EUROPEAN COMMISSION
Competition DG

CASE AT.39839 - TELEFÓNICA AND PORTUGAL TELECOM

(Only the English and Portuguese texts are authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) No 1/2003

Article 7 Regulation (EC) 1/2003

Date: 25/01/2022

EUROPEAN
COMMISSION

Brussels, 25.1.2022
C(2022) 324 final

COMMISSION DECISION

of 25.1.2022

amending Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty)

(AT.39839 – Telefónica and Portugal Telecom)

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amending Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty)

(AT.39839 – Telefónica and 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[1],

Having regard to the Agreement on the European Economic Area,

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[2], and in particular Articles 7 and 23(2) thereof,

Having regard to the Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union in case COMP AT.39839 - Telefónica / Portugal Telecom[3],

Having regard to the judgments of the General Court of 28 June 2016 in Case T-216/13 *Telefónica SA v European Commission*[4] and Case T-208/13 *Portugal Telecom SGPS SA v European Commission*[5],

Having given the undertakings concerned, Telefónica and Pharol (ex-Portugal Telecom)[6] the opportunity to make known their views on the intention of the Commission to amend its Decision C(2013) 306 final of 23 January 2013 to the extent that it determines, on the basis of the material put forward by the Parties, the services for which the Parties were not in potential competition within the Iberian market during the period of application of the non-compete

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1 OJ, C 115, 9/5/2008, p. 47.

2 OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty, respectively, where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of TFEU will be used throughout this Decision.

3 A summary of the decision has been published in the Official Journal, OJ C 140, 18 May 2013.

4 Judgment of the General Court of 28 June 2016, T-216/13 - *Telefónica v Commission*, EU:T:2016:369, as confirmed by Case C-487/16 P - *Telefónica v Commission*, EU:C:2017:961.

5 Judgment of the General Court of 28 June 2016, T-208/13 - *Portugal Telecom v Commission*, EU:T:2016:368.

6 In 2015, PT changed its registered name to Pharol.

clause, in order to exclude them from the value of sales, for the purposes of calculating the fines, in accordance with the principles established in the General Court judgments,

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

Having regard to the final report of the Hearing Officer in this case,

Whereas:

1. INTRODUCTION

1.1. The Telefónica/PT Decision

(1) On 23 January 2013, the Commission adopted a Decision under Articles 7(1) and 23(2) of Regulation (EC) No 1/2003 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union ("TFEU")[7], (C(2013) 306 final, "the Telefónica/PT Decision" or "the 2013 Decision").

(2) In Article 1 of the 2013 Decision, the Commission found that Telefónica, S.A. ("Telefónica") and Portugal Telecom SGPS, S.A. ("PT") (collectively referred to as "the Parties") infringed Article 101 TFEU 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 non-compete clause" or "the clause") in the context of the acquisition by Telefónica of sole control over the Brazilian mobile service operator Vivo.

(3) For this infringement, and based on the considerations set out in Sections 6.1 to 6.6 of the 2013 Decision, the Commission imposed fines of EUR 66 894 000 on Telefónica and of EUR 12 290 000 on PT under Article 23(2) of Regulation (EC) No 1/2003.

(4) Both Telefónica and PT appealed the Telefónica/PT Decision to the General Court[8].

1.2. The judgments of the General Court in Case T-216/13 Telefónica SA v European Commission and Case T-208/13 Portugal Telecom SGPS SA v European Commission

(5) In its judgments of 28 June 2016 in Case T-216/13 *Telefónica SA v European Commission* ("the *Telefónica* judgment") and Case T-208/13 *Portugal Telecom SGPS SA v European Commission* ("the *PT* judgment") (together, "the General Court's judgments"), the General Court held as follows:

(a) As regards the finding by the Commission of an infringement of Article 101 TFEU, the General Court upheld the Commission's conclusion in Article 1 of the Telefónica/PT Decision that Telefónica and PT infringed Article 101 TFEU from 27 September 2010 until 4 February 2011 by participating in a non-compete agreement, included as clause nine of the Stock Purchase Agreement entered into by them on 28 July 2010.

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7 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 (OJ L 1/2003, 4.01.2003, p. 1). Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

8 Case T-216/13 *Telefónica SA v European Commission* and Case T-208/13 *Portugal Telecom SGPS SA v European Commission*.

(b) As regards the imposition of fines, the General Court:

(i) dismissed Telefónica's and PT's arguments that certain specific sales should be excluded from the calculation of the amount of the fines[9],

(ii) dismissed Telefónica's argument that the volume of sales taken into account for Telefónica should be the same as that for PT[10],

(iii) dismissed certain of Telefónica's arguments concerning the calculation of the basic amount of the fine[11],

(iv) dismissed Telefónica's arguments concerning mitigating circumstances[12],

(v) annulled Article 2 of the 2013 Decision in so far as the amount of the fines was set on the basis of the value of sales taken into account by the Commission[13].

(6) Telefónica appealed the *Telefónica* judgment. On 13 December 2017, the Court of Justice issued its judgment in Case C-487/16 P *Telefónica SA v European Commission*, rejecting Telefónica's appeal. Pharol did not appeal the *PT* judgment[14].

(7) As a result of the General Court's and the Court of Justice's judgements, the Commission's finding that Telefónica and PT infringed Article 101 TFEU is definitive while the fines for those infringements imposed have been annulled solely in so far as the amount of the fines was set on the basis of the value of sales taken into account by the Commission. Therefore, all aspects concerning the calculation of the fines are definitive, with the exception of the setting of the amount of the fine on the basis of the value of sales in so far as the Commission did not examine the arguments seeking to show that there was no potential competition between Telefónica and PT concerning certain services.

(8) Indeed, as regards sales that Telefónica and PT claimed corresponded with activities not subject to potential competition, the General Court held that "*the Commission ought to have considered whether the applicant was correct to maintain that the value of the sales of the services in question should be excluded from the calculation of the fine on the ground that there was no potential competition between the parties with respect to those services*"[15]. Sales by each of the Parties corresponding to activities that could not be in competition with the other party during the period of application of the non-compete clause should therefore be excluded from the value of sales for the purposes of calculating the fines[16].

2. PROCEDURE

(9) Between 19 January 2018 and 12 November 2018, the Commission sent several requests for information to the Parties with the aim of establishing the exact value of sales, following the General Court's judgments.

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9 *Telefónica* judgment, paragraphs 281 to 283 and 288 to 289 and *PT* judgment, paragraphs 259 to 261.

10 *Telefónica* judgment, paragraphs 258 to 273.

11 *Telefónica* judgment, paragraphs 317 to 329.

12 *Telefónica* judgment, paragraphs 330 to 340.

13 *Telefónica* judgment, paragraph 1 of the operative part.

14 The bank guarantees initially given by Telefónica and Pharol were withdrawn in July 2016, after the General Court judgments.

15 *Telefónica* judgment, paragraph 296 and *PT* judgment, paragraph 230.

16 *Telefónica* judgment, paragraph 295 and *PT* judgment, paragraph 229.

(10) On 23 July 2019 and on 5 November 2019, the Commission sent a Letter of Facts (including two Annexes: "Annex I – Telefónica" and "Annex II – Pharol") to Telefónica and Pharol, respectively[17]. The Letter of Facts was directed to Pharol since in 2015, PT changed its registered name to Pharol. PT's subsidiary PT Portugal SGPS S.A. ("PT Portugal"), in which PT held all the shares when the 2013 Decision was adopted, was acquired by Altice in 2015, after a series of successive transactions[18].

(11) Telefónica and Pharol submitted their views on the Letter of Facts on 18 October 2019 and 10 January 2020 respectively. Moreover, both Parties submitted replies to the respective Annexes addressed to them[19].

(12) On 22 June and 4 August 2020, Telefónica submitted additional observations.

(13) On 26 June 2020, the Commission held a meeting with Telefónica's representatives[20].

(14) On 16 February 2021[21] and 8 March 2021[22], the Commission sent further requests for information to Telefónica and Altice, which controlled Portugal Telecom at that moment[23]. In those requests for information the Commission asked to break down some figures already provided by the Parties concerning the value of sales.

(15) The Advisory Committee on Restrictive Practices and Dominant Positions expressed unanimously its consent in this case in a meeting on 21 January 2022.

2.1. Letter of Facts and its Annexes

(16) In the Letter of Facts (including its two Annexes), the Commission informed Telefónica and Pharol that it intended to adopt a new decision pursuant to Article 23 of Regulation (EC) No 1/2003 imposing fines on each of the Parties for their infringement of Article 101 TFEU. The new decision would amend the Telefónica/PT Decision, taking due account of the Court of Justice and General Court judgments.

(17) The Letter of Facts described the circumstances, parameters and method of calculation relevant for setting the fines to be imposed on Telefónica and Pharol and invited them to submit their views.

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17 The Letters of Facts sent to Telefónica and Pharol were essentially identical, non-confidential versions vis-à-vis each other. The time difference between the sending date of these two sets of documents to Telefónica and, respectively, Pharol, stems from the fact that Pharol has not provided the Commission a language waiver and therefore the documents have been translated into Portuguese.

18 PT held all of the share capital of PT Portugal on 23 January 2013, when the Telefónica/PT Decision was adopted. PT made an in-kind contribution to Oi of 100% of its interest in PT Portugal, the control and management of which was transferred to Oi on 5 May 2014. On 9 December 2014, Altice entered into a transaction agreement with Oi, with a view to acquiring sole control over PT Portugal. On 20 April 2015, the Commission cleared the concentration, subject to conditions. On 2 June 2015, Oi announced that, having complied with all these conditions, the sale of all its shares in PT Portugal to Altice had taken place.

19 Response to Annex 1 by Telefónica, Document ID 1640; Pharol's response to the LoF by Pharol, Document ID 1649.

20 At the request of Telefónica, the Commission had a telephone call with Telefónica's representatives on 11 May 2021 to discuss the timeline of the case.

21 Document ID 1679, NC ID 1680.

22 Document ID 1686, NC ID 1687.

23 On 9 December 2014, Altice entered into an agreement with Oi, whereby Altice would acquire sole control over PT Portugal. The European Commission cleared the acquisition in its Decision of 20 April 2015, M.7499 ALTICE / PT PORTUGAL.

2.2. The adoption of a new Commission decision under Article 23(2) of Regulation (EC) No 1/2003 for the infringement established in Article 1 of the Telefónica/PT Decision

(18) As explained in the Letter of Facts, the situation whereby the Commission's finding of an infringement remains in effect and has *res judicata* value, while the fines for that infringement have been annulled, should be remedied by this Decision under Article 23(2) of Regulation (EC) No 1/2003 for Telefónica's and PT's infringement of Article 101 TFEU established in the Telefónica/PT Decision.

(19) This Decision does not involve any new objections against Telefónica and PT/Pharol, beyond those on which Telefónica and PT/Pharol had already been given the opportunity to be heard in the context of the proceedings leading up to the adoption of the Telefónica/PT Decision. Therefore, the obligation pursuant to Article 27(1) of Regulation (EC) No 1/2003 was fulfilled for the infringement found in that Decision[24].

(20) For the calculation of the fine, the Commission relies on the assessment of the facts established in the Telefónica/PT Decision. At the same time, it applies the principles established in the General Court's judgments regarding the Commission's obligation to determine, on the basis of the material put forward by the Parties, the services for which the Parties were not in potential competition with each other within the Iberian market during the period of application of the non-compete clause. The Commission therefore excludes those services from the value of sales for the purpose of calculating the fines.

2.3. Telefónica's request for a new Statement of Objections and for an Oral Hearing

(21) In its reply to the Letter of Facts, Telefónica requested a new Statement of Objections ("SO") and a new Oral Hearing. It did not, however, explain why it considered this to be necessary but merely stated: "*Given the content of the Letter of Facts and the proposals made in it, the appropriate action would be for the Commission to issue a new statement of objections and to grant Telefónica an oral hearing* […]"[25].

(22) Pharol did not request a new SO or Oral Hearing.

(23) The Commission considers that this Decision does not involve any new objections against Telefónica and Pharol, beyond those on which Telefónica and PT were given the opportunity to be heard in the context of the proceedings leading up to the adoption of the Telefónica/PT Decision. Therefore, the obligation pursuant to Article 27(1) of Regulation (EC) No 1/2003 was fulfilled for the infringement found in that Decision.

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[24] Following the SO and as requested by the Parties 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. Telefónica and PT submitted their respective replies to the SO on 13 January 2012. They did not request an oral hearing.

[25] Telefónica's reply to the Letter of Facts, Document ID 1627, paragraph 9.

(24) It follows, amongst others, from the judgments in *Toshiba* and *Mitsubishi Electric* of 19 January 2016[26] that when there are no material alterations to the essential nature of the Commission's case, the Commission does not need to issue a new SO.

(25) In this Decision, as determined by the General Court, the Commission simply assesses the arguments put forward by the Parties in their reply to the SO and recalculates the value of sales following the General Court's judgments. Moreover, the Parties have had the opportunity to present their views on any new evidence put forward by the Commission in the Letter of Facts. This Decision contains no material alterations to the essential nature of the Commission's objections as presented in the SO[27].

(26) The SO also set out the principal factual and legal elements giving rise to the calculation of fines and therefore the Parties' rights of defence have been respected in the procedure leading to the adoption of this Decision, without the need to provide for detailed calculations of the value of sales in a Supplementary SO. Furthermore, the General Court's judgments did not call into question the accuracy, relevance or validity of those elements. Therefore, the Commission considers that there is no need to adopt a Supplementary SO.

3. REMEDIES

3.1. Article 23(2) of Regulation (EC) No 1/2003 — Fines

(27) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 TFEU. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(28) In fixing the amount of the fines pursuant to Article 23(2) of Regulation (EC) No 1/2003, 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[28] (the "Guidelines on fines").

3.2. Basic amount of the fines

3.2.1. Methodology

(29) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales[29]. This is the value of the undertakings' sales of goods or services to which the infringement related directly or indirectly in the relevant geographic area in the EEA.

(30) The assessment of gravity of the infringement concerned is made on a case-by-case basis, taking into account all the relevant circumstances of the case. As a general

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26 Judgment of the General Court of 19 January 2016, T-404/12 *Toshiba v Commission*, EU:T:2016:18 paragraphs 34 to 48; and Judgment of the General Court of 19 January 2016, T-409/12 *Mitsubishi Electric v Commission*, EU:T:2016:17, paragraph 51.

27 Paragraph 82 of the Letter of Facts to Telefónica.

28 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1.9.2006, p. 2.

29 Paragraph 12 of the Guidelines on fines.

rule, the proportion of sales to be taken into account is to be set at a level of up to 30% of the value of sales[30].

(31) The Commission has used the figures provided by Telefónica in its responses to the requests for information of 18 December 2018[31], 16 February 2021[32] and 8 March 2021[33] and by PT, in its response to the request for information of 5 September 2012[34], as confirmed by PT Portugal SGPS S.A.[35] in which PT held all the shares when the Telefónica/PT Decision was adopted, and in its responses to the requests for information of 21 June 2018[36], 9 November 2018[37], 18 December 2018[38] and 16 February 2021[39].

3.2.2. The value of sales related directly or indirectly to the infringement

3.2.2.1. The Telefónica/PT Decision

(32) In the Telefónica/PT Decision, the Commission considered that the non-compete clause applies to electronic communication services and television services. In recital (482) of that Decision, the Commission concluded that any services provided in Spain or Portugal and included in the markets listed in Section 5.3 of that Decision, are directly or indirectly related to that infringement, with the exception of global telecommunication services and wholesale international carrier services. 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 non-compete clause[40]. These findings apply equally in this Decision.

(33) In the Telefónica/PT Decision (recital (483)), the Commission only took into account for each Party the value of its sales in its Member State of origin. The Commission takes the same approach in this Decision. This means that as regards Telefónica, the Commission sets the value of sales by reference to the applicable value of its sales in Spain, and for Pharol, by reference to the applicable value of PT's sales in Portugal.

(34) In the Telefónica/PT Decision (recital (484))[41], the Commission took into account the undertakings' sales in 2011, which were lower than the sales achieved by the

30 Paragraphs 20 and 21 of the Guidelines on fines.

31 Document ID 1520. As shown in Section 3.11, as well as in Sections 4.1.2.4. "Calculation mistakes affecting the value of sales in the 2013 Decision for Telefónica" and Section 4.1.2.5. "Determining the value of sales in the new decision" of the Letter of Facts, the Commission cannot use the figures provided by Telefónica in its reply of 21 September 2012 to the request for information of 5 September 2012 (Document ID 1040), as a basis for the calculation of the amount of the fines, as these figures were affected by several calculation mistakes and inaccuracies.

32 Document ID 1679, NC ID 1680.

33 Document ID 1686, NC ID 1687.

34 Document ID 1012, NC ID 1016.

35 See foonote 18.

36 Document ID 1362 NC ID 1365.

37 Document ID 1385 NC ID 1387.

38 Document ID 1452 NC ID 1460.

39 Document ID 1684.

40 Recitals (173) and (174) of the Telefónica/PT Decision.

41 See also paragraph 13 of the Guidelines on fines.

Parties in 2010[42]. For the purposes of this Decision, the Commission also takes into account the undertakings' sales in 2011.

3.2.2.2. The General Court's judgments

(35) In their replies to the SO, both Telefónica and PT submitted factual material in order to demonstrate that the value of sales of certain services should be excluded for the purposes of the calculation of the fine due to the absence of potential competition between them with respect to these services during the period of application of the non-compete clause.

(36) The General Court held that the Commission "ought, in order to determine the value of those sales, to have determined the services for which the parties were not in potential competition within the Iberian market, by examining the material put forward by them in their replies to the Statement of Objections in order to demonstrate the absence of potential competition between them with respect to certain services during the period of application of the clause"[43].

(37) According to the General Court, when the Commission chooses to rely, in order to determine the amount of the fine, on the value of sales directly or indirectly related to the infringement within the meaning of point 13 of the Guidelines on fines, it must determine that value precisely. The value of sales "*cannot cover the sales which do not fall, directly or indirectly, within the scope of the infringement* […]"[44].

(38) The Commission has therefore examined the arguments put forward by the Parties to demonstrate the absence of potential competition as regards certain services and excluded from the value for sales those services for which the Parties were not in potential competition within the Iberian market during the period of application of the clause (see Sections 3.5 to 3.9).

3.3. Absence of potential competition – general framework

(39) Telefónica and Pharol repeat throughout their submissions several general claims that concern all the markets assessed. This section addresses those general claims.

3.3.1. Insurmountable barriers to entry

(i) Parties' arguments

(40) Telefónica and Pharol maintain that the Commission should assess the real and concrete possibilities of each undertaking to enter the markets where the other undertaking is present. Both undertakings argue that this should be the relevant standard to judge the existence of potential competition on the market[45].

(41) In Telefónica's view, this requires an in-depth analysis of the plausibility and real ability on the part of PT to enter into the markets and services in which Telefónica was operating with a viable economic strategy.

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42 Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040, pages 8 and 13. PT's reply of 17 September 2012 to the request for information of 5 September 2012, Document ID 1016.

43 *Telefónica* judgment, paragraph 309 and *PT* judgment, paragraph 243.

44 *Telefónica* judgment, paragraph 307 and *PT* judgment, paragraph 241.

45 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 11 to 22, Telefónica's reply to the LoF, paragraphs 48 to 95, Pharol's reply to the LoF, paragraphs 44 to 72.

(42) Telefónica submits that the Commission should use the criterion of potential competition established by the case-law of Union courts in matters of potential competition: among other things, in *E.ON Ruhrgas and E.ON v Commission*[46]. Telefónica argues that in *Servier*, the General Court reiterated that the general criterion for determining the existence of potential competition is that of the ability to enter the market, not that of insurmountable barriers to entry, as proposed in the Letter of Facts[47].

(43) Moreover, in its supplementary submission of 22 June 2020, Telefónica argues that the *Generics (UK)* judgment[48] only confirms this criterion and further clarifies that in order to consider that an undertaking which is not yet present in the market is a potential competitor of another undertaking already established in the market, account must be taken of whether that undertaking had the "*firm determination and inherent capacity to enter the market*"; and whether, in fact, it had undertaken preparatory actions which would allow it to enter in the short term and exert competitive pressure on the other undertaking.

(44) Pharol refers to *E.ON Ruhrgas and E.ON v Commission* as well as to *Visa Europe and Visa International Service v Commission*[49] to argue that an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy[50]. Pharol claims that the relationship between the criteria to analyse potential competition in light of the case-law relating to *E.ON Ruhrgas* and previous cases – which relate to verifying real and concrete possibilities of entry – and that of the *Toshiba* case-law – which assessed the existence of insurmountable barriers to entry – is not alternative in nature but rather complementary and that this was recently clarified by the General Court in *Servier*[51]. Therefore, even though the "*insurmountable barriers to entry*" test is a necessary test to consider, Pharol would moreover expect the Commission to conduct an analysis of the real and concrete possibilities of entry into the market in the period in question in each of the markets generically covered by the clause[52].

(ii) Commission's assessment

(45) Contrary to Telefónica's and Pharol's claims, the Commission considers that in market-sharing agreements, such as the one concerned in this Decision, the standard of proof to assess potential competition is "*insurmountable barriers to entry*". According to the General Court's judgments, *"where the relevant market has been liberalised, as in the present case, the Commission is not required to analyse the structure of the market and the question whether entry to that market would correspond to a viable economic strategy for each of the Parties, but* […] *is required*

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46 Judgment of the General Court of 29 June 2012, T-360/09, *E.ON Ruhrgas AG and E.ON AG v European Commission*, EU:T:2012:332.

47 Telefónica's reply to the LoF, paragraphs 52 to 55 and 81 to 95.

48 Judgment of the Court of 30 January 2020, C-307/18 - *Generics (UK) and Others*, EU:C:2020:52.

49 Judgment of the General Court of 14 April 2011, T-461/07, *Visa Europe Ltd and Visa International Service v European Commission*, EU:T:2011:181.

50 Pharol's reply to the LoF, paragraph 63.

51 Judgment of the General Court of 12 December 2018, T-691/14, *Servier SAS and Others v European Commission*, EU:T:2018:922.

52 Pharol's reply to the LoF, paragraphs 57 to 59.

to examine whether there are insurmountable barriers to entry to the market that would rule out any potential competition"[53].

(46) This was confirmed in *Servier*[54], where the General Court specifically referred to paragraph 181 of the *PT* judgment and to the *Toshiba* judgment[55] to clarify that "*In other contexts, it has also been held than an undertaking constitutes a potential competitor if there exist no insurmountable barriers to its entry to the market*".

(47) In the *Servier* judgment, the General Court distinguished between, on the one hand, restrictions by object, of a "*particularly obvious nature*", which are "*neither atypical nor complex*" and which "*do not require and in-depth analysis of the economic and legal context to establish that they are by nature sufficiently harmful"* (paragraph 328), such as the market-sharing agreements in *Toshiba*; and, on the other hand, other agreements, such as patent settlements agreements, whose unlawful nature and the fact that they constituted a restriction of competition by object "*might not have been evident to an outside observer*" (paragraph 329).

(48) In the present case, both the General Court and the Court of Justice have confirmed the legal assessment contained in the Telefónica/PT Decision that the non-compete clause had market sharing as its object. Moreover, the Court of Justice referred in its *Telefónica* judgment to well-established case-law stating that such market-sharing agreements constitute particularly serious breaches of the competition rules[56]. In particular, the General Court referred to market-sharing as an "*obvious restriction of competition*"[57]. Moreover, the General Court took into consideration that the non-compete clause was a market-sharing agreement to find that the Commission was not required to carry out a detailed analysis of the structure of the markets concerned and of potential competition between the Parties on those markets[58].

(49) Contrary to Telefónica's and Pharol's claims, the Commission is not obliged to consider the real and concrete possibilities of the other company to enter the market in its assessment of potential competition in market-sharing agreements of this type, but can restrict itself to verifying whether there were insurmountable barriers to entry. Indeed, as regards the restrictions by object which are obvious, such as market-sharing agreements, the General Court held in *Servier* that "*the analysis of the economic and legal context of which the practice forms part may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object and, in particular, to verifying that the barriers to entry on the market at issue cannot be described as insurmountable*" (paragraph 327).

(50) In Toshiba[59], the General Court held that "a market sharing agreement, which is designed to protect the European producers in their home territories from actual or potential competition from Japanese producers, is capable of restricting competition, unless insurmountable barriers to entry to the European market exist, which rule out

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53 Telefónica judgment, paragraph 221 and the *PT* judgment, paragraph 181.

54 Case T-691/14, *Servier SAS and Others v European Commission*, EU:T:2018:922, paragraph 319.

55 Paragraphs 28, 29, 32 and 34.

56 *Telefónica* judgment, paragraph 230 with reference to the judgment by the Court of Justice of 8 December 2011, *KME Germany and Others v Commission*, C-389/10 P, EU:C:2011:816, paragraph 75. See also *Telefónica* judgment, paragraph 320.

57 *Telefónica* judgment, paragraph 230 and the *PT* judgment, paragraph 191.

58 *Telefónica* judgment, paragraph 215 and 224 to 227.

59 Judgment of the General Court of 21 May 2014, T-519/09, *Toshiba Corp. v European Commission*, EU:T:2014:263, paragraph 230.

any potential competition from Japanese producers". The Commission "could therefore restrict itself to showing that the barriers to entry to the European market were not insurmountable".

(51) In Servier, the General Court found that "merely checking" whether there are insurmountable barriers to entry on a given market "could result in a finding of potential competition simply because any operator entered the market in question" (paragraph 323)[60]. The absence of competitors at a given time on a given market should not, however, be automatically equivalent with a finding of insurmountable barriers to entry. As the General Court also found in Servier, any possibility, even hypothetical, of entering the market is sufficient to establish the existence of potential competition (paragraph 320).

(52) Contrary to Telefónica's arguments, the General Court did not state in *Servier* that the general standard for proving potential competition is "*real and concrete*" possibilities of entry. Quite the contrary, the General Court explained that "*depending on the context and the unlawful conduct in question, the threshold for a finding of potential competition may vary*" (paragraph 320). Also, the *Generics (UK)* judgment is, like *Servier*, specific to patent settlement agreements in the pharmaceutical sector and confirms the application of the "*real and concrete*" possibilities test to such agreements. However, that judgment does not put into question the distinction made by the General Court in *Servier*, where it stated that in market-sharing agreements such as the present one, the standard of proof should be "*insurmountable barriers to entry*". For instance, in *Toshiba*[61], the Court of Justice held that the Commission demonstrated to the requisite standard that the barriers to entry to the European market were not insurmountable.

(53) Contrary to Pharol's claim, the *Servier* judgment has not established that the two standards for assessing potential competition (namely insurmountable barriers to entry and real and concrete possibilities to entry) should be applied in parallel. The General Court clarified that in certain cases, such as the case of patent settlement agreements, where the Commission analysed the existence of real and concrete possibilities of entry, verifying the existence of insurmountable barriers to entry is not inconsistent, because in the presence of insurmountable barriers to entry, it cannot be considered that an operator has real and concrete possibilities of entering that market (paragraph 321).

(54) However, this does not mean that in market-sharing agreements such as the one concerned in this Decision, the Commission needs to rely on both standards of proof, as in the present case, the Commission does not need to analyse the real and concrete possibilities to entry. This would render ineffective the distinction made by the General Court in *Servier*, as a "*detailed analysis on the basis of information specific to each alleged potential competitor is characteristic of the examination of its real and concrete possibilities of entering the market and is not the same as merely checking whether there are insurmountable barriers to entry on a given market*" (paragraph 323).

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60 Judgment of the General Court of 12 December 2018, T-691/14, *Servier SAS and Others v European Commission*, EU:T:2018:922.

61 Judgment of the Court of 20 January 2016, Case C-373/14 P *Toshiba Corporation v European Commission*, EU:C:2016:26.

(55) Moreover, it is settled case-law that the very existence of a market sharing agreement is a strong indication that a competitive relationship existed. In *Toshiba* (paragraph 231), the General Court held that *"the very existence of the agreement provides a strong indication that a competitive relationship existed between the Japanese and European producers. It is unlikely that they would have entered into a market-sharing agreement if they had not considered themselves to be at least potential competitors*".

(56) As also stated by the Court in the Generics (UK) judgment at paragraph 42: "Further, as the Advocate General stated in point 60 of her Opinion, the perception of the established operator is a factor that is relevant to the assessment of the existence of a competitive relationship between that party and an undertaking outside the market since, if the latter is perceived as a potential entrant to the market, it may, by reason merely that it exists, give rise to competitive pressure on the operator that is established in that market"[62].

(57) In Generics (UK), the General Court further referred to the Toshiba judgment and found in paragraph 55 that the "conclusion of an agreement between a number of undertakings, operating at the same level in the production chain, some of which had no presence in the market concerned, constitutes a strong indication that a competitive relationship existed between those undertakings".

(iii) Conclusion

(58) Therefore, the Commission considers that it is not required to carry out an analysis of the viability of the economic strategies of the Parties to enter the market, i.e. of the real and concrete possibilities of the Parties to offer competing services during the period of application of the non-compete clause. The Commission thus considers the absence of potential competition on the basis of the criterion of "*insurmountable barriers to entry*". That being said, when applying the insurmountable barriers to entry test, the Commission has adopted a stricter approach than required, without merely relying on an hypothetical possibility to enter. The Commission has in fact verified that the possibility to enter each market was not purely hypothetical, taking into account the specific circumstances of the different markets. For instance, the Commission has also taken into account, among other considerations and circumstances, the fact that at the time of the infringement there existed competitors providing the services in question[63].

3.3.2. Consistent application of the standard of proof

(i) Parties' arguments

(59) In its submission of 22 June 2020, Telefónica argues that the insurmountable barriers to entry criterion can only be used to determine whether certain restrictions (in particular, market-sharing agreements) constitute an infringement of competition "*by object*", but that it should not be used for determining the value of sales on which the fines are based[64]. Telefónica argues that accepting the insurmountable barriers to entry criterion would render the General Court's judgments meaningless, as even if the General Court already noted that the telecommunications market was liberalised and therefore, concluded that the non-compete clause was a "*restriction by object*", it

62 Judgment of the Court of 30 January 2020, C-307/18 - *Generics (UK) and Others*, EU:C:2020:52.

63 See e.g. Section 3.9.1.2.

64 Document ID 1666, paragraph 16.

still ordered the Commission to recalculate the fine by analysing Telefónica's allegations on the absence of potential competition from PT in particular markets. According to Telefónica, the General Court stressed that such analysis should be done taking into account the "*factual and legal context*" of each market and service. Hence, Telefónica argues that the General Court requested the Commission to go a step further and not to simply retain the criterion of "*insurmountable*" barriers to entry.

(60) In its reply to the LoF, Telefónica also argues that it can be inferred from paragraph 306 of the *Telefónica* judgment, in conjunction with paragraphs 307 to 309 of that judgment, that the General Court has made a distinction concerning the level of the Commission's burden of proof when it analyses the existence of potential competition on its own initiative, without anyone having questioned whether such competition exists, and when it must give a detailed response to the submissions and arguments made in opposition[65].

(61) Pharol did not give any particular explanation as to why a different standard of proof from the one relevant for the assessment of the restriction of competition should apply when calculating the fines.

(ii) Commission's assessment

(62) The Commission notes that the "*insurmountable barriers to entry*" standard of proof is not contested as such by the Parties regarding the existence of the restriction of competition by object in this case. However, by arguing in favour of the application of a different standard of proof when setting the fine (namely real and concrete possibilities to entry), the Parties contest, in fact, the consistent application of the same standard of proof for potential competition when finding a restriction of competition and when calculating the fine.

(63) The Commission considers that the same standard of proof should apply both as regards the finding of a restriction of competition by object and the calculation of the value of sales on which the fines are based in such market-sharing agreement cases (namely "*insurmountable barriers to entry*"). The General Court held that the Commission ought to have considered whether Telefónica and PT were correct to maintain the exclusion of the value of sales of the services which they claimed should be excluded for the purposes of the calculation of the fine on the ground that there was no potential competition between the Parties with respect to those services[66].

(64) However, there are no reasons to conclude that such assessment by the Commission should be done on the basis of another, stricter criterion, different from the one applicable for the purposes of establishing the infringement and that a detailed analysis of the markets concerned was necessary, when, in fact, as also provided at paragraph 215 of the *Telefónica* judgment, that was not necessary in order to determine whether the clause constituted a restriction of competition by object.

(65) Applying the same standard of proof for the calculation of the fines as the one applied for the finding of a restriction by object in a market-sharing case (such as the current case) does not render the General Court's judgments meaningless. It implies assessing in detail the arguments and evidence put forward by the Parties to claim

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65 Telefónica's reply to the LoF, paragraph 58.

66 *Telefónica* judgment, paragraph 295.

that certain services should be excluded from the value of sales due to the absence of potential competition.

(66) Applying a different, higher, standard of proof for the purposes of calculating the value of sales on which the fine is based would result in inconsistencies and would render inefficient and meaningless any finding of a restriction of competition by object.

(67) This is precisely why the General Court sought to avoid any misunderstanding and clarified in the General Court's judgments that when determining fines, the Commission should not be imposed an obligation which it does not have when showing the existence of restriction by object.

(68) According to the General Court's judgments and prior case law, "the Commission cannot, admittedly, be required, when faced with a restriction by object such as that at issue in the present case, to carry out on its own initiative an examination of potential competition for all the markets and services concerned by the scope of the infringement […], and to introduce, by determining the value of sales to be taken into account when calculating the fine, the obligation to examine potential competition when such an exercise is not required in the case of a restriction of competition by object […], an interpretation which would result in an obligation being imposed on the Commission in respect of the method of calculating fines to which it is not subject for the purposes of applying Article 101 TFEU where the infringement in question has an anti-competitive object cannot be upheld (judgment in Prym and Prym Consumer v Commission[67], para. 64)"[68].

(69) Contrary to Telefónica's view and based on the reading of the above paragraph of the *Telefónica* judgment, there is no reason why there would be two different standards of proof, depending on whether the Commission analyses the existence of potential competition on its own initiative, in the framework of the restriction of competition assessment, or whether the Commission assesses the Parties' submissions when calculating the fine.

(70) Moreover, in order to clarify any possible misinterpretations, the General Court held that "the solution adopted in the present case does not consist in imposing on the Commission, when determining the amount of the fine, an obligation by which it is not bound for the purposes of applying Article 101 TFEU in the case of an infringement which has an anticompetitive object […]"[69].

(iii) Conclusion

(71) Therefore, the Commission applies the same standard of proof both as regards the finding of a restriction of competition by object and the calculation of the fines (namely "*insurmountable barriers to entry*").

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67 Judgment of the Court of 3 September 2009, C-534/07 P, *Prym and Prym Consumer v Commission*, EU:C:2009:505. In that case, it was held that in the case of market sharing, an interpretation which would result in an obligation being imposed on the Commission in respect of the method of calculating fines to which it is not subject for the purposes of applying Article 101 where the infringement in question has an anti-competitive object, cannot be upheld (paragraph 64).

68 *Telefónica* judgment, paragraph 306 and *PT* judgment, paragraph 240.

69 *Telefónica* judgment paragraph 307 and *PT* judgment, paragraph 241.

3.3.3. Relevant period

(72) Telefónica and Pharol repeatedly state in their different submissions that the four-month period when the clause was in force was insufficient for the other party to enter the market[70]. They both argue that the Commission should take this aspect into account for its assessment of insurmountable barriers to entry.

(73) The General Court found in *Lundbeck* that the relevant period for the purposes of establishing the existence of potential competition must be a reasonable one, but did not fix a specific limit. Moreover, it found that the Commission is not required to demonstrate with certainty that entry would have taken place before the end of the agreement at issue[71].

(74) As regards the specific aspects of the non-compete clause, first, the Commission notes that the non-compete clause between Telefónica and Portugal Telecom was intended to be in force at least for more than 15 months. In fact, the clause foresaw that it would be applicable "*for a period starting on [27 September 2010] the date of Closing until December 31, 2011*". This exceeds a period of one year[72]. With regard to the argument raised by the Parties that the clause was in place only for four months, the Commission further observes that the Parties only terminated the clause following the opening of the investigation proceedings by the Commission, as reflected in the agreement between Telefónica and PT which terminated the clause[73].

(75) In any event, it is not necessary for the Commission to show actual "entry" on the market within the duration of the non-compete clause for potential competition to exist. In other words, the lack of "entry" during the period of application of the non-compete clause does not automatically show the absence of potential competition.

(76) The Commission further notes that the wording of the non-compete clause prevented each Party from "*engaging*" and "*investing*", and drew therefore a difference between both terms. Moreover, the General Court stated in paragraph 199 of the *Telefónica* judgment that the interpretation of the clause must consider both its wording and its context. As regards its wording, the term "*engaging*" indicates a preliminary stage of showing interest and considering an investment[74]. As regards its context, the clause signed between Telefónica and PT imposed a non-compete obligation between the Parties and constituted a market-sharing agreement. The General Court's judgments confirmed the findings of the Commission that the non-compete clause constituted a restriction of competition by object. By preventing the parties from "*engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business*", the non-compete clause thus

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70 Telefónica raises this argument for different markets as part of the Response to Annex 1, *inter alia*, in paragraphs 87 (Call origination on the public telephone networks provided at fixed cost), paragraphs 105 to 107 (Call termination on individual telephone networks provided at a fixed location), paragraphs 130 to 135 (Transit services in the fixed public telephone network), paragraph 167 (Wholesale markets relating to leased lines), paragraphs 177 to 182 (Wholesale trunk segments of leased lines (Terrestrial routes)), paragraphs 183 to 190 (Submarine routes), paragraphs 200 to 202 (Virtual private networks), paragraph 266 (Call termination on individual mobile networks).

71 Judgment of the General Court of 8 September 2016, T-472/13 - *Lundbeck v Commission*, EU:T:2016:449, paragraph 163.

72 See also Judgment of the General Court of 14 April 2011, T-461/07 - *Visa Europe and Visa International Service v Commission*, EU:T:2011:181, paragraph 189.

73 Agreement of 4 February 2011 deleting Section Nine of the Stock Purchase Agreement, Document ID 128.

74 To engage is defined by the Oxford dictionary as "*Occupy or attract (someone's interest or attention)*".

prevented the Parties from taking up any steps that could eventually lead to entering any market covered by the non-compete clause.

(77) Indeed, within the four-month period during which the clause was in force, the Parties could have taken first steps towards becoming actual competitors in the markets covered by the clause. For instance, they could have started the process for getting the relevant licences or embarked in studies of the viability of the different entry modalities. Against this background, the Commission takes into account in its assessment whether the Parties could have engaged in preparatory steps towards competing on these markets during the period of application of the non-compete clause.

3.4. General considerations

3.4.1. Investment ladder principle

(78) The so-called investment ladder principle is one of the basic principles enshrined in regulation and competition to encourage infrastructure investments and competition of alternative operators. This principle describes a situation in which alternative operators could follow a step-by-step approach of investment which would be dependent on their customer base and effort to differentiate their services from those of the incumbent. However, the investment ladder principle is not to be taken as a pre-set or obligatory path as alternative operators can and do enter the relevant markets on different rungs of the investment ladder.

(79) Usually, there are several steps involved in using the investment ladder principle. The first possible entry point in a sense of cost intensity is, for example, reselling access products of the incumbent or other operators. In this scenario, the alternative operator does not have the ability to differentiate its offer from that of the incumbent to a high degree because the retail offer is based only on the wholesale service of the incumbent and the alternative operator does not have its own infrastructure to be used in provision of these services[75].

(80) The second possible entry point consists of the alternative operator developing its own infrastructure, or at least parts thereof. In case of fixed networks such network elements might consist of a national backbone network and alternative operators would consequently use wholesale central access services of the incumbent, which allows alternative operators to differentiate to a higher degree (relative to reselling).

(81) The next possible entry point presumes further development of the backbone network, to connect to the collocation points of the incumbent and using local loop unbundling ("LLU") to bridge the so-called last mile to the end-customer (for example as was the case of Orange and Jazztel, operators can rely on different wholesale services depending on the extent of their infrastructure or lack thereof)[76]. The importance of the investment ladder principle in general and this step for

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75 Commission Staff Working Document Accompanying document to the Draft Commission Recommendation on regulated access to Next Generation Access Networks (NGA), Document ID 1705, pages 13-14. Available here: https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/sec_2010_1037_en.pdf

76 Commission Decision of 19 May 2015, in Case COMP/M.7421 – *Orange/Jazztel*, pages 110-111.

alternative operators to be able to compete effectively in particular was also stressed in the *Slovak Telekom* case[77].

(82) The last step of the investment ladder principle is deploying own infrastructure (deployment of own active infrastructure could be also facilitated by access to passive infrastructure, i.e. ducts, poles, etc., which was for example the case in Portugal as Vodafone was deploying its own infrastructure using PT/Pharol's ducts and poles to provide for example retail internet access to its customers). This step provides alternative operators with the highest degree of independence from the incumbent as they do not rely on any (or very limited in case of access to passive infrastructure) of the incumbent's wholesale offers. It also provides for the highest degree of possible differentiation from the incumbent's offers.

(83) Similarly to fixed networks, the investment ladder principle could be applied to mobile services. In this respect, the first possible entry point would also include reselling of wholesale mobile access services (so-called 'branded resellers'). The second would be becoming a light Mobile Virtual Network Operator ("MVNO"), followed by a move to become a full MVNO, i.e. an MVNO with its own deployed core network, which is using the host network of mobile network operators ("MNOs") only for the radio access network part.

(84) The Commission notes that although the investment ladder principle is not prescriptive and does not entail that alternative operators must follow each of the rungs of the step-by-step approach to invest into infrastructure, it is recognised as a general principle which describes the observed pattern of market entry and expansion by new entrants in the context where the incumbent's network cannot be easily duplicated[78].

3.4.2. Takeover of competitor as a way to enter the market

(85) Telefónica and Pharol maintain that the General Court's judgments prevent the Commission from relying on the takeover of a competitor as a way to enter the market. They particularly refer to paragraph 312 of the *Telefónica* judgment and paragraph 246 of the *PT* judgment to support their claims.

(86) In fact, the acquisition of an established player is one of the most frequently used possibilities for a company to enter a market. In those paragraphs, the General Court did neither exclude this option, nor prevented the Commission from relying on it for the assessment of potential competition. The General Court rather held that the Commission could not merely state that *"Telefónica was a potential competitor of PT with respect to the services in question since it would have been able to participate in the calls for tenders or to buy a existing operator"* (paragraph 312), without examining the arguments put forward by the Parties in order to demonstrate the absence of potential competition between them with respect the certain services during the period of application of the non-compete clause.

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[77] Commission Decision of 15 October 2014 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT.39523 – *Slovak Telekom*), recitals 1074-1078.

[78] Commission Decision of 15 October 2014 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT.39523 – *Slovak Telekom*), recital 1080.

3.4.3. Investment in the telecoms sector, despite the economic crisis

(87) As to Telefónica's view that investing in the Spanish telecommunications and television markets was neither appealing, nor economically viable during 2010 and 2011 due to the economic crisis[79], the Commission considers that it is not required to analyse the viability of the economic strategies of the Parties to enter a market, i.e. of the actual capacity and incentives of the Parties to invest and offer competing services in the telecoms sector between 27 September 2010 and 4 February 2011.

(88) However, the Commission notes that several reports show that, despite the financial crisis, there were investments in the telecoms sector in Spain and Portugal, during the period of application of the non-compete clause.

(89) The Spain 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012, provides that in the context of the economic crisis, revenues in the electronic communications sector in Spain only decreased from EUR 38.613 million in 2009 to EUR 37.273 million in 2010, representing a decrease of telecom revenue growth of -3.5% for the 2009-2010 period. Moreover, in spite of this decrease of revenue growth and the overall context of economic downturn, investment in the sector experienced a 3.8% absolute investment growth in 2010 compared to the previous year, increasing from EUR 3.946 million in 2009 to EUR 4.095 million in 2010. Spain was among the Member States which experienced investment growth in the sector representing the 4th largest percentage of investment in the sector in 2010. The report also shows that while Telefónica contributed to this increase of investment in fixed networks, alternative operators also invested in the sector[80].

(90) The European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012, showed that the main Union operators' decrease of domestic revenues of about 4.5% was compensated by a 17.3% increase in revenues made in markets outside Europe[81]. This is corroborated by the fact that with a sector revenue of EUR 37.273 million and investment of EUR 4.095 million in 2010, telecom investment as percentage of revenue in Spain was at 11.0%, only slightly below the Union average (12.4% in 2010)[82].

(91) That demonstrates that, despite the financial crisis, there were investments in the telecoms sector in Spain, during the period of application of the non-compete clause.

(92) As to the situation in Portugal, the Commission considers that Pharol's argument that there was increased concentration on the market due to several circumstances, such as the development of own networks by alternative operators[83], only shows that competition was indeed possible on this market and that there were no insurmountable barriers to entry.

(93) Although alternative operators were already present, the Portuguese telecoms sector benefited from dynamic investments during the period of application of the non-compete clause. The European Union 2011 Telecommunications Market and

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79 Response to Annex 1, paragraphs 21 to 28, paragraphs 151, 153, 197, 198 or 243.

80 Document ID 1417, Section 3 - Revenues and investments.

81 Document ID 1412, page 13, bearing in mind that both Telefónica and PT were active for example in markets in Latin America.

82 Document ID 1417, Section 3 - Revenues and investments.

83 Pharol's reply of 7 September 2018 to RFI 2018/72949, paragraph 15.

Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012, shows that with 18.2% of the revenues in 2010 being invested in telecoms, Portugal ranked 6th in the EU and well above the Union average (12.4%)[84].

3.5. Markets related to fixed telephony

(94) In the Telefónica/PT Decision, the Commission found that the non-compete clause applied among other things to markets relating to fixed telephony and concluded that those markets are directly or indirectly linked to the infringement (section 5.5.1.1. "Markets relating to fixed telephony" and recital (482). Therefore, the Commission included those markets in the value of sales for the purpose of calculating the fines (recital (485)). The following sections will discuss fixed telephony services, namely "Wholesale services" (for Spain, see Section 3.5.1, for Portugal, see Section 3.5.2) and "Retail access and voice" (for Spain, see Section 3.5.3, for Portugal, see Section 3.5.4).

3.5.1. Wholesale services in Spain

(95) Telefónica claims that potential competition does not exist with respect to wholesale services in markets relating to fixed telephony, as the deployment of fixed networks is constrained by high barriers to entry, the need of significant investments, a long maturation period well beyond the period of application of the non-compete clause and uncertain profitability[85]. Telefónica argues that wholesale fixed telephony services were provided under a *de facto* monopoly and that it was not even theoretically possible for PT to enter within the period of application of the clause[86]. In Telefónica's view, investing in the Spanish telecommunications and television markets was neither appealing, nor economically viable during 2010 and 2011, when Spain was facing a severe economic downturn[87].

(96) The following sections first set out the ways in which entry into wholesale fixed telephony services can take place, that is, (a) on the basis of own infrastructure; (b) on the basis of local loop unbundling; or (c) via the acquisition of an existing operator who could provide these services, and then focus on entry into specific wholesale fixed telephony services, namely call origination on the public telephone networks provided at a fixed location (see Section 3.5.1.1) and call termination on individual public telephone networks provided at a fixed location (see Section 3.5.1.2).

a) Wholesale services on the basis of own infrastructure

(i) Telefónica's arguments

(97) Telefónica argues that there is no evidence provided to show that investments were made in the wholesale fixed telephony sector in Spain in general. Moreover, Telefónica considers that there is no evidence of investments by alternative operators in fixed networks that would enable them to provide wholesale services.[88]

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84 Document ID 1412, page 13.

85 Telefónica's reply of 13 January 2012 to the SO, Document ID 1055, paragraph 445 and Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 44.

86 Document ID 1554, paragraph 45.

87 Document ID 1554, paragraphs 37 and 38.

88 Response to Annex 1 to the Letter of Facts, paragraphs 9 to 28.

(98) Telefónica also argues that "only at a much later stage, when it [an operator] has a network with sufficient capillarity, can it consider offering wholesale services, because until then its offering would not be attractive in comparison with the regulated offering of the incumbent operator, insofar as Telefónica is under the obligation to provide those wholesale services at a cost-oriented price, as laid down by the regulator"[89].

(ii) Commission's assessment

(99) Wholesale services relating to fixed telephony can be provided operators on the basis of their own network. At the time of the infringement, alternative operators were able to deploy and actually deployed (for example Ono, Euskaltel, Vodafone)[90] their own infrastructure in Spain.

(100) First, there is evidence showing that despite the financial crisis, the Spanish telecoms sector benefited from dynamic investments, including in fixed infrastructure, on the basis of which a wide range of telecoms services, including wholesale telephony services, could be provided during the period of application of the non-compete clause:

– **The Spain 2011 Telecommunication and Markets Regulatory Developments** - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012, provides that certain investments in high-speed networks, based on which (i.a.) wholesale telephony service could be provided, took place in 2010 and continued in 2011 in Spain[91];

– **The Annual Report of the Spanish Regulator Comisión del Mercado de las Telecomunicaciones ("CMT") for 2010** shows that investment by the electronic communications operators as a whole increased by 4.6% to EUR 4 500 million, both in fixed and mobile networks. Investments per operator show that the majority of operators increased investment by more than 5% in 2010 in comparison with 2009. Alternative operators, such as Ono, R and Euskaltel, invested into fibre optic connections, cable up-grades, and new local exchanges, from which alternative operators provided services via local loop unbundling[92], on the basis of which wholesale telephony services could be provided as well.

  The pie chart on page 74 (page 76 of the .pdf) of this annual report indicates that several players provide interconnection services, that is, services between operators to exchange their traffic (even if not broken down by service);

– **The CMT decision of 24 February 2016** shows that in 2008 the Spanish market was a scene of dynamic network investments, on the basis of which not only potential, but also actual competition occurred[93].

89 Response to Annex 1 to the Letter of Facts, paragraph 5.
90 Document ID 1579, page 41.
91 Document ID 1417, Section 3 – Revenues and investments.
92 Document ID 1579, pages 11 and 37 to 42.
93 Table 6 included in page 38 of the CNMC Decision of 24 February 2016, Document ID 1478.

Alternative operators, who had no regulated access to NGA[94] networks ("New Generation Access"), started deploying their own infrastructure (namely parallel to Telefónica's network), which led to increased fibre-based competition, on the basis of which wholesale fixed telephony services could have also been offered.

(101) Secondly, "symmetric" regulation (namely imposed on all operators) adopted in Spain in 2010[95], providing that under exceptional circumstances and justified reasons, the CMT could impose obligations related to access or interconnection to alternative operators, significantly lowered the entry barriers for operators wishing to enter the electronic communications markets. As also shown by the Digital Agenda Scoreboard 2011, Pillar 1 Regulatory developments[96], in Spain such specific symmetric legislation was adopted to facilitate network deployment in buildings in 2010[97]. This shows that wholesale services could have been provided by alternative operators on the basis of their own networks, otherwise this possible obligation would be rendered useless. That legislation therefore further facilitated the entry into the wholesale fixed telephony market by alternative operators, both Spanish and foreign, and thereby further lowered entry barriers during the period of application of the non-compete clause.

(102) Thirdly, even if deployment of NGA networks was still a nascent technology during the period of application of the non-compete clause, wholesale services such as termination services were provided using these networks[98]. Telefónica argues that no operator provided wholesale fixed telephony services on the basis of Fibre to the Home ("FTTH")[99]. Telefónica refers to the CMT decision of 12 December 2008[100] where it is stated that at that point in time there was no potential competition in the wholesale market and that NGA was still at the very beginning of its deployment[101].

(103) However, the CMT decision mentioned by Telefónica dates back to 2008, that is, two years before the entry into force of the non-compete clause. In that decision, the CMT stated regarding NGA "*a progressive replacement of traditional accesses by accesses with IP technology is feasible and will necessarily lead to changes in the competitive structure of the markets*". In 2016, the Spanish Regulator considered that Spain was "*above the EU average regarding NGA coverage*". In fact, the trend foreseen by the CMT at the end of 2008 had already started to materialise two years later, when the non-compete clause was in force, as can be seen by the actual

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94 New Generation Access, that is, technologies allowing download speeds of at least 30 Mbps, e.g. Document ID 1415, page 6.

95 Article 13.2[1] of the Spanish telecoms law (LGTel).

96 Document ID 1418.

97 Article 13.2[1] of the Spanish telecoms law (LGTel) provides that, under exceptional circumstances and justified reasons, the Spanish Regulator may impose obligations related to access or interconnection to operators which have not been declared as holding SMP.

98 This is evidenced by the list of addressees of the decision adopted by the Spanish Regulator regarding call termination services, which includes operators using cable (NGA) infrastructure to provide their services to customers (Document ID 1434, page 37) as well as an overview of the cable operators providing service bundles including voice services (and hence wholesale call termination services), Document ID 1434, page 34.

99 Response to Annex 1 to the Letter of Facts, paragraphs 41 to 45.

100 Document ID 1433.

101 Response to Annex 1 to the Letter of Facts, footnote 21.

deployment of NGA networks in Spain: in 2010, there were nearly 8 million NGA connections and in 2011, there were over 11 million NGA connections[102].

(104) Fourthly, alternative operators having invested in fixed network services existed on the market. Telefónica argues that there is no concrete evidence of investments by new operators in fixed networks allowing them to provide wholesale services. According to Telefónica, investments were carried out mostly by already-established operators[103] and no operator has entered the Spanish wholesale fixed telephony market directly without previously being present in the retail market (Response to Annex 1 to the Letter of Facts ("Response to Annex 1"), paragraph 6).

(105) However, Telefónica acknowledges in its Response to Annex 1 the existence of alternative operators and the fact that they invested into fixed networks services during the period of application of the non-compete clause (paragraphs 13, 15, 17, 22 and 23 of the Response to Annex 1). There is no need for new alternative operators to have invested in own infrastructure for the Commission to show that there are no insurmountable barriers to entry on this market. In accordance with the case–law ("*Servier*"), it is enough for the Commission to show that "*any operator*" could have invested or have invested in own network and the fact that this is the case shows that there were no insurmountable barriers to entry on this market.

(106) Telefónica emphasises that there is no evidence of investment in own networks by alternative providers for wholesale services. Investments were for retail services[104]. Telefónica implicitly acknowledges that there might be some cases where investments for own wholesale networks happened, insofar as it refers to "*practically all*" (paragraph 170 of the Response to Annex 1).

(107) Telefónica also refers to an excerpt from a decision of the CMT of 23 July 2009 in support of its arguments. This excerpt, however, shows the opposite and confirms that investments in own networks were possible and indeed happened. It is stated in that decision that "*in recent years both cable operators and other alternative operators have made a big effort to invest in developing their own access infrastructure [for wholesale markets relating to leased lines], even if it is not foreseeable that these operators will be able to replicate Telefónica's network within the time horizon of the market review*"[105]. This is confirmed by the fact that there were investments in fixed network deployment (with which Telefónica agrees), on the basis of which wholesale services may be provided.

(iii) Conclusion

(108) Therefore, during the period of application of the non-compete clause, alternative operators were able to deploy and actually deployed their own infrastructure in Spain. Moreover, Telefónica acknowledges that it was possible for an operator to offer wholesale services on the basis of its own network. While the economic incentives of operators to actually offer certain services go beyond what is necessary to analyse the existence or not of insurmountable barriers to entry, the Commission notes that, for instance, in accordance with the Spanish Regulator's decision of 18 December 2008[106], as regards rates for wholesale call termination on individual

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102 Document ID 1478, pages 37-38.
103 Response to Annex 1 to the Letter of Facts, paragraph 17.
104 Response to Annex 1, paragraphs 169-170.
105 Document ID 1464, page 41.
106 Document ID 1433.

public telephone networks provided at fixed location, Telefónica's competitors were allowed by the CMT to charge reasonable prices (a mark-up of 30% above Telefónica's termination rates), in order to facilitate market entry (see recital (151) below).

b) Wholesale services on the basis of local loop unbundling (LLU)

(i) Telefónica's arguments

(109) Telefónica does not contest that wholesale fixed telephony services could also be provided on the basis of LLU by alternative operators which do not necessarily possess their own network from the local exchange to the premises/terminal equipment of the customer, that is, the so-called 'last mile'.

(110) However, Telefónica argues that the provision of wholesale services on the basis of LLU would be out of the question for any operators which had not been established in Spain for years and had not already deployed their own networks. According to Telefónica, the provision of wholesale services on the basis of LLU involves co-location, that is, access to the Main Distribution Frame and/or the Optical Distribution Frame, floor space, electrical power, air conditioning, etc. at a local exchange, at approximately 800-900 exchanges, which requires several years of investment[107]. Moreover, any existing wholesale fixed telephony competition based on LLU was marginal.

(111) On a more general level, Telefónica disagrees that the regulatory measures in force at the time did lower the barriers to entry in the wholesale market.

(ii) Commission's assessment

(112) The Commission considers that entry to the wholesale fixed telephony market via LLU was possible during the period of application of the non-compete clause.

(113) First, the regulatory framework lowered entry barriers. The Spanish *ex ante* access regulation, based (i.a.) on the Access Directive,[108] whose aim was to "*establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits*"[109], allowed for competition to occur, including through LLU. The wider range of entry possibilities given by this regulatory framework[110] encouraged access seekers' entry on the market for (i.a.) wholesale fixed telephony services, facilitated network deployment through the investment ladder principle (as described in section 3.4.1 above) and allowed telecom operators to compete both at wholesale and retail level. In general, *ex ante* access regulation consists of a procedure identifying competitive bottlenecks in telecoms markets and imposing remedies on an operator with Significant Market Power ("SMP") which are justified and proportionate *vis-à-vis* the competition problems identified. These could include

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107 Response to Annex 1, paragraphs 29 to 37.

108 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of electronic communication networks and associated facilities (Access Directive), Article 1. OJ L 108, 24.4.2002, p. 7–20.

109 Access Directive, Article 1.

110 Transposed into the Spanish General Telecommunications Act 32/2003.

access, transparency, non-discrimination, price control and cost accounting and accounting separation remedies[111].

(114) Secondly, not only was it possible for operators to provide wholesale fixed telephony services on the basis of LLU, but during the application period of the non-compete clause Jazztel was present on the market and actually provided such services, as also acknowledged by Telefónica[112]. The fact that the provision of those services by Jazztel was only "marginal", as argued by Telefónica, does not change the fact that there was competition.

(115) Thirdly, the provision of wholesale fixed telephony service via LLU did not require several years of investment. LLU is a solution precisely for the alternative operators which do not have their own networks deployed in the last mile but either (i) have their own backbone network and transit infrastructure to co-located exchanges; and/or (ii) are able to lease such connections from the central point to such exchanges. Co-location itself does not normally require several years of investment, especially if, for example, combined with wholesale transit services of other operators that would allow alternative operators to reach the local exchanges.

(116) Moreover, contrary to Telefónica's claims, the alternative operators did not have to co-locate in 800-900 exchanges, but could co-locate in only certain areas/exchanges in which it would be profitable (for instance areas in which customers are more concentrated, business customers are present, etc.). For example, operators such as BT and COLT specialised on business customers and were collocated in a (comparatively) low number of local exchanges[113]. In such areas, the alternative operators would themselves be able to provide wholesale services to other operators, just as for example Jazztel was doing.

(117) Fourthly, in accordance with the investment ladder principle, competing at retail level allows alternative operators to invest into their own networks, on the basis of which they may provide wholesale services if they wish so.

(118) Reductions of regulated prices due to decisions of the NRA based on the European telecommunication regulation (see recital (113) above) lowered entry barriers on both the retail and wholesale services markets. Wholesale prices were capped, which could have incentivised alternative operators to enter retail markets and then after a while, once they would have won retail customers, they could have built their own infrastructure and therefore could have entered themselves on the wholesale markets. As shown by the Spanish Regulator's Annual Report for 2010, at wholesale level, there were changes to reference wholesale offers, both in interconnection and leased lines reference offers, which are used to exchange traffic (including fixed telephony traffic) between operators and provide data transmission capacity services between two points. These services are used as inputs in the provision of retail and/or

111 NRAs periodically analyse the telecoms markets. If a situation of SMP, equivalent to dominance, is found to exist, NRAs may impose appropriate remedies, after consultation with the Commission (the so-called 'Article 7 procedure', referring to Article 7 of the Framework Directive (2002/21/EC)). The Commission can ask for a deeper analysis or even block a draft measure if it is not compatible with Union law.

112 Response to Annex 1, paragraphs 35 and 36.

113 Document ID 1478, page 35.

wholesale fixed telephony services and their wholesale price was significantly reduced by the incumbent operator during 2010[114].

(119) Furthermore, the Spanish Regulator's decision of 7 April 2011 approved new, lower prices for wholesale access services on the wholesale markets, the so-called Call origination on the public telephone network provided at a fixed location and Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location[115], which can be used to provide retail and/or wholesale fixed telephony services, including in particular the pricing set in the relevant reference offers. The Spanish Regulator decreased, among other things, the prices for wholesale access to analogue public switched telephone network (PSTN) by 4.7% and integrated switched digital network (ISDN) Wholesale Line Rental[116] by 20.2%[117]. These services can complement the portfolio of an alternative operator as they could facilitate acquiring a broader customer base. That decision further facilitated the entry into the wholesale fixed telephony market by alternative operators, both Spanish and foreign, and thereby further lowered entry barriers during the period of application of the non-compete clause.

(120) Indeed, a reduction in (cost-oriented) regulated prices would result in reductions in costs for the provision of local loop unbundling (LLU), while unbundled local loops could be used by alternative operators not only for the provision of retail services, but also for the provision of wholesale services, as the example of Jazztel shows. Moreover, the alternative operators would be able to benefit from the competition at retail level, improving their customer base (be it in the provision of fixed telephony services and/or Internet access, which would help to render investing in local loop unbundling (LLU) and/or own infrastructure profitable (the investment ladder principle).

(121) The evidence referred to in Section 3.5.3, which shows increasing competition at fixed telephony retail level, also indicates that, on the basis of the investment ladder principle, competition may also be encouraged at wholesale level. For instance, the Commission's Final Report on **Broadband Internet Access Cost (Biac)**[118], shows that alternative operators (Jazztel, Vodafone Spain, Orange Spain, Ono) as well as Telefónica offered bundles (Internet + Fixed Telephone or Internet + Fixed Telephone + TV) during the period of application of the non-compete clause. Network investments combined with telephone line rental facilitated the provision of those bundles[119]. Indeed, competition at retail level stimulates investments in own infrastructure, which allows competition both at retail and wholesale level.

(122) Telefónica argues that competition at retail level did not lead to an intensification of competition in the wholesale fixed telephony services and did not permit and

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114 The Spanish Regulator's Annual Report for 2010, Document ID 1579, pages 78 and 79.

115 Markets as listed in the Annex of the 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, OJ L 344, 28.12.2007, p. 65.

116 Wholesale line rental is a wholesale product for those alternative operators who wish to provide retail telephony services based on the incumbents infrastructure.

117 The Spanish Regulator decision of 7 April 2011, Document ID 1580.

118 Data as of February 2011.

119 Final Report - Broadband Internet Access Cost (BIAC) - 2011, Document ID 1416, pages 170, 184, 194, 204, 215, 224, 318, 319, 329, 330, 340, 351, and 366.

encourage the entry of new operators[120]. However, this statement is inconsistent with Telefónica's statement that "*the usual procedure is for operators to deploy proprietary networks some time after entering the retail market. That is to say, operators usually enter the market at retail level by relying on the incumbent's network and benefiting from the regulations which require Telefónica to give these operators access; once that operator has managed to establish a broad retail customer base it begins to consider the possibility of partially developing its own infrastructure in order to reduce its dependence on the incumbent (thereby reducing costs and broadening its possibilities to differentiate its offer from that of the incumbent) and increase its sales from the provision of retail services*"[121].

(iii) Conclusion

(123) The Commission concludes that entry to the wholesale fixed telephony market via LLU was possible during the period of application of the non-compete clause. The Commission notes that the regulatory framework lowered entry barriers and that there were competitors providing this service on the basis of LLU (Jazztel). Moreover, the reduction of certain wholesale prices incentivised alternative operators to enter retail markets, which in accordance with the investment ladder principle, would also allow alternative operators to invest into their own networks.

c) Gaining access to a fixed network through mergers/acquisitions

(124) In addition, the Commission considers that it cannot be excluded that PT could have acquired a fixed network and provided wholesale fixed telephony services through acquiring or controlling shares in another telecom operator or at least "*engaging or investing*" into that operation during the period of application of the non-compete clause.

(125) The Spanish market actually witnessed such an operation where the mobile operator MasMovil used the merger-related remedies imposed on Orange after its acquisition of Jazztel[122] and purchased the latter's FTTH infrastructure, on the basis of which fixed telephony services could be provided. Through the merger-related remedy agreements, MasMovil gained wholesale access to the Jazztel's ADSL network (which can be used also for wholesale fixed telephony services) for an initial 4-year period, extendable for a further four years.

(i) Conclusion

(126) The Commission considers that in view of the possibilities to entry (deployment of own network, access through LLU, mergers/acquisitions) and the effect of telecoms regulation, there were no insurmountable barriers to entry to the wholesale market relating to fixed telephony that would rule out any potential competition during the period of application of the non-compete clause.

(127) In the following sections the Commission analyses more closely whether there were insurmountable barriers to entry into providing call origination services on the public telephone networks provided at a fixed location (Section 3.5.1.1), call termination services on individual public telephone networks at a fixed location (Section 3.5.1.2) and transit services in the fixed public telephone network (Section 3.5.1.3). As also

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120 Paragraphs 46 to 49 of the Response to Annex 1.

121 Response to Annex 1, paragraph 5.

122 More information on this case is available on the Commission's competition website, in the public case register under the case number COMP/M.7421 – *Orange / Jazztel*.

mentioned at recital (188) of the Telefónica/PT Decision, those potential markets were also identified by the Spanish Regulator as markets with characteristics which may be such as to justify the imposition of regulatory obligations, in accordance with Directive 2002/21/EC of the European Parliament and of the Council[123].

3.5.1.1. Call origination on the public telephone networks provided at a fixed location

(i) Telefónica's arguments

(128) Telefónica argues that the Spanish Regulator has confirmed that there are structural barriers or obstacles which make it impossible for a third party to provide those services, as they require the availability of a capillary nation-wide network that cannot be profitably replicated due to the low return on investment[124]. Telefónica claims to be the only undertaking which was obliged to –and did- provide call selection and pre-selection services, one of the alleged subservices of this market[125].

(129) In its Response to Annex 1 to the Letter of Facts, Telefónica stresses that in this market there are two different services: (i) selection and pre-selection of the operator (where Telefónica submits that there was no potential competition), and (ii) smart network, including the automatic reversed charge service (where Telefónica acknowledges the existence of potential competition)[126]. Telefónica maintains that no alternative operator could have competed in selection and pre-selection given that own infrastructure is required and there were no such investments by alternative operators in their own network. Moreover, these particular wholesale services are allegedly not provided on the basis of local loop unbundling[127].

(130) Pursuant to Telefónica, no alternative operator provided or could have provided the selection and preselection services on the basis of its own network[128]. Telefónica further claims that no provision of wholesale services of preselection and selection on the basis of LLU would have been possible, especially considering the short time the clause was in force[129] and submits that it would be "*utopian*" to suggest that alternative operators would use the unbundled loops to provide wholesale services instead of using them to provide retail services[130]. Telefónica also claims that as the only player with SMP, it faced specific *ex ante* regulatory obligations that would have discouraged entry by other players[131].

(ii) Commission's assessment

(131) The Commission notes that call origination services can be provided on the basis of own network or on the basis of LLU.

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123 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).

124 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 58.

125 Document ID 1554, paragraphs 59 and 68 and paragraphs 90 to 97.

126 Response to Annex 1, paragraphs 64 to 77.

127 Response to Annex 1, paragraphs 78 to 92.

128 Response to Annex 1, paragraphs 92 to 97.

129 Response to Annex 1, paragrahs 86 to 89.

130 Response to Annex 1, paragraphs 78 to 85.

131 Response to Annex 1, paragraphs 71 to 73.

Call origination services on the basis of own network

(132) The Commission rejects Telefónica's arguments. The Commission notes that the market for *Call origination on the public telephone networks provided at a fixed location* is a differentiated market, consisting of several different services. Among those sub-services, there are those of call selection and pre-selection of the operator as well as of smart network services. All those sub-services belong to the same market, that is, Market 2 of the Commission Recommendation of 17 December 2007 (*Call origination on the public telephone networks provided at a fixed location)*. This has been equally confirmed by the Spanish Regulator in its decision of 2008[132]. Moreover, while in that decision the Spanish Regulator acknowledged the existence of barriers to enter the market, it did not classify them as insurmountable[133]. The Commission refers in this regard to Section 3.3.1, where the concept of insurmountable barriers has been assessed.

(133) The Commission also notes that Telefónica was not the only player in the market. That conclusion is further supported by:

(a) **The Spanish Regulator's decision of 12 December 2008**, showing that already in the early stages of alternative operators' network development, Telefónica had a market share of less than 100% in the provision of wholesale call origination services (in 2008 it had a market share of 96.2% measured in minutes and a market share of 88.5% in revenue)[134]. The decision also shows that an alternative operator could provide such services either on the basis of its own infrastructure or on the basis of local loop unbundling of Telefónica's network, even if it requires high investments[135]. Wholesale call origination services were not provided by Jazztel for example on a nation-wide network as its offer was dependent in which local exchanges it could use LLU and/or own network infrastructure;

(b) **Telefónica's submission of 19 March 2018**, showing that there were also other operators providing those call origination services in Spain in 2010, namely Vodafone and Orange, "*though only to a minor extent and as ancillary services insofar as they had their own network*"[136].

(134) Even if some competitors active in the call origination market were not providing selection and pre-selection services, it is not clear why an alternative operator could not have provided such services on the basis of its own network. As already shown in Section (3.5), at the time of the period of application of the non-compete clause, alternative operators such as ONO, Euskaltel, Vodafone, etc. deployed their own fixed infrastructure in Spain, on the basis of which they could provide wholesale services, including call origination services if they wished so. Contrary to what is argued by Telefónica, there is therefore no need for an alternative operator to provide a nation-wide network in order to offer call origination services as on the retail level, some operators in Spain focus on regional provision of, amongst other things, fixed telephony services (for example, Euskaltel). As shown above, in Section 3.4.3,

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132 For further reference on the Commission market recommendation, see footnote 115. See also Section I.4.1.6, page 18, Document ID 1433.

133 Document ID 1433, CMT Decision of 12 December 2008, Section II.1.2 Existencia de barreras a la entrada.

134 Document ID 1433, page 21. CMT Decision of 12 December 2008.

135 Document ID 1433.

136 Document ID 1554, paragraph 69.

investments and infrastructure-based competition could and did occur in the years 2010 and 2011.

(135) The Commission further notes that there are examples of alternative operators (i.e. operators not under a regulatory obligation to provide these services) offering call pre-selection services to other operators in other Member States, which indicates that there are no intrinsic barriers to the provision of these services and it is hence, up to the operators to decide whether they would offer these services or not[137].

Call origination services on the basis of LLU

(136) The Commission considers that an alternative operator could also provide call origination services on the basis of LLU.

(137) Contrary to what is suggested by Telefónica[138], the Spanish Regulator confirmed in its decision reviewing this market that access to it was feasible on the basis of LLU[139]. In addition, the excerpt from the decision of the Spanish Regulator that Telefónica quotes[140], lists explicitly LLU as a feasible way to access the market. Furthermore, Telefónica acknowledges that during the period of application of the non-compete clause, another operator, Jazztel, was providing call origination services based on LLU[141]. It is not clear from Telefónica's submission why a further alternative operator could not have provided such services. Moreover, as evidenced by Orange, alternative operators provided (retail) fixed telephony services based not only on fully unbundled local loops (such as Jazztel), but also by using shared unbundled local loops without the basic telephone service, offering voice over IP services[142]. Regarding Telefónica's arguments on the short time period when the clause was in force, the Commission refers to Section 3.3.3.

(138) Similarly, Telefónica's arguments about the fact that it was the only player with SMP and, therefore, it faced specific *ex ante* regulatory obligations do not refute the finding that there were competitors active in the market of call origination on the public telephone networks provided at a fixed location[143].

(139) Finally, Telefónica claims that there were no other players providing wholesale services of preselection and selection[144]. However, as outlined in recitals (133) and (137), Jazztel was providing those wholesale services based on LLU.

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137 For instance, Talk Talk offers such services, Document ID 1706, as shown here: https://www.talktalkbusiness.co.uk/partners/products/voice/calls-and-lines/carrier-pre-selection/ Moreover, in Portugal there were several players active in the market. See the section on the Portuguese market.

138 Response to Annex 1, paragraphs 86 and 89.

139 Document ID 1433, CMT Decision of 12 December 2008, Section II.1.2.1, Obstáculos estructurales the Spanish Regulator writes: "*En ausencia de regulación en el mercado de referencia, aquellos operadores que desearan prestar el servicio de acceso y originación de llamadas deberían desplegar su propia red o bien alquilar las infraestructuras ya existentes, por ejemplo, desagregando el bucle de abonado de TESAU en su modalidad completa. La manera de entrar al mercado dependerá, por tanto, del volumen de costes hundidos que el operador alternativo esté dispuesto a asumir pues en caso de que fracasara dicha entrada, una parte importante de la inversión se perdería al no poderse recuperar dichos costes*".

140 Response to Annex 1, paragraph 68.

141 Response to Annex 1, paragraph 87.

142 Document ID 1579, page 45.

143 Response to Annex 1, paragraphs 71 to 73.

144 Response to Annex 1, paragraphs 90 to 96.

(iii) Conclusion

(140) Therefore, the Commission concludes that there were no insurmountable barriers on the market of call origination on the public telephone networks provided at a fixed location during the period of application of the non-compete clause. The Commission finds that an alternative operator could have provided call origination services on the public telephone networks services at a fixed location. An alternative operator could have either deployed its own network to provide these services or relied on the LLU offer (see above the subheadings c*all origination services on the basis of own network* and *call origination services on the basis of LLU)*. There were alternative operators (Jazztel) active in this market during the period of application of the non-compete clause, which is evidence of actual competition. The Commission will therefore include Telefónica's sales corresponding to call origination services in the value of sales for the purposes of calculating the fines in this Decision.

3.5.1.2. Call termination on individual public telephone networks provided at a fixed location

(i) Telefónica's arguments

(141) Telefónica considers that no competition is possible on the call termination market, as each operator has a *de facto* monopoly for the provision of wholesale call termination services to its retail customers[145]. Telefónica also recalls that the Commission has held in merger decisions[146] that the provision of wholesale call termination services on the individual network of each operator constitutes a separate market[147].

(142) In its Response to Annex 1, Telefónica refers again to the decisions adopted by the CMT stating that each player has a monopoly in its own network[148]; and raises similar claims regarding some of the merger decisions adopted by the Commission in the past[149]. Telefónica also claims that neither PT nor another player could have entered the retail market *ex-novo* and therefore no increase of competition in this market could have been possible as well as stating that should an operator enter by selection or resale arrangements, it will not generate revenues in the termination market[150]. Telefónica argues that specific price regulation in place at point of the infringement was insufficient to allow alternative operators to enter the market, as fees were not fixed according to network development costs[151]. Telefónica also claims that price regulation was insufficient to allow alternative operators to enter the market, as fees were not fixed according to network development costs[152]. According to Telefónica, the purpose of such regulation was to incentivize the deployment of NGAs[153].

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145 Document ID 1554, paragraphs 48 and 49.

146 Cases M.5650, *T-Mobile/Orange UK*, paragraph 37; M.6584, *Vodafone/Cable & Wireless*, paragraphs 22-23 and M.6990, *Vodafone/Kabel Deutschland*, paragraph 117.

147 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 50.

148 Response to Annex 1, paragraph 110.

149 Response to Annex 1, paragraphs 101 to 104.

150 Response to Annex 1, paragraphs 105 to 108.

151 Response to Annex 1, paragraphs 119 to 120.

152 Response to Annex 1, paragraph 119.

153 Response to Annex 1, paragraph 120.

(ii) Commission's assessment

Competition on call termination derives from competition at retail level

(143) It is correct that the Commission held in the merger decisions referred to by Telefónica that the provision of wholesale call termination services on the individual network of each operator constitutes a separate market, as there is no substitutability between the individual networks of each operator for the termination of a call. This is the case since the network operator transmitting the incoming call (for the sake of simplicity, the originating operator) to a recipient can reach the recipient only through his or her respective other network operator (that is, the terminating operator).

(144) However, even if there is no competition possible in call termination on one operator's individual network, alternative operators could have offered call termination services on their own networks. The Commission considers that nothing prevented alternative operators from increasing their customer base and providing call termination services on their thus larger (in terms of number of customers) own networks in Spain and in Portugal. An alternative operator such as Pharol could therefore have competed in the Spanish market with Telefónica at retail and wholesale level, by terminating calls to an increased customer base.

(145) Telefónica's arguments cannot therefore be accepted. There were 23 operators providing call termination services at the time of the infringement, i.e. operators that could be considered competing 'in terms of revenues' with Telefónica in providing termination services, therefore no insurmountable barriers prevented operators from providing these services to other operators wanting to terminate calls on their network. Even if there were 23 monopolies in these markets at the time of the infringement, in other words one for each operator, those are not fixed monopolies, as there is competition between those operators at the retail level for individual customers and thus, competition at wholesale level of call termination services derives from competition at retail level – the revenues obtained from each of those monopolies from call termination services increase as the retail customer base increases, namely providing termination services to retail customers by using for example own network or LLU access.

(146) As indicated in the Spanish Regulator's Annual Report of 2010, the revenues from termination services can be influenced by the number of direct access customers that the operators have and the number of direct access customers of alternative operators increased in 2010[154].

(147) Furthermore, **Pharol's reply of 7 September 2018 to the request for information of 21 June 2018**, provides that demand for wholesale services, and call termination in particular, is essentially driven by retail activity and the need for network interconnection[155]. This shows that competition at retail fixed telephony prompts alternative operators having their own network and/or using the LLU offer to compete by providing wholesale call termination services to customers. In fact, during the period of application of the non-compete clause, there were several

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154 Document ID 1579, page 69.

155 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1371, paragraph 37.

alternative operators providing retail fixed telephony services and also call termination services in Spain[156].

(148) Moreover, the non-compete clause's aim was not preventing competition within each operator's own network, but rather competition between the operators, either on the basis of their network or on the basis of LLU. Excluding those call termination services on individual public networks from the value of sales for the mere reason that they are monopolies would mean that, in fact, it would always be possible to conclude non-compete clauses, with no consequence on the level of the fines, as those services would always, by definition, be considered monopolies. Therefore, competition law would never apply to those services on the basis of this reasoning.

(149) Regarding the need to enter the market *ex-novo* and the insufficient time duration of the clause, raised by Telefónica in paragraphs 105 to 107 of the Response to Annex 1, the Commission refers to Section 3.3.3, addressing Telefónica's arguments on the relevant period.

Regulated prices for call termination rates stimulate competition

(150) On the basis of the **Spanish Regulator's decision of 18 December 2008**, Telefónica was obliged to charge cost oriented prices for termination services provided at a fixed location, whereas its competitors were allowed to charge reasonable prices for termination rates (a mark-up of 30% above Telefónica's termination rates at local level was set)[157]. The Spanish Regulator's approach indicates that it regarded competition in this market as possible in the first place and shows that wholesale termination rates were effectively set in a way in which they could play a role in facilitating market entries and therefore in building the market strength of alternative operators.

(151) Moreover, the conclusion that competition was possible on termination rates is supported by the Termination Rates Recommendation ("TRR")[158], which provides that NRAs may allow new entrants to charge higher regulated termination rates (prices) than established operators if certain conditions are met and to build their market positions on this basis[159]. The TRR thus created conditions to support new market entries, and shows that termination prices played a key role for new entrants, prompting them to compete at wholesale and retail level.

(152) The Commission disagrees with Telefónica's arguments in paragraphs 118 to 120 of its Response to Annex 1 regarding the price regulation. In this regard, the Commission refers to the Spanish Regulator's decision of 18 December 2008, which

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156 A comparison of the list of addresses of the Decision adopted by the Spanish Regulator regarding call termination services (Document ID 1434, page 37), with the table of market shares of the Spanish retail market (Document ID 1495, page 29), evidences that, among others, Telefónica, Euskaltel, Orange (France Telecom), R cable, Vodafone, Iberbanda, Telecable de Asturias, Jazztel or Tele 2 were active in both markets.

157 Document ID 1434.

158 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009.

159 Point 10 of Termination Rates Recommendation: "*In case it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs than the modelled operator, after having determined that there are impediments on the retail market to market entry and expansion, the NRAs may allow these higher costs to be recouped during a transitional period via regulated termination rates. Any such period should not exceed four years after market entry.*"

establishes that the mark-up has as its goal to create more favourable conditions for alternative operators. The Spanish Regulator points out that the establishment of this mark-up was aimed at correcting the price differential paid by alternative operators as a result of Telefónica's multi-level termination network architecture, as well as at remunerating part of the additional costs faced by alternative operators arising from factors such as the different starting position with respect to the incumbent operator, especially in terms of coverage[160].

(iii) Conclusion

(153) In light of the foregoing, the Commission concludes that there were no insurmountable barriers to enter the market of call termination on public telephone networks provided at a fixed location and that an alternative operator could have entered it. There were 23 operators providing call termination services during the application of the non-compete clause. The close links between these services and the retail fixed telephony market made entry possible. Moreover, the existence of regulated prices for termination rates made entry of alternative operators easier, thereby stimulating competition. The Commission will therefore include the sales corresponding to services for call termination on individual public telephone networks provided at a fixed location in the value of sales for the purposes of calculating the fines.

3.5.1.3. Transit services in the fixed public telephone network

(i) Telefónica's arguments

(154) Telefónica claims that since PT did not have its own network in Spain, it would have been unable to provide transit services in the fixed public telephone network. It would therefore have been impossible for PT to enter into interconnection agreements and put interconnection points with other operators into service in the short term, during the time the non-compete clause was in force. Furthermore, PT would not have had incentives to enter this market given that the profitability of this market is low[161].

(155) In its Response to Annex 1, Telefónica maintains that those telecoms services are complementary to those of origination and termination and are not services provided on a standalone basis[162]. Moreover, it argues that only operators with a network that has sufficient capillarity provide transit services at wholesale level to third parties and that no operator could have attained such capillarity within the time period when the clause was in force[163]. Telefónica further argues that the *Telefónica* judgment requires the Commission to assess the economic viability of Pharol's entry into that market[164].

(156) Finally, Telefónica submits that the fact that those services were not included in the EC Recommendation of 2007 does not mean that there are no insurmountable barriers to entry. Telefónica refers in this regard to the fact that the Recommendation

160 Document ID 1434, page 25.

161 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 55, 56 and 72.

162 Response to Annex 1, paragraphs 125 to 129.

163 Response to Annex 1, paragraph 130 and 135.

164 Response to Annex 1, paragraphs 136 to 139.

is non-binding and that Member States still have to decide on a case-by-case basis whether the conditions are fulfilled[165].

(ii) Commission's assessment

Provision of transit services was possible on the basis of own network

(157) Contrary to Telefónica's arguments, the Commission considers that there were no reasons why alternative operators could not build their own network, even if not an end-to-end network like the one belonging to Telefónica[166]. On this basis, an alternative operator could have provided a wide range of telecoms services, including transit services, if it wished to. It was in fact, inter alia, the case of Jazztel and France Telecom, that were present in this market at the time of the infringement and had a combined market share of around 40%[167]. The presence of actual competition on this market is a clear sign that Telefónica's arguments are flawed.

(158) Moreover, as explained in Section 3.3.1, the Commission is not required to analyse the economic viability and the incentives of an operator to enter a specific market. The Commission should rather assess the existence of insurmountable barriers to entry.

(159) In this regards, the Commission finds that Telefónica's arguments are flawed. Firstly, in paragraph 128 of its Response to Annex 1 Telefónica refers to the CMT decision of 1 October 2009[168], where the Spanish Regulator stated that not all operators in the market for transit services have opted for self-provision (that is, deploying own infrastructure to provide retail services instead of using infrastructure of other operators), even if a majority have done so. The CMT stated that out of 98 smaller operators, 17% are interconnected only with Telefónica, 59% are interconnected both with Telefónica and with the main alternative operators (Jazztel and France Telecom). The Regulator thus concluded that the provision of transit services requires an infrastructure that is reproducible, and which allows for various real supply alternatives[169].

(160) Regarding the need to deploy a network with a specific level of capillarity, the Commission points to Telefónica's own statement before the CMT stating that the provision of transit services does not require a network capillarity comparable to the incumbent as the presence of alternative platforms have allowed alternative operators to establish interconnection points with almost all significant operators. Therefore, according to its own account, Telefónica was no longer an essential counterpart for operators with a geographically limited network coverage, as there was a significant presence of alternative offers on transit networks in the market. Furthermore, Telefónica pointed out to an alternative option for the provision of the transit service (carrier house) where operators can aggregate and easily reach agreements to connect their links directly and also facilitate the transits to other operators or offer bundled services to other parties[170]. With regard to Telefónica's arguments regarding time constraints stemming from the duration of the non-compete clause, the Commission refers to Section 3.3.3 of this Decision which addresses the specific time period and

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165 Response to Annex 1, paragraphs 140 to 142.

166 See also Section 3.5.1 above.

167 Decision of the Spanish Regulator of 1 October 2009, Document ID 1437, page 17.

168 Decision of the Spanish Regulator of 1 October 2009, Document ID 1437.

169 Document ID 1437, pages 14-15.

170 Document ID 1437, page 33.

the meaning and consequences of engaging into competition. With regard to Telefónica's arguments on the need to assess the viability of entry into the market, the Commission refers to Section 3.3.1 in this Decision, addressing the concept of insurmountable barriers to entry and the requirements imposed by the General Court on the Commission.

The Regulator's finding that the market is competitive

(161) As regards the Spanish market, the Commission notes that in the **Spanish Regulator's decision of 1 October 2009**, the CMT decided to de-regulate the wholesale market for transit services in the public telephone network provided at a fixed location in Spain. In this decision, the Regulator pointed to the fact that despite the relatively high (albeit decreasing) market share of Telefónica (60.2% in 2008 in terms of volume), there was competition on the market[171].

(162) The conclusion that there were no insurmountable barriers to entry on this market is also supported by the fact that the 2007 Recommendation on relevant markets[172] did not include transit services in the list of markets recommended for *ex-ante* regulation. The reason for not considering this market as susceptible to *ex-ante* regulation was that the barriers to entry were, already at that time, not considered to be high at Union level[173].

(163) Regarding Telefónica's arguments about the non-inclusion in the 2007 Recommendation of these services, the Commission notes that the Spanish Regulator concluded in its decision of 1 October 2009 that there were no high barriers to enter this market. The decision of the Spanish Regulator referred explicitly to the absence of this market in the 2007 Commission Recommendation as an indication that it should not be subject to *ex-ante* regulation[174]. Accordingly, and in light of the specific circumstances in the Spain, it found that this market should not be subject to *ex-ante* regulation[175]. Therefore, Telefónica's arguments about the Recommendation being non-binding and that Member States still have to decide on a case-by-case basis whether the conditions are fulfilled are immaterial.

(iii) Conclusion

(164) In light of the foregoing, the Commission concludes that there were no insurmountable barriers to entry on the market for transit services in the fixed public telephone network and that an alternative operator could have entered the transit

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171 Document ID 1437.

172 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 (Recommendation), OJ L 344, 28.12.2007, p. 65.

173 As explained in the Commission Staff Working Document, Explanatory Note accompanying the document Commission Recommendation 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 (SWD(2014) 298): "*Where the presence of alternative sources of supply constrains the incumbent's behaviour even as regards thinner routes, the transit market may on a case-by-case basis be found not to meet the second criterion. However, since the assessment for the forward-looking period is that this market does not in general satisfy the first criterion, the market for wholesale transit services is withdrawn from the recommended list*."

174 Document ID 1437, page 24.

175 Document ID 1437, III.1.3 Conclusion.

services market in the fixed public telephone network in Spain. This entry would have been possible on the basis of an alternative operator's own network. The fact that actual competition was taking place in the market and that it was no longer subject to *ex-ante* regulation strongly indicate that indeed entry was possible. The Commission will therefore include the sales corresponding to transit services in the fixed public telephone network in the value of sales for the purposes of calculating the fines.

3.5.2. Wholesale services in Portugal

(i) PT/Pharol's arguments

(165) Pharol considers unrealistic the idea that Telefónica would start providing access via its own network between 27 September 2010 and 4 February 2011. It argues that the increase in multiplay services, competition from ZON OPTIMUS ("ZON"), falling prices and the development of their own networks by operators present in the market served to increase concentration and led to a stagnation in the growth of alternative operators[176].

(166) PT considers that Telefónica already competed in Portugal through ZON as ZON provided fixed telephony services in Spain and therefore it is not reasonable to assume that Telefónica would have implemented any additional competing activity in the wholesale markets associated with providing fixed telephony services in the absence of the non-competition clause[177]. In PT's view, given the development characteristics of the Portuguese market, it is unlikely that an operator could decide to invest with the specific objective of providing wholesale fixed telephony services[178]. As regards the provision of origination, termination and transit services, PT considers that Telefónica would have needed its own infrastructure. Besides the investment necessary for the network development, it would have to consider the legal restrictions, namely licensing for the use of the public domain[179].

(167) In its Response to the Letter of Facts ("Pharol's response to the LoF")[180], Pharol claims that the Commission should assess the ability of an alternative operator as Telefónica to enter the wholesale market and to find out whether such entry was a realistic possibility or rather purely theoretical[181]. In this regard, Pharol argues that Telefónica did not have a real possibility of developing its own network in the time period when the clause was in force[182]. Moreover, Telefónica would not have been able to make use of third-party infrastructure as the law foreseeing the imposition of symmetric obligations was largely unimplemented and disregarded by public entities[183]. Pharol further argues that players active in the wholesale market typically provide services to their customers on retail market and it is not realistic that Telefónica or another player would use the wholesale network of another company to provide wholesale services to another operator[184]. Finally, Pharol claims that

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176 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraphs 12 to 17.

177 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 302 to 308.

178 Document ID 753, NC ID 946, paragraph 309.

179 Document ID 753, NC ID 946, paragraph 310.

180 Document ID 1649.

181 Pharol's response to the LoF, paragraph 82.

182 Pharol's response to the LoF, paragraphs 83 to 86.

183 Pharol's response to the LoF, paragraphs 88 to 97.

184 Pharol's response to the LoF, paragraphs 97 to 98.

Telefónica would not have been able to acquire control of an active operator and close the transaction within the time period when the clause was in force[185].

(ii) Commission's assessment

(168) As a general remark, the Commission notes that PT and Pharol's different submissions do not contain a clear division between the different services in fixed telephony (*i.e.* call origination, call termination and transit services) and their arguments refer to a broader category, that is, to wholesale services for fixed telephony. The Commission will address below the arguments raised by PT and Pharol as if they concern the wholesale services for fixed telephony as a whole. However, when PT and Pharol's arguments clearly refer to an individual service, the Commission will look into the situation in that specific service.

(169) Firstly, the Commission considers that potential competition on the market for wholesale services relating to fixed telephony was not excluded. At the time of the infringement, as also signalled by Pharol, alternative operators, for example ZON, Vodafone and Cabovisão, deployed their own infrastructure in Portugal. Alternative operators' own infrastructure could be used for the provision of wholesale fixed telephony services as was the case for (i.a.) ZON, Vodafone and Cabovisão, for example in case of wholesale fixed call termination, transit services, etc.

(170) Secondly, wholesale fixed telephony services could also be provided on the basis of LLU by alternative operators which do not necessarily possess their own network in the last mile.

(171) Thirdly, the Commission takes the view that the Portuguese *ex ante* access regulation, based (i.a.) on the Access Directive, whose aim was to "*establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits*"[186], allowed for competition to occur. The wider range of entry possibilities given by this regulatory framework[187] encouraged access seekers' entry on the market for (i.a.) wholesale fixed telephony services, facilitated network deployment through the ladder of investment (see Section 3.4.1) and allowed telecom operators to compete both at wholesale and retail level. In general, *ex ante* access regulation consists of a procedure[188] identifying competitive bottlenecks in telecoms markets and imposing remedies on an operator with SMP which are justified and proportionate *vis-à-vis* the competition problems identified. These could include access, transparency, non-discrimination, price control and cost accounting and accounting separation remedies.

(172) This "asymmetric" regulation imposed on the operator with SMP, can be complemented by "symmetric" regulations (that is, imposed on all operators), which

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185 Pharol's response to the LoF, paragraphs 98 to 104.

186 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (Access Directive), Article 1.

187 Transposed into the Portuguese Electronic Communications Law no. 5/2004 of 10 February.

188 NRAs periodically analyse the telecoms markets. If a situation of significant market power ('SMP', equivalent to dominance) is found to exist, NRAs may impose appropriate remedies, after consultation with the Commission (the so-called 'Article 7 procedure', for Article 7 of the Framework Directive (2002/21/EC)). The Commission can ask for a deeper analysis or even block a draft measure if it is not compatible with Union law.

may aim at ensuring end-to-end connectivity and network interoperability. At the time of the infringement, investments in own infrastructure were much easier in Portugal than in many other Member States due to the existence of symmetric obligations for duct and pole access, which have been applied in Portugal under national law since 2009[189]. Those regulatory tools significantly lowered the entry barriers for operators wishing to enter the electronic communications markets and providing a wide range of services, including fixed telephony services.

(173) The Commission supports its conclusions also by the following evidence:

(a) The Portugal 2011 Telecommunication Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. This report[190] shows that:

- following the finding that Portugal Telecom had SMP in the market for physical network infrastructure access, using which alternative operators were able to deploy their own networks with lower costs, several obligations were imposed on it: to publish a reference offer for access to ducts and associated infrastructure (known as "ORAC"), to publish a reference offer for access to poles (known as "ORAP") and to offer the access services at cost oriented prices[191];
- in February 2012, the Portuguese Regulator *Autoridade Nacional de Comunicações* ("ANACOM") launched the public consultation on the second review of the markets for physical network infrastructure access and wholesale broadband access. In January 2009, ANACOM had not yet imposed fibre related obligations. In the 2012 review, NGA obligations were however proposed to be imposed on the SMP operator. With regard to the market for physical network infrastructure access, the Regulator proposed to impose the full set of obligations[192]. This regulatory development shows that alternative operators were able to benefit from physical network infrastructure access to ducts and poles of NGA networks during the period of the application of the non-compete clause and to fibre networks in the following period;

(b) Portugal country profile in "ICT Country Profiles", Commission staff working document vol.2 of 17 May 2010, part of the Europe's Digital Competitiveness Report. That document shows that developments in 2009 in network infrastructure included the construction of open multi-operator networks with

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189 Law decree 123/2009.

190 This report describes the market situation and regulatory developments relevant for the period of application of non-compete clause as for example the imposed remedies aimed at facilitating access of alternative operators to Portugal Telecom's infrastructure at cost oriented prices.

191 In October 2010, the Regulator adopted amendments to the ORAC, by establishing, among other measures, that the incumbent (PT) must provide online (Extranet) information regarding the profile and occupation level of ducts (based on a colour system with 4 levels of occupation) to alternative operators. Such information is only available for ducts located in competitive areas (for ducts located in the other areas only the information regarding the location of PTC infrastructures is available online) - Document ID 1420, Section 4 Broadband, 4.1. Market situation and regulatory developments.

192 This included the obligation to provide a virtual unbundling fibre offer, until fibre unbundling over GPON becomes available (ICP-ANACOM proposes not to impose the virtual unbundling remedy in 17 municipalities (out of 308 in the whole country), where, according to ICP-ANACOM the competitive conditions justify the non-imposition of such remedy), Document ID 1420, Section 4 Broadband, 4.1. Market situation and regulatory developments.

over 1 200 km of optical fibre cable, including in rural areas[193], these networks could have been used to provide wholesale fixed telephony services;

(c) **Europe's Digital Competitiveness Report 2010**. That report published by the European Commission shows that alternative operators in Italy, Germany, Portugal and France were using the European Investment Bank to finance the upgrading of their networks and the roll-out of next-generation fibre networks[194], which could be also used to provide wholesale fixed telephony services;

(d) **Progress Report on the Single European Electronic Communications Market 2009 (15th Report) of 25 August 2010**. This report published by the European Commission shows that in order to foster the deployment of NGAs, legislative measures were taken in 2009 or before (for example, in Portugal, Austria, France, Slovenia) to facilitate access to physical infrastructure and facility sharing. In addition, access to passive infrastructure had been imposed by many NRAs, in order to facilitate network deployment by alternative operators (for example, Denmark, Greece, Estonia, Slovenia, Portugal, Germany, France, Spain). Measures in relation to in-house wiring were adopted by means of symmetric obligations in France, Portugal and Spain[195]. These measures aim at lowering costs and facilitating deployment of fixed networks, which could be used to provide wholesale fixed telephony services;

(e) **Commission comments by letter of 4 August 2014**, adopted pursuant to Article 7(3) of Directive 2002/21/EC and addressed to ANACOM, which shows that the market shares of PT Group in the market for wholesale fixed call origination services were constantly decreasing since at least 2008 (with a stagnation in 2011) and in 2014 reached the level of 53% (see Table 1 below)[196], leaving half of the market to alternative operators;

(f) The Broadband coverage in Europe in 2011 report by PointTopic carried out for the Commission - Mapping progress towards the coverage objectives of the Digital Agenda. The report shows that in 2011 three countries achieved fibre coverage well above average, with France and Luxembourg at 21.3% and 23.1% respectively and, standing out, Portugal at 41.2%[197];

(g) **The Communications Committee Working Document Broadband access in the EU**. According to that document published by the Commission, the situation as of 1 July 2010 was that FTTH lines grew by 5.6% and accounted for 2 206 486 lines (1.7% of the total lines). The biggest growth took place in Portugal (+154% in this period), with the incumbent having 81% of the FTTH lines, the remaining belonging to alternative operators[198]. These lines could be used to provide retail and/or wholesale provision of (i.a.) fixed telephony services;

193 Document ID 1407, page 178.
194 Document ID 1408, page 51 (page 53 of the .pdf).
195 Document ID 1472, page 7.
196 Case PT/2014/1638-1639, Document ID 1406.
197 Document ID 1415, page 28.
198 Document ID 1473, pages 14 and 21.

(h) **PT's reply to the SO** in which it states in relation to fixed telephone services that:

- "*In pure theory, increased competition by Telefónica is always possible in a market with these characteristics*"[199];
- ZON launched a telephone service at a fixed location based on its own network in November 2007. ZON provided dual play and triple play packages including, besides the fixed voice service, the subscription TV service and Internet access service, having preceded PT by 6 months in these offers and registered a great growth in sales since 2008[200];
- during 2010, 40% of the fixed telephone service customers in Portugal acquired retail telephone services from alternative operators based on direct access, i.e. using own fixed infrastructure or LLU, thus providing wholesale call termination services, a percentage that represents approximately double the EU15 average[201];

(i) Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, which provides that:

- as reported by the Portuguese Competition Authority (*Autoridade da Concorrência*), in 2010, operators were developing their own fixed networks[202] for a provision of (i.a.) fixed telephone services; and
- ZON, Vodafone, Cabovisão, AR Telecom and ONI were using their own network[203].

(174) Fourthly, Pharol refers to the lack of viability of the economic strategies and incentives of the Parties to enter the market and offer certain services during the period of application of the non-compete clause and that Telefónica would not have developed any additional competing activity in the wholesale markets associated with fixed telephone services due to the fact that it already competed in Portugal through ZON. As mentioned in Section 3.3.1 above as well as paragraphs 30 and 31 of the Letter of Facts, the Commission is not required and does not intend to analyse the viability of such strategy. The Commission will assess the existence of insurmountable barriers to entry on the market, which would exclude potential competition from Telefónica.

(175) Fifth, the Commission considers that the non-compete clause prohibited the Parties not only from entering into the market, but also from "*engaging or investing*" in offering services on the wholesale market of telephony services during the period of application of the non-compete clause. Therefore, Pharol's argument that Telefónica could not realistically start to provide wholesale access via its own network during the short period of application of the non-compete clause cannot demonstrate the absence of potential competition on that market.

(176) The aforementioned market developments show that the Union telecommunication regulatory framework (as referred to in recital (171) above) created conditions to

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199 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 307.
200 Document ID 753, NC ID 946, paragraph 302.
201 Document ID 753, NC ID 946, paragraph 294.
202 Document ID 1368, NC ID 1371, paragraph 15.
203 Document ID 1368, NC ID 1371, paragraph 20.

support new market entries and that termination prices can play a key role for new entrants, prompting them to compete at wholesale and retail level. This is also supported by Pharol's reply of 7 September 2018 to request for information of 21 June 2018, providing that demand for wholesale services, and call termination services in particular, is essentially driven by retail activity and the need for network interconnection[204] which shows that competition at retail fixed telephony prompts alternative operators to provide wholesale termination services to customers.

(177) The Commission also considers that the competition on the retail access and voice services (see Section 3.5.4) shows that telecoms operators were present at wholesale level – for instance the largest operators at retail level had their own networks and were therefore able to provide wholesale fixed telephony services as well. This follows also from Pharol's reply to the request for information: "*Demand for wholesale services, and call termination in particular, is essentially driven by retail activity and the need for network interconnection*"[205]. That shows that the retail and wholesale market for the provision of fixed telephony services are interlinked. Competition at retail level triggers investments, which also triggers alternative operators to provide wholesale services, which in turn, spurs competition at retail level.

(178) With regard to Pharol's argument on the absence of third-party infrastructure, the Commission observes that an alternative operator as Telefónica could have deployed its own infrastructure to access the market. As Pharol acknowledges in paragraph 98 of its Response to the Letter of Facts, there were several other players active in the market with their own network[206]. Access to infrastructure did not prevent the existence of actual competition in the market at the time of the infringement.

(179) Pharol's arguments that Telefónica did not have a real possibility of developing its own network during the time period when the clause was in force must be dismissed. As a general point, the Commission refers to Section 3.3.3, where the arguments related to the duration of the clause are explained. As discussed in that section, the clause prevented the Parties from any preparatory steps for entering that market, that is, "*engaging*".

(180) Finally, as regards Pharol's arguments about the inability of Telefónica to acquire an active operator and close the transaction within the established time period, the Commission refers to Section 3.3.3 above, where the arguments related to the duration of the clause are assessed. The Commission notes that in the case of Telefónica such entry would have been even easier, as it already had a minority stake in ZON, one of the operators with the largest network available. It is therefore irrelevant whether Telefónica would have been able to complete the acquisition of ZON, or any alternative operator, within the period of application of the non-compete clause. The clause prevented the Parties from even considering entry into this market and, therefore, from considering any acquisitions.

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204 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 37.

205 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 37.

206 Pharol refers to ZON, Cabovisão, Vodafone and AR Telecom as undertakings with their own infrastructure.

(181) As regards the provision of call origination, termination and transit services, Pharol does not clearly explain why it considers that competition is excluded. The Commission finds that an alternative operator could provide wholesale call origination services either on the basis of its own infrastructure or on the basis of LLU[207]. Table 1 below confirms that during the period of application of the non-compete clause, there were other operators providing wholesale call origination services.

(182) As regards call origination, as reflected in the Commission comments letter of 4 August 2014 and in the corresponding ANACOM's decision of 2014, since 2008 (with a stagnation in 2011), Pharol's market share (not including self-supply) in wholesale fixed call origination services was constantly decreasing and by the end of 2013, it reached the level of 53%[208], leaving half of the market available to alternative operators (see Table 1 below). With regard to Pharol's argument about the services provided by other players in the market, the Commission notes that ANACOM, in its decision of 2014, concluded that PT's market share of wholesale (fixed) call origination services (self-supply included, including the supply of wholesale services to provide services to its own retail customers) is slightly larger than the respective wholesale share not including self-supply, for the overview of the market shares, see Table 1 below[209], which shows market shares (by volume) of wholesale call origination services provided to third party operators and thus actual competition in a provision of wholesale call origination services.

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207 E.g. Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, page 39.

208 Case PT/2014/1638-1639, Document ID 1406, Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, page 58.

209 Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, page 58.

Table 1 – Evolution of market share of wholesale origination market (in minutes)

	2008	2009	2010	2011	2012	2013
PT Group	88%	80%	73%	74%	55%	53%
(IIC) ZON OPTIMUS	---	---	---	---	---	[30-40%]
ZON	[0-5%]	[5-10%]	[10-20%]	[10-20%]	[10-20%]	---
Optimus	[5-10%]	[10-20%]	[10-20%]	[5-10%]	[10-20%]	---
Cabovisão	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Vodafone	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Onitelecom	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Others	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]

Source: Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, page 58.

(183) Regarding call termination services, the Commission considers that nothing prevented alternative operators from providing such services on their own network in Portugal as for example (i.a.) ZON, Vodafone and Cabovisão provided wholesale call termination services during the period of application of the non-compete clause. Such alternative operators could therefore have competed with Pharol at wholesale and retail level, by increasing their revenues and consumer basis. That conclusion is also supported by the TRR[210], which provides that NRAs may allow new entrants to charge higher regulated termination rates (prices) than established operators if certain conditions are met and to build their market positions on this basis[211]. Pharol does not dispute these findings in its Response to the Letter of Facts. With regard to possible arguments of wholesale call termination monopolies, the Commission refers to Section 3.5.1.2 above as the same considerations are valid for wholesale call termination in Portugal.

(184) As regards transit services, the Commission considers that there are no insurmountable barriers to entry. The fact that competition was possible is supported by the fact that the 2007 Recommendation on relevant markets[212] did not include transit services in the list of markets recommended for *ex-ante* regulation. The reason for not considering this market as susceptible to *ex-ante* regulation was that the barriers to entry were, already at that time, considered not to be high at Union level[213]. Pharol does not dispute those findings in its Response to the Letter of Facts.

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210 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009.

211 Point 10 of Termination Rates Recommendation: "*In case it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs than the modelled operator, after having determined that there are impediments on the retail market to market entry and expansion, the NRAs may allow these higher costs to be recouped during a transitional period via regulated termination rates. Any such period should not exceed four years after market entry.*"

212 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 (Recommendation), OJ L 344, 28.12.2007, p. 65.

213 As explained in the Commission Staff Working Document, Explanatory Note accompanying the document Commission Recommendation on relevant product and service markets within the electronic

According to ANACOM's decision of 28 September 2010, there were alternative operators (e.g. Sonaecom, Onitelecom, Vodafone, REN) providing and/or using transport infrastructure to or of operators other than PT[214].

(iii) Conclusion

(185) Therefore, the Commission considers that there were no insurmountable barriers to entry in the wholesale market relating to fixed telephony in Portugal, which would rule out any potential competition during the period of application of the non-compete clause. The Commission finds that an alternative operator could have provided wholesale services associated with the provision of the public telephone networks services at a fixed location. An alternative operator could have either deployed its own network to provide those services or relied on the LLU offer. Moreover, with regard to call termination services, the existence of regulated prices for termination rates made entry of alternative operators easier, thereby stimulating competition. There were operators active in the Portuguese market, which is evidence of actual competition. The Commission includes the sales registered in this market within the value of sales, for the purposes of calculating the fines in this Decision.

3.5.3. Retail access and voice in Spain

(i) Telefónica's arguments

(186) Telefónica argues that PT did not have the incentive or ability to enter this market during the period of application of the non-compete clause due to its unstable financial situation and lack of financial resources as well as due to the fact that, despite its geographic proximity, Spain was never considered a strategic objective for PT[215].

(ii) Commission's assessment

Own network investments and access regulation stimulated competition

(187) The Commission considers that first, alternative operators were free to invest in their own networks. As shown in recital (100), this possibility did not remain theoretical, as there was also actual investment in the market for retail access and voice, on the basis of which operators were able to compete in Spain at retail level.

(188) Secondly, even in the absence of their own networks, alternative operators could have provided services at retail level on the basis of other operators' networks. The fact that competition was possible on that market follows from the circumstance that access regulation[216], in force at the time of application of the non-compete clause, together with symmetric regulation of in-house wiring[217] referred to in recital (101),

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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 (SWD(2014) 298): "*Where the presence of alternative sources of supply constrains the incumbent's behaviour even as regards thinner routes, the transit market may on a case-by-case basis be found not to meet the second criterion. However, since the assessment for the forward-looking period is that this market does not in general satisfy the first criterion, the market for wholesale transit services is withdrawn from the recommended list*."

214 Document ID 1444, pages 75-82.

215 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 73 and 74.

216 Decision of the Spanish Regulator of 5 March 2009, Document ID 1495, Articles 4 and 5.

217 In-house wiring refers to interal network elements of buildings (e.g. multidwelling units).

created the opportunity for alternative operators to compete at retail level, as those regulations lowered costs and facilitated deployment of own infrastructure or use of infrastructure of other operators.

(189) In the case of Spain, the Spanish Regulator's Annual Report of 2010 shows that regulatory measures such as local loop rental without the basic telephone service, wholesale line rental and naked bitstream access had a positive effect on competition in 2010. Full unbundling and shared loop access allowed operators to acquire clients and offer them a full range of services at competitive prices. In 2010, Telefónica lost around 1 million retail lines to its competitors[218].

(190) The Report also shows that one of the main features of fixed telephony was that it was increasingly sold in a bundled way, almost always with broadband. For that reason, the growth in fixed portability went hand-in-hand with increasing competition in broadband packages, as in 2010, more than 1.7 million fixed lines in retail were switched, 19.5% more than in 2009[219]. Telefónica lost 4.6% of its direct customers, whereas generally there was a growth of direct access customers at the expense of bistream access customers. This may be due to investments made by alternative operators and the success of their commercial offerings. Furthermore, service convergence offering combined fixed and mobile telephony services as part of the same commercial offer (for example Vodafone's or Orange's offer launched in 2010) introduced a competitive dynamic to the market[220]. That conclusion is not affected by Telefónica's argument that fixed and mobile bundles were very limited in number and that almost the only combined offer was fixed telephony + internet[221] as the Commission is pointing out to the incipient competitive pressure from those offers.

Increasing actual competition on the basis of own infrastructure and LLU

(191) The Commission also refers to evidence that in addition to *potential* competition there was *actual* competition on this market:

(a) The Spanish Regulator's Annual Report for 2010 shows that there were at least four actual competitors on this market. Telefónica's market share in terms of number of direct access customers was declining from 2003, when its market share was 89%, to 2010, when it reached 64.6%. In 2010, ONO was according to the same metric the second largest operator in the market with a market share of 12.2%, Vodafone substantially expanded its number of direct access customers thanks to the convergent services which it already had in the market, and obtained 7.1% of the total market. Jazztel increased its share by 2 p.p.and had 6.1% as compared to the previous year. Orange increased its share by 0.8 p.p. as compared to 2009, reaching 4.4%[222];

(b) Spain 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. That document shows that in 2011, while remaining the leading operator in the fixed retail market, Telefónica's market share for all types of calls by traffic volume had decreased to 58.5% as of December 2010,

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218 Document ID 1579, pages 12 and 45.
219 Document ID 1579, page 45.
220 Document ID 1579, pages 12, 45 to 60, and 78.
221 Response to Annex 1, paragraph 48.
222 Document ID 1579, pages 61 to 64.

compared with 61.7% in December 2009. The report also shows that the number of alternative operators such as Orange, Jazztel, ONO offering retail access and voice services through direct access increased to a total of 18 in 2011. The percentage of subscribers using an alternative fixed provider of retail access and voice services increased from 32.5% to 43.2% for both national and international calls as of July 2011, compared with a Union average of the percentage of subscribers using an alternative fixed provider of retail access and voice services of 38.8% for national calls and 39.6% for international calls[223];

(c) The Spanish Regulator's decision of 5 March 2009, regarding the market for access to the public telephone network at a fixed location. That document shows on the basis of 2007 data that alternative operators' retail market share at that time varied between 20% and 40%[224];

(d) **The Spanish Regulator's decision of 13 December 2012**[225], regarding the market analysis of retail access to the public telephone network at a fixed location for residential and non-residential customers in Spain. This document shows that in Spain, in the 2nd semester of 2012, Telefónica had a market share of 56.1% in the retail access to the public telephone network (that is, residential, excluding business market) and had to face competition of several operators: ONO, the biggest alternative operator in Spain had 14.3%, Jazztel 9.5%. The market share of the remaining alternative operators varied between 0.6% and 7.9%. That shows that there was actual competition in Spain in the relevant period[226];

(e) **The Spanish Regulator's decision of 12 December 2008**, which shows that in 2008 the retail markets for (national and international) calls were considered as not susceptible for regulation due to lack of high barriers to entry[227];

(f) The European Union 2011 Telecommunications Market and Regulatory Development - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report provides that for retail fixed calls markets which were no longer listed in the Commission Recommendation on relevant markets, *ex-ante* regulation was withdrawn in most Member States, including in Spain[228];

(g) **The Progress Report on the Single European Electronic Communications Market 2009**, which shows that retail voice calls markets were further deregulated in 2009 in several Member States, including Spain[229];

(h) **Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018**, paragraph 76, which recognizes that the Spanish market for

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223 Document ID 1417, Section 5.2. Fixed Voice and other telecommunications services.

224 Document ID 1495.

225 Document ID 1436.

226 The Spanish Regulator's decision of 17 January 2017 shows that the pro-competitive trend continued up to and including 2016, when retail regulation for fixed telephony access market was removed. At this point in time, Telefónica (only) had a market share of 46.44% in the mass market. See CNMC-Definitive-markets 1 and 2, 2017, Document ID 1429.

227 Document ID 1435.

228 Document ID 1412, page 25.

229 Document ID 1472, page 8.

fixed retail access and voice services in 2011 was a "*highly competitive market*"[230].

(192) In the Response to Annex 1, Telefónica argues that the four-month period when the clause was in force was not enough to allow it to enter the market[231]. Moreover, it claims that the companies active in the market were well-established players[232]. Telefónica also maintains that the Commission should also assess the real and concrete possibilities of PT to enter the market[233].

(193) The Commission refers to Section 3.3.3 of this Decision addressing Telefónica's arguments on the relevant period. Moreover, the Commission notes the fact that there are other players in this market means that the barriers to enter are not insurmountable. In fact, Telefónica acknowledges in paragraph 149 of the Response to Annex 1 that there are no insurmountable barriers to enter this market. Finally, the Commission refers to Section 3.3.1 in this Decision addressing Telefónica's arguments on the relevant test for insurmountable barriers to entry.

(194) The Commission considers therefore that there were no insurmountable barriers to entry on the market for retail access and voice services. Even Telefónica recognises the possibility to compete on this market, as in its reply of 19 March 2018 to the request for information of 19 January 2018, it states that: "*Telefónica does not deny that it is theoretically possible for a new operator to enter the Spanish market, given that there are no legal barriers to entry or monopolies*"[234].

(iii) Conclusion

(195) Accordingly, the Commission finds that there were no insurmountable barriers to entry and that an alternative operator could have entered the retail access and voice market in Spain either on the basis of its own infrastructure or relying on wholesale offers of other operators. The Commission also notes that actual competition was taking place on the market. The Commission will therefore include the sales corresponding to the retail access and voice services in Spain in the value of sales for the purposes of calculating the fines in this Decision.

3.5.4. Retail access and voice in Portugal

(i) PT/Pharol's arguments

(196) According to PT, the market structure has been evolving towards a state of stagnation and high concentration, the commercial interest in telephone services has been decreasing for several years due to regulation and the prices of fixed telephone services in Portugal were lower than the EU15 average, all of which had the effect of discouraging entry on the market for retail access and voice services[235]. Furthermore, increased competition by Telefónica in Portugal would be unlikely as Telefónica would in that case cannibalise the business of its invested company ZON without a foreseeable return[236].

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230 Document ID 1554.

231 Response to Annex 1, paragraphs 146 to 149.

232 Response to Annex 1, paragraphs 149 to 151.

233 Response to Annex 1, paragraphs 152 to 154.

234 Document ID 1554, paragraph 73.

235 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 295, 296, 297, 299 and 300 and Document ID 1368, NC ID 1371, paragraph 15.

236 Document ID 753, NC ID 946, paragraph 307.

(197) In its Response to the Letter of Facts, Pharol argues that the four-month period when the clause was in force was insufficient for an alternative operator to enter the market, either via its own network, the network of another operator or the acquisition of a competitor. There were in the market significant economic barriers preventing entry and the Commission is obliged to assess those. Pharol further submits that this market was in decline and it would be irrational for an alternative operator to enter it.

(ii) Commission's assessment

(198) The Commission considers that PT (and, subsequently, Pharol), have not demonstrated the absence of potential competition with respect to retail services in markets relating to fixed telephony (retail access and voice).

(199) First, alternative operators were free to invest in their own networks. As shown at Section 3.4.3 and in recitals (92) and (93), this possibility did not remain theoretical, but there was also actual investment, on the basis of which operators were able to compete in Portugal at retail level.

(200) As the following table of the Portuguese Regulator evidences, during the period of application of the non-compete clause, there were several alternative operators active in the market for retail access and voice services and their combined market share amounted to half of the market. Between 2011 and 2012, PT's market share decreased from 54.1% to 51.8%[237]:

[237] Informaçao Estatística do Serviço Telefónico Fixo 2012, Document ID 1413, page 15.

Table 2 – Market share evolution of direct access clients to the telecommunication service at fixed location

Tabela 8 - Evolução das quotas de clientes de acesso direto ao Serviço Telefónico em Local Fixo

	2011				2012
	1T11	2T11	3T11	4T11	1T12
Grupo PT	**54,1%**	**53,5%**	**53,1%**	**52,7%**	**51,8%**
PT Comunicações	53,9%	53,3%	52,9%	52,5%	51,7%
PT Prime	0,1%	0,1%	0,1%	0,1%	-
TMN	0,1%	0,1%	0,1%	0,1%	0,1%
Prestadores Alternativos	**45,9%**	**46,5%**	**46,9%**	**47,3%**	**48,2%**
Grupo ZON/TV Cabo[19]	**19,5%**	**20,1%**	**20,7%**	**21,7%**	**22,6%**
ZON TV Cabo Portugal	17,9%	18,4%	18,9%	19,9%	20,9%
ZON TV Cabo Madeirense	1,0%	1,0%	1,0%	1,0%	1,0%
ZON TV Cabo Açoreana	0,7%	0,7%	0,7%	0,7%	0,7%
Optimus/Sonaecom	**14,4%**	**14,4%**	**14,4%**	**14,3%**	**13,9%**
Cabovisão	**7,0%**	**7,0%**	**6,9%**	**6,9%**	**7,0%**
Vodafone	**4,2%**	**4,2%**	**4,3%**	**4,3%**	**4,4%**
AR Telecom	**0,7%**	**0,6%**	**0,6%**	**0,0%**	**0,0%**
Outros Prestadores Alternativos	0,1%	0,1%	0,1%	0,1%	0,3%

Unidade: %

Fonte: ICP-ANACOM

(201) Secondly, access regulation based on the Access Directive[238], which obliged PT to provide (i.a.) carrier selection and preselection services to other operators was in place since 2004 and during the whole period of application of the non-compete clause during which for example ZON, Optimus, Vodafone, Cabovisão and Onitelecom used indirect access,[239] together with symmetric regulation for ducts and poles access (see Section 3.5.1) created the opportunity for alternative operators to compete at retail level (ZON, Optimus, Cabovisão, Vodafone, AR Telecom, among others). Even in the absence of their own networks, alternative operators could also provide services on the basis of other operators' networks, for example by utilising wholesale services of carrier selection and preselection. PT's reply to the SO and Pharol's reply of 7 September 2018 to the request for information show that in the absence of their own network, the service that is potentially attractive for a new entrant is the carrier selection service, as well as the pre-selection service[240]. Through those processes, a telephone subscriber whose telephone line is maintained by one company, usually the incumbent, can choose to have some of their calls routed across

238 Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (Access Directive), Article 1.

239 Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, pages 86-87.

240 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 297 and Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraphs 13 and 14.

a different telephone company's network, thus allowing alternative operators to gain retail customers based on those wholesale services.

(202) Apart from carrier (pre-) selection services, alternative operators could enter the market on the basis of regulated[241] or commercially negotiated Wholesale Line Rental agreements, whereby a telecommunications operator takes control of all the connections made through a telephone line from the incumbent operator usually and collects the subscription fee from the subscribers[242].

(203) The Commission has considered also the following evidence:

(a) The Portugal 2011 Telecommunication Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. That report shows that:

- in December 2010, the incumbent operator in fixed retail (PT) had 59.5% market share by traffic volume, and lost some market share in 2011[243];
- Furthermore, as of July 2011, 40.7% of subscribers were using a provider other than the incumbent operator for direct access (the 2nd highest figures in the EU). That figure shows that the use of alternative operators for the provision of retail fixed voice services significantly increased in a short number of years, due to the increased take-up of bundled offers from cable and LLU operators, and the provision of fixed telephone services using mobile frequencies[244];

(b) **Statistical information on fixed telephony in Portugal, 2012, issued by the Portuguese Regulator**. That information shows that in 2011, there were 17 operators providing retail voice services, amongst which 9 on the basis of both direct and indirect access, 7 only direct access and 1 operator on indirect access[245];

(c) **The Portuguese Regulator's decision of 14 January 2009** regarding wholesale broadband markets and consulted at Union level under case PT/2008/0850. That decision observes that already in 2007-2008, there were market developments, namely the development of unbundling (60% of the population covered), the entrance of new operators, the spin-off of ZON Multimédia and the expansion of the cable network coverage area suggesting increased level of competition in some areas[246];

(d) **Commission comments by letter of 4 August 2014,** adopted pursuant to Article 7(3) of Directive 2002/21/EC, which shows that, as of 2014, retail telephony services were not regulated anymore in Portugal due to (according to

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241 Document ID 1490, PT/2004/0091. See also the Decision of the Portuguese authority of July 2004, imposing obligations on Portugal Telecom in respect of both the retail market for fixed telephony and the wholesale market for fixed call origination in Portugal. https://www.anacom.pt/streaming/mercados1e2.pdf?contentId=212249&field=ATTACHED_FILE

242 E.g. Wholesale Market for Call Origination on the Public Telephone Network Provided at a Fixed Location, Document ID 1707. Available here: https://www.anacom.pt/streaming/DecisionMarket2_Consultation2014.pdf?contentId=1338230&field=ATTACHED_FILE, pages 91-96.

243 Document ID 1420, Section 1. Market & Regulatory Developments.

244 Document ID 1420, Section 5.2. Fixed voice and other telecommunication services.

245 Statistical information about fixed broadband - 1st quarter of 2012, Document ID 1413, page 4.

246 Document ID 1445.

the Portuguese Regulator) successful and frequent entries of operators in the market (demonstrated by the increase of alternative operators' market shares and the decrease of the PT Group's share)[247];

(e) The European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that in 2010, 10 Member States, including Portugal, were subject to some (usually light) regulation[248];

(f) Pharol's reply of 7 September 2018 to request for information of 21 June 2018, which provides in relation to retail that:

- "*at the end of 2010, 25 operators were registered, of which 17 were active. Pharol accounted for 54.4% of direct access customers, Zon, 18.6%, Optimus/Sonaecom, 15%, Cabovisão, 7%, Vodafone, 4.2% and AR Telecom, 0.7%*"[249];
- fixed services were increasingly bundled with television and internet[250];

(g) **PT's reply to the SO,** which shows the following as regards retail:

- from 2005 to the date of PT's reply to the SO, the market share of the PT Group in telephone services decreased from around 80% to 57%;
- as shown by ANACOM, the fixed telephone service sector in Portugal between 2008 to 2010 saw a growth of the penetration rates, which could be a result of, amongst other things, the launching of packages of services for retail access and voice services;
- in 2010, Portugal was the country with the highest percentage of customers from competing operators other than the historic operator, as shown by the European Commission Report on the Monitoring of the Electronic Communications Markets (2010);
- during 2010, ZON maintained a strong rate of growth, and retail fixed services were increasingly bundled with television and internet[251].

(204) The Commission considers that Pharol's claims in its Response to the Letter of Facts are baseless. Firstly, with regard to the Parties arguments on the relevant period, the Commission refers to Section 3.3.3 addressing those claims.

(205) Secondly, there was actual competition ongoing in the market at that time, with at least 13 companies offering retail fixed telephony services[252]. That is clear evidence that there were no insurmountable barriers to entry. In this respect, the Commission further notes that in paragraph 113 of its Response to the Letter of Facts, Pharol

247 Case PT/2014/1638, Document ID 1406.

248 Document ID 1412, page 25. See Section 3.4.1 on how regulation impacts potential competition.

249 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 20.

250 Document ID 1368, NC ID 1371, paragraph 14.

251 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 291 to 293, 298 and 303.

252 Document ID 1578, page 137, with reference to 13 different providers of telephone service at fixed location in Portugal in 2010.

acknowledges the existence of at least one active operator via indirect access, which evidences that entry into this market was also viable without having an own network.

(206) Similarly, Pharol's argument that this market was in decline does not affect the fact that competition was possible and indeed took place on the market. That argument is immaterial for the assessment of the existence of insurmountable barriers to entry.

(iii) Conclusion

(207) The Commission concludes that there were no insurmountable barriers to entry and that an alternative operator could have entered the retail access and voice market in Portugal either on the basis of its own infrastructure or relying on wholesale offers of other operators. The Commission also notes that actual competition was taking place on the market. The Commission will therefore include the sales corresponding to this market in the value of sales for the purposes of calculating the fines in this Decision.

3.6. Markets related to leased lines and virtual private networks (VPN)

(208) In the Telefónica/PT Decision, the Commission found that the non-compete clause also applied to markets relating to leased lines and concluded that those markets are directly or indirectly linked to the infringement (see Section 5.5.1.3. and recital (482)).

3.6.1. Wholesale markets relating to leased lines in Spain

(i) Telefónica's arguments

(209) According to Telefónica, both wholesale leased lines services (wholesale terminating segments of leased lines and wholesale trunk segments of leased lines) should be excluded as competition did not and could not have existed between Telefónica and PT due to the need of significant investments and long implementation times[253].

(210) In its Response to Annex 1 to the Letter of Facts, Telefónica maintains that those services relating to leased lines require a well-established infrastructure which could not have been installed within the short time duration of the clause: capacity and capillarity are key, as those services are mainly demanded by business customers and their business premises are not necessarily situated in any specific location, with the exception of business parks or industrial sites[254]. Moreover, it submits that there is no evidence of investment in own networks by alternative providers for wholesale services. Such investments were allegedly into retail services[255]. Telefónica argues that access regulation has an effect on the retail market, but not necessarily on wholesale[256]. Telefónica denies that LLU was a viable possibility to enter those markets[257].

(ii) Commission's assessment

(211) The Commission considers that Telefónica has not shown that potential competition was excluded on those markets during the application period of the non-compete clause. Firstly, wholesale trunk and terminating leased lines services may be provided on the basis of regular telecoms infrastructure, which serves to the

253 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 114 to 118, 124 and 131.

254 Response to Annex 1, paragraphs 162 to 167.

255 Response to Annex 1, paragraphs 169 to 170.

256 Response to Annex 1, paragraph 171.

257 Response to Annex 1, paragraphs 172 to 176.

provision of wholesale and retail services on a wide range of telecoms markets[258]. Investments in own networks or in elements of own networks by alternative operators such as PT were possible and actually occurred, as shown in Section 3.4.3. Secondly, access regulation encouraged access seekers' entry on the market, facilitated network deployment through the ladder of investment and ultimately allowed telecom operators to compete both at wholesale and retail level[259].

(212) Thirdly, wholesale leased line services could also be provided on the basis of LLU by alternative operators which did not necessarily possess their own network in the last mile. The Spanish Regulator indicated in the regulatory decision of 23 July 2009[260], that operators could provide leased lines by relying on the regulated loop unbundling. Operators, by merging two or more completely unbundled copper pairs (technique known as "bonding") may obtain SHDSL[261] connections of up to 2 Mbit/s[262]. Therefore, operators could provide low-bandwidth leased lines.

(213) Fourthly, as shown by the Spanish Regulator's Annual Report of 2010, whereas Telefónica retained its leading position by market share in the wholesale circuit services, with 82.5% of total revenues, alternative operators were also present in the market, with market shares in 2009 of 4% and 2.4% respectively. Orange grew to account for 3.1% of the market. Isalink had 1%[263].

(214) The Commission refers to Section 3.3.3 in this Decision, addressing Telefónica's arguments on the relevant period. Moreover, as it is explained in recital (221), the Commission notes that there is no need to have a nationwide coverage to compete in this market. Besides, alternative operators could have relied not exclusively on their own infrastructure, but rather on a mix of own infrastructure and leased lines[264] or passive elements of networks (for example, dark fibre, ducts and poles) of other operators to provide services to other operators and/or customers in general.

(215) Telefónica's claims that there was not investment in this market is disproved by the "*relevant investment effort*" both by cable and alternative operators, as shown in the CMT decision of 23 July 2009[265].

(216) With regard to Telefónica's argument that access regulation has an effect on the retail but not necessarily on the wholesale market, the Commission refers to Section 3.4.1, where those arguments are addressed. Finally, Telefónica's claims that LLU would not be suitable to provide those services is disproved by the fact that LLU is a viable technique, as the CMT decision of 23 July 2009 also shows[266].

(iii) Conclusion

(217) The Commission therefore finds that actual competition did exist in the Wholesale markets relating to leased lines in Spain. The Commission will assess below the specific arguments of Telefónica concerning each of the respective services.

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258 ANACOM's Decision of 28 September 2010, Document ID 1444, pages 18-22.

259 See Section 3.4.1. 3.4.3.

260 CMT Decision of 23 July 2009, Document ID 1464.

261 Single-pair High-speed Digital Subscriber Line.

262 Document ID 1464.

263 Annual Report 2010 – CMT, Document ID 1579, page 76.

264 ANACOM's Decision of 28 September 2010, Document ID 1444, page 21.

265 Decision by the Spanish Regulator (CMT) of 23 July 2009, Document ID 1464, page 41. Telefónica refers to this in paragraph 166 of the Response to Annex 1.

266 Document ID 1464, page 29 and 30, Section III.1, letter c) includes LLU as a viable alternative.

3.6.1.1. Wholesale terminating segments of leased lines

(i) Telefónica's arguments

(218) Telefónica points to the fact that although in its decision of 23 July 2009, the Spanish Regulator did not identify the existence of a legal or a de facto monopoly position of Telefónica in the provision of those services, it concluded that given the high market barriers to entry "*it* [was] *not expected that potential competitors* [would] *enter this market*"[267]. Moreover, in its Response to Annex 1 to the Letter of Facts, refering to that same CMT decision of 23 July 2009, Telefónica argues that competition in that market was almost non-existent and that the other operators relied on Telefónica's network[268].

(ii) Commission's assessment

(219) The Commission considers that Telefónica has not demonstrated absence of potential competition on this market. First, even if the Spanish Regulator found high barriers to entry on this market (see **the Spanish Regulator's decision of 23 July 2009**[269]), alternative operators' market shares in the market for terminating segments of leased lines were at the level of around 27 to 30%, which is evidence that competitors were active in the market and an alternative operator such as PT could have entered it[270]. The decision also shows that the most profitable high capacity terminating segments of leased lines were also subject to competitive market entries and therefore not regulated. In 2008, Telefónica's wholesale market share was 73% in terms of lines and 70% in terms of revenues, therefore one-third of the market belonged to alternative operators[271]. Moreover, Telefónica's market share declined in the years after 2009. This is clear evidence that actual competition was taking place in this market during the time of the infringement and continued to do so afterwards[272].

(220) The Commission notes that the fact that there existed other operators with their own network in Spain evidences that there were no insurmountable barriers to entry. Moreover, Telefónica misinterprets the CMT Decision of 23 July 2009. The CMT did not refer to insurmountable barriers to entry and rather maintained that the players with a larger amount of access infrastructure were already present in the market for some years. Therefore, the market developments of the previous years would make mergers between the existing players more likely than the entry of new ones. The CMT did not exclude the entry of an alternative operator[273].

(221) Moreover, contrary to what Telefónica claims in its Response to Annex 1 to the Letter of Facts[274], the Commission considers that entry was possible even without deploying a network covering the whole country. The Commission notes that since 2009, Telefónica had been under an obligation to give third Parties access to its ducts and conduits[275]. This infrastructure represents the majority of the deployment costs in

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267 Document ID 1554, paragraphs 128 to 131.
268 Response to Annex 1, paragraphs 191 to 194.
269 Document ID 1464.
270 Document ID 1464, page 38.
271 Document ID 1464.
272 The figures included in the next market Revision, which was assessed by Decision of 11 April 2013, Document ID 1708, evidence this: MTZ 2012/2017 https://www.cnmc.es/sites/default/files/1485574_7.pdf; See the graphic on page 27.
273 Document ID 1464, page 40.
274 Response to Annex 1, paragraphs 162 to 167.
275 Decision of the Spanish CMT of 22 January 2009, Document ID 1729, pages 148 to 150.

a telecommunications network. It is indeed estimated that such infrastructure costs account for 50 to 80% of the costs of deploying an electronic communications network[276]. Moreover, entry was possible by focusing on big cities and on the business segment. For example, COLT was present only in the main Spanish cities[277].

(iii) Conclusion

(222) The Commission therefore finds that there were no insurmountable barriers to entry into this market and that an alternative operator could have entered it by deploying an own network. Some players did so by focussing on big cities and on the business segment (for example COLT). Accordingly, it was not necessary to have a network covering the whole of the country. Alternative operators were present in the market and had a market share of around 30%, which demonstrates actual competition. The Commission will therefore include the sales obtained in wholesale terminating segments of leased lines within the value of sales for the purposes of calculating the fines in this Decision.

3.6.1.2. Wholesale trunk segments of leased lines: terrestrial and submarine routes

(223) The Commission notes that the market of *Wholesale trunk segments of leased lines* can be subdivided in *terrestrial routes* and *submarine lines*.

(224) According to Telefónica, for *terrestrial routes* there were two options available for an alternative operator: building its own network or relying on utility network operators. Telefónica argues that, given the short time period when the clause was in force, neither of the two options would have been feasible[278].

(225) As regards *submarine cables*, Telefónica maintains that there were 10 of the 13 existing undewater routes where the barriers to entry were very high, which made it impossible to deploy an alternative underwater cable. Telefónica was the only company and argues that its value of sales should be excluded from fines calculation. As regards the remaining 3 underwater routes, for which there were alternative providers of wholesale services, Telefónica maintains that the entry of new players was uncertain given the uncertain profitability[279]. Telefónica repeats that it is not possible to deploy a network within the short timeframe of the application of the clause[280]. It further refers to the lack of capacity in the infrastructure[281].

(226) As regards Telefónica's arguments on *terrestrial routes*, the Commission notes that in 2009 the CMT found that there were no insurmountable barriers to enter this market and decided not to consider it for *ex-ante* regulation[282]. Moreover, as acknowledged by Telefónica, alternative operators could enter the market by relying on the network of other utilities. Given the large number of utility network operators that had deployed dark fibre, it is excluded that the need to reach agreements with those companies and the investment of time and money to transform the capacity of their networks into a terrestrial trunk network capable of providing wholesale

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276 Decision of the Spanish CMT of 22 January 2009, Document ID 1729, page 71.

277 Response to Annex 1, paragraph 193. See also the Decision of 11 April 2013, Document ID 1708, evidences this: MTZ 2012/2017 https://www.cnmc.es/sites/default/files/1485574_7.pdf, page 17.

278 Response to Annex 1, paragraphs 177 to 182.

279 Document ID 1554, paragraphs 117 to 126.

280 Response to Annex 1, paragraphs 183 to 190.

281 Response to Annex 1, paragraph 190.

282 CMT Decision of 2 July 2009, Document ID 1465.

services could amount to insurmountable barriers to entry[283]. With regard to Telefónica's arguments on the insufficient time to enter into new agreements, the Commission refers to the Section 3.3.3.

(227) As regards Telefónica's arguments on *submarine cables*, the Commission notes that there were several international cables connecting the Iberian Peninsula with the Canary Islands. That was the case for instance of the South Atlantic 3/West Africa Submarine Cable (SAT-3), which also links Portugal with those islands. The Atlantis-2 cable connects South-America and Portugal via the Canary Islands. Furthermore, the West Africa Cable System (WACS) links South Africa and the United Kingdom via the Canary Islands and Portugal[284]. The Commission considers that those cables would represent a viable alternative, particularly for an operator such as Pharol. Several of those cables have a landing station in the Canary Islands and in Portugal. For example, even if for self-provision, other undertakings active in the Spanish market, such as Vodafone, are using the WACS cable, thereby evidencing that use of such infrastructure was a viable alternative[285].

(228) Moreover, as regards Telefónica's arguments on the impossibility to deploy a network within the time period when the clause was in force, the Commission refers to Section 3.4.3. Moreover, Telefónica has not substantiated why there would be specific barriers to entry applying to each of the other routes, particularly when some of those routes had been deregulated and the existing international cables between the Canary Islands and Portugal were a real alternative to the ex novo deployment of infrastructure. The Commission further notes that there were several players deploying submarine cables in Spain. For instance, at the end of 2011, Canalink deployed a submarine cable connecting the Canary Islands and the Iberian Peninsula. Moreover, the activities of the company Islalink, connecting via submarine cable several of the islands in the Balearic Islands with the Iberian Peninsula, led the Spanish Regulator to withdraw the *ex-ante* regulation for several of those routes[286]. Finally, with regard to Telefónica's arguments on the insufficient time to enter into new agreements, the Commission refers to Section 3.3.3.

(229) As regards retail leased lines, Telefónica does not bring any arguments to show that potential competition was absent on this market during the period of application of the non-compete clause. In any event, the Commission considers that there were no insurmountable barriers to entry on this market. Indeed, as the Spanish Regulator found in its decision of 23 July 2009, barriers to entry of structural, legal or regulatory nature no longer existed and due to the presence of a wholesale regulated offer and the competitive pressure from alternative operators, Telefónica's market share was around 50% and declining[287].

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283 Document ID 1465, *Section II.2.1.1.2 Obstáculos estructurales*. In that section, the CMT also referred to the capillarity of certain electricity wholesalers like Endesa and Iberdrola, with a network reaching beyond the capitals of provinces (see page 21 and 22). The CMT concludes: "*The above shows that if there is a clear will to deploy the network, there are options for that*".

284 Source: https://www.submarinecablemap.com

285 CNMC Decision of 18 January 2018, Section III.2.3.4 Barreras a la entrada en la ruta Península – Canarias, Document ID 1709, page 37. Available under: https://www.cnmc.es/sites/default/files/1910467_10.pdf

286 See Document ID 1465, Section II.2.2.2 Tendencia hacia la competencia efectiva for Islalink activities. This led the Spanish Regulator to withdraw *ex-ante* regulation in the routes Iberian Peninsula-Balearic Islands and Mallorca-Ibiza.

287 Document ID 1464.

(230) In the light of the foregoing, the Commission concludes that there were no insurmountable barriers to entry into the market of providing wholesale services of trunk segments of leased lines and market of retail leased lines. The Commission finds that an alternative operator could have entered the wholesale market of trunk segments of leased lines. In particular, the Commission finds that specific submarine routes were already open to competition and for several others there was the possibility of providing the service via pre-existing submarine international cables that had a landing station in Portugal or deploying such cable, as it happened in some instances. Moreover, the terrestrial routes market was no longer subject to *ex-ante* regulation and could be entered either on the basis of an operators' own network or relying on the existing infrastructure of other operators or utilities companies. The Commission will therefore include the value of sales for the purpose of calculating the fine.

3.6.2. Virtual private networks (VPN) in Spain

(i) Telefónica's arguments

(231) Telefónica argues that despite the absence of regulatory barriers to entry, there are serious doubts that PT would have been able to compete on this market, as: PT did not intend to enter the Spanish market, as this country was not among the company's strategic priorities, there were many competitors on the market, which made it unappealing for new entrants, and the limited period of application of the clause would have made it difficult for PT, which had no presence in Spain, to start providing those services[288].

(ii) Commission's assessment

(232) The Commission notes that, as it has been also explained by Telefónica[289], VPN services can be provided by alternative operators on the basis of wholesale LLU or wholesale line rental services, without any need for the alternative operator to build its own network.

(233) Therefore, the Commission considers that Telefónica has not demonstrated that there were insurmountable barriers to entry to provide VPN services which would rule out any potential competition during the period of application of the non-compete clause. The Commission further supports this conclusion with the following evidence:

(a) Telefónica's submission of 19 March 2018, stating that the VPN market "*has many competitors (over 29)*" and the market constituted, already during the period of application of the non-compete clause, "*a mature market*"[290];

(b) The CMT's decision of 23 July 2009. In that decision, the Regulator held that the decrease of *Telefónica's* market share in terminating segments of leased lines was, among other things, related to the substitution of low-speed leased lines for VPN solutions over ADSL. This indicates that the alternative

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288 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 134 and 135. Telefónica raises similar arguments in paragraphs 196 to 202 of its Response to Annex 1 to the Letter of Facts.

289 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 137.

290 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 135 ii).

operators providing VPN services were in a position to exert competitive pressure on Telefónica[291].

(234) The Commission observes that in paragraph 202 of its Response to Annex 1 to the Letter of Facts, Telefónica acknowledges that there were no insurmountable barriers to enter this market. Moreover, the Commission notes that Telefónica's argument that the market was not commercially attractive is irrelevant as the Commission is not required to carry out an analysis of the viability of the economic strategies of the Parties to enter the market, and not convincing, in light of the numerous players active in it. The fact that there were numerous players offering those services show that there were no insurmountable barriers to enter the market. The Commission further refers to Section 3.3.3 on the relevant period and to Section 3.3.1 on the relevant test for insurmountable barriers to entry.

(iii) Conclusion

(235) The Commission concludes that there were no insurmountable barriers to entry. The Commission observes that there was actual competition ongoing in this market, with several players active in it. An alternative operator can be active in this market either by building its own network, or on the basis of wholesale LLU or wholesale line rental services. The Commission therefore will include the sales corresponding to VPN services in the value of sales for the purposes of calculating the fines in this Decision.

3.6.3. Wholesale markets relating to leased lines in Portugal

(i) PT/Pharol's arguments

(236) According to PT (and, subsequently, Pharol), given the investments necessary to enter the wholesale markets for leased lines, one cannot reasonably conclude that the non-competition clause could have a negative impact in the competitive process between the Parties[292]. In its reply of 7 September 2018 to the request for information of 21 June 2018, Pharol argues that it seems unlikely that an operator would decide to invest with the specific objective of providing wholesale services and claims that demand for wholesale services is essentially driven by retail activity and the need for network interconnection[293].

(237) In its Response to the Letter of Facts, Pharol argues that the provision of leased lines services only makes sense if the alternative operator has a network of its own, which Telefónica could not have obtained in the short period when the clause was in force. Moreover, Telefónica would not have any incentive to enter a market that was in decline[294]. Pharol further maintains that those markets were subject to *ex-ante* regulation and therefore they were less attractive for other operators to enter it. In that regard, it refers to a decision of the Portuguese Regulator, to claim the existence of major structural barriers to enter the trunk segments and terminating leased lines in Portugal[295]. Pharol also refers to the short time period when the clause was in

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291 Document ID 1464.

292 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 322 and Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 39.

293 Document ID 1368, NC ID 1371, paragraphs 37 and 38.

294 Pharol's response to the LoF, paragraphs 123 to 128.

295 Pharol's response to the LoF, paragraphs 130 to 133.

force, which would make impossible entry into the market via the acquisition of another player[296].

(ii) Commission's assessment

(238) As a general observation, the Commission considers that potential competition was not excluded on this market during the application period of the non-compete clause, as leased lines services may be provided on the basis of telecoms infrastructure, which serves to the provision of wholesale and retail services on a wide range of telecoms markets, including, in addition to leased lines, broadband, fixed telephony and broadcasting television services (for instance, IPTV). For example, ZON provided the majority (if not all) of the mentioned services[297]. There is no need to invest specifically with the objective of providing wholesale leased lines services. Investments in own networks or in elements of own networks by alternative operators were possible and actually occurred[298]. Access regulation encouraged access seekers' entry on the market, facilitated network deployment through the ladder of investment and ultimately allowed telecom operators to compete both at wholesale and retail level[299].

(239) The Commission further observes that the wholesale market of leased lines can be divided in terminating segments and trunk segments.

(240) As regards the market for *terminating segments* of leased lines, the Commission notes that Pharol acknowledges in paragraph 124 of its Response to the Letter of Facts that at least theoretically Telefónica could have obtained circuits on the wholesale market for certain part of the market. Pharol further admits in paragraph 125 that Telefónica could have complemented its own infrastructure by relying on the wholesale supply from PT (and subsequently, Pharol) in other parts of the territory. As acknowledged by Pharol, it was therefore possible for Telefónica to enter this market both on the basis of its own infrastructure and also relying in other parts of the national market on Pharol's infrastructure, for example on the basis of the Ethernet Leased Lines offer (known as ORCE) published following the adoption of the Portuguese Regulator's decision of 28 September 2010 or the traditional leased lines offer, known as ORCA, which was published in 2006[300].

(241) This means of entry are particularly relevant for terminating leased lines, as they are typically provided to end-business customers. Accordingly, there is less need of capillarity within the terminating lines network, and new entrants can focus, for example, on big cities. The Commission notes that the two largest Portuguese

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296 Pharol's response to the LoF, paragraphs 134 to 137.

297 Document ID 753, NC ID 946, paragraph 302.

298 As shown at recitals (93), (388), (389), (396) and(397).

299 Document ID 1444: ANACOM's Decision of 28 September 2010, maintaining access regulation in the terminating segments of leased lines markets and in the non-competitive routes of the trunk segments of the leased lines markets and deregulating the competitive routes of the trunk segments of the leased lines markets.

300 European Commission, Telecommunication Market and Regulatory Developments in 2011 (Portugal), Section 5.2. Fixed, Document ID 1420. Ethernet leased lines were included in the relevant markets and the obligation to publish a new leased lines offer, including the provision of Ethernet services, was specifically imposed on the SMP operator. Whilst the provision of traditional lines was subject to a cost-orientation obligation, the provision of Ethernet lines was subject to a retail-minus rule.

metropolitan areas (Lisbon and Porto) concentrate almost half of the population in the country and subsequently many business customers (or their premises)[301].

(242) The viability of that entry is further evidenced by the existence of actual competition in those areas. As in Spain, COLT was also active in large Portuguese cities and had nine local exchanges in the Lisbon area, from which it offered direct access service to customers. Additionally, ARTelecom was using its own and leased optical fibre for the provision of services to corporate clients and for connections to their base station and was active in Lisbon and Porto[302]. The existence of actual competition in those metropolitan areas is also reflected in the revisions carried out by the Portuguese Regulator. While Portugal Telecom had the highest market share, the Portuguese Regulator found that if all the lines supplied by alternative operators in the wholesale market were considered as terminating segments concentrated only in the Lisbon area, other alternative operators would still have around 50% market share in that area[303].

(243) Moreover, an alternative operator could also have entered the terminating segments of leased lines on the basis of LLU, even without its own network in the last mile. As indicated by the Portuguese Regulator, it is possible, in some cases, to replace the contracting of terminating segments of leased lines with solutions based on unbundled loops from the incumbent operator and to provide low-capacity lines and up to 2 Mbps[304].

(244) For an alternative operator as Telefónica, such entry would have been even easier, as it had a minority stake in ZON, a player already present in the market. Telefónica could have increased its stake in ZON, in order to obtain control of the company (see Section 3.4.2).

(245) Accordingly, Pharol's arguments on the lack of infrastructure for the provision of those services are baseless. The Commission additionally refers to sections 3.3.1 and 3.3.3 regarding the relevant standard to assess the existence of potential competition tand he relevant time period.

(246) The Commission considers that Pharol's arguments in paragraphs 130 to 133 of its Response to the Letter of Facts regarding the *trunk segments* market are also flawed[305]. Firstly, the Commission observes that a part of the market was deregulated, as confirmed by the Regulator finding that there was actual competition in that market. PT's market share was low, namely 35% in 2008[306]. This is evidence in itself of actual competition on those markets and the ability of access seekers to effectively enter the leased lines markets. Therefore, Pharol's arguments regarding the existence of no incentive by Telefónica to enter this market are irrelevant, insofar as there was actual competition taking place in it. The Commission further refers to Section 3.3.1, on the existence of insurmountable barriers as the relevant standard for the existence of potential competition.

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301 E.g. Document ID 1444, pages 45 and 86.

302 Document ID 1444, page 81, footnotes 203 and 204.

303 Document ID 1444, Section 5.1.2.

304 Document ID 1444.

305 Routes connecting more than 1500 local exchanges (including overseas routes, that is, Continental-Azores-Madeira (CAM) lines and backhaul).

306 ANACOM's Decision of 28 September 2010, Document ID 1444, page 100.

(247) As in the case of terminating leased lines, an alternative operator could have therefore relied on its own infrastructure for a part of the trunk segments market and on the regulated offer for the rest.

(248) Secondly, competition was also developing in the part of the trunk segments market that was regulated. In this regard, the Commission notes that other operators active in the market –Vodafone, NOS, Apax, IP Telecom and REN Telecom had their own fibre infrastructure and transport network, which they provided to other operators[307]. That was a market trend which was decisive to open the market to competition in Spain and that was also taking place in Portugal. In that regard, as the Portuguese Regulator pointed out in its market review of 2016, "*the presence of operators with transport networks and offers in alternative to those presented by MEO* [the incumbent] *(and which replicate the latter's offer in certain routes and geographical areas) has led several operators not to rely on the incumbent operator as their main provider of wholesale segments. Some of them use their own network and rely on/supply to third parties in a wide range of routes*"[308].

(249) Pharol acknowledges that market trend. In its reply to the SO, Pharol signalled the growth of infrastructures belonging to alternative operators[309]. Moreover, in Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Pharol recognises that there was an increase in competition in network infrastructure[310]. It also states that demand for wholesale services was essentially driven by retail activity and the need for network interconnection[311].

(250) This increased availability of fibre supplied by other operators along with the possibility of relying on Portugal Telecom's wholesale offer in specific parts of the territory evidences that Pharol's reference to the existence of major structural barriers to entry in part of the market is without merit. It was feasible for an alternative operator to enter the Portuguese market on the basis of its own infrastructure, combined with existing fibre offers (also including considerable terrestrial infrastructure (optical fibre) between Portugal and Spain supporting international leased lines)[312] and Pharol's regulated wholesale offer in the part of the country subject to *ex-ante* regulation[313].

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307 ANACOM's decision of 2016 – Markets for High-Quality Electronic Communications at a Fixed Location (Access and Trunk Segments), Document ID 1712, pages 75-81. Available here: https://www.anacom.pt/streaming/FinalDecision1sep2016Market4.pdf?contentId=1400979&field=ATTACHED_FILE; In its market review of 2010, ANACOM mentions alternative operators Sonaecom, Onitelecom, Vodafone, ZON, Cabovisão, ReferTelecom and utilities such as REN, Document ID 1444, pages 75-82.

308 ANACOM's decision of 2016 – Markets for High-Quality Electronic Communications at a Fixed Location (Access and Trunk Segments), Document ID 1712, page 81. Available here: https://www.anacom.pt/streaming/FinalDecision1sep2016Market4.pdf?contentId=1400979&field=ATTACHED_FILE

309 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 313.

310 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 27.

311 Document ID 1368, NC ID 1371, paragraph 37.

312 Document ID 1444, page 19.

313 In its 2010 market review, ANACOM divided geographically the wholesale market for trunk segments into two – Routes C and Routes NC, while designating a single national market for terminating segments of leased lines. However, ANACOM acknowledges its difficulties in collecting detailed information and that there needs to be more detailed data available from all operators in the next analysis, allowing, on the one hand, terminating segments to be clearly distinguished from trunk

(251) This entry would have been even easier in the case of an alternative operator as Telefónica, which had a minority stake in ZON, a player already present in the market. Telefónica could have increased its stake in order to obtain control of the company. According to the Portuguese Regulator, ZON possessed its own network which covered some of the major links between cities[314]. Therefore, ZON's available infrastructure for the provision of fixed telephony and broadband access would have allowed Telefónica to compete in this market.

(252) As in the case of Spain, the Commission finds that entry into the wholesale terminating segments of leased lines market by an alternative operator was possible by deploying an own network. Some players did so by focusing on big cities (for example Lisbon and Porto) and on the business segment. Accordingly, it was not so relevant to have a network covering the whole of the country. An alternative operator could have relied on its own infrastructure for a part of the trunk segments market and on the regulated wholesale offer part for the rest.

(253) Moreover, the Commission finds that an alternative operator could have also entered the market for wholesale trunk segments of leased lines. The Commission notes that a part of the market was no longer subject to *ex-ante* regulation. It would have been therefore possible for an alternative operator to enter the Portuguese market on the basis of its own infrastructure, combined with existing (fibre) offers and Pharol's regulated wholesale offer in the part of the country subject to *ex-ante* regulation.

(iii) Conclusion

(254) Therefore, the Commission concludes that there were no insurmountable barriers to entry into wholesale markets relating to leased lines that would rule out any potential competition during the period of application of the non-compete clause. The Commission will therefore include the sales corresponding to wholesale markets related to leased lines in the value of sales for the purposes of calculating the fines in this Decision.

3.6.4. Retail leased lines market in Portugal

(i) PT/Pharol's arguments

(255) According to PT (and, subsequently, Pharol), the retail market for leased circuits was not very attractive to new operators (dropping 10% year on year since 2003 in the number of accesses and 3% in income). Accordingly, PT believes that having an own infrastructure is fundamental for the current business model of the leased lines service. This involves investment in infrastructure, requiring planning, research and high capital investment, which make it unreasonable to assume that the non-compete clause could delay or hinder any plans of Telefónica to directly enter the market. Moreover, as ZON had a presence in the retail market for leased circuits, PT doubts whether it would be rational for Telefónica to implement its own infrastructure to compete with ZON, since it was not at all prevented from maintaining or increasing its share participation in this operator[315].

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segments and, on the other hand, clear identification of the areas/routes where operators have their own infrastructures and areas/routes where they need to resort to the regulated leased lines offer due to a lack of alternative infrastructure, Document ID 1444, e.g. pages 16-17.

314 Document ID 1444, page 77.

315 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 311 to 321.

(256) In its Response to the Letter of Facts, Pharol argues that the Commission should assess Telefónica's real and concrete possibilities for entry[316]. It further claims that to operate in this market, Telefónica would need its own infrastructure[317], which Pharol considers impossible to achieve in the four-month that the clause was in place. Pharol further submits that Telefónica would not have had economic incentives to provide retail services through wholesale access to the network of other operators as the market was in decline[318]. Pharol finally claims that Telefónica would not have been able to complete the acquisition of a competitor within those four months[319].

(ii) Commission's assessment

(257) The Commission considers that PT (and, subsequently, Pharol), have not demonstrated the absence of potential competition between the Parties with respect to retail leased lines. As mentioned in Section 3.3.1, the Commission is not required to analyse the viability of the economic strategy of Telefónica, its incentives to invest and offer services on this market. The Commission is obliged to assess whether there were insurmountable barriers to entry on the market, which would exclude potential competition from Telefónica.

(258) Moreover, the Commission 2007 Recommendation on relevant markets[320] did not contain the retail market for trunk segments of leased lines, which shows that this market was considered as not meeting the three criteria test making a market susceptible for *ex ante* regulation (that is, the existence of high barriers to entry, lack of tendencies towards effective competition and insufficiency of ex-post competition law) at Union level.

(259) The Commission supports its conclusions also by the following evidence:

(a) **The Portuguese Regulator's decision of 28 September 2010** concerning the review of the retail market for leased lines and the wholesale markets for the provision of terminating and trunk segments of leased lines in Portugal. ANACOM concluded that retail market should not be regulated whereas wholesale markets (for terminating and trunk segments of leased lines) should be regulated only partially, that is, it designated the PT Group as SMP operator in the market for terminating segments and only on "non-competitive routes" in case of the market for trunk segments[321]. The Regulator concluded that there was no need for *ex-ante* regulation as regards retail market for leased lines, as the wholesale regulation in place was sufficient to remove the previously identified barriers to entry and, consequently, to enforce competition at the retail level. The Regulator took several factors into account when reaching its conclusion, namely the entry of new competitors, the persistent reduction in the

316 Pharol's response to the LoF, paragraphs 138 to 142.
317 Pharol's response to the LoF, paragraph 143.
318 Pharol's response to the LoF, paragraph 146.
319 Pharol's response to the LoF, paragraph 151.
320 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 (Recommendation), OJ L 344, 28.12.2007, p. 65.
321 Document ID 1444. An English version of the document was made available by the Portuguese Regulator here: https://www.anacom.pt/streaming/Determination28september2010_final_decision.pdf?contentId=1061287&field=ATTACHED_FILE

demand for low bandwidth analogue and digital leased lines (where PT's market share was above 80% in terms of volumes and revenues), the migration process from low to higher bandwidth leased lines and the market share gained by the new operators in the market segment;

(b) **PT's reply of 13 January 2012 to the SO**. PT states that there is competition on the market, which can be explained by the growth of infrastructures belonging to alternative operators. PT's share in the market for leased circuits has seen a drop of around 22 p.p. since 2003[322]. Alternative operators could complement the investment in their own infrastructure by accessing PT's wholesale supply[323]. It also admits that one could theoretically conceive the possibility of Telefónica obtaining circuits in the wholesale market to "resell" them in the retail market, even if it believes "that is clearly not a sustainable business model"[324]. Furthermore, PT refers to the Portuguese Regulator's decision of 28 September 2010, providing that wholesale offers for fixed and mobile operators have been used mainly in the development of own network, but also in the resale of rented circuits, even if "only residually"[325]. Finally, PT acknowledges[326] that ZON was present in that market, which means not only that potential competition was not excluded, but also shows that actual competition occurred.

(260) Regarding Pharol's claims on the need to assess the existence of real and concrete possibilities of entry, the Commission refers to Section 3.3.1, where it is stated that the relevant standard for the assessment is the existence of insurmountable barriers to entry. Moreover, in its decision of 28 September 2010, the Portuguese Regulator found no significant and insurmountable barriers to entry and to expansion in the leased lines retail market and, consequently, it did not impose *ex-ante* regulation[327].

(261) Regarding the claims that the time period when the clause was in force was insufficient for Telefónica to deploy its own infrastructure, reach an agreement for wholesale access with another operator or complete the acquisition of another player, the Commission refers to Section 3.3.3 regarding the duration of the infringement. The Commission further notes that Pharol acknowledges in paragraph 146 of the Response to the Letter of Facts that it would be indeed possible to provide retail services through wholesale access to the networks of other operators within the time period when the clause was in force. Pharol's arguments are therefore flawed.

(iii) Conclusion

(262) The Commission concludes that there were no insurmountable barriers to enter the retail leased lines market in Portugal and that an alternative operator could have entered it. The Commission concludes that actual competition was taking place therein. Entry by an alternative operator would have been possible either by deploying infrastructure or by relying on the wholesale regulated offers of PT Group or wholesale offers of other operators. The Commission will therefore include the

322 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 313.
323 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 318.
324 Document ID 753, NC ID 946, paragraph 317.
325 Document ID 753, NC ID 946, paragraph 317 and Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraphs 31 and 32.
326 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 320.
327 Document ID 1444, page 57.

sales corresponding to the retail leased lines market in the value of sales for the purposes of calculating the fines in this Decision.

3.7. Markets related to mobile telephony

(263) In the Telefónica/PT Decision, the Commission found that the non-compete clause also applied to markets relating to mobile telephony and concluded that those markets are directly or indirectly linked to the infringement (Section 5.5.1.4. "Markets relating to mobile telephony" and recital (482)). Therefore, the Commission included those markets in the value of sales for the purpose of calculating the fines (recital (485)). The following sections will discuss "Wholesale markets for mobile telephony" and "Other services for mobile telephony (Mensatel, Trunking and Repairs)".

3.7.1. Wholesale markets in Spain

(264) The Commission analyses whether there were insurmountable barriers to entry on the markets for: "Access and call origination on public mobile telephone networks" (Section 3.7.1.1), "Call termination on individual mobile networks" (Section 3.7.1.2) and "International roaming on public mobile networks" (Section 3.7.1.3) in Spain.

3.7.1.1. Access and call origination on public mobile telephone networks

(i) Telefónica's arguments

(265) Telefónica argues that the provision of those wholesale services requires deployment of a network, which triggers large investments[328]. Moreover, only operators having a spectrum licence for the duration of the clause could compete in the wholesale market (namely Telefónica, Vodafone, Orange and Yoigo). PT did not take part in any tenders for spectrum allocation[329].

(266) In its Response to Annex 1, Telefónica claims that PT had no spectrum and there was no auction during the time duration of the clause[330]. The call for tender was only published in April 2011, that is after the suspension of the non-compete clause. Even without the clause or after its end, Pharol could have submitted bids, however, it did not do so[331]. Telefónica further argues that there was no spectrum in the secondary market, as it was all used by other telecommunication companies and purchasing it there would have been unprecedented[332]. There are also no precedents of alternative operators entering the wholesale market setting up their own network during the period when the clause was in force[333]. Telefónica also claims that entering a market as an MVNO does not allow an operator to become an Mobile Virtual Network Enabler (MVNE)[334]. Moreover, there were no alternative operators on sale which Pharol could have acquired. In any case, according to Telefónica, the *Telefónica* judgment rules out that entry into the market via acquisition of a competitor is a valid option to assess potential competition[335]. Telefónica also dismisses the existence competition at retail level as a criterion to determine whether there is competition at

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328 Telefónica's reply of 13 January 2012 to the SO, Document ID 1055, paragraph 475.

329 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 147 and 148.

330 Response to Annex 1, paragraphs 210 to 214.

331 Response to Annex 1, paragraphs 215 to 220.

332 Response to Annex 1, paragraphs 221 to 229.

333 Response to Annex 1, paragraphs 230 to 237.

334 Response to Annex 1, paragraphs 238 to 239.

335 Response to Annex 1, paragraph 240 to 246.

wholesale level[336]. Finally, the measures imposed by the Spanish Regulator in 2006, mentioned by the Commission in recital (285) concern the retail and not the wholesale market[337].

(267) More specifically, with regard to the auction of spectrum, Telefónica argues that in Spain, Royal Decree 458/2011, announcing the public auction which would release new spectrum, was published only in April 2011, after the non-complete clause stopped being in force. Telefónica therefore maintains that, until that decree was published, there was no spectrum available and there existed "*total uncertainty*" in the market about the auction[338]. Once the decree was published, the clause was no longer in force and nothing prevented the Parties from competing in the auction. Telefónica consequently considers that, in that context, the absence of spectrum would amount to an insurmountable barrier to entry.

(ii) Commissions's assessment

Spectrum auctions

(268) Spectrum is a scarce resource of radio frequencies which is allocated (usually by the competent National Regulatory Authority) to and could be used for transmitting signals and thus provision of, among other things, telecommunication services over the airwaves. That transmission could be only one way as in case of for example terrestrial television broadcasting or it could go in both directions as, for example, in mobile telephony.

(269) Firstly, the Commission is of the view that alternative operators could enter the wholesale market by building their own mobile network. As shown in the Spanish Regulator's Annual Report of 2010, mobile operators have made major investments to deploy their 3G networks, which resulted in an increase in the population covered by this technology to 95% of the population[339]. PT or any other operator could apply for the spectrum assignment in the framework of the spectrum allocation procedure and enter the market as MNOs during the period of application of the non-compete clause, as Telefónica's competitors, such as Vodafone, Orange and Yoigo did beforehand. Spectrum assignment in fact took place in Spain in June-July 2011, that is, after the period of application of the non-compete clause. Before that, in 2010, provisions aiming at extending or regulating spectrum trading were introduced in Spain (regarding the main frequency bands for mobile services)[340]. Preparatory work and consultation procedures had been carried out throughout 2010[341], including during the period of application of the clause. The fact that PT did not participate in the tender process does not mean that potential competition was absent.

(270) The following evidence demonstrates that several operators held spectrum and therefore provided wholesale offers for access and call origination on public mobile telephone networks:

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336 Response to Annex 1, paragraphs 247 to 251.

337 Response to Annex 1, paragraphs 252 to 257.

338 Response to Annex 1, paragraph 217.

339 Document ID 1579, pages 11 and 42 to 44.

340 Digital Agenda Scoreboard 2011, Pillar 1 regulatory developments, Document ID 1418, page 15.

341 The Spain 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012, Document ID 1417, Section 5.1. Mobile services.

(a) **The Spanish Regulator's Annual Report for 2010**, which shows that the wholesale services traffic grew by 12.2%, which was mainly due to increased traffic recorded in the use of mobile network access service by third party operators, mainly MVNOs. The recently entered operators, Yoigo and the MVNOs increased their market share in revenues[342];

(b) The Spain 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012:

- The report gives an overview of the spectrum tender process for the 800 MHz, 900 MHz, 1800 MHz and 2.6 GHz bands (310 MHz in total). The spectrum was assigned through a combination of auction and comparative selection procedures open to all operators with the condition of being registered and applying the principle of technological neutrality. 11 operators were initially registered to participate in the auction[343];

  The report also shows that in 2011, there were 26 mobile operators in the Spanish market (4 MNOs and 22 MVNOs actually providing services out of which 11 operators were holding spectrum eligible for the provision of mobile services). As a result of spectrum tenders which have taken place in 2011, there has been an increase in the number of operators in the Spanish mobile market[344];

(c) The European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that in France, Spain, and Belgium, MVNOs and new entrants have entered the mobile market in 2011 based on newly obtained licenses or prepared for mobile market entry foreseen in 2012[345].

(271) The Commission further recalls that the clause signed between Telefónica and PT was a non-compete clause, which constituted a market-sharing agreement and prevented the Parties from even taking preliminary steps for entering a market. It therefore precluded the Parties from taking the necessary steps for submitting bids in an auction or tender for spectrum, namely engaging with the competent authorities concerning the possible participation to the auction or starting internally or with other external players the acquisition of rights of use for the frequencies in question and subsequent provision of services, preliminary talks with vendors and suppliers, etc.

(272) Secondly, contrary to what Telefónica claims, there was no "*total uncertainty*" in the market about the auction, which would be formally published on 1 April 2011. It was long anticipated that the Ministry of Industry would call an auction of a significant amount of spectrum in 2011 and the press had reported about it[346]. That auction would include the following spectrum bandwidths, which are suitable to provide

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342 Document ID 1579, pages 101 and 106.

343 Document ID 1417, Section 6 - Spectrum management.

344 Document ID 1417, Section 5.1. Mobile services.

345 Document ID 1412, pages 22 and 23.

346 The press reported about the plans of the Ministry to conduct such an auction. See for instance the newspaper Expansion of 25 of January 2010, Document ID 1721, available here: https://www.expansion.com/2010/01/25/empresas/telecomunicaciones/1264457666 html

mobile telephony services: 800 MHz (auction as part of so-called "digital dividend"), 900 MHz, 1 800 MHz and 2.6 GHz.

(273) As indicated in the Spanish Regulator's Annual Report of 2010, the transition to Digital Terrestrial Television (DTTV) permitted the deregulation of a significant amount of spectrum, which was previously used by television stations for analogue broadcasting. Spectrum became therefore available for other uses[347]. In that regard, the Commission observes that on 26 March 2010, that is, several months before the entry into force of the clause, Spain had adopted Royal Decree 365/2010, which foresaw that the bandwidth of 800 MHz would be released in order to be allocated for telecom services by the end of 2014 at the latest, in line with the harmonised uses to be agreed at Union level. The Spanish Ministry relied on the technical details published in Royal Decree 365/2010 to subsequently formalise the auction details of that bandwidth with the adoption of Royal Decree 458/2011[348].

(274) In 2010, the Spanish Ministry of Industry published and submitted to consultation a plan with the next steps for the public auction. The bandwidths expected to be auctioned and the dates for that auction were announced in that plan[349].

(275) That plan materialised in December 2010, during the time that the clause was in force, when the Spanish Ministry published the draft of a Royal Decree which four months later would become Royal Decree 458/2011. The draft of Royal Decree 458/2011 included the bandwidth, the specific blocks to be auctioned, the general criteria to be followed in the auctions and the limits in the use of spectrum. That draft was consulted with the telecoms industry and included a time schedule for approval in the first quarter of 2011. It also foresaw that the auction would be taking place in the second half of 2011[350].

(276) Consequently, during the time when the clause was in force, there existed enough information available to know that a new spectrum auction was imminent, the bandwidth which would be made available and the commercial details of that auction. As the Commission has explained in Section 3.3.3, the clause prevented Pharol from preparing for that imminent auction and obtaining spectrum. As an example, in that period Pharol could have taken any appropriate preparatory steps (for example for obtaining the relevant administrative licences), could have enganged with the authorities in the framework of the auction design, could have engaged in internal studies or preparatory discussions or checked any corporate conflicts ahead of the imminent auction. In other words, it could have "*engaged*" into competing on this market well before the auction took place. However, as mentioned in Section 3.3.2, "*engaging*" was prevented by the non-compete clause.

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347 Document ID 1579, page 112.

348 It was Article 6 of Royal Decree 458/2011 where the Spanish ministry called for the auction just three months after its entry into force.

349 Consulta pública sobre actuaciones en material de espectro radioeléctrico: refarming en bandas 900 mhz y 1.800 MHz, dividendo digital y banda 2,6 GHz, Document ID 1722, available under: https://avancedigital mineco.gob.es/es-ES/Participacion/Documents/Espectro/consulta_espectro.pdf, mentioned by Telefónica in paragraph 220 of its Response to Annex I.

350 Press release by the Spanish ministry of Industry of 30 December 2010, Document ID 1730. Available here: https://www mincotur.gob.es/es-es/gabineteprensa/notasprensa/documents/npcatsi301210.pdf

(277) The Commission further recalls that the non-compete clause expressly referred to any project in the telecommunication business, including among others, mobile services[351].

(278) Thirdly, the Commission considers that, even in the absence of spectrum licences obtained through the spectrum procedure, alternative operators could apply for a transfer or lease of individual rights to use radio frequencies and enter the market as MNOs. Indeed, Article 9b of Directive 2002/21/EC[352], allows operators to transfer and lease spectrum. As a result, new entrants who want to provide wholesale or retail services can enter the market not only when there is a chance to get spectrum rights from public authorities but also at any moment through market transactions.

(279) Contrary to what Telefónica argues in paragraphs 230 to 237 of the Response to Annex 1, there have been transfers of bandwidth for use in mobile telephony in Spain, the UK[353] and in other Member States, for example in Austria[354], France[355], Slovakia[356], etc[357]. Even if limited to a specific geographic area, the Parties could have acquired bandwidth in the secondary market[358]. That could be viable strategy, for example when using a mix of own infrastructure in some part of the country ("home" region) and national roaming/(full) MVNO agreement for the rest of the country. Similar considerations of viability of limited geographical scope of the alternative operator's coverage would be valid even more so for example for fixed wireless access services.

(280) Fourthly, the Commission observes that, while spectrum might facilitate entry into this market, it is not essential to operate in it. For instance, PT could enter the market as MVNE, that is, a company which provides network infrastructure and related services, such as business support systems, administration and operations support systems to MVNOs. In this way, MVNEs could have competed at wholesale level with MNOs for the provision of access and call origination services.

(281) In paragraphs 238 and 239 of its Response to Annex 1, Telefónica seems to misconstrue the Commission's argument in paragraph 61 of Annex 1 to the Letter of Facts, alleging that entering a market as an MVNO does not allow an operator to become a MVNE. Contrary to Telefónica's argument, paragraph 61 of Annex 1 to

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351 The clause refers to *inter alia* to "*any project in the telecommunication business (including fixed and mobile services)*".

352 Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

353 Spectrum Information Portal, Document ID 1731, available here: https://www.ofcom.org.uk/spectrum/information/spectrum-information-system-sis/spectrum-information-portal

354 Frequenzhandel, Document ID 1732, available here: https://www.rtr.at/TKP/was_wir_tun/telekommunikation/spectrum/trade/FRQ_trading.de html

355 Boucle locale radio, Etat del lieux et perspectives d'utilisation et de développement: Consultation publique 23 mai – 23 juin 2011, Document ID 1710, available here: https://www.arcep.fr/uploads/tx_gspublication/consultation_blr_23mai2011.pdf

356 Uskutočnené prevody, Document ID 1711, available here: https://www.teleoff.gov.sk/uskutocnene-prevody/

357 For more examples and references, see Design of the European mobile network operator for research (EuWireless): Deliverable D1.2 Analysis of Regulations in Europe, Document ID 1713, pages 58-72, available here: https://euwireless.eu/wp-content/uploads/2019/01/EuWireless_D1.2.pdf

358 The Spanish Registry of Public Concessions contains evidence of such transferences for 2.6 GHz and 3.4 and 3.8 GHz. Available here: https://sedeaplicaciones minetur.gob.es/RPC_Consulta/FrmConsulta.aspx

the Letter of Facts does not refer to MVNOs, but to MNOs. The Letter of Facts does not state that an MVNO could provide access and call origination services, but only refers to this possibility for an MVNE (paragraph 64).

(282) The Commission further observes that entry as an MVNE was not purely theoretical. There were several examples such as Euskaltel and IOS in Spain providing those services[359] and MVNEs in other Member States as well[360].

(283) Lastly, contrary to what Telefónica maintains in paragraphs 240 to 246 of its Response to Annex 1, the Commission considers that PT could have acquired another telecom operator, through acquiring or controlling shares or at least "*engaging or investing*" into that operation during the period of application of the non-compete clause. For instance, in 2013 Orange (the third mobile operator in Spain after Movistar and Vodafone) bought 100% of Simyo, a full MVNO present in the Spanish market since 2008 with a market share of 1%. It took 1½ months for the Spanish Competition Authority to clear the transaction[361]. That means that alternative operators could have gained access to infrastructure even within a short period of time.

Relevance of retail for this market

(284) The Commission observes that Telefónica does not argue that PT could not compete on retail mobile markets. During the period of application of the non-compete clause, there were indeed several operators providing retail mobile services in Spain. Operators reach their retail customers on the basis of wholesale infrastructure (mobile telephone networks), either based on own mobile infrastructure (MNOs) or wholesale agreements (MVNOs). The presence of competition at retail level therefore implies that there is potential competition at wholesale level, too. The Commission considers therefore that there are no insurmountable barriers to entry at wholesale level. The following evidence demonstrates competition at retail level:

(a) The Spanish Regulator's Annual Report for 2010, which shows the following:

- against a background of growing competition, mobile telephone prices have decreased by 6.6% in 2010. As well as competition, one of the factors that prompted reductions in retail prices were the cuts in wholesale termination prices. The Spanish Regulator introduced a new glide path in 2009[362];
- mobile broadband became the fastest growing segment, with a revenue growth of 31%. Service bundling continued to grow[363];
- the most obvious sign of fierce competition among mobile operators was the high level of portability during 2010. The operators that gained the

359 Decision of CNMC, Market 15 – Market for access and call origination on public mobile telephone networks in Spain, Document ID 1714, page 71. Available here: https://www.cnmc.es/sites/default/files/1601180_46.pdf

360 E.g. Transatel in France, Belgium and the UK, Document ID 1717, available here: https://www.commsupdate.com/articles/2010/01/20/transatel-signs-mvne-deal-with-orange-switzerland/

361 The notification took place on 28 December 2012 and the transaction was approved on 13 February 2013, Documents ID 1591 and 1592.

362 Document ID 1579, pages 11 and 13.

363 Document ID 1579, pages 12 and 80.

most were Yoigo and the MVNOs, which, mainly due to portability, raised their market share by 3.1 p.p., to 8.7%[364];

- in 2010, the three main operators' (Movistar, Vodafone and Orange) market share of number of lines fell accordingly as other operators (Yoigo and MVNOs) increased their share[365];
- in 2010, the number of MVNOs increased – for instance, Orbitel, Lycamobile and fonYou started their commercial activity. Within the wholesale market, the mobile network access service for third party operators, mainly MVNOs, experienced a 15.3% increase in billing[366];

(b) Spain country profile in "ICT Country Profiles", Commission staff working document vol.2 of 17 May 2010, part of the Europe's Digital Competitiveness Report. The country profile shows that the take-up[367] of 3G internet on mobile phones was the 5th highest in the Union in 2010[368];

(c) **Electronic Communication Market indicators - Digital Agenda Scoreboard 2011, European Commission**. The Scoreboard shows that in September 2009, the market share of Telefónica on retail mobile market was 44%, the remaining 56% belonging to alternative operators[369];

(d) **The Broadband Coverage in Europe, Final Report, 2011 Survey, Data as of 31 December 2010, European Commission**. The Survey demonstrates that the most significant increase for broadband in Spain came from mobile broadband subscribers which grew by 71.2% – due mainly to users' changing consumption habits[370];

(e) Spain 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that:

- as of October 2011, Telefónica's market share on the retail market for mobile services was 42%, with its main competitor reaching 28% and other competitors reaching 31%. The overall market share of Telefónica's competitors has continued to grow in the mobile sector (from 56% to 59%)[371];
- the mobile penetration rate[372] in Spain as of October 2011 has continued to grow reaching 126%, from a penetration of 119% in October 2010 and significantly approaching the Union average of 127%[373].

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364 Document ID 1579, pages 13 and 84 to 86.

365 Document ID 1579, page 100.

366 Document ID 1579, pages 102 and 108.

367 Take-up refers to the number of fixed or mobile broadband subscriptions in relative terms (per number of households in the case of fixed markets and per number of inhabitants in the case of mobile markets) and is considered as a competition indicator.

368 Document ID 1407, page 186.

369 Figure 10: Mobile subscribers: operator market shares, October 2010, Document ID 1409, page 10.

370 Document ID 1414, page 242.

371 Document ID 1417, Section 5.1. Mobile services.

372 The penetration rate refers to the ratio between the number of subscribers and the total population for a particular location and is considered as a competition indicator.

373 Document ID 1417, Section 5. Voice and other telecommunications services.

(285) In addition, Spain was actually one of the few countries where, due to competitive problems with MVNO access, the Regulator imposed regulatory obligations in the market for access and call origination on the public mobile telephone networks in 2006, thus forcing local mobile operators to open their networks. In that respect access to Spanish network, covered by regulation, was even easier than in other Union markets[374]. Contrary to what Telefónica states in paragraphs 252 to 256 of its Response to Annex 1, such facilitation of retail market entry could also lead to broadening the scope of services provided by MVNOs, including becoming MVNEs (such as Euskaltel and IOS in Spain)[375] and/or, in line with the ladder of investment principle, becoming full MVNO with own core network, SIM cards and providing wholesale mobile termination services.

(286) With regard to Telefónica's arguments in paragraphs 230 to 237 of its Response to Annex 1, regarding the absence of precedents of alternative operators entering the wholesale market and setting up their own network during the period when the clause was in force, the Commission refers to Section 3.3.3 in this Decision, on the relevant period of the clause.

(iii) Conclusion

(287) The Commission considers that there were no insurmountable barriers to entry into the market for access and call origination services on public mobile telephone networks which would rule out any potential competition during the period of application of the non-compete clause.

(288) The Commission finds that an alternative operator could have taken the necessary steps to participate in the imminent spectrum auction that took place in Spain in 2011. The Commission also considers that an alternative operator could have acquired spectrum in the secondary market. Finally, the Commission finds that, in absence of spectrum, an alternative operator could have entered the market as a MVNE. Accordingly, an alternative operator as PT (or, subsequently, Pharol) could have entered the Spanish wholesale market of access and call origination on public mobile telephone networks. Therefore, the Commission will include sales corresponding to those markets into the calculation of the total value of sales.

3.7.1.2. Call termination on individual mobile networks

(i) Telefónica's arguments

(289) Telefónica argues that there is no competition possible on this market, as it is impossible that PT could compete with Telefónica in the provision of wholesale call termination services to Telefónica's customers, on Telefónica's mobile network. Telefónica also refers to the Spanish Regulator's decision MTZ 2011/2503 and to the Commission's merger practice (see Section 3.5.1.1) concluding that the provision of wholesale call termination services on the individual network operator constitutes a separate market[376].

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374 Document ID 1477.

375 Decision of CNMC, Market 15 – Market for access and call origination on public mobile telephone networks in Spain, Document ID 1714, page 71. Available here: https://www.cnmc.es/sites/default/files/1601180_46.pdf

376 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 141 to 145.

(290) In its Response to Annex 1 to the Letter of Facts, Telefónica argues that competition at retail level does not lead to competition at wholesale level. To provide call termination on individual mobile networks services, either an own network with spectrum is needed, or otherwise the player shall become a full MVNO[377]. Telefónica claims that it is impossible to become an MVNO within the short time period when the clause was in force[378]. Telefónica further submits that the TRR was not foreseen to foster competition at wholesale level[379]. Moreover, it adds that the Spanish Regulator established that there were absolute barriers to enter this market and that the measures adopted in 2009 and 2011 did not foster the market entry of other players[380].

(ii) Commission's assessment

(291) Firstly, it is correct that the Commission held in those merger decisions that the provision on wholesale call termination services on the individual network of each operator constitutes a separate market, as there is no substitutability between the individual networks of each operator for the termination of a call. That is the case since the network operator transmitting the incoming call can reach the recipient only through the recipient's respective other network operator.

(292) However, even if there is no competition possible on Telefónica's own network, the Commission considers that competition at wholesale and retail level is not excluded, as alternative operators could have increased their consumer base and provided call termination services on their own network in Spain. Therefore, alternative operators could have competed with Telefónica for its customers and consequently for termination of their calls.

(293) The Commission takes the view that competition on the retail market for mobile services (which, as shown in Section 3.7.3, does exist) implies that alternative operators compete to provide wholesale termination services to customers.

(294) Moreover, even in the absence of spectrum, some mobile virtual network operators (full MVNOs) were also able to provide wholesale termination services[381]. There were 22 MVNOs present on the market during the period of application of the non-compete clause[382] (see recital (270)). Amongst those 22 MVNOs, 11 were full MVNOs[383]. As the Commission has explained above[384] - and Telefónica omits in its Response to Annex 1 - the existence of 11 full MVNOs is general evidence of the existence of actual competition on this market as those full MVNOs were providing wholesale termination services to other operators.

(295) As also emphasised in the Spanish Regulator's Annual Report for 2010, the higher the percentage of the total number of retail lines owned by an operator in its own network, the greater the likelihood of receiving calls from the other networks established in the market. Yoigo and the MVNOs were the operators that achieved

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377 Response to Annex 1, paragraphs 262 to 264.

378 Response to Annex 1, paragraph 266.

379 Response to Annex 1, paragraphs 269 to 277.

380 Response to Annex 1, paragraph 273 with reference to Decision of 10 May 2012.

381 E.g. full MVNOs are subject to *ex ante* regulation of mobile termination rates in Spain as they are able to provide those services on their own.

382 Telecommunication Market and Regulatory Developments (Spain), 2011, Document ID 1417, Section 5.1. Mobile services.

383 Document ID 1579, page 109.

384 See recital (285).

the biggest increase in customer portfolios in the retail market and, therefore, saw an increase in their market share of the termination service. Full MVNOs, which manage termination services, obtained 1.8% of the total[385].

(296) Secondly, market entry can be facilitated by higher, asymmetric termination rates which alternative operators are allowed to charge[386]. The TRR[387] provides that NRAs may allow new entrants to charge higher regulated termination rates than established operators if certain conditions are met and to build their market positions on this basis[388]. That possibility shows that termination markets could play a key role for new entrants, prompting them to compete at wholesale and retail level. It was therefore in the interest of operators of terminating calls to increase their customers' base to benefit from as many as possible incoming calls.

(297) As regards the situation on the Spanish market, the Commission supports its conclusions with the **Spanish Regulator's decisions of 18 December 2008 and 29 July 2009**. Those decisions show that the Spanish Regulator prescribed mobile termination rates which were 5 to 7 times higher than a strictly cost oriented level that alternative operators could charge, as prescribed by the TRR[389]. For instance, on the basis of the Spanish Regulator's decision of 29 July 2009 (AEM 2009/967), Xferia charged asymmetric termination rates, as this operator had not reached the minimum efficient scale and therefore had high incremental costs per-unit. Contrary to Telefónica's view that the TRR was not foreseen to foster competition at wholesale level, the Spanish Regulator assesses the aim of the glide-path and confirms that it seeks to orientate termination rates according to costs and to impose reasonable prices in a stepwise manner in order to avoid a disproportional shock for alternative operators, thereby allowing effective competition[390].

(iii) Conclusion

(298) The Commission finds that there were no insurmountable barriers to enter the market of call termination on individual mobile networks. The Commission finds that an alternative operator could have provided call termination services on individual mobile networks, insofar as it could have entered the retail mobile market. A full MVNO could have competed without requiring spectrum in that latter market. The Commission will include the value of sales of these services into the fine calculation.

3.7.1.3. International roaming on public mobile networks

(i) Telefónica's arguments

(299) Telefónica argues that given that it had no radio spectrum, PT was not able to enter the wholesale segment for roaming services during the period the non-compete

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385 Document ID 1579, pages 106 and 107.

386 Document ID 1431.

387 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009.

388 Point 10 of Termination Rates Recommendation: "*In case it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs than the modelled operator, after having determined that there are impediments on the retail market to market entry and expansion, the NRAs may allow these higher costs to be recouped during a transitional period via regulated termination rates. Any such period should not exceed four years after market entry.*"

389 Document ID 1430 and Document ID 1431.

390 Document ID 1431, page 6.

clause was in force[391]. Similarly, in its Response to Annex 1, Telefónica submits that the lack of spectrum made entry into this market impossible.

(ii) Commission's assessment

(300) Mobile operators (including PT) could enter the market (for example by buying or leasing spectrum from other operators) and had the possibility to compete for the provision of international roaming services within the frames (that is, up to maximum price levels) prescribed by the 2007 "Eurotariff" rules[392]. Those Union rules addressed overcharging in roaming prices and capped maximum prices for phone calls made and received while abroad. The rules have since been periodically reviewed and reformed, with further reductions in price caps and automatic protections against data roaming bill shocks.

(301) The Commission therefore takes the view that there were no insurmountable barriers to entry on that market.

(302) As the spectrum needed for this specific market is the same as for other markets, the Commission refers to Section 3.7.1.1, which addresses the specific arguments on spectrum.

(303) With regard to the argument of Telefónica in paragraph 281 of its Response to Annex 1 that in order to be able to provide roaming services, an operator would also need agreements with the international operators to which it would provide those services, the Commission notes that, in case of Pharol, the incumbent company in Portugal, were to enter the Spanish market, it could have relied on the interconnection agreements that its parent company had signed with other operators in the Union or in case of a full MVNO entry, PT could rely on such agreements for wholesale roaming services for its customers abroad[393]. As the CMT established in its Annual Report 2010, "*each operator's international roaming traffic is closely linked to the size of the international group to which it belongs and to this group's policy of alliances and interconnection agreements with other groups. National operators with a strong presence in Europe have very large volumes of intra-group roaming traffic*"[394]. Moreover, the Annual Report of the Spanish Regulator evidences that there were several companies active in the market[395].

(iii) Conclusion

(304) The Commission concludes that there were no insurmountable barriers to enter the market and that a potential competitor could have entered it. This was possible as that operator could have acquired spectrum. Moreover, the possibility to provide

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391 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 150.

392 Regulation 717/2007 of the European Parliament and the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, as amended by Regulation 544/2009.

393 BEREC mentions that "*it is reported that it is technically possible for full MVNOs to resell minutes on their host MNO's network to other full MVNOs, where the minutes are tied to the IMSI range of the MVNO reselling the minutes.*", International Mobile Roaming Regulation, BEREC Report of December 2010, Document ID 1734, pages 34-35. Available here:https://berec.europa.eu/doc/berec/bor_10_58.pdf

394 Document ID 1579, page 107: "*El tráfico de itinerancia internacional de cada operador está muy vinculado a la dimensión del grupo internacional del que forma parte, así como a su política de alianzas y acuerdos de interconexión con otros grupos. Los operadores nacionales con fuerte presencia en Europa tienen unos volúmenes de tráfico de roaming intra-grupo muy importantes*".

395 See market shares in page 108 of the 2010 Annual Report of the CMT, Document ID 1579.

roaming services was even clearer in the case of a company such as Pharol, which could have relied on the interconnection agreements that its parent company had with other operators. The Commission will therefore include the sales corresponding to those services in the value of sales for the purposes of calculating the fines in this Decision.

3.7.2. Wholesale markets in Portugal

(i) PT/Pharol's arguments

(305) PT (and, subsequently, Pharol) considers that there are legal and regulatory barriers to entry in the mobile retail market. In addition, entering as an MNO would require a significant level of investment in its own infrastructure. Therefore, according to PT, those aspects have an impact in the associated wholesale markets and it appears nonsensical that Telefónica would enter the mobile telephony wholesale markets without a retail option. Since that would always require having its own network, as only operators that possess a mobile network provide access and call origination and termination services, it would make no sense to even consider an intervention of any operator in the wholesale market[396].

(306) In its reply to the SO, PT submitted that even when Telefónica had the opportunity to enter the market as an MNO, it decided not to do so, although the auction regulation was developed with the objective of promoting the entry of new operators to the Portuguese mobile market[397]. This means, in PT's view, that Telefónica had no interest in entering this market or that the Portuguese mobile market does not attract investment[398].

(307) In its response to the request for information of 21 June 2018, Pharol argued that the three MNOs (TMN, Vodafone and Optimus/Sonaecom) held about 83% of the market, and therefore it was not an attractive market for a new competitor. In addition, between 27 September 2010 and 4 February 2011 no allocations of radio spectrum were made and therefore any undertaking wishing to enter the Portuguese mobile market as an MNO could not have done so as it would not have had access to any spectrum[399].

(ii) Commission's assessment

(308) The Commission analyses whether potential competition was absent on the markets for: "Access and call origination on public mobile telephone networks" (Section 3.7.2.1), and "Call termination on individual mobile networks" (Section 3.7.2.2).

3.7.2.1. Access and call origination on public mobile telephone networks in Portugal

(i) PT/Pharol's arguments

(309) In its Response to the Letter of Facts, Pharol claims, firstly, that Telefónica did not have spectrum and could not have purchased it during the time that the clause was in force, as there was not an auction for its assignment. Such spectrum auction took place in November 2011. Pharol further claims that the relevant documents in anticipation of the call of auction were only published after the clause stopped being

396 Document ID 753, NC ID 946, paragraphs 351 to 353 and Pharol's reply of 7 September 2018 the to request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 55.

397 Document ID 753, NC ID 946, paragraphs 336 to 341.

398 Document ID 753, NC ID 946, paragraph 336.

399 Document ID 1368, NC ID 1371, paragraphs 44 and 45.

in force[400]. Secondly, Pharol argues that the national law transposing Directive 2009/140/EC of the European Parliament and of the Council[401] was only adopted on 13 September 2011, that is, after the clause stopped being in force. Therefore, an alternative operator could not have obtained spectrum in the secondary market[402]. Thirdly, Pharol argues that no alternative operator entered the country as an MVNE and that in Portugal, there were no mature MVNOs[403]. Finally, Pharol submits that Telefónica would not have been able to complete the acquisition of an alternative operator within the four months when the clause was applicable[404].

(ii) Commission's assessment

(310) The Commission takes the view that alternative operators could enter the wholesale access and call origination market by building their own mobile network. Telefónica or any other operator could apply for the spectrum assignment in the framework of the spectrum allocation procedure and enter the market as MNOs during the period of application of the non-compete clause. Indeed, spectrum assignment took place in Portugal in November 2011, that is, after the period of application of the non-compete clause. The fact that Telefónica did not participate in the tender process does not mean that potential competition was absent. The clause prevented any "*engaging or investing*" in the telecommunication business during the period of application of the non-compete clause, which means that it prevented or delayed any possible preparatory steps which may be necessary for entry to happen, such as, for instance, preparing the company's participation to spectrum auctions, which could have taken place during the period of application of the non-compete clause.

(311) In any case, the Commission considers that, even in the absence of spectrum licences obtained through the spectrum procedure, alternative operators could apply for a transfer or lease of individual rights to use radio frequencies and enter the market as MNOs. Indeed, Article 9b of Directive 2002/21/EC[405], allows operators to transfer and lease spectrum. As a result, new entrants who want to provide wholesale or retail services can enter the market not only when there is a chance to get spectrum rights from public authorities but also at any moment through market transactions.

(312) In addition, Telefónica could enter the market as an MVNE, that is, a company that provides network infrastructure and related services (wholesale only operators), such as business support systems, administration and operations support systems to MVNOs. In that respect, MVNEs can compete at wholesale level with MNOs for the provision of access and call origination services.

(313) Lastly, acquisition of another telecom operator, through acquiring or controlling shares or at least "*engaging or investing*" into that operation during the period of application of the non-compete clause is not excluded either. For instance, Altice

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400 Pharol's response to the LoF, paragraphs 162 to 174.

401 Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 337, 18.12.2009, p. 37).

402 Pharol's response to the LoF, paragraphs 175 to 178.

403 Pharol's response to the LoF, paragraphs 179 to 182.

404 Pharol's response to the LoF, paragraphs 183 to 185.

405 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).

bought 100% of Winreason, that holds OniTelecom, an MVNO present in the Portuguese market with a market share of 1%. It took 2 months for the Portuguese Competition Authority to clear the transaction[406]. In another case – the acquisition by Kento, Unitel and Sonaecom of 100% of ZON and Optimus (respectively, 3rd and 4th largest mobile operators in Portugal after PT (MEO) and Vodafone), together representing a market share up to 20%, took 6 months for the Portuguese Competition Authority to clear, which means that alternative operators could have gained access to infrastructure within a relatively short period of time[407].

(314) Therefore, the Commission considers that PT (and, subsequently, Pharol) has not demonstrated that there were insurmountable barriers to entry to wholesale mobile call origination markets that would rule out any potential competition during the period of application of the non-compete clause. The Commission supports its conclusions also by the following evidence:

(a) **Pharol's reply of 7 September 2018 to the request for information of 21 June 2018**. The reply shows that there were three MNOs in Portugal during the period of application of the non-compete clause (TMN, Vodafone and Optimus/Sonaecom)[408], which shows that alternative operators did invest in their networks and therefore potential competition on this market was not excluded. It also shows that in 2011, a public consultation was launched on the allocation of rights to use the frequencies in the following bands: 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1GHz and 2.6 GHz. The existing MNOs submitted bids[409];

(b) The Portugal 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report states that the Portuguese Regulator carried out a multiband spectrum auction of the 450 MHz, 800 MHz, 900 MHz, 1800 MHz, 2.1 GHz and 2.6 GHz frequency bands in November 2011. There were three winning bidders: Optimus, TMN and Vodafone; no new market entry took place. According to the auction regulation, the holders of at least 2×10 in 800 MHz or at least 2×10 MHz in 900 MHz band (including previous spectrum holdings in the 900 MHz band) were subject to an obligation to allow access to their networks on non-discriminatory grounds in each of those bands. Those three winning bidders had to negotiate and give access to MVNOs upon request. They were also obliged to negotiate national roaming agreements in order to provide national roaming to third parties under certain conditions[410].

(315) As shown in Section 3.7.5, there were several operators (MNOs and MVNOs) providing retail mobile services in Portugal during the period of application of the non-compete clause. However, operators reach their retail customers on the basis of wholesale infrastructure (mobile telephone networks), which implies that there is potential competition at wholesale level, too. The Commission considers therefore

406 Document ID 1590.
407 Document ID 1589.
408 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 44.
409 Document ID 1368, NC ID 1371, paragraph 46.
410 European Commission, Telecommunication Market and Regulatory Developments in 2011 (Portugal), Document ID 1420, Section 1. Main Market & Regulatory Developments and Section 6. Spectrum management.

that competition at retail level indicates that there are no insurmountable barriers to entry at wholesale level.

(316) Pharol's arguments regarding information about the upcoming call for spectrum are flawed. In paragraph 169 of the Response to the Letter of Facts, Pharol argues that the key document about the upcoming tender was only published on 17 March 2011[411]. The Commission notes, however, that the referred document makes clear the existence of several separate previous decisions whereby the Portuguese Regulator had released each of those bandwidths (namely 450 MHz, 800 MHz, 900 MHz and 1800 MHz and 2.1 GHz and 2.6 GHz) to be used for mobile telecommunication services. There was therefore enough certainty in the market about an upcoming spectrum tender.

(317) Moreover, the document mentioned by Pharol also contains a reference to the National Frequency Allocation Plan that ANACOM published in March 2010 (NFAP 2009/2010)[412]. In that document, the Portuguese Regulator specified the available bandwidths and clarified that it sets out the frequency bands reserved and to be made available in 2010, for the operation of electronic communications networks and services that are publicly available and non-publicly available.

(318) In addition, it was long anticipated that some of those bandwidths would be made available for the provision of electronic communication services[413]. For instance, with regard to the 800 MHz bandwidth, the Commission adopted on 6 May 2010 Decision 2010/267/EU, to harmonise the technical conditions for its availability and efficient use for terrestrial systems capable of providing electronic communications services in the EU[414]. Following the specifications of decision 2010/267/EU, on 28 September 2010, ANACOM approved its draft decision on the designation and availability of the 800 MHz sub-band for the provision of electronic communication services[415]. At that point in time, the clause between Telefónica and Pharol had just entered into force.

(319) The Commission accepts Pharol's argument about Directive 2009/140/EC. However, the Commission also notes that in paragraphs 177 to 178 of its Response to the Letter of Facts, Pharol acknowledges that at the time of the infringement, there was a specific procedure in the Portuguese law whereby this transfer was possible. Accordingly, such purchases on the secondary market were legally allowed.

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411 Pharol refers to the Document *Projecto de decisão sobre a limitação do número de direitos de utilização de frequências nas faixas dos 450, 800, 900, 1800, 2,1 e 2,6 GHz e definição do respectivo prodecimiento de atribuição* – Document ID 1724, available under the link https://anacom.pt/render.jsp?contentId=1076543

412 Quadro Nacional de Atribuição de Frequências (QNAF 2009/2010), Document ID 1725. The document is available here: https://www.anacom.pt/render.jsp?contentId=1019286&languageId=0

413 For example, EU Member States on course for analogue terrestrial TV switch-off, Document ID 1726. Available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_09_266, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Transforming the digital dividend into social benefits and economic growth (COM(2009) 586 final), Document ID 1727.
Available here: https://ec.europa.eu/transparency/regdoc/rep/1/2009/EN/1-2009-586-EN-F1-1.Pdf

414 Commission Decision 2010/267/EU on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union (OJ L 117, 11.5.2010, p. 95).

415 Designation of 790-862 MHz sub-band for the provision of electronic communication services, Document ID 1728, available on: https://www.anacom.pt/render.jsp?contentId=1053872

(320) Pharol's argument about the fact that no alternative operator entered the country as an MVNE and that there were no mature MVNOs in Portugal is irrelevant. As a preliminary point, the Commission notes than an MVNE does not require spectrum to operate in this market and, as explained in recital (280), its activities can consist in providing infrastructure and related services (wholesale only operators), such as business support systems, administration and operations support systems to MVNOs. In that way, an MVNE could have competed at wholesale level with MNOs for the provision of access and call origination services. The fact that the number of MVNOs was limited in Portugal does not mean that an MVNE would not find attractive to enter the market. As a matter of fact, presence of an MVNE can facilitate the entry of MVNOs, particularly of smaller ones that would have to face high entry costs. The incentives of entry for an MVNE can be even greater in a market as Portugal, with limited players at the time of the infringement. Accordingly, entry into this market was possible, even in the absence of spectrum.

(321) Finally, with regard to Pharol's argument about the inability of Telefónica to complete an acquisition within the period of application of the clause, the Commission refers to Section 3.4.2 above, with the relevant arguments on the relevant period. It is therefore irrelevant whether Telefónica could have completed an acquisition within that period. The fact is that the clause prevented Telefónica even from engaging into an acquisition. The Commission further notes that Telefónica had a minority stake in ZON Mobile, which could have been increased to obtain control over the operator. However, the clause also prevented that from happening.

(iii) Conclusion

(322) In light of the above, the Commission concludes that there were no insurmountable barriers and that alternative operators could have entered the market for access and call origination services on public mobile telephone networks. The Commission will include sales corresponding to those markets in the value of sales for the purposes of calculating the fines in this Decision.

3.7.2.2. Call termination on individual mobile networks

(i) PT/Pharol's arguments

(323) In its Response to the Letter of Facts, Pharol stresses that being active in this market presupposes the existence and control of a mobile network and that the legal and regulatory barriers existing in the market prevented this from happening[416]. Pharol further claims that each operator has a monopoly over its own network. There is no technological solution that would prevent this and, therefore, the only alternative would be investing in an operator's own network[417]. Pharol further claims that the existence of the TRR and the gradual reduction in the maximum prices charged for the voice call termination on mobile networks does not relate in any way to the entry of potential competitors[418].

(ii) Commission's assessment

(324) Firstly, the Commission considers that alternative operators could have provided call termination services on their own network in Portugal and therefore could have competed with PT, by increasing their revenues and consumer base. This would have

416 Pharol's response to the LoF, paragraphs 187 and 188.
417 Pharol's response to the LoF, paragraph 190.
418 Pharol's response to the LoF, paragraphs 191 to 197.

been possible by entering the retail mobile market, where a full MVNO could have competed without requiring spectrum.

(325) The Commission takes the view that competition on the retail market for mobile services (which, as shown in Section 3.7.5, does exist) implies that alternative operators compete to provide wholesale termination services to customers. The TRR[419] provided that NRAs may allow new entrants to charge higher regulated termination rates than established operators if certain conditions are met and to build their market positions on this basis[420]. That possibility shows that termination markets played a key role for new entrants, prompting them to compete at wholesale and retail level. It was therefore in the interest of operators terminating calls to increase their customers' base to benefit from as many incoming calls as possible.

(326) The Portuguese Regulator found in its analysis of 2005 that there was no effective competition on the termination markets and concluded that the three operators (TMN, Vodafone Portugal and Optimus) had SMP in their respective markets. Despite the Portuguese Regulator's analysis and intervention of 2008, there was still a need for further reduction in mobile termination rates. In that context, it was decided to implement a gradual reduction in the maximum prices charged for voice call termination on mobile networks by the three mobile operators having SMP, starting as from May 2010. That measure aimed at bringing termination rates in line with the cost of the service and therefore reducing competitive distortions between fixed and mobile operators and mobile operators of different sizes[421].

(327) Contrary to Pharol's arguments, as in the case of Sections 3.5.1.2 and 3.7.1.2, the fact that each operator has a monopoly over its own network does not mean that there is no competition in the termination market. Operators compete by increasing their customer base to which they provide call termination services. Therefore, there is competition as regards termination services.

(328) Entry into this market was possible especially for Telefónica, that had a minority stake in ZON. ZON mobile provided telephony services as a full MVNO in Portugal and, therefore, was already active in that market.

(329) As it has been explained in Section 3.3.3, the clause prevented the Parties from "*engaging*" into competition. Moreover, the clause specifically referred to "*mobile services*".

(330) Secondly, regarding Pharol's arguments on the TRR and the gradual reduction in the maximum prices, the Commission notes that, in its Response to the Letter of Facts, Pharol acknowledges that this rule sought "*to promote competition among users*" and to "*mitigate the Significant Market Power of each operator*". Indeed, insofar as this reduction aimed at reducing competitive distortions, it also brought down some of the existing barriers to entry and facilitated entry into this market.

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419 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009.

420 Point 10 of Termination Rates Recommendation: "*In case it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs than the modelled operator, after having determined that there are impediments on the retail market to market entry and expansion, the NRAs may allow these higher costs to be recouped during a transitional period via regulated termination rates. Any such period should not exceed four years after market entry."*

421 Portuguese Regulator's Report for 2010, Document ID 1578, page 33.

(iii) Conclusion

(331) The Commission finds that there were no insurmountable barriers to entry on the markets for call termination on individual mobile networks that would rule out any potential competition during the period of application of the non-compete clause.

(332) Therefore, the Commission takes the view that alternative operators could have competed on the wholesale market and will include sales corresponding to call termination on individual mobile telephone networks in the value of sales for the purposes of calculating the fines in this Decision.

(iv) General conclusion of wholesale mobile markets in Portugal

(333) The Commission considers that PT and, subsequently, Pharol have not demonstrated the absence of potential competition between the Parties with respect to wholesale mobile markets. The fact that there is actual competition on the access and call origination markets indicates that potential competition exists as well. It does not mean that it is not attractive for investment and entry, but quite the contrary, as competition is generally considered as a driver for investment. However, as mentioned in Section 3.3.1, the Commission is not required and does not intend to analyse the attractiveness of that market to Telefónica, its incentives to invest and offer services on that market. The Commission will therefore include the sales corresponding to these services in the value of sales for the purpose of calculating the fine.

3.7.3. Retail markets related to mobile telephony in Spain

(334) As regards the retail market for mobile services, Telefónica considers that PT could have become a potential competitor of Telefónica in this market within a short period of time, at least in theory and therefore Telefónica does not claim the exclusion of the turnover for the provision of retail mobile communication services[422]. The Commission will therefore include the retail market for mobile services within the value of sales for the purposes of calculating the fines in this Decision, as it also did in the Telefónica/PT Decision.

3.7.4. Other services (Mensatel, Trunking and Repairs) in Spain

(i) Telefónica's arguments

(335) According to Telefónica, Mensatel or radio-paging[423], Trunking or "RadioRed"[424] and Repairs services are minor activities characterised by steady decline, replaced by newer technologies and there were no incentives for new operators to provide those services. PT is not a potential competitor as it did not have any spectrum band in 2010 and it was not invited to tender for the award of spectrum in those bands for the duration of the clause. Furthermore, with regard to "repairs" Telefónica claims that it is not a telecommunication service[425].

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422 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 167.

423 Radio messaging system commonly known as "pager" which allows the user to read texts received by the data collection centre; no bi-directional flow.

424 Radio communications service carried out through radio frequencies; allows bi-directional communication between walkie-talkies (used by customers such as city councils, security services, taxi services, etc.).

425 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 175 to 181.

(ii) Commission's assessment

(336) Regarding **Mensatel** and **trunking**, in its Response to Annex 1, Telefónica claims that those services require a specific type of spectrum, which was only available to Telefónica. Moreover, Telefónica argues that to enter those markets, there is a need of a specific standardized national roaming solution, signed with each operator.

(337) Regarding **repairs**, Telefónica argues in its Response to Annex 1, that the Commission accepted to exclude from the scope of the Telefónica/PT Decision the revenues for certain services that did not stem from the telecommunications sector[426]. Some of those services are related to maintenance. Moreover, those services are ancillary and contracted separately from the other wholesale services.

(338) The Commission considers that there were no insurmountable barriers to entry that would rule out any potential competition during the period of application of the non-compete clause. The Commission considers that all those services constitute an integral part of telecommunications services. All those services are, in principle, open to competitive market entries, therefore nothing prevented PT from providing them.

(339) The Commission finds that PT's entry into markets where radio spectrum must be used was not constrained by the fact that PT did not have any spectrum band during the period of application of the non-compete clause, as PT could have leased spectrum already assigned to other operators or could have negotiated national roaming agreements.

(340) As regards the alleged steady decline of these services and the lack of incentives for new operators to provide these services, as mentioned in Section 3.3.1, the Commission is not required to assess the viability of the economic strategies of the operators to enter on the market, that is, of the specific circumstances of each market and services and of the actual capacity and incentives of the operators to offer competing services during the period of application of the clause.

(341) Moreover, with regard to Mensatel or radio-paging and Trunking or "RadioRed", Telefónica admits that these services are replaced by newer technologies and as such, PT (or other alternative operators) could constraint Telefónica's behaviour in Mensatel and Trunking by providing services based on these newer technologies, in other words, even without having to provide Mensatel and Trunking services directly.

(342) As regards "repairs", the Commission considers those services as an integral part, ancillary to wholesale electronic communications services. The maintenance costs are usually provided in the framework of regulated wholesale services and are also regulated as they are part of the wholesale services provided. In the framework of Article 7 (and Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code) consultations, the Commission has provided guidelines on the regulatory treatment of those services and recommended that reparis should be treated as ancillary services to the provision of wholesale services[427].

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426 Response to Annex 1, paragraph 293.

427 Case IT/2010/1133 in which the Commission urged AGCOM to verify the validity of the maintenance and commercial costing data in its model, in line with the BU-LRIC method employed. Document ID 1494. See also the Recommendation of 11 September 2013 on consistent non-discrimination obligations

(343) Moreover, in light of the broad terms included in the clause, there is no reason why repairs should not be covered by it.

(iii) Conclusion

(344) In the light of the foregoing, the Commission concludes that there were no insurmountable barriers to the market of providing Mensatel and Trunking and "repair" services. The Commission considers that these services are part of the telecommunication business. As regards Mensatel and Trunking, these services were being replaced by newer technologies and, therefore, an alternative service provider did not require spectrum to provide them. As regards the repairs market, the Commission notes that these services were included in the framework of regulated wholesale services and no insurmountable barriers existed to enter the market. Given that they are considered ancillary to the provision of wholesale services, they should be treated in the same way as the provision of these services, for which the Commission considers that there were no insurmountable barriers to entry (see Section 3.3.1). The Commission will therefore include the sales corresponding to these services in the value of sales for the purpose of calculating the fine.

3.7.5. Retail markets in Portugal related to mobile telephony

(i) PT/Pharol's arguments

(345) According to PT, the mobile markets are characterised by a high rate of penetration, a very concentrated structure and by barriers to entry (essentially resulting from the limited amount of radio spectrum), which discourage entry in this market[428]. Besides the barriers to entry, Telefónica's direct entry would require a significant investment in its own mobile network, which would trigger some legal barriers, such as the fact that the administrative process of related public and private entities take a long time, for example the installation of antennae[429].

(346) In its reply to the request for information of 21 June 2018, Pharol concludes that, given the market characteristics, this was not an attractive market for a new competitor[430]. As regards the possibility of entering the market as an MVNO, Pharol argues that it is doubtful whether any of the three MNOs present in the market would have been interested in concluding MVNO agreements with an operator like Telefónica within the period of application of the non-compete clause[431].

(347) In its Response to the Letter of Facts, Pharol argues in principle that there was no auction procedure during the non-compete clause and, at the time it was not possible to lease spectrum[432]. Moreover, in the absence of spectrum, entry into this market as an MVNO could have never been considered as a realistic option, as shown by the limited number of such operators active at the time of the infringement and their low

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and costing methodologies to promote competition and enhance the broadband investment environment, which recommends to measure, inter alia, repair times in the context of applying a non-discrimination obligation (point 20) and ensuring technical replicability of the regulated products (point 13).

428 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 324, 327, 331, 332, 334 and 335.

429 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 347.

430 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 44.

431 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 48.

432 Pharol's response to the LoF, paragraph 199.

market share[433]. Pharol argues that there were no specific regulatory solutions or mechanisms that would facilitate entry of an MVNO into the market. The specific regulation in that regard only entered into force in November 2011, that is, when the non-compete clause was no longer in force. Moreover, existing MNOs would not have incentives to negotiate agreements with Telefónica[434]. Finally, Pharol claims that, if Telefónica were to acquire an existing operator in the market, it is not plausible that the closure of the transaction would have taken place in less than four months and eight days, that is, the time period when the clause was in force[435].

(ii) Commission's assessment

(348) The Commission considers that PT (and, subsequently, Pharol) have not demonstrated the absence of potential competition with respect to mobile markets. A mobile operator can provide wholesale and retail services on the basis of spectrum obtained through auction or on the basis of leased spectrum, as a MNO, as shown in Section 3.7.1.1. In addition, market entry without any spectrum and infrastructure is possible, as MVNOs. In the Portuguese market at least two virtual operators entered the market before 2010 based on commercially negotiated contracts - Phone-ix started providing its services in 2007 and ZON Mobile launched its commercial activity in 2008[436]. Also Lycamobile concluded an agreement with Vodafone[437]. Pharol's argument that it is doubtful whether any of the three MNOs present in the market would have been interested in concluding MVNO agreement is not substantiated.

(349) As regards Pharol's conclusion that, given the market characteristics, this was not an attractive market for new entry, as mentioned in the main text of the Letter of Facts (paragraphs 30 and 31), the Commission is not required and does not intend to analyse the attractiveness of this market to Telefónica, its incentives to invest and offer services on the market in question.

(350) Therefore, the Commission considers that there were no insurmountable barriers to entry to mobile retail markets that would rule out any potential competition during the period of application of the non-compete clause. The Commission supports its conclusions also by the following evidence:

(a) The European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that European consumers and businesses increasingly used mobile communication services and that the highest levels were observed in Latvia, Finland, Italy, and Portugal[438];

(b) The Portugal 2011 Telecommunication and Markets Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report states that mobile penetration continued to grow, amounting to 156.4%, the 4th highest penetration rate in the Union and

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433 Pharol's response to the LoF, paragraphs 198 to 203.
434 Pharol's response to the LoF, paragraphs 204 to 209.
435 Pharol's response to the LoF, paragraphs 210 to 213.
436 Document ID 1449, Case PT/2010/1058.
437 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 47.
438 Document ID 1412, page 21.

well above the Union average (127%), which shows the intensive use of mobile services by subscribers. The market is dominated by two main operators which have 44% and 39% market shares, respectively. Although their market share was very low (1.4%) the two mobile virtual network operators (MVNOs) were offering a full range of mobile services[439];

(c) **Pharol's reply of 7 September 2018 to the request for information of 21 June 2018** and **PT's reply of 13 January 2012 to the SO**. Both documents demonstrate that the retail mobile market in Portugal had one of the highest penetration rates in the EU, that the number of calls originating in the mobile network increased in 2010 and that the total volume of mobile traffic showed an upward trend[440];

(d) **Pharol's reply of 7 September 2018 to the request for information of 21 June 2018**, which states that there were no legal barriers to Telefónica's entering the retail mobile market as an MVNO, since frequency use rights were not required and, consequently, nor was any infrastructure of its own connected to the radio access network[441].

(351) Pharol's arguments in its Response to the Letter of Facts are flawed. As acknowledged by Pharol, to operate in this market, an alternative operator would not require spectrum.

(352) Moreover, entry as an MVNO was possible for an operator as Telefónica. Pharol's argument about the low market share of the existing MVNOs is immaterial for the assessment of insurmountable barriers to entry. What is instead relevant for such assessment is the fact that Telefónica would not have legal obstacles to enter into this market as an MVNO, which Pharol acknowledges in paragraph 201 of its Response to the Letter of Facts. Moreover, the presence of further MVNOs rather confirms the viability of entry into the market.

(353) As regards Pharol's argument about the lack of specific regulatory solutions or mechanisms that would facilitate entry of an MVNO into the market, the Commission notes that, while such solutions indeed might facilitate entry, they are not indispensable for that purpose. Pharol's arguments about such measures being adopted after the clause was in force do not affect the absence of insurmountable barriers to entry. As a matter of fact, the existence of MVNOs in the Portuguese market predates the adoption of such measures and demonstrates that such entry was possible, even in their absence. The Commission further notes that one of such MVNOs was ZON, in which Telefónica had a minority stake.

(354) Finally, as regards Pharol's argument about the impossibility of closing the transaction in less than four months, the Commission refers to the relevant section in this Decision on the relevant period (see Section 3.3.3 on the relevant period).

(iii) Conclusion

(355) The Commission notes that there are no insurmountable barriers to enter the market. The retail mobile market in Portugal was a competitive market. An alternative

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439 Document ID 1420, Section 5.1. Mobile.

440 Document ID 1368, NC ID 1371, paragraph 44 and PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 324 and 328.

441 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 47.

operator could have entered either acquiring spectrum and deploying its own infrastructure or, in absence thereof, as a MVNO. The Commission will therefore include the sales corresponding to the retail mobile market in Portugal in the value of sales for the purposes of calculating the fines in this Decision.

3.8. Markets relating to Internet access

(356) In the Telefónica/PT Decision, the Commission found that the non-compete clause also applied to markets relating to Internet access and concluded that those markets are directly or indirectly linked to the infringement (Section 5.5.1.2. "Markets related to Internet access" and recital (482)). Therefore, the Commission included them in the value of sales for the purpose of calculating the fines (recital (485)).

(357) As regards the retail broadband internet access market, in 2018 Telefónica withdrew its claim of exclusion of this category of sales[442]. The Commission will therefore include the retail broadband internet access market within the value of sales of Telefónica, as it also did in the Telefónica/PT Decision. Pharol considers that the retail broadband internet access market category should not be part of the value of sales and argues in favour of excluding that category of services.

(358) The following sections will discuss the "Wholesale (physical) network infrastructure access and wholesale broadband access markets in Spain" (Section 3.8.1. divided into Sections 3.8.1.1 and 3.8.1.2, respectively), the "Wholesale (physical) network infrastructure access and wholesale broadband access markets in Portugal" (Sections 3.8.2.1 and 3.8.2.2, respectively) and the "Retail broadband services in Portugal" (Section 3.8.3).

3.8.1. Wholesale (physical) network infrastructure access (LLU) and wholesale broadband access (bitstream) markets in Spain

(i) Telefónica's arguments

(359) Telefónica argues that there was no potentially competitive relationship between PT and Telefónica in the markets for wholesale internet access due to the need of very significant investments and expected very low profitability. According to Telefónica, in 2010-2011, PT did not have its own network and its deployment would have required a significant investment and long maturation periods. Therefore, PT was not considered as a potential competitor[443].

(360) Telefónica further submits that the Spanish Regulator analysed these markets and concluded that Telefónica's network could not be replicated by third parties. Therefore, certain access obligations were imposed on Telefónica to facilitate the entry of other operators in the retail market. Consequently, it would be unrealistic to expect that an operator would make the investment required to offer wholesale services, the provision of which is mandatory for the incumbent operator. Therefore, according to Telefónica, neither PT nor any other operator can be considered a

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442 Annex 6 to Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, and Annex Q.7 of Telefónica's reply of 3 January 2019 to the request for information 12 November 2018, Document ID 1520.

443 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 198 and 206.

potential competitor in those markets which, given their structure, constitute a *de facto* monopoly[444].

(361) In its Response to Annex 1 to the Letter of Facts, Telefónica argues that, even if some operators invested in deploying their networks, that does not imply that a wholesale market had emerged, as not all the networks are attractive to third parties[445]. Telefónica argues that during the period of application of the clause not one operator provided wholesale services over fibre optic networks based on LLU[446]. Telefónica therefore refers to its 100% market share during the period of the infringement and the difficulty of obtaining access to the relevant infrastructure to provide that service[447].

(362) As regards wholesale broadband access (bitstream), in its Response to Annex 1 to the Letter of Facts, Telefónica argues that an alternative operator would only compete to a very limited extent in the wholesale market by providing bitstream services (Jazztel provided this service on a marginal basis) and that it would take years for a achieving a minimum number of exchanges and a minimum number of unbundled loops in order to provide bitstream services[448].

(ii) Commission's assessment

(363) The Commission will assess the Parties' arguments under two separate sections, corresponding to the two different wholesale internet access markets analysed: Section 3.8.1.1 Wholesale physical network infrastructure access in Spain (LLU) and Section 3.8.1.2 Wholesale broadband access in Spain (bistream).

3.8.1.1. Wholesale (physical) network infrastructure access (LLU) in Spain[449]

(364) The Commission notes that the Spanish competition authority found that no other operator had entered the market concerned and that Telefónica had a 100% market share in the respective market in 2011. Both in its Decision of 22 January 2009, which Telefónica refers to in its Response to Annex 1, and in its decision of 2014, the Spanish Regulator compares the access networks and infrastructure to an essential facility in certain cases. The Spanish Regulator refers in particular, to the access to infrastructure and to the loop as essential facilities that are not viable to replicate[450].

(365) The Commission notes that replicating Telefónica's infrastructure was not possible. During the period of the application of the non-compete clause, it was inconceivable that any other operator would have provided or taken preparatory steps to provide wholesale (physical) network infrastructrure services (LLU).

(iii) Conclusion

(366) The Commission finds that there were insurmountable barriers to enter the market. The Commission will, therefore, not include the sales of EUR [*see confidential*

444 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 199.
445 Response to Annex 1, paragraph 324.
446 Response to Annex 1, paragraph 343.
447 Response to Annex 1, paragraph 321.
448 Response to Annex 1, paragraphs 328 to 334.
449 This includes shared or fully unbundled access, at a fixed location – LLU.
450 CNMC Decision of 22 January 2009, Document ID 1729, available here: https://www.cnmc.es/sites/default/files/1048373_7.pdf, page 206.

annex only addressed to Telefónica] million corresponding to wholesale (physical) network infrastructure access in Spain[451] in the value of sales for the purpose of calculating the fine.

3.8.1.2. Wholesale broadband access markets (bistream) in Spain[452]

(367) Wholesale broadband access markets (bitstream) can be provided by an operator either on the basis of its own network or on the basis of LLU, that it previously obtained from Telefónica, in the context of Telefónica's *ex ante* access obligations.

(368) In January 2009, the Spanish Regulator approved *ex ante* obligations for Telefónica in the wholesale broadband access markets[453]. Access regulation facilitated the deployment of own networks by allowing operators to invest based on the *ladder of investment* (see Section 3.4.1), as also acknowledged by Telefónica in its Response to Annex 1 (paragraph 323): "*The intention in regulating all wholesale access services was to make it possible for Telefónica's competitors to deploy their own networks using the Telefónica infrastructure already in place*".

(369) Wholesale broadband access services are generally provided on the basis of an operator's own infrastructure. Even if Telefónica had a *de facto* monopoly on wholesale access to the network infrastructure services on the copper network and no other operator could have replicated Telefónica's network, as it claims[454], this is not relevant for assessing the provision of wholesale broadband services via bitstream.

(370) Firstly, in order to compete for the provision of wholesale broadband access with the local incumbent, alternative operators do not have to roll out a complete end-to-end network. Competitors could operate on the basis of a more limited network, for instance in the densely populated areas, where it made more sense from a competition and business perspective for alternative operators to deploy their own networks, also taking into account that those markets have been defined nationally by the Spanish Regulator.

(371) Secondly, apart from providing wholesale broadband access services on the basis of own network, entry on this market was possible by accessing the unbundled local loop on Telefónica's network and then providing wholesale bitstream access on this basis to other operators, with respect to end users connected to the unbundled infrastructure[455]. That is confirmed by the Spanish Regulator, who observed in its decision of 22 January 2009, that "*operators that unbundle loops could market wholesale broadband services. Although their network coverage would be limited geographically for the reasons outlined, these operators have already accessed a significant number of loops. This is common in other Union Member States*" and shows that entry into this market via LLU was possible[456]. Indeed, alternative operators relying on unbundled lines are in a position to create competition at

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451 Telefonica's reply of 23 February 2021 to request for information of 16 February 2021 (Document ID 1683, Document ID 1682 NC).

452 This comprises non-physical or virtual network access including "bitstream" access at a fixed location.

453 CNMC Decision of 22 January 2009, Document ID 1729, available here: https://www.cnmc.es/sites/default/files/1048373_7.pdf, page 206.

454 Response to Annex 1, paragraphs 309 and 312.

455 Based on this principle, Ofcom for instance de-regulated a large part of the wholesale broadband access market, as the first Union regulator, in its decision of 21 May 2008, see case UK/2007/0733, Document ID 1491.

456 Document ID 1729, Decision available here: https://www.cnmc.es/sites/default/files/1048373_7.pdf, page 122.

wholesale level for the provision of bitstream services. This means that the operator using LLU does not need to deploy its own infrastructure in the last mile, but can use a regulated wholesale offer of the operator having SMP (that is, Telefónica in Spain) and, based on that and a part of its own transport infrastructure and/or leasing such infrastructure of other operators, it can provide wholesale bitstream services to other operators.

(372) LLU's importance was constantly increasing during the infringement period. The Spanish Regulator's Annual Report of 2010 shows that "*the LLU service sustained its upward tendency, reflecting the continuity of investment by alternative operators in the collocation of new exchanges and in attracting new customers. Jazztel and Vodafone used fully unbundling lines as a means of access to the end users. Unbundled local loop service represented the main method of access of the alternative operators*"[457]. The Digital Agenda Scoreboard 2011 Pillar 4 - Fast and ultra fast internet access shows that the fully unbundled lines were the preferred way for new entrants to provide access in sixteen countries, amongst which Spain[458]. The Spanish Regulator's Annual Report of 2010 shows that wholesale activity increased significantly due to regulatory actions – in 2010, the total turnover for various broadband wholesale services, including LLU, increased by 30.5% compared to the previous year[459]. This conclusion is also supported by the Final Report - Broadband Internet Access Cost (BIAC)[460]. The report lists the new entrants in Spain by technology: Jazztel (xDSL and FTTx), Ono (cable), Orange Spain (xDSL) and Vodafone Spain (xDSL)[461]. This shows that alternative operators competed in Spain on the basis of LLU.

(373) Moreover, it was not only possible for an operator to provide bitstream services on the basis of LLU, but this actually took place. As acknowledged by Telefónica, Jazztel offered bitstream services, on the basis of LLU from Telefónica[462]. Moreover, in paragraph 332 of its Response to Annex 1, Telefónica states that 3 years before the infringement, that is, in 2007, Jazztel was active in enough loops to compete on the market.

(374) The Spanish Regulator's Annual Report for 2010 indicates that, besides Telefónica, there were some other operators that also offered bitstream services (1.6% of the total number of lines)[463]. This is also evident from the decision adopted by the Spanish Regulator in 2016 regulating this market[464]. Indeed, apart from Jazztel, Telefónica was facing competition from other operators in the market at the time of the infringement. The market shares by value are set in Table 3 as follows:

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457 Document ID 1579, pages 114 and 150.

458 Pillar 4 - Fast and ultra fast Internet access, Document ID 1419, page 19 and figure 19: New entrants' DSL lines by type of access.

459 Document ID 1579, page 14.

460 Data as of 1 February 2011.

461 Document ID 1416, page 25.

462 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 213; Response to Annex 1, paragraph 326.

463 Document ID 1579, page 146.

464 The Spanish Regulator's decision of 24 February 2016, Document ID 1478, page 170, table 28.

Table 3 – Market share by revenue of wholesale broadband providers to third parties

Tabla 28: Distribución de los ingresos por los servicios mayoristas de banda ancha prestados a terceros operadores

Operador	2008	2009	2010	2011	2012	2013	2014
Telefónica	90,1%	86,7%	90,6%	93,6%	93,1%	94,6%	95,2%
Jazztel	1,0%	2,8%	2,8%	2,4%	2,6%	2,8%	3,0%
BT	3,7%	5,1%	3,6%	2,4%	1,5%	1,1%	0,9%
Orange	4,5%	4,8%	2,6%	0,9%	0,7%	0,6%	0,4%
Otros	0,8%	0,5%	0,4%	0,7%	2,1%	0,9%	0,4%

Fuente: CNMC. Informes trimestrales

(375) Against this background, Telefónica's argument related to the limited presence of Jazztel in the market is irrelevant. The Commission considers that the fact that Jazztel was able to enter and was operating on this market based on LLU clearly illustrates that there were no insurmountable barriers to entry. The Commission further notes that the non-compete clause prevented the Parties from "*engaging*" into competition (see Section 3.3.3, where Telefónica's arguments on the time period are rebutted).

(i) Conclusion

(376) Therefore, the Commission considers that there were no insurmountable barriers to entry to the wholesale broadband market that would rule out any potential competition during the period of application of the non-compete clause. An alternative operator could have therefore entered the market. Therefore, the Commission will include the sales corresponding to wholesale broadband access markets (bistream) in Spain in the value of sales for the purposes of calculating the fine in this Decision.

3.8.2. Wholesale (physical) network infrastructure access (LLU) and wholesale broadband access (bitstream) markets in Portugal

(i) PT/Pharol's arguments

(377) According to PT, (and, subsequently, Pharol), Telefónica's entry in the wholesale network infrastructure access and wholesale broadband access markets would demand the development of an electronic communications infrastructure. Every operator present on that market (PT, ZON, Optimus, Vodafone, Cabovisão) have their own infrastructure. The installation of an own network discourages market entry, given the economies of scale needed and the short duration of the non-compete clause. Even in the event of an own network development project initiated before the signature of the non-compete clause, it would not be possible for an operator to provide services during the period of application of the non-compete clause[465].

(378) Pharol argues in its Response to the Letter of Facts that entry through developing its own network requires numerous steps, such as network planning, obtaining authorisations for installation in its own areas or areas belonging to third parties (including authorisations for use of the public domain), contracting civil construction services (tubing, ducting and other components) as well as electronic

[465] PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 356 to 362, 373, 375 and 376 and Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraphs 59 to 61.

communications networks (cables, equipment and other components). That would have been impossible in the four-month and eight-day period[466].

(379) Finally, Pharol argues that market entry of alternative operators on the basis of LLU was aimed at alternative operators competing on the retail broadband market, without the need to develop (at least immediately) own networks, which involve investment costs[467].

(380) The Commission will assess the Parties' arguments under two separate sections, corresponding to two different wholesale internet access markets: Section 3.8.2.1 Wholesale physical network infrastructure access in Portugal (LLU) and Section 3.8.2.2 Wholesale broadband access in Portugal (bistream).

3.8.2.1. Wholesale (physical) network infrastructure access in Portugal (LLU)

(ii) Commission's assessment

(381) The Commission notes that, indeed, the Portuguese Regulator found that no other operator had entered the market concerned and that PT had a 100% market share in the respective market in 2011[468].

(382) The Commission notes that replicating the infrastructure of PT was not possible. During the period of the application of the non-compete clause, it was inconceivable that any other operator would have provided or taken preparatory steps to provide wholesale (physical) network infrastructrure services (LLU).

(iii) Conclusion

(383) The Commission finds that there were insurmountable barriers to enter the market. Therefore, the Commission will not include the sales of EUR [*see confidential annex only addressed to Pharol*] million corresponding to wholesale (physical) network infrastructure access in Portugal (LLU)[469] in the value of sales for the purpose of calculating the fine.

3.8.2.2. Wholesale broadband access market in Portugal (bitstream)

(i) Commission's assessment

(384) Wholesale broadband access markets (bitstream) can be provided by an operator either on the basis of its own network or on the basis of LLU, that it previously obtained from PT (and, subsequently, Pharol), in the context of PT's (and, subsequently, Pharol's) *ex ante* access obligations.

(385) Firstly, the Commission considers that it is not excluded that alternative operators decide to invest in their own infrastructure and provide wholesale services on this basis. The Portuguese Regulator's Report for 2010 shows that Portugal was in 2010 one of those Union countries where alternative operators focused most on using their own infrastructure instead of using the infrastructure of the incumbent operator[470].

(386) Investing in own infrastructure in Portugal was supported by both asymmetric and symmetric access regulation.

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466 Reply to the Letter of Facts, paragraphs 218 to 253.

467 Reply to the Letter of Facts, paragraph 228.

468 ANACOM's Decision of 14 January 2009, Document ID 1445, page 88.

469 Reply of PT Portugal of 5 March 2021 to the request for information of 16 February 2021 (Document ID1684).

470 Document ID 1578, pages 28 and 30.

(387) Asymmetric regulation, imposed on the operator with SMP such as PT (and, subsequently, Pharol), contrary to Pharol's view, allowed potential competition and in fact encouraged access seekers' entry on the market, facilitated own network deployment through the ladder of investment and allowed telecom operators to compete both at wholesale and retail level. For instance, the Portuguese Regulator's Report for 2010 mentions that the operator which mainly benefited in Portugal from LLU stopped providing its retail offers on this basis in late 2010 and started providing offers on the basis of its own network infrastructure, including optical fibre[471]. Other examples show that operators such as Fibroglobal and DSTelecom deployed fibre networks without necessarily providing retail services first (recital (392) below).

(388) This "asymmetric" regulation was complemented by "symmetric" regulations (that is, imposed on all operators), further facilitating network deployment by alternative operators. The investments in own infrastructure were, at the time of the infringement, much easier in Portugal than in other Member States due to symmetric obligations for duct and pole access, which have been applied in Portugal under national law since 2009[472]. The Portuguese Regulator's Report for 2010 provides that in 2010, there was a growing demand for physical infrastructure access, including ducts in the context of the Reference Duct Access Offer (RDAO), with a view to the installation by alternative operators of their own optical fibre networks (FTTH). The relevance in Portugal of own infrastructure use by alternative operators also resulted from the fact that Portugal has been a pioneer in making the incumbent subject to the obligation to provide its competitors with a duct access offer which enables them to expand their own networks much more cheaply than if they had to undertake construction work to install their own ducts. In addition, a masts access offer (RMAO), aimed at extending NGA coverage, through the use of masts where there were no ducts[473]. Once an operator has access to a network, a wide range of telecoms services at wholesale level, including bitstream, can be offered.

(389) In order to compete for the provision of wholesale broadband (bitstream) access with the local incumbent, alternative operators do not have to roll out a complete end-to-end network, which takes time and involves high investments, but could have offered wholesale services on the basis of their geographically-limited network (for instance fibre network), in particular that fibre deployment developed extensively in Portugal at the time, as shown by the following evidence:

(a) **The Broadband Coverage in Europe by IDATE, 2011 Survey**. The survey shows that fibre deployment was particularly significant in Portugal (+409,000 homes passed in 2010). Also, in terms of FTTH/FTTB subscribers, developments were particularly significant in Portugal in 2010 (+118,500 subscribers)[474]. FTTx coverage is very high in Portugal due both to FTTH/B deployments (close to 1.6 million homes passed at the end of 2010) and to DOCSIS 3.0 upgrades by cable operators, mainly ZON[475]. This document also shows that despite the fact that mobile broadband penetration in Portugal was

471 Document ID 1578, page 28.
472 Law decree 123/2009.
473 Document ID 1578, pages 14, 29 and 31.
474 Document ID 1414, pages 27 and 28.
475 Document ID 1414, page 216.

higher than fixed broadband, fibre made real strides in the Portuguese market where it accounted for 13.6% of total fixed connections in 2010[476];

(b) **The Digital Agenda for Europe Scoreboard 2011, Pillar 4 - Fast and ultra fast internet access**, which shows that in Portugal several offers of 100 Mbps, 200 Mbps and even 1 Gbps were launched in 2010, following FTTH deployments in limited areas by some alternative operators and the incumbent and the upgrade of the main cable operator's network to DOCSIS 3.0[477]. The document also shows that in Portugal more than 4 million households had access to high-speed broadband networks and the country aims for a 100% penetration of NGA. In 2009, the Government signed a protocol with four of the main operators and adopted new national legislation in order to boost investment in NGA[478];

(c) **The Broadband Coverage in Europe in 2011 report by PointTopic**. The report states that Portugal has made major investments in broadband coverage, particularly for next generation access. As a result, despite being a relatively poor country, it is well ahead of the European averages for the coverage of fixed line standard and NGA services. For example it has the fifth highest Total NGA Coverage of any of the study countries, 74.5%, and the third highest rural figure at 33%[479].

(390) PT's (and, subsequently, Pharol's) submissions also show investments by alternative operators into own networks:

(a) PT's reply of 13 January 2012 to the SO, which provides that:

- in the third quarter of 2011, there were 49 entities entitled to provide fixed internet access services and that all the active fixed internet access service providers (ZON, Optimus, Vodafone, Cabovisão) provided broadband internet access and all of them had their own infrastructure[480];
- there was a growth in the offer of fibre optic in 2009, as shown by a graph from the Portuguese Regulator[481]; and
- alternative operators in the broadband internet access service had a market share of 54%, which was higher than the EU15 average share[482];

(b) Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, which shows that:

- some operators were offering broadband internet access via Pharol's wholesale service and some had elements of their own infrastructure[483]; and
- some of the operators might have been prepared to sell their operations in Portugal, as would be the case of Ar Telecom and Cabovisão[484].

476 Document ID 1414, page 212.
477 Document ID 1419, page 24.
478 Document ID 1419, page 31.
479 Document ID 1415, page 135.
480 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 364 and 375.
481 Document ID 753, NC ID 946, paragraph 371.
482 Document ID 753, NC ID 946, paragraph 372.
483 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 62.

(391) Furthermore, alternative operators such as Vodafone and Optimus rolled-out fibre networks, as shown by the Broadband Internet Access Cost (BIAC) 2011 report[485]. As shown by the Portuguese Regulator's Report for 2010, Portugal was in 2010 at the top of the European ranking of fibre optics, reinforcing its leading position and affirming the country's role as a main driver of development and change in the sector in Europe. According to data from the FTTH Council Europe, Portugal was one of the five European countries with the fifth largest absolute number of FTTH accesses and was the European country with the largest absolute number of net additions of FTTH customers[486].

(392) Moreover, rural network operators such as Fibroglobal and DSTelecom were obliged to provide wholesale broadband access to other operators, on the basis of fibre networks in rural areas, following public tenders launched in 2009. They were awarded tenders in February 2010 and were present in 42 municipalities in the central zone and 12 municipalities in the Azores (Fibroglobal) and in 44 municipalities in the northern region and in 35 municipalities in Alentejo and Algarve (DSTelecom), covering in total around 400 000 homes[487]. It is clear therefore that at the time of the infringement there were already telecoms operators obliged to offer wholesale services on the basis of their networks.

(393) As to Pharol's argument regarding the numerous steps required to enter this market and the fact that even in the event of an own network development project initiated before the signature of the non-compete clause, it would not be possible for an operator to provide wholesale services during the period of application of the non-compete clause, the Commission considers that the non-compete clause prohibits the Parties not only from effectively providing services, but also from "*engaging or investing*" into these operations during the period of application of the non-compete clause (see Section 3.3.3). Therefore, it was irrelevant whether Telefónica was not able to effectively provide such services within such a short period of time.

(394) Secondly, having an own network is not a necessary *condition* for the creation of competition in internet access related markets. Alternative operators might obtain access to the unbundled local loop on PT's network and then provide wholesale bitstream access on this basis to other operators, with respect to end users connected to the unbundled infrastructure[488]. Indeed, alternative operators relying on unbundled lines are in position to create competition at wholesale level for the provision of bitstream services.

(395) Already in 2007, PT Group only had a market share of 64% in the market for access to unbundled local loop, ZON had 26%, Cabovisão 7% and other operators had 2% (including self-supply, that is, providing wholesale services to own retail branch), as shown in the Commission comments letter of 5 January 2009 and in the Portuguese Regulator's decision of 14 January 2009[489]. The lower market share of the incumbent

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484 Document ID 1368, NC ID 1371, paragraph 68.

485 Document ID 1416, page 25.

486 Document ID 1578, page 32.

487 Portuguese Regulator's Final decision on the analysis of wholesale local access market at a fixed location and of wholesale central access at a fixed location for mass-market products of 2017 - anexo2finalM3a3b_en.pdf (anacom.pt), pages 76 and 108 and ANACOM's Next generation access networks (NGA) of 2 December 2011.

488 Based on this principle, Ofcom for instance de-regulated a large part of the wholesale broadband access market, in its decision of 21 May 2008, see case UK/2007/0733, Document ID 1491.

489 Document ID 1405 and Document ID 1445.

speaks for the existence of potential wholesale competition, where access could be provided by alternative network operators on the basis of the unbundled infrastructure, meaning that such alternative operators would have to build and/or lease transit connection from the central point (e.g. in a capital/regional city) to the local exchange and use PT's LLU for the last mile; based on this, an alternative operator could provide another operator with a wholesale bitstream service connecting its customer from the central point to the terminal/home of the customer. At the end of 2007, 60% of the population was covered by LLU. That development of LLU is also signalled in PT's reply of 13 January 2012 to the SO[490].

(396) In the context of a decrease of the number of unbundled local loops in 2010, the intervention by the Portuguese Regulator involved a decision on amendments to the reference unbundling offer (RUO) in February 2010. That intervention aimed to facilitate the investment by alternative operators in own infrastructure increasingly close to the end-user, where such investment was efficient[491].

(397) The following documents show the importance of LLU in Portugal:

(a) **The Digital Agenda for Europe Scoreboard 2011, Pillar 4 - Fast and ultra fast internet access**, which provides that fully unbundled lines is the preferred way for new entrants to provide access in 16 countries, including in Portugal[492];

(b) **The European Commission's Digital Agenda for Europe Scoreboard 2012**. The scoreboard demonstrates that fully unbundled lines are the preferred way for new entrants to provide access in sixteen countries in the EU, amongst which Portugal[493];

(c) **The Broadband Coverage in Europe by IDATE, 2011 Survey**. The survey shows that in Portugal, in 2010, 19% of the DSL connections were based on LLU and 5% on bitstream[494].

(398) Once LLU operators gain control of the "local loop" they can provide wholesale services (for example, bitstream) on this basis to other operators[495]. This approach means that the operator using LLU does not need to deploy its own infrastructure in the last mile, but can use a regulated wholesale offer of the operator having SMP (PT in Portugal) and based on this and a part of its own transport infrastructure and/or leasing such infrastructure of other operators, it can provide wholesale bitstream services to other operators.

(399) This is feasible, which is also shown by the fact that Jazztel offered bitstream wholesale services, on the basis of LLU from Telefónica in Spain. In *Toshiba*[496], the Court of Justice held that the Commission demonstrated to the requisite standard that the barriers to entry to the European market were not insurmountable - the Japanese producers had recorded considerable sales in the United States, but they have not

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490 Document ID 753, NC ID 946, paragraph 369.

491 Document ID 1578, page 48.

492 Document ID 1419, page 19.

493 Document ID 1410, page 62.

494 Document ID 1414, page 224.

495 Based on this principle, Ofcom, as the first Union regulator de-regulated large part of the wholesale broadband access market. See case UK/2007/0733, Document ID 1491.

496 Judgment of the Court of 20 January 2016, Case C-373/14 P *Toshiba Corporation v European Commission*, EU:C:2016:26.

produced any evidence showing that the barriers to entry to the Unitated States market were very different to the barriers to entry to the European market (paragraphs 45 and 46). Applying the same reasoning in the case at stake, the fact that Jazztel was able to provide bitstream services in Spain shows that there was potential competition also in Portugal, given that the barriers to entry to the Spanish market were not very different to the barriers to entry to the Portuguese market.

(ii) Conclusion

(400) The Commission considers that there were no insurmountable barriers to entry to the wholesale broadband access markets that would rule out any potential competition during the period of application of the non-compete clause. An alternative operator could have entered the market. Therefore, the Commission will include the sales corresponding to wholesale broadband access markets (bistream) in Portugal in the value of sales for the purposes of calculating the fine in this Decision.

3.8.3. Retail internet broadband access markets in Portugal

(i) PT/Pharol's arguments

(401) According to PT, the business model of the broadband internet access service relies on ownership of infrastructure, which requires a significant level of investment by a company in its own network. Furthermore, PT argues that 'triple play offers' are the main driver for competition on the market which in its view also shows that the competitive business model in the internet access market demands investment in an own network, not feasible in the short period of duration of the alleged non-competition clause[497].

(402) PT also puts forward that Telefónica never demonstrated any interest in entering this market and mentions an auction carried out in 2009 for the development of wireless broadband applications as an example, where Telefónica, although not being obstructed to bid, decided not to do so[498].

(403) Also, PT argues that the structure and characteristics of the broadband internet access market in Portugal prevent entry of Telefónica in the market[499].

(404) In its reply of 7 September 2018 to the request for information of 21 June 2018, Pharol submits that Telefónica's entry on the retail market between 27 September 2010 and 4 February 2011 using its own network and/or available wholesale services including LLU was not a realistic hypothesis[500]. Pharol also considers that any scenario involving the acquisition of control by Telefónica over another operator would not have been completed or would not have produced a competing activity within the short period of four months and seven days corresponding to the period of application of the non-compete clause, also due to the length of the authorization procedures[501].

(405) In its Response to the Letter of Facts, Pharol claims that an alternative operator would not have entered the market without deploying its own network. Accordingly, the Commission should have assessed the feasibility of this deployment[502]. Pharol

497 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 373.
498 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 362.
499 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 363 and following.
500 Document ID 1368, NC ID 1371, paragraph 66.
501 Document ID 1368, NC ID 1371, paragraph 70.
502 Pharol's response to the LoF, paragraphs 239 to 246.

maintains that access to the retail market on the basis of LLU was losing commercial attractiveness and that the Commission must assess the economic rationality of such entry[503]. Pharol submits that Telefónica could have never completed the acquisition of an operator with an own network within the four months when the clause was in force[504].

(ii) Commission's assessment

(406) The Commission considers that PT (and, subsequently, Pharol), have not demonstrated the absence of potential competition between the Parties with respect to the markets related to retail internet broadband access. As shown above in recitals (392) and (395), alternative operators were able to and did provide services on the retail internet broadband access markets in Portugal using either their own network or other operators' networks, mainly through access regulation, on the basis of LLU, bitstream or resale for instance. The Commission considers that the Portuguese retail broadband market was competitive, which is shown by the following evidence:

(a) **PT's reply to the SO**, which shows that:

- in 2011, there were 49 operators authorized to provide fixed internet access, even if not all of them were active[505];
- the rate of penetration of fixed broadband in Portugal grew above the growth average of the Union countries in 2010, even if it ranked only into the 21st place;
- at the beginning of 2011, Portugal was the country with the sixth highest mobile broadband penetration and between 2007 and 2011, the penetration rate of this service almost quadrupled in Portugal; and
- in 2010, the number of broadband offers included in multiple play increased, broadband package offers representing 83% of the total by the end of 2010. Around three in every five offers are included in triple play offers with the number of offers in quadruple play packages also increasing[506];

(b) The Portugal 2011 Telecommunication Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that the penetration of bundled offers is increasing, mainly driven by a rise in triple-play offers (+5 pp)[507];

(c) The Broadband Coverage in Europe by IDATE, 2011 Survey, which provides that:

- In 2010, growth continued on both fixed and mobile broadband market by a percentage of 10.6% and 18.8%, respectively. This document also shows that since 2009, Portugal has been home to more mobile broadband subscribers than fixed broadband subscribers[508];

503 Pharol's response to the LoF, paragraphs 247 to 251.
504 Pharol's response to the LoF, paragraphs 252 to 255.
505 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraph 364.
506 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 365 to 368.
507 Document ID 1420, Section 1. Main Market & Regulatory Developments.
508 Document ID 1414, page 212.

- Although not providing the same connection speeds as the most advanced fixed infrastructures, 3G+ mobile infrastructures provide fast enough connections for most internet usages. In 2010, mobile broadband penetration increased by 4.2 p.p.[509];

(d) **The Digital Agenda for Europe Scoreboard 2011, Pillar 4 - Fast and ultra fast internet access**. This report shows that in 2010 growth in fixed broadband markets was near the European average in several Member States, including in Portugal[510];

(e) **Commission comments letter of 5 January 2009 in case PT/2008/0850 and PT/2008/0851**[511] indicating that on the wholesale broadband access market (bitstream) PT's shares have decreased on average from 41% in 2005 to 27% in 2007, ZON Multimédia's market shares have also decreased from 39% to 33%, Sonaecom's market shares have increased significantly from 8% in 2005 to 25% in 2007, while Cabovisão's market share has remained stable at 10%. The total of all other operators' market share is as low as 4%. In non-competitive areas, the Regulator intends to designate PT Group as having SMP, as PT Group's market shares have decreased only slightly from 75% in 2005 to 72% in 2007, ZON Multimédia's market share has remained stable at 12%, Sonaecom's market share has increased from 1% in 2005 to 5% in 2007, while Cabovisão's market share has remained stable at 10%. The total of all other operators' market share is 2%.

(407) The Commission notes that in paragraph 245 of its Response to the Letter of Facts, Pharol lists several players that were active in the market on the basis of their own infrastructure. This is clear evidence that entry on such basis was possible.

(408) The Commission also notes that, in paragraphs 248 and 249 of its Response to the Letter of Facts, Pharol acknowledges that LLU was available and even refers to some examples of its use by some operators to provide internet broadband retail services. With regard to Pharol's claim about the economic rationality, the Commission refers to Section 3.3.1 above, on the applicable test of insurmountable barriers to entry.

(409) As regards the possibility of acquisition of another telecom operator, the Commission considers that there is no need for the authorisation of the transaction by the competition authorities to occur within the period of application of the non-compete clause to show that entry was possible. Indeed, the non-compete clause refers to "*engaging or investing, directly or indirectly* […] *in any project* […]". In addition, there are no reasons to believe that such an authorization could not be received within the period of application of the non-compete clause, which is much longer than the time it took for the Portuguese Competition Authority to authorise several transactions in the telecoms sector[512]. In any event, the Commission refers to Section 3.3.3, on the relevant period.

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509 Document ID 1414, page 218.

510 Document ID 1419, page 8.

511 Document ID 1405.

512 Pharol's reply of 7 September 2018 to the request for information of 21 June 2018, Document ID 1368, NC ID 1371, paragraph 70, referring to 53, 60, 83 and 97 days.

(iii) Conclusion

(410) Therefore, the Commission concludes that there were no insurmountable barriers to enter the market. The Commission notes that actual competition was taking place on the market. The Commission will therefore include the sales corresponding to services on retail internet broadband access market in Portugal in the value of sales for the purposes of calculating the fines in this Decision.

3.9. Markets related to television services

3.9.1. Wholesale – Broadcasting transmission services

(411) As provided at recital 214 of the Telefónica/PT Decision, Telefónica was not present in the market for broadcasting transmission services. Therefore, there is no corresponding value of sales associated with these services in the value of sales taken into account in the Telefónica/PT Decision.

(412) As mentioned at recital 231 of the Telefónica/PT Decision, PT's share in the broadcasting transmission services was 100% in 2010[513]. Therefore, subsections 3.9.1.1 and 3.9.1.2 concern the provision of digital and analogue terrestrial television broadcasting services in Portugal.

3.9.1.1. Digital terrestrial television broadcasting services

(413) As indicated by PT/Pharol, there was a legal barrier to entry, which prevented Telefónica or any other competitor from competing with PT as the Portuguese government decided that the transition from the analogue to the digital terrestrial television broadcasting services, with the date for the switch-off of 26 April 2012, would be done by way of a single open tender for the rights of use for all available frequencies designated for such a use. PT acquired these rights in the aforementioned open tender and was subsequently awarded the corresponding contract on 9 December 2008.

(414) In light of the foregoing, the Commission concludes that there were insurmountable barriers to the market of digital terrestrial television broadcasting services. Due to the fact that there was a *de-facto* monopoly created even before the period of application of the non-compete clause, the Commission will exclude the value of sales for the purpose of calculating the fine. The amount corresponding to these services is EUR [*see confidential annex only addressed to Pharol*] million[514].

3.9.1.2. Analogue terrestrial television broadcasting services

(415) In the Letter of Facts, the Commission considered that PT had not demonstrated the absence of potential competition between PT and Telefónica with respect to wholesale analogue television broadcasting services during the period of application of the non-compete clause.

(416) However, analogue terrestrial transmission ceased in the coastal areas of mainland Portugal in January 2012. Then analogue broadcasting services were switched off in Azores and Madeira Islands on 22 March 2012. Analogue terrestrial television

513 Reply of PT to the request for information of 25 May 2011, Document ID 465, page 10.

514 Reply of PT Portugal of 23 November 2018 to request for information 2018/179492, Document ID 1385, NC ID 1387, page 5.

broadcasting services ceased in the rest of the territory of Portugal on 26 April 2012[515].

(417) In light of the foregoing, the Commission concludes that there were insurmountable barriers to the market of wholesale analogue terrestrial television broadcasting services. Given that, as widely anticipated, on 26 April 2012, the market of wholesale analogue terrestrial television broadcasting services ceased to exist, with the switch-off starting in January 2012, the Commission will exclude the value of sales for the purpose of calculation the fine. The amount corresponding to these services is EUR [*see confidential annex only addressed to Pharol*] million[516].

3.9.2. Retail pay-TV services in Spain

(i) Telefónica 's arguments

(418) Telefónica argues that its pay-TV service does not fall within the scope of telecommunications services, but of audio-visual communications. Telefónica also argues that there are high barriers to entry due to considerable investment required to develop an attractive range of contents and to the need for an administrative authorisation. Moreover, according to Telefónica, it would have been impossible for PT to negotiate content licences, have the contents available, purchase the infrastructure required to operate pay television channels, carry out their commercial launch and the necessary advertising campaigns in the short time period when the non-compete clause was in force and provide pay TV services in the mentioned period[517].

(419) In its Response to Annex 1 to the Letter of Facts, Telefónica claims that television services are, by their very nature, different from telecommunication services and, in fact, are regulated separately. According to Telefónica, TV services are regulated by the Audiovisual Media Services Directive and are expressly excluded from telecommunications regulations, as described in recitals (5) and (6) and laid down in Article 2(c) of Directive 2002/21/EC[518]. Telefónica argues that the reference to television services in the non-compete clause should be understood to apply solely and exclusively to the transmission of signals over electronic communications networks and not to pay-TV services[519].

(ii) Commission assessment

(420) As stated in recital 214 of the Telefónica/PT Decision, Telefónica provided pay-TV services over its network (Imagenio). Its market share by revenues regarding these services was 12.7% in 2011[520]. In addition, Telefónica had a 21% stake in DTS Distribuidora de Television Digital, S.A., the company that developed the pay-TV services of the Prisa group of companies (Digital+).

Television services are covered by the non-compete clause

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515 Document ID 1420, page 13.

516 Reply of PT Portugal of 23 November 2018 to request for information 2018/179492, Document ID 1385, NC ID 1387, page 5.

517 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 216 to 239.

518 Response to Annex 1, paragraph 351.

519 Response to Annex 1, paragraphs 352 to 354.

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

(421) Contrary to Telefónica's argument, the Commission considers that pay TV services are fully covered by the non-compete clause. This follows primarily from the wording of the clause itself, which reads:

"[…] *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* […]" (emphasis added).

(422) The non-compete clause expressly mentions "*television services*" as part of its scope. Television services are therefore listed together with the other telecommunication services, as part of the "*telecommunication business*".

(423) The General Court has stated in paragraph 199 of the *Telefónica* judgment that the interpretation of the non-compete clause must consider both its wording and its context. Contrary to what Telefónica suggests, the wording of the non-compete clause included television services as part of the "*telecommunication business*". Indeed, the non-compete clause did not refer to the telecommunication "*markets*", or "*services*", but used a broader term such as "*telecommunication business*". Therefore, the fact that Directive 2002/21/EC does not cover telecommunication services is irrelevant, as the non-compete clause clearly covered those services irrespectively of the Directive which regulates them. Furthermore, Article 2(c) of Directive 2002/21/EC separates the regulation of transmission from the regulation of content. This separation is applied for regulatory purposes and cannot be understood to mean that pay-TV services should be excluded from the scope of the non-compete clause, which would only refer to the transmission of signals over electronic communications networks. Moreover, PT submitted that although television services do not fall within the definition laid down in Article 2 of Directive 2002/21/EC, they should be included in the scope of the clause because they were expressly included by Telefónica[521].

(424) Telefónica's interpretation would be contrary to the wording of the clause, which does not provide for any such exclusion, but also to the context of the clause.

(425) Pay-TV services in fact constitute an integral part of the telecommunication business. This may be even a decisive factor for end users to choose a given provider of electronic communications services. The Spanish Regulator's Annual Report for 2010 shows that telecommunications and cable operators, and those who offer Internet Protocol Television (IPTV) services also recorded increases in their combined share of the market. Thus, telecommunications operators supplied pay television services to 53.5% of all subscribers in Spain[522].

(426) This is also shown by the increasing importance of bundles including Internet, telephone and TV services. In 2010, contracting of pay television services from telecommunications operators continued to be very closely linked to contracting combined double play and triple play offers. In the case of IPTV, in 2010, double packages with television disappeared and 100% of IPTV services were contracted in a triple offer, which included Internet and fixed telephony. As regards satellite and pay terrestrial digital TV services, the fact that operators cannot offer combined services of pay television and telecommunications (telephony and Internet) could be

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521 PT's Response to the Statement of Objections, Document ID 0753, paragraph 164.

522 Document ID 1579, page 156.

a disadvantage. Nevertheless, in July 2010, Sogecable launched a combined offer with Jazztel in which these two operators offered discounts if the satellite operator's pay television services were contracted together with Jazztel's telecommunication services[523].

(427) The Broadband Internet Access Cost (Biac)[524] study shows that both alternative operators (Jazztel, Vodafone Spain, Orange Spain, Ono) and Telefónica offered bundles (Internet + Telephone or Internet + Telephone + TV) during the period of application of the non-compete clause. Network investments combined with telephone line rental facilitated the provision of these bundles[525]. The bundles from the new entrants represented in Spain one of the highest percentage (72.7%)[526].

(428) Furthermore, PT's reply to the SO[527] indicated that the subscription TV market was dominated by dual play and triple play offers, meaning that the profitability of the subscription TV service relies increasingly more on an approach of integration with various services.

(429) Therefore, the Commission considers that Telefónica has not demonstrated that pay-TV services were not covered by the non-compete clause.

Television services are subject to potential competition

(430) End-users, depending on their particular circumstance, could, during the period of application of the non-compete clause, receive television broadcasting via several technologies, namely (analogue or digital) satellite, (analogue or digital) cable, DSL networks through IPTV, (analogue or digital) terrestrial TV and mobile television services[528]. These services are open to entry and therefore are subject to potential and often actual competition.

(431) Pay-TV services are part of the telecommunication business - this is (i.a.) shown by the fact that IPTV services can be provided by telecommunication operators on the basis of access regulation. Indeed, alternative operators could start providing retail pay-TV services in Spain based on regulated access imposed in the framework of wholesale broadband services (that is, LLU and wholesale bitstream access) and provide IPTV services[529]. After cable and satellite, in terms of revenues by technology came the IPTV, with turnover of EUR 206.7 million, reflecting a major advance (24%) compared to the turnover achieved in 2009. It was accompanied by a 7.3% increase in the number of subscribers[530]. For example, Orange, Tele2/Comunitel and Jazztel were in a position to provide IPTV services as LLU operators, i.e. based on the regulated offers of Telefónica[531].

(432) The European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as

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523 Document ID 1579, pages 180-181.

524 Data as of February 2011.

525 Document ID 1416, pages 170, 184, 194, 204, 215, 224, 318, 319, 329, 330, 340, 351, 366.

526 Document ID 1416, table 72, page 410.

527 Document ID 946, paragraphs 384 to 386.

528 Document ID 1579, pages 171-172.

529 Commission's letter of 13 November 2008 adopted pursuant to Article 7(4) of Directive 2002/21/EC (case ES/2008/0804-0805), Document ID 1402.

530 Document ID 1579, page 171.

531 Commission's letter of 13 November 2008 adopted pursuant to Article 7(4) of Directive 2002/21/EC (case ES/2008/0804-0805), Document ID 1402.

part of the Scoreboard 2012 shows that IPTV services were provided throughout the EU, including in Spain[532]. Also, the main platforms for the provision of broadcasting services were cable (36.2%) and terrestrial TV, followed by satellite (17.1%) and IPTV (18.9%), which continued to experience significant growth (+ 4.7% vs previous year)[533].

(433) The Spanish Regulator's Annual Report for 2010 indicates that in 2010, there was competitive pressure on the incumbent operators in the pay-TV market. As well as being faced by an increased offer from new digital terrestrial TV pay services, the industry was confronted with the Internet emerging more and more as a competing platform for contents supply[534]. The telecommunications operator Jazztel reached a joint agreement with Digital + by which subscribers to the television service became part of a combined offer by both companies with discounts on contracting television from Digital + and ADSL and fixed telephony from Jazztel[535]. In terms of market shares, Sogecable (with Digital +), Ono and Telefónica (with Imagenio), accounted for 89.7% of revenues and 78.9% of the subscribers. Other competitors were Gol Television, TeleCable, Euskaltel, R, Orange, Procono, etc[536]. The tendencies on the market suggest that in 2010, operators launched promotions and price discounts on services to be more competitive, while the number of subscribers subscribing to lower priced service offers increased[537].

(434) As regards Telefónica's claim that there are high barriers to entry due to considerable investment required, as outlined in Section 3.4.1, there is a general need for considerable investments in order to compete on telecoms and television markets, which cannot be considered to show in itself the existence of insurmountable barriers to entry and the absence of potential competition on a specific market. Moreover, Telefónica does not explain why the requirement of an administrative authorisation would be such a burden as to impede potential competition on the retail pay-TV market.

(435) Regarding Telefónica's argument that it would have been impossible for PT to negotiate new licence agreements, have the contents available, purchase the infrastructure required, carry out their commercial launch and the advertising campaign, in the short time period of the non-compete clause, the Commission recalls that the non-compete clause prohibits the Parties not only from entering the market, but also from "*engaging or investing*" into those operations during the period of application of the non-compete clause (see Section 3.3.3).

(iii) Conclusion

(436) In light of the foregoing, the Commission concludes that there were no insurmountable barriers to the market of providing retail pay-TV services. Moreover, the Commission, takes the view that pay-TV services were covered by the non-compete clause. The Commission will therefore include the value of sales for the purpose of calculating the fine.

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532 Document ID 1412, page 26.

533 European Commission, Telecommunication Market and Regulatory Developments in 2011 (Portugal), Section 5.3. Broadcasting, Document ID 1420.

534 Document ID 1579, pages 169 and 170.

535 Document ID 1579, page 170.

536 Document ID 1579, pages 177 and 178.

537 Document ID 1579, page 178.

3.9.3. Retail pay-TV services in Portugal

(i) PT/Pharol's arguments

(437) PT submits that subscription TV is sold mainly through packages (> 67.1 %), which shows that the subscription TV market is dominated by dual play and triple play offers. According to PT, this means that the profitability of the subscription TV service relies increasingly more on an approach of integration with various services. Telefónica's direct entry in this market would therefore require the development of its own network, capable of offering triple play services. Given the short duration of the non-compete clause, PT argues that competition by Telefónica would not have been possible, even if the necessary investment in its own network had been made[538].

(438) Moreover, PT argues that it is not plausible that Telefónica would choose to develop its own network to compete with its participated company ZON, instead of increasing its participation in the latter. In addition, there would be no evidence that Telefónica ever showed any interest for a Portuguese subscription TV operator[539].

(439) In its Response to the Letter of Facts, Pharol argues that using wholesale offers available, more specifically, the unbundling of the local loop and wholesale access to bitstream and providing IPTV services would not allow Telefónica to create real, effective and appreciable competition during the period of application of the non-compete clause. Furthemore, Pharol states that it was not plausible that Telefónica would decide to enter this market by using wholesale offers supported on a declining network (copper). Pharol also argues that the Commission disregarded the period of negotiation for access contracts and the need to consider the acquisition of television content during the period of application of the non-compete clause, including a timeframe needed to possibly acquire small operators[540].

(ii) Commission assessment

(440) The Commission considers that end-users, depending on their particular circumstance, could, during the period of application of the non-compete clause, receive television broadcasting via analogue terrestrial, (analogue or digital) cable, (analogue or digital) satellite or DSL networks. All those services are open for competitive market entry and therefore are subject to potential and often actual competition. ZON/TV Cabo continued to have the largest share of subscription TV subscribers in 2010, with 60.8%. PT remained the second largest, with 26.5% of subscribers and the third largest operator continued to be Cabovisão, with 10%[541].

(441) Alternative operators could enter the Portuguese retail TV markets based on regulated access imposed in the framework of wholesale broadband markets (i.e. local loop unbundling and wholesale bitstream access) and to provide IPTV services[542]. The total number of subscribers continued to grow in 2010 and the main drivers of the service's growth have been IPTV and the TV offers supported over

538 PT's reply of 13 January 2012 to the SO, Document ID 753, NC ID 946, paragraphs 384 to 387.

539 Document ID 753, NC ID 946, paragraph 387.

540 Document ID 1649, paragraphs 294 to 295, 299, 303 to 304.

541 ANACOM – Fibre already represents half of new subscription TV customers, published on 13 September 2009, Document ID 1575.

542 Commission comments letter, adopted pursuant to Article 7(3) of Directive 2002/21/EC (case PT/2008/0850): as indicated during the consultation of ANACOM's draft regulatory decision, in 2008 in the areas in Portugal being within the range of LLU, users might have had a 24 Mbps product with unlimited calls and 25 TV channels, Document ID 1405.

optical fibre (around 50% of the new customers)[543]. At the end of the 1st Quarter 2011, there were 30 000 more subscribers than reported in the previous quarter and 207 000 more subscribers than in the first quarter of 2010. The service's main growth drivers were, first of all, offers supported over optical fibre and, secondly, offers supported over the xDSL – together these offers made up about 99% of new customers (net) in the first quarter of 2011[544].

(442) Also, pay-TV services constitute in fact an integral part of telecommunications services which may be even a decisive factor for end users to choose a given provider of electronic communications service. This is also shown by the increasing importance of bundles including Internet, telephone and TV services. In 2010, revenues from packages of services which included subscription TV totalled 94 million euros, rising by 74% compared to the first half of 2009. These revenues referred essentially to triple play packages associated with IPTV and similar technologies[545].

(443) The Commission refers to the European Union 2011 Telecommunications Market and Regulatory Developments - Commission Services working document of 18 June 2012, issued as part of the Scoreboard 2012. The report shows that IPTV services managed to achieve a substantial market share in several Member States, including in Portugal. This document also shows that completion of the switch off for analogue terrestrial transmission was planned before the end of 2012 in several Member States, including Portugal[546]. It also shows that the main platforms for the provision of broadcasting services are cable (36.2%) and terrestrial TV, followed by satellite (17.1%) and IPTV (18.9%), which continues to experience significant growth (+ 4.7 p.p. vs the previous year)[547].

(444) Furthermore, Pharol stated that subscription-TV services were offered by ZON, Cabovisão and AR Telecom in Portugal during the period of application of the non-compete clause. Provision of these services is offered using coaxial cable, FWA, fibre-optic networks and satellite. This shows that not only potential competition, but also actual competition took place on this market, on the basis of a wide range of technologies, during the period of application of the non-compete clause[548].

(445) With regard to Pharol's argument that using available wholesale offers would not allow Telefónica to create real, effective and appreciable competition during the period of application of the non-compete clause and that was not plausible that Telefónica would decide to enter this market by using wholesale offers supported on a declining network (copper), the Commission refers to Section 3.3.1 in this Decision addressing arguments on the relevant test for insurmountable barriers to entry. In fact, Pharol does not contest that wholesale offers were available during the period of application of the non-compete clause.

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543 ANACOM – Fibre already represents half of new subscription TV customers, published on 13 September 2009, Document ID 1575.

544 ANACOM – Optical fibre leads subscription TV growth, published on 19 July 2011, Document ID 1574.

545 ANACOM – Fibre already represents half of new subscription TV customers, published on 13 September 2009, Document ID 1575.

546 Document ID 1412, pages 26 and 27.

547 Document ID 1420, section 5.3. Broadcasting.

548 Document ID 1368, NC ID 1371, paragraph 83.

(446) Regarding Pharol's argument that given the short duration of the non-compete clause, competition by Telefónica would not have been possible, e.g. due to the period needed to negotiate access contracts or acquire television content, the Commission recalls that the non-compete clause prohibits the Parties not only from entering the market, but also from "*engaging or investing*" into those operations during the period of application of the non-compete clause (see Section 3.3.3).

(iii) Conclusion

(447) Therefore, the Commission considers that there were no insurmountable barriers to entry to the market for retail pay-TV services that would rule out any potential competition during the period of application of the non-compete clause. The Commission will include the sales corresponding to retail pay-TV services in the values of sales for the purposes of calculation the fines in this Decision.

3.10. Other telecommunication services

3.10.1. Radio communication services in rural areas

(i) Telefónica's arguments

(448) According to Telefónica, the deployment of a radio network in order to provide broadband services to rural areas requires the availability of the frequencies necessary for that purpose. Telefónica claims that PT could not have provided that service while the non-compete clause was in force, given that it lacked the necessary resources (spectrum). In addition, according to Telefónica this is not a very profitable market and it requires significant investment, meaning that a new operator would have little incentive to enter that market[549].

(449) In its Response to Annex 1, Telefónica claims that no alternative operator could have acquired the required spectrum to operate in this market, neither in a public auction nor in the secondary market. Telefónica argues that in September 2010 all the spectrum bandwidths had been assigned and that the next auction took place in 2016. Telefónica further submits that network would be needed to cover the national area[550].

(ii) Commission's assessment

(450) The Commission considers that radio communication services are open to potential market entry and there were no insurmountable barriers to entry. The Commission considers that all those services constitute an integral part of telecommunications services.

(451) The Commission finds that PT's market entry was not constrained by its lack of spectrum during the period of application of the non-compete clause. PT could have leased spectrum already assigned to other operators or could have negotiated national roaming agreements. In fact, there are several examples of transactions of the required bandwidth registered in the Spanish Registry of Public Concessions and

549 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 248 and 249.

550 Response to Annex 1, paragraph 368 to 373.

particularly of the bandwidth that Telefónica finds suitable to operate in this market, namely 3.3 GHz[551].

(452) The provision of that service is also possible at local level. PT could have either established a point-to-point wireless connectivity or provided mobile "home zone" services[552]. Therefore, Telefónica's arguments in paragraphs 371 and 372 of its Response to Annex 1 regarding the need to operate at national level are flawed.

(iii) Conclusion

(453) In light of the foregoing, the Commission concludes that there were no insurmountable barriers to the market of providing radio communication services in rural areas. The Commission considers that an alternative operator could have entered the market by acquiring spectrum or, alternatively, it could have also leased spectrum already assigned to other operators or could have negotiated national roaming agreements. Accordingly, there was potential competition in this market. The Commission will therefore include the value of sales for the purpose of calculating the fine.

3.10.2. Fixed communication services in public areas provided by Telefónica Telecomunicaciones Publicas (TTP)

(i) Telefónica's arguments

(454) Telefónica argues that the main corporate purpose of TTP is the operation of public payphones, which is part of the universal service and should be excluded from the calculation of the fine.

(455) In addition, TTP provides other services, which do not constitute telecommunication services in Telefónica's view, namely payment services, sale of defibrillators and rental of outdoor advertising solutions – rental of the phone box advertising space and therefore those services should be excluded from the value of sales for the purposes of calculating the fine in this Decision[553].

(456) In its reply to the SO, Telefónica argued that TTP's revenues also consist of retail telecoms services for which Telefónica was (or potentially could be) in competition with PT in Portugal through its shareholding in ZON, that is, voice and data transmission services[554] or "*the operation of public payphones outside the universal*

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551 The Spanish Registry of Public Concessions contains evidence of such transferences for 2.6 GHz and 3.4 and 3.8 GHz. Available here: https://sedeaplicaciones minetur.gob.es/RPC_Consulta/FrmConsulta.aspx

552 As explained in the Commission Staff Working Document, Explanatory Note *accompanying the document* Commission Recommendation 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 (SWD(2014) 298): "*A home-zone product consists of a mobile voice service provided at a fixed location. Customers using this service receive a telephone number from the fixed numbering plan, containing the area code of the location where the service is provided. This can be realised both by fixed networks and mobile networks, but this type of product does not allow clients to switch between different cells of those networks. Thus, when end customers walk outside the range of a base station (usually hundreds of meters), their call will be disconnected. In the Explanatory Note to the previous recommendation mobile services which are confined in a limited radius around a fixed location were considered as possible alternative to fixed telephony services.*"

553 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 253 to 260.

554 Document ID 1055, paragraphs 503 and 504.

service and to retail sale of traffic in publicly accessible locations"[555]. This was confirmed in Telefónica's reply of 3 December 2018 to the request for information of 12 November 2018, where Telefónica provided the value of sales corresponding to the three subcategories of services provided by TTP (universal services, services which are not considered as telecommunication services and retail sale of traffic in publicly accessible locations)[556].

(ii) Commission's assessment

(457) The Commission agrees that services in public areas provided by TTP, which are part of the universal service and in which no competition is possible, should be excluded from the value of sales for the purposes of calculating the fines in this Decision. In accordance with Telefónica, this category amounts to EUR [*see confidential annex only addressed to Telefónica*] million[557].

(458) As regards payment services, sale of defibrillators and rental of outdoor advertising solutions, the Commission considers that these services, although provided in connection with telecommunication services, are not telecommunications services as such. Even if they could be considered as ancillary to the provision of telecommunication services and facilitating their provision, they might be ancillary to universal services provided by TPP, which the Commission agreed to exclude from the value of sales. They should follow the same regime and therefore, the Commission will exclude the value of sales, amounting to EUR [*see confidential annex only addressed to Telefónica*] million[558] for the purpose of calculating the fine.

(459) As regards the retail telecoms services provided by TTP in public areas, the Commission considers that potential competition in this area existed, as these could constitute commercial activities of any operator present at retail level (for example, access to Internet in libraries or on the beaches) and therefore can be subject to potential competition. Telefónica admits in paragraph 376 of its Response to Annex 1 to the Letter of Facts that some of these activities might be open to competition.

(iii) Conclusion

(460) In light of the foregoing, the Commission concludes that there were no insurmountable barriers to the market of retail telecoms services provided by TTP in public areas. All the arguments presented in Section 3.5.3, on the basis of which the Commission will conclude that potential competition is not excluded at retail level, are also applicable to the retail telecoms services provided by TTP in public areas. In addition, Telefónica does not contest that PT could have competed on the retail broadband Internet access market, as provided in recital (357). The Commission will therefore include the value of sales for the purpose of calculating the fine.

3.10.3. Universal service

(i) Telefónica's arguments

(461) In its reply to the SO, Telefónica provides that, in response to the invitation to tender for the provision of this service, only Telefónica expressed an interest in being

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555 Telefónica's reply of 3 December 2018 to the request for information of 12 November 2018, Document ID 1555, paragraph 1.

556 Document ID 1555, paragraphs 1 and 5.

557 Document ID 1555, paragraph 5.

558 Telefónica's reply of 11 March 2021 to the request for information of 8 March 2021 (Document ID 1686, NC ID 1687).

designated universal service provider, with regard to the first lot. Telefónica was designated as the only universal service provider for the period from the 1st of January 2009 to 31 December 2010. That designation was extended for a further year (without a prior invitation to tender) until 31 December 2011 by Order ITC/3379/2010 of 28 December 2010 amending Order ITC/3808/2008 of 23 December 2008[559]. Telefónica emphasises that while the non-compete clause was in force, there was no call for tenders for the provision of the universal service[560].

(462) Telefónica argues that the public payphone services are part of the universal service and that the main corporate purpose of Telefónica's subsidiary, Telecomunicaciones Publicas (TTP), was the operation of public payphones (telephone booths). Telefónica argues, therefore, that the revenues from these services should be excluded from the calculation of the fine[561].

(ii) Commission's assessment

(463) The universal service rules ensure that every user can access basic communications services at a reasonable quality and an affordable price, even if the market would not provide it. Telefónica provides that the procedure to select the operator that would provide the universal service commenced in December 2005. The activities included in the universal service were grouped into two different lots:

– the first lot covered the connection to the public telephone network, the telephone service and the provision of public pay telephones;

– the second lot included the telephone directories and the telephoned directory enquiry service[562].

(464) As regards the second lot, namely, the telephone directory enquiry service, a call for tender was launched in 2008. Three companies participated in the ender (PT was not amongst them). Telefónica was awarded the tender and, as a result, it was appointed the operator responsible for the provision of the service for a period of three years (from 1 January 2009 to 31 December 2011). Therefore, PT could not be regarded as a potential competitor in the provision of those services and, consequently, the relevant volume of sales should be excluded from the from the value of sales for the purposes of calculating the fines in this Decision[563].

(iii) Conclusion

(465) In light of the foregoing, the Commission concludes that there were insurmountable barriers to the market of universal services. The Commission considers that Telefónica was the only operator able to provide those universal services during the period of application of the non-compete clause, as it was designated as the only universal service provider and therefore had a statutory monopoly for the provision

559 Telefónica's reply to the Statement of Objections, Document ID 1055, paragraphs 453 to 456.

560 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 85.

561 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 253, 254 and 264, Telefónica's reply to the Statement of Objections, Document ID 1055, paragraph 503.

562 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 86.

563 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 90 to 95.

of the services under this category. The Commission will therefore exclude the value of sales for the purpose of calculating the fine.

(466) The amount the Commission excludes is EUR [*see confidential annex only addressed to Telefónica*] million (composed of EUR [*see confidential annex only addressed to Telefónica*] million, corresponding to the A.4. Universal services category[564] and EUR [*see confidential annex only addressed to Telefónica*] million[565], corresponding to universal services provided by TTP, part of the G.3. Fixed communications services in public areas category[566]).

3.10.4. SIRDEE (Emergency Digital Radio System) service

(467) In its reply to the SO, Telefónica explains that this refers to the digital radio communications system employed by the security forces of the Spanish State (national police and civil guard) and that it allows for encrypted communications. Telefónica mentions that this service has been provided exclusively by Telefónica since 2000, when the Spanish administration has awarded the service on a negotiated and restricted basis without publicity[567]. The reason for using that public procurement process[568] is the need to protect essential national security interest. In accordance with this process, at least three companies with sufficient capacity to perform the contract must be invited to the tender, if possible. PT was never invited to participate in those tenders and therefore, it was never able to provide the service[569].

(468) In the light of the foregoing, the Commission concludes that there were insurmountable barriers to the market of providing SIRDEE (Emergency Digital Radio System) services. The Commission takes the view that Telefónica was awarded the provision of that service regarding the protection of the essential security interests of the State and therefore was the only operator who could provide those services during the period of application of the non-compete clause[570]. The Commission will therefore exclude the value of sales for the purpose of calculating

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564 Telefónica's reply to the Statement of Objections, Document ID 1055, paragraphs 453 to 456. Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 100 and Annex Q7 to Telefónica's reply of 3 January 2019 to the request for information of 12 November 2018, Document ID 1520.

565 In accordance with the LoF (paragraph 69), the amount for the universal services provided by TTP was EUR [*see confidential annex only addressed to Telefónica*] million. This amount was based on Telefónica's reply of 3 December 2018 to request for information 2018/180384 of 12 November 2018, Document ID 1555. However, it became clear from Telefónica's reply of 11 March 2021 to the request for information of 8 March 2021 (Document ID 1686, NC ID 1687), that this amount of EUR [*see confidential annex only addressed to Telefónica*] million also included EUR [*see confidential annex only addressed to Telefónica*] million of intra-group sales. Only sales to third parties, without intra-group sales, are part of the basis of calculation for the value of sales. Therefore, the correct amount to be excluded as sales corresponding to universal services provided by TPP is EUR [*see confidential annex only addressed to Telefónica*] million.

566 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 254 and Telefónica's reply of 3 December 2018 to the request for information of 12 November 2018, Document ID 1555.

567 Telefónica's reply to the Statement of Objections, Document ID 763, pararaphs 476 to 478.

568 This procedure is set out in Articles 13(2)(d), 138, 169, 170(f) and 178 of the consolidated text of the Spanish public procurement law.

569 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 159 to 162.

570 Telefónica's reply to the SO, Document ID 1055, paragraphs 476 to 478, Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 159 to 165.

the fine. The amount corresponding to this service is EUR [*see confidential annex only addressed to Telefónica*] million[571].

3.11. The determination of the new basic amount of the fines

(469) When determining the new basic amount of the fines, the Commission used the figures provided by Telefónica in its responses to the requests for information of 18 December 2018[572], 16 February 2021[573] and 8 March 2021[574]; and by PT in its response to the request for information of 5 September 2012[575], as confirmed by PT Portugal (in which PT held all the shares when the Telefónica/PT Decision was adopted) in its responses to the requests for information of 21 June 2018[576], 9 November 2018[577], 18 December 2018[578] and 16 February 2021[579].

3.11.1. Telefónica's calculation mistakes affecting the value of sales in the Telefónica/PT Decision

(470) When establishing the value of sales for the purposes of calculating the fines in the Telefónica/PT Decision, the Commission took account of the figures and the calculation method provided by Telefónica in its reply of 21 September 2012 to the request for information of 5 September 2012 ("Telefónica's 2012 reply")[580]. Telefónica's calculation method was to add up several sales categories (including intra-group sales and sales to other companies of the Telefónica Group) and deduct, from this total amount of EUR [*see confidential annex only addressed to Telefónica*] million, amounts corresponding to five sales categories: i) "services other than telecommunications services or television services", amounting to EUR [*see confidential annex only addressed to Telefónica*] million; ii) "global telecommunications services", amounting to EUR [*see confidential annex only addressed to Telefónica*] million; iii) "wholesale international carrier services", amounting to EUR [*see confidential annex only addressed to Telefónica*] million; iv) "accruals" (sales which did not correspond to 2011), amounting to EUR [*see confidential annex only addressed to Telefónica*] million and v) "total intra-group sales" (which, according to the original calculations of Telefónica, included categories "H.2. IT intra-group sales", "I. Eliminations of intra-group sales excluding IT" and "J. Sales to other companies of the Telefónica Group"), amounting to EUR [*see confidential annex only addressed to Telefónica*] million.

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571 Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 162 and Annex Q7 to Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1520.

572 Document ID 1520. As shown in Section 3.2.3, as well as in Sections 4.1.2.4. "Calculation mistakes affecting the value of sales in the 2013 Decision for Telefónica" and Section 4.1.2.5. "Determining the value of sales in the new decision" of the Letter of Facts, the Commission cannot use the figures provided by Telefónica in its reply of 21 September 2012 to the request for information of 5 September 2012 (Document ID 1040), as a basis for the calculation of the amount of the fines, as these figures were affected by several calculation mistakes and inaccuracies.

573 Document ID 1679 NC ID 1680.

574 Document ID 1686 NC ID 1687.

575 Document ID 1012 NC ID 1016.

576 Document ID 1362 NC ID 1365.

577 Document ID 1385 NC ID 1387.

578 Document ID 1452 NC ID 1460.

579 Document ID 1684.

580 Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040, Table 1. 2011 – Sales Spain – Headings and paragraphs 11 to 24.

(471) The resulting amount was EUR [*see confidential annex only addressed to Telefónica*] million[581], which the Commission accepted at the time as the value of sales of Telefónica in 2011 and on the basis of which the level of the fine for Telefónica was established in the Telefónica/PT Decision.

(472) However, in the current process of recalculating the fines, the Commission discovered several [miscalculations] made by Telefónica in its 2012 reply. Those errors made by Telefónica affect the value of sales taken into account in the Telefónica/PT Decision.

(473) Firstly, the value of "H.2. IT intra-group sales" category was unduly excluded twice[582] from the value of sales in the Telefónica/PT Decision: once as part of "total intra-group sales"[583] and once more as part of "sales of services other than telecommunications services or television services"[584].

(474) Secondly, on the basis of Telefónica's 2012 reply[585] and Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018 ("Telefónica's 2018 reply")[586], the Commission found that the amounts corresponding to "intra-group sales" for several categories of services, which were not considered as telecommunications or television services, were unduly deducted twice from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million – once as "total intra-group sales"[587] and once more as "sales of services other than telecommunications or television services"[588].

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581 Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040, Table 1. 2011 – Sales Spain – Headings and paragraph 24.

582 On the basis of the Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

583 "H.2. IT intra-group sales" was part of the total of EUR [*see confidential annex only addressed to Telefónica*] million ("total intra-group sales"), which was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million. Therefore, "H.2. IT intra-group sales" was deducted from EUR [*see confidential annex only addressed to Telefónica*] million within the "total intra-group sales" category - Paragraphs 12 and 23 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

584 "H.2. IT intra-group sales" was part of "H.1. Gross sales of IT" and was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million as part of "H.1.Gross sales of IT", within the "sales of services other than telecommunications services or television services" category (amounting to EUR [*see confidential annex only addressed to Telefónica*] million) - Paragraphs 12, 16 and 19 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

585 Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

586 Table 1 – Breakdown of intragroup sales of companies included in the scope of consolidation of Telefónica España, Document ID 1554.

587 These amounts are part of the total of EUR [*see confidential annex only addressed to Telefónica*] million ("total intra-group sales"), which was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million – Paragraphs 12 and 23 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

588 These amounts are part of the sales of services other than telecommunications services or television services category (amounting to EUR [*see confidential annex only addressed to Telefónica*] million), which was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million - Paragraph 12 and paragraphs 17 to 19 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

(475) Thirdly, on the basis of Telefónica's 2012 reply[589] and Telefónica's 2018 reply[590], the Commission found that the amounts corresponding to "sales to other companies of the Telefónica Group", for several categories of services which were not considered as telecommunications or television services, were also unduly deducted twice from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million – once as "total intra-group sales"[591] and once more as "sales of services other than telecommunications services or television services"[592].

(476) In its reply to the Letter of Facts, Telefónica has not contested that the value of sales it provided in 2012, which was used in the Telefónica/PT Decision, was affected by these three calculation mistakes and has not commented on the detailed reasoning and calculations leading to a corrected value of sales, which have been put forward in the Letter of Facts.

(477) In addition to these three errors identified by the Commission, Telefónica brought to the Commission's attention a separate instance of [miscalculation] of IT services amounting to EUR [*see confidential annex only addressed to Telefónica*] million that took place in 2012[593]. This amount was unduly excluded twice – once as "global telecommunications services" and once more as "services other than telecommunications services or television services" (within the subcategory "H.1. Gross sales of IT").

(478) The Annex A to this Decision sets out the detail of those aforementioned calculation errors (Section 3.11.1 Calculation mistakes)[594]. These calculation errors concern a total amount of EUR [*see confidential annex only addressed to Telefónica*] million and affect the value of sales taken into account in the Telefónica/PT Decision, as they had the effect of artificially lowering the value of sales, as these amounts were unduly excluded twice.

(479) Moreover, during the current investigation, Telefónica provided new corrected figures revising the sales amounts provided in 2012 for several of the categories forming part of the calculations leading to the value of sales in the Telefónica/PT Decision[595]. Those new figures, revised on the basis of audited accounts[596], show that

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589 Document ID 1040, Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24.

590 Document ID 1554, Table 2 – Intragroup sales to companies of Telefónica Group excluded from the scope of consolidation of Telefónica España.

591 These amounts are part of the total of EUR [*see confidential annex only addressed to Telefónica*] million ("total intra-group sales"), which was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million - Paragraphs 12 and 23 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

592 These amounts are part of the sales of services other than telecommunications services or television services category (amounting to EUR [*see confidential annex only addressed to Telefónica*] million), which was deducted from the gross total amount of EUR [*see confidential annex only addressed to Telefónica*] million - Paragraph 12 and paragraphs 17 to 19 of Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

593 Document ID 1588, page 4.

594 Annex A – Annex only available to Telefónica.

595 Document ID 1555 - Table comparing the total sales used for preparing the Reply to RFI 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI; Telefónica's reply of 3 January 2019 to the request for information of 12 November 2018, Document ID 1588, Tables a: total gross sales figures provided in 2012 compared to revised total gross sales figures in 2018 and Table b: Total intra-group sales.

596 Telefónica's reply of 3 December 2018 to the request for information of 12 November 2018, Document ID 1555, paragraph 20.

the value of sales established in the 2013 Decision was not correct as, in addition to calculation errors, it was also based on wrong figures. For instance:

- in its response of 19 March 2018 to the request for information of 19 January 2018, Telefónica stated that the corrected figure, corresponding to "H.2. IT intra-group sales" for 2011, is in fact EUR [*see confidential annex only addressed to Telefónica*] million and not EUR [*see confidential annex only addressed to Telefónica*] million, as it was in its reply of 2012[597];
- in the same reply, Telefónica corrected the amount corresponding to category "I. Eliminations of intra-group sales (excluding IT)", as amounting to EUR [*see confidential annex only addressed to Telefónica*] million as opposed to EUR [*see confidential annex only addressed to Telefónica*] million in its reply of 2012[598];
- in its reply of 3 December 2018 to the request for information of 12 November 2018, Telefónica stated that the value of sales corresponding to the category "A.2. Access and voice" amounted in fact to EUR [*see confidential annex only addressed to Telefónica*] million, as opposed to EUR [*see confidential annex only addressed to Telefónica*] million in Telefónica's 2012 reply[599];
- in the same reply, Telefónica stated that "C.8. (Other relevant revenue (Mensatel, trunking and repairs))" amounted in fact to EUR [*see confidential annex only addressed to Telefónica*] million, as opposed to EUR [*see confidential annex only addressed to Telefónica*] million in Telefónica's 2012 reply[600];
- in Telefónica's reply of 3 December 2018 there was also a new entry "Other (Interdomain + Telefónica Soluciones Sectoriales)" of EUR [*see confidential annex only addressed to Telefónica*] million, which did not exist in Telefónica's 2012 reply[601].

3.11.2. Telefónica's value of sales for the purposes of the fines calculation

(480) Calculation errors and inaccuracies such as those explained in Section 3.11.1 affect the value of sales and cannot be left unaddressed. If not corrected, the value of sales would remain erroneous and unduly low and would result in a fine calculated on the basis of incorrect information. That would not be in line with the Commission's practice[602], nor with the *Telefónica* judgment where the General Court held that,

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597 Document ID 1554, paragraph 280.

598 Document ID 1554, paragraph 282, although in table 1 of the same reply, the relevant amount is different, namely EUR [*see confidential annex only addressed to Telefónica*] million. Also, on its response of 3 January 2019 to the request for information of 12 November 2018, Document ID 1588, Telefónica provided that "I. Eliminations of intra-group sales (excluding IT)" amounts in fact to EUR [*see confidential annex only addressed to Telefónica*] million (paragraph 6, table b).

599 Table comparing the total sales used for preparing the reply to the request of information 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI, attached to Telefónica's reply of 3 December 2018 to the request for information of 12 November 2018, Document ID 1555.

600 Ibid.

601 Ibid.

602 For instance, in case AT.39144 *Euro Interest Rate Derivatives* (EIRDs), the Commission adopted on 6 April 2016 a new Decision C (2016) 1995 final correcting the value of sales on the basis of which the fine for Société Générale had been established in its initial Decision C(2013) 8512 final of 4 December

when the Commission chooses to rely, in order to determine the amount of the fine, on the value of sales directly or indirectly related to the infringement, "*it must determine that value precisely*"[603]. The Commission is therefore obliged to determine the correct value of sales and therefore the correct basis for calculating the fine.

(481) As explained at paragraph 60 of the Letter of Facts, the Commission considers that the most appropriate method of establishing the correct value of sales in its Decision is to base itself on the new revised figures provided by Telefónica during the current investigation.

(482) Therefore, the Commission has added up the new revised audited figures provided by Telefónica during the current investigation as "sales to third parties" for telecommunication and television services[604], which, contrary to the gross sales provided in 2012, exclude intra-group sales and sales to other companies of the Telefónica Group, thereby eliminating the calculation errors affecting the value of sales provided in Telefónica's 2012 reply. The Commission has considered the same sales categories as the ones retained for the calculation of the value of sales in the Telefónica/PT Decision and has also deducted the sales corresponding to the "global telecommunications services", as this category was also excluded in the Telefónica/PT Decision. Other categories such as "wholesale international carrier services", also excluded in the Telefónica/PT Decision, were not part of the new revised audited figures provided by Telefónica.

(483) The resulting value of sales is EUR [*see confidential annex only addressed to Telefónica*] million. More detailed explanations about the calculation of the value of sales on the basis of the new figures are provided in Annex A to this Decision (paragraph 21).

(484) From that amount, the Commission will substract the value of sales of services for which the Commission considers that there was no potential competition between the Parties during the period of application of the non-compete clause.

(485) Those services are the following:

(i) wholesale (physical) network infrastructure access (LLU) - EUR [*see confidential annex only addressed to Telefónica*] million (Section 3.8.1.1);

(ii) universal services – EUR [*see confidential annex only addressed to Telefónica*] million (Section 3.10.3);

(iii) SIRDEE (Emergency Digital Radio System) services – EUR [*see confidential annex only addressed to Telefónica*] million (Section 3.10.4); and

(iv) certain services, part of the fixed communication services in public areas provided by Telefónica (payment services, sale of defibrillators and rental of

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2016. After the adoption of the initial Decision, Société Générale explained in a letter to the Commission that it had not netted the cash-flows received on over-the-counter EIRDs and that it had not mentioned that fact explicitly in the methodological note and audited report submitted previously to the Commission. After correcting this error, the new fine imposed to Société Générale amounted to EUR 227 718 000, as opposed to EUR 445 884 000 in the initial Decision.

603 *Telefónica* judgment, paragraph 307 and *PT* judgment, paragraph 241.

604 Figures provided by Telefónica on Column 4) Total STP (sales to third parties) in Annex Q.7. – Comparison of the new claims and figures of 2018 for the exclusion of additional amounts not accepted in the Decision (see column 10) with the claims and figures of 2012, of Telefónica's reply of 3 January 2019 to the request for information of 12 November 2018, Document ID 1520.

outdoor advertising solutions) - EUR [*see confidential annex only addressed to Telefónica*] million (Section 3.10.2).

(486) Therefore, the recalculated amount of Telefónica's value of sales is EUR [*see confidential annex only addressed to Telefónica*].

3.11.3. The Commission's assessment of Telefónica's arguments as regards the correction of the value of sales

3.11.3.1. Use of the corrected value of sales as opposed to the value of sales determined in the Telefónica/PT Decision

(487) Telefónica argued in its response of 19 March 2018 to the request for information of 19 January 2018 that the Commission should not recalculate a new value of sales as a starting point, but only exclude from the value of sales determined in the Telefónica/PT Decision the value of sales corresponding to services for which there is no potential competition between Telefónica and PT[605].

(488) That approach cannot be accepted as it would result in the Commission knowingly basing fine calculations on an erroneous value of sales. As explained in Section 3.11.1, the value of sales determined in the Telefónica/PT Decision was affected by several calculation errors.

(489) Moreover, using the new figures for services to be excluded from the value of sales based on lack of potential competition, while at the same time using as a starting point for the exclusion the incorrect value of sales established in the Telefónica/PT Decision would lead to inconsistent results, as the value of sales in the Telefónica/PT Decision was based on the incorrect figures provided in 2012, not on the new ones provided during the current investigation.

(490) Finally, the General Court held that the Commission must calculate the fine "*precisely*"[606], which cannot be done without using the correct figures.

3.11.3.2. Calculation mistakes not the result of the methodology used to calculate the value of sales and non- "evident"

(491) Telefónica argued during the investigation that the duplication mistakes result from the methodology used in the Telefónica/PT Decision to calculate the value of sales[607]. Telefónica considers that the existence of imbalances in the sales figure was evident and the Commission could not have ignored it when Telefónica provided the information in 2012.

(492) However, Telefónica has not provided any explanation why and how exactly the methodology used would have resulted in such calculation mistakes. Moreover, an identical request for information to identify the relevant value of sales was also sent to PT in 2012 and PT's response did not appear to be affected by any calculation mistakes. In addition, the duplications resulted from Telefónica's own erroneous calculations. Telefónica was requested to provide the value of sales for the telecommunications business of Telefónica in Spain, including fixed and mobile

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605 Document ID 1554, paragraphs 271 and 276.

606 *Telefónica* judgment, paragraph 307 and *PT* judgment, paragraph 241.

607 Telefónica's reply of 3 January 2019 to the request for information of 12 November 2018, Document ID 1588, page 5.

services, internet access and television services, for 2011[608]. It was Telefónica's responsibility to ensure that the value of sales provided in response to the Commission's request for information as a result of Telefónica's own calculations, was not affected by calculation mistakes. That is of particular importance since, as explained by Telefónica, the figures provided in its 2012 reply "*were based on the total turnover included in the audited annual accounts and on Telefónica's internal accounting records and controlling area information*"[609]. In addition, contrary to Telefónica's view, the calculation mistakes were not "*evident*", as not even Telefónica was able to identify all these errors in its reply of 3 January 2019[610], even if it was already aware since 2018 that "*there might have been some duplication in the exclusion of intragroup sales*"[611].

3.11.3.3. No breach of the *res judicata* principle or Article 266 TFEU in recalculating the value of sales

(493) In its reply to the Letter of Facts, Telefónica took the view that recalculating a new value of sales contradicts the *Telefónica* judgment and would be contrary to Article 266 TFEU requiring the Commission to comply with the judgment in the terms specified in it[612]. Telefónica argues that the recalculation of the value of sales based on corrected figures involves a breach of the general principle of legal certainty, preventing Union institutions from altering the pre-established legal situation fixed in a firm, final decision that has been confirmed by a firm and final judgment. A new value of sales would exceed the scope of the judgment, as in Telefónica's view, the amount of the value of sales used in the Telefónica/PT Decision has *res judicata* value[613].

(494) Firstly, contrary to Telefónica's allegations, the amount of the value of sales is not a matter settled by judicial decision, subject to *res judicata*. On the contrary, the General Court held that "*in the present case, it is not appropriate to exercise the Court's unlimited jurisdiction and it is therefore for the Commission to draw all the inferences from the illegality found when it implements the present judgment and to make a new finding on the fixing of the amount of the fine*"[614]. The General Court indicated that it is for the Commission "*to make a new finding on the fixing of the amount of the fine*"[615], and not only as regards the services for which there would be no potential competition.

(495) In the operative part of the judgment, the General Court annulled the amount of the fine imposed on Telefónica *in its entirety*. Indeed, in the *dictum*, the General Court

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608 Question 1, Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1040.

609 Telefónica's reply of 3 January 2019 to the request for information of 12 November 2018, Document ID 1588, page 9.

610 Document ID 1588, page 4.

611 Telefónica's response of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraph 283.

612 Telefónica's reply to the Letter of Facts, paragraphs 13 to 26 and Telefónica's additional submission of 22 June 2020 in response to the Letter of Facts, paragraphs 9 and 10.

613 Telefónica's response of 19 March 2018 to the request for information of 19 January 2018, Document ID 1554, paragraphs 271 to 276, Telefónica's reply to the Letter of Facts, paragraphs 27 to 36 and Telefónica's additional submission of 22 June 2020 in response to the Letter of Facts, paragraphs 11 and 12.

614 *Telefónica* judgment, paragraph 316.

615 *Telefónica* judgment, paragraph 316 and *PT* judgment, paragraph 250.

annulled Article 2 of the Telefónica/PT Decision that sets the amount of the fine "*in so far as that amount was set on the basis of the value of sales taken into account by the European Commission*", and not only in so far as it failed to detract services for which the Commission was required to examine the arguments whereby the Parties sought to demonstrate that there was no potential competition. The determination of the basic amount, which is set as a percentage of the undertaking's value of sales, forms an integral part of calculating the amount of the fine. Therefore, the value of sales determined as a starting point in the Telefónica/PT Decision does not have *res judicata* value and is not part of a final decision confirmed by the General Court's judgments.

(496) It follows from the case-law that where a decision of an Union institution being challenged in court is annulled (in this case partially annulled), it is deemed to have never existed, and that the institution, which intends to take a new decision, is entitled to undertake a full review and rely on reasons other than those on which the annulled decision was based[616].

(497) Secondly, it is settled case-law that under Article 266 TFEU, the Commission has a broad discretion in taking the necessary measures to comply with Union Court judgments[617].

(498) More generally, the Commission also enjoys a broad discretion as regards the calculation of fines in relation to the infringement of Union competition rules[618]. With regard to the selection of the appropriate financial information, the Guidelines on fines[619] explicitly provide that in determining the value of sales, the Commission is to take the undertaking's best available figures into consideration, and if those are incomplete or not reliable, the calculation will be on the basis of the partial figures it has obtained and/or any other information which it regards to be relevant and appropriate. Hence, the Commission can rely on more accurate information obtained in the process of adopting a new decision, in compliance with a Court judgment.

3.11.3.4. Conformity with Article 47 of the Charter of Fundamental Rights of the European Union of the increase in the value of sales

(499) Telefónica claims that raising the value of sales in a new decision is contrary to Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')[620]. That is because under this Article, court judgments cannot become ineffective as a result of the acts of the administrative bodies which must enforce them. In Telefónica's view, under the Commission's approach, the effectiveness of a

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616 Judgment of the Court of 29 November 2018, C-600/16 P *National Iranian Tanker Company v Council of the European Union*, paragraph 55; Judgment of the Court of 6 March 2003, C-41/00 P *Interporc v Commission*, paragraph 31.

617 Judgment of the Court of 14 June 2016, C-361/14 P *Commission v McBride and Others*, paragraphs 52-53; Opinion AG Sharpston in C-361/14 P *Commission v McBride and Others*, paragraph 70.

618 Article 23(2) of Regulation (EC) No 1/2003, see, for example, Judgment of the Court of 28 June 2005, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S and others v Commission*, EU:C:2005:408, paragraph 172; Judgment of the Court of 19 December 2012, C-452/11 P *Heineken Nederland and Heineken v Commission*, EU:C:2012:829, paragraph 92; Judgment of the Court of 3 September 2009, C-322/07 P, C-327/07 P and C-338/07 *Papierfabrik August Koehler and Others v Commission*, EU:C:2009:500, paragraph 112.

619 Paragraphs 15-16 of Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003.

620 Telefónica's reply to the Letter of Facts, paragraphs 37 to 42.

judgment would be completely eradicated, thereby giving rise to a situation of risk for any future appellant considering bringing an action for annulment.

(500) However, Telefónica's claim is based on the consideration that the value of sales established in the Telefónica/PT Decision was definitive. For the reasons put forward in the previous section, the Commission considers that this is incorrect. Moreover, although the value of sales established by this Decision has increased on the basis of the new figures provided by Telefónica, the final amount of the fine has not increased, [*see confidential annex only addressed to Telefónica*] due to the application of the Commission's margin of discretion (see recital (530)). Therefore, there can be no question of violation of Article 47 of the Charter stemming from Telefónica's appeal of the Telefónica/PT Decision.

3.11.4. Telefónica's arguments regarding the limitation period

(501) On 4 August 2020, Telefónica filed a submission claiming that the Commission cannot increase the level of fines[621]. Telefónica refers to the time that has elapsed since the adoption of the Telefónica/PT Decision and puts forward specific case law setting out a five-year limitation period to review specific decisions adopted in the area of the Union budget and on the basis of the Union Staff Regulations. Telefónica specifically maintains that the Commission can only adopt a new decision increasing the fine within a "reasonable period". By analogy to the limitation periods laid down in those regulations, Telefónica concludes in that submission that the time elapsed since it provided the information on its value of sales would prevent the Commission from increasing the fine[622].

(502) The Commission notes that Telefónica's argument is moot given that the present Decision does not increase Telefónica's or Pharol's fine.

(503) In any event, the Commission notes that it is bound by the limitation period foreseen under Articles 25 and 26 of Regulation (EC) No 1/2003. Pursuant to Article 25(1), point (b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines is subject to a limitation period of five years in the case of an infringement that does not relate to requests for information or the conduct of inspections. The non-compete clause entered into between Telefónica and Portugal Telecom is different from any of those two infringements and, accordingly, the limitation period for the Commission to impose penalties for this infringement is five years.

(504) The starting date of the limitation period in the present case is 4 February 2011, that is the day that the infringement ended (see Article 25(2) of Regulation (EC) No 1/2003). On that date, the Parties signed a Termination agreement putting an end to the clause[623].

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621 Document ID 1663; Telefónica refers to Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1) and to Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 045 14.6.1962, p. 1385).

622 Document ID 1663, paragraph 18 and conclusion.

623 Agreement of 4 February 2011 deleting Section Nine of the Stock Purchase Agreement, Document ID 128.

(505) Pursuant to Article 25(3) of Regulation (EC) No 1/2003, any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement interrupts the limitation period and pursuant to Article 25(5) of Regulation (EC) No 1/2003, each interruption shall start time running afresh. A request for information sent to the undertaking counts as an interruption of the limitation period[624]. In the present case, the Commission sent several requests for information prior to the adoption of the Telefónica/PT Decision as well as after the judgment of the Court of Justice[625]. The most recent request for information was sent to both Parties on 10 December 2021 to obtain additional information for the recalculation of the fine. In addition, there have been several events amounting to interruptions of the process (for example, adoption of the SO).

(506) Pursuant to Article 25(5) of Regulation (EC) No 1/2003, the limitation period is to expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. Nonetheless, pursuant to Article 25(5) and 25(6) of Regulation (EC) No 1/2003, this absolute limitation period has to be extended by the time period during which the decision of the Commission is the subject of proceedings pending before the Court of Justice[626].

(507) In the present case, absent an extension, the original absolute limitation period would have expired on 4 February 2021. However, given the proceedings before the General Court and Court of Justice, the limitation period in the case of Telefónica must be extended by the period between 23 January 2013 (the day of adoption of the Telefónica/PT Decision) and 13 December 2017, the day when the judgment of the Court of Justice was delivered, in other words, by almost five years. As regards Pharol, the limitation period must be extended by the period between 23 January 2013 (day of adoption of the Telefónica/PT Decision) and 28 June 2016, the day that the General Court issued the *PT* judgment, by around three and a half years.

(508) Accordingly, Telefónica's arguments should be dismissed. The absolute limitation period in the case of Pharol is currently set to last until 2024 and, in the case of Telefónica itself, well beyond that date.

3.11.5. Pharol - value of sales for the purposes of the fines calculation

(509) The value of sales that was taken into consideration for PT in the Telefónica/PT Decision was EUR [*see confidential annex only addressed to Pharol*] (recital (485) – Table 5: Value of sales in 2011).

(510) From that amount, the Commission substracts the value of sales of services for which the Commission considers that there was no potential competition between the Parties during the period of application of the non-compete clause.

(511) Those services are the following:

(i) wholesale (physical) network infrastructure access (LLU) - EUR [*see confidential annex only addressed to Pharol*] million;

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624 See Article 25(3)(a) of Regulation (EC) No 1/2003.

625 The first RFI was sent on 5 January 2011. On 19 January 2011, the Commission decided to initiate proceedings against the Parties. See recital 5 and 6 of the 2011 Decision.

626 See Article 25(5) last sentence in conjunction with (Article 25(6)).

(ii) wholesale services for broadcasting digital television - EUR [*see confidential annex only addressed to Pharol*] million; and

(iii) wholesale analogue terrestrial television broadcasting services - EUR [*see confidential annex only addressed to Pharol*] million.

(512) Therefore, the value of sales that should be taken into consideration for Pharol is [*see confidential annex only addressed to Pharol*].

3.11.6. Gravity

(513) The gravity of the infringement determines the percentage of the value of sales taken into account in setting the fine. As set out in Sections 10.3.3. (Gravity) and 10.3.5. (Conclusion on the basic amounts of the fines to be imposed) of the Telefónica/PT Decision, and upheld by the General Court (see paragraph 367 of the *Telefónica* judgment), the Commission applies a gravity factor of 2%. As mentioned in recital (491) of the Telefónica/PT Decision, 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.

3.11.7. Duration

(514) As set out in Section 10.3.4. (Duration) of the Telefónica/PT Decision, and upheld by the General Court (see paragraph 367 of the *Telefónica* judgment), the Commission considers the duration of the infringement to be from 27 September 2010 (the date of closing) until 4 February 2011 (the date of the agreement whereby the Parties terminated the clause).

3.11.8. Conclusion on the basic amounts of the fines to be imposed

(515) As explained in recital (493) of the Telefónica/PT Decision, for the reasons referred to in Section 3.11.6 (Gravity) and in view of the size of the undertakings and the short duration of the restrictive agreement, the proportion of the value of sales to be taken into account should be 2% for the two undertakings concerned.

(516) Accordingly, the basic amount of the fines to be imposed on Telefónica and Pharol is as follows:

Party	**Basic amount (EUR)**
Telefónica	[*see confidential annex only addressed to Telefónica*]
Pharol	[*see confidential annex only addressed to Pharol*]

3.12. Adjustments to the basic amount

(517) 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.

3.12.1. Aggravating circumstances

(518) As indicated in recital (496) of the Telefónica/PT Decision, the Commission considers that there are no aggravating circumstances in the present case.

3.12.2. Mitigating circumstances

(519) As provided in recitals (500) and (501) of the Telefónica/PT Decision, the basic amount of the fines to be imposed to the Parties should be decreased by 20%.

3.12.3. Conclusion on the adjusted basic amounts of the fines to be imposed

(520) The adjusted basic amount of the fines to be imposed on Telefónica and Pharol is the following:

Party	**Adjusted basic amount (EUR)**
Telefónica	[*see confidential annex only addressed to Telefónica*]
Pharol	[*see confidential annex only addressed to Pharol*]

3.13. Application of the 10% turnover limit

(521) Under Article 23(2)(a) of Regulation 1/2003, the Commission may by decision impose fines on undertakings, where, either intentionally or negligently, they infringe Article 101 TFEU. For each undertaking and association of undertakings participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(522) However, the EU case-law has clarified that, in certain situations, the turnover of the business year preceding the adoption of the Commission decision does not provide any useful indication as to the actual economic situation of the undertaking concerned and the appropriate level of fine to impose on that undertaking. On this basis, the case-law clarified, in particular, that, if the undertaking concerned has not achieved any turnover for the business year preceding the adoption of the Commission decision, the Commission is entitled to refer to another business year in order to be able to make a correct assessment of the financial resources of that undertaking and to ensure that the fine has a sufficient deterrent effect[627].

(523) In 2020, Telefónica's total turnover corresponded to EUR 43 076 million[628]. The adjusted basic amount set out in the table in recital (520) does not exceed 10% of its total turnover.

(524) Pharol did not attain any turnover in 2020[629]. The Commission finds that the absence of turnover of Pharol in 2020 follows from a series of successive transactions and re-

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627 Order of the Court of Justice of 7 July 2016, C-514/15 P, *HIT Groep BV v Commission*, EU:C:2016:575, paragraphs 25 to 39; Judgment of the Court of Justice of 7 June 2007, *Britannia Alloys & Chemicals v Commission*, C-76/06 P, EU:C:2007:326, paragraphs 25 to 30; Judgment of the Court of Justice of 15 May 2014, C-90/13, *1. garantovaná v Commission*, EU:C:2014:326, paragraphs 14 to 18.

628 Document ID 1811. Telefónica has confirmed that its accounts for 2021 will not be available before the end of February 2022, i.e. after the date of adoption of this Decision, Document ID 1883.

629 Pharol did not attain any turnover from 2014 to 2020, Document ID 1796. Pharol expects not to attain any turnover in 2021 and has confirmed that its accounts for 2021 will be available on 25 February 2022, i.e. after the date of adoption of this Decision, Document ID 1879.

organisation within the company[630] and does not reflect appropriately its economic weight.

(525) The Commission explained to Pharol in its Request for Information sent on 12 November 2021 that if Pharol had achieved no (or close to no) turnover for the business year preceding the readoption of the Commission decision, the Commission would in principle consider appropriate to refer to another business year in line with the principles outlined in the abovementioned case-law[631].

(526) Based on the replies to the Requests for Information received on 19 November and 17 December 2021, the Commission notes that 2013 represents the last full year of Pharol's normal economic activity over a period of 12 months[632], as it was the last full business year before Portugal Telecom SGPS S.A. (now Pharol), on 5 May 2014, subscribed to the capital increase of Oi S.A. through the contribution in kind of all its operating assets and liabilities, consisting of the transfer of all the shares representing the share capital of PT Portugal SGPS S.A. (now Altice), which brought together all the operational assets of the PT Group[633]. The Commission finds that, as required by the case-law, the turnover of Pharol in the year 2013 best reflects Pharol's real economic situation and guarantees a sufficient deterrent effect. Pharol's adjusted basic amount set out in the table in recital (520) does not exceed 10% of its total turnover for the business year 2013, which corresponds to EUR 2 911 million[634].

(527) In light of the foregoing, the adjusted basic amounts of the fines to be imposed do not need to be modified in the light of the Parties' total turnover.

4. CONCLUSION: THE AMOUNT OF THE FINES IMPOSED IN THIS PROCEEDING

(528) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

(a) Telefónica, S.A., solely liable: EUR [see confidential annex only addressed to Telefónica]

(b) Pharol, SGPS, S.A., solely liable: EUR 12 146 000

(529) Although the errors relating to Telefónica's value of sales resulted from Telefónica's own erroneous calculations, the Commission would not have discovered these errors regarding the value of sales and would therefore not have been able to increase the fine, had the fines of the Telefónica/PT Decision not been annulled by the General Court. In those circumstances, and given the relatively modest effect those errors had on the size of the fine (additional amount of EUR [*see confidential annex only addressed to Telefónica*] in comparison with the fine imposed in the Telefónica/PT Decision), and the fact that a significant time period has already lapsed since those errors occurred (12 September 2012), the Commission considers it reasonable in this particular case not to increase Telefónica's fine beyond the level established in the Telefónica/PT Decision.

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630 See footnote 18.

631 Document ID 1808, pages 4 and 5.

632 As referenced for example in Judgment of the General Court of 28 April 2010, T-456/05 and T-457/05, *Gütermann et Zwicky*, EU:T:2010:168, paragraphs 94-103 and other references thereof.

633 Document ID 1337, response to Question 2.

634 Document ID 1796.

(530) The Commission has therefore applied its margin of discretion, in accordance with point 37 of the Guidelines on fines[635], to reduce the fine for Telefónica [*see confidential annex only addressed to Telefónica*]. This is without prejudice to the Commission's prerogative to impose a higher fine on the basis of a recalculated value of sales.

(531) The final amount of the individual 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
Pharol	12 146 000

HAS ADOPTED THIS DECISION:

Article 1

In Article 2, points (a) and (b) of Decision C(2013)306 final of 23 January 2013, the amounts for the fines are amended as follows:

(a) Telefónica, S.A.: EUR 66 894 000

(b) Pharol, SGPS, S.A.: EUR 12 146 000

The fines shall be credited, in euros, within a period of 3 months from the date of notification of this Decision, to the following bank account held in the name of the European Commission:

Banque centrale du Luxembourg
2, boulevard Royal
L-2983 Luxembourg

IBAN: LU27 9990 0001 1400 100E
BIC: BCLXLULL
Ref.: EC/BUFI/AT.39839

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, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[636].

635 "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21*".

636 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).

Article 2

This Decision is addressed to:

Telefónica, S.A., Gran Via 28, 28013 Madrid, Spain

Pharol, SGPS, S.A., Rua Joshua Benoliel 1, 2C, Edificio Amoreiras Square 1250-133 Lisboa, Portugal

This Decision shall be enforceable pursuant to Article 299 of the Treaty on the Functioning of the European Union.

Done at Brussels, 25.1.2022

For the Commission
(Signed)
Margrethe VESTAGER
Executive Vice-President

ANNEX A – […]

Telefónica's new value of sales

1. Calculation mistakes and erroneous figures affecting the value of sales in the Telefónica/PT Decision for Telefónica

1.1. Calculation mistakes

(1) When establishing the value of sales for the purposes of calculating the fines in the Telefónica/PT Decision, the Commission took account of the figures and the calculation method provided by Telefónica in its reply of 21 September 2012 to the request for information 2012/9113[1] ("Telefónica's 2012 reply"). In the process of recalculating the fines, the Commission has found several [miscalculations] affecting Telefónica's 2012 reply, which had the effect of artificially lowering the value of sales.

(2) Firstly, the value of the "H.2. IT intra-group sales" category was unduly deducted twice[2] from the value of sales in the Telefónica/PT Decision, once as part of "total intra-group sales"[3] and once more as part of "sales of services other than telecommunications services or television services"[4]. The amount of "H.2. IT intra-group sales" is EUR […] million, in accordance with the table provided by Telefónica in its 2012 reply. Therefore, the value of sales was unduly reduced by **EUR** […] **million**.

(3) This [miscalculation] of IT intragroup sales was initially not disputed by Telefónica[5]. However, in its reply of 3 January 2019 to the request for information of 12 November 2018, Telefónica stated that there was no such duplication, as the "H.2. IT intra-group sales" category (namely EUR […] million) was not included in the category "I Eliminations of intra-group sales (excluding IT)" (namely EUR […] million)[6]. The Commission considers it correct that the "H.2. IT intra-group sales" category was not included in the category "I Eliminations of intra-group sales (excluding IT)", but that does not negate the [miscalculation]. That is because the "H.2. IT intra-group sales" category was part of the total intra-group sales category (EUR […] million), which was excluded from the gross total amount of EUR […] million. Therefore, the "H.2. IT

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1 Telefónica's reply of 21 September 2012 to the request for information of 5 September 2012, Document ID 1022, NC ID 1040, Table 1.2011 – Sales Spain – Headings and paragraphs 11 to 24.

2 On the basis of the Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24 of Telefónica's 2012 reply.

3 "H.2. IT intra-group sales" was part of the total of EUR […] million ("total intra-group sales"), which was deducted from the gross total amount of EUR […] million. Therefore, "H.2. IT intra-group sales" was deducted from EUR […] million within the "total intra-group sales" category - Paragraphs 12 and 23 of Telefónica's 2012 reply.

4 "H.2. IT intra-group sales" was part of "H.1. Gross sales of IT" and was deducted from the gross total amount of EUR […] million as part of "H.1.Gross sales of IT", within the "sales of services other than telecommunications services or television services" category (amounting to EUR […] million) - Paragraphs 12, 16 and 19 of Telefónica's 2012 reply.

5 This was acknowledged by Telefónica during a meeting with the Commission services held on 7 March 2018 and in Telefónica's reply of 19 March 2018 to RFI 2018/4834 of 19 January 2018, Document ID 1304, NC ID 1554.

6 Document ID 1426, NC ID 1588, footnote 11.

intra-group sales" category was excluded once from the "total intragroup sales" category and once more from "the sales of services other than telecommunications services or television services" category.

(4) Secondly, Telefónica acknowledged during the current investigation that "*gross sales figures*" for "*some categories of services (which included sales to third parties and intragroup sales)*" were deducted from Telefónica's total gross sales and, in parallel, the aggregated total amount of intra-group sales was also excluded, leading to some "*possible duplications*"[7] in the calculation of the value of sales used for the purpose of the Telefónica/PT Decision. Telefónica did not, however, provide detailed explanations regarding the precise categories subject to such duplications affecting Telefónica's figures and calculations of 2012.

(5) On the basis of Telefónica's 2012 reply[8] and Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018[9], the Commission found that the amounts corresponding to "intra-group sales" for several categories of services, which were not considered as telecommunications or television services, have been unduly deducted twice from the gross total amount of EUR […] million, once as "total intra-group sales"[10] and once more as "sales of services other than telecommunications or television services"[11]. That [miscalculation] concerns the following:

- three categories in "A. Fixed Telephony": "A.6. Sale and renting of buildings and spaces", "A.7. Rental and maintenance of terminals" and "A.9. Other services (Advertising, Yellow Pages, Recovery Management)";
- two categories in "C. Mobile Communications": "C.4. International voice and data (business)" and "C.6. Rental of spaces and buildings"; and
- three categories in "F. Sales of equipment": "F.1. Sales of fixed telephony equipment", "F.2. Sales of mobile telephony equipment" and "F.3. Other (related) sales of equipment (Telyco)".

(6) Those [miscalculations] concern **EUR** […] **million** which were unduly deducted twice from the value of sales[12].

(7) Thirdly, on the basis of Telefónica's 2012 reply[13] and Telefónica's reply of 19 March 2018 to the request for information of 19 January 2018[14], the Commission found that

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7 Telefónica's reply of 3 January 2019 to Commission's RFI 2018/180384 of 12 November 2018, Document ID 1426, NC ID 1588, page 5.

8 Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24 of Telefónica's 2012 reply.

9 Table 1 – Breakdown of intragroup sales of companies included in the scope of consolidation of Telefónica España, Document ID 1304, NC ID 1554.

10 These amounts are part of the total of EUR […] million ("total intra-group sales"), which was deducted from the gross total amount of EUR […] million – Paragraphs 12 and 23 of Telefónica's 2012 reply.

11 These amounts are part of the sales of services other than telecommunications services or television services category (amounting to EUR […] million), which was deducted from the gross total amount of EUR […] million - Paragraph 12 and paragraphs 17 to 19 of Telefónica's 2012 reply.

12 Value calculated by adding-up the relevant amounts indicated in Table 1 – Breakdown of intragroup sales of companies included in the scope of consolidation of Telefónica España of Telefónica's reply of 19 March 2018 to request for information of 19 January 2018, Document ID 1304, NC ID 1554.

13 Table 1. 2011 – Sales Spain – Headings and the table at paragraph 24 of Telefónica's 2012 reply.

the amounts corresponding to "sales to other companies of the Telefónica Group", for several categories of services which were not considered as telecommunications or television services, have also been unduly deducted twice from the gross total amount of EUR […] million, once as "total intra-group sales"[15] and once more as "sales of services other than telecommunications services or television services"[16]. That [miscalculation] concerns the following:

- three categories in "A. Fixed Telephony: A.6. Sale and renting of buildings and spaces", "A.7. Rental and maintenance of terminals" and "A.9. Other services (Advertising, Yellow Pages, Recovery Management)";
- two categories in "B. Data (including leasing of circuits)": "B.1. Wholesale lease of international capacity" and "B.5. International data transmission (business)";
- two categories in "C. Mobile communications": "C.4. International voice and data (business)" and "C.6. Rental of spaces and buildings";
- three categories in "F. Sales of equipment": "F.1. Sales of fixed telephony equipment", "F.2. Sales of mobile telephony equipment" and "F.3. Other (related) sales of equipment (Telyco)"; and
- "H.1. Gross sales of IT".

(8) Those [miscalculations] concern **EUR** […] **million** which were unduly deducted twice from the value of sales[17].

(9) Telefónica considers that those duplications would result from the methodology followed in the Telefónica/PT Decision to calculate the value of sales[18]. However, Telefónica does not provide any reasons for its claim. The Commission considers that the duplications result from Telefónica's own erroneous calculations. The Commission requested Telefónica to provide the value of sales for its telecommunications business in Spain, including fixed and mobile services, internet access and television services, in 2011[19]. It was Telefónica's responsibility to ensure that the value of sales provided in response to the Commission's request for information is correct.

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14 Document ID 1304, NC ID 1554, Table 2 – Intragroup sales to companies of Telefónica Group excluded from the scope of consolidation of Telefónica España.

15 These amounts are part of the total of EUR […] million ("total intra-group sales"), which was deducted from the gross total amount of EUR […] million - Paragraphs 12 and 23 of Telefónica's 2012 reply.

16 These amounts are part of the sales of services other than telecommunications services or television services category (amounting to EUR […] million), which was deducted from the gross total amount of EUR […] million - Paragraph 12 and paragraphs 17 to 19 of Telefónica's 2012 reply.

17 Value calculated by adding-up the relevant amounts indicated in Table 2 – Intragroup sales to companies of Telefónica Group excluded from the scope of consolidation of Telefónica España, of Telefónica's reply of 19 March 2018 to request for information of 19 January 2018, Document ID 1304, NC ID 1554.

18 Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588, page 5.

19 Question 1, Telefónica's 2012 reply.

(10) Fourthly, Telefónica brought to the Commission's attention a separate instance of [miscalculation] of IT services amounting to **EUR** […] **million**[20]. That amount was unduly deducted twice, once as "global telecommunications services" and once more as "services other than telecommunications services or television services" (within the subcategory "H.1. Gross sales of IT").

(11) Those four calculation errors concern a total amount of **EUR** […] **million**[21].

1.2. Erroneous figures

(12) During the current investigation, Telefónica provided new figures regarding the sales amounts for several of the categories forming part of the calculations leading to the value of sales in the Telefónica/PT Decision[22]. Those new figures, which were revised on the basis of audited accounts[23], show that the value of sales established in the Telefónica/PT Decision was based on several erroneous figures. For instance:

- in its response of 19 March 2018 to the request for information of 19 January 2018, Telefónica stated that the corrected figure, corresponding to "H.2. IT intra-group sales" for 2011, is in fact EUR […] million and not EUR […] million, as it was in its 2012 reply[24],

- in the same reply, Telefónica corrected the amount corresponding to category " I. Eliminations of intra-group sales (excluding IT)", as amounting to EUR […] million as opposed to EUR […] million in its 2012 reply[25],

- in its reply of 3 December 2018 to the request for information of 12 November 2018, Telefónica stated that "A.2. Access and voice" amounted in fact to EUR […] million, as opposed to EUR […] million in 2012; "C.8. (Other relevant revenue (Mensatel, trunking and repairs))" amounted in fact to EUR […] million, as opposed to EUR […] million in 2012; there also was a new entry "Other (Interdomain + Telefónica Soluciones Sectoriales)" of EUR […] million, which did not exist in 2012[26].

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20 Document ID 1426, NC ID 1588, page 4.

21 This amount is reached by adding-up EUR […] million, EUR […] million, EUR […] million and EUR […] million.

22 Document ID 1391, NC ID 1555 - Table comparing the total sales used for preparing the Reply to RFI 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI; Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588, Tables a: total gross sales figures provided in 2012 compared to revised total gross sales figures in 2018 and Table b: Total intra-group sales.

23 Telefónica's reply of 3 December 2018 to request for information 2018/180384 of 12 November 2018, Document ID 1391, NC ID 1555, paragraph 20.

24 Document ID 1304, NC ID 1554, paragraph 280.

25 Document ID 1304, NC ID 1554, paragraph 282, although in table 1 of the same reply, the relevant amount is different, i.e. EUR […] million. Also, on its response of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588, Telefónica provided that "I. Eliminations of intra-group sales excluding IT" amounts in fact to EUR […] million (paragraph 6, table b).

26 Table comparing the total sales used for preparing the reply to the request of information 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI, Document ID 1391, NC ID 1555.

2. Determining Telefónica's new value of sales

(13) Given those calculation mistakes and erroneous figures, the Commission considers that the most appropriate method of establishing the correct value of sales in this Decision is the following:

(a) as a first step, to add up the new revised figures provided by Telefónica as "sales to third parties" for telecommunication and television services[27], which, contrary to the gross sales provided in 2012, exclude intra-group sales and sales to other companies of the Telefónica Group. Those figures correspond to the same sales categories as in the Telefónica/PT Decision. From this amount, to subtract the sales corresponding to "Global telecommunications services", which is a category of services already excluded in the 2012 calculations, and which is currently forming part of the value of sales of the following categories of services: "A.2. Fixed telephony. Access and voice", "B.4. Data. Virtual private networks" and "C.3. Mobile Services. Voice and data traffic"; and

(b) as a second step, to subtract from this amount the value of services for which the Commission considers that there was no potential competition between the Parties during the period of application of the non-compete clause.

(14) This recalculation method avoids any possible [miscalculations] and is based on the corrected audited figures provided by Telefónica. Therefore, the Commission complies with the General Court's finding that the Commission must determine "precisely" the value of sales[28].

(15) As a first step, the services which the Commission includes in the calculation of the value of sales are the following:

- Fixed telephony ("A.1. Wholesale services", "A.2. Access and voice" and "A.4. Universal service");

- Data services ("B.2. Other wholesale services", "B.3. Rental of circuits"[29] and "B.4. Virtual private networks");

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27 Figures provided by Telefónica on Column 4) Total STP (sales to third parties) in Annex Q.7. – Comparison of the new claims and figures of 2018 for the exclusion of additional amounts not accepted in the Decision (see column 10) with the claims and figures of 2012, of Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1427, NC ID 1520.

28 Telefónica judgment, paragraph 307.

29 There is no "sales to third parties" amount for "B.3. Rental of circuits" in Annex Q7 to Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1427, NC ID 1520. Therefore, this amount (EUR […] million) was calculated using as a starting point the amount of total sales (EUR […] million) for "B.3. Rental of circuits" provided by Telefónica in the Table comparing the total sales used for preparing the Reply to RFI 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI, attached to its reply of 3 December 2018 to request for information 2018/180384 of 12 November 2018, Document ID 1391, NC ID 1555. From this amount, it was deducted: i) the intra-group sales amount corresponding to B.3. (i.e. EUR […] million) provided by Telefónica in Table 1 of its reply of 19 March 2018 to request for information 2018/4834, and 2) the intra-group sales to companies of Telefónica Group excluded from the scope of consolidation of Telefónica España (i.e. EUR […] million), provided by Telefónica in Table 2 of its reply of 19 March 2018 to request for information 2018/4834.

- Mobile services ("C1. Wholesale services", “C.2. SIRDEE (Emergency Digital Radio System) service”, "C.3. Voice and data traffic" and "C.8. Other relevant revenues (Mensatel, trunking and repairs)";

- Internet and broadband ("D.1. Wholesale services" and "D.2. Internet and broadband");

- Pay TV ("E.1. Pay TV", "E.2. Payments for view of football matches", "E.3. Pay per view" and "E.4. Subscriptions, functionalities and other"); and

- Other services ("G.1. Radio communication services in rural area (Iberbanda)" and "G.3. Fixed communication services in public areas (TTP)").

(16) On that basis, the Commission considers that Telefónica’s total sales to third parties in 2011 amount to **EUR** […] **million**.

(17) From that amount, the Commission subtracts the sales corresponding to the "Global telecommunications services" already excluded in the 2012 calculations[30], for the following categories[31]:

- "A.2. Fixed telephony. Access and voice";

- "B.4. Data. Virtual private networks"; and

- "C.3. Mobile Services. Voice and data traffic".

(18) As explained by Telefónica[32], the "Global telecommunications services" category includes sales corresponding to global telecommunications services included in those three categories (i.e. only a certain proportion of the sales in this categories correspond to global telecommunications services), plus sales corresponding to "A.3. International Voice (Business)", "B.5. International data transmission (Businesses)" and "C.4. International voice and data (Businesses)", which include in their entirety sales corresponding to "Global telecommunications services".

(19) Telefónica provided revised figures for the "Global telecommunications services" category and for the "A.3. International Voice (Business)", "B.5. International data transmission (Businesses)" and "C.4. International voice and data (Businesses)" sales

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30 As explained in Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588, footnote 7, footnotes 57 and 83 of Telefónica's reply of 19 March 2018 to request for information 2018/4834 of 19 January 2018, Document ID 1304, NC ID 1554 and footnote 6 of Telefónica's 2012 reply.

31 It appears that the "global telecommunications services" category has not been excluded from the sales to third parties for these categories in Telefónica's reply of 3 January 2019 to request for information 2018/180384 (see column 4 of Annex Q.7), Document ID 1427, NC ID 1520, although sales corresponding to the "global telecommunications services" category should not be retained for the calculation of the value of sales, as this category has also been excluded from the fines calculation in the 2013 Decision, see recitals 173 and 174 of the 2013 Decision.

32 Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588, footnote 7, footnotes 57 and 83 of Telefónica's reply of 19 March 2018 to request for information 2018/4834 of 19 January 2018, Document ID 1304, NC ID 1554 and footnote 6 of Telefónica's 2012 reply.

categories. The sales corresponding to the global telecommunications services for categories "A.2. Fixed telephony. Access and voice", "B.4. Data. Virtual private networks" and "C.3. Mobile Services. Voice and data traffic" can be calculated by deducting from the corrected total of EUR […] million of global telecommunications services provided by Telefónica[33] the amount of EUR […] million, corresponding to the revised value of sales for the following:

- "A.3. International Voice (Business)";
- "B.5. International data transmission (Businesses)"; and
- "C.4. International voice and data (Businesses)"[34].

(20) This results in a total amount of **EUR** […] **million** corresponding to the global telecommunications services proportion in "A.2. Fixed telephony. Access and voice", "B.4. Data. Virtual private networks" and "C.3. Mobile Services. Voice and data traffic". Sales categories "wholesale international carrier services" and "accruals", which were deducted for the calculation of the value of sales in the Telefónica/PT Decision, are not deducted because they are not included in the new figures provided by Telefónica.

(21) The resulting amount (total sales to third parties minus global telecommunication services sales included in "A.2. Fixed telephony. Access and voice", "B.4. Data. Virtual private networks" and "C.3. Mobile Services. Voice and data traffic" categories) is **EUR** […] **million**.

(22) As a second step, the Commission subtracts the value of sales for the services for which the Commission, following the judgment of the General Court, considers that there was no potential competition. Those services are the following: (i) wholesale (physical) network infrastructure access (local loop unbundling) - EUR […] million; (ii) universal services – EUR […] million; (iii) SIRDEE (Emergency Digital Radio System) services – EUR […] million; and (iv) certain services, part of the fixed communication services in public areas provided by Telefónica (payment services, sale of defibrillators and rental of outdoor advertising solutions) - EUR […] million.

(23) The recalculated amount of the value of sales is EUR […] (see recital (486) of this Decision).

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33 Table a of Telefónica's reply of 3 January 2019 to request for information 2018/180384, Document ID 1426, NC ID 1588.

34 The Commission takes into account the new figures provided by Telefónica in the Table comparing the total sales used for preparing the Reply to RFI 2018/4834 with the Total sales – Table 1 of the reply to the 2012 RFI, attached to its reply of 3 December 2018 to request for information 2018/180384 of 12 November 2018, Document ID 1391, NC ID 1555.

3. Recapitulation

(24) For the sake of clarity, the full calculation is as follows:

First step[35]:

EUR […] million[36] + EUR […] million[37] + EUR […] million[38] + EUR […] million[39] + EUR […] million[40] + EUR […] million[41] - EUR […] million[42] = EUR […] million

Second step[43]:

EUR […] million - EUR […] million[44] - EUR […] million[45] - EUR […] million[46] - EUR […] million[47] = **EUR […] million**

35 See paragraphs 15 to 21 above.

36 Fixed telephony ("A.1. Wholesale services", "A.2. Access and voice" and "A.4. Universal service").

37 Data services ("B.2. Other wholesale services", "B.3. Rental of circuits" and "B.4. Virtual private networks").

38 Mobile services ("C1. Wholesale services", "C.2. SIRDEE (Emergency Digital Radio System) service", "C.3. Voice and data traffic" and "C.8. Other relevant revenues (Mensatel, trunking and repairs)".

39 Internet and broadband ("D.1. Wholesale services" and "D.2. Internet and broadband").

40 Pay TV ("E.1. Pay TV", "E.2. Payments for view of football matches", "E.3. Pay per view" and "E.4. Subscriptions, functionalities and other").

41 Other services ("G.1. Radio communication services in rural area (Iberbanda)" and "G.3. Fixed communication services in public areas (TTP)").

42 "Global telecommunications services", see paragraphs 18 to 21 above.

43 See paragraph 22 above.

44 Wholesale (physical) network infrastructure access (local loop unbundling).

45 Universal services.

46 SIRDEE (Emergency Digital Radio System) services.

47 Certain services, part of the fixed communication services in public areas provided by Telefónica (payment services, sale of defibrillators and rental of outdoor advertising solutions).

Annex B - Confidential Annex accessible only to Telefónica, S.A.

[…]

Annex C - Confidential Annex accessible only to Pharol, SGPS, S.A.

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