

## 3.5 SPAIN

### 1. REGULATORY FRAMEWORK

#### 1.1. National Regulatory Authority

On 26 July 2002, the Spanish Council of Ministers decided to remove the Telecommunications Market Commission (CMT) from the umbrella of the Ministry of Economy and to organically attach it to the Ministry of Science and Technology. This move should contribute to further coordination between the two arms of the Spanish regulator. However, the Ministry of Economy remains responsible for tariffs, which are, ultimately, decided by the Government's Executive Committee for Economic Affairs as far as the prices of the incumbent operator are concerned. A key objective of these two authorities is to keep inflation down, and market players note that this aim is not always convergent with the sector-specific policies of the Ministry of Science and Technology (State Secretariat for Telecommunications and the Information Society, SETSI) and the CMT.

This change thus appears not to have allayed the market players' continuing concerns regarding the complexity of the regulatory framework, the number of authorities involved in the regulatory process and the need for further coordination between these authorities with a view to achieving greater regulatory certainty. This need for further coordination also concerns the relationship between the central and the regional/local authorities, as the latter have adopted regulations and fees that hinder and complicate the exercise of rights of way. The Spanish regulator recognises this need for close coordination, with a view to which the new draft telecommunications law, which is intended to transpose the new Community regulatory framework, reaffirms and strengthens the general principles that all public administrations must comply with so as to guarantee the rights of operators and users.

The Spanish authorities have traditionally intervened significantly in the retail market. Market players have called on the authorities to shift their focus from the level of end-user prices to conditions and competition on the wholesale market. The new Minister for Science and Technology has been sensitive to this call: shortly after assuming his new post, he announced<sup>1</sup> measures to relax the current price cap regime (which is pegged to the consumer price index and closely controlled by the Ministry of Economy) and to increase competition in the sector as a means of improving competitiveness and lowering end-user tariffs.

As indicated above, the Spanish authorities have, generally speaking, been very active in recent months. The CMT has initiated several proceedings to ensure the effective implementation of its decisions, including ex officio proceedings. However, the fact that the CMT has no (on-site) inspection powers<sup>2</sup> undermines its ability to fully enforce its

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<sup>1</sup> Reference is made here to a press release issued by the Ministry of Science and Technology on 2 October 2002 stating that the current economic situation makes it advisable to achieve price reductions by strengthening the commercial opportunities available to new entrants rather than through direct regulation of the incumbent's tariffs.

<sup>2</sup> Article 76 of the General Telecommunications Act nonetheless stipulates that in matters pertaining to the competence of the CMT, and upon the latter's request, the Ministry of Science and Technology

decisions. Also, the number of pending proceedings is inflated by the numerous appeals that the incumbent lodges against the regulator's decisions. By June 2002, the incumbent had already launched twenty-five appeals against the regulator's decisions, compared with twenty-one for the whole of 2001.

In September 2002, there were four pending sanction proceedings initiated by the CMT against the incumbent, relating to carrier pre-selection, number portability, public telephone booths and capacity-based interconnection. In July 2002, the CMT imposed the largest ever fine (€18 million) on the operator for failure to comply with a decision it had taken regarding closed user groups.

## **1.2. Management of frequencies**

At the end of September 2002, the new Minister announced<sup>3</sup> that the administration was considering the creation of a State Agency for Radiocommunications that would be responsible for frequency management and could grant authorisations for interchanges of frequency.

## **2. INTERCONNECTION AND ACCESS REGIME**

### **2.1. Interconnection**

#### *2.1.1. Reference Interconnection Offer*

The currently applicable reference interconnection offer (RIO) was adopted by the CMT on 9 August 2001. This was the first RIO based on an analysis by the CMT of the incumbent's cost accounts established on the basis of current costs, and it resulted in a fall in interconnection charges of 26% (on a weighted average) compared with the 2000 RIO. Also, the offer introduced a number of novelties<sup>4</sup>, in particular a new capacity-based interconnection service. The objective of this new service was to give the new entrants more flexibility in setting their end-user tariffs and to allow them to compete more effectively with the incumbent operator.

In 2002, some changes have been made to the 2001 RIO. On 17 January a new alternative termination model for intelligent network services was established alongside the existing (and improved) access model, and on 27 June a new transit service for the internet access numbers 908 and 909 was introduced. The CMT also adopted, in February 2002, the non-provisional interconnection leased lines prices included in the RIO.

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(MCYT) carries out the inspections requested. It furthermore specifies that, in any event, it is the MCYT that exercises the inspection functions.

<sup>3</sup> Mr Piqué's address of 25 September 2002 to the Congress' Science and Technology Commission.

<sup>4</sup> For further details, see the 7<sup>th</sup> Report on the implementation of the telecommunications regulatory package (COM(2001)706), and the Spanish regulator's submissions for the preparation of this 8<sup>th</sup> Report ([http://europa.eu.int/information\\_society/topics/telecoms/implementation/annual\\_report/8threport/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm)).

The RIO for 2001 was welcomed by the new entrants. It appears, however, that it has been difficult, and in some cases impossible, to implement many of its components in practice. In particular, only three agreements on capacity-based interconnection have been concluded, and they only include in part the provisions contained in the RIO (e.g. the provision of voice and data over the same link is not available)<sup>5</sup>. Other operators are still negotiating a capacity-based agreement with the incumbent. The difficulties that have arisen in this process have prompted the CMT to adopt five Precautionary Measures, which have been appealed by the incumbent. These Measures have allowed the new entrants to benefit from the prices set out in the RIO for the combined provision of voice and data over the same link even though these have, in practice, been provided over separate links. A proceeding was also opened against the incumbent for alleged failure to provide the combined (voice and data) capacity-based interconnection model, which resulted in the imposition of a €13.5 million fine in October 2002.

Implementation of capacity-based interconnection is one of the regulator's priorities and forms part of the measures announced by the Minister for Science and Technology on 2 October 2002 to promote competition in the telecommunication sector. A study has been commissioned by the CMT to review the prices of capacity-based interconnection for inclusion in the next RIO.

Data gathered during the preparation of this Report suggest that interconnection charges have fallen considerably since the previous reporting period, with the exception of double transit charges. Local level charges are now slightly below EU average. Single transit charges have fallen even more than the local level charges, but remain slightly above the EU average. In this regard, the incumbent has repeatedly noted that comparison of nominal rates between the Member States does not provide an accurate picture of the Spanish situation and reiterates that the combined result of capacity-based interconnection and discounts by volume is that its interconnection charges are the lowest in Europe. As mentioned in the 7<sup>th</sup> Report, it has appealed the RIO 2001 on the grounds that the prices included therein are not cost oriented, in particular as concerns capacity-based interconnection.

Another development that undermines the attractiveness of the reduced RIO 2001 charges is that, in the context of two interconnection disputes, the CMT has decided that the termination charges that new entrants are authorised to levy must be “referenced to the RIO”, i.e. be based on the RIO prices applied to the incumbent’s network for similar services. This means in practice that new entrants may not levy higher charges than those corresponding to “local level” in the RIO 2001. The CMT argues that the RIO prices provide a signal of efficiency to the market and constitute the reference prices towards which all networks should tend and which they should undercut. Thus its decision produces effects beyond the abovementioned two cases, as the model is being applied in interconnection negotiations with the other new entrants, including cable operators, as confirmed by several CMT decisions.

The question arises as to whether such decisions indirectly impose a network architecture on the new entrants. Also, the practical result of these decisions appears to be that the entrants’ interconnection charges are indirectly regulated (not in terms of cost orientation or other SMP-related obligations, but in terms of profit margins).

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<sup>5</sup> Situation as of September 2002.

### *2.1.2. Fixed-to-mobile call termination*

Mobile operators with SMP in the national interconnection market (i.e. Telefónica Móviles and Vodafone) must comply with the cost orientation requirement. The CMT has initiated a process to orientate the termination charges of these two operators to their costs. On 11 July 2002, it cut the termination charges of both operators by 17.13% (with effect from 1 August 2002). This figure was arrived at using European benchmarking. The authorities expect these cuts to translate into a reduction of 11.44% in the end-user prices of these calls.

Both mobile operators have appealed this decision and questioned the CMT's timing in setting these prices just as they were about to submit their 2000 and 2001 cost accounts (the deadline for submission was 31 July 2001). Telefónica Móviles also points out that it (and Vodafone) already cut its termination charges by 17% in 2001 "on a voluntary basis" and claims that these reductions did not translate into lower user charges, as fixed operators used them to increase their margins.

The CMT decided to set these prices on its own initiative to respond to market needs. It used benchmarking, as although it recently approved the cost accounting system of both operators, it did not yet possess final cost accounting data. Once the latter have been analysed, these operators' interconnection charges will be reviewed in the light of the actual costs they incur.

Fixed-to-mobile charges are subject to the price cap, in the framework of which they fell by 13% in 2001. A further reduction of 13% is scheduled for 2002.

## **2.2. Interconnection leased lines / partial circuits**

According to data collected in the preparation of this Report, the monthly rental charges levied in Spain for leased short-distance (interconnection) lines have fallen considerably since the last reporting period; however, they remain the most expensive in the EU in terms of 2 Mbit/s lines.

The reference interconnection offer (RIO) for 2001 incorporated, for the first time, a wholesale offer for half circuits. A series of other improvements were introduced such as, for example, the extension of leased line interconnection to 34 Mbit/s and 155 Mbit/s lines, the establishment of delivery and repair terms, and penalties for breaches of those terms. Service availability and quality levels were also introduced, as were new reporting obligations.

The RIO introduced provisional prices, and on 26 February 2002 the CMT established the non-provisional prices of interconnection leased lines. They provide for an average margin in the order of 25% below the incumbent's retail offer. The RIO also provides that operators that have requested interconnection leased lines since 9 August 2001 (i.e. the date of adoption of the new RIO) will benefit from the prices set on 26 February 2002 with retroactivity to the date of their request.

The CMT also decided that the incumbent should present within three months (as from 21 February 2002) a proposal for modification of its cost accounts with a view to ensuring that there is sufficient unbundling for setting the prices of connectivity services and of the link to the customer, in all the lengths and capacities defined in the RIO. Based on an

analysis of the operator's proposal, the CMT will introduce the relevant changes to the cost accounting system.

These developments are welcomed by the new entrants. However, they maintain their claim that alongside these public prices there are special tailor-made offers by the incumbent to corporate customers. The CMT has not established whether such offers exist and is constrained from so doing by its lack of inspection powers.

### **2.3. Local loop unbundling**

#### *2.3.1. Reference unbundling offer and regulatory measures*

The incumbent operator duly published its reference unbundling offer (RUO) in January 2001. Nevertheless, the local loop unbundling process proved so cumbersome that the CMT had to adopt three Precautionary Measures<sup>6</sup> in the course of 2001 to facilitate it.

Despite these measures by the CMT, only some tens of local loops had been unbundled by the beginning of 2002 (i.e. one year after the adoption of the Local Loop Unbundling Regulation). The process was stalled as market players waited for the CMT to review the RUO, a new version of which was adopted on 29 April 2002. In this new offer, the prices of more than fifty different service elements were reduced, in most cases by more than 30% compared with the previous RUO.

The prices relating to collocation (already set in one of the abovementioned Precautionary Measures) and the monthly rental prices for the fully unbundled loop and shared access to the loop (established by the Government's Executive Committee for Economic Affairs in December 2000) were not modified, however. In this context, it should be noted that where the monthly price of the local loop remains at €12.62, Telefónica's line rental charge is €11.68.

The new RUO incorporates and further develops the requirements laid down in the abovementioned Precautionary Measures regarding collocation and the delivery of the signal. In addition to the abovementioned price reductions that also apply to these two services, regarding collocation, the new RUO introduces *inter alia* a 15-day deadline for the provision of the housing option, a flat-rate energy charge, new procedures for access to collocation sites (based on yearly badges for new entrants' accredited personnel) and penalties in the event of delays in provisioning. As to the delivery of the signal, penalties are also applicable in the event of delays in provisioning, and the RUO includes a detailed list of the services that can be contracted.

The RUO improves the information systems and administrative procedures available to new entrants by allowing them to access the incumbent's services and databases on-line and provides for a standard contract form that includes a service level agreement. It also removes restrictions on the use of (combinations of) DSL technologies in the incumbent's local loops.

The incumbent has appealed the new RUO in respect of both the conditions and the prices included therein; it considers that the latter are not cost oriented.

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<sup>6</sup> For further details, see the 7<sup>th</sup> Implementation Report, COM(2001)706.

### 2.3.2. *Effective implementation*

With a view to ensuring the effective implementation of this new reference offer, which has been welcomed by the new entrants, in March 2002 the Ministry launched a programme of inspections into all exchanges that have been solicited in the context of the unbundling process. No insurmountable obstacles were identified in this context. In this regard, it should be noted that the incumbent has made significant investments to prepare its exchanges for collocation. Preparatory work at all of the 103 exchanges solicited by the new entrants has been completed; these exchanges represent 24% of all local loops (i.e. more than four million loops).

As of 1 October 2002, 1 181 local loops had been unbundled. No loops were in shared use due to a lack of demand. This represents undeniable progress in the few months since the adoption of the new RUO in April 2002. However, the overall figure remains low compared with other Member States, and only relates to the six new entrants that have concluded local loop unbundling agreements with the incumbent, while another thirteen operators that initially expressed interest in the process have dropped out of it.

## 2.4. **Bitstream access**

The obligation to provide bitstream access was introduced in Spain in March 1999. In January 2001, this obligation was incorporated into the RUO.

While progress with local loop unbundling has been slow, the incumbent has been rolling out ADSL at an increasing pace and scale since it was authorised to launch a retail ADSL product (whose prices are regulated) in August 2001. In July 2001, the CMT adopted Precautionary Measures to accompany this authorisation, consisting in the setting of wholesale prices allowing for margins in the order of 40% below the incumbent's retail price. New entrants consider that these margins do not allow them to compete effectively with the incumbent due to the anti-competitive practices that the latter engages in. In September 2002, the CMT ended two proceedings, one of them concerning an alleged breach by the incumbent of the regulation governing the retail ADSL tariffs and the other relating to alleged anti-competitive practices by the incumbent in the retail DSL market, because no such breaches or practices were identified. In the meantime, a proceeding relating to alleged anti-competitive practices in the provisioning of the Telefónica Group's wholesale ADSL offers is still pending.

The Precautionary Measures of July 2001 were also incorporated into the RUO of April 2002. In addition to maintaining the abovementioned margins between the ADSL retail and wholesale products, the RUO also brought a series of other improvements to Telefónica's bitstream offer, including an obligation on the incumbent to provide information on the provisioning deadlines to companies belonging to the Telefónica Group, on the one hand, and to competitors, on the other hand, as well as procedures to avoid discrimination between operators.

Since the publication of the 7<sup>th</sup> Report, a new wholesale offer called ADSL IP (available in two forms<sup>7</sup>) has been introduced in the Spanish market. The RUO of April 2002 requires

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– <sup>7</sup> ADSL IP “no tunelizado”: ADSL line + ATM transport + IP connection to a single point; ADSL IP “tunelizado”: ADSL line + ATM and IP transport + Internet termination.

Telefónica to publish this offer, which was introduced internally within the Telefónica Group in September 2001. After a consultation of the sector, the regulator decided not to regulate this product, because it was assumed that this would have a negative impact on competition between IP networks. However, views differ among the new entrants as to whether it should be regulated or not. The question arises as to how the regulator can ascertain that ADSL IP is provided under non-discriminatory terms to the companies of the Telefónica Group, on the one hand, and to new entrants, on the other hand. No complaints or cases pointing to such discrimination have been submitted to the regulator.

Another concern of the new entrants is the possible early capturing, by the incumbent, of other emerging xDSL technologies, such as SDSL and VSDL. They have called on the regulator not to allow the incumbent to launch such retail services until it is satisfied that there are competitive wholesale offers available for new entrants.

## **2.5. Situation of the (broadband) local access market**

### *2.5.1. Status of the DSL market, position of the incumbent*

According to the Spanish regulator, there are currently 660 800 ADSL lines in Spain, of which 78% are commercialised to final users by the Telefónica Group companies (59% through Telefónica's retail products and 19% through other companies in the Group) and 22% are commercialised by new entrants (7% through Telefónica's bitstream offer and the rest through other wholesale offers). A total of thirty-five companies have contracted Telefónica's bitstream offer.

These figures, and the CMT's findings in the two above mentioned investigations closed in September 2002, show that since the entry of Telefónica of Spain into the ADSL market, this market has expanded rapidly, and the new entrants have also benefited from this increase in business by capturing, in some periods, more customers than the incumbent operator. They also show that in just one year Telefónica of Spain has managed to achieve a market share of nearly 60%. Part of this may be due to the fact that in December 2001 it took over the customers of Telefónica Data's retail ADSL product.

### *2.5.2. Development of alternative means of access*

Eight operators have been licensed to provide wireless local loops. Two of them, Skypoint and Neo, merged in 2001. They are operational in 72 towns and mainly serve small to medium-sized companies. The difficulties facing these operators arise from various factors such as the financial situation of the market and the public's concerns regarding the effects on human health of electromagnetic emissions emitted by operators' antennae, which are affecting the exercise of rights of way.

Wireless local loop operators were among those hardest hit by the increase in the spectrum reservation charges introduced in the Budget Law for 2001. However, they also benefited from the largest reductions in those charges introduced in the Budget Law for 2002, and in view of the difficulties they have been facing the authorities have announced a relaxation of some of the extraordinary commitments these operators made when applying for their licences (the other commitments having already been met).

There are some 200 000 cable-modem broadband customers. Even though the total operating income of cable operators remains low (some €356 million), in 2001 it increased by 184% over 2000<sup>8</sup>. As is the case with the WLL operators, these operators encounter difficulties in obtaining rights of way as they try to deploy new infrastructure. The incumbent's strong position in the xDSL market and the possible merger of the two satellite digital television platforms operating in Spain, Vía Digital and Sogecable, represent major challenges for them.

## **2.6. Leased lines**

Data received in the preparation of this Report show the prices of national leased lines (whether for 64 kb/s, 2Mbit/s or 34 Mb/s, and for all distances) to have fallen since the previous reporting period, though they remain clearly above the EU average.

National leased lines are subject to a price cap, which provided for a 16% reduction in 2001 and a 7% reduction in 2002 (and reductions of 7.5% in 2001 and 2002 for digital lines). The incumbent has met the requirements relating to 2001. In accordance with measures recently adopted by the government, the prices of 2 Mbit/s leased lines will be cut by an additional<sup>9</sup> 15% in 2003.

International leased lines are subject to maximum prices. As mentioned in the 7<sup>th</sup> Report, after its leased lines sector enquiry, at the end of 2000, the Commission opened an ex officio procedure to investigate the competitive provision of international leased lines in Spain. As a result, the CMT has launched a thorough review of the Spanish leased lines markets and had adopted a series of regulatory measures. However, it appears that the prices of international leased lines have remained at the same level since 2000, with the effect that they are still significantly above EU average.

Data presented by some new entrants suggest that in the last year there has been an improvement of provisioning deadlines. The overall competitive situation has improved in the last two years.

## **2.7. Numbering**

### *2.7.1. Carrier selection and pre-selection*

As of the end of August 2002, 1 702 228 carrier pre-selection agreements had been concluded, of which 391 641 are for carrier pre-selection for long-distance and fixed-to-mobile calls and 1 310 587 for the combined modality (local, long-distance and fixed-to-mobile). The total number represents 9% of the incumbent's lines.

These numbers have been fairly steady for several months, and new entrants have submitted complaints to the authorities regarding anti-competitive practices by the incumbent (mainly designed to win back customers). On 8 August 2002, the CMT decided to shelve a complaint regarding alleged anti-competitive practices by the incumbent relating to carrier pre-selection on the grounds that the company's activity had

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<sup>8</sup> The figures quoted here are taken from the CMT's Annual Report for 2001.

<sup>9</sup> This cut is in addition to the 7% and 4% cuts for 2003 originally planned in the context of the price cap for analogue and digital lines respectively.



not caused prejudice to its competitors. In the meantime, one case is still pending before the National Competition Authority, and on 18 April 2002 the CMT launched a sanction proceeding (which is still pending) against the incumbent for alleged practices designed to win back clients that have concluded pre-selection agreements with its competitors.

On 18 July 2002, the CMT adopted a new Circular on carrier pre-selection which provides that the incumbent may not engage in practices aimed at winning back clients within four months of the latter's request for a pre-selection agreement with an alternative operator. It also extends the availability of the carrier pre-selection facility to intelligent network services, personal numbers and paging as well as to calls generated by additional services (such as automatic dialling of the last caller's number) as from 1 March 2003. Lastly, the Circular establishes a mechanism aimed at preventing the high number of rejections of requests for pre-selection caused by lack of correspondence between the national identity document and the fiscal identification code.

This Circular was preceded, in May 2002, by a CMT decision to make carrier pre-selection available to the 2 046 500 subscribers connected to analogue telephone exchanges. The incumbent has been given a period of six months to make the necessary preparations in its network to allow for implementation of this facility from November 2002.

Finally, with a view to promoting competition, the authorities have decided to authorise new entrants to bill all telephone expenditure to the customer, including the line rental charge levied by the incumbent, when the customer has pre-selected the new entrant for carrying all of his/her calls. This measure<sup>10</sup>, commonly called "single bill" or "virtual unbundling of the loop", not only strengthens new entrants' direct links with customers, but is also designed to allow them to launch commercial offers such as flat rate and other price plans.

An obligation has been imposed on mobile operators with SMP to implement carrier pre-selection for international calls from 1 December 2000, but no agreements have been concluded as yet.

#### *2.7.2. Number portability*

By mid-September 2002, 327 250 fixed numbers had been ported. As for mobile numbers, up to 531 224 have been ported since 27 November 2000, which was the deadline for implementation of this facility. These figures compare favourably with other Member States.

Fixed number portability has been implemented by devising an intelligent network solution based on a "reference entity" that houses a centralised database of ported numbers. The CMT has monitored the implementation of number portability and, in this context, a public consultation was organised earlier this year and its results published in June 2002. A series of issues were identified for further improvement and possible regulatory measures, including the review of technical and administrative procedures. Many operators supported the view that companies' participation in the abovementioned

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<sup>10</sup> This measure has not yet come into force. It is due to be approved by the end of this year.

Reference Entity should be made mandatory so that they would also bear the costs associated with its management.

On 30 May 2002, the CMT launched a sanction proceeding against the incumbent operator for alleged breach of its Circular establishing the technical conditions applicable to number portability.

## **2.8. Cost accounting and accounting separation**

### *2.8.1. Cost accounting systems in place*

The principles, criteria and conditions for the development of the cost-accounting systems of SMP-operators were laid down in July 1999.

Telefónica's cost accounting system was approved by the CMT on 22 February 2001. On 20 December 2001, the CMT approved Telefónica Móviles' proposal for its cost accounting system. This system is to be applied to the company's 2000 accounts and to subsequent reporting periods. Equally, on 16 May 2002 Airtel-Vodafone's proposal for its cost accounting system was approved by the CMT, to be applied as from the 2000 cost accounts.

### *2.8.2. Statement concerning compliance*

The 2000 cost accounts of Telefónica were verified and approved by the CMT on 13 June 2002. The scope of the audit of the company's cost accounts is comprehensive: it not only addresses the methodology used, but also the actual figures and volumes; however, the separated accounts do not identify transfer charges. The CMT declared Telefónica's accounts to be broadly in line with the cost accounting system. It reduced the incumbent's estimates of its current costs by 5.5%, and the estimates concerning access services by 20%. The negative margin resulting from these modifications is, however, compensated by the surplus achieved in other services. The fact that there is equilibrium in the interconnection services provided to other operators suggests that the RIO 2000 prices adopted by the CMT were very much cost oriented. Telefónica has appealed this CMT decision in respect of aspects such as depreciation plans and labour costs.

The CMT has not yet issued any statement as to the verification of the cost accounts of Telefónica Móviles and Airtel-Vodafone as it is still studying their 2000 and 2001 data, which were submitted on 31 July 2002.

## **2.9. National roaming and access to mobile networks**

In March 2002, a new Regulation (CTE/601/2002) was adopted that replaced the previous regime (in which only the 2G licensees that obtained a 3G licence were obliged to grant national roaming to the 3G licensees) with a general roaming provision (based on commercial negotiation, with the regulator arbitrating disputes). No such agreements have been concluded so far.

A new Order establishing a new category of licence for mobile virtual network operators (MVNOs) was adopted on 14 March 2002. Conditions of access are set based on commercial negotiations. No agreements have been notified to the regulator.

### 3. AUTHORISATIONS

#### 3.1. Conversion of the pre-1998 licences

The process of converting licences granted prior to the 1998 General Telecommunications Act has been completed with the exception of the following: Telefónica of Spain (fixed telephony) and Retevisión Móvil (DCS 1800 mobile communications). Regarding the former, issues such as collocation and access to the local loop are being assessed in the light of Telefónica's request that its real property (*activos inmobiliarios*) be transferred to a new company. As concerns Retevisión Móvil, a series of changes have been requested by the licensee that are also being examined by the authorities. Both draft new licences are currently before the State Council and can be formally approved once the latter has issued its opinion on them.

The Spanish authorities do not expect difficulties with the adaptation of these two licences, or indeed any other licences, to the new regulatory framework as from July 2003, since the new draft telecommunications law provides that their adaptation be automatic.

Operators claim that the conditions for new licences entail fewer investment obligations than those applicable under the previous licences granted under the previous (non-liberalised) concession regime. In particular, cable operators are still bound by investment and other obligations dating from the previous regime. The new Minister has announced<sup>11</sup> that the licence conditions of the existing cable operators will be reviewed.

Telefónica Cable has been authorised, in the context of the transformation of its licence, to provide services (telephony, television and internet) in an integrated way using different technologies (xDSL and others) over local loops, nearly all of which are owned by Telefónica. The measure allowing for this authorisation has been appealed by the other cable operators, which have made significant investments in building cable infrastructure in fulfilment of their licence investment requirements. Investments made by Telefónica to provide access to Telefónica Cable are considered by the Spanish authorities as investments made by Telefónica Cable (carried out by a third party) and attributable to the licence of Telefónica Cable.

#### 3.2. Integration of Sogecable and Vía Digital

A new challenge for new entrants is the intended integration of the two satellite digital television platforms operating in Spain, i.e. Sogecable and Vía Digital (which is controlled by the Telefónica Group), which the Spanish competition authorities are currently assessing under national competition law. Prior to the case being referred to the national competition authorities, the European Commission reviewed the case and concluded that the concentration threatened to create or strengthen a dominant position in the Spanish pay TV market, as well as in the markets for the acquisition of exclusive rights for premium films, football matches involving Spanish teams, other sports and sale of TV channels. The Commission also noted that the creation of a structural link between the dominant operators in pay TV (and audiovisual content) and telecommunications is liable to strengthen Telefónica's dominant position in a number of telecommunications markets.

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<sup>11</sup> See press release of the Ministry of Science and Technology dated 2 October 2002.

The only licensed operator of terrestrial digital television (Quiero TV) discontinued its operations during 2002.

### **3.3. Spectrum charges**

When the 3G licences were awarded through a beauty contest, each of the licensees paid a once-off amount of approximately €130 million. Some €5 million was paid in spectrum reservation charges, which are payable on an annual basis. The Spanish Budget Law for 2001 substantially increased the spectrum reservation charges that are levied on all operators using radio frequencies. The largest increases affected the mobile operators, and the 3G licensees in particular: the charges that the latter had to pay in 2001 were more than thirty times higher than the charges for 2000 set in the licence specifications. In view of the heavy investment commitments made in the context of the beauty contest, the magnitude of these increases and their negative impact on business plans, the licensees have appealed the measure.

The 2002 Budget Law provided for an average reduction in spectrum reservation charges of 65% compared with 2001 as far as the GSM, DCS and UMTS technologies are concerned, and the introduction of more stability and predictability in that these charges may not increase by more than 5% on an annual basis until 2006. Operators find these reductions insufficient and are demanding that the charges be lowered to their 2000 level (i.e. the level set in the license specifications). They also stress that the authorities should ensure the stability and predictability of charge levels for the whole duration of the relevant licences. The new Minister, for his part, has indicated<sup>12</sup> that the charges could possibly be frozen at their 2002 level in 2003.

### **3.4. Rights of way**

Obtaining rights of way is an increasingly critical problem for Spanish operators. There are major differences in the numerous regulations affecting rights of way in different regions and localities. According to the incumbent's estimates, there are currently more than 500 municipal regulations governing the installation of antennae, all of them laying down different conditions.

The Spanish Government's adoption of Royal Decree 1066/2001 of 28 September 2001 establishing limits for exposure to electromagnetic emissions (which implements the Recommendation of the Council of the European Union of 12 July 2001) was welcomed by the operators, but has not done much to allay public concern regarding the effects on human health of the electromagnetic radiation emitted by operators' antennae.

ASTEL has made estimates which show the situation worsening to the point where it is extremely difficult to obtain permits to erect antennae: while 85% of the antennae for which permits were applied for were effectively installed in 2000, only 45% were installed in 2001 and the figure for 2002 is expected to be 20%. Some 2 000 antennae are currently waiting for the authorities to grant the relevant permit.

Local authorities have also levied different fees, and operators are concerned at the possibility that a fee corresponding to a certain percentage of their revenue might be introduced by local administrations throughout the country in the near future.

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<sup>12</sup> Mr Piqué's address of 25 September 2002 to the Congress' Science and Technology Commission.

The problem, as in other parts of the Community, is that several bodies are involved in the regulation of rights of way and that there is a lack of coordination between central, regional and local administrations and a general lack of coordination between urban planning and telecommunications legislation. It is exacerbated by the fact that under the Spanish Constitution, relations between the various administrations (national, autonomous and local) are not hierarchical.

The draft telecommunications law intended to transpose the new Community regulatory framework reaffirms and strengthens the general principles that all public administrations must comply with in order to guarantee operators' rights of way, including those (objective justification, proportionality, etc.) governing administrative fees and charges.

Within the limits of their competence, the telecommunications authorities have made considerable efforts to improve coordination between the authorities. As mentioned in the 7<sup>th</sup> Report, the regulator has, for example, been investigating the content of municipal orders and regulations affecting rights of way with a view to avoiding the imposition of conditions contrary to the General Telecommunications Act and Royal Decree 1736/1998, which regulate rights of way in Spain.

In January 2002, a Regulation was adopted which establishes the conditions for installing new antennae and for the certification that operators must present when taking yearly measurements of the level of emissions produced by their antennae. Pursuant to this Regulation, the operators have had to certify all of their installed antennae, which number over 23 000. The estimated cost of this exercise is in the order of €20 million.

The SETSI has also worked with the Spanish Federation of Municipalities and Provinces to prepare a standard Municipal Ordinance regulating the installation and functioning of radioelectric infrastructure. Furthermore, with the support of the College of Telecommunications Engineers it has organised information campaigns for local authorities and experts on relevant issues of telecommunications regulation.

These efforts by the regulator to remedy problems are appreciated by the operators, who are nonetheless calling for a broader political pact and more cooperation between authorities and market players as the existing networks are approaching saturation and these problems also have implications for their ability to meet their 3G licence obligations.

The General Telecommunications Act provides for the possibility of operators sharing public domain infrastructure. To this end, there is a special procedure governed by the principles of transparency and non-discrimination. The regulator arbitrates disputes in this area. As to rights of way in the private domain, operators must present a technical project whose approval by the regulator requires that the good that is expropriated be declared of public utility or social interest.

Some problems have arisen with regional/local authorities granting exclusive rights of way to some operators. For example, in May 2002 the CMT issued a decision establishing that an agreement concluded between Airtel-Vodafone and Metrocall regarding the network installed by the former in the Madrid metro includes provisions or may encourage practices contrary to free competition; the agreement was therefore prohibited.

The SETSI has cooperated with those operators that have contested agreements providing for exclusive rights of way and has issued certificates providing for rights of way to the operators prejudiced by such agreements.

#### **4. UNIVERSAL SERVICE/CONSUMERS**

##### **4.1. Retail tariffs**

The last amendment of the price framework for the services provided by Telefónica of Spain dates back to the Order of 10 May 2001, which established a new regulatory framework for prices and new efficiency factors for fixed telephony services and fixed-to-mobile call services in each of the years from 2001 until the end of 2003.

The Spanish price framework is stringent: it requires that increases in line rental be offset by cuts in the prices of long-distance and international calls. As a result, Spanish tariffs have fallen by some 35% (on average) since liberalisation, and the margins available for both the incumbent and its competitors have steadily decreased.

In September 2002, the Spanish authorities indicated that they would review the price cap to make it more flexible. The review will consist in removing the monthly line rental from the price cap basket (which according to some estimates would allow it to increase by more than 8% in 2003). For 2003, call tariffs are expected to decrease by at least 2%.

The announcements regarding the review of the price cap system<sup>13</sup> have been welcomed by the whole of the telecommunications sector. However, there is an outstanding concern voiced repeatedly by the new entrants (most recently at the hearing on the status of the Spanish telecommunications market held in Brussels on 20 September 2002) and which relates to several price plans implemented by the incumbent operator, in particular outside the price cap. Some of them result from regulation (e.g. the incumbent's flat-rate internet service and local calls discount plans). According to the new entrants, a serious price squeeze results from the combination of these plans (applied to Telefónica's retail tariffs) and the level of the interconnection charges. The new entrants expected the introduction of the new capacity-based interconnection model to remedy this problem, but the implementation of this model has encountered significant obstacles, as mentioned above.

The authorities have indicated in the context of their announcements regarding the review of the price cap that they will carefully scrutinise the incumbent's future proposals for price plans and only authorise them if they include innovative offers.

New entrants are also concerned about the developments regarding public procurement for the provision of telecommunications services to public administrations. At the end of 2001, the regulator opened a proceeding regarding a contract awarded to Telefónica by the regional government of Catalonia (Generalitat de Catalunya). In a recent decision, the CMT concluded that some provisions included in this contract did not comply with the current regulatory framework.

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<sup>13</sup> See press release of the Ministry of Science and Technology dated 2 October 2002.

## **4.2. Funding schemes**

Telefónica is required to provide universal service until 2005. On 31 January 2002, the CMT set the net cost of USO for 2000 at €268 million. However, it indicated that Telefónica had not suffered a competitive disadvantage by virtue of its universal service obligation and that, therefore, no Fund needed to be established. This came as a relief to the new entrants, which remain concerned, however, about the results of the calculation of the cost for 2001 and that the latter could trigger the establishment of a Fund. They call for the cost of universal service to be covered by the general State budget rather than through a funding mechanism drawing from new entrants. Both possibilities are provided for by the Interconnection Directive 97/33/EC and Directive 2002/22/EC on Universal Service.

As mentioned in the 7<sup>th</sup> Report, Telefónica refutes the CMT's arguments regarding the absence of a competitive disadvantage based on the evolution of the company's market shares and has appealed the CMT's decision. For 2001, it has presented estimates ranging from €271 million (using the CMT's methodology) to €770 million.

## **4.3. The replacement of the analogue wireless rural telephony service (TRAC)**

In July 2002, a new Law on information society services and electronic commerce was adopted which incorporates the notion of "functional access to the internet" embedded in the new Universal Service Directive 2002/22/EC in the current definition of universal service. In this context, the government is pushing for the replacement of the so-called TRAC system (i.e. an analogue wireless rural telephony network that supports only 2 400 bps and serves some 250 000 subscribers) operated by Telefónica using technologies permitting functional access to the internet.

Given that the new Law provides for a replacement plan to provide all subscribers of fixed public telephone services with the option of obtaining functional internet access, to be completed by 31 December 2004, the preparatory work for the replacement of the TRAC has had to be started swiftly. The Spanish authorities' intention is to co-finance the project (in the order of 30%) through European regional development funds, and Telefónica has organised an invitation to tender to subcontract the deployment of infrastructure. The conditions of the invitation to tender have been discussed with the Ministry, which is controlling the process. However, the European Commission has expressed concerns about Telefónica's role in the tender as it may act as judge and party, and has insisted on strict compliance with the relevant Community law (on competition, telecommunications, ERDF<sup>14</sup> project funding).

## **4.4. Other universal service issues**

A series of measures have been adopted to complete the regulation applicable to universal service in Spain. Regulation PRE 68/2002 of 16 January 2002 concerns the pricing of various parts of the universal service which fall within the competence of the Government's Executive Committee for Economic Affairs.

In December 2001, a Regulation was adopted which establishes *inter alia* the criteria for the production, up-dating and content of the data that must be included in the universal

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<sup>14</sup> European Regional Development Fund.

directory and the directory information services. In March, another Regulation was adopted that opens these services to effective competition. The Regulation implements the 118 number recommended by ECTRA, which is to be followed by two numbers identifying the operator chosen to provide the service.

It appears, however, that there is as yet no effective competition due to the way the provision of subscriber data has been organised. The Regulation of March 2002 provides that operators must submit their subscriber data to the CMT, which will make them available to those operators that are licensed to produce directories or manage directory information services. A CMT decision dated 27 June 2002 further develops the method of data submission (procedures, deadlines and format) and the content of the data to be provided. This decision provides for a very cumbersome process: on a monthly basis, operators must duplicate their subscriber data on diskette and make as many copies of these data as the number of requests submitted to the CMT. Operators are also concerned that the content of the data that must be provided for each subscriber is not restricted to the strict minimum for identification purposes. These obligations generate costs (both financial and administrative) which donor operators cannot recover. They have been appealed by several operators, in particular the incumbent operator, which has so far been responsible for these services, but also other operators, given that these obligations weigh particularly on the smallest operators.

It is understood that the CMT is currently working to remedy the problem of interchanges of subscriber data, which would require the construction of a centrally managed common database.

## **5. DATA PROTECTION**

The State Secretariat for Telecommunications and the Information Society is responsible for supervising the obligations placed on telecommunications operators, particularly those relating to the confidentiality of communications and the adoption of measures aimed at guaranteeing the protection of personal data in matters such as those covered by Directive 97/66/EC (traffic and billing data, non-solicited calls, calling line identification, etc.) It coordinates its activities with the Agencia de Protección de Datos, an independent data protection authority.

### **5.1. Traffic data retention**

Traffic data must be erased upon termination of the call and only certain data may be processed for the purpose of subscriber billing and interconnection payments. Such data may be stored during the period in which the bill may be lawfully challenged or payment pursued (five years). Exceptions to this general rule are provided in Royal Decree 1736/1998 and are limited to measures aimed at ensuring public security, the application of penal law and the lawful interception of communications.

Article 12 of the recently adopted Law on information society services and electronic commerce (which guarantees the confidentiality of electronic communications and the protection of personal data in the context of information society services) establishes a maximum period of retention of traffic data of twelve months for the purposes of criminal investigations and the protection of national security and defence. This provision is



restricted to those information society services that relate to access to telecommunications networks and hosting.

## **5.2. Unsolicited calls and e-mails**

Regarding unsolicited calls, e-mails and other similar electronic communications tools (such as SMS) used for purposes of direct marketing, an "opt-in" regime (informed prior consent of the called party) has been adopted in relation to both natural and legal persons.

## **6. MOBILE ISSUES**

### **6.1. UMTS and 2.5G roll-out**

In 2001, the Spanish authorities officially postponed the 3G launch date from 1 August 2001 to 1 June 2002. Following serious concerns among mobile operators about the difficulty of meeting the strict 3G licence conditions in the face of the market situation, the Spanish authorities decided, on 8 April 2002, to allow operators to roll out the networks in cities of more than 250 000 inhabitants (in accordance with the licence conditions relating to the initial phase of launching the service) on 1 June 2002 on an experimental basis only. No specific date has been set for operators to start the commercial launch; this decision is left to the licensees' discretion. Licence conditions relating to coverage obligations remain unchanged, but only start to run as from the date of the commercial launch of the service.

This pragmatic approach has provided a welcome "breathing space" for operators, who are nonetheless calling for further relaxation of the licence conditions, such as the gradual release of the guarantees paid by each 3G licensee (more than €8 billion) to back their investment plans. At the end of September 2002, the Ministry announced that these financial commitments would be relaxed in the near future. In the meantime, Xfera, which is one of the four 3G licensees and a new entrant in Spain, has announced a *sine die* freezing of its plans.

In the meantime, GPRS services are fully operational in all areas of the country covered by 2G networks and these services had some 350 000 customers at the beginning of July 2002. Operators have stressed that the implementation of GPRS will lead to increased traffic on 2G networks and that the authorities should therefore act immediately to give them the entire DCS1800 band (2x13.4 MHz) reserved in their 1998 licences before the end-of-2002 deadline for full assignment laid down in the licence specifications. In the light of the needs stemming from the implementation of GPRS, the authorities have increased the number of frequencies available to the 2G licensees to 2x20 MHz.

### **6.2. Infrastructure sharing**

There are no obstacles to network infrastructure sharing in the legislation. However, infrastructure sharing has proved difficult in practice, and even though operators are in favour of it, they want clarification from the authorities regarding the extent to which such sharing is permissible without breaching the licence conditions and, in particular, their investment commitments. The regulator has specified that the physical elements of the networks such as the sites, masts and energy, as well as the control and switching centres, can be shared insofar as there is a logical separation that allows for separate control of

customers and of the frequencies assigned to each operator and without prejudice to the coverage obligations contracted by each licensee.

## **7. PREPARATION FOR THE TRANSITION TO THE NEW FRAMEWORK**

Transposition of the new framework has already started. A new draft telecommunications law that will replace the existing law was submitted to the Consejo Asesor de las Telecomunicaciones on 26 July 2002.

The draft law does not alter the division of competence between the authorities associated with regulation and supervision of the sector, and operators have expressed concern about the fact that it does not make it clear how the latter will coordinate their action, especially when it comes to the National Competition Authority's role in the new framework. However, the recent attachment of the CMT to the Ministry of Science and Technology is expected to assist such coordination, and the draft telecommunications law provides for a Regulation to be adopted setting out the respective competencies of the SETSI and the CMT.