholesale trunk segments of leased lines.[195]

5.5.1.4. Markets relating to mobile telephony

(210) Telefónica's mobile arm (Movistar) is the largest mobile network operator in Spain. In 2011, Telefónica had a retail market share by revenue of 45.1%[196] At wholesale level, in the market for access and call origination, Telefónica had a 46.9% market share by revenue[197]. In the market for voice call termination in its network, Telefónica has a 100% market share. Telefónica's market share by revenue in the wholesale market for international roaming on public mobile networks was 39.9% in 2011.[198]

(211) CMT identified Telefónica as an SMP operator in the market for voice call termination on individual mobile networks.[199] On the other hand, Telefónica was identified by CMT as an SMP operator regarding the wholesale mobile access and call origination market.[200]

5.5.1.5. Markets relating to the provision of cross-border services

(212) In the global telecommunication services market, Telefónica had a world-wide market share of [0% to 10%] in 2011. In the European Union and European

190 CMT decision of 22 January 2009.

191 Reply of Telefónica to the request for information of 25 May 2011, Document ID 0474, p. 9.

192 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 15.

193 CMT decision of 23 July 2009.

194 CMT decision of 2 July 2009.

195 CMT decision of 23 July 2009.

196 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 16.

197 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 16.

198 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 17.

199 CMT decision of 10 May 2012.

200 CMT decision of 2 February 2006, which is still in force.

Economic Area, its market share was [0% to 10%] and in the Iberian Peninsula its market share was [50% to 60%].[201]

(213) Telefónica also provides wholesale international carrier services. Its market shares in 2011 were as shown in Table 3:[202]

Table 3 – Telefónica's market shares for the provision of cross-border services

Segment	Worldwide (%)	EU/EEA (%)	Iberian Peninsula (%)
Voice services	[0 to 10]	[0 to 10]	[40 to 50]
Data services	[0 to 10]	[0 to 10]	[10 to 20]
Transmission capacity	[0 to 10]	[0 to 10]	[0 to 10]

Source: Telefónica

5.5.1.6. Markets relating to TV services

(214) Telefónica provides pay-TV services over its network (Imagenio). Its market share by revenue regarding these services was 12.7% in 2011.[203] In addition, Telefónica has a 21% stake in DTS Distribuidora de Televisión Digital, S.A., the company that develops the pay-TV services of the Prisa group of companies (Digital+). At wholesale level, Telefónica is not present in the market for broadcasting transmission services.

5.5.1.7. Portugal

(215) In its reply to the request for information of 24 June 2011 Telefónica indicated that it is not present in any wholesale market in Portugal.[204] As regards retail markets, Telefónica indicated that it is present in the market for access to the public network at a fixed location for non-residential customers.[205] In their replies to the Statement of Objections, the parties to these proceedings submitted that, in view of the 5.46% minority shareholding of Telefónica in the Portuguese operator ZON, Telefónica would perform in Portugal the activities of ZON, which therefore would have to be excluded from the scope of the clause (see Recitals (165) to (169)).

201 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 18.

202 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, pp. 19-20.

203 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 17.

204 Reply of Telefónica to the request for information of 24 June 2011, Document ID 0516, p. 4.

205 Reply of Telefónica to the request for information of 25 May 2011, Document ID 0474, p. 6.

5.5.2. PT

(216) According to ANACOM, PT holds SMP in the majority of the electronic communications markets, as shown in Table 4.

Table 4: ANACOM SMP Assessments

Market	Date of ANACOM decision	PT's market share (%)	SMP
1. Retail access (fixed)	8 July 2004	> 90	Yes
2. Call origination (fixed)	8 July 2004	94.28	Yes
3. Call termination (fixed)	8 July 2004	100	Yes
4. Wholesale network infrastructure access	14 January 2009	64	Yes
5. Wholesale broadband access (bitstream)	14 January 2009	72 in non-competitive areas (27 in competitive areas)	Yes
6. Leased lines (wholesale terminating segments)	28 September 2010	> 90	Yes
7. Call termination (mobile)	18 May 2010	100	Yes
Retail markets for telephony services (fixed) (former markets 3-6)	8 July 2004	81.6 (local and national calls for residential customers) 72.2 (international calls for residential customers) 83.3 (local and national calls for non-residential customers) 87.5 (international calls for non-residential customers)	Yes
Transit services (former market 10)	25 May 2005	5	No[206]
Leased lines (minimum set of leased lines and wholesale trunk segments) (former markets 7 and 14)	28 September 2010	90.8 for circuits < 2Mbps; 70.3 for circuits = 2Mbps; 39.7 for circuits > 2 Mbps 100 in non-competitive areas of wholesale trunk segments market (40 in competitive areas)	Yes
Broadcasting transmission services (former market 18)	2 August 2007	95	Yes

Source: Commission based on the ANACOM decisions mentioned in the table

[206] ANACOM considered this market as not susceptible to ex ante regulation.

5.5.2.1. Markets relating to fixed telephony

(217) PT owns the only nation-wide local access network in Portugal. In December 2011, the Portuguese incumbent had a 58.6% market share in terms of volume in the retail market for access to the public telephone network at a fixed location and was responsible for 56.8% of the overall fixed telephony services traffic in Portugal.[207]

(218) At wholesale level, PT is present in the market for call origination on the public telephone network provided at a fixed location, the market for call termination on individual public telephone networks provided at a fixed location, where PT's market share corresponds to 100%, and the market for transit services in the fixed public telephone network.[208]

(219) PT was designated as an SMP operator by ANACOM in the markets for access to the public telephone network at a fixed location and in the markets of publicly available local and/or national/international calls[209]. PT was also identified as an SMP operator in the wholesale markets for call origination and call termination. The wholesale transit services market was considered to be competitive by ANACOM.[210]

5.5.2.2. Markets relating to internet access

(220) In 2011, and despite the 2007 spin-off of PT Multimedia, PT remained the main fixed internet provider in Portugal with a [55% to 60%] market share by revenue (in terms of volume of data its market share was [45% to 50%].[211]

(221) In 2011, PT was the sole operator providing services in the market for wholesale (physical) network infrastructure access at a fixed location and in the market for wholesale broadband access.[212]

(222) In 2009, ANACOM designated PT as an SMP operator in both wholesale broadband markets.[213]

5.5.2.3. Markets relating to leased lines

(223) In 2008, PT's market share for leased lines with a capacity up to 2 Mbps[214] was 70.3% and for leased lines with a capacity above 2 Mbps its market share corresponded to 39.7%.[215]

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207 ANACOM Report on Fixed Telephony Service 1st quarter 2012, Document ID 0976, pp. 10 and 22.

208 Reply of PT to the request for information of 25 May 2011, Document ID 0465, pp. 6 and 8. Reply of PT to the request for information of 5 September 2012, Document ID 1012, pp. 6 and 7.

209 ANACOM decisions of 8 July 2004, which are still in force.

210 ANACOM decisions of 8 July 2004 and 25 May 2005, which are still in force.

211 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 8.

212 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 8.

213 ANACOM decision of 14 January 2009.

214 Megabits per second.

215 ANACOM decision of 28 September 2010.

(224) At wholesale level, in the areas which ANACOM identified as competitive in the market for wholesale trunk segments of leased lines, PT's market share in 2008 was approximately 40%, both in terms of volume and value. In the areas identified as non-competitive PT's market share was 100%. PT's market share in the market for wholesale terminating segments of leased lines was above 90%, both in terms of volume and value in 2008.[216]

(225) According to ANACOM's 2010 SMP assessment, PT was designated as an SMP operator in the market for wholesale terminating segments of leased lines and in the market for wholesale trunk segments of leased lines.[217]

5.5.2.4. Markets relating to mobile telephony

(226) PT's mobile arm (TMN) is the largest mobile network operator in Portugal. In 2011, TMN had a market share of [40% to 45%] by value.[218]

(227) At wholesale level, TMN has a [20% to 25%] market share by revenue in the market for access and call origination on public mobile telephone networks.[219] In the market for voice call termination in its own network TMN has 100% market share. TMN's market share in the wholesale market for international roaming on public mobile networks was [35% to 40%] (in terms of value) in 2011.[220]

(228) In 2010, ANACOM identified TMN as an SMP operator in the market for voice call termination on individual mobile networks[221].

5.5.2.5. Markets relating to the provision of cross-border services

(229) PT is present in the global telecommunication services market and in the market for wholesale international carrier services. As referred to in Section 5.4, these markets are considered to be broader than national. PT's market share is small in those markets.[222]

5.5.2.6. Markets relating to TV services

(230) Despite PT's late entry in 2007 in the market for pay-TV services, in 2011 the Portuguese incumbent's market share reached [35% to 40%] by value.[223]

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216 ANACOM decision of 28 September 2010.

217 ANACOM decision of 28 September 2010.

218 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 10.

219 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 10.

220 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 10.

221 ANACOM decision of 18 May 2010.

222 In the voice segment of the latter market, PT's worldwide market share by revenue was estimated at [0 to 5]% in 2010. Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 12.

223 Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 10.

(231) At wholesale level, the market share of PT in the broadcasting transmission services was 100% in 2010.[224]

(232) PT was identified as an SMP operator by ANACOM in the market for broadcasting transmission services in 2007.[225]

5.5.2.7. Spain

(233) PT does not directly provide services in Spain, but only provides services in Spain to its multinational customers, using other operators' networks. Therefore, PT cannot be considered present in the Spanish electronic communications markets, where its market share would amount to zero.[226]

6. APPLICATION OF ARTICLE 101(1) OF THE TREATY

6.1. Article 101(1) of the Treaty

(234) Article 101(1) of the Treaty prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

6.2. Agreement

(235) As referred to in Recital (234) of this Decision, Article 101(1) of the Treaty prohibits, among other things, anticompetitive "agreements" between undertakings. An "agreement" may be considered to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The existence of an agreement may be express or implicit in the behaviour of the parties.

(236) In its judgement in the PVC II case, the General Court stated that: "*It is well established in the case-law that for there to be an agreement within the meaning of Article 81(1) of the Treaty*[227] *it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*".[228] In addition, it is not

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224 Reply of PT to the request for information of 25 May 2011, Document ID 0465, p. 10.

225 ANACOM decision of 2 August 2007.

226 Reply of PT to the request for information of 25 May 2011, Document ID 0465, pp. 3 and 4.

227 Now Article 101(1) of the Treaty.

228 Judgement of the General Court of 20 April 1999in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II), [1999] ECR II-931, paragraph 715.

necessary, in order for there to be an infringement of Article 101 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan.

(237) In accordance with the preliminary conclusions of the Statement of Objections, in this case, there is no doubt that clause nine of the Agreement of 28 July 2010 constitutes an agreement within the meaning of Article 101(1) of the Treaty. It is an agreement in written form, entered into and signed by the parties, and its existence is beyond doubt.[229] Moreover, the clause was included in a public deed granted before a public notary. In this regard, Recital B of the public share-transfer deed granted on 27 September 2010 mentions that a copy of the Agreement (which includes the clause) is annexed to the deed.[230]

6.3. Restriction of competition by object

(238) Article 101(1) of the Treaty prohibits agreements whose object or effect is to restrict competition.

(239) According to well-established case-law, restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1) of the Treaty.[231] In order to assess whether an agreement has an anticompetitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part.[232] The actual conduct and behaviour of the parties should also be considered. Although the parties' intention is not a necessary factor in determining whether an agreement has an anticompetitive object, this aspect may also be taken into account in the analysis. Restrictions that are black-listed in block exemptions or identified as hard-core restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include, among others, market sharing.[233]

(240) It is also settled case-law[234] that for the purposes of applying Article 101 of the Treaty there is no need to take into account the effects of an agreement or concerted practice when it has as its object the prevention, restriction or distortion of

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229 Stock Purchase Agreement, Document ID 0028.

230 Deed of Transfer of Shares granted on 27 September 2010, Document ID 0040, p. 3.

231 Judgment of the Court of 30 June 1966 in Case 56/65, Société Technique Minière (L.T.M.) contre Maschinenbau Ulm GmbH (M.B.U.), ECR Special edition, page 235. See also, judgement of the Court of 6 October 2009 in cases C-501/06 P, C-513/06 P and C-519/06 P Glaxo Smithkline Services Unlimited v. Commission, ECR [2009] I-09291, paragraph 55, and judgment of the Court of 4 June 2009 in the case C-8/08 T-Mobile Netherlands and Others (2009) ECR [2009] I-4529, paragraphs 28 and 30. See also paragraph 24 of the Communication from the Commission —Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011, p. 1) (the "Horizontal Guidelines") and paragraph 21 of the Article 101(3) Guidelines).

232 Paragraph 25 of the Horizontal Guidelines and paragraph 22 of the Article 101(3) Guidelines.

233 For example, see the judgment of the General Court of 29 June 2012, Case T-360/09, E.ON Ruhrgas AG and E.ON AG v Commission (OJ C 243, 11.8.2012, p. 15). See also paragraph 23 of the Article 101(3) Guidelines.

234 Joined Cases C-501/06 P, C-513/06 P and C-519/06 P Glaxo Smithkline Services and Case C-8/08 T-Mobile Netherlands and Others, referred to in footnote 231.

competition within the internal market. In its judgement in Glaxo SmithKline Services Unlimited v. Commission, the Court of Justice stated that "*It is also apparent from the case-law that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established*". In the same line the Article 101(3) Guidelines provide that "*once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects. In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object*".[235]

(241) According to Telefónica, the assessment of the clause in view of the factors referred to in Recital (239) would lead to the conclusion that the clause does not provide for a non-compete obligation, but only for an obligation to carry out a self-assessment exercise regarding the lawfulness and possible scope of a restraint ancillary to the Vivo transaction consisting of a non-compete commitment.[236] PT also submits that this is the most reasonable interpretation of the clause and that it should interpreted as such.[237] According to both parties, the self-assessment exercise would have been carried out in October 2010 and would have led to the conclusion that the non-compete commitment is not justified. The parties also claim that, in view of this conclusion, the clause would not have required further action by them.

(242) Section 6.3 discusses the arguments of the parties, which dispute the non-compete nature of the clause and concludes that the clause constitutes a restriction by object. For this purpose, in accordance with the case-law referred to in Recital (239), the Commission takes account of the following factors: the content of the agreement (Section 6.3.1), the objectives that it seeks to attain (Section 6.3.2), the economic and legal context of which the clause forms part (Section 6.3.3), the actual conduct and behaviour of the parties (Section 6.3.4), and the intention of the parties (Section 6.3.5).

6.3.1. The content of the agreement

(243) The literal wording of the clause is as follows:
"Ninth – Non-compete

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market".

(244) The title ("*Non-compete*") and wording of the clause clearly provide for a non-compete obligation on the parties, who are prevented from engaging or investing,

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235 Paragraph 20 of Article 101(3) Guidelines.

236 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 144 and ss and 148 and ss.

237 Reply of PT to the Statement of Objections, Document ID 0753, for example, paragraphs 141, 149 and 428.

directly or indirectly, in any project in the telecommunications business within the Iberian market, provided that certain conditions are met.

(245) The parties claim, however, that the wording "*to the extent permitted by law*" in connection with other elements (such as, for example, the circumstances of the negotiations, the parties' behaviour after the signature of the Agreement or their intent) would lead to a different interpretation of the clause. The parties argue that the clause provided for an obligation to self-assess the legality and scope of a possible non-compete commitment ancillary to the transaction. These other elements are analysed in Sections 6.3.2 to 6.3.5.

(246) In connection with the content of the agreement, Telefónica also alleges that the vagueness of the wording of the clause, in particular regarding the scope of the clause, would render impossible its direct application. This would, allegedly, show that the non-compete commitments could only be implemented further to a self-assessment exercise, where the scope of the commitment would be agreed by the parties.[238]

(247) In addition, in its reply to the Statement of Objections Telefónica attached a legal opinion based on Portuguese and European Union law in support of Telefónica's interpretation of the clause and of its arguments in this regard. In particular, the legal opinion argues that the wording of the clause should be given little or no weight in the overall assessment of the existence of a restriction by object.[239] This argument would be supported by: (a) paragraph 22 of the Article 101(3) Guidelines, which establishes that "*[t]he way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.*"; (b) the judgment in the *ACF Chemiefarma* case[240], which would show that the Court would not be satisfied with the simple examination of the wording of a market sharing agreement but would require further scrutiny of whether the conduct of the parties was consistent with that written stipulation; and (c) the judgment in the *Bayer* case where the General Court established that the concept of agreement centres around the existence of a concurrence of wills between two parties, the form of which is unimportant so long as it constitutes the faithful expression of the parties' intention.[241]

(248) Despite the parties' arguments, the Commission considers that the wording of the clause does not provide expressly for a self-assessment obligation, nor may such an obligation be deduced from the wording "*to the extent permitted by law"*. Likewise, the clause does not establish any terms and conditions which would govern the carrying out of the self-assessment exercise, nor what would be the consequences of the self-assessment exercise in view of its positive or negative results.

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238 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 285.

239 "Legal opinion undertaken at the request of Telefónica, S.A. in the framework of case No. COMP/C1/39.839 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union", Document ID 0804, pages 18 to 20.

240 Judgment of the Court of 15 July 1970, Case 41/69 ACF Chemiefarma NV v. Commission, [1970] ECR 00661. The legal opinion provided by Telefónica (Document ID 0804) quotes the paragraphs 111 to 116 of this Judgment.

241 Judgment of the General Court of 26 October 2000, Case T-41/96 Bayer AG v. Commission, [2000] ECR II-3383, paragraph 69.

(249) The absence of an express mention of what would allegedly be the main obligation provided by the clause is noticeably inconsistent with the interpretation advocated by the parties, despite their submissions that the changes in the wording of the clause were kept to a minimum in order to avoid putting the Vivo transaction at risk. This inconsistency is particularly notable taking into account the likely access and recourse of both parties to sophisticated legal advice for the negotiation of the Vivo transaction.

(250) Moreover, the wording of the clause establishes that the effects of the clause would start on a fixed date, namely the date of Closing (27 September 2010), instead of on the day of the finalisation of the self-assessment exercise to be allegedly carried out.[242] It therefore appears that the entry into force of the clause would be independent of the performance of any self-assessment exercise.

(251) On the other hand, the submission of Telefónica on the vagueness of the wording cannot be accepted, as discussed in Recital (146).

(252) Neither the text of the Article 101(3) Guidelines nor the judgments referred to by Telefónica (see the Recital (247)) support the conclusion that the wording of the clause should be given little or no weight in the assessment of whether an agreement may have an anticompetitive object.

(253) The Article 101(3) Guidelines confirm that, in order to assess whether an agreement has an anticompetitive object, regard must be had to several factors, including the wording of the agreement, as indicated in Recital (239). In the same way, the *ACF Chemiefarma* and *Bayer* judgments indicate that the wording of an agreement is a relevant factor and should be assessed together with other circumstances, such as the parties' behaviour.

(254) As referred to in Recital 115 of the Statement of Objections, it may not be excluded that in some cases involving matters of law which are unclear or where no precedent exists, the parties to an agreement wish to insert disclaimers such as "to the extent permitted by law" at the time of the signature of an agreement. In such cases, however, the parties should verify the compliance of such clauses with the law soon after the signature of the agreement. This seems clearly not to be the case in these proceedings as the clause constitutes a clear violation of competition rules and there could be no doubt as to its lawfulness, as referred to in Section 6.5.3. Moreover, the parties did not verify compliance soon after signature, as referred to in Section 6.3.4.3.

(255) To conclude, although the wording of an agreement is not *per se* a definite factor for the assessment, it is significant and may not be disregarded. In this case and in accordance with the preliminary conclusions of the Statement of Objections, the wording of the clause clearly shows its nature as a non-compete agreement. In addition, it gives no support to the interpretation advocated by the parties in their replies to the Statement of Objections, according to which the clause would only provide for a self-assessment obligation.

[242] See Section 4.3.1 on the timing of the alleged self-assessment exercise.

6.3.2. The objectives that the clause seeks to attain

(256) The parties have put forward several objectives that the clause would seek to attain, which are described in Section 4.2. These objectives refer to protecting PT in connection with the call option to buy back the PT shares held by Telefónica (see Recitals (83) and (90)), permitting the implementation of certain provisions of the Agreement (see Recital (88)), ensuring that the Portuguese government would not block the Vivo transaction (see Recital (85)) or ensuring the implementation of a self-assessment exercise (see Recitals (87), (93) and (94)).

(257) In the Commission's opinion, the clause appears to be objectively inconsistent with any of the objectives listed in Recital (256) and not justified by them.

(258) Section 6.5 of this Decision discusses whether the clause could be directly related and necessary in connection with the call option referred to in Recital 255 of this Decision, which was dropped from the Agreement, or the implementation of the Agreement and concludes that it cannot.

(259) In connection with Telefónica's argument that the clause would aim at avoiding the prevention of the Vivo transaction by the Portuguese government, it should be noted that Telefónica has not provided any evidence that the Portuguese government would have desired a non-compete clause for the Iberian market in the context of the Vivo transaction, as discussed in Section 4.1.7.

(260) On the other hand, the alleged objective of ensuring the self-assessment of a non-compete commitment covering the Iberian market which would be a restraint ancillary to the Vivo transaction cannot be justified, as there could be no doubt as to the unlawfulness of such a commitment at the date of the signature of the Agreement (as discussed in detail in Section 6.5.3).

(261) Therefore, the objectives of the clause alleged by the parties in their defence seem unfounded and therefore cannot prevail over the straightforward objectives of the clause in view of its wording.

(262) In that respect and as referred in Section 6.3.1, the wording of the clause imposes a non-compete obligation on the parties, each of which is prevented from engaging or investing, directly or indirectly, in any activity performed by the other in the electronic communications markets in the Iberian Peninsula, with the exception of the activities already performed at the date of signature of the Agreement (28 July 2010).

(263) The objective of the clause would therefore be to exclude or limit competition from the other party and to share the markets between Telefónica and PT, thereby potentially delaying the process of market integration in the electronic communications sector.

6.3.3. The economic and legal context of which the clause forms part

(264) This Section discusses the economic and legal context of which the clause forms part and addresses the parties' arguments in this regard, according to which this context would support the interpretation of the clause as a self-assessment clause. In particular, this Section discusses the context of the European Union electronic

communications regulatory framework, whether Telefónica and PT should be considered competitors, the content of the Agreement (other than the clause), as well as other arguments of the parties with regard to the legal context of the clause.

6.3.3.1. The European Union electronic communications regulatory framework

(265) It should be highlighted from the outset that the clause mainly relates to electronic communications services (as well as to television services) which are liberalised pursuant to the European Union regulatory framework. This framework permits and encourages competition among operators.

(266) In that regard, Directive 2002/21/EC includes among the objectives of regulation the promotion of competition in the provision of electronic communications networks, electronic communications services and associated facilities and services.[243] Likewise, Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communication networks and services[244] continued the trend of liberalising the electronic communications sector by abolishing the exclusive or special rights granted by the Member States for the establishment and the provision of electronic communications networks, or for the provision of publicly available electronic communications services.

6.3.3.2. Telefónica and PT as actual or potential competitors

(267) The liberalised context discussed in Section 6.3.3.1, where competition between the parties is possible and encouraged, should be the point of departure for the assessment of the clause. The clause was entered into by two parties who are, at least, potential competitors in the relevant markets, in accordance with the preliminary conclusions of the Statement of Objections.

(268) Telefónica and PT argue, however, that they are not even potential competitors, as discussed in Recitals (269) and (270).

(269) Telefónica submits that there is no actual or potential competition between the parties which may be restricted[245]:

(a) In particular, Telefónica argues that potential competition should be ascertained on the basis of realistic and not theoretical grounds. In order for two companies to be potential competitors in a certain market, four factors should be present, which the Commission has not analysed: (a) the objective capacity to enter the market and compete; (b) real (not hypothetical) incentives to enter the market; (c) the likelihood of entry to the market in the short-medium term; and (d) the likelihood for the entrant to be successful and modify the structure of the market in an appreciable manner. In Telefónica's view, the possibility of the parties' entering the electronic communications markets in the other party's Member State of origin is a mere "theoretical laboratory hypothesis".

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243 Article 8(2) of Directive 2002/21/EC.

244 OJ L 249, 17.9.2002, p. 21.

245 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 349 to 398.

(b) In that regard, Telefónica submits that the Commission does not even consider the possibility of PT entering the Spanish electronic communications markets and that there is no likelihood of such entry in view of PT's international plans that have been centred in the recent years in Brazil and Africa, the conditions of the Spanish electronic communications markets with revenues in decline, the Spanish economic crisis and PT's delicate financial situation in 2010.

(c) As regards particularly the potential entry of Telefónica into the electronic communications markets in Portugal, Telefónica argues that the Statement of Objections did not assess the real incentives but just theoretical ones and provides in this regard a letter dated 29 December 2011 on the strategic priorities of the company, issued by [an individual from Telefónica].[246] In addition, Telefónica submits that the effects of the sovereign debt crisis in Portugal and the maturity of its electronic communications markets confirm the lack of incentives to invest in these markets. Moreover, Telefónica claims that the arguments of the Commission relating to the possibility of Telefónica entering the Portuguese electronic communications markets are flawed and, in particular: (a) the entry of Telefónica in other markets in the European Union occurred in very different circumstances than the current ones and would just show the capacity of Telefónica to invest in Portugal but not real incentives to do so; (b) the presence of Telefónica in Portugal would not show any incentives for Telefónica to enter this market but, on the contrary, would show that its strategic needs in Portugal would be met by its current presence; (c) as regards the possibility that Telefónica could have launched a successful take-over of PT or another Portuguese operator, Telefónica submits that it never acknowledged that it could launch a take-over of PT (see Recital (276)). In addition, Telefónica submits that it never considered buying other Portuguese operators and has already a presence in Portugal via TIWS and its stake in ZON. Moreover, according to Telefónica, the acquisition of another Portuguese operator would have been impossible in view of the duration of the clause (according to Telefónica, one month), in particular if that operator stake would have been traded in a Stock Exchange market (as shown by the length of the failed take-over of Sonaecom on PT, which lasted 13 months).

(270) PT contests that the clause may have been agreed between two current or potential competitors and argues that the fact that Telefónica is present in other Member States is not sufficient for it to be considered a potential competitor. According to PT, the reasons indicated by the Commission at the Statement of Objections stage to prove the likelihood of Telefónica competing in Portugal (being present in other markets in the European Union , already having a presence in Portugal and the capacity to launch a take-over of PT or any of its competitors), would only show that such competition is merely theoretical.[247]

(271) In that respect, the Commission notes that entering into a non-compete agreement or providing for a self-assessment of the lawfulness and scope of an ancillary non-compete commitment (should the parties' interpretation of the clause be followed) is a recognition by the parties that they are at least potential competitors regarding

[246] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 380 and annex 43 of the reply of Telefónica to the Statement of Objections, Document ID 809.

[247] Reply of PT to the Statement of Objections, Doc ID 0753, pp 81 and 82.

some services, as in the absence of potential competition between them, there would be no reason to conclude a non-compete agreement or to consider the self-assessment of a non-compete commitment.

(272) Also and as accepted by the parties, they are present on the markets for the provision of global telecommunication services and wholesale international carrier services.[248]

(273) Moreover, the parties have not proven that the duration of the clause (in particular, the planned duration provided for by the clause, irrespective of its early termination) would be insufficient to acquire an existing telecommunications operator, as a way of becoming the holder of certain networks without the need to deploy them. The length of previous transactions, such as the failed take-over of Sonaecom on PT, cannot lead to the conclusion that the duration of the clause would be insufficient, as the timing of acquisition transactions is likely to depend on factors which can significantly vary from one transaction to the other, for example, the trading of the shares in stock exchange markets or the level of the price. Moreover, the length of the Sonaecom transaction until it was dropped (13 months) was less than the planned duration of the clause.

(274) In addition, the current conditions of the Spanish and Portuguese markets, such as the revenue trends or the economic crisis, cannot be invoked to exclude the possibility of investment in the sector. As indicated in the 2012 Digital Agenda Scoreboard, in spite of the decrease of revenues in the Spanish electronic communications markets and the overall context of economic downturn, investment in the sector has experienced a 3.8% growth in Spain in 2010 compared to the previous year, increasing from EUR 3 946 million in 2009 to EUR 4 095 million in 2010, although there has been an overall decrease of investment in the Spanish electronic communications sector during recent years and, in particular, in 2009).[249] As regards Portugal, the same 2012 Digital Agenda Scoreboard indicates that in 2010 overall investments in the electronic communications sector slightly increased (around 2%). Investments made, as a percentage of revenues, are 18.2%, one of the highest in the European Union, far above the European Union average of 12.4%.[250]

(275) On the other hand and contrary to Telefónica's submissions, the Commission notes that Telefónica itself had acknowledged the takeover of PT as a possibility during the negotiations of the Vivo transaction (see Recital (37)), and thus the acquisition of a competitor of PT could also be possible.

(276) However, in Telefónica's view, the notice from Telefónica to the Portuguese Securities Market Commission, *Comissão do Mercado de Valores Mobiliários* (CMVM), dated 26 May 2010, which the Commission referred to in Recital 118 of the Statement of Objections to support its argument, does not accept that it could launch such a take-over, and the wording that it does not "*discard any possible alternative*" only refers to possible instruments for the acquisition of Vivo and not to any interest of Telefónica in acquiring PT outside of the Vivo transaction. Moreover, Telefónica claims that the Portuguese government would have most likely blocked

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[248] See recitals (173) and (174).

[249] 2012 Digital Agenda Scoreboard, Spain profile (available at http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm).

[250] 2012 Digital Agenda Scoreboard, Portugal profile (available at http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm).

this acquisition, in particular in view of its position on the Vivo transaction (and its past opposition to the take-over of PT launched by Sonaecom).

(277) In that regard, the following should be noted:

(a) The statement by Telefónica that it does not discard any possible alternatives expressly included among the alternatives "*the one indicated above*", meaning the "*launch of a takeover bid over any security issued by Portugal Telecom, SGPS, S.A.*". Moreover, this statement by Telefónica was interpreted by the press and analysts to leave the door open for a takeover of PT.[251]

(b) The prices proposed for Vivo in the second and third offers were higher than PT's value in the stock exchange markets as of 5 May 2010.[252]

(278) In view of the matters referred to in Recitals (271) to (277), and taking into account the broad scope of the clause, there is no need for a detailed analysis of whether the parties are potential competitors regarding each specific market for the purposes of analysing whether the agreement should be considered a restriction by object.

6.3.3.3. The Agreement

(279) As referred to in Recitals (54) and (55), the clause is included in the Agreement, which provides for the purchase by Telefónica of the shares held by PT in the Dutch company Brasilcel, which in turn owned a majority stake in Vivo, for a consideration of seven thousand five hundred million euros.[253]

(280) According to Telefónica, the Agreement would include provisions which are linked with Spain and Portugal and which should be taken into account in the assessment of the clause (that is to say., the resignation of the members of the board of directors of PT designated by Telefónica, the "Industrial Partnership Programme" and the possible sale of Dedic –see Recital (88)-). Allegedly, these links with the Iberian market would justify the existence of reasonable doubts of the parties, on the date of signature of the Agreement, as to the lawfulness of a possible ancillary restraint consisting of a non-compete commitment covering Spain and Portugal.[254] The Commission considers that these links are extremely weak and the arguments by the parties in this regard cannot be accepted, as discussed in Section 6.5 on ancillary restraints.

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251 For example, Annex 4 to the reply of Telefónica to the Statement of Objections, Document ID 0770, press article "*PT rejeita proposta da Telefónica para fusão entre Vivo i Telesp*" published by the *Diário Económico* on 7 May 2010 and press article "*Guerra abierta entre Telefónica y Portugal Telecom por controlar Vivo*" published by *Expansión* on 27 May 2010. That latter mentions that the price of PT shares increased as a consequence of the possibility of a take-over of Telefónica on PT.

252 According to the press article published on 1 July 2010 by *Expansion* and provided as Annex 13 of the reply of Telefónica to the Statement of Objections, Document ID 0779, the price of the second offer (EUR 7,150 million) corresponded to 117% of the total stock value of PT on 5 May 2010 (the day before the first offer).

253 Stock Purchase Agreement of 28 July 2010, Document ID 0028.

254 Reply of Telefónica to the Statement of Objections, Document ID 0763, pp. 80 to 96.

6.3.3.4. The negotiation process, in particular, the involvement of the Portuguese government and the alleged opposition of Telefónica to the clause

(281) The parties highlight that, in order to assess the clause, due account should be given to the circumstances surrounding its negotiation and adoption. The facts relating to these negotiations are described in Section 4.1.[255]

(282) In particular, Telefónica argues that the circumstances surrounding the negotiation and adoption of the clause would advocate for the interpretation of the clause as a self-assessment clause. Telefónica argues in that regard that the following circumstances should be taken into account in the assessment of the clause and its context: (a) the strategic importance of Vivo for Telefónica[256]; (b) the involvement of the Portuguese government in the negotiations[257] ; and (c) the fact that during the negotiations Telefónica tried to limit as much as possible the scope of the clause, and its duration[258], and finally succeeded in modifying the nature of the clause.[259] Telefónica submits that it had the reasonable belief at the time of the Vivo transaction that the clause was essential in order for the Portuguese government not to oppose that transaction and block it via its golden share.[260]

(283) Telefónica argues that although it was forced to accept a non-compete clause in relation to the second offer dated 1 June 2010 and the third offer dated 30 June 2010, its bargaining position greatly improved after the approval by the majority of PT's shareholders of the third offer, the rejection by PT's board of directors of the interpretation of the Portuguese government of its special rights under the golden share, and the judgment of the Court of Justice of 8 July 2010 declaring the special rights conferred by the golden share contrary to European Union law.[261] This improvement of Telefónica's bargaining power would allegedly have permitted Telefónica to successfully propose changing the nature of the clause with the addition of the caveat "to the extent permitted by law". In this respect, Telefónica insists that any amendments introduced to the clause during the negotiations had to be kept at a minimum in order to avoid putting the whole Vivo transaction at risk.[262]

(284) PT also highlights the difficulties of the negotiations of the Vivo transaction and, in particular, the fact that it was very sensitive from a political viewpoint.[263] According to PT, the Portuguese government considered that it was essential that PT maintained

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255 For example, reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 29, 144 and 158.

256 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 32 to 35.

257 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 37, 38, 48 to 53, 83 to 85, 92, 93, 96, 97, 106, and 303 to 311.

258 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 64 to 70, 292.

259 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 101.

260 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 191.

261 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 99. On 8 July 2010 the Court of Justice ruled that the Portuguese State had failed to fulfil its obligations as regards the free movement of capital under Article 63 of the Treaty because of the special rights granted by the golden share, Case C-171/08, Commission v Portuguese Republic. On 26 July 2011 these special rights were eliminated following a General Meeting of the Shareholders. See PT press release of 26 July 2011, Document ID 0656.

262 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 64.

263 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 48 to 51.

some activities in Brazil and therefore that PT could not withdraw from Vivo without an alternative presence in Brazil.

(285) As discussed in Recitals (286) to (294) and contrary to Telefónica's argument that the circumstances of the negotiation of the clause would show that it should be interpreted as a self-assessment clause, the Commission considers that the circumstances referred to in Recitals (281) and (284) indicated by the parties (a) do not require or point out that the clause should be interpreted as having a self-assessment nature or (b) are not supported by evidence.

(286) The strategic importance of Vivo for Telefónica is a fact which is not disputed by the Commission (see Section 4.1.1). However, it cannot be deduced from such importance any specific interpretation of the clause, nor that the clause was imposed by PT or the Portuguese government on Telefónica.

(287) In the same way, as referred to in Section 4.1.7, the Commission does not dispute the fact that the Portuguese government followed the negotiations of the Vivo transaction, made public statements in this regard and blocked the third offer by using the "golden share" that it held in PT. The many press articles submitted by the parties show that the Vivo transaction was sensitive from a political viewpoint in Portugal and Spain. However, there is no evidence that the Portuguese government would have required that the clause be included in the Agreement.

(288) In any event, it could not be deduced from the alleged imposition of the clause by the Portuguese government that the clause would have to be interpreted as a self-assessment clause.

(289) Finally, the description by Telefónica of the negotiations of the clause and of the Vivo transaction, according to which it would have been opposed to entering into a non-compete clause and it would have limited as much as possible the scope and duration of the clause cannot be accepted, as explained in Recitals (290) to (294) and, in any event, the facts alleged by Telefónica would not require that the clause should be interpreted as providing a self-assessment obligation.

(290) In particular, the Commission cannot accept that, as submitted by Telefónica, the first offer would have excluded non-compete commitments in connection with the Iberian market.[264]

(291) The submission by Telefónica that during the negotiations of the Vivo transaction it only tried to narrow down the scope of the clause is contradicted by some of PT's submissions. In particular, although PT appears to conceive that Telefónica intended to limit the scope of the clause during the negotiations[265], PT also indicated that the obligation on PT not to compete with Telefónica was imposed by Telefónica, who requested that the clause provide for a bilateral obligation.[266]

(292) In any event, the clause establishes a non-compete obligation on PT. As explained in Recital (82), the explanations given by Telefónica regarding this fact, according to

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264 See recitals (42) to (44).

265 See recital (159).

266 Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 6.

which the clause establishes obligations both on Telefónica and PT due to Telefónica's negotiation strategy, are not convincing and inconsistent with the submission by Telefónica that it opposed the clause and limited its content.

(293) In addition, PT indicates in its reply to the Statement of Objections that television services were included in the scope of the clause at the request of Telefónica.[267]

(294) Therefore, Telefónica has not demonstrated its opposition to entering into any non-compete agreements with PT nor that its sole aim during the negotiations was to limit the effects of the clause, and, in any event it would not require that the clause should be interpreted as providing a self-assessment obligation.

6.3.3.5. Other allegations of the parties in relation to the legal context of the clause

(295) Telefónica submits that its interpretation of the clause would be supported by the legal regime provided for by Regulation (EC) No 1/2003, which provides that the parties to an agreement shall self-assess its legality by themselves instead of notifying it to competition authorities for clearance.[268]

(296) Although Regulation (EC) No 1/2003 removed the obligation to notify to the Commission potentially anticompetitive agreements, it cannot be inferred from this that the clause should be interpreted as a self-assessment clause.

6.3.4. The actual conduct and behaviour of the parties

(297) According to the parties' replies to the Statement of Objections, their actual conduct and behaviour in relation to the clause and, in particular, the self-assessment exercise which allegedly took place in October 2010, would demonstrate that the clause provides for a self-assessment obligation.

(298) However, the evidence in the Commission's file regarding the actual conduct and behaviour of the parties in relation to the clause, and in particular the termination agreement dated 4 February 2011, shows that the clause did not provide for a self-assessment obligation. In that regard, the evidence referring to the following is discussed in Sections 6.3.4.1 to 6.3.4.5: (a) the statements of the parties on the nature of the clause before their replies to the Statement of Objections ; (b) the termination agreement dated 4 February 2011; (c) the two conference calls in October 2010; (d) the timing of the alleged self-assessment; and (e) other conduct alleged by the parties, such as the publicity of the clause.

6.3.4.1. Statements of the parties on the nature of the clause before their replies to the Statement of Objections

(299) Telefónica argues that the parties' submissions to the Commission before their replies to the Statement of Objections and, in particular, the replies of the parties to the request for information dated 5 January 2011 are fully consistent with their interpretation of the clause as a self-assessment clause.

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[267] Reply of PT to the Statement of Objections, Document ID 0753, paragraph 164.

[268] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 168 to 172.

(300) In this regard, Telefónica argues that PT's reply to the request for information dated 5 January 2011, which states that "*as a consequences of* [certain news in the press, published on 23 and 24 August 2010 and on 19 October 2010] *PT instructed its lawyers to contact Telefónica's lawyers to clarify this matter* [the clause]"[269], shows that the parties carried out the alleged self-assessment exercise.[270]

(301) In addition, Telefónica submits that PT's reply to the request for information dated 5 January 2011, which states that "*two conference calls were held on 26 and 29 October 2010 at which it concluded that there was not a sufficient justification for a non-compete clause and that the clause would not be useful, but that it would be better to repeal it*" would demonstrate the content and results of the alleged self-assessment exercise.[271]

(302) Telefónica also submits that in the same reply PT mentions that it could not ask Telefónica for a certain behaviour under the clause "*until an assessment of the clause is conducted*"[272] and that this would mean that Telefónica's aim when including in the clause the wording "to the extent permitted by law", namely allegedly to change the nature of the clause, was shared by PT.

(303) The Commission notes that before their replies to the Statement of Objections the parties did not allege that the clause would provide for a self-assessment obligation but, on the contrary, many statements of the parties referred to the clause as a non-compete clause.

(304) In that regard, question 3.1 of the request for information dated 5 January 2011 requested the parties to provide "*any information which should be taken into account regarding the interpretation of this non-compete clause, including but not limited to, its duration*". In their replies, neither of the parties mentioned the self-assessment nature of the clause, nor that they carried out any self-assessment under the clause or considered the clause exhausted further to the two conference calls held in October 2010.[273]

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269 Reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraph 31.

270 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 131.

271 Reply of Telefónica to the Statement of Objections Document ID 0763, paragraph 132, which refers to the reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraph 32.

272 Reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraph 30. According to the report provided by Telefónica as Annex 38 to its reply to the Statement of Objections (Document ID 0804), this mention would "*obviously indicate that Telefónica' underlying intent when it introduced the precondition "to the extent permitted by law" was also known, understood and shared by PT*". This conclusion appears to be inconsistent with PT's acknowledgement that the meaning of "*to the extent permitted by law*" was not discussed at the time of the negotiations, and was not clear for PT, as indicated in PT's reply to the Statement of Objections, Document ID 0753, paragraphs 113, 114, and 139 to 141.

273 When discussing the clause in the reply to this request for information, Telefónica mentions that: "*In Telefónica's assessment, the inclusion of such a short duration clause is motivated by…* " ("*En la evaluación de Telefónica, la inclusión de esta cláusula de tan corta duración obedece…*"). This does not appear to refer to a legal assessment provided for by the clause on the validity of a non-compete commitment but rather to Telefónica's understanding of the reasons which explain the inclusion of the clause in the Stock Purchase Agreement. Telefónica reply to the request for information of 5 January 2011, Document ID 00489, p. 7.

(305) Moreover, the Commission does not agree that PT's reply to the request for information of 5 January 2011 could have the meaning indicated by Telefónica. PT's reply does not mention the alleged self-assessment obligation of the clause as the reason for the two October 2010 conference calls. In addition, the reply of PT expressly refers to the clause as a "non-compete clause" and indicates that the parties concluded that it would be advisable to terminate the clause, without any statement that it could be deemed "exhausted" as a consequence of the alleged self-assessment exercise.

(306) Thus, at the time of their replies to the request for information of 5 January 2011, both parties had an understanding of the nature of the clause that was different than what was set out in the reply to the Statement of Objections .

(307) The Commission does not question in any manner the right of the parties to modify their line of defence at any stage of the investigations and proceedings. However, as the modification in this case refers to the facts of the case and the interpretation of the clause, where the actual conduct and behaviour of the parties prove relevant, the Commission should assess the submissions provided by the parties in view of this modification.

6.3.4.2. The conference calls of 26 October 2010 and 29 October 2010

(308) As discussed in Section 4.3.3, taking into account the weakness of the evidence provided by the parties to prove the content of the two conference calls in October 2010 and its inconsistency with the rest of evidence in the Commission's file (for example, the termination agreement dated 4 February 2011), the Commission considers that the "exhaustion" of the clause in October 2010 has not been proven. Any self-assessment which may have been carried out by the parties, individually or in cooperation with the other via the October conference calls, was not required by the clause and, in any event, did not lead to any result, as the clause was only deleted on 4 February 2011.

6.3.4.3. The timing of the alleged self-assessment

(309) In the event that an agreement would include the obligation for the parties to verify the lawfulness of a clause included in that agreement, it would be expected that the parties would verify the compliance of such clause with the law soon after the signature of the agreement and, in any event, before the entering into force of such a clause.

(310) However, in this case, the clause, which was included in the Agreement signed on 28 July 2010, entered into force on the date of Closing (27 September 2010) and remained in force until it was deleted by the parties in writing on 4 February 2011. This is well after the date of signature of the Agreement (on 28 July 2010) and the first request for information of the Spanish Competition Authority in connection with the clause (on 9 September 2010). It is also after the initiation of proceedings by the Commission in this case (on 19 January 2011).

(311) As discussed in Section 4.3.1, the parties' justifications for the delay in performing the alleged self-assessment exercise are not supported by the facts and are not convincing.

(312) The delay referred to in Recital (310) in carrying out any self-assessment and the lack of evidence of the fact that the self-assessment exercise did even take place show that, in accordance with its wording, the clause provided for a non-compete obligation rather than an obligation to self-assess the lawfulness of a non-compete commitment.

6.3.4.4. The termination agreement dated 4 February 2011

(313) On 4 February 2011 Telefónica and PT signed an agreement "deleting" the clause (see Section 4.4). Both parties argue that they had considered the clause to be "exhausted" or the obligations under the clause fulfilled as a result of their conference calls on 26 October 2010 and 29 October 2010. As a result, according to the parties, the agreement of 4 February 2011 only had the effect of confirming the understanding reached during those calls.[274]

(314) In particular, according to Telefónica, the termination agreement dated 4 February 2011 should be considered the ratification or confirmation of the previous understanding reached during the conference calls of October 2010 that in light of the self-assessment exercise carried out by the parties there was no room for a non-compete commitment and that therefore the clause was "exhausted".[275] Telefónica argues that this conclusion would be confirmed by the following wording of the termination agreement dated 4 February 2011:

"… *the parties wish to confirm in writing their understanding that section ninth is not enforceable, and has not at any time been enforced*…"

(315) However, the Commission observes that there is no wording in the termination agreement dated 4 February 2011 which would connect that understanding to any self-assessment obligation pursuant to the clause or Agreement or the conference calls of October 2010 calls.

(316) The termination agreement dated 4 February 2011 includes five Recitals which provide a detailed rationale of the circumstances leading to the decision to "delete" the clause, but do not mention the conference calls of October 2010, which have been alleged by the parties to support their interpretation of the clause and of its duration.

(317) Moreover, and contrary to Telefónica's allegations, the wording of the termination agreement clearly shows that the clause provided for a non-compete obligation rather than a self-assessment obligation, as discussed in Recitals (248) to (255).

(318) Firstly, the termination agreement dated 4 February 2011 expressly refers to the clause as a non-compete clause:

"*Whereas Section Ninth of the Agreement included a Non-compete clause whereby, to the extent permitted by law, each Party would refrain from engaging in competition with the other*…"

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[274] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 137. Reply of PT to the Statement of Objections, Document ID 0753, paragraph 429.

[275] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 137 and 234.

(319) Secondly, the termination agreement amends the Agreement "*by deleting section ninth in its entirety, which will be deemed not to have had content at any time*". In the event that the clause was a self-assessment one, there was no need for such deletion and a reference to the conclusion of the self-assessment exercise would have sufficed. On the contrary, the termination agreement dated 4 February 2011 does not expressly refer to the self-assessment exercise or to the conference calls of October 2010.

(320) Thirdly, the termination agreement dated 4 February 2011 states that:

"I.2 The Parties irrevocably and definitively confirm that Section Ninth has not and may not have conferred any rights or imposed any obligations on them or on any third party."[276]

(321) That statement is not compatible with the parties' argument that the clause established an obligation to self-asses a non-compete commitment.

(322) Moreover, the termination agreement dated 4 February 2011 expressly states that the clause "*is not enforceable and has not at any time been enforced*". This lack of enforcement is inconsistent with the parties' thesis that the clause imposed a self-assessment obligation which was effectively enforced, as the parties claim to have allegedly carried out the self-assessment exercise in October 2010, thereby exhausting the clause.

(323) To conclude, the termination agreement dated 4 February 2011 is inconsistent with the parties' submission that this agreement is just a confirmation of the alleged results of the self-assessment exercise and with the interpretation of the clause as merely imposing an obligation to carry out a self-assessment. Accordingly, the clause should be considered terminated on 4 February 2011, rather than in October 2010, as alleged by the parties.

6.3.4.5. Other conduct alleged by the parties: the publicity of the agreement

(324) Telefónica submits that the publicity of the clause: (a) calls into question the consideration of the clause as a blatant and deliberate infringement of competition law; (b) prevents it being considered a secret cartel; and (c) advocates for the interpretation of the clause as containing an obligation to carry out a self-assessment exercise rather than containing a non-compete obligation.[277]

(325) PT submits that the publicity of the clause is inconsistent with the fact that the clause may have contained a non-compete obligation or with the fact that the wording "*to the extent permitted by law*" was included with a fraudulent intent.[278]

(326) The Commission notes that the publicity given to the clause and invoked by the parties refers to the clause included in the second and third offer, not to the one included in the Agreement (see section 4.5). In addition, although the Agreement, where the clause is included, was made available to the Brazilian competition

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276 Recital (125).

277 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 319 to 321.

278 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 436.

authority, it was not made available to any competition authority in the European Union until it was expressly requested by CNC on September 2010.

(327) However, in line with the parties' submissions, the non-compete clause included in the second offer of 1 June 2010, which is a precedent to the clause, was made public by several means, including the publication of its literal wording in the webpages of the parties and of the Stock Exchange authorities of Spain and Portugal, is a relevant fact. Accordingly, the Commission agrees with the parties that the publicity of the clause prevents it being considered to be a secret cartel (see Section 10.2).

(328) In any event, it cannot be inferred from the publicity given to the second and third offers that the clause which was finally adopted cannot provide for a non-compete obligation, as alleged by the parties.

6.3.5. The intention of the parties

(329) Generally speaking, it must be borne in mind that subjective anticompetitive intent is not a necessary condition for assessing a restriction by object.[279] Nevertheless, the parties appear to claim that their subjective intent when entering the clause was not to restrict competition.

(330) Telefónica submits that the parties' intention when including the wording "to the extent permitted by law" was to radically modify the nature of the clause by substituting the non-compete obligation provided by the clause with a self-assessment one.[280] Also, according to Telefónica, the facts of the case regarding the intention of the parties would show the following: (a) that Telefónica did not consider a non-compete agreement to be lawful or necessary, that Telefónica tried to minimise the impact of its inclusion in the agreement with PT and finally succeeded in transforming the clause into a self-assessment clause; (b) that PT considered the clause to conclude the transaction to be admissible and necessary; (c) that Telefónica understood that the Portuguese government considered the protection of PT to be essential.[281]

(331) On the other hand according to PT, the parties did not discuss and expressly agree on the meaning of the wording "to the extent permitted by law"[282]. However, PT submits that the object of the clause, as adopted (with the addition of the wording "to the extent permitted by law") appeared to be different from the clause of the second offer and that this wording should be interpreted as providing for an obligation to carry out a self-assessment exercise regarding the non-compete commitment provided for by the clause.[283]

(332) In addition, PT submits that it never opposed the "concerns" raised by Telefónica in relation to the following: (a) the "reciprocity" of the clause (see Recital (81)); (b) the exclusion from the scope clause of the current businesses of the parties (see Recital

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279 Paragraph 22 of the Article 101 (3) Guidelines.

280 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 101.

281 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 287 to 321.

282 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 110, and paragraphs 138 to 142,

283 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 120 and 139.

(40)), and (c) the limitation of the duration of the clause to one and a half year (see Recital (53)).[284]

(333) The Commission considers that, contrary to Telefónica's submissions regarding its opposition to the inclusion of the clause in the Agreement, Telefónica did not exclude in the first offer the possibility of a non-compete clause covering the Iberian market (see Recitals (42), (43) and (44)). Moreover, Telefónica has not explained in a convincing manner why the clause is bilateral and why it provides for a non-compete obligation in its favour (see Recitals (81) and (82)). In addition, there is no evidence in the Commission's file that the Portuguese government would have required that the clause be included in the Agreement in order not to oppose the Vivo transaction. (see Section 4.1.7).

(334) Although both parties indicate in their replies to the Statement of Objections that the clause provides for an obligation to carry out a self-assessment exercise, this submission cannot prevail over the many circumstances (such as the wording of the clause and the conduct and behaviour of the parties), which indicate that the clause should be considered a market-sharing agreement and a restriction by object.

6.3.6. Other arguments put forward regarding the meaning of the clause and the wording "to extent permitted by law"

6.3.6.1. The parties' access to sophisticated legal advice

(335) Telefónica submits that it is not reasonable to presume that a "*company with the size, experience and public exposure*" as Telefónica would have recourse to such a formal and "puerile" means as using the wording "*to the extent permitted by law*" to disguise its infringement.[285]

(336) In that regard, taking into account the circumstances of the case, including the wording used, the context of the clause, the objectives that it seeks to attain and the parties' behaviour, the Commission concludes that the clause provides for a non-compete obligation.

6.3.6.2. Use of the wording "*to the extent permitted by law*" with no fraudulent intention

(337) Telefónica also submits that it is the practice of the Commission to consider that expressions such as "*to the extent permitted by the law*" are not automatically a sign of "fraud" in the application of competition law.[286] In this regard, Telefónica submits that the use of these expressions does not differ in essence from the individual exemptions system of Regulation 17/62 - First Regulation implementing Articles 85 and 86 of the Treaty[287] where, as long as the agreement is not implemented, the parties are exempted from fines even if the Commission does not grant the individual exemption. In order to support its views, Telefónica refers to the *British Airways* case (COMP/D2/38.479)[288] where the wording "*to the maximum extent that is*

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284 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 112.
285 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 164.
286 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 167 to 177.
287 OJ 13, 21.02.1962, p. 204.
288 Commission Decision of 10 December 2003 in Case COMP/D2/38.479, British Airways/Iberia/GB Airway.

commercially feasible and permitted by law" was used and the *Maersk* merger case (IV/M951)[289], where the wording "*to the extent permitted by law*" was also used.

(338) The Commission does not contend, however, that the use of expressions such as "*to the extent permitted by law*" would automatically be a sign of "fraud" in the application of competition law. It considers, however, that this wording cannot be used in this case to exclude the existence of the infringement.

(339) Moreover, a subjective anticompetitive intent, such as a possible fraudulent intent, is not a necessary condition for assessing a restriction by object, as indicated in Section 6.3.5.[290]

6.3.6.3. The *favor negotii* principle

(340) Clause 17 of the Agreement provides the following rule regarding its interpretation:

"*Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or this Agreement*".

(341) The legal opinion provided by Telefónica in its reply to the Statement of Objections submits that that provision would subject the Agreement to the principle of the *favor negotii*, according to which contract provisions shall not be interpreted in a manner that renders them incompatible with a mandatory provision unless it is clearly shown that the parties have envisaged such a result. There would be an assumption that the parties' intent in entering into a contract, as rational and sensible persons, should be to conclude a valid and lawful agreement. Allegedly, this rule of interpretation would favour the interpretation of the clause as a valid self-assessment clause, rather than as an invalid non-compete clause.

(342) In the Commission's view, the *favor negotii* principle requires that in the event of a specific clause of an agreement being invalid (such as, for example, the clause), the agreement as a whole would remain valid, as expressly referred to in Clause 17 of the Agreement: "*if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or this Agreement."*

(343) Moreover, the *favor negotii* principle would only apply "*whenever possible*" as expressly referred to in Clause 17 of the Agreement. In view of the wording of the clause, its context and the parties' behaviour, the clause cannot be interpreted as a self-assessment clause. The *favor negotii* principle cannot overrule the rest of relevant circumstances for the assessment of restrictions by object.

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289 Commission Decision of 10 July 1997 declaring a concentration to be compatible with the internal market (Case NO IV/M951 - Cable & Wireless/Maersk Data) according to Council Regulation (EEC) No 4064/89 (OJ C 235, 02.08.1997, p. 4).

290 Joined Cases C-501/06 P, C-513/06 P and C-519/06 P Glaxo Smithkline Services Unlimited v. Commission, paragraph 58.

6.3.6.4. The presumption of innocence and *in dubio pro reo* principles

(344) Telefónica argues that the presumption of innocence and *in dubio pro reo* principles should be followed in the interpretation of contracts and, in particular, of the clause and its scope[291]. According to Telefónica and the legal opinion that it provided in reply to the Statement of Objections, (a) those principles entail that the existing evidence should be interpreted in the light that is most favourable to the parties in the antitrust proceedings, and (b) the Commission's interpretation in the Statement of Objections of the clause, which relied on the wording of the clause, and its interpretation of the scope of the clause, which favoured the broadest scope, breached those principles.

(345) Although the presumption of innocence and *in dubio pro reo* principles may apply to procedures relating to infringements of competition rules[292], the parties cannot rely on those principles to invalidate the Commission's finding of an infringement and its interpretation of the scope of the clause.

(346) The presumption of innocence and *in dubio pro reo* principles do not refer to the interpretation of contracts or to whether a restriction of competition should be considered by object, but to the need for sufficient evidence to support the finding that an alleged infringement took place.[293]

(347) In this case, there is no doubt and the parties do not dispute that they have entered the Agreement on 28 July 2010, and this Agreement includes the clause.

(348) Moreover, the Agreement and the clause have been assessed with other relevant evidence, which is described in this Decision and is sufficiently precise and consistent to support the finding by the Commission that the infringement took place and that the scope of the clause is as described in Section 5.1.

6.3.6.5. Exclusion of liability

(349) The parties have argued that the use of the caveat "*to the extent permitted by law*" would subject the clause to compliance with competition law and justify it. This argument was made independently from the argument that this wording would have transformed the nature of the clause from a non-compete clause to a self-assessment one.[294]

(350) In that regard, it should be noted that the caveat *"to the extent permitted by law"* included in the clause does not render the clause legal as the parties are always bound to comply with the law and this obligation cannot be modified by way of an agreement. Also, from a law enforcement perspective, the fact that two parties agree that a certain clause will only be valid "*to the extent permitted by law*" cannot be

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291 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 144 and paragraph 245. See also paragraphs 52 to 56 and 130 to 134 of the legal opinion provided by Telefónica as Annex 38 of its reply to the Statement of Objections, Document ID 0804.

292 See Judgment of the General Court (Second Chamber) of 25 October 2011, Case T-348/08, Aragonesas Industrias y Energía, S.A.U. v. Commission, ECR [2011], paragraph 94.

293 Case T-348/08, Aragonesas Industrias y Energía, S.A.U. v. Commission, paragraph 95.

294 Reply of Telefónica to the request for information of 5 January 2011, Document ID 0489, pp. 6 and 7. Reply of PT to the request for information of 5 January 2011, Document ID 0078, paragraph 29.

used to exclude liability for an infringement. Non-compete agreements between competitors, such as the one in question are clear infringements of competition law, and this cannot be changed by a caveat or qualification that the clause will only be valid "*to the extent permitted by law*". As discussed in Section 6.5.3, the parties cannot validly claim that there were reasonable doubts at the time of the negotiations of the Vivo transaction that a non-compete commitment covering the Iberian market could be ancillary to that transaction.

(351) In addition, a caveat such as the one in question is often agreed in contracts in order to limit the reciprocal liability of the parties in the event that the clause cannot be complied with. It cannot serve as a shelter for undertakings from the application of the law, in particular competition law, in relation to the actual content of the clause agreed.

(352) Moreover, accepting the disclaimer "*to the extent permitted by law*" would mean that any undertaking entering into agreements contrary to Article 101 of the Treaty could simply agree on these types of caveats as "safe harbours" to avoid liability.

6.3.7. Conclusion on the object of the clause

(353) Taking into account the scope of the clause (see Section 5), the clause prevented PT from entering into any telecommunication markets in Spain and prevented Telefónica from expanding its limited presence in the Portuguese electronic communications markets for the duration of the clause.[295] Instead of competing with each other and behaving as rivals as is expected in an open and competitive market, Telefónica and PT deliberately agreed to exclude or limit competition on each other's home markets. Therefore, the clause amounts to a market sharing agreement.

(354) In addition, the clause had the undesirable object of potentially delaying the process of market integration in the electronic communications sector. As referred to in Recital 1 of Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office[296], the aim of the European electronic communications framework is "*to create an internal market for electronic communications within the Community while ensuring a high level of investment, innovation and consumer protection through enhanced competition*".[297] Market integration is a key feature of the development of the single market for electronic communications.

(355) The market integration process would be seriously jeopardised if incumbents such as Telefónica and PT could reinforce their already very strong market power by colluding to protect their own home markets and to avoid the entry of other operators, thereby affecting the competitive structure of the markets and their integration.

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295 See recitals (12) to (27) and (200) to (233) regarding the parties' presence in Spain and Portugal.

296 OJ L 337, 18.12.2009, p. 1.

297 Recital 1 of Regulation (EC) No 1211/2009.

(356) To conclude, the clause provides for a non-compete obligation, amounts to a market-sharing agreement and qualifies as a restriction by object within the meaning of Article 101 of the Treaty. As explained in this Section, this conclusion is supported by the wording of the clause, the economic and legal context of which it forms part and the actual conduct and behaviour of the parties.

6.4. Arguments of the parties regarding the effects of the clause

(357) As referred to in Recital (240), in accordance with settled case-law in cases of violations by object, there is no need to take into account the effects of the agreement for the purpose of applying Article 101(1) of the Treaty.[298] Consequently, in this case, once it has been demonstrated that the clause constitutes a restriction by object, it is not necessary to show anti-competitive effects.

(358) However, as the parties have submitted a number of arguments regarding the effects of the clause, they will be briefly referred to in Recitals (359) to (366), even if the Commission is not required by law to do so.

(359) Telefónica argues that the clause had no effects for the following reasons:

(a) the duration of the clause should be taken into account in order to assess whether it was capable of producing anticompetitive effects.[299] In this respect, regardless of which duration is taken into account (the duration initially provided for in the Agreement namely 15 months, the effective duration of one month according to Telefónica from 27 September 2010 to 29 October 2010, or the duration indicated in the Statement of Objections from 28 July 2010 until 4 February 2011), it was insufficient to produce any effect, as entry would not be possible within such a duration. Entry into most electronic communications markets requires significant investments and the deployment of infrastructure, which would not be possible within such a duration;

(b) the fact that the clause had a very limited scope or was devoid of scope should also be taken into account regarding its possible effects[300];

(c) the Commission did not assess the counterfactual in the Statement of Objections and just assumed that the parties would have competed in the absence of the clause.[301] However, the Commission bears the burden of proving what would have been the competitive situation in the absence of the clause. As a result, the Commission cannot use the argument that the parties have not brought evidence that new activities were commenced during the period before the clause was deleted to prove that the clause was not implemented;

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298 Judgment of the General Court of 6 July 2000, Case T-62/98 Volkswagen AG vs Commission [2000] ECR II-2707, paragraph 178 and Judgment of the Court of 11 July 1986, Case 246/86 SC Belasco and others v Commission, [1989] ECR 2117.

299 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 328 to 330.

300 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 331 to 333.

301 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 334 to 342.

(d) Telefónica had no incentive to enter into the Portuguese electronic communications markets in view of the conditions of these markets (nor would PT have any incentive to enter the Spanish electronic communications markets).[302] In this respect, Telefónica provides an economic report which would show that there were no incentives for the parties to develop new competitive strategies in the other party's Member State of origin.[303] This same economic report analyses the parties' share price evolution in the stock markets and concludes that these markets did not react in any manner regarding the clause, thereby showing that the clause could have no effect;[304]

(e) the fact that, according to the jurisprudence of the Court of Justice, the Commission cannot presume anticompetitive behaviour when there is an alternative reasonable explanation for the behaviour of Telefónica and PT (not developing new competitive strategies in the other party's Member State of origin can be explained on the basis of economic grounds) or when it has not carried out a detailed analysis of the markets[305];

(f) the parties' behaviour was not modified by the entry into force of the clause; their behaviour also did not change when the clause was deleted. Telefónica did not participate in a tender for spectrum launched in September 2011 in Portugal, and, similarly, PT did not take part in a tender for spectrum launched in July 2011 in Spain.[306]

(360) PT submits the following arguments regarding the lack of effects of the clause:[307]

(a) that the clause was unsuited to produce effects during both its intended duration and the duration for which it was effective, in view of the conditions for entering the electronic communications markets identified by the Commission in the Statement of Objections, including legal barriers to entry, the investments required, the existing market conditions and the incentives to entry.[308] PT analyses the Portuguese markets from this perspective, in order to demonstrate that it would have been impossible or extremely unlikely that Telefónica could enter into these markets during the term of the clause. This unsuitability would also apply to the "corporate segment" markets, which according to PT was the only segment to which the clause could have applied;[309]

(b) that the parties behaviour remained unchanged after 4 February 2011, when the parties concluded the agreement to delete the clause;

(c) that PT's business strategy was unaffected by the clause;

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302 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 343.
303 Annex 39 to the reply of Telefónica to the Statement of Objections, Document ID 0805.
304 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 399 to 402.
305 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 344 to 347.
306 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 347 and 348.
307 Reply of PT to the Statement of Objections, Document ID 0753, pp. 51 to 82.
308 PT also understands that it is unlikely that Telefónica would enter the Portuguese markets where ZON is present as this would entail competing with this company, which is participated by Telefónica.
309 Reply of PT to the Statement of Objections, Document 0753, paragraph 394.

(d) that the arguments in the Statement of Objections regarding the possibility of Telefónica entering the Portuguese markets (the entry by Telefónica in other Member States' electronic communications markets, the presence of Telefónica in Portugal and the possibility of a take-over by Telefónica of a Portuguese operator such as PT) would show the opposite, that the interests of Telefónica in Portugal would have been already satisfied;

(e) that the Commission cannot require the submission of evidence of new activities of the parties in their respective national markets during the period before the clause was deleted to show that it was not implemented.

(361) The arguments of the parties regarding the lack of legal effect of the clause do not prevent it from being considered an infringement of Article 101 of the Treaty.

(362) In particular, the arguments of the parties that the clause was incapable of having any legal effect cannot be accepted.

(363) First, the clause was entered into by two competitors, as explained in Section 6.3.3, and therefore, it is capable of producing anticompetitive effects.

(364) Secondly, even if the clause was considered incapable of producing any effects, this would not impede its consideration as a restriction by object. As established by the Court of Justice, if an agreement has as its object the restriction of competition, it is irrelevant whether it is in the commercial interest of some of the participants.[310] Therefore, the fact that the clause, which had as its object the restriction of competition, could be incapable of producing any effects in the commercial interest of Telefónica or PT is irrelevant.

(365) Finally, as regards the possible implementation of the clause, apart from claiming that the clause was never implemented and had no legal effects, the parties did not submit any evidence of new activities in Spain or Portugal which might disprove that the clause was implemented. This does not mean that, as alleged by the parties, the Commission would require the parties to show new activities in order to evidence that the clause has not been implemented. The Commission accepts that it cannot be directly inferred from the lack of new competing activities that the clause was implemented. However, the observation that the parties did not submit any evidence of new activities in Spain or Portugal which would contradict the implementation of the clause should be maintained, as a non-conclusive sign that the clause may have been implemented.

(366) To conclude, it is not necessary in this case to show anti-competitive effects, as the anti-competitive object of the clause has been proven (see Recital (240)). In accordance with the preliminary conclusions of the Statement of Objections, it is therefore not necessary to carry out a detailed assessment of each electronic communications market and of the effects of the clause within each of these markets.

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[310] See Judgment of the Court (First Chamber) of 25 January 2007, Joined Cases C-403/04 P and C-405/04 P, Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission [2007] ECR I-00729, paragraphs 44 and 45.

6.5. Ancillary restraints

6.5.1. General considerations on ancillary restraints

(367) The concept of ancillary restraints covers any alleged restriction of competition which is directly related to (that is to say, subordinated and inseparably linked to) and necessary to the implementation of a main non-restrictive transaction (that is to say, objectively needed for the implementation of the main transaction and proportionate to it).[311] If an agreement does not have as its object or effect the restriction of competition, then restrictions which are ancillary to such an agreement would also fall outside the scope of Article 101 (1) of the Treaty.[312]

(368) A restriction directly related to a main transaction must be understood to be any restriction which is subordinated to the implementation of that transaction and which has a clear link to it.[313]

(369) On the other hand, the condition that a restriction may be necessary implies a two-fold examination. It is necessary to establish: (a) whether the restriction is objectively necessary for the implementation of the main operation; and (b) whether it is proportionate to it.[314]

(370) The assessment of the objective necessity is a relatively abstract analysis which does not require an assessment of the competitive effects, since the weighing of the procompetitive and anticompetitive effects of a restriction can take place only in the framework of Article 101(3) of the Treaty.[315] Moreover, the General Court held that: "*It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation.*"[316]

(371) The restriction of competition must be, in both scope and duration, strictly limited to what is necessary to implement the transaction.[317] Thus, in determining whether a restriction is necessary, it is appropriate not only to take into account its nature, but also to ensure that the subject matter and geographical field of application does not exceed what the implementation of the agreement reasonably requires.

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311 Judgment of the General Court (third chamber) of 18 September 2001, Case T-112/99, Métropole television (M6) and others, [2001] ECR II-2459, paragraph 104.

312 Judgment of the Court of 12 December 1995, Case C-399/93, Luttikhuis, [1995] ECR I-4515, paragraphs 12, 13 and 14.

313 Case T-112/99, Métropole television (M6) and others, paragraph 105.

314 Case T-112/99, Métropole television (M6) and others, paragraph 106.

315 Case T-112/99, Métropole television (M6) and others, paragraph 107.

316 Case T-112/99, Métropole télévision (M6) and others, paragraph 109.

317 Case T-112/99, Métropole télévision (M6) and others, paragraph 106 and 113 and the Judgment of the Court of 11 July 1985, Case 42/84 – Remia BV v Commission, [1985] ECR I-2545 paragraph 20: "[…] *such clauses must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose*."

(372) In addition, if equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.

(373) Various types of restrictions may in principle be considered ancillary to a transaction, including non-compete agreements (for example, to ensure the protection of the value transferred), provided that the criteria referred to in Recital (367) are fulfilled.

(374) The Article 101(3) Guidelines[318] provide guidance on the interpretation of the notion of ancillary restraints. Similarly, the Commission Notice on restrictions directly related and necessary to concentrations of 2005[319] (the "2005 Notice") provides guidance on ancillary restraints in the mergers field.

(375) In accordance with the preliminary conclusions of the Statement of Objections, the Commission remains of the opinion that there is no direct relation between the clause, which refers to the Iberian market, and the Vivo transaction, which refers to an operator whose activity is limited to Brazil; and that the clause would not be necessary for the implementation of the Vivo transaction, for the reasons that are set out in Section 6.5.2.

6.5.2. Arguments of the parties on the consideration of the clause as an ancillary restraint

(376) The parties submit that, as allegedly required by the clause, they have carried out an exercise to self-assess whether a non-compete commitment covering the Iberian market and with a scope to be determined could be ancillary to the Vivo transaction or any of its components. The parties claim that they concluded from the self-assessment that there was no room for such a non-compete commitment as an ancillary restraint:

(a) According to Telefónica, the self-assessment exercise led to the conclusion that there were no grounds to justify a non-compete commitment as an ancillary restraint to the transaction[320]. Telefónica claims that this conclusion was the result of a thorough self-assessment exercise and was reached in view of the developments which took place after the signature of the Agreement (for example, the confirmation by PT of its strategic partnership with Oi in Brazil, which prevented the negotiation by the parties of an "Industrial Partnership Programme"). Telefónica also submits that the fact that it reached that conclusion does not mean that, at the time of the negotiations of the Vivo transaction, there could not be reasonable doubts as to the validity of a non-compete ancillary restraint.

(b) According to PT, the self-assessment exercise led the parties to conclude that it would be unlikely that a restriction of competition, such as the one established in the clause could be acceptable under competition law.[321] However, PT still

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318 Paragraphs 28 to 31.

319 See Commission Notice (2005/C 56/03) on restrictions directly related and necessary to concentrations (OJ C 56, 5.3.2005, p. 24). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF

320 Reply of Telefónica to the Statement of Objections, Document ID 0763 paragraphs 10, 128, 130, 230 and 524.

321 Reply of PT to the Statement of Objections, Document ID 0753 paragraph 148.

argues that the clause could be considered as a restraint ancillary to the Vivo transaction, in view of the information made available to the members of the PT board of directors designated by Telefónica.[322] Although both considerations (that the clause would not be acceptable under competition law and that it could be considered a restraint ancillary to the Vivo transaction) could be inconsistent, whether the clause could be considered a restraint ancillary to the Vivo transaction will be analysed on its merits in this Section.

(377) This Section rebuts the arguments put forward by the parties to justify the possible consideration of the clause as an ancillary restraint. Section 6.5.3 assesses whether there could have been reasonable doubts at the time of the negotiations of the Vivo transaction that the non-compete commitment established in the clause could be considered an ancillary restraint to the Vivo transaction.

(378) Telefónica claims that in view of the circumstances of the negotiation of the Vivo transaction, at that time it had a reasonable belief that the Portuguese government would block the transaction in the absence of a non-compete clause. Accordingly, the clause would have to be considered directly related and necessary to the completion of the Vivo transaction.

(379) In that regard, the fact that Telefónica regarded the clause as necessary for the transaction not to be 'blocked' is not sufficient to consider the clause directly related and necessary for the transaction. The requirements for a direct and necessary link should be analysed from an objective perspective, and cannot be justified by the subjective perceptions of Telefónica.[323] Moreover, Telefónica has not provided any evidence showing that the Portuguese government would consider the clause necessary for the transaction or that it would even have desired it (see Section 4.1.7).

(380) Telefónica also argues that PT considered the clause necessary to conclude the Vivo transaction and alleged that it "*had no other choice but to accept this clause"* because of the risks associated with failing to close such a strategic transaction.[324] However, and as discussed in Recitals (84) and (86), there is no evidence that the clause was a deal breaker.

(381) Telefónica also submits that the Commission confused two separate issues on the indispensability of the clause: (a) indispensability from the perspective of the admission of the restriction under Article 101(1) of the Treaty; and (b) indispensability under Article 101(3) of the Treaty which, contrary to Article 101 (1) of the Treaty requires for its assessment an efficiency analysis.[325]

(382) Contrary to what Telefónica claims, the Commission assesses indispensability both under Article 101(1) and (3) of the Treaty and acknowledges that the efficiency analysis is limited to Article 101(3) of the Treaty. In particular and in connection with Article 101(1) of the Treaty the Commission notes that the application of competition law cannot be subordinated to the commercial and business strategy of the parties. Moreover, and as discussed in Section 4.1.7, Telefónica has not proved

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322 Reply of PT to the Statement of Objections, Document ID 0753 paragraphs 407 to 413.
323 Case T-112/99, Métropole television (M6) and others, paragraph 106 to 113.
324 Reply of Telefónica to the request for information of 5 January 2011, Doc ID 0489, p. 7
325 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 192 to 194.

that the clause would have been required by the Portuguese government and its alleged subjective perception that it may have been is insufficient to justify the objective necessity of the clause.

(383) Telefónica also argues that it may be implied from the analysis of the Commission in the Statement of Objections that the Commission could be limiting the possibility of ancillary restraints to the merger field (whereas agreements between undertakings could also include ancillary restraints).[326]

(384) The Commission did not and does not support in any manner such a limitation. The fact that the Commission took the preliminary view in the Statement of Objections that the clause cannot be considered an ancillary restraint in this case does not entail that it restricted the possibility of ancillary restraints to the merger field.

(385) Telefónica submits that the fact that the main transaction referred to Brazil could not exclude *per se* that other related and necessary transactions provided by the Agreement could justify ancillary restraints regarding the Iberian market. In particular, Telefónica understands that the clause could be considered an ancillary restraint to the following agreements: (a) the agreement for Telefónica to abandon PT's board of directors; (b) the agreement to develop an "Industrial Partnership Programme"; and (c) the agreement to explore the possible acquisition of Dedic by Telefónica.[327] Those agreements referred to by Telefónica are described in Recitals (57) to (61).

(386) In that regard, the Commission notes that whether a restriction of competition would be ancillary to a main transaction should be ascertained by reference to a "main" transaction or operation[328]. Moreover, such restriction needs to be "subordinate" to the implementation of that operation.[329] Therefore, the ancillary nature of a restriction should be determined by reference to the transaction or operation as a whole, rather than by reference to an artificial division of the transaction or operation into independent provisions. Ancillary restraints cannot be of more economic importance than the operation or transaction that may justify them.

(387) Accordingly, the assessment of the clause from an ancillary restraints perspective should be made by reference to the Vivo transaction rather than by reference to the provisions identified by Telefónica and referred to in Recital (385).

(388) As discussed in Sections 6.5.2.1, 6.5.2.2 and 6.5.2.3, the clause cannot be considered a restraint ancillary to the agreements referred to by Telefónica in Recital (385) or in relation to the information made available to the members of the PT board of directors designated by Telefónica.

6.5.2.1. The resignation of the members of PT's board of directors designated by Telefónica.

(389) According to Telefónica, transactions where a minority shareholder leaves the shareholding of a non-controlled company can legally be accompanied by non-

326 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 195 to 197.
327 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 191.
328 Case T-112/99, Métropole television (M6) and others, paragraph 104.
329 Idem, paragraph 105.

compete commitments.[330] It claims that this would be the case not only for the call options to sell a minority stake but also for agreements not to be represented in a board of directors, as the ratio for a non-compete commitment would be the same. Telefónica appears to understand that the rationale for admitting non-compete commitments in that case would be to protect confidential information (such as information on the strategic plans of the company made available to the members of PT's board of directors). Telefónica submits that this interpretation would be supported by the Commission Decision of 22 February 1991 in Case IV/M057 *Digital/Kienzle*.[331] Telefónica also submits that in the Statement of Objections the Commission did not completely discard the possibility that a non-compete commitment would be possible in the event of a call option to sell a minority stake in a participated non-controlled company.

(390) In that regard, it should be stressed that there is no need to analyse whether the clause could be a valid ancillary restraint to a call option for PT to buy back the PT shares held by Telefónica, as this call option (which was provided for in the second and third offers) was not included in the Agreement.[332]

(391) The question could, however, remain whether the implementation of the resignation of Telefónica's representatives from PT's board of directors (which is provided for by the Agreement) would require the adoption of the clause for the aims indicated by the parties, such as protecting the value transferred and protecting PT's confidential information.

(392) In that regard, it should be noted that the resignation of Telefónica's representatives from PT's board of directors does not entail any value or assets transferred which could require any protection (by means of a non-compete commitment or otherwise).

(393) As regards the alleged need for the protection of the confidential information accessed by the members of PT's board of directors designated by Telefónica while on that board, it should be noted that this information was made available before the Vivo transaction, and that a non-compete commitment was not deemed necessary before the Vivo transaction as a consequence of such access.

(394) In addition, the argument that the clause would be justified by the access that the members of PT's board of directors designated by Telefónica had to the information made available to that board would require demonstration that the resignation of the members of PT's board of directors designated by Telefónica triggered a need for the clause.

(395) Telefónica argues in that regard that Portuguese corporate law and, in particular Articles 64, 254 and 398 of the Portuguese Commercial Code ("*Código das*

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330 Reply of Telefónica to the Statement of Objections Document ID 0763, paragraphs 201 to 206.

331 Commission Decision of 22 February 1991 declaring a concentration to be compatible with the internal market (Case No IV/M.0057 - DIGITAL / KIENZLE) according to Council Regulation (EEC) No 4064/89 (OJ C 56, 5.3.1991, p. 16).

332 See Stock Purchase Agreement, Document ID 0028 in comparison with the binding offers of 6 May, 1 June and 29 June 2010, Document ID 0027. This does not mean however that the Commission acknowledges that the call option could have justified the clause or that the Commission has reasonable doubts on this issue, as suggested by Telefónica. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 205.

Sociedades Comerciais")[333] establish a legal obligation on the members of the board of directors not to use the information made available to them for purposes other than ensuring the good functioning of their company. Telefónica submits that it would be obvious that the resignation of the members designated by Telefónica from PT's board of directors would make the enforcement of these legal obligations more difficult.[334] Telefónica does not explain, however the reasons why this would be the case.

(396) However, the Commission considers that the fact that the information made available to the members of PT's board of directors would be already protected by virtue of Portuguese corporate law contradicts the alleged need for protecting such information by a non-compete commitment and therefore is an argument against the consideration of this commitment as an ancillary restraint.

(397) Telefónica also submits that the fact that the members of the board of directors designated by a shareholder resign from the board of directors can radically change the incentives and interests of the shareholder vis-à-vis that company, and that therefore PT could have perceived that the resignation of the members of PT's board of directors designated by Telefónica triggered the need for the clause.[335] Telefónica does not duly explain, however, why Telefónica's incentives and interests vis-à-vis PT would have changed further to its exit from PT's board of directors , in particular taking into account that Telefónica remained a shareholder of PT, although it diminished its stake (see Recital (18)).

(398) PT submits that the Vivo transaction triggered the need for the protection of the information made available to the members of PT's board of directors designated by Telefónica by means of a non-compete commitment.[336] According to PT, this was the case since (a) Telefónica competed with PT in Portugal and was one of the main shareholders of the major competitor of PT in Portugal; (b) the fact that Telefónica was one of PT's main shareholders was perceived as having an influence on the incentives of Telefónica to compete in Portugal; and (c) the participation in the board of directors of the members designated by Telefónica could not be perceived in the same manner after "the sale of the PT stake held by Telefónica".[337] In addition, PT indicates that there were concerns that the resignation of the members of PT's board of directors designated by Telefónica was just a mere "best efforts" obligation in the Agreement.[338]

(399) Taking into account the matters referred to in Recitals (397) and (398), both parties appear to differentiate the scenario where Telefónica was participating in PT's board of directors from the scenario where it had abandoned that board on their subjective perceptions, rather than on objective grounds. These perceptions would relate to the likelihood of Telefónica competing with PT, rather than to specific risks of misuse of certain information. In addition, the Commission notes that PT's justification also

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333 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 207.

334 Reply of Telefónica to the Statement of Objections O, Document ID 0763, paragraph 209.

335 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 210 and 211.

336 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 409 to 413.

337 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 412. It is unclear whether this reference by PT to the sale of the PT shares held by Telefónica refers to the partial sale of Telefónica of its stake in PT in June 2010 (see recital (18)) or to an hypothetical sale.

338 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 413.

refers to Telefónica abandoning PT's shareholding and this departure from PT's board of directors, which did not take place in full, would be independent from the Agreement.

(400) The Commission considers that the assessment of whether a competition restriction is directly related and necessary for a transaction should be based on objective grounds.[339] Therefore the subjective perceptions (see Recital (399)) of the parties are irrelevant to justify such relationship and need.

(401) Moreover, there is no evidence on whether and to what extent the competition from Telefónica would be facilitated by the information made available to the members of PT's board of directors designated by Telefónica, as a consequence of the resignation of the members of the PT's board of directors designated by Telefónica. Although PT identifies the information on large customers as sensitive information which could be misused by Telefónica, the fact is that PT has not submitted any specific information and concrete risk of misuse, other than a general consideration that information on large customers is sensitive, due to the limited number of large customers and the revenues generated from them.[340] The general reference by PT to information on PT's weaknesses and on its short and medium term strategies which would have been made available to the members of its board of directors[341] is also insufficient to sustain a concrete risk of misuse of that information by Telefónica.

(402) In any event, should a non-compete commitment be found to be necessary and required for the implementation of the resignation of the members of the PT's board of directors designated by Telefónica in order to ensure the protection of the confidential information made available to PT's board of directors (*quod non*), this non-compete commitment should have been strictly limited to what was necessary to implement such resignation.[342]

(403) In that regard, it cannot be accepted that a non-compete obligation imposed on PT (as the clause provides for a non-compete obligation on both Telefónica and PT) would be needed to protect PT's interests from Telefónica's actions.

(404) The parties' arguments relate to the information made available to Telefónica and therefore could only and at best be invoked to justify the need for the protection of PT from Telefónica's actions, and not for the protection of Telefónica from PT's actions. On the contrary, the clause imposes obligations on both parties and therefore the non-compete obligation imposed on PT cannot be justified in any manner by the protection of PT's own confidential information.

(405) To conclude, the obligation not to compete provided for by the clause cannot be considered an ancillary restraint to the resignation of the members of PT's board of directors designated by Telefónica, in relation to the protection of PT against any misuse by Telefónica of the confidential information of PT.

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339 Case T-112/99 Métropole television (M6) and others, paragraphs 106 to 113.

340 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 424.

341 Reply of PT to the request for information of 5 January 2011, Document ID 0078, p. 5.

342 It should also be noted that PT has not identified the information which would have been made available to the members of the PT board of directors designated by Telefónica and demonstrated that it refers to the services and territories covered by the non-compete clause.

6.5.2.2. The obligation to negotiate the Industrial Partnership Programme

(406) According to Telefónica, it was reasonable, on a preliminary analysis, that a non-compete commitment could be a valid ancillary restraint to the provision of the Agreement between the parties regarding the "Industrial Partnership Programme".[343] In that regard, as explained in Recitals (59) and (60) the Agreement established that the parties would start negotiations in January 2011 regarding the implementation of a strategic global industrial alliance (the Industrial Partnership Programme) regarding several sensitive areas identified in schedule Six to the SPA, such as procurement, technological development, joint services to multinational clients, roaming, R&D and exchange of best practices.

(407) In Telefónica's view, the possible start of those negotiations in January 2011 would have required the parties not to compete for a period of 15 months starting from the date of Closing (27 September 2010) covering the activities in which they were not competing already and which could impact such an alliance. The objective of that restriction would have been to ensure that one of the parties did not take unfair advantage of their cooperation and exchange of know-how and confidential information.[344]

(408) Telefónica's arguments regarding the possibility of the clause being ancillary to the Industrial Partnership Programme cannot be accepted, as discussed in Recitals (409) to (420).

(409) The only obligation provided by the Agreement regarding the Industrial Partnership Programme is an obligation to start good faith negotiations in January 2011, provided that certain conditions are met (see Recitals (59) and (60)). The Agreement only includes certain general references to possible areas for cooperation, leaving the determination of the content of this cooperation for the future negotiations stage.

(410) Whereas the Industrial Partnership Programme was, at the time of signature of the Agreement, a mere hypothetical project to be, as the case may be, negotiated in the future, the clause was included in the Agreements as a binding obligation to enter into force on the date of Closing (27 September 2010).

(411) In that context, it cannot be accepted that a binding non-compete agreement the duration and content of which does not coincide with the duration and content of certain hypothetical negotiations could be ancillary to an obligation (subject to certain conditions) to start such negotiations.

(412) The fact that the possible scope of the non-compete obligation was kept broad in the clause cannot be justified by the fact that the precise scope would be determined further to the alleged self-assessment exercise. The scope of the clause is not necessarily narrower or broader than that of the Industrial Partnership Programme, it is simply different. For example, the Industrial Partnership Programme could

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343 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 215 to 225.

344 "*… ensuring that the cooperation results and the exchange of know-how business confidential information would not be unduly taken advantage by one of the parties to the prejudice of the other party in order to develop commercial initiatives which would empty and harm the expected cooperation before its start*". Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 216.

potentially cover R&D or the exchange of best practices, which are different matters from a general non-compete obligation. The Industrial Partnership Programme could also refer to territories other than the Iberian Peninsula, whereas the clause is limited to the Iberian Peninsula.

(413) It cannot be accepted that a non-compete agreement could be necessary to protect the misuse of confidential information which has not been exchanged by the parties or, at best, could only be exchanged more than three months after the clause has entered into force.

(414) Telefónica submits that the results of the cooperation could be misused before the cooperation starts.[345] It is, however, difficult to understand how the cooperation could have results before it starts. It is also difficult to understand how the parties could misuse information which has not been exchanged. The exchange of information under the Industrial Partnership Programme or regarding its negotiation could be easily covered by the parties with a non-disclosure agreement ensuring the protection of any confidential information exchanged.

(415) Finally, the possibility of the parties entering an Industrial Partnership Programme was first included in the Agreement of 28 July 2010, whereas the first binding offer containing the clause is dated 1 June 2010. The origin of the clause appears, therefore, to be absolutely unrelated to the possibility of the parties entering into an Industrial Partnership Programme.

(416) Telefónica submits several additional arguments to prove that the Industrial Partnership Programme could have justified the clause as an ancillary restraint and, in particular, the following: (a) that the Article 101(3) Guidelines provide for the possibility of ancillary restraints (for example, non-compete commitments) especially in connection with the creation of joint ventures, (b) that the Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements[346] ("the Horizontal guidelines for R&D agreements") do not include the non-compete commitments among the restrictions by object[347]; (c) that Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements[348] ("R&D block exemption Regulation") does not consider non-compete commitments related to the scope of cooperation of the parties among hardcore restrictions; and (d) that there are many precedents of non-compete commitments accepted by the Commission in the context of industrial cooperation agreements, such as in Case IV/36581-*Télécom Development*-[349] or in Case IV/32009 -*Elopak/Metal Box-Odin*-[350]. For those reasons,

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345 See footnote 344.

346 OJ C 11, 14.1.2011, p. 1.

347 According to Telefónica the Industrial Partnership programme would constitute a R&D agreement. Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 219.

348 OJ L 335, 18.12.2010 p. 36.

349 Commission Decision 1999/574/EC of 27 July 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/36.581 - Télécom Développement) (OJ L 218, 18.8.1999, p. 24).

350 Commission Decision 90/410/EEC of 13 July 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.009 - Elopak/Metal Box – Odin) (OJ L 209, 8.8.1990, p. 15).

Telefónica concludes that, at the time the Agreement was signed, there could be reasonable doubts as to the lawfulness of a non-compete commitment which would be an ancillary restraint to the Industrial Partnership Programme.

(417) The arguments referred to in Recital (416) do not call into question the analysis by the Commission, according to which the clause cannot be considered directly related, or necessary to the implementation of the obligation to negotiate an Industrial Partnership Programme.

(418) Those arguments appear to assume that the Agreement requires the parties to enter into an R&D agreement, whereas it only establishes the obligation to start negotiations on several possible areas for cooperation, provided that certain conditions are met (namely, that the parties do not compete in Brazil).

(419) It cannot be accepted that a binding clause could be ancillary to a non-existing hypothetical R&D agreement.

(420) Moreover, the clause provides for the limitation of output or sales of services other than the contract products or technologies which would be covered in the possible areas of R&D cooperation under the Industrial Partnership Programme, and therefore would be considered a hard-core restriction under point (b) of Article 5 of the R&D block exemption Regulation. In addition, the cases referred to by Telefónica cannot support the argument that the clause could be lawful, as they refer to facts and non-compete commitments which should be clearly distinguished from the ones in this case. In particular, the *Télécom Development* case refers to a number of concrete agreements entered into by a new telecommunications operator and a railway company to cooperate through a jointly-owned subsidiary to develop and run a national long-distance telecommunications network (and not to an obligation to negotiate a possible cooperation programme), in the context of which the parties (two non-competing entities, unlike the parties in this case, which concerns two incumbent telecommunications operators) entered into a non-compete agreement. On the other hand, the *Elopak* case refers to the creation of a joint venture in relation to the research and development of a new form of packaging (and not to an obligation to negotiate a possible cooperation programme, as in this case), where in case of a 'break up', the parties keep the right to use the know-how of the other party and the know-how developed by the joint venture and are free to compete amongst themselves (unlike in this case), but are prevented from giving access to this know how to competitors.

6.5.2.3. The sale of Dedic

(421) Similarly, the argument that the clause could be directly related and necessary to the possible sale by PT to Telefónica of the Brazilian call centre company Dedic, on the basis of the ubiquity of call centre services, cannot be given any merit.[351] In particular, the ubiquity of call centre services would refer not only to the Iberian market but also to any other market.

[351] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 102, 187, 191 and 200.

(422) Moreover, the Agreement does not provide for such sale but only for an obligation on Telefónica to "*use its best efforts to analyse the purchase*" of all shares in Dedic owned by PT, further to a due diligence process (see Recital (61)).

(423) A binding non-compete clause covering the Iberian market for electronic communications services cannot be directly related or necessary for the implementation of an obligation to analyse the possible sale and purchase of a Brazilian call centre company.

(424) In addition, as argued by Telefónica[352], call centre services should be excluded from the scope of the clause, as these services are not electronic communication services. Therefore the activities of Dedic would not be covered by the clause.

6.5.3. The alleged reasonable doubts at the time of the Vivo transaction on the consideration of the clause as an ancillary restraint

(425) As referred to in the Statement of Objections, it cannot be excluded that in some cases involving matters of law which are unclear or where no precedents exist, the parties to an agreement wish to insert disclaimers like "*to the extent permitted by law*" to a clause and verify its compliance with the law soon after signature. The Commission has already concluded that this was not the case regarding the clause, which provides for a non-compete obligation (rather than a self-assessment obligation as alleged by the parties).

(426) However, the parties submit in that regard that they had doubts on whether a non-compete commitment could be considered justified in the context of the Vivo transaction and that they relied on the alleged self-assessment exercise to determine the concrete scope of the non-compete commitment. This argument by the parties refers to the reasonableness of the doubts in the context of the negotiations of the Vivo transaction rather than to whether the clause is caught by Article 101(1) of the Treaty.

(427) In relation to the doubts of the parties and their reasonableness, Telefónica submits the following:

(a) that a thorough exercise was needed in order for Telefónica to self-assess whether the clause could fall outside the scope of Article 101(1) of the Treaty as an ancillary restraint to the Agreement.[353] Telefónica submits the extensive arguments discussed in Section 6.5.2. and in this Section, which would show that the lawfulness of the clause could be argued or, at least, that the possibility of the clause being lawful could not have been completely dismissed at the time that the Agreement was signed;

(b) that the analysis of the reasonableness of the doubts should be conducted with reference to the date of the signature of the Agreement. The events that occurred subsequently (such as the Oi transaction, which would exclude the

[352] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 434.

[353] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 130 ("*tras un detenido studio*").

negotiations between the parties on the Industrial Partnership Programme) should not be taken into account regarding this exercise.[354]

(428) The Commission notes that there is no difference between the information available at the date of signature of the Agreement and the information available at the time of the alleged self-assessment exercise, which would impact any assessment of the clause as an ancillary restraint. In particular, whether the negotiations of the Industrial Partnership Programme would take place is irrelevant as the clause cannot be considered ancillary to an agreement to negotiate that Programme (see Section 6.5.2.2). Moreover, there was no difference in certainty regarding the likelihood of the parties negotiating the Industrial Partnership Programme at the date of the Agreement, compared with October 2010 (see Recitals (106) and (107)).

(429) The Commission cannot accept that there could be reasonable doubt that a non-compete agreement with a scope which would have been reduced in the context of the self-assessment exercise could be justified. First, and as already discussed in Section 6.3, the self-assessment nature of the clause has not been proven. Moreover, a non-compete commitment between the parties and covering the Iberian market cannot be considered ancillary to the Vivo transaction under any circumstances, irrespective of its scope.

(430) The Commission would like to highlight that the fact that the parties have provided extensive arguments regarding the possible consideration of the clause as an ancillary restraint does not mean that this matter would be complex from a legal perspective. On the contrary, and as discussed in Section 6.5.2, the different justifications which have been submitted by the parties to prove that the clause constitutes an ancillary restraint are manifestly unfounded.

(431) In that respect, the parties are market players which develop their activities in a sector which is heavily regulated and where competition law plays an important role, as Telefónica acknowledges.[355] The parties are therefore most likely to have full access and recourse to sophisticated legal counsel.

(432) To conclude, in accordance with the preliminary conclusions of the Statement of Objections, it cannot be accepted that the parties may have had doubts at the date of signature of the Agreement that a non-compete commitment covering the Iberian market could be justified.

6.5.4. Conclusion on ancillarity

(433) The clause cannot be considered a restraint ancillary to the Vivo transaction or to any of its components, as it cannot be considered directly related or necessary for the implementation of the Agreement. Moreover and contrary to the parties' submissions, there could not be reasonable doubt that the clause could be considered a restraint ancillary to the Agreement at the time of signature of the Agreement.

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354 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 214.

355 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 164.

6.6. Conclusion on the application of Article 101(1) of the Treaty

(434) In accordance with the preliminary conclusion of the Statement of Objections dated 21 October 2011, the Commission concludes that the clause amounts to a market-sharing agreement with the object of restricting competition within the internal market, thereby infringing Article 101 of the Treaty in view of the content of the agreement (and, in particular, the wording of the clause which leaves little, if any, doubt as to the non-compete nature of the clause), the economic and legal context of which the agreement forms part (that is to say, the electronic communications markets, which are liberalised) and the actual conduct and behaviour of the parties (and, in particular, the termination of the agreement on 4 February 2011 following the opening of proceedings by the Commission on 19 January 2011 and not as a result of the October 2010 calls as alleged by the parties).

(435) Therefore, the Commission considers that the clause is in violation of Article 101(1) of the Treaty.

7. APPLICATION OF ARTICLE 101(3) OF THE TREATY

7.1. Article 101(3) of the Treaty

(436) Although an agreement may have as its object the restriction of competition, it could nevertheless fall under the exemption established in Article 101(3) of the Treaty, provided that it fulfils the four following conditions established in it:

(a) It contributes to an improvement in the production or distribution of goods or in technical or economic progress;

(b) It allows consumers a fair share of the resulting benefits;

(c) It does not impose restrictions which are not indispensable to the attainment of the objectives;

(d) It does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(437) Those conditions are cumulative and must be satisfied in full.[356]

(438) In accordance with Article 2 of Regulation (EC) No 1/2003 the undertaking claiming the benefit of the conditions of Article 101(3) of the Treaty bears the burden of proving that those conditions have been fulfilled.

[356] See for example Judgment of the General Court (first chamber extended composition) of 11 July 1996, Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission [1996] ECR II-649.

7.2. Analysis of the conditions of Article 101(3) of the Treaty

(439) Telefónica submits that the clause does not restrict competition within the meaning of Article 101(1) of the Treaty. In that context, Telefónica does not examine the conditions of the Article 101(3) exemption.

(440) On the other hand, PT identifies as efficiencies of the clause that it was necessary to protect its investment under the call option (to buy the PT shares held by Telefónica) and its business and customers' information (in particular, regarding large customers).[357] Moreover, according to PT, the clause did not afford the possibility to eliminate competition in respect of a substantial part of the products in question, due to its limited scope and duration and also because effective competition in the corporate segment could not be affected to the detriment of consumers.

(441) First of all, the Commission highlights that restrictions which have as their object the restriction of competition rarely satisfy the terms of Article 101(3) of the Treaty.[358]

(442) In this case, the parties have not claimed that the clause could have contributed to improving the production or distribution of goods or services or to promoting technical or economic progress, and that consumers could receive a fair share of any benefits derived from the clause. As indicated in Recital (439), Telefónica did not even make submissions in relation to the exemption in Article 101(3) of the Treaty.

(443) It is hard to see how the conditions of Article 101(3) of the Treaty could be satisfied in this case. It should be noted that the conditions of Article 101(3) of the Treaty are cumulative and the burden of proof under that Article falls on the undertaking(s) invoking the benefits of the exemption.

(444) In addition, the clause cannot be considered indispensable to the attainment of the objectives of the Agreement. As discussed in relation to its assessment as an ancillary restraint to the Vivo transaction in Section 6.5, the clause, which refers to the Iberian market, cannot be considered directly related and necessary to the Vivo transaction or any of its components. As regards Telefónica's argument that, unless it accepted the clause, the Vivo transaction would not have been concluded, it should be noted that the question when analysing indispensability under Article 101(3) of the Treaty is not whether in the absence of the restriction the agreement would not have been concluded, but rather whether the restriction is indispensable to attain the efficiencies in question –efficiencies which do not exist in this case.[359]

(445) Finally, the clause afforded the parties the possibility of eliminating competition in respect of a substantial part of the services in question, as its object is eliminating a source of potential competition in the home markets of the parties. PT's arguments to the contrary indicated in Recital (440) refer to the scope of the clause and its duration and are discussed in Sections 5 and 9 respectively. On the other hand, PT appears to argue that, as the clause targets the corporate segment, it would not eliminate competition to the prejudice of "consumers". In this regard, the concept of

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357 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 422 to 426.

358 Paragraph 46 of the Article 101(3) Guidelines.

359 Paragraph 74 of the Article 10 (3) Guidelines.

"consumers", to be taken into account regarding the conditions of Article 101(3) of Treaty, refers to all users of the products covered, including corporations.[360]

(446) It may therefore be concluded that, in accordance with the preliminary conclusions of the Statement of Objections, the conditions of Article 101(3) of the Treaty are not fulfilled in this case.

8. EFFECT ON TRADE BETWEEN MEMBER STATES

(447) Article 101(1) of the Treaty is applicable to agreements and concerted practices between undertakings which "*may affect trade between Member States*".

(448) The Court of Justice of the European Union and the General Court have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".*[361] Whilst Article 101 of the Treaty does not require that agreements referred to in that provision actually affect trade between Member States, it does require that it be established that the agreements are capable of having that effect.[362]

(449) As indicated in Section 61 of the Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty[363], *"Agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States".* According to those Guidelines, this would always be the case when a certain turnover is exceeded (EUR 40 million). On the other hand, Section 64 of those Guidelines points out that *"when undertakings agree to allocate geographic territories, sales from other areas into the allocated territories are capable of being eliminated or reduced".*

(450) In relation to the effect on trade of the clause, PT argues that the clause does not establish the partitioning of markets between the parties. In addition, PT submits that, even if the clause is construed as a market sharing agreement, it would have a limited scope and would be unsuited to restrict competition in most electronic communications markets, due to their barriers to entry and, in particular, legal barriers.[364] These submissions are based on PT's arguments regarding the nature,

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360 Paragraph 84 of the Article 101 (3) Guidelines. Although this paragraph refers to the second condition of Article 101(3) of the Treaty (fair share for consumers), it shows that the analysis of the conditions under Article 101(3) of the Treaty should not be limited to impact on natural persons.

361 Case 56/65, Société Technique Minière, paragraph 7; Case 42/84, Remia and Others, paragraph 22 and Judgment of the General Court of 15 March 2000, Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, Cimenteries *CBR* [2002] ECR II-491, paragraph 3930.

362 Judgment of the Court of 28 April 1998, Case C-306/96 Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP), [1998] ECR I-1983, paragraphs 16 and 17; see also Judgment of the General Court (second chamber), Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services v. Commission, [1998] ECR II-3141, paragraph 136.

363 OJ C 101, 27.4.2004, p. 81.

364 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 418 to 421.

scope and unsuitability to produce effects of the clause, which have been rebutted in Sections 6.3, 5 and 6.4 respectively.

(451) In the Commission's view, the clause refers to two Member States (Spain and Portugal) and involves market sharing by the parties. Thus, the clause between the parties is by its very nature capable of affecting trade between Member States.

(452) In addition, the parties are the incumbent operators in their respective Member States of origin, and their turnover significantly exceeds the threshold mentioned in Recital (449).[365] In view of the scope of the clause, this market sharing agreement corresponds to, generally speaking, the assignment to each party of its Member State of origin. Therefore, the clause has the potential of affecting the structure of the market, of partitioning or reinforcing the partitioning of the Internal Market, and of delaying the process of market integration in the electronic communications sector (see section 6.3.7). Finally, it also has the potential of affecting sales in the respective country of origin of the parties.

(453) Thus, in accordance with the preliminary conclusions of the Statement of Objections, the clause may affect trade between Member States and infringes Article 101 of the Treaty.

9. DURATION OF THE INFRINGEMENT

(454) The clause was agreed on 28 July 2010, the date on which the Agreement was signed.[366] According to the very wording of the clause, it was intended to contain obligations binding the parties as from the date of Closing (27 September 2010) until 31 December 2011. On 4 February 2011 the parties amended the Agreement by deleting the clause.[367]

9.1. Date of commencement of the infringement

(455) As regards the commencement of the infringement, in the Statement of Objections the Commission took the preliminary view that the date to be taken into account should be the date when the clause was agreed (28 July 2010). This was because the Agreement was signed on 28 July 2010 and the activities covered by the obligation not to compete were determined by reference to the date of the Agreement.

(456) In its reply to the Statement of Objections, Telefónica rejected the Commission's argument that the infringement would have commenced before the date of Closing (27 September 2010), as this is the date on which the clause would have entered into force according to its literal wording.[368]

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365 See Telefónica 2011 Annual Accounts (Document ID 0952) and PT 2011 Annual Accounts (Document ID 0951).

366 Stock Purchase Agreement of 28 July 2010, Document ID 0028.

367 Recital (125).

368 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 517.

(457) Telefónica disputes the reasoning of the Commission on the grounds that the parties can validly delay the possible non-compete commitment of the clause by subjecting its entry into force to a term or condition and that the only obligation provided for by the clause before Closing was to carry out the self-assessment exercise.[369]

(458) On the other hand, PT submits that it was not possible that a non-compete commitment could enter into force before the conclusion of the self-assessment exercise and thus the duration of the non-compete commitment cannot be validly discussed, since it did not enter into force.[370] According to PT, the preliminary view of the Commission expressed in the Statement of Objections is theoretical and assumes that the clause provides for a standstill obligation which would prohibit the expansion of existing activities and investments.[371]

(459) Telefónica and PT's arguments regarding the self-assessment nature of the clause and its lack of effects have already been rebutted in Sections 6.3 and 6.4. It is correct that, as the parties allege, the very wording of the clause expressly provides for its entry into force on the date of Closing (27 September 2010). However, it could also be argued that the effects of the obligation not to compete started on the date of signature of the Agreement. The Commission retains the literal interpretation of the clause, according to which the date of commencement of the infringement would be 27 September 2010.

9.2. Date of termination of the infringement

(460) As regards the end of the infringement, Telefónica submits that the clause "exhausted" its object subsequent to the self-assessment exercise and therefore that it should be considered terminated on 29 October 2010 at the latest. The termination agreement entered into on 4 February 2011 to delete the clause would be a mere formalisation of such "exhaustion".[372]

(461) Similarly, PT argues that the parties agreed on 29 October 2010 at the latest that the non-compete commitment provided for in the clause was not valid under competition law.[373]

(462) As discussed in Section 4.3.3, there is no evidence that the October 2010 conference calls were prompted by the alleged self-assessment obligation under the clause and would have resulted in an agreement by the parties that the clause was "exhausted". Moreover, the termination agreement of 4 February 2011, which, according to the parties was entered into in order to confirm the conclusions of the October 2010 conference calls, does not mention those calls or the alleged self-assessment exercise, despite its five Recitals, which give a detailed description of its rationale and background.

(463) The Commission understands that the clause provides for a non-compete obligation and not, as alleged by the parties, a self-assessment obligation (see Section 6.3).

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369 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 519 to 521.
370 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 428.
371 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 430 to 432.
372 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 523 to 525.
373 Reply of PT to the Statement of Objections Document ID 0753, paragraph 429.

Accordingly, the October 2010 conference calls cannot be explained on the basis of the alleged self-assessment obligation which would according to the parties be provided for by the clause.

(464) In the Commission's view, the infringement ended on 4 February 2011 when the clause was deleted by the parties.

9.3. Conclusion on duration

(465) In conclusion, the duration of the infringement corresponds to the period from the date of Closing (27 September 2010) until the date when the clause was deleted (4 February 2011).

10. REMEDIES

10.1. Article 7 of Regulation (EC) No 1/2003

(466) Where the Commission finds that there is an infringement of Article 101 of the Treaty, it may require by decision that the undertaking concerned brings such an infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(467) In this case, on 4 February 2011 Telefónica and PT signed an agreement deleting the clause after the Commission opened proceedings on 19 January 2011 (see Section 4.4), putting an end to the infringement.

(468) The General Court stated in the Sumitomo judgement[374] that:

"*The cessation of an infringement prior to the adoption of a decision by the Commission does not in itself constitute an obstacle to the Commission's exercise of its powers to find and penalise an infringement of the competition rules. In that respect, the Court of Justice has already held, first, that the Commission's power to impose penalties is in no way affected by the fact that the conduct constituting the infringement has ceased and that it can no longer have detrimental effects (ACF Chemiefarma v Commission, paragraph 175) and, second, that the Commission may take a decision finding an infringement which the undertaking has already terminated, on condition, however, that the institution has a legitimate interest in so doing (GVL v Commission, paragraph 24).*"

(469) The Commission retains therefore the power to impose fines despite the termination of the infringement –particularly when, as in this case, termination followed the opening of proceedings by the Commission.

(470) In order to suppress illegal activities in general and, in particular, to prevent the parties from reaching new non-compete commitments covering the Iberian market, a decision finding an infringement and imposing fines is fully justified in this case.

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374 Judgment of the General Court (Fourth Chamber, extended composition) of 6 October 2005, Joined Cases T-22/02 and T-23/02, Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd v Commission, ECR [2005] II-04065. See also Case 41-69, ACF Chemiefarma NV v Commission, and Judgment of the Court of 2 March 1983, Case 7/82 Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission, ECR [1983] 00483.

Moreover, the possibility for effective competition between the parties to fully develop in their Member States of origin should be ensured.

10.2. Article 23(2) of Regulation (EC) No 1/2003 – Fines

(471) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty.[375] For each undertaking participating in the infringement, the fine is not to exceed 10% of its total turnover in the preceding business year.

(472) In fixing the amount of the fines, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[376] ("the Guidelines on fines").

Arguments of the parties

(473) Telefónica submits that it would not have committed the infringement wilfully nor negligently and therefore that it should not be sanctioned, in accordance with the general principle of culpability (*culpabilidad*) regarding the imposition of fines.[377] Telefónica justifies this submission on the basis that it proposed the wording "*to the extent permitted by law*" in order to transform the clause into a self-assessment one. In addition, it did not act negligently as it carried out the alleged self-assessment exercise in October 2010.

(474) On the other hand, in relation to the application of mitigating circumstances, Telefónica submits that the infringement was not committed willfully but, as the case may be, as a result of negligence.[378] According to Telefónica, the only behaviour for which the parties could be blamed would be their lack of diligence regarding the formalisation and communication to the Commission of the results of the self-assessment exercise.[379]

(475) PT submits that the infringement cannot be considered to be committed wilfully because the parties did everything possible to ensure compliance with the law.[380] The wording "*to the extent permitted by law*" was not introduced with fraudulent intent and the publicity of the clause shows that the parties did not intend to behave in an anticompetitive manner. PT also submits that the only behaviour for which it could be blamed is its lack of diligence regarding the self-assessment of the clause and the adoption of the measures to terminate it.[381]

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375 Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102 TFEU] of the EC Treaty […] shall apply *mutatis mutandis.*" (OJ L 305, 30.11.1994, p. 6).

376 OJ C 210, 1.9.2006, p. 2.

377 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 406 to 422.

378 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 552.

379 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraph 510.

380 Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 435 to 437.

381 Reply of PT to the Statement of Objections, Document ID 0753, paragraph 443.

Appraisal by the Commission

(476) The submissions of the parties set out in Recitals (473) to (475) are based on the arguments that the clause provided for a self-assessment obligation and that the self-assessment exercise was carried out in October 2010. As referred to in Section 6.3, the clause imposes a non-compete obligation on the parties and amounts to a market-sharing agreement. On the other hand and as referred to in Section 4.3.3, the Commission considers that the "exhaustion" of the clause in October 2010 has not been proven and that any self-assessment which may have been carried out by the parties, individually or in cooperation with the other via the conference calls of October 2010, was not required by the clause and did not lead to any result, as the clause was only deleted on 4 February 2011. Moreover, the parties could not have any reasonable doubt as to the validity of a non-compete commitment at the time of signature of the Agreement (see Section 6.5.3).

(477) Therefore, in this case, the Commission considers that, based on the facts described in this Decision, the infringement was committed intentionally.[382] The infringement consists of a clearly unlawful agreement not to compete and to share the Spanish and Portuguese electronic communications markets between the parties. With respect to this type of obvious infringement, the parties cannot claim that they did not act deliberately.

10.3. Basic amount of the fines

10.3.1. Methodology

(478) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales[383], that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the European Union.

(479) The assessment of gravity is made on a case-by-case basis for all types of infringement, taking into account all the relevant circumstances of the case. As a general rule, the proportion of sales to be taken into account will be set at a level of up to 30% of the value of sales.

(480) The Commission has used the figures provided by the undertakings for the calculation of the fines to be imposed.

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382 See, for example, Judgment of the General Court of 19 May 2010, Case T-11/05 – Wieland-Werke AG v Commission, ECR [2010] II-0086 paragraph 140; Judgment of the General Court (first chamber) of 6 April 1995, Case T-143/89 – Ferriere Nord v Commission ECR [1995], II-917 paragraph 42; Judgment of the Court of 17 July 1997, Case C-219/95 P Ferriere Nord v Commission, – ECR [1997], I-4411 paragraph 50.

383 Paragraph 12 of the Guideline on fines.

10.3.2. The value of sales

Arguments of the parties

(481) The parties submit that the value of sales should refer to the services covered by the clause and that the Commission overestimates the scope of the clause, which impacts on the value of sales. The arguments of the parties on the scope of the clause have been appraised in Section 5.

Appraisal by the Commission

(482) As indicated in Recital (184), the Commission finds that the non-compete clause applies to electronic communication services and television services, with the exception of global telecommunication services and wholesale international carrier services (see Section 5.2.4.3). This exception is a consequence of both parties' presence in the markets for global telecommunication services and wholesale international carrier services in the Iberian Peninsula at the date of the Agreement. In particular, any services provided in Spain or Portugal and included in the markets which are listed in Section 5.3 with the exception referred to in this Recital (global telecommunication services and wholesale international carrier services) are directly or indirectly related to the infringement.

(483) Considering that the clause excludes from its scope any investment and activity at the date of the Agreement, that could be deemed to be in competition with that of the other party in the Iberian market, the Commission only takes into account for each party the value of its sales in its Member State of origin and, in particular, does not include the value of sales of one party in the other party's Member State of origin, as these amounts correspond in principle to pre-existing activities not covered by the clause. This means that as regards Telefónica, the value of sales is set by the Commission by reference to the applicable value of its sales in Spain, while for PT, it is set by reference to the applicable value of its sales in Portugal.

(484) The Commission normally takes into account the sales made by the undertakings during the last full business year of their participation in the infringement.[384] Taking into account that the infringement lasted for less than one year and is divided between 2010 and 2011, the Commission uses the undertakings' sales in 2011, which are lower than the sales achieved by the parties in 2010.[385]

(485) In view of the matters referred to in Recitals (482) to (484) and based on the information provided by the parties[386], the values of sales that will be taken into consideration are the following:

Table 5: Value of sales in 2011 (million EUR)

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384 Paragraph 13 of the Guidelines on fines.

385 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, pp. 8 and 13. Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 3.

386 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, p. 8. Reply of PT to the request for information of 5 September 2012, Document ID 1012, p. 3.

Party	Value of sales in its country of origin
Telefónica	[11 968 to 13 235]
PT	[2 000 to 3 000]

10.3.3. Gravity

(486) The gravity of the infringement determines the percentage of the value of sales taken into account in setting the fine. In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

Arguments of the Parties

(487) As regards the gravity of the infringement, Telefónica submits the following arguments[387]:

(a) that the clause cannot be considered a restriction by object, as it only provides for an obligation to carry out a self-assessment exercise. The only behaviour for which the parties could be blamed is their lack of diligence regarding the formalisation and communication to the Commission of the results of the self-assessment exercise;

(b) that as regards the possibility of taking into account regarding gravity the fact that Telefónica and PT are incumbent operators in their Member States of origin, Telefónica submits that being an incumbent is directly proportional to its value of sales and therefore cannot be taken into account regarding the gravity of the infringement, as this would imply taking that fact into account twice;

(c) that the clause did not and could not produce any effects;

(d) that the publicity of the clause should be taken into account in the assessment of gravity, as the parties have never hidden its existence.

(488) PT argues that although the parties are incumbent operators in their Member States of origin, in order to assess the gravity of the infringement, it should be borne in mind that PT is in a situation of effective competition in most electronic communications markets in Portugal.[388] Moreover, PT argues that it is not correct that the clause was broad and covered the totality of Spain and Portugal, as due to barriers to entry it could not have produced effects during its duration.

[387] Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 508 to 514.

[388] Reply of PT to the Statement of Objections, Document ID 0753, paragraphs 438 to 441.

Appraisal by the Commission

(489) The infringement consists of an agreement not to compete and to share the Spanish and Portuguese electronic communications and television markets between the parties. Telefónica and PT are the incumbent telecommunications operators in their respective Member States of origin.

(490) The arguments of the parties related to the nature of the clause and its effects are appraised in Sections 6.3 and 6.4 respectively. In addition, the Commission has not taken the status of the parties as incumbents in their Member States of origin into account when determining gravity in this case.

(491) In this case, the Commission takes into account the fact that the clause was not kept secret by the parties from the moment it was introduced for the first time in the second offer dated 1 June 2010. As explained in Recitals (128) to (130), the second offer including the first version of the clause was uploaded by the parties to their corporate websites and communicated to the Portuguese and Spanish Stock Exchange Authorities, which also published it on their webpages. In addition, on 9 June 2010 PT distributed to its shareholders a brochure including information regarding the Vivo transaction and the clause. Furthermore, the Agreement including the final version of the clause was part of the filings by Telefónica and PT to ANATEL and CADE. Finally, in a press article published by the *Jornal de Negócios* on 23 August 2010, Telefónica confirmed that the Agreement included a non-compete clause.[389]

10.3.4. Duration

(492) As discussed in Section 9, the Commission takes into consideration that the infringement lasted from 27 September 2010 (the date of Closing) until 4 February 2011 (the date of the agreement whereby the parties terminated the clause).

10.3.5. Conclusion on the basic amounts of the fines to be imposed

(493) For those reasons and in view of the size of the undertakings and the short duration of the restrictive agreement, the Commission considers that it is proportionate and sufficient to achieve deterrence, in the specific circumstances of this case, to take into account a low proportion of the value of sales in setting the basic amount of the fines. The Commission therefore considers that the proportion of the value of sales to be taken into account should be 2% for the two undertakings concerned.

(494) Accordingly, the basic amount of the fines to be imposed on Telefónica and PT is as follows:

Party	**Basic amount (EUR)**
Telefónica	[80 000 000 to 90 000 000]
PT	[14 500 000 to 16 000 000]

[389] See recital (103).

10.4. Adjustments to the basic amount

(495) The Commission may consider aggravating and mitigating circumstances that result in an adjustment of the basic amount. Paragraphs 28 and 29 of the Guidelines on fines contain a non-exhaustive list of such circumstances.

10.4.1. Aggravating circumstances

(496) The Commission considers that no aggravating circumstances are present in this case.

10.4.2. Mitigating circumstances

Arguments of the parties

(497) Telefónica submits that the following mitigating circumstances should apply in this case:[390]:

(a) the parties terminated the infringement as soon as the Commission intervened and the Commission practice is to apply a mitigating circumstance in these cases (for example, *PO/Michelin* case[391]). According to Telefónica, this mitigating circumstance would apply in cases where the intervention of the Commission triggers the termination of the infringement (as shown in the *Amman & Söhne GmbH & Co KG* judgment[392]) and its application would be more likely the more doubts there are on whether the relevant conduct infringes competition law (as shown by the *World Wide Tobacco España, S.A.* judgment[393]). Telefónica submits that in this case there would be reasonable doubts regarding the compatibility of the clause with competition law. Telefónica took into account the intervention of the competition authorities by carrying out the self-assessment exercise further to the requests for information of the Spanish competition authority in September 2010 and by formally terminating the clause further to the opening of proceedings by the Commission;

(b) Telefónica avoided applying the clause by adopting competitive conduct in the market (such as the alleged self-assessment exercise). As shown in the *Cheil Jedang Corp.*[394] and *Gütermann AG*[395] cases, the application of the mitigating circumstance regarding the adoption of competitive conduct should be based in the individual behaviour of the parties, and therefore the subjective intent of the parties would be relevant. In this regard, Telefónica submits that the agreement was never implemented as was the intention of the parties. In

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390 Reply of Telefónica to the Statement of Objections, Document ID 0763, paragraphs 526 to 560.

391 Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin) (OJ L 143, 31.5.2002, p. 1).

392 Judgment of the General Court (Fifth Chamber) of 28 April 2010, Case T-446/05, Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission, ECR [2010] II-01255.

393 Judgment of the General Court (Fourth Chamber) of 8 March 2011, Case T-37/05, World Wide Tobacco España, SA v European Commission, ECR [2011] II-0041.

394 Judgment of the General Court (Fourth Chamber) of 9 July 2003, Case T-220/00 Cheil Jedang Corp. v Commission, , ECR [2003] II-02473.

395 Judgment of the General Court (Fifth Chamber) of 28 April 2010, Joined Cases T-456/05 and T-457/05 Gütermann AG and Zwicky & Co. AG v Commission, ECR [2010] II-01443.

addition, Telefónica always had a procompetitive approach, as the clause was not included at its initiative and Telefónica reduced its scope and duration. The role played by each undertaking party to the infringement should be assessed on an individual basis;

(c) Telefónica would not have committed the infringement intentionally but as a result of negligence (if any);

(d) the intervention of the Portuguese government in the negotiations had a direct influence regarding the inclusion of the clause and Telefónica's behaviour, as Telefónica had to take into account the position of the Portuguese government in relation to the Vivo transaction. This intervention may not exclude Telefónica's liability but, in any event, should be considered a mitigating circumstance, as shown in the *French beef*[396] and *Raw Tobacco Spain*[397] cases;

(e) Telefónica has fully cooperated with the Commission, by providing the information requested and additional information.

(498) On the other hand, Telefónica submits that the fact that the infringement was not committed wilfully or negligently, together with the mitigating circumstances referred to in Recital (497), would require that, if a fine was imposed, it would have to be merely symbolic.[398] According to Telefónica, the practice of the Commission in the electronic communications field is to avoid the imposition of fines when the companies have adopted measures which have prevented the implementation of the anticompetitive practice, as shown by the case *QSC AG/Deutsche Telekom AG* (COMP.38.436).

(499) For its part, PT submits that the following should be taken into account as mitigating circumstances: the fact that the agreement was not kept secret and the fact that PT acted in the belief that the use of the "to the extent permitted by the law" wording would have permitted agreeing to the clause.

Appraisal by the Commission

(500) The parties agreed to delete the clause on 4 February 2011, terminating the infringement. Taking into account that the termination took place only 16 days after the Commission initiated proceedings (and 30 days after the Commission sent its first request for information to the parties) and that the clause is not secret, the Commission considers the mentioned deletion as a mitigating circumstance. This mitigating circumstance applies to both parties equally.

(501) In view of the matters referred to in Recital (500), the basic amount of the fines to be imposed to the parties should be decreased by 20%.

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396 Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty in Case COMP/C.38.279/F3, French beef (OJ L 209, 19.8.2003, p. 12).

397 Commission Decision 2007/236/EC of 20 October 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty in Case COMP/C.38.238/B.2, Raw Tobacco Spain.

398 Reply of Telefónica to the request for information of 5 September 2012, Document ID 1022, paragraph 10.

(502) On the other hand, all other arguments submitted by Telefónica should be dismissed. In particular, Telefónica's arguments in relation to the substantial limitation of its involvement in the infringement cannot be accepted. The clause was agreed by both parties and provides also for a non-compete obligation by PT. The justifications presented by Telefónica in this regard are unconvincing (see Recitals (81) and (82)). Although PT may have advocated the convenience and admissibility of the clause, the responsibility for entering into it should fall on both parties.

(503) Therefore, the evidence in the Commission's file does not prove that Telefónica's involvement in the infringement was substantially limited.

(504) In addition, as discussed in Recitals (473) to (477), the Commission considers that the parties committed the infringement intentionally and therefore cannot consider as a mitigating circumstance or as a ground for a symbolic fine that the infringement was committed only negligently.

(505) Furthermore, the intervention of the Portuguese government in the negotiations of the Vivo transaction is described and appraised in Section 4.1.7. While it is undisputed that there were public statements by members of the government to the effect that PT should continue to be a main actor in the telecommunications sector in Portugal and in Brazil, there is no evidence in the file that the Portuguese government would have imposed the clause, or that it would have encouraged the infringement.

(506) As regards the cooperation of Telefónica with the Commission during the investigation, the Commission considers that this cooperation was clearly insufficient to qualify as a mitigating circumstance, as there is nothing special about this cooperation.[399]

(507) The *QSC AG/Deutsche Telekom AG* case (COMP.38.436) alleged by Telefónica would not prevent in any manner the Commission from imposing fines in this case. This case, which relates to an anticompetitive agreement between two operators, should be distinguished from the *QSC AG/Deutsche Telekom AG* case, where Deutsche Telekom applied to the German NRA for an increase of the prices for shared access to its network and then changed its application subsequent to intervention by the Commission to ensure compliance by Deutsche Telekom with previous commitments given to the Commission in 2004.

(508) Finally, PT's argument about the lack of secrecy of the agreement has been taken into consideration by the Commission in the appraisal of the gravity of the infringement.

[399] To the contrary, on 5 January 2011, the Commission asked Telefónica to provide any agreements between the parties regarding their cooperation in the Spanish and Portuguese electronic communications markets. Telefónica did not submit the 2002 Framework Cooperation Agreement and the 2010 Commercial Agreement, which PT submitted and were clearly within the scope of the request for information. Accordingly, the Commission had to reiterate on 1 April 2011 the request already included in the request for information of 5 January 2011. Request for information to Telefónica of 1 April 2011, Document ID 0205.

10.4.3. Conclusion on the adjusted basic amounts of the fines to be imposed

(509) The adjusted basic amount of the fines to be imposed on Telefónica and PT is the following:

Party	Adjusted basic amount (EUR)
Telefónica	[60 000 000 to 70 000 000]
PT	[11 500 000 to 13 000 000]

10.5. Application of the 10% turnover limit

(510) The fine imposed on each undertaking participating in the infringement will not exceed 10% of its total turnover relating to the business year preceding the date of this Decision.[400]

(511) The adjusted basic amounts set out in the table in Recital (509) do not exceed 10% of the total turnover for any of the undertakings concerned. Total turnover corresponds in 2011 to EUR 62 837 million in the case of Telefónica and EUR 6 146.8 million in the case of PT (see Recitals (12) and (23)). Therefore the amounts are not required to be modified in the light of the undertaking's turnover.

10.6. Conclusion: final amount of individual fines

(512) The total fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be the following:

Party	Total fine (EUR)
Telefónica	66 894 000
PT	12 290 000

11. CONCLUSION

(513) In light of the considerations set out in this Decision, the Commission finds that Telefónica and PT have infringed Article 101 of the Treaty by agreeing to the clause referred to in recital 1 of this Decision and fines should be imposed on them pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003.

[400] Article 23(2) of Regulation (EC) No 1/2003.

HAS ADOPTED THIS DECISION:

Article 1

Telefónica, S.A. and Portugal Telecom SGPS, S.A. have infringed Article 101 of the Treaty on the Functioning of the European Union by participating in a non-compete agreement, included as clause nine of the Stock Purchase Agreement entered into by them on 28 July 2010.

The duration of the infringement was from 27 September 2010 until 4 February 2011.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) Telefónica, S.A.: EUR 66 894 000

(b) Portugal Telecom SGPS, S.A.: EUR 12 290 000

The fines shall be paid in euro, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1–2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39.839

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.[401]

Article 3

This Decision is addressed to

(a) Telefónica, S.A., Distrito C – Edificio Central, Planta 3, Ronda de la Comunicación s/n, 28050 Madrid, Spain.

[401] OJ L362, 31.12.2012, p. 1.

(b) Portugal Telecom SGPS, S.A., Avenida Fontes Pereira de Melo 40, 1069-300 Lisboa, Portugal.

This Decision shall be enforceable pursuant to Article 299 of the Treaty on the Functioning of the European Union.

Done at Brussels, 23.1.2013

For the Commission

Joaquín ALMUNIA
Vice-President

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry

CONFIDENTIAL ANNEX